App. 1

United States Court of Appeals
for the Eighth Circuit

No. 21-2283

Northland Baptist Church of St. Paul, Minnesota; John Bruski; Living Word Christian Center,

Plaintiffs

Glow In One Mini Golf, LLC; Aaron Kessler; Myron's Cards and Gifts, Inc.; Larry Evenson; AJ Hulse Company; Andrew Hulse; Gay Bunch-Hulse,

Plaintiffs - Appellants

v.

Governor Tim Walz, individually and in his official capacity; Attorney General Keith M. Ellison, in his official capacity; Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota; Anthony Charles Palumbo, in his official capacity as County Attorney for Anoka County, Minnesota; John Choi, in his official capacity as County Attorney for Ramsey County, Minnesota,

Defendants - Appellees

The Forum for Constitutional Rights,

Amicus on Behalf of Appellants

Appeal from United States District Court
for the District of Minnesota

Submitted: February 17, 2022
Filed: June 16, 2022

Before LOKEN, COLLOTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

In response to the COVID-19 pandemic, Minnesota Governor Tim Walz declared a state of "peacetime emergency" and began issuing executive orders (EOs) intended to combat the spread of the virus. The EOs pertinent to this appeal limited which types of businesses could continue operations and, later, specified the capacities at which those businesses could operate. Appellants, three Minnesota businesses and their respective owners, suffered financial losses during the COVID-19 pandemic and while these EOs were in effect. Appellants brought an Equal Protection Clause claim against Governor Walz and Keith M. Ellison, Minnesota's Attorney General, in their official capacities and a Takings Clause claim against Governor Walz

in his individual capacity, which the district court[1] dismissed.[2] They now appeal that dismissal, and having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I.

On March 13, 2020, former President Donald Trump declared the United States to be in a state of emergency due to the COVID-19 pandemic and approved major disaster declarations in all 50 states and most territories. On this same day, Governor Walz issued EO 20-01, which declared Minnesota to be in a "peacetime emergency." In that EO, Governor Walz explained:

> The infectious disease known as COVID-19, an act of nature, has now been detected in 118 countries and territories, including the United States. COVID-19 has been reported in 42

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[1] The Honorable Wilhelmina M. Wright, United States District Judge for the District of Minnesota.

[2] Two churches, Northland Baptist Church of St. Paul and Living Word Christian Center, as well as a pastor, John Bruski, originally joined appellants as plaintiffs. The churches and pastor brought a free exercise claim and a freedom of speech and assembly claim pursuant to the United States and Minnesota Constitutions and named as defendants Mike Freeman, Hennepin County Attorney, Tony Palumbo, Anoka County Attorney, and John Choi, Ramsey County Attorney. However, the plaintiffs voluntarily dismissed their claims against Freeman, Palumbo, and Choi, leaving only Governor Walz and Attorney General Ellison as defendants. Then, the parties, pursuant to Federal Rule of Civil Procedure 41(a)(1), stipulated to the dismissal of the churches' and the pastor's claims with prejudice, leaving only appellants as plaintiffs.

> states. There are over 1,600 confirmed cases nationwide, including fourteen in Minnesota.
>
> The U.S. Department of Health and Human Services Secretary has declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19. The World Health Organization has recently assessed that this outbreak can be characterized as a pandemic.
>
> In coordination with other state agencies, local governments, and partners in the private sector, the Minnesota Department of Health . . . has been preparing for and responding to the COVID-19 pandemic in Minnesota.

R. Doc. 57-1, at 30.

Three days later, on March 16, Governor Walz issued EO 20-04 in response to a "rapidly increasing" number of confirmed COVID-19 cases within Minnesota's borders. This EO closed some "places of public accommodation," which the EO defined as "a business, or an educational, refreshment, entertainment, or recreation facility, or an institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." R. Doc. 57-1, at 42. This included appellant Glow In One Mini Golf, LLC, an indoor mini-golf facility owned by appellant Aaron Kessler. EO 20-04 became effective March 17, 2020. On March 18, Governor Walz issued EO 20-08, which amended EO 20-04 to include, as relevant here, salons like appellant AJ Hulse Company, a

hair salon with two locations owned by appellants Andrew Hulse and Gay Bunch-Hulse. EO 20-08 was effective immediately.

Throughout 2020, Governor Walz continued issuing EOs, and in each EO, he provided an updated total of active COVID-19 cases in Minnesota and extended, modified, or replaced previously issued guidelines to reflect Minnesota's ever-evolving response to the virus. These EOs initially provided for the almost-complete closure of the state and required Minnesotans to remain at home unless engaging in "critical infrastructure sector" work, a term defined by the United States Department of Homeland Security to include "workers needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response," such as health care workers, law enforcement, and first responders. R. Doc. 57-1, at 60. As a result, appellant Myron's Cards and Gifts, Inc., a greeting card and gift store owned by appellant Larry Evenson, along with Glow In One and AJ Hulse, were forced to close completely. However, in May 2020, Governor Walz issued an EO that permitted certain businesses, including Myron's Cards and Gifts and AJ Hulse, to begin conducting curbside retail sales and, later, EOs that allowed businesses like Myron's Cards and Gifts to begin operating at 50% capacity and AJ Hulse to begin operating at 25% capacity. Finally, on June 5, 2020, Governor Walz issued EO 20-74, which became effective on June 9 and which is the focus of appellants' equal protection claim. EO 20-74 allowed businesses

like AJ Hulse to reopen at 50% capacity and Glow In One to reopen at 25% capacity. However, by June 9, Glow In One had closed completely due to lack of income and, for the same reasons, could not reopen. Associated with these EOs were criminal penalties which included jail time and fines.

Appellants filed this action asserting that the EOs violated their constitutional rights, and Appellees filed a motion to dismiss, which the district court granted in part and denied in part. The district court granted sovereign immunity to appellees insofar as appellants sought monetary damages against them in their official capacities, denied sovereign immunity to appellees insofar as appellants sought declaratory and injunctive relief against them in their official capacities, and granted qualified immunity to Governor Walz insofar as appellants brought claims against him in his individual capacity. The district court alternatively dismissed appellants' equal protection and takings claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court did not consider mootness. Appellants now appeal the district court's dismissal of their equal protection and takings claims.

"We review the grant of the motion to dismiss de novo." Allen v. Monico, 27 F.4th 1372, 1376 (8th Cir. 2022) (reviewing dismissal based on qualified immunity de novo); see also Butler v. Bank of Am., N.A., 690 F.3d 959, 961 (8th Cir. 2012) (reviewing dismissal for failure to state a claim pursuant to Rule 12(b)(6) de novo). "[W]e read the complaint in the light most

favorable to the plaintiff, making all reasonable inferences of fact in the plaintiff's favor." Allen, 27 F.4th at 1374. "When considering . . . a motion to dismiss under Fed.R.Civ.P. 12(b)(6)[ ], the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." Miller v. Redwood Toxicology Lab'y, Inc., 688 F.3d 928, 931 (8th Cir. 2012) (alterations in original) (citation omitted). Having determined the applicable standard of review, we turn to appellants' arguments and, for the following reasons, affirm the district court.

II.

We must first determine whether we have jurisdiction to consider appellants' equal protection claim, a claim for which they request only declaratory and injunctive relief.

"Article III of the Constitution grants federal courts the power to hear 'Cases' and 'Controversies.' This 'requirement subsists through all stages of federal judicial proceedings, trial and appellate.'" Teague v. Cooper, 720 F.3d 973, 976 (8th Cir. 2013) (citation omitted). "To establish Article III standing, a plaintiff must have suffered an injury in fact that is fairly traceable to the defendant's challenged action, and it must be likely that the injury will be redressed by a favorable judicial decision." Cross v. Fox, 23 F.4th 797, 800 (8th Cir. 2022) (citation omitted); see also North

Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) ("To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (alteration in original) (citation omitted)). "When, during the course of litigation, the issues presented in a case 'lose their life because of the passage of time or a change in circumstances . . . and a federal court can no longer grant effective relief,' the case is considered moot." Ali v. Cangemi, 419 F.3d 722, 723 (8th Cir. 2005) (en banc) (alteration in original) (citation omitted); see also Whitfield v. Thurston, 3 F.4th 1045, 1047 (8th Cir. 2021) ("When the issues presented in a case are no longer live, the case is moot and is therefore no longer a 'Case' or 'Controversy' for purposes of Article III." (citation omitted)). Therefore, where, over the course of the litigation a case has become moot, we lack jurisdiction and must dismiss the action. See Ali, 419 F.3d at 724.

Here, appellants seek a declaration that

> Governor Walz did not have the statutory authority to declare an emergency . . . , issue shelter in place orders, authorize penalties in excess of his statutory authority, or otherwise restrict lawful activity . . . under the circumstances, and that the Attorney General does not have the authority to prosecute violations of the EOs using that authority,

R. Doc. 51, at 47, as well as a declaration that appellees "violated [their] equal protection rights . . . to operate their businesses without arbitrary and capricious government interference," R. Doc. 51, at 47-48. Additionally, appellants request an injunction "prohibiting [appellees] from enforcing EO 20-74, and any additional, successor, or replacement executive orders which violate [their] rights." R. Doc. 51, at 48.

