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9/14/2021 5:36 PM

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Parents Advocating for Safe Schools ("PASS"),

Plaintiff,

vs.

State of Minnesota and Governor Timothy James Walz,

Defendants.

Court File No.: 62-CV-21-4711

ORDER AND MEMORANDUM

This matter came before the undersigned upon Plaintiff Parents Advocating for Safe Schools' ("PASS") motion for a temporary restraining order.

Attorneys Michael Vanselow and Marshall Tanick appeared on behalf of PASS. Solicitor General Liz Kramer appeared on behalf of Defendants State of Minnesota (the "State") and Governor Timothy James Walz (the "Governor").

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. PASS's motion for a temporary restraining order is **DENIED**.

2. The attached Memorandum shall be incorporated into this Order.

BY THE COURT:

Dated: _____, 2021

Gilligan, Thomas(Judge)
Sep 14 2021 5:29 PM

Thomas A. Gilligan, Jr.
Judge of District Court

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

MEMORANDUM

INTRODUCTION

Minnesotans have experienced considerable tragedy and hardship during the COVID-19 pandemic. Thousands have died, tens of thousands have been hospitalized, and hundreds of thousands have tested positive for the COVID-19 virus. Workers and students were ordered to stay home. Businesses closed and have struggled to reopen. Families were kept apart during holidays, milestones, celebrations, and funerals. Students missed in-person classes, playgrounds, sports, extra-curricular activities, proms, and graduations. Most Minnesotans followed public health guidance and government mandates and did what was necessary to turn the tide of the pandemic. They stayed at home. They worked and attended school from home. They masked. They social-distanced. They got tested. They got vaccinated. Because of this collective effort, Minnesotans were breathing an unmasked sigh of relief in the summer of 2021. It appeared to many Minnesotans that during the early summer of 2021 we had finally turned the tide of the pandemic and that soon everything would be back to normal.

Unfortunately, the Delta variant of the COVID-19 virus has prevented the pandemic tide from turning. The highly transmissible Delta variant has rapidly spread, particularly among the unvaccinated portion of United States population, resulting in hospitalization spikes throughout the South and West. It has hit children particularly hard because those under the age of 12 are not eligible to receive the vaccine, leaving them vulnerable to infection from the Delta variant.[1] Children currently make up about 2.4% of the nation's COVID-19 hospitalizations.[2] Infectious disease specialists predict that the pandemic will not end anytime soon.[3]

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[1] Gabriella Borter, *Children Hospitalized with COVID-19 in U.S. Hits Record High Number*, REUTERS (Aug. 16, 2021), https://www.reuters.com/world/us/children-hospitalized-with-covid-19-us-hits-record-number-2021-08-14/.
[2] *Id.*
[3] Michelle Cortez & Bloomberg, *Prepare for a Rough Few Months of COVID-19, According to These Scientists*, FORTUNE (Sept. 13, 2021) https://fortune.com/2021/09/13/covid-future-next-six-months-vaccines-variants-outbreaks/

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

The spike in new coronavirus cases among children has ramped up tensions between state leaders and school districts, and between school boards and parents – particularly over the issue of whether school children should be required to wear masks when they return to the classroom.[4] In Minnesota, there is no uniform, statewide educational policy on the use of masks in school buildings. The Minnesota Department of Health's most recent Best Practice Recommendations for COVID-19 Prevention in Schools for the 2021-2022 School Year include: "Aligned masking guidance to reflect the federal recommendation of universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status."[5] Some large school districts such as in Saint Paul, Minneapolis, Saint Cloud, Duluth, and Rochester, have mandated masks for all students, teachers, staff, and visitors.[6] Some school districts, such as in Mankato, Minnetonka, and South Washington County have mandated masks for those in elementary and middle school buildings, and recommend masks in high schools.[7] Other school districts, such as Anoka-Hennepin and Rosemount-Apple Valley-Eagan, are recommending masking in school buildings.[8] News reports suggest that the Minnesota Department of Health is in ongoing conversations with the Legislature about whether to reimpose a masking requirement for schools at the state level.[9]

This case presents the novel question of whether the judicial branch can order a co-equal branch of government to implement a particular educational policy – namely, mandating a statewide mask requirement for all public schools. After due consideration, this court concludes that it cannot.

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[4] Jennifer Sinco Kelleher et al., *Mask, Vaccine Conflicts Descend Into Violence and Harassment*, AP (Aug. 21, 2021) https://apnews.com/article/health-coronavirus-pandemic-2eba81ebe3bd54b3bcde890b8cf11c70

[5] (Sept. 3, 2021) https://www.health.state.mn.us/diseases/coronavirus/schools/schoolrecs.pdf.

[6] Erin Golden, *Minnesota Schools Wrestle with Mask Decisions Just Weeks Before Classes Start*, STAR TRIBUNE (Aug. 21, 2021) https://www.startribune.com/minnesota-schools-wrestle-with-mask-decisions-just-weeks-before-classes-start/600089919/.

[7] *Id.*

[8] *Id.*

[9] Brandi Powell, *Parents Speak Out on Masks in School as MDH Discusses New Mandate with Legislature*, KSTP (Aug. 24, 2021) https://kstp.com/news/parents-speak-out-on-masks-in-school-as-mdh-discusses-new-mandate-with-legislature/6217211/.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

This issue is a non-justiciable political question which has been specifically delegated to another co-equal branch of government with the discretionary power to act.

