No. _____

In the Supreme Court of the United States

KIMBERLY BEEMER AND ROBERT JOSEPH MUISE,
Petitioners,

v.

MICHIGAN GOVERNOR GRETCHEN WHITMER AND
MICHIGAN ATTORNEY GENERAL DANA NESSEL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The COVID-19 pandemic was as much a constitutional crisis as it was a public health crisis. For years, American citizens, specifically including Michigan residents, were subject to constantly changing orders that imposed extreme burdens on fundamental freedoms in a way that our nation has never experienced in its history. The cost of these burdens is incalculable. Unfortunately, many courts did nothing, abdicating their duty to say what the law is and allowing this frontal assault on liberty to proceed largely unchecked.

1. Is this constitutional challenge to the Michigan Governor's emergency restrictions that directly infringed fundamental rights moot when the restrictions are capable of repetition yet so short in duration that they evade review and the Governor voluntary ceased the allegedly unlawful action while this lawsuit was pending?

PARTIES TO THE PROCEEDING

Petitioners are Kimberly Beemer and Robert Joseph Muise (collectively referred to as "Petitioners").

Respondents are Michigan Governor Gretchen Whitmer and Michigan Attorney General Dana Nessel (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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The opinion of the court of appeals appears at App. 1 and is available at No. 22-1232, 2022 U.S. App. LEXIS 26758 (6th Cir. Sep. 22, 2022). The opinion of the district court appears at App. 11 and is available at No. 1:20-cv-323, 2022 U.S. Dist. LEXIS 32719 (W.D. Mich. Feb. 24, 2022).

JURISDICTION

The opinion of the court of appeals was entered on September 22, 2022. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Procedural Background.

On April 15, 2020, Petitioners filed this action challenging Governor Whitmer's Executive Order (EO) 2020-42. Petitioners alleged violations of Equal Protection, Due Process, the Contract Clause, the Second Amendment, and the Right of Association under the United States Constitution, Article 1, § 6 of the Michigan Constitution, and 42 U.S.C. § 1983. R.1, Compl.

Petitioners sought a temporary restraining order, and the court set a hearing for April 30, 2020. The U.S. magistrate judge held a status conference on April 24, 2020, and that same day Governor Whitmer issued Executive Order 2020-59, which rescinded EO 2020-42.

On April 26, 2020, the parties submitted a stipulation resolving Petitioners' request for a temporary restraining order and for a preliminary injunction, which the Court entered on April 27, 2020. App. 12, 19-25.

On April 28, 2020, Petitioners filed a First Amended Complaint. R.25. Petitioners continued to assert their claims challenging EO 2020-42. However, they dropped the Contracts Clause claim and added a Free

Exercise claim. Petitioners argued that while the stipulation remedied the immediate harm, it did not resolve the underlying constitutional issues. App. 13.

On May 21, 2020, Respondents filed an amended motion to dismiss. In their motion, Respondents argued, *inter alia*, that Petitioners' claims were moot. R.35.

On February 24, 2022, the district court issued its Order, concluding that Respondents' motion and Petitioners' claims in the amended complaint were moot. App. 11-16. That same day, the court entered judgment, dismissing the case and terminating the action. App. 17. Petitioners appealed, and the Sixth Circuit affirmed. App. 1-10.

This petition follows.

II. Decisions Below.

The district court dismissed this case on mootness grounds. In its opinion, the district court relied heavily on the opinion issued by the Michigan Supreme Court in *In re Certified Questions from United States District Court*, 958 N.W.2d 1 (Mich. 2020). App. 14-16. In that case, the state's highest court held, in relevant part, (1) that the Emergency Management Act (EMA) did not permit the Governor to extend a declaration of a state of emergency or state of disaster beyond April 30, 2020 (twenty-eight days), and (2) that the Emergency Powers of the Governor Act (EPGA) violated the nondelegation doctrine of Michigan's Constitution and

was therefore unconstitutional. 958 N.W.2d at 9-11, 16-25.

Notably, the Michigan Supreme Court did not rule that the EMA was unconstitutional. That law, which served as the primary authority and basis for Governor Whitmer to issue EO 2020-42, remains in effect. Additionally, the Michigan Supreme Court did not hold that EO 2020-42 violated any provision of the Michigan Constitution. The court did not address the matter.

