**No. 21-15602**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JANICE ALTMAN, *et al.,*

*Plaintiffs–Appellants,*

vs.

COUNTY OF SANTA CLARA, *et al.*,

*Defendants–Appellees.*

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

## APPELLANTS' REPLY BRIEF

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## INTRODUCTION AND SUMMARY OF ARGUMENT

At the outset of the ongoing COVID-19 pandemic, an unelected clique of county health officers, accountable to no electorate or constituency, banded together to make judgment calls about what constituted the "essential" needs of the citizenry during such a crisis. These judgments became the basis of executive edicts, dictating with the force of criminal law, that all so-called "*non*-essential" businesses must close their doors. These edicts compelled the shutdown of the entire firearms industry, without regard for the fundamental Second Amendment rights of millions of law-abiding citizens for whom access to firearms retailers, ammunition retailers, and shooting ranges was unquestionably *essential* to exercise their constitutional right to keep and bear arms.

When the counties did finally reopen retail for everyone, some two months later, this action challenging the unconstitutionality of the Appellee-Counties' previous shutdowns orders did not suddenly become moot. The controversy persisted just the same, and it will continue to persist until the important legal question at the center of the case is resolved on the merits, i.e., whether government officials have the power to shut down the industry necessary for law-abiding citizens to exercise their Second Amendment rights for indefinite periods of time in the name of combatting a public health crisis.

Appellees cannot escape this conclusion. They cannot carry their "heavy burden" of showing it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," as they must in order to rely on their voluntary cessation of the shutdown orders to demonstrate the case is now "moot." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (internal quotations omitted) ("Ultimately, the question remains whether the party asserting mootness has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.").

Appellees have never committed to an unequivocal or permanent change in their policies that led to the shutdowns. To the contrary, they have expressly reserved to themselves the power to reinstate similar shutdowns at any time, if and when, in their unilateral judgment, the prevailing conditions of the pandemic warrant declaring the firearms industry *non*-essential. And their new claim, contained solely within the confines of an appellate brief, that they don't intend to "reinstate prohibitions of the type challenged here," Ans. Brf. at 29, comes with the glaring disclaimer that this promise is "based upon currently foreseeable conditions," *id.* at 15, 29 37-37. It does not mean "they would *never* reinstate similar restrictions" because they "have not renounced their power to close retail" based on such judgments, *id.* at 29, 31 (italics added). Moreover, the retail

reopenings in June 2020—by which time firearm and ammunition sales had effectively been halted for 81 days—left completely unaddressed any of the objections to the previous policies that Plaintiffs raised. *See Rosebrock*, 745 F.3d at 972 (if "the policy change fully addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case," a finding of mootness may be more appropriate). In fact, Appellees continued to insist throughout the litigation that the Second Amendment was not even implicated much less violated, refusing to take any responsibility for what they *now* admit on appeal was actually an "eight-to-ten week deprivation" of Plaintiffs' rights. Ans. Brf. at 23.

For the same essential reasons, there exists "a demonstrated probability that the same controversy will recur involving the same complaining party," *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)—which simply means a probability that "materially similar" circumstances will recur, *Fed. Election Com'n v. Wis. Right to Life Inc.*, 551 U.S. 449, 463 (2007)—and, as Appellees "assume" to be true, Ans. Brf. at 30, the deprivation is "of a type inherently shorter than the duration of litigation," *Planned Parenthood of Greater Washington and North Idaho v. U.S. Dept. of Health & Human Services*, 946 F.3d 1100, 1109 (9th Cir. 2020). Accordingly, the claims here are necessarily "capable of repetition, yet evading review," which independently preserves their justiciability. *Id.* As long as the

counties continue to ignore the significance of the deprivation of Plaintiffs' rights while granting themselves the right to reinstate their orders at any time based on the "case counts, hospitalization rates, and testing capacity" of this pandemic, Plaintiffs remain under a constant threat of constitutional injury.

Plaintiffs also continue to maintain a live case, because they have sought nominal damages for the past constitutional injuries inflicted, a plain fact which prevents dismissal. Plaintiffs did not and could "waive" or "forfeit" the *argument* that their nominal damages claim *also* precludes a finding of mootness. They need only have raised the *claim* itself, and the inescapable legal effect of it is to bar dismissal. Further, Plaintiffs' arguments about mootness were properly tailored to the specific nature of the circumstances and the parties' dispute actually before the district court at the time it requested briefing and arguments; it was only later, based on *subsequent* events, that the court abruptly jettisoned the claims against Appellees as moot. Plaintiffs certainly did not engage in the sort of gamesmanship that the forfeiture rule is designed to prevent. Even if a finding of forfeiture *could* be made under these circumstances, this all presents a pure question of law that is entirely appropriate and ripe for adjudication. And, again, the inevitable effect of the nominal damages claim is just *one* of multiple independent bases compelling the conclusion that Plaintiffs' action continues to present a live case and controversy.

