

No. 22-250

IN THE
Supreme Court of the United States

MATTHEW BRACH, et al.,
Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY
AS THE GOVERNOR OF CALIFORNIA, et al.,
Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**MOTION FOR LEAVE TO FILE BRIEF OUT
OF TIME OF *AMICUS CURIAE* AND BRIEF
OF *AMICUS CURIAE* CALIFORNIA
CONSTITUTIONAL RIGHTS FOUNDATION
IN SUPPORT OF PETITIONERS**

GARY G. KREEP
Counsel of Record
California Constitutional
Rights Foundation
932 D Street, Suite 1
Ramona, CA 92065
(760) 803-4029
gary@ggkmail.us

Counsel for Amicus Curiae

**MOTION FOR LEAVE TO FILE BRIEF
OUT OF TIME OF AMICUS CURIAE**

Pursuant to Supreme Court Rule 21, California Constitutional Rights Foundation (“Amicus”), respectfully move the Court for leave to file the brief of *amicus curiae* out of time, and to file the accompanying brief in support of Petitioners’ Writ of Certiorari.

Amicus regret missing the deadline for filing. This is a very important COVID K-12 School lockdown case to be heard by this Court, and the fact that it has reached this Court since COVID lockdowns began nearly three years ago, shows its significance. As a non-profit organization that represents parents, and teachers in K-12 schools who have been affected by the California school closures over the past three years, *amicus* have been involved extensively in bringing similar lawsuits against the State of California in both Federal and State Court, and, respectfully, believe that they have a perspective that might assist in the Supreme Court's consideration of the issue now pending before the Court.

Amicus apologizes for the late motion, and respectfully request that this Court grant the motion for leave to file the brief of *amicus curiae* out of time, and to file the accompanying brief. *Amicus* miscalculated the date for Amicus Briefs to be filed after the Court Requested a Response from Respondents on October 28, 2022, and then extended the time for Respondents to file their response on November 8, 2022.

The filing of this *amicus* brief has not been consented to by both parties. Petitioners consent to the filing of this *amicus* brief; Respondents do not. Since Respondents have been granted an extension of time to file their brief until December 28, 2022, the granting of this motion would not have prejudiced them as *amicus* originally filed their brief on December 27, 2022, and were notified by the Court on December 30, 2022, that the motion needed to be corrected. Thus, with the federal holiday observed on January 2, 2022, this was the earliest date *amicus* could re-file this amicus brief with the Court.

In support of this motion, *amicus* asserts that the Ninth Circuit Court of Appeals failed to fully and properly analyze the doctrine of capable of repetition yet evading review. The capable of repetition doctrine has a much broader application than the narrow standard that the Ninth Circuit applied because the actual legal standard for capable of repetition is not a very demanding, one as noted by this Court on several occasions. See *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988); *Murphy v. Hunt*, 455 U.S., 478, 482 (1982); *Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 (1987). *Amicus* request that this motion to file the attached *amicus* brief be granted.

No counsel for a party authored this motion or the proposed amicus brief in whole or in part, and no person, other than amicus, its members, or its counsel made a monetary contribution to fund the motion or brief.

Dated: January 4, 2023

Respectfully submitted,

GARY G. KREEP

COUNSEL OF RECORD

California Constitutional
Rights Foundation

932 D Street, Suite 1

Ramona, CA 92065

(760) 803-4029

gary@ggkmail.us

Counsel for Amicus Curiae

*California Constitutional Rights
Foundation*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... vi

INTEREST OF THE AMICUS CURIAE..... 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT..... 4

I. The “capable of repetition” exception to mootness applies to the challenged restrictions in this case, because they are short in duration, and are reasonably likely to recur when the Governor has retained his emergency powers... 5

A. Under the capable of repetition exception the challenged action must be too short in its duration to be fully litigated prior to its expiration..... 6

B. Under the capable of repetition exception there must be a reasonable expectation that the challenged action would recur, where “reasonable expectation” is not an exacting standard, which the Ninth Circuit incorrectly held to a much higher standard..... 7

(i) “Reasonable” is not a demanding legal standard and has been met when it is somewhat less than probable..... 8