PROCEDURAL AND FACTUAL BACKGROUND

PASS is an association of parents of Minnesota students with and without disabilities who attend school in districts that have not imposed a COVID-19 mask mandate for the coming school year. PASS commenced this action against the State and the Governor and alleges that the failure or refusal of the Governor to: (1) declare a peacetime emergency pursuant to the Minnesota Emergency Management Act ("MEMA"); and (2) issue an executive order directing all Minnesota school districts and schools to impose and enforce a mask mandate to protect against the spread of COVID-19 violates the State's constitutional duty to provide Minnesota students with an adequate education. In addition to claiming that the State and Governor have violated Article XIII, Section 1 of the Minnesota Constitution (the "Education Clause"), PASS also contends that the failure to implement and enforce a mask mandate for school districts and schools: (1) creates a private and public nuisance; (2) breaches a fiduciary duty to students; and (3) violates the Minnesota Human Rights Act ("MHRA") by discriminating against students with disabilities who are especially vulnerable to COVID-19. PASS seeks a declaration that the Governor's inaction on requiring masks in schools violates the Education Clause. It also demands that this court order the Governor to: (1) declare a peacetime emergency; and (2) issue an executive order directing all school districts and schools in Minnesota to impose and enforce a mask mandate to protect against the spread of COVID-19.

Immediately after commencing this action, PASS moved this court to issue a temporary restraining order[10] which demands relief different than that demanded in the Complaint. Specifically, the motion seeks the issuance of a temporary restraining order "to enjoin Governor Timothy J. Walz

[10] While PASS used "temporary injunction" in some documents and "temporary restraining order" in others, this court will use the term "temporary restraining order" throughout the Order and Memorandum.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

to provide to the Minnesota Department of Education to require that all public K-12 schools in the state of Minnesota implement and enforce mandatory mask policies for all students, administrators, faculty, staff, and visitors to the school facilities and sites."[11]

In support of its motion for a temporary restraining order, PASS argues that the continuing deleterious effect of COVID-19 and its Delta variant present new and significant risks to unmasked and unvaccinated school-age children. It also contends that the public health guidance from the Centers for Disease Control and Prevention ("CDC"), the American Academy of Pediatrics ("AAP"), and the Minnesota Department of Health ("MDH") is uniform in recommending that K-12 school students, staff, and visitors should wear masks indoors, regardless of vaccination status. PASS argues that only a small percentage of school districts in the state have a mask mandate, and a recent outbreak of COVID-19 in the Albert Lea school district is a "terrifying real-life harbinger of the catastrophic consequences that can be expected all across the state if this Court does not order the Governor to declare an emergency and order that school districts impose mask mandates."

PASS has also submitted affidavits from three physicians, who contend variously: (1) "universal mask wearing in school is a necessary step to making schools safe for all Minnesota students and especially those with disabilities" (pediatrician); (2) "Relative to financial and practical constraints of implementing more elaborate physical distancing and environmental hazard controls, existing medical technology, and the non-COVID-19 hazards associated with keeping children out of physical school settings, mandated mask wearing within Minnesota's public K-12 schools is a policy that has immense evidence of benefit with comparatively very limited risk of harm" (specialist in occupational and environmental medicine); and (3) masking everyone in schools is effective in reducing the number

[11] The proposed Order seeks something even different than what was proposed in the motion. It enjoins the Governor: "to direct the Department of Education to establish a policy mandating that all public K-12 schools in the state of Minnesota implement and enforce mandatory masking policies for all students, administrators, teachers, staff and visitors to school building [sic] and other school-related sites."

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

of COVID-19 cases in schools and surrounding communities, the surge of the Delta variant has severely impacted children in other states with increased rates of infection, hospitalization, and deaths, and without consistent masking by everyone in schools, there will be significantly more COVID-19 cases and hospitalizations (specialist in infectious disease).

In the end, PASS claims that all the *Dahlberg* factors, which courts routinely use in consideration of whether to grant emergency interim injunctive relief, weigh in its favor. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). The five *Dahlberg* factors are as follows: (1) the nature of the relationship between the parties before the dispute giving rise to the request for relief; (2) the harm to be suffered by the moving party if the temporary injunctive relief is denied as compared to that inflicted on the non-moving party if the injunction issues pending trial; (3) the likelihood of the moving party's success on the merits of the case; (4) the public interest, to the extent that it is a factor; and (5) the administrative burdens involved in enforcing the temporary injunction. *Id.*

First, PASS claims that the relationship between the parties favors it because the State and Governor have a constitutional duty to protect the children of the parents who comprise PASS. Second, it contends that the balance of harms favors an order mandating masking Minnesota students, teachers, and school staff because of the life-or-death issues presented by the spread of the Delta variant. It claims that there will be no significant harm to the State or the Governor from such an order other than political opposition and criticism. Third, PASS maintains that it will likely succeed on the merits of its constitutional claim because, in its estimation, the right to an adequate education requires that: "Minnesota students be allowed to attend schools that provide a healthy and safe environment . . . ." PASS argues that it is likely to succeed on its public and private nuisance claim because the failure to require mask-wearing in schools will affect the enjoyment of life of students, teachers, and school staff, and will endanger their safety and public health. Finally, PASS maintains

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

that it will likely prevail on its MHRA claim because the Governor and the State have discriminated against students with disabilities who "are especially vulnerable" to COVID-19 "due to compromised immune systems," by failing to impose a school mask mandate.[12] Fourth, PASS argues that public interest and policy strongly favor protecting the health and lives of Minnesota students, teachers and staff, by enforcing the constitutional obligations of the State under the Education Clause. Fifth and last, PASS claims that there would be no administrative burden on the court by ordering the Governor to: (1) issue another peacetime emergency; and (2) order school districts in the State to impose mask mandates because these are immediate, and not long-term, steps.

The Governor and the State oppose the motion for a temporary restraining order, though they explicitly recognize: (1) the health of students is of preeminent importance and that COVID-19 continues to spread in Minnesota; (2) that the best course of action is for universal masking to be required in schools; and (3) in accordance with public health consensus, all Minnesota K-12 schools should adopt policies requiring universal masking and other preventative measures to protect students and communities. Nonetheless, the Governor and the State argue that this court lacks the power to force the Governor to exercise his discretionary authority to declare a peacetime emergency and issue an order mandating masks in public schools because those decisions are political questions which are committed to the discretion of other branches of government. In other words, because PASS is asking for the implementation of a particular educational policy – mandatory masks in all K-12 public schools – it presents a non-justiciable political question which the judicial branch cannot resolve. The Governor and the State also contend that PASS lacks standing because it has not: (1) alleged an injury which differs from injury to the interests of other citizens generally; (2) submitted enough evidence about its members to demonstrate organizational standing; (3) demonstrated that its alleged injury is fairly traceable to the challenged action of the Governor and State because neither is responsible for

[12] PASS did not argue that it was likely to prevail on its breach of fiduciary duty claim.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

educational policies; or (4) established that any alleged injury is redressable by a favorable judicial decision because this court cannot direct a state executive in the discharge of any constitutional duty involving the exercise of judgment and discretion – particularly the declaration of a peacetime emergency.

