SLIP OPINION NO. 2023-OHIO-2577

HIGHLAND TAVERN, L.L.C., ET AL., APPELLANTS, *v.* DEWINE, GOVERNOR, ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Highland Tavern, L.L.C. v. DeWine*, Slip Opinion No. 2023-Ohio-2577.]

Challenge to constitutionality of an emergency rule of Ohio Liquor Control Commission adopted in response to COVID-19 pandemic—Appeal and underlying case are moot because the rule is no longer in effect—Court of appeals' judgment vacated.

(No. 2022-0014—Submitted January 10, 2023—Decided August 1, 2023.)

APPEAL from the Court of Appeals for Franklin County,
No. 21AP-176, 2021-Ohio-4067.

BRUNNER, J., announcing the judgment of the court.

{¶ 1} This case involves a challenge to the constitutionality of an emergency rule of the Ohio Liquor Control Commission that was adopted as part

of the state's initial response to the 2020 COVID-19 ("Covid") pandemic. Because the rule is no longer in effect, we hold that this appeal and the underlying case are moot. Accordingly, we vacate the judgment of the Tenth District Court of Appeals and remand the case to the trial court with instructions for it to dismiss the action.

I. BACKGROUND

A. The adoption of Rule 80

{¶ 2} Under Ohio's liquor laws, class D-1, D-2, and D-3 liquor permits allow the holder to sell beer, wine, mixed beverages, and spiritous liquor ("alcoholic beverages") for on-premises consumption. *See* R.C. 4303.13; R.C. 4303.14; R.C. 4303.15. Before the Covid pandemic, the holder of any of these permits could sell and allow on-premises consumption of alcoholic beverages until 1:00 a.m. *See* Ohio Adm.Code 4301:1-1-49(B). A D-3a permit under R.C. 4303.16 would allow sales and consumption to continue until 2:30 a.m. *See* Ohio Adm.Code 4301:1-1-49(C). From Monday to Saturday, sales and on-site consumption could resume at 5:30 a.m. *See* Ohio Adm.Code 4301:1-1-49(B)(1), (B)(3), (C)(1), and (C)(3). On Sunday, they could resume at midnight, Ohio Adm.Code 4301:1-1-49(B)(2) and (C)(2), unless the holder had a D-6 permit, which allowed sales and on-site consumption during certain hours on Sundays, *see* former R.C. 4303.182, 2016 Sub.H.B. No. 342 (effective Sept. 28, 2016).

{¶ 3} Within the first few months of the pandemic, appellee Ohio Liquor Control Commission adopted an emergency rule restricting these statutorily permitted hours of sale and on-site consumption of alcoholic beverages. This rule was codified as Ohio Adm.Code 4301:1-1-80, known at the time as "Rule 80." Rule 80 applied to all liquor-permit holders who were authorized to sell alcoholic beverages, that is, beer, wine, mixed beverages, or spirituous liquor, for on-premises consumption. The rule limited the permitted times for the sale and on-premises consumption of alcoholic beverages, requiring that sales cease at 10:00 p.m. and that on-premises consumption cease at 11:00 p.m. *See* former Ohio

Adm.Code 4301:1-1-80(A)(1) and (2), 2020-2021 Ohio Monthly Record 2-61, effective July 31, 2020.

{¶ 4} Rule 80 was adopted through the emergency procedure prescribed by R.C. 119.03(G). Specifically, appellee Governor Mike DeWine signed an executive order stating: "[A]n emergency exists requiring the immediate adoption of [Rule 80]." The rulemaking procedures that would ordinarily be required for the adoption of a rule such as Rule 80 were suspended, and as set forth in R.C. 119.03(G), the rule took effect immediately upon the filing of the final rule on July 31, 2020. *See* Executive Order 2020-30D, available at https://governor.ohio.gov /media/executive-orders/executive-order-2020-30d (accessed Mar. 6, 2023) [https://perma.cc/BR2Y-SYTS]. By operation of law pursuant to R.C. 119.03(G)(1), Rule 80 could remain in effect for only 120 days, causing its automatic expiration on November 29, 2020.

B. Highland violates Rule 80

{¶ 5} Appellant, Highland Tavern, L.L.C., held class D-1, D-2, D-3, D-3a, and D-6 liquor permits for the sale and consumption on premises of alcoholic beverages for the tavern/bar it operated at 808 West Market Street in Akron. Appellant, Highland Square Tavern, L.L.C., had purchased the assets of Highland Tavern, L.L.C., including its liquor permits, and operated at that location. For ease of reference, this opinion refers to the two entities jointly as "Highland."

