22-16675

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA RENTAL HOUSING ASSOCIATION, MARY MONTANO, and TRANG HO,

Plaintiffs and Appellants,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1 through 20, inclusive,

Defendants and Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:21-cv-01394-JAM-JDP
The Honorable John A. Mendez, Judge

ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs California Rental Housing Association et al. challenge California's temporary moratorium on unlawful detainer evictions, enacted in response to the COVID-19 pandemic. However, unlawful detainer evictions resumed on October 1, 2021, and additional rental protections ended on June 30, 2022. Because the challenged moratorium had expired on its own terms, the district court correctly dismissed this lawsuit as moot. Plaintiffs claim that this appeal remains a live case or controversy under two exceptions to Article III mootness principles: the voluntary cessation doctrine and the "capable of repetition, yet evading review" doctrine. However, two en banc decisions of this Court squarely foreclose Plaintiffs' argument and demonstrate that the district court did not err in dismissing the case.

In *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1198–1199 (9th Cir. 2019) (en banc), this Court recognized that the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal unless there is some evidence in the record that the Legislature intends to reenact the challenged legislation. Here, the unlawful detainer moratorium ended on October 1, 2021, and was not renewed by the Legislature despite significant

surges of COVID-19 during the intervening period. In fact, the moratorium had been steadily phasing out since September 1, 2020, and there is nothing in the record that would indicate that the Legislature is likely to reinstate a moratorium that expired nearly a year and a half ago.

Similarly, in *Brach v. Newsom*, 38 F.4th 6, 12-15 (9th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 854, this Court found moot a challenge to the Governor's executive orders regarding school operations during the COVID-19 pandemic based on factors that are equally applicable to the eviction moratorium at issue here—that the public health landscape has changed dramatically since 2020, the State did not reinstate the challenged policy during recent surges of the Omicron COVID-19 variant, and the decision to end the challenged policy is entrenched because the legislation here has expired, just like the challenged orders in *Brach*.

Accordingly, this Court should affirm the decision of the district court.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On October 12, 2022, the court dismissed the action for lack of subject matter jurisdiction. ER-003-014. Plaintiffs appealed on October 24. ER-041-044. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

1. Did the district court err in dismissing Plaintiffs' lawsuit as moot once unlawful detainer evictions had resumed in California?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. COVID-19 Emergency

On March 4, 2020, Governor Newsom proclaimed a state of emergency in California due to the outbreak of COVID-19. SER-008-012. As of the date the summary judgment motion was briefed in mid-2022, COVID-19 had killed more than a million Americans, including over 90,000 in California. SER-114, ¶ 19. The COVID-19 pandemic presented "the largest public health crisis since the Great Influenza Epidemic of 1918." *Brach*, 38 F.4th at 9. And throughout the pandemic, California appropriately treated it as such. Specifically, the Governor and other state and local officials took numerous actions to address the serious public health, economic, and other impacts of this unprecedented emergency. These measures included capacity restrictions on stores, restaurants, and other business, masking requirements, and other measures to stop the spread of the disease. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1132-36 (9th Cir. 2021) (describing state efforts), *vacated and remanded*, 141 S. Ct. 2563

(2021). They also included state laws placing a temporary moratorium on some unlawful detainer actions—a statutorily created expedited eviction process—intended to slow the spread of COVID-19 by helping eligible tenants with COVID-19-related hardships remain in their home and out of crowded shelters.

B. Evictions in California Before COVID-19

The primary way evictions occur in California is via unlawful detainer.[1] Unlawful detainer is a summary civil proceeding in state court for the restoration of possession of real property (i.e., eviction) for which California law provides expedited judicial procedures. *See generally Titus v. Canyon Lake Prop. Owners Ass'n*, 118 Cal.App.4th 906, 914 (2004), *disapproved of on other grounds by Brown v. USA Taekwondo*, 11 Cal.5th 204, 209 (2021). In unlawful detainer actions, "[t]ime periods for pleading are shorter than ordinary civil actions, the matter is set for trial more quickly and entitled to priority on the trial calendar, and expeditious enforcement procedures are available." *Id.* A landlord can pursue an unlawful detainer

[1] Evictions can also occur via ejectment, which is a common law remedy to regain possession of property. *Rickley v. Goodfriend*, 212 Cal.App.4th 1136, 1154 (2013). Evictions via ejectment were unaffected by the moratorium at issue here.

