NO. A21-0626

State of Minnesota

In Supreme Court

Drake Snell, et al.,

Appellants,

vs.

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

Respondents.

APPELLANTS' BRIEF

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STATEMENT OF LEGAL ISSUES

Consistent with the Court's grant of further review, the issue before the Court is:

1. **Whether Governor Walz' rescission of Executive Order 20-81 on May 6, 2021, renders this case moot.**

   Court of Appeals Decision: The court of appeals held that this case is moot because Emergency Executive Order ("EO") 20-81, and Governor Walz' COVID-19 peacetime emergency have ended, and no exception to the mootness doctrine applies. (Add. 12).

   Most Apposite Authorities:

   Dean v. City of Winona, 868 N.W.2d 1 (Minn. 2015)

   Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005)

   Friends of the Earth, Inc. v. Laidlaw Env't'l Servs., 528 U.S. 167 (2000)

   Ector Cty. All. of Bus. v. Abbott, No. 11-20-00206-CV, 2021 Tex. App. LEXIS 7492, (Tex. App. Sep. 9, 2021)

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case.

Appellants brought this matter in the Second Judicial District of Minnesota, Ramsey County District Court, before Judge John H. Guthmann. Appellants are sixteen Minnesota residents, businesses, and churches who petitioned the Ramsey County District Court for a Writ of Quo Warranto seeking to restrain the implementation and enforcement of Governor Walz' mask mandate, Emergency Executive Order 20-81. Appellants moved for the issuance of the writ and a temporary injunction stopping the enforcement of the mandate, and Respondents Governor Tim Walz and Attorney General Keith Ellison moved to dismiss. The District Court granted Respondents' motion to dismiss and denied Appellants' motion for a temporary injunction.

Appellants timely appealed the Ramsey County District Court's decision by filing a Notice of Appeal in the District Court on May 10, 2021, and thereafter filing the accepted Notice from the District Court in the Court of Appeals on May 13, 2021. The Court of Appeals dismissed the appeal as moot on December 6, 2021. On January 5, 2022, Appellants filed the Petition for Review. On February 23, 2022, the Court granted the Petition for Review as to the first issue presented, on the issue of mootness.

II. Relevant Facts.

Given that the Court's grant of review is limited to the issue of mootness, Appellants present the following facts relevant to that determination.

A. The Mask Mandate's Promulgation.

With only the claim that "[a]ccording to the Centers for Disease Control and Prevention ("CDC"), face coverings are effective in preventing the transmission of respiratory droplets that may spread COVID-19," on July 22, 2020, Governor Tim Walz issued Emergency Executive Order 20-81, which required all "Minnesotans"—unless in an airport or on tribal lands—to wear masks in indoor businesses and public settings. Doc. 21 (Am. Petition ¶38, citing Emergency Executive Order ("EO") 20-81, *available at* https://mn.gov/governor/assets/EO%2020-81%20Final%20Filed_tcm1055-441323.pdf) (last visited Apr. 4, 2022).[1]

B. Appellants File This Lawsuit and Seek a Merits Hearing on Their Petition for a Writ of Quo Warranto.

On August 20, 2020, less than a month after Governor Walz issued the mask mandate, the Appellants filed this petition for quo warranto in Ramsey County District Court. Doc. 1. On September 4, 2020, Respondents Tim Walz and Keith Ellison moved to dismiss the petition and set a hearing date for November 13, 2020. Doc. 17.

After discussions with the original Respondent Dakota County Attorney related to that office's prosecutorial functions as to the mask mandate, Appellants dismissed the Dakota County Attorney and amended the Petition on September 29, 2020 to add the city

[1] References to the Governor's executive orders referenced by the Amended Petition and the memoranda of law below (and which are also relevant public records) will refer directly to the EOs and their pages or paragraphs for clarity. The Governor's executive orders are all generally available at https://mn.gov/governor/news/executiveorders.jsp. Appellants will cite the direct webpage for each as they arise in the brief.

attorneys for Miesville and Forest Lake as prosecutors for violations of the mask mandate related to some of the Appellants. Doc. 21 (Am. Pet. ¶¶ 28-29). With the exception of a few paragraphs about whether local government resources had become adequate to battle COVID-19, the majority of the changes in the Amended Petition were to replace the Dakota County Attorney with the city prosecutors for Miesville and Forest Lake. *Id.* Despite the lack of significant substantive changes to the Petition and 17 days left before the deadline for submitting moving papers, Respondents Walz and Ellison obtained a new hearing date for their motion to dismiss of December 22, 2020, more than a month after the original hearing date. Doc. 28.

Appellants cross-moved for the immediate issuance of the writ of quo warranto and, in the alternative, a temporary injunction, on November 24, 2020. Doc. 38. In that motion, Appellants asked the district court to use its inherent authority to consider affidavits and take testimony related to the writ of quo warranto and the motion for a temporary injunction at the December 22, 2020 hearing. Docs. 38 (Motion), 39 (Mem. of Law at 2). Respondents, in a letter, objected to Appellants' effort to streamline and speed up the process of fully hearing the merits of this case, despite the accepted practice of hearing whether to grant or dismiss quo warranto proceedings in the same hearing. *Compare* Doc. 45 *with Save Lake Calhoun v. Strommen*, 928 N.W.2d 377, 390 (Minn. Ct. App. 2019) (rev'd on other grounds, 943 N.W.2d 171 (Minn. 2020)). In other words, Appellants tried to obtain merits review on a full record, and Respondents objected and insisted instead that the district court slow down the case.

The district court declined to take live testimony at the hearing but considered the

affidavits submitted for purposes of the temporary injunction motion. (Add. 14 (District Court Order 2)). On March 15, 2021, the district court denied Appellants' petition for a writ of quo warranto, granted Respondents' motion to dismiss, and denied Appellants' motion for a temporary injunction as moot. (Add. 13-14 (District Court Order 1-2)). On May 10, 2021, Appellants filed their notice of appeal in the district court, and then filed the accepted notice in the Court of Appeals on May 13, 2021.

C. Governor Walz Partially Terminates the Mask Mandate but Refuses to Agree Not to Reinstate It.

On May 14, 2021, after Appellants filed their Notice of Appeal, Governor Walz "amended" EO 20-81 to mostly rescind the mask mandate as it applied to Appellants. EO 21-23, *available at* https://mn.gov/governor/assets/EO%2021-23%20Final_tcm1055-485873.pdf (last visited Apr. 4, 2022).[2] EO 21-23 specifically rescinded paragraphs 2, 9, 10, 11, 12.c, 13, 14, and 15 of EO 20-81. *Id.* ¶2. Paragraph 2 of EO 20-81 had required "Minnesotans" (as opposed to Wisconsinites, Iowans, North Dakotans, or South Dakotans, apparently) to wear masks "in indoor businesses and public settings." EO 20-81 ¶2. EO 21-23 kept the mandate in place as it related to children in school. EO 21-23 ¶4 (citing EO 20-81 ¶¶12.a and 12.b).

[2] While EO 21-23 post-dates the decision below, along with a number of other public-facing documents cited herein, this Court may take judicial notice of public records and other documents using its "inherent power," where "the orderly administration of justice commends it." *Eagan Econ. Dev. Authority v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010); Minn. R. Evid. 201, 803(8). Appellants request and move that the Court exercise that inherent power, especially considering that this case concerns claims of mootness after the initiation of this appeal, meaning that none of these documents could have been in the district court record.

