

No. _____

**In the
Supreme Court of the United States**

Minnesota Voters Alliance, Andrew Cilek, Kim Crockett, Craig Anderson,
Yvonne Hundshamer, Craig Jones,

Applicants,

v.

Tim Walz, in his official capacity as Governor of Minnesota, or his successor;
Steve Simon, in his official capacity as Secretary of State of Minnesota, or his
successor, Mark V. Chapin, in his official capacity as Hennepin County Auditor, or
his successor, Christopher A. Samuel, in his official capacity as Ramsey County
Auditor, or his successor, Keith Ellison, in his official capacity as Attorney General of
Minnesota, or his successor, Mike Freeman, in his official capacity as Hennepin
County Attorney, or his successor, John Choi, in his official capacity as Ramsey
County Attorney, or his successor,

Respondents.

**To the Honorable Neil M. Gorsuch,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Eighth Circuit**

Emergency Application for an Injunction Pending Appellate Review

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Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. 1651, the undersigned, on behalf of the Minnesota Voters Alliance and individual applicant-members, respectfully apply for an injunction pending appellate review of the October 2, 2020 order denying preliminary injunctive relief issued by the United States District Court for the District of Minnesota, pending the consideration and disposition of the appeal from that order to the United States Court of Appeals for the Eighth Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The United States Court of Appeals for the Eighth Circuit on October 26, 2020 denied a motion for injunction pending appellate review. The Applicants need the injunction pending appellate review so that they can vote in-person on November 3, 2020 and future elections during the appellate review.

Minnesota's conflicting mask policies are the constitutional problem. On one hand, Minnesota Statutes § 609.735 makes wearing a mask a crime. On the other hand, the Governor's Executive Order No. 20-81 makes not wearing a mask a crime. The Secretary of State has put out a memorandum to election judges at polling places to take down Minnesota's voters who violate Minnesota's mask laws. In response, Applicants, not wanting to violate Minnesota's laws criminalizing both wearing and not wearing a mask refrained from political activities and in-person voting for the August 11, 2020 primary. Now, applicants seek an injunction pending appellate review so that they can participate in political activities and engage in in-person voting on November 3, 2020 and in future election, without threat of criminal and civil prosecution, during the appellate review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Minnesota Voters Alliance states that it is a non-stock, non-profit corporation, has no parent corporation, and is not a publicly held company.

PARTIES TO THE PROCEEDING

The Applicants (plaintiffs-Appellants below) are Minnesota Voters Alliance, Andrew Cilek, Kim Crockett, Craig Anderson, Yvonne Hundshamer and Craig Jones.

The respondents (defendant-Respondents below) are Tim Walz, in his official capacity as Governor of Minnesota, Steve Simon, in his official capacity as Secretary of State of Minnesota, Mark V. Chapin, in his official capacity as Hennepin County Auditor, Christopher A. Samuel, in his official capacity as Ramsey County Auditor, Keith Ellison, in his official capacity as Attorney General of Minnesota, Mike Freeman, in his official capacity as Hennepin County Attorney, John Choi, in his official capacity as Ramsey County Attorney.

LIST OF ALL PROCEEDINGS

The proceedings below are as follows: *Minnesota Voters Alliance, et al. v. Walz, et al.*, U.S. District Court for the District of Minnesota case no. 20-cv-1688 PJS/ECW; and *Minnesota Voters Alliance, et al. v. Walz, et al.*, U.S. Court of Appeals for the Eighth Circuit case no. 20-3072.

DECISIONS BELOW

On August 4, 2020, the Applicants Minnesota Voters Alliance, Andrew Cilek, Kim Crockett, Craig Anderson, Yvonne Hundshamer and Craig Jones filed a complaint

seeking a judgment, declaration and injunction alleging that Minnesota’s combination of laws criminalizing wearing a mask and criminalizing not wearing a mask at polling places and elsewhere violates the Free Speech Clause of the First Amendment of the United States Constitution. ECF 1. At the August 11, 2020 primary, Applicants did not engage in in-person voting because of Minnesota’s conflicting laws—chilling their First Amendment expression; afterwards, they amended their complaint. ECF 7.

On October 2, the district court issued an order denying the motion for preliminary injunctive relief. ECF 51, App. 1-35. On October 2, the Applicants appealed under 28 U.S.C. § 1292 to the United States Court of Appeals for the Eighth Circuit from the denial of preliminary injunction. ECF 52. On October 13, the district court denied the motion for injunction pending appellate review. ECF 65, App. 36-42. On October 26, the court of appeals denied the motion for injunction pending appeal. App. 43.

Now, the applicants apply for an emergency injunction pending appellate review to this Court so applicants can engage in in-person voting in the November 3 and future elections during appellate review—as they were not able to do in the August 11, 2020 primary election due to Minnesota’s conflicting mask policies.

JURISDICTION

On August 4, 2020, the Applicants Minnesota Voters Alliance, Andrew Cilek, Kim Crockett, Craig Anderson, Yvonne Hundshamer and Craig Jones filed a complaint seeking a judgment, declaration and injunction alleging that Minnesota’s combination of laws criminalizing wearing a mask and criminalizing not wearing a mask at polling

places and elsewhere violates the Free Speech Clause of the First Amendment of the United States Constitution. ECF 1. The district court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343 and 42 U.S.C. 1983.

On October 2, the Applicants appealed to the United States Court of Appeals for the Eighth Circuit from the district court's denial of preliminary injunction. ECF 52. The court of appeals has jurisdiction over interlocutory appeals under 28 U.S.C. 1292.

This Court has jurisdiction under 28 U.S.C. 1651 and the Court's precedents. Minnesota Voters Alliance's application is "in aid of [this Court's] jurisdiction," *id.*, because the appellate process will take months to conclude, by which time the November 3, 2020 election and other election will have occurred—and the Applicants again will continued to be denied in-person voting as they were denied in the August 11, 2020 primary election.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the U.S. Constitution contains the Free Speech Clause:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is incorporated through the Fourteenth Amendment against the states and their political subdivisions.

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To the Honorable Neil M. Gorsuch as Circuit Justice for the U.S. Court of Appeals for the Eighth Circuit:

The Applicants seek from this Court an injunction pending appellate review. In addition to considering the merits, this Court balances the equities when granting injunctions, “Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue.” *Breswick & Co. v. U.S.*, 75 S.Ct. 912, 915 (U.S. 1955), *citing Yakus v. United States*, 321 U.S. 414, 440 (1943). The Applicants meet the Court’s standards for injunction pending appellate review.

The proposed injunction pending appellate review would enjoin the Respondents from enforcing its mask policies criminalizing both wearing and not wearing a mask at the polling places and elsewhere because those conflicting policies are not “capable of reasoned application”:

Minnesota has not supported its good intentions with a law capable of reasoned application.

Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876, 1892 (2018). “The capable of reasoned application” legal standard is synonymous to “palpably unconstitutional” legal exception found in *Jacobson*:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters.

Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 31 (1905). In fact, for the *Jacobson* case to be like this case, the Commonwealth would have had to criminalize both being vaccinated as well as not being vaccinated. So, even during a pandemic, at least with respect to First Amendment activities, state and local policies criminalizing First-Amendment-protected conduct must be “capable of reasoned application” or the state and local policies are “palpably unconstitutional” under both *Jacobson* and *Mansky*. *Jacobson*, 197 U.S. at 31; *Mansky*, 138 S.Ct. at 1892. The Respondents’ conflicting mask policies unnecessarily restrict First Amendment rights.

Statement of Facts

Applicants’ political activities in public places and in-person voting are chilled by the Respondents’ threat of prosecution under Minnesota’s policy regarding masks.

The Applicants have been active politically.¹ They want to participate in general election activities in public places and participate in in-person voting on November 3.²

As to the August 11 primary, four individual Applicants—Anderson, Crockett, Hundshamer and Jones—wanted to vote in-person at the August 11 primary, but did not do so because of the Respondents’ policy regarding masks.³ They did not vote absentee for the primary and wanted to vote in-person at their respective primary

¹ Anderson Dec. ¶3; Cilek Dec. ¶3; Crockett Dec. ¶3; Hundshamer Dec. ¶3; Jones Dec. ¶3.

² Anderson Sec. Dec. ¶6; Crockett Sec. Dec. ¶6; Hundshamer Sec. Dec. ¶6; Jones Sec. Dec. ¶6.

³ Anderson Sec. Dec. ¶5; Crockett Sec. Dec. ¶5; Hundshamer Sec. Dec. ¶5; Jones Sec. Dec. ¶5.

polling places in Hennepin and Ramsey Counties because they thought it was more secure.⁴

Prior to the primary, the four Applicants had read Minnesota Statutes § 609.735 which criminalizes wearing a mask in public.⁵ The four Applicants had read Executive Order 20-81 which criminalizes not wearing a mask in public.⁶ The four Applicants understood that the Secretary of State's July 22, 2020 instructions to precinct election judges encouraged the election judges to write down names for prosecution for violating Minnesota's laws on mask wearing.⁷ A Minnesota County Attorney and criminal defense attorney agreed that Minnesota Statutes § 609.735 criminalizes wearing a mask and that Emergency Executive Order 20-81 criminalizes not wearing a mask.⁸

Because the four Applicants were aware of Minnesota's policy of criminalizing both wearing and not wearing a mask, the four Applicants did not participate in the primary campaign political activities and did not vote in-person at the primary on August 11.⁹ The four Applicants' political participation in primary political activities in public places and in-person primary voting was chilled by Minnesota's policy criminalizing both wearing and not wearing a mask.¹⁰

⁴ Anderson Dec. ¶6; Crockett Dec. ¶6; Hundshamer Dec. ¶6; Jones Dec. ¶6.

⁵ Anderson Dec. ¶7; Crockett Dec. ¶7; Hundshamer Dec. ¶7; Jones Dec. ¶7.

⁶ Anderson Dec. ¶8; Crockett Dec. ¶8; Hundshamer Dec. ¶8; Jones Dec. ¶8.

⁷ Anderson Dec. ¶9; Crockett Dec. ¶9; Hundshamer Dec. ¶9; Jones Dec. ¶9.

⁸ Kaardal Dec. Exs. 4 and 5.

⁹ Anderson Sec. Dec. ¶5; Crockett Sec. Dec. ¶5; Hundshamer Sec. Dec. ¶5; Jones Sec. Dec. ¶5.