action to evict a tenant in certain statutorily defined situations, including if the tenant continues in possession of the property after a default in the payment of rent, after the termination of the lease term, or after failing to perform other conditions of the lease. *See* Cal. Code Civ. Proc., § 1161.[2]

Before a landlord can pursue an unlawful detainer action for nonpayment of rent, the landlord must serve the tenant with a three-day notice of termination of the lease, and the tenant has a right to cure the default by paying the rent due during the notice period. §§ 1161(2)-(3); 1162. The tenant commits an "unlawful detainer" only if the tenant fails to cure the default within this notice period. *Id.*; *see also* § 1161.5. If a landlord serves notice of termination of the lease and the tenant fails to cure the default, the landlord can file a complaint in Superior Court for unlawful detainer. § 1166.

C. Evictions in California in Response to the COVID-19 Pandemic

Early in the COVID-19 pandemic, state officials recognized the public health risk of a potential eviction crisis brought about by the economic disruption caused by COVID-19. *See* SER-119-120, ¶¶ 33-35. In response,

[2] All subsequent statutory citations are to the California Code of Civil Procedure, unless otherwise indicated.

the Governor, Legislature, and court system acted to temporarily halt unlawful detainer actions against eligible tenants. These actions served the same function as other public health and emergency orders that required certain businesses to close or reduce capacity, and prohibited non-essential gatherings. As the Centers for Disease Control has explained, "[i]n the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease" because they reduce the likelihood that people will be forced out of their homes and into crowded shelters where they would face a substantially increased risk of contracting COVID-19 or transmitting it to others. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,294 (Sept. 4, 2020). Moreover, even when an eviction does not lead to homelessness, many evicted renters "double up" with friends or family, and "more people in a household increases the opportunity for someone in the household to be infected and bring it into the household . . . [and] lessens the opportunity for an infected individual to isolate within the home." SER-117, ¶ 27, SER-111, ¶ 13. Accordingly, the federal government, the majority of states, and many localities temporarily barred evictions of tenants facing financial hardships due to COVID-19. SER-126, ¶ 53.

Eviction protections were particularly important in California, where the unemployment rate surged from approximately 4% in February 2020 to about 16% in April 2020 as a result of the pandemic, and the number of initial monthly claims for unemployment benefits grew from about 165,000 to 2.5 million in the same time period. SER-199, ¶¶ 3-5.

1. The State's initial response via executive order and Judicial Council activity

On March 4, 2020, Governor Newsom proclaimed a "State of Emergency" to address the pandemic's spread throughout California. SER-008-012. (The State of Emergency concluded on February 28, 2023.)[3] On March 16, 2020, the Governor issued executive order N-28-20, which among other things, advised vulnerable Californians to self-quarantine or self-isolate at home to reduce transmission of COVID-19, and recognized that homelessness could further exacerbate vulnerability to the disease. SER-014-017. The order did not itself limit or prohibit any evictions for nonpayment of rent or relieve any tenant of the obligation to pay rent. Instead, it removed state law barriers from local governments that wished to

[3] Office of Governor Gavin Newsom, Governor Newsom Marks End of California's COVID-19 State of Emergency (Feb. 28, 2023), https://www.gov.ca.gov/2023/02/28/governor-newsom-marks-end-of-californias-covid-19-state-of-emergency/.

enact their own emergency eviction protections. *Id*. The order was twice extended and expired on September 30, 2020. SER-019-032.

On March 19, 2020, the Governor issued executive order N-33-20, which directed all residents to immediately heed state public health directives, including those requiring all individuals living in California to stay home or at their place of residence except as needed to maintain operations of certain federal critical infrastructure sectors. The directive's "goal [was] simple . . . to bend the curve, and disrupt the spread of the [COVID-19] virus." SER-034-035.

On March 27, 2020, the Governor issued executive order N-37-20, which recognized that minimizing evictions was critical to reducing the spread of COVID-19. SER-037-039. The order made two changes to the rules for unlawful detainer actions. It temporarily extended by sixty days the deadline for tenants to respond to unlawful detainer complaints if they could document an inability to pay rent because of a COVID-19 hardship. *Id*. The order also prohibited the enforcement of writs to evict such tenants for nonpayment of rent. *Id*. The order did not relieve any tenant of liability for unpaid rent, and it expired on May 31, 2020. *Id*.

