

STATE OF MINNESOTA  
IN SUPREME COURT

A20-0748



In re Proposed Recall Petition to  
Request the Recall of Timothy James Walz,  
Governor of the State of Minnesota.

O R D E R

A proposed petition to recall Governor Timothy James Walz has been submitted to the Office of the Secretary of State. The Secretary of State determined that the proposed petition meets the requirements of Minn. Stat. § 211C.04 (2018), and forwarded the proposed petition to the Clerk of the Appellate Courts in accordance with that statute. Minnesota Statutes § 211C.05, subd. 1 (2018), provides for review of the proposed petition by the Chief Justice of the Supreme Court. The court issued an order allowing the petitioners and Governor Walz to submit materials in support of or opposition to the petition. They both filed such materials.

An elected state official “may be subject to recall for serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office.” Minn. Stat. § 211C.02 (2018); *see also* Minn. Const. art. VIII, § 6 (stating recall can be based on “serious malfeasance or nonfeasance”).

The proposed petition challenges actions Governor Walz took in response to the COVID-19 pandemic. On March 13, 2020, Governor Walz declared a peacetime

emergency due to the COVID-19 pandemic. Governor Walz issued Emergency Exec. Order No. 20-20 (“the Stay-at-Home Order”) on March 25, 2020. Beginning on March 27, 2020, at 11:59 p.m., the order required “all persons currently living within the State of Minnesota . . . to stay at home or in their place of residence except to engage in the Activities and Critical Sector work set forth” in that order. The Stay-at-Home Order also stated that provisions in other emergency executive orders temporarily closing restaurants, bars, and other places of public accommodation remained in effect. While Governor Walz has since rescinded the Stay-at-Home Order, he has replaced that order with other emergency executive orders that continued the stay-at-home directive. The additional emergency executive orders referenced in the proposed petition were effective through May 31, 2020. *See* Emergency Exec. Order No. 20-33; Emergency Exec. Order No. 20-48; Emergency Exec. Order No. 20-56.

### **ANALYSIS**

The proposed petition makes two allegations. First, it alleges that Governor Walz “exceeded his authority” under the Emergency Management Act, Minn. Stat. ch. 12 (2018), when he issued the Stay-at-Home Order and that “in doing so, [he] violated the rights of the citizens of the State of Minnesota under the U.S. Constitution.” According to the proposed petition, Governor Walz violated Minn. Stat. § 12.21, subd. 3(7), because he did not cooperate with the President, federal agencies, or agencies in other states when he issued an order that “regulate[d] all commerce and intercourse within the State of Minnesota.”

Second, the proposed petition alleges that Governor Walz exceeded his authority under the Emergency Management Act when issuing Emergency Exec. Order Nos. 20-33, 20-48, and 20-56. The proposed petition asserts that in these orders, Governor Walz “expanded the existing criminal sanction threat” beyond what the Legislature authorized by making it a gross misdemeanor for a business owner to require or encourage their employees to violate the executive order.<sup>1</sup>

The proposed petition addresses Governor Walz’s affirmative conduct, arguing that the Governor exceeded his authority in the Stay-at-Home Order and three other emergency executive orders. These allegations fall within the scope of alleged malfeasance, rather than nonfeasance. *See In re Hatch*, 628 N.W.2d 125, 126 (Minn. 2001) (noting that malfeasance “focus[es] . . . on action taken by the official,” while “nonfeasance focuses on the official’s failure to act”).

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<sup>1</sup> The memorandum filed in support of the proposed petition includes additional allegations to support the claim that Governor Walz exceeded his authority under the Emergency Management Act. The memorandum also includes additional allegations to support the claim that petitioners’ rights have been violated. The applicable statutes, however, limit the initial review of a proposed recall petition to what is alleged in the petition. *See* Minn. Stat. § 211C.05, subd. 1 (noting that in conducting an initial review of a proposed recall petition, “[t]he justice . . . shall review the proposed petition to determine whether *it* alleges specific facts that, if proven, would constitute grounds for recall of the officer under the Minnesota Constitution, article VIII, section 6, and section 211C.02”) (emphasis added). While the statute authorizes “the persons proposing the petition [to] provide to the reviewing judge any materials supporting the petition,” this provision does not allow the petitioners to expand the allegations of the petition. *See id.* Rather, “[e]ach page of the petition must contain . . . the specific grounds upon which the state officer is sought to be recalled and a concise, accurate, and complete synopsis of the specific facts that are alleged to warrant recall on those grounds.” Minn. Stat. § 211C.03(2) (2018) (emphasis added). As a result, only the grounds for recall and facts alleged in the proposed petition will be considered.

