No. 22-16675

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA RENTAL HOUSING ASSOCIATION, ET AL.,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:21-cv-01394-JAM-JDP
Hon. John A. Mendez

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellants state that no parent or publicly held corporation owns any stock in Appellants.

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I. INTRODUCTION

This is a federal civil rights challenge to California's eviction moratorium codified in the "COVID- 19 Tenant Relief Act." From 2020 to 2022, the Act barred rental housing owners from freely repossessing their properties due to tenants' nonpayment of rent based on tenants' self-certification of financial distress related to the pandemic. For nearly two years, State repeatedly extended the eviction moratorium even long the initial COVID-19 crisis had subsided. The moratorium forced landlords to house their tenants for free or at a fraction of the rent owed, with no hope or expectation of ever recovering rent arrears from largely judgment-proof tenants.

The moratorium devastated many landlords, both financially and emotionally, including Appellant Mary Montano. A senior citizen, Montano barely scrapes by on Social Security and can hardly afford her prescriptions because she had to subsidize a tenant living in her property to the tune of almost $60,000 in unpaid rent. With the California Rental Housing Association ("CRHA") and fellow landlord Trang Ho, Ms. Montano—collectively, "Owners"—filed suit against the Governor and Attorney General ("the State") on the grounds that the moratorium was unlawful under the Federal Constitution.

First, the moratorium allowed a tenant's ***self-certification*** of inability to pay—a self-certification that the landowner cannot meaningfully challenge—to cut off a landlord's right to evict for nonpayment of rent. In later extensions of law, the moratorium allowed a tenant's mere application for rental assistance to achieve the

same end: to block the owner's right to evict. It is hornbook law that "no man can be a judge in his own case consistent with the Due Process Clause." *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021). The law's scheme for depriving landlords of their eviction rights violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.*

Second, the moratorium resulted in a *per se* taking of landlords' property rights—namely, the fundamental right to exclude. The taking served no public use or purpose; it served only a private one: to benefit a subset of tenants who self-certified as unable to pay rent or who filed an application for rental assistance. The moratorium provided no mechanism for compensating landlords for the taking.

Third, the moratorium violated the Contracts Clause of the Federal Constitution, which bars state from impairing the obligations of contracts, Specifically, the law substantially impaired the contractual relationship between rental housing owners and their tenants. Owners' rental agreements entitle them to repossess their units when rent is not paid. But the moratorium rewrote those contracts to eliminate that right of repossession for a then-indefinite period of time, thereby extinguishing the contractual bargain that is the hallmark of all rental agreements. Owners argue that the State's substantial impairment of their leases was unreasonable under the circumstances.

The State and Owners filed cross-motions for summary judgment. But the district court denied the cross-motions as moot after concluding it lacked subject matter jurisdiction. The court reasoned that Owners' challenge itself was moot because the moratorium had—by the time of the court's decision—expired.

The district court erred. As explained below, while the moratorium has expired and the State has not since extended, the "voluntary cessation" and related "capable of repetition, yet evading review" exceptions confer jurisdiction on the federal court to adjudicate Owners' claims. The State engineered the moratorium to be short-lived, and the State never repudiated it in litigation or otherwise. Rather, it vigorously defended its eviction moratorium. Further, the constitutional questions that emergency-inspired moratoria like the one at issue in this appeal are easily capable of repetition yet evading judicial review. The eviction moratorium here lasted less than two years—too short for full judicial review—and the expectation that a moratorium will be imposed in the future under the pretense of the same or similar emergency is perfectly reasonable, especially given the State's stalwart defense of its actions. Given this reality, the district court was obliged to exercise jurisdiction and decide the Owners' claims.

The Court should reverse the district court's judgment dismissing this case, and remand it for consideration and ruling on the parties' cross-motions for summary judgment.

II. JURISDICTIONAL STATEMENT

The district court had original jurisdiction over Owners' federal claims pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 2201.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the district court rendered a final order dismissing Owners' action on October 12, 2022.