## ARGUMENT IN REPLY

### I. APPELLEES HAVE NOT MET THEIR HEAVY BURDEN TO SHOW THAT VOLUNTARY CESSATION OF THE CHALLENGED ORDERS MOOTS THE CASE.

#### A. THE VOLUNTARY CESSATION DOCTRINE APPLIES.

Initially, Appellees proclaim that "The Voluntary Cessation Exception Does Not Apply." Ans. Brf, at 18. Their argument misconstrues or misapprehends the voluntary cessation doctrine by suggesting Plaintiffs must show that Appellees acted with "pretextual" purposes designed to "manipulate court proceedings and evade judicial review" in finally lifting the shutdown orders. *Id.* at 18-20. But as they admit, *they* carry the burden here. *Id.* at 19. As they also admit, no one factor is definitive in determining whether they have carried this heavy burden, *id.* at 26, as the voluntary cessation doctrine ultimately "requires a defendant to establish 'that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,'" *id.* at 19 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). Relatedly, but independently, Appellees must also show that '"interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

Not only does the voluntary cessation doctrine *apply* here, but the clear weight of relevant factors squarely *resolves* in Plaintiffs' favor. Even the district

court—once it directly addressed the issue five months later in connection with the County of Alameda's motion to dismiss—agreed. Focusing on the essential question whether the county had clearly demonstrated a permanent abandonment of its previous policy, the court found the policy change "was not 'broad in scope' or 'unequivocal in tone'" because "neither the State of California nor Alameda County has committed to permanently abandoning the closure of non-essential retail businesses as a means of fighting COVID-19 or evinced any intent to exempt firearms retailers from future closures." 2-ER-50 [ECF 80 at 9:11–14].

Apparently now struck by the significance of this factor to the carrying of their actual burden, Appellees make a last-second attempt to fill the void with carefully crafted promises limited to the confines of their brief. They say that "*based on currently foreseeable conditions*," they "do not intend" to "reinstate prohibitions of the type challenged here," "issue orders similar to those Plaintiffs challenge in this case," or "issue similar restrictions." Ans. Brf. at 15, 29, 36 (italics added). Any such promises are obviously not binding on the counties, as they cannot and do not in any way alter, rescind, or disclaim the powers that their health officers expressly reserved *to themselves* to modify their orders as *they* see fit. *See, e.g.*, Santa Clara County Order, 3-ER 588 [ECF 50, Exh. A, § 1, at 2] ("The businesses and activities allowed under this Order may be modified as necessary based on *the Health Officer's* analysis of that data.") (italics added). But

the promises are also empty. Appellees use this late-stage play to tee up a claim central to their theme on appeal—that any further orders issued at any time in the future would necessarily be based on "different circumstances" because all such orders would be based on the then-prevailing "case counts, hospitalization rates, and testing capacity" of the COVID-19 pandemic. Ans. Brf. at 16, 26. Thus, so the story goes, all future orders effecting any shutdowns of the firearms industry would necessarily present "a new controversy" involving "dissimilar circumstances," rendering any controversies involving any previous shutdown orders constitutionally stale for purposes of Article III. *Id.* at 16, 29-30.

Appellees are merely promising that they won't issue further shutdown orders based on *precisely the same* pandemic conditions—which is meaningless since the constantly fluctuating "case counts, hospitalization rates, and test capacity" are never the same—while expressly stating an intent to reserve and exercise their powers as they see fit based on any new or different data or features of the pandemic that they believe warrant further shutdowns. Appellees' posturing certainly does not provide any assurance, much less absolute clarity, that "the allegedly wrongful behavior could not reasonably be expected to recur." In fact, it highlights the corollary factor that always weighs heavily against a finding of mootness under the voluntary cessation doctrine, and on which the district court itself expressly relied in rejecting Alameda County's mootness claim—'"the new

policy could be easily abandoned or altered in the future."' 2-ER-50 [ECF 80 at 9:14–15 (quoting *Rosebrock*, 745 F.3d at 971)]. For the same essential reasons, Appellees cannot show "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Fikre*, 904 F.3d at 1037.

Under these circumstances, Appellees necessarily cannot carry their "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* And the same conclusion holds throughout a closer examination of the situation under the non-exhaustive *Rosebrock* factors commonly applied in mootness analyses.

