STATE OF MINNESOTA

IN SUPREME COURT

A21-0626

Court of Appeals — Gildea, C.J.

Drake Snell, et al.,

Appellants,

vs.

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

Respondents.

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Office of Appellate Courts

Douglas P. Seaton and James V. F. Dickey, Minneapolis, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

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Anthony B. Sanders, Minneapolis, Minnesota, for amicus curiae Institute for Justice.

Mahesha P. Subbaraman, Minneapolis, Minnesota, for amicus curiae The Forum for Constitutional Rights.

S Y L L A B U S

1. Because the question of whether the Emergency Management Act, Minn. Stat. §§ 12.01–.61 (2022), allows the Governor to declare a peacetime emergency in response to

a public health crisis is functionally justiciable and an issue of statewide importance that should be decided immediately, that question is justiciable under an exception to the mootness doctrine.

2. Because appellants have not shown a reasonable expectation that they will be subjected to a statewide face-covering mandate in the future, their claims alleging that the mandate violates the constitution and conflicts with statute are moot and not justiciable under the capable-of-repetition-yet-evading-review doctrine.

3. Because respondents have met their burden to show that it is absolutely clear that Executive Order Number 20-81 (or a substantially similar order) is not reasonably expected to recur, appellants' claims that Executive Order 20-81 violates the constitution and conflicts with statute are moot and not justiciable under the voluntary-cessation doctrine.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

GILDEA, Chief Justice.

This case arises from Governor Walz's declaration of a peacetime emergency under the Emergency Management Act, Minn. Stat. §§ 12.01–.61 (2022), and the executive order Governor Walz issued that required that Minnesotans wear face coverings. *See* Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020); Emerg. Exec. Order No. 20-81, *Requiring Minnesotans to Wear a Face Covering in Certain Settings to Prevent the Spread of COVID-19* (July 22, 2020). Appellants petitioned for a writ of quo warranto challenging Executive Order 20-81—the face-covering mandate (mask mandate).

According to appellants, Governor Walz's declaration of a peacetime emergency to combat a public health crisis overstepped his powers under the Emergency Management Act, and Executive Order 20-81 violated their constitutional rights in several ways. On these grounds, appellants asked the district court to enjoin enforcement of Executive Order 20-81, along with "any other emergency executive order related to COVID-19" issued under the Emergency Management Act.

Respondents—Governor Walz and Attorney General Ellison—moved to dismiss the petition for failure to state a claim upon which relief could be granted. The district court granted respondents' motion and dismissed the case. Appellants appealed, and while the appeal was pending the peacetime emergency and the mask mandate ended. The court of appeals then dismissed the appeal as moot. We granted appellants' petition for review on the mootness issue. Because the peacetime emergency ended and Executive Order 20-81 is no longer in effect, this appeal is moot. There are, however, exceptions to the mootness doctrine. Here, although the appeal is technically moot, the legal question of whether the Emergency Management Act authorizes a peacetime emergency for a public health emergency—such as the COVID-19 pandemic—is functionally justiciable and an important issue of statewide significance that should be decided immediately. Accordingly, we reverse the court of appeals determination that it lacked jurisdiction over that issue and remand that single issue to the court for consideration of its merits. Appellants other challenges to the mask mandate, however, do not meet any of the mootness exceptions, and we thus otherwise affirm.

FACTS

The Governor of Minnesota has emergency powers to "(1) ensure that preparations of this state will be adequate to deal with disasters, (2) generally protect the public peace, health, and safety, and (3) preserve the lives and property of the people of the state." Minn. Stat. § 12.02. Under this statute—the Emergency Management Act (the Act)—the Governor may declare a peacetime emergency, "only when an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation." Minn. Stat. § 12.31, subd. 2.

In March 2020, Governor Walz declared a peacetime emergency for the COVID-19 pandemic. Emerg. Exec. Order No. 20-01, *Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (March 13, 2020). Early in the pandemic, Governor Walz used executive orders to implement widespread closure of public places to control the spread of COVID-19. *See* Emerg. Exec. Order No. 20-02, *Authorizing and Directing the Commissioner of Education to Temporarily Close Schools to Plan for a Safe Educational Environment* (Mar. 15, 2020); Emerg. Exec. Order No. 20-04, *Providing for Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation* (Mar. 16, 2020); Emerg. Exec. Order No. 20-20, *Directing Minnesotans to Stay at Home* (Mar. 25, 2020).