Excerpts of Record ("ER") 3. Owners filed their notice of appeal on October 24, 2022. ER 41. The appeal is timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

III. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err in dismissing Owners' action for lack of subject matter jurisdiction?

IV. STATEMENT OF THE CASE

A. The State Imposes—Through Repeated Extensions—an Eviction Moratorium Lasting Nearly Two Years

On August 31, 2020, the State enacted the "COVID-19 Tenant Relief Act" ("Act"), codified at Code of Civil Procedure section 1179.01, et seq. In relevant part, the Act bars evictions for the nonpayment of rent at the stroke of a tenant's pen. Cal. Code of Civ. Proc. §§ 1179.03-1179.03.5. The moratorium initially was intended to be temporary. But over the course of about two years, even as the pandemic's effects subsided, the State repeatedly extended the moratorium through a series of bills, with (at the time) no realistic end in sight for rental housing owners.

The first bill (AB 3088) was enacted on August 31, 2020, and added sections 1179.03 and 1179.03.5 to the Code of Civil Procedure. Under those sections, a tenant who timely submitted to his landlord a sworn "Declaration of COVID-19-related financial distress" claiming decreased income or increased expenses due to the pandemic was automatically protected against eviction for nonpayment of rent

that came due between March 1, 2020, and August 31, 2020. *See* Request for Judicial Notice ("RJN"), Exh. 1; Cal. Code of Civ. Proc. §§ 1179.03(b), 1179.03(g), 1179.03.5. The declaration—amounting to nothing more than a ***self-certification*** of financial hardship—simply needed to make the following assertions for a tenant to be protected against eviction:

> "I am currently unable to pay my rent or other financial obligations under the lease in full because of one or more of the following:
>
> 1. Loss of income caused by the COVID-19 pandemic.
>
> 2. Increased out-of-pocket expenses directly related to performing essential work during the COVID-19 pandemic.
>
> 3. Increased expenses directly related to health impacts of the COVID-19 pandemic.
>
> 4. Childcare responsibilities or responsibilities to care for an elderly, disabled, or sick family member directly related to the COVID-19 pandemic that limit my ability to earn income.
>
> 5. Increased costs for childcare or attending to an elderly, disabled, or sick family member directly related to the COVID-19 pandemic.
>
> 6. Other circumstances related to the COVID-19 pandemic that have reduced my income or increased my expenses.
>
> Any public assistance, including unemployment insurance, pandemic unemployment assistance, state disability insurance (SDI), or paid family leave, that I have received since the start of the COVID-19 pandemic does not fully make up for my loss of income and/or increased expenses."

Code of Civ. Proc. § 1179.02(d).

No owner who received such a declaration, regardless of its truthfulness and regardless of the tenant's actual ability to pay rent, could exercise the right to

repossess his property for nonpayment of rent coming due between March 1, 2020, and August 31, 2020. Cal. Code of Civ. Proc. §§ 1179.03(b), 1179.03(g).

For rent that came due between September 1, 2020, and January 31, 2021, a tenant was protected against eviction for nonpayment of rent if the tenant both (1) submitted the sworn declaration described above and (2) paid—by January 31, 2021—at least 25 percent of each rental payment that came due or would come due between September 1, 2020, and January 31, 2021. See RJN, Exh.1; Cal. Code of Civ. Proc. §§ 1179.03(c)(4), 1179.03(g), 1179.03.5.

Subsequent bills extended the moratorium, including the date by which the tenant had to make the minimum 25% payment to avoid eviction for nonpayment of rent.

