No. 22-250

IN THE

Supreme Court of the United States

MATTHEW BRACH, *et al.*,

Petitioners,

v.

GAVIN NEWSOM, GOVERNOR
OF CALIFORNIA, *et al.*,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners challenge California's practice of closing private schools to in-person learning in response to surging COVID-19 infections. The question before the Court is whether this challenge falls within one of the well-recognized exceptions to mootness. To answer this question, the Court need only determine whether the school closure could reasonably be expected to recur. On the record before the Court, it can. The State's Brief attempts to obfuscate this point, but these efforts only underscore the importance of resolving this case.

Though California has been in a state of emergency for nearly three years, it took less than five weeks after Petitioners filed this Petition for Governor Newsom to announce his intent to rescind the emergency declaration. And at no point has he ever definitively said he will never close private schools to in-person learning again if COVID-19 cases increase. So even if he does rescind the declaration, the threat to Petitioners remains.

Governor Newsom's announcement also shows why this case remains a good vehicle for clarifying when challenges to emergency policies become moot. Given the inconsistent mootness standards the Circuits apply, access to the courthouse during a volatile public health emergency is often a roll of the dice that depends on where the claim is filed. Indeed, the Ninth Circuit's standard essentially swallows both exceptions to the mootness doctrine long recognized by this Court. This case is an appropriate opportunity for the Court to clarify the confusion.

The COVID-19 pandemic has taught us that deprivation of constitutional rights is an all-too-common occurrence during times of public emergency. By granting this Petition, the Court can establish a clear mootness standard for challenges to unilateral emergency policies that deprive individuals of their constitutional rights. Petitioners remain threatened by such a policy, especially given the ongoing ebb and flow of COVID-19 infections in California. The present controversy therefore remains very much alive, and the Court should grant this Petition for review.

ARGUMENT

I. The Threat to Petitioners Has Not Dissipated

Governor Newsom has used his emergency powers more extensively during the COVID-19 pandemic than perhaps any other governor. *See* Pet. at 4–6. And while he has finally announced his intent to repeal the declaration of emergency in California, his administration remains keenly aware that "the threat of this virus is still real." *See* Press Release, Office of Governor Gavin Newsom, *Governor Newsom to End the COVID-19 State of Emergency* (Oct. 17, 2022) ("Repeal Announcement") (cited in Resp. Br. at 10, 22). Governor Newsom retains the unilateral authority under California law to reimpose school closures at any moment, Pet. at 3–4, and given his "track record of 'moving the goalposts'" it is reasonable to believe that he would do so if he thought it necessary, *Tandon v. Newsom,* 141 S. Ct. 1294, 1297 (2020) (*per curiam*). The threat to Petitioners remains both real and credible, and the announced repeal of the emergency declaration does nothing to change this.

Respondents freely admit that the repeal of the emergency declaration is not necessarily permanent. Resp. Br. at 15.[1] In the same press release announcing his decision, Governor Newsom reiterated that his administration is "guided by the science and data – moving quickly and strategically to save lives," and will "remain[] nimble to adapt mitigation efforts" in response to future waves of the virus. Repeal Announcement, *supra.* Nowhere in the announcement did Governor Newsom dispel the concern that restrictions on in-person learning at private schools could be reimposed if conditions warranted.

In fact, Governor Newsom's actions indicate the opposite. He tied his repeal decision to vaccination and booster rates, Resp. Br. at 4, 10, a tacit admission that variants evading immunization efforts will lead to reinstatement of old measures.[2] Indeed, last June, when relaxing other restrictions he had previously imposed, Governor Newsom made clear that his administration will "continue to deploy proven strategies and programs that

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1. In fact, the Governor has yet to actually repeal the declaration—he has only announced his intent to do so. In his press statement announcing the repeal, Governor Newsom conceded that he was doing so because "hospitalizations and deaths [have] dramatically reduced." Repeal Announcement, *supra*. This indicates that reversal of this progress—i.e., an increase in COVID-19 infections—would warrant keeping the emergency declaration in effect.

