SJC-13193

CITY OF LYNN[1] vs. ARIANA MURRELL.[2]

Essex. February 2, 2022. - May 2, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Moot Question. Practice, Civil, Moot case. Public Health.

Civil action commenced in the Superior Court Department on April 23, 2021.

A motion for injunctive relief was heard by Salim Rodriguez Tabit, J., and questions of law were reported by him to the Appeals Court.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William E. Gens for the defendant.
James F. Wellock, Assistant City Solicitor, for the plaintiff.
Kimberly Parr, Assistant Attorney General, for the Commonwealth.

[1] By and through its board of health.

[2] Individually and as manager of Liberty Tax Service.

CYPHER, J. On March 10, 2020, Governor Charles D. Baker, Jr. (Governor), according to his authority under the Civil Defense Act, St. 1950, c. 639, and G. L. c. 17, § 2A, and in response to the emergence of the COVID-19 pandemic in the Commonwealth, declared a state of emergency. See Desrosiers v. Governor, 486 Mass. 369, 373 (2020). During this state of emergency, which eventually ended on June 15, 2021, the Governor issued sixty-nine emergency orders. See Order Announcing the Termination of the March 10, 2020 State of Emergency and Rescinding COVID-19 Executive Orders Issued Pursuant to the Massachusetts Civil Defense Act, COVID-19 Order No. 69 (May 28, 2021) (Order 69). The defendant, Ariana Murrell, individually and as manager of Liberty Tax Service (Liberty Tax), challenges two of those emergency orders and the Statewide face covering requirements associated with them: (1) Order Authorizing the Re-Opening of Phase II Enterprises, COVID-19 Order No. 37 (June 6, 2020) (Order 37); and (2) Revised Order Requiring Face Coverings in Public Places, COVID-19 Order No. 55 (Nov. 2, 2020) (Order 55). As Order 69 revoked Orders 37 and 55 while the interlocutory appeal was pending, see Order 69 at 2, we now dismiss the case as moot.[3]

[3] We acknowledge the amicus brief submitted by the Commonwealth in support of the city of Lynn.

Background. 1. The emergency orders. Order 37, issued on June 6, 2020, required the director of the Department of Labor Standards (director) and the Commissioner of Public Health to issue COVID-19 workplace safety rules. Order 37 at 4. In addition, Order 37 gave the Department of Labor Standards, in consultation with the Department of Public Health (department), "general authority to promulgate directives, regulations, and guidance to implement and enforce" those safety rules. Id. at 5. A regulation promulgated under this authority required that "[a]ll enterprises that are authorized to open and are operating brick-and-mortar premises that are open to workers, customers, vendors or the public shall . . . [r]equire face coverings or masks for all workers." 454 Code Mass. Regs. § 31.03(1)(d) (2020).

Order 55, which went into effect on November 6, 2020, required "all persons . . . over the age of 5 years old . . . to wear a mask or cloth face covering over their mouth and nose when in a public location." Order 55 at 2, 4. Order 55 granted enforcement power to the department, local boards of health, and authorized agents. Id. at 3. We refer to the mask requirements imposed by regulation under Order 37 and Order 55 together as the "Statewide mask mandates."

2. Murrell's conduct. Murrell operates Liberty Tax, a business providing tax preparation services in the city of Lynn

(city). Murrell initially complied with the Statewide mask mandates, but after allegedly noticing that face masks were causing harm to people's health, Murrell adopted a no-mask policy at Liberty Tax. The policy required that customers and staff members not wear masks inside the premises. The Lynn police department received multiple complaints about Murrell's no-mask policy. The Lynn police investigated and corroborated these complaints with their own independent and documented observations of Murrell's practices at Liberty Tax. Members of the public also contacted the city's board of health (board) to notify it of Murrell's no-mask policy.

