NO. A21-0626

State of Minnesota

In Supreme Court

Drake Snell, et al.,

Appellants,

vs.

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

Respondents.

APPELLANTS' REPLY BRIEF

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Appellants sued Governor Walz and Attorney General Ellison in August 2020 because they imposed an indoor mask mandate via Emergency Executive Order 20-81 on Minnesotans in July 2020. Appellants have chiefly argued, and will continue to argue if given the opportunity, that the mask mandate and the Minnesota Emergency Management Act enabling it violate the separation of powers provisions of the Minnesota Constitution. This Court has yet to decide these important questions squarely presented by this case. But the court of appeals chose not to address them because Governor Walz, without *any* help from the legislature, unilaterally terminated the mask mandate in May 2021 while this case was on appeal. Governor Walz thus voluntarily ceased his challenged conduct before appellate review of the merits of this case could be completed. It is an easy fit for the voluntary-cessation exception to mootness, which this Court should embrace, and it also fits well within the Court's current mootness jurisprudence.

Against this backdrop, the Court faces three interrelated questions derived from the issue on review, and the Court should decide this appeal in the following order. First, based on the Court's established jurisprudence, did the court of appeals err in holding that Governor Walz' termination of the mask mandate also moots this case? Second, if these doctrines do not except this case from the mootness doctrine, should the Court recognize the voluntary-cessation doctrine? And third, if the Court does recognize that doctrine, does this case fit within it? To Appellants, the answer to all three of these questions is, "yes."

This case is both "capable of repetition, yet evading review" and involves matters of statewide significance that are functionally justiciable, and the Court should recognize

the voluntary-cessation doctrine. The Court should hold that Governor Walz' termination of the mask mandate does not stop Minnesota courts from determining whether issuance of the mask mandate violates the Minnesota Constitution. Notably, even as it considers the importance of this case on a statewide basis, the Court need not weigh in on the efficacy of masks or the wisdom of Governor Walz' policies in this matter.

There are substantial policy reasons supporting Appellants' position here. First, *amicus curiae* Institute for Justice is correct: Minnesota courts should be as protective, if not more so, of individual rights as federal courts are. This Court has consistently approved doctrinal positions more protective of individual rights and Court access than comparable federal court doctrine, and it should not change course here. Second, the Court should not allow government defendants to defend fleeting executive orders based on a temporary injunction or emergency standard, as Respondents advocate. Minnesota courts should hear the *merits* of citizens' grievances in state court, and not pursuant to the *Dahlberg* test on expedited schedules. Third, the Court should encourage resolution of issues already preserved, pleaded, and briefed instead of permitting gamesmanship and waste of judicial resources. In other words, there is no reason to invite future, repetitive litigation over the merits of the Minnesota Governor's invocation of emergency powers under Chapter 12, as written, and there is every reason to apply measured judicial consideration to those actions. Fourth, as *amicus curiae* The Forum on Constitutional Rights rightly points out, exercising appellate review in the context of the executive branch's use of emergency powers is crucial to protecting individual rights against illegal government intrusion.

Appellants therefore ask the Court to reverse the judgment of the court of appeals

and remand to the court of appeals to decide this case on its merits.

I. Respondents Should Bear the Burden to Demonstrate That This Case Is Moot and That No Exception to Mootness Applies.

Respondents claim that Appellants bear the burden of demonstrating that an exception to mootness applies, across the board. Resp. Br. 38 (citing *In re Welfare of K.-A.M.C.*, No. A13-0512, 2013 Minn. App. Unpub. LEXIS 785 (Minn. Ct. App. Aug. 19, 2013)). This is incorrect.

First, related to the voluntary-cessation exception to mootness, defendants asserting mootness because of their rescission of challenged conduct bear the "heavy burden of persuading the court" that "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs.*, 528 U.S. 167, 189 (2000). This standard puts the burden on the party which "creates" mootness. "Equity will not aid a volunteer." *Merrimac Mining Co. v. Gross*, 12 N.W.2d 506, 510 (Minn. 1943).

Second, related to the capable-of-repetition-yet-evading-review exception to mootness, it does appear that some federal courts and the unpublished *In re Welfare of K.-A.M.C.* court of appeals decision require plaintiffs to carry the burden on the capable-of-repetition-yet-evading-review exception, even though defendants carry the burden on the voluntary-cessation exception. *See, e.g., Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1215 (10th Cir. 2015) ("Mr. Ind. also relies on…whether the issue is a wrong capable of repetition which will evade review. In contrast to the voluntary cessation exception, which places the burden of proof on the defendant, the plaintiff bears the burden of establishing

the issue is a wrong capable of repetition yet evading review."). However, to Appellants' knowledge, this Court has not addressed the burden related to the capable-of-repetition-yet-evading-review doctrine. Appellants therefore submit that the burden should be on the defendant, like with the voluntary-cessation exception.

As to the "statewide significance" doctrine, it is unclear which party carries the burden. The Court's recent cases appear to suggest that this is more of a Court-directed balancing test without assigning burden to either party. *See, e.g., In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020).