¹⁰ Anderson Dec. ¶11; Crockett Dec. ¶11; Hundshamer Dec. ¶11; Jones Dec. ¶11.

Similarly, as to the general election on November 11, 2020, the Applicants, because of Minnesota's policy criminalizing both wearing and not wearing a mask, will not participate in the general election political activities in public places and will not vote in-person at the primary on November 3.¹¹ The Applicants' political participation in general election campaigning in public places and in-person general election voting is being chilled by Minnesota's policy criminalizing both wearing and not wearing a mask.¹²

Additionally, the Applicants are not willing to attend Minnesota Voters Alliance's events in public places because of Minnesota's policy of criminalizing both wearing a mask and not wearing a mask in public places.¹³ Consequently, attendance at plaintiff Minnesota Voters Alliance's public events is diminished.¹⁴

If the Court does not grant the preliminary injunctive relief, the Applicants will not be politically participating in general election political activities in public places, the Applicants will not be voting in person at the general election polling places on November 3, and the Applicants will not be attending Minnesota Voters Alliance's public events.¹⁵

¹¹ Anderson Sec. Dec. ¶12; Crockett Sec. Dec. ¶12; Hundshamer Sec. Dec. ¶12; Jones Sec. Dec. ¶12.

¹² Anderson Sec. Dec. ¶13; Crockett Sec. Dec. ¶13; Hundshamer Sec. Dec. ¶13; Jones Sec. Dec. ¶13.

¹³ Anderson Sec. Dec. ¶¶12, 14; Crockett Sec. Dec. ¶¶12, 14; Hundshamer Sec. Dec. ¶¶12, 14; Jones Sec. Dec. ¶¶12, 14.

¹⁴ Cilek Dec. ¶¶6-8.

¹⁵ Anderson Sec. Dec. ¶14; Crockett Sec. Dec. ¶14; Hundshamer Sec. Dec. ¶14; Jones Sec. Dec. ¶14.

Procedural Background

On March 13, 2020, the Governor signed “Executive Order 20-01: Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19.” Since then, the Governor has issued eighty-four executive orders, nos. 20-01 through 20-84.¹⁶ The Governor has claimed legal authority to issue these executive orders pursuant to Minnesota Statutes § 12.31, subdivision 2.¹⁷

The Governor has issued subsequent executive orders extending the peacetime emergency for additional day thirty periods: Executive Order 20-35 on April 13, 2020; Executive Order 20-53 on May 13, 2020; Executive Order 20-75 on June 12, 2020; Executive Order 20-78 on July 13, 2020; and Executive Order 20-83 on August 12, 2020; Executive Order 20-89 on September 11, 2020; and Executive Order 20-92 on October 12, 2020.

Generally, these executive orders extending the peacetime emergency noted that the governor’s asserted authority could only be rescinded by “a majority vote of each house of the legislature pursuant to Minnesota Statute 2019, section 12.31, subdivision 2(b).”¹⁸

Executive Order 20-81 makes it a crime not to wear a mask.

On July 22, 2020, Defendant Walz signed “Executive Order 20-81: Requiring Minnesotans to Wear a Face Covering in Certain Settings to Prevent the Spread of

¹⁶ The Governor’s Office maintains a website with all the emergency executive orders at: <https://mn.gov/governor/news/executiveorders.jsp>.

¹⁷ Executive Orders 20-01 to 20-84.

¹⁸ Executive Orders 20-35, 20-53, 20-75 and 20-78.

COVID-19.”¹⁹ Executive Order 20-81, page 3, generally asserts: “Minnesotans must wear a face covering in indoor businesses and indoor public settings, including when waiting outdoors to enter an indoor business or public indoor space.”²⁰ Executive Order 20-81, pages 13 and 14, establishes criminal enforcement provisions for not wearing a mask, to-wit:

- a. For an individual, it is criminal petty misdemeanor not to be wearing a mask: “Any individual [adult, non-student] who willfully violates this Executive Order is guilty of a petty misdemeanor and upon conviction must be punished by a fine not to exceed \$100.”
- b. For a business, it is a criminal misdemeanor not to be wearing a mask and requiring compliance: “Any business owner, manager, or supervisor who fails to comply with this Executive Order is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed \$1,000, or by imprisonment for not more than 90 days.”²¹

Minnesota Statutes § 609.735 makes it a crime to wear a mask in public places.

To the contrary, Minnesota Statutes § 609.735 makes wearing a mask in public places a criminal act, punishable by up to 90 days imprisonment and/or a \$1000 fine.²² The only exception to this prohibition is if wearing a mask is “based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment.”²³ *Id.*

The Attorney General and County Attorneys are to prosecute Applicants, criminally and civilly, for wearing a mask and prosecute Applicants for not wearing a mask in public places, including polling places.

Under the Governor’s executive orders and Minnesota’s statutes, the Attorney

¹⁹ Kaardal Dec. Ex. 1.

²⁰ *Id.*

²¹ *Id.*

²² Kaardal Dec. Ex. 3.

²³ *Id.*

General and county attorneys prosecute crimes and pursue civil remedies.²⁴ Minnesota Statutes § 609.735 makes wearing a mask in a public place a criminal act. Under Minnesota Statutes § 609.735, Respondents Attorney General Ellison, Hennepin County Attorney Freeman and Ramsey County Attorney Choi threaten prosecution of Applicants for wearing a mask.²⁵ The Governor’s Executive Order 20-81 makes not wearing a mask in a public place a criminal act. Under Governor’s Executive Order 20-81, Respondents Attorney General Ellison, Hennepin County Attorney Freeman and Ramsey County Attorney Choi prosecute, criminally or civilly, Applicants for not wearing a mask.²⁶

So, Applicants, when engaged in political participation in public places, are to be criminally or civilly prosecuted by Respondents Attorney General Ellison, Hennepin County Attorney Freeman and Ramsey County Attorney Choi for wearing a mask and for not wearing a mask.²⁷ Either way, the Applicants get prosecuted.²⁸ For example, the Attorney General’s Office on July 31 filed a lawsuit against North Star Ranch, LLC, for violating the Governor’s executive orders.²⁹

²⁴ *See, e.g.*, Executive Order 20-81 at 14 (“In addition to these criminal penalties, the Attorney General, as well as city and county attorneys, may seek any civil relief available pursuant to Minnesota Statutes 2019, section 8.31, for violations of this Executive Order, including civil penalties up to \$25,000 per occurrence from businesses and injunctive relief.”); Minnesota Statutes § 8.31 (additional duties of Attorney General), § 211B.16 (county attorneys prosecute under Minnesota’s fair campaign practices law); § 388.01, et seq. (on county attorneys).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Kaardal Dec. 6.

The Secretary of State and County Auditors are enforcing a policy to wear a mask in the polling place—while it is a crime to do so under Minnesota Statutes § 609.735.

Defendant Secretary of State Simon in his written policy implementing the mask mandate dated July 22, 2020, requires county auditors and other election officials to enforce upon all persons in the polling place the Executive Order 20-81 mask mandate—under threat of prosecution—regardless of Minnesota Statutes § 609.735:

If the voter insists on voting in the polling place without a face covering, record any violation of the face cover order...Record the name and addresses of a voter from the polling place roster in the incident log along with a notation that the voter refused to comply with the facial covering executive order...³⁰

Under Secretary of State Simon's policy, County Auditor Chapin and Ramsey County Auditor Samuel enforce a policy upon voters to wear a mask in the polling place—under threat of prosecution under Executive Order 20-81.³¹ But, under Minnesota Statutes § 609.735, the same people that Respondents Simon, Chapin and Samuel are recommending, encouraging and ordering to wear a mask are committing a crime by wearing the mask under Minnesota Statutes § 609.735.³²

Because of Minnesota's policy regarding masks in public places and polling places, the Applicants will not politically participate in public places and will not vote in-person on November 3.

As detailed above, the Applicants desire to engage in First Amendment protected activities relating to the November 3 election.³³ Such political speech

³⁰ Kaardal Dec. Ex. 2 at 2.

³¹ *Id.*

³² *Id.*

³³ Anderson Dec. ¶3; Cilek Dec. ¶3; Crockett Dec. ¶3; Hundshamer Dec. ¶3; Jones Dec. ¶3.

activities are at the core of First Amendment protection.³⁴

The individuals also engage in in-person voting at primary elections and general elections.³⁵ Respondents, collectively, have taken steps towards criminalizing or prosecuting Applicants when wearing a mask in a public place, including polling places, and criminalizing or prosecuting Applicants when not wearing a mask in public places, including polling places.³⁶

Minnesota's policy suppresses political participation and voter attendance.³⁷ Since Minnesota criminalizes both wearing and not wearing a mask in public places, the Applicants will not participate in First Amendment protected activities in public places and in polling places for the November 3 election and beyond.³⁸

Argument

The Applicants are entitled to a preliminary injunction pending appellate review.

The Applicants respectfully request the Court to grant an injunction pending appellate review because the factors for an injunction pending appellate review have been met.

I. The Applicants have a substantial probability of success on the merits.

The Applicants have a substantial probability of success on the merits. The district

³⁴ Cilek Dec. ¶5.

³⁵ Anderson Sec. Dec. ¶¶5, 7; Crockett Sec. Dec. ¶¶5, 7; Hundshamer Sec. Dec. ¶¶5, 7; Jones Sec. Dec. ¶¶5, 7.

³⁶ Kaardal Dec. Exs. 1-3.

³⁷ See, e.g., Anderson Sec. Dec. ¶¶5, 12; Crockett Sec. Dec. ¶¶5, 12; Hundshamer Sec. Dec. ¶¶5, 12; Jones Sec. Dec. ¶¶5, 12.

³⁸ Anderson Sec. Dec. ¶¶13, 14; Crockett Sec. Dec. ¶¶13, 14; Hundshamer Sec. Dec. ¶¶13, 14; Jones Sec. Dec. ¶¶13, 14.

court indicated in its Order denying the preliminary injunction:

[I]t appears that the Court likely has jurisdiction over Plaintiffs' federal claims against the Governor, Attorney General and the Hennepin Respondents, and only insofar as those claims rest on Applicants' allegations that EO 20-81 conflicts with § 609.735.

Order (Oct. 2, 2020) at 20. So, for the purpose of this motion, Applicants focus on claims based on "Plaintiffs' allegations that EO 20-81 conflicts with § 609.735."

