IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, et al.

Defendants.

No. 4:21-cv-01300-DDN

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants file this Notice to alert this Court to the United States District Court for the Western District of Michigan's dismissal of *Vanderstelt v. Biden*, 1:22-cv-5 (W.D. Mich. Oct. 20, 2023). As in this case, plaintiffs in *Vanderstelt* challenged Executive Order 14042. *Vanderstelt*, Order and Opinion at 1 Granting Motion to Dismiss, 1:22-cv-5. After the President revoked that Executive Order, defendants moved to dismiss the case as moot. *Id.* The court agreed with defendants and dismissed the lawsuit, rejecting plaintiffs' arguments that the voluntary cessation exception applied and that the case was capable of repetition yet evading review. *Id.* at 9. A copy of the decision is attached.

Dated: October 23, 2023

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN VANDERSTELT, *et al.*, Plaintiffs,	)	
	)	No. 1:22-cv-5
-v-	)	
	)	Honorable Paul L. Maloney
JOSEPH R. BIDEN, *et al.*, Defendants.	)	

OPINION AND ORDER GRANTING MOTION TO DISMISS

Plaintiffs, on behalf of themselves and others similarly situated, filed this lawsuit to challenge Executive Order 14042. Plaintiffs complain that Defendants, through executive action, compelled individuals employed by federal contractors to receive a COVID-19 vaccine. Plaintiffs sought a series of declaratory judgments and $1 in nominal damages.

Following the revocation of EO 14042, Defendants filed the pending motion to dismiss (ECF No. 37). Defendants argue the Court should dismiss this lawsuit because it cannot provide Plaintiffs with any relief. The Court agrees and will grant the motion.

I.

This lawsuit arises from the federal efforts to reduce the spread of the SARS-CoV-2 virus, commonly known as COVID-19. In March 2020, President Donald Trump declared COVID-19 a national emergency. On his first day in office, January 20, 2021, President Joseph Biden signed Executive Order 13991 which, among other things, created the Safer Federal Workforce Task Force. The Task Force's mission was to provide guidance concerning the operation of the federal government and its employees during the COVID-

19 pandemic. About a month later, in February 2021, President Biden extended the declaration of the COVID-19 national emergency. On September 9, 2021, President Biden issued Executive Order 14042. EO 14042 required, among other things, federal departments and agencies to include a clause in contracts that contractors and subcontractors would comply with the relevant guidance issued by the Task Force. Two weeks later, on September 24, 2021, the Task Force issued the Guidance for Federal Contractors and Subcontractors that required covered contractor employees to be vaccinated against COVID-19. The Guidance became effective in November 2021.

Individuals filed legal challenges to the federal contractor vaccine requirement soon thereafter. Relevant here, on November 30, 2021, the United States District Court for the Eastern District of Kentucky issued an injunction against enforcing the vaccine requirement in Kentucky, Ohio, and Tennessee. *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021). On December 7, 2021, the United States District Court for the Southern District of Georgia issued a nationwide injunction against the vaccine requirement. *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021). On December 9, the Task Force issued a statement that federal government would take no action to enforce the contractor vaccine requirement. Plaintiffs filed this lawsuit on January 4, 2022. Plaintiffs did not properly serve any defendant until late March 2022.

On April 5, 2022, this Court granted Defendants motion to stay pending the outcome of the appeal of the injunction issued by the United States District Court for the Southern District of Georgia. On August 26, 2022, the Eleventh Circuit Court of Appeals affirmed

the injunction but narrowed its scope by limiting the injunction to the parties. *Georgia v. President of the United States*, 46 F.4th 1283, 1308 (11th Cir. 2022).

On September 19, 2022, the Court extended the stay of this lawsuit (ECF No. 28). The Court explained that the Sixth Circuit had held oral argument on the injunction issued by the Eastern District of Kentucky but had not yet issued any opinion. In addition, the Eighth Circuit had scheduled oral argument on an injunction issued by the United States Court for the Eastern District of Missouri. Finally, the Court noted that the Safer Federal Workforce Task Force had suspended any enforcement of the vaccine requirement for federal contractors.

On February 23, 2023, the Court again extended the stay of this lawsuit through May 25, 2023 (ECF No. 31). In mid-January, the Sixth Circuit upheld the injunction issued by the federal district court in Kentucky but limited the scope of the injunction to the parties only. *Kentucky v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023). Then, on January 30, 2023, the Biden Administration announced that it intended to end, on May 11, the emergency declarations related to COVID-19. On May 9, 2023, President Biden signed Executive Order 14099 which revoked Executive Order 14042 and instructed federal agencies that policies premised on EO 14042 could no longer be enforce and must be rescinded. EO 14099 became effective on May 12, 2023.

