STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1612

State of Minnesota, by Jan Malcolm,
Commissioner of Health, in her Official capacity,
Respondent,

vs.

Southwest School of Dance, LLC,
d/b/a Havens Garden,
Appellant.

Filed July 6, 2021
Affirmed; motion denied
Hooten, Judge

Ramsey County District Court
File No. 62-CV-20-5691

Keith Ellison, Attorney General, Kaitrin C. Vohs, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Nathan M. Hansen, North St. Paul, Minnesota (for appellant)

Veronica S. Newcomer, Leonard Fineday, White Earth, Minnesota (for White Earth Band of Ojibwe)

Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this appeal from a civil contempt judgment and the underlying temporary injunction requiring compliance with the governor's COVID-19 executive order restricting

restaurant service, appellant-restaurant argues that enforcement of the executive order violates appellant's constitutional right to equal protection in that restaurants located on Indian reservations in the state were exempted from the order. Because we conclude that the executive order does not violate appellant's constitutional right to equal protection, we affirm. Respondent-state also brought a motion to dismiss the appeal for mootness. Because we conclude that the issues raised by the appeal are not moot, the state's motion to dismiss is denied.

FACTS

On March 13, 2020, Minnesota Governor Tim Walz issued Emergency Executive Order No. 20-1 declaring a peacetime emergency due to the spread of the infectious disease COVID-19 and the resulting pandemic. Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020) (EEO 20-1). In EEO 20-1, Governor Walz ordered the Minnesota Department of Health to lead the coordination of Minnesota's response to COVID-19 in consultation with tribal nations, among others. Throughout the remainder of 2020, Governor Walz issued orders renewing and extending this state of emergency roughly every 30 days. Emergency Executive Orders Nos. 20-35 (Apr. 13, 2020), 20-53 (May 13, 2020), 20-75 (June 12, 2020), 20-78 (July 13, 2020), 20-83 (Aug. 12, 2020), 20-89 (Sept. 11, 2020), 20-92 (Oct. 12, 2020), 20-97 (Nov. 12, 2020), 20-100 (Dec. 14, 2020).

On November 18, 2020, Governor Walz issued Emergency Executive Order No. 20-99 prohibiting restaurants, bars, tobacco establishments, and other places of public

accommodation offering food, beverage, or tobacco products from operating for on-premises consumption from November 20, 2020, through December 18, 2020. Emerg. Exec. Order No. 20-99, *Implementing a Four Week Dial Back on Certain Activities to Slow the Spread of COVID-19* (Nov. 18, 2020) (EEO 20-99). However, EEO 20-99 contained the following exemption for tribal activities and lands: "Activities by tribal members within the boundaries of their tribal reservations are exempt from the restrictions in this Executive Order but may be subject to restrictions by tribal authorities." Governor Walz encouraged "state and local licensing and regulatory entities that inspect businesses for compliance with rules and codes to protect the public" by assessing regulated businesses' compliance with the executive order and using any existing enforcement tools to bring businesses into compliance with its terms. EEO 20-99.

Appellant Southwest School of Dance, LLC, d/b/a Havens Garden, has a license from Southwest Health and Human Services (SWHHS) to operate Havens Garden as a food and beverage service establishment in Minnesota. On November 23, 2020, SWHHS contacted appellant about Havens Garden's Facebook advertisement for an event featuring live music, food, and an open microphone on November 27, 2020. Appellant informed SWHHS that it intended to proceed with the event and provide indoor dining. Two days later, SWHHS sent a letter to appellant stating that "[i]ndoor dining and the planned gathering scheduled for November 27 from 9pm-11pm would be considered a violation of [E]EO 20-99, requiring SWHHS inspection staff to proceed with enforcement action."

On November 27, 2020, SWHHS conducted an onsite inspection of Havens Garden and observed approximately 80 to 100 people consuming food and beverages inside the

restaurant. After determining that Havens Garden violated EEO 20-99 by remaining open to the public for on-premises consumption of food and drink, SWHHS issued an order on December 9, 2020, requiring appellant to cease and desist operation of Havens Garden. After being served with the cease and desist order, Havens Garden posted a video to its public Facebook page announcing its intention to remain open for on-premises consumption of food and beverages on December 9, 10, and 11, 2020.

