

**No. 22-35539**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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**COMMUNITY ACTION RESOURCE ENTERPRISES, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**THOMAS J. VILSACK; JUSTIN MAXSON; JOAQUIN ALTORO; MARGARET**  
**HOFFMAN,**

**DEFENDANTS-APPELLEES.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF OREGON, PORTLAND DIVISION**  
**CASE No. 3:16-CV-02116-SI**

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**ANSWERING BRIEF OF DEFENDANTS-APPELLEES**

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## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
Br.	Plaintiff's opening brief
CARE	Community Action Resource Enterprises, Inc. (Plaintiff-Appellant)
ER	Excerpts of Record
Golden Eagle	Golden Eagle II housing development
NWCH	Northwest Coastal Housing, a housing non-profit corporation, and new owner of Golden Eagle
RD	Rural Development, a mission area of the U.S. Department of Agriculture
SER	Supplemental Excerpts of Record
USDA	U.S. Department of Agriculture

## **STATEMENT OF JURISDICTION**

Plaintiff-Appellant Community Action Resource Enterprises, Inc (“CARE”) is a non-profit organization. CARE, along with individual tenants, challenged a federal agency’s decision to approve prepayment of a government loan for a low-income housing development. The challenge was brought under the Administrative Procedure Act, 5 U.S.C. § 706(2).

The district court had jurisdiction to determine whether it had jurisdiction over the proceedings under 28 U.S.C. § 1331. The district court granted Defendants’ Fed. R. Civ. P. 12(b)(1) motion to dismiss as moot because the new owner of the housing development did not seek prepayment of the loan, ER 003-11, and final judgment was entered on June 1, 2022. ER 135. CARE filed a timely notice of appeal on July 8, 2022. ER 120. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## **ISSUE PRESENTED FOR REVIEW**

Whether the district court correctly determined that CARE’s action was moot under Fed. R. Civ. P. 12(b)(1)?



## STATEMENT OF THE CASE

### I. Statutory and regulatory background

This action involves a federally subsidized rental housing program for lower-income tenants known as the section 515 program.<sup>1</sup> Rural Development (“RD”), a mission area of the U.S. Department of Agriculture (“USDA”), administers the section 515 program. USDA’s Rural Housing Service is part of RD.

Under the section 515 program, RD makes and/or insures subsidized, low-interest loans and provides other benefits to borrowers who agree to build and/or operate rental housing for lower-income tenants. *See* 42 U.S.C. § 1490a(a)(1).

Section 515 mortgage typically have long-term repayment periods that span several decades. *See* 42 U.S.C. § 1485(a)(2). During the life of the section 515 loan, the property is subject to RD regulations that govern operation of the property, including rent levels. *E.g.*, 7 C.F.R. § 3560.202 (rents to be based on operating costs and subject to approval by RD). *See generally* 7 C.F.R. Part 3560.

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<sup>1</sup> Section 515 derives its name from section 515 of the Housing Act of 1949, codified as amended at 42 U.S.C. § 1485.

In certain circumstances, a borrower may prepay a section 515 loan issued prior to 1989, but if RD determines that removing the property from the section 515 program would materially affect “housing opportunities of minorities” or that there is an insufficient “supply of safe, decent, and affordable rental housing” in the market area to accommodate each tenant who would be displaced by the prepayment, RD will attach conditions to a prepayment. 42 U.S.C. § 1472(c)(5)(G)(ii).

RD also administers a voucher program to subsidize the rents of low-income tenants in section 515 projects if a borrower prepays a section 515 loan. *See* Rural Development Voucher Program, 82 Fed. Reg. 21,972 (May 11, 2017). At the time of prepayment, RD would use the market rate rent for the apartment for purposes of establishing the voucher amount. *Id.* at 21,974.

## **II. Factual and procedural background**

This action centers on the Golden Eagle II apartment complex (“Golden Eagle”) in Tillamook, Oregon. ER 004, 045. Golden Eagle was developed through a 1976 government loan with a 50-year repayment term. ER 058. Through that loan, Golden Eagle received operating

subsidies via USDA. ER 045.

**A. Initial administrative and litigation proceedings**

In 2015, Golden Eagle’s then-owner submitted a request to RD to prepay the loan before completion of the 50-year repayment term. *See* ER 058. This prepayment request was subject to statutory conditions in 42 U.S.C. § 1472(c). In September 2016, RD informed the borrower that it was approving the prepayment request, subject to certain conditions. ER 006, 058.

In November 2016, CARE and individual tenants (collectively “Plaintiffs”) commenced this action in the district court, challenging RD’s approval of the prepayment. ER 045, 059. Plaintiffs moved for a preliminary injunction to enjoin RD’s approval of the prepayment. ER 006, 059. RD then voluntarily rescinded its prepayment approval in order to undertake further analysis, and the district court denied Plaintiffs’ motion for preliminary injunction. ER 006-07, 045, 059. In its further analysis, RD concluded that prepayment of the Golden Eagle loan would materially affect minority housing opportunities. ER 007. RD therefore required that Golden Eagle be offered for sale to a non-profit or public agency to try to maintain the property as affordable

housing in the section 515 program. ER 007, 059.

### **B. Further litigation proceedings**

In July 2017, Plaintiffs filed their second amended complaint—the operative complaint—with four Administrative Procedure Act (“APA”) claims regarding Golden Eagle. ER 007, 075-93. The district court later reached the unchallenged finding that the operative complaint brought “as-applied challenge relating to prepayment” only regarding Golden Eagle. SER-031. As the district court found, “Defendants’ decisions relating to other properties are not before the Court.” *Id.*

In February 2018, the district court denied Defendants’ motion to dismiss the operative complaint. ER 007. The district court determined that the government’s voluntary rescission of prepayment approval met the voluntary cessation exception to mootness. ER 062-69. Although the approval was rescinded, the prepayment request was still pending. *See* ER 071, ER 059. In May 2018, Defendants filed the administrative record. ER 128.

In April 2019, Plaintiffs filed a motion for summary judgment on their first and fourth claims for relief. ER 007, 129. The district court stayed consideration of the motion pending resolution of discovery-

related litigation. ER 007.

**C. Progress to preserve Golden Eagle section 515  
protections through sale to a non-profit organization**

In a March 2020 joint status report, the parties notified the district court that Northwest Coastal Housing (“NWCH”), a housing non-profit organization, had signed an agreement to purchase Golden Eagle and assume the existing government loan. ER 007. When finalized, the purchase would keep Golden Eagle in the section 515 program. Based on ongoing negotiations for the final purchase of the property, the district court stayed proceedings. ER 132.

At a March 2020 status conference, the district court emphasized that if the Golden Eagle tenants are fully protected through a sale to NWCH, it would be “skeptical” that this action is “the right vehicle to deal with any more abstract issues” that CARE “may wish to assert.” SER-005-06. The district court later extended the stay given continued progress towards the sale of Golden Eagle to NWCH. *See* ER 132.

In August 2020, the district court extended the stay through March 2021. ER 133, SER-032. The district court also found, to no objection, that Plaintiffs’ action was an “as-applied challenge” regarding Golden Eagle. SER-031. The district court further found that the “final

sale” of the property “to a nonprofit organization that keeps the complex in the program” would “likely moot” Plaintiffs’ claims. *Id.* In addition, the district court took note of Plaintiffs’ willingness to dismiss their second claim. *Id.*

With further progress on a final sale of Golden Eagle to NWCH, the district court in March 2021 and in July 2021 again extended the litigation stay. *See* ER 133. In July 2021, the district court denied Plaintiffs’ summary judgment motion without prejudice and with leave to renew it if the sale of Golden Eagle to a nonprofit organization “ultimately is not completed or if Plaintiffs demonstrate that even with a completed sale there remains a live case or controversy in this action” regarding any of Plaintiffs’ claims. *Id.*

In October 2021, with still further progress on a final sale of Golden Eagle to NWCH, the district court extended the litigation stay to January 10, 2022. ER 133.

**D. The final sale of Golden Eagle that preserves section 515 protections**

On December 28, 2021, NWCH completed the purchase of Golden Eagle. ER 007, SER-011. NWCH assumed the existing section 515 loan, with new rates and terms, and received additional section 515

loan financing from RD. ER 007, SER-011-12. The loans are secured by a deed of trust filed in the public land records of Tillamook County, and will mature on December 28, 2051. ER 007, SER-016-20.

As a condition of the Golden Eagle sale, NWCH agreed to record a thirty-year restrictive use covenant against Golden Eagle, which requires the property to be operated in accordance with section 515 restrictions until December 2051. *See* ER 007. NWCH agreed that it and any successors in interest will use the property in compliance with section 515-related statutes and regulations, “for the purpose of housing program eligible very low-, low-, or moderate-income tenants.” SER-025, ER 007. The restrictive use covenant is expressly enforceable and is expressly intended to run with the land. ER 007, SER-025-27. The covenant will also “remain in full force and effect” even if there is a foreclosure “or transfer of title pursuant to any other instrument or agreement.” SER-026, ER 007.

### **E. Final litigation proceedings**

In February 2022, given the final sale of Golden Eagle to NWCH, Defendants moved to dismiss Plaintiffs’ case as moot under Fed. R. Civ. P. 12(b)(1). ER 008, 134. On May 11, 2022, after full briefing and oral

argument, the district court granted Defendants' motion. ER 003-011, 135. Prior to the oral argument, the district court provided the parties with a tentative opinion and order that would grant Defendants' motion. ER 008, 016. At argument, Plaintiffs' counsel conceded that the individual Plaintiffs' claims are moot. ER 016.

As the district court recognized in dismissing the action, CARE brought "an as-applied challenge" to the government's decision to approve the prior Golden Eagle owner's prepayment of its section 515 loan. ER 004. *See also* SER-031.

The district court determined that after the sale of Golden Eagle to NWCH, CARE's claims became moot. ER 009. As the district court found, although each of Plaintiffs' claims challenge RD's "actions and policies related to prepayment applications," there "is no pending application for prepayment" of the Golden Eagle loan, and NWCH "has not indicated that it plans to file one." *Id.*

The district court rejected CARE's argument that its case was not moot because other section 515 borrowers in the area might someday apply for prepayment. ER 009-10. As the district court found, only Golden Eagle "is at issue in this case." *Id.* It recognized that CARE did



“not assert any claim against Defendants with respect to any action related to any other housing development or other Section 515 borrowers.” ER 010. The district court further found that CARE’s “burden of filing a new complaint” should there be “a future RD prepayment approval at another housing development” does not “create a live controversy in this case.” *Id.*

The district court also determined that CARE “misunderstand[s] the law of the case doctrine.” ER 010. The district court recognized that its February 2018 ruling—that RD’s rescission of Golden Eagle prepayment approval did not establish mootness due to the voluntary cessation exception—“does not mean that any subsequent factual development that moots Plaintiffs’ claims also constitutes voluntary cessation.” *Id.* The district court explained that in its February 2018 ruling, the voluntary cessation exception applied because the government ceased its challenged approval of the Golden Eagle prepayment. *Id.* But now, the district court found that Defendants had “not merely ceased the challenged conduct.” *Id.* Rather, CARE’s claims are moot “because a non-party has purchased Golden Eagle and assumed the Section 515 loan.” *Id.*

This appeal followed.

### **SUMMARY OF ARGUMENT**

The district court correctly determined that CARE's action was moot under Fed. R. Civ. P. 12(b)(1). This lawsuit was based on the possibility that RD might decide to allow the prior Golden Eagle owner to prepay the loan and the property might then leave the section 515 program. Based on subsequent intervening events, the district court correctly found that the circumstances fundamentally changed and correctly held that the lawsuit is moot.

Golden Eagle is now owned by a housing nonprofit organization (NWCH) that formally agreed to enforceable provisions that preserve the property with section 515 protections. Given that these protections are entrenched and not easily abandoned or altered in the future, the voluntary exception to mootness does not apply.

CARE's opening brief fails to identify any remaining issues regarding Golden Eagle. It does not argue that the new Golden Eagle protections are easily abandoned or altered in the future. Instead, CARE mischaracterizes the scope of its claims and the applicable

mootness standard. CARE also seeks to convert this case into a time-barred challenge to USDA regulations.

### **STANDARD OF REVIEW**

This Court reviews *de novo* a district court's dismissal for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998).

This Court reviews *de novo* whether the law of the case doctrine applies. *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014). This Court reviews a district court's application of the doctrine for an abuse of discretion. *Id.*

This Court may affirm the district court's judgment on any grounds supported by the record, whether or not the decision of the district court relied on the same grounds. *See Atel Financial Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

## ARGUMENT

**The district court correctly determined that CARE’s action was moot under Fed. R. Civ. P. 12(b)(1).**

**I. An action becomes moot whenever it loses its character as a present, live controversy.**

Mootness is the doctrine under which courts ensure that “a live controversy [exists] at all stages of the litigation, not simply at the time plaintiff filed the complaint.” *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007). The mootness doctrine, embedded in Article III’s case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011). A case becomes moot “whenever” it loses its character as “a present, live controversy of the kind that must exist if [courts] are to avoid advisory opinions on abstract propositions of law.” *West v. Sec’y of Dep’t of Transp.*, 206 F.3d 920, 924 (9th Cir. 2000) (internal quotation omitted). “A moot case cannot be revived by alleged future harm that is so remote and speculative that there is no tangible prejudice to the *existing* interests of the parties.” *Doe No. 1 v. Reed*, 697 F.3d 1235, 1239 (9th Cir. 2012) (emphasis in original) (internal quotation omitted).

**II. All of Plaintiff's Golden Eagle-specific, prepayment-related claims are moot given the property's preservation by the new owner.**

As the district court recognized on multiple occasions, all four claims in this lawsuit were rooted in the prior Golden Eagle owner's prepayment request and RD's decision to approve prepayment for that owner. ER 004, SER-030-31. And, as the district court correctly concluded, all four claims are moot because the final sale of the property to NWCH represented a fundamental change in circumstances. Instead of prepayment, Golden Eagle will continue to be operated in accordance with the requirements of the section 515 program. *See* ER 009, SER-011, SER-024-27 Any problem at Golden Eagle is now "speculative." ER 028. The individual Plaintiffs conceded their claims are moot, ER 009, and CARE states on appeal that it "welcomed the sale and preservation" of Golden Eagle. Br. 25.<sup>2</sup> Therefore, Plaintiff's claims "lack a live controversy for the Court to resolve." ER 009.

The district court's mootness determination came as no surprise. In August 2020, the district court had emphasized that the final sale of

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<sup>2</sup> Page references to CARE's brief use the page number at the bottom of the page, rather than the page number at the top.

Golden Eagle “to a nonprofit organization that keeps the complex in the program” would “likely moot” all four claims. SER-031.

**A. The first and second claims are moot regarding the standards used by RD in determining the impact of Golden Eagle loan prepayment on minority housing opportunities.**

In its first claim, as applied to Golden Eagle, CARE alleged that regulations at 7 C.F.R. § 3560.658(b) are inconsistent with statutory requirements regarding the effect of prepayment on minorities. ER 004; ER 088; SER-030. In its second claim, as applied to Golden Eagle, CARE alleged RD has not adopted guidelines “on how to determine whether a prepayment will have an effect on minority housing opportunities when determining whether to approve an owner’s request for prepayment.” ER 004; ER 088-89; SER-030-31.<sup>3</sup>

With the final sale of Golden Eagle to NWCH, there is no longer a prepayment request at Golden Eagle, no chance of any prepayment approval for the former owner, and no need for RD to assess the impact of Golden Eagle prepayment on minority housing opportunities. See ER 009. NWCH, further, has agreed to publicly recorded and enforceable

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<sup>3</sup> To the district court, CARE also represented its interest in dismissing the second claim. SER-031.

provisions to maintain the property as affordable housing with all section 515 program protections. ER 009; SER-011, SER-024-27. The district court correctly recognized that litigating prepayment-related claims as applied to Golden Eagle is speculative and no longer presents a justiciable live controversy. *See* ER 009-10.

**B. The third claim regarding housing voucher eligibility is moot because Golden Eagle prepayment is a prerequisite to any Golden Eagle voucher administration.**

The third claim challenged RD's administration of its housing voucher program, as applied to Golden Eagle. ER-004, SER-030, ER 089-90. But the claim is moot because Golden Eagle prepayment by the former owner is permanently off the table and any prepayment issue with the new owner NWCH is "purely speculative." ER 028.

As CARE recognized, RD housing vouchers are available only to residents of prepaid developments. *See* ER 086; Rural Development Voucher Program, 82 Fed. Reg. 21,972 (May 11, 2017) ("[T]o be eligible for the Rural Development Voucher under this Notice, the tenant must . . . [b]e residing in the Section 515 project on the date of the prepayment of the Section 515 loan . . .").

Accordingly, the district court did not err when it determined that

CARE's third claim is moot, because there is no longer a live controversy involving Golden Eagle prepayment. ER 004, 009.

**C. The fourth claim regarding termination of use restrictions is moot, because Golden Eagle prepayment is a prerequisite step before any potential termination.**

As with CARE's first three claims, the district court correctly determined the fourth claim is moot, because there is no longer any live controversy over Golden Eagle loan prepayment. ER 004, 009. In its fourth claim, CARE challenged a USDA regulation, as applied to Golden Eagle, that could authorize the termination of use restrictions imposed in certain circumstances on an owner that prepays its section 515 loan. ER 091; SER-030. That regulation—7 C.F.R. § 3560.662(f)—allows for a restrictive use covenant to be released if financial assistance provided to tenants is no longer available. While a property remains in the section 515 program, RD does not provide financial assistance to tenants, only to the property/owner. Tenants are eligible for financial assistance—in the form of vouchers—only if the section 515 loan has been prepaid. *See* ER 086; 82 Fed. Reg. 21,972.

This claim is moot because the challenged regulation was not applied at Golden Eagle and is not now applicable to the property.



There has been no prepayment, there is no pending prepayment request, and the tenants are not eligible for voucher assistance and have conceded that their claim is moot. With NWCH's formal agreement to preserve the property in the section 515 program, "it's purely speculative [to suggest there] might [be] a problem with" Golden Eagle. *See* ER 028. Multiple future contingencies would need to occur before RD could even *consider* releasing the Golden Eagle restrictive-use covenant under 7 C.F.R. § 3560.662(f): first, a new prepayment request by NWCH; then RD's approval of that request; and finally, tenant receipt and subsequent loss of vouchers.

In a similar case involving section 515 properties, another district court in the Ninth Circuit rejected as moot an as-applied challenge to 7 C.F.R. § 3560.662(f) when properties were not prepaid and instead remained in the section 515 program. *Bayview Plaza Tenants Ass'n v. Bouma*, No. C17-1771JLR, 2020 WL 1330637 at \*7-\*8 ( W.D. Wash. March 23, 2020). Here, as in *Bayview*, CARE no longer has any injury under the challenged regulation as applied to Golden Eagle.

**III. The district court correctly determined that the voluntary cessation exception to mootness did not apply.**

In dismissing CARE's action as moot, the district court correctly determined that the voluntary cessation exception to mootness did not apply. ER 010, 028-29. Under the voluntary cessation exception, the mere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness carries its burden to establish that the "challenged behavior cannot reasonably be expected to recur." *Brach v. Newsom*, 38 F. 4th 6, 12 (9th Cir. 2022) (en banc) (internal quotation omitted).

The record shows ample grounds to affirm the district court's judgment. Here, the government established that Golden Eagle prepayment was off the table and that the property would remain preserved in the section 515 program. Case law within the Ninth Circuit shows that the government carries its mootness burden when it ensures that section 515 properties are not prepaid and will remain in the subsidized housing program. *Bayview*, 2020 WL 1330637 at \*5-\*8. Given the fundamental change in circumstances at Golden Eagle, the voluntary cessation exception is inapplicable. There is no reasonable likelihood that the challenged conduct by Defendants could occur at

Golden Eagle. Pursuant to the restrictive use covenant now recorded against the property running with the land, no Golden Eagle prepayment scenario remains live; instead the property will be preserved in accordance with the requirements of the section 515 program. ER 009; *See* SER-011, SER-024-27.

The district court recognized, with the final sale of Golden Eagle to NWCH, that Defendants “have not merely ceased the challenged conduct.” ER 010. Instead, “a non-party has purchased Golden Eagle and assumed the Section 515 loan.” *Id.* The district court similarly emphasized at argument that the sale of Golden Eagle to NWCH brought about a situation “totally different” than RD’s earlier voluntary cessation of its prepayment approval for the prior Golden Eagle owner. ER 028. With Golden Eagle now owned by a housing non-profit and preserved under section 515, the district court correctly concluded it was “purely speculative we might have a problem” with Golden Eagle. *Id.*

This Court recognizes a presumption of good faith when the government, as opposed to a private party, ceases challenged conduct. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir.

2010). Here, the new circumstances at Golden Eagle show that Defendants have taken extensive, enforceable steps to preserve the property as subsidized housing and ensure that the section 515 protections will endure for decades. Because final sale and preservation of Golden Eagle is entrenched and not easily abandoned or altered in the future, the voluntary cessation exception does not apply. *See Brach*, 38 F.4th at 13.

In arguing that the district court erred in determining that the voluntary cessation exception did not apply, Br. 29-36, CARE incorrectly asserts the facts “have not changed since 2018.” Br. 32. The district court correctly found that the circumstances at Golden Eagle had changed significantly since February 2018. ER 010. Nor did this finding come as any surprise. Indeed, in August 2020, the district court reviewed its February 2018 mootness analysis and opined that the final sale of Golden Eagle to a nonprofit organization that keeps the development in the section 515 program “would likely moot” Plaintiffs’ claims. SER-031.<sup>4</sup> As the district court determined, “it’s not simply a

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<sup>4</sup>In its brief, CARE fails to challenge or even acknowledge the district court’s August 2020 order.

question of voluntary cessation anymore if a new owner takes ownership of the building as a nonprofit and the building remains in the program.” SER-007. Similarly, as the district court found at argument, “[T]here’s a difference in situation between what we have now” with the sale to NWCH and preservation of Golden Eagle, “and what we had back in 2018” with RD’s earlier voluntary cessation. ER 032.

CARE argues the voluntary cessation analysis in the district court’s February 2018 ruling became the law of the case and should have prevented the district court’s May 2022 dismissal for mootness. Br. 33-35. But the district court correctly determined that CARE misunderstood the law of the case doctrine. ER 010. The doctrine did not require the district court to conclude that the voluntary cessation exception applied after the final sale of Golden Eagle to NWCH. As the district court recognized, that it previously ruled that RD’s rescission of prepayment approval constituted voluntary cessation “does not mean that any subsequent factual development that moots Plaintiffs’ claim also constitutes voluntary cessation.” *Id.*

CARE incorrectly asserts that the district court erred because its May 2022 ruling was supposedly inconsistent with its February 2018

ruling. Br. 34. It is well-established that the law of the case doctrine does not bar a district court from reassessing and reconsidering earlier rulings. *Askins v. U.S. Dep't of Homeland Security*, 899 F.3d 1035, 1042 (9th Cir. 2018) (“The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case.”). Nor does the doctrine “bar a court from reconsidering its own orders before judgment is entered.” *Id.* At argument in May 2022, the district court stated that its February 2018 ruling may have taken too broad a view of the voluntary cessation exception. Regarding the February 2018 ruling, the district court stated, “I think if I said that about other properties not involving Golden Eagle, I may have misapplied voluntary cessation.” ER 029. *See also id.* (“If I said that, I might have spoken too broadly.”). The record shows that the district court appropriately reassessed or reconsidered its February 2018 ruling before it entered final judgment in June 2022. ER 135. The district court did not run afoul of the law of the case doctrine, and its May 2022 ruling is not in error.

**IV. CARE fails to establish any error by the district court.**

CARE's opening brief makes other arguments in addition to its voluntary cessation arguments. As Defendants explain below, none of these arguments amount to any valid ground to reverse the district court's judgment.

**A. CARE's attempt to generalize its claims or assert a facial challenge is inappropriate.**

CARE attempts to characterize its claims broadly, as an apparent facial "challenge to RD regulations and policies." Br. 15. But CARE conceded below that this action is as applied only to Golden Eagle. ER 026-27, SER-031. Further, in its opening brief, CARE fails to identify any remaining issue or controversy regarding Golden Eagle. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.") (internal quotation omitted).

CARE also conceded below that the lawsuit would be time-barred if the lawsuit was a facial challenge to the government's actions. *See* ER 026-27. CARE acknowledged that "the statute of limitations for a

facial challenge has lapsed” and that “the only way that this case can go forward is . . . by the decision as applied in this case to [Golden Eagle].” ER 026. Without any live controversy that applies to Golden Eagle, CARE’s action is moot.

CARE argues that its action is not moot because RD “has not changed any of the challenged regulations and practices.” Br. 34. According to CARE, RD “will continue to violate” federal housing statutes “when assessing prepayment requests from owners of Section 515 developments located in Tillamook or surrounding counties.” Br. 34.

This argument has nothing to do with Golden Eagle and fails to show any error by the district court. CARE ignores the cornerstone reality that there are no longer any live claims as applied to Golden Eagle. As the district court recognized, CARE in this action targeted only RD action regarding Golden Eagle, ER 009-10, and did not assert “any claim” against Defendants regarding “any action related to any other housing development or other Section 515 borrowers in Tillamook County.” ER 010.

Nor can CARE maintain this action as a general programmatic



challenge to how RD makes prepayment decisions and operates its housing voucher program. Maintaining such a challenge would run afoul of well-established precedent that a plaintiff “must direct its attack against some particular ‘agency action’ that causes it harm.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990). The APA “does not give federal courts general supervisory authority over executive agencies, but only over cases in which a person has suffered legal wrong because of agency action, or is adversely affected or aggrieved by agency action.” *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011 (9th Cir. 2021) (internal quotation and alteration omitted).

CARE argues it has a continuing “interest” in preventing RD from approving prepayments at developments other than Golden Eagle and in preventing RD from operating its voucher program “in a manner” that CARE believes is illegal. Br. 18-19. CARE also takes the position in its opening brief that it was not seeking to apply its challenge to a specific property. Br. 22-23 (“the preservation of [Golden Eagle], or of another particular development, was [not] the object of this litigation.”). But CARE conceded at argument in the district court that it would not

be able to bring a case challenging RD without applying its challenge to a specific property. ER 031.

**B. CARE relies on cases that are inapposite.**

On pages 21 and 25 of its brief, CARE cites *Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241 (9th Cir. 1988), but that case recognized that the “basic question” in mootness is whether there is a “present controversy as to which effective relief can be granted.” *Id.* at 1244. Here, CARE’s case no longer presents a present controversy regarding Golden Eagle on which effective relief can be granted. CARE is also wrong that the district court “failed to review” its claims to assess whether there could be any effective relief. Br. 21. CARE’s claims applied only to Golden Eagle and the district court discussed each claim and explained that there was no remaining controversy at the property and therefore nothing on which effective relief could be granted. ER 004, ER 009-010.

CARE mischaracterizes mootness here as depending on a litigant receiving “all the relief to which it was entitled.” Br. 22. *See also* Br. 28 (arguing CARE’s case is not moot because it “did not get any of the relief that it originally sought”). Before CARE can leapfrog to relief, its threshold problem is it no longer has a cognizable injury in the first

place as applied to Golden Eagle. Without a remaining controversy regarding the property, CARE puts the proverbial “cart before the horse” in arguing that the broad relief and remedies it wishes to seek, untethered to Golden Eagle, render its action justiciable. Br. 18. There is no longer any actual or imminent Golden Eagle prepayment scenario. CARE is therefore not entitled to any relief.

This Court’s recent *en banc* decision in *Brach* illustrates that mootness here is based on “intervening events,” not whether CARE received all its desired litigation relief, and that the actual controversy has evaporated. *Brach v. Newsom*, 38 F.4th 6, 11-12 (9th Cir. 2022) (*en banc*). In *Brach*, the plaintiffs sought relief including a declaratory judgment against executive orders and an injunction against a state’s reopening framework. But this Court determined their case moot based on intervening factual developments, even though the plaintiffs received none of the relief they sought. *See id.* Here, consistent with the analysis in *Brach*, the district court correctly determined that intervening factual developments rendered this action moot, although CARE did not receive the litigation relief it sought.

CARE relies on *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) for its

argument that a case is only moot if a litigant receives all the relief it sought. Br. 19, 25. But that case involved totally different legal and factual circumstances. In *Chew*, a plaintiff won a damages verdict against a city police officer, and the remaining defendants won summary judgment against the plaintiff's other claims. 27 F.3d at 1436. The plaintiff appealed the summary judgment ruling, but the remaining defendants argued the plaintiff's damages verdict against the police officer fully redressed the plaintiff's injuries and mooted the appeal. *Id.* at 1436-37. This Court rejected that argument, noting that the plaintiff alleged different violations against the remaining defendants that may be compensable. *Id.* at 1437. *Chew* is far afield from the instant case, where Golden Eagle's preservation and the evaporation of any controversy as applied to Golden Eagle has made this action moot.

Nor does *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016) assist CARE here. *See* Br. 19, 25. In *Chen*, an insurance company consented to a judgment favorable to a plaintiff; the judgment would afford the plaintiff "complete relief on his individual claims for damages and injunctive relief." *Id.* at 1148. However, the plaintiff had not yet "actually received" that relief, and his claims were therefore not moot.

*Id.* *Chen* is inapplicable here, because Defendants did not consent to any judgment favorable to CARE, and instead established below that the controversy as applied to Golden Eagle had evaporated given intervening events. Unlike in *Chen*, further, the change in circumstances at Golden Eagle is complete with the execution of the final sale of Golden Eagle to NWCH.

**C. CARE is not entitled to maintain this action to challenge possible future RD actions.**

CARE emphasizes that “it plans to file new cases against RD if it continues to illegally approve prepayment applications in Tillamook and surrounding counties.” Br. 32. But any relief regarding a future RD decision is unripe in this as-applied action regarding Golden Eagle. As CARE acknowledges, whether a housing development is “allowed to prepay” a loan “depends on decisions and factors that are unique to each owner and development for which a prepayment request is filed.” Br. 22. Therefore, the district court correctly found that “the burden of filing a new complaint on a new set of facts . . . does not create a live controversy in this case.” ER 010. *See People of Village of Gambell v. Babbitt*, 999 F.2d 403, 408 (9th Cir. 2003) (determining a litigant’s claims were moot and that its “objection to potential government

activity in the future is unripe”).

CARE also fails to establish that a possible future RD prepayment approval—for a property different from Golden Eagle—allows the instant action to proceed. The district court correctly recognized that it would invite an “impermissible advisory opinion” to maintain this action “based on the possibility that borrowers for other developments not currently before the Court might someday apply for prepayment.” ER 010. *See also* ER 027 (observing that CARE’s arguments to maintain this action based on how RD may handle other properties is “essentially asking the Court for an advisory opinion”).

Constitutional standing requires an “injury in fact” that is “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted). CARE has only a conjectural, hypothetical interest in what might happen at another property someday.

## CONCLUSION

For these reasons, this Court should affirm the district court's judgment.

Dated this 12th day of December, 2022.

Respectfully submitted,

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*/s/ Sean E. Martin*

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## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of this Court, counsel for Defendants-Appellees is unaware of any related cases.

DATED this 12th day of December, 2022.

/s/ Sean E. Martin  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief complies with the type-volume limitations, uses a proportionately spaced font (Century Schoolbook), has a typeface of 14-point, and contains 5,961 words according to the word processing system used to produce the document.

DATED this 12th day of December, 2022.

/s/ Sean E. Martin  
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