2. *See* Brenda Goodman, *Omicron offshoot XBB.1.5 could drive new Covid-19 surge in US,* CNN (January 3, 2023), https://www.cnn.com/2023/01/03/health/covid-variant-xbb-explainer/index.html (describing the new XBB.1.5 variant as "63 times less likely to be neutralized by antibodies in the blood of infected and vaccinated people [than previous strains]").

allow [it] to swiftly and effectively respond to changing pandemic conditions." Press Release, *Office of Governor Gavin Newsom, Governor Newsom Continues to Roll Back COVID-19 Executive Orders* (June 17, 2022) (cited in Resp. Br. at 9, 10).

In light of these public statements, the Court should be skeptical of Respondents' assertion that the State has "unequivocally renounced the use of school closure orders in the future." Resp. Br. at 13. A large outbreak could again occur in California.[3] Absent a direct statement by the Governor that school closures are off the table, the "ongoing threat" to Petitioners remains. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 164 n.5 (2016).

II. The Repeal of the Declaration of Emergency Underscores the Need for Resolution Here

If Governor Newsom does repeal the emergency declaration, he still fails to meet his "heavy" burden to demonstrate mootness. *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022). Governor Newsom's announcement—coupled with his conduct throughout this litigation, and indeed, throughout the pandemic more generally—demonstrates why mootness exceptions apply here.[4]

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3. *See* Goodman, *supra* ("Omicron offshoot XBB.1.5 could drive new Covid-19 surge in US."); *see also See* Luke Money, *et al*, *California hospitals still stressed as flu, RSV, COVID remain at high levels*, The Los Angeles Times (Jan 3, 2023), https://www.latimes.com/california/story/2023-01-03/tripledemic (observing that coronavirus "remains at a heightened level" in Los Angeles).

4. The very nature of Governor Newsom's ever-evolving response to the COVID-19 pandemic is the precise reason why

First, Governor Newsom's actions remain a classic example of voluntary cessation. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). As Respondents rightly observe, this exception to mootness is intended to prevent defendants from "engag[ing] in unlawful conduct, stop when sued to have the case declared moot, then pick up where [they] left off, repeating this cycle" until they achieve "all [their] unlawful ends." Resp. Br. at 12 (quoting *Already LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). But the party asserting mootness "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190 (citation omitted). Governor Newsom fails to satisfy this burden.

The repeal of the emergency declaration is the latest example of Governor Newsom "moving the goalposts." *Tandon*, 141 S. Ct. at 1297. Though the emergency declaration has been in place for almost three years—since March 2020—its repeal comes just *five weeks* after Petitioners filed for certiorari. Vaccines became widely available at the beginning of 2021, yet Governor Newsom waited another *two years* to rescind the declaration of emergency and did so only *after* Petitioners sought this Court's review. And nowhere does Governor Newsom claim "that if this litigation is resolved in [his] favor [he] will not reimpose [the offending regulations]." *West Virginia*, 142 S. Ct. at 2607. Indeed, he "vigorously

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rescission of the initial school closure orders and the emergency declaration do not moot this case. While Respondents' Brief takes great pains to explain why Petitioners' children can *currently* attend school in person, *see* Resp. Br. 11–12, Governor Newsom provides no assurances that such restrictions will not be imposed again during future surges in infections.

defends the legality of" his prior orders. *Ibid.* (cleaned up). This Court does not "dismiss a case as moot in such circumstances." *Ibid. See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (observing that challenged conduct is reasonably likely to recur when voluntary cessation "does not remedy the source" of the original policy).

