

CASE NOS. 20-55445, 20-56324

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY GISH, et al.

Plaintiffs and Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of
California, et al.

Defendants and Appellees.

Appeal From The United States District Court,
Central District of California, Case No. 5:20-cv-00755-JGB-KK

COUNTY OF SAN BERNARDINO DEFENDANTS-APPELLEES'

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY	3
A. Appellants Do Not Challenge Any Operative Orders Issued By The COSB	3
B. Procedural History	5
III. STANDARD OF REVIEW	7
IV. THERE IS NO CASE OR CONTROVERSY BETWEEN APPELLANTS AND THE COSB APPELLEES	8
A. Appellants’ Claims Against The COSB Appellees Were Mooted When The COSB Appellees Rescinded The Challenged Public Health Orders	8
B. Appellants Fail To Establish Any Exception To The Mootness Doctrine That Could Save Their Claims Against The COSB Appellees	10
1. Appellants’ Challenge to Executive Order N-33-20 Has No Bearing On Their Claims Against The COSB Appellees	10
2. The COSB Appellees’ Rescission Of The Public Health Orders Is Not Mere “Voluntary Cessation”	12
3. Appellants Have Not Established That The Challenged COSB Public Health Orders Are Capable Of Repetition And Evading Review	16
V. CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers,
941 F.3d 1195 (9th Cir. 2019) 14, 15

City of Mesquite v. Aladdin’s Castle, Inc.,
455 U.S. 283 (1982)..... 15

Cnty. Court of Ulster Cnty., N. Y. v. Allen,
442 U.S. 140 (1979)..... 8

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000)..... 13

Maldonado v. Morales,
556 F.3d 1037 (9th Cir. 2009)..... 9, 12

*Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys.
of Georgia*,
633 F.3d 1297 (11th Cir. 2011)..... 8

Roe v. Wade,
410 U.S. 113 (1973)..... 16

Rosebrock v. Mathis,
745 F.3d 963 (9th Cir. 2014)..... 7, 14

Santa Monica Food Not Bombs v. City of Santa Monica,
450 F.3d 1022 (9th Cir. 2006)..... 12

Spell v. Edwards,
962 F.3d 175 (5th Cir. 2020)..... 9

Rules

Fed. R. Civ. Proc., Rule 12(b)(1) 8

Fed. R. Civ. Proc., Rule 25(d)..... 1

Constitutional Provisions

U.S. Const., Article III, § 28

I. INTRODUCTION

Appellants filed this action back in the spring of 2020, challenging the State’s Executive Order No. N-33-20, along with the local public health orders issued by both the County of San Bernardino and the County of Riverside. On May 8, 2020, the County of San Bernardino (“the COSB”) rescinded and vacated the challenged local public health orders and has not taken any action to readopt those orders over the last eight months. The claims asserted by Appellants against the COSB Appellees¹ in April 2020 are therefore moot in their entirety, and were properly dismissed as such by the district court.

Appellants’ opening brief implicitly concedes that the only actions they now challenge are those of the State and that there are no operative local orders at issue. And Appellants cannot hold the COSB Appellees liable for the actions of the State. Indeed, Appellants’ arguments for why this Court should reverse the district court’s order each rely on treating the State and the COSB Appellees’ as a single generic governmental entity. None of these arguments can save Appellants’ claims.

¹ The COSB Appellees are Dr. Erin Gustafson, Sheriff John McMahon, Supervisor Col. Paul Cook, Supervisor Janice Rutherford, Supervisor Dawn Rowe, Supervisor Curt Hagman, and Supervisor Joe Baca, Jr. Appellants originally named Supervisors Robert Lovingood and Josie Gonzalez as defendants in their official capacity only. Supervisors Col. Paul Cook and Joe Baca, Jr. now hold these seats and are therefore automatically substituted in place of former Supervisors Lovingood and Gonzalez. Fed. R. Civ. Proc., Rule 25(d).

First, Appellants urge that their claims are not moot because the State’s Executive Order N-33-20 is still in effect, that the State has imposed different restrictions over the course of the pandemic, and that some of the State public health restrictions remain in effect. But Appellants cannot explain why that should save their claims against the COSB Appellees, particularly where there is no evidence that the COSB Appellees have adopted any new local Public Health Orders, nor issued citations or even threatened criminal enforcement of the State’s Public Health Orders against Appellants.