Finally, on April 6, 2020, the Judicial Council of California (the rule-making arm of the California court system) enacted Emergency Rule 1,

which ran through the end of September 2020, and also placed restrictions on unlawful detainer evictions. SER-041-042. First, the rule provided that "[a] court may not issue a summons on a complaint for unlawful detainer unless the court finds, in its discretion and on the record, that the action is necessary to protect public health and safety." SER-041. Second, the rule provided that a court may not enter a default or a default judgment for restitution in an unlawful detainer action unless the court found that the action was necessary to protect public health and safety, and that the defendant failed to appear within the time provided by law. *Id*. Third, the rule provided that, if a defendant appeared, the court may not set a trial date earlier than 60 days after a request for trial was made unless the court found that an earlier trial date was necessary to protect public health and safety, and that any trial already set was continued at least 60 days. *Id*.

Plaintiffs do not challenge any of these orders.

2. Legislative efforts on eviction protections to prevent disease spread

On September 1, 2020, "[r]ecognizing that eviction and homelessness would leave residents more vulnerable to COVID-19 due to living in close quarters in shelters, or on the street, the State Legislature enacted eviction protections" in Assembly Bill 3088, known as the COVID-19 Tenant Relief

Act ("Act"). 2020 Cal.Stat. c. 37 (A.B.3088); *see also* Dkt. 10:6-33 (text of AB 3088). The Legislature was concerned that the "COVID-19 pandemic has caused widespread unemployment, business closures, and an economic contraction that threatens to metastasize into a potentially catastrophic wave of evictions and foreclosures" and saw AB 3088 as "a temporary, stop-gap solution intended to stave off the worst levels of eviction and foreclosure." SER-044-045; *see also* SER-069 (discussing widespread job and income losses and need to prevent "a potential wave of evictions.")

The Act established temporary restrictions on unlawful detainer evictions of tenants who could demonstrate hardship related to COVID-19. § 1179.01 et seq. The Legislature also passed SB 91 on January 29, 2021 and AB 832 on June 28, 2021, each of which modified the Act and provided temporary extensions of its protections. *See* Dkt. 10:35-98 (text of SB 91 and AB 832); SER-076-102 (discussing need for extensions).

To qualify for the Act's protections, tenants had to provide to their landlord a declaration attesting, under the penalty of perjury, that they were unable to pay rent because of a qualifying COVID-19 hardship. §§ 1179.02(d), 1179.03(b)-(c), 1179.04. If a tenant qualified, a court could not find the tenant guilty of unlawful detainer for unpaid rent between March 1 and August 31, 2020, which the Act defined as the "protected time

period." §§ 1179.02(f), 1179.03(b). The Act then provided for a "transition time period," which began September 1, 2020 and, following two statutory extensions, expired on September 30, 2021. During this time, the Act required qualifying tenants to pay a portion of rent due to avoid eviction by unlawful detainer. §§ 1179.02(i), 1179.03(g). Specifically, it provided that the tenant could not be evicted by unlawful detainer for rent that came due during the "transition time period" if, by the end of that period, the tenant had paid at least 25% of each transition-period rental payment demanded. §§ 1179.02(i), 1179.03(g). The Act defined the "transition time period" and the "protected time period" together as the "covered time period." § 1179.02(a). When the covered time period expired on September 30, 2021, unlawful detainer actions for nonpayment of current rent were permitted to resume.

Moreover, even during the covered time period, the Act permitted unlawful detainer evictions to continue for reasons other than a tenant's inability to pay rent because of a COVID-19-related hardship. § 1179.03.5(a)(3). Permissible reasons for unlawful detainer evictions included "just cause" evictions, which could occur for many reasons, such as a tenant's criminal activity, an improper assignment or sublet of the property, refusal to allow the landlord access to the property, or the use of

the premises for an unlawful purpose. *Id.*; Cal. Civ. Code, § 1946.2(b)(1). In addition, throughout the covered time period the Act permitted unlawful detailer actions due to the withdrawal of the residential real property from the rental market or a sale of the property to a new owner who intends to occupy the property. § 1179.03.5(a)(3); Cal. Civ. Code, § 1946.2(b)(2).

The Act did not forgive any tenant's liability for nonpayment of rent. § 1179.03. To the contrary, the Act eliminated the monetary limits of small claims court, allowing landlords to bring actions against tenants for nonpayment of rent that occurred between March 1, 2020 and September 30, 2021, related to the COVID-19 pandemic. § 116.223.

