IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERICH SMITH, FRANK E. GARWOOD, JR., MARIBEL LORENZO, and Dr. DANIEL DONOFRIO Plaintiffs-Appellants, vs. PRESIDENT JOSEPH R. BIDEN, JR. (in his official capacity and any successor to the Office of the President) Defendant-Appellee .	No. 21-3091

OPPOSITION TO MOTION TO DISMISS

Neither the case, nor this appeal are moot and the appeal should not be dismissed. It should be decided. There is continuing harm from the mandates that has not been resolved and which is not addressed in the Government's motion. Pursuant to the mandates, an infrastructure was created and information was collected, including information about people's medical decisions concerning whether to take a vaccine, information about people's medical conditions that they otherwise would not have had to disclose to their employer or the government to request accommodation, and information about deeply personal religious beliefs that

would otherwise never be known to the government or their employer. That information has been collected and is, presumably, being stored somewhere. The Workers submitted this private information to the government under the coercion of the unconstitutional pharmaceutical mandates and this ongoing invasion of privacy is a continuing effect of the rescinded mandates. This Court can provide meaningful relief and restore the Workers privacy in accord with Supreme Court precedent. *See Church of Scientology of California v. United States*, 506 *U.S.* 9, 13 (1992) (holding that "[e]ven though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot"). For the same reasons, this case is not moot. Where there is a right, there is a remedy.

Moreover, with regard to the contractor mandate, a clause has been inserted in an unknown number of contracts throughout the country in which an unknown number of contractors and subcontractors have agreed that they "shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force." The Federal Taskforce still exists and could issue new guidance at the stroke of a pen

(executive order or perhaps a different source of authority), which would be automatically binding *via* these contract clauses. Moreover, the Workers would be affected by these contract clauses, but may lack standing to challenge them.

The President has ordered that policies be rescinded and he has rescinded the executive orders, but the procedures and the infrastructure created to track employees, as well the information collected, remains in place. As such, the controversy is live and continuing. The preliminary injunction poses the exact same legal question as the case below and is now simplified. The only question remaining is whether the mandates violate the constitution. Deciding whether the Workers were likely to prevail on the merits will decide the underlying lawsuit and resolve the controversy concerning whether the power to determine what medical procedures a Worker will undergo lies with the President or the individual.

This Court should deny the Government's motion to dismiss, declare that the mandates and their implementation violative of the Fifth Amendment right to liberty and/or otherwise *ultra vires*. The matter should be remanded to the District Court for discovery on the current status of Plaintiff's private information and to fashion a remedy to restore Plaintiffs to their privacy.

BACKGROUND

On September 9, 2021, President Biden announced four vaccine mandates intended to coerce unwilling or hesitant American workers into being injected with

a pharmaceutical or else lose their livelihood. On September 24, 2021, the Task Force issued guidance for agencies and private employers whose workers were subject to the mandates. Essentially, the Task Force guidance instructed agencies and corporations subject to the executive orders how to enact, administer, and enforce the executive orders, which necessarily required adopting policies *and procedures* to track employees' medical status, decide on employee requests for accommodation in line with the guidance, and creating a system to surveil employee compliance with whatever guidance the Task Force issued.

Agencies, Workers, and private corporations were given very little time to get into compliance with the mandates, *i.e.* to set up this infrastructure. The guidelines instructed agencies to "work expeditiously so that their employees are fully vaccinated as quickly as possible and by no later than November 22, 2021." This required all federal workers to have undergone at least one medical procedure by November 8, 2021.

The Workers filed a Complaint on October 29, 2021 and a motion for a preliminary injunction on November 3, 2021. Judge O'Hearn addressed the matter expeditiously and set an aggressive briefing schedule, held oral argument, and issued a decision on November 8, 2021. The Workers appealed on November 10, 2021 and filed a motion to expedite briefing, which was granted. The matter has been fully briefed in the Third Circuit since December 2021.

ARGUMENT

I. There is still a live controversy with regard to both mandates because rescinding the executive orders did not extinguish residual and continuing effects

Both the federal employee and federal contractor mandates involved creating an infrastructure, including not just policies but procedures as well, through which to effectuate, administer, and enforce the mandates. The Task Force guidance has been revoked, but the infrastructure and ghosts of the executive orders remain in place causing continuing effects and also greatly undermining the Government's argument that the issues presented in this litigation are not likely to reoccur.