The Governor and State further contend that they are not proper defendants because only the Legislature is responsible under the Education Clause to provide a general and uniform system of public schools, and that school districts are responsible for operating the educational system created by the Legislature.

Even if PASS's claims are justiciable, the Governor and State contend that this court should still deny the motion for a temporary restraining order because the *Dahlberg* factors do not favor its issuance. First, they claim that PASS is unlikely to succeed on the merits because: (1) the separation-of-powers doctrine prevents this court from deciding policy questions which are entrusted to other branches of government; (2) the Governor has broad discretion to declare a peacetime emergency and issue executive orders; (3) it is the Legislature's constitutional duty to establish a general and uniform system of public schools; (4) the nuisance, breach of fiduciary duty, and MHRA claims are not likely to succeed because there is no causation, *i.e.* the risk posed to students and others is due to decisions made by school districts and school boards, not by the Governor or the State. Second, the Governor and State also contend that granting the temporary restraining order would create a significant administrative burden on the court because of the inevitable litigation which would follow from: (1) other litigants seeking the imposition of other COVID-19 restrictions; (2) litigation regarding the imposition of a peacetime emergency related to COVID-19 or for other ostensible peacetime emergencies; and (3) litigation to force compliance with any court-imposed executive order. Third, the Governor and the State argue that the relationship of the parties favors the denial of the temporary restraining order because this factor favors the status quo. Since there is no peacetime emergency and

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

no executive order mandating school mask use, they argue that none of the parties could reasonably expect to radically change the status quo. Finally, the Governor and the State contend that there is a substantial public interest in honoring the separation-of-powers between the co-equal branches of government.

The court held oral argument on September 9, 2021 via Zoom. There were approximately 500 members of the public in attendance at the hearing. The court took the matter under advisement immediately after the hearing.

TEMPORARY INJUNCTION STANDARD

Any party requesting preliminary injunctive relief must establish that the party has no adequate remedy at law and interim relief is necessary to prevent a "great and irreparable injury." *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 294 (Minn. Ct. App. 1995) (quoting *Central Lakes Educ. Ass'n v. Independent Sch. Dist. No. 743*, 411 N.W.2d 875, 878 (Minn. Ct. App. 1987)). The burden is on the moving party to establish the material allegations of the threatened injury. *Marriage of Geske v. Marcolina*, 642 N.W.2d 62, 67 (Minn. Ct. App. 2002).

Once a party has shown irreparable harm, as indicated previously, Minnesota courts apply the *Dahlberg* factors to determine whether the moving party has established "sufficient grounds" for injunctive relief as required by Rule 65.02(b) of the Minnesota Rules of Civil Procedure. *Dahlberg*, 137 N.W.2d at 321-22. The purpose of a temporary restraining order is to maintain the status quo of the parties' relationship until the case can be decided on its merits. *Pickerign v. Pasco Mktg., Inc.*, 228 N.W.2d 562, 564 (Minn. 1975) (temporary injunction). A temporary restraining order is an extraordinary equitable remedy. *Haley v. Fourcelle*, 669 N.W.2d 48, 55 (Minn. Ct. App. 2003) (temporary injunction). It "is the strong arm of equity" and should only be granted with "great caution and deliberation on the part of the court." *Gen. Minn. Utilities Co. v. Carlton Cty. Co-op Power Ass'n*, 22 N.W.2d 673, 679 (Minn. 1946). Injunctive relief may be awarded "only in clear cases, reasonably free from doubt."

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 348, 351 (Minn. 1961). The burden of proof is on the movants to establish the material allegations that entitle them to relief. *Id.*

PASS HAS NOT ESTABLISHED STANDING

As a matter of preliminary consideration, this court must determine whether PASS has standing to bring this lawsuit. The State and the Governor contend PASS has not submitted evidence to demonstrate organizational standing; that PASS's injury is not fairly traceable to the State or the Governor; and that the separation-of-powers doctrine bars redress for PASS's injury by this court. It appears that PASS contends it has organizational standing through its constituent parents who are injured by the lack of mask mandate. PASS maintains that the Minnesota Constitution confers the right to an adequate education which, when violated, gives rise to standing.

"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 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).

Here, PASS must establish an injury-in-fact to have standing because there is no statute at issue which grants standing. "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)).

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Ordinarily, a party must assert its own legal rights. *In re Welfare of R.L.K.*, 269 N.W.2d 367, 372 (Minn. 1978) (citing *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976)). But courts recognize an exception to this general rule "when the litigant has suffered an injury in fact, the litigant has a close relationship with the third party, and the third party is somehow hindered from asserting his or her own rights." *Welter v. Welter*, 2004 WL 2163149, at *3 (Minn. Ct. App. Sept. 28, 2004) (citing *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)); *accord Schable v. Boyle*, 2002 WL 31056699, at *4 (Minn. Ct. App. Sept. 17, 2002).

Similarly, 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, 342-43 (1977))(discussing three-part test). "Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing." *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 914 (Minn. Ct. App. 2003).

In *Metro. Stability*, for example, the plaintiff organizations claimed their missions of "promoting more affordable housing" were harmed by the Metropolitan Council's failure to properly implement the Metropolitan Land Use Planning Act. *Id.* at 910. The court concluded Plaintiffs had standing because, although "affordable housing affects many individuals and communities," "the general public does not have a mission to educate and advocate for affordable housing." *Id.* at 914; *see also Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004) (removal of money from a statutory mineral fund made organizational plaintiff's "mission of economic development in northeastern Minnesota more difficult").

