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.

RESPONDENTS' BRIEF AND ADDENDUM

UPPER MIDWEST LAW CENTER

DOUGLAS P. SEATON (#127759)
JAMES V. F. DICKEY (#393613)
8421 Wayzata Blvd., Suite 105
Golden Valley, Minnesota 55426
Phone: (612) 428-7000
doug.seaton@umwlc.org
james.dickey@umwlc.org

Attorneys for Appellants

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

LIZ KRAMER (#325089)
Solicitor General
ALEC SLOAN (#0399410)
Assistant Attorney General
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
Phone: (651) 757-1010
Liz.kramer@ag.state.mn.us

Attorneys for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(h)(3).

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STATEMENT OF THE CASE

This appeal seeks to revive a challenge to an executive order that was rescinded in May 2021—one year before the date of this brief. Because the case is moot and does not fit in any of the recognized exceptions to mootness, Appellants urge this Court to adopt a new exception to mootness for the first time in nearly 40 years, one covering "voluntary cessation" of litigation. However, there is no demonstrated need for a new exception to mootness in Minnesota, and even if this Court were to adopt the voluntary cessation exception as applied in federal courts, it would not cover Appellants' claims.

While the case has turned into one about mootness, this case was originally a challenge to Emergency Executive Order 20-81 ("EO 20-81"), which required most Minnesotans to wear masks in indoor public spaces. EO 20-81 was a cornerstone of Minnesota's COVID-19 response, which allowed Minnesota to outperform all of our neighboring states in management of the public health crisis. *See, e.g.*, Lauren Leamanczyk & Steve Eckert, *KARE 11 Investigates: New data shows Minnesota's COVID restrictions saved lives* (July 7, 2021), https://perma.cc/X3PS-EHGV **(**last visited Apr. 28, 2022). To date, the COVID-19 virus has claimed the lives of more than 12,500 Minnesotans, equivalent to nearly the entire population of Chippewa County.[1]

Appellants did not want to wear masks when they visited indoor public spaces, so they filed a petition for a writ of quo warranto in Ramsey County district court, seeking to have EO 20-81 struck down under numerous theories. Judge John H. Guthmann

[1] https://perma.cc/Q45U-QDMV;https://perma.cc/U6XZ-NRJ3

dismissed their lawsuit, holding that (1) the Emergency Management Act is a valid delegation of authority to the Governor; (2) the COVID-19 pandemic is a valid basis for a peacetime emergency; (3) the mask mandate does not conflict with Minnesota's anti-disguise statute; (4) the mask mandate is not unconstitutionally vague; (5) the mask mandate does not violate Appellants' free-speech rights; and (6) the mask mandate does not violate the Free Exercise Clause.

About two months after the district court issued its decision, in May of 2021, the Governor rescinded EO 20-81. In June 2021, the entire peacetime emergency ended by joint legislative and executive action. In the ten months since, Minnesota has not returned to a state of emergency.

Despite the rescission of EO 20-81, Appellants appealed the district court's ruling. The court of appeals held (1) that this appeal was moot; (2) that neither of the recognized mootness exceptions applied to the facts of this case; and (3) that Minnesota has not recognized the voluntary cessation exception to mootness and Appellants did not provide any reason to do so now.

Respondents ask the Court to affirm the judgment of the Court of Appeals.

STATEMENT OF FACTS

I. THE COVID-19 PANDEMIC HIT AND MINNESOTA RESPONDED.

In 2020, the COVID-19 pandemic began spreading across the world, causing death on a scale unrivaled by any pathogen since the 1918 influenza pandemic. In response, the governors of all 50 states invoked their powers to declare states of emergency and issue executive orders thereunder. President Trump likewise declared a

National Emergency on March 13, 2020 and—for the first time in history—approved major disaster declarations in all 50 states. (Doc. 40 at 26–28.)

As part of that unified response, Governor Walz declared a peacetime emergency on March 13, 2020. (Emergency Executive Order 20-01, https://perma.cc/LT6B-XAZB.) As the pandemic continued, researchers across the world found that one of the most effective tools to combat COVID was wearing a mask to cover one's mouth and nose when in public spaces, particularly indoors. On July 22, 2020, in response to the broad scientific consensus, Governor Walz issued Emergency Executive Order Number 20-81 ("EO 20-81"), which required most people in Minnesota to wear masks in most indoor public places effective July 24, 2020.[2] (EO 20-81, https://perma.cc/ME5C-XF85.)

II. APPELLANTS SUED RESPONDENTS OVER EO 20-81.

About one month later, on August 20, 2020, Appellants filed a petition for a writ of quo warranto filled with partisan rhetoric challenging the constitutionality of EO 20-81 on various grounds. (*See* Doc. 1 at 1–23.)[3] Respondents promptly moved to dismiss the

[2] Minnesota was not alone. At least 38 other states also enacted laws temporarily requiring masks to be worn in some public settings. Additionally, the federal government required masking in some settings, such as airports, and the Minnesota Judicial Branch enforced a mask requirement in court buildings until March 7, 2022. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (Mar. 3, 2022).

[3] (Doc. 21 ¶¶ 4 (comparing Governor Walz's issuance of EO 20-81 to the centralization of power in the Soviet Union during the Cold War era), 9 (describing requirement of PPE in public indoor spaces as a "mandatory dress code" comparable to a prohibition on political clothing at the polling place, and implying, falsely, that the Surgeon General and Dr. Anthony Fauci opposed public masking), 76–78 (asserting, in the face of all scientific evidence and opinion, that masking is ineffective in controlling the spread of COVID), 81 (arguing for a free speech right to disregard any law with which they disagree lest they
(Footnote Continued on Next Page.)

Petition for failure to state a claim on which relief could be granted and obtained a hearing date from the court.[4] (Doc. 17 at 53–55.) Appellants then filed an Amended Petition, which sought exclusively declaratory and injunctive relief. (Doc. 21 at 62–86.) Respondents moved to dismiss the Amended Petition, requiring a new hearing date. (Doc. 30 at 107–09.) Only then, on November 24, four months after EO 20-81 took effect, did Appellants first move for a temporary injunction. (Doc. 38 at 117–18.)

The district court heard both Respondents' motion to dismiss and Appellants' motion for a temporary injunction on December 22, 2020. On March 15, 2021, the court issued an order granting Respondents' motion and denying Appellants' motion. (Doc. 68 at 42–79.) Judgment was entered the next day. (Doc. 69 at 80–117.)

III. IN RECOGNITION OF MINNESOTA'S IMPROVED CIRCUMSTANCES, GOVERNOR WALZ RESCINDED EO 20-81 AND ENDED THE PEACETIME EMERGENCY.

The first half of 2021 brought significant improvements in the fight against COVID. Most significantly, the FDA approved three vaccines against COVID in December of 2020, and those were broadly available to Minnesotans beginning in spring of 2021. Each of these vaccines has proven highly effective, not only at preventing the recipient from being infected, but at reducing the severity of the infection in those

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be forced to "virtue signal" their agreement through compliance), 89, 94 (characterizing a phone line by which concerned Minnesotans may report illegal COVID practices as a "Snitch Hotline"), 93 (asserting, without explanation, that EO 20-81 "encourage[s] arbitrary and discriminatory enforcement"), 122–124 (characterizing facts regarding the efficacy of masks in preventing the spread of COVID as a "political position"), 134 (characterizing mask-wearing as a "deed[] of darkness").)

[4] Respondents moved to dismiss the day after a judge was assigned to the case. (Docs. 10 at 43 & 17 at 53–55.)

recipients who do become infected. (*See* Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, Yale Medicine (March 30, 2022), https://perma.cc/3RM5-GHQF (last visited May 2, 2022).) Daily infections, hospitalizations, and deaths from COVID all declined significantly in the spring and summer months of 2021.

On May 6, 2021, Governor Walz announced that he would rescind the statewide masking requirement effective the earlier of two dates: July 1 or when 70% of adults in Minnesota receive their first vaccine dose. EO 21-21 at 8. Governor Walz cited the changed circumstances surrounding COVID in Minnesota, especially the wide availability of COVID vaccines. (*After Reaching Deal with USDA to Protect $45 Million in Hunger Relief, Governor Walz Announces Plan to End COVID-19 Emergency on July 1 While Ensuring an Orderly Transition*, Office of Governor Tim Walz & Lt. Governor Peggy Flanagan (Jun. 29, 2021), http://mn.gov/governor/news/index.jsp?id=1055-487865 (last visited May 2, 2022).) When the Centers for Disease Control and Prevention ("CDC") issued new guidance just eight days later, indicating that universal masking was no longer necessary, Governor Walz immediately rescinded the relevant portions of EO 20-81. (Emergency Executive Order 21-23 at 1, https:www.lrl.mn.gov/archive/execorders/21-23.pdf.)

On June 29, 2021, with most adults in Minnesota fully vaccinated and COVID cases, hospitalizations, and deaths decreasing, Governor Walz announced that he would end the peacetime emergency under which all COVID emergency orders, including EO 20-81, had been issued. The next day, on June 30, the Legislature passed, and the

Governor signed, a bill ending the Peacetime Emergency and rescinding all remaining emergency orders issued thereunder effective July 1, 2021. 2021 Minn. Laws 1st Spec. Sess. Ch. 12., Art. 2, § 23.