3. Post-moratorium rent relief and landlord assistance programs

The moratorium established by AB 3088, and extended by SB 91 and AB 832, has ended. Unlawful detainer evictions for nonpayment of rent resumed on October 1, 2021, when the Act's covered time period ended. *See, e.g.*, § 1179.11 (procedures for unlawful detainer actions after October 1, 2021). Since that time, tenants who fail to pay the rent due each month have been subject to eviction.

Moreover, for unpaid rent, the State created the California COVID-19 Rent Relief Program (Relief Program), which—with the assistance of

federal funding—covered 100% of rent owed for eligible tenants. Cal. Health & Saf. Code, §§ 50897 et seq., 50897.1(d)-(f). Under the Relief Program, both renters and landlords could apply for assistance. *Id.*, § 50897.1(d), (e), (h). And landlords seeking to initiate unlawful detainer proceedings for unpaid rent that accumulated because of COVID-19 hardship were required to first apply for rental assistance, and allowed to proceed with the eviction proceeding only if the application was denied. Code Civ. Proc., §§ 1179.09, 1179.11. Plaintiffs did not challenge in their complaint the requirement that landlords participate in the Relief Program or the related eviction protections, which expired on June 30, 2022.[4]

As of the summary judgment briefing in mid-2022, the State and local government partners have distributed over $4.5 billion in rental assistance to

[4] Although the requirement that landlords apply for rental assistance before evicting expired on March 31, 2022, AB 2179 extended eviction protections until June 30, 2022 for tenants who had applied for rental assistance before March 31, 2022 and were waiting on the State to process their application. § 1179.11, *see also* Dkt. 10:100-108 (text of AB 2179). At the time AB 2179 was enacted, there were "between 165,000 and 190,000 California households with viable applications for emergency rental assistance still pending." SER-104. "[A]bsent legislative action," those households were "at high risk of losing their homes for nonpayment of rent, even though full compensation for the landlord may be only days away." *Id.*; *see also* SER-213, ¶ 11 (discussing backlog).

over 400,000 households. SER-212-213, ¶¶ 9-10. Indeed, one of the named plaintiffs, Mary Montano, received over $80,000 in rental assistance from the State, while another, Trang Ho, received over $50,000. SER-213, ¶ 13.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their lawsuit on August 5, 2021, challenging AB 832 on Contract Clause and takings grounds. District Ct. Dkt. 1. Soon thereafter, Plaintiffs filed the operative first amended complaint, adding a due process claim. SER-214-227. Plaintiffs did not move for a preliminary injunction, nor did they seek expedited summary judgment briefing. On January 6, 2022, the district court on its own initiative set a briefing schedule on cross-motions for summary judgment. District Ct. Dkt. 9.

In October 2022, after the summary judgment briefing had concluded, the district court dismissed the complaint as moot, and denied both motions for summary judgment as moot. ER-013-014. The court noted that the moratorium had expired, with any remaining restrictions ending in June 2022, and that neither the voluntary cessation nor the "capable of repetition, yet evading review" exceptions to mootness applied. ER-007.

Regarding voluntary cessation, the court found "that the State has met its burden to prove upon the record that the challenged action cannot reasonably be expected to recur." ER-008. The court noted that the

Legislature had allowed the last eviction statute "to expire" which suggests "it is unlikely to renew similar restrictions in the future." ER-009. "Further, the record shows that the State's approach to unlawful detainers has been 'steady and consistent' in its gradual tapering" "until all restrictions were finally lifted on June 30, 2022." ER-009-010. The court also rejected Plaintiffs' claims that the case was still live because "the pandemic is far from over," that there was still a state of emergency, and that the State had not "renounced" the past use of the moratorium. ER-010-011.

Regarding "capable of repetition, yet evading review," the court found that the "while each moratorium extension lasted only months, the extensions were consecutive" such that there was time to litigate the matter before the moratorium expired. ER-0012. In any event, "[e]ven if the moratorium were too short to allow full litigation, Plaintiffs would not prevail on the second prong of the capable of repetition analysis." *Id*. The court relied on *Brach*, which reasoned that the voluntary cessation and capable-of-repetition exception are "analogous" to one another. *Id*. Because the "challenged moratorium has already expired and because the public health landscape is drastically different from the start of the pandemic, there

is no reasonable expectation that Plaintiffs will be subjected to the challenged conduct again." ER-0012-0013.[5]

Plaintiffs filed a notice of appeal on October 24, 2022. ER-041.