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

PASS has not demonstrated associational standing as did the organizational plaintiffs in *Metro. Stability* and *Rukavina*. PASS professes in its unverified Complaint to be "an unincorporated association comprised of Minnesota parents of Minnesota public school children" who attend districts without mask mandates. PASS has submitted no evidence of its mission. Because this court has no information about PASS' purpose, there is no way to ascertain whether the interests it seeks to protect are germane to its purpose.

In addition, this court cannot assess whether PASS's members have standing as individuals. PASS has provided this court with no specific information regarding who its members are, where they reside, the disabilities of its members' children, or their ages.[13] A party claiming to have standing "must have a direct interest . . . that is different in character from the interest of citizens in general." *Metro. Stability*, 671 N.W.2d at 913. Put another way, when citizens bring lawsuits challenging governmental conduct, they must show harm distinct from harm to the general public. *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999). Without more, the potential threat of COVID-19 transmission to members of PASS and their children from unmasked Minnesotans is not "different in character from the interest of citizens in general."

Another threshold issue of standing relates to the issue of whether PASS has suffered an injury which is fairly traceable to the action or inaction of the Governor or the State. *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014). The foundation of all of PASS's claims relate to the fact that, without a mask mandate, Minnesota school children are not receiving an "adequate education" as required by the Education Clause. The Education Clause provides:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of *the legislature* to establish a general and uniform system of public

[13] Age is particularly germane to standing because children under twelve years of age are both ineligible for the vaccine and are at greater risk of developing Multi-system Inflammatory Syndrome in Children. *See Declaration of Hannah Lichtsinn.*

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

> schools. *The legislature* shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Minn. Const. Art. 13, § 1 (emphasis added). The Minnesota Supreme Court has determined that the explicit language of the Education Clause "places a 'duty' on the legislature to establish a 'general and uniform system' of public schools. This is the only place in the constitution where the phrase 'it is the duty of the legislature' is used." *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *see also Cruz-Guzman v. State*, 916 N.W.2d 1, 8 (Minn. 2018)("There is no dispute that the Minnesota Constitution assigns to the Legislature responsibility for establishing a public school system."). Accordingly, matters of educational policy are matters which fall within the authority of the Legislature. *Cruz-Guzman*, 916 N.W.2d at 8.

PASS has not met its burden to demonstrate standing. In any event, this court will consider PASS's motion for temporary restraining order.

PASS'S MOTION FOR TEMPORARY RESTRAINING ORDER IS DENIED

Throughout the short duration of this proceeding, PASS's request for relief has been something of a moving target. In the Complaint, it demanded the same fundamental two-step relief in each of its four causes of action; namely for this court to order the Governor to: (1) declare a peacetime emergency under MEMA; and (2) issue an executive order to direct all school districts and schools in Minnesota to impose and enforce a mask mandate. In the motion for a temporary restraining order, however, PASS moved to enjoin the Governor "to provide to the Minnesota Department of Education to *require* that all public K-12 schools in the state of Minnesota implement and enforce mandatory mask policies for all students . . . ." (emphasis added). Then, in its proposed temporary restraining order, it asked that the Governor direct "the Department of Education to *establish a policy mandating* that all public K-12 schools in the state of Minnesota implement and enforce mandatory masking policies for all students . . . ." (emphasis added). In its memorandum in support of the motion for temporary restraining order, PASS indicated that its "requested Order would require

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

the Governor to take two *immediate* steps: (1) issue another peacetime emergency; and (2) order school districts in the State to impose mask mandates." (emphasis in original). At oral argument, counsel for PASS suggested that this court did not have to order the Governor to declare a peacetime emergency, but instead could force the Governor to issue an executive order which mandated the use and enforcement of masks in public schools. Later in oral argument, counsel for PASS indicated that the court could simply declare that the Education Clause had been violated by the State and that would necessarily compel the Governor, or the Legislature, or somebody else to remedy the constitutional violation in an unspecified manner.

Suffice it to say, the changing request for relief makes the judicial task presented in the motion rather difficult. The court declines to make a decision which impacts the Department of Education because such a request for relief was neither briefed nor argued. *In re Metro Siding, Inc.*, 624 N.W.2d 303, 308 (Minn. Ct. App. 2001) ("A party is bound by its pleadings unless other issues are litigated by consent."). Moreover, this court also declines to make a merits declaration on an abbreviated record regarding whether any party or non-party to this action violated the Education Clause. Accordingly, this court will assess both PASS's "two-step" request (that this court order the Governor to declare a peacetime emergency and issue an executive order mask mandate to Minnesota school districts and schools) as well as its "one-step" request (that this court order the Governor to issue an executive order mask mandate to Minnesota school districts and schools).

PASS contends that this court should order the Governor to declare a peacetime emergency under MEMA because of the risks posed to unmasked students returning to school during the rise of the Delta variant. While the Governor did declare a peacetime emergency under MEMA during the COVID-19 pandemic and extended it multiple times over the course of 2020 and 2021, it was terminated by an act of the Legislature on July 1, 2021.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Minn. Stat. § 12.31, subd. 2(a) provides in pertinent part: "The governor *may* declare a peacetime emergency. A peacetime declaration of emergency *may* be declared only when an act of nature . . . endangers life and property and local government resources are inadequate to handle the situation." (emphasis added). A peacetime emergency ordered by the Governor may not last more than five days unless it is extended by resolution of the Executive Council for up to 30 days. *Id.* The Executive Council consists of the Governor, the Lieutenant Governor, Secretary of State, State Auditor and Attorney General. Minn. Stat. § 9.011. Subsection (b) of Minn. Stat. § 12.31, subd. 2 provides that a peacetime emergency lasting more than 30 days may be terminated by a majority vote of each house of the Legislature.