{¶ 6} Because Highland's liquor permits were for the sale and on-premises consumption of alcoholic beverages, it was subject to the requirements of Rule 80. On three days in August 2020, agents with the Ohio Department of Public Safety visited the bar and observed that Highland's employees allowed patrons to consume alcohol on the premises after 11:00 p.m. and on at least one of the days also sold alcohol for on-site consumption after 10:00 p.m. The agents issued three violation notices, each of which cited Highland for violating Rule 80(A).

{¶ 7} The commission held a hearing on the three violation notices within a few weeks after the notices were served on Highland. Highland had the right "to be represented by counsel, [and] to offer evidence" at the hearing, R.C. 4301.04. Counsel for Highland offered evidence and questioned three witnesses, including Gary Trentman, an employee of the Ohio Department of Health Bureau of Infectious Diseases. In questioning Trentman, Highland's counsel sought to develop a factual record for a constitutional argument. He asked Trentman why Covid restrictions were being applied to bars and restaurants covered by Rule 80 but no similar Covid restrictions were being applied to other places where crowds gathered, such as retail establishments and sporting events. At the end of the hearing, Highland's counsel cited this line of questioning and argued to the commission that Highland was being "targeted" because it is a bar and that Rule 80 was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

{¶ 8} On September 11, 2020, the commission found that Highland had violated Rule 80 as alleged in each of the three notices and ordered that its permits be revoked as of the close of business on October 2, 2020.

C. Highland pursues an administrative appeal and a separate civil lawsuit

{¶ 9} Highland appealed the commission's order to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. *See Highland Tavern, L.L.C. v. Ohio Liquor Control Comm.*, Franklin C.P. No. 20CV-6447 ("the administrative appeal"). Soon after the case was assigned to a judge, Highland moved the court for a stay of the commission's revocation of its liquor permits pending the conclusion of the administrative appeal. The trial court denied the motion. Highland closed its business on October 2, 2020.

{¶ 10} Before the deadline for the filing of merit briefs in its administrative appeal, Highland initiated a separate civil action for declaratory judgment, contesting the constitutionality of Rule 80. This action was also filed in the

Franklin County Court of Common Pleas, where its prior-filed administrative appeal was pending. The declaratory-judgment action was assigned to a different judge. At Highland's request, the trial judge presiding over the administrative appeal stayed the briefing in the administrative appeal pending resolution of the declaratory-judgment action. The court ordered the parties to the appeal to inform it when the declaratory-judgment matter was decided. The judgment in the declaratory-judgment action is the judgment we review today.

{¶ 11} Highland filed its declaratory-judgment action on November 25, 2020—before it filed merit briefs in the administrative appeal and just four days before Rule 80 expired. Highland named as defendants the governor, the commission, and the commission's three members, all of whom are appellees in this case. Highland alleged that Rule 80 was unconstitutional under the separation-of-powers principles inherent in the Ohio Constitution and the substantive due-process protections of both the Ohio and United States Constitutions. Highland sought a declaratory judgment that Rule 80 was unconstitutional and an injunction "to prevent further harm."

D. The declaratory-judgment action is dismissed because of the pending administrative appeal

{¶ 12} On January 4, 2021, after Rule 80 had expired, appellees moved to dismiss Highland's declaratory-judgment action, asserting that the trial court lacked jurisdiction. Appellees argued that Highland's declaratory-judgment action was an improper attempt to bypass the administrative-appeal process, a special statutory proceeding for appealing liquor-permit revocations, that was already underway. Highland opposed appellees' motion.

