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' OPENING BRIEF

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August 11, 2021

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants submit this corporate disclosure and financial interest statement pursuant to Fed. R. App. P. 26.1(a).

Appellant City Arms LLC is a limited liability company, organized under the laws of the State of California. This party does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock or membership interest.

Appellant City Arms East LLC is a limited liability company, organized under the laws of the State of California. This party does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock or membership interest.

Appellant Cuckoo Collectibles LLC, d.b.a. Eddy's Shooting Sports is a limited liability company, organized under the laws of the State of California. This party does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock or membership interest.

Appellant Second Amendment Foundation is a non-profit corporation with no parent corporation, nor has it issued any stock.

Appellant California Gun Rights Foundation is a non-profit foundation which has no parent corporation, nor has it issued any stock.

Appellant National Rifle Association of America is a non-profit corporation which has no parent corporation, nor has it issued any stock.

Appellant California Association of Federal Firearms Licensees, Inc. is non-profit organization which has no parent corporation, nor has it issued any stock.

Appellant Firearms Policy Coalition, Inc. is a non-profit membership organization which has no parent corporation, nor has it issued any stock.

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INTRODUCTION

Plaintiffs filed this suit to redress constitutional violations caused by Defendants-Appellees' ("Appellees") unconstitutional and discriminatory COVID-19 orders and executive actions that completely eliminated Plaintiffs' access to firearm vendors, ammunition vendors, and firearm ranges, in violation of their Second Amendment rights while keeping open government-favored types of businesses, such as corporate media, newspapers, and entertainment companies.

Appellees justified their shutdown orders on the grounds that only certain businesses were deemed to be "essential" because "they provide food, shelter, medicine, healthcare services and supplies, personal hygiene products, and products and services that enable people to isolate in their places of residences." ER 772. But Plaintiffs, and other law-abiding Bay Area residents like them, also had a right to acquire arms and ammunition for self-defense while they were forced to "isolate in their places of residences."

Perhaps driven by animus—for example, Appellee San Jose Mayor Sam Liccardo said, "one thing we cannot have is panic buying of guns," ER 1052—Appellees failed to consider and accommodate citizens' fundamental right and need to acquire instruments of self-defense that are constitutionally protected under the Second Amendment. In fact, in their self-sanctifying judgment calls, purporting to know what their citizens *really* need, Appellees gave no consideration to the

Second Amendment whatsoever, while at the same time allowing the continued operation of a litany of other businesses unnecessary and unrelated to the exercise of any constitutional rights and subject only to simple health protocols which firearm retailers and ranges just as easily could have followed.

Plaintiffs pleaded a strong case of serious constitutional violations—the orders suspended the people's fundamental Second Amendment rights. Plaintiffs also showed they were under threat of further and repeated harm in the future without the declaratory and injunctive relief they sought from the district court, because of the broad and unchecked powers that Appellees reserved to extend, modify, and reinstate such restrictions at any time.

Plaintiffs appropriately sought a preliminary injunction against the Appellees' orders and executive actions. While the proceedings on the preliminary injunction motion were pending, the orders in three of the four counties at issue were modified to restore limited operations of retailers. In response, within its order denying the motion for a preliminary injunction, the district court *sua sponte* declared the disputes to be over and summarily dismissed those three county defendants and affiliated parties (the Appellees herein) without considering the harm that had already been done or the risk that the Appellees might reinstate unconstitutional mandates—all on the grounds that the claims against Appellees

had been rendered moot. ER 13 [ECF 61, Order Denying Preliminary Injunction, p. 8:5-8].

In doing so, the district court failed to apply or even consider Plaintiffs' specific contentions that any finding of mootness was precluded under both the voluntary cessation doctrine and the related exception for enactments that are capable of repetition, yet evading review. ER 513-516 [ECF 53, Supp. Brief at p. 7:25–10:17]. In fact, when the district court *did* address those arguments, in considering Alameda County's later-filed motion to dismiss, it actually *agreed* that Plaintiffs' claims for prospective relief (declaratory and injunctive relief) were not moot for these very reasons. The district court's summary dismissal of Appellees here was also in error for the independent reason that it failed to consider Plaintiffs' undisputed claim for nominal damages, even while having expressly acknowledged in its dismissal order that Plaintiffs had specifically requested this remedy. ER 10 [ECF 61, Order, p. 5:21-22].[1]

[1] In their prayer for relief, Plaintiffs also gave notice "that pre-litigation investigation is continuing in this urgent and expedited matter and that this complaint may be further amended to add additional claims and requests for relief, including but not limited to actual damages, once the facts are more fully developed. Additionally, counsel for the institutional plaintiffs are continuing to investigate the claims of additional potential parties with substantially similar claims who may also suffer constitutional and economic damages as a result of the individual and/or collective orders and/or enforcement actions of Defendants named herein." ER 1197 [First Am. Compl. at p. 36, n.16]. Plaintiffs further prayed for "All other and further legal and equitable relief, including injunctive

Local government officials may not unilaterally suspend constitutionally protected liberties during times of crisis. As the Supreme Court recently put it, "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). And, when they do, they must be held responsible. The district court's dismissal order and judgment must be reversed.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 in that this action arises under the Constitution and laws of the United States, specifically the Second Amendment to the United States Constitution, and relief is sought under 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988.

The district court entered judgment against Plaintiffs herein on March 24, 2021, ER 4, following its prior dismissal of Appellees, which was a final appealable order. ER 6-39 [ECF 61, Order Denying Preliminary Injunction].

Plaintiffs filed a timely Notice of Appeal on April 2, 2021. ER 1230 [ECF 97]; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this appeal under

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relief, against Defendants as necessary to effectuate the Court's judgment, or as the Court otherwise deems just and equitable[.]" ER 1198.

28 U.S.C. § 1291, in that plaintiffs are appealing a final judgment of the district court under Fed. Rule Civ. Pro. 54.

ISSUES PRESENTED

Plaintiffs present two primary questions in this appeal:

First, did the district court err in *sua sponte* dismissing Plaintiffs' claims for declaratory and injunctive relief under the Second Amendment on the basis that they were rendered "moot" by the revised public health orders permitting resumption of retail operations, even though Appellees expressly reserved the right to reinstate further closure orders at any time?