II. The Court of Appeals Erred in Its Application of Existing Mootness Jurisprudence to This Case.

Governor Walz still claims the "capability" to declare a new peacetime emergency and issue another mask order. Emergency executive orders—especially those lasting *less than a year*—are perhaps the most prone to run into mootness issues. And there is no question that the people of Minnesota are intimately affected by executive orders like EO 20-81, which forced them to wear masks on their faces in public indoor settings. Repeated litigation over the same principles, instead of a final decision on the merits of the issues raised, is a waste of judicial resources. Applying the Court's existing mootness exceptions to this case conserves judicial resources and allows important questions to be answered without delay.

A. The Capable-of-Repetition-Yet-Evading-Review Doctrine Applies Here.

Respondents present a view of the capable-of-repetition-yet-evading-review doctrine that too narrowly defines the "capable of repetition" prong and misunderstands

"evading review." The Court should hold that this case falls within the exception.

1. Capable of repetition.

Respondents argue that their actions are not capable of repetition and could not be "reasonably expected" to recur. Resp. Br. 40-41. Their analysis is, however, bound up in whether the repetition is more probable than not, which fails this Court's "capable of repetition" test adopted from the U.S. Supreme Court. This Court applies "capability" as related to *reasonable* expectations, not *probable* expectations. *Kahn v. Griffin*, 701 N.W.2d 815, 822-23 (Minn. 2005). That formulation considers whether an action is *capable* of recurring, not whether it is *probable* that it would recur. *E.g., Honig v. Doe*, 484 U.S. 305, 342 n.6 (1988) (Rehnquist, C.J., concurring).

Respondents seem to ignore *Kahn*. Resp. Br. 40-45. Appellants explained why it is a good analogy, Appellants' Br. 32-33, but one other aspect of *Kahn* bears noting. The *Kahn* Court, pointing to the federal district court's analysis, noted that "[t]he situation presented by this case will not likely reappear for twenty years in the City of Minneapolis, but it is likely to reappear somewhere in Minnesota after each decennial census." 701 N.W.2d at 823. The Court thus relied on the premise that the redistricting statute would have a broader effect than Minneapolis alone every ten years. *Id.* Consistent with *Kahn*, it is not only important whether the Minnesota Governor may attempt to reimpose a mask mandate; *it is also important* whether a Governor might apply Chapter 12 to arrogate legislative power based on *other* claimed emergencies. Like the redistricting statute and constitutional provisions in *Kahn*, Chapter 12 and Article III, Section 1 of the Minnesota Constitution are at issue in every declared emergency in this state.

Appellants acknowledge that Governor Walz has not indicated a present intent to reimpose a mask mandate. Resp. Br. 41. But that is not the extent of the reach of this case; as *Kahn* indicates, Respondents' version of the capable-of-repetition-yet-evading-review doctrine is too narrow. Contrary to Respondents, Minnesotans can reasonably expect peacetime emergencies to be declared and emergency orders to be issued on a regular basis. Governor Walz has declared two peacetime emergencies in 2022 alone, related to local flooding.[1] In 2021, Governor Walz declared two peacetime emergencies related to the killing of Daunte Wright.[2] He based each of these orders on authority derived from Chapter 12. *Id.* Governor Walz has also claimed that "climate change" is an "existential threat" that "threatens Minnesotans' health and wellbeing" and merits government intervention.[3] Under Governor Walz' interpretation of Minn. Stat. §12.31, as Appellants already showed, Appellants' Br. 7-8, Governor Walz claims he needs *zero* factual basis to declare an emergency. Emergency orders using Chapter 12's broad grant of legislative power are capable of repetition.

Here, the Court does not *need* to look beyond the possible reimposition of a mask

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[1] Emergency Executive Order 22-13, May 19, 2022, *available at* https://mn.gov/governor/assets/EO%2022-13_tcm1055-528554.pdf; Emergency Executive Order 22-08, April 24, 2022, *available at* https://mn.gov/governor/assets/EO%2022-08_tcm1055-526260.pdf.

[2] Emergency Executive Order 21-20, April 19, 2021, *available at* https://mn.gov/governor/assets/EO%2021-20%20Final_tcm1055-476993.pdf; Emergency Executive Order 21-17, April 12, 2021, *available at* https://mn.gov/governor/assets/EO%2021-17%20Final_tcm1055-476250.pdf.

[3] Executive Order 19-37, Dec. 2, 2019, *available at* https://mn.gov/governor/assets/2019_12_2_EO_19-37_Climate_tcm1055-412094.pdf.

mandate to find that this case is capable of repetition. But if that is not persuasive enough, the Court *can and should*, consistent with its reasoning in *Kahn*, consider the reasonable expectation that peacetime emergencies which impact civil rights and raise constitutional questions will recur. In either approach, this case is "capable of repetition," and the Court should remand to the court of appeals to determine whether Governor Walz' mask mandate is preempted by contrary state law, and whether Chapter 12's enabling statutes, which allowed Governor Walz to reorder the social and economic fabric of this state, are constitutional.

