No. 22-2085

United States Court of Appeals
for the Fourth Circuit

ELIZABETH ETHERTON,

Plaintiff–Appellant,

v.

JOSEPH R. BIDEN, *in his official capacity as President of the United States*; OFFICE OF HEAD START; BERNADINE FUTRELL, PH.D., *in her official capacity as Director of the Office of Head Start*; ADMINISTRATION FOR CHILDREN &FAMILIES; JOOYEUN CHANG, *in her official capacity as Acting Assistant Secretary and Principal Deputy Assistant Secretary for the Administration for Children &Families*; DEPARTMENT OF HEALTH & HUMAN SERVICES; XAVIER BECCERA, *in his official capacity as Secretary of the Department of Health & Human Services*,

Defendants–Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 1:22-cv-00195-LMB-JFA

OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT

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INTRODUCTION

Appellant Elizabeth Etherton submits this Opposition to Appellees' Motion to Dismiss this Appeal as Moot (Dkt. 22). Defendants are correct that the administration has now backed off, at least for now, from the vaccination and masking mandates Etherton challenges. But that does not render the case moot. This case satisfies the voluntary cessation exception to the mootness doctrine as well as the exception for government actions that are capable of repetition but evading review.

Defendants have vigorously defended the legality of their Head Start mask and vaccine mandates ("the Rule") throughout this litigation, and in numerous other cases throughout the country. They have not offered any assurances to Etherton that they will not reenact the Rule if the administration later believes that COVID-19 conditions have worsened again. Indeed, even the announcement of the repeal reiterates the importance of COVID-19 vaccines and encourages Head Start programs to continue requiring vaccines on their own initiative. And the nature of virus-related restrictions means that any future mandates may be similarly amended or repealed before a challenge such as this one has

the time to work its way through the court system. This case is therefore anything but moot.

ARGUMENT

The "[g]overnment . . . bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). "'[V]oluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 2607; *see also Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring).

Trinity Lutheran confirms that government actors confront a particularly heavy burden to demonstrate mootness in the context of voluntary cessation. There, a state offered state funds to schools and nonprofits to help them build playgrounds but excluded churches from

this program. 137 S. Ct. at 2017. A church sued, claiming the exclusion violated the Free Exercise Clause, and lost at the district court and before the court of appeals. *Id*. at 2018-19. While the church's appeal was pending at the Supreme Court, the state's governor announced "that he had directed the [state] to begin allowing religious organizations to compete for and receive [state agency] grants on the same terms as secular organizations." *Id*. at 2019 n.1. The Court held that the state had not "carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." *Id*. Thus, the case was not moot. *Id*. Just as in *Trinity Lutheran*, here the administration has announced a voluntary change in policy, but nothing more. That is not enough, by itself, to meet the "absolutely clear" standard articulated by the Supreme Court's voluntary cessation jurisprudence.

Defendants understandably rely on this Court's decisions in *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157 (4th Cir. 2021) and *Eden, LLC v. Justice*, 36 F.4th 166 (4th Cir. 2022), but those cases are readily distinguishable. Those were cases about *lockdown* policies, rather than vaccination. The church in *Lighthouse* had been cited for

holding worship services with greater attendance than Virginia's social distancing policies allowed. 20 F.4th at 160. Plaintiffs in *Eden* included business owners who similarly objected to the shutdown of their businesses, along with parents of school children who had struggled with remote learning. 36 F.4th at 168. When the lockdowns ended, this Court found those cases moot because there was no reasonable possibility that the lockdown orders would be reimposed.

But this case is not about stay-at-home orders, or gathering restrictions, or any of the other society-wide emergency measures that we may never return to. This is about a more specific policy that the administration targeted at a specific group: schoolteachers who declined to get vaccinated. A reimposition of such a mandate would not require the complete upending of society that took place in 2020—indeed, vaccination mandates have often been advocated as a less intrusive alternative to lockdowns. *See, e.g.*, American Civil Liberties Union, *Civil Liberties and Vaccine Mandates: Here's Our Take*.[1] A new variant of the virus could well put public health authorities back on a war footing; and

[1] https://www.aclu.org/news/civil-liberties/civil-liberties-and-vaccine-mandates-heres-our-take.

given the political limits on broad lockdowns, targeted vaccination requirements may well be the *first* pandemic policy to return.

Indeed, Defendants have not even now disclaimed their push for teachers like Etherton to get vaccinated; they're just declining to enforce the policy themselves. As their own website says "Although ACF will remove the vaccine and testing requirements, ACF strongly recommends that Head Start programs use vaccines and tests as part of their mitigation policy to reduce the spread of COVID-19 and reduce the likelihood of mortality or morbidity from infection."[2] Etherton submits that Defendants have not "carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy" of requiring by rule what they *continue* to strongly recommend. *Trinity Lutheran*, 137 S. Ct. at 2019 n.1.