On July 22, 2020, Governor Walz issued Emergency Executive Order 20-81 (EO 20-81), which required people in Minnesota to wear face coverings in most indoor public places. Governor Walz instituted this mask mandate because after "Minnesota had

experienced a brief period of stable or decreasing numbers in COVID-19 cases, . . . cases begin to increase" again. EO 20-81 was a response to uncertainty after other states experienced COVID-19 surges with "little warning and disastrous consequences." EO 20-81. And EO 20-81 was based on Centers for Disease Control (CDC) guidance at the time that "face coverings are especially important in settings where social distancing is difficult to maintain . . . . [and] are most effective when they are worn by all individuals in public settings when around others outside of their households because many people infected with COVID-19 do not show symptoms." *Id.* The purpose of the mask mandate was to "provide opportunities for a variety of businesses and other venues to scale up their operations" while also controlling COVID-19 transmission. *Id.*

EO 20-81 made face coverings mandatory "[i]n an indoor business or public indoor space, including when waiting outdoors to enter an indoor business or public indoor space," and while in multi-household transportation, including public transportation, among other circumstances. EO 20-81 included several exceptions to the mask mandate, including for organized sports and places where "exertion makes it difficult to wear a face covering," gyms and fitness centers that maintained social distancing measures, "[w]hen testifying, speaking, or performing," "[w]hen eating or drinking in an indoor business or indoor public space, provided that at least 6 feet of physical distance is maintained between persons who are not members of the same party," "[w]hen asked to remove a face covering to verify an identity for lawful purposes," and "[w]hile receiving a service—including a dental examination or procedure, medical examination or procedure, or personal care service—

that cannot be performed or would be difficult to perform when the individual receiving the service is wearing a face covering."[1]

About a month after Governor Walz instituted EO 20-81, in mid-August, Snell and the other appellants[2] (collectively referred to as Snell) filed a petition for a writ of quo warranto[3] challenging the legality of EO 20-81 on several grounds: (1) that it conflicts with Minn. Stat. § 609.735 (2022), a criminal statute that forbids wearing masks to conceal identity; (2) that it exceeds the Governor's authority under the Act; (3) that it is an unconstitutional delegation of legislative power; (4) that it is unconstitutionally vague; and (5) that it violates Snell's rights to free expression and free exercise of religion. Snell also sought an injunction barring two allegedly illegal actions by Governor Walz: the statewide mask mandate in EO 20-81 and the issuance of emergency orders related to COVID-19 based on the powers given to the Governor in the Act.

Broadly speaking, Snell raised two kinds of issues. First, he raised issues that relate to the specific language and circumstances of EO 20-81. These issues include allegations that EO 20-81 violates Snell's constitutional rights, that EO 20-81 is unconstitutionally

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[1] Individuals faced a fine not to exceed $100 for failure to comply with masking requirements. And businesses faced a fine not to exceed $1,000 or up to 90 days imprisonment if they did not ensure their workers wore face coverings, update their COVID-19 preparedness plans accordingly, post signs visible to all workers, customers, and visitors instructing them to wear face coverings, and make reasonable efforts to enforce the face-covering requirement for customers and visitors.

[2] Appellants are Minnesota residents, businesses, and churches.

[3] A writ of quo warranto is a remedy to challenge official action that is not authorized by law. *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 174 (Minn. 2020).

vague, and that EO 20-81 conflicts with a state criminal statute, Minn. Stat. § 609.735, making it illegal to wear a mask to conceal identity. Second, Snell raised an issue about the scope of the Governor's authority under the Act. Specifically, Snell alleges that the Act does not authorize the Governor to invoke emergency powers for public health purposes. *See* Minn. Stat. § 12.31, subd. 2. Accordingly, Snell asserts that not only EO 20-81, but *all* the executive orders issued pursuant to Governor Walz's declaration of a peacetime emergency for the COVID-19 pandemic—a public health purpose—were void because the executive orders exceeded the Governor's statutory authority.

Governor Walz and Attorney General Ellison (collectively, respondents) moved to dismiss Snell's complaint for failure to state a claim upon which relief could be granted. Snell moved for a temporary injunction. Following a hearing on the motions, the district court granted respondents' motion to dismiss and denied Snell's motion for a temporary injunction.