Given the termination of the mask mandate as it related to the Appellants, none of whom are in K-12 school, Appellants repeatedly offered to dismiss this case if Governor Walz simply agreed not to reimpose his mask mandate. Appellants' Br., June 14, 2021, p. 18 ("Appellants would dismiss this action if Respondents would agree to settle this action by giving up the authority to re-impose a mask mandate under Governor Walz' claimed COVID-19 powers."); Appellants' Reply. Br. 1 ("Appellants will re-state their rejected offer here: Appellants will dismiss this appeal if Respondents agree not to reimpose a COVID-19 mask mandate like that in Emergency Executive Order 20-81….If this case really is moot, Respondents will accept this reiterated offer because they have literally nothing to lose by it."); Oral Argument Tr., Oct. 13, 2021, at 3:00 ("Governor Walz had and still has a simple way out of this appeal. All he has to do is agree not to reimpose the mask mandate. We've offered twice now on the record, and now a third time I'm reiterating the offer to dismiss this case as long as he makes that agreement. He has refused to do so.").[3] Each time Appellants offered to dismiss this case, Governor Walz refused to accept and relinquish his authority to re-impose a mask mandate.

And Appellants would do so—their counsel have reached similar agreements with the Governor terminating his ability to discriminate against churches via his COVID-19 shutdown orders. *E.g.,* Scott McClallen, "Churches settle with Gov. Walz's administration

[3] Because Respondents refused to accept Appellants' prior offers of dismissal in return for an agreement not to reimpose a mask mandate, and this Court has taken review, Appellants' prior offer is no longer "on the table." Appellants would prefer that this Court determine the mootness issues raised by this case, which may frequently arise in the future related to "emergency" orders too short to be fully litigated on their merits through the normal Minnesota court process.

over COVID-19 restrictions," *The Center Square*, May 6, 2021, *available at* https://www.thecentersquare.com/minnesota/churches-settle-with-gov-walzs-administration-over-covid-19-restrictions/article_75c8e69e-ae91-11eb-a38e-8b4aa9211b3d.html.

After Governor Walz partially rescinded EO 20-81 in May 2021, the Legislature ended his peacetime emergency on July 1, 2021, based on a narrow 70-63 passage in the House. S.F. 2, 92nd Leg., 2021 1st Spec. Sess., June 30, 2021, available at https://www.revisor.mn.gov/bills/text.php?number=SF2&version=3&session=ls92&session_year=2021&session_number=1. Governor Walz had notably just extended the peacetime emergency on June 14, 2021 until July 14, 2021. EO 21-24, June 14, 2021, *available at* https://mn.gov/governor/assets/EO%2021-24%20Final_tcm1055-485447.pdf. The legislature's June 30 vote superseded that order. And, Walz had publicly declared that he would keep his emergency powers until at least August 1, 2021. Madelyne Watkins, "Gov. Tim Walz will end his peacetime emergency powers by August 1st," *KIMT3*, June 29, 2021, *available at* https://www.kimt.com/archive/gov-tim-walz-will-end-his-peacetime-emergency-orders-by-august-1st/article_4aa2fe9a-9173-54dd-9fc7-9e598e28d5d7.html.

D. Governor Walz Asserts That He Has the Authority Under Chapter 12 to Declare a Peacetime Emergency Immediately, Without Any Empirical Support, and Without Any Limit on the Subject Matter of His Decrees.

Relevant here, under Chapter 12 of the Minnesota Statutes, the Governor of Minnesota may "declare a peacetime emergency….only when an act of nature…endangers life and property and local government resources are inadequate to handle the situation."

Minn. Stat. §12.31, Subd. 2. The statute strongly implies, but does not expressly state, that a governor must demonstrate an empirical basis for an emergency declaration. *See id*.

However, in the face of this implication, Governor Walz has argued the opposite is true in federal lawsuits related to his COVID-19 orders. Add. 51-62 (Defs.' Mem. in Supp. of Mot. to Dismiss, *Northland Baptist Church v. Walz*, 530 F. Supp. 3d 790, No. 20-CV-1100-WMW-BRT, ECF No. 56 (July 13, 2020)). Governor Walz has argued that "evidentiary support or rational basis" for the implementation of a peacetime emergency is "not a requirement of Chapter 12," and that he need not "explain in the text of any executive order how local government resources are inadequate." Add. 53-54 (*Id.* at 32, 33). The Governor has also argued that there is no limit to the subject matter of his authority under Chapter 12:

> Subdivision 3 indicates that it is only listing the Governor's ***specific*** authorities—it is not providing an exhaustive list of all of the authorities granted to him by section 12.21. Instead, the statute makes clear that the legislature intended to give the Governor broad "general authority" including "general direction and control" of emergency management as well as carrying out the provisions of Chapter 12. Minn. Stat. §12.21, subd. 1.

Add. 56 (*Id.* at 35 (emphasis in original)). Thus, in Governor Walz' mind, there is nothing stopping him, at any time, from declaring an emergency and reinstituting another mask mandate with no empirical support for its existence.

Once declared, Chapter 12 holds that a peacetime emergency continues for five days unless extended by the Executive Council[4] for up to 30 days. Thereafter, the legislature

[4] The Executive Council consists of the governor, lieutenant governor, secretary of state, state auditor, and attorney general. Two of these five positions are Respondents in this lawsuit, and the Executive Council has only voted to extend Governor Walz' emergencies.

cannot end the Governor's peacetime emergency unless *both houses* affirmatively vote to end it. Minn. Stat. §12.31, Subd. 2. As the Governor's executive orders reflect, the Governor continually extended his emergency every month until a majority vote in both houses of the legislature terminated it on July 1, 2021.

E. Governor Walz "Turned the Dials" for COVID-Related Restrictions Repeatedly Throughout the Peacetime Emergency, and It Is Reasonable to Expect That Another COVID-Like "Emergency" Could Arise in the Near Future.

Governor Walz "turned the dials" of his COVID-19 restrictions multiple times related to his restrictions of small businesses while exempting big businesses like Target and Wal-Mart. *E.g.,* EO 20-99, "Implementing a Four Week Dial Back on Certain Activities to Slow the Spread of COVID-19," Nov. 18, 2020, available at https://mn.gov/governor/assets/EO%2020-99%20Final%20%28003%29_tcm1055-454294.pdf (last visited Apr. 4, 2022). And just last September, after the termination of the peacetime emergency, the Solicitor General expressed sympathy for parents seeking to force another mask mandate on students across the state, arguing in Ramsey County District Court that Governor Walz "agrees that COVID-19 is a continuing concern in Minnesota." Brian Bakst, "Minn. judge skeptical about push for school mask mandate," *MPR News*, https://www.mprnews.org/story/2021/09/09/mn-judge-skeptical-about-push-for-school-mask-mandate.

Concerning as well to Appellants, those government executives who favor mask mandates and other COVID-19 restrictions (such as Governor Walz), and who have not been restrained by Court orders or overarching authorities prohibiting their imposition of

mask mandates on citizens, have seesawed back and forth between more restrictions, no restrictions, and fewer restrictions across Minnesota and the United States. When the Delta and Omicron variants reached Minnesota in 2021 and the beginning of 2022, cities across Minnesota, including Minneapolis, Saint Paul, Duluth, Rochester, Golden Valley, and Minnetonka jumped right back into mask restrictions. *E.g.,* "More Minnesota cities move to adopt mask mandates," MinnPost, *available at* https://www.minnpost.com/glean/2022/01/more-minnesota-cities-move-to-adopt-mask-mandates/ (last visited Apr. 4, 2022). It is true that Governor Walz did not reimpose one on the state level, but as discussed above, he has refused to relinquish that authority, and he has taken an expansive view of his executive power under Chapter 12.