Next, Appellants are simply wrong when they assert that the COSB Appellees’ action to rescind the challenged Public Health Orders falls under the “voluntary cessation” exception to mootness. The “voluntary cessation” exception generally applies to private parties, whereas government action rescinding the challenged law enjoys a presumption of mootness.

Finally, Appellants’ argument that the COSB Appellees’ Public Health Orders are likely to be repeated and evade review finds no support in the record. On the contrary, the COSB Appellees rescinded the challenged Public Health Orders eight months ago and have taken no action to readopt the orders or anything similar.

The district court below correctly found that Appellants’ claims against the COSB Appellees were moot, as they were based entirely on challenges to local Public Health Orders that were rescinded. The law and the record support the district

court's ruling, and Appellants' offerings for reversal fall short. This Court should affirm the district court's order and entry of judgment in favor of the COSB Appellees.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Appellants Do Not Challenge Any Operative Orders Issued By The COSB

Appellants' recitation of the factual background of this case simply lumps together all of the various defendants by collectively defining them as "the Government." Op. Br. at 1, fn. 1. This improper lumping together of defendants from three distinct jurisdictions—the State of California, the County of San Bernardino, and the County of Riverside—creates a misleading factual narrative because it generally ascribes the actions of any one defendant to every other defendant, without any support in the record. The COSB Appellees provide a brief summary to clarify the factual background as relevant to the claims asserted against the COSB Appellees.

Appellants' primary focus is on Governor Newsom's March 19, 2020 Executive Order N-33-20, as well as the health directives issued by the State of California Department of Public Health under Executive Order N-33-20 (collectively "the State Public Health Orders"). See Op. Br. at 3. Appellants fail to identify any action or order by the COSB Appellees that they are seeking to enjoin

or challenge. This is for the simple reason that there is no operative COSB Public Health Order to enjoin.

In March 2020, the COSB initially mirrored the State Public Health Orders. On March 10, 2020, the COSB declared a Local Health Emergency based on the imminent and proximate threat to public health based on the introduction of the novel and incurable COVID-19 virus. 3-ER-314–16, 3-ER-318–19. On March 17, 2020, following the directive of the Governor, the COSB issued an Order of the Health Officer of the County of San Bernardino Cancelling All Gatherings. 3-ER-321–23. The COSB followed this with public health orders dated April 7, 2020 and April 17, 2020, imposing shelter in place restrictions that mirrored the State’s then-operative public health directives.² 3-ER-333–38, 3-ER-574–77.

On May 4, 2020, the Governor issued Executive Order N-60-20, which laid out the State’s four-stage framework for reopening the State, commonly known as the State Blueprint for a Safer Economy. 2-ER-176–81. The restrictions imposed by the COSB to that point were always intended to be temporary, in order to flatten the curve of COVID-19 infections. *See, e.g.*, 3-ER-322. So with the State’s phased reopening plans in place, the COSB rescinded all its previous COVID-19-related orders on May 8, 2020, except for an order dated March 10, 2020 adding COVID-

² The various Orders of the COSB Health Officer referenced herein are collectively referred to as the “COSB Public Health Orders.”

19 to a disease list, and an order dated May 8, 2020 regarding licensed residential care facilities, neither of which are at issue in this case. 3-ER-349. The May 8, 2020 Order further explained that individuals and entities were directed to the State for any COVID-19-related restrictions going forward. 3-ER-349 (“Individuals and entities are directed to [the State’s] Executive Orders N-33-20 and N-60-20, and all orders issued thereafter, for restrictions on individuals and the operation of businesses.”). So while Appellants’ misleading factual background suggests the COSB Appellees adopted new orders since then,³ in fact Appellants’ challenges as to the COSB Appellees have been stale for eight months and it is solely the State Public Health directives that are in play.

B. Procedural History

Context is important to understand the COSB’s local Public Health Orders and the litigation below. Appellants initially filed this action on April 13, 2020, and immediately sought a temporary restraining order and preliminary injunction to enjoin the then-operative Public Health Orders. 1-ER-61, 6-ER-1055. The district court denied Appellants’ motion after briefing and oral argument. 1-ER-61.

³ For example, Appellants misleadingly state that “[o]n and around May 25, the Government issued new directives” regarding worship services. Op. Br. at 5. But the referenced directives were issued by the State, not the COSB Appellees. 2-ER-133.

Appellants appealed and filed an emergency motion for injunction pending appeal, which this Court denied on May 7, 2020. *See* Case No. 20-55445, Dkt. nos. 9, 21.⁴

While the interlocutory appeal was pending in this Court, the case was proceeding before Judge Bernal in the district court. The COSB Appellees, along with all other defendants in the case, moved to dismiss Appellants' Complaint on May 27, 2020. 6-ER-1128; COSB-SER-45–71. Among other grounds, the COSB Appellees argued that all claims asserted against them were moot because they were based upon challenges to County Public Health Orders that had all been rescinded by May 8, 2020 and had not been replaced. COSB-SER-58–59. The district court granted the motions, concluding that the Complaint was moot as it challenged restrictions that were no longer in effect. 1-ER-13–14. The district court granted Appellants leave to amend, explaining it was “appropriate to allow Plaintiffs to bring claims based upon the orders (such as the [State’s] May 25, 2020 order) that remain in effect.” 1-ER-14 at fn. 2. Appellants, however, elected to not amend their complaint, and instead moved for reconsideration of the order granting the various motions to dismiss based solely on the fact that the State had issued new public

⁴ By Order dated December 23, 2020, this appeal was consolidated with Case No. 20-55445. *See* Case No. 20-55445, Dkt. no. 103. Appellants were ordered to dismiss Case No. 20-55445 or else show cause why it should not be dismissed by December 31, 2020. *See* Case No. 20-55445, Dkt. no. 103. On January 5, 2021, Appellants moved to voluntarily dismiss the appeal in Case No. 20-55445. *See* Case No. 20-55445, Dkt. no. 117.

health directives for religious services on July 13, 2020. COSB-SER-37-44. Even after the COSB Appellees raised the issue in opposition to the motion for reconsideration, Appellants never explained why the State’s updated directives could serve as the basis for reconsideration of the COSB Appellees’ motion to dismiss. COSB-SER-11–21; COSB-SER-34–35. The district court denied the motion for reconsideration. 1-ER-4. As counsel for Appellants confirmed they were not seeking to amend the complaint, (see COSB-SER-8–9), the State moved for entry of judgment and the district court entered judgment on December 14, 2020. 1-ER-2–3, 6-ER-1129. This appeal followed.

III. STANDARD OF REVIEW

Appellants correctly recite the relevant standard of review for the district court’s order of dismissal. This Court reviews a dismissal for mootness de novo. *Rosebrock v. Mathis*, 745 F.3d 963, 970 fn. 8 (9th Cir. 2014). Any “[f]actual determinations underlying the district court’s mootness determination are reviewed for clear error.” *Id.*

IV. THERE IS NO CASE OR CONTROVERSY BETWEEN APPELLANTS AND THE COSB APPELLEES

A. Appellants' Claims Against The COSB Appellees Were Mooted When The COSB Appellees Rescinded The Challenged Public Health Orders

The district court properly granted the COSB Appellees' motion to dismiss the complaint because the claims asserted by Appellants against the COSB Appellees are entirely moot, and there is therefore no case or controversy giving rise to Article III standing.

Federal Rule of Civil Procedure 12(b)(1) permits a court to dismiss a claim for lack of subject matter jurisdiction, including because there is no justiciable "case or controversy." *See* U.S. Const., Art. III, § 2. When a claim is moot, it no longer presents a "case or controversy" such that a favorable decision by the court will affect the plaintiff. *E.g., Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1308–09 (11th Cir. 2011).

Similarly, while federal courts have a duty to decide constitutional issues when necessary, "they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *Cnty. Court of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 154 (1979). Appellants therefore have the burden to demonstrate that a decision in their favor

would have some effect and that resolution of the constitutional claims is necessary to resolve the dispute. The district court properly determined that they could not do so as against the COSB Appellees.

Appellants' complaint seeks an order declaring the COSB Public Health Orders void as unconstitutional and enjoining the COSB Appellees from enforcing them. 6-ER-1088. As of May 8, 2020, however, each of these "previous COVID-19-related [COSB Public Health] Orders from the Health Officer . . . [has been] rescinded" and is no force and effect. 3-ER-349. And in the eight months since these prior COSB Public Health Orders were rescinded, the COSB Appellees have not readopted nor replaced them. Any challenge to these rescinded Public Health Orders is now moot, because "[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." *Maldonado v. Morales*, 556 F.3d 1037, 1042 (9th Cir. 2009). And, a sister circuit addressing COVID-19 public health orders has recently affirmed that this doctrine applies to executive orders related to curbing the spread of COVID-19 after they expired. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) ("Governor Edwards's stay-at-home orders expired by their own terms. The plaintiffs' request that we enjoin them is therefore moot.") Thus, Appellants' claims against the COSB Appellees are moot and were properly dismissed.

B. Appellants Fail To Establish Any Exception To The Mootness Doctrine That Could Save Their Claims Against The COSB Appellees

In their opening brief, Appellants raise three arguments asserting why mootness should not bar their claims, but these arguments are wholly inapplicable to their claims as asserted against the COSB Appellees and do not support a reversal of the district court's order. First, Appellants' focus on the fact that the State's Executive Order N-33-20 is still in effect has no bearing on Appellants' claims against the COSB Appellees. Second, the "voluntary cessation" exception to the mootness doctrine is inapplicable here because the COSB Appellees did not just "cease" the challenged conduct, but in fact rescinded the challenged Public Health Orders. Finally, the record does not support any inference that the challenged COSB Public Health Orders are capable of repetition and evading review, because those orders were rescinded eight months ago and have not been readopted.

1. Appellants' Challenge to Executive Order N-33-20 Has No Bearing On Their Claims Against The COSB Appellees

Appellants' lead argument for why mootness should not bar their claims has no bearing on their claims against the COSB Appellees. Appellants assert that their claims are not moot because they are challenging Executive Order N-33-20, which has remained in effect since March 2020 and is the authority under which the State

has issued its Public Health Orders. But, Executive Order N-33-20 was issued by Governor Newsom, not the COSB Appellees. Regardless of whether Executive Order N-33-20 provides an ongoing basis for a challenge against the State, it certainly does not create a case or controversy between Appellants and the COSB Appellees that would confer standing in a federal court.

In an attempt to escape this unavoidable conclusion, Appellants simply argue that the COSB “ha[s] also promised publicly to enforce the State’s COVID-19 requirements.” Op. Br. at 23. This is not supported by the record: the only citation (for the COSB Appellees) is a May 25, 2020 news release educating the public that the State’s new guidelines allowed churches to resume in-person, indoor services. 3-ER-366. The record shows a much different story as indeed, there is no evidence in the record that the COSB Appellees have threatened citations or any other criminal enforcement of the State’s Public Health Orders. Appellants themselves concede as much, admitting that COSB Appellees last April stated they “do[] not expect law enforcement to broadly impose citations on violators’ and that ‘the expectation is that law enforcement will rely upon community members to use good judgment, common sense, and act in the best interest of their own health and the health of their loved ones and the community at large.’” Op. Br. at 40 (citing 5-ER-1014). Conspicuously absent is any public statement or movement to readopt local Public

Health Orders or threatening Appellants with criminal citation or other enforcement action. This is because no such action has occurred.

Moreover, Appellants cannot show that any relief is necessary against the COSB Appellees based on the State's Executive Orders. If the State Executive Orders are sufficient to present a live controversy between Appellants and the State, the COSB Appellees need not be parties to any action to be bound by a Court order enjoining in part or in full the Executive Orders against Appellants. Thus, Executive Order N-33-20 is no basis for Appellants to proceed with their claims against the COSB Appellees.

2. The COSB Appellees' Rescission Of The Public Health Orders Is Not Mere "Voluntary Cessation"

On May 8, 2020, the County of San Bernardino Health Officer issued an Order rescinding each of the challenged COSB Public Health Orders. 3-ER-349. In the eight months that have followed, the COSB Appellees have not readopted any of those orders or issued any new orders that Appellants challenge. In cases like this involving challenged laws or enactments by public entities, 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.*" *Maldonado*, 556 F.3d at 1042 (emphasis added); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031–32 (9th Cir. 2006). In other words, the "voluntary cessation"

exception to mootness that Appellants rely upon is simply inapposite where a public entity has rescinded the challenged law without replacement.

In contrast to the rescission of a local health order, the exception for a defendant’s “voluntary cessation” of challenged conduct generally applies to the conduct of a private party to avoid a situation in which the challenged conduct could be easily resumed immediately upon dismissal of the litigation as moot. For example, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), environmental groups brought an action against a wastewater facility for violating environmental regulations and its permit for discharging excessive levels of mercury into treated wastewater. *Id.* at 175–76. After the action was filed, the facility brought its discharged water within the permitted measures and closed the offending facility. *Id.* at 189. The Supreme Court explained that the defendant’s “voluntary cessation” of the challenged conduct could not moot the claims because it would “leave the defendant free to return to his old ways.” *Id.* (internal citations and alterations omitted). This Circuit has expressly addressed this distinction between private party conduct and government action:

[L]egislative 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. Therefore, in 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.

Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers, 941 F.3d 1195, 1199 (9th Cir. 2019) (*Chambers*).

Moreover, while *Chambers* involved state legislative action as opposed to the rescission of a local public health order, this Circuit has laid out the factors that support mootness when courts are confronted with other types of government action. *See Rosebrock*, 745 F.3d at 972. The district court correctly applied *Rosebrock* in finding that Appellants’ claims against the COSB Appellees are moot. First, the May 8, 2020 Order rescinding the prior COSB Public Health Orders is broad and unequivocal, as it entirely vacated the challenged orders. *See id.* The change also “fully addresses” Appellants’ objections to the COSB Appellees’ actions—there are no operative COSB Public Health Orders that ban or restrict Appellants’ ability to worship. *Id.* Moreover, the claims have been moot for eight months now, which is a “long time” in comparison to the COVID-19 pandemic timeline and the one and a half months in which the restrictions were in place from the middle of March to early May 2020. *See id.* Finally, as noted above, there is no evidence in the record that the COSB Appellees have taken any action to readopt the challenged Public Health Orders, impose any other similar restrictions on Appellants’ worship services, or issued citations or otherwise sought criminal enforcement of the State’s restrictions against Appellants. The record does not support any reasonable expectation that the

COSB Appellees would “reenact the challenged provision or one similar to it,” and a mere possibility is not grounds to overcome mootness. *Chambers*, 941 F.3d at 1199.

Appellants’ reliance on *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982), does not alter the result. *City of Mesquite* involved a wholly different situation. A licensing ordinance required the chief of police to consider whether “coin-operated amusement establishments” had any “connections with criminal elements” before issuing a permit. *Id.* at 284–85. After the district court enjoined the ordinance as unconstitutionally vague and while the case was pending on appeal, the city amended the ordinance to remove the phrase “connections with criminal elements” and asserted the appeal was therefore moot. *Id.* at 289–90. But *Aladdin’s Castle* is not analogous to the situation here, where the district court has not enjoined anything, there has been no change in the COSB Appellees’ position since the order granting their motion to dismiss, and the restrictions at issue here are not part of a long-term regulatory framework but were short-term emergency actions. Thus, unlike in *City of Mesquite*, the vacated orders were stale when the district court dismissed the action and continue to be stale today.

Under this Circuit’s settled precedent, the COSB Appellees’ rescission of the challenged Public Health Orders here clearly and unequivocally mooted Appellants’

claims against the COSB Appellees, and the district court properly granted the COSB Appellees' motion to dismiss on that basis.

3. Appellants Have Not Established That The Challenged COSB Public Health Orders Are Capable Of Repetition And Evading Review

Finally, while again improperly lumping all defendants together, Appellants argue that this case meets an exception for mootness because the dispute is “capable of repetition yet evading review.” Op. Br. at 28, citing *Roe v. Wade*, 410 U.S. 113, 125 (1973). But Appellants have not made, and could not credibly make, any allegation that the COSB Appellees have any intention to readopt the rescinded COSB Public Health Orders, or any other orders that would ban indoor religious services. The district court also made a factual finding that “there is no reason to conclude that any hypothetical future restrictions on in-person religious services will evade review.” 1-ER-14. The district court’s factual finding here is subject to review for clear error, and Appellants certainly cannot make such a showing. Particularly given that it has now been eight months since the COSB Appellees rescinded the challenged orders and the district court’s finding has proven true with respect to the COSB Appellees, there is no basis for finding clear error. And as vaccinations are now underway and will continue to ramp up, Appellants have no basis to assert that the challenged COSB Public Health Orders are likely to be

readopted going forward such that this Court should find an exception to the mootness doctrine to allow Appellants to proceed with their claims against the COSB Appellees.

V. CONCLUSION

The COSB Appellees rescinded and vacated all of the COSB Public Health Orders at issue in this case eight months ago, and there is nothing in the record to suggest that the COSB Appellees have taken any action to either readopt the restrictions on religious services or to enforce the State's restrictions through fines or criminal punishment. Appellants' claims asserted against the COSB Appellees are therefore moot and were properly dismissed by the district court. The COSB Appellees respectfully request that this Court affirm the district court's order. In the alternative, if this Court finds that Appellants' claims against the COSB Appellees are not moot or there is an exception to mootness, the COSB Appellees respectfully request that this Court simply remand the matter back to the district court.

DATED: January 7, 2021

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Dated: January 7, 2021

/s/ Kathryn J. Glass

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