NOT FOR PUBLICATION

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DEC 22 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JANICE ALTMAN; RYAN GOODRICH; ALBERT LEE SWANN; ROMAN KAPLAN; YAN TRAYTEL; DMITRI DANILEVSKY; GREG DAVID; CITY ARMS EAST LLC; CITY ARMS LLC; CUCKOO COLLECTIBLES LLC, DBA Eddy's Shooting Sports; SECOND AMENDMENT FOUNDATION; CALIFORNIA GUN RIGHTS FOUNDATION; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC.; FIREARMS POLICY COALITION, INC.; SCOTT CHALMERS,

Plaintiffs-Appellants,

v.

COUNTY OF SANTA CLARA; LAURIE SMITH; JEFFREY ROSEN; SARA H. CODY; CITY OF SAN JOSE; SAM LICCARDO; EDGARDO GARCIA; CITY OF MOUNTAIN VIEW; MAX BOSEL; COUNTY OF SAN MATEO; CARLOS BOLANOS; SCOTT MORROW; CITY OF PACIFICA; DANIEL STEIDLE; COUNTY

No. 21-15602

D.C. No. 4:20-cv-02180-JST

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

OF CONTRA COSTA; DAVID LIVINGSTON; CHRIS FARNITANO; CITY OF PLEASANT HILL; BRYAN HILL,

Defendants-Appellees,

and

COUNTY OF ALAMEDA; GREGORY J. AHERN; NICHOLAS MOSS,

Defendants.

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted November 15, 2022
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and MOLLOY,[**] District Judge.
Partial Concurrence and Partial Dissent by Judge PAEZ.

[**] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

A group of individuals, firearm retailers, and gun-advocacy groups (collectively, "Altman") petition for review of the district court's judgment dismissing their claims against the California counties of Santa Clara, San Mateo, and Contra Costa ("the Counties"). Altman alleged that the Counties' retail-closure orders during the early months of the COVID-19 pandemic violated their Second Amendment rights by excluding firearm vendors and ranges from the list of "essential businesses" permitted to remain open. Because the Counties lifted some restrictions on retail during the pendency of the litigation, the district court dismissed as moot Altman's claims for injunctive relief, declaratory relief, and nominal damages. We have jurisdiction under 28 U.S.C. § 1291, and we review de novo a district court's determination of mootness. *See Demery v. Arpaio*, 378 F.3d 1020, 1025 (9th Cir. 2004). We conclude that Altman's claims for injunctive and declaratory relief are moot and that Altman forfeited the argument that the claim for nominal damages preserves this otherwise moot controversy. Thus, we affirm.

Injunctive and Declaratory Relief. Our recent en banc decision in *Brach v. Newsom* forecloses Altman's attempt to resurrect claims for injunctive and declaratory relief against the Counties. 38 F.4th 6 (9th Cir. 2022) (en banc). There, we held that plaintiffs' challenges to California's suspension of in-person schooling in 2020 and early 2021 were moot after the state rescinded its orders and reopened classrooms. *Id.* at 9. Emphasizing that "our jurisdiction is limited to live

controversies and not speculative contingencies," we concluded that "the mere *possibility* that California might again suspend in-person instruction is too remote to save this case." *Id.*

Just as in *Brach*, here there is "no longer any [county] order for the court to declare unconstitutional or to enjoin." *Id.* at 11. By the time that the district court dismissed Altman's motion for a preliminary injunction, the Counties had not only permitted outdoor and curbside retail and recreation but also had made provisions to resume indoor retail altogether. Although the Counties' original orders did not "expire[] by their own terms," like the school regulations in *Brach*, 38 F.4th at 12, the Counties' continued commitment to reopening retail and the consistent improvement of public health conditions still render Altman's fears of recurrence too "remote and speculative" for either mootness exception to apply, *see id.* at 14; *see also Rosebrock v. Mathis*, 745 F.3d 963, 971–72 (9th Cir. 2014) (outlining factors for assessing the voluntary cessation exception); *Sample v. Johnson*, 771 F.2d 1335, 1340–43 (9th Cir. 1985) (discussing the burden that plaintiffs face in demonstrating the likelihood of repeated injury). More than two years have passed since the Counties ceased the challenged conduct, and they have displayed no "track record of moving the goalposts," *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (quotation marks omitted), and wielded no "constant threat" of reimposition, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68

(2020) (per curiam).