The district court's order adopted the government's standard of review which is inaccurate. The U.S. Supreme Court decision in *Mansky* required Minnesota laws in the polling place to be at least "capable of a reasoned application":

Minnesota has not supported its good intentions with a law capable of reasoned application.

Mansky, 138 S.Ct. 1876, 1892 (2018). Applicants have asserted this is the legal standard of review for their First Amendment claims in this case.

It's the State's fault that the district court was led astray. For example, the State in its memorandum to dismiss at pages 7 through 12 does not acknowledge that the standard of review set in *Mansky* applies to Minnesota's polling places. Instead, the State's argument begins at page 7 with "Applicants' claims are based on a faulty assumption" and goes on for five pages without referencing *Mansky* or any other legal standard.

In a similar way, the district court's October 2 order at pages 21 through 26 addressing the merits of whether § 609.735 conflicts with Executive Order 20-81 does not acknowledge the standard of review set in *Mansky* for Minnesota's polling places. Instead, the district court's order analyzes how the Minnesota Supreme Court might

interpret § 609.735. To be sure, the district court later in denying the motion for injunction pending appeal specifically addressed the applicability of *Mansky*. Order (Oct. 13, 2020) at 4-6 (“In short, *Mansky* has little to do with this case.”)

The Applicants’ concern is that *Mansky* does apply, and if it does apply, they are entitled to an injunction pending appellate review. The U.S. Supreme Court in *Mansky* did not ask itself what the Minnesota Supreme Court might think of the election law at issue. The U.S. Supreme Court decision in *Mansky* was not based on how the Minnesota Supreme Court might interpret Minnesota statutes, but instead on how elections judges might interpret them. After all, that is how voters are affected by real, live elections judges telling them what they can and cannot do.

Once the right legal standard is applied from *Mansky*, then the case turns on whether § 609.735 conflicts with Executive Order 20-81. The Applicants acknowledge the district court’s orders, but encourages this Court to consider in the context of injunction pending appeal, whether the Applicants are likely to succeed on the merits.

The district court’s Order dated October 2 at pages 21 through 26 engages in legal interpretation of the statute without applying the *Mansky* standard of review: “capable of a reasoned application.” In *Mansky*, the U.S. Supreme Court did not undertake the inquiry the district court did in “predict[ing]” what the Minnesota Supreme Court would say.” No, in *Mansky*, the relevant inquiry was what would election judges interpreting the law say. In other words, among election judges, is the law “capable of a reasoned application.”

Because *Mansky* applies, the Applicants are still likely to prevail on the Amended Complaint's Count 2 under the *Mansky* "not capable of reasoned application" standard applicable to polling places which are a non-public forum for First Amendment analysis. In Count 2, Applicants claim that Minnesota's policy criminalizing both wearing a mask and not wearing a mask in a polling place, a non-public forum, violate the First Amendment right to free speech because it is "not capable of reasonable application":

Minnesota has not supported its good intentions with a law capable of reasoned application.

Mansky, 138 S.Ct. at 1892.

Since the Supreme Court has already invalidated a similar provision of Minnesota law which prohibited political apparel in the polling place, the controlling precedent is readily available. In *Mansky*, the U.S. Supreme Court held that Minnesota's political apparel ban restricted a form of expression protected by the First Amendment and that a polling place in Minnesota qualifies as a nonpublic forum for First Amendment purposes. 138 S.Ct. at 1888.

The U.S. Supreme Court acknowledged that Minnesota's political apparel ban pursued permissible objectives of setting polling place aside as an "island of calm" in which voters could peacefully contemplate their choices, but Minnesota's political apparel ban violated the Free Speech Clause because it was "not capable of reasoned application." *Id.*

Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.

See *Cornelius*, 473 U.S., at 808–809, 105 S.Ct. 3439. Here, the unmoored use of the term “political” in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Id. at 1888. The U.S. Supreme Court explained:

[Minnesota] Election judges “have the authority to decide what is political” when screening individuals at the entrance to the polls. App. to Pet. for Cert. I–1. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as “political.” And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

Id. at 1891.

The *Mansky* decision is binding in this case. First, Minnesota's policy criminalizing wearing a mask and criminalizing not wear a mask are restricting a form of expression protected by the First Amendment—wearing apparel while attending a polling place. The Applicants have testified in their declarations that they will not participate in in-person voting at the general election polling places on November 3, because of the threatened prosecutions for wearing a mask and threatened prosecutions for not wearing a mask. It is their political protest—just like wearing Tea Party t-shirts as in the *Mansky* case. Their right to vote in-person at the August 11 primary has already been chilled.

Second, according to *Mansky*, polling places in Minnesota qualify as nonpublic forums for First Amendment purposes. So, the test in this case is whether Minnesota's laws affecting the polling place are "not capable of reasoned application."

Third, if Minnesota's regulations affecting attendance at the polling places are "not capable of reasoned application," they violate the Free Speech Clause:

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter," we are told, could be "perceived" as political. Tr. of Oral Arg. 41. How about a shirt bearing the name of the National Rifle Association? Definitely out. *Id.*, at 39–40. That said, a shirt displaying a rainbow flag could be worn "*unless* there was an issue on the ballot" that "related somehow ... to gay rights." *Id.*, at 38 (emphasis added). A shirt simply displaying the text of the Second Amendment? Prohibited. *Id.*, at 40. But a shirt with the text of the *First* Amendment? "It would be allowed." *Ibid.*

Id. at 1891.

Similarly, in this case, the Governor's Executive Order 20-81 and the Secretary of State's July 22 memorandum adopted policies criminalizing not wearing a mask at the polling places while Minnesota Statutes § 609.735 criminalizes wearing a mask in the polling places. In a hypothetical oral argument, the Respondents will struggle in this case to solve the dilemma presented by the Governor's Executive Order 20-81 and the Secretary of State's July 22 memorandum and Minnesota Statutes § 609.735.

Accordingly, Minnesota's laws and policies are "not capable of a reasoned application" as in *Mansky*. There is no "island of calm." The consequence of the government's laws and policies has been and is an unnecessary chilling effect on the Applicants who wish to exercise their political rights protected by the First

Amendment: in-person voting in the polling places on November 3.

II. The moving party will suffer irreparable injury absent the injunction.

In addition to considering the merits, this Court balances the equities when granting injunctions, “Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue.” *Breswick & Co. v. U.S.*, 75 S.Ct. 912, 915 (U.S. 1955), *citing Yakus v. United States*, 321 U.S. 414, 440 (1943).

Here, the balance of equities favors issuing the injunction pending appellate review. Private unconstitutional interference with the November 3 elections pose the same type of “irreparable injury” and are analogous to “irreparable injury” for First Amendment deprivations. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There is no adequate legal remedy.

The Applicants, absent the injunction, will suffer irreparable injury. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008). “For this reason, the irreparable harm factor generally weighs in the movant's favor in First Amendment cases, although it is often intertwined with a court's evaluation of the likelihood of success on the merits.” *Seaton v. Wiener*, 22 F.Supp.3d 945, 951 (D. Minn. 2014).

Here, the district court's Order dated October 2 at page 32 states that Applicants have not shown a "threat of irreparable harm, because they have not shown that there is any chance that they will actually be prosecuted for violating § 609.735 if they wear a face covering in compliance with EO 20-81." But, the district court in making its assessment of "no chance of prosecution" failed to account for the County Attorney's declaration interpreting Executive Order 20-81 to criminalize not wearing a mask and § 609.735 criminalizing wearing a mask:

4. On July 22, 2020, the Governor signed "Executive Order 20-81: Requiring Minnesotans to Wear a Face Covering in Certain Settings to Prevent the Spread of COVID-19."
5. Executive Order No. 20-81, page 3, generally asserts, "Minnesotans must wear a face covering in indoor businesses and indoor public settings."
6. Executive Order No. 20-81, pages 13 and 14, establishes criminal enforcement provisions for not wearing a mask, to-wit:
 - a. For an individual, it is criminal petty misdemeanor not to be wearing a mask: "Any individual [adult, non-student] who willfully violates this Executive Order is guilty of a petty misdemeanor and upon conviction must be punished by a fine not to exceed \$100."
 - b. For a business, it is a criminal misdemeanor not to be wearing a mask and requiring compliance: "Any business owner, manager, or supervisor who fails to comply with this Executive Order is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed \$1,000, or by imprisonment for not more than 90 days."
7. However, Minn. Stat. § 609.735 makes wearing a mask in a public place a criminal act, punishable by up to 90 days imprisonment and/or a \$1000 fine.
8. The only exceptions to this prohibition is if wearing a mask is "based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment."

9. Under common definitions of “treatment,” mask-wearing to prevent a contagious disease is not medical “treatment.” That is why the executive order seeks to assert on page 13 of Executive Order 20-81 that “(w)earing a face covering in compliance with this Executive Order or local ordinances, rules, or orders is not a violation of Minnesota Statutes 2019, section 609.735.”
10. The combination of Minn. Stat. § 609.735 and Executive Order 20-81 makes it a crime in Minnesota to wear a mask and a crime in Minnesota not to wear a mask.

Franzese Dec., Am. Compl., Ex. 5. A leading criminal defense attorney has arrived at the same conclusion. Am. Compl., Ex. 4. There could not be any better evidence of a credible threat of prosecution than a First Amendment plaintiff presenting a prosecutor’s declaration stating that the alleged First Amendment protected activity is a crime. Consistent with the Franzese Declaration, the district court’s Order dated October 2 at page 33, note 13, acknowledges that § 609.735 has been “mentioned in a handful of reported cases”—one case as recent as 2011.

The balancing of harms in First Amendment cases generally favors granting the injunction.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The balance of equities typically favors the constitutionally-protected freedom of expression. *Id.* As discussed above, the Applicants are irreparably harmed by the loss of their First Amendment free speech and associational rights. On the other hand, the harm that Respondents will experience if enforcement of Executive Order 20-81 and Minnesota Statutes § 609.735 is enjoined is little or none. The policies conflict: criminally prohibiting both wearing and not wearing a mask. No one benefits. Everyone is harmed.

