IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Matthew Johnson, *et al.*,	:	
	:	No. 21-1795
	:	
Appellants,	:	
	:	
v.	:	
	:	
Governor of New Jersey, *et al.*,	:	
	:	
	:	
Appellees.	:	

OPPOSITION TO APPELLEES' MOTION TO DISMISS

This case is not moot. The plain terms of EO 128 establish that the order will continue to impair housing providers' right to contract in New Jersey until at least December 4, 2021. And even then, the damage that EO 128 has already caused to Appellants' contractual rights will persist long after the order's immediate effects dissipate. Appellants also maintain a concrete interest in the resolution of this action because the trial court's erroneous ruling will have collateral consequences on their right to recover damages in actions for breach of their respective leases. Moreover, established exceptions to the mootness doctrine apply to preserve this case's justiciability even absent the ongoing and collateral harms that Appellants face.

BACKGROUND

Governor Murphy issued EO 128 on April 24, 2020. Just over one month later, Appellants sued to enjoin that order and sought a declaration that Governor Murphy

exceeded his statutory authority and violated the U.S. Constitution. (App.219). Twenty-eight days after that, Appellants moved, with Appellees' consent, to amend the complaint to add several more plaintiffs. (App.85). The court granted the leave to amend on September 23, 2020, (App.221) and granted Appellees' motion to dismiss about six months later. (App.3, 4).

Appellants timely noted their appeal to this Court on April 21, 2021, less than a year after Governor Murphy issued EO 128. (App.1). As this appeal was pending, on June 4, Governor Murphy signed into law A5820, through which the New Jersey legislature terminated the Public Health Emergency and most of Governor Murphy's executive orders that relied on the health emergency. *See* App'x, Mot. to Dismiss. Governor Murphy contemporaneously issued EO 244, declaring the end of the Public Health Emergency, but keeping in place the State of Emergency so he could preserve his emergency powers under the Disaster Control Act, his source of authority for EO 128. EO 244, at 7-8. The enactment of A5820 and issuance of EO 244 set an expiration date of July 4, 2021, for EO 128.

On June 16, the same day Appellants filed their opening brief with this Court, Appellees moved to dismiss the appeal and sought a stay of the briefing schedule on the theory that the case would become moot on July 4 when EO 128 is currently set to expire. (ECF No. 16).

Appellants submit this opposition to Appellees' motion to dismiss pursuant to Fed. R. App. P. 27(a)(3).

I. This Case Is Not Moot

Challenges to temporary laws often face claims of mootness from the government defendants who withdraw those laws before an appellate court can rule on the merits. But "[a] case is not necessarily moot simply because the challenged law has expired[.]" *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union v. Gov't of V.I.*, 842 F.3d 201, 208 (3d Cir. 2016). A challenged law's expiration will moot a case *only* when it "forestall[s] any occasion for meaningful relief" and deprives the parties of any "legally cognizable interest in the outcome." *Id.* (citations omitted). So long as the parties retain "an interest in the outcome of the litigation, regardless of size, … a live case or controversy exists. Thus, the case will be moot only if it is '*impossible* for the court to grant effectual relief.'" *Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)) (emphasis added). This court may still grant the relief Appellants seek here.

A. EO 128 Continues to Impair Contracts Beyond Its Expiration

EO 128's impairment of residential leases in New Jersey does not end with the order's expiration on July 4. Once a tenant has invoked EO 128, the housing provider cannot require the tenant to pay "any further security deposit relating to" the lease that is in effect at the time. EO 128, ¶ 2.b. By its terms, then, EO 128 *permanently* nullified the express terms of countless residential leases in New Jersey, including the Kravitzes'

Glassboro Lease (plus the leases of any other Appellants whose tenants invoke EO 128 between now and July 4).

Even when a lease expires, EO 128 continues to impair the rights of any housing provider who chooses to renew the lease—something many must do given how difficult the ongoing eviction moratorium makes it to end a tenancy. *See* EO 106; A5820 (allowing the eviction moratorium in New Jersey to remain in place until at least January 2022). EO 128 provides that if a tenant who has invoked EO 128 renews their lease, the housing provider cannot require a new security deposit until December 4, 2021, "six months following the end of the Public Health Emergency[.]" EO 128, ¶ 2.b. If, at any time, housing providers ignore EO 128's lingering effects, they are subject to criminal charges. EO 128, ¶ 4 (decreeing that Governor Murphy can impose criminal penalties for violations of the order).

Even beyond those effects, Appellants maintain a concrete interest in this litigation because EO 128 devalued their current and future leases. As set out more thoroughly in Appellants' briefing (App. Br. 38-39), the Governor's purported authority to unilaterally nullify the terms of residential leases in New Jersey merely because the state has already regulated leases "lessened the value of the contracts[.]" (Pls'. Opp. to MTD, ECF No. 36, at 25). Unless the trial court's erroneous ruling is reversed, Appellants will no longer be able to rely on security deposits to mitigate risk during a tenancy. (App. Br. 38-39).

Requiring a security deposit—typically an amount worth 12.5% of a year-long lease's value—allows Appellants to mitigate the risk of leasing their private property to a stranger. Without the ability to rely on a security deposit, Appellants will have to mitigate that risk in other ways, including by raising their monthly rent or exiting the housing market entirely—depriving Appellants of future income. Both these alternatives will continue to harm Appellants. This persisting harm from EO 128, and the Governor's claimed authority to issue that order, will remain without a declaration from this Court that his actions violated the Contracts Clause.

Consequently, the value of residential leases in New Jersey would be permanently diminished by the trial court's decision upholding Governor Murphy's ability to impair residential leases with such an overly broad executive order. Appellants need this Court to rule on the merits so they can know during future lease negotiations whether they will be able to rely on having security deposits available or not. The uncertainty they currently face due to their waning faith in the enforceability of private contracts (made worse by the trial court's ruling) is an ongoing harm. This Court's decision on the merits "will have a real impact on the parties." *Main Line Fed. Sav. & Loan Ass'n v. Tri-Kell, Inc.*, 721 F.2d 904, 907 (3d Cir. 1983).

The declaratory judgment that Appellants sought in their complaint will relieve these ongoing burdens that EO 128 continues to impose on housing providers well beyond the order's July 4 expiration.

B. The Trial Court's Erroneous Ruling Has Collateral Consequences

A case is not moot "if a trial court's order will have possible collateral legal consequences." *Nat'l Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485, 490 (3d Cir. 1992). "A declaratory judgment can [] be used as a predicate to further relief" in another action. *Powell v. McCormack*, 395 U.S. 486, 499 (1969). Even when the "primary and principal relief sought" becomes moot, the appellant can maintain a concrete interest in declaratory relief, *id.*, especially whenever the declaration will have collateral legal consequences in a separate legal action. *Nat'l Iranian Oil*, 983 F.2d at 490. A live controversy will remain on appeal even when the appellants might not even be able to recover on a damages claim. *Powell*, 395 U.S. at 500. It is not the role of the court on appeal to resolve the merits of the collateral claim—to do so confuses mootness of one claim with the right to recover on another. *Cf. id.*

In *United Steel Paper*, another Contracts Clause challenge to a temporary law adopted during an emergency, this Court held that the law's expiration did not moot the case because the trial court's decision to uphold the law would have collateral legal consequences on the plaintiffs' damages claim in a separate arbitration proceeding. 842 F.3d at 209. The emergency measure at issue in that case was a Virgin Islands law reducing the salaries of most government employees by 8% for a two-year period. *Id.* at 204-05. Given the two-year lifespan of the law, it expired before the plaintiffs could even appeal the trial court's adverse ruling. *Id.* at 208. Confronted with Virgin Islands'

assertion of mootness, this Court determined that it maintained jurisdiction to consider the appeal because the trial court's ruling that the law "d[id] not violate the Contract[s] Clause w[ould] have collateral legal consequences on the binding arbitration between the Unions and the Government[.]" *Id.* at 209. This Court reasoned that the future arbitration of the union employees' wage claims "w[ould] likely depend on the validity of" the salary-reduction law. *Id.* Accordingly, this Court ruled that the case was not moot and decided the merits of the Contracts Clause challenge. *Id.* at 210.