Second, even if Plaintiffs' injunctive relief claim was moot, did the district court err in dismissing Appellees *sua sponte* notwithstanding Plaintiffs' nominal damages claim?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On March 4, 2020, California Governor Gavin Newsom declared "a state of Emergency to exist in California as a result of the threat of COVID-19." ER 1003 [ECF 20-2, Decl. Exhibit 1]. On March 19, 2020, the Governor signed Executive Order N-33-20, directing all individuals living in California "to stay home or at their place of residence except as needed to maintain continuity of operations of

the federal critical infrastructure sectors." *Id*. The Executive Order incorporated an order from Dr. Sonia Y. Angell, the State's Public Health Officer, who was granted the authority to "designate additional sectors as critical in order to protect the health and well-being of all Californians," *id.*, although Dr. Angell did not identify any additional sectors nor indicate which sectors may qualify as critical.[2]

Around that time, on March 16, 2020, the health officers of six Bay Area counties issued their own shelter-in-place orders that were substantially similar to each other, if not identical. ER 770 [ECF 46-11, Decl. of Sara H. Cody, M.D., ¶ 12]; ER 1006-12 [Order of Santa Clara County]; ER 1056-62 [Alameda County]; ER 1091-97 [San Mateo County]; ER 1099-1104 [Contra Costa County] (the "Prior Orders"). The Prior Orders required most businesses in the respective counties (and in most local municipalities within each county) to "cease all activities at facilities located within the County." ER 1007, 1057, 1092, 1100. The Prior Orders exempted 21 categories of "essential businesses," such as hardware stores, and "stores that sell groceries and also sell other non-grocery products, and

[2] In connection with a stipulation to dismiss him from an action challenging similar county orders in Southern California, the Governor later clarified that "the challenged orders of Governor Newsom and Dr. Angell did not require the closure of firearm retailers, ammunition vendors, or shooting ranges. To the extent any local authority requires the closure of those retailers, vendors, or ranges, such action is not required by the State Defendants' orders." *See*, STIP. RE: DISMISSAL OF DEFENDANTS GAVIN NEWSOM AND SONIA Y. ANGELL, *Brandy v. Villanueva*, No. 2:20-cv-02874-AB-SK, ECF 53, p. 6, ¶ 6 (C.D. Cal. July 8, 2020).

products necessary to maintaining the safety, sanitation, and essential operation of residences." ER 1010, 1060, 1095, 1102. Essential businesses also included "[n]ewspapers, television, radio, and other media services[.]" *Id*.[3]

Exempted businesses under the Prior Orders were limited to "minimum basic operations" and required to abide by certain infectious disease prevention protocols, like social distancing, but they were otherwise permitted to continue operations. ER 1007, 1057, 1092, 1100. But, as Defendants acknowledged, these exemptions did not include firearm retailers, ammunition vendors, or shooting ranges. ER 907 [ECF 46, at 1:5-9].

The Prior Orders were to remain in effect through April 7, 2020, "or until [they were] extended, rescinded, superseded, or amended in writing by the Health Officer." ER 1012 [Santa Clara], 1062 [Alameda], 1096 [San Mateo], 1104 [Contra Costa].

On March 31, 2020, the county Defendants, did in fact extend the Prior Orders through May 3, 2020. ER 1039 [Santa Clara]; 1075 [Alameda], 764 [San Mateo], 1117 [Contra Costa].

[3] Defendants later justified this media exemption on the basis that these businesses, among others, were "necessary to the continuity of essential infrastructure and the basic functions of society such as […] access to critical information (e.g. newspapers)[.]" *See* ER 676 [ECF 48 at p. 11, n.5].

On April 29, 2020, the county Defendants further extended the Prior Orders through May 31, 2020. ER 913 [ECF 46, Opposition at 7:26, n.5].

On May 15, and May 18, 2020, the county Defendants again modified the Prior Orders, this time easing certain restrictions on retailers by providing that "[t]hese retail stores may operate for curbside/outside pickup only, including a drive-through window. Customers shall not enter the store." ER 579-661 [ECF 50, Defendants' Supp. Req. for Jud. Notice]; ER 600 [Santa Clara Order, Appx. C-1]; ER 621 [Alameda Order, Appx. C-1]; ER 642 [Contra Costa Order, Appx. C-1]; ER 660 [San Mateo Order, Appx. C-1]. Thereafter, between May 29 and June 2, 2020, three of the four county Defendants, San Mateo, Santa Clara, and Contra Costa Counties, issued further superseding orders which permitted many retail businesses to resume in-store sales, subject to certain infectious disease prevention protocols.

II. PROCEDURAL HISTORY

A. THE COMPLAINT AND REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

On March 31, 2020, after the county Defendants had extended the Prior Orders through May 3, 2020, Plaintiffs brought this action against the Defendants in Santa Clara, San Mateo, Contra Costa, and Alameda Counties as well as the Defendants in local municipalities within these counties.

Individual Plaintiffs Janice Altman, Ryan Goodrich, Albert Lee Swan, Roman Kaplan, Yan Traytel, Dmitriy Danilevsky, Greg David, and Scott Chalmers are residents in the four affected counties. Retailer Plaintiffs City Arms LLC, City Arms East LLC, and Cuckoo Collectibles LLC, d.b.a. Eddy's Shooting Sports, are licensed firearm and ammunition retailers in the counties of San Mateo, Contra Costa, and Santa Clara respectively. Organizational Plaintiffs Second Amendment Foundation, California Gun Rights Foundation, National Rifle Association of America, Inc., California Association of Federal Firearms Licensees, Inc., and Firearms Policy Coalition, Inc. are non-profit Second Amendment membership organizations whose affected members include members residing within the affected counties.

All Plaintiffs challenged the Prior Orders on the basis that the county-mandated closures of firearm and ammunition vendors and shooting ranges infringed upon the fundamental right to keep and bear arms as guaranteed under the Second Amendment and the Due Process Clause of the Fourteenth Amendment.

Plaintiffs filed their First Amended Complaint on April 10, 2020. ER 1162 [ECF 19]. At the same time, Plaintiffs also moved for a temporary restraining order and/or a preliminary injunction against Defendants' enforcement of the Prior Orders insofar as they deemed "non-essential" and thus compelled the closure of

retail firearm and ammunition businesses and shooting ranges. ER 1157 [ECF 20]. Plaintiffs' application was made on the grounds that the closure of these businesses and ranges violated the Second and Fourteenth Amendments, particularly since California's extensive laws require firearm and ammunition sales to be conducted in face-to-face transactions and with background checks, and thus access to these businesses was in fact *essential* to the exercise of constitutionally protected Second Amendment rights. ER 1127 [ECF 21, Memorandum]; ER 942-1126 [ECF 20-1 through 20-15, supporting declarations and exhibits].

The same day, April 10, 2020, the district court denied Plaintiffs' TRO application and scheduled the matter for hearing as a motion for preliminary injunction. ER 939 [ECF 22]. Following the district court's order, the parties agreed that all Defendants would file a consolidated memorandum in opposition to the motion. ER 934-37 [ECF 42]. The district court accepted the parties' stipulation and reset the hearing on the preliminary injunction motion to May 20, 2020. ER 1248 [ECF 43].

B. THE DISTRICT COURT'S DISMISSAL OF THE CLAIMS AGAINST APPELLEES ON MOOTNESS GROUNDS

The issue of mootness first arose during the proceedings on Plaintiffs' motion for a preliminary injunction, shortly before the scheduled hearing on the motion, which by then had already been fully briefed. On May 19, 2020, the day before the hearing, Defendants filed a Supplemental Request for Judicial Notice of

their revised Prior Orders issued on May 15, 2020 and May 18, 2020, "which supersede[d] prior versions of the Public Health Orders and permit[ted] retailers to sell goods for curbside/outdoor pickup." ER 579, [ECF 50, p. 1:21-22].