This court is quite familiar with the operation of Minn. Stat. § 12.31 after having addressed a constitutional challenge to the Governor's peacetime emergency declaration last year. *Free Minn. Small Bus. Coalition v. Walz*, 62-CV-20-3507 (Ramsey Cty. Dist. Ct. Order Sept. 1, 2020). Minnesota Governors have declared peacetime emergencies infrequently since 1967.[14] This court has discovered no instance, however, where a district court judge has ever ordered a Governor to declare a peacetime emergency. This court will not be the first to do so.

The Governor and the State contend that ordering the Governor to declare a peacetime emergency would violate the separation-of-powers doctrine. This doctrine is embodied in article III of the Minnesota Constitution, which states: "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.

> Minn. Const. art. III, § 1, 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 exception clause, which allows one branch to exercise another type of power

[14] *Minnesota Executive Orders – 1967 to Present*, MINN. LEG., https://www.leg.state.mn.us/lrl/execorders/eoresults?gov=all (last visited Sept. 13, 2021).

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

> when the constitution expressly provides for it. Together, these clauses create not merely a separation of functions, but also, importantly, a balance of powers among the branches of our government. Each branch has areas of autonomy and has available certain tools to check another branch from exceeding its power. A proper balance of powers among the branches is what secures the separation of those powers.

Free Minn. Small Bus. Coalition v. Walz, 2021 WL 1605123, at *3 (Minn. Ct. App. Apr. 26, 2021) (cleaned up).

Here, this court's focus is on the prohibitive clause of article III, section 1. In other words, the central issue here is one of justiciability, which presents a "constellation of constraints" on judicial power derived from the words "cases" and "controversies." Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76 (2007); *see also Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 653 (Minn. 2012) ("The role of our court . . . is limited to deciding actual cases and controversies."). The pertinent constraint here is the political question doctrine. *Cruz-Guzman*, 916 N.W.2d at 8.

As the Minnesota Supreme Court observed over one hundred years ago:

> The meaning of executive, legislative, and judicial power is fairly well understood; but much confusion has resulted from the use of the word 'political' to describe a class of powers which are not judicial, but may be either legislative or executive. Many questions arise which are clearly political, and not of judicial cognizance.

In re McConaughy, 119 N.W. 408, 414-415 (Minn. 1909) (observing that "the existence of a state of war or belligerency" is a political question). With that understanding, the *McConaughy* court defined a political question as "a matter which is to be exercised by the people in their primary political capacity," or a matter that "has been specifically designated to some other department or particular officer of the government, with discretionary power to act." *Id.* at 415.

The Minnesota Supreme Court considered the political question doctrine in the context of education in *Cruz-Guzman*. 916 N.W.2d at 4. In that case, the court was asked to decide whether the State had violated the Minnesota Constitution by failing to meet its obligations under the Education Clause. *Id.* at 7. The court concluded that question was justiciable because, although the Legislature is vested with the responsibility to develop a school system, the court's role was merely to "adjudicate

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

claims of constitutional violations." *Id.* at 9-10. Unlike *Cruz-Guzman*, the questions before this court are not "yes or no question[s]," *id.* at 9, but requests to impose directives upon the Governor.

In drafting and enacting MEMA, the Legislature made specific choices about what circumstances would create an emergency which might necessitate discretionary action on the part of the Governor to protect the lives of Minnesotans. The Legislature also 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 powers in times of emergency. Clearly, the Legislature designated discretionary power to the Governor to declare a peacetime emergency.

The Governor's decision of whether to declare a peacetime emergency under MEMA is both discretionary and political. Minn. Stat. § 12.31, subd. 2(a) (the Governor "may" declare a peacetime emergency). The discretionary decision of whether to declare a peacetime emergency has been specifically designated to the Governor, not to the judiciary. Accordingly, under separation-of-powers principles, the judiciary cannot exercise any of the powers properly belonging to the Governor. *See Cruz-Guzman v. State*, 916 N.W.2d 1, 8 (Minn. 2018) (holding the judiciary cannot exercise any of the powers properly belonging to the Legislature). Put another way, whether to declare a peacetime emergency under MEMA is a nonjusticiable political question.

Providing the remedy sought by PASS here would necessarily require the judiciary to exercise the powers of the Governor. Even assuming, for the sake of argument, that the Governor violated the Education Clause, or committed some other transgression which violated the right of Minnesota K-12 students to an adequate education, a court cannot force the Governor to exercise his discretionary political power. The Governor obviously knows how to exercise this discretionary political power because he has done so during the COVID-19 pandemic. While PASS and many other

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Minnesotans may wish that that Governor would exercise that extraordinary power again, PASS cannot compel him to declare a peacetime emergency by seeking relief in court.[15]

In summary, the courts are not the appropriate domain to dictate to the Governor that he must exercise his discretionary political power in a certain way. Therefore, PASS's contention that this court must issue a temporary restraining order which orders the Governor to declare a peacetime emergency is not justiciable. *Contra Cruz-Guzman*, 916 N.W.2d at 9 (concluding claims which did *not* require the judiciary "to devise particular educational policies to remedy constitutional violations" were justiciable). As such, to the extent that PASS has moved for a temporary restraining order which would order the Governor to declare a peacetime emergency under MEMA, that motion is denied.

This court's evaluation of the second step in PASS's "two-step" request, or its singular "one-step" request, is quite like the separation-of-powers analysis that the court has already made. This request for relief demands that this court order the Governor to issue an executive order mask mandate to Minnesota school districts and schools. Again, the relief requested by PASS in this regard is unprecedented. The court reaches the same conclusion as above. This request is also not justiciable.

Under Minn. Stat. § 4.035, the Governor may issue an executive order, which is defined as: "A written statement or order executed by the governor pursuant to constitutional or statutory authority and denominated as an executive order, or a statement or order of the governor required by law to be in the form of an executive order. . . ." Executive orders issued by the Governor can be mundane and perfunctory, such as establishing a Blue Ribbon Commission, or they can be extraordinary and detailed, such as ordering Minnesotans to "stay at home" during the COVID-19 pandemic. No matter the importance or level of detail, all the executive orders issued by the Governor involve the exercise of judgment and discretion.