### B. APPELLEES CONTINUE TO CLAIM THEY HAVE THE POWER TO FORCE SHUTDOWNS OF THE FIREARMS INDUSTRY BASED ON THE PREVAILING CONDITIONS OF THE PANDEMIC.

Again, the ultimate burden of the party claiming mootness based on its voluntary cessation of the challenged conduct is to prove with absolute clarity that "the allegedly wrongful behavior could not reasonably be expected to recur." The *Rosebrock* factors most directly focused on this inquiry are whether "the policy change is evidenced by language that is broad in scope and unequivocal in tone" and, of close relation, whether it "could be easily abandoned or altered." *Rosebrock*, 745 F.3d at 972. As we have already seen, the only attempt Appellees have made to meet this fundamental element of their burden is their non-binding, late-stage play disclaiming an intent to reimpose shutdowns of the firearms

industry based on the previous or currently prevailing pandemic conditions that led to the initial shutdowns, while reasserting their ability to do so based on any "dissimilar circumstances" the future may bring, including any differences in the basic "COVID Indicators." Ans. Brf. at 16, 26. Appellees make clear that they "have *not* declared they would never reinstate similar restrictions," "have *not* renounced their power to" do so, and have *not* "declared they never will again." *Id.* at 29, 30 (italics added). Instead, despite their attempts to placate with late-stage assurances of benevolent intentions, they are essentially continuing to say, as they have all along, that they remain free to impose shutdowns on *all* industries and businesses based on their own assessments of what is "essential" to the public good *regardless* of whether doing so results in a deprivation of constitutional rights.

*That* is the nub of this controversy, and Appellees' doubling-down on this claim of power underscores the importance of a merits adjudication. Indeed, if Appellees can avoid liability under a cloak of "mootness" here, more than the fundamental Second Amendment rights are in jeopardy. Appellees could claim this power to infringe upon all manner of constitutional rights that don't jive with the prevailing winds of their policy determinations regarding the "COVID Indicators." This situation is nothing like the cases that Appellees cite for support. In *Already, LLC v. Nike, Inc.*, cited in Appellees' Ans. Brief at pp. 17-19, defendant Nike "unconditionally and irrevocably covenant[ed] to refrain from making *any* claim(s)

or demand(s) … against Already" of the sort that spurred the litigation, 568 U.S. at 93 (emphasis original). In *American Diabetes Assn. v. United States Dept. of the Army*, 938 F.3d 1147 (9th Cir. 2019), cited in Appellees' Ans. Brief at p. 23, after it was sued over a regulation prohibiting treatment of diabetic children in a youth program, the Army issued a new memorandum and policy that "unequivocally renounce[d] the previously challenged prohibition on care" and required the provision of special needs accommodations except under rare circumstances, 938 F.3d at 1153. Similarly, in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), cited in Appellees' Ans. Brief at p. 23, after being sued for allegedly harassing plaintiffs in violation of their First Amendment rights, HUD implemented and memorialized a new policy specifically prohibiting agency investigations into protected First Amendment activity, which reflected "a permanent change in the way HUD conducts FHA investigations," reinforced by a press release and new field handbook that incorporated the new policy, 227 F.3d at 1225, 1234.

These cases are miles away from Appellees' non-binding, empty promises, which instead put the case squarely in the camp of cases like *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013), where "[e]ven assuming [the] Defendants [may] have no intention to alter or abandon the [new policy], the ease with which [they] could do so counsels against a finding of mootness, as a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact

the provision." *Id.* at 900 (internal quotations omitted). This is especially true when Appellees ultimately *reassert* the ability to impose any new shutdown orders whenever they like based on the future "COVID Indicators."

### C. THE NEW ORDERS DID NOT ADDRESS AT ALL APPELLEES' PRIOR DEPRIVATION OF SECOND AMENDMENT RIGHTS.

Another *Rosebrock* factor of significance in reaching a proper finding of mootness is whether "the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case." 745 F.3d at 971. Appellees attempt to assume this factor away, claiming simply, "Plaintiffs do not dispute that, as revised in May and early June 2020," the orders "fully address[] all of the objectionable measures . . .—ranges and gun stores reopened." Appellees' Ans. Brf. at 22.

The revised county orders did not address, or even pretend to concern themselves with, any activity protected by the Second Amendment. While the broad county retail reopenings which occurred between May 29 and June 2, 2020, *happened to* include gun stores and ammunition vendors, those orders sidestepped the very fundamental concern of this lawsuit, which, as framed in the very first paragraph of Plaintiffs' complaint is that "California's local governments, whether legislatively or by executive decree, cannot simply suspend the constitution. Authorities may not, by decree or otherwise, enact and/or enforce a suspension or deprivation of constitutional liberties." 5-ER-1169 [ECF 19 at 3, ¶ 1]. Again, and

notably, Appellees admit their actions effected a "*deprivation*" of the rights at stake, Ans. Brf. 23, yet they persist in attempting to shirk any responsibility for it, *and* they claim they're free to do the same thing again without any consequence based on whatever they believe "COVID Indicators" may dictate as "essential" in the future. Worse, they seek to hide under a cloak of "mootness" that would strip the court in this case of the power to adjudicate the claims and require a brand-new lawsuit be brought against them before any court could do anything about any new orders.