During the hearing the following day, the first and primary topic of discussion was whether Defendants' newly revised Prior Orders of May 15 and May 18, 2020, potentially rendered the requested injunctive relief "moot" to the extent that the new "curbside pickup" option might apply to firearm and ammunition retailers. ER 525 [ECF 100, Tr. of Hearing at 7:2-11]. Plaintiffs asserted that a myriad of state firearms laws and regulations prevented "curbside delivery" of firearms and ammunition because, among other reasons, state law requires such transactions to take place within the building of a Federal Firearms Licensee (FFL). ER 525-26 [ECF 100, Tr. of Hearing at 7:22–8:14]. Moreover, it was also questionable whether the "safe handling demonstration" and the Firearms Safety Certificate test required for handgun recipients, Cal. Penal Code §§ 26840, 26850, could practically and safely be conducted in public or outdoors.

In supplemental briefing following the hearing on the question of mootness, Plaintiffs expounded on these legal and practical concerns that would prevent curbside delivery of firearms, ER 507-16 [ECF 54], ER 459-65 [ECF 57], as discussed at the hearing, while Defendants continued to assert that curbside delivery of firearms and ammunition was feasible and therefore rendered the

requested preliminary injunctive relief moot. ER 494-506 [ECF 55]. Defendants further and specifically argued in their supplemental brief that a "presumption of mootness" arose from the new health orders. ER 495 [ECF 55, at p. 1:12].

Following this round of supplemental briefing that focused on the curbside delivery issue, as noted, between May 29 and June 2, 2020, three of the four county Defendants, San Mateo, Santa Clara, and Contra Costa Counties, further revised their orders so as to permit most retail businesses to resume in-store sales, subject to certain infectious disease prevention protocols.[4] On the same day, June 2, 2020, the district court issued its decision. The court took judicial notice of the new orders and based solely on these orders, without further analysis, it *sua sponte* dismissed all three counties, summarily concluding:

> 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.

ER 13 [ECF 61, Order Denying MPI, at 8:5-8]. The district court proceeded with this dismissal order notwithstanding having specifically acknowledged that

[4] The district court noted the chronology in its Order: "On May 29, 2020, San Mateo County issued a superseding Order that permits retail businesses to resume socially distanced in-store sales. ECF No. 58 at 20. Santa Clara County issued a similar Order on June 1, 2020, to take effect on June 5, 2020. ECF No. 59. Contra Costa County issued a similar Order on June 2, 2020, to take effect on June 3, 2020. ECF No. 60." ER 9-10 [ECF 61, Order Denying MPI, at 4:22–5:1].

Plaintiffs had asserted a claim for nominal damages based on the impact of the Prior Orders. ER 10 [ECF 61, Order, p. 5:21-22].

On the other hand, the district court rejected Defendants' claim that the case against the Alameda County Defendants was moot because, by that point, Alameda County still prohibited "non-essential" in-store retail sales.[5] On the merits, the district court went on to deny Plaintiffs' motion for preliminary injunction entirely, finding that Plaintiffs failed to satisfy the standards for this "extraordinary remedy" against the Prior Orders. ER 15-39 [ECF 61, Order at 10:5 – 34:6].

Upon a later request for clarification of its dismissal order, the district court stated that the dismissal applied to the Defendants in the three counties and all the municipal Defendants associated with these counties (i.e., the Appellees in this appeal), ER 5 [ECF 65], leaving only the Alameda County Defendants as the remaining defendants in the case.

C. THE DISTRICT COURT'S SUBSEQUENT DENIAL OF ALAMEDA COUNTY'S MOTION TO DISMISS ON THE GROUNDS OF MOOTNESS, FINDING A LIVE, JUDICIABLE CONTROVERSY ON THE SAME CLAIM

Following the district court's denial of the motion for preliminary injunction, the sole remaining defendants, the County of Alameda, Gregory J. Ahern, and Erica Pan (collectively, "Alameda County Defendants"), filed their motion to

[5] Alameda County would not permit in-store sales until it likewise issued a revised order on June 18, 2020. ER 394 [ECF 68-1, Exh. H, Alameda County Revised June 18, 2020, Appx. C, p. 2].

dismiss under Rule 12(b)(6) on July 1, 2020. ER 404-13 [ECF 68]. By that time, the County of Alameda had issued its revised public health order on June 18, 2020, which, according to these defendants, "further [opened] retail business within the County, rendering moot the case against these Defendants." ER 405 [ECF 68, p. 2:1-3]. The Alameda County Defendants specifically moved for dismissal on the grounds that the claims raised in the First Amended Complaint were moot, now claiming that Alameda County had joined the other three counties previously dismissed on mootness grounds. ER 409-411 [ECF 68, p. 6:25-8:12].

This time, however, the district court actually performed the mootness analysis, considered the voluntary cessation and the capable-of-repetition, yet evading review exceptions, determined that the Alameda County Defendants had not met "the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again[,]" and thus "den[ied] Defendants' request to dismiss the claims for declaratory and injunctive relief as moot." ER 48-49 [ECF 80, Order on Motion to Dismiss, at p. 9:21-10:1].

The district court also held that Plaintiffs' claim for nominal damages, alone, prevented dismissal of the First Amended Complaint as to the Alameda County Defendants on mootness grounds. ER 44 [ECF 80, p. 5:8-21]. The district court addressed the inconsistency between this holding and its dismissal of Appellees on the same ground by simply stating in a footnote that Plaintiffs had not made a

nominal damages argument in the supplemental briefing the court ordered on the mootness question, and therefore, their nominal damages "argument" had been "waived." ER 44 [ECF 80, p. 5 n.3].

Again, the district court's own order denying the preliminary injunction had expressly recognized that Plaintiffs had asserted a claim for nominal damages. ER 10 [ECF 61, Order, p. 5:21-22]. And the district court did not explain at all the inconsistency between its finding that the claims for prospective relief (e.g., the declaratory and injunctive relief claims) were *not* moot as to the Alameda County Defendants and its previous findings that these same claims against the Appellees were moot.

Following the district court's denial of the Alameda County Defendants' motion to dismiss, Plaintiffs entered into a settlement with those defendants, and the parties jointly filed a motion for their voluntary dismissal. On March 24, 2021, the district court granted the parties' joint motion for dismissal of the Alameda County Defendants pursuant to their settlement, and further granted Plaintiffs' separate request for entry of judgment concerning the claims against Appellees. ER 3 [ECF 96, p. 3]. The district court entered its Judgment of Dismissal as to Appellees on March 24, 2021. ER 4 [ECF 65, p. 4]. Plaintiffs filed a timely Notice of Appeal as to the district court's Judgment, and its prior order of dismissal of the Appellees. ER 1230-31 [ECF 97].

SUMMARY OF ARGUMENT

The district court erred when it summarily dismissed, *sua sponte*, three of the four county defendants and related parties on the grounds of mootness. The well-trod exceptions under the voluntary cessation doctrine and the related capable-of-repetition, yet evading review doctrine, prevented dismissal—and the district court failed to even consider these doctrines. Had it done so, it would have logically concluded that Plaintiffs' prospective relief claims for declaratory and injunctive relief were not moot—just as it did when it denied the Alameda County Defendants' motion to dismiss.

