IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

RYAN VANDERSTELT, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

CASE NO: 1:22-cv-00005

Hon. Paul L. Maloney
U.S. District Court Judge

Hon. Ray Kent
U.S. Magistrate Judge

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs oppose Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs are challenging the Covid-19 vaccine mandate for employees of federal contractors ("Contractor Mandate") issued under Executive Order 14042 in September 2021, purportedly to improve economy and efficiency in federal procurement by reducing Covid-19-related absenteeism among contractor employees. The President withdrew that Mandate in May 2023, after determining it was no longer warranted because of improved Covid-19 conditions. This voluntary cessation, however, does not moot this case because the President seeks to preserve his authority to reissue the Contractor Mandate at his personal discretion. Mootness is also inappropriate because the Contractor Mandate has a short duration and can be reimposed on the President's whim. It is therefore capable of repetition, yet evading review.

STATEMENT OF FACTS

I. The Covid-19 Vaccine Mandate for Employees of Federal Contractors

"When COVID-19 vaccines became widely available in the spring of 2021, the federal government largely left inoculation decisions to the people and the States." *Kentucky v. Biden*, 57 F.4th 545, 547 (6th Cir. 2023). On September 9, 2021, however, President Biden announced that "his patience is wearing thin" with unvaccinated Americans, so he issued a series of unlawful vaccine mandates to compel "about 100 million Americans—two thirds of all workers" to vaccinate or be fired. *Remarks by President Biden on Fighting the Covid-19 Pandemic* (Sept. 9, 2021).[1]

One such mandate was an emergency rule promulgated by the Occupational Safety and Health Administration (OSHA) that required private employers to force their employees to fully vaccinate or subject them to weekly testing. The Supreme Court struck down the OSHA mandate as exceeding the

[1] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ (last visited Aug. 23, 2023).

agency's statutory authority to regulate workplace health and safety. *NFIB v. OSHA*, 142, S.Ct. 661, 666 (2022) (per curiam). A second mandate "require[d] COVID-19 vaccination for all Federal employees." 86 Fed. Reg. 50,989. The Fifth Circuit affirmed a nationwide injunction against that Federal Employee Mandate. *Feds for Med. Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023), *cert. filed.*

The President also said he would require all federal contractors to vaccinate their employees: "If you want to do business with the federal government, vaccinate your workforce." *Remarks by President Biden*, *supra.* This Contractor Mandate is the subject of this lawsuit and was implemented through Executive Order 14042, which directs all executive agencies to include in their new and renewed contracts a clause specifying that the contractor and all subcontractors would obey COVID-19 safety guidance issued by the Safer Federal Workforce Task Force. 86 Fed. Reg. 50,985 (Sept. 9, 2021). Executive Order 14042 further required the OMB Director to "determine whether [the Task Force's] Guidance will promote economy and efficiency in Federal contracting." *Id.* at 50,986.

On September 24, 2021, the Task Force issued its "guidance," which the Sixth Circuit noted was "a curious term given that it *required* contractors to ensure that their covered employees are [fully] vaccinated." *Kentucky*, 57 F.4th at 547 (emphasis in original). Such employees must take a vaccine even if they present negligible risk of workplace transmission because they acquired natural immunity to Covid-19. The Mandate also covered employees who worked remotely from home and thus could neither catch nor transmit Covid-19 to co-workers.[2]

As the Sixth Circuit explained:

> The mandate's scope is stunning. It is undisputed that approximately 20% of the nation's labor force works for a federal contractor. And once one unravels the guidance's nest of expansive definitions of "covered employee" and "covered contractor," "the difficult issue is understanding who" amongst that population "could

[2] "Covered employees include anyone working … 'in connection with' a covered contract, *or* at a covered workplace; and a 'covered workplace' includes anywhere even a single employee works … 'in connection with,' a … contract, whether indoors or outdoors." *Kentucky*, 57 F.4th at 548.

> possibly *not* be covered. … The upshot is that the President's order effectively mandates vaccination for tens of millions of Americans.