{¶ 13} On March 31, 2021, the trial judge in the declaratory-judgment action granted the commission's motion to dismiss, holding that the statutory scheme governing the revocation of liquor permits deprived the court of jurisdiction, citing *State ex rel. Albright v. Delaware Cty. Court of Common Pleas*,

60 Ohio St.3d 40, 42, 572 N.E.2d 1387 (1991),[1] and *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 153, 573 N.E.2d 655 (1991) ("where the General Assembly has enacted a complete and comprehensive statutory scheme governing review by an administrative agency, exclusive jurisdiction is vested within such agency").[2] The trial court concluded that Highland's declaratory-

1. *Albright* is factually distinguishable from this case. The competing actions at issue in that case had been filed in two different counties and involved the municipal annexation of land that was located in the two counties. *Albright* was an action in prohibition to prevent one of the courts from maintaining jurisdiction over the action because a related matter had already been filed in the county in which the original annexation hearing had been held. In *Albright*, we stated:

> Relators argue that R.C. Chapter 709, supplemented by our decision in [*State ex rel.*] *Lewis* [*v. Warren Cty. Court of Common Pleas*, 52 Ohio St.3d 249, 556 N.E.2d 1184 (1990),] fixes exclusive jurisdiction to consider annexation matters in the county in which the hearing takes place. We agree and therefore find that the respondent court has no jurisdiction to consider the matter set forth in the pending declaratory judgment/injunction action. Accordingly, we overrule respondents' motions to dismiss the complaint, and grant a peremptory writ of prohibition prohibiting respondents from proceeding in that case.

Id. at 41-42.

2. *Kazmaier* is not analogous to this case, because it involved an action that was filed in a common pleas court raising claims that were clearly within the exclusive jurisdiction of the Public Utilities Commission. In *Kazmaier*, we stated:

> In regard to administrative agency exclusivity, generally, this court has recognized that where the General Assembly has enacted a complete and comprehensive statutory scheme governing review by an administrative agency, exclusive jurisdiction is vested within such agency. *State ex rel. Geauga Cty. Budget Comm. v. Geauga Cty. Court of Appeals* (1982), 1 Ohio St.3d 110, 113, 438 N.E.2d 428; * * *
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> This appeal involves a dispute over the correct rate to be assessed and the reimbursement of any overcharge along with interest upon the overcharge, if any. Kazmaier's claim alleged that it was charged a rate other than the appropriate commission-approved rate. Whether expressly alleged or not, Kazmaier's claim is that it was subjected to an unjust and unreasonable rate in violation of R.C. 4905.22.
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> * * *
>
> We conclude that in this type of matter involving a dispute inherently arising from charges based upon tariffs filed with and approved by the commission, the General Assembly has granted the commission exclusive jurisdiction to determine the mutual rights and responsibilities of the parties.

judgment action had been filed in an effort to bypass the administrative-appeal procedure for appealing the liquor commission's order revoking its permits. The trial court further noted that Highland should have pursued a constitutional challenge to Rule 80 through claims for declaratory and injunctive relief in a suit filed immediately after the rule was adopted rather than in a suit filed *after* it was cited for violating the rule. The trial court agreed with appellees and held that Highland's "true aim [in the declaratory-judgment action was] to resolve the legality of its liquor permit revocation." It opined, based on *Albright* and *Kazmaier*, that the proper way to pursue that goal was through the administrative-appeal process.

E. The trial court presiding over the administrative appeal affirms the commission's order, and Highland does not appeal

{¶ 14} When the trial court dismissed Highland's declaratory-judgment action, the stay was lifted in the administrative appeal. Highland then argued in its merit brief in that case that, among other things, Rule 80 was unconstitutional because it violated Highland's right to equal protection and the separation-of-powers doctrine.

{¶ 15} On September 24, 2021, the court hearing the administrative appeal affirmed the commission's order revoking Highland's liquor permits. It rejected Highland's arguments that Rule 80 was unconstitutional. Highland did not appeal that judgment.

F. The appellate court affirms the trial court's judgment in the declaratory-judgment action, and this court accepts jurisdiction over Highland's discretionary appeal

{¶ 16} On November 16, 2021, the appellate court affirmed the trial court's dismissal of the declaratory-judgment action. It agreed with the trial court that

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Id. at 153-154.

Highland's declaratory-judgment action sought to bypass a special statutory proceeding, contrary to the holdings of *Albright* and *Kazmaier*.

{¶ 17} Highland appealed to this court, presenting two propositions of law:

> Proposition of Law I: Ohio Administrative Code section 4301:1-1-80, "Rule 80," is unconstitutional as it violate[s] the separation of powers doctrine implicitly embedded in the Ohio Constitution.
>
> Proposition of Law II: An administrative appeal challenging the application of an administrative rule does not divest a court of common pleas of jurisdiction over a separate constitutional challenge to the facial validity of the administrative rule.