The district court also erred in dismissing Appellees, *sua sponte*, on the grounds of mootness when Plaintiffs had pleaded a claim for nominal damages, a fact that the district court expressly recognized, yet sidestepped, only later claiming that Plaintiffs had somehow "waived" the point. Under clearly established law, the claim for nominal damages satisfied the redressability element of standing for justiciability of the case and alone precluded a finding of mootness as a matter of law.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST APPELLEES CONTINUE TO PRESENT A LIVE JUSTICIABLE CONTROVERSY NOTWITHSTANDING THE REVISED COUNTY ORDERS.

A. STANDARD OF REVIEW

This Court "review[s] de novo the question of whether a case is moot." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). A district court's dismissal for failure to state a claim generally is also reviewed de novo. *Kruso v. Int'l Tel & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

B. THE VOLUNTARY CESSATION DOCTRINE PRECLUDES ANY FINDING OF MOOTNESS, AND THE DISTRICT COURT FAILED TO EVEN CONSIDER IT.

The "case and controversy" requirement for federal court jurisdiction requires "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (citations omitted). However, a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* at 161 (citation omitted). "'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* (quoting *Chafin v. Chafin*, 568 U.S. 165, 171 (2013)). It is well established that a party claiming mootness bears a "heavy burden" to show that a court can provide no effective relief. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (citing *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir.

2006)); *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 715 (9th Cir. 2011). And, when the claim is based on the party's voluntary cessation of the challenged conduct, the party bears the "'formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur.'" *Brach v. Newsom*, __ F.4th __, 2021 WL 3124310 at *8 (9th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)) (emphasis in original).

In summarily dismissing Appellees, the district court failed to consider any of the well-settled exceptions to the mootness doctrine, including the voluntary cessation doctrine or the capable-of-repetition, yet evading review doctrine, both of which Plaintiffs argued as independently precluding any finding of mootness. ER 513-16 [ECF 54, Supp. Brief at p. 7:25–10:17], ER 462-64 [ECF 57, Supp. Reply at p. 3:21–5:28]. Instead, the district court simply concluded that the general restoration of retail operations within Appellees' counties *ipso facto* rendered the matter "moot" as to them—and not just the preliminary injunctive relief Plaintiffs had sought against them, but the *entire case* against them. This was an error.

Appellees' limited voluntary cessation of the challenged public health orders through ongoing revision in the midst of this litigation could not extinguish Plaintiffs' claims as moot "unless 'it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur' and '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)) (internal quotations omitted). Otherwise, "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *American Diabetes Association v. U.S Dept. of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019) (internal citations omitted). This Court recently reiterated that this burden is a "formidable" one, requiring Appellees to show '"it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur."' *Brach*, 2021 WL 3124310 at *8 (quoting *Laidlaw*, 528 U.S. at 190). This Appellees simply cannot do.

'"A *statutory* change ... is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quoting *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006)) (italics added). By contrast, a "repeal or amendment of an ordinance by a local government or agency" or "a policy change not reflected in statutory changes" "will not necessarily render a case moot" or "necessarily deprive a federal court of its power to determine the legality of the practice at issue." *Id.*; *see also Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1141 (D. Or. 2020)

("an executive action that is not governed by any clear or codified procedures cannot moot a claim") (citing *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)). Indeed, "'a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision.'" *Rosebrock*, 745 F.3d at 971 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991)).

Here, we have a mere policy change at the county level, devoid of any legislative process, and infused with an essentially unbridled reservation of power to reenact the very same form of restrictions challenged in this action. Specifically, in their later orders permitting the general resumption of retail activities, Appellees expressly reserved for themselves the full power and right to further modify their orders on this subject whenever and however they see fit, without any input or voice from any member of the affected public. For example, Santa Clara County's revised order of May 18, 2020 declared:

> As further provided in Section 11 below, the Health Officer will continue to monitor the risks of the activities and businesses allowed under this Order based on the COVID-19 Indicators (as defined in Section 11) and other data. The businesses and activities allowed under this Order may be modified as necessary based on the Health Officer's analysis of that data.

ER 585 [ECF 50, Def. Req. for Jud. Not., Exh. A, § 1]. Likewise, this order provided that, while progress had been made to allow "Additional Businesses" to resume operations, "[t]he Health Officer will continually review whether

modifications to the Order are warranted" based upon progress on the COVID-19 trends, ER 587 [Exh. A, at p. 4, § 11], and that the definition of "Additional Businesses" "will be updated as warranted based on the Health Officer's ongoing evaluation of the COVID-19 Indicators and other data," ER 596 [Exh. A, at p. 13, § 15(n)]. The Contra Costa and San Mateo County orders similarly contained these express reservations of power using identical language. *See*, ER 625 [ECF 50, Exh. C, Contra Costa County Order, § 1]; ER 644-45 [ECF 50, Exh. D, San Mateo County Order, § 1]. Thus, as argued below, should the regional health situation once again deteriorate – which is not only plausible but once again a reality with the resurgence in new cases and deaths stemming from COVID-19 and its variants – Appellees' public health orders may well be further modified to reinstate the same sort of prohibitions at issue here, for the same essential reasons that gave rise to them in the first place.

Even now, over one year later, the Centers for Disease Control and Prevention (CDC) continues to monitor classes of SARS-CoV-2 variants, as either "Variant of Interest," "Variant of Concern," or "Variant of High Consequence." And of these, the well-known "Delta Variant," classified as a "Variant of Concern,"[6] now makes up over 20% of the COVID-19 cases in the U.S., which is double the rate from one month ago. The White House and the NIH have

[6] https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html.

highlighted the growing threat of the SARS-CoV-2 Delta Variant (B.1.617.2) as being associated with an increased severity/hospitalization risk compared to the Alpha variant, as evidenced by occurrences in other countries, including the United Kingdom.[7] Indeed, this Court recently recognized that the rise in Delta variant cases could conceivably prompt the California Department of Public Health to consider reimposing its prior school closure order, even for reopened schools, in specified areas. *Brach*, 2021 WL 3124310 at *9.

Even in the latest revised order of the County of Santa Clara, dated June 21, 2021, and with over 71% of County residents over age 12 fully vaccinated, the County Health Officer still forewarns: "In the event that circumstances surrounding COVID-19 change, the Health Officer will reassess whether further action is necessary."[8]

Appellees' reservation of their rights to unilaterally rescind and revise their orders, reverting to stricter measures should the health situation change, hardly

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[7] Transcript of June 22, 2021, White House Press Briefing by Dr. Anthony Fauci, et al.: https://www.whitehouse.gov/briefing-room/press-briefings/2021/06/22/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-42/.

