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.

BRIEF OF *AMICUS CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS SUPPORTING APPELLANTS DRAKE SNELL, ET AL.

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Amicus Identity, Interest, & Authority to File[1]

A. Identity of The Forum for Constitutional Rights (FCR)

The Forum for Constitutional Rights (or FCR) is a general public-benefit corporation that is organized and operated under Minnesota law. FCR provides public education about constitutional history and rights, including (but not limited to) rights enshrined by the First Amendment. FCR's public education efforts include filing *amicus curiae* briefs in cases involving First Amendment rights and other important constitutional protections. FCR's advocacy is non-partisan in nature.

B. FCR's Interest in *Snell*

FCR's interest in *Snell* is public in nature. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). FCR believes this settled rule should apply with equal force in Minnesota courts, thus vindicating these courts' responsibility to "safeguard[] the rights" of all Minnesotans. *State v. Hamm*, 423 N.W.2d 379, 382 (Minn. 1988).

C. FCR's Authority to File in *Snell*

On March 11, 2022, the Court granted FCR leave to file this brief.

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[1] Amicus FCR certifies under MRCAP 129.03 that: (1) no counsel for a party authored this brief either in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than FCR, its members, and its counsel.

Argument

The voluntary cessation doctrine is an exception to the "general rule" that an "appeal should be dismissed as moot" insofar as "an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible." *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). The doctrine generally provides that a defendant's "voluntary cessation of allegedly illegal conduct … does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

In this case, Appellants call upon the Court to adopt the voluntary cessation doctrine, bringing the Court in line with the federal judiciary and most state high courts. (Snell Br. 12-30.) Amicus FCR joins this call. Appellants' case shows why the voluntary cessation doctrine matters: to ensure judicial review whenever the government meets emergencies by claiming broad new powers. Absent judicial review, these powers risk eroding constitutional rights and the separation of powers.

The fleeting nature of emergencies often means that government leaders will voluntarily end their use of emergency powers long before lawsuits challenging these powers can be fully adjudicated. These powers nevertheless have long-term effects, reshaping the sensibilities of officials about the true limits of their authority. History teaches "the tendency of a principle to expand itself to the limit of its logic." B. CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921). The voluntary cessation doctrine enables courts to meet this danger—regardless of how popular (or unpopular) the government's emergency powers may currently happen to be.

I. Emergencies often lead government entities to assume broad new powers under transformative legal theories.

In times of emergency, the government is bound to act quickly and push the limits in addressing immediate and evolving dangers. During such times, new theories of government power often materialize that may redefine precious constitutional rights and the separation of powers for generations to come. Federal and state responses to the present ongoing COVID-19 pandemic is but one example of this reality.

Here in Minnesota and in states across the nation, government officials have scrambled to meet the pandemic's unique dimensions with a broad array of restrictions that push the limits of government power. These assertions of authority have triggered many legal challenges. *See, e.g., Heights Apartments, LLC v. Walz*, No. 21-1278, 2022 U.S. App. LEXIS 9092, at *10-21, 23-30 (8th Cir. Apr. 5, 2022) (takings and contracts-based challenges to pandemic-era moratorium on residential evictions); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 653–54, 655 (E.D.N.C. 2020) (religious-free-exercise challenge to pandemic-era limits on the capacity of religious gatherings); *Robinson v. Mo. Dep't of Health & Senior Servs.*, No. 20AC-CC00515, slip op. at 1-2 (Mo. Cir. Ct., Cole Cty., Nov. 22, 2021) (separation-of-powers and equal-protection challenges under Missouri Constitution to Missouri state health department's assumption of power during pandemic to close schools and places of worship).

This dynamic long predates COVID-19. Over two decades ago, a similar set of legal challenges emerged as federal officials mobilized in response to the terrorist attacks of September 11, 2001. The Executive

Branch's response included actions that fell within settled authority, like the ability to reorganize both law enforcement and intelligence agencies, leading to the formation of the Department of Homeland Security. Other executive actions, however, rested on novel and expansive conceptions of presidential authority under Article II of the Constitution.