Similarly, in *Malhan v. Secretary of the United States Department of State*, this Court considered the merits of a wage-garnishment decision that had "lasted less than nine months," and therefore expired before the appeal could proceed on the merits. 938 F.3d 453, 464 (3d Cir. 2019). The *Malhan* Court relied in part on *United Paper Steel* because Malhan "allege[d] that the family court ha[d] repeatedly refused to recalculate his child support obligations" and because "[t]hat debt obligation create[d] 'a reasonable expectation' of future garnishment[.]" *Id.* (citing 842 F.3d at 208). Thus, this Court determined the case was not moot even though Malhan had not "demonstrated [the] probability" that the collateral legal consequences would occur absent this Court's decision. *Id.* (quoting *Honig v. Doe*, 484 U.S. 305, 320 n.6 (1988)).

These decisions follow this Court's pronouncement in *National Iranian Oil* that "[a] case is saved from mootness if a viable claim for damages exists," 983 F.2d at 489, and Appellants possess such a claim. "Even where the amount of damages at issue is minute," this Court reasoned, "a case is not moot so long as the parties have a concrete

interest, *however small*, in the outcome of a litigation." *Id.* (citing *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 442 (1984)) (emphasis added). In *National Iranian Oil*, the plaintiff was "unlikely" to "ever be able to recover more than a small fraction of the relief requested[,]" but this Court could not "say with confidence that the plaintiff w[ould] *never* be able to collect any money damages from the defendant [in two separate actions]." *Id.* at 489-90 (emphasis added). Because "[a] viable damages claim exist[ed]," this Court ruled that "the case [wa]s not moot." *Id.* at 490; *see also Cinicola*, 248 F.3d at 119 ("If assignment of their contracts is vacated, the physicians may have a claim for rejection damages. … Because potential contractual obligations and damages claims remain, we hold the physicians' claims are not constitutionally moot.").

This appeal is not moot because the permanent changes that EO 128 imposed on residential leases—including that of the Kravitzes (and any other Appellant whose tenant invokes the order before July 4)—will have collateral legal consequences on their actions for breach of contract against their tenants. Take the Glassboro Lease, for instance, which required the Rowan Tenants to pay a security deposit of $2,000 and to clean the property and repair any damage before vacating. (App.141-46). In reliance on EO 128, which substantially impaired the Glassboro Lease, the Rowan Tenants used their security deposit to pay their rent and then left the Kravitzes' property in disrepair, in breach of their lease. (App.145, 188-92). Given this material breach, the requires the Rowan Tenants to submit to non-binding mediation and then binding arbitration, with the possibility of attorneys' fees for the prevailing party. (App.143-146). In their

breach-of-contract action against the Rowan Tenants, the Kravitzes will seek not only the cost of repairing property damage but also damages prescribed by the lease against tenants who vacate the property prematurely and attempt to apply their security deposit toward payment of rent. The prescribed damages include a $100 penalty (App.140) and a re-rent levy up to $4,000. (App.147). The Kravitzes ability to recover such damages is contingent upon a showing that EO 128 is invalid and did not modify the Rowan Tenants' contractual obligations.

Accordingly, a ruling by this Court that EO 128 violated the Contracts Clause and was void *ab initio* will have a direct legal impact on the Kravitzes' collateral breach-of-contract claim and the damages they recover from their tenants. It is not the role of a mootness inquiry to decide the merits of the Kravitzes' claim. *See Powell*, 395 U.S. at 500. So long as their claim is colorable and there is a chance, "however small," that this Court's constitutional ruling will impact their right to recover in their collateral action, the case is not moot. *See Nat'l Iranian Oil*, 983 F.2d at 490; *see also United Steel Paper*, 842 F.3d at 209; *Malhan*, 938 F.3d at 464. A collateral damages action provides Appellants with a continued concrete interest in the outcome of this litigation. *See Nat'l Iranian Oil*, 983 F.2d at 489. The case, therefore, is not moot.

II. Mootness Exceptions Apply

Even assuming *arguendo* that Appellants' Contracts Clause challenge is moot—despite EO 128's continued effect, the collateral legal consequences of the trial court's

order, and EO 128's diminution of the value of Appellants' contracts—established exceptions to mootness apply to defeat Appellees' motion to dismiss.

A. Governor Murphy's Voluntary Cessation Did Not Moot this Case

A party's voluntary cessation of an unlawful practice will not moot a lawsuit challenging that practice unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (citation omitted). Otherwise, a defendant could defeat a lawsuit by temporarily ceasing its unlawful activities, but then "return to [its] … old ways" after the court dismisses the case. *Gray v. Sanders*, 372 U.S. 368, 376 (1963). To ensure this Court that the Governor will not reinstitute his unlawful action, Appellees bear the "heavy burden" of establishing that the ceased conduct will not recur. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1983).

Appellees must establish two conditions to prove that their voluntary cessation mooted the case: (1) there is no "reasonable likelihood" that they will resume their alleged misconduct, *id.* at 72; and (2) Appellants have been made whole by the Appellees' cessation of the challenged policy. *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979).

1. There Is a Reasonable Likelihood that Governor Murphy Will Impair Appellants' Leases Again in the Future

This Court has held that government defendants who voluntarily cease challenged activities bear a "'heavy,' even 'formidable' burden of persuading the court that the challenged conduct cannot reasonably be expected to resume." *United States v. Gov't of V.I.*, 363 F.3d 276, 285 (3rd Cir. 2004) (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

It is reasonably likely that the challenged conduct will recur when the amended law neither adequately cures the constitutional defect nor eliminates the government's authority to reenact the challenged policy. *Cf. Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 193 (3d Cir. 2001) (finding a lack of reasonable likelihood of recurrence because the amended law was "substantially broader" than its challenged predecessors, curing any "equal protection" and "bill-of-attainder" defects).

Appellees discount the likelihood that the challenged behavior of Governor Murphy will recur because the New Jersey Legislature passed A5820, which terminated most of Governor Murphy's executive orders (including EO 128) that relied on the Public Health Emergency. Mot. to Dismiss, at 3. A major deficiency in Appellees' theory, though, is that Governor Murphy expressly relied on the ongoing State of Emergency—not just the Public Health Emergency—when issuing EO 128. *See* EO 128, at 3-4 (citing N.J.S.A. App. A: 9-33 *et seq.*). More to the point, EO 128 had *nothing* to do with the Emergency Health Powers Act ("EHPA"), the Public Health

Emergency, or any of the other authorities that Governor Murphy cited, such as his authority to control the New Jersey militia. (App.66-68, 79-84). The actual source of authority on which Governor Murphy relied to issue EO 128—as opposed to the catch-all list of inapposite powers, including his authority under the EHPA—was the Disaster Control Act.

Governor Murphy's actual reliance on the Disaster Control Act, as opposed to the EHPA, directly implicates the likelihood he will reissue EO 128 or something substantially similar. His statements in EO 244, the order ending EO 128, confirm this point:

> WHEREAS, while the State has effectively curtailed the immediate public health threat of the virus, **the economic and social impacts of the virus will require ongoing management and oversight**; and
>
> WHEREAS, **the State of Emergency** declared in [EO 103] **pursuant to N.J.S.A. App.A.:9-33 et seq. must remain in effect to allow for the continued management of New Jersey's recovery from and response to the COVID-19 pandemic;**
>
> NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey … do hereby DECLARE and PROCLAIM:
>
> 1. The Public Health Emergency declared in [EO 103] pursuant to the EHPA, N.J.S.A. 26:13-1, et seq., is hereby terminated.
>
> 2. **The State of Emergency** declared in [EO 103] **pursuant to [the Disaster Control Act,] N.J.S.A. App.A.9-33 et seq. *continues to exist in the State of New Jersey*.**

EO 244, at 7-8 (emphasis added).