But, to the contrary, the district court's October 2 Order at page 33 adopts the view that there is no First Amendment harm if the state legislates the First Amendment protected activity as a crime as long as the prosecutors don't prosecute:

The record before the Court contains no evidence that either § 609.735 or its predecessor has ever been enforced, despite being on the books for nearly a century. Meanwhile, over the past six months, millions of Minnesotans have worn face coverings in indoor public settings, such as stores, restaurants, salons, medical facilities, places of worship, offices, and classrooms. If Applicants' reading of § 609.735 is correct, then the statute has been violated hundreds of millions of times during the pandemic. And yet Applicants cannot point to a single instance of anyone being prosecuted under § 609.735 for wearing a face covering during the pandemic.

(Footnote omitted.)

However, this sort of analysis by the district court is only possible without the *Mansky* legal standard of review. Under the First Amendment analysis in *Mansky*, people are entitled to polling place laws "capable of a reasoned application." So, the Applicants, applying the correct legal standard to this case, read Executive Order 20-81 and Minnesota Statutes § 609.735 and determined for themselves that Executive Order 20-81 and Minnesota Statutes § 609.735 were not "capable of a reasoned application." For example, Yvonne Hundshamer's Second Declaration states:

9. I have read Minnesota Statutes section 609.735 which criminalizes wearing a mask.
10. I have read Emergency Executive Order No. 20-81 which criminalizes not wearing a mask.
11. I understand that a Secretary of State's July 22, 2020 instructions to precinct election judges encourages the election judges to write down names for prosecution for violating Minnesota's laws on mask wearing.

12. Because of Minnesota's combination of laws and policies criminalizing both wearing and not wearing a mask, I will not be politically participating in the election campaign and I will not be voting in person at the election on November 3, 2020. For the same reason, I will not be attending Minnesota Voters Alliance events in public places.

Hers is a rational response to the government criminalizing wearing and not wearing a mask. The district court orders expect her to make an additional unreasonable calculation for a citizen to make, "What is the chance I will get prosecuted?"

Nonetheless, staying at home and not participating politically is a harm to the Applicants. Not voting in-person on November 3 is a harm to the Applicants. The government is not harmed by Applicants' political participation. If the government wants to criminalize not wearing a mask, it can do so by repealing § 609.735. It's not a harm to the government to pick up the legislative pencil and enact a law repealing § 609.735. But, the government won't do it.

CONCLUSION

The Court should issue an injunction pending appellate review so that the applicants can engage in in-person voting at the November 3, 2020 general election and future elections.

Dated: October 26, 2020.

/s/Erick G. Kaardal
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA VOTERS ALLIANCE;
ANDREW CILEK; KIM CROCKETT;
CRAIG ANDERSON; YVONNE
HUNDSHAMER; and CRAIG JONES,

Case No. 20-CV-1688 (PJS/ECW)

Plaintiffs,

v.

ORDER

TIM WALZ, in his official capacity as
Governor of Minnesota; STEVE SIMON,
in his official capacity as Secretary of
State of Minnesota; MARK V. CHAPIN,
in his official capacity as Hennepin
County Auditor; CHRISTOPHER A.
SAMUEL, in his official capacity as
Ramsey County Auditor; KEITH
ELLISON, in his official capacity as
Attorney General of Minnesota; MIKE
FREEMAN, in his official capacity as
Hennepin County Attorney; and JOHN
CHOI, in his official capacity as Ramsey
County Attorney,

Defendants.

Erick G. Kaardal, MOHRMAN, KAARDAL & ERICKSON, P.A., for plaintiffs.

Elizabeth C. Kramer, Megan J. McKenzie, and Kevin A. Finnerty, MINNESOTA
ATTORNEY GENERAL'S OFFICE, for defendants Tim Walz, Steve Simon, and
Keith Ellison.

Kelly K. Pierce and Jeffrey M. Wojciechowski, HENNEPIN COUNTY
ATTORNEY'S OFFICE, for defendants Mike Freeman and Mark V. Chapin.

Robert B. Roche, RAMSEY COUNTY ATTORNEY'S OFFICE, for defendants John Choi and Christopher A. Samuel.

On July 22, 2020, Governor Tim Walz issued Executive Order 20-81, which requires Minnesotans to wear face coverings in indoor public settings in order to control the spread of COVID-19. Plaintiffs—the Minnesota Voters Alliance and five political activists—have brought this action against Governor Walz and other public officials¹ to challenge the legality of Executive Order 20-81. Plaintiffs have framed this action as primarily relating to the impact of Executive Order 20-81 on their right to vote in the upcoming election. In fact, though, plaintiffs argue that Executive Order 20-81 is invalid in its entirety—i.e., that Governor Walz does not have authority to order any person to wear a face covering in any indoor public setting. Indeed, plaintiffs go even further: Plaintiffs argue that it is illegal for any person to *choose* to wear a face covering in a public place for the purpose of preventing the spread of COVID-19.

This matter is before the Court on plaintiffs' motion for a preliminary injunction. The Court held a lengthy hearing on that motion on September 23, 2020. For the reasons that follow, plaintiffs' motion is denied.

¹Plaintiffs have sued Governor Walz, Secretary of State Steve Simon, and Attorney General Keith Ellison ("the State defendants"); Hennepin County Attorney Mike Freeman and Hennepin County Auditor Mark Chapin ("the Hennepin defendants"); and Ramsey County Attorney John Choi and Ramsey County Auditor Christopher Samuel ("the Ramsey defendants").

I. BACKGROUND

A. *The COVID-19 Pandemic*

COVID-19 is a deadly disease caused by a virus that is easily spread between people through respiratory droplets produced when an infected person coughs, sneezes, or talks. Kramer Decl. Ex. 2. It appears that the virus may also be transmitted via respiratory microdroplets that can travel in the air for tens of meters and remain airborne for hours. *Id.* Exs. 3, 4. As a result, COVID-19 is easily transmitted in indoor environments, particularly if those environments are crowded or lack adequate ventilation. *Id.* Ex. 3. The virus may be transmitted by infected people who have no symptoms and do not even know that they are infected. *Id.* Exs. 5, 8.

On March 11, 2020, the World Health Organization declared a global pandemic. *Id.* Ex. 6. Since the start of the pandemic, over 7.2 million cases of COVID-19 in the United States have been reported to the Centers for Disease Control and Prevention (“CDC”) and over 206,000 Americans have died, including over 2,000 Minnesotans.² There is currently no cure and no vaccine. *Id.* Exs. 1, 5. In response to this public-health crisis, the President declared a national emergency on March 13, 2020 and later

²See Centers for Disease Control and Prevention, at www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Oct. 2, 2020).

approved major disaster declarations in all 50 states—the first time a president had done so in the history of the United States. *Id.* Exs. 9, 10.

B. Face Coverings

Federal and state health officials recommend face coverings to slow the spread of COVID-19. According to CDC officials, “the more individuals wear cloth face coverings in public places where they may be close together, the more the entire community is protected.” *Id.* Ex. 12. Recent studies have found that face-covering mandates are associated with large declines in the growth rate of COVID-19 infections and fatalities. *Id.* Exs. 21, 22, 24. One study estimated that a nationwide mandate would significantly benefit the economy by substituting a mask mandate for renewed lockdowns that would subtract nearly 5% from GDP. *Id.* Ex. 24. Projections by the University of Washington indicate that universal use of face coverings would save thousands of lives in Minnesota. *Id.* Ex. 23.

It is important to stress that plaintiffs do not deny any of this. Plaintiffs do not deny the existence of COVID-19, or that it is a dangerous disease, or that it is easily spread (including by people who do not know that they are infected), or that face coverings slow its spread and thus save lives. To the contrary, plaintiffs emphasize that “[n]o one in this case is saying that mask wearing isn’t a good thing.” ECF No. 1 at 1–2.

C. Executive Order 20-81

On March 13, 2020, the same day that the President declared a national emergency, Governor Walz declared a peacetime emergency in Minnesota. *See* Executive Order 20-01; Minn. Stat. § 12.31, subd. 2(a). Among the actions that Governor Walz has taken pursuant to his emergency powers is issuing Executive Order 20-81 (“EO 20-81”), which requires Minnesotans to wear face coverings while present in indoor businesses and public indoor spaces and while waiting outdoors to enter an indoor business or public indoor space. Am. Compl. Ex. 1 [hereinafter “EO 20-81”] ¶ 9(a). Certain individuals are exempt from the mandate, including individuals with physical or mental conditions that make it unreasonable for them to wear a face covering, workers for whom a face covering would create a job hazard, and children under the age of six. EO 20-81 ¶ 8. An individual who willfully violates EO 20-81 is guilty of a petty misdemeanor. EO 20-81 ¶ 20(a).

II. ANALYSIS

A. Standard of Review

In reviewing a motion for a preliminary injunction, a court must consider four factors: (1) the movant’s likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between that harm and the harm that granting the injunction will inflict on the other parties; and (4) the

public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). “A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant.” *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (internal citation omitted).

B. Likelihood of Success

The main thrust of plaintiffs’ amended complaint is that it is impossible for anyone to enter an indoor public setting in Minnesota without committing a crime. On the one hand, EO 20-81 makes it unlawful *not* to wear a face covering in an indoor public setting. On the other hand, according to plaintiffs, a Minnesota statute makes it unlawful *to* wear a face covering in any public place, including any indoor public setting. Specifically, Minn. Stat. § 609.735 provides:

A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor.

Because EO 20-81 and § 609.735 are in direct conflict, plaintiffs argue, they cannot enter an indoor public place—such as a polling place, or a meeting hall, or even a grocery store—without committing a crime. As a result, plaintiffs contend that they are chilled from engaging in political activities that are protected by the First Amendment,

such as voting in person, campaigning in public, and associating with others in indoor settings.

Plaintiffs also allege that EO 20-81, in combination with guidance from the Secretary of State concerning how to implement EO 20-81 at polling places, violates the Elections Clause in Article I, § 4 of the United States Constitution. Plaintiffs further allege that EO 20-81, standing alone, violates the First Amendment and various provisions of the Minnesota Constitution. Before addressing the merits of plaintiffs' claims, the Court must address a number of thorny jurisdictional issues.

1. Jurisdictional Issues

a. Standing

Defendants argue that plaintiffs are unlikely to prevail in this litigation because they lack standing. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing consists of three elements: "[(1)] an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The plaintiff bears

the burden of establishing standing and must clearly allege facts demonstrating each element. *Id.* at 1547; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

i. Ramsey Defendants

Under Minnesota law, county attorneys “shall . . . prosecute felonies . . . and, to the extent prescribed by law, gross misdemeanors, misdemeanors, petty misdemeanors, and violations of municipal ordinances, charter provisions and rules or regulations[.]” Minn. Stat. § 388.051, subd. 1(3); *see also* Minn. Stat. § 484.87, subd. 3 (“Except as provided in subdivision 2 and as otherwise provided by law, violations of state law that are petty misdemeanors or misdemeanors must be prosecuted by the attorney of the statutory or home rule charter city where the violation is alleged to have occurred, if the city has a population greater than 600.”). As noted, a violation of § 609.735 is a misdemeanor, and a violation of EO 20-81 is a petty misdemeanor.

