UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
APPEAL NO. 23-1867

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.
Plaintiff-Appellant,

v.

JANET LOUISE YELLEN, in her official capacity as Secretary of Treasury;
JOSEPH ROBINETTE BIDEN, JR. in his official capacity as
President of the United States,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case No. 1:23-cv-11001-RGS
The Honorable Richard G. Stearns

REPLY BRIEF OF PLAINTIFF-APPELLANT

Shannon Liss-Riordan, CAB # 77877
Matthew Carrieri, CAB # 1207125
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801
sliss@llrlaw.com
mcarrieri@llrlaw.com

Thomas H. Geoghegan, CAB # 1198514
Despres, Schwartz & Geoghegan, Ltd.
77 West Washington Street, Suite 711

Chicago, Illinois 60602
(312) 372-2511
tgeoghegan@dsgchicago.com

Patrick V. Dahlstrom, CAB # 1173468
Pomerantz LLP
10 South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 377-1181
pdahlstrom@pomlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The same ceiling on further indebtedness or borrowing by the United States to meet its obligations – i.e., the ceiling that was in effect on May 8, 2023, when Plaintiff National Association of Government Employees ("NAGE") filed the challenge that precipitated this appeal – returns as a matter of law on January 2, 2025. In their brief, Defendants do not deny the *facts* that gave NAGE clear legal standing to file this action on May 8, 2023. On that date, thousands of NAGE members who participated in the Thrift Saving Plan known as the G Fund lost tens of thousands of dollars as a result of an effective default by the Secretary of the Treasury on payment of the interest on the debt owed to them, as well as failure to reinvest in interest-bearing Treasury bonds. As of May 8, 2023, and prior to the passage of the Fiscal Responsibility Act on June 3, 2023, NAGE members also had no legal remedy to recover these sums. Nor did the Secretary of the Treasury have any legal authority to pay or give a legally enforceable promise to repay amounts due to NAGE members. And unlike the case with private investors in Treasury bonds, the debt which NAGE members purchased with their own personal savings were not marketable, and NAGE members were locked into these losses unless they took extreme actions to withdraw entirely from this Thrift Savings Plan. The Defendants are incorrect that under 5 U.S.C. § 8438(g), there was any enforceable guarantee of repayment, absent the enactment of a new federal law.

Nor do Defendants specifically deny that there was a "substantial risk" at the time of a likely default on June 5, 2023, the date on which the Secretary of the Treasury anticipated the government would run out of cash. Clapper v. Amnesty Int'l, 568 U.S. 398, 414 n.5 (2013). The only acknowledged contingency plan at the time was to delay the paychecks of all federal employees, including all NAGE members. Defendants only quibble as to the degree of certainty that such action would occur, in part because there was no "blueprint" as to what to do, but there is no statement from the Secretary of the Treasury denying that a delay in the issuance of paychecks would have occurred. The fact is that the Secretary of Veteran Affairs, overseeing a department in which many NAGE members work, warned NAGE members to anticipate such a delay in wage payments. The Secretary of the Treasury could easily give a declaration denying the facts presented here but has not, and the Defendants again do not specifically deny that federal employees faced a substantial risk of a delay in payment.

The Defendants – and Congress – have not withdrawn the statute. The same debt ceiling will go back into effect on January 2, 2025. The Fiscal Responsibility Act postpones the date of injury, and there is little time to resolve the case. Plaintiff takes the law as it is written, and under that law (as opposed to political forecasting) there is a "certainly impending" future injury or a "substantial risk" of it within the meaning of Clapper, 568 U.S. at 409–14 & n.5, and other cases of the Supreme Court that Plaintiff has previously cited.

ARGUMENT

I. NAGE had standing at the time this action was filed and continues to have standing under Clapper's legal framework.

As set out in the opening brief and above, Plaintiff NAGE represents thousands of members who have placed their own personal savings in a Thrift Savings Plan, controlled by the Secretary of the Treasury, who purchases government debt on their behalf. On January 13, 2023, the Secretary of the Treasury defaulted on payment of that debt, and continued to do so up through the enactment of the Fiscal Responsibility Act, P.L. 118-5 § 401, which temporarily postponed the ceiling on borrowing by the United States. Unlike private investors, the NAGE members cannot buy or sell the public debt in which the Secretary of the Treasury invests their personal savings. For thousands of these members, the G Fund, available only to federal employees, represents their principal or entire personal voluntary savings.

By May 8, 2023, after the start of a debt suspension period beginning on January 13, 2023, thousands of participants had failed to receive interest payments on the debt held by them into their separate individual accounts, and the Secretary of the Treasury had stopped investing their personal savings in any manner. Although 5 U.S.C. § 8438(g) requires repayment upon action by Congress to raise the debt limit, this provision is not an "I.O.U." or an enforceable promise to pay. In fact, unlike a commercial transaction, the loss is irreparable, as there is no legal remedy for it until and unless Congress passes a law to raise the debt limit. Also, there is no guarantee that the enactment of such a law would even lead to repayment because Congress must raise the debt limit sufficiently so that the repayment of the debt on which the government has defaulted does not create a new peril of breaching the revised debt ceiling and includes payment of the debt owed to G Fund beneficiaries by the government's default that has "not otherwise appropriated." 5 U.S.C. § 8348(j)(4). Given that Congress must pass a law raising the debt ceiling, there is nothing to ensure that Congress complies with or authorizes again the same promise in 5 U.S.C. § 8438(g) to repay the debt owed to Plaintiff's members.