The city's health inspector (inspector) issued an initial citation to Murrell, dated February 2, 2021, warning her that Liberty Tax was in violation of the State's emergency orders. The inspector issued another five citations from February to April 2021, each fining Murrell $300 for Liberty Tax's continuing violation of the Statewide mask mandates, and a cease and desist order, dated March 17, 2021. Murrell unsuccessfully appealed the fines and the cease and desist order before the board, and sought judicial review in the District Court.

Murrell's no-mask policy drew the attention of the director as well as the Federal Occupational Safety and Health Administration (OSHA). The director issued a cease and desist order, dated February 23, 2021. Following a visit by an OSHA

compliance officer on March 17, 2021, OSHA issued Murrell a citation and notice of penalty, including a $136,532 fine, dated April 8, 2021. Murrell appealed OSHA's citation and notice of penalty.[4]

About one month after issuing its cease and desist order, the city brought an action in Superior Court seeking a temporary restraining order and a permanent injunction to prevent Murrell from operating Liberty Tax until the Governor ended the state of emergency, and requesting a declaratory judgment stating that the city had authority to enforce the cease and desist order. Alongside its complaint, the city filed an emergency motion for a preliminary injunction. Murrell responded to the motion, claiming, among other things, that the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651 et seq., preempted the Governor's emergency orders and that only OSHA had the statutory authority and jurisdiction to seek an injunction against her. After a hearing, a judge of the Superior Court concluded that the emergency orders were not preempted and that it was in the public interest to grant a preliminary injunction

[4] The status of the appeal is not in the record. The OSHA online establishment search indicates that no final order has issued and that the matter continued to be "[c]ontested" as of April 23, 2021. See United States Department of Labor, Occupational Safety and Health Administration, Inspection Detail, Inspection: 1520204.015 -- Ariana Murrell-Rosario D/B/A Liberty Tax Service, https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1520204.015 [https://perma.cc/DW42-RAAL].

authorizing the Lynn police to close Liberty Tax if Murrell failed to comply with the city's cease and desist order within twenty-four hours. The judge, however, stayed the injunction on May 10, 2021, and, pursuant to G. L. c. 231, § 111, and Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1403 (1996), reported the following two questions for decision by the Appeals Court: (1) "Did the court err in holding that Order . . . 37 and Order . . . 55 are not preempted by the OSH Act?"; and (2) "Did the court err in holding that the public interest required an order shutting down Liberty [Tax]?" We transferred the interlocutory appeal to this court on our own motion on October 20, 2021. On May 28, 2021, before the transfer, the Governor issued Order 69, which lifted most COVID-19 related orders and restrictions, including Order 37 and Order 55, the following day. See Order 69 at 2.

Discussion. Murrell argues on appeal that the now-rescinded Orders 37 and 55, and the directives and regulations associated them, were preempted by the OSH Act. See art. VI, cl. 2, of the United States Constitution. Murrell also argues that the judge erred in issuing the preliminary injunction because the city did not meet its burden of showing that it was in the public interest to do so. Because Orders 37 and 55 have been rescinded, the city no longer seeks to enjoin the operation of Liberty Tax, and neither party seeks any other form of

relief. As a threshold matter, however, we must determine whether the issues are moot and, if they are, whether we ought to exercise our discretion to decide them anyway.

1. Mootness. "[L]itigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976). A party no longer has a personal stake in a case "where a court can order 'no further effective relief.'" Branch v. Commonwealth Employment Relations Bd., 481 Mass. 810, 817 (2019), cert. denied, 140 S. Ct. 858 (2020), quoting Lawyers' Comm. for Civ. Rights & Economic Justice v. Court Adm'r of the Trial Court, 478 Mass. 1010, 1011 (2017). We have explained that "generally . . . '[c]ourts decline to hear moot cases because (a) only factually concrete disputes are capable of resolution through the adversary process, (b) it is feared that the parties will not adequately represent positions in which they no longer have a personal stake, (c) the adjudication of hypothetical disputes would encroach on the legislative domain, and (d) judicial economy requires that insubstantial controversies not be litigated.'" Lockhart v. Attorney Gen., 390 Mass. 780, 782-783 (1984), quoting Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293, 298 (1975).

