

eviction moratorium that the Commission ordered on August 31, 2021, rescinded on February 25, 2022, and replaced with a second temporary eviction moratorium, which ended on March 31, 2022. For the sake of convenience, and consistently with its legal arguments presented below, NELF will refer to these orders collectively as the Commission's eviction moratorium.

I. THIS CASE SHOULD NOT BE DISMISSED AS MOOT BECAUSE IT IS OF CRUCIAL PUBLIC IMPORTANCE, IS CAPABLE OF REPETITION, YET EVADES JUDICIAL REVIEW.

While the Commission's eviction moratorium has ended, "an exception to the mootness doctrine exists where a case is *capable of repetition, yet evading review* In such circumstances, we do not hesitate to reach the merits of cases that no longer involve a live dispute so as *to further the public interest*." *Guardianship of D.C.*, 479 Mass. 516, 520 (2018) (cleaned up) (emphasis added). See also *Ott v. Boston Edison Co.*, 413 Mass. 680, 683 (1992) (exception to mootness applies where "(1) the issue was fully argued on both sides; (2) the question was certain, or at least very likely, to arise again in similar factual circumstances; (3) where appellate review could not be obtained before the recurring question would again be moot; and (4) *most importantly*, the issue was of public importance.") (emphasis added); *Wolf v.*

represented a party in a proceeding or legal transaction that is at issue in this appeal.

Comm'r of Pub. Welfare, 367 Mass. 293, 299 (1975) (“This is a case of asserted importance, capable of repetition, yet evading review[.] . . . [T]he claim . . . is likely to be mooted by the mere passage of time during the appeal process.”) (cleaned up) (emphasis added).

Moreover, a party should not be permitted to create mootness, as in this case, by voluntarily ceasing its disputed conduct before an appellate court of the Commonwealth can determine the validity of that conduct. See *eVineyard Retail Sales-Massachusetts, Inc. v. Alcoholic Beverages Control Comm'n*, 450 Mass. 825, 829-30 (2008) (internet wine seller who unlawfully sold alcohol to minors could not evade suspension of alcohol license by allowing license to lapse and then applying for new license).

A. At Issue Is The Very Constitutionality Of The Commission's Unauthorized Eviction Moratorium.

According to these key precedents, this case should proceed on the merits, even though the Commission has recently ended the moratorium. First, a decision on the merits clearly “furthers the public interest” and is “of asserted importance,” under the Supreme Judicial Court precedents quoted above. This is because § 7(5) of the Home Rule Amendment to the Massachusetts Constitution forbids local government from regulating the landlord-tenant relationship, such as with the eviction moratorium, unless the Legislature has

explicitly authorized local government to do so.² See *Ash v. Attorney Gen.*, 418 Mass. 344, 349 (1994) (landlord-tenant relationship is a “civil relationship” under § 7(5) of Home Rule Amendment, and local government cannot regulate that civil relationship unless “the Legislature has *explicitly delegated* that power to the municipality.”) (emphasis added).³

Notably, the Single Justice order of February 14, 2022, which is the subject of Case No. 2022-P-0155, and which is paired with this case, makes *no mention* of § 7(5) of the Home Rule Amendment. Similarly, that Single Justice order erroneously relies on *Grace v. Town of Brookline*, 379 Mass. 43 (1979), for the proposition that

² Section 7 of Amended Article 2 of the Massachusetts Constitution, titled “Limitations on Local Powers,” provides, in relevant part:

Nothing in this article shall be deemed to grant to any city or town the power . . . (5) to enact private or civil law *governing civil relationships* except as an incident to an exercise of an independent municipal power; . . . provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight[.]

Massachusetts Constitution 2, § 7(5) (emphasis added).

³ Contrary to the Commission’s assertions in its Motion to Dismiss, this central legal issue of the case has indeed been “fully briefed” and “fully argued,” in the Housing Court below. See Commission’s Motion to Dismiss, at 11-12. Therefore, the Commission has failed to establish this basis for not reaching the merits of this case.

the Supreme Judicial Court has generally approved a local government's issuance of an eviction moratorium for a period of six months. That is incorrect. *Grace* is entirely inapposite because in that case, unlike in this case, the Legislature had *explicitly* delegated to the town of the Brookline the power to regulate rents and the eviction process, "under the authority specifically granted to Brookline by St.1970, c. 843" *Grace*, 379 Mass. at 45. See also St.1970, c. 843 (titled "an Act to provide for the establishment and administration of rent regulation and the *control of evictions* in housing accommodations in the town of Brookline," and expressly authorizing Brookline to "regulate the evictions of tenants," in § 6 of that special law, titled "Defense to Summary Process for Possession") (emphasis added).