The Ramsey defendants argue that, because state law does not give the Ramsey County Attorney authority to prosecute these offenses, plaintiffs’ alleged injuries are not traceable to him, nor would plaintiffs’ injuries be redressed by a favorable judicial decision on any claims against him.³ *See Dig. Recognition Network, Inc. v. Hutchinson*, 803

³The Hennepin defendants do not argue that the Hennepin County Attorney lacks authority to prosecute non-felony offenses. At oral argument, defendants explained that, unlike Ramsey County, Hennepin County contains unincorporated areas in which there is no city attorney available to prosecute non-felony offenses, and accordingly the Hennepin County Attorney has some authority to prosecute such
(continued...)

F.3d 952, 957–58 (8th Cir. 2015) (“When a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.” (cleaned up)).

In response, plaintiffs do not point to any provision of state law granting the Ramsey County Attorney authority to prosecute misdemeanors under § 609.735 or petty misdemeanors under EO 20-81. Instead, plaintiffs cite *State v. Lemmer*, 736 N.W.2d 650 (Minn. 2007), which states that “the county attorney acts as the attorney for the state in all criminal matters within the county and has no authority to act in civil cases, such as implied consent proceedings, in which the state is a party.” *Id.* at 660. But *Lemmer* had nothing to do with the allocation of prosecutorial authority between county and city attorneys; indeed, later in the same paragraph, *Lemmer* cites § 388.051 and notes that county attorneys’ duties “include prosecuting felonies, and to the extent prescribed by law, gross misdemeanors, misdemeanors, and petty misdemeanors.” *Id.* (emphasis added).

At oral argument, plaintiffs pointed out that county attorneys have civil-enforcement powers under EO 20-81. But the provision that plaintiffs cited addresses the liability of *businesses*, not *individuals*. EO 20-81 ¶ 20(b)(ii). Nowhere in plaintiffs’ amended complaint or briefs does any plaintiff contend that the plaintiff is a business or

³(...continued)
offenses.

otherwise subject to EO 20-81's business provisions. Because plaintiffs have failed to meet their burden to show traceability and redressability as against the Ramsey County Attorney, the Court finds that plaintiffs are unlikely to prevail on any claims against him. *See Dig. Recognition Network, Inc.*, 803 F.3d at 958 ("The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." (citation and quotation marks omitted)).

With respect to the Ramsey County Auditor, the Ramsey defendants similarly argue that there is no law giving him the authority to prosecute offenses under either § 609.735 or EO 20-81. Plaintiffs point to a July 22 guidance memorandum issued by the Secretary of State to county auditors and election officials concerning the impact of EO 20-81 on voting in Minnesota. Am. Compl. Ex. 2. The Secretary of State issued the guidance in response to questions concerning how to handle compliance with EO 20-81 in polling places. Am. Compl. Ex. 2. The guidance recommends that, if a voter enters a polling place without a face covering, (1) an election official should inform the voter of the face-covering requirement and offer the voter a disposable mask; (2) if the voter refuses to wear a face covering, the voter should be offered the opportunity for outdoor curbside voting; and (3) if the voter insists on voting inside the polling place without a face covering, the voter should be permitted to do so after again being informed that

face coverings are required and that the voter's refusal to comply with that requirement will be recorded and "reported to the appropriate authorities." Am. Compl. Ex. 2.

This guidance was issued to county auditors and election officials, but it does not purport to be binding; rather, it is characterized as "guidance that we hope is helpful as you work with your municipalities on polling place procedures." Am. Compl. Ex. 2. Nor does this guidance vest county auditors with any authority to prosecute violations of EO 20-81; instead, it simply recommends that the auditors advise election officials to report any violations to the "appropriate authorities." Am. Compl. Ex. 2. It therefore appears that plaintiffs do not have standing to pursue any claims against the Ramsey County Auditor.⁴

ii. State and Hennepin Defendants

The State and Hennepin defendants argue that plaintiffs do not have standing because they have failed to plead a particularized injury; instead, the injury that plaintiffs identify (being subject to the allegedly conflicting dictates of § 609.735 and EO 20-81) is suffered by all Minnesotans. The cases on which defendants rely, however, do not hold that if a government action violates the rights of all citizens, no citizen has

⁴The Hennepin defendants did not raise this argument with respect to the Hennepin County Auditor, and the Court does not know whether the authority of the Hennepin County Auditor differs from the authority of the Ramsey County Auditor. If the two auditors are similarly situated, plaintiffs would not appear to have standing to pursue claims against the Hennepin County Auditor.

standing to challenge that action in federal court. Instead, those cases involve attempts by a plaintiff to vindicate a generalized, abstract interest in the proper application of the law. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 441–42 (2007) (plaintiffs lacked standing to challenge judicial redistricting because “[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed”); *see also FEC v. Akins*, 524 U.S. 11, 23 (1998) (“The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’” (quoting *L. Singer & Sons v. Union Pac. R.*, 311 U.S. 295, 303 (1940))).

Here, by contrast, plaintiffs allege an injury personal to them. Specifically, they allege that they want to engage in political activities in indoor public settings but are chilled from doing so. This is a sufficiently individual and particularized injury, at least insofar as plaintiffs’ claims rest on the alleged conflict between § 609.735 and EO 20-81. *See Susan B. Anthony List*, 573 U.S. at 159 (“a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder” (citation and quotation marks omitted)); *Akins*, 524 U.S. at 24 (“Often the fact that an interest is abstract and the fact that it is

widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”).

With respect to plaintiffs’ standalone challenges to the validity of EO 20-81, however, their allegations appear insufficient to establish an injury in fact. The amended complaint alleges that plaintiffs want the freedom to choose whether to wear a mask, Am. Compl. ¶¶ 3, 30, that they intend to vote and engage in other political activities either wearing or not wearing a mask, Am. Compl. ¶ 18, and that they have “a right to protect themselves by wearing a mask and a right to politically protest the government’s pandemic response by not wearing a mask,” Am. Compl. ¶ 4. As an aside, the Court notes that plaintiffs’ claims are inconsistent with some of the major premises of their lawsuit. Plaintiffs strenuously argue that § 609.735 makes it *unlawful* to wear a mask in a public place, and that wearing a mask to slow the spread of COVID-19 does not fit within the “medical treatment” exception to the statute. Plaintiffs further argue that EO-81 is invalid because an executive order cannot conflict with a valid statute. If plaintiffs are correct, they do not have the right to “choose” whether or not to wear a mask in a public place; § 609.735 bars them from doing so.

In any event, the amended complaint stops short of alleging that any individual plaintiff wants or intends to violate EO 20-81 by not wearing a face covering when EO 20-81 would require them to do so. Again, plaintiffs bear the burden of clearly

alleging facts demonstrating each element of standing, *Spokeo*, 136 S. Ct. at 1547, and “[e]ach plaintiff must establish standing for each form of relief sought,” *Miller v. Thurston*, 967 F.3d 727, 734 (8th Cir. 2020). As no plaintiff has clearly “allege[d] an intention to engage in a course of conduct arguably . . . proscribed by” EO 20-81, *Susan B. Anthony List*, 573 U.S. at 159 (citation and quotation marks omitted), no plaintiff appears to have standing to challenge the validity of EO 20-81 in its own right.⁵

The State and Hennepin defendants also argue that plaintiffs’ alleged future injuries are too speculative to establish standing. See *Clapper v. Amnesty Int’l, USA*, 568 U.S. 398, 409 (2013) (“we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient” (cleaned up)). Relatedly, the State and Hennepin defendants argue that plaintiffs face no risk of prosecution from them and therefore plaintiffs’ injuries are not “fairly traceable” to them.

With respect to the Secretary of State: The only alleged connection between the Secretary of State and plaintiffs’ alleged injury is the July 22 guidance discussed above. The guidance, however, is simply that—guidance—and plaintiffs do not point to any provision in any law granting the Secretary of State any authority to prosecute

⁵This argument would appear to preclude plaintiffs from establishing standing with respect to such claims against the Ramsey defendants as well. See *Dunbar v. Wells Fargo Bank, N.A.*, 709 F.3d 1254, 1256 n.4 (8th Cir. 2013) (federal courts have an independent obligation to determine whether subject-matter jurisdiction exists).

violations of either § 609.735 or EO 20-81. It therefore appears that plaintiffs lack standing to pursue claims against the Secretary of State.⁶

With respect to the remaining State and Hennepin defendants: “The Supreme Court has repeatedly found that plaintiffs have standing to bring pre-enforcement First Amendment challenges to criminal statutes, even when those statutes have never been enforced.” *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011). “It is only evidence—via official policy or a long history of disuse—that authorities actually reject a statute that undermines its chilling effect.” *Id.*; see also *UFCW Int’l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) (“Where plaintiffs allege an intention to engage in a

⁶For similar reasons, the Secretary of State is likely entitled to Eleventh Amendment immunity. See *Ex parte Young*, 209 U.S. 123, 157 (1908) (for the *Ex parte Young* exception to Eleventh Amendment immunity to apply, the state official must have “some connection” to the challenged law); see also *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (noting that, in cases against state officials, the standing and Eleventh Amendment issues are similar).

The Court does not read *Calzone* or *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) to the contrary. In *Calzone*, the Eighth Circuit found that the superintendent of the state highway patrol had a sufficient connection to an allegedly unconstitutional search policy because she had promulgated the policy pursuant to her authority to enforce a state highway regulation. *Calzone*, 866 F.3d at 870. In *Missouri Protection & Advocacy Services*, the Eighth Circuit held that the Missouri secretary of state had a sufficient connection to the enforcement of a law disqualifying certain persons from voting partly because state law obligated the secretary of state to send local election authorities the names of persons ineligible to vote under the law. 499 F.3d at 807. Here, by contrast, the Secretary of State simply provided guidance in response to questions from local election officials concerning the effect of EO 20-81 on polling places; there is no law formally connecting the Secretary to the enforcement of EO 20-81.

course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement.”).