ARGUMENT AND AUTHORITIES

Appellants filed this quo warranto petition on August 20, 2020, less than a month after Governor Walz issued Emergency Executive Order 20-81, which required all Minnesotans aged 6 and older to wear masks when visiting indoor businesses and public spaces. The petition seeks a writ declaring that EO 20-81 exceeds Governor Walz' authority under Chapter 12 of the Minnesota Statutes, or that Chapter 12 itself is an unconstitutional delegation of legislative authority, among other claims. The "merits" of this case, based on cross-motions to dismiss (by Respondents) and for the writ (by Appellants), were heard in December 2020. The district court granted Respondents' motion to dismiss in March 2021, and Appellants filed their appeal in May 2021. Three days after the Appellants filed their notice of appeal in district court, and only about 9 months after EO 20-81 was issued, Governor Walz amended his mask mandate to eliminate the provisions under review in this appeal.

Despite the continual threat that Governor Walz could declare another peacetime emergency and reimpose a mask mandate at any point in time, the Court of Appeals erroneously held that this appeal is moot, citing Governor Walz' termination of the mask mandate and the legislature's termination of the COVID-19 peacetime emergency. Add. 12. This case is not moot, because three exceptions to the mootness doctrine except it from the rule: (1) the voluntary cessation doctrine, based on Governor Walz' voluntary rescission of the executive order at issue; (2) the capable-of-repetition-yet-evading review doctrine, based on the same rescission and reasonable likelihood of recurrence; and (3) the doctrine that matters of statewide importance which are functionally justiciable should be

decided.

Governor Walz claims that a window of 9 months, controlled by his own actions, is sufficient for judicial review of his executive orders. Virtually no civil case, especially one with complex legal questions for courts to wrestle over, is ever complete within that sort of fleeting time window. And in this new era of COVID-19 emergency executive orders adopted by a majority of state governments in the United States, including Minnesota, the threat of an imposition of restrictions on civil liberties is always one stroke of the pen away. This is especially true here, where Governor Walz has taken a breathtakingly expansive view of his emergency powers under Chapter 12. The Court should reverse the Court of Appeals' mootness determination and affirm the importance of judicial review of difficult legal questions which arise in a clash between citizens and their executive branch officers issuing emergency restrictions of civil liberties. In doing so, the Court should recognize the voluntary cessation doctrine in Minnesota state courts.

I. The Court of Appeals' Dismissal of the Appeal Based on Mootness Is Subject to *De Novo* Review.

"Mootness is an issue of justiciability," and the court of appeals' decision to dismiss this appeal based on mootness is therefore subject to *de novo* review. *State ex rel. Young v. Schell*, 956 N.W.2d 652, 662 (Minn. 2021).

II. This Court Should Recognize and Apply the Voluntary Cessation Doctrine to Hold That Governor Walz' Rescission of the Mask Mandate Does Not Moot This Case.

This Court should adopt the voluntary cessation exception to mootness that has long existed in federal justiciability jurisprudence. Four interrelated reasons support the

adoption of the voluntary cessation doctrine by *this* Court, in *this* case. *First*, the federal-court rule that a party cannot moot a case by voluntarily stopping its challenged conduct is well established and, more importantly, well-reasoned. *Second*, because the logic of the voluntary cessation exception is so sound, every state to consider the question of whether to adopt the doctrine has done so on grounds that echo those set forth by the federal courts. *Third*, adoption of the voluntary cessation doctrine is fully consistent with existing Minnesota law, and in fact is necessary to ensure that Minnesota state courts are at least as protective of the rights of litigants as their federal counterparts. *Finally*, the specific facts in this case demonstrate the inequities that result when the voluntary cessation exception to mootness is not available to litigants who seek to vindicate their rights. As a result, this Court should adopt the voluntary cessation exception to mootness, vacate the Court of Appeals decision on the grounds that the voluntary cessation analysis should be applied in this case, and remand for further proceedings consistent with the Court's opinion.

A. The Court of Appeals Held That the Voluntary Cessation Doctrine Has Yet to Be Adopted in Minnesota.

The court of appeals erroneously held that "appellants have not otherwise established that it is appropriate to apply the voluntary-cessation doctrine for the first time in this case." Add. 11. The court so held despite clearly identifying Appellants' argument that Governor Walz' cessation of the mask mandate cannot allow him to avoid judicial review of his actions claimed to be illegal. Add. 10-11 (quoting *Tandon v. Newsom*, 141 S. Ct. 1294 (2021)); Appellants' Reply Br. 2-3, 6-7. This Court is squarely presented with the opportunity to adopt the voluntary cessation doctrine here, and it should.

B. The Voluntary Cessation Doctrine Is Well-Established in Federal Court and Logically Sound.

The voluntary cessation doctrine has been established in federal court for decades. It is well-known that a case can be rendered moot by an extra-judicial "event…that resolves the issue" presented in the case. *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. Ct. App. 2007). Mootness is thus a doctrine that is uniquely susceptible to manipulation by parties. In recognition of that fact, the U.S. Supreme Court has adopted the "stringent" exception to mootness known as the voluntary cessation doctrine for cases in which a party alleges that its voluntary conduct has mooted the controversy. *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs.*, 528 U.S. 167, 189 (2000).

Under this doctrine, a case is not moot unless a defendant who stops challenged behavior carries the "heavy burden of persuading the court" that "subsequent events ma[k]e it ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)) (emphasis added). The U.S. Supreme Court has reasoned that the doctrine is designed to "prevent a defendant from evading court review by stopping his conduct and starting it up again once the case is declared moot." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

In terms of the specific context here, the U.S. Supreme Court last year held that the cessation of a COVID-19 emergency order does not moot applications for injunctive relief against those orders. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). The Court so held because of the possibility that a Governor might re-impose the restrictions complained of

by a subsequent executive order:

> Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so 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. at 1297.

The voluntary cessation doctrine avoids unfairness to the party whose claim has been eliminated by the opposing party's abrupt halt to its challenged conduct. It also avoids a waste of judicial resources because it prevents cases from cycling in and out of the court system without receiving a full resolution on the merits of the issues they present.

Federal courts are so concerned about the potential for manipulation inherent in the mootness doctrine that they place the burden on the party claiming mootness by voluntary cessation "to show that it could not reasonably be expected to resume" the challenged conduct. *Already*, 568 U.S. at 92 (internal quotations omitted). According to the U.S. Supreme Court, again, this is a "formidable burden" that requires the party claiming mootness to "***show***[] that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190 (emphasis added). The burden is not impossible to meet, however. For example, in *Already*—one of the key federal cases applying the doctrine—the party claiming mootness met its burden of demonstrating that its challenged conduct could not reasonably be expected to recur. *See Already*, 568 U.S. at 100. Thus, while the burden of proving mootness by voluntary cessation is high, it is not an unreasonable one to impose.

Moreover, the requirement of a strong showing provides assurance that the Court will "avoid a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 54-55 (1st Cir. 2013). In this way the voluntary cessation doctrine guards against a party gaming the system at the expense of opposing parties and the integrity of the courts.

Important here as well, justiciability requirements in federal courts and Minnesota courts are substantially similar, so there is no reason that Minnesota should not follow the reasoning of the federal courts in adopting the voluntary cessation exception to mootness. Under Minnesota law, "[a] justiciable controversy exists if the claim (1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336-37 (Minn. 2011) (internal quotations omitted); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (substantially similar requirements). Minnesota should likewise adopt the federal courts' reasoning as to this important issue concerning justiciability.