The challenged actions of Appellees simply ran roughshod over Second Amendment considerations, a "deprivation" they now admit. Since then, Appellees have continued to justify the shutdowns as being necessary measures for our own good. In opposing Plaintiffs' request for preliminary injunctive relief, Appellees first flatly denied that Second Amendment rights were even implicated at all. 4-ER-921 [ECF 46 at 11:11-12 ("Plaintiffs cannot claim constitutional protection from broad, neutral health directives just because arms-related commerce would violate them.")]. And then, to the extent Appellees begrudgingly acknowledged *some* rights were being curtailed, their only justification for the infringement of *these* constitutional rights was that they were *also* burdening *other* constitutional rights. 4-ER-930 [ECF 46 at 20:25–27 ("Many institutions—bookstores, houses of

worship, libraries, schools, businesses that 'present erotic dancing' to name a few—can claim some constitutional status.")]

Beyond this, Appellees simply claimed that the county health officers were appropriately exercising their power to make judgment calls about what was "essential" for the needs of society during a "public health crisis." 4-ER-912 [ECF 46 at 2:10–12]; 4-ER-776 [ECF 46-11, ¶ 15].

Conspicuously absent from Appellees' self-proclaimed "Hierarchy of Needs," however, was the basic human need for personal security and self-defense. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citing *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)). The right to self-defense is "'the central component' of the Second Amendment right," which the Supreme Court declared years ago is a fundamental individual constitutional right. *Id.* It is not subject to suspension, even temporarily, in the name of public health crises. As it should go without saying, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S.Ct. 63, 68 (2020).

Appellees' revised orders which reopened retail operations did not address, mention, or even pay lip service to these real constitutional concerns. One day in June 2020, the doors simply reopened for everyone, and apparently Appellees just

thought that was that. Plaintiffs' constitutional concerns about this deprivation of rights did not dissipate into thin air once *all* retail operations reopened in three of the four counties. But by expressly reserving to themselves the power to reinstate their shutdown orders at any time, as the data may direct them to do, and by not even pretending to care about these constitutional concerns, Appellees have left themselves open to further challenges which are not foreclosed by any repudiation of their prior policies, especially when they continue to insist they know best about what's good for everyone in the future and retain the power to effect more such shutdowns based on the evolving "COVID Indicators." Appellees' policy change in lifting the prior shutdown orders most assuredly did not "fully address[] all of the objectionable measures that the Government officials took against the plaintiffs in the case." *Rosebrock*, 745 F.3d at 971.

### D. That the Present Case Was Not a Catalyst for the New Policy Further Weighs Against a Finding of Mootness.

Appellees struggle to deal with the additional *Rosebrock* factor concerning whether "the case in question was the catalyst for the agency's adoption of the new policy," 745 F.3d at 972. They acknowledge this factor is potentially "neutral" at best, Ans. Brf. at 23—which, as the party with the burden, necessarily means it is of *no* benefit to them. Then, they attempt to conjure support for themselves here by challenging the plain language of *Rosebrock*, saying that this factor, if found true, actually weighs *in favor* of finding mootness. *Id.* at 23-24. They do this by

claiming the litigation catalyst factor isn't truly "an independent factor" but is instead subsumed within the factor concerning whether the defendant's change in policy "addressed all objectionable aspects of the challenged policy," such that any change in policy *not* litigation-driven should be seen as evidence of a lower likelihood of recurrence. *Id.* But as Appellees acknowledge, *Rosebrock* suggests the *opposite*—i.e., that "a case is more likely to be moot if litigation motivated the defendant's change in position." *Id.* at 23. This is a problem for Appellees because they admit the change in policy at issue was *not* driven by this litigation. *Id.* at 23-24. But it only makes sense that the absence of a litigation-driven change must further weigh *against* a finding of mootness.

The *White* case illustrates the straightforward logic. There, HUD's "confession" that its policy change was motivated in part by the litigation, further demonstrated that the defendants were less likely to reinstate the offending policy in the first place. 227 F.3d at 1243; *see also Bell v. City of Boise*, 709 F.3d at 900 ("[t]he new policy [in *White*] was designed to protect the First Amendment rights of parties subject to HUD investigations[.])"). Litigation that prompts a policy change necessarily incentivizes the defendants not to return to those policies in the first place and necessarily reduces the likelihood of a recurrence, which in turn supports a finding of mootness.