2. Evading review.

The mask mandate was in place for less than 10 months. One day was too long a mandate to Appellants, but 10 months was not long enough for the courts to decide this case *on its merits*, as opposed to a decision under temporary injunction standards.

Under this Court's precedent, the relevant consideration as to whether a case, by its nature, is "evading review" is whether the "merits" of the case can be decided within the applicable time window. *State ex rel. Young v. Schnell*, 956 N.W.2d 652, 663 (Minn. 2021). In *Young*, a 2021 decision, this Court held that a July 2017 habeas petition was not moot even though the petitioner had been released from incarceration in December 2017, and the appeal was decided in May 2018. *Id.* at 657, 661.

Respondents attempt to cabin "evading review" to a subset of cases much narrower than this Court's and the U.S. Supreme Court's view of "evading review". Resp. Br. 43-44. The U.S. Supreme Court has held that 2 years is not enough time to decide a case on its merits. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016) (a

procurement contract that expires in two years does not permit judicial review); *S. Pac. Terminal Co. v. Interstate Commerce Commerce*, 219 U.S. 498, 514 (1911) (two-year order from the Interstate Commerce Commission too brief to review before technical mootness).

Plaintiffs like Appellants here should not be forced to litigate emergency orders under a heightened, deferential standard of review; they are entitled to cool judicial consideration based on the merits of the case. *E.g., Buzzell v. Walz*, No. A20-1561, 2022 Minn. LEXIS 179 (May 18, 2022). Plaintiffs should be able to bring cases on significant legal issues like these to Minnesota's highest court in fewer than 17 months and not find the courthouse doors closed to them. From the opposite perspective, executives should not be able to create barriers to judicial review by decreeing emergency orders with no substantive limits over short periods of time. This case "evades review."

The example of *County of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020), *vacated as moot by County of Butler v. Governor of Pa.*, 8 F.4th 226 (3d. Cir. 2021), illustrates Appellants' point. In that case, the plaintiffs brought a Rule 57 speedy declaratory judgment action on May 7, 2020 related to Pennsylvania Governor Wolf's COVID-19 orders, which included an expedited trial on the merits on May 27, 2020. *County of Butler*, 2020 U.S. Dist. LEXIS 93484, at *1-2. The plaintiffs there prevailed on September 14, 2020, 486 F. Supp. 3d at 928, but while the case was on appeal, Pennsylvania passed laws nullifying some of the Governor's orders. *Cty. of Butler*, 8 F.4th 226 at 230 (3d Cir. 2021). Thus, even though the plaintiffs did everything they could to expedite the case, by the time the Third Circuit reviewed the case in August 2021, that court refused to decide the merits of the case. *Id.* The Third Circuit was wrong to vacate

that decision; it was impossible for that case to complete appellate review before technical mootness set in. This Court should avoid that pitfall and hold that cases like this one are "evading review" by their nature.

The cases related to Governor Walz' orders cited by Respondents also support Appellants here. Related to EO 20-81, Respondents admit that *Minnesota Voters Alliance v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020), never got full appellate review. Resp. Br. 44 n.36. Respondents fail to note that the case focused on the legality of the mask mandate vis-à-vis *voting in the 2020 election*, and by the time full appellate review would have occurred, the 2020 election was already in the rearview mirror. *Minn. Voters All.*, 492 F. Supp. 3d at 825-26. An appeal in that case certainly *could* have continued under the capable-of-repetition-yet-evading-review doctrine. Even so, there are myriad factors, including cost of litigation, which often deter plaintiffs represented by private attorneys from continuing lawsuits after injunctive relief is denied.

Another problem with Respondents' analysis, related to both *Minnesota Voters Alliance* and *Free Minnesota Small Business Coalition v. Walz*, is that both cases sought emergency review and were analyzed under that framework. As noted above, there is no reason that Appellants should be *required* to proceed under an injunctive relief standard instead of on the merits.

Again, this case was initiated within a month after the mask mandate was issued. Respondents set a December 2020 hearing date, in which the district court heard cross-motions, including motions on the merits of this case. Appellants appealed the decision timely. The Governor's partial rescission of the mask mandate should not prevent this

Court from reviewing the *merits* of the Governor's use of Chapter 12 powers. It is likely that this Court will face these questions again.

B. This Is an Important Case with Statewide Significance.

Respondents unfairly cabin the "statewide significance" doctrine to cases filed on an emergency basis. The doctrine encompasses *this* case, in which individual citizens, businesses, and churches have brought major statutory and constitutional challenges to the Governor's use of delegated legislative power.

Respondents essentially adopt the court of appeals' position[4] that this case is not significant enough because it does not concern matters "fundamental to life or liberty" with "broad impact." Resp. Br. 45. To the contrary, as two members of this Court already noted in a prior case:

> The issue of the Governor's authority to issue emergency executive orders with the force of law during the COVID-19 pandemic is urgent and of statewide importance.