[8] Order of the Health Officer of the County of Santa Clara Phasing Out the May 18 2021 Health Order Given Widespread Community Vaccination. https://covid19.sccgov.org/order-health-officer-06-21-2021-phasing-out-May-18-health-order, at ¶ 1.

evinces "with assurance that there is no reasonable expectation that the alleged violation[s] will recur," or that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Fikre*, 904 F.3d at 1037; *Brach*, 2021 WL 3124310 at *9. In fact, they have done nothing to carry their burden here. All they have done is attempt to shift their burden with arguments that somehow *Plaintiffs have failed to demonstrate* a reasonable expectation of a recurrence of the prohibitions at issue, because they can only "speculate" about Appellees' intent, and that the "indications" in the record are Appellees "are not likely to reimpose the original restrictions." ER 501-02 [ECF No. 55, Def. Joint Opp. to Plaintiffs' Supp. Brief, at 7:15-8:17].

The State of California employed a similar tactic in the *Brach* case, as it attempted to dismiss as moot the constitutional challenges to school closures it had previously imposed as a measure in response to the COVID-19 pandemic. *Brach*, 2021 WL 3124310 at *8. The majority of the Court flatly rejected this tactic, reasoning that "the State's coy assertion that it is 'speculative' whether it might close schools again merely underscores the State's refusal even to say that it *will not* do so." *Id.* (italics in original). The majority found such an assertion necessary for the State to surmount the voluntary cessation doctrine because, like the Appellees in this case, the State "still retain[ed] the authority to alter the rules at a moment's notice should changing circumstances, in their view, warrant new

restrictions." *Id.* Thus, the State's "*failure to expressly foreswear* ever using school closures again" was a primary basis for the majority's conclusion that "we cannot say that the State has carried its 'formidable burden' under the voluntary cessation doctrine" as interpreted by the Supreme Court. *Id.* (relying on *Tandon v. Newsom*, __ U.S. __, 141 S.Ct. 1297 (2021) and *Laidlaw*, 528 U.S. at 190) (italics added).

Tandon is illustrative as well. There, the plaintiffs sought preliminary injunctive relief against restrictions on in-home private religious gatherings that California had imposed in response to COVID-19. In opposing such relief, the State argued that its later relaxing of restrictions on such gatherings had rendered "injunctive relief particularly unwarranted." Respondents' Opposition to Emergency Application for Writ of Injunction, *Tandon v. Newsom*, No 20A151 (U.S.) (April 8, 2021) at p. 22. The court rejected this contention and granted the required preliminary relief, noting in its *per curiam* opinion that "although California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S.Ct. at 1297 (citing *South Bay United Pentecostal Church v. Newsom*, __ U.S. __, 141 S.Ct. 716, 720 (2021) (statement of Gorsuch, J.)); *see also*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. at 68 ("[I]t is clear that this matter is not moot" and "injunctive relief is still

called for because the applicants remain under a constant threat."); *see also, Dark Storm Industries LLC v. Cuomo*, 471 F. Supp. 3d 482, 494 (N.D.N.Y. 2020) (where the district court found that New York State's later relaxation of its executive orders, allowing firearm retailers to reopen after forced closures, did not moot the plaintiff's claims "because there is a reasonable expectation that New York might be forced to shut down once again").

Appellees here have the same "track record of 'moving the goalposts'" and they have retained the same "broad 'authority to reinstate those heightened restrictions at any time'" as in the other cases constituting binding precedent, where the courts have rejected "mootness" claims under the voluntary cessation doctrine. *Brach*, 2021 WL 3124310 at *9. And Appellees surely have done nothing to assure—much less "*foreswear*"—they "*will not*" reinstate the same sort of prohibitions at the heart of the claims on which this action is based. *Id.* at *8. Given the recent spike in new infections and deaths, just as in *Brach*, "recent case rates in some areas have begun to edge back up towards levels that, under earlier iterations of Defendants' restrictions … would have triggered an order to keep [firearms and ammunition retailers] closed." *Id.* at *9.

Indeed, right now, health officers for seven of the nine Bay Area counties—including Contra Costa, San Mateo and Santa Clara—have restored their prior

indoor mask mandates, in response to the rise in Delta variant cases.[9] Is it so far-fetched and "speculative" to say that restoration of prior retail shutdown orders or other retail restrictions are on the horizon? Particularly where the counties will likely follow the State's established history of rolling back its prior shutdown orders[10] in response to a spike in COVID-19 data? No.

But the district court did not consider, apply, or even discuss any of these variables, much less the voluntary cessation doctrine, which alone precludes any finding of mootness as to either the requested preliminary injunctive relief or the claims themselves.

C. THE DISTRICT COURT ALSO FAILED TO CONSIDER THAT THE PRIOR ORDERS ARE CAPABLE OF REPETITION, YET EVADING REVIEW, SEPARATELY PRECLUDING MOOTNESS.

As Plaintiffs also asserted below, their claims for prospective injunctive relief were not mooted because the Prior Orders were subject to another, independent "justiciability-saving exception"—the claims "are 'capable of repetition, yet evading review.'" *Planned Parenthood of Greater Washington and North Idaho v. U.S. Department of Health & Human Services*, 946 F.3d 1100,

[9] https://www.sfchronicle.com/bayarea/article/San-Francisco-set-to-bring-back-indoor-mask-16357895.php.

[10] *See* July 13, 2020 Press Release of the County of San Mateo, "Governor Orders Statewide Shutdown of Indoor Dining, Movie Theaters, Family Entertainment Centers as COVID-19 Cases Spike, https://cmo.smcgov.org/press-release/july-13-2020-governor-orders-statewide-shutdown-indoor-dining-movie-theaters-family.

1109 (9th Cir. 2020). This exception to the mootness doctrine, closely related to the voluntary cessation doctrine, "requires (1) the complaining party to reasonably expect to be subject to the same injury again and (2) the injury to be of a type inherently shorter than the duration of litigation." *Id*. A party has a "reasonable expectation" of being "subject to the same injury again" when it reasonably believes it "'will again be subjected to the alleged illegality' or will be or 'subject to the threat of prosecution' under the challenged law." *Koller v. Harris*, 312 F. Supp. 3d 814, 823 (N.D. Cal. 2018) (quoting *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007)).

A "reasonable expectation" consists of a "'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (internal citation omitted). In the as-applied context, the sameness of the controversy need not be "down to the last detail." *Wis. Right to Life Inc.*, 551 U.S. at 463 ("Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges."). Rather, there need only be a demonstrated probability that "materially similar" circumstances will recur. *Id*.

Here, Appellees' reservation of power to unilaterally reinstate the same or similarly restrictive prohibitions against firearms and ammunition retailers "at a

moment's notice should changing circumstances, in their view, warrant new restrictions," *Brach*, 2021 WL 3124310 at *8, coupled with their failure or refusal to provide any express assurances to the contrary and the persistence—indeed resurgence—of the same sort of public health risks that led to the Prior Orders in the first place, necessarily create a "demonstrated probability" of the same or "materially similar" restrictions in the future. In fact, as of this writing, statewide in California, the total number of new confirmed cases has increased over 60% in just the last two weeks. *See Tracking the coronavirus in California*, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/ (last visited August 10, 2021). Thus, the matter is "capable of repetition" with the meaning of this justiciability-saving doctrine. As noted above, the counties already have a demonstrated history of reimposing restrictions on certain businesses in response to sharp spikes in the COVID-19 data. *See* fn. 10, *supra*.