Id. at 48 (cleaned up). The statutory authority relied upon for this sweeping directive was the Federal Property and Administrative Services Act of 1949 (Procurement Act), which the President contends gives him power to impose any "orders that improve the economy and efficiency of contractors' operations." *Id.* at 551 (quoting Government's Brief). The President argued that the Contractor Mandate improved economy and efficiency by reducing worker absenteeism resulting from Covid-19. Federal contractors and subcontractors around the country responded to the Contractor Mandate by forcing their employees, including Plaintiffs in this case, to vaccinate or be fired. ECF 1 ¶¶ 2-12.

II. Litigation Against the Contractor Mandate

Several lawsuits challenged the Contractor Mandate. On November 30, 2021, the Eastern District of Kentucky preliminarily enjoined enforcement of the Contractor mandate "in all covered contracts in Kentucky, Ohio, and Tennessee." *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021), *aff'd as modified*, 57 F.4th 545 (6th Cir. 2023). The Southern District of Georgia issued a nationwide injunction against the Contractor Mandate on December 1, 2021. *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021), *aff'd in part and vacated in part sub nom. Georgia v. President of the United States*, 46 F.4th 1283, 1308 (11th Cir. 2022). Defendants subsequently suspended enforcement of the Contractor Mandate. Notwithstanding the nationwide preliminary injunction, Plaintiffs were told by their employers that they must take an unwanted vaccine or be fired because such employers anticipated the injunction would be narrowed or reversed. ECF 1 ¶¶ 2-12.

Plaintiffs filed this putative class action on January 4, 2022, seeking declaratory judgment that the Contractor Mandate is unlawful and injunctive relief from its enforcement. In April 2022, Defendants moved to stay proceedings in this matter pending final resolution of the federal government's appeal from the nationwide preliminary injunction in *Georgia*, which this Court granted. ECF 17-18. In August 2022, the Eleventh Circuit issued a decision in *Georgia v. President of the United*

States, 46 F.4th 1283 (11th Cir. 2022), upholding the preliminary injunction against the Contractor Mandate but narrowing its scope to contracts and solicitations involving plaintiffs in that case. *Id.* at 1308. This Court extended the stay based in part on the fact that several similar challenges to Executive Order 14042 were then "working their way through the federal circuit courts," including the appeal of a preliminary injunction before the Sixth Circuit. ECF 28.

The Eleventh Circuit was joined by the Fifth Circuit, which in December 2022 upheld a preliminary injunction against the Contractor Mandate, explaining that "[t]he President's use of procurement regulations to reach through an employing contractor to force obligations on *individual employees* is truly unprecedented [and] … unlawful." *Louisiana v. Biden*, 55 F.4th 1017, 1033 (5th Cir. 2022) (emphasis in original). In January 2023, the Sixth Circuit agreed with the Fifth and Eleventh Circuits "that the President exceeded his authority in issuing the contractor mandate." *Kentucky*, 57 F.4th at 555. The Sixth Circuit upheld the injunction but narrowed its scope to contracts and solicitations involving the plaintiffs in that case. *Id.* at 557. This Court again extended the stay in this case on February 23, 2023. ECF 31. On April 19, 2023, the Ninth Circuit disagreed with the Fifth, Sixth, and Eleventh Circuits to dissolve a permanent injunction against the Contractor Mandate issued by the District of Arizona because it concluded that "the Contractor Mandate falls within the President's Procurement Act authority." *Mayes v. Biden*, 67 F.4th 921, 940 (9th Cir. 2023). There has been no final decision on the merits vacating or permanently enjoining the Contractor Mandate.