However, EO 20-74 (as well as the other EOs challenged by appellants, though appellants focus on EO 20-74 in this claim) is no longer in effect, all capacity restrictions have lapsed, and Minnesota is no longer in a peacetime emergency. Thus, because the issues presented by appellants' equal protection claim lost their life during the course of this litigation, a declaration or an injunction by this Court cannot provide relief, and the claim has become moot. See Rice, 404 U.S. at 246 ("Early in its history, this Court held that it had no power to issue advisory opinions, and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." (citation omitted)); cf. Trump v. Hawaii, 138 S. Ct. 377, 377 (2017) (per curiam) (finding moot a challenge to provisions of an executive order which had "expired by [their] own terms" ((alteration in original) (citation omitted))).

However, our analysis does not end here because "[t]here is an exception to [the] mootness [doctrine] for cases that are capable of repetition yet evading review." Calgaro v. St. Louis Cnty., 919 F.3d 1054, 1059 (8th Cir. 2019). The "capable of repetition yet evading

review" exception is applicable "when there is a reasonable expectation that the alleged actions of the defendant[s] will recur." Id. We have explained:

> Under this doctrine, a case that would otherwise be moot is not if '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.

Whitfield, 3 F.4th at 1047 (alterations in original) (citation omitted); see also Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam) (requiring "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party" (citation omitted)).

Beginning in 2020, the nation's understanding of COVID-19 changed rapidly, and states, like Minnesota, have been required to adapt their approach to accommodate those near-constant developments. In turn, federal courts across the country have been presented with novel questions of mootness. This Court, following the Supreme Court, has explained that although a lawsuit challenging a COVID-19 restriction may outlive that challenged restriction, "that does not necessarily moot the case." See Hawse v. Page, 7 F.4th 685, 692 (8th Cir. 2021) (quoting Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam)). "At the same time, however, that the government once imposed a particular COVID restriction does not necessarily mean that litigation over a defunct restriction presents a live controversy

in perpetuity." Id. Instead, we must engage in a fact-specific analysis to determine if the issue is capable of repetition yet evading review. See id. (explaining that "[r]esolution of the mootness question requires attention to the particular circumstances of the case").

In Minnesota, the governor may declare a peacetime emergency "only when an act of nature . . . endangers life and property and local government resources are inadequate to handle the situation." Minn. Stat. § 12.31, subdiv. 2(a). Once a peacetime emergency has been declared, the governor is authorized to act pursuant to "the necessary portions of the state emergency operations plan," id. at subdiv. 3, which includes "mak[ing], amend[ing], and rescind[ing] the necessary orders and rules" to address that emergency, § 12.21, subdiv. 3(1).

Here, it is appellants' burden to prove that this issue is capable of repetition yet evading review. See Whitfield, 3 F.4th at 1047. However, they have not offered anything that supports their hypothesis that Governor Walz will, first, declare a second peacetime emergency and, then, will issue additional EOs—specifically, EOs like 20-74 that, in their view, treat them differently than other, similarly situated businesses and impede them from conducting their businesses as they wish. Instead, appellants state only that Governor Walz "could easily declare another peacetime emergency tomorrow" and "has stated ongoing concern about 'variants' which have led to a rise in COVID-19 cases among unvaccinated people."

Our recent opinion in Hawse suggests that, due to "the emerging availability of vaccines for COVID-19, and declining COVID-19 case numbers," i.e., the "substantial changes in public health conditions since May 2020," it is unlikely that government officials will reissue the sort of exacting restrictions on businesses in 2022 or beyond as they did in 2020. See 7 F.4th at 692-93. Courts across the country have similarly found that, due to developments in the COVID-19 public health crisis, such as the availability of vaccines, orders like Governor Walz's EOs are not capable of repetition yet evading review. See, e.g., Church v. Polis, 2022 WL 200661, at *6 (10th Cir. Jan. 24, 2022) ("Thus, any chance of the State reimposing the challenged restrictions on plaintiffs is entirely speculative, stemming only from the uncertainty inherent in the pandemic and the State's general authority to impose restrictions in emergencies."); Cnty. of Butler v. Governor of Pennsylvania, 8 F.4th 226, 230 (3d Cir. 2021) (explaining that plaintiffs failed to show that challenged orders were capable of repetition yet evading review and that, to the contrary, defendants "represented that the public health landscape has so fundamentally changed that 'what we were facing in this case is not what you would be facing going forward'" (citation omitted)); Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 560 (6th Cir. 2021) (finding that capable-of-repetition-yet-evading-review exception to mootness did not apply to COVID-19-related challenge to election provision because, due to "advancements in COVID-19 vaccinations and treatment since this case began, the

COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle").

After carefully reviewing the allegations contained in appellants' complaint, along with materials in the public record, materials necessarily embraced by the pleadings, and cases like Hawse, in which this Court (and other courts) have described developments in the state of the COVID-19 pandemic between 2020 and now, we find that there is no reasonable expectation that EO 20-74 is capable of repetition. Therefore, we affirm the district court's dismissal of appellants' equal protection claim, albeit on mootness grounds. See Adam & Eve Jonesboro, LLC v. Perrin, 933 F.3d 951, 958 (8th Cir. 2019) ("[W]e may affirm a judgment on any ground supported by the record.").

However, our conclusion that appellants' claim for declaratory and injunctive relief is moot does not preclude us from reaching appellants' claim for damages against Governor Walz in his individual capacity. Therefore, we turn to the district court's finding that Governor Walz was entitled to qualified immunity on appellants' takings claim.

"Qualified immunity is an immunity from suit, not merely a defense to liability," and "[t]o avoid pretrial dismissal, a plaintiff must present facts showing the violation of a constitutional right that was clearly established at the time of the defendant's act." Irvin v. Richardson, 20 F.4th 1199, 1204 (8th Cir. 2021). To determine if a state official is entitled to qualified immunity, we employ the familiar two-prong analysis,

asking "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." Burns v. Cole, 18 F.4th 1003, 1007 (8th Cir. 2021) (citation omitted). "Courts can 'exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.'" Id. (citation omitted).

The Takings Clause, made applicable to states like Minnesota through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There are different types of takings claims that a plaintiff may bring depending on what type of government action he wishes to challenge. See Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 693 (8th Cir. 1996) ("The takings clause reaches both direct appropriations of property and some regulations that redefine a property owner's range of interests in property."). "An owner whose deprivation is less than complete, and thus does not amount to a per se taking, may nevertheless be entitled to compensation in some circumstances." Id. at 695.

Here, appellants argue that Governor Walz's EOs (specifically, EOs 20-04, 20-08, 20-18, 20-20, 20-33, 20-38, 20-48, and 20-56) constituted a per se taking or, in the alternative, a regulatory taking. A per se taking occurs where there is a "direct government appropriation of or physical invasion of private property." Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430,

440 (8th Cir. 2007) (citation omitted). A regulatory taking has traditionally been characterized as occurring when a regulation "goes too far." See, e.g., id. (citation omitted). The Supreme Court recently clarified that when determining whether a per se taking or a regulatory taking occurred, if either, the "essential question" is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

We need not parse through whether or not a taking occurred, however, because even assuming that a taking *did* occur, whatever its type, appellants have offered nothing to support their contention that, in 2020, the law was clearly established such that Governor Walz would have understood that his EOs constituted a taking.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Williams v. Herron, 687 F.3d 971, 977 (8th Cir. 2012) (alterations in original) (citation omitted). "In other words, the right violated must have been established 'beyond debate.'" Manning v. Cotton, 862 F.3d 663, 668 (8th Cir. 2017) (citation omitted). "[C]ourts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular

circumstances that he or she faced." Bell v. Neukirch, 979 F.3d 594, 607 (8th Cir. 2020) (alteration in original) (citation omitted). In performing the clearly established inquiry, we must "look to the state of the law at the time of the incident." Williams, 687 F.3d at 977 (citation omitted).

We agree with the district court that Governor Walz is entitled to qualified immunity on this claim because appellants have not shown that Governor Walz's response to COVID-19—specifically, closing and then restricting the capacity of businesses deemed non-critical—was a taking under clearly established law. In appellants' opening brief to this Court, they discuss why, in their view, Governor Walz's EOs constituted a taking, citing hallmark Takings Clause cases such as Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). They suggest that, for decades, it has been clearly established that just compensation is required for government takings. We agree with that general proposition, as it is written within the Fifth Amendment's text. However, that does not explain how Governor Walz, in 2020, would have known that his EOs, issued in response to an unprecedented pandemic, constituted a taking for which just compensation was owed.

As a final matter, appellants do not point to, nor can we find, any instance in which the Supreme Court or this Court has held a government official individually liable for a government taking. Instead, Supreme Court cases only contemplate government entities—not individual government officials—providing just

compensation. Recently, in Cedar Point Nursery, the Supreme Court, when discussing a physical taking, explained that the Fifth Amendment Takings Clause implicates "a simple, *per se* rule: The *government* must pay for what it takes." 141 S. Ct. at 2071 (second emphasis added). Similarly, earlier cases, regardless of the type of taking being considered, refer only to the government's provision of just compensation, never an individual's. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) ("[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. . . . [T]he government must [also] pay just compensation for such 'total regulatory takings. . . .'" (citation omitted)); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Plan. Agency, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner. . . ."); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999) ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation."); Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). In fact, the

Supreme Court, when proscribing how "just compensation" should be calculated, considers "the property owner's loss" and "the government's gain." Brown v. Legal Found. of Wash., 538 U.S. 216, 235-36 (2003). Although none of these cases expressly *reject* appellants' theory that a government official can be held personally liable for a government taking, it is traditionally the government itself that is responsible for compensating an individual who has suffered a governmental taking.