(ii) The challenged emergency restrictions are reasonably expected to recur because the State of California is still under a state of emergency, and the State Officials have retained their unfettered emergency powers..... 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Barilla v. Ervin</i> , 886 F.2d 1514 (9th Cir. 1989)	3
<i>Brach v. Newsom</i> , 38 F.4th 6 (9th Cir. 2022) (en banc)	7, 9
<i>Dobbs v. Jackson Women's Health Org.</i> , 597 U.S. _____, 142 S. Ct. 2228 (2022).....	11
<i>Honig v. Doe</i> , 484 U.S. 305 (1988)	3, 5, 8, 9
<i>Kingdomware Technologies, Inc. v. United States</i> , 579 U.S. 162 (2016).....	6
<i>Murphy v. Hunt</i> , 455 U.S. 478 (1982)	5
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	11, 12
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 592 U.S. _____, 141 S. Ct. 63 (2020)	8
<i>S. Pac. Terminal Co. v. ICC</i> , 219 U.S. 498 (1911).....	6
<i>Simpson v. Lear Astronics Corp.</i> , 77 F.3d 1170 (9th Cir. 1996).....	3
<i>South Bay United Pentecostal Church v. Newsom</i> , 590 U.S. _____, 141 S. Ct. 716 (2021)	4
<i>Tandon v. Newsom</i> , 593 U.S. _____, 141 S. Ct. 1294 (2021).....	4, 8
<i>United States v. Sanchez-Gomez</i> , 584 U.S. _____, 138 S. Ct. 1532 (2018).....	5

Other Authorities

Coronavirus: This is not the last pandemic - BBC News ; https://www.bbc.com/news/science-environment-52775386	11
--	----

COVID-19 will not be last pandemic: WHO – DW –
12/26/2020 ; <https://www.dw.com/en/covid-19-will-not-be-last-pandemic-who/a-56065483>... 11

Governor Newsom to End the COVID-19 State of
Emergency | California Governor ;
<https://www.gov.ca.gov/2022/10/17/governor-newsom-to-end-the-covid-19-state-of-emergency/> 6

Health Advisory: Early Respiratory Syncytial Virus
and Seasonal Influenza Activity (ca.gov) ;
<https://www.cdph.ca.gov/Programs/OPA/Pages/CAHAN/Early-Respiratory-Syncytial-Virus-and-Seasonal-Influenza-Activity.aspx> 2, 3

If You Think The Pandemic Is Over, You May Be
Part Of The Problem (yahoo.com) ;
<https://www.yahoo.com/news/think-pandemic-over-may-part-213835127.html>..... 4

Mpox (ca.gov) ;
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Mpox.aspx>..... 2

PowerPoint Presentation (cdc.gov) ;
<https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pdfs/1918-pandemic-webinar.pdf> 11

States' COVID-19 Public Health Emergency
Declarations and Mask Requirements -
NASHP ; <https://nashp.org/states-covid-19-public-health-emergency-declarations-and-mask-requirements/> 6

The triple threat of the influenza, Covid and RSV |
CNN ;
[https://www.cnn.com/2022/12/09/health/covid-
influenza-rsv-vaccine-pandemic-
wellness/index.html](https://www.cnn.com/2022/12/09/health/covid-influenza-rsv-vaccine-pandemic-wellness/index.html) 3

Tired of Hearing about the Pandemic? Welcome to
the Tripledemic - LA Weekly ;
[https://www.laweekly.com/tired-of-hearing-
about-the-pandemic-welcome-to-the-
tripledemic/](https://www.laweekly.com/tired-of-hearing-about-the-pandemic-welcome-to-the-tripledemic/) 3

INTEREST OF THE AMICUS CURIAE¹

The California Constitutional Rights Foundation (CCRF), a project of the FAITH AND FREEDOM FOUNDATION, Inc., Alexandria, VA, a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3).

Such organizations were established, inter alia, for the purpose of participating in the public policy process, including conducting research and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of all citizens, and discussing questions related to human and civil rights as secured by law. *Amicus* has previously filed amicus briefs in this court in a number of other cases.

SUMMARY OF THE ARGUMENT

This case falls squarely under the “capable of repetition yet evading review” exception², and thus, is not moot. The Petition presents an important question that courts across the country are facing: when short-term laws that expire or are rescinded during the litigation challenging them, do these circumstances

¹ It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these amicus curiae, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel notified the parties of this filing and have obtained consent by the Petitioners. Respondents have withheld their consent

² This doctrine will be referred to, hereinafter, as “capable of repetition.”

render the challenge moot while the government maintains its unrestricted emergency powers?

This question has haunted, and continues to haunt, several circuit courts across the country, whereas an opinion rendered by the Court will end the confusion among the circuit courts and set the record straight once and for all.

Amicus will outline for the Court the distinguishable nature of the capable of repetition doctrine, and that this exception has a less demanding standard than the Ninth Circuit Court Appeals en banc decision has used. It must be noted that both exceptions to mootness are held to different standards, and, thus, should be analyzed as distinguishable doctrines. The Petition has focused immensely on the “voluntary cessation” exception, and, therefore, our Amicus brief will focus on the “capable of repetition” exception.

The tyrannical emergency orders that have been enacted in the State of California, by Governor Newsom, et al, fall squarely into the capable of repetition exception, and are ripe for judicial review, because there is an ongoing state of emergency in California, coupled with the fact that pandemics will always be a part of general society, not just COVID--for example monkey pox³, RSV⁴, influenza, and the

³ [Mpox \(ca.gov\)](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Mpox.aspx) ;
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Mpox.aspx>
⁴ [Health Advisory: Early Respiratory Syncytial Virus and Seasonal Influenza Activity \(ca.gov\)](https://www.cdph.ca.gov/Programs/OPA/Pages/CAHAN/Early-Seasonal-Influenza-Activity) ;
[https://www.cdph.ca.gov/Programs/OPA/Pages/CAHAN/Early-](https://www.cdph.ca.gov/Programs/OPA/Pages/CAHAN/Early-Seasonal-Influenza-Activity)

“triple demic”⁵ (a combination of COVID, RSV, and influenza).

The capable of repetition exception is a less demanding legal standard than the en banc Ninth Circuit Court held it to in this case, and that court failed to follow its own finding in *Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989) (holding that the burden to show a “reasonable expectation” of repetition is “not a very demanding one.” *Barilla v. Ervin*, 886 F.2d 1514, 1519-20 (9th Cir. 1989), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

Additionally, this Court has also concluded that the legal standard for the capable of repetition issue is not exacting, that it is reasonable, and that it is somewhat *less* than probable. *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). The crux of the capable of repetition exception is whether the challenged behavior is reasonably expected to recur. The emergency orders that were tightened and loosened at the whim of California’s Governor are still being held over the heads of the Golden State’s citizenry. The unbridled, flip-flopping, restrictions enacted over the

[Respiratory-Syncytial-Virus-and-Seasonal-Influenza-Activity.aspx](#)

⁵ [The triple threat of the influenza, Covid and RSV | CNN](https://www.cnn.com/2022/12/09/health/covid-influenza-rsv-vaccine-pandemic-wellness/index.html) ; <https://www.cnn.com/2022/12/09/health/covid-influenza-rsv-vaccine-pandemic-wellness/index.html> ; [Tired of Hearing about the Pandemic? Welcome to the Tripledemic - LA Weekly](https://www.laweekly.com/tired-of-hearing-about-the-pandemic-welcome-to-the-tripledemic/) ; <https://www.laweekly.com/tired-of-hearing-about-the-pandemic-welcome-to-the-tripledemic/>

past two years and nine months are the exact actions that are reasonably likely to recur.

Therefore, this Court should grant the petition and resolve the issue of whether reasonable expectation is a low standard to meet, and whether it is met when a governor retains its emergency powers to restore an offending order at the flick of a pen.

ARGUMENT

“[A] challenge to state restrictions is not moot when “**officials with a track record of ‘moving the goalposts’** retain authority to reinstate those heightened restrictions at any time.” (Emphasis added). *Tandon v. Newsom*, 593 U.S. ____, 141 S. Ct. 1294, 1297 (2021) (quoting *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ____, 141 S. Ct. 716, 720 (2021)). Almost two years after these decisions were rendered by the Court, the State of California is still under a state of emergency, and the governor has continued to flip-flop, and to move the emergency directive goalposts.

Specifically, students attending public and private K-12 schools, are presently living in a time where California State Officials can shut down their school, if and when another pandemic/epidemic resurfaces⁶. Given the history of pandemics, and the COVID pandemic specifically, there is a reasonable probability that the issue will arise again, but there

⁶ [If You Think The Pandemic Is Over, You May Be Part Of The Problem \(yahoo.com\) : https://www.yahoo.com/news/think-pandemic-over-may-part-213835127.html](https://www.yahoo.com/news/think-pandemic-over-may-part-213835127.html)

will be insufficient time to litigate the matter before the state's reinstated restrictions do more damage. Therefore, the mootness argument continues to be the avenue that the State of California uses regarding the court challenges to the COVID emergency order cases, in an attempt to avoid appellate review.