By contrast, *nowhere* has the Legislature expressly authorized the Commission to issue the eviction moratorium, whether by general or special law. Nor did the Commission ever seek permission from the Legislature to do so, such as by filing a Home Rule petition under § 8.⁴

⁴ Section 8 of the Home Rule Amendment, titled "Powers of the General Court," provides, in relevant part:

The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to [at least two cities and towns] . . . , and by *special laws* enacted (1) *on petition filed or approved by the voters of a city or*

Moreover, as a result of its unconstitutional imposition of an eviction moratorium, the Commission has also violated the plaintiffs' constitutional right to "hav[e] recourse to the laws, for all injuries or wrongs which [they] may receive in [their] person, property, or character." Mass. Const. Pt. 1, Art. 11. In particular, G. L. c. 239 is a detailed statutory scheme that balances the respective rights and duties of landlords and tenants with regard to the summary eviction process. The Commission's unlawful eviction moratorium has prevented the plaintiffs from enforcing their important judicial remedy provided by c. 239.

In sum, a final appellate judgment in this case is of the utmost public importance to preserve the structural constitutional limits on the exercise of the local police power, to uphold the constitutionally permissible process for expanding the exercise of that local power, and to protect the constitutional right of landlords throughout the Commonwealth to enforce their statutory remedies governing the eviction process.

town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor

Massachusetts Constitution 2, § 8 (emphasis added).

B. The Imposition of An Unauthorized Local Eviction Moratorium Is Likely To Recur.

Next, the issue in this case is “capable of repetition” because it is likely to recur in the near future. The Commission, or any other local governmental authority in the Commonwealth, for that matter, could decide in the near future, *without* obtaining legislative approval, that another public health or economic emergency, whether Covid-related or not, warrants another temporary eviction moratorium.

The strong possibility of another such unauthorized local order in the near future is greatly increased by the lingering and uncertain duration of the pandemic;⁵ the resulting exacerbation of global supply-chain problems, causing shortages of products and fuel, and inflationary prices overall;⁶ and the additional spiraling

⁵ Indeed, the number of coronavirus infections in the Commonwealth is increasing, according to official state data measuring the presence of the coronavirus in wastewater in Massachusetts (a reliable indicator of the number of infections in the general population). See <https://www.mwra.com/biobot/biobotdata.htm>. See also Mass. Guide to Evid. § 201(b)(2) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from *sources whose accuracy cannot reasonably be questioned.*”) (emphasis added); *Gent v. CUNA Mut. Ins. Soc’y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (“[W]e take judicial notice of the relevant facts provided on the [CDC] website, which are ‘not subject to reasonable dispute’ . . . [under] Fed.R.Evid. 201(b), (f).”).

⁶ See Ben Casselman and Ana Swanson, *Supply Chain Hurdles Will Outlast Pandemic, White House Says*, N. Y. Times (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/biden-supply->

fuel costs and worldwide food shortages resulting from countries' responses to Russia's war against Ukraine.⁷ In short, the fragile and volatile global health and economic situation could result in another unauthorized temporary eviction moratorium in Boston, or anywhere else in the Commonwealth, in the foreseeable future.

Indeed, Boston is not the only local government in the Commonwealth to have ordered an unauthorized eviction moratorium during the Covid pandemic. Notably, the city of Somerville has recently extended its eviction moratorium until June 30, 2022.⁸ In addition, the city of Cambridge and the town of Brookline had implemented temporary eviction moratoria earlier in the pandemic,

[chain.html?searchResultPosition=1](#) ("The coronavirus pandemic and its ripple effects have snarled supply chains around the world, contributing to shipping backlogs, product shortages and the fastest inflation in decades. . . . White House economists argue[, however,] that while the pandemic exposed vulnerabilities in the supply chain, it didn't create them--and they warned that the problems won't go away when the pandemic ends.").

⁷ See Abdi Latif Dahir, *War in Ukraine Compounds Hunger in East Africa*, N.Y. Times (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/world/africa/food-crisis-africa-drought-ukraine.html?searchResultPosition=3>; Helen Thompson, *It's Not Just High Oil Prices. It's a Full-Blown Energy Crisis*, N.Y. Times (Apr. 23, 2022), <https://www.nytimes.com/2022/04/23/opinion/oil-gas-energy-prices-russia-ukraine.html?searchResultPosition=8>.

⁸ See <https://www.somervillema.gov/news/board-health-approves-extensionsunset-period-somerville-eviction-moratorium>.

in 2020 and 2021 respectively.⁹

This case is clearly distinguishable from *City of Lynn v. Murrell*, 2022 WL 1298832 (No. SJC-13193, May 2, 2022), in which the Supreme Judicial Court recently dismissed as moot a business's challenge to the Governor's 2020 emergency executive orders authorizing a statewide mask mandate in all places of employment, and requiring the same in all public places.

Unlike the Commission's eviction moratorium, however, the Governor issued the disputed emergency orders in *Murrell* in 2020, at the *early* stages of the pandemic. See *Murrell*, 2022 WL at 1298832, at *1 (workplace order issued on June 6, 2020; statewide mask mandate in all public places issued on November 6, 2020.). Moreover, the Governor rescinded those orders nearly *one year* ago, on May 28, 2021. See *Murrell*, 2022 WL at 1298832, at *2. What's more, the Governor issued those emergency orders when there was no available vaccine, and when there were no widely available home test kits, let alone available home treatments. See *Murrell*, 2022 WL 1298832, at *4 ("[Protective] [m]easures now available include

⁹ See <https://www.cambridgema.gov/news/2020/11/evictionmoratoriumandtenantprotection>;
<https://www.cambridgema.gov/covid19/News/2021/05/cityofcambridgetoliftremainingcovid19restrictions>;
<https://brooklinecovid19.com/2020/06/02/june-2-evictions-and-landlord-access-restricted-in-brookline-plus-case-updates/>.

multiple types of COVID-19 tests, vaccines, and COVID-19 treatments that can be administered at home.”). In short, the repealed executive orders in *Murrell* are not likely to recur, because the intervening material improvements in the treatment and containment of the pandemic obviate the need for such statewide emergency orders.

