No. 22-181

In The
Supreme Court of the United States

RESURRECTION SCHOOL, et al.,
Petitioners,

v.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE MITIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF CALIFORNIA RENTAL HOUSING ASSOCIATION, SOUTHERN CALIFORNIA RENTAL HOUSING ASSOCIATION, AND WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITIONERS

PAUL J. BEARD II
Counsel of Record for Amici Curiae
FISHERBROYLES LLP
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
(818) 216-3988
paul.beard@fisherbroyles.com

QUESTIONS PRESENTED

1. Whether under the voluntary cessation exception to mootness a government must satisfy the "absolutely clear" standard and, if not, to what extent should the government be treated differently from private defendants?

2. Whether the government is owed a presumption of good faith under the voluntary cessation exception to mootness when it retains the authority and interest to reimpose its challenged policy?

3. Whether a claim is capable of repetition yet evading review when the government retains the authority to re-issue a restriction that imposes the same harm in the same way?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes, Rules, and Local Laws

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus California Rental Housing Association ("CalRHA") represents over 24,000 members totaling more than 632,000 units, made up of small, medium, and large rental housing owners throughout the State of California. CalRHA's purpose is to advocate in the best interest of the rental housing industry and collectively address industry needs and challenges. CalRHA provides timely grassroots mobilization for the purposes of advocating at the State level and contributing to change in the multifamily housing industry.

Amicus Southern California Rental Housing Association ("SCRHA") is a California not-for-profit corporation authorized to do business in the State of California. SCRHA is one of Southern California's leading trade associations, serving the needs of the rental housing industry in San Diego, Imperial, and southern Riverside Counties. The mission of SCRHA is to protect rental housing owners' rights and educate the industry, including with respect to ever-changing

---

[1] All counsel of record for the parties in this case received timely notice of, and provided written consent to, the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than *Amici*, their members or counsel made a monetary contribution towards the preparation and submission of this brief.

laws and regulations. SCRHA has 2,200 dues-paying members, many of whom are owners of rental housing within the aforementioned counties.

Amicus Western Manufactured Housing Communities Association ("WMA") is a California nonprofit organization created in 1945 for the purpose of promoting and protecting the interests of owners, operators and developers of manufactured home communities in California. Supported by a dues-paying membership consisting of mobilehome park owners and operators, WMA assists its members to successfully manage manufactured home communities in today's complex business and regulatory environment. Collectively, WMA's members own, operate, and control over 194,000 mobile home spaces in California.

Amici's members have a substantial interest in this Court's review of the Sixth Circuit's decision dismissing Petitioners' challenge as moot. At present, they are challenging a variety of short-lived laws passed on a purportedly "emergency" basis. As a consequence, their challenges risk the same "mootness" argument—and misapplication of the "mootness" exceptions—that doomed Petitioner's challenge and request for preliminary relief in this case.

The purpose of this brief is to highlight the confusion regarding application of the "mootness"

doctrine in the context of challenges to short-lived, emergency-based laws. The brief's purpose also is to show that Michigan's successful evasion of judicial review in this case, through "temporary" law-making, is not an isolated event. This brief brings to the Court's attention similar tactics by government entities in other parts of the country and across other industries.

SUMMARY OF THE ARGUMENT

The petition presents important questions that litigants and courts across the country and across different industries face: When the government promulgates short-term laws that expire or are otherwise rescinded during the litigation challenging them, when do those challenges become moot? Who bears the burden of proof when the "mootness" doctrine is invoked? What is the substantive test for evaluating when the "mootness" exceptions apply?

As explained below, the Circuit Courts of Appeal are split on these questions. Even within the Ninth Circuit Court of Appeals, there are conflicting decisions as to how to analyze the "mootness" doctrine and its exceptions in the context of challenges to "temporary" laws. Further, the brief explains why the problems raised by the petition transcend the specific dispute between the parties in this case. *Amici* are California nonprofit organizations that are facing the same procedural obstacles to otherwise valid

challenges to "temporary"—and unconstitutional—laws.