Free Minn. Small Bus. Coal. v. Walz, No. A20-1161, Order Denying Review (Oct. 28, 2020) (Thissen and Moore, JJ., dissenting).

Again, Appellants agree with Justices Thissen and Moore's prior statement. Appellants have already noted the important legal issues raised by the mask mandate and the broader issues posed by the Governor's use of emergency powers. Appellants' Br. 37.[5]

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[4] Respondents do not challenge the court of appeals' holding that this case is functionally justiciable. Appellants' Br. 36-37; Add. 7-9.

[5] Throughout their brief, Respondents mischaracterize Appellants' allegations in this case and wrongly accuse Appellants of improperly discussing the merits in an appeal on mootness. *E.g.,* Resp. Br. 3-4 n.3, 7 n.5. They protest too much. The breadth of Governor Walz' assumption of legislative authority and his staunch defense of that authority are

Respondents ignore these concerns and the cases Appellants cite and adopt, in a cursory manner, court of appeals' view of the *Dean*, *Rud* and *Tschumy* cases. Resp. Br. 45-46. Appellants already addressed why those cases support a broader view of the statewide significance doctrine than the court of appeals or Respondents advocate. Appellants' Br. 37-38.

Further, Respondents' attempted distinction, that the "statewide importance" doctrine is "generally" limited to "criminal cases or those involving end-of-life care," is artificially narrow. Resp. Br. 46. *Kahn* is an example to the contrary: it dealt with redistricting. 701 N.W.2d at 818. And *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000), while superficially a "criminal" case, satisfied the exception because the "issue is…significant," "an important public issue," and "failure to address this issue may create a class of defendants with constitutional claims but no remedy." *Id.* at 348. The case satisfied the doctrine because of the potential lack of a *civil remedy* to constitutional violations, not because of its nature as a "criminal case."

This case presents an urgent matter of statewide importance—Chapter 12 exists in the same form as when Governor Walz arrogated to himself legislative authority in violation of the Minnesota Constitution. This case presents clear legal issues which are "teed up" for adjudication. The Court should hold that this case is not moot under the Court's already-existing mootness doctrine and remand to the court of appeals for consideration of the merits.

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relevant to this Court's determination of whether the challenged actions are likely to recur and whether this case is of statewide importance. *See* Appellants' Br. 8, 12, 23-24.

III. If the Court Does Not Apply Existing Mootness Exceptions, It Should Recognize and Apply the Voluntary-Cessation Doctrine and Remand for Merits Determination.

As Appellants have already argued, this Court should adopt the voluntary-cessation exception to mootness that has long existed in federal justiciability jurisprudence. Respondents' argument obfuscates the consensus which has emerged concerning the voluntary-cessation doctrine. The Court should see past this and recognize the voluntary-cessation doctrine.

A. Appellants Established That Minnesota's Existing Mootness Doctrine Has a Shortcoming.

Appellants established why the voluntary-cessation doctrine is needed in Minnesota: it both *stops* and *deters* any defendant's attempt to moot a case by voluntary action. *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016) ("The exception's purpose is to deter a "manipulative litigant [from] immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after."). It prevents the possibility that a government or private defendant might change practices to, for example avoid Section 1988 attorney fees in an action brought under 42 U.S.C. §1983 against a state actor in state court. Should litigants be forced to turn to federal court for these claims to avoid this pitfall even though Minnesota courts have concurrent jurisdiction[6] over these claims? Absolutely not.

Important as well, the voluntary-cessation doctrine is different from the capable-of-repetition-yet-evading-review doctrine in that it focuses on the defendant's actions, as

[6] *Williams v. Bd. of Regents*, 763 N.W.2d 646, 653 (Minn. Ct. App. 2008).

opposed to general circumstances outside the defendant's power (such as an action by a plaintiff or third party) which may technically moot a case. *C.f. Roe v. Wade*, 410 U.S. 113, 125 (1973) (Roe no longer pregnant, but pregnancy could recur); *State v. Brooks*, 604 N.W.2d at 348 (cash bail already posted, but right to post bond not adjudicated in time).

Respondents' claim that only two cases exist where a litigant invoked the voluntary-cessation doctrine in a Minnesota appellate court is a red-herring argument. Resp. Br. 14. Where a doctrine is not yet part of state common law, it is not surprising to see few references to it in case law. And Minnesota is not specially immune from controversies over conduct which the defending party—private or governmental—may cease to stop judicial review from occurring. In fact, Minnesota courts have considered the doctrine in other cases, but have yet to formally adopt it. *See, e.g., Mankato Twp. v. Malcolm, Inc.*, C8-00-1661, 2001 Minn. App. LEXIS 266 (Ct. App. Mar. 13, 2001).

