IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERICH SMITH; FRANK E. GARWOOD, JR.; MARIBEL LORENZO; DR. DANIEL DONOFRIO,

Plaintiffs-Appellants,

v.

PRESIDENT UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 21-3091

MOTION TO DISMISS APPEAL AS MOOT

Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27.4, the government respectfully moves to dismiss this appeal as moot. Plaintiffs appealed the denial of their motion for a preliminary injunction barring enforcement of two executive orders that required certain federal employees and certain federal contractor employees to be vaccinated against COVID-19. On May 9, 2023, the President issued a new executive order that revoked those executive orders, effective May 12, and specified that agency policies premised on those orders may no longer be enforced and shall be rescinded consistent with applicable law. Pursuant to the May 9 order, the Safer Federal Workforce Task Force has revoked all guidance implementing the now-rescinded executive orders. Accordingly, plaintiffs are no longer subject to the vaccination requirements they challenged, the executive orders can no longer be

enforced, and the purpose of this appeal no longer exists. There is no basis to apply any exception to the mootness doctrine. Accordingly, the Court should dismiss this appeal as moot. Plaintiffs' counsel has stated that plaintiffs oppose this motion.

BACKGROUND

1. On September 9, 2021, President Biden issued two executive orders to address COVID-19's impact on federal contractors and employees. *See* Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021) (Contractor EO); Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (Employee EO). The Employee EO directed federal agencies to require their employees to be vaccinated against COVID-19. The Contractor EO directed agencies to incorporate into certain government contracts a clause imposing COVID-19 workplace safety protocols specified by the Safer Federal Workforce Task Force, including a vaccination requirement for the contractors' employees.

2. Plaintiffs are three federal employees who were subject to the Employee EO and one employee of a covered federal contractor that was allegedly subject to the Contractor EO. Plaintiffs filed suit against President Biden on October 29, 2021, seeking to enjoin enforcement of the executive orders on the ground that the orders violated plaintiffs' Fifth Amendment rights. On November 3, plaintiffs moved for a temporary restraining order or preliminary injunction. The district court denied plaintiffs' motion on November 8, concluding that plaintiffs' claims were not likely to succeed on the merits, that "the irreparable harm factor heavily weigh[ed] against

injunctive relief," and that the balance of harms and the public interest favored the government. *See Smith v. Biden*, No. 1:21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021). The district court also noted that the President—the only defendant named in plaintiffs' operative complaint—is not subject to injunctive relief. *See id.* at *5. Although the employee plaintiffs had sought to add their employing agencies as defendants in a proposed amended complaint, the contractor plaintiff's proposed amended claims were still asserted solely against the President, and the court therefore concluded that her claims would fail on that ground. *See id.*

On November 10, 2021, plaintiffs filed a notice of appeal from the order denying their motion for a preliminary injunction. This Court granted their request for expedited briefing, and the appeal was fully briefed in mid-December 2021. The district court litigation is stayed pending final resolution of this appeal.

3. On May 1, 2023, the White House issued a statement announcing that, at the end of the day on May 11, 2023, it would "end the COVID-19 vaccine requirements for Federal employees[] [and] Federal contractors" that are the subject of this appeal. The White House, *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities* (May 1, 2023), https://perma.cc/8DSB-4NPP. That timing aligned with the May 11 expiration of the federal COVID-19 public health emergency. *See, e.g.*, U.S. Dep't of Health & Human Servs., *Fact Sheet: End of the COVID-19 Public Health Emergency* (May 9, 2023), https://perma.cc/VFR4-MLT9

(explaining why the United States was "well-positioned to transition out of the emergency phase" of the pandemic).