Appellees can find no real support in *Sze v. I.N.S.*, 153 F.3d 1005 (9th Cir. 1998) (overruled on other grounds in *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004)), for their claim that the significance of the litigation catalyst factor is the opposite of what *Rosebrock* says it is. *Sze* long preceded the 2014 opinion in *Rosebrock*, which coalesced and further clarified the relevant factors relevant to this analysis and, in any event, the primary basis for the finding of mootness there was the permanency of the change and the lack of any effective relief that court could grant as a consequence of the change: "the INS altered the [challenged] naturalization application process," as a direct result of which "the class of potential plaintiffs ha[d] effectively been closed." *Id.* at 1008-09.

Because this case was *not* an apparent catalyst for the lifting of the prior shutdown orders, as Appellees themselves boast, this factor weighs against them. Appellees have shown so little concern for the rights at stake here that the reinstatement of future shutdown orders is *quite* likely to include the firearms industry—especially if they get what they want here in being shielded from any liability under a cloak of mootness.

### E. THE OTHER *ROSEBROCK* FACTORS ALSO DO NOT SUPPORT A MOOTNESS FINDING.

Given that the *Rosebrock* factors most directly focused on the central inquiry of whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" all weigh so heavy against a finding of mootness,

any counterweight that *may* be assigned the two remaining factors in this list of non-exhaustive factors cannot tip back the scales. *See Rosebrock*, 745 F.3d at 972 (considering whether "the policy has been in place for a long time when we consider mootness" and whether agency's officials have not engaged in similar conduct since the policy changed). While Appellees have not reinstated the shutdowns since lifting them in June 2020, 18 months is not necessarily a "long time" in the grand scheme of a pandemic whose length and trajectory are uncertain and which may persist years longer. *See* https://www.cnbc.com/2021/12/17/pfizer-executives-say-covid-could-become-endemic-by-2024.html (predicting the pandemic will persist into 2024). Also, that the county officials have not *yet* decided to reimpose similar shutdowns is necessarily of little value in the balance when they continue insist upon the right to do so whenever they like, based on whatever dynamics of the "COVID Indicators" may strike them as warranting it.

## II. THIS CONTROVERSY ALSO REMAINS LIVE BECAUSE IT IS "CAPABLE OF REPETITION, YET EVADING REVIEW."

Appellees' strategy in dealing with the capable-of-repetition-yet-evading-review exception is basically a riff off their theme that any future shutdown orders "would present a new controversy" involving "dissimilar circumstances" because they would be based on the health officials' read of the *then*-prevailing "COVID Indicators." Ans. Brf. at 16, 26, 29-30. But literal sameness is not required. A

"'demonstrated probability' that the same controversy will recur involving the same complaining party," *Murphy v. Hunt*, 455 U.S. at 482, does not require that the defendant's future action share all the same legally relevant characteristics, *Wis. Right to Life*, 551 U.S. at 463 (such a standard "asks for too much"). It merely requires a probability that "materially similar" circumstances will recur. *Id. Any* future shutdowns on the basis of "COVID Indicators" that shutter the firearms industry would necessarily present "materially similar" circumstances within the meaning of Article III's case and controversy requirement. It's that simple. The district court itself recognized this in explaining that Alameda County's mootness claim failed because it had not "committed to permanently abandoning the closure of non-essential retail businesses as a means of fighting COVID-19 or evinced any intent to exempt firearms retailers from future closures." ER 48 [ECF 80 at 9:11-14]. Appellees also make no such commitment and evince no such intent, and that's enough for material similarity. And Appellees don't contest the existence of the only other element of this doctrine—that '"the challenged action is too short to allow full litigation."' Ans. Brf. at 30 (quoting *Native Village of Nuiqsut v. Bureau of Land Management*, 9 F.4th 1201, 1209 (9th Cir. 2021), and "assuming" its existence).

This case is readily distinguishable from the challenged actions of the oil-and-gas and fish-and-game industries in the cases Appellees cite, all of which

involved truly unique circumstances not likely to share material similarity with any future actions, and in two of which the courts expressly found the litigation was simply *not* too short to allow full litigation. Ans. Brf. at 23-24 (relying on *Public Utilities Com'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451 (9th Cir. 1996); *Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 442 F.3d 1278 (9th Cir. 1994); *Idaho Dept. of Fish & Game v. National Marine Fisheries Service*, 56 F.3d 1071 (9th Cir. 1995); and *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996)).