The offending actions here also did not "expire by their own terms," as Respondents suggest. Resp. Br. at 12 (citing *Trump v. Hawaii*, 138 S. Ct 377 (2017)). In *Trump*, the underlying executive order provided that the policy would only last 90 days. 138 S. Ct. at 377. Here, neither Governor Newsom's emergency declaration nor the school-closure orders had a set expiration date. *See* App.6a, 231a; Proclamation of a State of Emergency (Mar. 4, 2020).[5] And as Respondents acknowledge, the State "repeatedly modified the school-closure orders during the course of this litigation." Resp. Br. at 16 n.14. The only time limit Governor Newsom has ever imposed on the emergency declaration was the announced date of its expiration in response to this Petition last October. *See* Repeal Announcement, *supra*.

Second, Governor Newsom's repeal of the emergency declaration shows why Petitioners' claims are capable of repetition yet evading review. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). Because Governor Newsom retains the unilateral authority to reimpose both the emergency declaration and the school closure order—and has yet to expressly disclaim the possibility of reimposing the same restrictions challenged by Petitioners

5. https://bit.ly/3UlTGlH.

if infections surge—there is "a reasonable expectation that the same complaining party will be subject to the same action again." *Ibid.* (cleaned up); *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157–58 (1st Cir. 2021). Until Governor Newsom disclaims any intent or authority to reimpose school closures in the event of a future wave of COVID-19 cases, this "reasonable expectation" remains. *Kingdomware,* 579 U.S. at 170; *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (holding that petitioner need only show "the controversy [is] *capable* of repetition," not that "recurrence of the dispute [is] more probable than not") (emphasis in original).[6]

III. Repeal of the Emergency Declaration Highlights the Disagreement Among the Circuits

Governor Newsom's relinquishment of his emergency powers modifies the question presented in the Petition, *see* Pet. at 10, but it does not eliminate the existence of a circuit split.

The State concedes that repeal of the emergency declaration does not materially impact this case. Resp. Br. at 15. As the State candidly admits "both the Governor's proclamation of a state of emergency and his executive order directing the Department to adopt the challenged framework [closing schools] were unilateral

6. The State also asserts, without citation, that "Petitioners contend that this case will be moot when the Governor . . . rescinds the [emergency] proclamation." Resp. Br. at 15. But Petitioners make no such contention. Petitioners' position is—and has been—that this case is not moot. For reasons discussed below, the rescission of the emergency declaration does not impact that conclusion.

executive actions under California law." Resp. at 15. Thus, according to the State, the "theoretical possibility of reinstatement exists regardless of whether or not the underlying proclamation of emergency has been rescinded, because the Governor could theoretically reimpose the proclamation itself as well." *Ibid.* Petitioners agree with this concession.

In light of this conclusion, the Ninth Circuit's *en banc* decision below directly conflicts with the First Circuit's decision in *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157–58 (1st Cir. 2021). In *Bayley's*, the First Circuit considered a challenge to a COVID-19 emergency order issued by the governor of Maine. *Ibid.* at 155. The governor rescinded the offending order after the plaintiffs filed suit. *Ibid.* at 156–57. The state argued that the plaintiffs' claims were moot, but the First Circuit disagreed, holding that the state failed to satisfy its burden of demonstrating mootness because "the Governor has not denied that a spike in the spread of the virus . . . could lead her to impose [another order] just as strict as the one [being challenged]." *Ibid.* at 157.

In finding a live controversy, the First Circuit recognized that the challenged action was one "that the Governor voluntarily rescinded and could unilaterally reimpose." *Ibid.* at 157. The court also observed "that nothing in the record suggests that the Governor rescinded [the order] for litigation-related reasons rather than to account for changing conditions owing to the course of the virus itself." *Ibid.* at 157. But because the governor retained the unilateral authority to reimpose the restriction—and had not *expressly disclaimed* the authority or willingness to do so in the face of rising infections—the First Circuit

held it was not "absolutely clear" the allegedly wrongful behavior "could not reasonably be expected to recur." *Ibid* at 158 (citing *Friends of the Earth*, 528 U.S. at 190).

The Ninth Circuit *en banc* court here created a far less demanding standard. It held that if some underlying change in circumstances rendered the recurrence of the harm less likely, the Governor may simply rescind the offending order to moot the case without providing reasonably definitive assurances that the conduct will not resume at some point in the future. *See* App.14a-15a. Unlike the First Circuit, the Ninth Circuit did not demand the governor *disclaim* legal authority or willingness to reinstate the offending policy. *Bayley's*, 985 F.3d at 157–58. This effectively leaves the Governor "free to return to his old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation and quotation omitted).

As in *Bayley's*, Governor Newsom has not denied that a spike in the virus could lead him to re-impose the emergency declaration and school closure order. App.95a (observing that the governor "has the authority to swiftly revise the relevant restrictions and reimpose school closures, even for reopened schools, in specified areas"). While Governor Newsom has *suggested* the school-closure order would not be reinstated—a suggestion the Ninth Circuit found persuasive—under First Circuit precedent, a mere suggestion would not be enough. *Bayley's*, 985 F.3d at 157–58. In other words, Petitioners would get their day in court in Maine but not California.[7]

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7. In *Boston Bit Labs, Inc v. Baker*, 11 F.4th 3 (1st Cir. 2021), the First Circuit distinguished *Bayley's* on the ground that, in *Boston Bit Labs*, the governor had withdrawn the emergency

The Court should grant the Petition and resolve whether a finding of mootness requires that a governor must "deny" that the offending orders will be reinstated—as the First Circuit held in *Bayley's*—or whether a governor may merely suggest that the offending orders will not be reinstated, as in the Ninth Circuit's *en banc* decision below.[8] Resolution of this question is important not just for this case, but all future public emergencies that prompt government officials to impose drastic public-health and safety measures.

IV. Petitioners Deserve Their Day in Court

Not only is this case a good vehicle to provide clarity to the proper standard for mootness in the context of emergency orders, but Petitioners' claims also involve important constitutional questions that deserve to be heard on the merits.

Contrary to Respondents' contention, Petitioners' *Meyer-Pierce* claims are viable on remand. Petitioners' first cause of action alleged they were deprived of their fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. *See Brach v. Newsom,* No.

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declaration. *Ibid.* at 11–12. As Petitioners have pointed out, however, and as the State concedes, Governor Newsom's withdrawal of his emergency declaration does not have a material impact on the resolution of the mootness question.

8. This question is properly before the Court, both under Rule 14.1.(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.") and because the State reframed the question presented to include this question, Resp. Br. at i; *see also Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 n.12 (1992).

20-6472, ECF No. 9 ¶ 7–21 Petitioners asserted this claim on behalf of their children and themselves. *Ibid.*

The federal rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (*per curiam*) (quoting Fed. R. Civ. Pro. (8)(a)(2)). Interpreting this requirement, this Court has emphasized the distinction between separate *claims* and separate *arguments* supporting a claim. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992). Of course, the plaintiff must plead sufficient factual allegations to demonstrate a plausible entitlement to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To that end, the complaint here included twenty pages of non-conclusory factual allegations to support this claim. *See Brach v. Newsom*, No. 20-6472, ECF No. 9 ¶ 26–108.

As the three-judge panel majority correctly recognized, "as to [the private-school parents], this claim can only be understood as asserting that the State was unconstitutionally interfering with [their] effort to choose the forum that they believed would provide their children with an adequate education." App.106a. The three-judge panel properly decided to remand this case to the district court so it could determine whether the school-closure orders were narrowly tailored. App.124a–25a.

Respondents' Brief highlights that counsel for Petitioners did not "fault the district court for not addressing [the *Meyer-Pierce*] claim," Resp. Br. at 23, but this does not mean Petitioners *waived* their right to appeal the district court's failure to consider those claims. Respondents present no authority to the contrary.

And finally, the district court has not yet had the opportunity to resolve Petitioners' *Meyer-Pierce* claims. The Court should therefore ignore Respondents' arguments on the merits, *see* Resp. Br. at 23, and allow the lower court to conduct its initial review.

CONCLUSION

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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