SUMMARY OF THE ARGUMENT

Under Article III, federal courts may adjudicate only actual, ongoing cases or controversies. Plaintiffs acknowledge that California's COVID-19 eviction moratorium has expired, but nevertheless contends that the voluntary cessation and "capable of repetition, yet evading review" exceptions to mootness apply. The district court correctly rejected these arguments.

In *Chambers*, this Court recognized that the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot. Plaintiffs can rebut that presumption only if there is a reasonable expectation, based on evidence in the record, that the Legislature intends to reenact the challenged legislation. Plaintiffs are unable to meet that standard. Here, the unlawful detainer moratorium ended on October 1, 2021, and had been steadily phasing out since September 1, 2020. The

[5] The district court also rejected, on Eleventh Amendment grounds, Plaintiffs' theory that its claim for nominal damages saved the action from mootness. ER-013. Plaintiffs do not raise this argument on appeal.

Legislature did not reimpose a moratorium despite significant surges of COVID-19 in the intervening period, and nothing in the record would indicate that the Legislature would reinstate a moratorium that expired nearly a year and a half ago.

Similarly, in *Brach*, this Court found moot a challenge to the Governor's executive orders on school operations during the COVID-19 pandemic based on factors that are equally applicable to the eviction moratorium. California's approach to the unlawful detainer moratorium has been steady and consistent, gradually loosening over time, and ending on October 1, 2021. The State did not reinstate the challenged policy during past surges, and the public health landscape has changed dramatically since the policy was imposed, with vaccines and other measures to combat the virus. Finally, California's decision to end the unlawful detainer moratorium is "entrenched" and not "easily abandoned or altered in the future," 38 F.4th at 13, because the challenged policy here was imposed by legislation that the Legislature allowed to expire.

Plaintiffs' claim also fails both prongs of the "capable of repetition, yet evading review" analysis. This issue has not evaded review because there are published decisions from this Court and numerous other courts on the constitutionality of COVID-19 eviction moratoria. The reason this case did

not resolve before the moratorium expired is that Plaintiffs decided to wait more than a year to file their complaint and did not move forward on the matter until the district court, on its own initiative, set a briefing schedule for summary judgment. As to the second prong of the analysis, which is analogous to the voluntary cessation doctrine, the moratorium and state of emergency have expired, and given that the moratorium was enacted in response to the country's worst public health crisis in more than a century, there is no reasonable expectation that the Legislature will enact a new moratorium.

STANDARD OF REVIEW

This Court reviews "the district court's dismissal on the grounds of mootness de novo." *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010.)

ARGUMENT

I. PLAINTIFFS' LAWSUIT IS MOOT

The district court correctly dismissed Plaintiffs' lawsuit as moot. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable

to the defendant and likely to be redressed by a favorable judicial decision." *Id*. "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Id*.; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed") (quotation omitted).

Plaintiffs admit that the moratorium on unlawful detainer evictions "has expired and . . . has not [been] extended." Appellants' Opening Brief (AOB) 3. Nonetheless, Plaintiffs argue that two exceptions to mootness apply—the voluntary cessation and the "capable of repetition, yet evading review" doctrines. However, neither doctrine applies here.[6]

[6] In their opening brief, Plaintiffs repeatedly reference AB 2179, the extension of COVID-19 eviction protections for certain individuals waiting for state rental assistance. *See, e.g.*, AOB 18. But Plaintiffs did not challenge AB 2179 in their complaint, *see* SER-214-227, and it is therefore not properly before the court. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-92 (9th Cir. 2000); *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc) ("[W]here, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court."). In any event, the protections of AB 2179 expired on June 30, 2022, so even if Plaintiffs had included allegations about AB 2179 in their complaint, the case would still be moot.

A. The Voluntary Cessation Doctrine Is Inapplicable

1. Recent precedent forecloses Plaintiffs' claims

The voluntary cessation doctrine aims to prevent gamesmanship. As the Supreme Court has explained, a defendant cannot be permitted to "automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013) (citation omitted); *see also Knox v. Service Employees' Int'l Union*, 567 U.S. 298, 307 (2012) (when conduct is voluntarily stopped, "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed").