The Court should grant the petition and resolve whether the government can or should be able to manufacture mootness to avoid claims challenging their short-term and iterative laws.

ARGUMENT

I. The "Mootness" Doctrine in the Context of Challenges to "Temporary" Laws Is Rife with Confusion

Article III of the United States Constitution limits the Court's jurisdiction to "cases" and "controversies." U.S. Const. art. III; *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 136 S. Ct. 663, 678 (2016). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732-33, (2008) (internal quotation marks omitted). But there are two important exceptions—the "voluntarily cessation" and "capable of repetition but evading review" exceptions. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)

A "voluntary cessation of allegedly illegal conduct does not deprive the [court] of power to hear

and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "[V]oluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia v. EPA*, 142 S. Ct. 2587, 2594 (2022). As for the "capable of repetition" exception, "[a] dispute qualifies for that exception only if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (internal citation and quotation marks omitted).

In recent years, challenges to COVID-19-related laws[2]--billed as "temporary" and sometimes self-expiring—have faced "mootness" arguments by the government authorities who enacted or promulgated them. Challengers have made appeals to either or both of the two "mootness" exceptions, with varied success. This area of the law remains confused, with circuits differing in their application of the "voluntary cessation" and "capable of repetition" exceptions.

---

[2] By "laws," Amici intend to include statutes, mandates, and orders enacted or issued by legislative or executive authorities.

For example, the Sixth Circuit Court of Appeals in this case applied the "mootness" exceptions with inordinate deference to the government. The case involves a private religious school and two parents of students who attend private religious schools. They challenged and sought a preliminary injunction against a statewide mask mandate that the State of Michigan had repealed nearly a year earlier. A divided court *en banc* held that the interlocutory appeal from denial of preliminary relief and the claim itself were moot, despite the challengers' arguments that both "mootness" exceptions were met. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 527 (2022).

In so doing, the majority effectively placed the burden on the *challengers* to show that their claim and request for preliminary relief remained live. The court observed that the challengers "face[d] strong headwinds." *Id.* at 528. With respect to the "voluntary cessation" exception, the court held:

> "This dispute is therefore moot unless there is a decent chance that the defendant officials will not only impose a new mask mandate, but also roughly stick to the exceptions in the old one. And that prospect is exceedingly remote given all that has happened in the year or so since the State rescinded its mandate."

Id. at 529.

The court did not demand that the State make it "***absolutely*** clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia*, 142 S. Ct. at 2594. Quite the contrary. Rather than framing the question as whether Michigan had proven it would ***not*** reimpose the mandate, the court reversed the burden, asking "whether Michigan [would] reimpose the mask mandate"—something that, in the court's judgment, the challengers had not established. *Resurrection Sch.*, 35 F.4th at 530. The court dismissed the challengers' "capable of repetition" argument for similar reasons. *Id.*

Similarly, in a unanimous *en banc* decision from 2019, the Ninth Circuit was more explicit in its near-total deference to the government's "mootness" argument in a challenge to a law subsequently repealed in the midst of litigation. In *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019), Nevada enacted a debt-collection law that was challenged on preemption grounds. *Id.* at 1197. After the state appealed the district court's ruling striking down the law, and while the appeal was pending, the state repealed and replaced the offending statute. *Id.* The state then argued the challengers' claim was moot.

"[R]elying on different strands of [the Ninth Circuit's] precedent," a divided panel concluded that repeal and replacement of the offending law was not

moot. *Id.* at 1197-98. The court granted rehearing *en banc* "to examine and harmonize [the Ninth Circuit's] precedent concerning the proper analytical framework to apply when determining whether the repeal, amendment, or expiration of legislation renders a lawsuit challenging the legislation moot." *Id.*at 1197. Thus, as late as 2019, the court *en banc* acknowledged intra-circuit confusion over how to apply the "mootness" doctrine and its exceptions in the context of "temporary" laws that become ineffective during litigation challenging them.