Respondents also wrongly claim that Rule 11 and inherent authority adequately address the interest in conserving judicial resources and securing for a plaintiff the ability to seek injunctive relief. Resp. Br. 15-16. These are helpful but incomplete tools. If a plaintiff brings a case related to repeated behavior after a prior dismissal because of mootness, neither Rule 11 nor the rule against vexatious litigation could apply in a way that does not deprive the defendant of its right to defend the matter. And these doctrines impose additional burdens on a plaintiff to carry, risk in bringing such motions, and more attorney fees.

Finally, Respondents argue that the voluntary-cessation exception might not conserve resources. Resp. Br. 15-16. It may be more efficient for government defendants[7] facing a lawsuit and wanting to avoid judicial scrutiny, but it is not efficient for plaintiffs to be forced to re-file dismissed cases, nor is it efficient for the parties to repeatedly engage in the same Rule 12 and Rule 26 repetitive process to get to the same appellate court on the same issues.

Appellants' position is sound. The voluntary-cessation doctrine "address[es] the concern 'that parties should not be free to manipulate mootness so as to frustrate, after the investment of significant judicial resources, the public interest in having the legality of their practices settled.'" *Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 799 (Ky. 2021). There is good reason to adopt the voluntary-cessation exception, including the interests in deterring gamesmanship, the securing of a plaintiff's ability to obtain declaratory and injunctive relief against violations of his or her rights without repetitive filings, and the avoidance of waste of judicial resources.

B. The Voluntary-Cessation Doctrine Is Consistent with Constitutional Limitations on Judicial Power.

Respondents contradict themselves by arguing that the voluntary-cessation exception to mootness forces the Court to make advisory opinions, while the other

[7] These government defendants do not appear to consider what would happen if *they* were in the reverse position. What if the Minnesota Pollution Control Agency were faced with a situation like that faced by the plaintiffs in *Friends of the Earth, Inc.*, 528 U.S. at 189, where a polluting company was violating the terms of one of its permits? Would the Attorney General and the MPCA "let it go," in terms of injunctive and declaratory relief, if the polluter voluntarily came back into compliance during an appeal? Appellants think not.

mootness exceptions Respondents acknowledge do not. *Compare* Resp. Br. 16-17 *with id.* at 13-15. This is nonsense. As Chief Justice Rehnquist of the U.S. Supreme Court noted in his *Honig v. Doe* concurrence:

> If it were indeed Art. III which -- by reason of its requirement of a case or controversy for the exercise of federal judicial power -- underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible.

Honig, 484 U.S. at 330 (Rehnquist, C.J., concurring).[8] Chief Justice Rehnquist explained that mootness exceptions originate from the judiciary's inherent authority to decide cases that are technically moot where there are strong reasons to do so, not from an interpretation of constitutional limitations on judicial authority. *Id.* at 331 (Rehnquist, C.J., concurring). Respondents' position—that some mootness exceptions are more "constitutional" than others—is self-contradictory and "incomprehensible," in Chief Justice Rehnquist's words. There is no constitutional barrier to the Court adopting the voluntary-cessation exception to mootness.

C. Other State Courts' Adoptions or Applications of the Voluntary-Cessation Doctrine Support Adoption by This Court.

Respondents make the misleading claim that the voluntary-cessation doctrine has only been adopted by a "minority" of states. Resp. Br. 8. This wrongly implies that the adoption of the voluntary-cessation doctrine is a "minority rule." It is not, and *even*

[8] Article VI of the Minnesota Constitution does not indicate any limitation on the judicial power of this Court to adjudicate "cases" that is lesser than that of the federal judiciary under Article III of the U.S. Constitution. In fact, this Court's jurisprudence on other prudential matters, like state taxpayer standing, defines this Court's jurisdiction as broader than that of federal courts. *E.g., McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977).

Respondents believe that only two courts have "rejected" the doctrine out of 26 jurisdictions to have considered it.[9] Respondents then split hairs related to whether the voluntary-cessation doctrine has been formally "adopted" by the highest court in the state, or whether intermediate or district courts have "applied" the doctrine before its formal adoption. Resp. Br. 17-24. However, Respondents have presented zero cases where a state court[10] affirmatively rejected the voluntary-cessation exception on the grounds that it should not be part of the mootness doctrine in the applicable state's jurisprudence. Other courts have overwhelmingly adopted, recognized, or approved the voluntary-cessation doctrine. *E.g.,* Br. of *Amicus Curiae* Institute for Justice 9-15; Appellants' Br. 16-17 & 17 n.5.

Amicus curiae Institute for Justice's listing of states to adopt, recognize, or apply the voluntary-cessation doctrine appears correct, except that Arizona and North Dakota have also adopted or applied the doctrine. Br. of *Amicus Curiae* Institute for Justice 9-15; Appellants' Br. 16-17 & 17 n.5; Respondents' Br. 18-24. Institute for Justice's thorough review puts the total number of states which have *not* adopted, applied, or recognized the doctrine at only 6. And taking a close look at Respondents' analysis, the states cited by

[9] Resp. Br. 23-24 (citing examples from California and Wyoming). Appellants disagree with Respondents' characterization of these courts' decisions, as discussed below.

