

SECOND CIRCUIT REVIEW

Expert Analysis

Determining Mootness of COVID-Era Executive Orders

In the 19 months since the beginning of the COVID-19 pandemic, the Second Circuit on several occasions has analyzed the circumstances in which challenges to certain restrictions implemented pursuant to COVID-19-related executive orders were moot. In four recent rulings—*Agudath Israel of America v. Cuomo*, 983 F.3d 620 (2d Cir. 2020), *36 Apartment Associates v. Cuomo*, —F. App'x—, No. 20-2565, 2021 WL 3009153 (2d Cir. July 16, 2021), *Connecticut Citizens Defense League v. Lamont*, 6 F.4th 439 (2d Cir. 2021), and *Dark Storm Industries v. Hochul*, No. 20-2725, 2021 WL 4538640 (2d Cir. Oct. 5, 2021) (summary order)—the court evaluated whether certain orders were moot on the basis of whether plaintiffs were under threat that the relevant restric-



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tions would be imposed again in the future. The decisions illustrate that, in examining the mootness of executive orders made in response to ever-evolving public emergencies, the court is tasked

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Voluntary Cessation of Challenged Conduct

In three of the cases, *Agudath Israel*, *Citizens Defense League* and *Dark Storm*, the Second

Circuit considered whether the voluntary cessation of the challenged conduct, either through the rescission of the relevant executive orders or withdrawal of restrictions at the state agency level, rendered plaintiffs' claims moot. In each of these decisions, the Second Circuit considered the full context of the pandemic and the State's response in deciding the mootness question.

The plaintiffs in *Agudath Israel* challenged Executive Order 202.68 issued by then-New York Governor Andrew Cuomo. The Order directed the New York State Department of Health to designate areas of New York at greater risk from COVID-19, and those areas were then subject to enhanced gathering restrictions, such as capacity limits for houses of worship. Certain religious organizations and some individuals who were adversely impacted by the Order sought a preliminary injunction enjoining the Governor from enforcing

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the capacity limits on the basis that they violated the Free Exercise Clause of the Constitution. During appellate proceedings stemming from denial of that relief (discussed in our Dec. 22, 2020 column), the New York State Department of Health lifted restrictions on the areas in which the plaintiffs were located, although the Order authorizing those restrictions remained.

In a December 2020 opinion granting plaintiffs' request for a preliminary injunction, the Second Circuit rejected the Governor's argument that changes to the list of restricted areas mooted the case, referring to the Supreme Court's decision in a related case. See *Agudath Israel*, 983 F.3d at 631 n.16 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 66, 68 (2020)). Both the Supreme Court in the related case and Second Circuit declined to find that the case was moot, holding that "the applicants remain[ed] under a constant threat that the area in question [would] be reclassified" as an area subject to restrictive capacity limits because of the renewal of the Order, including the challenged fixed-capacity limits. *Id.* (quoting *Roman Cath. Diocese*, 141 S. Ct. at 68). The Second Circuit accordingly enjoined the enforcement of the capacity limits.

Citizens Defense League concerned Executive Order 7E, issued by Connecticut Governor Ned Lamont. The Order permitted the state and municipal police departments to reduce or cease the collection of fingerprints of individuals seeking a firearm permit. A number of plaintiffs, who each sought firearm permits, sued to enjoin the Order. Although the Governor represented that he would shortly repeal the Order, the District Court granted the preliminary injunction. It noted that "[t]he voluntary cessation of allegedly illegal activities will usually render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." See 465 F. Supp. 3d 56, 69 (D. Conn. 2020) (quoting *Mhany Mgmt. v. City of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016)). The District Court held that the claims were not moot because the challenged restrictions remained in place and it did not have "sufficient assurance" that the challenged conduct would, in any event, be "permanently discontinued." See *id.*

On appeal, the Second Circuit disagreed, holding that the claims

of several plaintiffs had been mooted after individual police chiefs had resumed fingerprinting and plaintiffs withdrew their motion as to those chiefs, regardless of the continuing existence of the Order itself. See *Citizens Def. League*, 6 F.4th at 445. The Second Circuit further reasoned that, even if the withdrawal of the motion was not dispositive, it was an abuse of discretion for the District Court to find that the voluntary cessation rule precluded mootness when the Governor represented he was repealing the order and "mitigation measures [had] become available to combat the spread of COVID-19," so a finding of recurrence of the challenged restrictions was "speculative." *Id.* at 446.

In *Dark Storm*, the Second Circuit considered New York Executive Orders 202.6 and 202.8, which prevented firearms merchants from selling to civilians. One of those merchants sought to enjoin the Order. In June 2021, while the case was pending, the Governor rescinded the Orders. Attempting to convince the court that this rescission did not moot their claims, plaintiffs argued that the pandemic was "a 'sui generis worldwide situation' that has created 'a state of extreme flux' and 'almost certainly will require ... varying responses by state execu-

tive branches.” *Dark Storm*, 2021 WL 4538640, at *1. Citing *Connecticut Defense League*, the court, in an October 2021 non-precedential summary order, rejected this argument and added that recent pandemic developments made it less likely that the Orders would be reinstated as “a recent increase in COVID-19 cases has prompted neither a renewed disaster emergency declaration nor an order closing businesses.” *Id.* It also noted that the legislature had curtailed the Governor’s ability to issue certain COVID-related orders. The Second Circuit accordingly dismissed the appeal as moot.

Expiration of Executive Orders

In *Apartment Associates*, the Second Circuit assessed mootness in the context of an expiring executive order imposing certain restrictions, and compared and contrasted that situation with voluntary cessation of the challenged conduct.

The Second Circuit examined New York Executive Order 202.28, which prohibited eviction proceedings for nonpayment of rent because of pandemic-related financial hardship and allowed renters to use their security deposit in lieu of a rent payment. The District Court granted summary judgment in June 2020 in

favor of the Governor. During the pendency of plaintiffs’ appeal, both provisions expired by their own terms. The Second Circuit requested additional briefing on whether the appeal was moot.

In its July 2021 non-precedential summary order, the court contrasted the case with one where “the challenged restrictions were voluntarily withdrawn or altered during the litigation,” citing the Supreme Court’s decision in *Agudath*. See *Apartment Associates*, 2021 WL 3009153, at *2 (citing *Roman Cath. Diocese*, 141 S. Ct at 68-69). The court reasoned that, because the Order expired on its own and was replaced by legislation, recurrence of the challenged restrictions was unlikely. It further noted that the security deposit provision “was enacted as part of a statewide response to the COVID-19 crisis,” and therefore also was not “sufficiently likely to reoccur.” *Id.* The court accordingly dismissed the appeal as moot.

Conclusion

The Second Circuit, in assessing whether claims are moot where the challenged conduct has ceased, focuses on whether the challenged conduct is nevertheless likely to recur. These four decisions, in the context of an ever-evolving public health

emergency, illustrate that this inquiry can be fact-intensive and difficult because it does require some speculation about what will happen in the future. The decisions also illustrate the importance of timing—while the Second Circuit found a threat of recurrence in *Agudath*, it declined to do so in *Citizens Defense League* and *Dark Storm* because of improvement in the COVID-19 situation. This arc of decisions will provide some guidance to lower courts on how to assess the significance of voluntary and involuntary cessation of conduct in the context of mootness.