Ultimately, whether this case is moot is not dependent on the rise and fall of "COVID-19 Indicators," nor is this a contest about what the data might portend. The pandemic is with us for the foreseeable future, and thus, the inquiry is properly focused on local health officials' express advisories that they may reinstate COVID-19 shutdown orders, regressively subjecting Plaintiffs to unconstitutional policies, at any time. *See County of Los Angeles Dept. of Public Health v. Superior Court*, 61 Cal.App.5th 478, 487 (2021) (because "[Los Angeles] County has made it clear that it may re-impose its prohibition on outdoor dining if the region faces another [COVID-19] surge," the claim challenging its previous prohibition "fits squarely within" this exception to the mootness doctrine).

Because there is a "demonstrated probability that the same controversy will recur involving the same complaining party," these claims are capable of repetition, yet evading review, and are thus fully justiciable.

## III. PLAINTIFFS CONTINUE TO MAINTAIN A LIVE CLAIM FOR NOMINAL DAMAGES FOR THE DEPRIVATION *ALREADY* INFLICTED.

### A. PLAINTIFFS' NOMINAL DAMAGES CLAIM PRECLUDES A FINDING OF MOOTNESS.

Plaintiffs continue to maintain a claim for nominal damages, as pled in their complaint, a fact which the district court expressly recognized. 1-ER-11 [ECF 61 at 5:22]. On *de novo* review here, in addition to the other independent reasons this case remains live, this fact prevents dismissal of the case as moot. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002).

Appellees cite a series of cases as purported analogies in support of the proposition that Plaintiffs "forfeited" the right to raise the *argument* that the effect of their properly pleaded *claim* for nominal damages is to preclude dismissal. Ans. Brf. at 38-42. Several of these cases necessarily lack any precedential value in being unpublished or from other circuits, but they're all entirely unavailing. In four of the cases, the party seeking to avoid mootness on the basis of a claim for nominal or other monetary damages failed to raise such a claim *at all* in the district, asserting the claim for the first time on appeal. *County Motors, Inc. v. General Motors Corp.*, 278 F.3d 40, 43 (1st Cir. 2002) (the county never requested nominal damages in the trial court and never argued it was entitled to them until its reply brief on appeal); *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir. 1981) (Fitzgerald's claim for nominal damages was raised "for the first time, on

appeal to this court”); *Alpha Painting & Construction Company, Inc. v. Delaware River Port Authority of Pennsylvania New Jersey*, 822 Fed.Appx. 61, 66-68 (3d Cir. 2020) (Alpha *expressly declared* in the trial court that it was *not* seeking any damages, but then argued on it appeal that the district court maintained jurisdiction because “it *could* have awarded nominal damages”); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097 (9th Cir. 2002) (Seven Words raised no claim for nominal damages until just “days before oral argument” on appeal, in a “particularly self-serving,” last-minute attempt to avoid a mootness problem).

The case of *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033 (9th Cir. 2006) is the same, with the only difference being that the claim of concern was one for injunctive relief, which Walsh forfeited because she had never pleaded for any such relief in the district court. *Id.* at 1036-37. In *Espinosa* and *Arizona*, the obvious problem with the nominal damages claims was that they were purportedly asserted against *state* defendants against whom such damages do not lie as a matter of law. *Espinosa v. Dzurenda*, 775 Fed.Appx. 362, 363 n.2 (9th Cir. 2019); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, 71 (1997).

The *AMA* and *Young* cases have nothing to do with nominal damages claims and concern only the unremarkable principle that “exceptional circumstances” are normally required for *claims* to be raised for the first time on appeal, *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1214–15 (9th Cir. 2020), and that

parties may "request reconsideration" of adverse district court rulings, *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021). In the *AMA* case, the main reason the court declined to exercise its discretion to consider the claim for the first time was that it presented what was "plainly a factual question," not a "pure question of law," and considering it would have prejudiced the other party. *AMA* at 1214-15.

Here, Plaintiffs *did* raise a claim of nominal damages in the district court, through a properly pleaded claim for such damages in their Complaint, quite unlike in the cases Appellees cite as purported analogies. *See Seven Words*, 260 F.3d at 1097-98 (quoting *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("'[a] request for damages ... will not avoid mootness if it was inserted *after the complaint was filed* in an attempt to breathe life into a moribund dispute'") (italics added). The district court's *sua sponte* dismissal here is to be treated with the same standard as a motion to dismiss under Rule 12(b). *Dodd v. Spokane County, Washington*, 393 F.2d 330, 334 (9th Cir. 1968). Thus, the focus is whether the Complaint itself properly alleges nominal damages. And the court expressly recognized it did, but at the same time overlooked Plaintiffs' nominal damages claim in its hasty dismissal of the claims against Appellees. 1-ER-11 [ECF 61 at 5:22].