Nonetheless, the district court concluded as follows:

> The Court concludes [Petitioners'] claims and their requested remedies are moot. Whitmer rescinded EO 2020-42. The parties stipulated that EO 2020-59 did not prohibit [Petitioners] from doing what they alleged, in the initial complaint, they were prohibited from doing by EO 2020-42. And, the Michigan Supreme Court's ruling eliminated all reasonable possibilities that Whitmer could extend the state of emergency and reinstitute the restrictions about which [Petitioners] complain. The Court cannot enjoin [Respondents] from issuing and enforcing restrictions that they no longer have the authority [to] enact. And, following these events, there no longer exists a "substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment."

App. 15-16.

The Sixth Circuit affirmed. In its opinion, the court cited a number of cases challenging emergency executive orders—cases which the court concluded were moot in large part because the Michigan Governor voluntarily rescinded the challenged restrictions, App. 7-10—and concluded as follows in this case:

> These same considerations hold true here; the stay-at-home order has long been rescinded, and the [Petitioners] have not set forth any likelihood of Whitmer reissuing it in a similar form. Therefore, we see no reason to depart from this line of cases, and the [Petitioners'] claims are moot.

App. 10. In other words, it was a regular practice of Governor Whitmer to rescind an emergency executive order when faced with a legal challenge.

III. Statement of Facts.

On March 23, 2020, Governor Whitmer issued EO 2020-21, which was described as a "[t]emporary requirement to suspend activities that are not necessary to sustain or protect life." R.25, First Am. Compl. ¶ 21.

On April 9, 2020, Governor Whitmer issued EO 2020-42, which "reaffirm[ed] the measures set forth in Executive 2020-21, clarif[ied] them, and extend[ed] their duration to April 30, 2020." The executive order took effect "on April 9, 2020 at 11:59 pm." When EO 2020-42 took effect, it rescinded EO 2020-21. R.25, First Am. Compl. ¶ 22.

By its own terms, EO 2020-42 was to remain in effect until April 30, 2020 at 11:59 pm. Though EO 2020-42 was rescinded by Governor Whitmer, today she retains the power under the EMA to declare a state of emergency and to institute measures identical to those found in EO 2020-42 for at least twenty-eight days. And a "willful violation" of such orders is a misdemeanor. App. 23-24.

EO 2020-42 put in place draconian measures that arbitrarily and unreasonably imposed restrictions and thus criminal sanctions on Petitioners' fundamental rights and liberty. The order stated, in relevant part, the following:

> 2. Subject to the exceptions in section 7, <u>all</u> individuals currently living within the State of Michigan are *ordered to stay at home or at their place of residence*. Subject to the same exceptions, <u>all</u> *public and private gatherings of* <u>any number</u> *of people occurring among persons not part of a single household are prohibited*.
>
> * * *
>
> 7. Exceptions.
>
> a. Individuals may leave their home or place of residence, and travel as necessary:
>
> 1. To engage in outdoor physical activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity, as well as any comparable activity for those with limited mobility.

* * *

6. To obtain necessary services or supplies for themselves, their family or household members, *their pets*, and their vehicles.

* * *

7. To care for a family member or a family member's pet in another household.

* * *

b. Individuals may leave their home or place of residence, and travel as necessary:
1. To return to a home or place of residence from outside the state.
2. To leave this state for a home or residence elsewhere.
3. Between two residences in this state, through April 10, 2020. *After that date, travel between two residences is not permitted.*

* * *

c. *All other travel is prohibited, including all travel to vacation rentals.*

R.25, First Am. Compl. ¶¶ 25, 26 (emphasis added).

Petitioner Beemer and members of her household frequently travel to her cottage, property which she owns, located in Charlevoix County. She would often leave from her residence in Saginaw, Michigan and travel to the cottage on a Thursday, remaining at her cottage over the weekend and returning late on Sunday or early Monday morning. Her cottage is a second home, and it is her private retreat from the daily grind of her law practice. R.25, First Am. Compl. ¶ 27.

Under the measures set forth in EO 2020-42, if Petitioner Beemer travelled to her cottage, she would have committed a criminal offense, subjecting her to prosecution for violating the executive order. As a result, Petitioner Beemer ceased her travel and was thus denied the use and enjoyment of her private property by the government while this order was in effect. Petitioner Beemer had no recourse for this deprivation of her property rights other than seeking redress in a court of law by bringing this action. R.25, First Am. Compl. ¶ 28.