However, this Court "treat[s] the voluntary cessation of challenged conduct by government officials with more solicitude . . . than similar action by private parties." *Chambers*, 941 F.3d at 1198 (quotation omitted). Courts "should assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire." *Id*. at 1199. "For this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Id*. at 1198; *see also Rosebrock v. Mathis*, 745

F.3d 963, 971 (9th Cir. 2014) ("A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed") (quotation omitted). Accordingly, courts "should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Chambers*, 941 F.3d at 1199. And "a determination that such a reasonable expectation exists must be founded in the record . . . rather than on speculation alone." *Id*.

Under *Chambers*, the burden thus falls on Plaintiffs to rebut the presumption of mootness and demonstrate a reasonable likelihood of reenactment. 941 F.3d at 1199; *see also Rentberry, Inc. v. City of Seattle*, 814 F. App'x 309, 309 (9th Cir. 2020) (mem.) (finding that parties opposing mootness "have not met their burden"), *cert. denied*, 141 S. Ct. 1061 (2021). Plaintiffs do not (and cannot) meet that burden. There is no evidence in the record that a moratorium is likely to be reenacted. Indeed, all indications are to the contrary. In late 2021 and in 2022, there were significant waves of COVID-19 infections due to the Delta and Omicron variants. SER-124, ¶ 46. Nonetheless, the State did not extend the moratorium on unlawful detainer actions (or renew any of its other public health orders) at that time.

As the district court noted, the State initially enacted AB 3088, and extended the moratorium several times. ER-008-009. That the State allowed AB 2179 to expire on June 30, 2022 suggests, therefore, that it is unlikely to renew similar restrictions in the future. *Chambers*, 941 F.3d at 1199; *see also Chem. Prod. & Distribs. v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) ("As a general rule, if a challenged law is repealed or expires, the case becomes moot. The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted") (citation omitted).

Although Plaintiffs speculate that the State might reimpose an eviction moratorium (despite letting it expire more than a year ago), "speculation alone" is not enough under *Chambers*. 941 F.3d at 1199. This is because the "rigors of the legislative process bespeak finality," such that courts may not presume that repealed or lapsed legislation will be re-enacted. *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1038 (9th Cir. 2018) (internal quotation marks and alteration omitted); *see also N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (dismissing Second Amendment challenge as moot after New York amended its firearm licensing statute.) Moreover, the COVID-19 state of emergency has expired. It is highly unlikely that the Legislature would enact a new moratorium to

address COVID-19 impacts when the Governor has terminated the state of emergency proclaimed in response to the COVID-19 pandemic. Accordingly, under *Chambers*, because the Legislature allowed the moratorium to expire, and there is nothing but deeply implausible speculation that the Legislature might reenact a new one, the voluntary cessation exception does not apply.

Brach also supports the district court's rejection of any voluntary cessation exception to mootness. In that case, this Court, sitting en banc, found moot a challenge to the Governor's executive orders on school operations during the COVID-19 pandemic, based on factors that are equally applicable to the eviction moratorium at issue here. 38 F.4th at 12.

Like the school policies at issue in *Brach*, "California's approach to [the unlawful detainer moratorium] has been steady and consistent," 38 F.4th at 15, gradually loosening over time. California's unlawful detainer moratorium ended on October 1, 2021, and it has not been renewed despite significant surges of COVID-19 during the intervening period. SER-124 (discussing waves of COVID-19 in December 2021 and March 2022.) To the contrary, the moratorium has been steadily phasing out since September 1, 2020. While tenants with qualifying COVID-19 hardships did not need to pay any rent to prevent an unlawful detainer eviction between March 1 and

August 31, 2020, §§ 1179.02(f), 1179.03(b), the Act provided for a "transition time period," beginning September 1, 2020 and which, following two statutory extensions, expired on September 30, 2021. Landlords could evict tenants who failed to pay at least 25 percent of their rent during that period. §§ 1179.02(i), 1179.03(g). And, as stated above, after October 1, 2021, the Act's covered time period expired, and since that time tenants have had to pay all rent due each month to avoid eviction. §§ 1179.03(g); 1179.03.5. And while AB 2179 provided some additional protection (until June 30, 2022) for those tenants that had pending applications for rental assistance, those protections have likewise ended.