On May 9, 2023, President Biden issued an executive order revoking the Contractor and Employee EOs, effective at 12:01 a.m. on May 12, 2023. *See* Exec. Order No. 14099, 88 Fed. Reg. 30,891 (May 9, 2023) (Revocation EO). The Revocation EO explained that, although the Contractor and Employee EOs had been "necessary to protect the health and safety of critical workforces," the United States is "no longer in the acute phase of the COVID-19 pandemic." *Id.* at 30,891. The Revocation EO noted that "over 270 million Americans" had received "at least one dose of the COVID-19 vaccine" and that, since the prior orders' issuance in September 2021, COVID-19 deaths had declined by 93 percent and hospitalizations by 86 percent. *Id.* It also noted that "public health experts have issued guidance that allows individuals to understand mitigation measures to protect themselves and those around them" and that the "healthcare system and public health resources throughout the country are now better able to respond to any potential surge of COVID-19 cases without significantly affecting access to resources or care." *Id.* "Considering this progress, and based on the latest guidance from our public health experts," the Revocation EO explained, "we no longer need a Government-wide vaccination requirement for Federal employees or federally specified safety protocols for Federal contractors." *Id.*

Accordingly, the Revocation EO stated that, effective May 12, "Executive Order 14042 and Executive Order 14043 are revoked." 88 Fed. Reg. at 30,891. The Revocation EO further specified that "[a]gency policies adopted to implement Executive Order 14042 or Executive Order 14043, to the extent such policies are premised on those orders, no longer may be enforced and shall be rescinded consistent with applicable law." *Id.*

Pursuant to the Revocation EO, the Safer Federal Workforce Task Force announced that, effective May 12, "all prior guidance from the Safer Federal Workforce Task Force implementing the requirements of" the Contractor and Employee EOs "has also been revoked." Safer Federal Workforce Task Force, *What's New?* (May 12, 2023), https://perma.cc/9UJJ-BNWB.

ARGUMENT

In this appeal, plaintiffs sought to challenge the district court's denial of a preliminary injunction barring enforcement of the Contractor and Employee EOs. Those executive orders have now been revoked, and there is no prospect that they will be enforced against plaintiffs. It therefore no longer makes any practical difference whether plaintiffs obtain the preliminary injunction they sought, and this appeal is accordingly moot. Because the matter became moot while plaintiffs' appeal was pending, the government would not oppose vacatur of the district court's decision denying a preliminary injunction. *See, e.g.*, *United States v. Munsingwear, Inc.*, 340

U.S. 36, 39-40 (1950); *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

1. "Article III of the Constitution grants the federal courts the power to adjudicate only actual, ongoing cases or controversies." *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 192-93 (3d Cir. 2001). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Id.* at 193 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). "[T]he central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 39 (3d Cir. 1985). Claims for prospective relief against the enforcement of a policy often become moot when the policy is repealed or expires. *See, e.g.*, *Khodara*, 237 F.3d at 193-94; *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 622, 628 (3d Cir. 2013); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260 (3d Cir. 2007). As the Supreme Court has explained, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation marks omitted).

Consistent with these principles, 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. In *Clark v. Governor of New Jersey*, 53 F.4th 769 (3d Cir. 2022), for example, the plaintiffs asked this Court to decide the constitutionality of a New Jersey state executive order that prohibited in-person gatherings and required residents to stay home during the pandemic's early weeks. *See id.* at 771. Those restrictions were "progressively relaxed," and ultimately rescinded, as public health conditions evolved. *Id.* at 772-73. This Court concluded that an appeal challenging the rescinded restrictions was moot, explaining that it could grant "no 'effectual relief whatsoever'" and that withdrawal of the policies gave plaintiffs "the very relief sought." *Id.* at 776. The Court further explained that the "possibility of . . . renewed restrictions [was] speculative, and an analysis of the legal status of such hypothesized rules doubly-so." *Id.* at 781; *see also County of Butler v. Governor of Pennsylvania*, 8 F.4th 226 (3d Cir. 2021) (holding that a challenge to expired stay-at-home, business-closure, and gathering-restriction orders was moot); *Stepien v. Governor of New Jersey*, No. 21-3290, 2023 WL 2808460 (3d Cir. Apr. 6, 2023) (same for rescinded school mask requirements); *Johnson v. Governor of New Jersey*, No. 21-1795, 2022 WL 767035 (3d Cir. Mar. 14, 2022) (same for expired rent-relief policy); *Parker v. Governor of Pennsylvania*, No. 20-3518, 2021 WL 5492803 (3d Cir. Nov. 23, 2021) (same for expired mask requirement).[1]