Ultimately, we find that, in 2020, the law was not clearly established such that Governor Walz would have understood that his issuance of the challenged EOs violated appellants' constitutional right to just compensation for a government taking. We therefore affirm the district court's grant of qualified immunity and dismiss appellants' takings claim.

III.

For the foregoing reasons, we affirm.

App. 19

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2283

Northland Baptist Church of St. Paul, Minnesota; John Bruski; Living Word Christian Center

Plaintiffs

Glow In One Mini Golf, LLC; Aaron Kessler; Myron's Cards and Gifts, Inc.; Larry Evenson; AJ Hulse Company; Andrew Hulse; Gay Bunch-Hulse

Plaintiffs - Appellants

v.

Governor Tim Walz, individually and in his official capacity; Attorney General Keith M. Ellison, in his official capacity; Mike Freeman, in his official capacity as County Attorney for Hennepin County Minnesota; Anthony Charles Palumbo, in his official capacity as County Attorney for Anoka County Minnesota; John Choi, in his official capacity as County Attorney for Ramsey County Minnesota

Defendants - Appellees

The Forum for Constitutional Rights

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-01100-WMW)

JUDGMENT

(Filed Jun. 16, 2022)

Before LOKEN, COLLOTON and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 16, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2283

Northland Baptist Church of St. Paul, Minnesota, et al.

Glow In One Mini Golf, LLC, et al.

Appellants

v.

Governor Tim Walz, individually and
in his official capacity, et al.

Appellees

The Forum for Constitutional Rights

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the
District of Minnesota
(0:20-cv-01100-WMW)

MANDATE

(Filed Aug. 16, 2022)

In accordance with the opinion and judgment of June 16, 2022, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 16, 2022

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2283

Northland Baptist Church of St. Paul, Minnesota, et al.

Glow In One Mini Golf, LLC, et al.

Appellants

v.

Governor Tim Walz, individually and
in his official capacity, et al.

Appellees

The Forum for Constitutional Rights

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the
District of Minnesota
(0:20-cv-01100-WMW)

ORDER

(Filed Jul. 15, 2022)

A petition for rehearing has been filed by the Appellants in the above case. The court requests a response to the petition for rehearing en banc.

The response is limited to 3900 words, and must contain a word count certificate. The response should be filed electronically by July 25, 2022.

July 15, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES
DISTRICT COURT
District of Minnesota

Northland Baptist Church of St. Paul, Minnesota, John Bruski, Living Word Christian Center, Glow In One Mini Golf, L.L.C., Aaron Kessler, Myron's Cards and Gifts, Inc., Larry Evenson, A J Hulse Company, The, Andrew Hulse, Gay Bunch-Hulse,

Plaintiff(s),

v.

Governor Tim Walz, Attorney General Keith Ellison,

Defendant(s).

JUDGMENT IN A CIVIL CASE

(Filed May 21, 2021)

Case Number: 20-cv-1100 WMW/BRT

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

all claims Northland Baptist Church, John Bruski, and Living Word Christian Center against the Defendants are **DISMISSED WITH PREJUDICE** and without costs or disbursements awarded to any party.

Date: 5/21/2021 KATE M. FOGARTY, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NORTHLAND BAPTIST CHURCH OF ST. PAUL, MINNESOTA, et al., Plaintiffs, v. Governor Tim WALZ, *individually and in his official capacity*, et al., Defendants.	Case No. 20-cv-1100 (WMW/BRT) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** (Filed Mar. 30, 2021)

This matter is before the Court on Defendants' motion to dismiss Plaintiffs' second amended complaint (complaint). (Dkt. 54.) For the reasons addressed below, Defendants' motion is granted in part and denied in part.

BACKGROUND

This case arises out of the State of Minnesota's response to the coronavirus (COVID-19) pandemic. Plaintiffs are two churches and one pastor (Faith-Based Plaintiffs), and an indoor recreation facility, a small retail business, a hair salon, and the owners of these businesses (Business Plaintiffs), all located in Minnesota. Defendant Tim Walz is the Governor of the State of Minnesota and is sued in his individual and official capacities. Defendant Keith Ellison is the

Attorney General of the State of Minnesota and is sued in his official capacity only.

Beginning in March 2020, Governor Walz issued a series of executive orders (EOs) relating to the COVID-19 pandemic. On June 5, 2020, Governor Walz issued EO 20-74, which is the primary EO challenged in this lawsuit. As relevant here, EO 20-74 authorized houses of worship to hold worship services at up to 50 percent of the building's capacity, with a 250-person maximum. Barbershops and cosmetology salons were subject to the same restrictions as houses of worship. Places of public accommodation that were closed under prior EOs were authorized to have up to 25 percent of the fire marshal's occupancy limit for the space with a maximum of 250 occupants at once. And "Non-Critical" businesses were required to implement sanitation and social-distancing guidelines.[1]

The Faith-Based Plaintiffs allege that Defendants, through EO 20-74, infringed on their right to freely exercise their religion (Count One) and their right to free speech and assembly (Count Two) in violation of the First Amendment to the United States Constitution and Article I, Sections 3 and 16 of the Minnesota Constitution. The Business Plaintiffs allege that Defendants, though EO 20-74, infringed on their property rights in violation of the Takings Clause of the Fifth

[1] Governor Walz issued several additional EOs pertaining to the COVID-19 pandemic after the parties briefed and argued the pending motion. Among them is EO 21-12, which is the EO currently in effect. Material differences between EO 20-74 and EO 21-12 are addressed as relevant to the Court's legal analysis.

Amendment to the United States Constitution (Count Four). And Plaintiffs allege that Defendants, through EO 20-74, infringed on their rights to equal protection in violation of the Fourteenth Amendment to the United States Constitution (Count Three).[2]

Defendants move to dismiss Plaintiffs' complaint, arguing that Plaintiffs lack standing, Defendants are immune from suit, the Court should abstain from deciding this case, and Plaintiffs have failed to state a claim on which relief can be granted. When evaluating the merit of a motion to dismiss, a district court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010).

ANALYSIS

I. Standing

Article III of the United States Constitution limits federal jurisdiction to actual cases and controversies. U.S. Const. art. III, § 2, cl.1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing is a jurisdictional prerequisite and must be established before the merits of a claim may be reached. *See*, *e.g.*, *McCarney v. Ford*

[2] Although Plaintiffs' complaint includes one reference to "due process," the complaint lacks any pertinent factual allegations or legal analysis addressing due process with respect to any aspect of Plaintiffs' claims. Therefore, the Court construes Plaintiffs' complaint to *not* include a due-process claim.

Motor Co., 657 F.2d 230, 233 (8th Cir. 1981). Defendants argue that Plaintiffs lack standing.

To establish standing, a plaintiff must (1) allege to have suffered an injury in fact, (2) demonstrate a causal relationship between the opposing party's conduct and the alleged injury, and (3) demonstrate that the injury would likely be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Here, Plaintiffs' satisfaction of the injury-in-fact requirement is uncontested. Defendants argue, however, that the Faith-Based Plaintiffs have failed to demonstrate that their injuries are fairly traceable to Defendants and that all of the Plaintiffs have failed to demonstrate that a favorable decision would redress their injuries. *Id.* Arguments as to these disputed elements are addressed in turn.

A. Traceability

To have standing, a plaintiff must allege an injury that is fairly traceable to the allegedly unlawful conduct and is not the consequence of independent actions of a third party that is not before the court. *Id.* at 560. An injury that is fairly traceable also must be "certainly impending," not speculative. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401-02 (2013); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Importantly, the standing inquiry is not an assessment of the merits of the claim. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012).

Defendants argue that, because the Faith-Based Plaintiffs' injuries are not fairly traceable to the actions of Defendants, the Faith-Based Plaintiffs fail to meet the causation element of standing. Typically, an injury is fairly traceable when the named defendants have the authority to enforce the complained-of provision of law. *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015). Here, the EOs issued by Governor Walz plainly confer civil and criminal enforcement power on the Minnesota Attorney General. And Governor Walz has statutory authority to direct the Attorney General to prosecute cases. Minn. Stat. § 8.01. The Faith-Based Plaintiffs have not provided examples of the State of Minnesota prosecuting faith-based organizations or congregants. Yet Plaintiffs argue, and Defendants do not dispute, that the Attorney General has taken action to enforce the EOs. Therefore, the Faith-Based Plaintiffs' alleged injuries are fairly traceable to the actions of Governor Walz and Attorney General Ellison.

Defendants also contend that the Faith-Based Plaintiffs could have hosted drive-in services but chose not to.[3] Quoting *Clapper*, Defendants argue that the Faith-Based Plaintiffs cannot "manufacture standing

[3] This Court need not determine, for purposes of this Order, whether drive-in services are a substitute for in-person services. Such a question would almost certainly require this Court to determine whether a drive-in service constitutes "assembling . . . together," *Hebrews* 10:25 (King James), and the Supreme Court has advised against scriptural assessment, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

merely by inflicting harm on themselves." 568 U.S. at 401-02,. But *Clapper* is inapposite. The plaintiffs in *Clapper* challenged the constitutionality of the Foreign Intelligence Surveillance Act (FISA), arguing that they were harmed because they were spending money on counter-surveillance measures, and that harm was fairly traceable to the FISA provision at issue. *Id.* at 404-05, 407. The Supreme Court of the United States concluded that the alleged harm was speculative. *Id.* at 401-02. Here, the Faith-Based Plaintiffs allege that the EOs have completely or partially inhibited their ability to congregate together in person. These alleged harms are not speculative or self-inflicted. Rather, the harms alleged are concrete injuries sustained, at least in part, because of the restrictions imposed by the EOs. Moreover, the plaintiffs in *Clapper* had a "similar incentive" to alter their behavior both before and after FISA was enacted. *Id.* at 417. Here, no party argues that the Faith-Based Plaintiffs had a similar incentive to alter their worship practices before the EOs. Therefore, *Clapper* does not govern this case.