By contrast, these significant improvements in the management and treatment of the pandemic, discussed in *Murrell*, have apparently made little to no difference to local government when deciding to issue or extend an unauthorized eviction moratorium. In particular, the Commission issued its eviction moratorium on August 31, 2021, months *after* the Governor had already rescinded the emergency executive orders at issue in *Murrell*, and months *after* a vaccine had become available to the general public. Moreover, the Commission rescinded the moratorium less than two months ago, on March 31, 2022. What’s more, the city of Somerville recently *extended* its eviction moratorium until June 30, 2022, as amicus has discussed above.

These facts clearly show the stubborn persistence and likely recurrence of an unauthorized local eviction moratorium, *despite* the current availability of vaccines, home tests, and even home treatments. Therefore, those underlying changes have *not* reduced to mere speculation the likely recurrence of another unauthorized

local eviction moratorium.

In sum, there is a strong likelihood that the Commission, or any other local government in the Commonwealth, could order another eviction moratorium in the near future, but without first obtaining the legislative approval required by the Massachusetts Constitution. Therefore, the central and crucial issue presented in this case--the validity of an unauthorized local eviction moratorium--is capable of repetition and should override the mootness doctrine.¹⁰

C. The Very Nature Of A Temporary Eviction Moratorium Evades Judicial Review.

It goes without saying that the very nature of a temporary eviction moratorium "evades review" under the Supreme Judicial Court's exception to mootness. The limited duration of such a measure makes it difficult, if not impossible, to pursue the appellate process and obtain a final judgment on the issue. As a

¹⁰ Contrary to the Commission's arguments in its Motion to Dismiss, it would make no difference *how* future eviction moratoria were worded, or whether future moratoria were to differ from the eviction moratorium at issue in this case. See Commission's Motion to Dismiss, at 15 ("A theoretical future moratorium might also apply to a different step of the eviction process (instead of applying to the levy upon an execution). It might apply to a different subset of landlords, tenants, or eviction cases. And it might differ in other ways to be responsive to the particular characteristics of the theoretical future COVID-19 or other public health emergency."). Regardless of such details, any unauthorized local attempt to regulate the landlord-tenant relationship would be

result, local government could implement unauthorized temporary eviction moratoria repeatedly and thereby escape any judicial consequences for their unlawful actions. A final appellate decision is therefore especially important in this case, to establish a *binding precedent* applicable to all forms of local governments in the Commonwealth, in the event that contemplate an unauthorized eviction moratorium, now or in the future.

unconstitutional under § 7(5) of the Home Rule Amendment, as amicus has discussed above.

II. THE COMMISSION SHOULD NOT BE ALLOWED TO *CREATE* MOOTNESS BY VOLUNTARILY ENDING THE DISPUTED EVICTION MORATORIUM BEFORE THIS COURT CAN DECIDE THE VALIDITY OF THAT MORATORIUM.

The evasion of judicial review is particularly troubling when as here, a local government voluntarily ends the challenged action just as the case begins the appellate process. See *eVineyard Retail Sales*, 450 Mass. at 829-30 (discussing same). In this connection, the United States Supreme Court has provided a powerful statement of why a (federal) court should decide the merits of a case when a party's own conduct has potentially rendered that case moot. Accordingly, the High Court has announced a demanding standard of proof under those circumstances, in which the party asserting mootness must prove that the challenged action "could not reasonably be expected to recur":

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, the courts would be compelled to leave *the defendant free to return to his old ways*. . . . In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if *subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*. . . . The *heavy burden of persuading* the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528

U.S. 167, 189 (2000) (cleaned up) (emphasis added).

Under this appropriately demanding standard of proof, the Commission cannot show that "subsequent events ma[k]e it absolutely clear that" another unlawful eviction moratorium "could not reasonably be expected to recur," in light of the lingering and volatile worldwide health and economic crises that NELF has discussed in some detail above.

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court deny the defendants-appellants' motion to dismiss this case under Mass. R. App. P. 29(b), and that the Court decide the merits of the case.

Respectfully submitted,

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May 9, 2022

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 9th day of May, 2022, I served the within memorandum of law, in *Avila & others v. Boston Public Health Commission & others*, 2022-P-0118, by causing it to be delivered by eFileMA.com to: counsel for the Plaintiffs-Appellees, Jordana Greenman, jordana@jrglegal.com; counsel for the Defendants-Appellants, Batool Raza, braza@bphc.org, and Katherine Jones, katherine.jones@boston.gov; and counsel for the intervener-appellant, Gary Klein, gklein@gbls.org.

Signed under penalties of perjury.

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