The recall standard is necessarily a high one. *See* Minn. Const. art. VIII, § 6 (authorizing recall only for “serious malfeasance”). Accordingly, to determine whether sufficient grounds and facts have been alleged, I do not need to decide whether Governor Walz had the authority to issue the Stay-at-Home Order or the other emergency executive orders at issue. The question instead is whether, assuming the facts alleged in the proposed petition are true, Governor Walz committed malfeasance in doing so. *See* Minn. Stat. § 211.05, subd. 1 (directing the Chief Justice to review the petition to determine whether the allegations, if proven, would constitute grounds for recall).

“[M]alfeasance” has “five identifiable elements: 1. an intentional act; 2. that is unlawful or wrongful; 3. in the performance of the officer’s duties; 4. that is substantially outside the scope of the authority of the officer; and 5. that substantially infringes on the rights of any person or entity.” *In re Ventura*, 600 N.W.2d 714, 716 (Minn. 1999); *see also* Minn. Stat. § 211C.01, subd. 2 (2018) (defining malfeasance).

#### I.

With respect to the first element, Governor Walz argues that the proposed petition should be dismissed because it does not allege that he intentionally exceeded the authority granted to him under the Emergency Management Act. Malfeasance requires “the intentional commission of an unlawful or wrongful act.” Minn. Stat. § 211C.01, subd. 2. The Legislature has directed that statutes are to be interpreted according to the rules of grammar. *See* Minn. Stat. § 645.16 (2018). As applied here, the rules of grammar indicate that the adjective “intentional” modifies the noun “commission”; it does not modify the adjectives “unlawful or wrongful.” This interpretation is consistent with the “identifiable

elements” of malfeasance. *See Ventura*, 600 N.W.2d at 716 (stating the “identifiable elements” of malfeasance include “1. an intentional act; 2. that is unlawful or wrongful”). The Governor improperly attempts to rewrite the definition of malfeasance so that it reads: the commission of an intentionally unlawful or wrongful act. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) (“We cannot rewrite a statute under the guise of statutory interpretation”). The orders identified in the proposed petition were all signed by the Governor, approved by the Executive Council, and filed with the Secretary of State; that is, they were acts done intentionally. The proposed petition therefore alleges sufficient facts to satisfy the intentional act element of malfeasance.

## II.

The second element—unlawful or wrongful conduct—means “conduct that is contrary to a legal standard established by law, rule or case law.” *Ventura*, 600 N.W.2d at 719. The examination of this element must “turn . . . on a substantive legal standard,” and not on merely “the reviewing justice’s . . . subjective judgment about whether certain conduct is right or wrong.” *Id.*

The proposed petition questions the scope of the Stay-at-Home Order and whether a governor may require people to stay at home and temporarily close some businesses or public accommodations. According to petitioners, Minn. Stat. § 12.21, subd. 3(7), limits a governor’s authority to issue an emergency order that “regulate[s] all commerce and intercourse within the state” and “the everyday lives of Minnesota residents” to situations when a governor “cooperate[s]” with the President, federal authorities, or officials in other states. Minnesota Statutes § 12.21, subd. 3(7), authorizes the governor to cooperate with

federal officials and officials in other states “in matters pertaining to emergency management of the state and nation, including the direction or control of” the “conduct” of citizens, the “occupancy of facilities,” and “public meetings or gatherings.” Petitioners contend that Governor Walz did not cooperate with these other officials when he issued the Stay-at-Home Order.<sup>2</sup>

For his part, Governor Walz notes that he has express statutory authority to declare a peacetime emergency “when an act of nature . . . endangers life and property and local government resources are inadequate to handle the situation.” Minn. Stat. § 12.31, subd. 2(a). The governor also has the express authority to issue “necessary orders . . . to carry out the provisions” of the Emergency Management Act during a peacetime emergency that have “the full force and effect of law.” Minn. Stat. §§ 12.21, subd. 3(1), 12.32. And while the proposed petition relies on a “specific authority” provision in the Emergency Management Act, citing section 12.21, subdivision 3(7), Governor Walz, in response, looks to more “general authority,” citing section 12.21, subdivision 1, and asserts that the Stay-at-Home Order was a lawful exercise of his overall authority to act in emergency situations. He argues, in essence, that he had the statutory authority to regulate the scope of conduct