[1] Other courts of appeals have reached similar conclusions. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022) (en banc) (holding that a challenge to a rescinded order suspending in-person education was moot); *Eden, LLC v. Justice*, 36 F.4th 166

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The Court should follow that practice now that the vaccination requirements plaintiffs sought to enjoin are no longer in place. Because the President has rescinded the executive orders and prohibited enforcement of agency policies premised on them, and the Task Force has also rescinded all relevant guidance implementing the orders, "there is no 'effectual relief whatsoever' that this Court may grant in relation to th[e] orders." *Clark*, 53 F.4th at 776. Plaintiffs' sole request in their preliminary-injunction motion was for "an order enjoining EO 14042 and EO 14043." Suppl. App. 139.[2] Those orders are no longer in force, "and there is consequently no relief that this Court can grant concerning them." *County of Butler*, 8 F.4th at 230. A preliminary injunction barring enforcement of nonexistent executive orders could have no effect on plaintiffs' rights. In short, any "actual controversy" presented by plaintiffs' preliminary-injunction motion has "evaporated." *Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (en banc).

2. Courts have recognized two limited exceptions to these mootness principles, neither of which applies here.

The voluntary-cessation exception is aimed at preventing situations in which a defendant "engage[s] in unlawful conduct, stop[s] when sued to have the case declared

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(4th Cir. 2022) (same for rescinded school-closure orders and business restrictions); *Resurrection Sch. v. Hertel*, 35 F.4th 524 (6th Cir. 2022) (en banc) (same for rescinded school mask requirement); *Hawse v. Page*, 7 F.4th 685 (8th Cir. 2021) (same for superseded stay-at-home order).

[2] This is a citation to the Supplemental Appendix that the government filed with its brief.

moot, then pick[s] up where he left off, repeating this cycle until he achieves all his unlawful ends." *Johnson*, 2022 WL 767035, at *2 (alterations in original) (quoting *Already*, 568 U.S. at 91). The exception generally does not apply, however, where a defendant did not cease the challenged action "as a response to the litigation." *County of Butler*, 8 F.4th at 230; *see Clark*, 53 F.4th at 778 ("[W]e are generally less skeptical of voluntary cessation claims where the change in behavior was unrelated to the relevant litigation[] . . . . "); *cf. Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 307 (3d Cir. 2020) ("[I]f the defendant ceases because of a new statute or a ruling in a completely different case, its argument for mootness is much stronger.").

As in *Butler*, the President maintained the executive orders at issue here for many months after plaintiffs "challenged their constitutionality," and he rescinded the orders only after concluding that changed public-health circumstances had rendered them unnecessary. *County of Butler*, 8 F.4th at 230. The executive orders are not being revoked in response to this litigation; rather, as the Revocation EO and White House announcement explain, they are being revoked along with several other pandemic-related orders, consistent with the ending of the COVID-19 public health emergency on May 11, 2023, and in recognition that the circumstances of the pandemic have changed dramatically since these requirements were issued in September 2021. The Revocation EO explains that "we are no longer in the acute phase of the COVID-19 pandemic." 88 Fed. Reg. at 30,891. "[O]ver 270 million Americans" have received at least one dose of the COVID-19 vaccine, and since September 2021, "COVID-19

deaths have declined by 93 percent, and new COVID-19 hospitalizations have declined by 86 percent." *Id.* "Our healthcare system and public health resources throughout the country," moreover, "are now better able to respond to any potential surge of COVID-19 cases without significantly affecting access to resources or care." *Id.* "Considering this progress, and based on the latest guidance from our public health experts," the President has determined that "we no longer need a Government-wide vaccination requirement for Federal employees or federally specified safety protocols for Federal contractors." *Id.* In short, "the public health outlook has changed dramatically" since the executive orders were issued, *Clark*, 53 F.4th at 778, and the executive orders were not revoked "opportunistically . . . to avoid an unfavorable adjudication," *County of Butler*, 8 F.4th at 230; *see id.* ("We generally presume that government officials act in good faith, and we will not depart from that practice under these circumstances.").

