IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,	)	
Plaintiff,	)	Civil Action No.: 1:23-cv-11001-RGS
v.	)	
JANET YELLEN, Secretary of Treasury, in her official capacity, and JOSEPH BIDEN, President of the United States, in his official capacity	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Rule 7.1(b)(3) of the Local Rules of the United States District Court for the District of Massachusetts, Plaintiff National Association of Government Employees respectfully submits this request to the Court for leave to file a sur-reply to Defendants' Motion to Dismiss for Lack of Jurisdiction.

In their Reply Memorandum of Law In Support of Their Motion to Dismiss for Lack of Jurisdiction, Defendants make at least two new arguments not made in their opening brief. First, Defendants argue that the voluntary cessation doctrine "does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." Reply Br. at 1. As set forth in Plaintiff's proposed Sur-Reply, ACLU of Massachusetts v. U.S. Conf. of Cath. Bishops, 705 F.3d 44 (1st Cir. 2013), upon which Defendants rely, does not stand for this proposition at all and the Supreme Court has recently all but rejected the notion that a defendant must have a specific intent of avoiding or mooting litigation in order for the voluntary cessation doctrine to apply.

Second, Defendants argue that Plaintiff lacks standing because any injury sustained by the government's temporary suspension of investments into the G fund would be redressed by the statutory requirement under 5 U.S.C. § 8438(g) that the government make G fund participants whole upon expiration of the debt issuance suspension period. See Reply. Br. at 1. As set forth in Plaintiff's proposed Sur-Reply, Defendants' reliance on Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020), in support of this argument is misplaced, and 5 U.S.C. § 8438(g) does not provide any such guarantee that Plaintiff's members will be made whole.

Plaintiffs conferred with counsel for Defendants prior to filing this motion. Counsel for Defendants stated that they oppose Plaintiffs' request for leave to file a sur-reply.

For the reasons discussed herein, there is good cause for Plaintiff to file a sur-reply to address new arguments advanced by Defendants in their recent Reply. Plaintiffs respectfully request leave to file the proposed Sur-Reply attached hereto as Exhibit 1.

Dated: October 3, 2023

Respectfully submitted,

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,

By its attorneys,

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, BBO #640716
Matthew P. Carrieri BBO #705192
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com
mcarrieri@llrlaw.com

Sarah E. Suszczyk *(pro hac vice)*
General Counsel NAGE/IBPO/IAEP/IBCO
159 Burgin Parkway

Quincy, Massachusetts 02169
(617) 376-7239
ssuszczyk@nage.org

Thomas H. Geoghegan *(pro hac vice)*
Despres, Schwartz & Geoghegan, Ltd.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
(312) 372-2511
tgeoghegan@dsgchicago.com

Patrick V. Dahlstrom *(pro hac vice)*
Pomerantz LLP
10 South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 377-1181
pdahlstrom@pomlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served by electronic filing on October 3, 2023 on counsel for Defendants.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., Plaintiff, v. JANET YELLEN, Secretary of Treasury, in her official capacity, and JOSEPH BIDEN, President of the United States, in his official capacity Defendant.	)	Civil Action No.: 1:23-cv-11001-RGS

PLAINTIFF'S SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

INTRODUCTION

In Defendants' Reply Memorandum in Support of their Motion to Dismiss for Lack of Jurisdiction, Defendants raise two new arguments, neither of which have any merit. First, citing ACLU of Massachusetts v. U.S. Conf. of Cath. Bishops, 705 F.3d 44 (1st Cir. 2013), Defendants argue that the voluntary cessation doctrine "does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." Reply Br. at 1. However, neither the First Circuit nor the Supreme Court have held that a defendant must have a specific legislative intent when it voluntarily ceases to engage in the challenged activity in order for the exception to mootness to apply. In ACLU of Mass., the First Circuit found that the voluntary cessation doctrine did not apply because the defendant had taken *no voluntary or affirmative* action to moot the ACLU's challenge to the contract between Health and Human Services and the U.S. Conference of Catholic Bishops. See 705 F.3d at 54–56. Rather, the contract expired according to its original terms, which were set well before any legal challenge was filed. See id. at 55. In

West Virginia v. EPA, 142 S. Ct. 2587 (2022), the Supreme Court held that the voluntary cessation doctrine applied to the government's repeal of the Clean Power Act *despite* the fact that the government's action was not motivated by an intent to avoid or moot litigation.