The district court decided Snell's claims on the merits, including the issue of whether the Act authorizes the Governor to declare a peacetime emergency for a public health purpose. The court found that the Act includes "an act of nature" as one of the grounds for the Governor to declare a peacetime emergency, and the court found that public health emergencies, such as the COVID-19 pandemic, are an act of nature. Accordingly, the court rejected Snell's argument that Governor Walz could not declare a peacetime emergency for the COVID-19 pandemic. The court also rejected Snell's other claims challenging the lawfulness of EO 20-81.

On May 6, 2021—about six weeks after the district court's order—Governor Walz announced plans to rescind the mask mandate on June 30 or when 70 percent of Minnesota adults received their first COVID-19 vaccination, whichever came first. Emerg. Exec. Order No. 21-21, *Safely Sunsetting COVID-19 Public Health Restrictions* (May 6, 2021). Four days later, on May 10, Snell appealed the district court's order dismissing his case. A few days after Snell appealed, Governor Walz rescinded the mask mandate. Emerg. Exec. Order No. 21-23 (EO 21-23), *Amending Emergency Executive Orders 20-51, 20-81, 21-11, and 21-21* (May 14, 2021) (citing CDC's announcement that vaccinated people could safely go out in most public places without wearing a mask).

On June 29, Governor Walz announced his intention to end the peacetime emergency by August 1. But on June 30, the Legislature passed a bill to end the peacetime emergency effective July 1, which Governor Walz signed. Act of July 1, 2021, ch. 12, art. 2, § 23, 2021 Minn. Laws 1st Spec. Sess. 2124, 2155.[4] Thus, the peacetime emergency ended in Minnesota on July 1, 2021. Governor Walz has not instituted another mask mandate or peacetime emergency in response to COVID-19, but he maintains that he retains that power.

[4] The law provided that, "[e]ffective July 1, 2021, at 11:59 p.m., and consistent with Minnesota Statutes, section 12.31, subdivision 2, paragraph (b), the peacetime emergency declared by Executive Order 20-01 issued March 13, 2020, is terminated." Act of July 1, 2021, ch. 12, art. 2, § 23, 2021 Minn. Laws 1st Spec. Sess. 2124, 2155. The Emergency Management Act, Minn. Stat. § 12.31, subd. 2(b), states that "[b]y majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days."

In early December 2021, the court of appeals dismissed the appeal as moot and held that no exceptions to the mootness doctrine applied. *Snell v. Walz*, No. A21-0626, 2021 WL 5764234, at *5 (Minn. App. Dec. 6, 2021). Snell petitioned our court for review. All parties agree that this case is technically moot. Specifically, they agree that the court can no longer grant Snell the relief he seeks because the challenged executive order and the peacetime emergency have ended. We granted Snell's petition for review to consider whether even though technically moot, Snell's claims are nevertheless justiciable under an exception to mootness.[5]

ANALYSIS

The question presented is whether the court of appeals has jurisdiction to reach the merits of the issues appellants raised in their appeal, given that the mask mandate and peacetime emergency have ended. Justiciability is an issue of law that we review de novo. *See Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). A moot case is nonjusticiable. *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 401 (Minn. 2019). We dismiss an issue or claim on appeal as moot "when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Id.* (citations omitted) (internal quotation marks omitted). But mootness is not "a mechanical rule that is automatically invoked whenever the underlying dispute between the parties is settled or otherwise resolved"; it is "a 'flexible discretionary doctrine.' " *Dean*, 868 N.W.2d at 4 (quoting *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984)).

[5] We declined Snell's request for review of the merits of his claims.

Even though a case may be technically moot, we have recognized a justiciable controversy under an exception to mootness in two circumstances. First, courts may consider a moot issue when it is "functionally justiciable" and an important matter of "statewide significance" that requires immediate decision. *Rud*, 359 N.W.2d at 576. Second, courts may decide a moot case when the harm to the plaintiff is " 'capable of repetition yet evading review.' " *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Snell argues that the issues raised here are justiciable under both theories. He also advocates that we should recognize a third mootness exception, a theory recognized in federal cases when the defendant has voluntarily stopped engaging in the allegedly wrongful conduct. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189–95 (2000) (discussing "voluntary cessation" doctrine). For his part, the Governor urges us to affirm the court of appeals and hold that the issues are not justiciable.

I.