[15] Even putting aside separation-of-powers concerns, it is questionable whether this court could order a peacetime emergency that lasted more than five days without also usurping the power of both the Executive Council and the Legislature.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Like the decision of whether to order the Governor to declare a peacetime emergency, the decision of whether to order the Governor to issue an executive order which would mandate mask wearing in Minnesota schools is ill-suited for judicial resolution. The judiciary does not have the power to "control, coerce, or restrain" the action of another branch of government "within the sphere allotted them by the Constitution wherein to exercise judgment and discretion." *State ex rel. Burnquist v. Dist. Court, Second Judicial Dist.*, 168 N.W. 634, 636 (Minn. 1918); *see also McConaughy*, 119 N.W. at 415 (explaining that the discretionary constitutional powers held by the Executive and Legislative Branches are not subject to judicial control "not merely because they involve political questions, but because they are matters which the people have by the Constitution delegated to" those branches).

Here, PASS is not simply asking this court to find that the Governor has in some way violated the Education Clause, or otherwise committed a transgression which puts schoolchildren at risk of contracting COVID-19 (in effect, answering a "yes or no question"); PASS is asking this court to substitute its discretion and judgment for that of the Governor in a very specific way. *See Cruz-Guzman*, 916 N.W.2d at 9 ("In essence, appellants' claims ask the judiciary to answer a yes or no question . . . ."). Requesting that this court "issue an executive order directing all school districts and schools in the State to impose and enforce a mask mandate to protect against the spread of COVID" requires this court to exercise the discretionary power of another branch of government. This request is substantially different than leaving to the discretion and judgment of the Governor the manner with which he must correct any alleged violation of the Education Clause, assuming he had the power to do so. Conceivably, there is a continuum of choices which another branch of government could use to keep school children safe from the effects of the Delta variant – from closing schools and having students attend class from home, to vaccinating students, teachers, and staff age 12 and older, to improving ventilation, to social distancing – but PASS's request for relief asks this court to institute a specific and singular educational policy – mandating everyone in Minnesota K-12 schools to wear a

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

mask. *See, e.g., Declaration of Zeke J. McKinney* ("Environmental controls of COVID-19 include social restrictions (closure/limitation of environments, limitation of capacity), travel restrictions, quarantine, isolation, contact tracing, cleaning, and indoor air ventilation/filtering, while individual controls include vaccination, testing, avoidance of touching one's face, respiratory etiquette (e.g. covering one's mouth/nose when sneezing or coughing), hand hygiene, mask-wearing, and physical distancing."); *Declaration of Hannah Lichtsinn* ("In addition to vaccination, improved ventilation, and physical distancing, universal mask wearing plays a key role in reducing spread of SARS CoV-2 within schools."). This request dictates to the Governor the precise educational policy[16] which he must implement in order resolve the issue of the potential spread of COVID in public schools.

As with the request to direct the Governor to declare a peacetime emergency, the courts are not the appropriate domain to dictate the Governor exercise his discretionary power in a certain way. Therefore, the relief PASS seeks – that this court issue a temporary restraining order which forces the Governor to issue an executive order directing all school districts and schools in Minnesota to mandate and enforce mask-wearing in K-12 schools – is not justiciable. *Cruz-Guzman*, 916 N.W.2d at 9. As such, to the extent that PASS has moved for a temporary restraining order which would order the Governor to implement a K-12 school mask mandate, that motion is denied.

Moreover, even if PASS did not present a non-justiciable political question, this court could not grant relief as to the Governor or the State. The Minnesota Supreme Court has interpreted the "right to a general and uniform system of education" as one that "provides an adequate education to all students in Minnesota." *Id.* at 11. In fact, the thrust of PASS's argument is that without a mask mandate, K-12 students in Minnesota are not receiving an "adequate education." This is the exclusive duty of the Legislature, not the Governor. *Id.* at 12 ("An education that does not equip Minnesotans

[16] Inexplicably, PASS denies that the request to order the Governor to issue a mask mandate in all K-12 schools involves discretion or concerns a matter of educational policy.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

to discharge their duties as citizens intelligently, cannot fulfill *the Legislature's duty to provide an adequate education under the Education Clause*.") (emphasis added). PASS did not sue the Legislature. If there was injury to PASS due to a violation of the Education Clause, or a public/private nuisance, breach of fiduciary duty, or an act of disability discrimination, it would fall within the exclusive duty of the Legislature.

PASS contends that even if the Governor was not the right party to this matter, it has cured any justiciability defect because it also sued the State. It points to language in *Cruz-Guzman* which suggests that it is the State's responsibility to provide a constitutionally adequate education. *See, e.g., id.* at 12 ("Of course, some level of qualitative assessment is necessary to determine whether the State is meeting its obligation to provide an adequate education."). In PASS's assessment, so long as it sued the State, it does not matter whether it is the Legislature or the Governor's obligation to ensure Minnesota school children are receiving an adequate education. There are two problems with this contention. First, PASS misreads *Cruz-Guzman* and the explicit language of the Education Clause. The founders made an explicit decision to place the duty for a "general and uniform system of education" on the Legislature.[17] Second, the relief PASS is requesting in its pleading and its motion for a temporary restraining order is that the Governor, not the State, must be directed to declare a peacetime emergency and issue an executive order mandating mask-wearing in K-12 schools. Suing the party which created an alleged injury, and which has the duty and authority to provide a remedy to the injury, is not a trifling or superficial matter. PASS has failed to sue the party whose action or

[17] It also appears that the Legislature has delegated some of its powers to the boards of independent school districts: "The board must have the general charge of the business of the district, the school houses, and of the interests of the schools thereof. The board's authority to govern, manage, and control the district; to carry out its duties and responsibilities; and to conduct the business of the district includes implied powers in addition to any specific powers granted by the legislature." Minn. Stat. § 123B.02.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

inaction caused its alleged injury and whose responsibility it is to redress such an alleged injury. PASS's motion for a temporary restraining order is denied for this reason as well.[18]

Even though this court has determined that PASS's motion for a temporary restraining order should be denied because it does not present a justiciable issue, the court will nonetheless evaluate PASS's motion under the *Dahlberg* factors.

