This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0626

Drake Snell, et. al.,
Appellants,

vs.

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

Filed December 6, 2021
Appeal dismissed
Larkin, Judge

Ramsey County District Court
File No. 62-CV-20-4498

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Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellants challenge the dismissal of their action seeking to preclude enforcement of a statewide mask mandate issued during the COVID-19 pandemic. We dismiss the appeal as moot.

FACTS

On March 13, 2020, Minnesota Governor Tim Walz declared a "peacetime emergency" based on the COVID-19 pandemic, deeming it "an act of nature." Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency & Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020). Under the Minnesota Emergency Management Act of 1996 (MEMA), Minn. Stat. §§ 12.01-.61 (2020), the governor is authorized to promulgate certain orders with the "full force and effect of law" during a "peacetime emergency." Minn. Stat. §§ 12.21, .32.

On July 22, 2020, the governor issued Emergency Executive Order 20-81 (hereafter, the "mask mandate" or "mandate"), which required most Minnesotans to wear face coverings in certain places, for example, "in indoor businesses and indoor public settings." Emerg. Exec. Order No. 20-81, *Requiring Minnesotans to Wear a Face Covering in Certain Settings to Prevent the Spread of COVID-19* (July 22, 2020). The mandate was to remain in effect until it was rescinded or until the peacetime emergency was terminated. *Id.* The mandate required businesses to make "reasonable efforts" to ensure customers wore face coverings, and it contained enforcement provisions making violations by an individual a petty misdemeanor and violations by a business a misdemeanor. *Id.*

Appellants are various Minnesota residents, businesses, and churches. In August 2020, appellants filed an action in district court, challenging the mask mandate. The named defendants included the governor and the attorney general.

Appellants challenged the mask mandate on several grounds. They claimed that it conflicted with Minn. Stat. § 609.735 (2020), which criminalizes concealing one's identity, and they argued that if the mandate superseded the criminal statute, it violated the Minnesota Constitution's separation-of-powers requirement. They also claimed that MEMA is an unauthorized delegation of legislative power. They asserted that section 12.31 of MEMA does not authorize the governor "to invoke emergency powers for public health purposes."[1] And they argued that the mandate violates the First Amendment and is unconstitutionally vague.

In October 2020, respondents moved the district court to dismiss appellants' action. In March 2021, the district court granted that motion, rejecting appellants' legal theories on the merits.

On May 6, 2021, the governor announced his intent to rescind various executive orders. Emerg. Exec. Order No. 21-21, *Safely Sunsetting COVID-19 Public Health Restrictions* (May 6, 2021). On May 13, 2021, appellants filed their notice of appeal of the district court's order dismissing their action. On May 14, 2021, the governor issued an executive order lifting "face-covering requirements in most settings." Emerg. Exec. Order

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[1] Section 12.31, subdivision 2, regards the declaration of a peacetime emergency and states in relevant part, "A peacetime declaration of emergency may be declared only when an act of nature . . . endangers life and property and local government resources are inadequate to handle the situation."

No. 21-23, *Amending Emergency Executive Orders 20-51, 20-81, 21-11, and 21-21* (May 14, 2021). On June 29, 2021, he announced that he would end the peacetime emergency. And on June 30, 2021, the governor signed a bill terminating the peacetime emergency as of July 1, 2021. 2021 Minn. Laws 1st Spec. Sess. ch. 12.

DECISION

Appellants challenge the district court's refusal to preclude enforcement of the governor's mask mandate. Respondents counter that this case is moot because the governor has rescinded the mask mandate and terminated the peacetime emergency.

"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 v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). A justiciable, real controversy must exist for a claim to be brought before this court. *State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979). Justiciability issues may be raised at any time. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) ("As a constitutional prerequisite to the exercise of jurisdiction, we must consider the mootness question even if ignored by the parties."). It is well established that an appellate court will decide only actual controversies and will not issue advisory opinions or decide cases just to establish precedent. *Id.* Justiciability is an issue of law, which we review de novo. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011).

The mootness doctrine is a flexible doctrine and not a mechanical rule. *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002). Minnesota courts recognize two discretionary exceptions to the general rule that moot actions must be dismissed. *Dean*, 868 N.W.2d at 5. First, a court may decline to dismiss a moot action if the issues

"are likely to reoccur, but also would continue to evade judicial review." *Id.* And second, a court has "the discretion to consider a case that is technically moot when the case is functionally justiciable and presents an important question of statewide significance that should be decided immediately." *Id.* at 6 (quotations omitted).

Appellants acknowledge that the mask mandate has ended, but they argue that a live controversy remains because the governor maintains the power to reimpose face-covering requirements. Appellants therefore assert that the exceptions to the mootness doctrine apply. We examine each exception in turn.