On December 11, 2020, the state by its commissioner of health filed a civil complaint, along with a motion for a temporary restraining order (TRO) and a temporary injunction against appellant. In its motion, the state asked the district court to (1) enjoin appellant from providing on-site consumption services at Havens Garden in violation of EEO 20-99, and (2) order appellant to comply with EEO 20-99 and any future executive orders applying to restaurants, bars, or food and beverage establishments. The next day, the district court granted the state's motion for a TRO and ordered appellant to certify in writing that it was no longer providing on-premises consumption services within one hour after being served a copy of the TRO. The state served appellant with a copy of the TRO on December 14, 2020, at 10:50 a.m. There is no evidence in the record that appellant certified in writing that it was no longer providing on-premises consumption services within one hour of being served the TRO.

Appellant filed a responsive memorandum opposing the state's motion for a temporary injunction, arguing that EEO 20-99 violated its constitutional right to equal protection by discriminating in favor of tribal restaurants. After a hearing on December 16, 2020, the district court issued a temporary injunction enjoining appellant from taking

any action violating EEO 20-99 including, but not limited to, providing onsite consumption services at Havens Garden. The district court ordered appellant to comply with EEO 20-99 and any future executive orders applying to restaurants, bars, or food and beverage establishments. The district court also ordered appellant to certify its compliance with the temporary injunction within one hour after being served with a copy of the order for the temporary injunction. The state served appellant with a copy of the order for the temporary injunction on December 17, 2020, at 2:58 p.m. There is no evidence in the record that appellant certified its compliance with the order for the temporary injunction within one hour of being served.

Because appellant refused to comply with the TRO and order for the temporary injunction, the state moved the district court to order appellant to show cause for why it should not be held in contempt of court. At the December 18, 2020, hearing on the state's motion to show cause, appellant informed the district court that it would not comply with the district court's orders or Governor Walz's executive orders, arguing that they were "unlawful and unconstitutional." The district court found appellant to be in constructive civil contempt for its failure to comply with the district court's December 12 and 16 orders, and ordered appellant to pay a $250 fine for each day Havens Garden remained open in violation of the district court's order, beginning on December 19, 2020. In the contempt order, the district court states that its finding of civil contempt shall be vacated and dismissed "[u]pon [appellant's] filing of an affidavit of compliance demonstrating compliance" with the district court's order. There is nothing in the record indicating that appellant has certified or demonstrated compliance with the district court's December 12,

16, and 18 orders. Appellant now appeals the district court's civil contempt judgment and the underlying temporary injunction.[1]

[1] In its brief, the state argues that the contempt judgment is not appealable because the contempt finding could be purged upon appellant's certification of compliance with the district court's order. A contempt order is not appealable if it "direct[s] punishment only if [a party] fails to purge himself of his contempt." *See Becker v. Becker*, 217 N.W.2d 849, 850 (Minn. 1974). The contempt judgment in this case imposed daily fines for noncompliance, and it is not clear whether accumulated fines were subject to the purge conditions in the judgment. Thus, we reject the argument that the judgment was conditional and not appealable. *See Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 440 (Minn. App. 1986) (holding appealable contempt order that "found contempt and imposed fines, costs and attorney fees").

After this appeal was argued and submitted for decision, the state filed a motion to dismiss the appeal as moot. The state explains that EEO 20-99 is no longer in effect and that Minnesota bars and restaurants are no longer subject to "occupancy limits, distancing, or other sector-specific limits." Thus, the state asserts, appellant's challenge to the constitutionality of EEO 20-99 is moot. The "general rule is that when, pending appeal, an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot." *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). But "an appeal is not moot when a party could be afforded effective relief." *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016). Although the requirements of the district court's injunction might be vitiated by subsequent events, appellant also seeks review of the contempt judgment stemming from violations of the injunction. And we could grant effective relief to appellant by reversing the contempt judgment. Moreover, an appeal will not be dismissed as moot "where collateral consequences attach to the judgment." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). The parties represent that proceedings to revoke appellant's food and beverage license are pending before the Office of Administrative Hearings and that the constitutionality of EEO 20-99 has been challenged in those proceedings. Because those license proceedings turn at least in part on the constitutionality of EEO 20-99, the district court's rulings could have collateral effects. For these reasons, we are not persuaded that this appeal is moot, and we deny the state's motion to dismiss.