For example, the Department of Justice (DOJ) claimed the President had plenary authority to detain American citizens outside the American judicial system. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004). DOJ also claimed that the President had the authority to surveil virtually all domestic communications without a warrant.[2] And DOJ claimed that the President had plenary authority to disregard laws passed by Congress, including the Posse Comitatus Act,[3] the Foreign Intelligence Surveillance Act,[4] and prohibitions on torture under 18 U.S.C. § 2340A.[5]

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2 *See* Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 591 n.69 (2009) (OLC has "opined that Fourth Amendment protections … do not apply to 'domestic military operations'") (citing DOJ Mem. from John C. Yoo, Deputy Assistant Att'y Gen. 8 n.10 (Mar. 14, 2003)).

3 *See* DOJ Mem. from John C. Yoo, Deputy Assistant Att'y Gen., to Alberto Gonzales 15–16 (Oct. 23, 2001), https://bit.ly/3Ofqsmt ("[T]he PCA does not apply to … a Presidential decision to deploy the Armed Forces domestically for military purposes.").

4 *See* DOJ Mem. from John C. Yoo, Deputy Assistant Att'y Gen. 4 (Nov. 2, 2001), https://bit.ly/3jMB5PC ("[T]he Foreign Intelligence Surveillance Act … does not restrict the constitutional authority of the executive branch to conduct surveillance of the type at issue here.").

5 *See* DOJ Mem. for William J. Haynes II, DOD Gen. Counsel (Mar. 14, 2003), https://bit.ly/3KMrsN3 ("We believe the statute would not apply to the conduct of the military during the prosecution of a war ….").

Virtually all these actions were challenged in court. Some of these cases produced landmark decisions on the limits of government power in addressing terrorism. *See Hamdi*, 542 U.S. at 509–10 (plurality op.) ("[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) ("constitutional privilege of habeas corpus" applies to "aliens designated as enemy combatants").

Decisions like these demonstrate the judiciary's traditional role as a watchful protector of constitutional rights during times of emergency. Indeed, many of the Supreme Court's seminal decisions were authored in response to emergency situations. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 604–05 (1952) (holding that President Truman exceeded his authority in his efforts to avert the "grave emergency" of a steel-production stoppage during the Korean War); *Ex parte Milligan*, 71 U.S. 2, 130 (1866) (holding "trial and conviction by a military commission was illegal" so long as American courts were still in operation).

These cases reflect that "in a crisis," the judiciary is "perhaps the only institution that is in any structural position to push back against … potential overreaching by the local, state, or federal political branches." *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 899 (W.D. Pa. 2020), *mooted by statute*, 8 F. 4th 226 (3d Cir. 2021). Constitutional liberties "are not fair-weather freedoms." 486 F. Supp. 3d at 928. The Constitution "sets certain lines that cannot be crossed, even in an emergency." *Id.*

Put another way, "[e]mergency does not create power." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934). Emergency also does not "increase granted power" or lessen "restrictions imposed upon power granted." *Id.* Courts cannot then abdicate their duty to review the exercise of emergency powers, especially given how these powers tend to multiply and to endure long after the events justifying them. This duty includes situations when the government voluntarily ceases the use of a challenged power before the completion of judicial review.

II. Government actions during emergencies can be voluntarily terminated but still have long-term impacts on constitutional rights and fundamental structural protections.

A recurring feature of emergency powers is their implementation under highly mutable circumstances or for periods of time that are hard to define. This is of course the nature of emergencies, be they pandemics, natural disasters, or civil unrest. Whenever circumstances on the ground change, government actions will change too. Such changes may involve expanding or contracting the use of specific emergency powers to meet the circumstances at hand (e.g., imposing a statewide lockdown versus a municipal lockdown). But the government's basic legal justification for any given emergency power is bound to remain the same.

As a result, legal controversies surrounding the use of emergency powers survive any voluntary government cessation of the power in question. Public protests that coincide with civil disorder illustrate this. During the 1999 World Trade Organization (WTO) protests, the city of Seattle imposed a multi-block "exclusion zone" to curb vandalism and

civil disorder. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1120–28 (9th Cir. 2005). The zone barred all persons save for WTO participants; those who owned or worked at businesses in the zone; and emergency personnel. *Id.* at 1125. After being arrested for violating the zone, several persons sued, seeking a declaratory judgment about the zone's constitutionality. *See id.* at 1118. Five years of litigation followed—all to address a zone limited to (and voluntarily ceased after) a handful of days in 1999. *Id.*