In concluding that the challengers' claim was moot, the court drew a sharp distinction between private and government defendants who voluntarily cease the challenged conduct: "A private defendant's voluntary cessation of challenged conduct does not necessarily render a case moot because, if the case were dismissed as moot, the defendant would be free to resume the conduct." *Id.* at 1198. Without much explanation, the court concluded that *government* defendants can and should be presumed to act in "good faith" when they cease bad conduct. In the Ninth Circuit's view, courts must "treat the voluntary cessation of challenged conduct by government officials with more solicitude . . . than similar action by private parties." *Id.* (internal citation and quotation marks omitted). In the court's view, "legislative actions should not be treated the same as voluntary cessation of challenged acts by a private party, and . . . we should assume that a legislative

body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire." *Id.* at 1199. As a consequence of this presumption of "good faith" on the part of government defendants, the court concluded that "the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Id.* at 1198. The court articulated the rule as follows:

> "[I]n determining whether a case is moot, we should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it. . . . [A] determination that such a reasonable expectation exists must be founded in the record rather than on speculation alone."

Id. at 1199.

The intra-circuit confusion that *Chambers* purported to resolve resurfaced just a few years later. In June 2022, the Ninth Circuit—again, *en banc*—dismissed as moot a challenge to since-rescinded orders barring in-person school instruction during the early stage of the pandemic. *Brach v. Newsom*, 38

F.4th 6, 9 (2022).[3] The court concluded that neither the "voluntary cessation" nor the "capable of repetition" exception could save the challenge. *Id.* at 12.

In contrast to its decision in *Chambers*, the *Brach* court stated that it "hold[s] the government to the ***same*** burden as private litigants" in applying the "mootness" exceptions. *Id.* at 12 (emphasis added). It affirmed that the burden is on the government defendant to establish mootness—and, as a corollary, that the exceptions do not defeat mootness. *Id.* at 13 ("[W]e probe the record to determine whether the government has met its burden. . . ."). But in the same breath, the court confusingly affirmed the view it expressed in *Chambers* that the government defendant is entitled to "more solicitude" than the private defendant, and must be granted "a presumption of good faith" when the challenged conduct is discontinued. *Id.* at 12-13 (internal citation and quotation marks omitted). Granting the government defendant such a "presumption" has the effect of shifting the burden onto the *challenger* to show why the exceptions save his claim. *See, e.g.*, Fed. R. of Evid., Rule 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the

[3] A petition for writ of certiorari in this case was filed with the Court on September 13 and docketed on September 16. *See* U.S. Supreme Court Docket No. 22-250.

burden of producing evidence to rebut the presumption.").

Moreover, the *Brach* court adopted a version of the "mootness" exceptions that strongly favors government defendants. For the court, the test is not whether "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia*, 142 S. Ct. at 2594. The court categorically rejected the need for such an "ironclad assurance" from the government defendant. *Brach*, 38 F.4th at 15. Instead, the court viewed the test as being whether the government defendant simply established "no reasonable expectation" of a recurrence of the challenged conduct. *Id.*

The First and Seventh Circuit Courts of Appeal have applied the "mootness" exceptions differently in similar challenges to short-lived laws. *See Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

In *Bayley's*, the Governor of Maine issued a COVID-19-related executive order that, with few exceptions, required persons traveling to that state to self-quarantine upon their arrival for a period of fourteen days before going out in public. *Bayley's*, 985 F.3d at 155. Three individuals challenged the law in federal district court, lost, and appealed. During the

appeal, the Governor rescinded and replaced the offending order. *Id.*

The First Circuit held that the claim was nevertheless live. In sharp contrast to the Sixth and Ninth Circuits, the First Circuit unequivocally placed the burden of establishing mootness on the government, without the benefit of a "good faith" or other presumption that would implicitly have reversed or otherwise watered down the government's heavy burden. And, unlike the Sixth and Ninth Circuits, the First Circuit demanded ironclad assurance that the ceased conduct would not recur. As the Court explained: "[W]e cannot say that the Governor has carried the ***formidable burden*** that she bears of showing that it is ***absolutely clear*** the allegedly wrongful behavior could not reasonably be expected to recur." *Bayley's*, 985 F.3d at 157-58 (emphasis added).