We turn first to Snell's argument that the issues he raises on appeal are functionally justiciable and of statewide importance. We may exercise discretion to hear an issue that is " 'functionally justiciable' " when the issue "presents an important question of 'statewide significance that should be decided immediately.' " *Dean*, 868 N.W.2d at 6 (quoting *Rud*, 359 N.W.2d at 576).

An issue is functionally justiciable when the case includes "the raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decision-making." *Id.* (citation omitted) (internal quotation marks

omitted). Here, the court of appeals correctly ruled that the issues that Snell raises are functionally justiciable because the issues are primarily legal and were well-briefed by the parties. *Snell*, 2021 WL 5764234, at *3.

But the court of appeals also determined that none of the issues raised by Snell present important questions of statewide significance that should be decided now. *Id.* at *4. We disagree with that determination in part. Specifically, we conclude that the claim Snell raises regarding the scope of the Governor's authority under the Act is an important issue of statewide significance that should be decided now.

A.

The peacetime emergency declaration and the executive orders implemented afterward assert that the Act empowers the Governor to enter emergency orders to respond to the COVID-19 pandemic. The orders issued following the emergency declaration impacted all Minnesotans in nearly every aspect of their lives, restricting their freedoms to move about, to conduct business, and to practice religion. The Executive Order about which appellants specifically complain is an example of the scope of the power the Governor contends he has under the Act. But there are many other examples in the wide-ranging orders the Governor issued to address the COVID-19 pandemic. *See, e.g.*, Emerg. Exec. Order No. 20-02, *Authorizing and Directing the Commissioner of Education to Temporarily Close Schools to Plan for a Safe Educational Environment* (Mar. 15, 2020); Emerg. Exec. Order No. 20-04, *Providing for Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation* (Mar. 16, 2020); Emerg. Exec. Order No. 20-20, *Directing Minnesotans to Stay at Home* (Mar. 25, 2020); Emerg. Exec. Order No. 20-33, *Extending*

Stay at Home Order and Temporary Closure of Bars, Restaurants, and Other Places of Public Accommodation (Apr. 8, 2020).

The Governor contends that the COVID-19 pandemic plainly falls within the scope of the Act, and the district court agreed. The Governor states that the actions he took were necessary to save the lives of Minnesotans as the world was reeling from the effects of the pandemic. Given that the peacetime emergency and the consequent executive orders impacted every Minnesotan and the import of those decisions, the legal question of whether the Act authorizes such actions is undoubtedly an issue of statewide significance.

We also conclude that this important legal issue should be decided now so that any lack of clarity can be settled before it is necessary for a governor to invoke the Act again. Our cases recognizing justiciability for functional justiciable issues of statewide significance support our conclusion. In these cases, we have relied on the broad impact of leaving the legal question unresolved. *See In re Guardianship of Tschumy*, 853 N.W.2d 728, 740 (Minn. 2014) (noting number of Minnesotans confronting decisions regarding life-sustaining treatments); *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002) (noting broad use of equipment at issue); *Rud*, 359 N.W.2d at 576 (discussing "adverse impact" to numerous pending criminal cases). The legal question at issue here and the lack of clarity as to its resolution impacts many more Minnesotans than did the questions at issue in these cases.

And the question at issue has also been the subject of significant litigation. In addition to this case, this issue arose in other challenges to COVID-19 executive orders. *See Free Minn. Small Bus. Coalition v. Walz*, No. A20-1161, 2021 WL 1605123, at *1 (Minn. App.

Apr. 26, 2021) (explaining that one argument raised was "that Minn. Stat. § 12.31, subd. 2, does not authorize the governor to invoke emergency powers for public-health purposes," but determining that appellants lacked standing to raise that specific challenge), *rev. denied*, (Minn. July 20, 2021); *Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 805 (D. Minn. 2020) (noting the government's argument that "the scope of the Minnesota governor's powers during a public health emergency, which depends on the Minnesota Constitution and the Minnesota Emergency Management Act, is unclear" and thus the federal court should abstain under the *Pullman* abstention doctrine), *appeal dismissed in part as moot, rev'd in part on other grounds*, 30 F.4th 720 (8th Cir. 2022); *Northland Baptist Church of St. Paul, Minn. v. Walz*, 530 F. Supp. 3d 790, 805–06 (D. Minn. 2021) (wherein plaintiffs sought a "declaration that Governor Walz did not have the statutory authority to declare an emergency that invoked Chapter 12 of the Minnesota Statutes" for COVID-19, but the state law claims were dismissed as barred in federal court), *aff'd sub nom. Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365 (8th Cir. 2022), *rehearing and rehearing en banc denied* (8th Cir. Aug. 9, 2022), *cert. denied*, ___ U.S. ___, 2023 WL 124080 (Jan. 9, 2022); *see also In re Proposed Recall Petition to Request the Recall of Timothy James Walz*, No. A20-0748 (Minn. June 15, 2020) (dismissing recall petition because it was "enough to conclude here that Minn. Stat. § 12.21 does not clearly and unambiguously prohibit the Stay-at-Home Order and no Minnesota court had, prior to the Order being issued, interpreted the statute as prohibiting that conduct"). That the question has been the subject of so much recent litigation further supports our determination that Minnesota's appellate courts should resolve it now.