This litigation subsequently established the permissible parameters of emergency powers in this kind of situation. The Ninth Circuit upheld the exclusion zone as a content-neutral, time-place-manner restriction of free speech under the First Amendment. *Id.* at 1155–56. At the same time, the Ninth Circuit held that a trial was necessary to address certain police conduct that "may have gone too far and infringed certain individual protestors' constitutional rights by making the content of their expressed views the test for their entry into the restricted zone." *Id.*

A local example of a legal controversy surviving voluntary cessation of emergency powers may be seen in the events following the May 2020 police killing of George Floyd in Minneapolis. Led by freelance journalist Jared Goyette, a group of reporters sued city and state officials for their allowance of indiscriminant police violence against reporters covering the protests after Floyd's death.[6] The reporters noted: "[t]he violence against journalists has ceased, for now. But the chill on their First Amendment

[6] *See* Class Action Complaint, *Goyette v. City of Minneapolis*, No. 20-cv-1302 (D. Minn. June 2, 2020) (ECF No. 1), https://bit.ly/37gd29u.

right to document the protests continues, as does the physical damage done by Defendants' violence. Plaintiffs bring this action and ask the Court to restrain Defendants from further violence and unconstitutional conduct and to provide relief for the damage done."[7]

The need for judicial intervention then became plain as the police subjected reporters to a fresh round of indiscriminant violence during the protests that followed the police killing of Daunte Wright.[8] Goyette and his fellow plaintiffs ultimately secured a six-year monitored injunction against state law enforcement.[9] Approving the injunction, the district court acknowledged the ongoing "significant public interests" involved.[10] These interests included "[the reporters'] First Amendment and Fourth Amendment rights, the public's ability to learn about ongoing events of public importance, and public safety."[11] Goyette's suit thus confirms that voluntary cessation of emergency powers rarely ends the important legal questions at stake. Instead, disputes persist as the government continues to test the bounds of these powers with each new emergency.

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7 Second Amended Complaint at 2, *Goyette*, No. 20-cv-1302 (D. Minn. filed July 30, 2020) (ECF No. 53), https://bit.ly/3vpBHA6.

8 *See* ACLU-MN, *ACLU-MN Sues to Stop Attack on Journalists Covering Daunte Wright Protests* (Apr. 14, 2021), https://bit.ly/37T8xBE ("Over the past few days, Minnesota State Patrol have shot journalists from the Twin Cities and across the nation with rubber bullets, pepper sprayed them, and arrested or threatened them with arrest ….").

9 *See* Order Granting Plaintiffs' Motion for Monitored Injunction at 2, *Goyette*, No. 20-cv-1302 (D. Minn. Feb. 8, 2022) (ECF No. 316).

10 *Id.*

11 *Id.*

III. Based on the realities of emergency powers, the Court should adopt the voluntary cessation doctrine, ensuring mootness does not swallow judicial protection of constitutional rights.

"Ordinarily when a dispute between two litigants is settled or in some other way resolved during the pendency of an appeal," Minnesota courts "dismiss the appeal as moot." *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). But "mootness" is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically whenever the underlying dispute between the particular parties" is "resolved." *Id.*

Applying these principles, the Court has in various cases endorsed the ideological underpinnings of the voluntary cessation doctrine—i.e., that "a defendant's voluntary cessation of a challenged practice does not" terminate a court's power "to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982). In particular, the Court has recognized that an appeal should not be held "moot" when this holding would mean: (1) enabling defendants to evade constitutional review through provisional actions; (2) neglecting a matter whose "crux" persists regardless of a particular defendant's conduct; and (3) allowing constitutional rights to suffer without any effective remedy.

First, in *In re Schmidt*, 443 N.W.2d 824 (Minn. 1989), a mental patient challenged "a [state] statute governing the administration of neuroleptic medication to mentally ill persons committed to state hospitals." *Id.* at 825. The Court noted this appeal could be moot insofar as the patient did receive "a *Jarvis* type adversarial hearing"—a proceeding that the Court had previously approved for situations like this. *Id.* at 826.

The Court rejected mootness, observing "the challenged statute undoubtedly will be utilized by state hospital authorities in attempting to treat other mentally ill committed patients by neuroleptic medication." *Id.* The Court then emphasized: "should we decline jurisdiction in this case, review of the constitutionality of the statute **could be evaded by others in the future by simply affording a patient a *Jarvis* type hearing** whenever the constitutionality of the statute is challenged by a patient's attorney." *Id.* (bold added) And given this concern, the Court determined that it "ha[d] jurisdiction to decide" the plaintiff's appeal. *Id.; see also, e.g., State v. Barrientos*, 837 N.W.2d 294, 304 (Minn. 2013) (case was not moot where "discharge from probation was merely provisional").