We accepted jurisdiction. 166 Ohio St.3d 1438, 2022-Ohio-798, 184 N.E.3d 131.

II. ANALYSIS

{¶ 18} Highland could have filed its two claims—the administrative appeal of the revocation of its liquor permits and the declaratory-judgment action to challenge the constitutionality of Rule 80—in the same action. Additionally, the common pleas court could have consolidated the two separate cases that Highland filed, but it declined to do so. Clearly, the trial and appellate courts were troubled by Highland's "true aim" in filing a separate declaratory-judgment action. However, the tendency of trial and appellate courts in administrative appeals to limit the presentation of additional evidence to "newly discovered" evidence,[3] if

3. *See, e.g.*, *Hudson v. Brown*, 75 Ohio Misc.2d 4, 6-7, 662 N.E.2d 99 (C.P.1995) (denying request to introduce additional evidence even though the appellant had not had an opportunity to present evidence before administrative agency); *Herubin v. Ohio Dept. of Job & Family Servs.*, 2022-Ohio-3243, 196 N.E.3d 896, ¶ 44-45 (7th Dist.) (upholding trial court's decision to strike additional evidence because it was not "newly discovered"); *Starr v. Ohio Dept. of Commerce Div. of Real Estate & Professional Licensing*, 10th Dist. Franklin No. 20AP-47, 2021-Ohio-2243, ¶ 31-32

that, may also account for Highland's having pursued separate actions in order to fully develop its arguments against Rule 80.

{¶ 19} The additional evidence permitted in administrative appeals brought under R.C. 119.12 is described in R.C. 119.12(K):

> Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The phrase "[u]nless otherwise provided by law" in R.C. 119.12(K) has largely been omitted from consideration by trial and appellate courts of this state, *see, e.g.*, *Herubin* at ¶ 44-45, and those courts have applied the statute to limit additional evidence in administrative appeals to *only* newly discovered evidence, with the admission of that evidence subject to the discretion of the trial court. *Id.*

{¶ 20} But the phrase "[u]nless otherwise provided by law" is broader than was characterized by the Fifth District Court of Appeals in *Herubin* and should not be ignored. In the context of the statutory language, the phrase may be taken to mean either when the law permits new evidence *other than* newly discovered evidence or when the law does *not* permit *even* newly discovered evidence. Here, it seems that Highland sought the ability to bring sufficient evidence to challenge the constitutionality of Rule 80, especially as it applied to Highland as the holder of class D liquor permits. Even though Highland did *raise* but sought to develop

(same); *Gainer v. Cavanaugh*, 5th Dist. Stark No. 2019CA00043, 2020-Ohio-175, ¶ 19 (recognizing that the phrase "[u]nless otherwise provided by law" in R.C. 119.12(K) is an exception to the general prohibition on additional evidence in administrative appeals under R.C. 119.12 and distinguishing that provision from one lacking any such "qualifiers or limitations").

evidence for a constitutionality claim before the commission, the commission could not adjudicate that claim. *See Pivonka v. Corcoran*, 162 Ohio St.3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, ¶ 24. "[T]he proper procedure for raising a constitutional challenge is to first exhaust all administrative remedies. A party can then raise the constitutional challenge in the court that hears the administrative appeal." *Id.*

{¶ 21} R.C. 119.12(L) prescribes that for administrative appeals from an agency to the common pleas court, "[t]he hearing in the court of common pleas *shall proceed as in the trial of a civil action*, and the court shall determine the *rights of the parties* in accordance with the laws applicable to a civil action." (Emphasis added.) This language in the administrative-appeal statute is similar to R.C. 2721.02(A), which pertains to declaratory-judgment actions. R.C. 2721.02(A) provides that

> courts of record may declare *rights, status, and other legal relations whether or not further relief is or could be claimed.* No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

(Emphasis added.)

{¶ 22} Article IV, Section 4(B) of the Ohio Constitution states that common pleas courts have "such original jurisdiction over all justiciable matters * * * as may be provided by law." We have interpreted this to mean that " 'the general subject matter jurisdiction of Ohio courts of common pleas is defined *entirely by statute*.' " (Emphasis added in *Ruehlman*.) *Ohio High School Athletic Assn. v. Ruehlman*, 157 Ohio St.3d 296, 2019-Ohio-2845, 136 N.E.3d 436, ¶ 7, quoting

State v. Wilson, 73 Ohio St.3d 40, 42, 652 N.E.2d 196 (1995). In addition, as Justice (now Chief Justice) Kennedy stated, with respect to actions for declaratory judgment,

> [t]he General Assembly exercised its power to define the subject-matter jurisdiction of the common pleas courts in enacting R.C. Chapter 2721, the Declaratory Judgment Act. * * * "[C]ourts of record may declare rights, status, and other legal relations," R.C. 2721.02(A) * * *.