On May 31, 2023, the Court lifted the stay (ECF No. 36). Defendants filed the pending motion to dismiss on July 12 and filed the reply brief on September 13, 2023.

II.

Defendants filed this motion to dismiss under Rule 12(b)(1) and they challenge subject-matter jurisdiction. When challenged by a motion filed under Rule 12(b)(1), the plaintiff bears the burden of establishing subject matter jurisdiction. *Spurr v. Pope*, 936 F.3d 478, 482 (6th Cir. 2019). A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may take the form of a facial challenge, which tests the sufficiency of the pleading, or a factual challenge, which contests the factual predicate for jurisdiction. *Enriquez-Perdmom v. Newman*, 54 F.4th 855, 861 (6th Cir. 2022). In a facial attack, the court accepts as true all the allegations in the complaint, similar to the standard for a Rule 12(b)(6) motion. *Id.* If the allegations in the complaint establish a federal claim, the court may exercise subject matter jurisdiction. *Id.* In a factual attack, the allegations in the complaint are not afforded a presumption of truthfulness and the district court weighs competing evidence to determine whether subject matter jurisdiction exists. *Id.* Unlike a motion for summary judgment under Rule 56, a district court may resolve factual disputes when ruling on Rule 12(b)(1) motion raising a factual attack on subject matter jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134-35 (6th Cir. 1996).

III.

As courts of limited jurisdiction, our Constitution only authorizes federal courts to adjudicate "actual, ongoing controversies." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 557 (6th Cir. 2021) (citation omitted). The ongoing controversy requirement exists "at every stage of the case." *Id.* (citation omitted); *see Alvarez v. Smith*, 558 U.S. 87, 92 (2009) ("An actual controversy must be extant at all stages of review, not merely at the

time the complaint was filed."); *Jarrett v. United States*, 79 F.4th 657, 677-78 (6th Cir. 2023) ("To respect that 'cradle to grave' limitation, federal courts must ensure that a true dispute persists throughout the case."). When circumstances change such that "a court may not grant 'any effectual relief,' the case becomes moot." *Jarrett*, 79 F.4th at 678; *see Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017) (holding that a lawsuit become moot when the parties "lack a legally cognizable interest in the outcome" and explaining that parties lack such an interest when subsequent "events make it impossible for the court to grant any effectual relief whatsoever to the prevailing party.") (cleaned up; citation omitted). When the case or controversy becomes moot, a federal court loses any authority, subject matter jurisdiction, over the lawsuit and the court must dismiss the case. *Davis v. Colerain Twp., Ohio*, 41 F.4th 164, 174 (6th Cir. 2022); *Ohio v. United States Envtl. Prot. Agency*, 969 F.3d 306, 308 (6th Cir. 2020).

Lawsuits may become moot when an executive officer repeals the challenged regulation. *Davis*, 41 F.4th at 174; *Thompson v. Whitmer*, No. 21-2602, 2022 WL 168395, at *3 (6th Cir. Jan. 19, 2022); *see, e.g., Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc) (involving a mask mandate issued and later revoked by the Michigan Department of Health and Human Services). Other federal courts have already held that the repeal of EO 14042 and the rescinded guidance from the Task Force mooted a legal challenge to the vaccine mandate. *See, e.g., Donovan v. Vance*, 70 F.4th 1167, 1172 (9th Cir. 2023); *Missouri v. Biden*, No. 22-1104, 2023 WL 3862561, at *1 (8th Cir. June 7, 2023) (per curiam); *Hollis v. Biden*, No. 21-60910, 2023 WL 3593251, at *1 (5th Cir. May 18, 2023) (per curiam).

Plaintiffs identify exceptions to mootness: (1) voluntary cessation and (2) capable of repetition yet evading review.