A. Continuing effects for Workers subject to procurement mandate

With regard to the contractor mandate, purportedly authorized by the procurement law, contract clauses requiring corporations to comply with Task Force guidance now exists in unknown numbers of contracts. Those clauses would not exist but for the contractor mandate. If the mandates were unconstitutional, the continued presence of the clauses in the contract continues a controversy with regard to this mandate because it is irrelevant that the executive order was rescinded if the Task Force can publish new guidance with the stroke of a pen and the government can enforce the contract clauses. These Workers rights remain unsettled.

Ms. Lorenzo also had to disclose her personal religious views to her employer solely because the government had created a new condition on her employment that

conflicted with her religious views, which is an ongoing effect of the invasion of her privacy and liberty. The District Court should fashion a remedy to restore Ms. Lorenzo to privacy with her employer.

B. Continuing effects for federal employees

President Biden's mandate conflicted with some federal worker's religious views, including the Workers in this case. Without having done anything different themselves, they suddenly became disqualified from their positions because their religious views put them in conflict with a new and unprecedented job requirement. Due to the mandate, employees had to disclose their private medical information and religious views to their government employer to request exemption. But for the unconstitutional condition on their employment, this private information would have stayed private. This information was collected by the government employers and nothing further is known about its handling. It is not known how this information was stored, whether it stayed in agency or in department, whether it has been filed somewhere or become part of an employee's personnel file. If the executive orders are unconstitutional, as the Workers argue, then those violations must be undone, that information destroyed, and every effort must be made to restore the Workers to their privacy, as difficult as it is to put that genie back in the bottle. This harm has been alleged by the Workers from the beginning. Supp. App. 18:12-15 (counsel for the Workers stating that "having to file an exception [sic] and a request not to be

subject to an order that violates their Fifth Amendment rights is itself damage"); *see also* Supp. App. 48:1-7 (Workers' counsel stating "they've already been harmed by having to disclose that information to the government" and the "violation of their privacy rights as well as being required to disclose their religious beliefs in order to get an exception to the government's mandating of a medical procedure is harm").

C. The case and the appeal are not moot because there is an ongoing constitutional controversy between the individual Workers and the federal government and this court can provide meaningful relief through declaratory judgment

Both the President and the Workers claim the right to determine what medical procedures will be done to the Workers' bodies and both claim their authority from the Constitution. The workers point to the Fifth Amendment. The President has just cited the Constitution generally as a basis for his power. The President states that this "is not about freedom or personal choice." The Workers claim that is exactly what it is about. This is an adversarial, genuine, and ongoing controversy, the resolution of which will provide meaningful relief to the Workers by settling their rights over their bodies, which are quite meaningful, restoring them to their privacy, and preventing this harm or a substantially similar one from occurring again.

In addition, the Workers were subjected to overt and government-ordered discrimination based on their exercise of a fundamental right (the right to decline medical procedures. This was degrading, embarrassing, and stigmatizing. Judicial recognition that the Workers were exercising their constitutionally-protected liberty

will provide meaningful relief, provide vindication, and decrease their embarrassment and stigmatization from having been singled out. It will provide the Workers with the only relief they sought when they instituted this action nineteen months ago: a declaration that the mandates violated their rights.

II. Even if there were not an existing case or controversy, the doctrine of voluntary cessation applies

A Defendant's voluntary cessation of an allegedly unlawful behavior is presumptively NOT moot and "[t]he Government bears the burden to establish that a once-live case has become moot." *W. Virginia v. Env't Prot. Agency*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2594 (2022). This is a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). It is an especially "heavy" burden in a case like this one where, "[t]he only conceivable basis for a finding of mootness in the case is [the Defendant's] voluntary conduct." *W. Virginia v. Env't Prot. Agency*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2607 (2022)(cleaned up and internal citations omitted); *see also Friends of the Earth*, 528 U.S. at 189 (stating that "[i]t 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").

The Supreme Court has stated that when a Defendant has voluntarily

withdrawn a challenged policy that is the basis of litigation but continues to "vigorously defend" the legality of its action, the claim remains justiciable. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288–289 (1982).

Here, the voluntary cessation doctrine precludes a finding of mootness. The Government's argument depends on its conclusory assertion that the emergency is now over and is unlikely to reoccur in the exact same way. However, the government states the nature of the legal controversy much too narrowly and adopting that narrow of a framing would mean that federal government action taken pursuant to an emergency will always become moot if not reviewed before being rescinded, thus being essentially unchallengeable since the exact same emergency with the exact same proposed solution is unlikely to occur (according to the government).