For these reasons, we conclude that the question of whether the Act authorizes the Governor to declare a peacetime emergency to respond to a global pandemic is justiciable. Respondents, relying on the flexibility built into the mootness doctrine, urge us nevertheless to decline to exercise jurisdiction over the issue. Specifically, respondents argue that the court of appeals appropriately declined to reach the issue because, as in *Limmer v. Swanson*, this case involves a question about the powers of the legislative and executive branches. 806 N.W.2d 838 (Minn. 2011). We are not persuaded by this argument.

In *Limmer*, we declined to exercise our discretion to hear an otherwise moot challenge *by a legislator* to the Ramsey County District Court's authority to authorize expenditures by the executive branch when the Legislature failed to appropriate funds. *Id.* We acknowledged that the case was functionally justiciable and a matter of statewide importance, but nonetheless declined to exercise our discretion "to resolve fundamental constitutional questions about the relative powers of the three branches of our government." *Id.* at 839.

Unlike *Limmer*, this case does not involve a dispute between branches of government or even an argument among government actors. This case does not require the courts to adjudicate the relative powers of the branches of government or present the separation of powers concerns that animated our decision in *Limmer*. *See id.*

This case instead is a dispute between the government on the one hand and Minnesota citizens on the other. The question Snell brings is a straightforward one of statutory interpretation asking the court to decide the scope of the power the Legislature delegated to the Governor in the Act. The judiciary is the branch of government

constitutionally committed to resolving such disputes. *See Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 625 (Minn. 2017) (stating that judiciary's role is to "say what the law is," not to mediate political disputes (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

The question of whether the Act gives the Governor power to declare a peacetime emergency for a public health crisis is functionally justiciable and an important issue of statewide significance that should be decided immediately. We therefore reverse the court of appeals mootness decision as to that issue. The issue is remanded to the court of appeals for consideration on the merits.

B.

The other issues in this appeal—those specific to EO 20-81—are not, however, issues of statewide importance that require immediate resolution. These claims instead are more like the claim at issue in *Dean*. The issue there involved the right to rent one's property, which we acknowledged is "an important property interest." *Dean*, 868 N.W.2d at 7. But we concluded that because city ordinances vary and do not operate identically—together with the ability of future litigants to bring similar claims again—the issue was not one of statewide importance. *See id.*

Similarly, here, EO 20-81 is unlikely to arise in the same way again. Any future statewide mask mandate would likely have different terms and exclusions that might address the free-exercise, free-expression, void-for-vagueness, and conflict-with-criminal-statute challenges raised here by Snell. And even if the same issues do arise again, Snell and other challengers are free to raise the issues at that time, when any such orders are still in effect.

Although the constitutional rights at issue are important ones, there is no serious harm or uncertainty that requires immediate resolution. *See id.* Accordingly, we affirm the court of appeals holding that Snell's claims that EO 20-81 violates the constitution and conflicts with statute are not justiciable under the functionally-justiciable-issues-of-statewide-significance doctrine.

II.

We turn next to Snell's contention that his claims are justiciable under the capable-of-repetition-yet-evading-review doctrine. Because we held above that the claim involving the scope of the Governor's power under the Act is justiciable, we do not address that claim further. Instead, we focus on the remaining claims—those alleging that EO 20-81 violates the constitution and conflicts with statute. Snell argues that these claims are justiciable because they are capable of repetition but will evade review. We disagree.