Second, citing Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020), Defendants argue that Plaintiff lacks standing because any injury sustained by the government's temporary suspension of investments into the G fund would be redressed by the statutory requirement under 5 U.S.C. § 8438(g) that the government make G fund participants whole upon expiration of the debt issuance suspension period. See Reply. Br. at 1. Defendants' citation to Thole is misplaced. In Thole, the Supreme Court denied standing to participants in a defined *benefit* plan, but made clear that participants in defined *contribution* plans would have standing to challenge a trustee's failure to fund such plans. See 140 S. Ct. at 1618 ("Of decisive importance to this case, the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan."). The NAGE members who participate in the individual G Fund accounts are participants in a defined contribution plan, which suffered months of losses because the Secretary of the Treasury defaulted on the notes that it held and failed to invest its own personal savings in other notes. Further, 5 U.S.C. § 8438(g) does not provide any guarantee that the debt issuance suspension period will end or that a new debt ceiling established by Congress will be sufficient to allow for repayment.

ARGUMENT

I. The First Circuit's decision in ACLU of Massachusetts v. U.S. Conf. of Catholic Bishops does not apply when the government by its own voluntary act has ended the challenged conduct.

The basis for the holding in ACLU of Mass. is relatively narrow: the voluntary cessation doctrine does not apply if the defendant has done nothing, or taken no voluntary act, to bring an end to the challenged conduct. See 705 F.3d at 54–56. Defendants take out of context the First Circuit's statement that the voluntary cessation doctrine does not apply when cessation of the

challenged activity occurs "for reasons unrelated to the litigation." Id. at 55. Indeed, the Court clarified exactly what it meant:

> Circuit courts have routinely held that the voluntary cessation exception is not invoked when the challenged conduct ends **because of an event that was scheduled before the initiation of the litigation, and is not brought about or hastened by any action of the defendant**.

Id. at 54 (emphasis added).

ACLU of Mass. does not stand for the proposition, as Defendants argue, that a defendant must act with specific intent to moot a case in order for the voluntary cessation doctrine to apply. Rather, the First Circuit in that case held that the voluntary cessation doctrine does not apply when events show that there was no true "voluntary" act to hasten the end of the litigation.

The Supreme Court has also held that specific intent to moot a case is not required for the voluntary cessation doctrine to apply. In the recent and leading case of West Virginia v. EPA, the Court found that the voluntary cessation doctrine applied after the EPA withdrew its Clean Power Plan, despite the fact that, in withdrawing the plan, the government had no specific intent to avoid a legal challenge. See 142 S. Ct. at 2606–07. To the contrary, the government repealed the rule after concluding, apparently in agreement with the plaintiffs in that case, that the Clean Power Plan "had been in excess of [the EPA's] statutory authority[.]" See id. at 2604 (internal citations and quotation marks omitted). Nonetheless, the Court found that the government's repeal of the Clean Power Plan—an affirmative act that would have ended the litigation—sufficed to invoke the voluntary cessation doctrine even though there was no finding of specific intent to moot the case before it. See id. at 2606–07.

Courts are reluctant to inquire into legislative motive, which is exactly what this Court would have to do here to determine Congress's motive in raising the debt ceiling. See Dobbs v. Jackso Women's Health Org., 142 S. Ct. 2228, 2255–56 (2022) ("This Court has long disfavored

arguments based on alleged legislative motives. The Court has recognized that inquiries into legislative motives are a hazardous matter. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole.") (internal citations and quotation marks omitted). Even so, there is evidence that Congress did enact the Fiscal Responsibility Act to avoid confronting the very constitutional issues raised in this lawsuit. Defendants' claim that President Biden and Congress acted for reasons entirely unrelated to the very constitutional issues that Plaintiff argues in this case contradicts public statements made by President Biden and several members of Congress. For example, President Biden has stated on multiple occasions that if Congress did not act to raise the debt ceiling, he himself might make a challenge under the Fourteenth Amendment.[1] Dozens of members of Congress argued that defaulting on the debt would violate the Fourteenth Amendment.[2] It is presumptuous for Defendants to claim that neither

[1] See President Joseph R. Biden, Jr., *Remarks Following a Meeting With Congressional Leaders on the Public Debt Limit and an Exchange With Reporters*, THE AMERICAN PRESIDENCY PROJECT (May 9, 2023), https://www.presidency.ucsb.edu/documents/remarks-following-meeting-with-congressional-leaders-the-public-debt-limit-and-exchange; *Remarks by President Biden in a Press Conference*, THE WHITE HOUSE (May 21, 2023, 6:57 P.M.), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/21/remarks-by-president-biden-in-a-press-conference/.