The matter is also likely to "evade review." The *Brach* case puts this into perspective. There, as the majority explained, "[w]ere California again to enforce a distance-learning mandate on Plaintiffs' schools, by the time a future case challenging the new mandate could receive complete judicial review, which includes Supreme Court review, the State would likely have again changed its restrictions before that process could be completed." *Brach*, 2021 WL 3124310 at *9. Thus, "[e]ffective relief likely could not be provided in the event of any

recurrence, which makes this a paradigmatic case for applying the doctrine of 'capable of repetition, yet evading review.'" *Id.* (quoting *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855–56 (9th Cir. 1999). So too here. Were Appellees to again force a shutdown of firearms and ammunition retailers, "by the time a future case challenging the new mandate could receive complete judicial review, which includes Supreme Court review, the [counties] would likely have again changed its restrictions before that process could be completed." *Brach* at *9. That is precisely what has already happened with the various superseding orders issued just since the time this action was initiated, and the case has yet to reach the stage where a party could even seek review in the Supreme Court. As in *Brach*, this is "a paradigmatic case for applying the doctrine of 'capable of repetition, yet evading review.'" The district court erred in failing to apply or even consider this doctrine, which independently precludes any finding of mootness here.

D. THE DISTRICT COURT EXPRESSLY RECOGNIZED THAT THE CLAIMS AGAINST THE ALAMEDA COUNTY DEFENDANTS CONTINUED TO PRESENT A LIVE JUSTICIABLE CONTROVERSY, UNDERSCORING ITS ERROR IN *SUA SPONTE* DISMISSING THE *SUBSTANTIVELY IDENTICAL* CLAIMS AGAINST APPELLEES AS MOOT.

In their briefing following the hearing on the motion for preliminary injunction, Plaintiffs asserted that all the Defendants had failed to meet their heavy burden to show mootness, under the voluntary cessation doctrine, and because the restrictions were capable of repetition, yet evading review. As discussed, the

district court summarily dismissed Plaintiffs' claims against Appellees as moot based on the general reopening of retail businesses, despite Plaintiffs' express contentions that both of these doctrines precluded any finding of mootness. ER 513-16 [ECF 54, p. 7:25—10:17]; ER 462-63 [ECF 57, p. 3:21—4:21].

However, when the Alameda County Defendants subsequently moved to dismiss the *substantively identical* claims against them as moot because they too had installed new orders permitting retail operations, the district court *rejected* this argument and *agreed* with the very position that Plaintiffs had previously advanced.

Specifically, the district court outlined the relevant law, first citing the factors identified in the *Rosebrock* case which militate towards a finding of mootness:

> (1) the policy change is evidenced by language that is broad in scope and unequivocal in tone; (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case; (3) the case in question was the catalyst for the agency's adoption of the new policy; (4) the policy has been in place for a long time when we consider mootness; and (5) since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff.

ER 46 [ECF 80, Order on Motion to Dismiss, at p. 7] (quoting *Rosebrock*, 745 F.3d at 971). Then, the court noted that "a court is 'less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Id.* (quoting *Rosebrock,* 745 F.3d at 971). Finally, the court acknowledged that

ultimate question is '"whether the party asserting mootness has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur."' *Id.* (quoting *Rosebrock,* 745 F.3d at 971).

In applying these factors, the district court correctly found "the policy change in question 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." ER 48 [ECF 80 at p. 9:11-14]. Instead, just as Plaintiffs had previously argued, the district court reasoned that "this is a case 'where the new policy could be easily abandoned or altered in the future."' *Id.* (quoting *Rosebrock,* 745 F.3d at 971). "Second, there is no evidence that this case was 'the catalyst for the agency's adoption of the new policy."' *Id.* (quoting *Rosebrock,* 745 F.3d at 972). Third, the new policy was not longstanding. *Id.* Thus, the court held that the Alameda County defendants had not met '"the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again."' *Id.* (quoting *Rosebrock*, 745 F.3d at 971). Just as Plaintiffs had advocated then, the court "denie[d] Defendants' request to dismiss the claims for declaratory and injunctive relief as moot." *Id.* at 9-10.

For purposes of any proper mootness analysis, there is no situational or substantive difference between the revised county orders in Santa Clara, San Mateo, and Contra Costa Counties and the revised Alameda County order that followed suit in permitting the general reopening of retail businesses. As the district court's own *later* analysis of the mootness claim shows, the circumstances compel rejection of any such claim. The only difference between the two situations is that the district court actually engaged in the necessary analysis when addressing the claims against the Alameda County Defendants and it hastily skipped over this analysis in an apparent rush to dispose of the same claims against Appellees. That the court itself was compelled to reach the conclusion it did in addressing the claims against the Alameda County Defendants underscores the error in its *sua sponte* dismissal of the claims against Appellees as being supposedly moot.

II. THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL OF THE CLAIMS AGAINST APPELLEES WAS AN ERROR FOR THE ADDITIONAL, INDEPENDENT REASON THAT APPELLANTS SOUGHT NOMINAL DAMAGES.

A. STANDARD OF REVIEW

Again, the propriety of the district court's *sua sponte* dismissal of Plaintiffs' claims is reviewed de novo. *See Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.*, 336 F.3d 982, 985 (9th Cir. 2003).

B. THE PLAINTIFFS' REQUEST FOR NOMINAL DAMAGES ALONE PRECLUDED DISMISSAL.

Beyond the voluntary cessation and capable-of-repetition, yet evading review doctrines—each of which alone precludes any finding of "mootness" as outlined above—Plaintiffs' claim for nominal damages independently preserves the justiciability of their claims against Appellees under black-letter law.

1. The Nominal Damages Claim Satisfies the Redressability Requirement Under Clearly Established Law.

As the district court itself recognized in addressing the *substantively identical claims* against the Alameda County Defendants, "'[a] live claim for nominal damages will prevent dismissal for mootness.'" ER 44 [ECF 80, at p. 5:10-11] (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)). The Supreme Court recently reaffirmed this principle, unequivocally, in *Uzuegbunam v. Preczewski*, __ U.S. __, 141 S.Ct. 792 (2021). "Despite being small, nominal damages are certainly concrete." *Id.* at 801. "[A] person who is awarded nominal damages receives 'relief on the merits of his claim' and 'may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages.'" *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). While "a single dollar often cannot provide full redress … the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

Because "an award of nominal damages by itself can redress a past injury," "we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Id.* at 796, 802 (Kavanaugh, J., concurring) ("a plaintiff's request for nominal damages can satisfy the redressability requirement for Article III standing and can keep an otherwise moot case alive"); *see, e.g.*, *Covenant Media of California, L.L.C. v. City of Huntington Park*, 377 F. Supp. 2d 828, 843-44 (C.D. Cal. 2005) ("because Covenant has asserted a claim for at least nominal damages, the court concludes that the action is not moot, and declines to dismiss it").