The capable-of-repetition-yet-evading-review doctrine applies when two elements are satisfied: "there is a reasonable expectation that a complaining party would be subjected to the same action again *and* the duration of the challenged action is too short to be fully litigated." *Dean*, 868 N.W.2d at 5. Snell has the burden to prove that both elements exist. *See, e.g.*, *Super Tire Engineering Co. v. McKorkle*, 416 U.S. 115, 125–26 (1974) (stating that to satisfy the exception, "[i]t is sufficient . . . that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest"); *Abdurrahman v. Dayton*, 903 F.3d 813, 817 (8th Cir. 2018) ("The party asserting jurisdiction bears the burden of showing the

presence of both requirements" of the capable-of-repetition-yet-evading-review exception.). We conclude that he has not met that burden.

Snell has not shown that there is a reasonable expectation that he will be subject to the same order again. EO 20-81 expired on May 14, 2021. Since that time, Governor Walz has not issued another mask mandate, and Snell has not offered any evidence that Governor Walz intends to do so. Snell offers only speculation about another COVID-19 resurgence, and we will not conclude that a claim is justiciable based merely on speculation. *See County of Butler v. Governor of Pa.*, 8 F.4th 226, 231 (3d Cir. 2021) ("[W]e [cannot] say that there is a reasonable expectation that the same complaining parties will be subject to the same orders again."); *Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (finding the imposition of future capacity limits "speculative, at best" because "[t]he trend . . . has been to reopen the state, not to close it down"). Accordingly, Snell's claims are not justiciable under the capable-of-repetition-yet-evading-review doctrine.[6]

III.

Having concluded that existing Minnesota precedent on the mootness exceptions does not compel reversal, Snell asks us to recognize an additional exception to mootness recognized by the United States Supreme Court for "a defendant's voluntary cessation of a challenged practice." *Laidlaw*, 528 U.S. at 189 (citation omitted) (internal quotation marks omitted). The voluntary-cessation exception protects plaintiffs from a defendant continually mooting a challenge to his conduct by ceasing the challenged behavior to end

[6] Both elements of the doctrine must be met. Because Snell has not met the first element, we need not consider whether he satisfies the second element.

the litigation, but then returning to the allegedly wrongful conduct after the litigation is dismissed as moot. *See id.* Under the voluntary-cessation exception, "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness."[7] *Id.* at 170 (citation omitted) (internal quotation marks omitted) (alteration omitted). The United States Supreme Court has acknowledged that the voluntary-cessation exception applies to COVID-19 policies. *See Tandon v. Newsom*, 593 U.S. ___, 141 S. Ct. 1294, 1297 (2021) ("[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case.").

We now join the federal courts—and numerous state courts—and adopt the voluntary-cessation exception to mootness. We find the United States Supreme Court's reasons for adopting the doctrine persuasive. Without the voluntary cessation exception, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC*, 568 U.S. at 91.

Under the voluntary-cessation doctrine, to prove that the claim is moot when the defendant has voluntarily stopped the challenged conduct, the "defendant . . . bears the

[7] The Governor asserts that the voluntary-cessation exception is unnecessary because Minnesota has adopted the capable-of-repetition-yet-evading-review exception. One way the doctrines are different, however, is in the allocation of the burden of proof. The burden is on the plaintiff to prove that claims are capable of repetition yet will evade review. But the voluntary cessation exception places the burden on the defendant. *See Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 875 (Mont. 2006) (adopting the voluntary-cessation exception in addition to the capable-of-repetition-yet-evading-review exception because the burdens are distinct).

formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. The defendant meets this burden by showing that the challenged action cannot "be resumed in this or any subsequent action" and that it is "entirely speculative that any similar claim would arise in the future." *Already, LLC*, 568 U.S. at 92 (citation omitted) (internal quotation marks omitted); *see also Resurrection Sch. v. Hertel*, 35 F.4th 524, 529 (6th Cir. 2022) ("[T]he State would need to impose a mandate 'similar' enough to the old mandate to present substantially the same legal controversy as the one presented by the plaintiffs' complaint" for the voluntary-cessation exception to apply.).[8]

As we concluded above, it is entirely speculative that there will be an executive order akin to EO 20-81 in the future. Governor Walz issued EO 20-81 amid an increase in

[8] Respondents argue that we should impose a lesser burden on defendants who are government actors. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) (assuming *arguendo* the government actor is reviewed with "some solicitude"); *see also Rich v. Sec'y, Fl. Dep't of Corr.*, 716 F.3d 525, 531–32 (11th Cir. 2013) (placing a "lesser burden" on government defendants "when they have unambiguously terminated the challenged policy" but finding that Department of Corrections did not meet its burden to show the policy was unambiguously terminated when the policy was terminated at a suspicious time and the department maintained the constitutionality of the policy). It is not necessary for us to resolve this question today because as we explain, respondents met the burden of proof articulated in *Laidlaw*.