A government actor's failure to offer assurances that its wrongful conduct will not reoccur is a factor weighing against mootness. *West Virginia*, 142 S. Ct. at 2607. This is especially so when the government actor defends the conduct's legality. *Id*.

[2] Head Start ECLKC, About Us, *Head Start Vaccine and Testing Announcement*, *available at* https://eclkc.ohs.acf.hhs.gov/about-us/press-release/head-start-vaccine-testing-announcement.

Defendants continue to insist on the legality of the Rule, just as the EPA defended the rule's legality in *West Virginia*. There, the D.C. Circuit reinstituted the EPA's Clean Power Plan and a group of parties appealed the Plan's legality to the Supreme Court. *Id.* at 2603-06. The EPA claimed the case was moot because it had no intention of enforcing the Plan while it considered promulgating a new rule. *Id.* at 2607.

But the Supreme Court held that it was a live controversy. *Id.* at 2607. It explained that the EPA's burden of showing mootness was "'heavy'" because the "'[t]he only conceivable basis for a finding of mootness in th[e] case is [its] voluntary conduct." *Id.* (quotation omitted). It held that it was not "'absolutely clear'" that "'the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quotation omitted). It reasoned that the EPA "'nowhere suggest[ed] that if this litigation is resolved in its favor it [would] not' reimpose [the Plan] . . . indeed, it 'vigorously defends' the legality of such an approach." *Id.*

As in *West Virginia*, Defendants' voluntary conduct is the only conceivable basis for a finding that the challenge to the vaccine and mask mandates is moot. Thus, Defendants bear a heavy burden of

showing that it is "absolutely clear" that their wrongful behavior in promulgating the Rule will not reoccur. They cannot meet that burden. They make no assurances that that the administration will not reimpose the vaccine and mask mandates if COVID cases and hospitalizations increase. Instead, they have vigorously defended the Rule's legality in litigating this case and cases in other courts. *See, e.g.*, *Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489, 490 (6th Cir. 2022) (6th Cir.); *Texas v. Becerra*, No. 5:21-CV-300-H, 2023 U.S. Dist. LEXIS 56119, at *88 (N.D. Tex. Mar. 31, 2023).

The nature of pandemic restrictions also weighs against a finding of mootness, as *Roman Catholic Diocese* shows. There, the New York governor issued COVID-19 orders limiting attendance at religious services depending on whether their locality was categorized as a "'red' or 'orange' zone." 141 S. Ct. at 66. He also "regularly change[d] the classification of particular areas without prior notice." *Id*. at 68. The governor changed the capacity limits for the religious groups' locality after they asked the Supreme Court for an emergency stay. *Id*.

But the Court held that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question

will be reclassified as red or orange." *Id.* at 68. The Court noted: "If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* In concurrence, Justice Gorsuch reasoned that the fact that churches and synagogues "had been subject to unconstitutional restrictions for months" and that the Governor recently changed the restrictions for their location "only advances the case for intervention." *Id.* at 71. He explained that "just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant." *Id.* at 72. Thus, declining review would "sacrifice" the rights at stake because "nothing would prevent the Governor from reinstating the challenged restrictions tomorrow" and "the Governor has fought this case at every step of the way." *Id.*

The same is true here: nothing prevents Defendants from reinstating the mask and vaccine mandates if COVID conditions worsen in the coming months. In fact, the Biden Administration continues to defend the Rule's wisdom. In its announcement that it was repealing the vaccine mandate, it asserts that "vaccination remains one of the most

important tools in advancing the health and safety of employees and promoting the efficiency of workplaces." White House announcement ending vaccine mandate, May 1, 2023.[3]

Again, the separate announcement from the Agency also states that "[a]lthough the [U.S. Department of Health and Human Services' Administration for Children ("AFC")] will remove the vaccine and testing requirements, ACF strongly recommends that Head Start programs use vaccines and tests as part of their mitigation policy to reduce the spread of COVID-19 and reduce the likelihood of mortality or morbidity from infection." *See supra,* n.2.

The Defendants violated the Constitution's separation of powers by issuing the mask and vaccine mandates without Congressional authorization. And they have offered Etherton no assurances that the administration will not reinstate the mask or vaccine mandate in the face of a new wave of COVID-19. The facts of this case therefore present

[3] https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/.

nothing close to the absolute clarity required by binding Supreme Court precedent.

CONCLUSION

For the foregoing reasons, this Court should deny the motion to dismiss this appeal as moot.

Dated: July 20, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume limit of Federal Rule of Appellate Procedure 27(d) because it contains 1,737 words. I also certify that it complies with Rule 27(d) because it was prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font, size 14.

Dated: July 20, 2023 /s/ Reilly Stephens

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2023, I electronically filed the foregoing using the CM/ECF system, which will send a notification of electronic filing to the following counsel of record.

Dated: July 20, 2023 /s/ Reilly Stephens

Attorney for Plaintiff-Appellant