SB 91 was enacted on January 29, 202, to bar eviction for nonpayment of rent that came due between September 1, 2020, and June 30, 2021, if the nonpaying tenant (1) submitted a sworn declaration of COVID-19 financial distress and (2) paid—by June 30, 2021—at least 25% of the of rent missed between September 1, 2020, and June 30, 2021. See RJN, Exh. 2; Cal. Code of Civ. Proc. §§ 1179.03(c)(5), 1179.03(g), 1179.03.5. Then, on June 28, 2021, the State enacted AB 832, which again extended the moratorium and time for payment of the minimum 25%. See RJN, Exh. 3; Code of Civ. Proc. §§ 1179.03(c)(6), 1179.03.5. AB 832 barred eviction for nonpayment of rent that came due between September 1, 2020, and September 30, 2021, if the nonpaying tenant (1) submitted a sworn declaration of COVID-19 financial distress and (2) paid—by September

30, 2021—at least 25% of rent missed between September 1, 2020, and September 30, 2021.

Finally, on March 31, 2022, AB 2179 was enacted. That bill further extended the moratorium on evictions related to rent coming due between September 1, 2020, and September 30, 2021. See RJN, Exh. 4. But there was a different trigger for the moratorium. Instead of submitting a declaration of COVID-19 financial distress, all a tenant needed to do to cut off a landlord's right to evict for nonpayment of rent was to apply for rental assistance by March 30, 2022. If the application was submitted by that deadline, the landlord had no right to evict for nonpayment of rent until July 1, 2022. See RJN, Exh. 4; Cal. Code of Civ. Proc. §§ 1179.03(c)(7).

B. Owners Challenge the Moratorium, the Parties Move for Summary Judgment, and the Court Dismisses the Case As Moot

On August 5, 2021, Owners filed a federal civil rights complaint challenging the moratorium pursuant to 42 U.S.C. section 1983. Dkt. No. 1 (Complaint).[1] A First Amended Complaint (the operative pleading in this case) was filed on August 13, 2021. Dkt. No. 4 (FAC). Owners consist of two landlords who have suffered substantial hardship under the moratorium, along with an association—California Rental Housing Association—that represents the rights of dues-paying members who own rental housing units in the State. *Id.* (FAC at 3-4).

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[1] References to "Dkt." are to the district court's docket for this case.

The stories of the landlords' hardships under the moratorium are illustrative of the harm suffered by countless rental housing owners across the State.

At the time this case was filed, Ms. Montano was 77 years old. She owns a duplex in the City of Santa Barbara. Since July 1, 2019, Ms. Montano was renting out one unit to a tenant pursuant to a lease that gave her the right to evict for nonpayment of rent. Taking advantage of the State moratorium, the tenant has refused to pay rent for 18 months, between April 2020 and September 2021; by June 2022, he had racked up a total of $57,600 in unpaid rent during the moratorium. Dkt. No. 10-4 (Declaration of Mary Montano ("Montano Decl."), ¶ 2-4).

Following a notice to pay or quit, the tenant timely provided Ms. Montano with a declaration self-certifying to alleged financial distress related to COVID, thereby cutting off her right to repossess the property during those many months when she fully subsidized his occupancy. Id. After September 2021, the tenant began paying monthly rent. Until March 2022, he refused to complete any paperwork to apply for any government rental assistance. But shortly before the March 2022 deadline for applying for rental assistance, the tenant finally applied, again cutting off—automatically—Ms. Montano's right to evict for nonpayment of the $57,600 in arrears. Dkt. No. 10-4 (Montano Decl., ¶¶ 4-5).

Thanks to the State's eviction moratorium, Ms. Montano struggled to make ends meet. The other half of the duplex was paying rent. However, that was enough only to cover the mortgage on the duplex. Because of the nonpaying tenant, she had to take out a substantial loan to pay the property taxes on the

duplex. Her monthly income consisted only of $1,838 in Social Security, as well as the limited income from one of the units in the duplex which covered the property's mortgage. It was difficult for Ms. Montano to even cover the costs of her prescription medications. The emotional strain and distress this caused her cannot be overstated. Dkt. No. 10-4 (Montano Decl., ¶ 6).