The Governor also argues that we should treat executive orders like legislation, and follow federal cases holding that a "repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot." *See, e.g., Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198–99 (9th Cir. 2019). But legislation requires a rigorous process for repeal or amendment of a challenged statute, such that a change to the statute generally indicates finality. *See Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017) (legislative actions "bespeak of legislative finality and not of for-the-moment, opportunistic tentativeness"). The same cannot be said for the executive's power to issue executive orders.

COVID-19 cases early in the pandemic. *See* EO 20-81 ("[I]n the past week we have seen our cases begin to increase."). And Governor Walz later rescinded EO 20-81 when conditions changed. Specifically, by the time Governor Walz rescinded EO 20-81, vaccines were available and public health guidance was "that vaccinated people are not required to wear face coverings in most places." EO 21-23 (stating that Governor Walz "followed the science and adhered to public health guidance"). There is no "suspicious timing" in Governor Walz's change in policy that suggests he is likely to reimpose another mask mandate. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020).

Other courts have also concluded that a recurrence of COVID-19 executive orders is entirely speculative in cases challenging executive orders issued in response to the COVID-19 pandemic. *See, e.g., Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 11 (1st Cir. 2021) (concluding that defendant met burden to show that voluntary-cessation exception to mootness was not met where it was "unrealistically speculative" that the challenged policy will be reenacted); *Glow in One Mini Golf*, 37 F.4th at 1373 (considering the developments in COVID-19 pandemic and finding that "there is no reasonable expectation" that an executive order that imposed capacity restrictions on certain businesses "is capable of repetition"); *Hawse v. Page*, 7 F.4th 685, 693 (8th Cir. 2021) (holding it was only "hypothetical" that the governor might reimpose 10-person capacity restrictions).[9]

[9] *See also Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163–64 (4th Cir. 2021) (declining to apply the voluntary-cessation exception to a challenge to COVID-19 restrictions because it was unreasonable to expect the alleged wrong to reoccur, even though it was possible); *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (stating that the voluntary-cessation exception does not apply when orders expired on their own terms); *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (declining to

Illustrative of the analysis in these cases is *Resurrection School v. Hertel*. There, the Sixth Circuit considered whether the Governor of Michigan met her burden to show a statewide mask mandate to combat COVID-19 (with similar conditions to EO 20-81) was reasonably unlikely to recur. 35 F.4th at 529–30. The court saw "no reasonable possibility" of the governor reimposing a mask mandate for several reasons. *Id.* at 529. First, because the state did not rescind the mask mandate in response to the lawsuit, but in response to changing circumstances in the COVID-19 pandemic's progression, including "high vaccination rates, low case counts, new treatment options, and warmer weather," there was no evidence of litigation scheming by the Governor of Michigan. *Id.* Second, because COVID-19 conditions continued to improve, it was unlikely that a new mask mandate with the same conditions would be imposed.[10] *Id.*

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apply the voluntary cessation exception when the challenged restriction expired on its own terms); *Church v. Polis*, No. 20-1391, 2022 WL 200661, at *6 (10th Cir. Jan. 24, 2022) ("[A]ny chance of the State reimposing the challenged restrictions on plaintiffs is entirely speculative, stemming only from the uncertainty inherent in the pandemic and the State's general authority to impose restrictions in emergencies. And we reject plaintiffs' position that such a speculative possibility is sufficient to invoke the voluntary-cessation exception."); *Clark v. Governor of N.J.*, 53 F.4th 769, 776–79 (3d Cir. 2022) (determining there was no reasonable likelihood that the governor would reimpose a substantially similar capacity restriction on houses of worship because the pandemic circumstances had changed, the law had been clarified by the U.S. Supreme Court, and restrictions did not recur during the Delta and Omicron waves).

[10] *Resurrection School v. Hertel* concerned a free-exercise claim, so the court also considered the fact that the Supreme Court has clarified free-exercise clause jurisprudence in response to orders like those under consideration and concluded it was unlikely any future order would contravene Supreme Court precedent. 35 F.4th at 529. This case also concerns a free-exercise clause challenge, and we assume that Governor Walz or any future governor imposing a statewide mask mandate will similarly abide by Supreme Court precedent. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63, 67–68 (2020).