There is little to no chance that Petitioner Beemer would have caused the spread of COVID-19 by travelling with members of her household from her residence in Saginaw, Michigan to her cottage in Charlevoix County. In fact, she and members of her household are more isolated at the cottage than when they are at their home in Saginaw. R.25, First Am. Compl. ¶ 29.

EO 2020-42 permitted individuals to travel from Saginaw to Charlevoix County to purchase pet food, gasoline, marijuana, Lotto tickets, and liquor, among other reasons. Under EO 2020-42, a Wisconsin or Ohio resident could have travelled from his State to his cottage in Charlevoix County, Michigan without violating the order. Thus, the order discriminated against individuals, including Petitioner Beemer, based upon their State of residence, it impaired their right to travel, and it deprived them of the use and enjoyment of their property. Prohibiting individuals from traveling from one place of residence in the State to another place of residence or cottage within the State

had no real or substantial relation to promoting the objectives of EO 2020-42, particularly in light of the exceptions permitted by the order. R.25, First Am. Compl. ¶¶ 30-32.

Following the issuance of EO 2020-21, and reaffirmed in EO 2020-42 and EO 2020-59, Governor Whitmer refused to close abortion centers in Michigan even though abortion is an elective procedure and is contrary to the stated goal of the executive orders "to sustain or protect life." Moreover, it is impossible to practice social distancing in an abortion center due to the nature of the procedure. Governor Whitmer also permitted marijuana businesses to remain open during this pandemic, and she allowed these businesses "to sell or transfer marijuana" to a purchaser "who has an expired driver license or government-issued identification card during home delivery and curbside sales." R.25, First Am. Compl. ¶¶ 33, 34.

In contrast, there is little to no chance that a landscaping business, for example, will spread COVID-19. Yet, EO 2020-42 closed these businesses. Landscaping businesses could easily practice social distancing and other safety measures recommended by the CDC. There is far less likelihood of a landscaping business spreading COVID-19 than other businesses that Governor Whitmer permitted to remain open under her executive orders, specifically including hardware stores, convenience stores, grocery stores, gas stations, marijuana businesses, and abortion centers. R.25, First Am. Compl. ¶ 35.

During her free time, Petitioner Beemer enjoys boating on Lake Charlevoix. However, EO 2020-42 prohibited this activity. Under this executive order, Governor Whitmer permitted kayaking and canoeing, but arbitrarily prohibited the use of boats with motors. R.25, First Am. Compl. ¶ 36.

Petitioner Muise is professionally trained in the use of firearms, he legally owns firearms, and he is a staunch defender of the Second Amendment, which constitutionally guarantees him the right to bear arms for self-defense, defense of his family, and for the defense of a free State. He also uses firearms to hunt in Michigan and in other States. To support his right to bear arms, which necessarily includes the right to purchase firearms and ammunition, Petitioner Muise patronizes local gun shops, specifically including a gun shop located in Washtenaw County. R.25, First Am. Compl. ¶¶ 38, 39.

EO 2020-42 ordered all non-essential businesses and activities to cease. Though this order exempted "critical infrastructure," Governor Whitmer purposefully referenced an outdated list of such industries (issued March 19, 2020) rather than the more current federal guidelines (issued March 28, 2020) that designated firearm and ammunition retailers as critical. This deliberate action shut down gun stores[1] in order to deny citizens, including Petitioner Muise, access to their Second Amendment rights. Thus, for reasons that can only be explained as

[1] Governor Whitmer conceded in her brief filed in the district court that gun stores were closed because she considered them "non-essential." R.32, Governor's Br. at 35.

political, Governor Whitmer considered Lotto, marijuana, liquor, and abortion to be essential but not firearms and ammunition. Consequently, the order also banned travel to gun stores but permitted individuals to travel to buy pet food, marijuana, liquor, and Lotto tickets, among other items. R.25, First Am. Compl. ¶¶ 40-42.

Accordingly, EO 2020-42 prohibited Petitioner Muise from traveling to gun stores to purchase firearms and ammunition and to travel to gun ranges to train with his firearms. Because he did not want to be subject to criminal or other sanctions for violating the executive order, Petitioner Muise did not travel to any guns stores or ranges while EO 2020-42 was in effect. R.25, First Am. Compl. ¶ 43.