The first factor to consider in deciding whether to grant a temporary restraining order is "[t]he nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief." *Dahlberg*, 137 N.W.2d at 321. This factor examines the reasonable expectations of the parties considering the background of their relationship. *Id.* at 322. This factor is somewhat difficult to assess since this court knows little about PASS other than what is represented in the unverified Complaint. PASS represents that it is an organization comprised of Minnesota parents of Minnesota public school children, with and without disabilities, and who attend schools in school districts which have not imposed a mask mandate. In any event, since the purpose of a temporary restraining order is to maintain the status quo of the parties' relationship until the case can be decided on its merits, this factor would not favor the issuance of a temporary restraining order – which would upend the status quo, rather than preserve it. *Pickerign*, 228 N.W.2d at 564. This factor does not favor PASS.

The second factor to consider in deciding whether to grant a temporary restraining order is "[t]he harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Dahlberg*, 137 N.W.2d at 321. In applying the second *Dahlberg* factor, courts must balance the harm that the non-moving party would suffer if injunctive relief were to be granted against the harm that the moving party would suffer if injunctive

[18] It seems doubtful that, even if PASS had sued the Legislature, its claims would be justiciable under the same separation-of-powers analysis that doomed its motion for a temporary restraining order against the Governor.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

relief were to be denied. *Cramond v. AFL-CIO*, 126 N.W.2d 252, 256 (Minn. 1964). A temporary injunction will be issued if the denial of injunctive relief would lead to certain and irreparable injury to the moving party, and the grant of relief would lead only to inconsiderable injury to the opposing party. *Town of Burnsville v. City of Bloomington*, 117 N.W.2d 746, 750 (Minn. 1962). A party seeking injunctive relief must show irreparable harm, but the party opposing the motion need only show substantial harm in order to bar injunctive relief. *Yager v. Thompson*, 352 N.W.2d 71, 75 (Minn. Ct. App. 1984).

Comparing the parties' relative harms, it seems quite clear that the potential harm to K-12 students is immediate and irreparable in districts which allow students, teachers, and staff to enter school buildings unmasked. This is especially true for those students who cannot be vaccinated or who have certain disabilities or pre-existing conditions which put them at greater risk. The Delta variant is virulent and pernicious and its recent effects on children have been profound and deadly. The Governor and the State have not attempted to demonstrate that they will suffer substantial harm, which would bar injunctive relief. This factor favors PASS.

The third factor to consider in deciding whether to grant a temporary restraining order is "[t]he likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief." *Dahlberg*, 137 N.W.2d at 321. Under the third *Dahlberg* factor, a party seeking a temporary injunction must demonstrate a substantial probability of succeeding at trial on the merits of the action. *See Minn. Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1327 (8th Cir. 1973).

The court has already discussed this issue, indirectly, when it addressed the issues of standing and justiciability. Obviously, if a party cannot establish standing and justiciability, it cannot demonstrate a likelihood of success on the merits. For that reason alone, this factor does not favor PASS.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Evaluating the merits of PASS's claims ends with the same conclusion. PASS's Education Clause claim (and for that matter, all its claims) depend on a determination by this court that the pronouncement in *Cruz-Guzman* that the right to an "adequate education" means that students have a right to a "healthy and safe environment." PASS contends that the right to a "healthy and safe environment" is inherent in an "adequate education." PASS may ultimately be correct; however, no Minnesota court, high or low, has made such a determination. While it is the obligation of the judiciary to "say what the law is," this is a case of first impression and the court cannot say that this novel claim has a substantial likelihood of success on the merits. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

PASS has made three other claims – private/public nuisance, breach of fiduciary duty,[19] and disability discrimination under the MHRA. All these claims seek to hold the Governor and the State responsible for potential harm to school children created by the Governor's decision not to declare a peacetime emergency and impose a statewide K-12 mask mandate. It seems doubtful that the Governor's decision not to declare a peacetime emergency, and to recommend and encourage mask wearing, but not mandate it, could provide the basis for a tort or discrimination claim. Further, as this court has previously observed, it does not appear that any injury suffered by PASS is fairly traceable to the alleged inaction of the Governor. It also appears that a governor's failure to declare a peacetime emergency, or issue an executive order, is simply too remote to hold them, or the State, liable under the tort and discrimination claims advanced by PASS. *Cf. State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495 (Minn. 1996) (concluding an insurance company purchaser's harm was too remote from tobacco companies' harmful misrepresentations for recovery). Therefore, it does not appear that PASS is likely to succeed on the merits of these claims.

[19] Since PASS does not argue that it is substantially likely to succeed on its breach of fiduciary claim, this court will not specifically address it here.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

It also does not appear that PASS will succeed on its private and public nuisance claims. A private nuisance claim is limited to real property interests. *Anderson v. State, Dep't of Natural Resources*, 693 N.W.2d 181, 192 (Minn. 2005); *Schmidt v. Village of Mapleview*, 196 N.W.2d 626, 628 (Minn. 1972) ("It is elementary that the term 'nuisance' denotes an infringement or interference with the free use of property"). PASS appears to lack the requisite property interest to maintain a private nuisance claim.

With regard to PASS's public nuisance claim, "[p]rivate persons may not bring a cause of action for public nuisance unless they allege some special or peculiar injury." *North Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 189 (Minn. Ct. App. 1984). Special or peculiar injuries are those which are "not common to the general public." *Hill v. Stokely-Van Camp, Inc.*, 109 N.W.2d 749, 753 (Minn. 1961). Over one hundred years ago, the Minnesota Supreme Court described this concept in the following manner:

> [A]n individual cannot maintain a private action for a public nuisance by reason of an injury which he suffers in common with the public; that it is only when he sustains special injury differing in kind, and not merely in degree or extent, from that sustained by the general public: that an individual may recover damages in a private suit.