This principle applies here. Plaintiffs specifically sought an award of nominal damages from Appellees as remedy for the constitutional injuries inflicted by them, as specifically prayed for in the First Amended Complaint. ER 1197 [ECF 19, FAC at p. 36:22]. (*See also id.* at footnote 16.) The district court expressly recognized this fact in its order summarily dismissing Appellees from the case. ER 10 [ECF 61, Order at p. 5:22]. As a matter of clearly established law, Plaintiffs' "request for nominal damages satisfies the redressability element of standing the justiciability" and preserves the justiciability of their claims notwithstanding the later orders lifting the previous restrictions on the operations of firearms and ammunition retailers. *Uzuegbunam*, 141 S.Ct. at 802 ("for the purpose of Article III standing, nominal damages provide the necessary redress for

a completed violation of a legal right"). The district court also expressly recognized this in holding that Plaintiffs' claims against the Alameda County Defendants were *not* moot, because "Plaintiffs' nominal damages claims are live" and thus '"prevent dismissal for mootness."' ER 44 [ECF 80, at 5:10-11 (quoting *Bernhardt*, 279 F.3d at 872)].

2. A Nominal Damages Claim Must be Considered in Any Proper Analysis of Subject Matter Jurisdiction; It is Not an "Argument" that Can be "Waived."

Regarding Plaintiffs' substantively indistinguishable claim against Appellees, the district court made no recognition of the obvious impact of the nominal damages being sought. Rather, the court simply dismissed all those claims *sua sponte* in the earliest phase of the case, declaring them moot for all purposes and effectively ending the litigation against Appellees—all without considering anything more than the mere shift in policy that permitted resumption of some limited retail operations in Appellees' counties. In fact, even in the very context of rejecting the "mootness" argument that the Alameda County Defendants made in support of their motion to dismiss—which was based on nothing more than the very same sort of policy shift—the district court's opinion denying their motion did nothing to substantively distinguish the claims against Appellees. Instead, the opinion entirely avoided this issue, setting it aside as having purportedly been "waived" because "Plaintiffs did not make a nominal damages argument in the

supplemental briefing the Court ordered on the mootness question during the preliminary injunction proceedings." ER 44 [ECF 80, at p. 5, n.3]. However, and again, in the same prior order at issue, the district court had also expressly recognized that a prayer for nominal damages had been asserted against all Defendants. ER 10 [ECF 61, at p. 5:22].

At the outset, such treatment of the nominal damages dimension of the mootness question sidesteps the reality that mootness is precluded on multiple independent grounds, which Plaintiffs *did* specifically raise during the preliminary injunction proceedings and *alone* defeat mootness, but were *also* ignored in the rush toward the *sua sponte* dismissal of Appellees from this case. Beyond that, the impact of the nominal damages claim on the mootness question and the justiciability of the action cannot be overlooked on the basis of "waiver." A proper analysis does not turn on the list of specific arguments a party does or does not raise in support of a claim, particularly when it comes to *jurisdictional* matters.

The majority opinion in *Brach* is illustrative. There, the defense contended that the plaintiffs had forfeited a particular argument they made on appeal in support of their constitutional claim that the State's closure of their private schools violated their Fourteenth Amendment right to choose the educational forum that would best provide an adequate education for their children, because they did not make this argument in the district court. *Brach*, 2021 WL 3124310 at *13. This

court rejected this contention, explaining that the plaintiffs unquestionably raised this *claim* below and, "[h]aving presented their private-school-closure claim below, Plaintiffs 'can make any argument in support of that claim [on appeal]; parties are not limited to the precise arguments they made below.'" *Id.* (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). '"An argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that.'" *Id.* (quoting *Puerta v. United States*, 121 F.3d 1338, 1341–42 (9th Cir. 1997)).

The *Brach* court went on to explain that this principle applied "with special force" there because the district court had "conducted expedited proceedings that resulted in a *sua sponte* grant of summary judgment before the State even answered the complaint," pointing to the Ninth Circuit's authority "cautioning against the use of *sua sponte* summary judgment at the preliminary injunction stage, when the merits might not yet have been 'fully ventilated.'" *Brach*, 2021 WL 3124310 at *13 (citing *Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015)).

Similarly, in this case, Plaintiffs unquestionably raised the *claim* that the Prior Orders effecting a shutdown of the entire firearms industry in Appellees' respective counties and municipalities (and in all the other defendants' jurisdictions) violated their constitutional rights protected under the Second

Amendment, and they specifically advanced multiple, independently meritorious arguments in fending off Defendants' contentions that the later orders rendered their claims moot. The decision they are challenging on appeal stems from the district court's *sua sponte* dismissal of their claims against Appellees during the preliminary injunction phase proceedings before the merits were or could have been "fully ventilated." In fact, at the conclusion of the hearing on the preliminary injunction, defense counsel—speaking for all Defendants—indicated that they intended to file a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure ("Rule 12"). ER 576 [ECF 100, Tr. of Hearing at 58:2-9]. Thus, all parties to the case reasonably anticipated a full and complete opportunity to address all arguments germane to the broader question of whether the complaint met the legal standards under Rule 12. But immediately after three of the four county Defendants fully reopened most retail operations, the district court hastily and summarily dismissed Plaintiffs' claims against Appellees *sua sponte*, cutting off any such opportunity, and highlighting why this Circuit generally cautions against rushing towards final dispositions of claims at preliminary stages.

It is axiomatic that jurisdictional issues can be raised at any time, and indeed must be considered whenever they may surface during the pendency of the action, regardless of whether or when a party may or may not have raised them, because they go to the court's very power over the case. *Gonzalez v. Thaler*, 565 U.S. 134,

141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."); *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999) ("Lack of subject matter jurisdiction may be raised at any time because the parties cannot, by their consent, confer jurisdiction upon a federal court in excess of that provided by Article III of the United States Constitution."); *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992) ("Defects in subject matter jurisdiction may be raised at any time, by the parties or by the court on its own motion, and may never be waived."); *Harjo v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086, 1098 (9th Cir. 2016) (quoting *Clinton v. City of New York*, 524 U.S. 417, 428 (1998) ("A jurisdictional issue may be raised for the first time on appeal regardless of its 'constitutional magnitude.'").

This principle was applied under similar circumstances in *Bernhardt*—which the district court itself cited in holding that Plaintiffs' claims against the Alameda County Defendants were *not* moot, ER 44 [ECF 80, at p. 5]. There, in contending that she retained standing to pursue her civil rights claim despite the dismissal of the underlying action, the only argument Bernhardt specifically articulated was that her alleged injuries were "capable of repetition, yet evading review." *Bernhardt*, 279 F.3d at 871. The defense had not even raised an argument of mootness. Nevertheless, the court addressed the matter on its own because "we *must* raise issues concerning our subject matter jurisdiction *sua sponte*." *Id.* And it

found: "we must conclude that Bernhardt's claims for prospective relief are moot, *although we hold that her possible entitlement to nominal damages creates a continuing live controversy*." *Id.* (italics added).[11] That is, it made no difference whether either of the parties raised or argued the significance of the nominal damages claim; the court directly addressed that issue regardless because the issue of nominal damages *necessarily* went to the fundamental question of its subject matter jurisdiction in the case and compelled the conclusion that Bernhardt "ha[d] standing to pursue her claim for damages." *Id.* at p 872.