Cincinnati v. Fourth Natl. Realty, L.L.C., 163 Ohio St.3d 409, 2020-Ohio-6802, 170 N.E.3d 832, ¶ 22 (Kennedy, J., concurring). The legislature specified in R.C. 2721.13 that "[t]he provisions of [the declaratory-judgment] chapter are remedial and shall be liberally construed and administered." Thus, because the declaratory-judgment provisions are statutory, they satisfy the phrase "[o]therwise provided by law" in R.C. 119.12(K) for the admission of additional evidence in administrative appeals beyond newly discovered evidence.

{¶ 23} And in the context of administrative appeals, this makes sense. Without the evidence necessary to "determine the rights of the parties in accordance with the laws applicable to a civil action," R.C. 119.12(L), constitutional claims of litigants could not be heard. It was unfair for the trial court, in dismissing the declaratory-judgment action, to suggest that Highland should have brought its declaratory-judgment action at the time Rule 80 was adopted by emergency measure instead of waiting until after its liquor permits were revoked for violating the rule. The rule was adopted in the midst of a pandemic, when businesses, including Highland's, were losing money and were quickly implementing measures to avoid having to shut down. The trial court did not lack subject-matter jurisdiction to hear Highland's action.

{¶ 24} Before addressing Highland's two propositions of law, this opinion addresses appellees' assertion that Highland's case is moot. Rule 80 expired on November 29, 2020. Highland seeks a declaratory judgment that Rule 80 was unconstitutional and an injunction prohibiting it from being enforced in the future. Even if we were to agree that Rule 80 was unconstitutional, appellees argue, we would be unable to provide the relief that Highland seeks. As appellees state in their mootness argument, "[a]n order enjoining a rule that no longer exists will achieve nothing. And a declaration that the same rule 'was' unconstitutional will not entitle Highland to anything."

{¶ 25} In response, Highland argues that an exception to the mootness doctrine applies. It first points to case law providing that a party's voluntary cessation of a challenged practice ordinarily does not render the case moot unless the party can show that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 190, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). According to Highland, appellees have not met this burden, because they have not provided any evidence to support their suggestion that neither Rule 80 nor a similar rule can reasonably be expected to be adopted in the future.

{¶ 26} Highland also frames this case as one involving an issue that is capable of repetition yet evading review. This mootness exception applies when "(1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000). According to Highland, because Rule 80 was an emergency rule that could remain in effect for only 120 days, there was not enough time to fully litigate the constitutionality of the rule before it expired. While that may be true in the abstract, we agree with appellees' assertion that the question of the constitutionality of Rule 80 is moot.

{¶ 27} As earlier quoted, Article IV, Section 4(B) of the Ohio Constitution grants courts of common pleas "such original jurisdiction over all justiciable matters * * * as may be provided by law." An essential component of justiciability is that " ' "the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote." ' " (Ellipsis sic.) *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9, quoting *League for Preservation of Civil Rights & Internatl. Tranquility, Inc. v. Cincinnati*, 64 Ohio App. 195, 197, 28 N.E.2d 660 (1st Dist.1940), quoting Borchard, *Declaratory Judgments*, at 40 (1934).

{¶ 28} Although a case may present a live dispute at the time it is filed, subsequent events may transform it into one involving only a hypothetical dispute. One example is when a party alleges that a law is unconstitutional and the law at issue is repealed or materially amended while the case is underway. *See Hill v. Snyder*, 878 F.3d 193, 203-204 (6th Cir.2017). In that situation, the dispute is no longer "live" and the case is ordinarily moot. *Id.* at 203. That is what has happened here. When Rule 80 expired, the dispute in this case then involved a condition that had ceased to exist; hence, the case is moot.