That the public health situation and its effect on federal contractors and employees could change again in the future would not be grounds for concluding that this case presents a live controversy. The possibility of such a change is purely "speculative," *Clark*, 53 F.4th at 781, and the mere fact that the President would "still ha[ve] the 'power to issue new executive orders involving COVID-19-related restrictions'" does not preserve a live controversy, *Johnson*, 2022 WL 767035, at *3 (quoting *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163-64 (4th Cir. 2021)); *see also Brach*, 38 F.4th at 14 (citing cases). "After all, plaintiffs only have standing in

the first place to challenge an officer's allegedly unlawful conduct, not his abstract power." *Johnson*, 2022 WL 767035, at *3. Factual circumstances surrounding the pandemic have changed, as underscored by the concurrent expiration of the public health emergency and Congress's April 2023 passage of legislation ending the President's separate declaration of a national emergency, *see* Pub. L. No. 118-3, 137 Stat. 6 (2023). It is not reasonably likely that the President will reenact the same executive orders he has just revoked.

Moreover, even if there were some basis to conclude that the President would in the future issue a similar executive order, any future order likely would not present "the same legal controversy" as the one originally presented here. *Clark*, 53 F.4th at 777-78; *see Stepien*, 2023 WL 2808460, at *2 (explaining that, if New Jersey were to require masking again in light of changed public health conditions, there would be "an altogether different fit between any *new* mask mandate and the reality on the ground, birthing a different controversy between the parties"). Given the evolving circumstances and the context-dependent nature of plaintiffs' claims, there is no reason to conclude that any future executive order would be sufficiently "similar" to the rescinded executive orders to present substantially the same legal controversy as the one that plaintiffs' preliminary-injunction motion presented. *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993). As the Court explained in *Clark*, "the very possibility of . . . renewed restrictions is itself speculative, and an analysis of the legal status of such hypothesized

rules doubly-so." 53 F.4th at 781; *see also Resurrection Sch. v. Hertel*, 35 F.4th 524, 529 (6th Cir. 2022) (en banc) (voluntary-cessation exception inapplicable where "any future" mask mandate "likely would not present substantially the same legal controversy as the one originally presented here").

Mootness is also subject to an exception where the underlying controversy between the parties is "capable of repetition yet evading review." *County of Butler*, 8 F.4th at 231. "That exception is 'narrow' and 'applies only in exceptional situations,' where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (citation omitted) (quoting *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017)). This case fails on both criteria.

First, for the reasons already explained, it is not reasonable to expect that the President will reissue the executive orders and that plaintiffs will once again be subject to the same vaccination requirements. *See County of Butler*, 8 F.4th at 231 ("There must be more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability."); *Stepien*, 2023 WL 2808460, at *3 ("[T]he action that must be repeatable is the precise controversy between the parties." (quoting *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 517 (D.C. Cir. 2019))). Any chance of reissuance is speculative at best, particularly given the dramatically changed circumstances of the pandemic. And, as

noted above, any future executive order would present a different legal controversy that would require different analysis. *See supra* pp. 11-12.

Second, even if the President did reissue the executive orders, there is no reason to think the orders would be in place for such a short period that the controversy between the parties would "inherent[ly] . . . evade review." *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1130 (3d Cir. 1982). The orders at issue here remained in place for almost 20 months, and several different courts of appeals reviewed and decided challenges to them before they were revoked. Plaintiffs had ample opportunity to present their claims to the district court and this Court, making clear that the orders "were not of too short a life to be reviewed." *County of Butler*, 8 F.4th at 231.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A). This document contains 3114 words. I further certify that this motion complies with the type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font.

/s/ *Sarah Carroll*
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