So it is here, and in any other case where the plaintiff seeks damages based on the constitutional injury already suffered. The impact of a damages claim—a *purely legal* issue—can and must be considered in properly resolving the nature and scope of the court's subject matter jurisdiction. *See, Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362, n.3 (9th Cir. 1998) ("a purely legal question of considerable significance" is appropriately addressed regardless of whether it was raised by a party below). The issue of nominal damages is squarely before this Court as part of any proper assessment of subject matter jurisdiction regardless of whether or when the issue was raised below.

[11] The court found the claims for prospective relief to be moot, but only "[b]ecause the appeal in Bernhardt's underlying action ha[d] been dismissed and that case [wa]s no longer pending." *Bernhardt*, 279 F.3d at 871.

Principles of "waiver" cannot and do not operate to cut off the inescapable effect of nominal damages claims on the core issue of justiciability.

Regardless of whether *the argument* was raised below, this Court can and should consider this issue of law within its broad discretion to consider any argument concerning the propriety of the district court's ruling on justiciability. *See Brach*, 2021 WL 3124310 at *13 (this Court has "discretion to consider a new argument as to why that court erred as a matter of law"); *id.* (holding it "thus would exercise discretion to consider the private-school Plaintiffs' claims even if we had concluded that their claims had been forfeited").

3. The District Court's *Sua Sponte* Dismissal of the Claims Against Appellees Constituted an Abdication of Its Duties in Properly Adjudicating Its Subject Matter Jurisdiction.

For many of the same essential reasons that the issue of nominal damages is squarely before this Court in this jurisdictional analysis, the district court was *duty-bound* to consider the effect of Plaintiffs' nominal damages claim before even entertaining, much less entering, a *sua sponte* dismissal of the claims against Appellees. Its failure to do so—especially in the face of its recognition of this damages claim—underscores the erroneous nature of its extraordinary action in summarily dispatching Appellees from the case at the earliest stage of the proceedings.

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)). "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* the issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *Naruto* at 423, n.5 (rejecting the notion that courts are limited to considering solely those bases for subject matter jurisdiction asserted by the parties). Thus, courts *must* consider all claims and allegations bearing upon subject matter jurisdiction. Further, while a district court may act on its own initiative to dismiss an action on the basis of a possible jurisdictional defect, the court must give notice and "afford plaintiffs 'an opportunity to at least submit a written memorandum in opposition to such motion"' before acting on any such intention. *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981) (quoting *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979)); 5 Wright & Miller, *Fed. Practice and Procedure* § 1357 (3d. ed. 2021). "In addition, the court must give a statement of the reasons for dismissal, and an opportunity to amend unless the complaint is clearly deficient." *Franklin v. State of Oregon, State Welfare Division*, 662 F.2d 1337, 1341 (9th Cir. 1981).

"The Supreme Court has noted that '[t]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are

adequate to safeguard the right for which the constitutional protection is invoked.'" *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974) (quoting *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944)). "The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system." *Id.* at 281. Even a judge's opinion that the case is "frivolous" "does not justify by-passing that right." *Id.*

Thus, in *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, the plaintiffs brought a civil rights action against a local sheriff for bad faith arrests, seeking injunctive and monetary relief. When the plaintiffs moved for a preliminary injunction, the trial court denied it on abstention grounds and then went on to dismiss the case *sua sponte*. *Id.* at 280. On appeal, this Circuit held the *sua sponte* dismissal was error because "the trial judge should have given notice of his 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*. at 281 (citing *Porter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970), and *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972)). The Court also held that the dismissal of the plaintiff's claim for monetary damages was specifically in error because "the equitable principles which might dictate dismissal of a complaint for equitable relief, are not necessarily controlling with respect to a damage action." *Id*. at 284.

The same applies here. There was no prior indication that the district court intended to dismiss Plaintiffs' claims against Appellees *sua sponte* in connection with the early-stage proceedings on the preliminary injunction motion—much less any prior formal notice, opportunity for briefing or a hearing on the propriety of an outright dismissal of these claims at the beginning of the case, or any chance to address any of the court's concerns through any amendments to the complaint. Thus, the court's *sua sponte* dismissal of these claims not only constituted an abdication of its duty to consider the nominal damages claims which it had expressly recognized, but it deprived Plaintiffs of the basic due process to which they were entitled.

And, once again, any proper analysis of subject matter jurisdiction here compels the conclusion the claims against Appellees are not moot, for multiple independent reasons, including, at the very least, the claim for nominal damages. The inevitability of this result in any proper subject matter jurisdiction analysis is even clearer when one considers that with "facial" attacks of subject matter jurisdiction like this (under Rule 12(b)(1))—i.e., those that treat the complaint's allegations as "insufficient to invoke jurisdiction"— "the court 'accept[s] all allegations of fact in the complaint as true and construe[s] them in the light most favorable to the plaintiffs,"' just like with motions to dismiss for failure to state a claim (under Rule 12(b)(6)). *Phong Lamb v. United States*, 389 F. Supp. 3d 669,

679 (N.D. Cal. 2019) (quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)); *accord Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

The same is equally true when the matter arises on the court's own motion. *See Dodd v. Spokane County, Washington*, 393 F.2d 330, 334 (9th Cir. 1968) (by *sua sponte* dismissing the complaint, "the court, in practical effect, invoked on its own Rule 12(b)(6), Federal Rules of Civil Procedure" and thus had to assume "the truth of the facts set forth in the complaint"). Plaintiffs' First Amended Complaint clearly pleaded a request for nominal damages against Appellees based on their Prior Orders and actions that already had and continued to violate their Second Amendment rights—facts that must also be accepted. The district court itself expressly acknowledged that the operative complaint sought nominal damages. ER 10 [ECF 61, p. 5:22]. The facts concerning application of the voluntary cessation and capable-of-repetition, yet evading review exceptions to the mootness doctrine were also essentially undisputed; indeed, the district court *agreed* with Plaintiffs' arguments when it subsequently denied the Alameda County Defendants' motion to dismiss on these very grounds. Had it so examined the issue here, it would have been compelled to similarly conclude that Plaintiffs' claims against the Appellees were not moot.

The district court's error in dismissing Plaintiffs' claims against Appellees *sua sponte* is clear on all fronts: its hasty dismissal of Appellees after proclaiming no harm, no foul once retail stores were limitedly reopened was an abdication of its duties to properly adjudicate its subject matter jurisdiction. And, as the court's own examination of the substantively identical claims against the Alameda County Defendants shows, a proper analysis necessarily precluded any finding of mootness.

CONCLUSION

The district court's order dismissing the Appellees on the grounds of mootness alone should be reversed.

Dated: August 11, 2021

SEILER EPSTEIN LLP

s/ George M. Lee
George M. Lee

Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants identify the following known related cases pending in this Court:

Martinez v. Villanueva, Case No. 20-56233, concerns an appeal from the dismissal of a similar challenge under the Second Amendment to similar public health orders of Los Angeles County.

McDougall v. County of Ventura, Case No. 20-56220, concerns an appeal from the dismissal of a similar challenge under the Second Amendment to similar public health orders of Ventura County.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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: August 11, 2021

s/ George M. Lee
George M. Lee