Murrell argues that this case is not moot because there is still an ongoing dispute between the parties in the District

Court regarding fines under the challenged emergency orders. That dispute, however, is a separate matter concerning Murrell's ongoing pecuniary obligations, separate from this interlocutory appeal. In this case, Murrell challenged the validity of the emergency orders in response to the city's seeking an injunction based on them. The city, on appeal, concedes that the injunction, by its terms, expired when the Governor rescinded the emergency orders. Because Murrell no longer is subject either to the emergency orders or to the injunction, a ruling from this court on the issues that she raises would offer no additional relief and would not alter either party's legal position. See Mullholland v. State Racing Comm'n, 295 Mass. 286, 289 (1936) ("When . . . the situation is such that the relief sought is no longer available . . . and a decision by the court will not be applicable to existing rights, . . . [t]he questions . . . have become moot"). All that is left is for us to invest valuable judicial resources in settling a "hypothetical dispute[]." Wolf, 367 Mass. at 298. Thus, the case is moot.

2. Discretion to decide the issues. Despite the "general rule" that we will not decide cases that have become moot, Norwood Hosp. v. Munoz, 409 Mass. 116, 121 (1991), mootness differs from other doctrines of justiciability in that it is "'a factor affecting [the court's] discretion, not its power,' to

decide a case." Styller v. Zoning Bd. of Appeals of Lynnfield, 487 Mass. 588, 595 (2021), quoting Rosado v. Wyman, 397 U.S. 397, 403 (1970). When determining whether to exercise this discretion, we consider whether

> "(1) the issue was fully argued on both sides; (2) the question was certain, or at least very likely, to arise again in similar factual circumstances; (3) . . . appellate review could not be obtained before the recurring question would again be moot; and (4) most importantly, the issue was of public importance."

Ott v. Boston Edison Co., 413 Mass. 680, 683, (1992), citing Lockhart, 390 Mass. at 783. Murrell advances a number of additional arguments that appear to urge us to decide the issues notwithstanding their mootness. We address each in turn.

a. Resolution of the parallel District Court case. Murrell argues that answering the question of Federal preemption ultimately might guide the District Court's decision concerning fines in the parallel action. While that may be, this court's "long tradition of not unnecessarily deciding constitutional questions" counsels against reaching the merits of a case merely to aid in resolving a controversy that may not be decided based on the constitutional question raised here.[5] Lockhart, 390 Mass.

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[5] As we observed in Wolf, 367 Mass. at 298, deciding "hypothetical disputes . . . encroach[es] on the legislative domain." We are cognizant that an unnecessary preemption ruling has the same effect of encroaching on the other branches of government. We previously have stated that "[p]reemption . . . is not favored, and State laws should be upheld unless a conflict with Federal law is clear" (citation omitted). Sawash

at 784. Because "[t]his court 'do[es] not decide constitutional questions unless they must necessarily be reached,'" such a question concerning preemption under the supremacy clause would be better addressed on appeal from the District Court judge's decision should the judge decide the case on that ground. Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils. (No. 1), 461 Mass. 166, 172 (2011), quoting Commonwealth v. Paasche, 391 Mass. 18, 21 (1984) (court required that preliminary question regarding town's statutory authority to issue regulation be answered before addressing defendant's multiple constitutional claims, including that regulation violated supremacy clause).

b. Likelihood of repetition. Murrell argues that we should decide the issues because, based on the Governor's comments at a press conference on May 29, 2021, and his reopening plan announced in May 2020, he could reinstate an emergency order like the ones challenged here at any time. First, Murrell's assertion that the issues are likely to arise again is "speculative and insufficient to confer a stake in the outcome of this particular appeal." Commonwealth v. Delmore D.,

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v. Suburban Welders Supply Co., 407 Mass. 311, 315, 318 (1990) (holding that neither Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801–1813 [1982 & Supp. III 1985], nor Federal regulation 49 C.F.R. § 173.315 [1989] preempted plaintiff's tort claims).