[10] Respondents' distinctions between state high courts and lower courts, or formal adoption versus application, are superficial. From *this* Court's policy perspective, what matters is not the technical status of "adoption" in other states, but whether those courts addressing the voluntary-cessation doctrine have approved the reason and logic behind the doctrine. Reference to the reasoning of intermediate courts is perfectly in keeping with this Court's mode of analysis in matters of first impression in Minnesota. *E.g., McDaniel v. United Hardware Distrib. Co.*, 469 N.W.2d 84, 87 (Minn. 1991) (citing, *inter alia*, Illinois and California intermediate courts).

Respondents as having "rejected" the doctrine have, in fact, not rejected the doctrine. They have either declined to adopt or apply it to the specific circumstances faced by those courts, or have not rejected it at all.

To that end, Wyoming did not reject the doctrine in *Guy v. Wyoming Department of Corrections*, 444 P.3d 652 (Wyo. 2019), but rather declined to adopt it because the plaintiff did not preserve the argument and did not make a "cogent" case for its adoption. *Id.* at 657 ("Mr. Guy presents no argument why we should adopt the exception now. *See Lemus v. Martinez*…(refusing to consider appellate argument not supported by cogent argument)."). Neither has California rejected the doctrine.[11] In contrast, as recently as 2016, the California Court of Appeals reiterated the existence of the voluntary-cessation doctrine. *Ctr. for Local Gov't Accountability v. City of San Diego*, 247 Cal. App. 4th 1146, 1157 (Cal. Ct. App. 2016) ("The voluntary cessation of allegedly wrongful conduct destroys the justiciability of a controversy and renders an action moot unless there is a reasonable expectation the allegedly wrongful conduct will be repeated.").

Further, Respondents are also wrong on Iowa, Nevada, and West Virginia. Iowa did not reject the adoption of the voluntary-cessation doctrine; the Iowa Supreme Court assumed that it *did* exist in Iowa and then decided not to apply it in the circumstances presented. *Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 297 (Iowa 2022) ("Assuming, without deciding, that the voluntary-cessation doctrine exists in Iowa, we are

[11] Respondents cite an intermediate California court, which cited another California appellate court, for their premise here, while at the same time chiding Appellants for citing intermediate and trial courts related to the application of the doctrine. Resp. Br. 23 (citing *Lee v. Davis*, 190 Cal. Rptr. 682, 685-86 (Cal. Ct. App. 1983)).

not persuaded to apply it here."). Likewise, Nevada simply did not apply the doctrine to the facts in *Guinn v. Legislature of Nev.*, 76 P.3d 22, 33 (Nev. 2003) ("And to the extent counter-petitioners assert that the Legislature's voluntarily ceased "unconstitutional conduct" was passing revenue-raising legislation by a simple majority vote, there was no such conduct."). Finally, West Virginia has not rejected the voluntary-cessation exception, but rather declined to apply it to an unripe case. *State Farm Mut. Auto Ins. Co. v. Schakten*, 737 S.E.2d 229, 238 n.6 (W. Va. 2012).

Again, Respondents have presented zero cases which reject the voluntary-cessation exception on the grounds that it should not be part of the mootness doctrine in the applicable state's jurisprudence. Other states have followed the U.S. Supreme Court's lead on this issue because it makes sense and deters manipulation of the judicial process by defendants. This Court should join that group and adopt a well-defined standard for Minnesota courts to apply under the voluntary-cessation doctrine.

D. Respondents Fail to Rebut the Compelling Reasons for Recognizing the Voluntary-Cessation Doctrine Presented by Appellants and *Amici Curiae*.

Strong reason and logic support the adoption of the voluntary-cessation doctrine. Tellingly, Respondents have only churned up arguments that (1) Minnesota's mootness jurisprudence is fine as-is, and (2) they disagree with Appellants' and *amici's* counts of the number of states to adopt the federal standard.

Respondents fail to rebut Appellants' policy-based arguments grounded in the federal judiciary's adoption of the voluntary-cessation doctrine. Appellants' Br. 14-16, 19-21. Respondents also fail to rebut *amicus curiae* The Forum on Constitutional Rights'

demonstration of the importance of the doctrine in the face of novel exercises of government power, including where (1) emergencies lead to assertions of emergency power, and (2) government actions during emergencies cause enduring effects which continue thereafter. Br. *Amicus Curiae* of The Forum on Constitutional Rights. These policy arguments showcase why this Court can bolster the fairness of the court process by adopting the voluntary-cessation doctrine.

E. Respondents Misconstrue Appellants' Proposed Test.

Appellants did not "make up" a voluntary-cessation test out of "whole cloth." Resp. Br. 37. Rather, Appellants drew from federal case law, substantiated with multiple citations, and drew upon the judicial-notice doctrine in the context of post-trial-court actions triggering mootness defenses. Appellants' Br. 22. Respondents' concerns are easily dispatched.