Capable of Repetition While Evading Review

We first consider whether the issues in this case are capable of repetition while evading review. This two-pronged exception applies "when there is a reasonable expectation that a complaining party would be subjected to the same action again *and* the duration of the challenged action is too short to be fully litigated before it ceases or expires." *Id*. at 5.

As to the first prong of the exception, appellants argue that a reasonable expectation exists that the mask mandate will be reimposed because the governor has shown a "willingness to subject the people of Minnesota to broad restrictions" and could "at any point" declare another peacetime emergency. Appellants point to the rise of the Delta variant of COVID-19 as a potential catalyst for another mask mandate. Yet, despite the pervasiveness of the Delta variant and the governor's "willingness" to impose restrictions, the governor has not reimposed a mask mandate. And appellants do not identify any actions taken by the governor that portend a second mask mandate. Thus, appellants fail

to establish that the circumstances of this case create a "reasonable expectation" that another mask mandate will be imposed.

The second prong of the exception has traditionally been satisfied when the issues, by their character, are "too short to be fully litigated prior to [their] cessation or expiration." *Dean*, 868 N.W.2d at 5 (quotation omitted); *see State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) ("Most pretrial bail issues are, by definition, short-lived and failure to decide this issue could have a continuing adverse impact on those defendants who are unable to post cash only bail."). Issues have been found to evade review if they "involve disputes of an inherently limited duration, such as prior restraints on speech and short-term mental-health confinement orders." *Dean*, 868 N.W.2d at 5 (citations omitted).

The issues here stem from the governor's use of peacetime-emergency powers in relation to a pandemic, which is a rare occurrence compared to the type of circumstances that typically give rise to issues that evade review. *See, e.g.*, *Brooks*, 604 N.W.2d at 348 (applying the exception to a pretrial-bail issue); *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 360-61 (Minn. 1980) (applying the exception to three-day hold orders for mentally ill individuals); *see also Dean*, 868 N.W.2d at 5 (discussing length of hold orders in *Madonna*). Moreover, the duration of the challenged peacetime emergency indicates that appellants' issues are not of a duration that are, by definition, "short-lived." *Brooks*, 604 N.W.2d at 348. Again, the governor declared a peacetime emergency in March 2020, and the peacetime emergency ended July 1, 2021. The duration of the peacetime emergency is simply not comparable to the durations of the short-term orders that traditionally have

justified application of the exception for issues that are capable of repetition while evading review. For those reasons, we decline to apply that exception here.

Functionally Justiciable Question of Statewide Significance

The second mootness exception provides discretion to hear a moot case that is functionally justiciable and presents an issue of statewide significance "that should be decided immediately." *Dean*, 868 N.W.2d at 6 (quotation omitted). Courts "apply this exception narrowly." *Id.*

"A case is functionally justiciable if the record contains the raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decision-making." *Id.* (quotation omitted). The issues here are primarily legal in nature, and the parties have appropriately briefed them. Thus, the case is functionally justiciable.

As to whether a case presents an urgent question of statewide significance, the supreme court has looked at its prior cases in determining whether to utilize the "narrowly" applied exception. *Id.* at 6-7 (summarizing cases applying exception). For example, in *State v. Rud*, the supreme court considered whether a defendant accused of criminal sexual conduct could compel child witnesses to testify at an omnibus hearing. 359 N.W.2d 573, 575 (Minn. 1984). Even though there was no longer a live controversy, the *Rud* court determined that the case was functionally justiciable and of statewide significance, noting that a failure to decide the issues presented "could have a continuing adverse impact in other criminal trials." *Id.* at 576.

In another case, *In re Guardianship of Tschumy*, the supreme court determined whether a court-appointed guardian may consent to ending life support for an incapacitated ward, despite the issue being technically moot because the ward had died. 853 N.W.2d 728, 731-33, 741 (Minn. 2014). The supreme court addressed the issue because it implicated the state's power "to protect infants and other persons lacking the physical and mental capacity to protect themselves." *Id*. at 740 (quotation omitted). The *Tschumy* court noted that there were more than 12,000 wards in Minnesota under state supervision and that a decision was necessary to "clarify for the guardians and their wards the scope of the guardians' authority to make one of life's most fundamental decisions." *Id*.

In other cases, the supreme court has declined to apply the exception. For example, in *Dean*, the supreme court did not apply the exception because the issue presented—a challenge to a city's rental ordinance—did "not present the urgency or significance that underpinned . . . *Rud*, and *Tschumy*." 868 N.W.2d at 3, 7.