Moreover, like the school policies at issue in *Brach*, the State did not reinstate the unlawful detainer moratorium during "the surge of the Omicron COVID-19 variant, even while the State's case count soared well past numbers reached early in the pandemic." *Brach*, 38 F.4th at 14. The decision by the Legislature and the Governor not to reinstate the moratorium even during "those waves of increased infection" is a "powerful signal that whatever course the COVID-19 pandemic takes, a return to restrictions like those challenged here is highly unlikely." *Tuck's Rest. & Bar v. Newsom*, No. 220CV02256KJMCKD, 2022 WL 5063861, at *4 (E.D. Cal. Oct. 4, 2022). California's decision to end the unlawful detainer moratorium is

therefore "entrenched" and not "easily abandoned or altered in the future." *Brach*, 38 F.4th at 13.

Moreover, as the court noted in *Brach*, the public health landscape has changed since the unlawful detainer moratorium was imposed, and "availability of vaccines and other measures to combat the virus have led to a significant change in the relevant circumstances." 38 F.4th at 14. Because vaccines, along with "new innovations, such as treatments (including monoclonal antibodies and antiviral medication) for high-risk people," have "dramatically reduce[d] the risk of hospitalization and death" from COVID-19, there is now much less need for "broad-based public health protections" like the moratorium. SER-124.

Finally, the extension of certain protections in AB 2179—which, again, is not before this Court—provides no basis for the mootness exemption Plaintiffs seek. AB 2179 was enacted for a specific reason that will not recur. At the time the bill was being enacted, there were "between 165,000 and 190,000 California households with viable applications for emergency rental assistance still pending. . . . As a result, absent legislative action . . ., those households [were] at high risk of losing their homes for nonpayment of rent, even though full compensation for the landlord may be only days away." SER-104; *see also* SER-213, ¶ 11 (discussing backlog). That

backlog no longer exists, SER-213, ¶ 12, and the application deadline has long since closed. §§ 1179.09; 1179.11.

Accordingly, the voluntary cessation doctrine does not apply here.

2. Plaintiffs' arguments to the contrary are unconvincing

None of Plaintiffs' arguments rebut this analysis. Plaintiffs assert that the State has "expressed no regrets" about the moratorium and points to its "defiant defense" of the moratorium as a reason why it could recur. AOB 15-16. But Plaintiffs cite no authority suggesting that a State must apologize for a law or concede an expired statute's unconstitutionality in order to raise a mootness defense. That is not the law. On the contrary, courts "presume that a government entity is acting in good faith when it changes its policy," without any requirement that the government express any form of contrition for its prior approach. *Rosebrock*, 745 F.3d at 971.

In a similar vein, Plaintiffs argue that the State has not "renounced" the moratorium, arguing such renouncement is required under *Brach*. AOB 14. But as the district court explained, Plaintiffs "read[s] too much into *Brach*. Although the Ninth Circuit found it compelling that the State 'renounce[d] its use of school closure orders in the future,' the court did not require an explicit renouncement for its analysis." ER-0010. The district court

correctly noted that "[t]he renouncement was significant only because it demonstrated the State's 'commitment' to keeping schools open. As such, where the State shows through other means that it is committed to quitting the challenged conduct, the State does need an explicit announcement denouncing its previous conduct." *Id*. (citation omitted). Here, of course, the Legislature allowed the moratorium to expire, has not reinstated it for more than a year despite surges of COVID-19, and the state of emergency is itself over, all demonstrating that there is no "reasonable expectation" that the Legislature would enact a new moratorium.

Finally, Plaintiffs cite *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), for the principle that government defendants should get "no special solicitude" or "presumption of good faith." AOB 16. But that case concerned a stay of a judicial decision that would have put a repealed regulation back in force. 142 S. Ct. at 2604-2606. It has nothing to do with the situation here, where the legislature allowed a law to expire years ago and legislative action is required to renew it. The Supreme Court has repeatedly held that the expiration of legislation moots a case. *See Chambers*, 941 F.3d at 1198 (citing *Lewis*, 494 U.S. at 478, *Burke v. Barnes*, 479 U.S. 361, 363 (1987), and *Kremens v. Bartley*, 431 U.S. 119, 127-128 (1977)); *see also N.Y. State Rifle & Pistol Ass'n,* 140 S. Ct. at 1526 (same).