IV. THE COURT OF APPEALS FINDS THE APPEAL IS MOOT.

On May 10, 2021, 55 days after the entry of judgment, Appellants filed a notice of appeal. (Doc. 71 at 121–22.) On December 6, 2021, the court of appeals held that the appeal was moot because the court could not grant effective relief on the petition for quo warranto, as the executive order was no longer in place. (App. Add. 4–5.) The court also rejected Appellants' arguments that one of Minnesota's recognized mootness exceptions applied. In particular, it held that the "capable of repetition yet evading review" exception was inapplicable because "[A]ppellants fail[ed] to establish that the circumstances of th[e] case create a 'reasonable expectation' that another mask mandate will be reimposed" and the peacetime emergency was not too short to pursue claims. (*Id.* 5–7.) The court also held that Appellants' claims were unlike those in which this Court has applied the "issue of statewide importance" mootness exception. (*Id.* 9.) Finally, the court rejected Appellants' request to adopt the federal "voluntary cessation" exception, because that doctrine has never been recognized by Minnesota courts and Appellants' arguments for adoption were unpersuasive. (*Id.* 10–11.)

Appellants petitioned this Court for further review of the court of appeals' mootness ruling and several of the district court's substantive rulings. (App. Pet. for

Review (Jan. 5, 2022).) The Court granted review only as to the mootness question.[5] (Order Granting Review (Feb. 23, 2022).)

V. GOVERNOR WALZ HAS CONTINUED TO ADDRESS COVID WITHOUT USING EMERGENCY POWERS.

In late 2021 and early 2022, the highly contagious Delta and Omicron variants led to high numbers of new COVID infections both nationally and in Minnesota. In fact, in January 2022, the average number of Minnesotans infected daily was 16,578, more than double the previous highwater mark (7,052 in November 2020). Due to the efficacy of the vaccines, however, hospitalization and death rates remained lower than they had been in the 2020 peak of the pandemic. (*Tracking Coronavirus in Minnesota: Latest Map and Case Count*, N.Y. Times (Apr. 25, 2022), https://perma.cc/76R2-M8SD (last visited Apr. 25, 2022).)

Despite the ebb and flow of infection rates during the past year, Governor Walz has not taken any action to reinstate a COVID-related peacetime emergency in Minnesota. Nor has he taken any action to impose a new statewide masking requirement in the year since he rescinded EO 20-81.[6]

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[5] Appellants have nevertheless taken opportunities to sneak in arguments germane only to the issues on which the Court denied review. (*See, e.g.*, App. Br. 8, 12, 23–24 (criticizing the manner in which Governor Walz used his emergency powers).)

[6] Without any evidence that Governor Walz has reinstated a mask mandate, Appellants point to temporary mask orders issued by municipal leaders. (App. Br. 10.) None of those mayors or cities are parties to this action.

STANDARD OF REVIEW

The sole issue before the Court is whether Appellants' challenge to EO 20-81 was rendered moot by that provision's rescission twelve months ago and the end of the underlying peacetime emergency ten months ago. Mootness is a legal issue that the Court reviews de novo. *State ex rel. Young v. Schnell*, 956 N.W.2d 652, 662 (Minn. 2021); *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). In addition, whether to adopt a new mootness exception is a matter of law for this Court to consider de novo. *See Glacier Park Iron Ore Props., LLC v. U.S. Steel Corp*., 961 N.W.2d 766, 769 (Minn. 2021).

ARGUMENT

Appellants agree that this case is moot. But they ask this Court to apply the voluntary cessation exception, a mootness exception never before recognized in Minnesota, to this case. Appellants offer no compelling reason for this Court to add a third exception to mootness at this time. Neither the federal court's recognition of the exception or its adoption by a minority of states provides a compelling reason to expand jurisdiction over moot cases. Critically, there would be no utility in adopting the exception in this case, because it would not apply here.

Appellants also argue that the recognized exceptions to mootness in Minnesota—for issues capable of repetition yet evading review and urgent issues of statewide importance—apply to this case. As the court of appeals correctly held, this case does not fit either exception.

I. MOOTNESS IS AN IMPORTANT LIMIT ON JUDICIAL POWER AND MINNESOTA COURTS HAVE BEEN CAUTIOUS IN RECOGNIZING AND APPLYING EXCEPTIONS TO MOOTNESS.

Mootness is a limit on the judicial power, ensuring that Minnesota courts decide only live disputes. *See Young*, 956 N.W.2d at 662. "An appeal should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean*, 868 N.W.2d at 5. Minnesota courts do not decide issues merely to establish precedent. *Sinn v. City of St. Cloud*, 295 Minn. 532, 533, 203 N.W.2d 365, 366 (1972).

The Court has recognized two exceptions to the general mootness rule: legal issues that are capable of repetition while evading review and issues of statewide importance that are functionally justiciable. Each of these exceptions was adopted only in response to compelling circumstances and have been used sparingly.

A. Adoption of the Exception for Cases Capable of Repetition Yet Evading Review.

The Court appears to have first recognized an exception to mootness in 1973, and it was for legal issues that are capable of repetition but evading appellate review. That year, the Court was faced with a challenge to the constitutionality of a statute requiring, with some exceptions, one year of residency in Minnesota before obtaining a divorce in Minnesota's courts. *Davis v. Davis*, 297 Minn. 187, 210 N.W.2d 221 (1973). By the time the case came before this Court, the appellant had lived in Minnesota for more than one year and could obtain a divorce in Minnesota's courts, regardless of whether the challenged statute applied, raising the possibility that the matter was moot. The court

recognized that the first year of residency in Minnesota was a fleeting status that would often lapse before litigation was complete. *Id.* at 223 n.1. It also recognized that the statute would undoubtedly apply to other people after the appellant. *Id.* Citing the then-recent U.S. Supreme Court decision in *Roe v. Wade*, which found pregnancy a "classic" example of something "capable of repetition, yet evading review", this Court held that, under the circumstances, it could decide the divorce residency issue. *Id.* (citing 410 U.S. 113, 125, 93 S. Ct. 705 (1973)).

B. Adoption and Application of the Exception for Urgent Issues of Statewide Importance.

Roughly a decade later, the Court recognized a mootness exception for urgent issues of statewide importance. *See State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). In *Rud*, the Court exercised its discretion to decide an issue of statewide importance that was functionally justiciable and needed immediate clarification. *Id.* In that case, both parties agreed that the appeal should not be dismissed as moot and the Court saw a risk of "continuing adverse impact in other criminal trials" if the appeal was not heard on the merits. *Id.* The *Rud* Court did not cite any federal precedent for the standard it developed. *Id.* Respondents are not aware of any analogous federal exception.

This exception is reserved for cases in which there is a need to render an immediate decision. The touchstone of this exception is urgency and breadth of impact. *See Dean v. City of Winona*, 868 N.W.2d 1, 7 (Minn. 2015). This Court "appl[ies] this exception narrowly." *Id.* at 6. Indeed, over the course of thirty years this Court has exercised discretion to hear moot issues using this exception in fewer than ten cases.

This Court has limited its exercise of this exception to cases involving important issues of criminal law, commitment, and end-of-life care.[7] In fact, the exception was developed in the context of competing rights during criminal trials. In *Rud*, the legal issue concerned the relative rights of criminal defendants to call witnesses at hearings and of minors who were the alleged victims of sexual crimes to be shielded from being forced to testify at that preliminary stage. *Rud*, 359 N.W.2d at 575. After *Rud,* this Court has exercised its discretion to apply the exception in a few other criminal matters. In *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000), the Court addressed issues of cash-only bail. In *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439-40 (Minn. 2002), this Court applied the exception to consider whether the results of a particular device used for measuring alcohol concentration on breath samples could be admitted into evidence without expert testimony. In *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010), the Court exercised its discretion to address an otherwise moot issue related to jury instructions in a first-degree murder case.

In *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 403–04 (Minn. 2019), this Court found that the alleged unlawful incarceration of offenders in the sex offender program fit this exception to mootness, when there was "a 'parade of appeals' related to the issue presented" in the court of appeals, and the issue applied to all offenders. In *Werlich v. Schnell*, 958 N.W.2d 354, 364 n.6 (Minn. 2021), the Court exercised its discretion to

[7] An elections case, *Kahn v. Griffin*, 701 N.W.2d 815, 823 (Minn. 2005), discussed this exception, but appeared to rest on a decision that the issues were capable of repetition yet evading review.

address programs available for predatory offenders, because "it concerns the eligibility of numerous Minnesota inmates for the program."

With respect to end-of-life issues, this Court has exercised its discretion to review a technically moot matter to determine whether a guardian has power to order removal of life support without a district court's prior approval. *In re Guardianship of Tschumy*, 853 N.W.2d 728, 741 (Minn. 2014). Against that backdrop, the Court found it more prudent to provide guidance to lower courts, guardians, and hospital administrators, rather than wait for another person under guardianship to suffer, as Tschumy had, "continual seizures that could [only] be controlled [through] . . . deep sedation" while litigation proceeded. *Id.* at 741. In *In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020), this Court addressed issues of how medical assistance recipients can protect their personal assets when receiving long-term care, even though the affected individual had died during appeal. Similarly, in *Pfoser v. Harpstead*, 953 N.W.2d 507, 514 n.4 (Minn. 2021), this Court applied the exception to address claims by a deceased litigant about using assets to pay for long-term care, because it affected many seniors with disabilities. In both cases, the issues were urgent because they necessarily arise when life expectancy is short and affect many Minnesotans.[8]

[8] Respondents note that many of these cases also fit the capable-of-repetition-yet-evading-review exception.