Accordingly, Plaintiffs have satisfied the causation element of Article III standing.

B. Redressability

The third element of Article III standing requires a plaintiff to demonstrate that it is likely, not merely speculative, that the remedy the plaintiff seeks can redress the alleged injuries. *Lujan*, 504 U.S. at 561; *Frost v. Sioux City*, 920 F.3d 1158, 1161 (8th Cir. 2019).

Defendants argue that Plaintiffs are unable to demonstrate that a favorable decision would redress Plaintiffs' injuries because "[c]ongregants and customers may still choose to stay home in order to avoid the virus, even if Plaintiffs' facilities are operating at 100 [percent]." But Defendants' characterization of Plaintiffs' injuries is inconsistent with the injuries that Plaintiffs allege. The Business Plaintiffs allege that they are injured because either they have been temporarily closed under some EOs, or they are unable to operate at the same capacity as critical businesses under EO 20-74. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20(1978) (recognizing that a party may be injured by not being able to compete for the same opportunity). The Business Plaintiffs seek declaratory and injunctive relief authorizing them to operate at the same capacity as "Critical" businesses, and they seek monetary relief for losses incurred. If this Court were to hold that the EOs must treat the Business Plaintiffs in the same manner as "Critical" businesses are treated, and that the Business Plaintiffs must receive damages for the economic harms suffered, such relief would redress the harms that the Business Plaintiffs allege.

Similarly, the Faith-Based Plaintiffs suffer alleged harm because the EOs allegedly treat religious entities in an unequal, disfavored manner as compared with secular entities. The Faith-Based Plaintiffs state that removing the distinction between the Faith-Based Plaintiffs and "Critical" businesses will redress their injuries. "When the constitutional violation is unequal

treatment, . . . a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens to all." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020); *see also Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984) (holding that plaintiff suffering unequal treatment had standing to seek "withdrawal of benefits from the favored class"). If this Court were to rule that the EOs must treat Faith-Based Plaintiffs in the same manner as "Critical" businesses are treated, that ruling would redress the alleged harm that the Faith-Based Plaintiffs experience.

As Plaintiffs have satisfied the redressability element of Article III standing, Defendants' motion to dismiss on this basis is denied.

II. Immunity

Defendants argue that Governor Walz and Attorney General Ellison in their official capacities are immune from suit based on the Eleventh Amendment to the United States Constitution. Defendants also argue that Governor Walz in his individual capacity is subject to qualified immunity, and that Governor Walz and Attorney General Ellison in their official capacities are immune from Plaintiffs' state-law claims based on the

Pennhurst doctrine.[4] Defendants' immunity arguments are addressed in turn.

A. Eleventh Amendment Sovereign Immunity

Defendants seek to dismiss all claims against Governor Walz and Attorney General Ellison in their official capacities on the basis that they are immune from suit.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States. . . ." U.S. Const. amend. XI. The Eleventh Amendment establishes a general prohibition against suits in federal court by a citizen of a state against their state

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[4] Defendants raise the issue of Eleventh Amendment sovereign immunity in their opening brief but cite *Pennhurst* specifically for the first time in their reply brief. Courts typically do not address arguments raised for the first time in a reply brief. However, Eleventh Amendment immunity implicates this Court's subject-matter jurisdiction. *Jones v. United States*, 255 F.3d 507, 511 (8th Cir. 2001); *but cf. Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998) (whether "Eleventh Amendment immunity is a matter of subject matter jurisdiction [is] a question [the Supreme Court has] not decided"). Because subject-matter jurisdiction is a threshold requirement in every federal lawsuit, *Green Acres Enters., Inc. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005), the Court must consider Defendants' *Pennhurst*-doctrine arguments, *Demery v. Kupperman*, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984) ("[W]hen state officials raise an objection that eleventh amendment immunity applies, a federal court must consider all relevant arguments whether or not specifically advanced by the state officials.").

or an officer or agency of that state. *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). Sovereign immunity is a threshold jurisdictional matter, properly addressable at any time. *Lors v. Dean*, 746 F.3d 857, 861 (8th Cir. 2014). The burden rests with the entity asserting Eleventh Amendment sovereign immunity to show its entitlement to such immunity. *United States ex rel. Fields v. Bi-State Dev. Agency of the Missouri-Illinois Metro. Dist.*, 829 F.3d 598, 600 (8th Cir. 2016).

Eleventh Amendment sovereign immunity is not absolute. *Doe v. Nebraska*, 345 F.3d 593, 597 (8th Cir. 2003). Notwithstanding sovereign immunity, a state may be subject to suit in federal court when (1) the state has unequivocally waived its sovereign immunity and consented to suit in federal court; or (2) Congress has unequivocally, through legislation, abrogated state immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). Here, nothing demonstrates that Minnesota has waived, or Congress has abrogated, Minnesota's Eleventh Amendment sovereign immunity rights.

Sovereign immunity also can be abrogated by the *Ex parte Young* doctrine. A plaintiff may proceed in a suit against a state official for prospective injunctive relief when: (1) the official has "some connection with the enforcement" of the challenged law, and (2) the official threatens and is "about to commence proceedings" to enforce the challenged law. *Ex parte Young*, 209 U.S. 123, 156-57 (1908). Here, Plaintiffs rely on the *Ex parte Young* doctrine to avoid sovereign immunity.

Defendants counter that Governor Walz lacks a sufficient connection to the enforcement of the EOs to satisfy the first element of the *Ex parte Young* doctrine. And neither Governor Walz nor Attorney General Ellison is about to commence proceedings to enforce the EOs, Defendants contend. The Court addresses each argument.

1. Connection with Enforcement

Defendants maintain that Plaintiffs fail to satisfy the first element of the *Ex parte Young* test because Governor Walz is not connected with enforcement of the EOs.[5] Citing *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), *abrogated on other grounds by Obergefell v. Hodges*, 576 U.S. 644 (2015), Plaintiffs counter that Governor Walz is sufficiently connected with enforcement of the EOs such that the first element of the *Ex parte Young* doctrine is satisfied.

The *Ex parte Young* exception to Eleventh Amendment sovereign immunity requires the official to have only *some* connection with enforcement. 209 U.S. at 156-57; *see also Minn. Voters All. v. Walz*, ___ F. Supp. 3d ___, 2020 WL 5869425, at *6–7 (D. Minn. Oct. 2,

[5] No party contests that Attorney General Ellison has "some connection with the enforcement" of EO 20-74, as the Attorney General is specifically tasked with enforcing EO 20-74. *See Ex parte Young*, 209 U.S. at 157; *see also Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) ("A suit for injunctive or declaratory relief avoids [sovereign] immunity if the official has some connection to the enforcement of the challenged laws."). The first element of the *Ex parte Young* test is satisfied as to Attorney General Ellison.

2020) (concluding that both the Minnesota Attorney General and Minnesota Governor had sufficient connection with enforcement of challenged law in similar circumstances). A state official's connection with enforcement of a state statute may be specifically created by the act itself or arise out of general law. *Digit. Recognition Network*, 803 F.3d at 960. At the motion-to-dismiss stage, a federal court need only consider whether a plaintiff has plausibly identified a "*potentially* proper party for injunctive relief." *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005); *compare 281 Care Comm*, 638 F.3d at 626 (addressing *Ex parte Young* doctrine at motion-to-dismiss stage), *with 281 Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) (addressing *Ex parte Young* doctrine at summary-judgment stage).

Plaintiffs rely on *Bruning* to support their contention that Governor Walz has some connection with enforcement such that this element of the *Ex parte Young* doctrine is satisfied. 455 F.3d 859.[6] In *Bruning*, the Eighth Circuit concluded that a governor's broad authority under a state constitution to ensure that the laws of the state are enforced satisfies the connection-with-enforcement element of the *Ex parte Young* doctrine. *Id.* at 864. The Eighth Circuit subsequently elaborated on this conclusion, recognizing that the reason the governor in *Bruning* had "some connection to the enforcement of the [state] Constitution [was] because

[6] Defendants do not address whether *Bruning* is applicable.

[the governor] may direct the attorney general to file suit to enjoin application of an unconstitutional state statute." *Digit. Recognition Network*, 803 F.3d at 961; *accord Balogh v. Lombardi*, 816 F.3d 536, 546 (8th Cir. 2016) (explaining analysis in *Bruning* and *Digital Recognition Network*). Here, by granting the Governor of Minnesota authority to direct Minnesota's Attorney General to prosecute any person charged with an indictable offense, Minnesota law provides Governor Walz with more connection with enforcement than the governor in *Bruning* had. *See* Minn. Stat. § 8.01.[7] Therefore, Governor Walz, in his official capacity, has some connection with the enforcement of the EOs.