First, Appellants' test poses no inflexibility on any court. Appellants' test summarizes the federal standard, Appellants' Br. 22 (par. 1-3), and invites courts faced with like situations to consider several relevant "factors" as a matter of sound discretion. Appellants' Br. 22 (par. 4, "This is a fact-intensive inquiry…."). Appellants made no claim that this test would abrogate courts' discretion to decline to apply mootness exceptions in circumstances like *Limmer v. Swanson*, 806 N.W.2d 838 (Minn. 2011). Right or wrong, *Limmer* and its progeny suggest that the Court can decline to apply a mootness exception where two co-equal branches of government[12] are deadlocked in a power struggle. *Accord*

[12] *Limmer*'s reasoning does not appear to apply to *individuals'* objections to one branch's actions, so it does not apply here.

Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 623-24 (Minn. 2017). Appellants' proposed test does not even hint that this doctrine must be abrogated.

Second, Appellants accurately place the burden of proof on defendants, as dealt with above in detail. The burden of proof under the voluntary-cessation doctrine, per the U.S. Supreme Court, is squarely on the defendant whose conduct technically moots a case. *Friends of the Earth, Inc.*, 528 U.S. at 189.

Third, Respondents provide no support for their claim that the voluntary-cessation doctrine—analyzed concurrently with the "capable of repetition, yet evading review doctrine" by many federal courts over many decades—creates a "conflict" in mootness doctrine. Further, Respondents offer no reason litigants cannot establish that their case is an important matter of statewide significance at the same time they seek refuge in the voluntary-cessation doctrine. The tests apply different standards.

Fourth, Appellants' test does not expand judicial notice. It merely provides guidance that lower courts should consider post-record submissions consistent with their inherent authority, as appropriate. Appellants' test reiterates the current rule.

Instead of proposing an alternative, Respondents emphasize opportunities for courts to decline to apply the exception. Courts can, of course, decline to apply the exception in different cases—but defendants like Respondents should have to carry a heavy burden to persuade courts to do so. And where government defendants insist their actions were constitutional and refuse to agree not to reimpose the challenged conduct, that burden cannot be carried.

F. The Court Should Apply the Voluntary-Cessation Exception Here.

Appellants' initial brief on the application of the voluntary-cessation exception fully meets Respondents' rebuttal. Appellants' Br. 23-30. Nonetheless, Appellants are compelled to point out significant problems with Respondents' analysis.

First, Respondents ignore the "heavy," "formidable" burden they carry to show that the voluntary-cessation exception should not apply to their conduct. Consistently, Respondents fail to distinguish *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). Again, in *Parents Involved*, the Supreme Court applied the voluntary-cessation exception where

> the district vigorously defend[ed] the constitutionality of its race-based program, and nowhere suggest[ed] that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,"… a heavy burden that Seattle has clearly not met.

551 U.S. at 719. As Appellants previously noted, courts examining mootness claims in the face of a voluntarily discontinued COVID-19 restriction have also held that a refusal to agree not to reimpose the restriction, coupled with the authority to reimpose it, justifies the application of the voluntary-cessation doctrine. *Ector Cty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 Tex. App. LEXIS 7492, at *18 (Tex. App. Sep. 9, 2021) ("the Governor and the State have not admitted that any of the executive orders were wrongfully issued and continue to maintain that the Governor has the authority to issue such orders").

Ector fully supports Appellants. Again, Respondents failed on multiple occasions to agree to not reimpose a mask mandate and settle this case accordingly. They have

vigorously defended their authority to impose a mask mandate. If Respondents want to maintain their authority to impose and enforce a mask mandate, they should have to defend that policy on its merits.

Second, "changed circumstances" alone do not defeat the voluntary-cessation exception. It is a fact-intensive analysis, as Appellants' proposed test indicates. Appellants accurately predicted that Respondents would rely on "changed circumstances," and Respondents' arguments fail for the reasons Appellants already offered. *Compare* Resp. Br. 30-37 *with* Appellants' Br. 28-30.

For example, consider *Hawse v. Page*, 7 F.4th 685 (8th Cir. 2021). Respondents claim that the split decision in *Hawse* means that a "substantial evolution of circumstances" evades the voluntary-cessation doctrine. Resp. Br. 32-33. As the test Appellants proposed indicates, it depends on the circumstances. What is clear, however, is that this case and *Hawse* are different. *Hawse* dealt with a church shutdown in St. Louis, Missouri where the authority for the county to reimpose that was superseded 14 months prior. And an intervening state law[13] issued well before the *Hawse* decision forbade St. Louis County from reimposing a church shutdown. Becky Willeke, "Page: mask mandate doesn't 'trigger' new state law on public health orders," *FOX 2 Now*, https://fox2now.com/news/missouri/page-mask-mandate-doesnt-trigger-new-state-lawon-

[13] To the extent Respondents argue that the *legislature* mooted this case, that is incorrect. Governor Walz alone rescinded the mask mandate a few days after Appellants appealed. The legislature did terminate the peacetime emergency, but the structure of Chapter 12 is such that Governor Walz, based on his interpretation, has little to no barrier to reimposing a mask mandate or other emergency orders. Appellants' Br. 8, 10, 12, 23-24, 32-33.

public-health-orders/.[14] This case deals with the exercise of emergency powers in Minnesota where no state law or case decision stops the Governor from declaring an emergency and acting thereon, as he is wont to do.