II. THIS COURT SHOULD DECLINE APPELLANTS' INVITATION TO ADOPT THE VOLUNTARY CESSATION EXCEPTION TO MOOTNESS AT THIS TIME.

In the 38 years since this Court decided *Rud*, it has not adopted any new mootness exceptions. There is no indication that access to Minnesota courts has been unduly limited during those 38 years or that Minnesota courts have been beset by manipulation from unscrupulous parties.

This Court should decline Appellants' invitation to add a new exception to its mootness doctrine. Appellants provide no compelling reason to change Minnesota's justiciability rules in this significant manner. Moreover, as a practical matter, the Court should decline to adopt this doctrine now because its application would not provide any relief to Appellants; it does not apply when there has been legislative action to end challenged action.

A. Appellants Do Not Establish That Minnesota's Existing Mootness Exceptions Have Any Shortcomings.

Against the backdrop of two long-standing exceptions to mootness in Minnesota, Appellants fail to show any need to add the voluntary cessation exception. Instead, Appellants offer only speculation regarding gamesmanship and counter-intuitive arguments regarding judicial resources.

Appellants surmise, without citation, explanation, or analysis, that the "potential for litigation gamesmanship . . . exists in Minnesota." (App. Br. 18.) The attempt by Amicus Forum for Constitutional Rights fares no better, in that every single example it offers is either not moot or falls squarely within the existing mootness exception doctrines. (Br. of Forum for Const. Rights 7–8 (citing claims of alleged police brutality

toward journalists in *Goyette*, which were never moot because they sought damages); *id.* at 9–10 (citing *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989), in which the existing exception for cases capable of repetition yet evading review prevented mootness); *id.* at 10 (citing *In re Senty-Haugen*, 583 N.W.2d 266, 268 n.1 (Minn. 1998), in which the court found the case was not moot without need to resort to mootness exceptions); *id.* at 10–11 (citing *State v. Brooks*, 604 N.W.2d 345, 347–48 (Minn. 2000), in which the existing capable of repetition yet evading review and issue of statewide importance exceptions allowed the Court to decide the case).)[9]

In the 70 years since the U.S. Supreme Court developed the voluntary cessation exception, this is only the second case that Respondents can find in which a party has asserted voluntary cessation before a Minnesota appellate court. In the first case, the appellant initiated a challenge to the respondent's calculation of the optimal termination price of trust assets as part of a sale or termination process. *See Matter of Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset-Backed Certificates, Series 2006 RM-2*, A18-1554, 2019 WL 2079819, at *1 (Minn. Ct. App. May 13, 2019) (unpublished). After the petition was filed, the respondent rescinded its offer to purchase and terminate the trust. *Id.* at 2. The court of appeals found the capable-of-repetition-yet-evading-review exception was inapplicable because there was no indication that the respondent would resume its purchase and termination attempt at the same optimal termination price,

[9] The Forum for Constitutional Rights also argues for voluntary cessation largely on the basis for its potential to establish precedent. (Br. of Forum for Const. Rights 6–7.) Deciding cases just to establish precedent is incompatible with the judicial power in Minnesota and has long been prohibited. *See Sinn*, 295 Minn. at 533, 203 N.W.2d at 366.

and appellant could move for another temporary restraining order to stop the process in the event it did resume. *Id.* at 2–3. As a backup argument, the appellant asked the court to adopt the voluntary cessation exception, which it declined to do. *Id.* at 3. That single case does not offer much support to Appellants' suggestion that Minnesota law needs a third exception to the mootness doctrine, especially since the court concluded that the appellant's rights could be fully protected by the filing of a TRO motion (and the parties later resolved their appeal).

Appellants also assert that adoption of the voluntary cessation exception will save judicial resources. Their theory is that it will prevent cases from moving into and out of court. (App. Br. 15.) The record does not support this contention.[10] Appellants do not identify a single instance in Minnesota in which a case has moved back and forth in this manner due to a party manipulating court jurisdiction. The only discernible effect Appellant's proposed rule would have is keeping cases in the courts longer than necessary, which would waste, rather than save, judicial resources. Moreover, it is unclear why existing judicial tools would be insufficient to prevent such manipulation. The capable of repetition yet evading review exception has been effective in maintaining jurisdiction where the risk of manipulation exists. Moreover, Rule 11 and courts'

[10] Aside from the factually dubious nature of Appellants' assertion on this point, it is an assertion that this Court has not found compelling in the past. Adoption of the *Twombly* pleading standard, for instance, may have saved judicial resources by facilitating earlier dismissals, but the Court has found that to be an insufficient reason to depart from its longstanding pleading standard. *See Walsh*, 851 N.W.2d at 605–06.

inherent authority allow courts to deter bad faith litigation tactics. *See Wolf v. Oestreich*, 956 N.W.2d 248, 256 (Minn. Ct. App. 2021).

B. The Court Should Decline Appellants' Invitation to Adopt the Voluntary Cessation Exception Simply Because the Federal Courts and Some States Have Done So.

Appellants' main arguments in favor of voluntary cessation doctrine is that the Court should adopt the federal standard because it comes from federal court and because other states have done so. There are two considerable flaws with these arguments: Minnesota is not obligated to follow federal precedent on mootness; and the precedent from other states is not binding or persuasive.

1. The court has never uncritically adopted federal standards as the law in Minnesota.

Minnesota is under no obligation to adopt federal law regarding exceptions to mootness. Minnesota's judicial power is rooted in Article VI of the Minnesota Constitution, and this Court is the ultimate authority on the interpretation of Article VI and the extent of judicial power in Minnesota. *See Petition for Integration of Bar of Minn.*, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943) ("The supreme court is thereby made the final authority and last resort in" interpreting the constitution). As such, this Court need not defer to the federal courts' interpretation of their own separate judicial power derived from Article III of the United States Constitution. *C.f. Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598 (Minn. 2014).

For many years, this Court has consistently held that the judicial power extends only to actual controversies. *See, e.g.*, *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*,

875 N.W.2d 279, 283 (Minn. 2016) (Minnesota courts decide only actual controversies); *Graff v. Moench*, 121 Minn. 531, 141 N.W.2d 1134 (1913) (same). It is equally well established that Minnesota state courts do not issue advisory opinions or decide cases just to establish precedent. *See, e.g.*, *Minn. Democratic-Farmer-Labor Party by Martin v. Simon*, 970 N.W.2d 689, 692 (Minn. 2022) (no advisory opinions or precedents for own sake); *Works v. Tiber*, 169 Minn. 172, 173, 210 N.W. 877, 878 (1926) (same); *In re Application of Senate*, 10 Minn. 78, 80-82, 10 Gil. 56, 56 (1865) (same). Against this backdrop, the Court should not adopt other jurisdictions' standards for deciding controversies that are no longer live without a showing of need for the change and clear applicability of the new standard.

2. States' approaches to the voluntary cessation exception provide little support for its adoption in Minnesota.

Appellants overstate the level of acceptance of the voluntary cessation exception among the states. In fact, fewer than half of states have adopted or recognized that exception. Only 18 states have recognized voluntary cessation as a valid exception to mootness, two states have expressly rejected the exception, another three states have declined to apply the exception, and the majority of states have not made any pronouncements at all.

a. Fewer than half of states have expressly adopted the voluntary cessation exception.

By Respondents' count, the high courts of only 18 states plus the District of Columbia have adopted the voluntary cessation exception to mootness. The table below shows the states whose high courts have adopted the voluntary cessation exception.

Respondents discuss the variance between this table and the states identified by Appellants (*see* App. Br. 17 n.5) as well as those identified by Amicus Institute for Justice after the table.

	State	**High Court Case Adopting Voluntary Cessation Exception**
1	Alabama	*Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 71 (Ala. 2009).
2	Alaska	*Young v. State*, 502 P.3d 964, 972 (Alaska 2022).
3	Arizona	*Aguila v. Ducey*, CV-20-0335, 2021 WL 1380612, at *1 (Ariz. Mar. 24, 2021) (unpublished) (citing *Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 141, 761 P.2d 1041 (1988)).[11]
4	Connecticut	*Boisvert v. Gavis*, 210 A.3d 1, 18-19 (Conn. 2019).
5	Georgia	*WMW, Inc. v. Am. Honda Motor Co.*, 733 S.E.2d 269 (Ga. 2012).
6	Idaho	*O'Boskey v. First Fed. Sav. & Loan Ass'n of Boise*, 739 P.2d 301, 306 (Idaho 1987)
7	Kentucky	*Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788, 799–800 (Ky. 2021).
8	Louisiana	*Ulrich v. Robinson*, 282 So.3d 180, 188 (La. 2019).
9	Maryland	*State v. Neiswanger Mgmt. Servs., LLC*, 179 A.3d 941, 950 (Md. 2018).
10	Montana	*Havre Daily News, LLC v. City of Havre*, 142 P.3d 864 (Mont. 2006).
11	Nebraska	*Stewart v. Heineman*, 892 N.W.2d 542, 565 (Neb. 2017).
12	North Dakota	*Tibert v. City of Minto*, 679 N.W.2d 440, 444 (N.D. 2004).[12]
13	Rhode Island	*Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1080 (R.I. 2013).
14	Tennessee	*Norma Faye Pyles Lynch Fam. Purpose LLC v. Putman Cnty.*, 301 S.W.3d 196, 205–06 (Tenn. 2009).
15	Texas	*Matthews, on behalf of M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016).
16	Utah	*Widdison v. State*, 489 P.3d 158, 164 n.5 (Utah 2021).[13]
17	Vermont	*In re Lawrence*, No. 2021-039, 2021 WL 3020752, *3 (Vt. July, 16, 2021) (unpublished).