By June 2022, Ms. Montano had no reason to believe that her tenant would pay off his rent arrears, even if she pursued the arrears in court. As noted above, he submitted a COVID-19 declaration of financial distress, which the State itself automatically accepted as proof that he cannot pay. In other words, the tenant was, by operation of the moratorium's provisions, assumed to be judgment-proof. To Ms. Montano, it was not worth the time and expense of pursuing a judgment-proof tenant in court for substantial rent arrears, where she had a low-to-no chance of securing payment at the end of that court process. Thus, the moratorium left her without the right to evict, and without any recovery or compensation to make her financially whole. Dkt. No. 10-4 (Montano Decl., ¶ 8).

The other named landlord in this suit, Ms. Ho, owns a rental unit in the City of Los Angeles, California. Her tenant began his tenancy in January 2020, before the State first imposed the eviction moratorium that is the subject of this lawsuit. The lease with her tenant allowed her to evict for nonpayment of rent. Dkt. No. 10-3 (Declaration of Trang Ho ("Ho Decl."), ¶ 2).

Ms. Ho's tenant paid rent in February and March 2020, but has paid nothing since. He timely provided a sworn declaration of COVID-19-related financial distress when his rent default began. Although otherwise ready, willing, and able to

do so, Ms. Ho was unable to evict him through 2020 and most of 2021 because of the State moratorium on evictions for nonpayment of rent. Dkt. No. 10-3 (Ho Decl., ¶ 3).

The State moratorium caused Ms. Ho great emotional and mental distress, as she lost an important stream of income that ordinarily would help her to pay the mortgage, taxes, and maintenance costs of her rental units. Given her tenant's declaration of financial distress, one could reasonably assume he was judgment-proof. As of June 2022, she had no reasonable expectation of being able to recover past-due rents now or in the future. That meant the moratorium had required Ms. Ho to house a tenant in her property for free—with no realistic prospect of recovery and no mechanism for compensation by the State. Dkt. No. 10-3 (Ho Decl., ¶ 5).

Given the harm caused by the moratorium, Owners challenge it on the grounds it violated the Due Process Clause, the Takings Clause, and the Contracts Clause of the Federal Constitution. Dkt. No. 4 (FAC at 14). Among other things, they seek a declaration and injunction to the effect the moratorium is unconstitutional. *Id.* The State filed an answer vigorously defending the moratorium's constitutionality. ER 32 (Answer).

In July 2022, the parties filed cross-motions for summary judgment. Dkt. Nos. 10, 16. Following full briefing on the cross-motions, the district court issued an Order Dismissing Action for Lack of Subject Matter Jurisdiction. The Court concluded that, given the moratorium's expiration, the case was moot. ER 13-14

(Order at 11-12). Given its dismissal of the case, the court denied the cross-motions as moot. *Id.* Owners timely appealed. *Id.*

V. SUMMARY OF THE ARGUMENT

The question in this appeal is whether the Owners' challenge to the State's eviction moratorium is moot. It is not. Under the "voluntary cessation" and/or "capable of repetition" exceptions, Owners' challenge is live.

The "voluntary cessation" exception provides that a plaintiff's case does not become moot merely because the defendant has ceased the challenged act. Under that exception, the defendant has the heavy burden of proving it is "absolutely clear" that the allegedly wrongful act could not "reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The State cannot meet that heavy burden. It has not repudiated the moratorium; it has vigorously defended it. Further, State concerns about the COVID-19 pandemic and its effect on tenants persist, as does the real risk of other kinds of state-wide emergencies that the government can reasonably expected to invoke to justify reinstatement of the moratorium.

Owners also satisfy the requirements of the "capable of repetition" exception to mootness. That exception requires a showing that "(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." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (cleaned up). Here, the moratorium lasted less than two years, which

the Supreme Court has held is too short for courts to conduct full judicial review. *Id.* Further, given the State's strong defense of the moratorium, its refusal to repudiate it, and the continued concerns about the pandemic's effects on tenants, Owners have a "reasonable expectation" that they will be subject to the same moratorium in the future.