Considering that Governor Murphy expressly proclaimed that he maintains the authority on which he relied to issue EO 128 "to allow for the continued management of New Jersey's recovery from and response to the COVID-19 pandemic," and said

that "the economic and social impacts of the virus will require ongoing management and oversight," there is little reason to believe that the legislature's termination of the Public Health Emergency will keep Governor Murphy from reissuing an order like EO 128. This prospect seems especially likely given Governor Murphy's continued reliance on executive orders to alter the contractual relationship between housing providers and their tenants. *See* EO 106. This likelihood defeats Appellees' reliance on cases in which the "condition triggering the offending conduct" involved a very "fact-specific … chain of events" that was no longer present. *See, e.g.*, *N.J. Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 33 (3d Cir. 1985). Instead, the Governor's continued defense of the "validity and soundness" of his policy—in addition to his continued reliance on the authority and circumstances for adopting EO 128 in the first place—make it reasonably likely that he will resume his unlawful conduct if this Court dismisses Appellants' case as moot. *See Sansett v. Litscher*, 197 F.3d 290, 291-92 (7th Cir. 1999), *abrogated on other grounds*; *see also Gov't of V.I.*, 363 F.3d at 286 (reasoning that the defendant's "continued defense of the validity and soundness … d[id] not bespeak of a genuine belief that the contract was of a type that would not be contemplated again").

Governor Murphy's track record of rule through executive fiat also defeats Appellees' reliance on cases that found it too speculative that a legislature might reenact challenged legislation. Mot. to Dismiss, at 6-8. Neither the "public debate" nor the bicameralism and presentment required to pass such laws is required for Governor Murphy to unilaterally issue another executive order. *Cf. Nat'l Black Police Ass'n*, 108

F.3d at 350 (reasoning that voters were not reasonably likely to reenact a challenged citizen initiative); *Khondara Envtl.*, 237 F.3d at 188 (finding it unlikely that Congress would reenact challenged legislation); *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003) (challenged legislation required passage by both houses of Pennsylvania legislature).

2. Governor Murphy's Voluntary Cessation of EO 128 Did Not Make Appellants Whole

Although Appellees omit analysis of this element in their motion to dismiss, a defendant's voluntary cessation of a challenged policy will moot a case *only* if "events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of L.A.*, 440 U.S. at 631 (citations omitted); *see also Thompson v. Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987) (clarifying that voluntary cessation will moot a case only if the defendant proves that "the party seeking relief ha[s] been made whole").

Neither EO 244 nor A5820 have "completely and irrevocably" eradicated the effects of EO 128's impairment of Appellants' contractual rights. As explained above, EO 128 lessened the value of Appellants' leases by undermining Appellants' future right to rely on a security deposit and their faith that residential leases in New Jersey will remain free from governmental nullification. This potential harm is particularly acute while Governor Murphy still claims the power on which he relied to issue EO 128 and believes that the economic recovery from the pandemic may require his future intervention. *See* EO 244, at 7-8.

B. The Constitutionality of EO 128 Is a Question Capable of Repetition Yet Evading Review

Another exception to mootness applies to preserve this Court's jurisdiction over Appellant's case: A challenge is not moot "if the underlying dispute between the parties is one 'capable of repetition, yet evading review[.]" *N.J. Tpk. Auth.*, 772 F.2d at 31 (citing *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 546 (1976)). This exception defeats claims of mootness when two elements are present: "(1) the challenged action was 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 would be subjected to the same action again." *Id.* (citations omitted).

1. EO 128 Will Expire Before Appellants Could Fully Litigate Its Legality

An issue "evades review when [it] cannot be resolved in time to fully contest the challenged action." *Seneca Res. Corp. v. Twp. of Highland, Pa.*, 863 F.3d 245, 255 (3d Cir. 2017) (citation omitted). This Court has held that a challenged law that expires after only two years is not in effect long enough "to be fully litigated prior [to] its expiration." *United Steel Paper*, 842 F.3d at 208. EO 128 will have been in place for a little more than 14 months—significantly less time than the law at issue in *United Steel Paper*. Appellees claim that "[i]n no respect is [14 months] too short a timeframe for ample litigation" (Mot. to Dismiss, at 9) blinks reality and directly conflicts with this Court's caselaw.

To make matters worse, Appellants seem to think that a case is not capable of evading review if the *trial court* can rule on the merits while the challenged order is in

place. *See* Mot. to Dismiss, at 8. They are woefully wrong on the law. *See United Steel Paper*, 842 F.3d at 208. The mootness exception continues to apply when the entire case—including the appeal—is not capable of resolution before the issue's cessation or expiration. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (collecting appellate cases applying the evading-review exception to mootness).

Next, Appellees muster the audacity to suggest that Appellants did not proceed in a timely fashion. Mot. to Dismiss, at 8. For this point, they rely on a rule that applies "to mootness in a criminal conviction, where … the appellant ha[s] been released from custody or had served his sentence[.]" *Marshall v. Whittaker Corp.*, 610 F.2d 1141, 1144 (3d Cir. 1979). This Court applied the criminal rule in *Marshall* because the appellant was challenging a contempt order, one that he had to purge by allowing an inspection of a manufacturing plant. *Id.* at 1143-44. Marshall began purging his contempt immediately, and despite the fact the plant inspection would take two months to complete, he waited 60 days before appealing the contempt order. *Id.* at 1144-45. Consequently, this Court held that his appeal was moot under the criminal rule because his sentence (or contempt order) was already complete. *Id.* at 1145.

Nevertheless, Appellees selectively pluck language from *Marshall*, which criticized the appellant's actions as "barely timely," "far from diligent or prompt," and at a "less-than-expeditious pace."[1] *Id.* In stark contrast to that inapposite case,

[1] The irony is not lost on Appellants that Appellees suggest this case did not proceed promptly in the same motion where Appellees once again sought to delay the

Appellants here are not seeking to purge a contempt order; they seek a declaration that an executive order is unconstitutional and, despite their prompt efforts, could not obtain appellate review before the order expired. And beyond that, Appellants have proceeded quickly. As noted, Appellants sued just 39 days after EO 128's issuance (App.219), and their appeal reached this Court less than a year after the order's issuance. (App.1). If not for the three-month delay following Appellants' unopposed motion to amend their complaint, the case would have likely proceeded even more quickly than it did. Thus, despite Appellants' best efforts, EO 128 has been too short in duration to complete this Court's review.

2. Appellants Reasonably Expect to Be Subject to Governor Murphy's Next Order Impairing Residential Leases

Although a "reasonable expectation" of the challenged conduct recurring will not rest on "mere speculation," there need only be a "reasonable quantity of proof—perhaps … by [a] preponderance of the evidence," that the conduct will recur. *N.J. Tpk. Auth.*, 772 F.2d at 33.

As discussed in Section II.A.2, there is a reasonable likelihood that Governor Murphy will continue to impair Appellants' contractual rights. In issuing EO 244,

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briefing schedule. *See* Mot. to Dismiss, at 9 (seeking a stay of briefing); *see also* (App.221) (ECF No. 21; ECF No. 30; ECF No. 37 (seeking briefing extensions). Beyond their repeated motions for extensions of time, Appellees also filed a letter asking the trial court to withhold any judgment whatsoever until after the state court resolved Appellants' separate state-law claims. (App.211). Appellants responded by admonishing Appellees' delay tactics and urging the trial court to resolve the case as promptly as possible. (App.213-15).

Governor Murphy asserted that he maintains authority under the Disaster Control Act—the authority on which he relied to issue EO 128—due to his stated need to continue managing New Jersey's "recovery from and response to the COVID-19 pandemic." EO 244, at 7. Governor Murphy maintains that "the economic and social impacts of the virus will require [his] ongoing management and oversight[.]" *Id.*

And again, unlike in *United Steel Paper* in which there was no evidence the legislature would enact a new law, Governor Murphy's unilateral rule under the Disaster Control Act does not face the same collective-action problems as legislation. *See* 842 F.3d at 209. Since the beginning of the pandemic, Governor Murphy has repeatedly issued orders that single out housing providers to shoulder additional financial costs (and continues to do so through EO 106). And he still claims the authority to rewrite residential leases in New Jersey on the theory that housing providers could never expect otherwise given the existence of some regulation in the industry. Absent a ruling by this court on the merits, there is little reason to expect that Appellants' contractual rights are safe from further unlawful action.

III. If this Court Determines the Case Is Moot, the Proper Disposition Is Vacatur

This Court has recognized that "[t]he proper disposition when a case becomes moot on appeal is an order vacating the lower court's judgment." *Main Line Fed. Sav. & Loan Ass'n v. Tri-Kell, Inc.*, 721 F.2d 904, 907 n.4 (3d Cir. 1983) (citing *United States v. Munsingwear*, 340 U.S. 36 (1950)). When a case becomes moot on appeal, through no

fault of the appellants, vacatur is an equitable form of relief to prevent the trial court's ruling from prejudicing the appellants without the benefit of appellate review on the merits. *See Old Bridge Owners Co-op. Corp. v. Twp. of Old Bridge*, 246 F.3d 310, 314 (3d Cir. 2001) ("We conclude that the FDIC should not be penalized by allowing the District Court's ruling to stand when it is precluded, through no fault of its own, from having that decision reviewed on the merits."). Vacatur is particularly appropriate "when mootness occurs through happenstance … or the '*unilateral action of the party who prevailed in the lower court*.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (emphasis added) (citation omitted).

If this Court were to determine that this case is moot and that no exceptions to mootness apply, the proper disposition would be to vacate the trial court's judgment. The trial court's erroneous application of the Contracts Clause (based on its "substantial deference" to Governor Murphy's impairment of Appellants' contracts) will have lasting and prejudicial effects on Appellants' contractual rights as housing providers. As discussed above, EO 128—and the trial court's erroneous ruling that Appellants did not even state a claim for relief under the Contracts Clause—will continue to devalue Appellants' leases and the residential-housing market more generally. Through no fault of the Appellants, they have not yet been able to complete their appeal and may not be able to do so before the temporary measure expires. *See United Steel Paper*, 842 F.3d at 208 ("[T]he duration of VIESA—two years—is too short to be fully litigated prior [to] its expiration."). It would be inequitable for Appellants to suffer under the district

court's precedential decision that effectively writes the Contracts Clause out of the United States Constitution. *See Old Bridge Owners Co-op.*, 246 F.3d at 314. Vacatur of that erroneous decision would be the appropriate remedy if this Court were to determine that it lacks jurisdiction to reverse the trial court's ruling on the merits. *See Tri-Kell, Inc.*, 721 F.2d 907 n.4.

CONCLUSION

This Court should deny the motion to dismiss. Alternatively, if the Court determines this case will become moot before its resolution on appeal, this Court should vacate the district court's decision.

June 28, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Opposition to Appellees' Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system on June 28, 2021. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1.

June 28, 2021

Respectfully,

/s/ Jared McClain
JARED MCCLAIN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 27(a)(3), and (d). This response brief has been prepared in 14-point, plain, roman-style font, and it contains 5,028 words. I further certify that the electronic version of this brief was scanned with Microsoft Defender Antivirus and contains no known viruses. The hard copies provided pursuant to Fed. R. App. P. 27(d)(3) will be identical to the electronic version.

June 28, 2021

Respectfully,

/s/ Jared McClain
JARED MCCLAIN