[11] Institute for Justice does not include Arizona in its tally.

[12] Institute for Justice does not include North Dakota in its tally.

[13] Institute for Justice does not include Utah in its tally, presumably because Utah has recognized the doctrine but never found it applicable.

18	Washington	*Family of Butts v. Constantine*, 491 P.3d 132, 141 (Wash. 2021).
+	District of Columbia	*Welsh v. McNeil*, 162 A.3d 135 (D.C. 2017).
	Total	- 18 state high courts, along with the D.C. Court of Appeals, have adopted the voluntary cessation exception.

Appellants misleadingly claim that 25 states plus the District of Columbia have "explicitly adopted" the voluntary cessation exception. A review of the cases on which they rely reveals that Appellants: are counting statements by courts which lack the authority to adopt new legal rules; and are including cases that do not adopt or apply the voluntary cessation exception. Most notably, Appellants' citations to unpublished district court level decisions in Delaware and Massachusetts do not constitute proof that those states have adopted the voluntary cessation exception, because no appellate court in those states has spoken.[14] (App. Br. 17 n.5.) Similarly, Appellants assert that the states of Colorado, Illinois, Kansas, Michigan, and Oregon have adopted the voluntary cessation exception based solely on citations to decisions of those states' intermediate appellate courts.[15] (App. Br. 17 n.5.) Application of a rule by an intermediate appellate court falls

[14] The Massachusetts Supreme Court recently considered a case in which a Massachusetts business owner sought appellate review of that state's rescinded mask requirement. *City of Lynn v. Murrell*, SJC-13193, --- N.E.3d ----, 2022 WL 1298832 (Mass. May 2, 2022). The court found the appeal moot in a lengthy analysis without ever mentioning the voluntary cessation exception. *Id.* at *3–5.

[15] As explained below, the Michigan Court of Appeals case Appellants cite did not adopt to apply the voluntary cessation exception. Institute for Justice's citation to Oregon's *Gates v. McClure*, 588 P.2d 32, 33–34 (Or. 1978) does not resolve the issue for Oregon, as that case merely discussed the voluntary cessation exception without adopting it, before holding that it did not apply to the facts of the case.

short of adoption by those states.[16] Appellant also relies on a district court case from Virginia. (*Id.*) The Virginia Court of Appeals has recognized the voluntary cessation exception in unpublished opinions, but it has never found the exception applicable. *See, e.g.*, *Forbes v. Commonwealth*, Nos. 0699–04–3, 0713–04–3, 2005 WL 1388060 (Va. Ct. App. Jun. 14, 2005) (unpublished).

In addition, several of the cases Appellants cite do not adopt or apply the voluntary cessation doctrine at all. *State ex rel. Ind. State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 673 n.2 (Ind. 2006) (declining to apply mootness exceptions because it found the case was not moot); *Larocque v. Turco*, SUCV202000295, 2020 WL 2198032, at *10 (Mass. Super. Feb. 28, 2020) (unpublished) (applying Massachusetts' *Wolf* doctrine for mootness, a procedural rule applicable only to named plaintiffs in class actions);[17] *Micheli v. Mich. Auto. Ins. Placement Fac.*, --- N.W.2d ----, 2022 WL 414189, at *6-7 (Mich. Ct. App. Feb. 10, 2022) (Gleicher, C.J., concurring) (after majority finds issue capable of repetition yet evading review in footnote, solo concurrence argues for the adoption of the voluntary cessation exception); *Delanoy v. Township of Ocean*, 246 A.3d 188, 198 n.5 (N.J. 2021) (citing voluntary cessation standards, in dictum, in a case where

[16] Appellants also rely on cases from the intermediate appellate courts of Arizona, Tennessee, and Texas, but, as noted in the table above, Respondents agree that those states have adopted the voluntary cessation exception because there are decisions confirming that adoption from those states' high courts.

[17] Although it is not clear whether *Larocque* is a class action, the *Wolf* rule cited by the court in *Larocque* is only properly applied in that context. *Cantell v. Comm'r of Corr.*, 60 N.E.3d 1149, 1155 n.16 (Mass. 2016).

claims for retrospective relief made mootness a non-issue)[18]; *State ex rel. Okla. Firefighters Pension & Retirement Sys. v. City of Spencer*, 237 P.3d 125, 129 (Okla. 2009) ("Oklahoma jurisprudence recognizes two exceptions to the mootness doctrine: (1) when the appeal presents a question of broad public interest and (2) when the challenged event is 'capable of repetition, yet evading review.' ")[19]; *All Cycle, Inc. v. Chittenden Solid Waste Dist.*, 670 A.2d 800, 804–05 (Vt. 1995) (citing voluntary cessation standards in dicta but finding no exception needed because the matter was not moot).

In addition, other state opinions that Appellants or amici cite provide only shaky support. Cited cases from Alabama, Colorado, Delaware, Hawai'i, Idaho, Kansas, Nebraska, and North Dakota merely state the federal rule without any analysis regarding adoption or citation to in-state authority.[20] This is the kind of reflexive acquiescence to

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[18] Treatment of the voluntary cessation exception in a subsequent case concerning COVID regulations further suggests that *Delanoy* did not adopt that doctrine. *Bayshore Enterprises, Inc. v. Murphy*, Nos. A-3616-19 & A-3873-19, 2021 WL 3120868, at *10 (N.J. Super. July 23, 2021) (unpublished). For the similar reasons, Institute for Justice's inclusion of New Jersey among states having adopted the exception is misleading. (Br. of Inst. for Justice 10 (citing *Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n*, 393 A.2d 218 (N.J. 1975).)

[19] Amicus Institute for Justice also cited this case as its basis to include Oklahoma on its list of states adopting the exception. (Br. of Inst. for Justice 10.)

[20] *See Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65, 71 (Ala. 2009); *United Airlines, Inc. v. City & Cnty. of Denver*, 973 P.2d 647, 652 (Colo. Ct. App. 1998); *First State Orthopaedics, P.A. v. Employers Ins. Co. of Wausau*, C.A. No. S19C-01-051, 2020 WL 2458255, at *3 (Del. Super. May 12, 2020) (unpublished); *Wiginton v. Pac. Credit Corp.*, 634 P.2d 111, 119 (Haw. Ct. App. 1981); *Stano v. Pryor*, 372 P.3d 427 (Kan. Ct. App. 2016); *Stewart v. Heineman*, 892 N.W.2d 542, 565 (Neb. 2017); *Tibert v. City of Minto*, 679 N.W.2d 440, 444 (N.D. 2004).

federal law in which this Court has refused to engage. *See Walsh*, 851 N.W.2d at 603. In addition, Utah recognizes the exception, but has never found it applicable. *Widdison v. State*, 489 P.3d 158, 164 n.5 (Utah 2021) (noting that Utah has acknowledged voluntary cessation but never applied it and raising concerns about the exception).

In addition to the states wrongly identified by Appellants, Amicus Institute for Justice asserts that Maine and North Carolina have also adopted the voluntary cessation exception. (Br. of Inst. for Justice 9-10 (citing *LeGrand v. York Cnty. Judge of Probate*, 168 A.3d 783, 791 (Me. 2017); *Thomas v. N.C. Dep't of Human Res.*, 485 S.E.2d 295 (N.C. 1997) (per curiam).) Respondents disagree. In *LeGrand*, the court merely cited a voluntary cessation case in dicta. The holding on mootness, however, was that the presence of other class members with continuing injuries prevented mootness even after the named plaintiff's claim for prospective injunctive relief was mooted. 168 A.3d at 791–92. With respect to North Carolina, its intermediate appellate court applied the voluntary cessation exception in *Thomas v. N.C. Dep't of Human Res.*, 478 S.E.2d 816 820–21 (N.C. Ct. App. 1996), but the North Carolina Supreme Court affirmed the decision without opinion. 485 S.E.2d 295 (N.C. 1997) (per curiam).

b. Five states have rejected requests to adopt or apply the voluntary cessation exception.

Appellants claim that every state to consider the voluntary cessation exception has adopted it. (App. Br. 16.) This is inaccurate. At least five states have rejected either its adoption or its application.

In a 2019 case before the Wyoming Supreme Court, the appellant asked the court to adopt the voluntary cessation exception. *Guy v. Wyo. Dep't of Corrections*, 444 P.3d 652, 656–57 (Wyo. 2019). The issue was squarely before the court, and the court declined to adopt the exception: "We are unable to find any case where we have cited, let alone adopted, the voluntary cessation exception. Moreover, [appellant] presents no argument why we should adopt the exception now." *Id.* California appellate courts have also rejected the voluntary cessation exception. *Lee v. Davis*, 190 Cal. Rptr. 682, 685–86 (Cal. Ct. App. 1983) (noting discrepancy between federal and state rule).[21]

The Nevada Supreme Court also rejected a request to apply the voluntary cessation exception. *Guinn v. Leg. of State of Nev.*, 76 P.3d 22, 33 n.45 (Nev. 2003). Similarly, the Iowa Supreme Court declined a request that it apply the voluntary cessation exception in a case concerning COVID executive orders. *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 not persuaded to apply it here."). The West Virginia Supreme Court was also asked to adopt the voluntary cessation exception and declined because the matter was unripe. *State Farm Mut. Auto. Ins. Co. v. Schakten*, 737 S.E.2d 229, 238 n.6 (W. Va. 2012).

