22-1257

United States Court of Appeals
for the Sixth Circuit

LIVINGSTON EDUCATIONAL SERVICE AGENCY and WAYNE-WESTLAND COMMUNITY SCHOOLS,
Plaintiffs – Appellants,
v.
XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JOOYEUN CHANG, in her official capacity as Assistant Secretary and Principal Deputy Assistant Secretary of the Administration for Children and Families; ADMINISTRATION FOR CHILDREN AND FAMILIES; and BERNADINE FUTRELL, in her official capacity as the director of the Office of Head Start,

Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:22-cv-10127
Honorable Nancy G. Edmunds

PETITION FOR PANEL REHEARING

Jacob Huebert
LIBERTY JUSTICE CENTER
440 N. Wells St., Suite 200
Chicago, Illinois 60654
(312) 637-2280

Amy E. Murphy
Rebecca L. Strauss
Brett Swearingen
MILLER JOHNSON
45 Ottawa Ave SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700

Attorneys for Plaintiff-Appellant

Pursuant to Federal Rule of Appellate Procedure 40(a), Plaintiffs respectfully ask this Court to grant a panel rehearing of this case. The Court *sua sponte* dismissed Plaintiffs-Appellants' challenge to the Department of Health and Human Services' Head Start vaccine mandate as moot after the Department rescinded the rules that Plaintiffs challenge. But the parties never briefed the question of mootness, and Plaintiffs respectfully submit that the Court's dismissal was erroneous because this case satisfies the mootness doctrine's exceptions for voluntary cessation and government actions that are capable of repetition but evading review.

The Government has vigorously defended the legality of its Head Start vaccine mandate throughout this litigation and other litigation challenging the mandate. The Government has not offered any assurances to Plaintiffs that it will not reenact the Rule if it later believes that COVID-19 conditions have worsened. Nor has it promised to refrain from imposing a vaccine mandate in response to other diseases. Instead, the Government reiterated the importance of COVID-19 vaccines to containing the virus even as it announced that it would rescind the mandate. The evolving nature of viruses also makes it more likely that restrictions will recur, whether it be for this virus or others. And the nature of virus-related restrictions means that any future mandates may be amended or repealed before a case has the time to work its way through the court system. Under these circumstances, the case is not moot.

STANDARD OF REVIEW

This Court has the authority to order a panel rehearing under Federal Rule of Appellate Procedure 40. Rehearing may be warranted when the panel has

"overlooked or misapprehended" a "point of law or fact[.]" *United States v. Shafer*, 573 F.3d 267, 276 (6th Cir. 2009); Fed. R. App. P. 40(a)(2). "In order to establish that a case is moot, the party asserting mootness 'bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Unan v. Lyon*, 853 F.3d 279, 288 (6th Cir. 2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000)).

ARGUMENT

I. Plaintiffs' challenge to the Rule's vaccine mandate is not moot.

Plaintiffs' challenge to the Rule's vaccine mandate is not moot because the Government's voluntary cessation of its challenged practice does not, in this circumstance, render Plaintiff's challenge moot, and because Plaintiffs challenge a government action that is capable of repetition but evading review.

A. The voluntary cessation exception to mootness applies.

The Government's repeal of the vaccine mandate does not warrant dismissal of this case under the mootness doctrine's exception for "a defendant's voluntary cessation of a challenged practice." *Unan*, 853 F.3d at 288. "'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.'" *Id.* 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).

"The burden of demonstrating mootness is a heavy one." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). "Although not dispositive, the Supreme Court has found whether the government 'vigorously defends the constitutionality of its . . . program' important to the mootness inquiry." *Id.* at 770 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).

This case is not moot under the voluntary cessation doctrine for at least two reasons: (1) because the Government has continued to defend the Rule's legality; and (2) because COVID-19 restrictions have a propensity to recur. Here, the Government's voluntary conduct is the only basis for a finding that the challenge to the vaccine mandate is moot. Thus, the Government bears a heavy burden of showing that it is absolutely clear that its wrongful behavior in promulgating the Rule will not recur.

1. The government has vigorously defended the mandates.

Here, the government maintains that its mandate was constitutional and has not suggested, let alone made absolutely clear, that it will not reimpose the vaccine

mandate if COVID cases and hospitalizations increase. Instead, in this case and others, it has vigorously defended the Rule's legality. *See Etherton v. Biden*, No. 22-2085 (4th Cir.); *Texas v. Becerra,* No. 5:21-CV-300-H, 2023 U.S. Dist. LEXIS 56119, *88 (N.D. Tex. Mar. 31, 2023); *Louisiana v. Becerra*, No. 3:21-03970, 2022 U.S. Dist. LEXIS 218899 (W.D. La. Nov. 3, 2022), *appeal docketed*, No. 22-30748 (5th Cir. Nov. 21, 2022).