Relying on *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 365 (Minn. 1977), Defendants argue that, although Minn. Stat. § 8.01 confers enforcement power on the Governor, that authority is a "safety-valve alternative[] for use in extreme cases of prosecutorial inaction." But *Otis* is inapposite. In *Otis*, the Minnesota Supreme Court held that a private citizen could not

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[7] Moreover, at least one other court within this District has concluded at the motion-to-dismiss stage that Governor Walz has some connection with enforcement of the EOs he issued during the COVID-19 pandemic such that the connection-with-enforcement element of the *Ex parte Young* doctrine is satisfied. *See Heights Apartments, LLC v. Walz*, ___ F. Supp. 3d ___, 2020 WL 7828818, at *6 (D. Minn. Dec. 31, 2020) (concluding Governor Walz was not subject to sovereign immunity as he "issued the EOs and continues to extend the peacetime emergency that keeps the EOs in effect"); *cf. Minn. RFL Republican Farmer Labor Caucus v. Freeman*, No. 19-cv-1949 (ECT/DTS), 2020 WL 1333154, at *3 (D. Minn. Mar. 23, 2020) (addressing Governor Walz's connection with enforcement to challenged Minnesota election statute).

commence and maintain private prosecutions for alleged violations of criminal law. 257 N.W.2d at 363. And although *Otis* describes Minn. Stat. § 8.01 as a "safety-valve alternative[ ]," the court "merely cite[d] this statute as one of the possible alternatives available in the case of allegedly unjustified prosecutorial inaction." *Id.* at 365. Nothing about the *Otis* holding confines Minn. Stat. § 8.01 to be a "safety-valve alternative[ ]." *Id.* And, most importantly, neither does the plain language of Minn. Stat. § 8.01. Accordingly, the first element of the *Ex parte Young* doctrine is satisfied as to both Governor Walz and Attorney General Ellison.

2. About to Commence Proceedings

Defendants next argue that both Governor Walz and Attorney General Ellison are immune from suit because neither official has threatened or is about to commence a lawsuit against Plaintiffs. Plaintiffs counter that this element of the *Ex parte Young* doctrine is satisfied as to both Governor Walz and Attorney General Ellison.

"[I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, . . . may be enjoined by a Federal court of equity from such action." *Ex parte Young*, 209 U.S. at 155-56 (emphasis added). But "conjectural injury cannot warrant equitable relief." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992). The about-to-commence-proceedings requirement prevents

federal courts from having "to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Id.*

Defendants do not dispute that Attorney General Ellison has enforced the EOs that Governor Walz issued on at least one occasion. As such, a "demonstrated willingness" to enforce the EOs exists. *281 Care Comm.*, 766 F.3d at 797 (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014)). The enforcement of the EOs, therefore, is not merely conjectural or hypothetical. On a motion to dismiss, the Court considers whether Governor Walz and Attorney General Ellison are potentially proper defendants. *See 281 Care Comm.*, 638 F.3d at 626, 632 (addressing *Ex parte Young* doctrine at motion-to-dismiss stage). This Court joins at least one other in this District in concluding that neither Governor Walz nor Attorney General Ellison is subject to sovereign immunity as related to the EOs. *Heights Apartments*, 2020 WL 7828818, at *6. At this stage in the litigation, the Eleventh Amendment does not provide Governor Walz and Attorney General Ellison, in their official capacities, immunity from suit to the extent Plaintiffs seek prospective or injunctive relief.

In summary, Defendants' motion to dismiss this case on sovereign-immunity grounds is granted in part and denied in part. To the extent that Plaintiffs seek retroactive or monetary relief, Defendants in their official capacities are immune from suit and Defendants' motion to dismiss is granted. However, to the extent

that Plaintiffs seek prospective or injunctive relief, at this stage in the litigation Defendants, in their official capacities, are not immune from suit and Defendants' motion to dismiss is denied.

B. *Pennhurst* Doctrine

Defendants argue that the *Pennhurst* doctrine bars Plaintiffs from seeking relief against state officials on the basis of state law in federal court.

In *Pennhurst State School and Hospital v. Halderman*, the Supreme Court explained that the *Ex parte Young* doctrine, which abrogates Eleventh Amendment sovereign immunity for state officials, rests on a legal fiction designed to reconcile the supremacy of federal law with the constitutional immunity of states. 465 U.S. at 105. But when relief, whether prospective or retrospective, is sought against state officials in federal court based on state law, such reconciliation is not at issue. *Id.*; *see Minn. Voters All.*, 2020 WL 5869425, at *7 (addressing and applying *Pennhurst* doctrine). For that reason, the Supreme Court declined to extend the *Ex parte Young* doctrine to circumstances where plaintiffs seek relief against state officials in federal court on the basis of state law. *Pennhurst*, 465 U.S. at 106.

Here, Plaintiffs' prayer for relief seeks "[a] declaration that Governor Walz did not have the statutory authority to declare an emergency that invoked Chapter 12 of the Minnesota Statutes . . . and that the Attorney General does not have the authority to prosecute violations of the EOs using that authority." This

claim for relief appears to pertain to all counts of the complaint. But such a declaration, if granted, constitutes relief sought against state officials in federal court on the basis of state law, which is barred by the *Pennhurst* doctrine. *See Heights Apartments*, 2020 WL 7828818, at *7 (applying *Pennhurst* doctrine to state-law claims challenging Governor Walz's EOs); *see also Minn. Voters All.*, 2020 WL 5869425, at *7 (similar).

Accordingly, to the extent that Plaintiffs' claims are premised on state law, Defendants in their official capacities are immune from suit. Those state-law claims are, therefore, dismissed.

C. Qualified Immunity

Defendants next argue that Governor Walz, to the extent that he is sued in his individual capacity, is subject to qualified immunity. Plaintiffs disagree.

Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). On a motion to dismiss, qualified immunity warrants dismissal "only when the immunity is established on the face of the complaint." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996) (internal quotation marks omitted). To determine whether an official is entitled to qualified immunity, courts consider "(1) whether the facts alleged or shown, construed most favorably to the plaintiffs,

establish a violation of a constitutional right, and (2) whether that constitutional right was clearly established at the time of the alleged misconduct, such that a reasonable official would have known that the acts were unlawful." *Small v. McCrystal*, 708 F.3d 997, 1003 (8th Cir. 2013). A court may consider these qualified-immunity factors in any order. *Pearson*, 555 U.S. at 236.

Defendants argue that Plaintiffs fail both prongs of the qualified-immunity test—that Plaintiffs have neither alleged a violation of a constitutional right nor set forth that the right was clearly established at the time of the alleged violation. The Court first considers whether a clearly established right existed at the time of Defendants' conduct.

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (internal quotation marks omitted). When performing a qualified-immunity analysis, a district court assesses the facts as they appeared to the relevant state actors. *Greinder v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994). A "clearly established" right does not require a case directly on point. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Rather, the key inquiry is whether the state actor had fair warning that the conduct violated a right. *Id.* The Supreme Court has cautioned against defining "clearly established right" with an excessive degree of generality. *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014). "[C]learly established law must be particularized to the facts of the case." *White v. Pauly*, 137

S. Ct. 548, 552 (2017) (internal quotation marks omitted).

To prove that the law was clearly established at the time that Governor Walz allegedly violated Plaintiffs' constitutional rights of free-exercise, free-speech, free-assembly, property, and equal-protection, Plaintiffs "must point to existing circuit precedent that involves sufficiently similar facts to squarely govern the individual defendants' conduct in the specific circumstances at issue, or, in the absence of binding precedent, to present a robust consensus of persuasive authority constituting settled law." *Bus. Leaders in Christ v. Univ. of Iowa*, ___ F.3d ___, 2021 WL 1080556, at *9 (8th Cir. Mar. 22, 2021) (internal quotation marks and brackets omitted); *accord Lane v. Nading*, 927 F.3d 1018, 1022 (8th Cir. 2019) (addressing qualified immunity in the context of a motion to dismiss).

Here, Plaintiffs have not identified any existing circuit precedent involving sufficiently similar facts to squarely govern the conduct of Governor Walz in his individual capacity. Plaintiffs have not clearly defined the scope of the constitutional rights that they allege have been violated, let alone tied those allegations to binding Eighth Circuit precedent or a robust consensus of persuasive authority involving sufficiently similar facts. Governor Walz issued executive orders in the midst of a novel global pandemic. Certainly, the existence of an ongoing pandemic does not eradicate constitutional rights. But when assessing the facts as they appeared to state actors, *Greinder*, 27 F.3d at 1354, ignoring this unprecedented context would result in

defining constitutional rights with an excessive degree of generality, *see Plumhoff*, 572 U.S. at 779. As such, it is not clear that Governor Walz had fair warning that the EOs violated Plaintiffs' rights, if they in fact do so. *See Hope*, 536 U.S. at 741; *see*, *e.g.*, *Wood v. Moss*, 572 U.S. 744, 759-63 (2014) (context of Secret Service members favoring presidential supporters in crowd considered novel and qualified immunity precluded First Amendment claims).

For these reasons, existing precedent did not clearly establish Plaintiffs' rights at the time of the alleged violations so as to put Governor Walz's conduct beyond debate.[8]

Therefore, Governor Walz is subject to qualified immunity from suit in his individual capacity. To the extent Defendants seek money damages against Governor Walz in his individual capacity, Governor Walz is immune from such claims.

In summary, Defendants' motion to dismiss on the basis of qualified immunity is granted as to Governor Walz in his individual capacity.

