NO. 22-1232

United States Court of Appeals for the Sixth Circuit

KIMBERLY BEEMER; **ROBERT JOSEPH MUISE**,

PLAINTIFFS-APPELLANTS,

v.

GRETCHEN WHITMER, IN HER OFFICIAL CAPACITY AS GOVERNOR FOR THE STATE OF MICHIGAN; **DANA NESSEL**, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL FOR THE STATE OF MICHIGAN,

DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL L. MALONEY
Civil Case No. 1:20-cv-00323

APPELLANTS' REPLY BRIEF

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INTRODUCTION

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) (emphasis added). 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 Governor of Michigan 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.") (emphasis added). And the only meaningful check on such power is the judiciary. A new norm has been established by Governor Whitmer, and it is the duty of this Court to "say what the law is," particularly when the challenged executive order is patently unconstitutional.

At the end of the day, this case is not *Resurrection School v. Hertel*, No. 20-2256, 2022 U.S. App. LEXIS 14205 (6th Cir. May 25, 2022). In other words, this case is not moot, and it would be a tragic error and a tragic loss for our Constitution for the Court to avoid addressing the substantive constitutional issues raised.

ARGUMENT IN REPLY

I. This Case Is Not *Resurrection School*.

In a rather scant opinion, a majority of this Court held that the plaintiffs' challenge to a constantly changing, statewide mask mandate which the State itself repealed was moot. *Resurrection School*, 2022 U.S. App. LEXIS 14205 at *10-11.

In *Resurrection School*, the Court treated the voluntary cessation and capable of repetition yet evading review exceptions to the mootness doctrine as essentially the same, offering little analysis or discussion in the process. *See id*. at *10 ("This [capable of repetition yet evading review] exception is inapposite for largely the same reasons the previous exception is."). The Court rejected the exceptions, citing three reasons for concluding that there was no "reasonable possibility" that the State would issue a similar mask mandate in the future. "First, the State rescinded the mask mandate not in response to this lawsuit, but eight months later." *Id*. at *7. Thus, the "timing" of the cessation did not raise any suspicion that it was not genuine. *Id*. (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769 (6th Cir. 2019)).

"Second, the relevant circumstances have changed dramatically since the Department imposed its statewide mask mandate . . . ." *Resurrection School*, 2022 U.S. App. LEXIS 14205 at *7-8. The Court noted that "the relevant circumstances now . . . are largely the same circumstances that prompted the State to rescind the mandate." *Id*. at *8.

"Third, any future masking order likely would not present substantially the same legal controversy as the one originally presented here," noting that "[t]he Supreme Court and other courts have since blocked any number of them, thereby providing concrete examples of mandates and restrictions that violate the Free Exercise Clause." *Id.* In other words, the development of case law that favors the plaintiffs' position makes it unlikely that the State will attempt to reimpose what is in all likelihood an unlawful mandate.

The Court summarized as follows: "For all the reasons recited above—the changed circumstances since the State first imposed its mask mandate, the substantially developed caselaw, the lack of gamesmanship on the State's part—we see no reasonable possibility that the State will impose a new mask mandate with roughly the same exceptions as the one originally at issue here. This claim is moot—indeed palpably so." *Id.* at *10-11.

The Court's three justifications for concluding that the mask mandate challenge was moot in *Resurrection School* do not recommend the same conclusion in this case. Indeed, they compel the opposite conclusion.

First, the timing of the rescission of the challenged executive order demonstrates that it was not genuine. On April 9, 2020, Governor Whitmer issued EO 2020-42. By its own terms, EO 2020-42 was to remain in effect until April 30, 2020 at 11:59 pm. Plaintiffs filed this action on April 15, 2020 (Compl., R.1), and

immediately sought a temporary restraining order/preliminary injunction (Mot. for TRO, R.7). The Governor opposed the motion (Governor's Resp., R.10, PageID. 168-207),[1] and the court set a hearing for April 30, 2020 (Order, R.14). The magistrate judge held a status conference on April 24, 2020, and that same day Governor Whitmer rescinded EO 2020-42. (Order at 2, R.47, PageID. 1334). This "gamesmanship" compels finding in Plaintiffs' favor on mootness. In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the Court instructed 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." *Id*. at 632, n.5.