In short, states' approaches to the voluntary cessation are varied. States have ranged from fully embracing the doctrine (*e.g.*, Texas), to recognizing it but never

[21] Although *Lee* was decided 41 years ago, the California courts still decline to apply the voluntary cessation exception. *RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co.*, 270 Cal. Rptr. 3d 425, 444 (Cal. Ct. App. 2020), *review denied* (Feb. 10, 2021).

applying it (*e.g.*, Utah), to declining to apply it (*e.g.*, Iowa), to rejecting it (*e.g.*, Wyoming and California). The majority of states have either not adopted the exception or explicitly rejected it. There is no uniform approach among the states that would provide the type of overwhelmingly persuasive authority to compel this Court to also adopt the exception. In addition, state high courts have noted the difficulty in applying the voluntary cessation exception, a factor that counsels against adoption. *Norma Faye*, 301 S.W.3d at 205–06; *Widdison*, 489 P.3d at 164 n.5.

III. EVEN IF THE COURT ADOPTS THE VOLUNTARY CESSATION EXCEPTION, THIS CASE WOULD BE OUTSIDE THE EXCEPTION'S BOUNDS.

The voluntary cessation exception was created for one purpose: to prevent parties from manipulating court jurisdiction by ceasing a challenged activity just long enough to moot the case and then resuming that activity as soon as the court's jurisdiction ends. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 1074–75 (1982).[22] The U.S. Supreme Court has reiterated this underlying policy consistently over the 70 years that the exception has existed. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 727 (2013); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897 (1953).

[22] In a case earlier this year in which a majority of the Michigan Court of Appeals relied upon the exception for cases capable of repetition but evading review, the chief judge, in concurrence, urged application of the voluntary cessation exception specifically because the litigation decision that purportedly mooted the dispute "smack[ed] of gamesmanship." *Micheli v. Mich. Auto. Ins. Placement Facility*, --- N.W.2d ----, 2022 WL 414189, at *7 (Mich. Ct. App. Feb. 10, 2022) (Gleicher, C.J., concurring).

Even if the Court were to believe that some form of the voluntary cessation exception is appropriate for Minnesota courts, the exception would not apply to the facts of this case. First, there is no evidence that Governor Walz rescinded EO 20-81 to frustrate this litigation. Second, federal courts do not generally treat the repeal of legislation as "voluntary cessation" for purpose of mootness. Finally, courts have repeatedly rejected attempts to revive moot litigation challenging COVID executive orders. There is no reason for this Court to adopt a new exception to mootness in a case where that exception would not even apply, and there is certainly no reason to adopt the radical version of the exception that Appellants propose.

A. Governor Walz Responded to the Pandemic, Not This Litigation.

Appellants filed suit in August of 2020, and Governor Walz did not alter EO 20-81 during the entirety of the time the case was pending in district court. On May 6, 2021, after Governor Walz had *succeeded* in dismissing Appellants' claims, and before there was any indication that Appellants planned to appeal that dismissal, Governor Walz announced that EO 20-81 would be repealed no later than July 1. That sequence of events alone is evidence that Governor Walz did not repeal the EO to manipulate court jurisdiction. In addition to the sequencing, however, Governor Walz's communications were clear that he made the decision due to circumstances related to public health. His announcement included reasons for the decision, including the wide availability of vaccines for any interested adults; the high vaccination rate, especially among people 65 and older; and decreases in numbers of cases and hospitalizations. *Governor Walz Announces Timeline to End State COVID-19 Restrictions*, Office of

Governor Tim Walz & Lt. Governor Peggy Flanagan (May 6, 2021), https://mn.gov/governor/news/#/detail/appId/1/id/480351 (last visited Apr. 27, 2022).

A few days after Governor Walz announced the plan to repeal EO 20-81, on May 10, Appellants appealed the district court's decision. On May 14, in response to a CDC announcement the previous day that universal masking was no longer necessary, Governor Walz immediately repealed the relevant portions of EO 20-81.[23] Then, in conjunction with the state legislature, Governor Walz ended the state of emergency, effective July 1, 2021.

This was in line with the nationwide trends. One by one, every state in the United States that had a masking requirement dropped it, most citing the same reasons that Governor Walz cited. Four other governors ended their masking orders immediately on May 14 or 15.[24] At least four other governors announced on May 14 or 15 that their

[23] Appellants imply that Governor Walz's May 14 announcement was a response to their appeal. (*See* App. Br. at 5.) This is implausible for at least two reasons. First, the relationship of the May 14 announcement to the CDC's announcement is clear. Indeed, as noted below, at least four other governors also lifted their mask orders just after the CDC's announcement. Second, May 14 action was not necessary to moot the case. If Governor Walz had simply stuck with the timeline he announced on May 6, the mask requirement would have expired on July 1, well before the court of appeals took the matter under advisement, let alone issued a decision.

[24] (*See* Colorado Executive Order D 2021 103 (May 14, 2021), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202021%20103%20Face%20Covering%20Order.pdf (last visited May 4, 2022); *Governor Hogan Announces End of Statewide Mask Mandate*, Office of Maryland Governor Larry Hogan, https://perma.cc/AUS8-8WGX (last visited Apr. 27, 2022); North Carolina Executive Order No. 215 (May 14, 2021), https://governor.nc.gov/executive-order-no-215 (last visited May 4, 2022); *Guidance – EO 72 and 79 Updates*, Va. Dep't of Health,
(Footnote Continued on Next Page.)

mask orders would end or be relaxed on a later effective date and several others ended or relaxed their mask orders in the days that followed.[25] Eighteen other state mask requirements have ended more recently. (*State-Level Mask Requirements in Response to the Coronavirus (COVID-19) Pandemic 2020-2022*, Ballotpedia, https://perma.cc/2LPY-YSB3 (last visited Apr. 25, 2022).) Since Hawai'i ended its masking requirement on March 26, 2022, not a single state has a general masking requirement. (*See* Tim Stelloh, *Hawaii, Last State with Mask Mandate, Is Letting It Expire*, NBC News (Mar. 8, 2022), https://perma.cc/G6FV-3X79 (last visited Apr. 27, 2022.) In short, there is nothing to suggest that Governor Walz was influenced in any way by this litigation.

B. Appellants' Arguments That Respondents Manipulated Court Jurisdiction Are Absurd.

With a total lack of humility, Appellants assert that "the pendency of this case is the only thing keeping [Governor Walz] from reimposing a mask mandate." (App. Br.

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https://www.vdh.virginia.gov/content/uploads/sites/8/2021/05/Mask-changes-EO-72.pdf (last visited May 4, 2022).)

[25] (*See Kentucky Restrictions, Mask Mandate to Mostly End in June*, U.S. News & World Report (May 14, 2021), https://www.usnews.com/news/best-states/kentucky/articles/2021-05-14/kentucky-restrictions-mask-mandate-to-mostly-end-in-june (last visited May 4, 2022); *Maine to Align With CDC, End Mask Rule for Vaccinated People*, U.S. News & World Report (May 14, 2021), https://www.usnews.com/news/best-states/maine/articles/2021-05-14/collins-new-cdc-guidance-on-masks-overdue-but-progress (last visited May 4, 2022); *Governor DeWine Statement on New CDC Mask Guidance*, Office of Ohio Governor Mike DeWine (May 14, 2021), https://perma.cc/9QGA-GWZ5 (last visited Apr. 27, 2022); Rob Manning & Kristian Foden-Vencil, *As Oregon's Mask Mandate Ends, It's Up to Each Business To Chart What's Next*, OPB (May 14, 2021), https://perma.cc/H2ND-MWTK (last visited May 4, 2022); https://perma.cc/73RS-RX93 (last visited Apr. 25, 2022).)

27.)[26] As argued above, the timing of events, as well as the similarity to the timing in other states, makes clear the Governor made his decision to rescind EO 20-81 based on public health factors. However, even if this Court considers each of Appellants' three attempts to draw those public health rationale into question, it will find each attempt fails.

First, Appellants assert that Governor Walz misrepresented his reliance on CDC guidance, because Minnesota has not rigidly followed CDC guidance throughout the pandemic. (App. Br. 27.) But Respondents have never purported to be bound by CDC guidance. Like any rational state leader, Governor Walz regards the CDC as a helpful source of reliable information on pathogens, but the CDC is not a decisionmaker in Minnesota. In early May, Governor Walz had already committed to ending the mask requirement by July 1, without any corresponding announcement by the CDC, because conditions in Minnesota demonstrated that it was the right decision. Moreover, the subsequent CDC announcements to which Appellants cite fell well short of calls for state-wide universal masking.[27]

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[26] Appellants are silent as to whether this or similar litigation is also the only thing keeping all 49 other governors from enacting masking requirements. *See id.*

[27] *Compare* Athalia Christie, et al., *Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage*, CDC (Jul. 27, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm (last visited Apr. 25, 2022)[27] (urging "*local* decision makers" to consider several enumerated factors in determining what "layered prevention strategies," potentially including masking, are needed in their communities) (emphasis added), *with CDC Calls on Americans To Wear Masks To Prevent COVID-19 Spread*, CDC (Jul. 14, 2020), https://perma.cc/HU5A-DA36 (last visited Apr. 25, 2022) (stating that "*[a]ll Americans* have a responsibility to protect themselves, their families, and their communities" by wearing masks) (emphasis added).