{¶ 29} And neither the exception to the voluntary-cessation defense nor the capable-of-repetition-yet-evading-review exception apply here. Both exceptions apply only when there is a reasonable expectation that the alleged violation will occur again. *See Laidlaw*, 528 U.S. at 190, 120 S.Ct. 693, 145 L.Ed.2d 610 (voluntary cessation); *Calvary*, 89 Ohio St.3d at 231, 729 N.E.2d 1182 (capable of repetition yet evading review). It is not reasonably likely that a rule substantially similar to Rule 80 will be adopted in the future. Several events that occurred since Rule 80 expired support this statement.

{¶ 30} First, the laws related to both states of emergency and emergency rules have changed substantially. On March 24, 2021, the General Assembly

passed Sub.S.B. No. 22 ("Sub.S.B. 22"), over the governor's veto. Sub.S.B. 22 became effective June 23, 2021, and it added provisions to the Revised Code limiting a state of emergency to 90 days and giving lawmakers authority to terminate by concurrent resolution a state of emergency after 30 days. *See* R.C. 107.42. It also added a provision empowering the General Assembly to terminate by concurrent resolution any administrative rule adopted in response to the state of emergency. *See* R.C. 107.43(C)(1). With these new laws in place, rules similar to Rule 80 will be in effect for a much shorter time, from 30 to 90 days, and there will be more opportunity for public response to proposed orders that affect more than a specific group of people. The passage of Sub.S.B. 22 leaves us only to speculate about what will happen if a similar situation occurs in the future; we cannot say it is reasonably likely that a similar rule will be adopted again or have the same effect on persons or entities similarly situated to Highland.

{¶ 31} The United States Food and Drug Administration granted final approval to two vaccines providing protection against Covid. *See* United States Food and Drug Administration, August 23, 2021 Press Announcement, *FDA Approves First COVID-19 Vaccine*, https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine (accessed Mar. 13, 2023) [https://perma.cc/BWP8-AHA5]; United States Food and Drug Administration, January 31, 2022 Press Announcement, *Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine*, https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-key-action-approving-second-covid-19-vaccine (accessed Mar. 13, 2023) [https://perma.cc/25TH-9883]. Appellees also did not reimpose a restriction like Rule 80 during the spikes in Covid cases caused by the Delta variant in the fall of 2021 or the Omicron variant in the winter of 2021-2022. Nor have they reimposed a restriction resembling Rule 80 in the time since the peak of the Omicron variant. Finally, to the extent Highland suggests that a similar restriction may be imposed

in the future in reaction to events unrelated to the Covid pandemic, it relies entirely on speculation.

{¶ 32} Even though Rule 80 has expired, Highland attributes its permit revocations to the application of the allegedly unconstitutional rule. However, Highland does not seek a remedy that would order the reinstatement of its permits. Rather, Highland seeks a declaration that Rule 80 was unconstitutional and an injunction to prevent enforcement of a future rule similar to the now-expired Rule 80. Counsel for Highland confirmed at oral argument that this was all the relief that Highland seeks in this case. Even if we were to find that Rule 80 was unconstitutional, neither that declaration nor an injunction to prevent enforcement of a future similar rule would reinstate Highland's permits.

{¶ 33} In the end, Highland seeks only prospective relief from a future harm that is no longer possible—harm from the application of Rule 80, a rule that is no longer in effect. Analyzing the exceptions to the mootness doctrine, we find no viable situation in which it is likely that Rule 80 or a rule of similar import will be adopted in the future.

III. CONCLUSION

{¶ 34} This case is moot. We therefore vacate the judgment of the Tenth District Court of Appeals and remand the cause to the Franklin County Court of Common Pleas with instructions for it to dismiss the action. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 95 L.Ed. 36 (1950) (stating that when a civil case becomes moot while on appeal, the ordinary practice of the United States Supreme Court is to "reverse or vacate the judgment below and remand with a direction to dismiss" because review of the judgment "was prevented through happenstance").

Judgment vacated
and cause remanded to the trial court.

BALDWIN and DONNELLY, JJ., concur.

KENNEDY, C.J., and BYRNE and STEWART, JJ., concur in judgment only.

DETERS, J., concurs in paragraphs ¶ 32-34 of the opinion announcing the judgment of the court and otherwise concurs in judgment only.

CRAIG R. BALDWIN, J., of the Fifth District Court of Appeals, sitting for FISCHER, J.

MATTHEW R. BYRNE, J., of the Twelfth District Court of Appeals, sitting for DEWINE, J.

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