C. The Voluntary Cessation Doctrine Has Been Adopted by Every State Court to Consider It and Should Be Adopted by This Court.

Because the federal voluntary cessation doctrine rests on such firm grounds, it has been widely accepted into the canons of justiciability law in other states. In fact, not a single state to consider adoption of the doctrine to date has rejected it. Among the states

recognizing or explicitly adopting the exception are Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington.[5]

Like the U.S. Supreme Court, virtually every state that has adopted the voluntary cessation exception has done so out of concern that "a dismissal for mootness [due to voluntary cessation] would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012);

[5] *See, e.g.*, *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 71 (Ala. 2009); *Slade v. State, Dep't of Transp. & Pub. Facilities*, 336 P.3d 699, 700 (Alaska 2014); *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 626 P.2d 1115, 1118 (Ariz. Ct. App. 1981); *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647, 652 (Colo. Ct. App. 1998); *Windels v. Envtl. Prot. Comm'n of Darien*, 933 A.2d 256, 265-66 (Conn. 2007); *First State Orthopaedics, P.A. v. Emplrs. Ins. Co.*, No. S19C-01-051 CAK, 2020 Del. Super. LEXIS 226, at *7-8 (Del. Super. May 12, 2020); *Welsh v. McNeil*, 162 A.3d 135, 154 (D.C. 2017); *WMW, Inc. v. Am. Honda Motor Co.*, 733 S.E.2d 269, 273 (Ga. 2012); *Fisch v. Loews Cineplex Theatres, Inc.*, 850 N.E.2d 815, 818 (Ill. Ct. App. 2005); *State ex rel. Ind. State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 673-74 (Ind. 2006); *Stano v. Pryor*, 372 P.3d 427, 430-31 (Kan. Ct. App. 2016); *Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 800 (Ky. 2021); *Cat's Meow, Inc. v. City of New Orleans ex rel. Dep't of Fin.*, 720 So.2d 1186, 1194 (La. 1998); *Larocque v. Turco*, Nos. 144466, SUCV2020-00295, 2020 Mass. Super. LEXIS 57, at *28 (Feb. 28, 2020); *Micheli v. Mich. Auto. Ins. Placement Facility*, No. 356559, 2022 Mich. App. LEXIS 844, at *20 (Ct. App. Feb. 10, 2022); *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 875 & n.7 (Mont. 2006); *Delanoy v. Tp. of Ocean*, 245 N.J. 384, 412, 246 A.3d 188, 204 n.5 (2021); *Tibert v. City of Minto*, 679 N.W.2d 440, 444 (N.D. 2004); *State ex rel. Okla. Firefighters Pension and Ret. Sys. v. City of Spencer*, 237 P.3d 125, 129 & n.16 (Okla. 2009); *Nevius v. Palomares*, 314 Or. App. 193, 199, 496 P.3d 1130, 1135 (2021); *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1080-81 (R.I. 2013); *Akers v. Dyck-O'Neal, Inc.*, No. M2021-00063-COA-R3-CV, 2021 Tenn. App. LEXIS 396, at *6 (Ct. App. Sep. 30, 2021); *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex. Ct. App. 2008); *All Cycle, Inc. v. Chittenden Solid Waste Dist.*, 670 A.2d 800, 803 (Vt. 1995); *Dillon v. Northam*, 108 Va. Cir. 367, 374 (Cir. Ct. 2021); *Family of Butts v. Constantine*, 198 Wash. 2d 27, 41, 491 P.3d 132, 141 (2021).

see, e.g., *Bucci*, 68 A.3d at 1081 ("[I]f the court were to dismiss the case as moot, it would leave the defendant free to return to his old ways." (internal quotations omitted)); *Stano*, 372 P.3d at 431 (Kan. Ct. App. 2016) ("This exception to mootness exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct" (internal quotations omitted)).

Courts, including the U.S. Supreme Court, have also explicitly noted that where a government defendant "vigorously defends the constitutionality" of a program, "and nowhere suggests that if this litigation is resolved in its favor it will not resume" the challenged practice, the voluntary cessation exception to mootness applies. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *accord Ector Cty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 Tex. App. LEXIS 7492, at *18 (Tex. App. Sep. 9, 2021) ("the Governor and the State have not admitted that any of the executive orders were wrongfully issued and continue to maintain that the Governor has the authority to issue such orders"); *Family of Butts*, 198 Wash. 2d at 41 (finding a showing of intent to stop the challenged conduct permanently).

In sum, courts of other states have uniformly recognized that the federal voluntary cessation standard "makes good sense" and incorporated it into their analyses of justiciability under state law. *WMW, Inc.*, 733 S.E.2d at 273. The same potential for litigation gamesmanship and abuse that has led other states to adopt the doctrine exists in equal measure in Minnesota, and this Court should incorporate the voluntary cessation exception into Minnesota justiciability law for the same reasons.

D. Adoption of the Voluntary Cessation Doctrine Is Consistent with Existing Minnesota Law.

The adoption of the voluntary cessation doctrine is not a radical change of the law in Minnesota, but rather a clarification that Minnesota law on justiciability is as fully aligned with federal law as it already appears to be. Indeed, this Court has already relied on *Friends of the Earth*, one of the leading U.S. Supreme Court cases articulating the federal court standard for voluntary cessation, in several cases involving the analysis of justiciability questions under Minnesota law. *See, e.g.*, *Dean v. City of Winona*, 868 N.W.2d 1, 4-5 (Minn. 2015); *In re Guardianship of Tschumy*, 853 N.W.2d 728, 734 (Minn. 2014); *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). And the Court of Appeals has on at least one occasion held that when "[t]here is a reasonable expectation…that [a] wrong will be repeated," then "voluntary cessation of the act would not make th[e] case moot." *Mankato Twp. v. Malcolm*, *Inc.*, No. C8-00-1661, 2001 WL 243229, at *4 (Minn. Ct. App. Mar. 13, 2001) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974)).

Other Minnesota justiciability doctrines are similarly in keeping with federal law, and intentionally so. For example, Minnesota law recognizes that a case is not moot if it "implicates issues that are capable of repetition, yet likely to evade review," a principle that this Court has recognized as deriving from U.S. Supreme Court jurisprudence. *Kahn*, 701 N.W.2d at 821 (discussing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). The general doctrines of mootness and standing are sufficiently in accord with federal law that Minnesota courts have cited general, *federal* overviews of these areas as guides to Minnesota law. *See, e.g.*, *Crossroads Ctr. Rochester v. City of Rochester*, No. A12-1221,

2013 WL 1500858, at *2 (Minn. Ct. App. Apr. 15, 2013) (citing Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 677-78 (1990), to explain "overlapping doctrines, including standing, mootness, and ripeness"); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007) (citing Chemerinsky article's general discussion of federal law on mootness and standing). And case law explicating Minnesota's ripeness doctrine has relied heavily on federal precedent from the beginning. *See, e.g., In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. Ct. App. 2009) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003)); *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. Ct. App. 2007) (same); *see also State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 477 n.1 (Minn. 1946) (relying on *White Packing Co. v. Robertson*, 17 F. Supp. 120 (M.D.N.C. 1936), *aff'd*, 89 F.2d 775 (4th Cir. 1937)).