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<sup>2</sup> The Stay-at-Home Order states that “[o]n March 16, 2020, President Donald Trump issued guidelines to limit gatherings of more than 10 people. As of March 24, 2020, twenty-four states representing almost 200 million Americans have issued orders or public health directives closing non-essential businesses or limiting residents from participating in non-essential activities.” The Stay-at-Home Order also incorporates guidance issued by the U.S. Department of Homeland Security and uses this federal guidance as a “baseline for Minnesota’s efforts to ensure critical infrastructure and services are maintained while slowing the spread of COVID-19.” But the factual question of whether there was or was not cooperation cannot be resolved at this stage of the proceeding.

in the Stay-at-Home Order under the “general authority” provision in the Act, and that the “specific authority” set out in Minn. Stat. § 12.21, subd. 3, is not an exhaustive list of the governor’s powers and does not limit the authority granted by other sections of the Emergency Management Act.

Under the “general authority” provision, “[t]he governor (1) has general direction and control of emergency management” and “(2) may carry out the provisions of this chapter.” Minn. Stat. § 12.21, subd. 1. Emergency management means “the carrying out of emergency functions . . . to prevent, minimize and repair injury and damage resulting from disasters,” including, “without limitation,” “functions related to civilian protection.” Minn. Stat. § 12.03, subd. 4. A “disaster” includes “a situation that creates an actual or imminent serious threat to the health and safety of persons.” *Id.*, subd. 2.

Taken together, these statutory provisions, along with the governor’s authority to issue orders during a peacetime emergency, could be interpreted to give the governor the power to issue the Stay-at-Home Order. Under this interpretation, these statutes authorize the governor to issue emergency orders that are necessary for the direction and control of emergency management, which includes protecting civilians and preventing and minimizing injuries, during a peacetime emergency. *See* Minn. Stat. §§ 12.03, subds. 2, 4, 12.21, subd. 1, 12.31, subd. 2(a), 12.32.

At the same time, there is an argument that the specific authority provision on which petitioners rely—Minn. Stat. § 12.21, subd. 3(7)—proscribes the governor’s authority to regulate only when such regulation is done in “cooperation” with federal authorities or those from other states. Minn. Stat. § 12.21, subd. 3(7). Under this interpretation, the

governor's broad authority would be limited to these specific powers during a peacetime emergency.<sup>3</sup>

But it is not clear that the provision petitioners cite limits the governor's authority in the manner petitioners suggest. The plain language of subdivision 3 states the governor "may" cooperate with these entities, not that he must cooperate. *Id.* Nothing in this language imposes a limit on the general authority granted to the governor in section 1 of the same statute, which includes the "general direction and control of emergency management" and "carry[ing] out the provisions in this chapter." Minn. Stat. § 12.21, subd. 1. And this provision states that the governor may take these actions "[i]n performing duties under this chapter." *Id.*, subd. 3. Viewing section 12.21 as a whole, the discretionary powers identified in subdivision 3 could be interpreted to supplement, not limit, the governor's other authority granted in the Emergency Management Act.

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<sup>3</sup> When a peacetime emergency is declared, the governor is "authorize[d] . . . to exercise . . . the powers and duties conferred and imposed by this chapter for a peacetime emergency." Minn. Stat. § 12.31, subd. 3. Such a declaration also "invokes the necessary portions of the state emergency operations plan . . . and may authorize aid and assistance under the plan." *Id.* The Emergency Management Act expressly gives the governor some specific powers during a peacetime emergency. *See* Minn. Stat. § 12.34 (requiring people during a peacetime emergency "to perform services for emergency management purposes" and "commandeer[ing]" their personal property "for emergency management purposes"); Minn. Stat. § 12.381 ("provid[ing] for the safe disposition of dead human bodies" that involve deaths related to a peacetime emergency); Minn. Stat. § 12.61 (requiring people to get emergency medical care at "temporary care facilities" during a peacetime emergency). Because petitioners make no argument that this specific authority relating to a peacetime emergency declaration precludes the Stay-at-Home Order, there is no need to resolve how the specific duties assigned when a peacetime emergency is declared relate to the governor's more general authority over emergency management.



