

No. 21-1832

**In The United States Court of Appeals
For the Third Circuit**

MADISON M. LARA, SOPHIA KNEPLEY, LOGAN D. MILLER, SECOND AMENDMENT
FOUNDATION, INC., AND FIREARMS POLICY COALITION, INC.,

Plaintiffs-Appellants,

v.

COMMISSIONER PENNSYLVANIA STATE POLICE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (20-cv-1582)
(Hon. William S. Stickman, IV, Presiding)

SUPPLEMENTAL RESPONSE BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Since 2010, the state of Pennsylvania has been under 19 different emergency declarations. *See* Reply Br. of Pls.-Appellants at 1 n.1 (Oct. 13, 2021) (“Reply Br.”). From 2000-09, there were 26 more (not including extensions).¹ The declared emergencies have many different causes, from rare and unpredictable events, like the September 11th terrorist attacks, *see* 31 Pa. B. 5359 (Sept. 11, 2001), or the COVID-19 pandemic, *see* 50 Pa. B. 1644 (Mar. 6, 2020), to not uncommon periods of severe weather, *see, e.g.*, 47 Pa. B. 1728 (Mar. 13, 2017). And though they are not predictable, they can be counted on. Since 2000, there have been just three periods (and just one since 2010) of a year or more without a new disaster declaration

¹ 30 PA. B. 1249 (Feb. 19, 2000) (weather); 31 PA. B. 3399 (June 20, 2001) (weather); 31 PA. B. 5359 (Sept. 11, 2001) (terrorist attack); 32 PA. B. 1035 (Feb. 12, 2002) (weather); 33 PA. B. 1046 (Feb. 17, 2003) (weather); 33 PA. B. 4068 (Aug. 6, 2003) (weather); 33 PA. B. 4889 (Sept. 18, 2003) (weather); 33 PA. B. 6207 (Dec. 5, 2003) (weather); 34 PA. B. 826 (Jan. 30, 2004) (sinkhole); 34 PA. B. 4410 (Aug. 5, 2004) (weather); 34 PA. B. 5242 (Sept. 15, 2004) (weather); 34 PA. B. 5349 (Sept. 17, 2004) (weather); 35 PA. B. 1878 (Mar. 11, 2005) (weather); 35 PA. B. 2205 (Apr. 3, 2005) (weather); 35 PA. B. 5088 (Sept. 3, 2005) (Hurricane Katrina); 35 PA. B. 5089 (Sept. 6, 2005) (Hurricane Katrina); 36 PA. B. 2169 (Apr. 21, 2006) (fuel shortages); 36 PA. B. 5775 (Sept. 1, 2006) (weather); 36 PA. B. 6085 (Sept. 26, 2006) (extending unreported June 28 declaration); 36 PA. B. 7952 (Dec. 15, 2006) (weather); 37 PA. B. 750 (Feb. 7, 2007) (weather); 37 PA. B. 927 (Feb. 14, 2007) (weather); 37 PA. B. 1409 (Mar. 16, 2007) (weather); 37 PA. B. 1957 (Apr. 13, 2007) (weather); 39 PA. B. 828 (Feb. 2, 2009) (weather); 39 PA. B. 3428 (June 29, 2009) (weather).

or an extension of an existing declaration. Much more commonly, several declarations are made each year.

Disasters are declared by the governor “upon finding that a disaster has occurred or that the occurrence or threat of a disaster is imminent that threatens the health, safety or welfare of [the] Commonwealth.” PA. CONST. art. IV, § 20(a). As a result of a recent change to the state’s constitution, the governor cannot unilaterally extend declarations beyond a 21-day period, but the General Assembly can. *Id.*; *see Cnty. of Butler v. Gov. of Penn.*, 8 F.4th 226, 229 (3d Cir. 2021). Regardless of the reason for a declaration, its duration, or which branch of Pennsylvania’s government bears responsibility for keeping it in place, the effect of a declaration on the gun rights of 18-to-20-year-old Pennsylvanians is always the same: it makes it unlawful for them to carry guns in public for purposes of self-defense. 18 Pa. C.S. § 6107.

ARGUMENT

The Commissioner argues that this case has been rendered moot by “recent developments” which have provided Plaintiffs “the precise relief [they] sought to obtain by bringing this action.” Supp. Br. for Appellee, Comm’r Penn. State Police at 2 (Nov. 2, 2021) (“Comm’r Supp.”). Specifically, the Commissioner asserts that the amendment to the Pennsylvania Constitution removing the Governor’s authority to unilaterally extend declared states of emergency, *see* PA. CONST. art. IV, § 20, and the sunseting of the emergency declarations related to the opioid epidemic, the

COVID-19 pandemic, and Hurricane Ida that had, until now, prevailed during the pendency of this litigation, together render Plaintiffs case moot because, until the next emergency is declared, Plaintiffs can carry guns openly under Section 6107. Comm'r Supp. at 5. These developments do not leave Plaintiffs without any chance for effective relief and they represent, at best, a temporary abatement of a permanent problem, so they do not moot this case.

“[A]n appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it impossible for the court to grant *any effectual relief whatsoever.*” *In re World Imports Ltd.*, 820 F.3d 576, 582 (3d Cir. 2016) (emphasis added). As an initial matter, even accepting the arguments the Commissioner makes in his supplemental brief, that standard is not met. Although the Commissioner claims that Plaintiffs did not identify a specific form of relief for their claims until their reply brief to this court, *see* Comm'r Supp. at 2, the Plaintiffs merely restated here what they asked for in their Complaint, *see* Reply Br. at 24–25; J.A. Vol. II at 71 (June 23, 2021) (“JA”). And in their Complaint, Plaintiffs also made specific requests for relief that are entirely independent of the existence of a current emergency declaration. For example, Section 6106 makes it illegal for 18-to-20-year-olds to transport firearms outside of narrowly defined circumstances. Plaintiffs have stated an intention and desire to do so lawfully, *see, e.g.*, JA 45, and requested that the statute preventing them from doing so (which the Commissioner

enforces) be declared unconstitutional and its enforcement enjoined, JA 71; *see* Reply Br. 3–4, 25 n.5. That claim, at least, is independent from any declaration of emergency and prevents this case from becoming moot.

More importantly, even the claims in the case that do hinge on the existence of an emergency declaration are not moot because they are textbook examples of the “capable of repetition yet evading review” exception to mootness. That exception applies where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017). A plaintiff need not show that future injury is certain, just that there is “more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability.” *See Cnty. of Butler* at 231.

That standard is easily met here. As to “capable of repetition,” Pennsylvania has only very rarely had a period of even a year without a new emergency declaration and it is frequently under several declarations a year. Although extending declarations is now more difficult, declaring them is not, so there is every reason to think that trend will continue. Meanwhile, both remaining individual plaintiffs in this case are young. Madison Lara will turn twenty-one in just under a year, in October 2022, and Sophia Knepley’s twenty-first birthday is over a year and a half

away in June 2023. Until then, both Lara and Knepley will again be subject to the same restriction challenged here if a new emergency is declared, and given the frequency of emergency declarations, future infringement of their Second Amendment rights is all but guaranteed.

What is more, the plaintiff organizations are filing this suit on behalf of all their members in Pennsylvania, not just Lara and Knepley. *See* JA 58, 60. Therefore, even if Lara and Knepley turn 21 before this litigation concludes, those organizations will maintain standing to sue so long as they continue to have 18-to-20-year-old members subject to the challenged laws in Pennsylvania. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (holding that organizations may bring suit on behalf of members who would have standing if interests are germane to the organization's purpose and individual participation not required); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (holding that a claim can move forward as long as one plaintiff has standing). Given the frequency of emergency declarations in Pennsylvania, it is a near-certainty that 18-to-20-year-old members of the plaintiff organizations will be subject to a carry ban due to an emergency declaration in the future.

This is a considerably stronger case for repetition than many in which this Court has previously held the exception applies. In *Belitskus v. Pizzigrilli*, 343 F.3d 632, 648 n.11 (3d Cir. 2003), for example, the Court allowed two indigent candidates

to challenge a Pennsylvania law requiring candidates to pay a filing fee to have their names placed on the ballot even though “[t]he question whether [the candidates] will run in a future election, and, if so, whether they will again qualify as indigent, is a close one.” In so holding, this Court explained that it is “reasonable to expect political candidates to seek office again in the future” and a “lack of evidence” that the candidates would lose indigent status provided a basis for expecting their future indigency. *Id.* Concluding that Lara and Knepley reasonably fear a new emergency declaration will be made and they will be restricted in the exercise of their rights again before they turn twenty-one involves much less guesswork than in *Belitskus*. And the presence of the organizations in the suit essentially eliminates whatever guesswork remains.

With respect to “evading review,” it should be emphasized that nothing in the new constitutional provision prevents future General Assemblies from creating the sort of long-lasting emergency declarations that were in place when this suit was filed. But to the extent it makes such enduring emergencies less likely, as the Commissioner insists it does, *see* Supp. Br. at 8, it strengthens the reasons for finding this issue will evade review. Twenty-one days, the length the future declarations will have absent legislative extension, is certainly too short a time to litigate the issues presented by this case. *See, e.g., Praxis Props., Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, n.10 (3d Cir. 1991) (90 days is too short). As a result, “a finding that

this case is moot would essentially doom all challenges to the Commonwealth's” emergency carry ban. *Belitskus*, 343 F.3d at 648 n.11. So that Plaintiffs (and all the other 18-to-20-year-old Pennsylvanians affected by the carry ban) are not left without any way to challenge the evisceration of their Second Amendment rights occasioned by these emergency declarations, this Court should find this case is not moot.

CONCLUSION

For the above reasons, the Court should not dismiss this case as moot.

Dated: November 18, 2021

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

Dated: November 18, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(ii) because this brief contains 1,697 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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Dated: November 18, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on November 18, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I certify that seven copies will be sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

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