B. The "Capable of Repetition, Yet Evading Review Doctrine" Also Does Not Apply

Alternatively, Plaintiffs contends that the eviction moratorium fits within the "capable of repetition, yet evading review" exception to mootness. AOB 21-23. This exception requires that "(1) the duration of the challenged action or injury must be too short to be fully litigated; and (2) there must be a reasonable likelihood that the same party will be subject to the action again." *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1287 (9th Cir. 2013) (internal quotation marks omitted). As Plaintiffs admit, this exception is reserved for "exceptional" circumstances. AOB 21 (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016)).

Neither requirement is met here. As to the first prong, this issue has not evaded review: there are published decisions from this Court and the Eighth Circuit on the constitutionality of COVID-19 eviction moratoria, as well as numerous district court decisions from across the country.[7] And this

[7] *See, e.g.*, *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1699 (2022); *Heights Apartments v. Walz*, 30 F.4th 720 (8th Cir. 2022); *Williams v. Alameda County*, No. 3:22-CV-01274-LB, _ F. Supp. 3d __, 2022 WL 17169833 (N.D. Cal. Nov. 22, 2022); *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV2106311DDPJEMX, 2022 WL 17069822 (C.D. Cal. Nov. 17, 2022)

Court is set to hear argument on challenges to other COVID-19 eviction moratoria in April.[8] That *this* case did not resolve before the moratorium expired on October 1, 2021 is due entirely to Plaintiffs' decisions to wait more than a year to file its case and then not move forward on the matter until the district court, on its own initiative, set a briefing schedule for summary judgment. District Ct. Dkt. 9.

Moreover, as to the second prong, the "rationale for rejecting this exception mirrors much of [the] analysis regarding the voluntary cessation exception." *Brach*, 38 F.4th at 15 (noting that the voluntary cessation and the "capable of repetition yet evading review" exceptions are "analogous"). As discussed above, there is no "reasonable expectation" that Plaintiffs will be subject to an eviction moratorium again. Unlawful detainer evictions

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Stuart Mills Props., LLC v. City of Burbank, No. 222CV04246RGKAGR, 2022 WL 4493573 (C.D. Cal. Sept. 19, 2022); *Gallo v. D.C.*, 610 F.Supp.3d 73 (D.D.C. 2022); *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092 (D. Or. Feb. 3, 2022); *S. Cal. Rental Housing Ass'n v. County of San Diego,* 550 F. Supp. 3d 853 (S.D. Cal. 2021); *Jevons v. Inslee*, 561 F. Supp. 3d 1082 (E.D. Wash. 2021), *appeal pending*, No. 22-35050 (9th Cir.); *El Papel LLC v. Durkan*, No. 220CV01323RAJJRC, 2021 WL 4272323 (W.D. Wash. Sep. 15, 2021); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020); *Auracle Homes, L.L.C. v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020); *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 386 (D. Mass. 2020).

[8] *Jevons v. Inslee*, No. 22-35050; *El Papel, LLC v. City of Seattle*, No. 22-35656.

resumed on October 1, 2021, the extension for tenants waiting for rental assistance expired on June 30, 2022, and the state of emergency is now over. Nor has the State "retain[ed] authority to reinstate" the restrictions "at any time" as Plaintiffs suggest, AOB 23. That is true only in the narrow sense that it is always theoretically possible that expired legislation will be re-enacted. As this Court has repeatedly emphasized, however, that is not sufficient to avoid mootness. And the State enacted the moratorium in response to the country's worst public health crisis since 1918, *Brach*, 38 F.4th at 9, which in turn led to a fourfold explosion in the unemployment rate in California, and a fifteen-fold increase in claims for unemployment benefits. SER-199, ¶¶ 3-5. These circumstances are very unlikely to recur anytime soon, much less pose a "reasonable expectation" that the Legislature would craft and enact a new eviction moratorium.

CONCLUSION

This Court should affirm the judgment of the district court dismissing Plaintiffs' complaint as moot.

Dated: March 23, 2023

Respectfully submitted,

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22-16675

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA RENTAL HOUSING ASSOCIATION, MARY MONTANO, and TRANG HO,

Plaintiffs and Appellants,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1 through 20, inclusive,

Defendants and Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 23, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-16675

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Case Name: **California Rental Housing Association, et al. v. Gavin Newsom, et al.** No. **22-16675**

I hereby certify that on March 23, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF

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