III. Defendants Voluntarily Withdraw the Contractor Mandate While Defending Its Wisdom and Legality

On May 1, 2023, the White House announced that the Administration would "end the COVID-19 vaccine requirement[] for … Federal contractors" on May 11, 2023, "the same day that the COVID-19 public health emergency ends." *See* 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). The announcement did not acknowledge the

legal defeats faced by the Contractor Mandate in numerous courts and instead boasted without evidence that "our broader vaccination campaign has saved millions of lives." *Id.*

On May 9, 2023, the President issued Executive Order 14099, which withdrew Executive Order 14042 and the Contractor Mandate effective May 12. *See* 88 Fed. Reg. at 30,891. The new Executive Order neither disclaims power to issue the Contractor Mandate nor acknowledges that the Mandate was found unlawful and enjoined by courts, let alone signals any form of acquiescence or agreement with those rulings. Instead, Executive Order 14099 defended the wisdom of the Contractor Mandate, asserting (again without evidence) that it was "necessary to protect the health and safety of critical workforces serving the American people and to advance the efficiency of Government services during the COVID-19 pandemic." *Id.* at 30,891. Executive Order 14099 further stated that, due to a decline in COVID-19 deaths and hospitalizations, the President concluded that "we no longer need … federally specified safety protocols for Federal contractors" and are "able to move beyond these Federal requirements." *Id.* It made no assurance that the Mandate will not return if the President later determines a need exists due to changing public-health conditions or other reasons. In other words, the President is keeping the Contractor Mandate as policy in his toolbox to be reused.

Defendants also continued to vigorously defend the legality of the Contractor Mandate in court after voluntarily revoking it. On June 15, 2023, a judge on the Ninth Circuit called for rehearing *en banc* in *Mayes*, presumably because the panel's conclusion that the President has statutory authority to issue the Contractor Mandate created a split with three other circuits. Defendants urged the *en banc* Ninth Circuit not to rehear *Mayes* in a July 6 brief that argued the President "properly exercised his Procurement Act authority to prescribe vaccination-related steps contractors must take in order to work on government contracts," and that "the Contractor [Mandate] fits well within the Procurement Act's historical uses." Appellants' Suppl. Br., *Mayes v. Biden*, No. 22-15518, 13-14 (July 6, 2023) (cleaned up) (Attached as Exhibit 1). Defendants further argued that "major-questions principles did not

require clearer authorization for the President's actions" because the Contractor Mandate "brought about no transformative expansion of executive authority." *Id.* at 14-15.

ARGUMENT

Defendants' voluntary cessation of the Contractor Mandate does not moot this case because the President continues to insist that he has authority to reissue the Mandate if he determines it improves the economy and efficiency of contractors. The President's position that the Mandate is not warranted now because of improved Covid-19 conditions indicates that he believes the Mandate would be warranted if those conditions worsen. Covid-19 is not going away; indeed, it has become endemic. "[N]ew variants and seasonal surges" can emerge at any time "to undo hard-won progress." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 573 (6th Cir. 2021) (Moore, J. dissenting). One such variant is causing a surge in hospitalizations right now.[3] Defendants thus cannot meet their "heavy" burden of demonstrating that it is "absolutely clear" that the President would not reimpose the Mandate. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). The case is therefore not moot under the voluntary cessation doctrine. Mootness is also inappropriate because the Contractor Mandate is capable of repetition, yet evading review. It evades review because its duration is too short for a challenge to be fully litigated. And it is capable of repetition because—absent the declaratory and injunctive relief sought herein—the President retains power to reimpose the Mandate at his whim.

I. DEFENDANTS' VOLUNTARY CESSATION OF THE CONTRACTOR MANDATE DOES NOT MOOT THIS CASE

"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." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, "courts would be compelled to leave the defendant

[3] Alex Fitzpatrick and Kavya Behera, *All signs point to a late summer COVID wave*, Aug. 17, 2023, https://www.axios.com/2023/08/17/covid-19-cases-2023-uptick-where-why (last visited Aug. 18, 2023).

free to return to his old ways." *Id.* at 289 n.10 (cleaned up). Courts have recognized a "narrow exception" to the "general rule" against mootness. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833 (2018). The government's voluntary cessation of a challenged policy moots a case "only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Barrios Garcia v. DHS*, 25 F.4th 430, 440 (6th Cir. 2022) (emphasis in original) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Further, it is "the defendant"—not the plaintiff—who "bears 'the formidable burden of showing'" mootness from voluntary cessation. *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371 n.4 (6th Cir. 2016); *accord Husted*, 838 F.3d at 713. Even if the defendant's likelihood of resuming its illegal conduct is "too speculative to support standing," such a speculative possibility can still "overcome mootness." *Adarand*, 528 U.S. at 224.