Second, Appellants attempt to undercut Governor Walz's May 2021 citation to the availability of vaccines as a reason to rescind EO 20-81. They rely on a December 2021 NPR article for the proposition that vaccines may be less effective against Omicron variant infections.[28] (App. Br. 26.) The Omicron variant was first identified in November 2021 and detected in Minnesota in December 2021, several months *after* Governor Walz made his decision to lift the mask mandate. (*The Omicron Variant Has Arrived in Minnesota – Here's What You Need To Know*, M Health Fairview (Jan. 25, 2022), https://perma.cc/KTU4-PHYA (last visited May 2, 2022).) The Governor does not have a crystal ball. When he made decisions in May 2021, he could not have considered data that was not available until December 2021.

Third, Appellants assert that data cannot explain the lack of a mask requirement because one data point—(total daily cases)—at one point in time—(the Omicron spike of last winter)—was high. (App. Br. 27.) Appellants appear to intentionally ignore other relevant metrics, most notably hospitalizations and deaths. Through a combination of the efficacy of vaccines against severe illness and the less virulent nature of the Omicron variant, the number of deaths and serious cases did not reach 2020 levels, and hospitals did not experience the same level of overcrowding. (*See Tracking Coronavirus in Minnesota: Latest Map and Case Count*, N.Y. Times (Apr. 25, 2022), https://perma.cc/6S96-8WEL (last visited Apr. 25, 2022).) The COVID situation in Minnesota is fundamentally different than it was in the 2020 peak. (*See* Bill Chappell,

[28] To be clear, that article also emphasized that the vaccines remain highly effective against severe disease from the Omicron variant.

Here's Why Dr. Fauci Says the U.S. Is 'Out of the Pandemic Phase', NPR (Apr. 28, 2022), https://perma.cc/YN5J-QC6F (last visited Apr. 29, 2022).)

There can be no serious contention that Governor Walz would "pick up where he left off" and impose the same masking order if this Court affirms that the case is moot. *See Already, LLC*, 568 U.S. at 91, 133 S. Ct. at 727.[29] As explained above, changed circumstances, and not pending litigation, explain why EO 20-81 was repealed and has not been reenacted. There is no reasonable basis to assert that, upon affirmance of the court of appeals' decision, Governor Walz and the Executive Council will immediately spring to action and make Minnesota the only state in the union to require universal indoor masking.

C. The Actions That Mooted This Case Were Not "Voluntary Cessation" within the Meaning of the Exception.

The voluntary cessation exception is a bad fit for this case for two additional reasons. First, even state and federal courts that recognize the voluntary cessation exception have rejected its application where, as here, COVID regulations were completely repealed. And second, even outside the COVID context, repeal or expiration of a law is generally not considered "voluntary cessation" unless there is bad faith.

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[29] Respondents litigated other COVID cases in state and federal appellate courts. *E.g.*, *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022); *610 Doran Apartments, LLC v. State by and through Walz*, A21-0869, 2022 WL 764229 (Minn. Ct. App. Mar. 14, 2022) (unpublished); *Free Minn. Small Bus. Coal. v. Walz*, A20-0641, 2020 WL 2745414 (Minn. Ct. App. May 26, 2020) (unpublished). It is not clear why Appellants believe their case, which challenged a single EO, caused Governor Walz to abandon all COVID-related emergency orders.

Numerous courts—including five federal circuit courts of appeal and two other state high courts—have held that the voluntary cessation exception does not apply to revive cases challenging COVID regulations when those regulations were repealed due to the change in public health circumstances. *E.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 22 F.4th 701, 702 (7th Cir. 2022); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163–64 (4th Cir. 2021); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 11–12 (1st Cir. 2021); *Cnty. of Butler v. Governor of Penn.*, 8 F.4th 226, 230 (3d Cir. 2021); *Hawse v. Page*, 7 F.4th 685, 692 (8th Cir. 2021); *Let Them Play MN v. Walz*, 556 F. Supp. 3d 968, 977–78 (D. Minn. 2021); *Riley Drive*, 970 N.W.2d at 297; *Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788, 800 (Ky. 2021); *Aguila v. Ducey*, No. CV-20-0335, 2021 WL 1380612, at *1 (Ariz. Mar. 24, 2021) (unpublished).[30]

In *Boston Bit Labs*, for instance, the court found that rescission of both the challenged restriction and the state of emergency eliminated any reasonable expectation of recurrence. *See* 11 F.4th at 10–12. When rescinding his state's emergency declaration, the Governor of Massachusetts had cited the wide distribution of COVID

[30] As Appellants note, Illinois's intermediate appellate court reached the opposite conclusion. *See Kristen B. v. Dep't of Child & Family Servs.*, --- N.E.3d ----, 2022 WL 266620, at *4 (Ill. Ct. App. Jan. 28, 2022). The other federal decisions cited by Appellants (App. Br. 25) either: have no discussion of voluntary cessation, *Cassell v. Snyders*, 990 F.3d 539, 546 (7th Cir. 2021); have been vacated, *Resurrection Sch. v. Hertel*, 11 F.4th 437, 452 (6th Cir. 2021), *vacated by Resurrection Sch. v. Hertel*, 16 F.4th 1215, 1216 (6th Cir. 2021); or are trial court decisions from much earlier stages of the pandemic when governors were still wielding emergency authority. *E.g.*, *Prof'l. Beauty Fed'n. of California v. Newsom*, No. 2:20-CV-04275, 2020 WL 3056126, at *5 (C.D. Cal. June 8, 2020); *Amato v. Elicker*, 534 F. Supp. 3d 196, 206 (D. Conn. 2021) (decided in April 2021); *BK Salons, LLC v. Newsom,* No. 2:21-CV-00370, 2021 WL 3418724, at *3 (E.D. Cal. Aug. 5, 2021).

vaccines, which indicated that the rescission was unrelated to litigation. *Id.* at 10. The court found "night-and-day differences" between the circumstances before it and those in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), in which the United States Supreme Court decided an appeal after the challenged executive order had been lifted, beginning with the fact that "neither the challenged restriction nor the state of emergency" remained in effect. *Id.* at 11. That, combined with the governor's lack of new orders like the challenged restriction despite upticks in COVID cases made it "unrealistically speculative" to think that the challenged order would be reinstated. *Id.* at 11–12.

In *Hawse*, the Eighth Circuit similarly found that changed circumstances eliminated any reasonable expectation of recurrence. The appellants challenged an order that, when in place, had restricted gatherings at churches to fewer than 10 people in a single room. 7 F.4th at 687. The court acknowledged United States Supreme Court cases rejecting mootness but held that the matter was moot due to substantial evolution of circumstances. *Id.* at 692. The challenged provision had been rescinded "[f]or more than a year," and there had been no capacity limit at all for two-and-one-half months. *Id.* at 692–93. In addition, there was no "track record of 'moving the goalposts' in a way that places the appellants under a constant threat" of new attendance limits. *Id.* at 693. The court noted that despite the emergence of the Delta variant, the respondents had not reimposed capacity limitations on gatherings. *Id.* Under the circumstances of the

evolved COVID situation and the respondents' response, the court held that "there is no reasonable expectation that the [respondents] will reinstate [the challenged order]." *Id*[31].

Likewise, in *Let Them Play*, which considered the specific circumstances in Minnesota, the court held that the voluntary cessation exception was inapplicable where the Governor acted based on changes in the circumstances surrounding COVID, rather than to evade judicial review. 556 F. Supp. 3d at 978. The record demonstrated that "new Guidance from the Centers for Disease Control and prevention, the state's progress on vaccine administration, and trends in public health risk metrics" were the cause of the changes to restrictions, and the voluntary cessation exception was therefore inapplicable. *Id.*

As detailed above, Governor Walz repealed EO 20-81 in response to changed circumstances unrelated to litigation. Soon thereafter, he and the legislature ended the peacetime emergency that allowed him to implement the mask mandate. Under the sensible rule applied in numerous jurisdictions, that makes the voluntary cessation exception inapplicable.

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[31] Appellants urge this Court to adopt the reasoning of the dissent in *Hawse*, or to interpret the decision as resting entirely on the presence of intervening U.S. Supreme Court caselaw (that made clear any limitations on religious exercise must compare favorably to the least limitation on secular activity). (App. Br. 29.) However, before discussing the legal development, the majority in *Hawse* had already concluded "there is no reasonable expectation that the County will reinstate its Public Health Order" based on the change in public health conditions. Furthermore, Appellants are unable to point to any other case limiting the voluntary cessation exception to instances in which the recurrence of the challenged action would be illegal.