III. Abstention

This Court should abstain from considering this case, Defendants argue, because Counts One through Three of the complaint "revolve around the assertion"

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[8] In light of this conclusion, the Court need not address whether Plaintiffs have alleged that Governor Walz, in his individual capacity, violated Plaintiffs' constitutional rights.

that Governor Walz did not have the authority to issue the EOs and Minnesota state courts are considering this "novel" issue of state law. Abstention is proper under either *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), or *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), Defendants maintain. What is unclear, however, is whether Defendants contend that abstention is proper as to the state-law claims, the federal-law claims, or both. As addressed above, Defendants in their official capacities are immune from Plaintiffs' state-law claims because of the *Pennhurst* doctrine. Consequently, this Court need only determine whether it should abstain from deciding the federal-law claims under either the *Pullman* abstention doctrine or the *Colorado River* abstention doctrine. Arguments relating to these abstention doctrines are addressed in turn.

A. *Pullman* Abstention

Defendants argue that "Plaintiffs' [complaint] raises novel questions regarding the scope of the Governor's authority during a public-health emergency" and that state-court cases challenging the Governor's statutory authority to issue the EOs might "obviate entirely" the need for this Court to determine whether EO 20-74 violated Plaintiffs' constitutional rights. For this reason, Defendants argue, this Court should abstain under the *Pullman* abstention doctrine pending the conclusion of the state-court proceedings. Plaintiffs counter that EO 20-74 cannot be construed in a way that avoids the federal constitutional questions raised

in this lawsuit. At oral argument, Plaintiffs also argued that, in the absence of a controlling question of state law, the Court is not precluded from addressing the federal questions raised.

The *Pullman* abstention doctrine provides that a federal court may abstain from deciding a "substantial federal constitutional question" if a "difficult and unsettled question[] of state law must be resolved." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); *Pullman*, 312 U.S. at 498, 500-01. *Pullman* abstention is appropriate when the challenged state statute is unclear and may be construed by state courts to avoid or modify the federal constitutional question. *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965); *see also Pullman*, 312 U.S. at 498 (concluding federal court abstention is proper when a "definitive ruling on the state issue would terminate the controversy"). The Supreme Court has "frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967). By contrast, if the state statute is clear and unambiguous, then a federal court must exercise its proper jurisdiction. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971); *Harman*, 380 U.S. at 534-35 (concluding abstention is improper when the relevant state statutes are "clear and unambiguous in all material respects"). "Abstention is, of course, the exception and not the rule. . . ." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987). Therefore, a court should not invoke

abstention except in "rare" circumstances. *Growe v. Emison*, 507 U.S. 25, 32 (1993).[9]

Here, *Pullman* abstention is improper for at least two reasons. First, Defendants fail to identify which Minnesota statute or statutes are relevant. It is not the Court's task to pick, choose and analyze whether a Minnesota statute might be dispositive as to the issues here. Second, because Defendants have not identified what Minnesota statutes are relevant, this Court also cannot conclude that there are Minnesota statutes that are ambiguous but otherwise capable of a limiting construction that would clearly obviate the need for federal constitutional interpretation. If the challenged statute is unambiguous, there is no need to abstain, even if state courts have not previously interpreted the statute. *Hill*, 482 U.S. at 468; *see Midkiff*, 467 U.S. at 237 (observing that "the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary"). Moreover, although Defendants argue that Minnesota courts have not had the opportunity to interpret "the scope of the Governor's authority during a public-health emergency," federal abstention is not warranted merely because litigation over the same subject matter is pending simultaneously in

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[9] Moreover, the nature of the claims raised under the First Amendment weigh against abstention. *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965). "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right [the plaintiff] seeks to protect." *Zwickler*, 389 U.S. at 252.

federal and state courts. *See*, *e.g.*, *Farms v. Kuehl Poultry LLC*, No. 19-cv-3040 (ECT/BRT), 2020 WL 2490048, at *5 (D. Minn. May 14, 2020) (citing *Growe*, 507 U.S. at 32).

For these reasons, abstention under the *Pullman* doctrine is not appropriate here. Accordingly, Defendants' motion to dismiss on this basis is denied.

B. *Colorado River* Abstention

Defendants also argue that the *Colorado River* abstention doctrine warrants dismissal of this case because there are "at least two pending state court actions that raise identical issues" as to the Governor's authority to issue the challenged EOs. Plaintiffs counter that abstention under the *Colorado River* abstention doctrine is inappropriate here.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction" they are given. *Colo. River*, 424 U.S. at 817. Notwithstanding this obligation, a federal court can abstain under *Colorado River* when (1) parallel state and federal actions exist *and* (2) exceptional circumstances warrant abstention. *Cottrell v. Duke*, 737 F.3d 1238, 1244-45 (8th Cir. 2013). State and federal cases are parallel when there is "a *substantial likelihood* that the state proceeding will *fully dispose* of the claims presented in federal court." *Id.* at 1245 (emphasis added) (internal quotation marks omitted). "The pendency of a state claim based on the same general facts or subject matter as a federal claim and involving the same parties is not alone sufficient"

for *Colorado River* abstention. *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009).

Here, Plaintiffs' claims raise questions as to whether Governor Walz has the authority to issue EOs and whether those EOs comport with federal law. Defendants argue that "identical issues" as to Governor Walz's authority are raised in two pending state-court actions. But for at least two reasons it is not certain that the state proceedings have or will fully dispose of the claims, in particular the federal-law claims, presented here. First, the two state-court proceedings that Defendants identify involve entirely different parties other than Governor Walz in one case and Attorney General Ellison in the other case.[10] Second, one state proceeding seeks an entirely different form of relief, a writ of *quo warranto*, which is not sought here; and the other state proceeding involves Minnesota seeking to enjoin a restaurant re-opening. These differences create doubt as to whether the proceedings are indeed parallel. And when there is doubt as to whether the state and federal proceedings are parallel, abstention under *Colorado River* is improper. *Fru-Con*, 574 F.3d at 535. For these reasons, Defendants' motion to dismiss on the basis of *Colorado River* abstention is denied. In summary, Defendants' motion to dismiss on abstention grounds is denied.

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[10] *Free Minn. Small Bus. Coal. v. Walz*, No. A20-0641, 2020 WL 2745414 (Minn. Ct. App. May 26, 2020) (unpublished); *State v. Schiffler*, No. 73-CV-20-3556, 2020 WL 2576304 (Minn. Dist. Ct. May 18, 2020).

IV. Failure to State a Claim

Defendants also move to dismiss Plaintiffs' complaint for failure to state a claim on which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff need not *prove* its case at the pleading stage, nor do the pleadings require detailed factual allegations to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *L.L. Nelson Enters., Inc. v. County of St. Louis*, 673 F.3d 799, 805 (8th Cir. 2012) (observing that "specific facts are not necessary" and pleadings "need only give the [opposing party] fair notice of what the claim is and the grounds upon which it rests" (internal quotation marks omitted)). To survive a motion to dismiss, a complaint must allege sufficient facts to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). Factual allegations that raise only a speculative right to relief are insufficient. *Twombly*, 550 U.S. at 555. A district court accepts as true all of the plaintiff's factual allegations and views them in the light most favorable to the plaintiff. *Stodghill v. Wellston Sch. Dist.*, 512 F.3d 472, 476 (8th Cir. 2008). But legal conclusions couched as factual allegations are not accepted as true. *Twombly*, 550 U.S. at 555. Also, mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" fail to state a claim for relief. *Id.*

Defendants first argue that the constitutional analysis here is governed by *Jacobson v. Massachusetts*, 197

U.S. 11 (1905), and mandates dismissal of all counts of the complaint. Defendants argue, in the alternative, that even if Plaintiffs' claims are analyzed under the traditional tiers of constitutional scrutiny, Plaintiffs' claims fail rational-basis review. Defendants' arguments are analyzed in turn.

A. *Jacobson v. Massachusetts*

Defendants argue that this Court should analyze Plaintiffs' constitutional claims applying the framework set forth in *Jacobson v. Massachusetts*. Plaintiffs counter that the traditional tiers of constitutional scrutiny apply.

Jacobson involved a constitutional challenge to a Massachusetts law requiring all persons over the age of 21 to receive a smallpox vaccine or pay a fine. 197 U.S. at 12. The Supreme Court held that judicial review of legislative action involving "a matter affecting the general welfare" is proper only if (1) "a statute purporting to have been enacted to protect the public health . . . has no real or substantial relation to those objects," or (2) the statute "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

Early in the COVID-19 pandemic, the United States Court of Appeals for the Eighth Circuit interpreted *Jacobson* to mean that state action in the context of a public-health crisis is susceptible to constitutional challenge only when the action fails the *Jacobson* test. *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020). In

In re Rutledge, a case challenging abortion restrictions that the State of Arkansas imposed in response to the COVID-19 pandemic, the Eighth Circuit held that the district court abused its discretion when it did not "meaningfully apply the Supreme Court's [*Jacobson*] framework for reviewing constitutional challenges to state actions taken in response to a public health crisis." *Id.* The Eighth Circuit then applied *Jacobson* to the dispute. *Id.* at 1028-32.