For these reasons, the district court erred in dismissing the case as moot. This case presents live claims, and the parties' cross-motions for summary judgment should be adjudicated. This Court should revise the district court's dismissal.

VI. STANDARD OF REVIEW

The Court "review[s] *de novo* a district court's order dismissing a case for lack of subject matter jurisdiction." *Ali v. Rogers*, 780 F.3d 1229, 1233 (9th Cir. 2015).

VII. ARGUMENT

A. This Case Is Justiciable Under the "Voluntary Cessation" Exception

"Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies,' and an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Kingdomware*, 579 U.S. at 170 (internal citation and quotation marks omitted). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th

Cir. 2014) (internal citations omitted). Where a plaintiff sues the government over a law or policy, "the Government . . . bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022).

"That burden is 'heavy' when, as here, the only conceivable basis for a finding of mootness in the case is the respondent's voluntary conduct." *Id.* (cleaned up). Under the "voluntary cessation" exception to mootness, "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." *Friends of the Earth*, 528 U.S. at 189 (internal citation and quotation marks omitted). "If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." *Id.* (internal citation and quotation marks omitted).

Accordingly, the standard that the Supreme Court has applied for determining whether a defendant's voluntary cessation moots a case is "stringent": "A case might become moot if subsequent events made it ***absolutely clear*** that the allegedly wrongful behavior could not ***reasonably be expected*** to recur." *Id.* (emphasis added) (internal citation and quotation marks omitted). The Supreme Court reaffirmed this "stringent" standard as recently as June 2022, when it found that a government defendant's voluntary cessation of a challenged policy did not moot plaintiff's case. *West Virginia*, 142 S. Ct. at 2607 ("Voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (cleaned up)).

This Court recently applied the "voluntary cessation" exception in *Brach v. Newsom,* 38 F.4th 6 (2022). *Brach* involved parents' constitutional challenge to the

State's policy delaying school re-openings as the effects of the COVID-pandemic appeared to subside. *Id*. at 9. Following adverse rulings from the district court, the parents appealed to this Court. *Id.* at 10-11. Although the parents' schools had reopened, the parents argued their challenge was not moot under the "voluntary cessation" exception. *Id.* at 11. After a panel of this Court held the case was not moot, the Court *en banc* held, in a 6-5 decision, that it was.

First, the Court reaffirmed the view that the government bears the burden of showing its conduct cannot reasonably be expected to recur and concluded that the State had met that burden. *Id.* at 15-16. But the reason why the Court arrived at its conclusion is significant. The Court stated that the "[m]ost important[]" fact was that "the State has '***unequivocally renounce[d]***' the use of school closure orders in the future." *Id.* at 13 (emphasis added) (quoting *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019)). The Court went on to explain that "[t]he State has consistently worked to reopen schools and Governor Newsom has publicly 'reaffirm[ed]' his 'commitment to keep California's schools open for safe, in-person learning.'" *Brach*, 38 F.4th at 13 (quoting State's statements). Indeed, contrary to their early policy of closing schools, State officials later underscored the permanence of their reopening policy by declaring that "[i]n-person schooling is critical to the mental and physical health and development of our students." *Id.* at 10 (internal citation and quotation marks omitted). The State Legislature followed suit, enacting "financial penalties for schools that continue to operate remotely." *Id.* at 18.

The circumstances here are far different from the circumstances present in *Brach*. In this case, the State has not renounced—let alone unequivocally—its moratorium, and further extensions or reimpositions thereof. The State has not committed itself to never re-impose such a moratorium again. And, unlike the State's clear-eyed recognition in *Brach* of the serious harm its school-closure policy caused students, the State here denies the serious harm that its iterative moratorium caused rental housing owners over the course of nearly two years. Indeed, the State has expressed no regrets about the devastation its moratorium visited upon them. *See, e.g.*, ER 32-39 (State's Answer, defending the moratorium); ER 16-31 (Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment ("DSUF"), defending reasonableness and necessity of moratorium).

Moreover, unlike the rescission of the executive orders authorizing the State's school-closure policy in *Brach*, the legal, epidemiological, and social bases for the moratorium persist. For example, when the moratorium was first enacted, the Legislature cited Governor Newsom's declaration of a state of emergency in response to the COVID-19 pandemic—a declaration that is ***still*** in force as of the writing of this brief. See RJN, Exh. 5 (Governor's Executive Order N-07-21, dated June 11, 2021, declaring COVID-19 state of emergency). Further, the State has emphasized that the pandemic is far from over, and the risks of COVID-19 transmission and its deleterious effects on the tenant population continue to this day. For example, the State has warned that "[u]nvaccinated Californians are highly susceptible to severe COVID-19 infection, the vaccinated population is

experiencing waning immunity, and there are new contagious variants. ER 28-29 (DSUF, ¶ 48). "Throughout 2021 and 2022, the United States (and California) experienced 'waves' of COVID-19 infections, due to new variants," including as recently as March 2022. ER 29 (DSUF, ¶ 49). Given the State's defiant defense of its moratorium, and the fact the legal and epidemiological predicates for future moratoria persist, the State's voluntary cessation does not render this case moot.

Finally, the district court's analysis of the "voluntary cessation" exception as applied to this case is flawed.

First, the district court declared that government defendants are entitled to "more solicitude" than private defendants and are entitled to a "presumption of good faith." ER 8 (Order at 6). It cited two decisions of this Court. *Id.* But as late as last year, the Supreme Court made clear that government defendants are subject to the same "heavy" burden to establish that a once-live case has become moot. *West Virginia*, 142 S. Ct. at 2607. In *West Virginia*, there was no indication whatsoever of special solicitude to the federal defendant or of a presumption of good faith. *See also S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Statement of Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner").

Second, and perhaps because of the greater solicitude and "good faith" presumption granted to the State, the district court found that the State met its burden. The court reasoned that "AB 2179's expiration" on June 30, 2022 "breaks with the State's previous pattern of behavior," whereby it repeatedly extended the

moratorium. ER 8-9 (Order at 6-7). In the court's view, the fact 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." ER 9 (Order at 7). But the district court's chronology suggests no such thing. Owners' challenge was filed on August 5, 2021. Dkt. No. 1. *In the midst of litigation*, the State allowed one additional extension before allowing the moratorium to lapse. Having occurred in the context of a pending court challenge to the moratorium, the State's decision to forgo further extensions does not create even an inference that "it is unlikely to renew similar restrictions in the future." ER 9 (Order at 7). Again, the State has not unequivocally renounced the moratorium; at every step, it has only vigorously defended its attack on landlords' right to evict for nonpayment of rent.

Third, the district court observed that "with each bill" extending the moratorium, "the State gradually rescinded its restrictions on unlawful detainers until all restrictions were finally lifted on June 30, 2022." ER 10 (Order at 8). Not so. The original bill (AB 3088) and subsequent extensions imposed largely the same severe restrictions and conditions on landlords. As detailed above:

- AB 3088 was enacted on August 31, 2020, and barred landlords from evicting tenants for nonpayment of rent that came due between March 1, 2020, and August 31, 2020, as long as tenants self-certified as to their COVID-19-related financial hardship. For rent coming due between September 1, 2020, and January 31, 2021, evictions were barred as long as tenants self-certified as described above *and* paid, by

January 31, 2021, at least 25% of the accrued rent during that time period.

- SB 91 was enacted on January 29, 2021, to extend the moratorium imposed by AB 3088, to landlords' serious detriment. The bill barred evictions for nonpayment of rent owed between September 1, 2020, and ***June 30, 2021***, as long as tenants self-certified as to their COVID-19-related financial hardship and paid, by June 30, 2021, 25% of the rent due from September 1, 2020, to June 30, 2021.
- AB 832, enacted on June 28, 2021, extended the moratorium yet again—and for the worse. The bill barred eviction for nonpayment of rent that came due between September 1, 2020, and ***September 30, 2021***, as long as tenants self-certified as to their COVID-19-related financial hardship and paid, by September 30, 2021, at least 25% of rent owed between September 1, 2020, and September 30, 2021.
- Finally, after Owners filed this case, the State enacted one more extension through AB 2179. The restrictions were largely the same as those imposed by prior extensions, except that AB 2179 imposed a different trigger for the moratorium. Instead of submitting a declaration of COVID-19 financial distress, all a tenant needed to do to cut off a landlord's right to evict for nonpayment of rent was to apply for rental assistance by March 30, 2022.

As the foregoing shows, there was no "gradual[] rescind[ing]" of the State's restrictions. ER 10 (Order at 8). Indeed, all iterations of the moratorium permitted

a landlord to lose her right to evict for nonpayment of rent if the tenant simply self-certified to a COVID-19-related financial hardship. And all iterations substantially interfered with landlords' contract and property right to repossess their properties, which is the crux of Owners' claims. Additionally, contrary to the district court's statement, there is no evidence in the record, and certainly none that the State produced, establishing that the State "finally"—i.e., once and for all—"lifted" its moratorium on June 30, 2022." *Id.*

Fourth, the district court dismissed material facts in the record that militate against mootness under the "voluntary cessation" exception. For example, the court gave no weight to the glaring fact that the State hasn't unequivocally renounced its harmful moratorium. This was the "most important" fact for the Court in *Brach*. As the Court there stated in that case:

> "California has presented a strong case that the current order opening schools is not a temporary move to sidestep the litigation. ***Most importantly***, the State has unequivocally renounced the use of school closure orders in the future."

Brach, 38 F.4th at 13 (cleaned up).

The district court brushed off the State's failure to unequivocally renounce the moratorium, asserting that Owners "read too much into *Brach*." ER 10 (Order at 8). But that ignores the underpinnings of the "voluntary cessation" exception, which is to ensure that government defendants' voluntary cessation of an unlawful act does not bar judicial review. A government defendant's refusal to renounce a challenged law and to vigorously defend it in litigation are the hallmarks of a

challenge that can and should be adjudicated. As the Supreme Court explained last year in *West Virginia*:

> "Here the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose [the challenged policy]; indeed, it vigorously defends the legality of such an approach. We do not dismiss a case as moot in such circumstances."

West Virginia, 142 S. Ct. at 2607. Like this Court in *Brach*, the Supreme Court in *West Virginia* deemed the issue of a defendant's renunciation of a challenged act to be essential to the "voluntary cessation" analysis.

The district court also dismissed out of hand the fact that the State has both the power and the incentive to reimpose the same or similar eviction moratorium in the future, particularly given that the pandemic is not over. In dismissing that fact, the court cited *Brach* for the proposition that "there must be evidence indicating that the challenged [policy] likely will be reenacted" and, in the court's view, the evidence adduced by Owners was insufficient to meet that high bar. ER 11 (Order at 9 (quoting *Brach*). But that line from *Brach* departs from Supreme Court precedent insofar as it suggests that the "voluntary cessation" exception puts the burden on the *plaintiff* to produce evidence that a challenged policy likely will be reenacted. That formulation turns the correct standard on its head.

In *West Virginia*, which came down a few weeks after *Brach*, the Supreme Court reaffirmed the stringent standard imposed on a government defendant: "voluntary cessation does not moot a case unless it is ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur"—a showing that ***the government defendant*** bears the "heavy" burden of establishing.

West Virginia, 142 S. Ct. at 2607 (cleaned up) (emphasis added). Thus, it is not *Owners'* burden to prove the likelihood of the moratorium being reimposed; rather, it is the *State's* burden to prove the contrary.

B. This Case Is Justiciable Under the "Capable of Repetition" Exception

Owners' challenge to the moratorium also remains live under the "capable of repetition, yet evading review" exception to mootness. The exception applies in "exceptional situations" when "(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." *Kingdomware*, 579 U.S. at 170 (cleaned up). Owners satisfy both prongs of the "capable of repetition" exception.

As to the first prong, each iteration of the moratorium lasted only several months at a time and easily evaded judicial review. The various extensions added up to close to two years. In a recent decision, the Supreme Court concluded that the plaintiff had satisfied the first prong of the "capable of repetition" exception on the grounds that "a period of two years"—the duration of the "short-term contracts" at issue there—was "too short to complete judicial review." *Kingdomware*, 579 U.S. at 170. So, too, here. The nearly two years the moratorium lasted were similarly too short for Owners to complete judicial review, even if they had brought suit the day after the first bill was enacted.

Owners also satisfy the second requirement—i.e., a reasonable expectation exists that the same complaining party will be subject to the same action. The Supreme Court has been clear that the standard is relatively forgiving to plaintiffs.

The plaintiff need not prove that the challenged action will *probably* recur; she needs to prove only that the challenged action is "capable" of recurring. *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988), *superseded by statute on other grounds as stated in Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1039 n.1 (9th Cir. 2009). As the Supreme Court explained about its "capable of repetition" jurisprudence: "Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was ***capable*** of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was ***more probable than not***." *Honig*, 484 U.S. at 318 n.6 (emphasis added).

For the reasons justifying the "voluntary cessation" exception, there is at least a "reasonable expectation" that the State will reimpose an eviction moratorium in the future. *Brach*, 38 F.4th at 15 (noting that analysis of the second prong of the "capable of repetition" exception mirrors the analysis of the "voluntary cessation" exception). The State itself has emphasized that the pandemic is not over, and the risks of COVID-19 transmission and its effects on tenants continue. ER 28-29 (DSUF, ¶¶ 48-49). The State has not renounced its nearly iterative moratoria, lasting almost two years. To the contrary, the State has vigorously defended it. ER 32-39 (Answer). Should the COVID-19 pandemic persist—or any other similar emergency arise—there is little doubt, and certainly a reasonable expectation, that the State would reinstate the moratorium.

Indeed, the Supreme Court has repeatedly found pandemic restrictions, such as the moratorium at issue here, capable of repetition, yet evading review. For example, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court found that

religious groups' challenge to New York's COVID-19 restrictions on attendance at religious services was not moot because "the Governor regularly changed the classification of particular areas without prior notice" and retained the power to do so in the future. 141 S. Ct. 63, 68 (2020) (cleaned up). In rejecting the Governor's mootness argument, the Supreme Court relied on *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007), which applied the "capable of repetition" exception. *Roman Catholic*, 141 S. Ct. at 68. Similarly, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that a challenge to California's pandemic restrictions on religious gatherings was not moot because California officials "retain[ed] authority to reinstate" the restrictions "at any time." *Id.* at 1297.

Given the iterative, but short, life of the moratorium, and the reasonable expectation it will return when the State invokes a pandemic or other statewide emergency to justify restrictions on residential evictions, the "capable of repetition" exception calls out for federal adjudication of Owners' claims.

VIII. CONCLUSION

This case is not moot under the "voluntary cessation" and/or "capable of repetition" exceptions. The Court should reverse the district court's judgment dismissing this case, and remand it for consideration and ruling on the parties' cross-motions for summary judgment.

Date: January 20, 2023

Respectfully submitted,

s/ Paul J. Beard II

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I am the attorney of record in this case.

This brief contains 6024 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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