Due to the panic caused by the pandemic and the uncertainty caused by Governor Whitmer's executive orders, owning and possessing firearms was critically important at this time. EO 2020-42 deprived Michigan residents, including Petitioner Muise, of their fundamental right to use arms in defense of their "hearth and home." R.25, First Am. Compl. ¶ 44.

Petitioner Muise and his wife have been blessed with twelve children and eleven grandchildren (his family continues to grow).[2] At the time this lawsuit was filed, three of his adult children were married, and all reside locally in Michigan. Two of his adult children resided locally in rental properties in Michigan. And

[2] R.40-1, Muise Decl. ¶ 5.

his other seven children resided at his home in Superior Township.[3] R.25, First Am. Compl. ¶ 45.

On most Sundays, Holy Days, and other special events, the family would gather at Petitioner Muise's home for a meal, fellowship, and prayer. The family's faith is the center of their family life. R.25, First Am. Compl. ¶ 46.

Petitioner Muise and his family are devout Catholics. Because of COVID-19, there were no public Masses in the Lansing Diocese. However, Jesus Christ taught that where two or more gather in His name, He is present. (Matthew 18:20). Petitioner Muise wanted his family to gather together on Sundays, other Holy Days, and special events to associate for a meal, fellowship, and prayer, and thus gather as a family in Christ's name. Such gatherings are religious worship for Petitioner Muise. However, under the measures expressly set forth in EO 2020-42, it was a crime in Michigan to engage in such family associations and gatherings. EO 2020-42 stated that "a place of religious worship, when used for religious worship, is not subject to penalty." But there were no definitions or guidance within the executive order to explain how this exemption applied. EO 2020-59 stated that "neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place." But again, there were no definitions or guidance within the

[3] As of this filing, four of Petitioner Muise's children are married and reside locally, three children reside locally in rental properties in Michigan, and the other five children reside at his home in Superior Township.

executive order to explain how this exemption applied. R.25, First Am. Compl. ¶¶ 47-49. Moreover, per the order, "[s]ubject to [the exceptions in section 7], all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited." R.25, First Am. Compl. ¶ 26.

In addition to criminal sanctions for violating an executive order, Petitioners also feared that they could jeopardize their Michigan law practices and related for-profit and non-profit business interests if they violated an executive order. Governor Whitmer was quoted in the news on or about April 1, 2020, as follows: "You know, just about every business in the state has some sort of license, from the state of Michigan or not, and so we've encouraged them not to play fast and loose with this order because their licenses could be in jeopardy as a result." R.25, First Am. Compl. ¶ 51.

Governor Whitmer has expressly stated her willingness to "return to her old ways," stating that the State must "be nimble enough to go backward, on occasion." Indeed, new variants of COVID continue to emerge,[4] and each year there is a flu season. Some years are far worse than others. Consequently, restrictions like those challenged here will easily and predictably become the "new norm." R.25, First Am. Compl. ¶¶ 57-60.

The public interest in determining the legality of the executive orders was on full display on April 15,

[4] Per the CDC, "New variants of the [COVID-19] virus are expected to occur." (https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html).

2020, when thousands of Michigan residents and other demonstrators descended upon the State Capitol in Lansing, Michigan in what was called "Operation Gridlock" to publicly protest Governor Whitmer's restrictions on their liberty. R.25, First Am. Compl. ¶ 61.

LIFTING THE PANDEMIC VEIL

It is the government's burden to justify its restriction on a fundamental liberty; it is not a private citizen's burden to justify his freedom. The Bill of Rights is a brake on the power of government; it is not a conferring of rights by the government only to be withheld at the whim of a government official.

Throughout the pandemic, government officials (including Governor Whitmer) kept moving the goal posts. They felt compelled to lord over nearly every detail of our lives, and they justified this power grab by relying on fear and a parade of horribles. For example, in their brief filed in the district court, Governor Whitmer and Attorney General Nessel asserted, without supporting evidence or data, that "[a]s the virus ravaged southeastern Michigan, health systems were quickly at or above capacity. Medical supplies were dwindling, and beds in intensive care units were in short supply." R.32, Governor's Br. at 22. The facts did not support this assertion.