Explicit recognition of the voluntary cessation doctrine by this Court would confirm that this fundamental federal justiciability principle applies in this State, just as Minnesota's recognition of other federal justiciability concepts would lead one to expect. It would also eliminate the uncertainty that leads lower courts to hesitate where the Supreme Court's view may be anticipated but has not been clearly stated. *See, e.g.*, Add. 10-11.

Furthermore, while consistency itself is valuable in the development of the law in this area, a core reason for that consistency—namely, the protection of litigants—is even more important. Adoption of the voluntary cessation doctrine in Minnesota would ensure that Minnesota law is at least as protective as federal law of the rights of litigants to receive

full and timely resolution of the issues that brought them to court. This accords with the role of Minnesota's state courts as courts of general jurisdiction where all people may seek redress for their grievances.

In fact, this is the most significant way in which Minnesota courts have historically departed from federal justiciability law—by being *less* restrictive in their application of shared justiciability principles. *See, e.g.*, *Walsh v. U.S. Bank, N.A.* 851 N.W.2d 598, 600 (Minn. 2014) (rejecting heightened federal plausibility standard for pleading); *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977) (recognizing more liberal state taxpayer standing doctrine than federal counterpart); Mary Jane Morrison, *The Minnesota State Constitution: A Reference Guide*, at 16 (2002) ("In general, access to Minnesota district courts is not as limited by justiciability rules as is access to federal courts, which have limited jurisdiction."). It would be anomalous, and contrary to Minnesota's general policy of being "not as limited by justiciability rules" as federal courts, to determine that of all the federal justiciability principles, the voluntary cessation doctrine is the one that fails to qualify for adoption in Minnesota.

E. The Court Should Adopt a Clear Test Which Requires an Evidentiary Showing by Respondents That It Is "Absolutely Clear" That the Challenged Conduct Cannot "Reasonably Be Expected" to Recur.

The voluntary cessation doctrine has been adopted by many state courts, as discussed above, but at different levels of clarity. It would benefit the litigants here and future litigants in Minnesota if the Court adopts a test which clearly identifies relevant burdens of proof and the extent of the showing required to satisfy the Court that the conduct

at issue will not resume.

Appellants propose that the Court adopt the following test:

(1) The voluntary cessation doctrine applies where a defendant ceases conduct which, if permanent, would moot a case.

(2) When courts face voluntary cessations, the ceasing party carries the burden to show a court that "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

(3) The ceasing party's burden is heavy. For the ceasing party to prevail on a mootness defense, it must establish with evidence, by affidavit or by reference to public records,[6] that subsequent events have made it absolutely clear that it is unreasonable to believe that the defendant will not resume the ceased behavior.

(4) This is a fact-intensive inquiry. A reviewing court should consider all circumstances and evidence before it in making this determination. In other words, courts should consider (a) the reasons for which the challenged conduct was initiated, (b) the probability that the circumstances which gave rise to the challenged conduct may occur again, (c) the ceasing party's defense of its challenged conduct, (d) whether the ceasing party continues to claim the ability to resume the challenged conduct, and (e) the ceasing party's public statements, if any, related to its challenged conduct and the circumstances which gave rise to it.

(5) The voluntary cessation of challenged conduct after a lawsuit is filed, and especially after an appeal has been initiated, is the sort of circumstance in which the "orderly administration of justice" leads appellate courts to use their "inherent power" to consider extra-record documents and events to judge whether challenged conduct cannot reasonably be expected to recur. *Eagan Econ. Dev. Authority v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010).

This test encapsulates the requirements laid out by the U.S. Supreme Court and other states to consider the doctrine, and it includes pre-existing aspects of Minnesota justiciability jurisprudence. Appellants urge this Court to adopt it.

[6] *See* Minn. R. Evid. 201, 803(8).

F. The Voluntary Cessation Exception Should Be Applied in This Case.

If this Court adopts the voluntary cessation exception to mootness (and for all of the reasons outlined above, it should), this case should be remanded to require Governor Walz and Attorney General Ellison to "show[] that it is absolutely clear" that Governor Walz "could not reasonably be expected to" reimpose a mask mandate on the people of Minnesota. As the record currently stands, Governor Walz cannot meet this burden. Based on his conduct in this litigation and in other defenses of his claimed COVID-19 powers, it is reasonable to believe Governor Walz might resume his challenged conduct by reimposing a mask mandate. Governor Walz faces a "formidable," "heavy" burden to carry to show otherwise.

1. Governor Walz has repeatedly refused to give up his claimed authority to mandate masks, and he has vigorously defended his right to do so.

As noted above, and most important here, Governor Walz has refused multiple offers to settle this matter and have it dismissed by a simple agreement not to reimpose the challenged conduct. Appellants have repeatedly offered to dismiss with no costs to any party upon such an agreement in their principal brief, in their reply brief, and even at oral argument. Appellants' Br., June 14, 2021, p. 18; Appellants' Reply. Br. 1; Oral Argument Tr., Oct. 13, 2021, at 3:00. Governor Walz refused that invitation each time, either rejecting it or ignoring it in his briefs and oral argument.

Additionally, Governor Walz has vigorously defended his authority to impose a mask mandate in this case, and he has asserted astonishingly broad claims as to his authority to both declare a peacetime emergency and the subject matter of his claimed

authority under a declared emergency—namely that of *the entire Minnesota Legislature*. Add. 51-62. He has claimed that he needs to provide no showing whatsoever to justify the declaration of a peacetime emergency under Chapter 12, which means that he can declare one at any time, for any reason, without any evidence supporting it. *Id.* The Governor's refusal to agree not to reimpose a mask mandate—and his vigorous defense of his authority to do just that—are fatal to his mootness arguments. These are by far the most important factors as to whether the Governor can carry his heavy burden because they are purely objective and intrinsically linked to the possibility of reimposition in the future.

Consistent with the Supreme Court's decision in *Parents Involved in Community Schools*, this type of conduct militates strongly against a finding that it is "absolutely clear" that the challenged conduct "cannot reasonably be expected to" recur. In *Parents Involved*, the Supreme Court applied the voluntary cessation exception to mootness where

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

551 U.S. at 719. Courts which have examined mootness claims in the face of a voluntarily ceased COVID-19 restriction have also held that the failure to agree not to reimpose the restriction makes it impossible for a governor to satisfy the heavy burden of the voluntary cessation test. *Ector Cty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 Tex. App. LEXIS 7492, at *18 (Tex. App. Sep. 9, 2021) ("the Governor and the State have not admitted that any of the executive orders were wrongfully issued and continue to maintain

that the Governor has the authority to issue such orders").

Other courts have likewise held that the expiration of COVID-19 orders does not render challenges to the legitimacy of those orders moot when they are voluntarily ceased. *Kristen B. v. Dep't of Children & Family Servs.*, 2022 IL App (1st) 200754, ¶ 26 (Jan. 28, 2022); *Cassell v. Snyders*, 990 F.3d 539, 546 (7th Cir. 2021); *Resurrection Sch. v. Hertel*, 11 F.4th 437, 452 (6th Cir. 2021);[7] *Amato v. Elicker*, 534 F. Supp. 3d 196, 206 (D. Conn. 2021); *BK Salons, Ltd. Liab. Co. v. Newsom*, No. 2:21-cv-00370-JAM-JDP, 2021 U.S. Dist. LEXIS 147226, at *8 (E.D. Cal. Aug. 4, 2021); *Pro. Beauty Fed'n of California v. Newsom*, No. 2:20-CV-04275, 2020 U.S. Dist. LEXIS 102019, 2020 WL 3056126, at *4 (C.D. Cal. June 8, 2020). These decisions which have held that challenges to ceased COVID-19 restrictions are not moot because of the rescission of the restrictions have correctly applied the voluntary cessation doctrine.