I. The “capable of repetition” exception to mootness applies to the challenged restrictions in this case, because they are short in duration, and are reasonably likely to recur when the Governor has retained his emergency powers.

Regarding 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*, 584 U.S. ____, 138 S. Ct. 1532, 1540 (2018). The legal standard for the capable of repetition argument is not exacting because the reasonableness standard is not demonstrably probable. *Honig*, 484 U.S. at 318 n.6; *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The restrictions being challenged here are official acts that are capable of repetition, yet evading review. Under this exception, the legal standard for reasonableness is not demanding and California has unsuccessfully carried its burden to show that there is no “reasonable expectation” this dispute will recur.

A. Under the capable of repetition exception the challenged action must be too short in its duration to be fully litigated prior to its expiration.

The Court has held on more than one occasion that “a period of two years is too short to complete judicial review of the lawfulness” of an action. *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 170 (2016) (citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514–16 (1911)).

This pandemic was not going to last forever, although it could be argued that the State of California has attempted to make it last as long as possible, as evidenced by the fact that the state of emergency does not end until February 28, 2023⁷, assuming that Governor Newsom does not change his mind again. Additionally, in comparison to other states around the country, only ten states have remained under their emergency declarations⁸. Aside from the two other states that remain on indefinite emergency orders, (New Mexico, and West Virginia), California’s state of emergency ends the latest. The emergency orders were meant to be “temporary,” regardless of the

⁷ [Governor Newsom to End the COVID-19 State of Emergency | California Governor :](https://www.gov.ca.gov/2022/10/17/governor-newsom-to-end-the-covid-19-state-of-emergency/)
<https://www.gov.ca.gov/2022/10/17/governor-newsom-to-end-the-covid-19-state-of-emergency/>

⁸ [States' COVID-19 Public Health Emergency Declarations and Mask Requirements - NASHP ; https://nashp.org/states-covid-19-public-health-emergency-declarations-and-mask-requirements/](https://nashp.org/states-covid-19-public-health-emergency-declarations-and-mask-requirements/)

constant moving of the goalpost that has stretched this “emergency” out for nearly three years.

Even though the temporary emergency orders have lasted almost three years, it was inevitable that these emergency COVID pandemic orders would come to an end before reaching appellate litigation and judicial review of the lawfulness of the orders could take place. Furthermore, the ebb and flow, back and forth, roller coaster of the emergency executive orders has made it likely that, by the time appellate review commenced, the actions would have ceased. Last, the Parties and the Ninth Circuit agree that this first condition under the capable of repetition exception has been met. *Brach v. Newsom*, 38 F.4th 6, 15 (9th Cir. 2022) (en banc).

Therefore, the nature of the challenged action, emergency COVID pandemic orders, is too short in duration to be fully litigated prior to its expiration, and, thus, clearly and easily, meets prong one of the capable of repetition exception.

B. Under the capable of repetition exception there must be a reasonable expectation that the challenged action would recur, where “reasonable expectation” is not an exacting standard, which the Ninth Circuit incorrectly held to a much higher standard.

The crux of the capable of repetition exception in this case is the reasonable expectation that a challenged action would recur, and whether the legal standard is one that is not demanding.

Over the past two plus years of COVID lawsuits, the Court has found, on more than one occasion, that the emergency pandemic style restrictions are capable of repetition yet evading review. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____, 141 S. Ct. 63, 68 (2020); *Tandon*, 141 S. Ct. at 1297. The Court found that, in both of these cases, the State government continually changed their emergency orders, and State officials retained their emergency unchecked authority to reinstate the challenged actions.

Reasonableness is not an exacting legal standard, and it is met when it is somewhat less than probably to recur. *Honig*, 484 U.S. at 318 n.6.

(i) “Reasonable” is not a demanding legal standard and has been met when it is somewhat less than probable.

The Court has concluded that the legal standard in prong two of the capable of repetition exception is not exacting. *Honig*, 484 U.S. at 318 n.6. The Court explained that the “plaintiff need not show that there is a ‘demonstrated probability’ that the dispute will recur... [but that] [the] concern in [cases] involving potentially moot claims [has been] whether the controversy was *capable* of repetition and not ... whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.” *Id.*

In light of the Court’s finding that this legal standard is a low bar to meet, the Ninth Circuit sitting

en banc applied the reasonableness standard incorrectly and much too narrowly.