480 Mass. 1009, 1009 n.2 (2018). See Bronstein v. Board of Registration in Optometry, 403 Mass. 621, 627 (1988) ("Speculative fear of future litigation . . . does not save a case from being moot"). See also Boston Bit Labs, Inc. v. Baker, 11 F.4th 3, 11 (1st Cir. 2021) ("even if . . . COVID-19 flare-ups occur . . . , it is unrealistically speculative that Governor Baker would again declare a state of emergency, again close businesses, and again put arcades in a less favorable reopening phase than casinos").

Second, it overlooks the changes in both the factual and legal landscape of the COVID-19 pandemic. The emergency orders were issued to address an earlier variant of COVID-19 at a time when the State had a limited number of protective measures at its disposal. See World Health Organization, Tracking SARS-CoV-2 Variants, https://www.who.int/en/activities/tracking-SARS-CoV-2-variants [https://perma.cc/K4DS-T6W2]. Measures now available include multiple types of COVID-19 tests, vaccines, and COVID-19 treatments that can be administered at home. See Centers for Disease Control and Prevention, COVID-19 Testing: What You Need to Know, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html [https://perma.cc/S6DT-9F6P]; Department of Public Health, Find a COVID-19 Test, https://www.mass.gov/info-details/find-a-covid-19-test [https://perma.cc/X8B3-STVC]; Department of Public Health, Massachusetts COVID-19 Vaccination

Data and Updates, https://www.mass.gov/info-details /massachusetts-covid-19-vaccination-data-and-updates [https: //perma.cc/B4XL-44LX]; National Institutes of Health, Coronavirus Disease 2019 (COVID-19) Treatment Guidelines, at 122 (updated Apr. 22, 2022), https://files.covid19treatment guidelines.nih.gov/guidelines/covid19treatmentguidelines.pdf [https://perma.cc/H8KD-KMET]. These changes suggest that the "factual underpinnings of the dispute have so changed or are likely to so change as to make an appellate decision 'a useless and inappropriate exercise.'" Lockhart, 390 Mass. at 784, quoting Reilly v. School Comm. of Boston, 362 Mass. 689, 693–695 (1972).

When we have found that an issue is likely to arise again and exercised our discretion to decide a moot issue, we often have been presented with concrete examples of repetition and not mere speculation. For example, in Globe Newspaper Co. v. District Attorney for the Middle Dist., 439 Mass. 374, 378-379 (2003), we concluded that, even if the issue were moot, the plaintiff's entitlement to certain information within the public records statute's ten-day deadline for compliance was an issue capable of repetition but evading review. We observed that the plaintiff had brought three successive actions against the defendants, and in each action the defendants claimed the same defense. Id. Cf. Wilson v. Commissioner of Transitional

Assistance, 441 Mass. 846, 850 (2004) (holding that even "assuming the case [were] moot, . . . [t]he situation [was] likely to arise again in similar circumstances" and observing that "this is the second fiscal year in which there has been litigation challenging the commissioner's authority"). Murrell asks us to conclude that issues surrounding the validity of the rescinded mandates, which have not applied to anyone since June 2021, are capable of repetition. Contrast Gonzalez v. Commissioner of Correction, 407 Mass. 448, 450 (1990) (issues around inmate drug testing that apply to "any inmate in any Department of Correction institution" are capable of repetition). Simply put, with no definitive evidence that these issues are capable of repetition, Murrell's "[s]peculative fear of future litigation . . . does not save [this] case from being moot." Bronstein, 403 Mass. at 627.