Swanson v. Mississippi & Rum River Boom Co., 44 N.W. 986, 987 (Minn. 1890). The potential injury at the heart of this matter is the contraction of the COVID-19 virus and its Delta variant. Everyone in Minnesota is susceptible to contract COVID-19, whether old or young, disabled or not, vaccinated or unvaccinated. PASS does not contend in its Complaint that its members would suffer a potential special injury differing in kind from any potential injury which could be sustained by the general public. While there is evidence in this record which suggests that school age children, or more specifically disabled school age children, may contract COVID-19 at higher rates, or may have some greater susceptibility to the virus, these are matters of magnitude and degree. PASS has not demonstrated a likelihood of success on the merits of its public nuisance claim because there is nothing different in kind from its potential injury due to COVID-19 than the potential injury to the general public.

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

Finally, this court will turn to its analysis of the likelihood of success on the merits of PASS's disability discrimination claim under the MHRA. Minn. Stat. § 363A.13, subd. 1 states: "It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . disability, or to fail to ensure physical and program access for disabled persons." PASS summarily argues that they will likely prevail on this claim. The Governor and the State also spend little time addressing this specific claim. The language of the statute seems to focus on the discriminatory practices of an educational institution which is denying a person from its benefits, or which fails to ensure access to its building and programs. Presumably, in this case, the "educational institution" would be the school districts or the schools which have failed to require and enforce masking for students, teachers, and staff. It seems unlikely that Minn. Stat. § 363A.13, subd. 1 was intended to create liability for the Governor, or the State, for failing to take action to address an issue which is the constitutional responsibility of the Legislature and the statutory responsibility of the boards of independent school districts. There also may be immunities which would protect the Governor against a discrimination claim under Minn. Stat. § 363A.13. *See, e.g., State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 570-71 (Minn. 1994) (official immunity). The lack of robust advocacy about the likelihood of success on the merits of this claim leaves this court concluding that PASS has not met its burden.

PASS has not demonstrated that it is likely to succeed on the merits of any of its claims. This factor does not favor PASS.

The fourth factor to consider in deciding whether to grant a temporary restraining order is "[t]he aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal." *Dahlberg*, 137 N.W.2d at 321. PASS contends that public policy considerations weigh heavily in favor of protecting the health and safety of Minnesota K-12 students and others involved in public school education. The Governor and State do not argue

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

otherwise, but instead contend that the public policy focus of the court should be on the preservation of separation-of-powers. For the reasons previously discussed, and despite this court's concerns about ensuring the safety of children in Minnesota public schools, PASS has asked this court to provide relief which it cannot give. Accordingly, while protecting health and safety of Minnesota K-12 students is critical, it does not factor in the court's consideration of whether to issue a temporary restraining order in this case.

This court has significant public policy concerns regarding the prospect of creating an avenue for citizens or organizations to come to court to have it force the Governor to declare a peacetime emergency or issue an executive order. These concerns are particularly acute when as here, the litigant is requesting one branch of government (judicial) to order another branch of government (executive) to perform a function that is the exclusive responsibility of a third branch of government (legislative).

Moreover, this court has concerns about the prospective effect of exercising subject-matter jurisdiction in a case like this one. If a citizen suffered the effects of a natural disaster such as a tornado or flood, can they avail themselves of court intervention to force the Governor to issue an executive order to restore power, rebuild structures and flood protection, or make emergency funds available? If a citizen is experiencing a spike in violent criminal activity in their neighborhood, can they avail themselves of court intervention to force the Governor to issue an executive order to dispatch the National Guard to control the streets?

The constitutional separation-of-powers forbids interference by one branch in the spheres of power allocated to another branch. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 630 (Minn. 2017) (Anderson, J., dissenting). None of the branches "can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion." *State ex rel. Birkeland v. Christianson*,

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

229 N.W. 313, 314 (Minn. 1930). Public policy does not support judicial intervention here. This factor does not favor PASS.

The fifth and final factor to consider in deciding whether to grant a temporary restraining order is "[t]he administrative burdens involved in judicial supervision and enforcement of the temporary decree." *Dahlberg*, 137 N.W.2d at 321. "An injunction or decree of specific performance will not lie if as a result the court will be required to maintain constant supervision over the actions of the parties." *Id.* at 323.

PASS contends that there will be no administrative burden on this court aside from contempt proceedings against the Governor if he does not obey a court order. The Governor and the State do not contend that there will be administrative burdens on this court, but rather contend that a temporary restraining order providing the relief requested by PASS will spawn litigation initiated by those resisting a mask mandate or its enforcement, and enforcement actions by the executive branch to compel compliance from school districts which do not implement or enforce the mask mandate. While this court is aware of the litigation which occurred around the state, both resisting and enforcing the Governor's peacetime emergency declaration and the various executive orders which followed it, this court has not located any authority which suggests that litigation fallout is an appropriate consideration in whether to issue a temporary restraining order. This factor favors PASS but does not predominate over the other factors which do not favor PASS.

CONCLUSION

In the words of Dr. Michael Osterholm, the Director of the Center for Infectious Disease Research and Policy at the University of Minnesota, the COVID-19 pandemic "is a coronavirus forest fire that will not stop until it finds all of the human wood it can burn."[20] While this court is gravely

[20] Michelle Cortez & Bloomberg, *Prepare for a Rough Few Months of COVID-19, According to These Scientists*, FORTUNE (Sept. 13, 2021) https://fortune.com/2021/09/13/covid-future-next-six-months-vaccines-variants-outbreaks/

Filed in District Court
State of Minnesota
9/14/2021 5:36 PM

concerned about the public health consequences of the failure of school districts to implement the guidance of the CDC and the Minnesota Department of Health regarding the use of masks for children, teachers, and staff in K-12 public schools, the judiciary cannot order a co-equal branch of government to exercise its discretionary, political judgment to implement a specific educational policy.

PASS has not demonstrated that it has standing, or that it has a justiciable claim for relief. In addition, PASS has not demonstrated that the *Dahlberg* factors favor injunctive relief. Therefore, PASS's motion for a temporary restraining order is denied.

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