At this stage of the proceedings, however, the exact contours of the governor's authority do not need to be defined. It is enough to conclude here that Minn. Stat. § 12.21 does not clearly and unambiguously prohibit the Stay-at-Home Order and no Minnesota court had, prior to the Order being issued, interpreted the statute as prohibiting that conduct.

Because the Stay-at-Home Order was not “contrary to a legal standard established by law, rule or case law,” it is not “unlawful or wrongful” as that term has been defined in the recall context. *Ventura*, 600 N.W.2d at 719. As a result, with respect to the Stay-at-Home Order, the proposed petition does not allege facts that, if proven, would constitute malfeasance. *See id.* at 717–20 (stating that “[a]llegations in a proposed recall petition must be made with sufficient precision and detail to enable the challenged official and the electorate to make informed decisions in the recall process” and dismissing proposed recall petition of the governor, in part, because it did not allege facts that would establish one element of malfeasance); *see also In re Radinovich*, No. A13-0829, Order at 2–3 (Minn. filed May 20, 2013 (dismissing proposed recall petition of a state representative because it did not allege facts that would establish two of the elements of malfeasance); *In re Ward*, No. A13-0845, Order at 2–3 (Minn. filed May 20, 2013) (same); *In re Murphy*, No. A03-0594, Order at 3–4, 6 (Minn. filed June 5, 2003) (dismissing proposed recall petition of a state senator because it did not allege facts that would establish one element of malfeasance).

### III.

As a separate basis for recall, the proposed petition alleges that Emergency Exec. Order Nos. 20-33, 20-48, and 20-56 are unlawful because they contain a criminal penalty

for violating the orders that is not authorized by law. The Emergency Management Act makes it a misdemeanor to willfully violate an emergency order issued during a peacetime emergency. It states that,

Unless a different penalty or punishment is specifically prescribed, a person who willfully violates a provision of this chapter or a rule or order having the force and effect of law issued under authority of this chapter 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.

Minn. Stat. § 12.45.

The proposed petition claims that Governor Walz “expanded the existing criminal sanction threat” by making it a gross misdemeanor, as opposed to a misdemeanor, for a business owner, manager, or supervisor to require or encourage their employees to violate provisions of the order. The Governor responds that Minn. Stat. § 12.45 establishes a baseline criminal penalty for violation of emergency executive orders and expressly allows a different penalty or punishment to be prescribed for violating an emergency executive order. He contends that he has the authority to prescribe such a penalty or punishment, and that he lawfully did so in the three emergency executive orders at issue.

Resolution of this dispute requires interpretation of the phrase “[u]nless a different penalty or punishment is specifically prescribed,” Minn. Stat. § 12.45. An argument can be made that the governor has the statutory authority in an emergency order issued during a peacetime emergency to prescribe a different punishment for violating that order. But the introductory phrase in Minn. Stat. § 12.45 more likely refers to Minn. Stat. § 12.34, subd. 3, which prescribes a criminal penalty for violating that statute that is different than the penalty stated in Minn. Stat. § 12.45. Under this interpretation, a governor would have

no authority to vary the penalty. There is, however, no need to resolve these competing interpretations.

In order to constitute malfeasance, an act must “substantially infringe[] on the rights of any person or entity.” Minn. Stat. § 211C.01, subd. 2. The proposed petition contains no allegations of any harm, let alone substantial harm, to anyone from the gross-misdemeanor criminal sanction in the emergency executive orders at issue. Petitioners have not alleged that anyone has been charged with, or threatened to be charged with, a gross-misdemeanor for violating these orders. The petition does not allege that any petitioner is a business owner, manager, or supervisor who wanted to encourage or require their employees to violate these orders. As a result, with respect to Emergency Exec. Order Nos. 20-33, 20-48, and 20-56, the petition does not allege facts that, if proven, would constitute malfeasance.

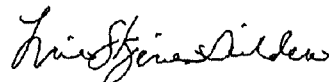
In sum, the allegations in the proposed petition for recall, even if proven, do not constitute malfeasance, and therefore no basis exists upon which to refer this matter to a special master.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the proposed petition for recall of Governor Walz be, and the same is, dismissed.

Dated: June 15, 2020

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lorie S. Gildea".

Lorie S. Gildea  
Chief Justice