It is true that EO 20-81 sets forth the state’s official policy that wearing a face covering in compliance with EO 20-81 does not violate § 609.735. EO 20-81 ¶ 19. There is therefore no credible threat that the Governor or the Attorney General will instigate prosecution against an individual under § 609.735 for *complying* with EO 20-81.⁷ But the reverse is not true—that is, neither the Governor nor the Attorney General has an official policy against prosecuting individuals for *violating* EO 20-81. Nor have the Hennepin defendants claimed that they have adopted an official policy not to prosecute violations of EO 20-81 or § 609.735.⁸ It therefore appears that plaintiffs’ alleged fear of facing prosecution for either wearing or not wearing a mask is sufficient under *281 Care Committee* to establish standing as against these defendants.

b. Eleventh Amendment

i. Ex parte Young

⁷As discussed below, Minn. Stat. § 8.01 grants the Governor and the Attorney General some discretionary authority to be involved in criminal prosecutions.

⁸As noted below, there appear to be no reported cases of prosecutions under either § 609.735 or its predecessor since the latter was first enacted in 1923. Defendants do not argue that this long history of lack of prosecution deprives plaintiffs of standing, however.

The State defendants next argue that they are entitled to Eleventh Amendment immunity. Under the Eleventh Amendment, “an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citation and quotation marks omitted). The Supreme Court recognized an exception to this immunity in *Ex parte Young*, 209 U.S. 123 (1908). “Under the *Ex Parte Young* doctrine, a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law.” *281 Care Comm.*, 638 F.3d at 632. For this exception to apply, the state official must have “some connection” with the enforcement of the allegedly unconstitutional law; otherwise, the lawsuit is “merely making [the official] a party as a representative of the state, and thereby attempting to make the state a party.” *Ex parte Young*, 209 U.S. at 157.

In *281 Care Committee*, the Eighth Circuit held that the Minnesota Attorney General had a sufficient connection with the enforcement of a challenged state statute based in part on the fact that, under Minn. Stat. § 8.01, a county attorney may request that the Attorney General take over a criminal prosecution. *281 Care Comm.*, 638 F.3d at 632–33; *see also Reprod. Health Servs. of Planned Parenthood v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005) (holding that the Missouri attorney general was potentially a proper defendant because Missouri law permits the governor to direct him to aid prosecutors

and trial courts to direct him to sign indictments). It therefore appears that plaintiffs' claims against the Attorney General may fall within *Ex parte Young*. Similarly, § 8.01 grants the Governor the authority to request the Attorney General to "prosecute any person charged with an indictable offense," indicating that claims against the Governor may also fall within *Ex parte Young*.

The Court recognizes that, in a second appeal, the Eighth Circuit in *281 Care Committee* held that the Minnesota Attorney General was immune under the Eleventh Amendment. *281 Care Comm. v. Arneson*, 766 F.3d 774, 796–97 (8th Cir. 2014). By that stage of the proceedings, however, a deputy attorney general had filed an affidavit attesting that the Attorney General's Office had never initiated a prosecution under the challenged law, that the office was not aware of any county attorney who had asked the office to do so, that the office would decline any such request, and that the office had no intention of undertaking any enforcement activities. *Id.* On the basis of that affidavit, the Eighth Circuit held that the Attorney General was immune from suit under the Eleventh Amendment. *Id.* at 797. In this case, however, neither the Governor nor the Attorney General has introduced evidence that he does not intend to use his authority under § 8.01.

ii. Pennhurst

Finally, the State defendants argue that, under the Eleventh Amendment and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Court lacks jurisdiction to resolve plaintiffs' claims that EO 20-81 violates the Minnesota Constitution. The Court agrees.

As the Supreme Court explained in *Pennhurst*, the *Ex parte Young* exception to Eleventh Amendment immunity is premised on the theory that "sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.'" *Id.* at 104 (quoting *Ex parte Young*, 209 U.S. at 160). This is somewhat of a legal fiction, but it is necessary to vindicate *federal* rights and ensure the supremacy of *federal* law. *Id.* at 105. That necessity does not exist in cases in which a state official is alleged to be acting in violation of *state* law. "On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. The *Ex parte Young* exception to Eleventh Amendment immunity therefore does not apply to plaintiffs' claims that Governor Walz and the other State defendants have violated Minnesota law. See *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345–46 (7th Cir. 2020) (holding that *Pennhurst* barred plaintiffs' claim that COVID-19 restrictions on religious gatherings violated state law); see also *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (explaining that a federal court would have no jurisdiction to enjoin the

defendants from enforcing state law even if their construction of state law was based on an erroneous interpretation of federal law).

Plaintiffs' only argument regarding *Pennhurst* seems to be that, although the Court cannot enjoin state officials from violating state law, the Court can decide whether state officials have violated state law in the course of litigating the federal constitutional claims. But whether EO 20-81 violates the Minnesota Constitution is not relevant to the merits of plaintiffs' federal claims. Moreover, the fact that the Court may have jurisdiction over plaintiffs' federal claims does not establish an exception to Eleventh Amendment immunity; the Court still may not "intru[de] on state sovereignty" by "instruct[ing] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. Finally, the doctrine of constitutional avoidance does not override the Eleventh Amendment. *See id.* at 120–23.

To summarize, then, it appears that the Court likely has jurisdiction only over plaintiffs' federal claims against the Governor, the Attorney General, and the Hennepin defendants, and only insofar as those claims rest on plaintiffs' allegation that EO 20-81 conflicts with § 609.735.

2. Merits

a. Section 609.735 and EO 20-81

As noted, plaintiffs' main claim is that they are caught in an impossible situation: EO 20-81 makes it a crime *not* to wear face coverings in indoor public settings, while Minn. Stat. § 609.735 makes it a crime *to* wear face coverings in public places (with exceptions that do not apply to this case⁹). Defendants argue that EO 20-81 and § 609.735 do not, in fact, conflict because (1) § 609.735 prohibits concealing one's identity by means of a "disguise," and the face coverings required by EO 20-81 neither conceal one's identity nor constitute a "disguise"; and (2) § 609.735 requires proof of an intent to conceal one's identity, and someone who wears a mask to comply with EO 20-81 is not wearing a mask to conceal his or her identity.

These issues have not been addressed by the Minnesota Supreme Court, and therefore this Court must attempt to predict "what that court would probably hold were it to decide the issue[s]." *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir. 1995). For a number of reasons, this Court believes that the Minnesota Supreme Court would hold that § 609.735 is violated only when someone wears a face covering for the purpose of concealing his or her identity.

⁹Defendants do not argue that wearing a face mask to slow the spread of COVID-19 fits within the "medical treatment" exception to § 609.735.

The original version of the statute was enacted in 1923.¹⁰ See 1923 Minn. Laws ch. 160, § 1. Like similar laws enacted during the same era, the law grew out of concerns over the rise of the Ku Klux Klan. See Wayne R. Allen, Note, *Klan, Cloth & Constitution: Anti-Mask Laws & the First Amendment*, 25 Ga. L. Rev. 819, 821–22 & n.17 (1991). The original version of the statute clearly required that the perpetrator act with the intent to conceal his or her identity: “It shall be unlawful for any person . . . to appear on any street or highway, or in other public places or any place open to view by the general public, with his face or person partially or completely concealed by means of a mask or other regalia or paraphernalia, *with intent thereby to conceal the identity of such person.*” Minn. Stat. § 615.16 (1941) (emphasis added). The original version of the statute also established a presumption: “The wearing of any such mask, regalia or paraphernalia by any person on any street or highway or in other public places or any place open to view by the general public, shall be presumptive evidence of wearing the same with intent to conceal the identity of such person[.]” *Id.*

The statute was amended in 1963. See 1963 Minn. Laws ch. 753, § 609.735. The purpose of the amendment was to delete the presumption in light of *State v. Higgin*, 99

¹⁰The statute was originally codified at Minn. Stat. § 10300 (1923) and later at Minn. Stat. § 615.16 (1941).

N.W.2d 902 (Minn. 1959).¹¹ Although the remainder of the statute was rewritten—and although the rewritten version did not contain an explicit intent requirement—the Advisory Committee Comment explained that the substance of the new version was intended to be the same as the substance of the original version (save for the deletion of the presumption). *See* Minn. Stat. § 609.735, 1963 Advisory Comm. Cmt. (“This contains the substance of Minn. St. § 615.16 which will be superseded. The presumption contained in the latter section has not been retained in view of *State v. Higgin*, 1960, 257 Minn. 46, 99 N.W.2d 902.”). Minnesota appears to regard such commentary as authoritative. *See State v. Lopez*, 908 N.W.2d 334, 336 n.3 (Minn. 2018) (citing *State v. Vredenberg*, 264 N.W.2d 406, 407 (Minn. 1978) (per curiam) as an example of a case in which there was “evidence that the Legislature did not intend to change the law”); *Vredenberg*, 264 at 407 (relying on an Advisory Committee Comment stating that the amended statute contained the substance of the earlier statute to find no change in the law).

In addition to the statutory history, the language of § 609.735 also suggests that intent to conceal is an element of the offense. The statute makes it unlawful to conceal one’s identity in a particular way—“by means of a robe, mask, or other disguise.” The

¹¹*Higgin* held that, when specific intent is an element of an offense, a jury can never be instructed that a given set of facts gives rise to a presumption of such intent. *Higgin*, 99 N.W.2d at 907.

word “other” in the phrase “robe, mask, or other disguise” indicates that the statute encompasses only the use of a robe or mask as a “disguise.” In other words, the statute does not make it unlawful to wear robes and masks; the statute makes it unlawful to wear *disguises*. “Disguise,” in turn, connotes something worn for the purpose of concealing one’s identity. Notably, three of the five exceptions to the statute—for religious beliefs, amusement, and entertainment—cover cases in which people could be wearing face coverings (such as Halloween costumes) with the intent to conceal their identities.

It is true that, if § 609.735 is not violated unless a person acts with intent to conceal his or her identity, then the exceptions for protection from weather and for medical treatment are redundant. But “[r]edundancy is not a silver bullet,” and “[s]ometimes the better overall reading of the statute contains some redundancy.” *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019).