Similarly, in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), two churches contended that an executive order issued by Illinois' Governor and limiting the size of public assemblies (including religious services) to ten persons violated their federal constitutional rights. *Id.* at 342. During the appeal from denial of preliminary relief, the Governor rescinded the order, allowing resumption of all religious services. *Id.* at 344. The Governor argued the challenge was therefore moot.

The Seventh Circuit disagreed. Like the First Circuit—but unlike the Sixth and Ninth Circuits—the court unequivocally affirmed that the government defendant carries the heavy burden of establishing that the offending conduct will not recur despite its voluntary cessation. The court explained: "Voluntary cessation of the contested conduct makes litigation moot only if it is ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 345 (internal citation and quotation marks omitted).

The foregoing precedents underscore continued confusion over how to properly apply the "mootness" doctrine and its exceptions in the context of "temporary" laws that lapse or are otherwise rescinded in the midst of litigation. The Circuits do not agree which party carries the burden—or how heavy that burden is, particularly in light of judicially created presumptions. And the Circuits do not agree on the substantive test to apply, particularly with respect to the "voluntary cessation" exception. The Court's guidance is necessary to resolve this confusion and conflict among the courts.

II. How To Apply the "Mootness" Exceptions in Challenges to "Temporary" Laws Is of Nationwide Importance

The questions presented in the petition are not unique. The problems surrounding how to apply the

"mootness" exceptions in challenges to so-called "temporary" laws have been plaguing litigants and courts across the country. *Amici*'s challenges illustrate the nationwide reach of the questions presented.

A. CalRHA's Challenge to a Series of Temporary and Self-Expiring Eviction Moratoria

In 2021, CalRHA sued California Governor Gavin Newsom and his Attorney General (collectively, "the State") in a federal civil rights challenge to a state eviction moratorium that was iteratively imposed for relatively brief periods of time over the course of two years. Starting in 2020, the "COVID-19 Tenant Relief Act"—as repeatedly extended time and again—barred rental housing owners from freely repossessing their properties due to tenants' nonpayment of rent based on tenants' self-certification of financial distress. The moratorium was in effect for months at a time and extended multiple times throughout those two years.

The eviction moratorium had the effect of forcing landlords to house their tenants for free or at a fraction of the rent owed, with no hope or expectation of ever recovering rent arrears from largely judgment-proof tenants. This devastated many landlords, both financially and emotionally, including CalRHA's members. One CalRHA member is Mary Montano, who barely scrapes by on Social

Security and can hardly afford her prescriptions because she has had to subsidize a tenant living in her property to the tune of almost $60,000 in unpaid rent. CalRHA alleges that the moratorium violated the federal Due Process, Takings, and Contracts Clauses.

First, CalRHA alleges the moratorium allowed a tenant's self-certification of inability to pay—a self-certification that cannot be meaningfully challenged—to cut off a landlord's right to evict for nonpayment of rent. More recently, the moratorium allowed a tenant's mere application for rental assistance to achieve the same end: eliminate the owner's right to evict. The law's scheme for depriving landlords of their eviction rights violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) ("[N]o man can be a judge in his own case consistent with the Due Process Clause.").

Second, CalRHA alleges the moratorium resulted in a *per se* taking of landlords' property rights—specifically, the fundamental right to exclude. The taking served no public use or purpose; it served only a private purpose—i.e., to benefit a subset of tenants who self-certify as unable to pay rent or who file an application for rental assistance. Further, the law provided no mechanism for compensating landlords for the taking. As such, the moratorium violated both the Public Use and Just Compensation

requirements of the Takings Clause of the Fifth Amendment.