A. Defendants Cannot Avoid the Heavy Burden of Establishing that It Is 'Absolutely Clear' the Contractor Mandate Could Not Return

Defendants attempt to avoid the heavy burden of establishing that it is "absolutely clear" the Contractor Mandate would not return. *First*, they argue that burden applies only when there are "suspicions that [voluntary] cessation was not genuine" or was the product of "gamesmanship." Defs. Br. at 13 (quoting *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528–30 (6th Cir. 2022)). Not so. While bad-faith cessation is sufficient to overcome mootness, it is by no means necessary. In *West Virginia*, the federal agency defendant represented that "it does not intend to enforce the [challenged rule] because it has decided to promulgate a new … rule." 142 S. Ct. 2587, 2606 (2022). There was no indication that the agency was promulgating the new rule in bad faith. The Supreme Court nonetheless required an "absolutely clear" showing that the challenged rule would not recur and found the agency failed to meet that exacting standard. *Id.* The same was true of *Barrios Garcia*, 25 F.4th at 440. There, immigrants who applied for U-visas (for crime victims who cooperated with law enforcement) sued to require a

federal agency to adjudicate their applications. *Id.* at 435. During their appeal, the agency implemented a new application processing program. *Id.* There was suspicion of neither bad faith nor gamesmanship. Yet, the Sixth Circuit required the agency to show that it was "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 440 (emphasis in original). So, the lack of bad faith does not obviate the heavy burden of establishing mootness through voluntary conduct.

Second, Defendants claim that government actors have "an easier time satisfying [the voluntary cessation] test." Br. at 12 (quoting *Davis v. Colerain Twp.*, 51 F.4th 164, 174 (6th Cir. 2022)). The Supreme Court has never granted government actors any solicitude when they attempt to moot a case through voluntary conduct. The Court instead applies the same "absolutely clear" standard that other litigants must meet. *West Virginia*, 142 S. Ct. at 2607. The Sixth Circuit has granted government actors more solicitude, but only where voluntary cessation involved legislative or regulatory changes that are "particularly burdensome" to undo. *Husted*, 838 F.3d at 713. "[T]he degree of solicitude the voluntary cessation enjoys is based on whether … the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). "If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.*

Here, the Contractor Mandate was imposed by the President through Executive Order based solely on his judgment regarding what improves the economy and efficiency of procurement; and it was rescinded by the President through a new Executive Order based, again, on his sole judgment. Absent a court ruling on the merits, no legal or procedural obstacle prevents the President (or his successor) from reimposing yet another unilateral Executive Order. Solicitude is not appropriate where, as here, the President "wields sole and unadulterated discretion" to impose, withdraw, and reimpose the challenged policy with the stroke of pen. *Barrios Garcia*, 25 F.4th at 440-41 (requiring

government agency to prove that it is "*absolutely* clear" that the challenged policy would not recur). Rather, courts "should be suspicious of officials who try to avoid judicial review by voluntarily mooting a case—especially in the absence of an admission of illegality or credible assurance of future compliance." *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677–78 (5th Cir. 2023) (Ho, J. dissenting).

B. Defendants Cannot Make an 'Absolutely Clear' Showing that the Contractor Mandate Will Not Recur

Defendants cannot make the extraordinarily strong showing needed for mootness because they continue to insist on preserving their ability to reimplement the Contractor Mandate in the future by vigorously defending its legality and wisdom.