In their en banc opinion, the Ninth Circuit incorrectly held that “the parent’s argument that the pandemic *may* worsen and that the State *may* impose further restrictions is speculative.” *Brach v. Newsom*, 38 F.4th at 15 (9th Cir. 2022) (en banc). However, in light of *Honig*, the fact that the State “may” impose further restrictions falls precisely in line with a plaintiff not needing to show that there is a “demonstrated probability” that the dispute will recur, but it is met when it is *likely* to recur. *Honig*, 484 U.S. at 318 n.6 (1988).

The dissent in the Ninth Circuit en banc was correct in its holding that Governor Newsom retains the specific power to impose similar restrictions, and that “reasonable is not an exacting bar”, as they also agreed with this Court that reasonable is somewhat *less* than probable. *Brach v. Newsom*, 38 F.4th at 16 (dissenting opinion) (9th Cir. 2022) (en banc).

Thus, the Court has held, on several occasions, that the “reasonable” standard is met when it is likely to recur, and the standard is not a demanding one.

(ii) The challenged emergency restrictions are reasonably expected to recur because the State of California is still under a state of emergency, and the State Officials have retained their unfettered emergency powers.

The state of California continues to operate under the original state of emergency that was enacted in March, 2020, which gives the Governor, and other State officials, the unfettered authority to reinstate the offending emergency orders.

Moreover, California State Officials have kept the state of California on a continuous roller coaster with the constant loosening and tightening of COVID restrictions throughout the entirety of the past two years and nine months, with one unconstitutional emergency order after another. There has been a constant knee jerk reaction by the State to reimplement COVID restrictions at the inkling of a rise in COVID cases, or a new COVID variant.

In view of the past actions of the California state Officials constantly moving goalposts, and retaining the expansive unrestrained emergency power to reimplement the offending order, there is a reasonable expectation that the offending actions will recur. Additionally, numerous statements have been

made by the CDC⁹, WHO¹⁰, and others that COVID will not be the last pandemic¹¹ because pandemics will always be a part of the general population, and, therefore, cannot be escaped.

Furthermore, the challenged emergency restrictions do not merely relate to “COVID restrictions,” but they relate to all pandemic related restrictions where the offending conduct is likely to recur and should be reviewed by the Court so that California state Officials think twice before they go down the “COVID road.”

Essentially, the capable of repetition doctrine is much broader than what has been litigated in the lower courts. In *Roe v. Wade*, the court found that the 266-day gestational period for a human was too short, and that the pregnancy will end before the usual appellate process is complete, which would make pregnancy litigation moot, and would not survive past the trial stage. The Court found that “our law should not be that rigid.” *Roe v. Wade*, 410 U.S. 113, 125 (1973), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. ____, 142 S. Ct. 2228 (2022). **Pregnancy** often comes more than once to the same woman, and **in the general**

⁹ PowerPoint Presentation (cdc.gov) :

<https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pdfs/1918-pandemic-webinar.pdf>

¹⁰ COVID-19 will not be last pandemic: WHO – DW – 12/26/2020 ; <https://www.dw.com/en/covid-19-will-not-be-last-pandemic-who/a-56065483>

¹¹ Coronavirus: This is not the last pandemic - BBC News ; <https://www.bbc.com/news/science-environment-52775386>

population, if humanity is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be "capable of repetition, yet evading review." (Emphasis added). *Roe*, 410 U.S. at 125.

Similarly, here, pandemics will always be with the general population, and, thus, we have not seen the last of pandemic emergency legislation.

Amicus does not seek assurance from the State that the COVID orders that occurred during this pandemic will never occur again. Amicus does, however, reach out to the Court for its expertise on the capable of repetition exception to mootness, and whether these tyrannical style lockdowns are unconstitutional.

The Court has this opportunity to set the record straight regarding the mootness exception doctrines, what the standards are, and whether the government has met those standards in defending their cases based on a mootness argument.

Therefore, based on the State of California's track record of the constant loosening and tightening of restrictions, and the unfettered authority to reinstate emergency orders, it is reasonably likely that the offending conduct will recur.

CONCLUSION

For the reasons set out above, the Court's guidance is necessary in this case to resolve the confusion and conflict among the circuit courts, and the Court should reverse the decision of the Ninth Circuit Court of Appeals, and remand the case for the

Ninth Circuit to properly apply the capable of repetition yet evading review exception to mootness.

Dated: January 4, 2023

Respectfully Submitted

Gary G. Kreep
Counsel of Record
California Constitutional
Rights Foundation
932 D Street, Suite 1
Ramona, CA 92065
(760) 803-4029
gary@ggkmail.us

Counsel for Amicus Curiae