Trinity Lutheran also shows that the Government has not met its burden. 137 S. Ct. at 2017. There, a state offered state funds to schools and nonprofits to help them build playgrounds but excluded churches from this program. *Id.* A church sued claiming the exclusion violated the Free Exercise Clause and lost at the district court and courts of appeals levels. *Id.* at 2018-19. While its 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. But 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.*

So too here. The Government has not made it absolutely clear that it could not revert to its policy of mandating vaccines for Head Start staff, contractors, and volunteers. Accordingly, this case is not moot.

2. COVID-19 restrictions have a propensity to recur.

The nature of pandemic restrictions also weighs against a finding of mootness as *Roman Catholic Diocese* shows. There, New York's 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.* 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.*

Justice Gorsuch's concurrence explained that the shifting nature of COVID-19 restrictions and the government's continued defense of their legality weighed against a finding of mootness. *Id.* at 71-72 (Gorsuch, J., concurring). He 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.*

Likewise, nothing prevents the Government from reinstating the vaccine mandate if COVID conditions worsen in the coming months. In fact, the Biden Administration continues to defend the Rule's wisdom. When it announced that it would repeal the vaccine mandate, the Administration also asserted that "vaccination remains one of the most important tools in advancing the health and safety of employees and promoting the efficiency of workplaces." *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities*, THE WHITE HOUSE (May 1, 2023).[1] The Department's separate announcement also stated that "[a]lthough the [Department's Administration for Children ("AFC")] will remove the vaccine and testing requirements, AFC 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] Thus, the Department has not renounced the wisdom or legality of its policies.

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[1] 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/.

[2] https://eclkc.ohs.acf.hhs.gov/about-us/press-release/head-start-vaccine-testing-announcement

Additionally, the Government repealed the vaccine mandate just as this Court's decision on the merits in this case was imminent, briefing was completed on the *Louisiana v. Becerra* challenge before the Fifth Circuit, and *Texas v. Becerra* had ordered nationwide vacatur of the Rule, 2023 U.S. Dist. LEXIS 56119, at *88. And the Government has not offered Plaintiffs any assurances that it will not reinstate the vaccine mandate if COVID-19 cases increase.

B. The mootness doctrine's exception for government actions that are capable of repetition yet evading review applies.

This case also satisfies the mootness doctrine's exception for government actions that are "capable of repetition yet evading review." That exception applies where the challenged action is "too short in duration to be fully litigated before it ceases" and there is "a reasonable expectation that the same parties will be subjected to the same action again.'" *Wilson v. Gordon*, 822 F.3d 934, 951 (6th Cir. 2016). A case evades review if its duration is too short to receive "complete judicial review," including Supreme Court review. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Both elements are satisfied here.

First, COVID-19's rapidly evolving nature and the government's corresponding rapidly evolving restrictions have made it difficult for parties challenging such restrictions to obtain complete judicial review before the restrictions are amended or repealed. *Roman Catholic Diocese* is again instructive. The Court held that the stay request in that case was not moot because "[t]he Governor regularly changes the classification of particular areas without prior notice." 141 S. Ct. at 68. The

Court concluded that "[i]f that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* The Court explained that if the governor were to reinstate the restrictions, then the Court might not be able to issue a stay quickly enough to ensure the religious groups could attend that week's planned religious services. *Id.*

Justice Gorsuch's concurrence added that it had taken "weeks" for the religious groups to "work their way through the judicial system and bring their case to us." *Id.* at 71 (Gorsuch, J., concurring). Thus, *Roman Catholic Diocese* shows that COVID-19 conditions and corresponding restrictions change too quickly for judicial review.

Here, while Plaintiffs' case has been pending since January 20, 2022, and Plaintiffs have been diligent in pursuing their challenge to the Rule, there has not been enough time to receive a final appellate resolution of the Rule's legality. That is unsurprising, given that COVID-19 conditions and government restrictions in response have constantly evolved and cannot be expected to remain static for years at a time.

In other circumstances, the Supreme Court has held that months and even years is too short of a window for a party to seek review. *See, e.g., Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 170 (2016) (two years too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (twelve months too short); *Bellotti*, 435 U.S. at 774 (eighteen months too short); *S. Pac. Terminal Co. v. Interstate Commerce Com.*, 219

U.S. 498, 515 (1911) (two years too short). COVID-19 restrictions likewise evade review, given how long it takes to litigate a case from start to finish and how quickly COVID-19 restrictions evolve.

Second, this case is capable of repetition because COVID-19 restrictions have a propensity to recur, as *Roman Catholic Diocese* shows. Just as the governor in that case gave no assurances that he wouldn't reimplement the restrictions on religious gatherings if the Supreme Court dismissed the application for a stay, so too the Government has not promised that it will not impose the Rule under review here if COVID-19 conditions change or another disease emerges. Thus, this case also satisfies the capable of repetition but evading review exception to mootness.