Based on (widely considered inflated) data from the Michigan Department of Health and Human Services, the CDC, and USAfacts.org (which the CDC has cited and relied upon for some of its data), during the month

of April 2020, the average weekly percentage of available ICU beds in Michigan ranged from 20.89% to 31.50%, and the average weekly percentage of available inpatient hospital beds in Michigan ranged from 36.17% to 39.54%. R.40-2, Korkes Decl. ¶¶ 3-5, Ex. A.

During the first two weeks in May 2020, the average weekly percentage of available ICU beds in Michigan ranged from 31.80% to 33.93%, and the average weekly percentage of available inpatient hospital beds in Michigan ranged from 35.24% to 36.60%. *Id*. There never was a shortage of hospital capacity. And Governor Whitmer's ban on "elective" medical procedures (except abortion) was destroying Michigan's healthcare system.[5]

According to the "Official Website of Michigan.Gov," as of May 27, 2020, there were reportedly 55,608 confirmed COVID-19 cases and 5,334 deaths statewide. The City of Detroit and Wayne County accounted for 19,999 of the cases and 2,406 of the deaths. In comparison, Saginaw County, where Petitioner Beemer resides, reported only 1,002 cases and 107 deaths, and Washtenaw County, where Petitioner Muise resides, reported only 1,305 cases and 97 deaths.

Charlevoix County, where Petitioner Beemer's cottage is located, reported only 15 cases and 1 death. In fact, according to Michigan's statistics as of May 27, 2020, fifty-seven (57) out of the eighty (80) counties

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[5] *See* https://www.detroitnews.com/story/news/local/Michigan/2020/05/05/university-michigan-health-system-lays-off-1400-health-care-workers/3084104001/.

reporting had ten (10) or fewer deaths associated with COVID-19.[6]

Indeed, the State's pandemic was largely confined to the City of Detroit (10,872 cases), the surrounding Wayne County (9,127 cases), and the suburbs of Oakland (8,260 cases) and Macomb (6,558 cases) counties, accounting for 34,817 reported cases as of May 27, 2020. And the same jurisdictions reported 4,151 COVID-19 deaths during this time, which was nearly 78% percent of the statewide total of 5,334 deaths. The rest of Michigan had been relatively unaffected. Yet, Governor Whitmer's statewide restrictions took no account of regional differences.

Additionally, when you evaluate the data based on age, 87% of the deaths occurred in people 60 or older (69% of which were 70 or older). The median age of death was 77 years.[7] Yet, Governor Whitmer's restrictions took no account of this difference.

Moreover, during the peak period of this pandemic (March through May 2020), far more people died in Michigan from cancer and heart disease (7,329) than from the virus (4,349). R.40-17, Muise Decl. ¶ 3, Ex. B.

Fear mongering was used to justify unprecedented and overly broad (not to mention, unconstitutional) restrictions on personal liberty. In short, the facts do not support this frontal assault on freedom. And the

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[6] R.40-1, Muise Decl. ¶ 2, Ex. A.
[7] R.40-1, Muise Decl. ¶ 2, Ex. A.

Constitution is intended to be a bulwark against it, but only if the courts are willing to say so.

REASONS FOR GRANTING THE PETITION

While the fear engendered by war, pandemic, or some other crisis might lead politicians, their attorneys, and yes, even judges of the highest order, to assert that patent violations of the Constitution are acceptable (or beyond judicial scrutiny) because public safety interests demand an exception to our most fundamental liberties, history teaches that we will look back on these arguments as "gravely wrong . . . overruled in the court of history . . . and . . . [having] no place in law under the Constitution." *Trump v. Haw.*, 138 S. Ct. 2392, 2423 (2018) (repudiating *Korematsu v. United States*, 323 U.S. 214 (1944)).

During times such as these, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The importance of doing so during (and in the immediate aftermath of) a crisis is essential to ensure the protection of our system of constitutional liberties for it is in such times that the need for protection is at its zenith. *See generally Coolidge v. N.H.*, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.").

The Emergency Management Act (EMA), which spawned the egregious constitutional violations at issue in this case, is alive and well. Mich. Comp. Laws § 30.401, *et seq*. We have witnessed during this COVID-19 crisis, most of us firsthand, the abuse that accompanies such executive power when left unchecked. Lord Acton was famously suspicious of power for the sake of power, which led to his famous quote: "Power tends to corrupt, and absolute power corrupts absolutely."