A case is not moot when government ends the challenged conduct while simultaneously preserving the ability to reimplement it later. In *Barrios Garcia*, plaintiffs argued that the Immigration and Nationality Act required DHS to implement a certain visa process. 25 F.4th at 435. The agency attempted to moot the case by adopting the requested visa process while simultaneously insisting in its policy manual that the process is not statutorily required. *Id.* at 441. The Sixth Circuit held that "the manual betrays the agency's stance on mootness" because it showed the agency "does not believe that statutes compel the promulgation of the [visa] process." *Id.* As such, a "future administration could rescind the [visa] process just as easily as this administration established it," and therefore the Sixth Circuit "conclude[d] that the Government … does not satisfy the 'voluntary cessation' framework." *Id.* This conclusion obviously rested on a significant degree of speculation, as the court lacks insight into the identity of the "future administration" and its immigration policy. The mere possibility of reverting to unlawful policy—even if speculative—was enough to overcome mootness where the agency's explicit reservation of power to reverse course "betrays" an interest to reimpose the prior unlawful policy. *Id.*

The Supreme Court applied the same reasoning in *West Virginia*, wherein a federal agency

argued that a challenge against a rule was mooted by the agency's decision to replace that rule. 142 S. Ct. at 2607. But the agency was also "vigorously defend[ing] the legality" of the challenged rule. *Id.* The Supreme Court made clear that courts "do not dismiss a case as moot in such circumstances," because a vigorous defense of the challenged rule betrays an interest to "reimpose" it. *Id.*

Here, Defendants' vigorous defense of the challenged Contractor Mandate likewise betrays their stance on mootness. Less than a week before they filed the instant Rule 12(b)(1) motion, Defendants told the Ninth Circuit in *Mayes* that the "President here properly exercised his Procurement Act authority to prescribe vaccination-related steps contractors must take in order to work on government contracts." Ex. 1 at 14 (cleaned up). By insisting that the Procurement Act authorizes the President to implement the Contractor Mandate based on his determination of economy and efficiency, Defendants are explicitly reserving power to reimplement that Mandate at the President's (or his successor's) whim, just like the agency in *Barrios Garcia*, 25 F.4th at 441. The Executive Order withdrawing the Contractor Mandate further defends the Mandate on the merits, claiming that it was "necessary to protect the health and safety of critical workforces serving the American people and to advance the efficiency of Government services," 88 Fed. Reg. at 30,891. Instead of providing "absolute[]" confirmation that the Contractor Mandate will never be "reimpose[d]," *West Virginia*, 142 S. Ct. at 2607, Defendants' defense of that policy in court and in public betrays their desire to maintain the Mandate as a policy instrument to be reused in the future.

Defendants' assertion that the "ability to reimplement the statute or regulation at issue is insufficient to prove the voluntary-cessation exception" is misplaced. Defs. Br. at 14 (quoting *U.S. Navy SEALs 1-26*, 72 F.4th at 674). For one, cessation of the vaccine mandate in *U.S. Navy SEALs 1-26* was not "voluntary" but rather was required by an Act of Congress that "ordered the military branches to rescind their mandates." 72 F.4th at 669. Moreover, this case does not involve the ability to reimplement a statute or regulation—which typically is burdensome—but rather the ability to

reissue an Executive Order, which requires nothing more than a stroke of the pen. Binding Sixth Circuit precedent makes clear that mootness is not appropriate where the government retains ability to easily reimplement the challenged policy. *Barrios Garcia*, 25 F.4th at 441 ("A future administration could rescind the [requested visa] process just as easily as this administration established it").

Defendants' argument that reimplementation of the Contractor Mandate requires "speculation" is also meritless. Defs. Br. at 14. Even if the possibility of future reimplementation is "too speculative to support standing," a speculative possibility can still "overcome mootness." *Adarand*, 528 U.S. at 224. In *Barrios Garcia*, the Sixth Circuit held that the challenged conduct could return, and mootness was thus inappropriate based on the possible policy preference of an unidentified future presidential administration. 25 F.4th at 441. Such speculation is not even needed to reject mootness here because the current President signaled conditions under which he would reimpose the Contractor Mandate. Executive Order 14099 explicitly ties the Mandate's withdrawal to falling Covid-19 hospitalization and fatality rates, 88 Fed. Reg. at 30,891, indicating that the President would reimpose the Mandate if Covid-19 once again becomes more virulent. Thus, to make an "absolutely clear" showing that the Contractor Mandate would not be reimposed, Defendants must guarantee that Covid-19's virulence will not recur. They cannot carry that burden because new and more virulent variants of Covid-19 routinely emerge. One such variant, termed EG.5, is currently spreading and causing a rise in hospitalization.[4]