The assertion of the nominal damages claim in the Complaint alone suffices to preclude a finding of mootness based on the defendant's cessation of the

challenged conduct or other changes in circumstances during the pendency of the case. While Appellees unpersuasively attempt to set aside *Bernhardt*, Ans. Brf. at 44-45, they can't avoid the fundamental point that the case unmistakably shows a party need not specifically argue before the district court each and every issue relevant to the existence or non-existence of the district court's jurisdiction, and in particular need not specifically argue the well-settled point that the effect of a nominal damages claim is to necessarily preclude mootness. *Bernhardt*, 279 F.3d at 871 ("Although mootness was not raised by the County or briefed by the parties—other than Bernhardt's assertion that injuries 'capable of repetition, yet evading review' are an exception to mootness—we must raise issues concerning our subject matter jurisdiction sua sponte," including the issue that the plaintiff's "possible entitlement to nominal damages creates a continuing live controversy"); *see also*, *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018–19 (9th Cir. 2010) ("the plaintiffs' prayer for nominal damages for their substantive due process, procedural due process, and equal protection claims prevents those claims from becoming moot"); *Draper v. Coombs*, 792 F.2d 915, 922 (9th Cir. 1986) ("Even assuming that Draper did not suffer actual damages as a result of the unlawful extradition, his complaint stated valid section 1983 claims for nominal damages."); *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196,

198 (9th Cir. 2009) ("A claim for nominal damages creates the requisite personal interest necessary to maintain a claim's justiciability.").

Further, while Appellees had *intended* to file a motion to dismiss under Rule 12(b), 3-ER-579 [ECF 100 at 58:2-9], and presumably would have done so had the district court not abruptly handed them a win with its *sua sponte* dismissal of the claims against them, that never happened in light of the dismissal. Thus, *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 888 (9th Cir. 2010), does not stand for the proposition that Plaintiffs have "effectively abandoned" the argument that the nominal damages claim precludes a finding of mootness, as Appellees say. Ans. Brf. at 38. *Carvalho* concerned the plaintiff's failure to raise a particular claim *in response* to an argument the defendant asserted in a motion to dismiss. *Id.* *If* Appellees had pursued such a motion and *if* Appellees had argued in the motion that the nominal damages claim did not preclude a finding of mootness, *then* certainly Plaintiffs would have *responded to* that argument.

But the law is clear that Plaintiffs were not required to put before the court each and every issue or argument with potential bearing on the question of the court's continuing jurisdiction, particularly at this preliminary stage of the case. Again, it is the job of the court, not the parties, to identify and consider all factors significant to a proper determination of jurisdictional questions. The "long held and often restated duty" of the courts is "to examine *sua sponte* whether

jurisdiction exists, "regardless of how the parties have framed their claims." *Naruto v. Slater*, 888 F.3d 418, 423 n.5 (9th Cir. 2018). Courts are "obligated" to consider such issues *sua sponte* even if "the parties have disclaimed or have not presented" them. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

Accordingly, Plaintiffs could not and did not "forfeit" or "waive" the right to raise the argument that the effect of their nominal damages claim is to preclude mootness. They can make any argument on appeal concerning the effect of that claim, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), which, again, the district court was duty-bound to consider in any proper jurisdictional analysis.

### B. THE CONTEXT OF THE PARTIES' BRIEFING AND ARGUMENTS WAS LIMITED TO THE EFFECT OF THE *CURBSIDE DELIVERY OPTION* ON THE JUSTICIABILITY OF THE PROSPECTIVE RELIEF BEING SOUGHT .

It bears emphasis here that the specific change in the counties' policies which prompted the district court to dismiss the claims against them on June 2, 2020 was *not* the same condition upon which "supplemental briefing" regarding Plaintiffs' motion for preliminary injunction was actually requested and offered. Again, just one day before the hearing on this motion, all four counties presented the district court with revised health orders that then allowed storefront or "curbside delivery" of most retail items. The supplemental briefing thus focused on whether *that* change rendered the requested prospective injunctive relief moot.

In response to *this* changed condition, which the parties discussed at the hearing, the district court was earnestly working through a particular conundrum: Were there any legal or regulatory impediments to allowing outdoor transactions for firearm and ammunition sales generally?