The Supreme Court has subsequently held, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, that the Governor of the State of New York's restrictions on religious services must be enjoined. 141 S. Ct. 63 (2020). *Roman Catholic Diocese* involved a free-exercise challenge to executive orders limiting attendance at any religious service to 10 people in locales designated as "red zones" and 25 people in locales designated as "orange zones." *Id.* at 66. The Supreme Court concluded that a challenge to the executive orders as unconstitutional likely would succeed on the merits. *Id.* Notably, the majority in *Roman Catholic Diocese* did not apply the *Jacobson* framework when analyzing the constitutionality of the executive orders in question. Instead, the majority opinion applies the traditional tiers of constitutional scrutiny. *Id.* at 66-67. Following the Supreme Court's decision in *Roman Catholic Diocese*, numerous courts have concluded that the traditional tiers of constitutional scrutiny apply. *See*, *e.g.*, *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) (applying strict scrutiny to First

Amendment claims); *see also Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 32 (D. Me. 2020) (rejecting *Jacobson* standard); *cf. Kentucky v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020).

Based on the Supreme Court's recent application of traditional tiers of constitutional scrutiny in *Roman Catholic Diocese*, the Court concludes that *Jacobson* does not replace the traditional tiers of constitutional scrutiny. Accordingly, the traditional tiers of constitutional scrutiny are applied here.

B. Free-Exercise Claim (Count One)

Defendants seek to dismiss Plaintiffs' free-exercise claim. To successfully plead and prove a violation of the Free Exercise Clause of the First Amendment, Plaintiffs must establish that the governmental activity at issue places a substantial burden on their religious practice. *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). One's free-exercise right is substantially burdened when a regulation "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a person's individual religious beliefs; . . . meaningfully curtail[s] a person's ability to express adherence to his or her faith; or den[ies] a person reasonable opportunity to engage in those activities that are fundamental to a person's religion." *United States v. Ali*, 682 F.3d 705, 709-10 (8th Cir. 2012) (internal quotation marks omitted).

The Free Exercise Clause requires that statutes be neutral and generally applicable. An incidental burden

on religion, however, typically is insufficient to constitute a free-exercise claim. *Emp. Div., Dep't of Human Servs. v. Smith*, 494 U.S. 872, 878 (1990); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991). Any restriction on the free exercise of one's faith that is not neutral and generally applicable must be narrowly tailored to serve a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Facial neutrality is not determinative, however, if the "object or purpose of a law is the suppression of religion or religious conduct." *Id.* at 533.

Defendants present two arguments as to why EO 20-74 is facially neutral and generally applicable. First, Defendants argue that there is no evidence that religious discrimination motivated Governor Walz's EOs. But the Free Exercise Clause demands more than the absence of discriminatory animus against religion. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). The Free Exercise Clause demands neutrality. *Id.* Therefore, the mere absence of religious animus does not render EO 20-74 neutral and generally applicable.

Second, while acknowledging that EO 20-74 treats religious services differently from critical businesses, Defendants argue that the EOs are neutral and generally applicable because religious services are treated in the same manner as restaurants, bars, and other public accommodations. And for this reason, Defendants contend, the EOs survive rational-basis review. Plaintiffs disagree. Maintaining that the EOs are not

facially neutral, Plaintiffs argue that the EOs are subject to strict scrutiny, which the EOs cannot withstand.

Neutral laws of general applicability are subject to rational-basis review. *Doe v. Parson*, 960 F.3d 1115, 1119 (8th Cir. 2020) (citing *Church of the Lukumi*, 508 U.S. at 544). When considering whether a law is neutral and generally applicable, courts consider whether comparable activities are treated similarly. *Compare Mitchell v. Newsom*, 509 F. Supp. 3d 1195, 1202 (C.D. Cal. Dec. 23, 2020) (observing that "tattoo parlors are not singled out for differential treatment among like businesses, such as hair and nail salons, in which close contact between individuals is necessitated by the nature of the business" and concluding that rational basis review applied), *with Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (noting that casinos, bowling alleys, restaurants, and other "similar secular entities" were limited to 50 percent of fire-code capacity but houses of worship were limited to 50 people, regardless of fire-code capacity, and applying strict scrutiny).

Disparate treatment of religion, however, triggers strict scrutiny review, *see Roman Catholic Diocese*, 141 S. Ct. at 67, and some federal courts have considered a relatively broad category of secular actors in order to determine whether a challenged EO is neutral and generally applicable, *see*, *e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F. 3d 477, 482 (6th Cir. 2020), *reh'g denied* (Jan. 6, 2021) (applying strict scrutiny after concluding that restrictions closing all schools, including parochial schools, were not generally applicable when offices, tanning salons, and

casinos were open); *S. Bay United Pentecostal Church v. Newsom*, 508 F. Supp. 3d 756, 768-69 (S.D. Cal. Dec. 21, 2020) (applying strict scrutiny because "retail establishments" were open at a greater capacity than religious services).

EO 20-74 subjects religious gatherings to the same occupancy restrictions imposed on funerals, weddings, restaurants and bars. Defendants argue that these limitations are based on the information known about how COVID-19 spreads. The parties do not dispute that some businesses—namely those that the State of Minnesota considers "Critical"—are not subject to the 50-percent capacity limit, with a maximum of 250 persons, that religious services are subject to.[11] And it appears that "Non-Critical" businesses also may be able to operate without capacity restrictions, if these businesses comply with sanitation and social distancing measures outlined by the Minnesota Department of Health. However, at this stage of its development, the record is unclear as to whether any of these businesses are comparable to religious services and are therefore improperly receiving favorable treatment. Given both the rapid evolution of the law addressing many of the free-exercise issues raised here, and the accompanying uncertainty as to whether religious services are receiving disfavored treatment in relation to comparable

[11] It appears that pursuant to EOs 21-01, 21-11, and 21-12, religious gatherings are no longer subject to an occupancy limit. However, it does appear that houses of worship must develop and implement a "COVID-19 Preparedness Plan," pursuant to applicable guidance from the State of Minnesota.

secular activities, the Court declines to dismiss Plaintiffs' free-exercise claim at this stage in the proceedings.

Therefore, Defendants' motion to dismiss Plaintiffs' free-exercise claim, Count One, is denied.

C. Freedom-of-Speech and Freedom-of-Assembly Claim (Count Two)

Defendants seek to dismiss Plaintiffs' freedom-of-speech claim. Here, Count Two of Plaintiffs' complaint states that "[p]rohibiting or punishing [the Faith-Based Plaintiffs'] religious speech . . . does not serve any legitimate, rational, substantial, or compelling government interest," but otherwise includes no factual allegations pertaining to Plaintiffs' speech. Such sweeping and conclusory allegations cannot survive a motion to dismiss. *See Twombly*, 550 U.S. at 555. Therefore, Defendants' motion to dismiss Plaintiffs' free-speech claim is granted.

Defendants also move to dismiss Plaintiffs' freedom-of-assembly claim. Plaintiffs' complaint alleges that EO 20-74's capacity restrictions on religious services violate Plaintiffs' right to peaceably assemble under the First Amendment. Both parties fail to distinctly address Plaintiffs' freedom-of-assembly claim in their briefing on Defendants' motion to dismiss, however. Instead, the arguments of both parties congregate around Plaintiffs' free-exercise claim. Without a specific argument addressing Plaintiffs' freedom-of-assembly claim, this Court cannot conclude that

Plaintiffs have failed to state a freedom-of-assembly claim. Accordingly, Defendants' motion to dismiss Plaintiffs' freedom-of-assembly claim in Count Two is denied.

D. Equal-Protection Claim (Count Three)

In seeking to dismiss Plaintiffs' equal-protection claim, Defendants argue that Plaintiffs fail to establish that entities treated differently under the EOs are similarly situated. Defendants also argue that any distinctions the EOs make between entities withstand rational-basis review.[12] Plaintiffs disagree, arguing that the EOs "discriminate without any rational justification."

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To establish an equal-protection violation, a plaintiff must show that it was treated differently than another who was in all relevant respects similarly situated. *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 820 (8th Cir. 2011). A plaintiff's failure to demonstrate that it is "similarly situated to those who allegedly receive favorable treatment" precludes the viability of an equal-protection claim because the Equal Protection Clause

[12] Defendants also seek to dismiss Plaintiffs' equal-protection claim on the basis that such a claim is not recognized under *Jacobson*. But, as addressed in Part IV.A., *Jacobson* does not govern this Court's analysis.

does not preclude dissimilar treatment of dissimilarly situated entities. *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994); *see also Roark v. City of Hazen*, 189 F.3d 758, 761-62 (8th Cir. 1999) (holding that plaintiff's equal-protection claim failed because no evidence of dissimilar treatment of similarly situated individuals was presented). Accordingly, the threshold inquiry is whether the Plaintiffs are similarly situated to any entity or person allegedly receiving favorable treatment under EO 20-74.

Here, the complaint alleges that "EO 20-74 treats Plaintiffs and their businesses differently from other businesses." But the complaint itself highlights numerous distinctions between Plaintiffs and the entities or persons allegedly receiving favorable treatment—for example whether the businesses are indoors or outdoors or provide services for people or animals. And although Plaintiffs allege, for instance, that two stores are similar because they both sell Hallmark cards, outside of conclusory allegations, Plaintiffs have failed to allege that they are similarly situated *in all relevant respects* to any entity or person allegedly receiving favorable treatment under EO 20-74.

The parties disagree as to whether the criteria the EOs use to distinguish between entities is rational. Plaintiffs' principal assertion appears to be that the capacity to social distance is the relevant basis for comparison. Defendants appear to argue that the goods or services an entity provides, or the COVID-19 exposure risks in doing so, are the relevant bases of comparison. Accordingly, Plaintiffs appear to challenge the criteria

on which Defendants base those distinctions. But Plaintiffs' apparent disagreement with the method by which EO 20-74 classifies entities and persons is relevant to whether the distinctions are rationally related, not whether the entities are similarly situated in the first instance. Because Plaintiffs have not established that Plaintiffs and the entities or persons allegedly receiving favorable treatment are similarly situated in all relevant respects, Plaintiffs have failed to state an equal-protection claim.