2. The unpredictability of COVID-19 and Governor Walz' claim to be able to impose or rescind mandates based on the ebb and flow of COVID-19 metrics make this case a live controversy.

COVID-19 has proven to be entirely unpredictable, with its different variants posing different threats of virulence and infectiousness. At the time the court of appeals decided the instant matter, on December 6, 2021, it noted that the Delta variant was then Minnesotans' primary COVID-19 concern. Add. 5. Since that time, the Omicron variant,

[7] Appellants recognize that the Sixth Circuit panel decision in *Resurrection School v. Hertel* was vacated by the subsequent grant of rehearing *en banc* by the full Sixth Circuit. *Resurrection Sch. v. Hertel*, 16 F.4th 1215 (6th Cir. Nov. 10, 2021). Whatever the reason for the grant of rehearing, Appellants believe the panel decision in *Resurrection School* is well-reasoned and persuasive.

and its new subvariants, have become Minnesotans' primary concerns. In fact, the Omicron variant led to far more "cases" in Minnesota than the original COVID-19 variant which led Governor Walz to issue EO 20-81 in the first place. *E.g., CDC*, "Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, available at https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (last visited Apr. 6, 2022) (select Minnesota from radio button). It is true that Governor Walz did not re-declare a peacetime emergency during the spread of the Omicron variant. But, of course, had he done so, he would have had to forfeit his mootness defense and defend his actions on their merits, without question.

Governor Walz' public reasons given for not reinstituting an emergency or mask undermine any assurance that this Court could have that he will not later do so. Upon examination, it appears that his reasons for not reimposing a mask mandate have nothing to do with the CDC or differing COVID-19 variants, but instead with his concern that this Court or the legislature could limit his emergency authority.

First, as the Delta variant spread through Minnesota, Governor Walz claimed he would not reimpose a mask mandate because vaccination rates had increased in Minnesota. Resp. Br. 15 & n.5 (July 28, 2021). This reason became relatively meaningless when that same round of vaccinations only proved 30% effective against the Omicron variant of COVID-19. *E.g., MPR*, "Vaccine protection vs. omicron infection may drop to 30% but does cut severe disease," Dec. 14, 2021, *available at* https://www.npr.org/sections/goatsandsoda/2021/12/14/1063947940/vaccine-protection-vs-omicron-infection-may-drop-to-30-but-does-cut-severe-disea.

Second, Governor Walz claimed that he rescinded EO 20-81 in part in May 2021 because of a changed CDC recommendation that masks not be required in indoor public spaces. Resp. Br. 17 & n.7 (July 28, 2021). However, during the pendency of this appeal, the CDC has changed that recommendation back-and-forth, in at least July 2021, January 2022, and February 2022. *E.g., Washington Post*, "CDC urges vaccinates people in covid hot spots to resume wearing masks indoors," July 28, 2021, *available at* https://www.washingtonpost.com/health/2021/07/27/cdc-masks-guidance-indoors/; Kathy Katella, "COVID-19 Mask Guidelines Revised—Again," *Yale Medicine*, Feb. 28, 2022, available at https://www.yalemedicine.org/news/cdc-mask-guidance (noting CDC recommendations changed in January and February 2022). If Governor Walz is really "following the science," i.e., mirroring the CDC recommendations, then a mask mandate is highly likely to recur.

Third, Governor Walz claimed that he rescinded EO 20-81 in part because "key COVID-19 metrics improved." Resp. Br. 17. It is not clear what this meant when written, but there is no question that during the Omicron variant spread in Minnesota, "key metrics" related to case numbers were *not* improving, as discussed above. Again, Governor Walz' own reasoning supports Appellants' real fear that the pendency of this case is the only thing keeping him from reimposing a mask mandate.

Governor Walz' claimed reasons for not re-imposing a mask mandate are self-defeating. He cannot carry the heavy burden of making it absolutely clear that his challenged conduct is not reasonably likely to recur given his public reasoning for his rescission of the mask mandate.

3. The Court should resist Respondents' forthcoming invitation to premise mootness on the defendant's non-resumption of the challenged conduct, which premise would turn the voluntary cessation doctrine on its head.

Appellants expect Governor Walz to argue that he should not have to face judicial review of the merits of this case based almost entirely on his non-issuance of another peacetime emergency and mask mandate. But if the Court were to accept that argument, it would undo the core purpose of the voluntary cessation doctrine: how can the voluntary conduct itself, which gives rise to the mootness exception, alone satisfy the heavy burden the exception imposes on a defendant? If it could, the voluntary cessation exception would entirely fail to accomplish its intended purpose.

Appellants expect Respondents to argue that two strains of recent cases related to the voluntary cessation doctrine support their position that the voluntary cessation exception does not apply here. The first strain is best represented by a recent case from the 8th Circuit Court of Appeals related to COVID-19 emergency orders. *Hawse v. Page*, 7 F.4th 685 (8th Cir. 2021). This strain of cases is easily distinguishable.

In *Hawse*, the Eighth Circuit dealt with St. Louis County, Missouri's church capacity restriction orders. 7 F.4th at 690. Over dissent, the Eighth Circuit held that the case was moot, and that the challenged conduct could not reasonably be expected to recur, in substantial part because the challenged shutdown order was superseded fourteen months before the July 2021 decision. 7 F.4th at 693. In fact, in Missouri, a new law signed by Governor Parsons before the *Hawse* decision limited the ability of St. Louis County to issue health orders that would shut down churches. *E.g.,* Becky Willeke, "Page: mask

mandate doesn't 'trigger' new state law on public health orders," *FOX 2 Now*, https://fox2now.com/news/missouri/page-mask-mandate-doesnt-trigger-new-state-law-on-public-health-orders/.

The takeaway from the split decision in *Hawse* is this: where a government stops the challenged conduct, *and then a superior authority removes the ability to re-start the challenged conduct*, the case is moot.[8] This would only happen in *this case* if this Court were to hold that Governor Walz' mask mandate violated the law. It cannot happen absent a merits decision here.

The other strain of cases which Respondents will likely push is the strain that wrongly accepts the non-resumption of the challenged restrictions as evidence that the government which imposed restrictions will not do so again. *E.g., Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 2022 Iowa Sup. LEXIS 14, at *17-18 (Iowa 2022) (collecting cases). Simply put, any decision which declines to apply the voluntary cessation doctrine because of the non-resumption of challenged behavior *while the case is still ongoing* fails to properly apply the doctrine as enunciated by the U.S. Supreme Court. Judge Stras explained this well in his dissent in *Hawse*, where he noted that a government's *objective actions*, such as its "reiterat[ion of] its broad authority" to make COVID-19 emergency restrictions and "us[ing] its merits brief…to *defend* its decision" to restrict activity are more persuasive as to the likelihood of recurrence than the mere non-

[8] Appellants believe Judge Stras' dissent in *Hawse* is more persuasive and correctly would have held that the *Hawse* case is not moot. Nonetheless, the facts relied upon by *Hawse*'s majority distinguish it from this case.

resumption of challenged conduct. *Hawse*, 7 F.4th at 699-700 (Stras, J., dissenting) (emphasis in original).

The non-resumption of the mask mandate is not *close* to enough to carry the "heavy," "formidable" burden Respondents bear to show that it is "absolutely clear" that the challenged conduct is not "reasonably likely" to recur. The Court should adopt and apply the voluntary cessation exception to mootness here, vacate the Court of Appeals' decision, and remand to the Court of Appeals for consideration of the merits of this case.