By declaring an "emergency"—this time the "emergency" was a pandemic and next it will be climate change, gun violence, or the political issue *de jure*—the Michigan Governor is granted unfettered powers for at least twenty-eight days. Our Constitution does not permit such a tyrannical reign even if it is of short duration. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The only meaningful check on such power is the judiciary. A new norm has been established by the Michigan Governor, and it is the duty of this Court to "say what the law is," particularly when the challenged restrictions are patently unconstitutional.

Review by this Court is necessary because the Sixth Circuit committed precedent-setting errors of exceptional public importance and issued an opinion that directly conflicts with this Court's precedent. Sup. Ct. R. 10(c). Moreover, lower courts do not uniformly apply this Court's voluntary cessation and capable of

repetition yet evading review doctrines when reviewing cases involving the enforcement of emergency orders. *See, e.g.*, *Tucker v. Gaddis*, 40 F.4th 289, 293-94 (5th Cir. 2022) (Ho, J., concurring); *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting) ("I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance"). And the Sixth Circuit's application of these doctrines ensures the continuation of a practice that directly conflicts with fundamental liberties enshrined in our Constitution.

ARGUMENT

I. Petitioners' Claims Are Not Moot.

"Determination by the [government] of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." *Meyer v. Neb.,* 262 U.S. 390, 400 (1923). But this supervision is only effective if the courts are willing to exercise their authority to decide important constitutional questions. Unfortunately, the courts' mootness doctrine has become a convenient excuse for courts to surrender their duty to say what the law is, particularly when dealing with the draconian and historic restrictions imposed during the recent pandemic crisis.

The court's primary role is to safeguard freedom—it would be wrong to surrender that role because of the pandemic. As stated by Justice Gorsuch, "[Courts] may not shelter in place when the Constitution is under attack. Things never go well when [they] do." *Roman*

Catholic Diocese v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

Indeed, this case reflects a growing trend of allowing government defendants to moot a pending case by rescinding the challenged regulation prior to a court deciding the constitutionality of the claims against them, thus allowing government officials to remain unaccountable for the legal ramifications of their enacted policies.

Some circuits rightfully caution against such decisions as an abuse of the doctrine of mootness. As recently stated by Judge Ho in the Fifth Circuit:

> To be clear, it's not supposed to be this way. It shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens, fundamental constitutional freedoms frequently suffer as a result.
>
> That's why legal commentators have bemoaned that acts of "strategic mooting litter the Federal Reporter." Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 Yale L.J. Forum 325, 328 (2019). Because judicial acceptance of such gamesmanship "harm[s] both

> good sense and [] individual rights" and "depriv[es] the citizenry of certainty and clarity in the law" by "preventing the final resolution of important legal issues." *Id.*
>
> I am thankful that our court does not make that same mistake today. But I continue to worry that judges may be tempted to misapply mootness in other cases—not to ensure that we decide only actual cases or controversies, but to avoid deciding cases that happen to be controversial.

Tucker, 40 F.4th at 293-94 (Ho, J., concurring).

A. Petitioners' Claims Are Not Moot as the Challenged Restrictions Are Capable of Repetition, yet Evading Review.

Petitioners' claims come within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception applies to situations where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a *reasonable* expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (emphasis added).

Petitioners satisfy both requirements for this exception. First, the challenged executive order (EO 2020-42) was issued on April 9, 2020, and the EO stated that it would continue through April 30, 2020. App. 12. This Order derived its authority from the

EMA, which limits the emergency powers of a governor to twenty-eight days unless additional authority is granted by the Legislature. "The EMA carries a 28-day limit on the amount of time in which the Governor can issue orders under a state of emergency before the act requires the Governor to declare an end to the emergency, unless both houses of the Legislature extend the period through a resolution." *House of Representatives v. Governor*, 943 N.W.2d 365, 371 n.8 (Mich. 2020) (citing Mich. Comp. Laws § 30-403(3)).

Governor Whitmer had authority under the EMA to extend her emergency powers through April 30, 2020. *Id.* at 368 n.4 ("The Legislature approved an extension of the Governor's initial emergency declaration under the EMA until April 30."). Thus, the challenged executive order was valid under the EMA and not affected by the Michigan Supreme Court's ruling on the Emergency Powers of the Governor Act in *House of Representatives*.

This Court has found periods of up to two years to be too short to be fully litigated. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review). Petitioners satisfy the first requirement.