Here, as in *Resurrection School*, the record reflects that Governor Walz responded to changing circumstances in the COVID-19 pandemic. He announced plans to rescind the mask mandate after prevailing in district court and before Snell appealed to the court of appeals, and although he hastened plans to rescind the mask mandate after Snell appealed, there is no contention that he did so to moot the litigation. *See Clark v. Governor of N.J.* 53 F.4th 769, 778 (3d Cir. 2022) (noting that when the change in behavior by a government actor is a response to circumstances and not in response to litigation, "we are . . . less skeptical of voluntary cessation claims" and accordingly less likely to apply the voluntary cessation exception and determine the case is not moot). Nothing suggests that Governor Walz's decision to end EO 20-81 was anything other than a response to a change in circumstances. *See Resurrection Sch.*, 35 F.4th at 529.

And Governor Walz has not imposed another mask mandate since. Even during the surge of the Delta and Omicron COVID-19 variants, when local governments in Minnesota were instituting mask mandates, Governor Walz did not reenact a mask mandate. *Cf. Speech First*, 979 F.3d at 328 (considering the government actor's future intention to make policy changes in the voluntary-cessation analysis). Although theoretically possible, we can only speculate about what future restrictions might be, which does not warrant our exercise of jurisdiction over this dispute. *See Brach v. Newsom*, 38 F.4th 6, 14 (9th Cir. 2022); *Bos. Bit Labs*, 11 F.4th at 11 ("[I]t 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.").

In urging us to hold that his claims are justiciable under the voluntary-cessation doctrine, Snell relies on cases in which courts determined that claims challenging government actions taken in response to the COVID-19 pandemic are justiciable even though the government actors had ceased some of the challenged activities. *See, e.g.*, *Cassell v. Snyders*, 990 F.3d 539, 546 (7th Cir. 2021) (acknowledging that the likelihood of future COVID-19 restrictions is "minimal" but "[g]iven the uncertainty about the future course of the pandemic, we are not convinced that these developments have definitively rendered it moot"); *Amato v. Elicker*, 534 F. Supp. 3d. 196, 205 (D. Conn. 2021) (finding that the governor did not meet his burden when "he cannot say with certainty that it will never be necessary to re-impose restrictions in the future."); *BK Salons, LLC v. Newsom*, No. 2:21-CV-00370, 2021 WL 3418724, at *3 (E.D. Cal. Aug. 5, 2021) (finding that the governor did not meet his burden because COVID-19 pandemic is "ever-evolving"); *Kristen B. v. Dep't of Child. & Fam. Servs.*, ___ N.E.3d ___, 2022 IL App (1st) 200754, ¶ 28 (Ill. App. Ct. 2022) ("While the threat of [reinstating COVID-19 restrictions] is far less than previously, that threat is not zero" when the state of emergency remains in place.). These cases are unpersuasive because they involve challenges brought earlier in the pandemic, and often in states where underlying emergency declarations were still in place. By contrast, in Minnesota, EO 20-81 and the underlying emergency declaration have expired.

Snell also argues that his claims are justiciable because Governor Walz refuses to dispel his authority to impose an executive order like EO 20-81. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (considering the

defendant's vigorous defense of the challenged program's constitutionality relevant to voluntary-cessation analysis). That Governor Walz holds fast to the legal basis for his actions has little bearing on our determination because "the mere power to reenact a challenged [policy] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged [policy] likely will be reenacted." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (citation omitted) (alterations in original). Here, the only evidence shows that EO 20-81 or a substantially similar executive order is not reasonably likely to recur.

Based on our analysis, we hold that the voluntary-cessation exception to mootness does not apply to Snell's claims relating to EO 20-81. Accordingly, Snell's claims relating to EO 20-81 are moot, and we affirm the court of appeals dismissal of these claims.

CONCLUSION

For the foregoing reasons, we affirm in part the decision of the court of appeals dismissing the appeal, reverse that decision in part, and remand to the court of appeals to consider the merits of Snell's appeal of his claim that the Minnesota Emergency Management Act does not allow the Governor to declare a peacetime emergency in response to the COVID-19 pandemic.

Affirmed in part, reversed in part, and remanded.