The supreme court also declined to apply the exception in *Limmer v. Swanson*, even though both requirements of the mootness exception were present. 806 N.W.2d 838, 839 (Minn. 2011). In that case, the question presented was whether the judiciary could authorize certain expenditures by the executive branch in the absence of legislative appropriations. *Id.* at 838. While the case was pending, the legislature passed, and the governor signed into law, appropriations bills. *Id.* at 838-39. The supreme court agreed that it had the authority to decide the case. *Id.* at 839. But the court declined to exercise that authority, explaining:

> The petition asks us to resolve fundamental constitutional questions about the relative powers of the three branches of our government. We generally do not decide important constitutional questions unless it is necessary to do so. The constitutional questions posed by this case are currently moot and will not arise again unless the legislative and executive branches fail to agree on a budget to fund a future biennium. In addition, the legislative and executive branches have the ability to put mechanisms in place that would ensure that the district court is not again called upon to authorize expenditures by executive branch agencies in the absence of legislative appropriations, even if a budget impasse were to occur. Resolution of these budget issues by the other branches through the political process is preferable to our issuance of an advisory opinion adjudicating separation of powers issues that are not currently active and may not arise in the future.

Id. at 839 (quotation and citation omitted).

Here, the issues presented are very important to a significant number of people. However, they are not as significant as the life-or-death decision at issue in *Tschumy*, and they lack the urgency of the issue in *Rud.* Unlike the circumstances in those cases, there is no indication that the expired mask mandate impacts any individual or any pending criminal case. Instead, the circumstances here are more like those in *Limmer* in that appellants' arguments present constitutional questions involving the balance of power between the three branches of Minnesota's government. For example, appellants argue that MEMA violates the Minnesota Constitution's separation of powers principle. The supreme court is reluctant to resolve such questions unless it is necessary to so do. *See id.* This court is influenced by that reluctance, and we are not persuaded that it is appropriate to set it aside in this case. Thus, we decline to apply the second mootness exception.

Voluntary Cessation

Appellants also argue that we should consider the merits of their challenge under the voluntary-cessation doctrine. Under that doctrine, "a defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 169-70 (2000). The doctrine has been recognized by federal courts, but it has not been recognized by the Minnesota Supreme Court or this court.

Appellants cite to *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) for the proposition that "requests for injunctive relief against orders which have been modified or rescinded are still reviewable." In *Tandon*, the Supreme Court, without analysis, held that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. at 1297. The Supreme Court further stated, "[S]o long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants remain under a constant threat that government officials will use their power to reinstate the challenged restrictions." *Id.* (quotation omitted). The undeveloped exception in *Tandon* has been interpreted as a reference to the voluntary-cessation doctrine. *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 9 (1st Cir. 2021); *see also Calvary Chapel of Bangor v. Mills*, ___ F. Supp. 3d ___, ___, 2021 WL 2292795, at *13 n.24 (D. Me. June 4, 2021) (stating that *Tandon* "merely recognizes and reiterates the voluntary cessation exception to the mootness doctrine").

Appellants' briefing regarding application of the voluntary-cessation doctrine is cursory. Appellants do not explain the doctrine or the policy underlying it. But appellants

acknowledge that this court refused to adopt the doctrine in *In re Merrill Lynch Mortg. Invs. Tr. Mortg. Loan Asset-Backed Certificates*. No. A18-1554, 2019 WL 2079819, at *3 (Minn. App. May 13, 2019), *rev. granted* (Minn. Aug. 6, 2019) *and appeal dismissed* (Minn. Apr. 30, 2020). Appellants point out that the supreme court granted review in *Merrill Lynch* and assert that "a decision should be forthcoming on that issue." Appellants are incorrect. Although review was initially granted in *Merrill Lynch*, the appeal was subsequently dismissed by joint stipulation of the parties.

Without the aid of a decision from the supreme court contradicting this court's approach in *Merrill Lynch*, appellants "simply note that the doctrine should apply here" and that the governor's "voluntary cessation of the mask mandate is part and parcel of the 'evading review' nature of this matter." Appellants repeatedly circle back to the recognized exception for issues that are capable of repetition while evading review, arguing, "[s]imply put, [r]espondents' conduct is capable of repetition, yet evading review, and their voluntary cessation of their illegal conduct should not allow them to escape" judicial review.

Because we have decided not to apply the exception for issues that are capable of repetition while evading review, appellants' reliance on that exception as support for application of the voluntary-cessation doctrine is unavailing. And appellants have not otherwise established that it is appropriate to apply the voluntary-cessation doctrine for the first time in this case. We therefore decline to do so.

Conclusion

Because the peacetime emergency and mask mandate have ended, this case no longer presents a live controversy. And because neither of the recognized discretionary exceptions to the mootness doctrine applies, we dismiss this appeal as moot.

Appeal dismissed.