This exceedingly narrow framing appears particularly disingenuous given Government publications and statements by President Biden indicating that the Government actually believes and is telling Congress that "there is a reasonable likelihood that another serious pandemic that may be worse than COVID-19 will occur soon" and that rapid development and deployment of vaccines (within 130 days of identifying the virus) is the planned response. The very same month that President Biden rolled out the mandates to the American public, the Whitehouse published a document called, "American Pandemic Preparedness: Transforming Our

Capabilities."[1] The introduction does not mince words:

> As devastating as the COVID-19 pandemic is, there is a reasonable likelihood that another serious pandemic that may be worse than COVID-19 will occur soon — possibly within the next decade. Unless we make transformative investments in pandemic preparedness now, we will not be meaningfully prepared.

Rapidly developed and deployed mRNA pharmaceuticals, like the ones at issue here, are envisioned as an indispensable response to the inevitable "next pandemic" as well. *See id.* at pg. 11 (stating that top goals of pandemic preparedness will be to have a vaccine ready to go 130 days after a potential threat has been identified).

President Biden reiterated this likelihood again a year later. In June 2022, the President declared that "Eventually, we need more money to plan for the second pandemic…[t]here's going to be another pandemic…We have to think ahead."[2] To prepare, "Biden's proposed budget for 2023 suggests allocating about $82 billion over five years toward preparing for biological threats" with "[o]ne of its main goals is to create an environment in which the US can make effective vaccines and treatments for a pathogen within 100 days of its discovery." *Id.*

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[1] Available at https://www.whitehouse.gov/wp-content/uploads/2021/09/American-Pandemic-Preparedness-Transforming-Our-Capabilities-Final-For-Web.pdf (last access May 30, 2023).

[2] Matthew Loh, "Biden says another pandemic will come and the US needs to start preparing for it," June 22, 2022, available at https://www.businessinsider.com/biden-second-pandemic-funding-us-preparing-2022-6?op=1 (last accessed May 30, 2023).

The government tells the Court that this scenario is not likely to reoccur while it prepares for substantially the same scenario to reoccur. The legal controversy in this case is broader and more concrete than the Government posits. The question is whether the President possesses the power to impose *any* medical procedure on the Workers or whether the exercise of that power is *ultra vires* and/or violates the Workers' substantive due process rights. When viewed in that light, it is apparent that reoccurrence is likely given the government's statements concerning future pandemics and vaccine development and vigorous defense of the mandates' constitutionality and effectiveness. Given that the power the President claims in this matter has never been claimed by a President or Congress before, this Court should determine whether this power even exists before it decides that it is not likely to be asserted again. When the government "discovers" a new, never before used power, it is unlikely to only use it once. This is especially true when the government not only vigorously defends the allegedly unlawful actions, but maintains that the actions worked.

III. Even if there were not an existing case or controversy, the controversy is capable of repetition and avoiding review and is therefore not moot

A. The Mandates are capable of repetition

As detailed above, the Government itself asserts that "there is a reasonable likelihood that another serious pandemic that may be worse than COVID-19 will occur soon" and that newly developed vaccinations are expected to be a first line of

defense, warranting significant investment of money. The government takes the position that the mandates are a constitutional use of power, that the mandates did not infringe on the Workers' liberty in any way, and that they worked. There is no reason to believe that the government will react any differently in the next emergency than it did this one. Indeed, the Government has not asserted otherwise.

In addition, the procedures and infrastructure put in place by these mandates along with the simple fact that it happened, increase the likelihood of it happening again and even faster. A path already trodden is easier to take again. The fact that the specific policies were withdrawn is irrelevant if the procedures remain in place to institute a substantially similar policy with the strike of a pen.

The fact that these mandates were enacted by and on the judgment of a single person, and rescinded by and on the judgment of the same single person makes them substantially more capable of repetition than a legislative act, which requires bills to be introduced and to go through a public, lengthy, and deliberative process. These Mandates could be reenacted with no warning if the President, in his judgment, decided that new conditions warranted mandating, for example, the bivalent covid shot. It is easier to repeat an action emanating from the singular judgment of an individual in the executive branch than it is to repeat an action that must go through the legislative process.