A. Voluntary Cessation

Our Supreme Court has established the standard for determining whether a defendant's voluntary cessation of challenged conduct moots a plaintiff's legal challenge: the subsequent events must make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). Courts afford the government more leeway than private parties in voluntary cessation situations because governmental "self-correction provides a secure foundation for dismissal based on mootness so long as it appears genuine." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). When deciding whether the allegedly illegal conduct could not reasonably be expected to recur, courts take "into account the totality of the circumstances ..., including the manner in which the cessation occurred." *Id.*

The voluntary cessation exception to mootness does not apply here. It appears that these Plaintiffs were never at risk of having the vaccine mandate enforced against them. Before Plaintiffs filed this lawsuit, the Task Force halted enforcement of the contractor vaccine mandate after the nationwide injunction issued by the United States District Court for the Southern District of Georgia. Thirteen months later, in January 2023, the White House announced its intention to end the declaration of a national emergency related to the COVID-19 virus. The Biden Administration fulfilled that intention in May 2023 and also revoked Executive Order 14042. As Plaintiffs point out, the Administration did not justify

the change in course on the outcome of litigation, but on the change in circumstances concerning the risk of COVID-19 infections and the public's health. Defendants have met their burden. *See Donvan*, 70 F.4th at 1172 n.5 ("We reject as meritless Plaintiffs' suggestion that either the 'capable of repetition, yet evading review' or 'voluntary cessation' exceptions to mootness apply here."). Plaintiffs' focus on the "absolutely clear" language overlooks what must be made absolutely clear, "that the allegedly wrongful behavior could not *reasonably* be expected to occur." *See Resurrection Sch.*, 35 F.4th at 528-29. The "mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C .Cir. 1997) (collecting circuit court cases). Speculation about a possible future pandemic or even speculation about a resurgence in COVID does not alter the conclusion that this lawsuit is moot. *See Thompson v. DeWine*, 7 F.4th 521, 526 (6th Cir. 2021). "[T]he theoretical possibility of reversion to an allegedly unconstitutional policy is simply not sufficient to warrant an exception to mootness ...." *Thomas v. City of Memphis, Tennessee*, 996 F.3d 318, 328 (6th Cir. 2021).

B. Capable of Repetition Yet Evading Review

The second exception to mootness—capable of repetition yet evading review—applies in limited and exceptional circumstances where (1) the duration of the challenged act is too short to be fully litigated prior to cessation or expiration and (2) a reasonable expectation exists that the same complaining party will be subject to same action again. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (citation omitted). This "narrow exception applies to disputes that *by their nature* will become moot before litigation runs its

course, such as a college graduation date, and thus are 'likely forever' to evade appellate review." *Radiant Global Logistics, Inc. v. Furstenau*, 951 F.3d 393, 396 (6th Cir. 2020) (per curiam) (emphasis added); *see, e.g., Platt v. Bd. of Comm'rs on Grievances and Discipline of Ohio Supreme Court*, 769 F.3d 447, 453 (6th Cir. 2014) ("Challenges to election laws quintessentially evade review because the remedy sought is rendered impossible by the occurrence of the relevant election.") (cleaned up; citation omitted). The party asserting the exception bears the burden of establishing both prongs. *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005).

The capable of repetition yet evading review exception to mootness does not apply here. Again, the current administration did not revoke Executive Order 14042 because of the legal challenges to it. The challenged conduct, the Executive Order and the Task Force's Guidance, did not include the sort of limited periods or deadlines that would make the mandate something of a limited nature. Additionally, the COVID-19 pandemic and the resulting governmental restrictions are not the sort of events that are likely capable of repetition. *See, e.g., Hargett*, 2 F.4th at 560-61 (reasoning that the injury and requested relief "are inextricably tied to a COVID-19 pandemic, a once-in-a-century crisis" and concluding that the "unique factual situation of this case makes it one of the rare election cases where the challenged action is not capable of repetition."). Plaintiffs have not met their burden. *See Donvan*, 70 F.4th at 1172 n.5 ("We reject as meritless Plaintiffs' suggestion that either the 'capable of repetition, yet evading review' or 'voluntary cessation' exceptions to mootness apply here.").

IV.

Defendants have established that the executive action giving rise to this lawsuit has been revoked which renders this controversy moot. The Court can no longer grant Plaintiffs any effective relief. Defendants have established that a federal contractor vaccine mandate will not reasonably occur again in response to a national declaration of a public health emergency due to COVID-19. Plaintiffs have not established that the vaccine mandate constitutes an event capable of repetition yet evading review. Accordingly, the Court will grant Defendants' motion to dismiss this lawsuit as moot.

ORDER

For the reasons provided in the accompanying Opinion, the Court **GRANTS** Defendants' motion to dismiss (ECF No. 37). **IT IS SO ORDERED.**

Date: October 20, 2023

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge