UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 22-35539

COMMUNITY ACTION RESOURCE ENTERPRISES, INC.

Plaintiff-Appellant

vs.

THOMAS J. VILLSACK, Secretary of the Department of Agriculture, et al.

Defendants-Appellees

On Appeal From an Order of the
United States District Court
For the District of Oregon, Portland (Hon. Michael H. Simon)
Dist. Ct. No. 3:16-DV-2116-SI

REPLY BRIEF OF THE APPELLANT

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CARE, Plaintiff-Appellant, filed this "as applied" action to prevent RD from applying and continuing to rely on illegal regulations when it approves prepayments of Section 515 affordable housing loans and operates its voucher program in Tillamook and surrounding counties. RD's reliance on the illegal regulations and policies threaten the unnecessary displacement of low income households and, thereby, places demands on CARE's services and financial resources used to assist the displaced households.

The Defendants' response to CARE's opening brief is without merit. It mischaracterizes the nature of CARE's "as applied" challenge to Rural Development (RD) regulations by repeatedly and erroneously contending that this is an "as applied case relating to Golden Eagle" apartments and that, as a result, the relief that CARE is entitled to receive relates solely to Golden Eagle. Defendants' response also advances the false conclusion that CARE's interests have dissipated and that all controversy in the case has evaporated because the intervening events, the sale and preservation of Golden Eagle, have mooted the case. All of the Defendants' arguments are meritless and highlight why the district court's decision is also wrong and must be reversed.

A. This is not "an as applied case related to Golden Eagle."

Defendants' repeated depiction of this case as "an as applied case relating to Golden Eagle" apartments is a carefully crafted mischaracterization of the nature of this case that is designed to wrongly justify the district court's erroneous decision. On at least seventeen occasions the Defendants' brief states that this is an "as applied to Golden Eagle" case thereby falsely suggesting that the relief sought by the Plaintiffs was only related to Golden Eagle or that Golden Eagle's sale and preservation by Northwest Coastal Housing (NWCH) has healed CARE's injury and thereby caused the live controversy to evaporate. These arguments must be rejected because they lack legal and factual support.

CARE and the individual Plaintiffs initiated this case in 2016 after RD illegally approved the previous Golden Eagle owner's request to prepay the RD Section 515 loan that financed Golden Eagle Apartment's construction. ER 077. The prepayment approval was subject to use restrictions intended to protect the remaining residents of Golden Eagle. The approval also qualified the residents to apply for assistance under the RD voucher program, which CARE and the residents believed was operated in a manner that is arbitrary and contrary to law. ER 076.

Accordingly, the operative complaint made four claims alleging violations of the Administrative Procedure Act: First, that RD regulations specifying how to

analyze the effect of a prepayment on minority housing opportunities was inconsistent with the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), the statute governing the RD prepayment process; Second, that RD failed to establish standards for determining the effect of a prepayment on minority housing opportunities and, as a result was operating the approval process in an inconsistent and arbitrary and capricious manner; Third, the agency was operating the voucher program in a manner that violated ELIHPA and was otherwise arbitrary and capricious; and, fourth that RD regulations authorizing the lifting of use restrictions, such as would have been recorded against Golden Eagle, were contrary to ELIHPA. ER 088-090. CARE and the individual Plaintiffs sought declaratory relief that the agency rules and practices were contrary to law and injunctive relief preventing the agency from continuing to apply the illegal regulations and practices to them. ER 092-93.

Notably, none of the claims or the relief sought by the Plaintiffs included a claim forcing the sale of Golden Eagle to a nonprofit or that the nonprofit preserve Golden Eagle for any period of time. There simply is no basis in ELIHPA or any other law on which the Plaintiffs might have brought such a claim. In bringing this action, the Plaintiffs were seeking a change to the RD regulations such that RD's prepayment decisions would not continue to burden CARE's personnel and financial interests and the interests of Golden Eagle residents.

The complaint against RD was an "as applied" action, as the regulations at issue were adopted on or before 2005 and thus the challenge was outside the six year statute of limitations imposed by 28 U.S.C. § 2401, for bringing a facial challenge to the regulations. *See* ER 004 and ER 022-23. *See Wind River Min. Corp. v. U.S.*, 946 F2d. 710, 715 (9th Cir. 1991).

In *Wind River* this Court defined the nature of an as applied action. It held that if a "challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision *by filing a complaint for* ***review of the adverse application of the [agency] decision to the particular challenger***." *Wind River* at 715 (emphasis added), *Rodriquez v. U.S.* 852 F.3d 67, 82 (9th Cir. 2017. In other words, in an as applied challenge, the challengers or plaintiffs, as the injured parties, bring the action to prevent an agency from applying and continuing to apply the challenged regulation and actions to them. *Id.* This is precisely the nature of the action that was initiated by CARE and the individual Plaintiffs. They challenged the validity of RD regulations that authorize the prepayment of Section 515 loans and the operation of the voucher program.

In its opening brief, CARE[1] argues that this case is not moot because none of the four claims that it made in its operative complaint have been addressed by the court and it has not secured any of the injunctive or declaratory relief that it asked for in the complaint. *See* Br. 41. Moreover, it repeatedly makes clear that the objective of this lawsuit was not and could not have been the preservation of Golden Eagle. *See e.g.* Br. 23 and 27. Accordingly, CARE argues that the sale of Golden Eagle to NWCH and its preservation as affordable housing until 2051 cannot moot this case. Br. 32. CARE's interest in securing relief remains the same as it was when this case was first filed and a live controversy continues to exist for the court to resolve. In other words, the case is not moot.

In their response, the Defendants simply ignore or misrepresent CARE's substantive arguments that the district court's decision was wrong. Instead, they advance a novel and legally unsupported argument that disregards *Wind River* and, conveniently, sidesteps all of CARE's mootness arguments and thereby affirms the court's decision that the case is moot. They rely on a single erroneous premise, which they repeat and restate throughout their brief, namely, that all of CARE's claims applied only, or were related to, Golden Eagle, s*ee e.g.* DBr. 34-5, and that

[1] CARE is the only Plaintiff on this appeal. The individual plaintiffs, all residents of Golden Eagle, were fortunate enough to be able remain at Golden Eagle after its sale to NWCH.

the only relief that CARE is entitled to receive is, accordingly, restricted to Golden Eagle. *See e.g. id*.

In Part I of their brief Defendants boldly assert that CARE's opening brief "fails to identify any remaining issues **regarding Golden Eagle**." DBr. 18 (emphasis added). They then proceed to summarily dismiss CARE's first and second claims by stating that with the sale of Golden Eagle to NWHC, "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." DBr. 22 (emphasis added). Accordingly, they falsely conclude that the "district court correctly recognized that litigating prepayment-related claims **as applied to Golden Eagle** is speculative and no longer presents a justiciable controversy." DBr. 23 (emphasis added).

They also falsely dismiss CARE's third claim, regarding RD's arbitrary administration of the voucher program, by stating that "the claim is moot because Golden Eagle prepayment **by the former owner** is permanently off the table and any prepayment issues with the new owner NWCH is 'purely speculative'" *Id.*(emphasis added). Citing CARE's recognition that tenants are only eligible for vouchers when they reside in a prepaid development, they support the court's decision that the "third claim is moot, because there is **no longer a live controversy involving Golden Eagle prepayments**." *Id.* at 24 (emphasis added).

Lastly, they dismiss CARE's fourth claim regarding the validity of a regulation authorizing RD to lift use restrictions, such as it intended to apply to Golden Eagle when the agency first approved its prepayment, by stating that:

> the claim is moot because **the challenged regulation was not applied to 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 . . . . Multiple future contingencies would need to occur before RD could even *consider* releasing Golden Eagle restrictive use covenant.

Id. 24-25 (bolded emphasis added).

Each of these arguments is meritless. An "as applied" case refers to a case brought by a person or entity challenging illegal regulations that have been applied to that person or entity. The term, "as applied" simply serves as a shorthand reference to a particular type of case, and does not support the proposition that an as applied case somehow relates to the object or property that precipitated or is the subject of the litigation. The illegal regulations and agency actions did not injure Golden Eagle and it is not the party that has challenged their application.

Throughout their argument, the Defendants have not cited a single case that supports the premise that they advance. They have simply reframed the case by asserting that all the claims and relief must be judged as applied to Golden Eagle. Legally, the phrase "as applied to Golden Eagle" is meaningless. It does not provide a basis for determining whether the CARE's interests have been met or whether a controversy continues to exist which the court must resolve.

Defendants cite *Bayview Tenants Ass'n v. Bouma,* No. C17-1771JLR, 2020 WL 1330637 at *7-*8 (W.D. Wash. March 23, 2020), to support their claim that CARES' fourth claim is moot because "the challenged regulation was not applied to Golden Eagle and is not now applicable to the property" DBr. 24. In fact, the prepayment restrictions to which the regulation at issue applies were required to be placed on Golden Eagle when it was first prepaid. *See* Page 2, *supra*.

Critically, the Defendants fail to acknowledge or consider the fact that the only plaintiffs in *Bayview* were residents of the two developments and the court mooted their claims when the developments in which they lived were brought back into the Section 515 program and the owner was precluded from prepaying the developments' 515 loans before they matured in 2032. As a consequence, the court dismissed the residents' case as moot because the residents had not shown that they were injured from application of the regulation "or that such injury is even possible given the current circumstances." *Id*. 7.

Notwithstanding the Defendants' repeated contrary statements, this case is not solely as applied to Golden Eagle. Here CARE has an ongoing threatened injury from the challenged regulation as use restrictions can be imposed on any future approved prepayment in Tillamook or surrounding counties. Thereafter, RD may rely on the challenged regulation and illegally lift the use restrictions and thereby injure CARE by imposing demand on its personnel and financial

resources. To avoid injury, CARE sought declaratory relief that the regulation violated ELIHPA and an injunction preventing RD from applying the regulation to any property prepaid in Tillamook or surrounding counties. In short, the rationale of the *Bayview* decision does not extend to this case.

Here, the court's mootness decision must be reversed because it is based on the same premise that the Defendants advance, namely that CARE is only entitled to relief related to Golden Eagle. That view is evidenced by the court's statements that "[o]nly Golden Eagle . . . is at issue in this case," ER 009-010, and that "[t]here is no pending application for prepayment of the Golden Eagle loan." ER 009. These conclusions are not material in deciding CARE's claim that the regulation RD relied on to approve the Golden Eagle prepayment is contrary to law and that RD should be enjoined from relying on that regulation in making future prepayment decisions that affect CARE's interests. Contrary to the court's mootness decision, CARE's claims and interest continue to be at issue and there continues to be a controversy for the court to resolve.

B. The voluntary cessation exception to mootness continues to apply to this case.

Part III of the Defendants' brief, which supports the court's decision that the voluntary cessation exception no longer applies to this case, is also flawed because it relies on the same erroneous premise the Defendants applied to the mootness

argument. They argue that the sale and preservation of Golden Eagle evidences the agency's behavioral change with respect to Golden Eagle and, as a result of Golden Eagle having been preserved, the illegal agency practices are not likely to recur. Again, Defendants fail to respond to Plaintiffs arguments. They ignore the fact that the challenged conduct in this case is not related to Golden Eagle. Rather, the challenged conduct in this case is RD's continued reliance on illegal regulations that have not been modified since this case was filed in 2016.

The voluntary cessation exception is intended to prevent the government from correcting conduct that is challenged through litigation, arguing that as a result of the corrective action the case is moot, and then be free to return to its old ways. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n. 10 (1982). Accordingly, the exception, under which it is assumed that the case is moot, allows the challenger to continue to litigate the case "unless the government is able to show that the challenged behavior cannot reasonably be expected to recur." *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022) (citing *Already LLC v. Nike, Inc*. 568 U.S. 85, 96 (2013)).

In its opening brief, CARE argues that the voluntary cessation exception to mootness, which the court applied to the case in 2018, continues to apply because RD has not changed the illegal regulations that were used to approve the Golden Eagle prepayment or its procedure for operating the voucher program.

Accordingly, RD is still unable to show that the challenged behavior cannot reasonably be expected to recur.

As already noted, the sale and preservation of Golden Eagle was never the challenged conduct at issue in this case. None of Plaintiffs' claims ever sought the sale and preservation of Golden Eagle. Instead, the challenged conduct, as set out in the complaint, is RD's reliance on illegal regulations used to determine whether a prepayment will have a material impact on minority housing opportunities, its operating the voucher program in a manner contrary to law, and its maintaining another regulation that is contrary to law, which authorizes it to lift use restrictions imposed after some prepayments.

In response to the Defendants' motion to dismiss, filed in 2018, the court held that the voluntary cessation exception applied to the case because the agency, in response to this litigation, rescinded its prepayment approval and determined that the prior Golden Eagle owner could not prepay the loan without first offering Golden Eagle for sale to a nonprofit or public agency. *McFalls v. Purdue*, 2018 WL 785866 *11 (D.Or. Feb. 8, 2018). The voluntary cessation exception applied to the case because the rescission and correction of the prepayment approval arguably mooted the case, and thereby prevented CARE from securing the relief that it sought and allowing RD to return the its old ways. When the court evaluated whether RD could meet the heightened burden of showing that the challenged

behavior cannot reasonably be expected to recur, it concluded that RD could not. *Id*. Given that the agency had not changed any of its regulations, there was no way for the agency to meet its burden. Accordingly, the agency could not argue that it met the heightened mootness standard, set under the voluntary cessation exception, because the agency did not modify any of the applicable regulations. *See id.* Here, there still is no reasonable way that the Defendants can show that the challenged actions will not recur. Indeed, the contrary is true. Without a change to the illegal regulations the agency's continued reliance on them assures that the challenged conduct will continue to recur. Br. 37.

In support of its recent motion to dismiss, Defendants argued, as they do here, that the voluntary cessation exception no longer applies because the sale and preservation of Golden Eagle the development is "no longer in a prepayment scenario." DBr. 18. Defendants go on to claim that the government has not merely stopped the challenged conduct, it has also taken extensive, enforceable steps to preserve the property as subsidized housing." *Id.* The court agreed with Defendants' position. It held that the voluntary cessation no longer applied because "the Defendants have not merely ceased the challenged conduct. Instead, the reason Plaintiffs' claims are moot is because a non-party has purchased Golden Eagle and assumed the loan." DBr. 8.

As with the mootness argument, the Defendants fail to respond to Plaintiff's arguments claiming that the voluntary cessation exception applies to this case. Instead, they again continue to press their argument that this is an as applied case relating to the preservation of Golden Eagle. To wit, they argue that "[g]iven the fundamental changes in circumstances **at Golden Eagle**, the voluntary cessation exception is inapplicable. There is no reasonable likelihood that the challenged conduct by the Defendants **could occur at Golden Eagle."** DBr. 26-27. They further assert that "the government established that Golden Eagle prepayment was off the table and that the property would remain preserved in the section 515 program." DBr. 26. Both arguments are simply irrelevant in that, as stated earlier, neither the sale nor preservation of Golden Eagle are the conduct that CARE challenged in its complaint.

Given that the voluntary cessation exception applied to the case because RD, in response to the litigation, rescinded the Golden Eagle prepayment approval and given that RD has not changed any of the challenged regulations, the voluntary cessation exception continues to apply to this case.

The Defendants' arguments make it very clear that the district court's decision was incorrect. They highlight the fact that the court erroneously viewed the preservation of Golden Eagle as the object of the litigation when they state that the "district court recognized, with the final sale of Golden Eagle to NWHC, that

Defendants 'have not merely ceased the challenged conduct . . . [but that,] [i]nstead, a non-party has purchased Golden Eagle and assumed the Section 515 loan.'" DBr. 27. The Defendants' argument notwithstanding, the challenged conduct was and continues to be RD's reliance on illegal regulations to make its prepayment decisions and to operate the voucher program. Accordingly, the court's decision to abandon the voluntary cessation exception on the basis that the Defendants have ceased their challenged conduct is unfounded and must be reversed.[2] *See Fikre v. Federal Bureau of Investigation*, 904 F.3d 1033, 1039 (9th Cir. Sept. 20, 2018) (a claim is not moot if the government remains practically and legally "free to return to [its] old ways" despite abandoning them in the ongoing litigation. (citing to *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

C. Defendants' arguments that CARE has failed to establish any error by the district court are meritless.

Under the general heading that CARE fails to establish any error by the district court, the Defendants, in part IV of their brief, present several scattershot arguments that they did not include in the earlier parts of their response. Their broad contention that CARE has failed to establish any error by the district court is patently false and only supports the fact that the Defendants' arguments have

[2] It is noteworthy that at oral argument on the Defendants' motion to dismiss, the court expressed some doubt about its decision and invited appellate review of the case. It stated that "it would be very, very helpful to have appellate clarification on the scope of the voluntary cessation doctrine." ER 32.

deliberately sidestepped a direct response to CARE's opening brief. They mischaracterize the nature of CARE's claims and arbitrarily limit the relief that is available to CARE by continuing to falsely contend that the case is only a challenge "as applied to Golden Eagle." CARE's opening brief clearly establishes that the district court's mootness decision and its conclusion that the voluntary cessation exception to mootness no longer applies to the case are both wrong.

1. CARE has not tried to generalize its claims to assert a facial challenge to the regulations.

Defendants' first charge, that CARE has attempted to generalize its claims as an apparent effort to create a facial challenge to the prepayment and voucher regulations, DBr. 31, lacks foundation. CARE has always stated and acknowledged that this case is an as applied case and has never tried to expand its challenge beyond the regulations set out in its complaint. ER 26-27. The fact that CARE has conceded that a facial challenge to the RD regulations would be barred by the statute of limitation is contrary to Defendants' claim and is evidence of the fact that CARE has not attempted to generalize its claims in an effort to create a facial challenge to RD regulations. CARE's statement that this case can only go forward as an as applied case, DBr. 31-32, is true because CARE is seeking injunctive relief that would prevent RD from continuing to apply illegal regulations to prepayment requests in Tillamook and surrounding counties. As the district

court found in 2018, RD's continued reliance on the illegal regulations will adversely affect CARE's interests and resources. *McFalls at* *11.

The Defendants' quote that Plaintiffs' challenge is a broad challenge "to RD regulations and policies", DBr. 31, is taken out of context and is false. In context, the statement is simply a short hand reference to the regulations and policies that are at issue in this case and is not an effort to broaden CARE's challenge beyond those regulations and practices.

The Defendants' statement that the Plaintiffs conceded below that this action is as applied only to Golden Eagle, DBr. 31, is also taken out of context and is otherwise wrong. In the exchange with the court, Plaintiff's counsel made it clear that the case is "an as applied challenge, but what that means is that the . . . statute of limitation[s] for a facial challenge has lapsed. . . .So the fact that this is an as applied challenge simply deals with the statute of limitations issue." ER 026 -27.

Substantively, the Defendants' claim that CARE has failed to identify any remaining issues or controversy regarding Golden Eagle, DBr. 21, once again, wrongly contends that CARE's claims must be related to Golden Eagle. Clearly, CARE has not identified any remaining issues with respect to Golden Eagle because this case deals with RD's illegal behavior and not the preservation of Golden Eagle. Contrary to Defendants' claim, Plaintiff's opening brief clearly recites the remaining issues and has established why the court's decision is wrong.

See e.g. Br. 22 ("A. The District Court's Decision That The Case Is Moot Is Contrary To Law And fact").

The Defendants' claim that CARE has conceded that a facial challenge to agency regulations would be time barred, DBr. 24, is immaterial. The statement was made in response to the court's question of whether CARE could bring a new lawsuit challenging the agency's regulations without identifying an owner in Tillamook or surrounding counties who seeks to prepay a Section 515 loan. CARE's counsel correctly replied that the only way that such a case could go forward "is by an as-applied - - by the decision as applied in this case to G[olden] E[agle]." ER 26-27. As noted earlier, the reference to Golden Eagle simply identifies the fact that a new case would have to be brought to challenge the agency's practices as they were carried out with respect to Golden Eagle.

The Defendants' persistent effort to show that this case is an as applied case relating solely to Golden Eagle crops up once again when the Defendants attack CARES's claim that the case is not moot because RD has not changed any of the challenged regulation. DBr. 32. Defendants' response, that "this argument has nothing to do with Golden Eagle . . . [and that] CARE ignores the cornerstone reality that there are no longer any live claims as applied to Golden Eagle," DBr 32, is wrong because this is not an as applied case relating solely to Golden Eagle. *See* Pages 2-9 *supra.*

The Defendants extend their as applied to Golden Eagle argument by quoting parts of CARE's opening brief as well as to its counsel's statements at oral argument by which they claim that CARE has conceded that this case is only as applied to Golden Eagle. While several of the quotes are taken out of context and do not stand for the proposition for which they are cited, assuming that all are in fact true, the concessions are meaningless. This is not an "as applied to Golden Eagle" case and the phrase has no legal meaning. *See* Page 7 *supra*.

2. CARE has not relied on cases that are inapposite.

For the same reason, Defendants' argument that CARE has relied on cases that are inapposite is false. With respect to *Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241 (9th Cir. 1988) they argue that CARE "no longer presents a present controversy **regarding Golden Eagle,**" DBr. 34 (emphasis added) and that "it no longer has a cognizable injury . . . **as applied to Golden Eagle**." DBr 34-35 (emphasis added). They argue that *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), does not support CARE's arguments because the case 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." DBr. 36 (emphasis added). They also argue that *Chen v. Allstate Ins. Co*., 819 F.3d 1136 (9th Cir. 2016) does not support CARE's positions because Defendants have "established below that **the controversy as applied to Golden Eagle had**

evaporated given intervening events. Unlike in *Chen* . . . **the change in circumstances at Golden Eagle is complete with the execution of the final sale of Golden Eagle to NWCH**." D.Br. 37. All of these statements continue Defendants' persistent effort to argue that any and all of CARE's claims and forms of relief can only be related to Golden Eagle. As Plaintiffs have set out above, this is simply not the case here. *See* Pages 2-9 s*upra*.

The Defendants' claim that this Court's recent *en banc* decision in *Brach v. Newsome*, 38 F.4th 6 (9th Cir. 2022) supports their argument that mootness in this case is based on intervening events and not on whether CARE received its requested relief, DBr. 35, is also wrong. In *Brach*, the plaintiffs sued the California Governor challenging the constitutionality of an executive order allowing schools to suspend operations during the COVID-19 pandemic. Prior to the plaintiffs' filing the case, the governor rescinded the executive order and the state announced the 2020-21 School Reopening Framework, which "ratcheted in only one way towards reopening." *Brach at 10.* Thereafter, the state issued a 2020-22 Guidance lifting all restrictions on school reopening and by the time the case was before the *en-banc* panel all schools had been open for more than a year and the School Reopening Framework had been revoked. *Id.* 9-10. Thus, there was no state order for the court to declare unconstitutional or to enjoin and the parents conceded that there no longer was a barrier to school reopening for in

person learning. *Id.* After noting that "the parents have gotten everything they asked for" *Id*. at 11, the Court held that the case was moot because of intervening events. *Id.* at 15.[3]

The facts here are totally different from *Brach*. First, unlike *Brach*, RD has not altered any of the regulations that were challenged in the Plaintiffs' complaint. Second, the sale and preservation of Golden Eagle was not an object of this litigation and therefore it is not an intervening event that could moot CARE's claims. And third, RD rescinded its Golden Eagle prepayment decision in response to this litigation, thereby bringing the voluntary cessation exception into play. In short, *Brach* dos not support Defendants' argument.

3. CARE is entitled to stop RD from continuing to apply illegal regulations to prepayment decisions in Tillamook and surrounding counties.

The Defendant's argument that CARE is not entitled to maintain this action to challenge future RD actions, DBr. 37, is yet another instance where the Defendants have taken a statement out of context and mischaracterized the nature

[3] Nonetheless, the parents asked the court to use the voluntary cessation exception to determine whether the state's earlier actions violated federal law. The Court refused to apply the exception because the governor's rescission of the executive order preceded the parents filing their case. Moreover, it held that the state's unequivocal renunciation of any intent to close schools in the future made the imposition of new restrictions speculative. *Brach* at 13.

of the relief that CARE is seeking. The complaint here sought to enjoin RD from continuing to apply illegal regulations dealing with the prepayment of Section 515 projects and the operation of the voucher program, in a manner that will continue to frustrate CARE's mission and increase CARE's financial and personnel burdens in Tillamook and surrounding counties. *See* ER 092. Should CARE prevail in showing that the applicable RD regulations are illegal, the injunction would prevent RD from relying on these invalid regulations when approving future prepayments of any development where the prepayment would affect CARE's mission by increasing its financial and personnel burdens in Tillamook and surrounding counties. *Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009). The fact that there are no prepayment applications currently pending is irrelevant since CARE is not seeking to stop a particular prepayment but is seeking to enforce the injunction should it be issued.

Moreover, under the voluntary cessation exception to mootness, which CARE argues continues to be applicable to this case, the fact that no prepayment application is currently pending is also irrelevant. In *Rosemere,* this Court held that, under the voluntary cessation exception, the EPA's argument, that the adjudication of any new administrative complaint would be delayed was speculative, must be rejected because it impermissibly shifted the burden onto the

plaintiffs to prove that they would file a new administrative complaint when the heavy burden is on the agency to show that the plaintiff would not file a new complaint in the future. The Court held that the defendant could not meet that burden by merely arguing that the plaintiff had not done enough to show future harm. *Id.* at 1173-74.

Significantly, in *Rosemere,* this Court also noted that a plaintiff's stated intention to resume the activity that led to litigation is sufficient to overcome the agency's argument that it has met its burden of showing that the plaintiff will not encounter the challenged action again. *Id.* at 1174. CARE's statement that it would continue to challenge future RD prepayments and to file new lawsuits is simply an affirmation of its continued interest in averting future prepayments based on the illegal regulations at issue. *Id.*; *S.Or. Barter Fair v, Jackson* 372 F.3d 1128, 1134 (9th Cir. 2004); *McFalls v. Purdue,* 2018 WL 785866, *4 (D.Or. Feb. 8, 2018). Thus, Defendants' argument that CARE is not entitled to challenge future RD actions is without merit.

The Defendants' reliance on *People of Village of Gambell v. Babbitt*, 999 F.2d 403, 408 (9th Cir. 2003) to support their claim that CARE's future claims are moot, DBr. 30-31 is misplaced. In *Babbitt,* the court declined to issue declaratory or injunctive relief because the government declared that no future lease sales are contemplated in the area about which the plaintiffs are concerned. *Id*. This is not

the case here. RD has no control over whether an eligible owner in Tillamook or surrounding counties will seek to prepay a loan and it has not modified its regulations to prevent future violations. Thus, *Babbitt* is inapposite to this case, and the Defendants' argument that CARE no longer has standing to maintain this case is meritless.

CONCLUSION

The Defendants fail to support or justify the district court's flawed decision except by using unsupported arguments that distort the nature of this case and the relief to which CARE is entitled. In fact, their response highlights the errors in the courts reasoning and decision. Accordingly, the Plaintiffs ask that Defendants' arguments be rejected and the district court's decision reversed.

Dated this 2nd Day of February 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

CASE Number 22-35539

I am the attorney for CARE.

This brief contains 5,496 words.

The brief's type size and typeface comply with Federal Rule App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/ Gideon Anders Feb. 2, 2023