Second, in *In re Senty-Haugen*, 583 N.W.2d 266 (Minn. 1998), a convicted sex offender (Senty-Haugen) argued that statutory provisions governing his civil commitment entitled him to receive treatment from the "least restrictive alternative program"—in his case, a "program called Alpha House." *Id.* at 266-67. The Court rejected the argument that Senty-Haugen's appeal was made moot by the fact that Alpha House no longer accepted offenders like him. *See id.* at 268 n.1. The Court recognized the "**crux of this appeal**—whether there exists a requirement of commitment to a less restrictive treatment program—**remains whether or not Alpha House will admit Senty-Haugen**." *Id.* (bold added).

Third, in *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000), a criminal defendant challenged cash-only bail as a violation of Article I, Section 7 of the Minnesota Constitution, which regulates bail. *See id.* at 346. The

Court rejected the notion that the defendant's appeal was moot because the defendant ultimately posted the required bail and was no longer in custody. *See id.* at 348. The Court explained that "failure to address this issue **may create a class of defendants with constitutional claims but no remedy**" given the "short-lived" nature of "most pretrial bail issues." *Id.* (bold added); *see also, e.g., In re McCaskill*, 603 N.W.2d 326, 330–31 (Minn. 1999) (acknowledging the "burden" that "a holding of mootness would impose" on mental patients "discharged too quickly to obtain appellate review of the[ir] commitment" under a challenged statute).

Taken together, the foregoing principles align with the voluntary cessation exception to mootness that federal courts have recognized for decades. The emergency-powers context, in turn, only sharpens the point. Consider *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). Confronting a challenge to an Illinois executive order limiting the size of public gatherings to combat COVID-19, the panel rejected the argument that an intervening rescission of the executive order mooted the appeal. *Id.* at 344-45. The panel stressed that such voluntary cessation could not moot the appeal unless it was "absolutely clear" that the order could not be reinstated—"[o]therwise the [governor] could resume the challenged conduct as soon as the suit was dismissed." *Id.*

The United States Supreme Court echoes the same point in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021): "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." *Id.* at 1297. Otherwise, simply by "moving the

goalposts," government officials may retain unreviewable "authority to reinstate … restrictions at any time." *Id.* at 1297; *see also Brach v. Newsom,* 6 F. 4th 904, 919 (9th Cir. 2021) (noting California's "retention of unbridled emergency authority to promulgate whatever detailed [pandemic-based] restrictions" that California "think[s] will best serve the public"), *vacated by grant of en banc review*, 18 F. 4th 1031 (9th Cir. 2021).

The Court therefore should not hesitate to adopt the voluntary cessation doctrine, which merely serves to reinforce the Court's long-standing treatment of mootness as "a flexible discretionary doctrine, not a mechanical rule." *Rud*, 359 N.W.2d at 576. "Orderly rules of procedure do not require [the] sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). And for emergency powers raising serious constitutional questions, the voluntary cessation doctrine enables this Court to do justice in terms of checking authority that otherwise "lies about like a loaded weapon ready for the hand of any [official] that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Appellants here "tried, but [were] unable to obtain appellate review" of Executive Order 20-81 "before it expired." *City of W. St. Paul v. Krengel*, 768 N.W.2d 352, 355 & n.2 (Minn. 2009). Appellants "might … be in the same position again" should the Governor ever "resume[]" the Order—a realistic possibility given how emergency powers work and the ongoing evolution of the current pandemic. *Id.* The voluntary cessation doctrine then makes clear "that [Appellants'] appeal is not moot." *Id.*

Conclusion

The voluntary cessation doctrine ensures the ability of courts to uphold constitutional rights and protect the separation of powers in the face of emergency powers that government officials can terminate at will. This Court's flexible approach to mootness demands nothing less. The Court should therefore formally adopt the doctrine, reverse the Court of Appeals, and remand Appellants' case for further proceedings.

Respectfully submitted,

Dated: April 15, 2022

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Certification of Brief Length

The undersigned counsel certifies that this amicus brief satisfies MRCAP 132.01. This brief: (1) is printed using 13–point, proportionally-spaced fonts; and (2) complies with the relevant word-limit, containing 3,214 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software that counsel used to prepare this brief (Microsoft Word 2010).

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