Indeed, the weekly hospitalization rate today is comparable to that of July 4, 2021,[5] when the

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[4] *See* Brenda Goodman*, New Variant EG.5 is on the rise as Covid-19 cases and hospitalizations go up*, August 9, 2023, https://www.cnn.com/2023/08/09/health/covid-variant-eg5/index.html; Cecelia Smith-Schoenwalder, *New Covid-19 Hospitalizations Increase as EG.5 Spreads*, U.S. News & World Report, Aug. 15, 2023), https://www.usnews.com/news/health-news/articles/2023-08-15/new-covid-19-hospitalizations-increase-as-eg-5-spreads.

[5] The hospitalization rate for the week of August 12, 2023 is 12,613. The hospitalization rate for the week of July 2, 2021, was 14,073. CDC, *COVID Data Tracker: Daily and Total Trends*,

President first declared success over Covid-19.[6] But then a new and vaccine-resistant variant emerged, causing hospitalizations to surge, and the President responded by imposing the Contractor Mandate in September 2021. Defendants points out that circumstances have changed since then, citing that "nearly 270 million Americans have received at least one shot of the COVID-19 vaccine" and that "COVID-19 deaths have declined by 93%, and hospitalizations are down 86%." Defs. Br. at 13 (citing 88 Fed. Reg. at 30,891). But that progress was uneven and included periods of substantial backsliding. By the start of April 2022, the situation had dramatically improved to about the same level as summer 2021. By then, the number of Americans who had received at least one shot of vaccine had risen from 213 million in September 2021 to 256 million, slightly below the current vaccination level.[7] Hospitalizations had fallen by 88 percent from approximately 84,000 in September 2021 to approximately 10,000, which is actually 20 percent lower than current hospitalization rate.[8] And weekly deaths had fallen by over 90 percent from over 15,000 in September 2021 to fewer than 1,500.[9] Dr. Fauci even announced that the country was "out of the pandemic phase."[10] But that optimism was short lived as infections, fatalities, and hospitalizations spiked in June and July 2022.[11] The situation improved again in September 2022—leading the President to announce that "[t]he pandemic is over"[12]—before worsening yet again in winter months. Defendants vigorously defended the

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https://covid.cdc.gov/covid-data-tracker/#trends_weeklyhospitaladmissions_select_00 (last visited Aug. 15, 2023).

[6] *See* Jennifer Jacobs and Sophia Cai, *Biden Declares Success in Beating Pandemic in July 4 Speech*, Bloomberg, July 4, 2021, https://www.bloomberg.com/news/articles/2021-07-04/biden-to-appeal-for-vaccinations-after-u-s-missed-july-4-target?in_source=embedded-checkout-banner.

[7] *COVID Data Tracker*, supra note 5.

[8] *Id.*

[9] *Id*

[10] PBS News Hour, *Dr. Fauci on why the U.S. is 'out of the pandemic phase,'* Apr. 27, 2022, https://www.pbs.org/newshour/show/dr-fauci-on-why-the-u-s-is-out-of-the-pandemic-phase-2.

[11] *COVID Data Tracker*, supra note 5

[12] CBS, *Biden says COVID-19 pandemic is "over" in U.S.*, Sept. 19, 2022, https://www.cbsnews.com/news/biden-covid-pandemic-over/.

Contractor Mandate in court through out that period.