Finally, the Court believes that the Minnesota Supreme Court would interpret § 609.735 to require intent to conceal one’s identity because, without such a requirement, the statute would lead to absurd results. *See Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000) (“courts should construe a statute to avoid absurd results and unjust consequences”). A construction worker could not wear a dust mask while remodeling a public space, a government official could not wear a hazmat suit

while cleaning up a chemical spill in a public place, an emergency medical technician could not wear a surgical mask while tending to a person injured on a public road, and a nail artist could not wear a mask while giving a manicure. The Minnesota Legislature could not possibly have intended to criminalize such a broad range of commonplace conduct. *Cf. In re Welfare of C.R.M.*, 611 N.W.2d 802, 809 (Minn. 2000) (“great care is taken to avoid interpreting statutes as eliminating mens rea where doing so criminalizes a broad range of what would otherwise be innocent conduct”).

Indeed, as plaintiffs interpret the statute, § 609.735 not only bars Governor Walz from *ordering* Minnesotans to wear face coverings in public places, but § 609.735 bars Minnesotans from *voluntarily* wearing face coverings in public places if they are doing so to slow the spread of COVID-19. It is very difficult to believe that the Minnesota Supreme Court would interpret § 609.735 to *forbid* a Minnesotan from wearing a face mask in a public place if her reason for doing so was to protect herself from being infected by a communicable disease or to prevent herself from infecting another person. Needless to say, such an interpretation of § 609.735 would raise significant constitutional concerns. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (upholding a mandatory-vaccination provision, but suggesting that the result would be different if the plaintiff could have shown that vaccination “would seriously impair his health, or probably cause his death”).

This is not to say that plaintiffs' position that § 609.735 conflicts with EO 20-81 is frivolous.¹² But plaintiffs' reply brief did not bother to respond to defendants' arguments concerning the proper interpretation of § 609.735; in fact, plaintiffs' reply brief said nothing at all about their centerpiece claim that § 609.735 conflicts with EO 20-81. This failure is particularly problematic in light of the fact that there are no Minnesota cases construing § 609.735. Under all of the circumstances, the Court finds that plaintiffs have not met their burden to show a "fair chance of prevailing" on their argument that EO 20-81 conflicts with § 609.735. *See Powell v. Noble*, 798 F.3d 690, 698 (8th Cir. 2015) (citation and quotation marks omitted).

b. Challenges to the Validity of EO 20-81

As noted, because plaintiffs have not clearly alleged that they intend to enter public indoor spaces without face coverings, they likely lack standing to pursue their challenges to the validity of EO 20-81 under the Elections Clause and the First Amendment. Even if they had standing, however, both of their challenges lack merit.

i. Elections Clause

The Elections Clause provides as follows:

The Times, Places and Manner of holding Elections for
Senators and Representatives, shall be prescribed in each

¹²For example, Minn. Stat. § 609.02, subd. 9, undermines defendants' argument regarding intent. But no party to this lawsuit has even cited § 609.02, subd. 9, much less addressed its impact on the issues now before the Court.

State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 4, cl. 1.

Plaintiffs' briefs and amended complaint seem to contend that EO 20-81 is a law regarding the "Manner of holding Elections" and violates the Elections Clause because it was not enacted by the "Legislature." After the Court pointed out at oral argument that EO 20-81 is a generally applicable provision that does not on its face govern elections, plaintiffs conceded that EO 20-81 does not, by itself, contravene the Elections Clause. Plaintiffs' claim now seems to be that EO 20-81 *in combination with the Secretary of State's guidance* contravenes the Elections Clause.

The Court disagrees. Plaintiffs have not cited, and the Court has not found, a single case holding that a generally applicable provision that incidentally applies at a polling place constitutes a regulation of the "Times, Places and Manner of holding Elections." Cf. *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (holding that the challenged law "bears no relation to the 'manner' of elections as we understand it, for in our commonsense view that term encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

The fact that the Secretary of State provided advice as to how to implement EO 20-81 at polling places does not somehow turn EO 20-81 into a law regarding the “Manner of holding elections.” As noted, the Secretary of State’s memorandum is not a law and does not purport to be binding. The Court rejects the notion that the state official charged with overseeing elections cannot provide guidance concerning how to implement a generally applicable provision at polling places without somehow running afoul of the Elections Clause. If that were the case, election officials would be barred from providing advice on a whole range of subjects, from how to handle disruptive voters to how to accommodate voters with disabilities. Plaintiffs’ claim under the Elections Clause is plainly meritless.

ii. First Amendment

Finally, plaintiffs allege that EO 20-81 violates the First Amendment because it does not permit them to enter indoor public spaces without face coverings as a way to protest the requirement that they wear face coverings when they enter indoor public spaces. This claim is meritless for two reasons: First, EO 20-81 does not implicate the First Amendment at all. Second, even if EO 20-81 did implicate the First Amendment, the order would easily pass muster under both *United States v. O’Brien*, 391 U.S. 367 (1968), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

The Supreme Court has recognized that expressive conduct may be entitled to a measure of First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (flag burning). In general, courts evaluate the validity of a law that regulates expressive conduct under the standard articulated in *O'Brien*. This does not mean, however, that every law regulating conduct is subject to scrutiny under *O'Brien* whenever an individual decides to violate the law for the purpose of sending a message.

If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into “speech” simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

Rumsfeld v. F. for Acad. & Inst’l Rts., Inc., 547 U.S. 47, 66 (2006) (“*FAIR*”) (rejecting First Amendment challenge to provision requiring institutions of higher learning to permit military recruiters access to students on the same basis as other recruiters or forfeit certain federal funds).

To merit First Amendment protection under *O'Brien*, then, the conduct regulated by the challenged law must be “inherently expressive.” *Id.* Here, as in *FAIR*, the conduct at issue is not inherently expressive. Like the hypothetical observer in *FAIR*—who, absent explanation, would have no idea why a military recruiter would be

interviewing law students somewhere other than on a law-school campus, *id.* — an observer would have no idea why someone is not wearing a face covering. Absent explanation, the observer would not know whether the person is exempt from EO 20-81, or simply forgot to bring a face covering, or is trying to convey a political message. That fact takes the conduct outside of the First Amendment protection afforded by *O'Brien*. *Id.* (“The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*.”).

Even if wearing or not wearing a face covering was inherently expressive, EO 20-81 is clearly constitutional, whether analyzed under *O'Brien* or *Jacobson*. Under *O'Brien*,

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

There is no question that Minnesota has the constitutional authority to enact measures to protect the health and safety of its citizens. *See Jacobson*, 197 U.S. at 24–25 (under the Constitution, states retain the general police power to enact reasonable regulations to protect public health and safety). Likewise, there is no question that

EO 20-81 furthers the substantial government interest in controlling the spread of a deadly and highly contagious disease. As discussed above, federal health officials recommend face coverings as an effective way to slow the spread of COVID-19, and this recommendation finds support in recent studies. Finally, EO 20-81 is unrelated to the suppression of free expression and has at most an incidental effect on First Amendment freedoms that is no greater than necessary; plaintiffs are free to express their opinions about EO 20-81 in every conceivable way *except* by violating its provisions and putting at risk the lives and health of their fellow citizens.

Likewise, EO 20-81 is constitutional under the standard established in *Jacobson*, which requires courts to examine whether a measure adopted to address a public-health crisis has a “real or substantial relation” to the crisis and, assuming that it has such a relation, whether it is “beyond all question, a plain, palpable invasion” of a constitutional right. *Jacobson*, 197 U.S. at 31; *see In re Rutledge*, 956 F.3d 1018, 1028–29 (8th Cir. 2020) (applying *Jacobson* to assess the constitutionality of a measure adopted in response to the COVID-19-pandemic). Again, there is no question that EO 20-81 bears a real and substantial relation to the public-health crisis caused by COVID-19. And EO 20-81 either does not implicate the First Amendment at all or, at most, has an incidental and trivial impact on First Amendment freedoms. In short, plaintiffs have no chance of success on their claim that EO 20-81, standing alone, violates the First Amendment.

C. Threat of Irreparable Harm, Balance of Harms, and the Public Interest

Plaintiffs have not shown a threat of irreparable harm. They likely lack standing to pursue any claims against the Ramsey defendants or the Secretary of State. Similarly, they likely lack standing to pursue any standalone challenge to the validity of EO 20-81. Even if they had standing to pursue a standalone challenge, the Court would likely lack jurisdiction to entertain their state-law attacks, and they would have virtually no chance of success on their federal-law attacks.

That leaves plaintiffs' claim that the alleged conflict between EO 20-81 and § 609.735 infringes their First Amendment rights. "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (citation and quotation marks omitted). This is the rare case, however, in which this general rule does not hold sway. Even if plaintiffs had a "fair chance of prevailing" on their claim that a conflict between EO 20-81 and § 609.735 violates their First Amendment rights, they have not shown a threat of irreparable harm, because they have not shown that there is any chance that they will actually be prosecuted for violating § 609.735 if they wear a face covering in compliance with EO 20-81.

The record before the Court contains no evidence that either § 609.735 or its predecessor has ever been enforced, despite being on the books for nearly a century.¹³ Meanwhile, over the past six months, millions of Minnesotans have worn face coverings in indoor public settings, such as stores, restaurants, salons, medical facilities, places of worship, offices, and classrooms. If plaintiffs' reading of § 609.735 is correct, then the statute has been violated hundreds of millions of times during the pandemic. And yet plaintiffs cannot point to a single instance of anyone being prosecuted under § 609.735 for wearing a face covering during the pandemic.

This is hardly surprising, as EO 20-81 itself makes clear that it is the state's official policy that complying with EO 20-81 does not violate § 609.735. Plaintiffs did manage to find a county attorney who was willing to opine that complying with EO 20-81 would violate § 609.735. (The county attorney did not address any of the evidence to

¹³Section 609.735 has been mentioned in only a handful of reported cases and has never been mentioned in connection with an actual prosecution under that statute. In *United States v. Pentaleri*, No. 07-CV-0298 (PAM/JJG), 2007 WL 4350798 (D. Minn. Dec. 11, 2007), the district court noted that there was probable cause to arrest because, among other reasons, the defendant appeared to have violated § 609.735. *Id.* at *5. There is no suggestion that the defendant was in fact arrested on that basis, however; instead, the court was applying the objective standard applicable under the Fourth Amendment. *Id.* In *Stepnes v. Ritschel*, 663 F.3d 952 (8th Cir. 2011), the Eighth Circuit mentioned that the plaintiff was booked for a violation of § 609.735. *Id.* at 958. There is no mention of the plaintiff wearing any kind of disguise, however, and the district-court decision indicates that the plaintiff was booked for unlawful gambling under a mistaken statutory citation. *Stepnes v. Ritschel*, 771 F. Supp. 2d 1019, 1028 (D. Minn. 2011).

the contrary discussed above.) Putting aside the fact that none of the plaintiffs live in this county attorney's jurisdiction or even allege that they plan to visit that jurisdiction, this county attorney does not go so far as to say that he has prosecuted or would prosecute someone for wearing a mask in the midst of this pandemic.