Second, the repeal or expiration of a law cannot trigger the voluntary cessation exception absent a showing that it was done in bad faith. *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc) ("[T]he repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal.") (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478, 110 S. Ct. 1249 (1990); *Burke v. Barnes*, 479 U.S. 361, 363, 107 S. Ct. 734 (1987); *Kremens v. Bartley*, 431 U.S. 119, 127-28, 97 S. Ct. 1709 (1977)); *Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017) ("[S]tatutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."); *Ulrich v. Robinson*, 282 So.3d 180, 188 (La. 2019); *Guinn v. Legislature of State of Nev.*, 76 P.3d 22, 33 n.45 (Nev. 2003); *In re Lawrence*, No. 2021-039, 2021 WL 3020752, *3 (Vt. July, 16, 2021) (unpublished) (citing *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)); *see also Bos. Bit Labs*, 11 F.4th at 10 ("That the Governor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot. And we know some are."). In this case, Appellants make no argument that Respondents acted in bad faith. Nor could they, for the reasons described above.[32]

[32] Even Appellants' baseless suggestion that Governor Walz's reason for not reimposing a mask mandate is "his concern that this Court or the legislature could limit his emergency authority" (App. Br. 26) would not constitute "bad faith" within the meaning of the doctrine. "Bad faith" means gamesmanship in starting and stopping a challenged (Footnote Continued on Next Page.)

By contrast, the cases Appellant cites are poor comparators. In *Parents Involved*, for instance, the primary jurisdictional issue was the standing of the parent group who challenged the high school assignment policy of the Seattle Public Schools. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718–19 (2007). While challenging standing, the school district "note[d] that it has ceased using the racial tiebreaker pending the outcome of this litigation." *Id.* The Supreme Court seemed to construe that as a suggestion of mootness, and therefore added one sentence regarding the voluntary cessation exception to mootness. In contrast here, Respondents are not just suggesting, but affirmatively arguing mootness. And Governor Walz did not merely pause the effectiveness of the EO "pending the outcome of litigation." Instead, he completely rescinded EO 20-81. Furthermore, the peacetime emergency that authorized him to issue EO 20-81 ended through joint action of the Governor and Legislature. Further, the entire landscape of the pandemic is significantly different today than it was in July 2020.

Appellant's reliance on *Kristen B.* is also misplaced. In that case, the defendant amended the challenged policy to allow face-to-face visits, purportedly mooting the case. *See Kristen B. v. Dep't of Child & Family Servs.*, --- N.E.3d ----, 2022 WL 266620, at *3, *4 (Ill. Ct. App. Jan. 28, 2022). However, the text of the amendment warned readers that the department might reverse course. *Id.* That uncertainty, along with Illinois's low

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action. The institutional reason suggested by Appellants would not support any re-starting of a challenged action.

vaccination rate and several cases analyzing conditions specific to Illinois, led the court to conclude that the matter was not moot. *Id.* at *4–5.

Kristen B. is easily distinguishable from this case. On January 28, 2022, when the court issued its decision in *Kristen B.*, Illinois was still under a statewide emergency, including a statewide masking order. (Illinois Executive Order 2022-12 (Apr. 29, 2022), https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-order-2022-12.pdf (last visited May 4, 2022) (extending Illinois's COVID executive orders through May 28, 2022), Illinois Executive Order 2022-06 (Feb. 28, 2022), https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-order-2022-06.pdf (last visited May 4, 2022) (rescinding Illinois's general mask requirement on February 28, 2022).) By contrast, Minnesota has been out of its state of emergency for more than ten months. Moreover, the policy at issue in *Kristen B.* was a department memorandum, designed to change frequently. The challenged law in this case was an executive order with the force of law that was promulgated in accordance with Chapter 12 and rescinded when appropriate.

Finally, *Tandon v. Newsom* serves as no guide whatsoever. *See* 141 S. Ct. 1294 (2021). In that very short opinion from the emergency docket, the United States Supreme Court applied a mootness exception with absolutely no analysis or explanation.[33] *Id.* at 1297. Moreover, the case was not even moot, as the challenged restriction was still in effect. *Id.* The Court noted that California was in a state of emergency, had a track

[33] In fact, the Court did not even say that it was applying the voluntary cessation exception. *Id.* That is merely the best inference. (App. Add. 10.)

record of "moving the goalposts," and respondents retained the power to alter the public health regulations, because the case was decided in the height of the pandemic. *Id.* The differences from this case are stark.

D. The Rule Appellants Ask the Court to Adopt Is Inconsistent with Minnesota Law and with Most Versions of the Voluntary Cessation Exception.

Perhaps recognizing that application of the general voluntary cessation exception would not serve their case, Appellants ask the Court to adopt a radical voluntary cessation test they made from whole cloth. (App. Br. 22.) In the test proposed by Appellants, when *any* defendant takes *any* action, regardless of whether it is related to litigation, that obviates the need for the relief the plaintiff seeks, courts are *required* to issue an advisory opinion unless the defendant can meet some unspecified burden of "absolute" proof that the moot issue will never arise again. (*Id.*) Appellants would have the Court apply this test even where legislative action mooted the case, despite the fact that this would *never* allow such cases to be mooted because the Legislature can *always* reverse course with a subsequent bill. (*See id.* 23–24.)

Appellants' proffered test is inconsistent with Minnesota law for at least four reasons. Most importantly, Appellants advocate for a mechanical rule that limits the reviewing court's flexibility. This mechanical approach flies in the face of Minnesota's longstanding rule that mootness doctrine in Minnesota is "flexible and discretionary" and requires the reviewing court to carefully analyze "all aspects of the issues presented" in considering whether to decide a technically moot appeal. *In re Guardianship of Tschumy*, 853 N.W.2d 728, 737–38 (Minn. 2014). For example, Appellants' rule would

have precluded this Court from exercising discretion to treat the dispute in *Limmer v. Swanson*, 806 N.W.2d 838 (Minn. 2011) as moot based on the presence of "fundamental constitutional questions about the relative powers of the three branches of our government." Appellants do not include constitutional avoidance among the "circumstances" a court may consider, and instead propose that unless the Ramsey County court could have established with evidence that it would never authorize spending in a government shutdown, this Court would have been bound to issue an advisory opinion. Indeed, Appellants' proposed rule violates the Minnesota Constitution, because it would require judges to stray from the limits of their judicial power by issuing advisory opinions or intruding on the constitutional functions of other branches of government. *State v. Arens*, 586 N.W.2d 131, 132 (Minn. 1998).

Second, Appellants reverse the burden of proof. Currently, the party seeking to establish an exception to mootness has the burden of proving that exception. *In re Welfare of K.-A-M.C.*, No. A13-0512, 2013 WL 4404720, at *2 (Minn. Ct. App. Aug. 19, 2013). Yet Appellants' proposal forces the party arguing mootness to also prove no exception applies. (App. Br. 22.)

Third, the proposed rule would conflict with existing exceptions to mootness. For example, it does not leave room for a litigant to establish that their legal issue is an urgent matter of statewide importance. Nor does it consider whether a challenged issue would "evade review".

Fourth, Appellants' test radically expands the concept of "judicial notice" such that it has no bounds (App. Br. 22 ¶ 5), and conflicts with this Court's statements about

the importance of parties and reviewing courts generally remaining within the appellate record. *E.g.*, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

If the Court were to adopt a voluntary cessation exception (and as discussed, it need not here), it should adopt a well-established test from a jurisdiction with experience implementing it. The time-tested principles used by the federal courts are a good guide. Under these well-established principles, a defendant's voluntary cessation of challenged conduct does not *necessarily* render a case moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693 (2000). The focus of the court should remain on concerns of gamesmanship. *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016). When the challenged provision is a law, and it is repealed, amended in relevant part, or expires, there is a presumption of mootness, and the challenging party must demonstrate that a reasonable expectation of reenactment exists, "founded in the record, as it was in *City of Mesquite*, rather than on speculation alone." *Bd. of Trs. Of Glazing*, 941 F.3d at 1198–99.

IV. APPELLANTS' CLAIMS ARE NOT CAPABLE OF REPETITION YET EVADING REVIEW.

Appellants briefly argue that their claims fit within the exception for issues that are capable of repetition yet evading review. But their claims do not fit either prong of that exception. Under the capable of repetition yet evading review exception, a court has discretion to decide a case challenging a law or policy after the law or policy ceases to affect the challenging party if (1) there is a "reasonable expectation" that the challenging party will again become subject to the restriction and (2) the challenged action is,

"by its character," too short to be fully litigated before it ceases or expires. *Dean*, 868 N.W.2d at 5.

This exception's application is well illustrated in *Madonna*, in which the plaintiffs challenged a Minnesota statute that allowed courts to order involuntary commitment of a person for up to 72 hours pending a mental health evaluation in a process known as a "hold order." *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 359–60 (Minn. 1980). Although all three plaintiffs had been released from the challenged commitments prior to litigation, the court held that the case was not moot because it was capable of repetition yet would evade review. *Id.* at 361. The first prong was satisfied because one plaintiff suffered from serious mental illness and had been subject to several hold orders, making a future hold order likely. *Id.* The second prong was satisfied because it was impossible to get a ruling on the merits before the 72-hour hold order expired. *Id.*

In this case, the "capable of repetition, yet evading review" doctrine does not apply because: (1) Appellants have not established a reasonable expectation that an order requiring masking will be re-enacted; and (2) even if such an executive order were issued, there is no indication that it would evade review.

A. There Is No Reasonable Expectation That Appellants Will Again Be Subject to a Masking Order.

As the court of appeals correctly held, Appellants have not and cannot show a reasonable expectation that an executive order requiring universal masking will be re-enacted. (App. Add. 5–6.) The prospect has only grown more remote since the court of appeals' decision.