Finally, it is worth noting that the bulk of the harm from the mandates

happened at the time of their rollout before any legal action could reasonably have been instituted, so if it is repeated, this harm will likely happen again. The harm is the unconstitutional coercion and it began the moment the mandates were announced. Workers were suddenly told they were subject to the mandates and repeatedly contacted concerning their compliance while understanding very little about the mandates themselves. *See* Supp. App. 16:20-23 (Workers' counsel stating that "I know that Plaintiff Daniel Donofrio submitted a number of things to his employer but I'm not sure if it was a request for an exception or just an objection to ways that he has been treated") and Supp. App. 13-14 (Judge asking why facts have not been plead as to the contracts to which Worker Maribel Lorenzo's employer has with the federal government and Counsel explaining that all Ms. Lorenzo knew was that her employer told her she had to comply). The tight timelines, deadlines, regular reminders of non-compliance, and high stakes concerning personal liberty combined to create immediate confusion and added to the coercive nature of the mandate. In addition to the chaos of the sudden imposition of a coercive medical mandate, the President delivered ominous warnings toward "the unvaccinated," which increased the coercive effects of this short, but impactful, period of time. Appx 65-66 (President's speech stating that "the time for waiting is over" and that they must "combat those blocking public health," i.e. the unvaccinated).

The fact that coercion began at the mandates' announcement, and would again

in the future if a substantially similar situation arose, counsels against dismissing the appeal as moot. This is especially true in light of the Government documents predicting another pandemic and planning to use rapidly developed vaccinations as a primary means to combat it.

B. The Mandates are, demonstrably, capable of avoiding review

The Government's brief makes clear: covid era mandates are uniquely capable of avoiding review. *See* Government's Motion to Dismiss, ECF 56 at pg. 6-7 (stating "this Court has routinely dismissed as moot challenges to COVID-19 policies that have been rescinded or allowed to expire over the course of the pandemic" and collecting cases). Whether this is due to the emergency nature of the matters or the passage of time as things sit in the judicial branch of government, the proof is in the pudding. These cases are evading review.

C. The Government is deliberately avoiding judicial review

The Government took the position in this case and other challenges to the federal employee mandate that the claims were not yet ripe because the employees were required to proceed through an administrative process pursuant to the Civil Service Reform Act. Then, after two months of coercing federal employees, the Government suddenly announced that it would not discipline employees while exemption requests were pending, thus preventing the claims from becoming ripe, under the Government's theory. Supp. App. 17. Now, the Government takes the position that

the claims are moot because the executive orders have been rescinded. Thus, according to the government, these executive orders have never been reviewable.

D. Challenges to federal authority are particularly capable of evading review

It is well-established judicial doctrine that nominal damages play an important role in the adjudication of civil rights and liberties allowing cases to proceed that would otherwise evade review. *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 627 (3d Cir. 2013) (stating that "[n]ominal damages have traditionally vindicated deprivations of certain absolute rights that are not shown to have caused actual injury") (internal citations and quotations omitted). Nominal damages save claims from becoming moot. *Id.* at 622 (stating that "[c]laims for damages are retrospective in nature, i.e., they compensate for past harm, and thus, by definition, such claims cannot be moot, and a case is saved from mootness if a viable claim for damages exists").

However, there is no possible claim for damages against the President, the federal government, or federal government actors for violations of liberty because the government has not waived sovereign immunity as to such actions. As such, declaratory and injunctive relief is the *only* meaningful relief the workers could seek, and all they are seeking. Because it is not possible to assert damages against the federal government, constitutional challenges cannot be preserved by a claim for nominal damages, which makes evasion of review more likely than in cases against

local government entities, which can be sued under §1983 of the Civil Rights Act.

CONCLUSION

For the foregoing reasons, the Workers request that this Court deny the Government's motion to dismiss, declare that the mandates and their implementation violative of the Fifth Amendment right to liberty and/or otherwise *ultra vires*, and remand to the District Court for discovery on the current status of Plaintiff's private information and to fashion a remedy to restore Plaintiffs to their privacy.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, Dana Wefer, counsel for the Plaintiff/Appellant hereby certify as follows:

1) I am a member of the Bar of the Third Circuit Court of Appeals;
2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The word count of this electronic brief is 3,782 words and is typed in Times New Roman font, 14-point type.
3) This opposition was served on Appellant contemporaneously by filing with ECF;
4) This motion was run through Windows Security Virus & Threat detection software on May 30, 2023 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: May 30, 2023