Judge Moore explained in June 2021 that "COVID-19 has defied expectations to this point … with new variants and seasonal surges threatening to undo hard-won progress." *Hargett*, 2 F.4th at 573 (Moore, J. dissenting). She proved to be prescient as the virus's unpredictable virulence has proven prior declarations of victory in July 2021, April 2022, and September 2022, to be illusory. Given this pattern, it is not unforeseeable for the current Covid-19 situation to worsen—the country is currently experiencing a surge in hospitalizations.[13] It is not without irony that lead counsel for Plaintiffs, who is fully vaccinated, was infected with Covid-19 earlier this week. As the revocation of the Contractor Mandate was explicitly tied to improvement in the Covid-19 conditions, it follows that such deterioration could prompt reimplementation of the Mandate, but for this and other lawsuits challenging it.[14] Because Defendants cannot guarantee against Covid-19 backsliding, they also cannot make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," even if litigation against the Contractor Mandate were resolved in their favor. *West Virginia*, 142 S.Ct. at 2607 (citation omitted). The case is therefore not moot, at least not until and unless Defendants halt their vigorous defense of the Mandate and disclaim power to reissue it.

II. THE CASE IS NOT MOOT BECAUSE THE CONTRACTOR MANDATE IS CAPABLE OF REPETITION YET EVADING REVIEW

The end of challenged conduct also cannot moot a case when that conduct is "capable of repetition, yet evading review." *Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 170 (2016). This

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[13] *COVID Data Tracker*, supra note 5.

[14] A relatively modest deterioration may be enough as Defendants had attempted to enforce the Contractor Mandate during periods of Covid-19 virulence not dissimilar to today. For instance, Defendants urged the Eleventh Circuit at the April 8, 2022 oral argument to lift the nationwide injunction and allow for enforcement of the Contractor Mandate to improve contractors' economy and efficiency. Oral Argument, *Georgia v. President*, 21-14269 (Apr. 8, 2022). At that time, the weekly hospitalization rate—which corresponds to absenteeism that the Contractor Mandate purportedly addressed—was just 10,206, as compared to 12,613 last week. *COVID Data Tracker*, supra note 5.

doctrine applies 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.* (cleaned up).

The "evading review" condition is easily met because the Supreme Court has held that a period of even "two years is too short to complete judicial review of the lawfulness" of the challenged conduct. *Id.* It is beyond dispute that the Contractor Mandate lasted less than two years. Defendants nonetheless respond that "it was not 'by its *very nature* short in duration.'" Defs. Br. at 13 (quoting *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002)). It is unclear what Defendants think is the "natural duration" of a federally mandated vaccine requirement for employment. There is certainly no analog for comparison because the Contractor Mandate "is truly unprecedented." *Louisiana*, 55 F.4th at 1033. In any event, by its very nature, the duration of the Mandate is whatever the President wants—it lasted for as long as he believed it improved economy and efficiency of contractors—which is less than the two-year mark set by the Supreme Court. Defendants further claim the Mandate "was 'adjudicated while fully live' in other litigation." Defs. Br. at 22. Not so. While some other cases have resulted in preliminary injunctions, which were affirmed on appeal, they hardly qualify as *full* adjudications. The Contractor Mandate thus remains capable of evading review.

The "capable of repetition" condition is not exacting and does not require "repetition of every 'legally relevant' characteristic." *FEC v. Wis. Right to Life*, 551 U.S. at 449, 463 (2007). It is satisfied where government officials "retain[ed] authority to reinstate" the challenged policy. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) ("[E]ven if the government withdraws or modifies a COVID [policy] in the course of litigation, that does not necessarily moot the case."). The prospect of repetition can be speculative to a significant degree. In *Barrios Garcia*, the Sixth Circuit held that "injuries are capable of repetition" where "[a] future administration could rescind" an immigration policy. 25 F.4th at 441. The *Barrios Garcia* court reached this conclusion without any foresight into the nature of the "future

administration" nor its stance on immigration. Rather, the mere possibility of reversion to the prior policy was enough to prevent mootness. Here too, the government seeks to retain power to reinstate the Contractor Mandate, and it strongly suggests it would do so if Covid-19 becomes more virulent. Such reinstatement would injure Plaintiffs who work for federal contractors and subcontractors. The possibility of Covid-19's becoming more virulent—as occurred repeatedly throughout the pandemic—means the Contractor Mandate is also capable of repetition, yet evading review.

CONCLUSION

The Court should deny Defendants' Rule 12(b)(1) motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2023, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/*s*/Sheng Li
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