III. The Court of Appeals Erred by Holding That the "Capable of Repetition, Yet Evading Review" Doctrine Does Not Apply to This Case.

The court of appeals incorrectly held that Governor Walz' mask mandate was not capable of repetition, yet evading review because (1) Governor Walz' non-resumption of his challenged conduct prevented Appellants from establishing that there is a "reasonable expectation that another mask mandate will be imposed," and (2) the mask mandate emergency order was not, by its nature, too short in duration to be fully litigated prior to its cessation or expiration. Add. 5-7. The court of appeals was wrong on both issues under this Court's mootness doctrine.

A. The Mask Mandate is "Capable of Repetition."

First, the court of appeals wrongly shifted the burden[9] of demonstrating the

[9] It bears noting here that there appears to be a somewhat different burden for the defendant to carry between the "capable of repetition, yet evading review" doctrine and the voluntary cessation doctrine. Under the voluntary cessation doctrine, as formulated by the U.S. Supreme Court, the defendant has a "***heavy burden*** of persuading the court" that "subsequent events ma[k]e it ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. Under the "capable of repetition, yet evading review" doctrine, the burden is still on the defendant to

existence of a reasonable expectation of recurrence onto Appellants. Add. 5-6. The court held that "appellants fail to establish that the circumstances of this case create a 'reasonable expectation' that another mask mandate will be imposed." *Id.* The court of appeals had, prior to the case below, consistently quoted the U.S. Supreme Court for the premise that, in any mootness analysis, the party raising the mootness issue has the burden of demonstrating that subsequent events have produced mootness. *Guminiak v. Sowokinos*, No. A16-1796, 2017 Minn. App. Unpub. LEXIS 396, at *4 (May 1, 2017) (quoting *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) ("If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result."). The Respondents carry the burden related to mootness, regardless of the exception applied.

And it is a burden which Respondents cannot carry. Whether an action is "capable of repetition" relates to whether there is "a reasonable expectation that a complaining party would be subjected to the same action again." *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). The Court has adopted this test from the U.S. Supreme Court's formulation of it. *E.g., Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). The U.S. Supreme Court has described the meaning of this prong of the test:

> Our concern in these cases, as in all others involving potentially moot claims,

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show that it is not reasonable to expect recurrence of the challenged conduct. But the difference in language between the two suggests that the scrutiny on whether the defendant has carried its burden for the "capable of repetition" test may be less exacting.

> was whether the controversy was *capable* of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.

Honig v. Doe, 484 U.S. 305, 342, 108 S. Ct. 592, 614 n.6 (1988) (emphasis in original).

This Court's application of the "capable of repetition" prong in *Kahn* demonstrates that this is the kind of case that should be excepted from the mootness doctrine. In *Kahn*, the Court held that it could respond to a certified question from the federal district court based on a challenge to the failure to redistrict Minneapolis' malapportioned wards based on the 2000 Census in time for the 2001 city election. 701 N.W.2d at 820. By the time the Court decided the case in 2005, the 2000 Census' redrawing of the ward lines had long been accomplished and was ready for the 2003 and 2005 elections. Yet, the Court held that the case was not moot because the question presented—whether allowing City Council members to serve out full terms based on malapportioned districts violates the one-person-one-vote provision of the Minnesota Constitution—was one that was both important and would recur each decade. *Id.* at 823. The impossibility of showing that it was likely that malapportionment would recur in future decades did not prevent the Court from addressing the merits of the certified question. In other words, what matters is whether an action is *capable* of recurring, not whether it is *probable* that it will recur.

As noted above in detail, the Governor has asserted an extraordinarily broad view of his powers under Chapter 12 of the Minnesota Statutes, and he has vigorously defended this case and the legality of the mask mandate. The structure of Chapter 12, according to Governor Walz, is such that he can immediately declare an emergency for any reason without any evidentiary support. Add. 51-62. Most importantly, he has refused to agree not

to reimpose a mask mandate if he sees a future need to issue an emergency order related to COVID-19. And finally, COVID-19, and coronaviruses in general, are inherently unpredictable and may lead to future outbreaks. Again, contrary to the court of appeals, right after it issued its December 6 decision, the Omicron variant led Minnesota to its highest case numbers ever. Governor Walz' actions and the nature of pandemics like COVID-19 demonstrate that a mask mandate is certainly "*capable* of repetition."

B. The Mask Mandate Was Too Long for the People of Minnesota, But Too Short to Be Fully Litigated Prior to Its Cessation.

The relevant consideration for whether an action is "too short to be fully litigated prior to its cessation or expiration" is whether it is of "an inherently limited duration, such as prior restraints on speech." *Dean*, 868 N.W.2d at 5. Again, this Court has relied on federal precedent to define the contours of the "capable of repetition, yet evading review" test. The U.S. Supreme Court has found periods of up to two years to be too short to be fully litigated. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016) (a procurement contract that expires in two years does not permit judicial review). The Sixth Circuit, in its recent *Resurrection School* decision and in *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377 (6th Cir. 2001), have likewise held. *Deja Vu*, 274 F.3d at 390-91 (two years to challenge a local ordinance prohibiting individuals with a sex-crime history to work for a sexually oriented business was too short in duration); *Resurrection Sch.*, 11 F.4th at 452-53 (6th Cir. 2021), *vacated* 16 F.4th 1215 (Nov. 10, 2021). This Court's *Dean* decision is not to the contrary. In *Dean*, the Court held that the evading review prong was not satisfied because the case had been proceeding for

three years. 868 N.W.2d at 5-6.

These federal decisions and *Dean* dealt with cases much "older" than this one. This case challenges an *emergency order*. "Emergency" orders "inherently" deal with "emergent" circumstances and are supposed to be of limited duration. This particular "emergency order" lasted only 9 months. This case therefore fits within the *Dean* requirement that the challenged conduct be of "inherently limited duration." And this is a *quo warranto* action which was ready for a merits decision and heard within 4 months of the filing of the lawsuit.

Respondents will wrongly claim that this lawsuit, brought within a month of the issuance of EO 20-81 and appealed within the normal appellate window, proceeded at a "leisurely" pace, and somehow the merits of this lawsuit could normally be completed within 9 months—the duration of EO 20-81. Resp. Br. 16 (July 28, 2021). Lawsuits simply do not progress on the merits that quickly. Even those decisions of the U.S. Supreme Court which are so persuasive related to COVID-19 cases, like *Tandon v. Newsom*, are the result of emergency applications for temporary relief as the merits of the case progresses, not merits decisions.

Also important is that Appellants moved for the immediate issuance of the writ of quo warranto and, in the alternative, a temporary injunction, on November 24, 2020. Doc. 38. In that motion, Appellants asked the district court to use its inherent authority to consider affidavits and take testimony related to the writ of quo warranto and the motion for a temporary injunction at the December 22, 2020 hearing. Docs. 38 (Motion), 39 (Mem. of Law at 2). Respondents, in a letter, objected to Appellants' effort to streamline and speed

up the process of hearing the merits of this case, despite the accepted practice of hearing whether to grant or dismiss quo warranto proceedings in the same hearing. *Compare* Doc. 45 *with Save Lake Calhoun v. Strommen*, 928 N.W.2d 377, 390 (Minn. Ct. App. 2019) (rev'd on other grounds, 943 N.W.2d 171 (Minn. 2020)). In other words, Appellants tried to obtain immediate merits review on a fuller record,[10] and Respondents objected and insisted instead that the district court slow down the case.