[2] See, e.g., Press Release, Congressman Gerry Connolly, Connolly Urges President Biden to Invoke the 14th Amendment (May 24, 2023), https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4765; Press Release, Congressman Jamie Raskin, Raskin Statement on H.R. 3746 (May 31, 2023), https://raskin.house.gov/2023/5/raskin-statement-on-h-r-3746; Press Release, Congressman Earl Blumenauer, Blumenauer Statement on Debt Limit Vote (May 31, 2023), https://blumenauer.house.gov/media-center/press-releases/blumenauer-statement-on-debt-limit-vote; Press Release, Senator Ben Cardin, Cardin Votes to Prevent Historic National Default (June 1, 2023), https://www.cardin.senate.gov/press-releases/default-avoided/; Letter from Sixty-Six Members of Congress to President Joseph R. Biden, Jr. (May 19, 2023), 1–3, https://www.documentcloud.org/documents/23817271-cpc-letter-on-14th-amendment-and-debt-ceiling.

President Biden nor Congress were acting to head off thousands of potential lawsuits that would have raised claims under the Fourteenth Amendment.

II. The Supreme Court in Thole v. U.S. Bank made clear that participants in defined *contribution* plans like those in the individual G fund accounts *do* have standing to sue for wallet-type injuries.

For nearly six months, starting on January 13, 2023, Defendant Yellen defaulted on obligations on Treasury notes to thousands of G fund participants. Critically, the G fund accounts in which NAGE members participate are essentially defined contribution plans. In Thole, the Supreme Court held that the plaintiffs, who were all participants in a defined benefit plan, did not have standing to challenge the defendant's underfunding of that plan. However, the Court made clear that, although participants in defined benefit plans lack standing to sue for losses to their individual plans, participants in defined contribution plans would have standing to bring such a challenge to the underfunding of their accounts. That is because participants in defined contribution plans invest their own savings and "own" the assets in their accounts, whereas participants in defined benefit plans do not invest any of their own savings and thus do not "own" any assets in the plan. See Thole, 140 S. Ct. at 1616 ("Participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to participants in a defined-contribution plan, and they possess no equitable or property interest in the plan.").

In their opening memorandum, Defendants did not deny that participants in the G Fund accounts, which are effectively defined contribution plans, suffered a genuine financial injury during the debt issuance suspension period. Nor should they: the G fund participants suffered a decline in the value of their individual accounts for the obvious reason that the Secretary of the Treasury was not reinvesting their accounts in interest-bearing bonds, or even paying interest on existing bonds, during the five-month debt issuance suspension period. However, now in their

reply Defendants claim that despite those losses over five months, the participants never suffered any injury because they have a guarantee of repayment under 5 U.S.C. 8438(g).

They do not. Under 5 U.S.C. § 8438(g) there is no absolute guarantee at all. Whether the participants are made whole depends on future legislation, and at least three contingencies. First, under 5 U.S.C. § 8438(g), reimbursement occurs only once the debt issuance suspension period has to come to an end, but 5 U.S.C. § 8438(g) does not obligate the Secretary of the Treasury to end the debt issuance suspension period. Second, even if or when it does end, the Secretary of the Treasury will not reimburse the G Fund participants until and unless such reimbursement can occur without breaching whatever debt ceiling is in place. Third and finally, repayment depends on action by Congress to avoid a total default on Treasury notes under 31 U.S.C. § 3101(b). If there is a default or if Congress fails to raise the debt limit set under 31 U.S.C. § 3101(b), which will go back into effect on January 2, 2025, the participants who exclusively hold Treasury notes will suffer a massive loss, which 5 U.S.C. § 8438 does not even pretend the government will reimburse.

Of course, Defendants do not discuss the separate ground for standing: the threatened hold-up of Plaintiff's members' pay checks. Nor do they attempt to distinguish Seila Law v. Consumer Financial Protection Bureau,140 S. Ct. 2183, 2196 (2020), which holds that plaintiffs need not wait for an actual injury under the doctrine of ripeness to challenge an action that violates the separation of powers, as Defendants' actions do in this case. See also Collins v. Yellen, 141 S. Ct. 176 (2022).

CONCLUSION

For the reasons discussed above and those previously argued in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Jurisdiction, the Court should deny Defendants' Motion to Dismiss.

Dated: October 3, 2023

Respectfully submitted,

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,

By its attorneys,

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, BBO #640716
Matthew P. Carrieri BBO #705192
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com
mcarrieri@llrlaw.com

Sarah E. Suszczyk *(pro hac vice)*
General Counsel NAGE/IBPO/IAEP/IBCO
159 Burgin Parkway
Quincy, Massachusetts 02169
(617) 376-7239
ssuszczyk@nage.org

Thomas H. Geoghegan *(pro hac vice)*
Despres, Schwartz & Geoghegan, Ltd.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
(312) 372-2511
tgeoghegan@dsgchicago.com

Patrick V. Dahlstrom *(pro hac vice)*
Pomerantz LLP
10 South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 377-1181
pdahlstrom@pomlaw.com

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I hereby certify that a copy of this document was served by electronic filing on October 3, 2023 on counsel for Defendants.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan