No. 21-15602

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANICE ALTMAN, et al.,

Plaintiffs-Appellants,

v.

COUNTY OF SANTA CLARA, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-02180-JST
Hon. Jon S. Tigar

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

This case involves COVID-19 orders that the counties of Santa Clara, San Mateo, and Contra Costa issued between March and May 2020. Plaintiffs claim the orders, by incidentally and temporarily closing shooting ranges and gun retailers—along with virtually every other business in the region—infringed on their Second Amendment rights. The gravamen of their claim is that, because some businesses (*i.e.*, those offering the goods and services that enabled residents *to* shelter in place) were allowed to remain open during the pandemic's early weeks, those entities must somehow be "government favored." Op. Br. at 1. Correspondingly, they speculate that "[p]erhaps" ranges and firearms retailers lacked similar dispensations due to "animus"—though the only evidence Plaintiffs cite is a comment about "panic buying" they attribute to a city official not involved in preparing the county-issued orders. *Id.*

This appeal, at any rate, focuses on the longevity rather than the merits of Plaintiffs' claims. It presents two central questions. First, and relevant to Plaintiffs' requests for injunctive and declaratory relief: Are restrictions similar to those from early 2020 likely to recur? The answer, for four reasons, is "no": (i) the challenged orders issued during the pandemic's opening days, when little was known about the disease; (ii) those orders, which lasted just 8-10 weeks, have been a dead letter for roughly 18 months now; (iii) since ending retail closures, the

counties have faced materially worse epidemiological conditions three times but refrained in each case—including during the most recent Delta variant surge—from reimposing similar restrictions; and (iv) each county has achieved vaccination rates of 85-91%, among the highest statewide.

The second question is whether Plaintiffs' demand for nominal damages keeps the case alive, at least insofar as they seek retrospective relief. The answer, again, is "no," this time because Plaintiffs forfeited the right to argue otherwise. The district court dismissed Plaintiffs' claims after oral argument and briefing dedicated to the subject of mootness. Plaintiffs did not argue at either juncture that their request for nominal damages prevented dismissal. Conspicuously, their opening brief is silent about the reason for those omissions. The district court was not required to raise and address arguments Plaintiffs did not present, and Plaintiffs have given this Court no reason to depart from the rule against considering arguments for the first time on appeal.

Because Plaintiffs' request for prospective relief is moot, and their bid for nominal damages forfeited, their challenge to these long-expired orders no longer presents a live case or controversy. The district court's order dismissing their claims should, accordingly, be affirmed.

II. ISSUES PRESENTED FOR REVIEW

(1) Whether Plaintiffs' requests for prospective relief are moot given that Defendants superseded all of the orders Plaintiffs challenge by early June 2020.

(2) Whether any exception to mootness applies given that Defendants have both refrained from issuing similar orders despite three subsequent surges of COVID-19 and achieved vaccination rates of 85-91%.

(3) Whether the district court erred by finding the claims against Defendants moot—notwithstanding Plaintiffs' request for nominal damages—given that Plaintiffs did not argue in briefing specifically dedicated to mootness that the request preserved their claims.

III. STATEMENT OF THE CASE

A. The Counties Issue Shelter-in-Place Orders; Plaintiffs Sue

On March 16, 2020, the Public Health Officers of seven Bay Area jurisdictions, including Santa Clara, San Mateo, Alameda, and Contra Costa counties, issued substantially similar orders ("Public Health Orders" or "Health Orders") designed "to slow the spread of COVID-19." *See* 4-ER-781 (Santa Clara County Order); 5-ER-1096 (San Mateo); 5-ER-1104 (Contra Costa); 5-ER-1061 (Alameda). Effective March 17, 2020 (*see, e.g.,* 4-ER-787 ¶12), those orders permitted residents to leave their homes only for specified purposes, including to operate or patronize "Essential Businesses (*see, e.g.,* 4-ER-781-82 at ¶¶ 2-3). The

Public Health Orders identified 21 types of such businesses, most providing goods and services related to healthcare, food, medicine, hygiene, housing, transportation, and infrastructure. *See, e.g.,* 4-ER-785-86 at ¶ 10.f. By requiring *all* other business to suspend operations, the Health Orders incidentally and temporarily caused firearms retailers and shooting ranges to close.

On March 31, 2020, the same day officials issued revised Health Orders with minor modifications (*see, e.g.,* 4-ER-789 (Santa Clara County)), the plaintiffs in this case filed their initial Complaint for Injunctive and Declaratory Relief (5-ER-1204-34). Plaintiffs, three retailers, eight individuals, and five gun-advocacy organizations (5-ER-1207-14), asserted a single claim for a Second Amendment violation (5-ER-1230-32); they named as Defendants the four counties identified above as well as their respective Sheriffs, Public Health Officers and, in the case of Santa Clara County, its District Attorney (5-ER-1214-18). Plaintiffs also sued the cities of San José, Mountain View, Pacifica, and Pleasant Hill, their respective Police Chiefs, and the Mayor of San José due to roles each played in enforcing the county-issued Public Health Orders. 5-ER-1222-30. Plaintiffs did not allege that the latter group of Defendants enforced the Health Orders in a discriminatory manner or targeted ranges or firearms retailers.

On April 10, 2020, Plaintiffs filed a First Amended Complaint (FAC) for Injunctive and Declaratory Relief. 5-ER-1167-1203. In addition to the Second Amendment claim, Plaintiffs asserted a due process violation under the Fifth and Fourteenth Amendments (5-ER-1196-1201) against the same defendants named in the initial complaint (5-ER-1176-79). The FAC alleged that some defendants acted with "clear animus" towards firearm retailers and their customers but pleaded no supporting facts. 5-ER-1186. Plaintiffs concurrently moved for a temporary restraining order or, in the alternative, a preliminary injunction. 5-ER-1132-66. The district court denied the former request and set a briefing schedule and hearing date to consider the latter. 5-ER-944-45.

B. The Parties Brief Mootness; Plaintiffs Do Not Raise Nominal Damages

On May 19, 2020, one day before the scheduled hearing date, the four county defendants asked the district court to judicially notice revised Public Health Orders that each county had issued between May 15-18. 3-ER-582-4-ER-661. Those orders allowed retail and other businesses to operate outdoors, including curbside; they also permitted outdoor recreational activity, including at "shooting and archery ranges." 3-ER-633 ¶15aii3; 3-ER-641-42 (Contra Costa); *see also* 3-ER-588-99 ¶¶ 3,5,15aiii, 15l (Santa Clara) (similarly allowing outdoor recreation and operation of "[b]usinesses primarily operated outdoors"); 4-ER-645-661 ¶¶ 3, 5, 15aiii, 15l (San Mateo) (same); *see also* 3-ER-487-96 (webpage captures

announcing reopening of outdoor ranges).

At the hearing on May 20, 2020, as Plaintiffs concede, "the first and primary topic of discussion" was mootness. Op. Br. at 11. Plaintiffs did not make any arguments about nominal damages during those proceedings, which lasted nearly one-and-one-half hours. 3-ER-525 (noting start time of 2:00 p.m.); 3-ER-580 ("Proceedings adjourned at 3:25 p.m."). After hearing argument, the district court set a schedule—agreed to by Plaintiffs—for supplemental briefing to address mootness. 3-ER-569-578. It explained that it wanted Plaintiffs to argue in their submissions: "Here is why the case is not moot" (3-ER-570) and, again, "This case is not moot and here's why" (3-ER-576).

Plaintiffs then filed briefs on May 22 (3-ER-510-19) and May 29, 2020 (3-ER 462-68), in which they argued not only that their request for injunctive relief remained live but that intervening events had not "render[ed] the *claims* moot." 3-ER-517 (emphasis added). They specifically argued that "the voluntary cessation doctrine … preserve[d] this Court's jurisdiction over *the controversy*" because "[a] case is not easily mooted where the government" can easily reenact offending provisions (3-ER-517) and that "mootness would not deprive this Court of jurisdiction because the controversy is … 'capable of repetition, yet evading review'" (3-ER- 519) (emphasis added). Plaintiffs' submissions did not mention their request for nominal damages.

C. Three Counties End Retail Closures and are Dismissed

Between May 29 and June 2, Santa Clara, San Mateo, and Contra Costa counties asked the trial court to judicially notice revised Public Health Orders that had then recently issued. 3-ER-425-57. Effective June 1 (3-ER-454) to June 5 (3-ER-428), those revised orders permitted "[a]ll retail businesses" to reopen indoors subject to social distancing limitations, *see* 3-ER-431 at ¶(1)(b) (Santa Clara); 3-ER-455 ¶(1)(b) (San Mateo); 3-ER-426 (Contra Costa). Thus, as of early June 2020, the three counties allowed gun retailers to sell, and their customers to buy, firearms, ammunition, and related accessories.

On June 2, 2020, the district court denied Plaintiffs' request for a preliminary injunction. 1-ER-7-40. It held that Plaintiffs were unlikely to succeed on the merits of either claim they had asserted (1-ER-31-38) and that the balance of equities and public interest also weighed against preliminary injunctive relief (1-ER-38-40). It further concluded as follows: "Because Plaintiffs in San Mateo, Santa Clara, and Contra Costa Counties are now clearly able to purchase firearms and ammunition (or will be once the Orders go into effect), the Court holds that the case is moot as to those Defendants. The San Mateo, Santa Clara, and Contra Costa Defendants are hereby dismissed." 1-ER-14.

Plaintiffs did not ask the trial court to reconsider or grant them relief from the June 2 order under Federal Rules of Civil Procedure 59 or 60. Instead, on June

12, 2020, they asked the district court to clarify whether it had intended to dismiss only the three counties mentioned or also the officials associated with those entities and the cities within their boundaries. 3-ER-420-24. On June 18, 2020, the court entered an Order of Dismissal specifying that the broader group was "dismissed from this case with prejudice." 1-ER-6.

D. Plaintiffs Litigate Against, Then Settle with, Alameda County

Plaintiffs continued to litigate against Alameda County, which did not reopen indoor retail until after the court issued its preliminary injunction order. *See* 3-ER-396-97; *see also* Op. Br. at 13, n.5. In July 2020, Alameda County moved to dismiss the FAC on several grounds, including mootness. 3-ER-407-16. In their opposition (2-ER-53-83), Plaintiffs repeated the two arguments they made previously—that the voluntary cessation and capable-of-repetition, yet-evading-review exceptions kept the case live (2-ER-62-64). This time, however, they also made a third argument: that their "claim for nominal damages precludes mootness." 2-ER-64. The court in November 2020 agreed that the request for nominal damages was "live" and, on that basis, declined to dismiss Plaintiffs' complaint. 2-ER-46. It also observed that "Plaintiffs did not make a nominal damages argument in the supplemental briefing the Court ordered on the mootness question during the preliminary injunction proceedings" and that the Plaintiffs had therefore "waived this argument." 2-ER-46, n.3.

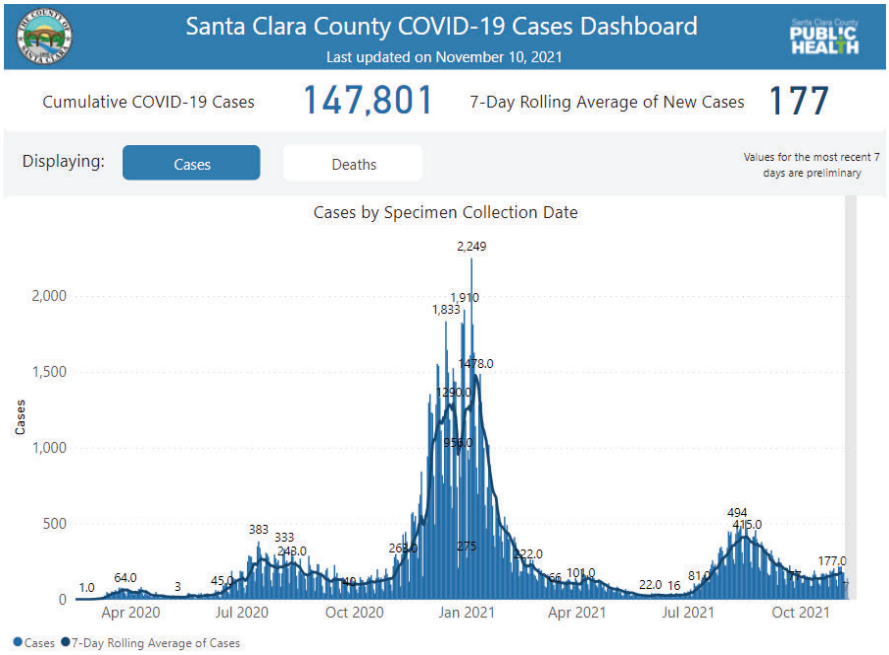
Finally, the court rejected Alameda County's argument that Plaintiffs' request for prospective relief was moot, even though it agreed that several factors supported a finding of mootness. 2-ER-46-51. At the time, "Alameda County's policy permitting indoor retail ha[d] been in effect for only six months." 2-ER-50. Plaintiffs later settled with Alameda County, its Sheriff, and its Public Health Officer for $10,000,[1] all of whom the trial court dismissed from the action (1-ER-2-5), leaving as Appellees here only Santa Clara, San Mateo, and Contra Costa counties (the "Counties" or "County Defendants"), the four cities previously dismissed, and officials associated with each public entity (collectively, with the County Defendants, "Defendants").

E. Despite COVID-19 Surges, the Counties Refrain from Closing Retail

Many circumstances relevant to mootness have changed since the district court considered the issue. In the roughly 18 months since retail reopened, epidemiological conditions have materially deteriorated three times: in July-August 2020, November 2020-January 2021, and July-September 2021. Each such COVID-19 surge involved case counts far greater than the region experienced during the opening days of the pandemic. As Santa Clara County's COVID-19

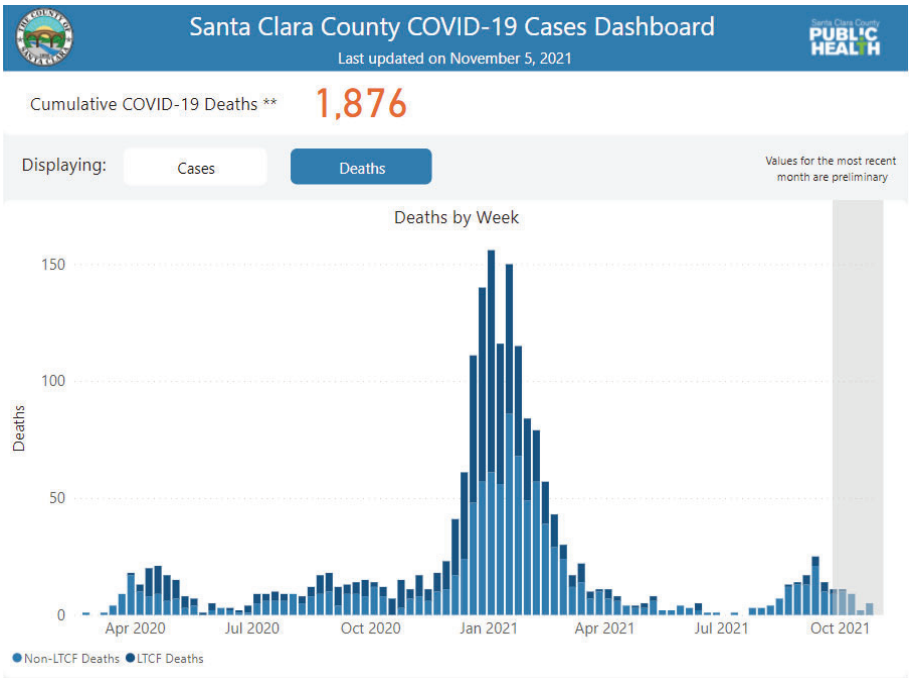
[1] Defendants' Motion for Judicial Notice, Ex. A. Further exhibit citations refer to Defendants' Motion for Judicial Notice.

Case Dashboard illustrates, cases peaked at 2,249 and 497 daily, respectively, in January 2021 and September 2021, much higher (even accounting for lower initial testing capacity) than the high of 64 daily cases recorded before June 2020.



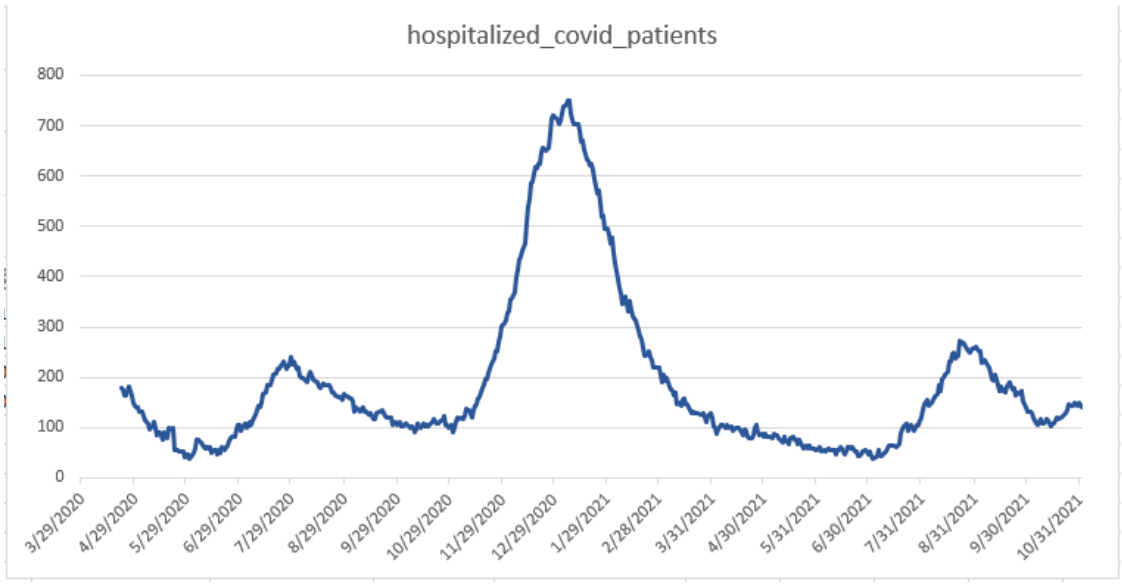
Ex. B.

Death rates during subsequent surges—particularly in November 2020-January 2021—also exceeded those extant when the initial shelter-in-place orders issued in early 2020. Data from Santa Clara County again illustrates the difference. Before June 2020, weekly in-county deaths peaked at 21. That figure increased more than sevenfold, to 151 in January 2021, and again exceeded pre-opening levels, at 25, last September.



Id.

Finally, since June 2020, the number of people hospitalized with COVID-19 cases has exceeded early levels three times. Data provided by the California Department of Public Health shows that, in Santa Clara County, more than 700 patients were hospitalized in January 2021, about four times the number from the pandemic's first three months. Hospitalization rates also exceeded early highs in July-September 2021 and July-August 2020.



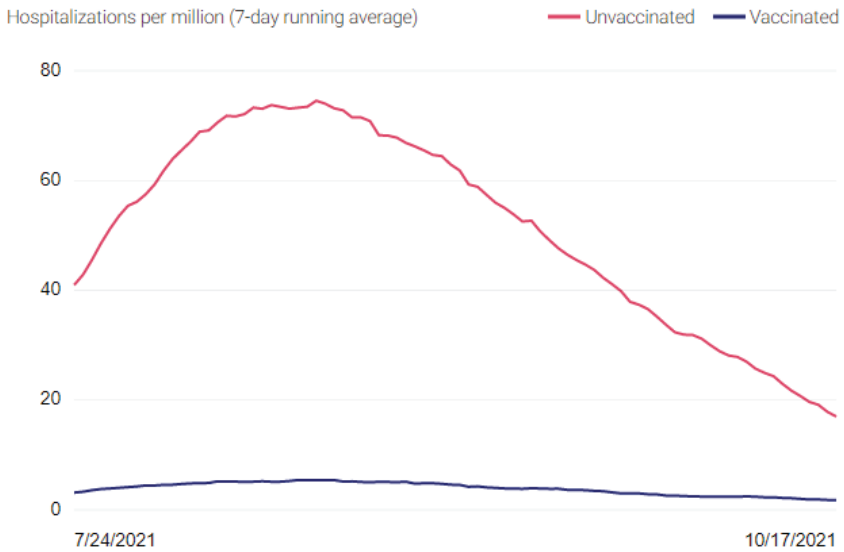
Ex. C.

Despite repeatedly facing epidemiological conditions worse than those from the pandemic's early months, no County Defendant has reinstated orders closing retail, barring outdoor recreation, or requiring residents to shelter in place. Several facts explain their forbearance. Public health authorities now better understand how the virus is transmitted and its spread mitigated, and they have more experience preparing for and meeting surging demand for health care resources. Medical providers have also developed better treatments for individuals stricken with COVID-19.

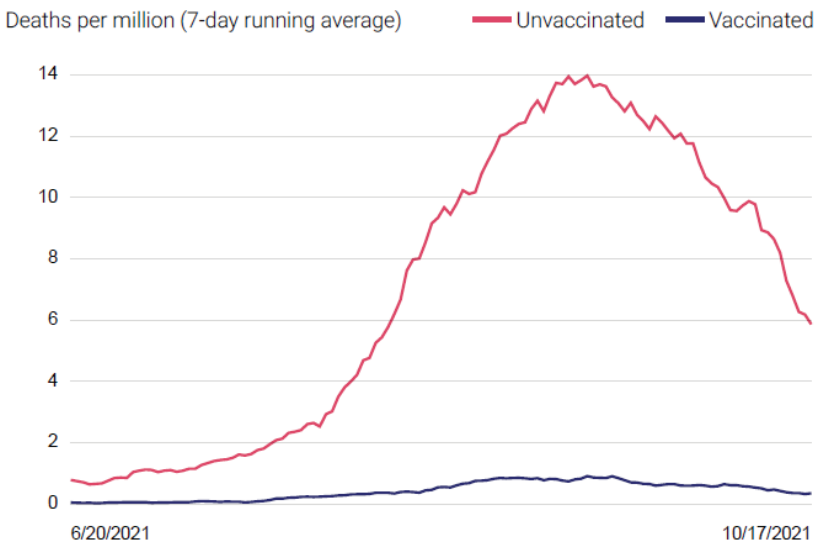
One development, however, stands out: the development and distribution of highly effective, Food and Drug Administration (FDA)-approved vaccines. Each County Defendant has been a leader in vaccinating its residents. Statewide, as of

early November 2021, only 73% of California residents at least 12-years old (Ex. D), and 66.4% of residents 5 years and older (Ex. E), are fully vaccinated. By comparison, in San Mateo and Santa Clara counties, respectively, 91% (Ex. F) and 85.6% (Ex. G) of residents 12-years old and over are vaccinated—12-18% higher than the State. In Contra Costa, which now reports data only for residents 5 and older, the percentage of vaccinated residents in that cohort is 77.6% (Ex. H)—more than 11% above the corresponding State figure.

Although they protect recipients against infection, vaccines are particularly effective at preventing death and hospitalization—the main concerns that drove early shutdowns. In late 2021, for example, unvaccinated individuals were 9.5 times more likely to be hospitalized with, and 16.9 more times likely to die from, COVID-19 than their vaccinated peers:



Ex. I.



Ex. J.

Residents of the County Defendants will be even better protected in the future than they are now for several reasons. First, in a manner of weeks the Counties have administered hundreds of thousands of booster shots, efforts that continue apace. Exs. G, H. Second, the Counties are now delivering vaccines to children 5-11 years old following the FDA's recent approval of the Pfizer-BioNTech COVID-19 Vaccine for that cohort. Ex. K. Third, recent news suggests an antiviral pill that cuts hospitalization and death rates by nearly 90% may be available by year-end. Ex. L. For each reason, residents are unlikely to again face circumstances as dire as those from the pre-vaccine surge of November 2020-January 2021—which did *not* produce orders similar to those from early 2020—let alone materially worse conditions.

IV. SUMMARY OF THE ARGUMENT

Plaintiffs' request for prospective relief is moot because the orders they challenge were superseded by early June 2020.

The voluntary cessation exception to mootness does not apply because the County Defendants did not supersede the challenged orders to avoid judicial review, and there is no other reason—such as a track record by the Counties of closing, opening, and re-closing retail—to be skeptical that cessation of conduct means cessation of a live dispute.

Even if the voluntary cessation doctrine did apply, its requirements would not be met here because it is absolutely clear that the orders Plaintiffs challenge are not *reasonably likely* to recur. Those orders issued at the beginning of the pandemic when little was known about COVID-19, and they remained in effect for only 8-10 weeks. In contrast, by the time this appeal is fully briefed, the County Defendants will have refrained from issuing similar orders for over 18 months despite three later surges involving worse conditions. Moreover, 85-91% of eligible residents in the Defendant counties are now vaccinated, far more than in California as a whole. Finally, the Counties expressly declare here that they do not intend, based on currently foreseeable conditions, to issue orders similar to those Plaintiffs challenge in this case.

The capable-of-repetition, yet-evading-review exception does not apply either. The challenged orders are not likely to recur for the same reasons detailed above—better knowledge of and treatments for COVID-19, a history of consistent forbearance through multiple surges, record high rates of FDA-approved vaccinations, and express disavowal of an intent to reinstitute similar closures. If closures did recur, it would be in response to epidemiological conditions materially worse than the region has experienced since the beginning of the pandemic. In the unlikely event that happens, those materially different circumstances would present a new controversy, not a repetition of this one.

Plaintiffs' pursuit of nominal damages does not keep the retrospective aspect of their case alive either. Requests for relief, including nominal damages, can be waived. Here, the parties orally argued and separately briefed the subject of mootness below. Plaintiffs failed both times to argue nominal damages preserved their claim. Their Opening Brief provides no explanation for those omissions. Plaintiffs instead argue that requests for nominal damages cannot be forfeited and focus on the *sua sponte* nature of their dismissal. The first point is incorrect; the second elides the fact that dismissal followed briefing on mootness. Plaintiffs forfeited their nominal damages request.

V. ARGUMENT

A. Plaintiffs' Requests for Prospective Relief Are Moot

The Constitution extends "[t]he judicial Power" only to actual "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. And it does so only for as long as the parties maintain "a legally cognizable interest in the outcome" of their dispute. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). If post-filing events prevent a court from granting injunctive relief, a plaintiff no longer has an interest in obtaining that relief, even if other aspects of its case survive. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (holding that "claim for declaratory and injunctive relief" was moot but remanding for consideration of damages). In particular, a request for "declaratory and injunctive relief … is [rendered]… moot" if a plaintiff has obtained that "precise relief" outside of the litigation. *Id.*; *see also Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1458 (9th Cir. 1996) (finding case moot where "[t]he only relief … requested is that [administrative] orders be vacated," which the agency had "already done").

Plaintiffs do not—and cannot—dispute that this standard is met here. They sought an order enjoining the Counties from enforcing March 16, 2020 directives that, by virtue of closing virtually all businesses, temporarily and incidentally closed "retail firearm and ammunition businesses and shooting ranges." Op. Br. at

9-10; *see also* 5-ER-1201-1202 (FAC). But by May 18, 2020, the Defendant Counties had allowed outdoor recreational activity, including at "shooting and archery ranges," to resume. *See, e.g.,* 3-ER-633 ¶15aii3. And by June 5, 2020, "[a]ll retail businesses" in each County were allowed to open. 3-ER-431 at ¶(1)(b); *see also* 3-ER-455 ¶(1)(b); 3-ER-426. The June orders, Plaintiffs concede, marked a "general reopening of retail" (Op. Br. at 32), from which they do not claim to have been excluded. Indeed, by exclusively "arguing that…*exception*[*s*] to mootness" apply, Plaintiffs "implicitly acknowledge that the case"—insofar as it requests prospective relief—"is moot." *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021).

B. No Exception to Mootness Saves Plaintiffs' Injunctive Claims

The only question, then, is whether an exception to mootness applies. Plaintiffs urge the Court to apply two: the (i) voluntary cessation and (ii) capable-of-repetition, evading-review doctrines. Neither resurrects their bid to prevent enforcement of long-expired orders.

1. The Voluntary Cessation Exception Does Not Apply

The voluntary cessation doctrine "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284, n.1 (2001). It is "based on the concern that a party … might be

attempting to manipulate court proceedings and evade judicial review" by temporarily changing course mid-litigation. *Cardona v. Shinseki*, 26 Vet. App. 472, 476 (2014) (citing *Already*, 568 U.S. at 91). If claims against all such defendants were deemed moot, bad-faith actors could offer "protestations of repentance and reform" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, Inc., 484 U.S. 49, 67 (1987)), then "return to [their] old ways" (*Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)) after the claims against them were dismissed.

It is "*[g]iven this concern*" of bad-faith manipulation that the voluntary cessation doctrine requires a defendant to establish "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (emphasis added). That standard, significantly, is "*not* the threshold showing required for mootness"; it represents a "heightened" burden that applies only "where [courts] have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy." *Friends,* 528 U.S. at 214 (Scalia, J., dissenting).

Not every case involving a mid-stream change in conduct warrants that skepticism or the heightened burdens it brings. For one, "unlike in the case of a private party, [courts] presume the government is acting in good faith." *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). Thus, the

voluntary cessation of challenged conduct by government officials "has been treated with more solicitude…than similar action by private parties." *Id.* More important, if a defendant changes its conduct for reasons unrelated to litigation, concerns that it is manipulating the system do not arise. Thus, "[f]or the exception to apply … the … voluntary cessation must have arisen *because of* the litigation." *Sze v. I.N.S.*, 153 F.3d 1005, 1008 (9th Cir. 1998), *overruled on other grounds by United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004); *see also Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (stating that "cessation … *in response to pending litigation* does not moot a case" unless heightened burden is met) (emphasis added).

Sze involved allegations that the Immigration and Naturalization Service (INS) took too long to process naturalization applications. This Court initially determined that the plaintiffs' request for orders requiring the INS "to grant or deny" their applications became moot after that agency naturalized them. *Id.* at 1007-08. It then held that the voluntary cessation exception did not apply because the INS processed the plaintiffs' "applications in due course," not "because of the litigation." *Id.* at 1008. Accordingly, the Court concluded that it "lack[ed] jurisdiction under Article III to consider this appeal," which it dismissed as moot. *Id.* at 1010; *see also F.E.R.C.*, 100 F.3d at 1460 (deeming case moot and declining to apply voluntary cessation exception where "economic/business considerations,

not this litigation," motivated change in position).

So too here. The orders from May and June 2020 that allowed ranges and retailers to reopen identify why they issued: "progress achieved in slowing the spread of COVID-19." 3-ER-587 ¶1; *see also, e.g.,* 3-ER-439 ¶1. Plaintiffs do not argue that rationale was pretextual or that the changes were actually prompted by this case. Any such claim would be highly implausible given that the orders, by opening "all retail" and "outdoor recreation," affected millions of individuals and businesses not parties to this case.

Nor do Plaintiffs identify any other reason "to be skeptical that cessation of violation means cessation of live controversy." *Friends,* 528 U.S. at 214 (Scalia, J., dissenting). For example, although Plaintiffs claim the Counties have a "track record of 'moving the goalposts'" (Op. Br. at 25) and a "demonstrated history of reimposing restrictions" (*id.* at 28) after relaxing them, they cite just a single press release for support. *Id.* at 26, n.10. That document announces that "*Gov. Gavin Newsom*"—not any County—ordered various businesses to close, and the businesses it identifies as being affected by that State order—such as "movie theaters," "tasting rooms," and "dine-in restaurants"—do not even include gun stores or shooting ranges. *Id.* It is undisputed that *the Counties* have not forced any of Plaintiffs' businesses to close since early June 2020; nor do Plaintiffs establish that the Counties "moved the goalposts" in any other manner relevant to

this case. "Therefore, the voluntary cessation exception is inapplicable" to their claim. *F.E.R.C.*, 100 F.3d at 1460.

2. If Voluntary Cessation Does Apply, Defendants Overcome It

Even if the doctrine did apply, the Counties would overcome it. For, on the facts presented here, it *is* absolutely clear the allegedly wrongful behavior could not *reasonably be expected* to recur. In *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), this Court identified factors to consider when assessing whether mid-litigation decisions that are "not reflected in statutory changes or … changes in ordinances or regulations" moot a case. The list includes: (i) whether the change was "evidenced by language that is 'broad in scope and unequivocal in tone'"; and (ii) "fully addresses all of the objectionable measures that the Government officials took"; (iii) "has been in place for a long time when we consider mootness"; (iv) has prevented officials from "engag[ing] in conduct similar to that challenged by the plaintiff"; (v) "could be easily abandoned or altered"; and (vi) was prompted by "the case in question." *Id.* (cleaned up).

These factors establish the low likelihood of recurrence in this case. Three straightforwardly support the Counties. First, Plaintiffs do not dispute that, as revised in May and early June 2020, the orders "fully address[] all of the objectionable measures" (*id.*)—ranges and gun stores reopened. Second, following the revisions, officials have not engaged "in conduct similar to that challenged"

(*id.*)—ranges and gun stores stayed open. Third, the changes will have "been in place for a long time" when this Court considers mootness (*id.*): 18-plus months when briefing closes and almost two years by the time an opinion likely issues. Those spans qualify as a "long time." *See American Diabetes Association v. United States Department of the Army* (9th Cir. 2019) 938 F.3d 1147, 1153 (finding that period of "over two years" qualified). The longstanding nature of the relief becomes even clearer when measured against the eight-to-ten *week* deprivation Plaintiffs experienced.

Properly considered, the remaining three factors are neutral or further demonstrate the low likelihood of recurrence. Regarding the litigation catalyst factor, *Rosebrock* suggests a case is more likely to be moot if litigation motivated the defendant's change in position. *Rosebrock*, 745 F.3d at 974. But it offers no analysis on that point and, for support, cites only *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000). That case, in finding recurrence unlikely, observes that the defendant "confesse[d] that this case was the catalyst for the agency's adoption of the new policy." *Id.* The opinion does not explain the relevance of that admission. And it cannot be that a defendant's having changed its conduct "because of the litigation" is both a prerequisite *for* applying the voluntary cessation doctrine, *Sze,* 153 F.3d at 1008, and a factor that militates *against* its application, *Rosebrock*, 745 F.3d at 974. The tack taken by *Rosebrock* not only contradicts *Sze*, it ignores the

gamesmanship concerns that animate the exception—concerns that have led this court to draw exactly the opposite conclusion it does. *See, e.g., Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (noting that "mootness is *less* appropriate when repeal of legislation occurred due to the 'prodding effect' of litigation") (emphasis added) (citing *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003)).

The better read of *White* is that it interpreted the litigation-driven nature of the defendant's change not as an independent factor supporting mootness but as evidence that the change addressed all objectionable aspects of the challenged policy. Consistent with that reading, the case melded both points together, noting that the memorandum implementing the new policy "addresses all of the objectionable measures that…officials took against the plaintiffs in this case, and even confesses that this case was the catalyst for the agency's adoption of the new policy." *White*, 227 F.3d at 1243. Under that interpretation, the "litigation catalyst" factor collapses into an analysis of the scope of the change, which in this case supports mootness for reasons set forth above.

As for whether the change "could be easily abandoned" (*Rosebrock*, 745 F.3d at 972), Plaintiffs emphasize that County officials could "modify their orders … whenever and however they see fit…." Op. Br. at 20. But "the concern with policy changes that are not cemented by statute or some other inertial form" is

"that the purported change in policy may be gamesmanship." *Rosebrock*, 745 F.3d at 973. Plaintiffs do not argue that concern exists here. Nor could they credibly make such a claim. The Counties have issued, modified, and superseded COVID-19 orders based on the changing epidemiological conditions present throughout the region, not in response to litigation generally or this case specifically. And just as *Rosebrock* found "compelling" the fact that officials there more "recommit[ted] " to "consistent[ly] enforc[ing] a longstanding policy" than implemented a "policy change," these orders were temporary, emergency departures from a status-quo without retail or other closures. *Id.; see also Halvonik v. Reagan*, 457 F.2d 311, 313 (9th Cir. 1972) (finding case moot where challenged "regulations [were] triggered by emergency and dependent upon … extraordinary events rather than arising in the normal course of regulation").

Finally, despite the absence of *procedural* obstacles to reimplementation, it defies reality to suggest there is no *practical* impediment to reinstating orders like those challenged here. This case does not involve a decision to place a single person on the "No Fly List" (*Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1035 (9th Cir. 2018)) or to prevent "the posting of materials" on particular property (*Rosebrock*, 745 F.3d at 966). It involves decisions that affect millions of individuals across multiple counties. Those decisions are subject to great public scrutiny, must be coordinated with neighboring jurisdictions, and—particularly at

this stage of the pandemic—would be accepted by residents only if truly necessary. As a practical matter, reinstating orders like those from early 2020 would involve at least as much effort as legislation, making this factor neutral. *See Fikre*, 904 F.3d at 1039 (emphasizing that government remained "*practically* and legally" free to reverse course) (emphasis added)).

Regarding the final factor, the May and June 2020 orders unequivocally state that they "supersede[]" the ones Plaintiffs challenge. *See, e.g.,* 3-ER-587 ¶1; 3-ER-439 ¶1. Although the orders also recognized that they "may be modified," they did not leave that possibility to whim or caprice. Op. Br. at 20; *see also, e.g.,* 3-ER-588 ¶1. Instead, they spell out specific "COVID Indicators"—such as case counts, hospitalization rates, and testing capacity—that would guide any such decision. 3-ER-590-91 ¶11. This is therefore not a case involving an "individualized determination untethered to any explanation or change in policy…." *Fikre*, 904 F.3d at 1039-40. The final factor thus supports a finding a mootness as well.

An additional factor courts consider when assessing the likelihood of recurrence—*Rosebrock*'s factors are not "exhaustive or definitive" (745 F.3d at 972, n.10)—is whether the challenged conduct arose from fact- and context-specific circumstances. In *Los Angeles County v. Davis* (1979) 440 U.S. 625, 631-32, for example, the plaintiffs claimed a process for hiring firefighters

discriminated against non-white applicants. The defendant modified its hiring practices during the litigation, mooting that claim. Concluding there was no "reasonable expectation that the alleged violation will recur," the Supreme Court emphasized that the defendants had employed the challenged procedure "only because of a temporary emergency shortage of firefighters and only because [they] then had no alternative means of screening job applicants." *Id.* (cleaned up). It added that "[t]hose conditions were unique, are no longer present, and are unlikely to recur" because the defendant had since implemented a new hiring process that increased "minority representation in the Fire Department." *Id.* Thus, the voluntary cessation exception did not apply.

The facts are even stronger here. As in *Los Angeles*, the Counties took the steps that aggrieved Plaintiffs due to "temporary emergency" circumstances in the very earliest stages of a pandemic. And, as in that case, in material respects those circumstances "are no longer present, and are unlikely to recur." For while COVID-19 has not been eradicated, the vast majority of eligible residents now enjoy the protection of vaccines that are highly effective at preventing death and hospitalization. Plaintiffs note that in Santa Clara County, as of June 21, "over 71% of…residents over age 12 [are] fully vaccinated…." Op. Br. at 22. That figure now exceeds 85% in Santa Clara County and 91% in San Mateo. Measures taken during the first weeks of a pandemic with little information and no vaccines

are not likely to recur nearly two years later after much more is known and nearly all eligible residents are inoculated.

The Counties' actions after retail reopened in June 2020 underscore this point. Several surges have occurred since then—in July-August 2020, November 2020-January 2021, and July-September 2021, the last driven by the Delta variant. During each, deaths, cases, and hospitalizations exceeded those extant when the Counties issued the orders challenged here. Yet the Counties refrained in each instance from issuing shelter-in-place orders like those from early 2020. In suggesting that "the rise in Delta variant" (Op. Br. at 22) might lead to recurrent regulations, of which "restored … indoor mask mandates (Op. Br. at 25-26) are just the first step, Plaintiffs thus prove precisely the opposite point they wish to make. The Delta surge ended without relapse. And the mask mandates both apply across the board to all businesses and did not require closure of any. They are exactly the type of measure Plaintiffs argue the Counties *should* have employed at the outset. *See* Op. Br. at 2 (arguing ranges and firearm retailers "just as easily could have followed" the "simple health protocols" imposed on essential businesses in March-May 2020).

And while Plaintiffs make much of the Counties' failure to declare they "'*will not*' reinstate the same sort of prohibitions" (Op. Br. at 25), neither *Los Angeles* nor *Rosebrock* required such a commitment. The Counties' actions,

moreover, do demonstrate they "'*will not'* reinstate the same sort of prohibitions" issued in early 2020 when confronted with the same (or even worse) circumstances as were then present. If the Court would be aided by an express declaration of the Counties' intent, it may accept one in this submission. *See CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc*., 48 F.3d 618, 622 (1st Cir. 1995) (finding dispute unlikely to recur in part because "[w]hen questioned at oral argument," counsel stated its client would not repeat conduct); *State of Cal. Dep't of Educ. v. Bennett*, 829 F.2d 795, 800, n.16 (9th Cir. 1987) (finding issue moot because party, "in its brief," stated it would provide requested relief). To that end, the Counties state expressly: they do not intend, based on currently foreseeable conditions, to reinstate prohibitions of the type challenged here.

That the Counties have not declared they would *never* reinstate similar restrictions is beside the point. When future, and allegedly "recurrent," conduct does not occur "on similar facts and in the same context…, the 'voluntary cessation' doctrine is inapplicable, because… review of future instances of 'wrongful behavior' may be quite different than the complained-of example that already has ceased." *Unified Sch. Dist. No. 259, Sedgwick Cty., Kan. v. Disability Rts. Ctr. of Kansas*, 491 F.3d 1143, 1150 (10th Cir. 2007). Here, if the Counties closed retail, it would not be "on similar facts and in the same context" as this case but due to conditions materially worse than anything seen to date. In the unlikely

event that occurs, the dissimilar circumstances guarantee any resulting review would be "quite different." *Id*. What is permissible when, say, thousands are dying weekly may differ from what can be done to prevent dozens of deaths. *Id.*; *see also Nuiqsut*, 9 F.4th at 1215 (holding that voluntary exception did not apply in part because any future dispute would likely involve different environmental standards than the one then being litigated).

3. The Repetition-Review Exception Does Not Apply

The repetition-review doctrine does not revive Plaintiff's prospective claims either. It applies where: (i) "the challenged action is too short to allow full litigation"; and (ii) "there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again." *Nuiqsut*, 9 F.4th at 1209. Because the doctrine is not limited to situations where courts have "reason to be skeptical" of the party asserting mootness, *Friends,* 528 U.S. at 214 (Scalia, J., dissenting), precedent places "the burden for showing a likelihood of recurrence firmly on the plaintiff." *Sample v. Johnson*, 771 F.2d 1335, 1342 (9th Cir. 1985); *see also Nuiqsut*, 9 F.4th at 1209 ("the *plaintiffs* have the burden"). The exception, moreover, "is a narrow one" that "applies only in 'exceptional situations.'" *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985). Here, even assuming its first element is satisfied, its second is not.

Plaintiffs argue recurrence is likely for three familiar reasons—because: (i) the Counties have not renounced their power to issue retail-closing health orders or declared they never will again; (ii) "the same sort of public health risks that led to" the challenged orders persist, as evidenced by the Delta variant, which increased new cases "over 60% in just … two weeks"; and (iii) "the counties already have a demonstrated history of reimposing restrictions…in response to sharp spikes in the COVID-19 data." Op. Br. at 27-28.

These arguments do not withstand scrutiny for the same reasons set forth above. The Delta surge ended without similar orders, and the "demonstrated history" of the Counties "reimposing restrictions" comes from a *State* order that does not reference ranges or gun stores. And, here too, the fact that the Counties have not renounced their power to—or declared they never again will—close retail misses the point. A defendant's mere retention of the power to act establishes only that the plaintiff *could* experience the same harm, not a "calculable" likelihood that the same injury *will* recur. *Sample*, 771 F.2d at 1340. It is not enough to meet their burden. *Id.* Otherwise, this "narrow" exception would apply not just in "exceptional situations" but in nearly every case challenging government action. *Lee*, 766 F.2d at 1390; *see also Halvonik*, 457 F.2d at 313 (rejecting argument that recurrence was likely because "the statute authorizing" challenged orders "still exists"); *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007)

(finding fact that policy "*might* adversely affect" plaintiff "at some indeterminate time in the future…too remote and … speculative").

Plaintiffs' arguments also ignore their obligation to establish that "the *same* controversy" will recur. *Lee*, 766 F.2d at 1390 (emphasis added). As Plaintiffs concede, the party invoking the exception must establish a demonstrated probability that it will face circumstances "'*materially similar*" to those giving rise to the original dispute. Op. Br. at 27 (citing *Wis. Right to Life Inc.*, 551 U.S. at 463) (emphasis added); *cf F.E.R.C.,* 100 F.3d at 1459 (exception applies only if the "exact factual and legal situation will recur").

Thus, as with voluntary cessation, when "resolution of a controversy depends on facts that are unique or unlikely to be repeated," the case "is not capable of repetition and hence is moot." *F.E.R.C.*, 100 F.3d at 1460. Consistent with that rule, this Court has determined that the exception did not apply to a dispute involving a gas pipeline because there was no reason to believe "future natural gas pipeline expansions … will necessarily adopt the [same] unique configuration" as was then at issue (*id.* at 1459-60); to a controversy over fishing rights because "[t]he circumstances of each year's salmon run are different" (*Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1283 (9th Cir. 1994)); to environmental disputes where regulatory agencies would

determine future harvest limits using a different biological opinion (*Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1075 (9th Cir. 1995)); the same biological opinion but "a different method of calculating the baseline" (*Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996)); or different environmental standards (*Nuiqsut*, 9 F.4th at 1209-12).

For the reasons detailed above, this case is at least as fact- and context-specific as these disputes and equally unlikely to recur. In the unlikely event similarly strict orders issued, it would be because materially different (and worse) conditions, such as much higher fatality rates, emerge than have existed at any point so far. The differences between that future, hypothetical dispute and this one would be at least as significant as between different gas-pipeline routs, annual salmon runs, or environmental analyses.

4. *Roman Catholic*, *Tandon*, and *Brach* Are Not to the Contrary

In arguing this case remains live, Plaintiffs rely primarily on *Brach v. Newsom*, 6 F.4th 904, 921 (9th Cir. 2021), *pet'n for reh'g en banc pending, Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). *See* Op. Br. at 23-26. None compels application of the voluntary cessation doctrine. The latter two cases do not even mention that doctrine by name. *Brach* nevertheless interpreted *Diocese of Brooklyn* as "foreclos[ing]" an argument that the voluntary cessation doctrine does

not apply when a plaintiff obtains relief due to "changes in underlying Covid infection rates, rather than … changes in [the defendant's] directives." *Brach*, 6 F.4th at 918-19. But *Brach* does not address prior authority requiring a defendant to have both changed its position and to have done so because of litigation. It also does not articulate any framework to apply going forward; explain whether the doctrine always or only sometimes applies when mid-litigation events afford relief; identify which types of events qualify and why; or state whether certain disputes, such as First Amendment challenges, should be analyzed differently than others. *Brach* does little more than extend *Diocese of Brooklyn*, which itself contains no analysis, to the facts before it.

Those facts, moreover, differ materially from these ones, and the differences matter when considering whether there "is reason to be skeptical that cessation of violation means cessation of live controversy." *Friends,* 528 U.S. at 214 (Scalia, J., dissenting). The *Brach* majority's skepticism stemmed largely from California's "track record of moving the goalposts" (*Brach*, 6 F.4th at 919) by issuing policies that "ebbed and flowed" (*id.* at 920) and took a "zig-zag course" (*id.*) during the litigation. In particular, after the lawsuit was filed, the State "tightened Covid-related school restrictions" (*id.* at 919) and "reverse[d] course" by "abandon[ing] its *previous* school opening plans" (*id.* at 920). It was not until "[a]fter oral argument" that "the State reclassified" the counties at issue there (*id.*

at 916) and adopted a "new framework" (*id.* at 915) that disfavored the school closures the plaintiffs challenged. Similar concerns existed in *Tandon* and *Diocese of Brooklyn*. *See Diocese of Brooklyn*, 141 S. Ct. at 74, (Kavanaugh, J., concurring) (describing near-daily changes to rules and defendant's failure to deny it would likely reimpose restrictions "in the very near future"); *Tandon*, 141 S. Ct. at 1297 (noting that "California officials changed the challenged policy shortly after th[e] application" to the Supreme Court was filed).

Here, in stark contrast, County orders have not ebbed and flowed or zigged and zagged. Nor did the Counties "reverse course" by re-closing retail after opening it. On the contrary, the orders requiring broad retail closures, having issued in mid-March 2020, eased less than two months later, on May 18, then ended less than two weeks after that—a status quo that will have remained constant for over 18 months when this appeal is fully briefed.

Even if the Court were to apply the voluntary cessation doctrine, the facts of this case would lead to a different result than in *Brach*, *Tandon*, and *Diocese of Brooklyn*. Besides considering frequent and unpredictable policy changes not present here, those cases confronted a less certain epidemiological landscape than exists today. *Diocese of Brooklyn* was decided early in the pandemic, *Tandon* before vaccines became widespread. And although *Brach* issued in the vaccine era, the majority worried that the Delta variant had caused infections to reach

levels that, under the State's then-recently superseded orders, "would have triggered an order to keep schools closed." *Brach*, 6 F.4th at 920. It similarly expressed concern that, if the State determined "case rates are increasing, that the pace of immunization has slowed, and that new variants pose a threat," it might reimpose orders requiring school closures. *Id.*

The contrast is again clear: vaccines are now widely distributed, the Delta surge has come and gone without retail closures, and there is no recently superseded County framework that, had it remained in effect, would currently require new shutdowns. Whatever one may think of *Brach's* concerns in July, and as to the State as a whole, that the "pace of immunization" might slow, "case rates" might increase, or that "new variants [could] pose a threat," they find no purchase at *this* time in *these* Counties. The percentage of fully vaccinated eligible California residents was only "61.5%" when *Brach* issued. *Brach*, 6 F.4th at 936, n 2 (Hurwitz, J., dissenting). Corresponding figures in San Mateo and Santa Clara counties, respectively, are 91% and 85.6% and rising. Those facts make recurrent orders extremely unlikely.

The main overlap between this case and *Brach*, *Tandon*, and *Diocese of Brooklyn* is that here, as there, the defendants did not "foreswear ever" reissuing similar orders. *Brach*, 6 F.4th at 920. Plaintiffs describe that commonality as "a primary basis" for *Brach's* holding. Their interpretation ignores the majority's

discussion of the State's "oft-changing" regulations, the Delta surge, and California's then-modest vaccination rates. Moreover, as set forth above, that a defendant has not relinquished (or promised never to exercise) a right cannot alone be dispositive or virtually no case involving the government would ever be moot. *See* pp. 28-32, *supra*. Finally, the Counties *do* expressly declare that they do not intend to issue similar restrictions based on currently foreseeable conditions. Similar orders would not issue unless circumstances became materially worse than anything experienced to date.

For the same reasons, *Brach*, *Tandon*, and *Diocese of Brooklyn* also do not establish that this dispute is capable of repetition and evading review. Repetition is far less likely here than in those cases due to the Counties' consistent and now longstanding positions regarding shelter-in-place orders, the widespread distribution of vaccines locally, and the recurrence-free end of the Delta surge. If orders similar to those from early 2020 did issue, it would be in response to materially different circumstances than existed then, which would represent not a repetition of this dispute but the creation of a new one.

C. Plaintiffs' Nominal Damages Request is No Longer Live

1. Plaintiffs Can, and Did, Forfeit Their Nominal Damages Request

Plaintiffs alternatively argue that the FAC's request for nominal damages keeps the case alive—at least to the extent they seek an award of one dollar from

the district court—even though they did not raise that argument when the parties briefed mootness below. In general, "[a] plaintiff who makes a claim ... in his complaint[] but fails to raise the issue in response to a defendant's motion to dismiss ..., has effectively abandoned his claim, and cannot raise it on appeal." *Carvalho v. Equifax Info. Servs*., LLC, 629 F.3d 876, 888 (9th Cir. 2010) (quoting *Walsh v. Nev. Dep't of Human Res.,* 471 F.3d 1033, 1037 (9th Cir.2006)). Nominal damages is no exception to this rule.

The analysis in *County Motors, Inc. v. Gen. Motors Corp*., 278 F.3d 40, 43–44 (1st Cir. 2002) is instructive. The plaintiff automobile dealer in that case, County Motors ("County Motors"), sued to enjoin General Motors (GM) from allowing a competitor to relocate in its sales area. *Id.* at 42. The district court granted judgment as a matter of law to GM, County Motors appealed, and, during the appeal, the competitor abandoned its plans to relocate. *Id.* at 43. County Motors argued that "even if it is no longer entitled to the injunctive relief that it originally sought," the case remained live because, on remand, "the district court could find that [Motors] is entitled to nominal damages…." *Id.* The court agreed "that a claim for damages may prevent a case from becoming moot" but added that the claim "must have been articulated to the district court." *Id.* "Because County [Motors] failed to argue that it was entitled to nominal damages until its reply brief," it had "waived this claim." *Id.* The court therefore remanded the case

"with direction to dismiss the complaint as moot." *Id.* at 44.

Similarly, in *Fitzgerald v. Century Park, Inc*., 642 F.2d 356, 357 (9th Cir. 1981), the plaintiff sued a developer for violating the Interstate Land Sales Full Disclosure Act. The district court ruled that she had not suffered "cognizable damages" (*id.*), a conclusion with which this Court agreed (*id.* at 358-59). She argued "that even if … damages are not available," the Court should "remand for trial on the issue of nominal damages." *Id.* at 357. Because that "request for nominal damages" was "raised, for the first time, on appeal," and because this Court "decline[s] to consider arguments not presented to the district court unless … injustice might … result," the Court denied her request. *Id.* at 359; *see also Walsh,* 471 F.3d at 1036 (holding that even if plaintiff "properly pleaded her claim for injunctive relief, she failed to preserve issue for appeal" because she did not raise it "in response to [the] defendant's motion to dismiss").

These cases control. During the preliminary injunction hearing below, the district court set a schedule—agreed to by Plaintiffs—for supplemental briefing to address mootness. It directed Plaintiffs to argue: "Here is why the case is not moot" (3-ER-570) and, again, "This case is not moot and here's why" (3-ER-576). Plaintiffs then filed briefs in which they argued not only that their request for injunctive relief remained live but that intervening events had not "render[ed] *the claims* moot." 3-ER-517 (emphasis added). They specifically argued that "the

voluntary cessation doctrine … preserve[d] this Court's *jurisdiction* over *the controversy*" because "*[a] case* is not easily mooted where the government" can easily reenact the offending provision. 3-ER-517 (emphasis added). They also argued that "any assumed mootness would not deprive this Court of *jurisdiction* because *the controversy* is inherently one 'capable of repetition, yet evading review.'" 3-ER-519 (emphasis added). What Plaintiffs did *not* do is argue that their request for nominal damages conferred "jurisdiction" or kept "the case" or "controversy" live. As in *County* and *Fitzgerald,* their failure to raise the issue before the district court precludes them doing so here.

That result is particularly appropriate in this case for several reasons. First, Plaintiffs do not explain their prior omissions, and an "unexplained failure to raise an argument that was indisputably available below is perhaps the least 'exceptional' circumstance" justifying appellate review. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1214–15 (9th Cir. 2020). Second, despite claiming surprise, Plaintiffs did not "request reconsideration" (*Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021) or file a Rule 59(e) motion which, would have been "the most prudent course" (*Charter Co. v. United States,* 971 F.2d 1576, 1582 (11th Cir. 1992)). Third, Plaintiffs do not argue that any specific exceptions to the general rule against introducing issues on appeal apply or explain why, if they do,

the Court should indulge them here. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (noting that, even if exception applies, "we must "still decide whether the particular circumstances" justify exercise discretion to consider forfeited arguments); *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1153 (9th Cir. 2020) (plaintiffs waived arguments because they "failed to address any of the exceptions to the general rule").

Plaintiffs instead argue, first, that their nominal damages "claim" is "not an 'argument' that can be waived." Op. Br. at 35. But a request for damages "constitute[s] a remedy, not a claim." *Oppenheimer v. Sw. Airlines Co*., No. 13-CV-260-IEG BGS, 2013 WL 3149483, at *3 (S.D. Cal. June 17, 2013). And "[a] party can waive a form of relief, including nominal damages." *Alpha Painting & Constr. Co., Inc. v. Delaware River Port Auth. of Pennsylvania New Jersey*, 822 F. App'x 61, 68 (3d Cir. 2020). This Court found such a request waived in *Fitzgerald* and reached the same result in other cases where a plaintiff failed to properly raise a demand at the district court. *See, e.g., Seven Words LLC v. Network Sols*., 260 F.3d 1089, 1098 (9th Cir. 2001) (finding waiver). This court has even found waiver and dismissed "for lack of a live case or controversy" when plaintiffs *did* properly raise nominal damages before the district court but "fail[ed] on appeal to name any of the Defendants"—state actors who otherwise enjoyed sovereign

immunity—"in their personal capacities." *Espinosa v. Dzurenda*, 775 F. App'x 362, 363 n.2 (9th Cir. 2019).

Plaintiffs rely mainly on *Brach* for the claim that "[a] proper analysis does not turn on the list of specific arguments a party does or does not raise in support of claim…." Op. Br. at 36. *Brach* does not aid Plaintiffs. The majority there determined that the plaintiffs asserted claims that "*necessarily* rested on the *Meyers-Pierce* fundamental right of parents to choose their children's educational forum." *Brach*, 6 F.4th at 925. It rejected the defendant's argument that the "more detailed *Meyers-Pierce* argument" in the plaintiffs' appellate brief should have been presented "in that form" to the district court because arguments are "typically elaborated more articulately… on appeal…." *Id.* at 926. The principle applied with "special force" because "expedited proceedings" had "resulted in a *sua sponte* grant of summary judgment…." *Id.* at 926-27. In the alternative, the majority found that the "importance of the issue" favored considering the argument even if the plaintiffs had forfeited it. *Id.*

None of these considerations apply here. Defendants do not fault Plaintiffs for presenting a "more detailed" nominal damages argument here or for elaborating it "more articulately" on appeal. Plaintiffs previously did not make the argument at all. Further, although the district court considered mootness on an expedited basis and *sua sponte* dismissed Defendants, it did so according to a schedule

Plaintiffs themselves negotiated after briefing dedicated solely to the issue of mootness. Finally, whatever the importance of the issues in *Brach*, here, all that could possibly remain of this case is an attempt by Plaintiffs—who have already obtained a $10,000 settlement from Alameda County—to recoup an additional dollar in damages from the remaining Defendants. Indeed, at least one Plaintiff (Albert Lee Swan of Alameda County (5-ER-1171)) seems to have no claim left at all following that settlement. The insubstantial nature of Plaintiffs' interest weighs against excusing their omission.

Plaintiffs next argue "[i]t is axiomatic that jurisdictional issues can be raised at any time, and indeed must be considered whenever they may surface … regardless of whether" a party raised them. Op. Br. at 38. But one case they cite states that "*[d]efects* in subject matter jurisdiction may be raised at any time…and may never be waived." *Id.* at 39 (citing *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1264 (9th Cir. 1992) (emphasis added). Another, that a *"lack of* subject matter jurisdiction may be raised at any time…." *Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999) (emphasis added). A third declares that "[a] jurisdictional issue may be raised for the first time on appeal regardless of its 'constitutional magnitude'" (*Hajro v. U.S. Citizenship & Immigr. Servs*., 811 F.3d 1086, 1099, n.6 (9th Cir. 2016)) but contextualizes that claim in the

immediately preceding sentence (not quoted by Plaintiffs): "*failure to challenge* the district court's jurisdiction … does not ordinarily constitute waiver." *Id.* (emphasis added). None stand for the claim that a party can introduce arguments *in support of* jurisdiction at any time. Any such dictum would contradict the Supreme Court's admonition that "a claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, [bears] close inspection" (*Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997)), as well as this Court's application of that rule (*see Seven*, 260 F.3d at 1098 (finding claim moot under *Arizona* because plaintiffs asserted nominal damages claim too late)).

2. Plaintiffs Had Ample Opportunity to Argue Nominal Damages

Bernhardt v. Cty. of Los Angeles, 279 F.3d 862, 871 (9th Cir. 2002), on which Plaintiffs primarily rely, is not to the contrary. The plaintiff in that case challenged a county's policy to settle civil rights cases solely on a "lump sum" basis, which she claimed prevented her from "the opportunity to obtain a civil rights lawyer" in a separate action. *Id.* at 866. The district court dismissed her claim for lack of standing. On appeal, this Court considered the issue of mootness not because it must always consider any basis *for* subject matter jurisdiction but because it was concerned the plaintiff's "claim may have become moot," *negating*

jurisdiction. *Id.* at 871. That subject had not previously been "raised by the [defendant] or briefed by the parties." *Id.* Indeed, the "underlying [civil rights] action" was dismissed "[s]ubsequent to the dismissal of the instant action" (*id.* at 866-67), so mootness *could not* have been raised previously, and the plaintiff could not possibly have forfeited any argument related to it. The case provides no support for Plaintiffs' no-forfeiture argument.

Plaintiffs' final argument—that "the district court was *duty-bound* to consider the effect of Plaintiff's nominal damages claim" (Op. Br. at 41)—fails for similar reasons. Plaintiffs rely primarily on *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 281 (9th Cir. 1974). There, a district court *sua sponte* dismissed the plaintiffs' complaint because they asked the court to "enjoin[]… pending [criminal] prosecutions," relief barred under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 (1971). This court reversed because the district court "should have given notice of [its] intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court." *Id*. It explained that, if given the opportunity, "the plaintiff may have been able to frame an injunction … without posing a threat of interruption of pending prosecution." *Id.* at 282.

This case differs for familiar reasons. Here, there *was* a hearing at which Plaintiffs admit "the first and primary topic of discussion" was mootness (Op. Br. at 11), and the court *did* provide Plaintiffs with notice of its potential "intention to dismiss." The district court likewise gave them "an opportunity to submit a written memorandum" on the subject—as Plaintiffs describe it, "supplemental briefing…on the question of mootness." Op. Br. at 11. Indeed, the court specifically directed Plaintiffs to address the risk of dismissal in that submission, explaining that they should argue: "Here is why the case is not moot" (3-ER-570) and, "This case is not moot and here's why" (3-ER-576). Finally, although the district court here did not provide an "opportunity to amend," that is because it based dismissal on mootness rather than any pleading deficiency that could be cured by amendment. In short, *Diversified* is inapposite where, as here, forfeiture followed argument and briefing on mootness. Further, Plaintiffs' assertion that the district court was required to accept pleaded facts as true for dismissal purposes is immaterial. Op. Br. at 45. The district court's mootness decision was grounded in law; it was not required to accept Plaintiff's failed legal arguments or forfeited remedies, neither of which precluded dismissal here.

VI. CONCLUSION

The district court's dismissal of Plaintiffs' request for prospective relief should be affirmed because Plaintiffs obtained that relief long ago, because the voluntary cessation doctrine does not apply, and because the controversy is not capable of repetition and evading review. And dismissal was appropriate, despite Plaintiffs' request for nominal damages, because Plaintiffs, by failing to present that request to the district court, forfeited the right to rely on it.

Date: November 12, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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