In addition, given that their alleged inability to vote in person is a focal point of plaintiffs' allegations of irreparable harm, it is worth noting that plaintiffs can vote in person without fear of prosecution under § 609.735. According to the Secretary of State's guidance, anyone who does not want to wear a mask at a polling place may vote curbside. Am. Compl. Ex. 2.

In contrast to the non-existent threat of prosecution under § 609.735, the threat of harm from an injunction prohibiting the enforcement of EO 20-81 is immediate and compelling.¹⁴ The Governor's order addresses an ongoing public-health emergency by requiring a measure that federal health officials recommend and that studies have

¹⁴Plaintiffs seek the following injunction: "The Defendants are enjoined from enforcing Minnesota's policy criminalizing wearing a mask and not wearing a mask in public places and in polling places." ECF No. 21. The Court notes, however, that even if an injunction were required to protect plaintiffs from a conflict between EO 20-81 and § 609.735, the Court would not necessarily have to enjoin the enforcement of EO 20-81. The Court could instead enjoin the enforcement of § 609.735 against anyone wearing a mask in compliance with EO 20-81. Given that the choice would be between enjoining a particular application of a never-enforced statute, on the one hand, and enjoining an executive order that is saving lives during an ongoing public-health crisis, on the other hand, the balance of harms and the public interest would overwhelmingly point toward enjoining enforcement of § 609.735.

predicted will save thousands of lives. Moreover, while plaintiffs focus on the alleged harm to their ability to vote in person, it is far more likely that enjoining enforcement of EO 20-81 would seriously disrupt the upcoming election by discouraging voter turnout and limiting the number of people willing to staff polling places. The balance of harms and the public interest both weigh very heavily against enjoining enforcement of EO 20-81.

Having carefully considered all of the *Dataphase* factors, the Court finds that plaintiffs are not entitled to a preliminary injunction.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT plaintiffs' motion for a preliminary injunction [ECF No. 8] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 2, 2020

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA VOTERS ALLIANCE;
ANDREW CILEK; KIM CROCKETT;
CRAIG ANDERSON; YVONNE
HUNDSHAMER; and CRAIG JONES,

Case No. 20-CV-1688 (PJS/ECW)

Plaintiffs,

v.

ORDER

TIM WALZ, in his official capacity as
Governor of Minnesota; STEVE SIMON,
in his official capacity as Secretary of
State of Minnesota; MARK V. CHAPIN,
in his official capacity as Hennepin
County Auditor; CHRISTOPHER A.
SAMUEL, in his official capacity as
Ramsey County Auditor; KEITH
ELLISON, in his official capacity as
Attorney General of Minnesota; MIKE
FREEMAN, in his official capacity as
Hennepin County Attorney; and JOHN
CHOI, in his official capacity as Ramsey
County Attorney,

Defendants.

Erick G. Kaardal, MOHRMAN, KAARDAL & ERICKSON, P.A., for plaintiffs.

Elizabeth C. Kramer, Megan J. McKenzie, and Kevin A. Finnerty, MINNESOTA
ATTORNEY GENERAL'S OFFICE, for defendants Tim Walz, Steve Simon, and
Keith Ellison.

Kelly K. Pierce and Jeffrey M. Wojciechowski, HENNEPIN COUNTY
ATTORNEY'S OFFICE, for defendants Mike Freeman and Mark V. Chapin.

Robert B. Roche, RAMSEY COUNTY ATTORNEY'S OFFICE, for defendants John Choi and Christopher A. Samuel.

On July 22, 2020, Governor Tim Walz issued Executive Order 20-81 ("EO 20-81"), which requires Minnesotans to wear face coverings in indoor public settings in order to slow the spread of COVID-19. Plaintiffs filed this action to challenge the legality of EO 20-81 and sought a preliminary injunction, which the Court denied. *See* ECF No. 51. Plaintiffs filed an appeal of that denial and now seek (1) a stay of this action pending appeal and (2) an injunction pending appeal.

With respect to plaintiffs' request for a stay of this action pending appeal: Ordinarily, the filing of a notice of appeal divests the district court of jurisdiction. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). However, the filing of a notice of appeal from an order disposing of a motion for a preliminary injunction "does not ipso facto divest the district court of jurisdiction to proceed with the cause with respect to any matter not involved in the appeal, or operate to automatically stay other proceedings in the cause pending the appeal." *Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) (per curiam).¹

¹Later Eighth Circuit cases seem to indicate that district courts still have jurisdiction over the merits notwithstanding the pendency of an appeal from an order (continued...)

Defendants have filed motions to dismiss this action. In support of those motions, defendants make arguments that are essentially the same as the arguments that they made in opposing plaintiffs' motion for a preliminary injunction. Under *Janousek*, then, the Court appears to lack jurisdiction to further address the merits of plaintiffs' claims, as those merits are intimately "involved in the appeal." Even if the Court has jurisdiction, however, the Court finds that a temporary stay is warranted, as the appeal is likely to resolve some of the legal issues in dispute, and a stay will not impose any hardship on defendants. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Frable v. Synchrony Bank*, 215 F. Supp. 3d 818, 821 (D. Minn. 2016) ("Relevant factors include the conservation of judicial resources and the parties' resources, maintaining control of the court's docket, providing for the just determination of cases, and hardship or inequity to the party opposing the stay.").²

¹(...continued)
 disposing of a motion for a preliminary injunction. *See, e.g., W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229–30 (8th Cir. 1986).

²Defendants cite the standard that applies under Fed. R. App. P. 8(a)(1)(A), which governs "a stay of the judgment or order of a district court pending appeal[.]" Plaintiffs are not seeking a stay of a court order or judgment, however (except insofar as their separate request for an injunction pending appeal could be interpreted as a request for a "stay" of the Court's order denying their motion for a preliminary injunction). Instead, plaintiffs are seeking to stay the litigation in this Court pending appeal.

The Court will therefore stay this case, but will order the parties to provide an update in 30 days as to the progress of the appeal in order to assess whether to continue the stay.

With respect to plaintiffs' request for an injunction pending appeal: As the parties recognize, plaintiffs' request is governed by the same factors that applied to their motion for a preliminary injunction, namely: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between that harm and the harm that granting the injunction will inflict on the other parties; and (4) the public interest. *See Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

The Court has already analyzed these factors and explained in detail the basis for its conclusion that plaintiffs are not entitled to a preliminary injunction. *See* ECF No. 51. For the same reasons, the Court determines that plaintiffs are not entitled to an injunction pending appeal. Only one matter merits comment:

Plaintiffs argue that the Court erroneously failed to apply *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), to assess their claim that EO 20-81 conflicts with Minn. Stat. § 609.735, which prohibits concealing one's identity "in a public place by means of a robe, mask, or other disguise." In *Mansky*, the Supreme Court addressed the validity of a Minnesota law prohibiting the wearing of a "political badge, political

button, or other political insignia” at polling places. *Mansky*, 138 S. Ct. at 1883; see Minn. Stat. § 211B.11, subd. 1. The Supreme Court held that the law violated the First Amendment because it broadly prohibited “political” apparel without defining the word “political,” instead empowering election judges at polling places to determine whether an individual’s apparel violated the ban. *Mansky*, 138 S. Ct. at 1888–91. As a result, the Court held, the law was not “capable of reasoned application.” *Id.* at 1892.

Plaintiffs argue that here, too, the combination of EO 20-81 and § 609.735 is not “capable of reasoned application” because these provisions directly conflict with each other. As the Court has already held, however, plaintiffs are not likely to succeed in showing that EO 20-81 does in fact conflict with § 609.735. Plaintiffs have not suggested any other reason why EO 20-81 or § 609.735 are not “capable of reasoned application.”

Plaintiffs contend that, in determining that EO 20-81 likely does not conflict with § 609.735, the Court should not have analyzed how the Minnesota Supreme Court would likely interpret § 609.735, but instead should have examined how election judges would interpret that provision. The Court disagrees.

Mansky concerned an explicit restriction of political speech at polling places that election judges were responsible for interpreting and applying. By contrast, § 609.735 is a generally applicable law that does not on its face regulate speech or have anything to do with elections or polling places. Nor is there any suggestion that election judges

have any role to play in interpreting or enforcing § 609.735; unlike in *Mansky*, plaintiffs have not cited a single instance in which any election judge has attempted to enforce § 609.735 at any polling place, despite the fact that Minnesota held a primary after EO 20-81 went into effect. In short, *Mansky* has little to do with this case.

The threshold question in this case is not how an election judge would interpret § 609.735, but rather whether § 609.735 in fact conflicts with EO 20-81—a legal question that depends on how the Minnesota Supreme Court would construe the language of § 609.735. Were it otherwise, every generally applicable state law that could conceivably apply to conduct at a polling place—including, say, laws prohibiting assault, disorderly conduct, or public intoxication—would be subject to challenge on the basis that some election judge working at some polling place somewhere in Minnesota might misconstrue it. *Mansky* cannot be stretched so far.

Plaintiffs’ motion for an injunction pending appeal is denied.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Plaintiffs’ motion to stay and for an injunction pending appeal [ECF No. 55] is GRANTED IN PART and DENIED IN PART.

2. The motion is GRANTED to the extent that it seeks a stay of this action, and this action is hereby STAYED until further order of the Court.
3. The motion is DENIED to the extent that it seeks an injunction pending appeal.
4. No later than 12:00 noon on Friday, November 13, 2020, the parties must file an update regarding the status of plaintiffs' appeal.
5. The November 18, 2020 hearing on defendants' motions to dismiss is CANCELED and will be rescheduled at a later date.

Dated: October 13, 2020

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-3072

Minnesota Voters Alliance, et al.

Appellants

v.

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

Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-01688-PJS)

ORDER

Appellants' motion for an injunction pending appeal has been considered by the court,
and the motion is denied.

October 26, 2020

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

/s/ Michael E. Gans