Governor Walz' mask mandate lasted 9 months. Appellants brought a quo warranto action to challenge it, which was ready for a merits decision within 4 months of the filing of this lawsuit. This type of case, challenging an emergency order, inherently evades review. And as discussed above, Governor Walz' actions are certainly *capable* of repetition.

IV. This Challenge to Governor Walz' Mask Mandate Is Functionally Justiciable and of Statewide Importance.

The *Kahn* Court noted that it could decide the merits of a question presented if it was "functionally justiciable" and "an important public issue of statewide significance that should be decided immediately." 701 N.W.2d at 821-22. The court of appeals applied this test and held that this case was functionally justiciable, but not of significant enough importance to except it from a finding of mootness based on Governor Walz' rescission of the mask mandate. Add. 7-9. The court was correct on the first matter and incorrect on the

[10] The court of appeals correctly noted that this case hinges mostly on legal issues and does not require a detailed fact record. In fact, even without testimony at the December 22, 2020 hearing, there is enough in the record for the court of appeals to decide to issue the writ of quo warranto upon remand.

second.

Functional justiciability deals with whether the case has a well-developed record. *Dean*, 868 N.W.2d at 6. Here, as to the merits of the case, the Court faces an appeal from a grant of a motion to dismiss and denial of the issuance of the writ of quo warranto. Add. 13-14 (District Court Order 1-2). These cross-motions address the merits of this case and whether the Petition states a claim for relief. As the court of appeal rightly noted, the issues presented here are overwhelmingly legal issues, not fact-driven determinations. Add. 7. This case is ready for a determination on the merits of the legal arguments presented, which makes the case "functionally justiciable." *Id.*; *Save Lake Calhoun v. Strommen*, 928 N.W.2d 377, 390 (Minn. Ct. App. 2019) (reversing grant of motion to dismiss and issuing the writ of quo warranto on record before it) (reversed on merits, but not procedural, grounds, 943 N.W.2d 171 (Minn. 2020)). The court of appeals correctly determined that this case is functionally justiciable.

However, the court of appeals incorrectly held that this case does not satisfy the "statewide significance" prong of this test. At least two justices of this Court, for example, have noted in their dissent from the denial of a petition for accelerated review, that

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

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

Appellants agree. This case, even after the rescission of the mask mandate, presents the crucially important issue of whether the Governor has the authority to use Chapter 12

to commandeer the entire legislative apparatus of Minnesota, without restriction. And even focusing just on the mask mandate, that mandate affected every Minnesotan over 5 years old for 10 months. Many Minnesotans had to seek physicians' guidance as to how to cope with wearing a mask given breathing issues, such as COPD. The mask mandate raised significant issues related to how exceptions would be enforced against those with disabilities entitled to exceptions under the ADA. After all, businesses whose clientele had exemptions from wearing masks could easily be turned in for noncompliance, a practice urged by Attorney General Ellison. Mandates in schools based on EO 20-81 created problems for students with disabilities as well and provided no discernible benefit. *E.g.,* David Zweig, "The CDC's Flawed Case for Wearing Masks in School," *The Atlantic*, Dec. 16, 2021, *available at* https://www.theatlantic.com/science/archive/2021/12/mask-guidelines-cdc-walensky/621035/. At least one longitudinal pre-print study of early child cognitive development raised concerns that COVID-19 mitigation efforts, including masks, led to a decline in verbal, motor, and overall cognitive performance among children. Sean Deoni, et al., "The COVID-19 Pandemic and Child Cognitive Development," Aug. 11, 2021, *available at* https://www.medrxiv.org/content/10.1101/2021.08.10.21261846v1.full.pdf.

The court of appeals held that the issues presented in this case "are not as significant as the life-or-death decision at issue in *Tschumy*, and they lack the urgency of the issue in *Rud*." Add. 9. While the court of appeals correctly noted that this mootness exception is "narrowly" applied, *Dean*, 868 N.W.2d at 6, it failed to note the similarity between this case and others where this Court *has* applied this exception to cases without life-or-death

decisions or ongoing trials impacted by it. *Compare* Add. 9 *with Dean*, 868 N.W.2d at 7.

In *Kahn*, for example, the "statewide significance" prong focused on the impact the decision would have on elections beyond Minneapolis, in cities across the state. 701 N.W.2d at 823. Such is the case here—the mask mandate is, by its nature, statewide (unless one is on tribal lands or is not a "Minnesotan"). The *Dean* Court noted this about *Kahn*—that a major reason the *Kahn* Court reached the merits was that Minneapolis' election procedures were similar to others in Minnesota and therefore affected about 14% of the state. *Dean*, 868 N.W.2d 1, 11-12. The *Dean* Court also noted the statewide importance of *Jasper v. Commissioner of Public Safety*, 642 N.W.2d 435 (Minn. 2002), which concerned the propriety of the Commissioner's approval of a breath-testing instrument for suspected impaired drivers. *Dean*, 868 N.W.2d at 11. Like this case, these cases affected either the entire state or substantial portions of it. And like the *Kahn* case, this case deals with crucial matters of state constitutional law which will arise each time the governor declares an emergency. *Dean*, on the other hand, is easily distinguishable from this case—it only dealt with "the homeowners of one municipality." *Id.* at 13.

The court of appeals also held that the nature of this case, which challenges Chapter 12's constitutionality, led the court to decline to review the merits, citing *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011); Add. 8-9. In *Limmer*, however, this Court dealt with a fight *directly between* the legislature and executive over whether the executive could spend money without legislative appropriations. 806 N.W.2d at 839. This is a different case: this is a challenge by *citizens* against the executive's abuse of emergency powers—the arrogation of the legislature's powers into one-person rule, for months on end.

The judiciary's role is to "say what the law is," not to abdicate its role to decide where there is a question of the balance of power between co-equal branches of government. *Sheridan v. Comm'r of Revenue*, 963 N.W.2d 712, 723 (Minn. 2021) ("deferring to the executive's interpretation of the Constitution would encroach on our 'province and duty . . . to say what the law is.' *Marbury*, 5 U.S at 177; *see also* Minn. Const. art. III, § 1"). And even more specifically, the judiciary's responsibility to "say what the law is" is the *greatest* when citizens seek to hold their government responsible for its actions which violate the Minnesota Constitution. *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018) ("It is well within the province of the judiciary to adjudicate claims of constitutional violations."). In fact, in this case, the court of appeals' deference to the Governor by removing itself from the fray not only did a disservice to Appellants but was also a self-inflicted wound to the judiciary's essential powers and responsibilities.

This case is functionally justiciable—it is "teed up" for resolution—and asks essential questions as to Governor Walz' authority during an emergency. The Court should invoke its discretion to hear this case under the "statewide significance" exception to mootness, regardless of the Governor's rescission of the mask mandate.

CONCLUSION

The Court should hold that Governor Walz' rescission of Emergency Executive Order 20-81 does not moot this case. In doing so, the Court should adopt the voluntary cessation exception to mootness. In addition, the Court should recognize that, despite the rescission of the mask mandate, this case is not moot because it falls within the "capable of repetition, yet evading review" exception to mootness, and it is a functionally justiciable question of statewide importance.

Appellants ask the Court to reverse and vacate the court of appeals decision and remand this case to the court of appeals to consider the case's merits.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document conforms to the requirements of Minn. R. Civ. App. P. 132.01, is produced with a proportional 13-point font, and the length of this document is 11,090 words. This Brief was prepared using Microsoft Word 365, Version 2202.

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