As of the date of this brief, it has been 360 days since EO 20-81 was rescinded and more than one year since Governor Walz announced that EO 20-81 would end. At no point during that year has Governor Walz issued any order requiring universal masking or intimated that one was likely. Moreover, the peacetime emergency that authorized EO 20-81 is no longer in effect. This contrasts starkly with cases like *Madonna*, in which the challenged statute was still in force. *See id.* at 359. It also distinguishes this case from cases like *Roman Catholic Diocese of Brooklyn v. Cuomo*, in which the regulatory scheme was still in place. *See* --- U.S. ----, 141 S. Ct. 63, 68 (2020). In *Roman Catholic Diocese*, at the time of the Supreme Court's decision, Governor Cuomo had rescinded the challenged regulation and replaced it with one that was less stringent, one of the eight times the regulation had been adjusted in the prior five weeks. *Id.* at 68 n.3. Thus, the threat that the challenged regulation would return loomed large. In this case, by contrast, the entire peacetime emergency has ended. *See Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 11 (1st Cir. 2021) (noting the rescission of Massachusetts' state of emergency as chief among the "night-and-day differences" between the circumstances of that case and those of *Roman Catholic Diocese*); *City of Lynn v. Murrell*, SJC-13193, --- N.E.3d ----, 2022 WL 1298832, at *4 (Mass. May 2, 2022) (finding an assertion that the governor might reimpose a mask requirement because he retained the power to do so was "speculative and insufficient to confer a stake in this appeal," particularly in light of the changed circumstances caused by new measures to combat COVID, such as multiple tests, vaccines, and at-home treatments).

Moreover, in contrast to Governor Cuomo's regular adjustment of the church capacity limits at issue in *Roman Catholic Diocese*, Governor Walz made exactly two moves on universal masking during the entire COVID pandemic: he issued an order in July 2020, and he rescinded that order in May 2021. Minnesotans had consistent guidance during the nearly ten months that the order was in force and there has been no change of course in the year since it was rescinded. Appellants cannot reasonably claim the same looming threat that existed for the *Roman Catholic Diocese* plaintiffs.

Finally, the conditions that led to the enactment of EO 20-81 have changed. Most significantly, COVID vaccines and boosters are widely available. Other than very young children, anyone in Minnesota can get significant protection from infection and from severe symptoms in the event of infection by getting vaccinated and, when appropriate, boosted. Since the vaccines became available, rates of severe COVID cases, hospital crowding, and death from COVID have remained lower than their 2020 peaks. (*Tracking Coronavirus in Minnesota: Latest Map and Case Count*, N.Y. Times, https://perma.cc/PT74-7WG3 (last visited Apr. 25, 2022).) Before the court of appeals, Appellants speculated that the Delta variant would lead to a new mask requirement. This did not happen. More recently, the Omicron variant case spike came and went without a new statewide mask requirement. These variants did not even lead Minnesota to enter a new peacetime emergency.[34] Based on the history of the COVID pandemic and the

[34] Likewise, every other state that had a universal mask requirement has rescinded it.

State's response, there can be no reasonable expectation that Appellants will be subject to a statewide masking order.

B. Executive Orders Are Not, by Their Nature, Too Short to Allow Litigation of a Quo Warranto Petition.

Appellants offer nothing to suggest that an executive order requiring face coverings is, by its character, unable to be fully litigated prior to its expiration.

EO 20-81 was in force for nearly ten months.[35] This is a much longer period than those to which this Court has applied the capable of repetition yet evading review exception. *See Madonna*, 295 N.W.2d at 361 (procedure for involuntary commitment capped at 72 hours was too short to litigate); *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (the time it took to complete an allegedly-insufficient administrative process to administer medication against a patient's will was insufficient to obtain judicial review of the statute authorizing that process, in an "extremely close" call on the mootness issue); *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) (pretrial bail disputes "are, by definition, short lived"); *In re Peterson*, 360 N.W.2d 333, 334–35 (Minn. 1985) (revocation of provisional discharge from involuntary commitment is short-lived enough to evade review); *Kahn v. Griffin*, 701 N.W.2d 815, 821–22 (Minn. 2005) (pre-election disputes often cannot be reviewed prior to passage of the election).

Ten months is ample time to fully litigate a petition for quo warranto. Appellants simply made no effort to expedite the handling of their case at the district court or

[35] Other emergency executive orders were in force even longer. *See, e.g.*, EO 20-10 (prohibiting price gouging; issued March 20, 2020; rescinded at the conclusion of the peacetime emergency on July 1, 2021).

appellate levels. They did not bring an immediate injunction motion, they did not ask the district court for an earlier hearing date, they did not appeal immediately from the dismissal, and they did not seek expedited handling of their appeal. Those litigation decisions by Appellants cannot keep a moot case alive. Appellants' record in this case undermines their contentions that the window was objectively too short.

Cases in both state and federal court demonstrate that Appellants could have obtained appellate review before this case was moot. *See Minn. Voters All. v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020); *Free Minn. Small Bus. Coal. v. Walz*, A20-1161, 2020 WL 9396052 (Minn. Oct. 28, 2020). In *Minnesota Voters Alliance*, the plaintiffs challenged the same executive order that is at issue in this case: EO 20-81. 492 F. Supp. 3d at 827. Those plaintiffs challenged EO 20-81 on August 4, 2020, less than two weeks after it was issued. (Resp. Add. 2.) On August 24, those plaintiffs simultaneously filed an amended complaint and a motion for injunctive relief. (*Id.* 3.) The federal court heard the motion on September 23 and issued a decision on October 2, 2020. *Id.* 4; *see also* 492 F. Supp. 3d at 826. Just four days later, on October 6, the plaintiffs filed their appeal.[36] (Resp. Add. 5.)

In *Free Minnesota*, the petitioners filed a petition for a writ of quo warranto in which they challenged Governor Walz's authority to issue emergency executive orders. *See Free Minn. Small Bus. Coal. v. Walz*, A20-1161, 2021 WL 1605123 (Minn. Ct. App. Apr. 26, 2021) (unpublished). The petitioners filed their writ on May 28, 2020. (Resp.

[36] The plaintiffs ultimately opted to voluntarily dismiss their appeal.

Add. 7.) The district court held a hearing on July 16, 2020, and denied and dismissed the petition on September 1, 2020. (*Id.* 8, 9.) After that decision was rendered, the plaintiffs had a petition for accelerated review before this Court in October 2020, one month before Appellants moved for a temporary injunction in district court. *See* 2020 WL 9396052. Finally, the U.S. Supreme Court cases that Appellants cite repeatedly throughout their brief, like *Tandon* and *Roman Catholic Diocese*, demonstrate that motivated plaintiffs were able to have issues adjudicated, even on appeal, while the challenged orders were in effect.

As the court of appeals correctly held, there is an insufficient likelihood of recurrence to support application of the capable of repetition yet evading review mootness exception. Additionally, an executive order is not, "by its nature," too brief to allow full litigation of a petition for quo warranto.

V. APPELLANTS' CLAIMS ARE NOT URGENT ISSUES OF STATEWIDE IMPORTANCE.

Appellants present a brief argument that the final mootness exception, for urgent issues of statewide importance, should be applied in this case. However, their legal issues do not present the urgency or importance of others where this exception has been applied.

Under this remaining exception, the Court has discretion to decide issues of statewide importance if they are functionally justiciable and should be decided immediately. *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). This exception is narrowly construed and is reserved for cases where the legal issue is fundamental to life or liberty, is urgent, and has broad impact. *See Dean*, 868 N.W.2d at 6; *supra* Section I.

When exercising their discretion to apply the issue of statewide importance exception, courts look at the likelihood that nonparties will be subject to the decision on appeal if it is not reviewed. *See Rud*, 359 N.W.2d at 576 ("[F]ailure to decide [the issues presented] now could have a continuing adverse impact in other criminal trials if the trial judges were to rely on the Court of Appeals' decision.").

This case does not fit the criteria for the exception. Even assuming this matter is functionally justiciable, it is utterly lacking in the urgency that the exception requires. *See Tschumy*, 853 N.W.2d at 741 (deciding a technically moot appeal so that no future litigant would have to suffer near-continuous seizures without any chance of recovery while their case is litigated on the same issue). Not a single person is affected by EO 20-81, because it is no longer in force. Nor are the claims raised by Appellants analogous to the claims that have been deemed of sufficient statewide importance previously. Those claims generally arose from criminal cases or those involving end-of-life care. The narrow exception for urgent issues of statewide importance is therefore inapplicable.

CONCLUSION

The statewide mask order has been rescinded for a year. The COVID-19 peacetime emergency has ended. The legal issues in this case have passed into the realm of non-justiciable claims. The Court should exercise the same restraint it has shown over the years, find this matter moot, and affirm the judgment of the court of appeals and district court.

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Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ **Liz Kramer**
LIZ KRAMER (#0335089)
Solicitor General
JACOB CAMPION (#0391274)
ALEC SLOAN (#0399410)
Assistant Attorneys General

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1010 (Voice)
liz.kramer@ag.state.mn.us

ATTORNEYS FOR RESPONDENTS

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/s/ **Liz Kramer**

LIZ KRAMER (#0335089)
Solicitor General
JACOB CAMPION (#0391274)
ALEC SLOAN (#0399410)
Assistant Attorneys General

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1010 (Voice)
liz.kramer@ag.state.mn.us

ATTORNEYS FOR RESPONDENTS

|#5222216-v3