No. 21-1795

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MATTHEW JOHNSON, *et al.*,

Plaintiffs-Appellants,

v.

GOVERNOR OF NEW JERSEY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
District of New Jersey; No. 1:20-cv-6750

APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS THE APPEAL AS MOOT

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INTRODUCTION

Two days ago, on July 4, 2021, the executive order that Appellants challenge in this action was terminated by an act of the New Jersey Legislature. Because this appeal exclusively involves requests for prospective declaratory and injunctive relief against an executive order that is no longer in effect, it is moot.

Under bedrock Article III principles, this Court can only pass upon actual, live cases or controversies in which it may grant meaningful relief to the parties. Here, Appellants seek only prospective relief against an executive order that has expired, such that no meaningful relief can issue. Faced with similar challenges to COVID-19 related orders, federal courts have consistently held that such challenges are moot when the challenged action is repealed or replaced. *See, e.g.*, *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020); *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 938 (6th Cir. 2020); *S. Wind Women's Ctr. v. Stitt*, 823 F. App'x 677, 679 (10th Cir. 2020); *Behar v. Murphy*, No. 20-5206, 2020 WL 6375707 (D.N.J. Oct. 30, 2020). In their Opposition, Appellants fail to distinguish—or even acknowledge—these authorities, which were cited in Appellees' opening papers. *See* Mot. at 5. Appellants do not respond because they have no response.

Instead, Appellants offer a smorgasbord of reasons why this Court should hold—despite termination of the very law they challenge—that there is still a live controversy in this appeal. All Appellants' arguments share a common flawed

premise: that this action is not moot because a favorable decision by this Court might bear on hypothetical claims, involving entirely different parties and/or imagined future executive orders. But Appellants cannot engineer a live controversy in this appeal by engaging in sheer speculation about other potential disputes, not before this Court, that might someday come to pass.

Nor can Appellants show that any exception to mootness applies here. Both the "voluntary cessation" and "capable of repetition, yet evading review" exceptions require a "reasonable likelihood" that the State will reinstate the challenged action. Given the dramatically improved public health environment, Appellants' musings about future executive action like EO 128 are pure conjecture.

ARGUMENT

I. The Appeal Is Moot Because No Meaningful Relief Is Available After The Expiration Of EO 128.

To satisfy Article III's case or controversy requirement, there must be a live dispute between the parties to the action—not a hypothetical dispute between non-parties, or potential future disputes that might come to pass. Said another way, "what makes … a proper judicial resolution of a 'case or controversy' rather than an advisory opinion is in the settling of some dispute which affects the behavior of the *defendant* towards the *plaintiff*." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). Thus, as this Court has put it, "the mootness inquiry focuses on the parties before [the Court]." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 307 (3d Cir. 2020). So even when

"a favorable decision" in a moot case "might serve as a useful precedent … in a hypothetical lawsuit[,]" "this possible, indirect benefit in a future lawsuit cannot save th[e]" case before a court "from mootness." *United States v. Juvenile Male*, 564 U.S. 932, 937 (2011); *see also, e.g., Commodity Futures Trading Comm'n v. Bd. of Trade of Chicago*, 701 F.2d 653, 656 (7th Cir. 1983) (Posner, J.) ("[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day ... control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot….").

Although Appellants offer various arguments as to why the dispute before this Court is not moot, all concern hypothetical disputes—involving non-parties, claims not at issue, and/or speculative challenges to future government action—that cannot satisfy the requirements of Article III.

First, Appellants argue that this appeal is not moot because even though EO 128 has terminated, "[o]nce 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 an effect at the time." Opp. at 3. But as to the three leases involved in this appeal, Appellants cannot identify any tenant who signed a lease prior to EO 128, applied a security deposit to rent under EO 128, and whose original lease will remain

in effect after EO 128 expired on July 4, 2021.[1] In other words, even if some landlord, in some case, would have a live claim with respect to an existing lease, Appellants do not. And the relevant question for mootness purposes is whether *Appellants* have a live claim in this case.

Second, Appellants argue this dispute will not be moot until December 4, 2021 because EO 128 provides that a tenant who applied a deposit to pay outstanding rent and subsequently renews their lease may not be required to replenish a deposit until six months after the end of the public health emergency. Opp. at 4; *see* EO 128, ¶ 2(b). But here, too, Appellants do not allege that any of *their* tenants applied a deposit to pay outstanding rent and then renewed a lease while EO 128 was in effect, meaning a favorable decision in this case would have no actual effect on any of the parties involved in this controversy. Moreover, even a hypothetical landlord whose tenant *did* renew a lease after EO 128 issued would have no cognizable injury under the Contracts Clause, because the Clause only applies when a challenged law disrupts *pre-existing* contractual arrangements. Contractual arrangements entered into after EO 128 went into effect are, by definition, not pre-existing. *See Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018).