Petitioners also satisfy the second requirement of the "capable of repetition, yet evading review" exception because this standard is a forgiving one. That is, "*reasonable*" in this context is not an exacting bar. Indeed, this Court has indicated that it is somewhat *less* than probable:

> [W]e have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable . . . Our concern in these cases . . . was whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.

Honig v. Doe, 484 U.S. 305, 318 n.6 (1988) (emphasis in original) (internal citations omitted).

In other words, recurrence of the issue need not be more probable than not; instead, the controversy must be *capable* of repetition. This standard provides that the chain of potential events does not have to be certain or even probable to support the court's finding of non-mootness.

This Court has repeatedly found restrictions issued during the COVID-19 pandemic capable of repetition. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court found that a church's challenge to New York's pandemic restrictions was not moot where "[t]he Governor regularly change[d] the classification of particular areas without prior notice" and retained the authority to continue doing so. 141 S. Ct. 63, 68 (2020) (per curiam). And while the Court did not identify which mootness exception applied, it cited to *Wisconsin Right to Life*'s discussion of the "capable of repetition, yet evading review" exception. *Id.* (citing *Wis. Right to Life*, 551 U.S. 449, 462 (2007)).

The Court applied *Roman Catholic Diocese* in *Tandon v. Newsom* and held that a challenge to California's restrictions on religious gatherings was not moot because California officials "retain[ed] authority to reinstate" the challenged restrictions "at any time." 141 S. Ct. 1294, 1297 (2021) (per curiam) (citing *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720, 209 (2021) (Gorsuch, J.) (explaining that the case was not moot because California officials have a record of "moving the goalposts")).

Because the Michigan Governor's executive order at issue here was "lawfully" issued pursuant to the EMA—a law which is alive and well in Michigan—its restrictions are "capable" of repetition. Under the EMA, the Governor could declare another state of emergency based upon a new COVID variant or some other asserted basis for invoking her emergency powers under the EMA *and issue precisely the same restrictions on constitutional freedoms*. There is no legislative action nor court decision preventing her from doing so.

In the final analysis, the challenged restrictions found in EO 2020-42 are capable of repetition, and these emergency executive orders by their very nature are short in duration, thus evading review. Petitioners' important constitutional challenge is not moot.

B. Governor Whitmer's Voluntary Cessation of EO 2020-42 Does Not Moot Petitioners' Claims.

When a party seeks to escape liability by claiming that it has voluntarily ceased the offending conduct,

"the *heavy burden* of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party*" seeking to avoid liability. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotations and citation omitted) (emphasis added).

As this Court noted, not only is a defendant "free to return to his old ways," *but also the public has an interest "in having the legality of the practices settled*." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (emphasis added); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982).

Consequently, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Thus, a claim for injunctive relief may be improper only "if the defendant can demonstrate that 'there is no *reasonable expectation* that the wrong will be repeated.' The [defendant's] burden is a *heavy one*." *Id.* (citation omitted) (emphasis added).

This Court has also instructed the lower courts to be particularly vigilant in cases *such as this*, warning that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Id.* at 632, n.5.

As the Court concluded, denying a plaintiff prospective relief "would be justified only if it were

absolutely clear that the litigant no longer had *any* need of the judicial protection that it sought." *Adarand Constructors, Inc.*, 528 U.S. at 224 (emphasis added); *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-70 (6th Cir. 2019) (finding the challenge to a university's speech restrict not moot and stating that "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim").

Here, Governor Whitmer *eased her restrictions just days before the Court was to hold a hearing on Petitioners' motion for a preliminary injunction*. App. 12. Governor Whitmer has also expressed her willingness to "return to her old ways," stating that the State must "be nimble enough to go backward, on occasion." R.25, First Am. Compl. ¶ 57. Moreover, COVID has not gone away (nor will it), and each year there is a flu season. Some years are far worse than others. Consequently, restrictions like those challenged here will easily and predictably become the "new norm," resulting in the loss of liberty. *Id*. ¶ 60.

In sum, Governor Whitmer is free to return to her old ways, and the public has a very strong interest in having the legality of the challenged restrictions settled, as evidenced by the public protests spurred by her orders. *Id*. ¶ 61. This case is not moot, and a federal court should decide the important constitutional claims presented. Things won't go well if they don't.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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