Of note as well, the Eight Circuit's precedent in other cases suggests that supervening authority is a key issue in assessing mootness. *Ness v. City of Bloomington*, 11 F.4th 914, 920 (8th Cir. 2021). In *Ness*, the Eighth Circuit held that a challenge to harassment restraining order statute, applied to the defendant by city law enforcement, was moot where the legislature amended the statute. *Id.* Thus, the *city defendant* could not enforce the statute, so the controversy was moot. In this case, on the contrary, the defendant is the party that makes and implements the orders at issue. There is no supervening legal authority that prohibits Governor Walz from re-issuing a mask mandate after issuing a new emergency declaration.

As Appellants argued before, those courts which have held moot cases challenging a COVID-19 emergency order because it was rescinded are typically wrong in their analysis absent some supervening authority which makes it "absolutely clear" that the restriction cannot reasonably be expected to be reimposed. Appellants' Br. 29-30. And here, accepting Respondents' application of the voluntary-cessation exception would render the doctrine a self-defeating nullity. It would be akin to saying that voluntary cessation of conduct, *which itself gives rise to mootness*, alone satisfies the exception. The Court should not apply the doctrine in a manner that relies on the defendant's

[14] Again, Judge Stras' dissent is more persuasive, and this Court can adopt his reasoning.

representations that he or she will not resume the challenged conduct, especially where the defendant refuses to agree not to resume the conduct and vigorously defends it. *Parents Involved*, 551 U.S. at 719.

Third, the Court should not impose a "bad faith" proof burden on a plaintiff vis-à-vis a government defendant under the voluntary-cessation doctrine. The cases Respondents cite for this premise read the tea leaves of the U.S. Supreme Court's decision in *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-89 (1982), but their reasoning is not supported by that case or by *Parents Involved*. In *City of Mesquite*, the Court held that a government defendant could not change an ordinance and declare the case moot, and it noted that the government defendant had announced its intention to reimpose the restriction as a factor in the analysis. *Id.* That action made it impossible for the government defendant to successfully argue mootness because of the "heavy burden" imposed on it under the voluntary-cessation doctrine. *Id.* at 289 n.10. But there is no basis to differentiate between a government defendant and a private defendant for purposes of whether that defendant can show that it is absolutely clear their conduct is not reasonably likely to recur. In fact, the Supreme Court's other cases related to government defendants—i.e., Seattle—militate against Respondents' premise. *Parents Involved*, 551 U.S. at 719.

Finally, as Appellants noted before, unless this Court holds to the contrary, Governor Walz is free to reinvigorate his claimed emergency powers and reimpose a mask mandate—or virtually any other action conceivable—using Minnesota's legislative power,

if he so chooses.[15] Appellants' Br. 23-30. Respondents emphasize that other circumstances arose during the pendency of this appeal that led to Governor Walz' rescission of the mask mandate, but Appellants submit that the unpredictability of COVID-19 and other emergencies substantially undermines this reasoning. Appellants' Br. 25-27. COVID-19 cases are, unfortunately, on the rise again in the upper Midwest. "Press Briefing by White House COVID-19 Response Team and Public Health Officials," May 18, 2022, *available at* https://www.whitehouse.gov/briefing-room/press-briefings/2022/05/18/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-may-18-2022/ (Dr. Rochelle Walensky of the CDC recommending masking for 32% of the U.S., including the upper Midwest).

In addition, while Respondents now claim that Governor Walz *isn't* following the CDC recommendations lock-step, that was their exact claim in July 2021 when they filed their brief to the court of appeals. *Compare* Resp. Br. 28 *with* Resp. COA Br., July 28, 2021, at 17 & n.7. Governor Walz' contradictory new claim to this Court that he does not follow CDC guidelines substantially erodes his credibility here. The Court should apply the voluntary-cessation exception to mootness to this case and remand for determination of the merits of this case.

[15] Again, in this appeal, the Court need not weigh in on whether Governor Walz is right or wrong about the efficacy of masks or whether his policy makes sense. What is relevant is whether Governor Walz' claimed reasons for rescinding the mandate undermine his attempt to show that it is "absolutely clear" that it is not "reasonably likely" he will reimpose a mandate.

CONCLUSION

The Court should hold that Governor Walz' rescission of Emergency Executive Order 20-81 does not moot this case. Appellants ask the Court to reverse and vacate the court of appeals decision and remand this case to the court of appeals to consider the case's merits.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document conforms to the requirements of Minn. R. Civ. App. P. 132.01, is produced with a proportional 13-point font, and the length of this document is 6,898 words. This Brief was prepared using Microsoft Word 365, Version 2204.

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