In addition, the United States Supreme Court recently indicated that OSHA's authority to issue COVID-19 regulations may be more limited than previously thought. In National Fed'n of Indep. Business v. Department of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 662-663 (2022), various applicants asked the Court to stay, pending judicial review, an OSHA emergency temporary standard that ordered employers with more than one hundred employees to require their employees to be vaccinated against COVID-19, or to take weekly COVID-19 tests

and wear a mask in the workplace. The Court granted the stay, holding that the "[a]pplicants [were] likely to succeed on the merits of their claim that the Secretary [of Labor] lacked authority to impose the mandate." Id. at 664-665. According to the Court, OSHA is not precluded from issuing COVID-19 regulations for the workplace; however, it is limited when such regulations "take[] on the character of a general public health measure, rather than an 'occupational safety or health standard.'" Id. at 666, quoting 29 U.S.C. § 655(b). In light of this decision, we cannot say with any degree of certainty that our understanding of OSHA's authority to issue general COVID-19 regulations, and the interrelated issue of preemption, would be the same if the Governor were to issue another Statewide mandate. Any new ruling regarding the scope of OHSA's authority would "'significantly alter[] the posture' of this case" if a factually similar case were to arise again. Bronstein, 403 Mass. at 627, quoting United States Dep't of Treasury, Bur. of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 559 (1986).

c. Likelihood of evading review. Even if the issues here were capable of repetition, we do not think it likely that "appellate review could not be obtained before the recurring question would again be moot." Ott, 413 Mass. at 683. "An issue apt to evade review is one which tends to arise only in

circumstances that create a substantial likelihood of mootness prior to completion of the appellate process" (emphasis added). First Nat'l Bank of Boston v. Haufler, 377 Mass. 209, 211 (1979). Such issues often arise in "evanescent, time-defined actions" like ones related to pregnancy, commitment orders, and student suspension. Aquacultural Research Corp. v. Austin, 88 Mass. App. Ct. 631, 634 (2015), citing Roe v. Wade, 410 U.S. 113, 125 (1973) (access to abortion). See Doe v. Superintendent of Sch. of Worcester, 421 Mass. 117, 123 (1995) (student suspension); Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 274 (1978) (commitment order to mental health facility). So far, questions related to COVID-19 have not fit into this category. Since its emergence in the United States in early 2020, it has been consistently unclear how long COVID-19 will pose a substantial threat to public health, especially in light of occasional spikes and dips in infections, lasting varying lengths of time. Thus, it is impossible to posit whether the circumstances that might spur a new Statewide mask

mandate, if they ever should arise, would not last long enough to enable appellate review of a challenge to such a mandate.[6,7]

Conclusion. Judgment shall enter dismissing the action as moot.

So ordered.

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[6] Furthermore, if it were likely that an emergency order similar to the ones challenged here were only to remain in place for a matter of weeks or months, "[o]ur appellate system has the capacity to move rapidly when circumstances warrant prompt resolution of an important issue." Ott, 413 Mass. at 684. We have demonstrated our ability to resolve pressing issues arising from the Commonwealth's response to the COVID-19 pandemic. See Desrosiers, 486 Mass. at 371-372.

[7] Murrell presses us to envision a cycle of relaxation and reimposition of similar Statewide mask mandates by the Governor that perpetually evade review, citing the United States Supreme Court's decision in Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68-69 (2020) (granting emergency injunctive relief, preventing New York governor from enforcing COVID-19 restrictions against religious institutions despite claim that change in restrictions rendered case moot). As the United States Court of Appeals for the First Circuit highlighted in Boston Bit Labs, Inc., 11 F.4th at 11, unlike the orders challenged here, the New York governor's order still was in effect when the Court reviewed the case. Id., citing Roman Catholic Diocese of Brooklyn, supra at 68. Moreover, the record in Roman Catholic Diocese of Brooklyn demonstrated the New York governor's deliberate attempts to evade judicial review by "'regularly chang[ing] the classification of particular areas without prior notice,' including three times in the seven days before the Supreme Court ruled." Boston Bit Labs, Inc., supra, quoting Roman Catholic Diocese of Brooklyn, supra at 68 & n.3. In effect, the applicants in Roman Catholic Diocese of Brooklyn "remain[ed] under a constant threat that the area in question [would] be reclassified." Boston Bit Labs, Inc., supra, quoting Roman Catholic Diocese of Brooklyn, supra at 68.