Plaintiffs also argue that Attorney General Ellison has selectively enforced the EOs. Defendants counter that the selective-enforcement arguments raised in Plaintiffs' opposition brief constitute an improper attempt by Plaintiffs to expand their equal-protection claims. Parties seeking leave to file an amended complaint must comply with Rule 15, Fed. R. Civ. P. Pleadings cannot be expanded via an opposition memorandum. *See Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) ("[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss. To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, . . . simply by raising a point in a brief." (internal quotation marks and citations omitted)).

The complaint before the Court does not allege selective enforcement. Moreover, throughout their briefing, Plaintiffs allege facts that were not included in the complaint to advance their selective-enforcement argument. Such actions are an improper attempt to

expand the scope of the pleadings without seeking leave to amend. Accordingly, Plaintiffs' selective-enforcement argument is rejected.

For these reasons, Defendants' motion to dismiss Plaintiffs' equal-protection claim is granted.

E. Takings Claim (Count Four)

Defendants move to dismiss Plaintiffs' takings claim for failure to state a claim on which relief can be granted. The Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has recognized two types of takings: (1) categorical takings, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); and (2) regulatory takings, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

To proceed with a takings claim, a plaintiff must have a property interest protected by the Fifth Amendment. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439 (8th Cir. 2007) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-03 (1984)). Here, Plaintiffs allege that the EOs constitute a taking of property "in the form of [Plaintiffs'] access to their physical property, total or substantial lost revenue, and goodwill." Defendants do not dispute that Plaintiffs have established a protectable property interest. As the threshold issue of Plaintiffs' property interests is undisputed, the parties' arguments addressing

whether the EOs constitute a categorical or regulatory taking are addressed in turn.[13]

1. Categorical Taking

Defendants argue that Plaintiffs fail to state a categorical takings claim because temporary property-use restrictions cannot form the basis of a categorical taking.

A categorical taking occurs when a regulation denies *all* economically beneficial or productive uses of land. *Lucas*, 505 U.S. at 1015. During the relevant period, Governor Walz issued EOs with restrictions on property. For example, EO 20-74 limits the number of patrons who may congregate in a business at one time. But Plaintiffs are able to conduct their businesses in some capacity under EO 20-74. Therefore, Governor Walz did not effectuate a categorical taking by issuing EO 20-74.

Plaintiffs argue that the earlier EOs constituted a categorical taking because those EOs prevented some businesses from being able to operate at all for a period of time. Here, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* is instructive. 535 U.S. 302 (2002). In *Tahoe-Sierra*, a 32-month

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[13] Because Governor Walz in his individual capacity is subject to qualified immunity and the *Ex parte Young* doctrine limits claims against government officials to declaratory and injunctive relief, Plaintiffs are not entitled to money damages. Accordingly, Plaintiffs' takings claim is limited to declaratory and injunctive relief.

moratorium on development in the Lake Tahoe Basin temporarily, but entirely, foreclosed landowners' development of their property during the moratorium. *Id.* at 312. The Supreme Court held that this temporary moratorium did not constitute a categorical taking because the moratorium did not cause a "complete elimination of value" or a "total loss." *Id.* at 341-4 (quoting *Lucas*, 505 U.S. at 1019-20.)

Here, some EOs temporarily, but entirely, foreclosed some Business Plaintiffs from utilizing their properties as intended. But *Tahoe-Sierra* indicates that such actions do not constitute a categorical taking. *Id.* Moreover, the emergency context of the alleged temporary taking at issue here is relevant. *See*, *e.g.*, *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 63 (3d Cir. 2013) (concluding that temporary closure of flea market due to presence of unexploded artillery shells did not constitute taking). The temporary nature of the shutdowns combined with the emergency nature of the circumstances supports the conclusion that the EOs did not constitute a categorical taking.

Plaintiffs argue that *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* supports the proposition that the now-rescinded EOs that prevented Plaintiffs entirely from operating their businesses constitute a categorical taking. 482 U.S. 304 (1987). But because the facts and circumstances here are materially distinguishable, *First English* is inapposite. In *First English*, a church owned a 21-acre parcel of land near a canyon. *Id.* at 307. After a natural disaster, Los Angeles County passed an ordinance

forbidding construction on the property. *Id.* Because of the Los Angeles County ordinance, the property owners in *First English* would *never* be able to build a church on the land. *Id.* at 307. The Supreme Court held that the ordinance, which "denied [First English] all use of its property for a considerable period of years," was a taking that required just compensation. *Id.* at 322. By contrast, the EOs were temporary and did not bar the Business Plaintiffs from ever operating their businesses normally. Because of this distinction, *First English* does not govern this Court's analysis.

Finally, Plaintiffs argue that *Kimball Laundry Co. v. United States* supports the proposition that the EOs that temporarily, but entirely, prevented Plaintiffs from operating their businesses are categorical takings. 338 U.S. 1 (1949). In *Kimball Laundry*, the United States took over a business to provide laundry services for the military during World War II. *Id.* at 3. With "no other means of serving its customers," Kimball Laundry was forced to suspend its business. *Id.* at 3, 12. Here, Defendants have not condemned, taken over, or repurposed any of the Business Plaintiffs' properties for government benefit. The Business Plaintiffs have other means of serving their customers. These distinctions are meaningful.

For these reasons, Plaintiffs have not established that actions taken under the EOs constitute categorical takings.

2. Regulatory Taking

Defendants also move to dismiss Plaintiffs' claim that the EOs constitute a regulatory taking. When determining whether the government has effectuated a regulatory taking in violation of the Fifth Amendment, a court considers (1) the economic impact of the regulation on the person suffering the loss, (2) the extent to which the regulation interferes with distinct investment-backed expectations, and (3) the character of the government action. *Penn Cent.*, 438 U.S. at 124. Because Defendants appear to concede that the first two factors fall in Plaintiffs' favor, and provide no argument to the contrary, only the third factor of the *Penn Central* test is at issue.

Defendants argue that the character of the government action, the third factor of the *Penn Central* test, favors Defendants because the EOs were issued to protect the public by minimizing the spread of the virus that causes COVID-19. Here, Plaintiffs strongly disagree that the EOs promote the common good. As such, Plaintiffs dispute that the third *Penn Central* factor favors Defendants.

A taking "may more readily be found when the interference with property can be characterized as a physical invasion by [the] government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (internal citation omitted); *accord Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226 (1986).

Plaintiffs argue that the shutdowns did not balance the benefits and burdens of economic life to promote the common good. "Rather, they prohibited Plaintiffs from doing business, while others were allowed to," Plaintiffs contend. In Plaintiffs' view, their businesses were selectively forced to bear the economic cost of the COVID-19 pandemic.

Defendants counter that the EOs were designed to prevent harm from the deadliest pandemic in 100 years. *See Penn Cent.*, 438 U.S. at 125 (recognizing decisions upholding land-use regulations by state tribunals based on reasonable conclusions relating to the promotion of general health, safety, and general welfare). Although Plaintiffs dispute the precise lines that Defendants have drawn when attempting to slow the spread of COVID-19 within Minnesota, courts within this District, presented with similar takings arguments relating to EOs issued by Governor Walz, have concluded that the EOs promote the common good. *See*, *e.g.*, *Heights Apartments*, 2020 WL 7828818, at *16 (stating that EOs are "precisely the kind of public program benefitting the common good that is not a compensable taking" and concluding that a temporary moratorium on evictions did not constitute a categorical or regulatory taking). Having performed an independent review and discerning no compelling rationale for ruling otherwise, this Court also concludes that promotion of the common good was the purpose of imposing the restrictions at issue here. Therefore, the character of the government action, the third factor of the *Penn Central* test, rests in Defendants' favor. Based

on this balancing of the three regulatory-takings factors articulated in *Penn Central*, Defendants' restrictions imposed pursuant to the EOs do not constitute a regulatory taking. *See* 438 U.S. at 124.

In summary, because Plaintiffs fail to establish either a categorical or a regulatory taking, Defendants' motion to dismiss Plaintiffs' takings claim, Count Four, is granted.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' motion to dismiss, (Dkt. 54), is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' motion to dismiss Plaintiffs' state-law claims based on sovereign immunity and Plaintiffs' federal-law claims seeking damages or retrospective relief is **GRANTED**.

2. Defendants' motion to dismiss Count One is otherwise **DENIED**.

3. Defendants' motion to dismiss the freedom-of-speech claim in Count Two for failure to state a claim is **GRANTED**.

4. Defendants' motion to dismiss Plaintiffs' federal freedom-of-assembly claim in Count Two is **DENIED**.

5. Defendants' motion to dismiss Counts Three and Four is **GRANTED**.

Dated: March 30, 2021

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2283

Northland Baptist Church of St. Paul, Minnesota, et al.

Glow In One Mini Golf, LLC, et al.

Appellants

v.

Governor Tim Walz, individually and
in his official capacity, et al.

Appellees

The Forum for Constitutional Rights

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the
District of Minnesota
(0:20-cv-01100-WMW)

ORDER

(Filed Aug. 9, 2022)

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Grasz and Judge Stras would grant the petition for rehearing *en banc*.

August 09, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans