IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DEBORAH ROSE,
Plaintiff/Appellant,

v.

TOWN OF PAYSON; CHRIS HIGGINS, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE TOWN OF PAYSON; BARBARA UNDERWOOD, IN HER OFFICIAL CAPACITY AS VICE-MAYOR OF THE TOWN OF PAYSON; BRETT FLAHERTY, IN HIS OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE TOWN OF PAYSON; JOEL MONA, IN HIS OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE TOWN OF PAYSON; SCOTT NOSSEK, IN HIS OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE TOWN OF PAYSON; JOLYNN SCHINSTOCK, IN HER OFFICIAL CAPACITY AS COUNCIL MEMBER OF THE TOWN OF PAYSON; SUZY TUBBS-AVAKIAN, IN HER OFFICIAL CAPACITY AS A COUNCIL MEMBER OF THE TOWN OF PAYSON; AND TROY SMITH, IN HIS OFFICIAL CAPACITY AS THE TOWN MANAGER OF THE TOWN OF PAYSON,
Defendants/Appellees.

No. 2 CA-CV 2024-0346
Filed May 28, 2025

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Gila County
No. S0400CV202400271
The Honorable Bryan B. Chambers, Judge

APPEAL DISMISSED

COUNSEL

Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix
By Jonathan Riches and John Thorpe
Counsel for Plaintiff/Appellant

Brueckner Spitler Shelts PLC, Scottsdale
By Larry J. Crown and Elan S. Mizrahi
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Vásquez concurred.

S K L A R, Judge:

¶1 Deborah Rose appeals from the superior court's dismissal of her complaint and denial of her application for a temporary restraining order and preliminary injunction application against the Town of Payson. Because the resolution she challenges has been repealed, Rose's appeal is moot. We therefore dismiss it.

BACKGROUND

¶2 In August 2024, Payson passed a resolution authorizing the sale of bonds. The resolution included an "emergency clause." That clause purportedly enabled Payson to immediately enact the resolution without a thirty-day waiting period in which a person or organization may challenge the resolution via referendum petition. *See* A.R.S. § 19-142(A), (B). It also purportedly exempted the resolution from referendum provisions under the Arizona Constitution and state law. *See id.*; Ariz. Const. art. IV, pt. 1, § 1(3).

¶3 Rose, a Payson resident and qualified elector, sued Payson and several town officials. She sought declaratory and injunctive relief to invalidate the resolution. She also applied for a temporary restraining order and preliminary injunction seeking similar relief. After a hearing, the

superior court denied her application and dismissed her complaint. Rose appealed. While the appeal was pending, Payson repealed the resolution.

MOOTNESS

¶4 Payson argues that the resolution's repeal renders this appeal moot. Rose disagrees, arguing that the appeal is not moot. We review de novo whether an issue is moot on appeal. *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, ¶ 11 (2021).

¶5 "A case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights." *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229 (App. 1985). Generally, we will not address moot questions out of judicial restraint. *Kondaur Cap. Corp. v. Pinal County*, 235 Ariz. 189, ¶ 8 (App. 2014). In the preliminary-injunction context, injunctive-relief issues are moot if "events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 12 (App. 2009) (quoting *SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, ¶ 39 (App. 2000)). The plaintiff bears the burden of demonstrating the defendant will likely reengage in the behavior the plaintiff is seeking to enjoin. *Id.* She may do so by pointing to three factors: (1) any such conduct in the past, (2) continuing conduct despite the plaintiff's action against the defendant, and (3) the fact that any cessation of such conduct was involuntary. *See id.* If the conduct has stopped, the case is not automatically moot. *Id.* But there must be "some cognizable danger of recurrent violation, something more than the mere possibility," to avoid a conclusion that the case is moot. *Id.* (quoting *Winokur v. Bell Fed. Sav. & Loan Ass'n*, 560 F.2d 271, 274 (7th Cir. 1977)).

¶6 As to the first factor, Rose argues that there is a high possibility Payson will continue to improperly include emergency clauses to avoid the referendum process. But she has not demonstrated that there is any chance—let alone more than a mere possibility—that Payson will reenact the resolution at issue. *See Modular Mining Sys., Inc.*, 221 Ariz. 515, ¶ 12. Because the repeal occurred after the appeal began, nothing in the superior court record would allow us to draw that conclusion. Nor has either party asked us to take judicial notice of any facts that would allow us to do so. *See* Ariz. R. Evid. 201(b)-(d). And while Rose points to past conduct suggesting that Payson might use emergency clauses in the future to avoid a referendum, we cannot assume that legislation and its underlying events would bear any meaningful similarities to this case.

¶7 Similarly, Rose has pointed to no continuing conduct applicable to this resolution. Thus, the second factor counsels against her argument as well. Instead, her argument amounts to a request that we issue an advisory opinion about the types of conduct that justify an emergency clause. We will not do so. *See Welch*, 251 Ariz. 519, ¶ 12.

¶8 As to the third factor, Rose argues that the conditions underlying Payson's repeal of the resolution support concluding that the case is not moot. In support, she cites *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, which explains that a defendant's "voluntary cessation" of allegedly wrongful conduct "will not automatically moot the injunctive remedy," especially when the conduct stops after the litigation begins. 128 Ariz. 483, 486 (App. 1981); *see also Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 141 (1988) (stating that defendant generally cannot moot case through "its own voluntary conduct").

¶9 Rose's argument is not entirely consistent. On one hand, she argues, Payson voluntarily repealed the resolution post-appeal, making her injunctive-relief request not automatically moot. *See Babbitt*, 128 Ariz. at 486. On the other hand, she argues that the repeal was involuntary because it was necessitated by bond-market conditions and therefore unrelated to the litigation. *See id.* (including "involuntary cessation" of conduct as factor that may help demonstrate likelihood defendant will reengage in behavior plaintiff is seeking to enjoin). In her view, it follows that Payson will likely continue to use emergency clauses to avoid the referendum process.

¶10 Under these circumstances, the voluntariness—or lack thereof—of Payson's repeal has minimal relevance. Rose still needs to demonstrate that Payson will continue its allegedly wrongful conduct. *Id.* But she has not shown any continuing efforts toward reenacting the resolution or improperly using an emergency clause to do so. Rose has therefore failed to carry her burden of demonstrating beyond a mere possibility that the conduct will recur. *See Modular Mining Sys., Inc.*, 221 Ariz. 515, ¶ 12.

MOOTNESS EXCEPTIONS

¶11 Rose also argues that even if the repeal moots her case, we should still address her appeal because it raises issues of "exceptional public importance" that are "capable of repetition while evading review." *See Kondaur Cap. Corp.*, 235 Ariz. 189, ¶ 8. Pointing to the fact that emergency clauses allow the government to bypass the thirty-day referendum window, Rose asserts that such challenges will almost never

receive appellate review until it is too late. *See City of Flagstaff v. Mangum*, 164 Ariz. 395, 399-400 (1990) (deciding issues on qualified-electors definition and method of calculating valid signatures despite untimely initiative petition rendering such issues moot); *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, ¶ 14 (2022) (explaining that Arizona Constitution exempts from referendum "laws *immediately necessary* for the preservation of the public peace, health, or safety" (emphasis added) (quoting Ariz. Const. art. IV, pt. 1, § 1(3))).

¶12 We agree with Rose that, as a general matter, emergency clauses and referendum prohibitions are matters of great public importance. *See* Ariz. Const. art. IV, pt. 1, § 1(3) (providing for right of referendum except for "laws immediately necessary for the preservation of the public peace, health or safety"). But her particular challenges to the resolution's emergency clause and referendum prohibition are not of great public importance because the resolution is no longer in effect.

¶13 We also do not agree that the issues she raises are capable of repetition yet evading review. Rose has not suggested that government entities routinely repeal measures including an allegedly illegal emergency clause to avoid appellate review. And the issue would have been appropriate for appellate review had Payson not done so here. Nothing prevents this court from deciding the relevant issues in a subsequent case where the law at issue has not been repealed, especially given the court's power to impose a stay that could prevent a similar resolution from taking effect.

ATTORNEY FEES AND MOOTNESS

¶14 Rose argues that her attorney-fees requests also prevent her case from being moot. At the superior court and on appeal, Rose seeks attorney fees under the private-attorney-general doctrine. The private-attorney-general doctrine "allows a court to award fees to 'a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance.'" *Ariz. Free Enter. Club*, 253 Ariz. 478, ¶ 37 (quoting *Ansley v. Banner Health Network*, 248 Ariz. 143, ¶ 39 (2020)).

¶15 Rose relies on *Fisher v. Maricopa County Stadium District*, 185 Ariz. 116 (App. 1995). In *Fisher*, we concluded that despite the enactment of a sales tax the appellant had sought to invalidate, the case was not moot on appeal because the appellant had preserved the issues of statutory damages and attorney fees. *Id.* at 119. There, the appellant did not seek to

invalidate the tax he had previously challenged before the superior court as violating the Open Meeting Law, A.R.S. § 38-431.01(A). *Fisher*, 185 Ariz. at 119. Instead, he sought recovery on appeal of his attorney fees and damages under the Open Meeting Law's enforcement statute. *Id.*; A.R.S. § 38-431.07(A).

¶16 This case is not *Fisher*. In *Fisher*, the appellant did not need to vindicate a right to receive fees under the Open Meeting Law. *Fisher*, 185 Ariz. at 119; § 38-431.07(A). He needed only to prevail. *Fisher*, 185 Ariz. at 119; § 38-431.07(A). Although Rose argues she is entitled to fees because she should have vindicated a right at the superior court, the reality is she did not. Nor could she receive fees on appeal. Even if she prevailed on the merits, the law has already been repealed, so she could not vindicate any rights. *See Ariz. Free Enter. Club*, 253 Ariz. 478, ¶ 37. Her requests for fees under the private-attorney-general doctrine therefore do not prevent us from concluding her case is moot.

DISPOSITION

¶17 We dismiss Rose's appeal. Payson requests its attorney fees on appeal under A.R.S. §§ 12-341, 12-349. We deny its request in our discretion.