Finally, CalRHA alleges the moratorium violated the Contracts Clause of the Constitution. It did away with the fundamental bargain of all leases—namely, the right to evict for nonpayment of rent. And it did so in a way that was neither appropriate nor reasonable under the circumstances, especially in light of the fact that the pretext for the moratorium—the COVID-19 pandemic—subsiding over time and under relative control for over a year.

CalRHA seeks a declaration from a federal district court in California, to the effect that the State's eviction moratorium was unconstitutional, as well as an injunction enjoining enforcement of future extensions or reimpositions of the law. CalRHA also seek nominal damages for violation of federal constitutional rights.

The State moved for summary judgment in part on mootness grounds. Relying on the Ninth Circuit's decision in *Chambers*, 941 F.3d 1195, the State claims *CalRHA* has the burden of establishing its claims remain live, and that the State enjoys a presumption of "good faith" associated with the most recent lapse of the eviction moratorium. This, despite the fact that the State has refused to concede the unconstitutionality of its moratorium or to

unequivocally state it will never again enact a similar moratorium. A decision on the State's motion is pending.

B. SCRHA's Challenge to the County of San Diego's Short and Draconian Eviction Moratorium

On May 4, 2021, the County of San Diego, California, enacted Ordinance 10724.[4] The Ordinance effectively barred all evictions within its borders, including incorporated cities governed by their own legislative bodies. The Ordinance barred landlords from repossessing their properties even to allow themselves and their families to move back in, or to remove nuisance tenants and tenants threatening owners, employees, and third parties. *S. Cal. Rental Hous. Ass'n v. Cty. of San Diego*, 550 F. Supp. 3d 853, 859-60 (S.D. Cal. 2021).

Within days of the Ordinance's enactment, SCRHA—which represents many "mom and pop" landlords—challenged the law as unconstitutionally impairing contracts, effecting an unconstitutional taking, and unconstitutionally reaching beyond the County's jurisdiction into incorporated cities. Soon thereafter, the Association moved for a preliminary injunction, which the federal district court denied. *S.*

---

[4] Available at https://bit.ly/3E1nBuY (last visited on September 28, 2022).

Cal. Rental Hous. Ass'n, 550 F. Supp. 3d at 857-58, 871.

The law went into effect on June 3, 2021, and expired, by its own terms, a little over two months later in August 2022. *Id.* at 859. During the appeal from denial of preliminary relief, the County argued the claim was moot given that the moratorium lasted only two or so months, and expired by its own terms. Like the State in the *CalRHA* case described above, the County relied principally on *Chambers*, 941 F.3d 1195 for the "mootness" framework. The County argued that SCRHA has the burden of establishing its claims remain live, and that the County benefits from a presumption of "good faith" that it won't reenact a similar moratorium in the future. Briefing on appeal is complete, and the Ninth Circuit has yet to issue a decision.

C. WMA's Challenge to "Emergency" Rent Control at Mobile Home Parks

Lastly, the Governor of California has relied on a state "price gouging" statute to impose severe limitations on rent that can be charged at some mobile home parks for mobile home spaces. The Governor's orders are based on declared emergencies arising out of wildfires that have swept the state in recent years. The orders have substantially harmed mobile home parks, many of whom are members of WMA.

WMA is involved in ongoing litigation to address their members' injury. *See, e.g., Western Manufactured Housing Communities Ass'n v. City of Santa Rosa* (Cal. Super. Ct., Sonoma County, No. SCV-268752). But in some areas, the declared state of emergency expired on December 31, 2021. That leaves federal claims challenging the state "rental control" orders—and future ones like it—vulnerable to government arguments that they are moot. With the confusion and conflict among the circuits, and even within the Ninth Circuit, litigants and courts have little guidance as to the proper framework for analyzing such arguments.

CONCLUSION

For these reasons, and those cited in the Petition, the Court should grant the petition.

DATED: September 2022

Respectfully submitted,

PAUL J. BEARD II
Counsel of Record
FisherBroyles LLP
4470 W. Sunset Blvd.
Suite 93165
Los Angeles, CA 90027
(818) 216-3988
paul.beard@fisherbroyles.com
Counsel for Amici Curiae