DECISION

The United States Supreme Court has recognized tribal sovereignty for more than a century and a half, explaining that under federal law, "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S. Ct. 905 (1991) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831)). As Chief Justice John Marshall described nearly two centuries ago, Indian tribes are "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . ." *Worcester v. Georgia*, 31 U.S. 515, 519 (1832). Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulating their internal and social relations." *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710 (1975) (quotation omitted). This "unique legal status of Indian tribes . . . permits the Federal Government to enact legislation singling out tribal Indians," even where that legislation "might otherwise be constitutionally offensive." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–501, 99 S. Ct. 740, 761 (1979).

Nonetheless, appellant argues that EEO 20-99 violates the Equal Protection Clauses of both the Minnesota and the United States Constitutions by discriminating in favor of tribal restaurants, and that the district court therefore erred by enforcing it by issuing a temporary injunction against appellant and finding appellant in constructive civil contempt. "Issues of constitutional interpretation are questions of law which we review de novo."

Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 283 (Minn. 2004). Like statutes, the governor's emergency executive orders have "the full force and effect of law." Minn. Stat. § 12.32 (2020). Accordingly, we presume executive orders to be constitutional and recognize that our power to declare an executive order unconstitutional should be exercised with extreme caution and only when absolutely necessary. *Cf. In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989) ("Minnesota statutes are presumed to be constitutional, and the power to declare a statute unconstitutional is "exercised with extreme caution and only when absolutely necessary."). Additionally, the party challenging the constitutionality of an executive order bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional provision. *Cf. id.* ("The party challenging a statute has the burden of demonstrating beyond a reasonable doubt a violation of some provision of the Minnesota Constitution.").

Appellant argues that: (1) we must apply the similarly-situated test, which is satisfied because appellant is similarly situated to restaurants located on tribal reservations; (2) rational-basis scrutiny applies; and (3) enforcement of EEO 20-99 fails rational-basis review. We address each argument in turn.

A. We need not apply the threshold similarly-situated test.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution provides that "[n]o member of this state shall be disfranchised or deprived of any of the

rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2.

"The equal protection clauses of both the United States and Minnesota constitutions mandate that all similarly situated individuals shall be treated alike." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. June 19, 2007). Under both clauses, "only invidious discrimination is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted). Equal protection "does not forbid [all statutory] classifications." *In re Welfare of M.L.M.*, 813 N.W.2d 26, 37 (Minn. 2012). Rather, "[i]t simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* (quotation omitted).

Equal protection analysis involves a three-tiered approach depending on the nature of the individual right at issue. *Back v. State*, 902 N.W.2d 23, 28 (Minn. 2017). Classifications based on race, alienage, or national origin, and laws affecting fundamental rights protected by the Constitution, are subject to strict scrutiny. *In re Welfare of M.L.M.*, 781 N.W.2d 381, 388 (Minn. App. 2010), *aff'd*, 813 N.W.2d 26 (Minn. 2012). Laws implicating these fundamental rights or suspect classifications "will be upheld only if [they are] necessary to serve a compelling state interest." *Id.* An intermediate level of scrutiny, which requires some laws to be substantially related to an important government objective, is used to assess quasi-suspect classifications such as those based on gender. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 569 (Minn. App. 2020). Legislation that does not affect a fundamental right or employ a suspect or quasi-suspect classification

is examined using the rational-basis test. *Id.* Such legislation is upheld so long as it is "rationally related to a legitimate state interest." *Back*, 902 N.W.2d at 29 (quotation omitted).

"[I]n order to establish that [an appellant] has been denied equal protection of the laws, [the appellant] must show that similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). This is a "threshold question in an equal protection claim," regardless of the level of scrutiny to be applied. *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018). However, we need not apply the similarly-situated test when "we can decide the case without great difficulty by applying the proper degree of scrutiny to the classifications created by the Legislature." *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015).

The United States Supreme Court has consistently rejected claims that laws treating tribal members as a distinct class violate equal protection. *See Washington*, 439 U.S. at 499–502, 99 S. Ct. at 760–762 (1979); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–90, 97 S. Ct. 911, (1977); *Fisher v. District Court*, 424 U.S. 382, 390–91, 96 S. Ct. 943 (1976); *Morton v. Mancari*, 417 U.S. 535, 551–55, 94 S. Ct. 2474 (1974). This extensive precedent allows us to decide this case without great difficulty by determining and applying the same degree of scrutiny applied in those cases, and we therefore need not determine whether Havens Garden is similarly situated to restaurants located on tribal reservations.