Plaintiffs, who are well familiar with the intricacies of California's firearm purchasing regulations, were the ones to initially discuss and suggest supplemental briefing concerning the myriad state laws that effectively prevent "curbside delivery" of firearms and ammunition. 3-ER-528-529 [ECF 100 at 7:22–8:3, 8:4-11]. The district court understood Plaintiffs' point, and advised, "I don't want you to use up all of your argument time on this point." *Id.* [ECF 100 at 8:15–16]. After additional colloquy on the "myriad of landmines" that people would encounter trying to engage in outdoor firearm transactions, 3-ER-529-530 [ECF 100 at 8:15 – 9:25], the court suggested the parties move on to the substance of Plaintiffs' motion, and if there was disagreement on the part of the Appellees as to "whether there is a mootness issue here, […] then we can either get more argument on that point now or have supplemental briefing or something like that[.]" 3-ER-531 [ECF 100 at 10:1–8]. The parties moved on to discuss, and spent the bulk of their time discussing, the merits of the underlying motion.

Later, the court returned to the issue of mootness, saying it believed the further development of the record was necessary to resolve the issue, in particular

to address the extent to which the ability to conduct outdoor sales or deliveries was impacted by the statutory constraints that Plaintiffs had cited. 3-ER-544 [ECF 100 at 23:3–17]. Appellees' counsel responded: "I agree. If they're right that they cannot sell firearms under some other law except inside, and we are saying we can't—they can't do it inside, *then that aspect of the issue would not be moot*. I think we do need to see more from them on that." *Id*. [ECF 100 at 23:18–22 (emphasis added)]. So, the real question before the court at that time, as even counsel for Appellees put it, was not whether the claims were moot for all intents and purposes, including as to the alleged constitutional injury *already inflicted*, but whether and the extent to which the new "curbside delivery" option rendered moot the request for *prospective* injunctive relief. 3-ER-539 [ECF 100 at 18:14–21].

It was in response to *this* discussion and directive of the court—which concerned the necessity of *prospective injunctive relief*, not retrospective relief for past constitutional injury—that Plaintiffs prepared and submitted their supplemental briefing focused on the impact of the change permitting curbside delivery as that pertained to mootness. Appellees' supplemental briefing confirms the true focus of this litigation was to address whether the request for preliminary injunctive relief was moot in light of the new curbside delivery option for retail. *See e.g.*, 3-ER-498 [ECF 55 at 1:22]; 3-ER-499-503 [ECF 55 at 2:19–6:22; 3-ER-504-505 [ECF 55 at 7:2–8:17]; 3-ER-505 [ECF 55 at 8:18].

At the time, there was no discussion or requested briefing on the issue of mootness generally, much less specifically as to the nominal damages claim seeking *retrospective* relief for the past constitutional injuries. If a party has no reason to assert an argument below, it should not be penalized for failing to respond or raise arguments about theoretical developments that did not exist at the time. In *Yniguez v. State of Arizona*, 975 F.2d 646 (9th Cir. 1992), the Ninth Circuit considered the plaintiff's constitutional challenge to Arizona's adoption of English as an official language of the state. The state raised the "suggestion of mootness" following revelation that the plaintiff had left her state employment while the matter was on appeal. *Id.*, at 647. This Court held: "Although the plaintiff may no longer be affected by the English only provision, that does not render her action moot. The plaintiff's constitutional claims may entitle her to an award of nominal damages." *Id*. (citing *Carey v. Piphus*, 435 U.S. 247, 258–59 (1978)). Furthermore, the Court went so far as to permit the plaintiff to cross-appeal the district court's implicit denial of a request for nominal damages, *even though she did not specifically raise that claim*, because "she had no reason to seek this form of relief at the time of the district court's judgment." *Yniguez*, 975 F.2d at 647 n.2.

Similarly, here, Plaintiffs had no reason to raise any arguments concerning the effect of the nominal damages claim on the question of mootness, because such

arguments go to the *retrospective* relief they sought for the past injury, not the *prospective* relief actually at issue in the context of the parties' briefing and arguments on Plaintiffs' motion for preliminary injunction. It was only later, after *new* orders in three of the four counties permitting the resumption all retail operations, that the question of mootness *generally* truly presented itself. But the district court then immediately dismissed the claims against Appellees, without requesting any further briefing or argument of the parties about whether the claims were moot in *all* respects, including the retrospective relief Plaintiffs sought.

Finally, even if Plaintiffs' argument about the legal effect of the nominal damages claim on the question of mootness could properly be considered forfeited, the argument raises "a pure question of law and the record is sufficient to review the issue," which this Court has broad discretion to consider on appeal. *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 968 (9th Cir. 2010).

## CONCLUSION

The district court's order should be reversed.

Dated: December 31, 2021

**SEILER EPSTEIN LLP**

s/ George M. Lee
George M. Lee

*Counsel for Plaintiffs-Appellants*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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## CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Dated: December 31, 2021

s/ George M. Lee
George M. Lee