Second, the nature of the draconian restrictions imposed by EO 2020-42 makes it unreasonable to conclude that there was such a dramatic change in the pandemic between April 9, 2020, and April 24, 2020, that the rescission of the challenged restrictions was based on facts related to the pandemic as opposed to the political whims of a Governor who did not want a court of law to curtail her power grab. Indeed, a review of the challenged restrictions—which were not merely suggestions, they were mandates that carried criminal penalties—demonstrates that they were politically and ideologically driven and not based in "science." Here, there was no

[1] "Although not dispositive, the Supreme Court has found whether the government 'vigorously defends the constitutionality of its . . . program' important to the mootness inquiry." *Speech First, Inc.*, 939 F.3d at 770 (citation omitted).

legitimate basis (and certainly not a compelling one) for permitting individuals to travel to purchase pet supplies, Lotto tickets, marijuana, or liquor, but then prohibiting them to travel to purchase firearms or to visit their own cottages within the State. There was no legitimate basis for permitting out-of-state residents to travel to their cottages within Michigan but prohibiting Michigan residents to travel to their cottages within the State. There was no legitimate basis for designating and thus permitting some businesses as essential or critical infrastructure to operate—businesses such as pet stores, marijuana retailers, abortion centers, and liquor stores—but prohibiting firearms retailers or businesses that can operate safely, such as landscaping businesses. There was no legitimate basis for permitting "places of worship" to operate or permitting individuals to gather for recreational purposes or for shopping at a hardware store but prohibiting immediate family members to meet at their private homes to pray or gather as a family. In short, the "circumstances" do not compel a finding of mootness.

Finally, there is no "substantially developed caselaw" regarding the issues raised in this challenge. Indeed, Plaintiffs' goal is to establish caselaw that will prohibit these draconian restrictions from becoming the new norm once a crisis is declared by a tyrannical governor. This last point is particularly crucial. As the Supreme Court noted, the voluntary cessation exception to mootness is important for at least two fundamental reasons: (1) a defendant is "free to return to his old ways"

and (2) the public has an interest "in having the legality of the practices settled." *W. T. Grant Co.*, 345 U.S. at 632. The latter reason is justification alone for this Court to resolve the constitutional issues presented.

In the final analysis, the rationale set forth in *Resurrection School* counsels the Court to conclude that *this* case is not moot. The Governor has not met her "*heavy burden* of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotations and citation omitted) (emphasis added); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 490 (6th Cir. 2002) ("[W]e note that the City's assurance that it no longer enforces the Ordinance . . . does not render the present appeal moot. '[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'") (citations omitted).

II. "Capable of Repetition Yet Evading Review" Applies in this Case.

While the Court in *Resurrection School* appeared to suggest that the voluntary cessation and the capable of repetition yet evading review exceptions to mootness were essentially the same, *see Resurrection School*, 2022 U.S. App. LEXIS 14205 at *10, the two exceptions are in fact distinct, and it is evident that the latter (as well as the former) plainly applies in this case.

The capable of repetition yet evading review exception generally 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.'" *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). The first factor is clearly met in this case. *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 was too short in duration to permit judicial review); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 390-91 (6th Cir. 2001) (holding that two years to challenge a local ordinance prohibiting individuals with a sex-crime history to work for a sexually oriented business was too short in duration).

Regarding the second factor, the "[r]ecurrence of the issue need not be more probable than not; instead, the controversy must be *capable* of repetition." *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016) (emphasis added). Under this requirement, "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* at 716. In other words, under this exception, "reasonable expectation" of recurring means "capable" of recurring. Because the challenged executive order was "lawfully" issued pursuant to the EMA—a law which remains in effect in Michigan—it is "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. The case is not moot.

CONCLUSION

This case presents a justiciable controversy; it is not moot. The Court should reverse the district court, declare the restrictions unlawful, and enjoin them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 2,072 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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