B. Rational-basis scrutiny applies.

Recognizing the unique legal status of tribes, the United States Supreme Court has repeatedly upheld legislation that singles out Indians for particular and special treatment. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055 (1974) (providing welfare benefits to Indians, but only those who live "on or near" reservations); *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705, 63 S. Ct. 920 (upholding exclusive tax immunity for certain Indians); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 93 S. Ct. 1257 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209, 86 S. Ct. 1459 (1966), *aff'g* 244 F. Supp. 808 (E.D. Wash. 1965) (limiting right to inherit reservation land only to Indians); *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959) (holding that state courts lacked jurisdiction over dispute between non-Indian, on-reservation retailer and Indian debtors).

In *Mancari*, the Supreme Court rejected an equal-protection challenge to a statutory hiring preference for Indians in the Bureau of Indian Affairs (BIA) after applying rational basis review. 417 U.S. at 555, 94 S. Ct. at 2485. Relying upon the "unique legal status" of tribal members, the Court held that statutory preferences favoring Indians over non-Indians were not unconstitutional classifications and that laws affording Indians special treatment are constitutional, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Id.* at 555, 94 S. Ct. at 2485. The Court also explained that statutory preferences for [] Indians are not racial but political when the preferences apply to members of federally recognized tribes. *Id.* at 553 n.24, 94 S. Ct. at 2484 n.24. Although the Supreme Court in *Mancari* considered a challenge to a classification contained in a federal law and relied on the unique obligation

of Congress to federally-recognized Indian tribes under the trust doctrine,[2] "[s]tate action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes." *Greene v. Comm'r of Human Servs.*, 733 N.W.2d 490, 497 (Minn. App. 2008), *aff'd*, 755 N.W.2d 713 (Minn. 2008). Thus, classifications based on tribal membership in state laws that promote the Congressional policy of tribal self-governance, benefit tribal members, or implement or reflect federal laws are subject to rational-basis review. *See Greene v. Comm'r of Human Servs.*, 755 N.W.2d 713, 727 (Minn. 2008)

C. EEO 20-99 satisfies rational basis review.

Because EEO 20-99 exempts activities by tribal members on reservations, and therefore classifies restaurants based on tribal membership, we must uphold the emergency executive order under the United States Constitution "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 at 554–55, 94 S. Ct. at 2484–85. Legislation involving preferences that directly promote Indian interests in self-governance passes rational basis review because "such regulation is rooted in the unique status of Indians as a separate people with their

[2] The trust doctrine is a source of federal responsibility to Indians requiring the federal government to support tribal self-government and economic prosperity, duties that stem from the government's treaty guarantees to protect Indian tribes and respect their sovereignty. *Mancari*, 417 U.S. at 541–542, n.10; 94 S. Ct. at 2478, n.10. ("'We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection.'" (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 8 (1934)).

own political institutions," *United States v. Antelope*, 430 U.S. 641, 646, 97 S. Ct. 1395, 1399 (1977) (quotation omitted), and is therefore rationally tied to the fulfilment of the trust doctrine.

EEO 20-99's exemption of restaurants on tribal reservations furthers the ability of tribal authorities to self-govern their members on public health issues related to COVID-19. This exemption is rationally related to the legitimate governmental interest of protecting and promoting tribal sovereignty, fostering Indian interests in self-governance on public health issues related to COVID-19, and fulfilling Minnesota's unique obligation toward Indians. EEO 20-99 therefore does not violate the equal protection clause of the United States Constitution.

Additionally, subject to one exception that is inapplicable here, "the principle we apply in analyzing laws subject to rational basis review under the Minnesota Constitution is the same principle applied to such laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020). Thus, under rational basis review of EEO No. 20-99, our state constitution mandates no different result than the United States Constitution.

Applying rational basis review, we conclude that the distinction between restaurants on tribal and non-tribal land in EEO 20-99 does not violate the United States and Minnesota Constitutions' guarantees of equal protection. Therefore, the district court did not err by

issuing a temporary injunction against appellant and finding appellant in constructive civil contempt.[3]

Affirmed; motion denied.

[3] We need not determine whether 25 U.S.C. § 231 or Minn. Stat. § 12.32 authorize Governor Walz to exercise jurisdiction over bars and restaurants on tribal lands during a state emergency because appellant failed to raise these arguments to the district court and therefore forfeited them on appeal. *State v. Balandin*, 944 N.W.2d 204, 220 (Minn. 2020). ("We consider issues that are not raised in the district court but are raised for the first time on appeal to be forfeited.").