Nominal Damages. Altman forfeited the argument that the nominal damages claim should have preserved the controversy, even if the other claims were moot. The district court acknowledged that Altman had amended its complaint to include nominal damages. Indeed, as to certain counties, the court ruled that Altman's nominal damages claims "are live." Thus, the district court well understood the law. However, as to the three Counties involved in this appeal, the district court concluded that Altman had waived its argument that the nominal damages claim was not moot: "Plaintiffs did not make a nominal damages argument in the supplemental briefing the Court ordered on the mootness question during the preliminary injunction proceedings. They have thus waived this argument." And Altman took no steps in the district courts to dispute this ruling, move for reconsideration, or advise the court otherwise. After the fact, on appeal, Altman is asking us to revive a claim that the district court provided ample opportunity to address.

As a general matter, "[a] live claim for nominal damages will prevent a dismissal for mootness." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801–02 (2021) (holding that nominal damages "satisf[y] the redressability element of standing" when a plaintiff's other prayers for relief fail). However, the Ninth Circuit strongly disfavors arguments that were waived or forfeited before the district court and raised

for the first time on appeal. *See In re Mortg. Electronic Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014); *see also Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir. 1981) (declining to review a request for nominal damages raised for the first time on appeal). While waiver requires the "intentional relinquishment or abandonment of a known right," forfeiture is a more implicit, passive failure to timely assert that right. *United States v. Scott*, 705 F.3d 410, 415 (9th Cir. 2012). For instance, a plaintiff's failure to raise a choice-of-law argument in multiple memoranda submitted to a magistrate judge and during a hearing before the district court judge amounted to forfeiture of that argument and foreclosed its motion for reconsideration. *See Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 891 (9th Cir. 2000). Although judges may at any point raise issues, such as mootness, that concern the validity of the court's subject matter jurisdiction, *see Bernhardt*, 279 F.3d at 871, this court has not applied the same principle to parties' new arguments *in support of* jurisdiction.

Despite multiple opportunities, Altman neglected to invoke the nominal damages claim as a possible defense to mootness. Altman did not raise the argument at the May 20, 2020 district court hearing or within the supplemental briefing that the district court then ordered on the issue of mootness. Although Altman contends that the hearing and briefing were concerned only with the effect the new "curbside pickup" option on the appropriateness of injunctive relief, the record does not

support such a restrictive view. Altman also declined subsequent opportunities to draw the district court's attention to the nominal damages claim, despite filing a motion for clarification. Thus, the district court was correct to conclude that Altman had "waived" (or, more precisely, forfeited) this argument with regard to Santa Clara, San Mateo, and Contra Costa counties.

AFFIRMED.[1]

[1] We grant the Counties' unopposed motion to take judicial notice of the Settlement Agreement between Altman and Alameda County and exhibits containing COVID-19 case and vaccination data (Dkt. 19).

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Altman v. County of Santa Clara, No. 21-15602
Paez, J., concurring in part and dissenting in part:

I respectfully dissent in part. I agree with the majority that the plaintiffs' ("Altman's") claims for injunctive and declaratory relief are moot under *Brach II*. 38 F.4th 6 (9th Cir. 2022) (en banc). In my view, however, Altman's claim for nominal damages remains live and should have precluded the district court from dismissing the county defendants for lack of subject matter jurisdiction.

Our caselaw has long recognized that a claim for nominal damages prevents mootness. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021). The majority holds that although Altman expressly prayed for nominal damages in her First Amended Complaint, she forfeited this claim by failing to raise it at certain points during and after the district court proceedings. Neither the record nor our caselaw supports this proposition.

In the context of this litigation, Altman fairly understood the district court's request for supplemental briefing as limited to the effect of curbside retail on her claims for prospective relief (i.e., whether those claims were moot). The majority cites no authority that supports the proposition that a plaintiff forfeits a claim by not addressing it in supplemental briefing although she has properly and clearly asserted it in her complaint. The fact that Altman did not argue that her request for nominal damages claim was not moot before the district court is immaterial.

Because she properly pleaded the claim in her complaint, its existence precluded a finding of mootness. Further, the majority's conclusion that Altman's failure to include nominal damages in her motion for clarification contributed to forfeiture is likewise unsupported. No authority requires a plaintiff to take such steps to preserve a claim for appeal after having asserted it in her complaint. Indeed, Altman continued to pursue her nominal damages claim by timely appealing the district court's decision that she had waived it.

The majority's decision embraces a hypertechnical view of claim preservation that allows the district court to effectively decline to hear Altman's constitutional claim despite the existence of a live controversy. This result is antithetical to the federal courts' duty to decide cases before them. *See BP P.L.C. v. Mayor & City Council of Baltimore,* 141 S. Ct. 1532, 1537 (2021). I therefore respectfully dissent from this aspect of the majority's disposition.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
    - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
    - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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