[1] Appellants attempt to rely on the Glassboro tenants as part of this argument, but their lease expired June 1, 2020. Opp. 3-4; App. 59, 140.

Third, Appellants suggest that they need this Court to pass upon the legality of the now-expired executive order because legal uncertainty about whether an order like this is permissible somehow diminishes the value of residential leases. Opp. at 4-5. But if legal uncertainty about how a future similar case might be resolved could render an otherwise moot controversy still live, then virtually no case concerning economic regulation could ever become moot. And here, the supposed harm that Appellants invoke rests on a chain of unsupported conjecture: that EO 128 diminished the value of a lease even though it was a modest measure that relieved no tenant of any obligation to pay outstanding rent or damages; that an order like EO 128 has any likelihood of recurring even though it arose in the context of an unprecedented pandemic; and that uncertainty about a future hypothetical order like EO 128 would diminish the value of a future lease. While Appellants claim that they "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," *id.* at 5, the prospect that a "favorable decision" might be "useful" for Appellants in a "hypothetical" "future" lease negotiation, "cannot save *this* case from mootness." *Juvenile Male*, 564 U.S. at 937.

Fourth, Appellants assert that a favorable decision in this matter could assist them in potential future lawsuits seeking damages from tenants. Opp. at 8-9. On this score, Appellants attempt to rely on the narrow "collateral consequences"

doctrine, under which a dispute "is not moot if" resolution "will have collateral legal consequences." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Union Int'l, Inc. v. Gov't of Virgin Islands*, 842 F.3d 201, 209 (3d Cir. 2016). Courts sometimes apply this doctrine when resolution of a dispute will have a direct effect on other pending litigation or legal action between the same parties. *See id.* at 208 ("the case is not moot because our decision here will affect collateral arbitration proceedings between the same parties"). In other words, if resolution of a controversy would, for example, have a "collateral estoppel effect" in pending suits, that collateral consequence can save a case from mootness. *Nat'l Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485, 490 (3d Cir. 1992) (finding the decision "would have a collateral estoppel effect" on the party's pending arbitration actions arising out of the same controversy). On the other hand, courts regularly reject any claim of "collateral consequences" where a determination will have no direct, concrete, and non-speculative legal effect. *Spencer v. Kemna*, 532 U.S. 1, 14-16 (1998) (rejecting claim that collateral consequences doctrine applied where the potential legal consequences were "purely a matter of speculation."); *Old Bridge Owners Coop. Corp. v. Twp. of Old Bridge*, 246 F.3d 310, 314 (3d Cir. 2001) ("[W]e do not believe that the collateral consequences the FDIC complains of"—namely, effects of a district court's order on "other proceedings" not before the Court—"are sufficient to save this appeal from being rendered moot"); *In re Kulp Foundry*, 691

F.2d 1125, 1130 (3d Cir. 1982) (rejecting collateral consequences doctrine given absence of "legal consequences") (citations omitted).

Here, resolution of this appeal will have no cognizable collateral effects whatsoever. To start, the existence and enforceability of EO 128 did not alter Appellants' ability to recoup damages from former tenants. *See* N.J. Exec. Order No. 128 (Apr. 24, 2020) (ensuring a "landlord may recoup from the tenant any monies the landlord expended that would have been reimbursable by the security deposit"); App. 31-33. Thus, whether or not EO 128 violated the Contracts Clause (and it did not), Appellants will be entitled to the same measure of damages in such suits.[2] Further, Appellants' suggestion that they will file such damages actions is purely speculative, as they cannot point to any such action that they have filed to date. *See* Opp. at 8-9 ("In their breach-of-contract action against the Rowan Tenants, the Kravitzes *will seek* ….") (emphasis added). And finally, any determination by this Court as to the legality of EO 128 would not have binding effect in those hypothetical damages actions, as they would involve tenants who are not a party to

[2] Pointing to one lease, Appellants argue that the legality of EO 128 will affect whether they can seek contractual penalties for improperly "apply[ing] the[] security deposit towards payment of rent." Opp. at 8-9. But the contractual penalties they identify do not relate to improper use of a security deposit at all, but rather a $100 fee related to late payment of rent, App. 140, and a "re-rent levy" imposed when a tenant "moves out prior to the natural expiration of th[e] [l]ease," App. 147. In other words, a tenant's use of a security deposit to pay rent is unrelated to Appellants' measure of damages under the only provision of any lease that they identify.

this action (meaning no res judicata or collateral estoppel arising from this action would apply), and would occur in state court (where this Court's view would be persuasive, but non-binding authority).

Where, as here, a party seeks to enjoin a state law that is no longer in effect, "[t]he raison d'etre for the injunction no longer exists" and the case is moot. *Black United Fund of N.J., Inc. v. Kean*, 763 F.2d 156, 160 (3d Cir. 1985). Because Appellants offer no basis to depart from that well-worn rule, this appeal is moot.

II. No Exception To Mootness Applies.

Nor can Appellants satisfy either of the exceptions to mootness, as both require a "reasonable likelihood" that the challenged action will recur, which is plainly not present here. *Thompson v. U.S. Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 (3d Cir. 2003).

EO 128 was enacted in response to a once-in-a-century pandemic and a related economic crisis. The Legislature's decision to terminate it, along with numerous other COVID-19 related orders, was prompted by a dramatic shift in public-health outcomes. *See* N.J. Exec. Order No. 244 (June 4, 2021) (noting that "the State has effectively curtailed the immediate public health threat of the virus"); *see also Behar v. Murphy*, 2020 WL 6375707, at *3 (D.N.J. Oct. 30, 2020) (holding the rescission of EO 107 mooted a challenge to that order when "the change in policy is a clear

response to the decreased number of COVID-19 cases in New Jersey since [EO] 107 was issued, not [this] suit or for the purpose of evading review").[3]

There is no indication that another pandemic is reasonably likely, much less imminent, or that such a hypothetical pandemic would require the same responses. And, as a consequence, any suggestion that the Governor will re-institute a measure like EO 128 in the future is pure, unfounded speculation. Appellants' reliance on the Governor's emergency powers under the Disaster Control Act misses the mark. Opp. at 12-13 (citing N.J. Exec. Order No. 244 (June 4, 2021)); N.J. Stat. Ann. App. A:9-33 to -63). As Appellees have explained (Mot. at 6), the mere fact that a challenged action could be enacted again in the future, because government actors possess the power to do so, does not establish a "reasonable likelihood" of recurrence. *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001); *see also Thompson*, 813 F.2d at 51.

III. Vacatur Is Not Warranted.

Based on a single footnote in a 40-year-old decision, Appellants attempt to derive a blanket rule that a dismissal for mootness on appeal requires vacatur of a

[3] Because there is no basis to conclude EO 128 is likely to recur, this Court need not consider whether the Order "evades review." But for the reasons explained in Appellees' Opening Brief, EO 128 was not so short as to evade review. Mot. at 8-9. Though Appellants failed to seek any temporary or preliminary relief, the Order stood long enough for a federal district court to review—and roundly reject—Appellants' claims. *Id.* That provides a second, independently sufficient basis to reject application of the "capable of repetition yet evading review" exception.

lower court judgment. Opp. 18-19; *Main Line Fed. Sav. & Loan Assoc. v. Tri-Kell, Inc.*, 721 F.2d 904, 907 n.4 (3d Cir. 1983) (citing *United States v. Munsingwear*, 340 U.S. 36 (1950)). But as "[t]he Supreme Court … has explained," "*Munsingwear* does not set forth a categorical rule." *Khodara*, 237 F.3d at 194. Instead, the decision to vacate a judgment based on mootness "is within the Court's discretion based on equity," *Old Bridge*, 246 F.3d at 314, and is appropriate only in narrow circumstances, *see U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("judicial precedents are presumptively correct and valuable to the legal community ... and should stand unless a court concludes that the public interest would be served by vacatur") (cleaned up).

There is no cause for vacatur here. For the reasons explained, this is not a case where leaving the district court's judgment will result in "any adverse legal consequences" for the parties. *Munsingwear*, 340 U.S. at 41. Nor is this a case where vacatur will permit the parties to relitigate an issue likely to recur. *Old Bridge*, 246 F.3d at 314. To the contrary, here there is no real possibility that the controversy could reignite. EO 128 has expired by action of the Legislature in response to the improved public health environment.

CONCLUSION

This matter should be dismissed as moot.

Respectfully submitted,

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Dated: July 6, 2021

/s/ Tim Sheehan
Tim Sheehan

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, I filed the foregoing Reply in Support of Appellees' Motion to Dismiss the Appeal as Moot with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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Dated: July 6, 2021

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Tim Sheehan