C. This case is distinguishable from *Resurrection School v. Hertel*

In dismissing this case as moot, the panel cited *Resurrection School v. Hertel*, 35 F.4th 524 (6th Cir. 2022). In *Hertel*, this Court dismissed as moot a Free Exercise Clause challenge to a statewide mask mandate that the Governor of Michigan issued in April 2020 (and later extended) before rescinding in April 2021.

This case is distinguishable from *Hertel*, however, because the mandate Plaintiffs challenge is more capable of repetition (yet evading review) than the *Hertel* mandate. The *Hertel* mandate was a "product of the pandemic's early stages." *Id.* at 530. Here, the Head Start mandate was instituted over a year and half into the pandemic. When the *Hertel* mandate was implemented, no vaccine was available. *Id.* at 529. But by the time the Department implemented the mandate at issue here, a COVID-19 vaccine had been available under emergency use

authorization for nearly a year (since December 11, 2020), and widely available since August 23, 2021. *FDA Approves First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMINISTRATION (Aug. 23, 2021).[3] Moreover, the Department still believes vaccination to be as important as ever and continues to promote it. *The Biden-Harris Administration*, *supra* note 1. That promotion, coupled with the Department's continuing belief in the validity of the Rule, make this case ripe for repetition.

Further, *Hertel* noted that "any future masking order likely would not present substantially the same legal controversy as the one originally presented here" in light of the Supreme Court's recent rulings on COVID-19 restrictions that implicate the Free Exercise Clause. *Hertel*, 35 F.4th at 529. But this case does not implicate the Free Exercise Clause; rather, it is about whether Defendants had the statutory authority to issue the mandate that Plaintiffs challenge. A future Head Start vaccine mandate would be virtually certain to present the same legal controversy as this case.

In addition, the timing of the Department's recission raises greater concern that the rescission occurred to evade judicial review than the State's rescission of the mask mandate in *Hertel*. *Hertel* determined that the State had rescinded its mask mandate "not in response to [the] lawsuit, but eight months later." *Id.* at 529. Here, as discussed above, the Department rescinded its mandate just as this Court—and

[3] https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

the Fifth Circuit—were about to rule on the legality of the mandates. That timing raises at least the "'suspicion[] that its cessation [was] not genuine.'" *Id.* (quoting *Speech First*, 939 F.3d at 769).

Finally, *Hertel* concluded that "relevant circumstances ha[d] changed dramatically since the Department imposed its statewide mask mandate." *Id.* The Court observed that, when Michigan's governor issued her mask mandate in October 2020, "nobody was vaccinated and treatments were less effective than they are now." *Id.* But there has been no such dramatic change since the introduction of the mandate Plaintiffs challenge here, which was introduced more than a year later than the mandate in *Hertel*, on November 30, 2021. *Id.*; 86 Fed. Reg. at 68,052. By that time, approximately 60 percent of the U.S. population had been vaccinated,[4] and more was known about treatment of COVID-19. Even if circumstances have changed, as one would expect with the evolution of an illness, the relevant circumstances have not *dramatically* changed.

Thus, *Hertel* should not control the outcome of this case, and the Court should conclude that this case, unlike *Hertel*, is not moot under the mootness doctrine's exceptions for voluntary cessation and government actions that are capable of repetition yet evading review.

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[4] *The U.S. COVID-19 Vaccination Program at One Year: How many Deaths and Hospitalizations Were Averted?* The Commonwealth Fund (Dec. 14, 2021) https://www.commonwealthfund.org/publications/issue-briefs/2021/dec/us-covid-19-vaccination-program-one-year-how-many-deaths-and (estimating COVID-related deaths and hospitalizations avoided due to U.S. vaccination through the end of November 2021).

CONCLUSION

This case should not be dismissed because two exceptions to the mootness doctrine apply: the exceptions for voluntary cessation and for government actions that are capable of repetition yet evading review. Plaintiffs-Appellants therefore respectfully ask the panel to rehear this case to reconsider its dismissal for mootness and reach a decision on the merits.

Dated: August 14, 2023

Respectfully Submitted,

/s/ Jacob Huebert
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280
jhuebert@libertyjusticecenter.org

Amy E. Murphy
Rebecca L. Strauss
Brett Swearingen
MILLER JOHNSON
45 Ottawa Ave SW, Suite 1100
Grand Rapids, Michigan 49503
(616) 831-1700
murphya@millerjohnson.com
straussr@millerjohnson.com
swearingenb@millerjohnson.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Century Schoolbook font, size 12, double-spaced, and is 2,777 words, which is under the limit of 3,900 for such a brief. It also does not exceed 15 pages. *See* Fed. R. App. P. 40.

/s/ Jacob Huebert