Plaintiff sufficiently alleged that harm would befall all NAGE members due to the delay in issuance of federal paychecks when the Secretary of Treasury ran out of cash as she herself anticipated on June 5, 2023. The Secretary of the Treasury failed to give any declaration that Plaintiff's members faced no "substantial risk" of such injury within the meaning of Clapper, 568 U.S. at 414 n.5.

While not dispositive, it is worth noting that Defendants did not challenge standing in their memorandum in support of the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1). Only in the reply brief did Defendants raise the standing issue for the first time.

II. An actual case or controversy under Article III continues to exist.

Plaintiff NAGE continues to have standing to bring this challenge. There is still the same substantial risk of future injury when the United States again runs out of cash in a few months, either on January 2, 2025, or just days thereafter, when the same ceiling on borrowing is reinstated by the Fiscal Responsibility Act, P.L. 118-5, § 401. While the Secretary of the Treasury has not yet issued a debt issuance suspension period, and may not until this case is dismissed, it is certain that before or after January 2, 2025, the Secretary will default on payment of the debt again. Defaulting on the debt to NAGE's members in the G Fund is the *only* emergency measure that the Secretary is authorized to take before a default occurs, or even after a default occurs. There is no other measure or action that the Secretary is authorized to take when – and it is a matter of certainty – the United States runs out of cash by operation of existing law.

Plaintiff denies that January 2, 2025, the date of certain injury, is so far off as to render this case moot. Nor is it reasonable to say that Plaintiff should wait until November or December to again file a challenge. At best that means a temporary restraining order from a district court that will not assure creditors as to the creditworthiness of the United States. Nothing less than a fully litigated case will be an adequate remedy. For that reason, President Biden has stated that without time for full litigation of the constitutional issue, especially under the Fourteenth

Amendment, a legal case is not even worth pursuing. On May 9, 2023, after a meeting with Congressional leadership, the President Biden told reporters: "I have been considering the 14th Amendment. And a man I have enormous respect for, Larry Tribe, who advised me for a long time, thinks that it would be legitimate [not to comply with the debt ceiling statute]. But the problem is it would have to be litigated. And in the meantime, without an extension [of the law], it would still end up in the same place." Remarks by President Biden on Meeting with Congressional Leaders, The White House (May 9, 2023), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/09/remarks-by-president-biden-on-debt-ceiling-negotiations/#:~:text=THE%20PRESIDENT%3A%20Well%2C%20the%20question,would%20have%20to%20be%20litigated. He added: "I will be very blunt with you: When we get by this, I'm thinking about taking a look at — months down the road — to see whether — what the court would say about whether or not the — it does work. Id. P.L. 118-5 affords very little time to do so. According to the Administrative Office of the U.S. Courts, civil cases in the federal district courts have a median length of 27 months from time of filing to trial. There is scant time left even now to enjoin the enforcement of the Debt Limit Statute even on an expedited schedule of litigation.

III. Williams v. Lew is not applicable to the issue of NAGE's standing.

In arguing that Plaintiff has not shown future injury, Defendants rely principally on Williams v. Lew, 819 F.3d 466 (D.C. Cir. 2016). But the "chain of contingencies" identified in that case does not exist here. Id. at 473. That case involved a private investor who may or may not hold public debt at the time of a future default. Rejecting this injury as too speculative, the appellate court stated:

> [A]ny future injury that Williams might suffer follows from an extended chain of contingencies. In particular: (1) federal debt must reach the statutory ceiling; (2) the Treasury department must exhaust any "extraordinary measures" to avoid a default; (3) the United States must be unable to pay its obligations with "cash on hand" in a given day; (4) payment on Williams's securities must come due *during* such time; and (5) Williams must continue to *hold* those securities.

Williams, 819 F.3d at 472 (emphasis supplied) (internal citations omitted).

All five of these contingencies identified by the appellate court are absent here. To take them in the same order: (1) the federal debt already exceeded the statutory ceiling set by 31 U.S.C. § 3101(b) on May 8, 2023, and will again exceed the ceiling on January 2, 2025; (2) the Treasury Department has taken "extraordinary measures", including defaulting on the debt held by Plaintiff's members, and the Secretary of the Treasury is certain to inflict such injury either on, shortly after, or shortly before January 2, 2025, as that is the only measure that Congress has authorized her to take; (3) the United States would have been unable to pay its obligations with cash on hand on June 5, 2023, and will be in the same position on or after January 2, 2025; (4) the interest on the debt *will* come due for thousands of G Fund participants on January 2, 2025; and (5) thousands of those participants will be holding debt during that period because of the difficulty of withdrawing from G Fund accounts in which many have invested their life savings and which the Secretary of the Treasury controls in their behalf. It is ironic that Defendants rely on a decision that finds a default on debt unlikely in Williams *in part* because there must *first* be default on the debt of G Fund participants.

Nor does Williams even address the substantial risk or certainly impending injury to *all* of Plaintiff's members as federal employees. The plaintiff in Williams may or may not be holding securities, but NAGE's members hope to be holding their jobs. Many live week to week by timely payment of their salary or wages. In upholding dismissal, Williams also notes that the plaintiff investor did not raise a challenge based on the separation of powers, and therefore waived such an argument. See 819 F.3d at 471. By contrast, Plaintiff NAGE *has* made such a claim. The Supreme Court has made clear it will more readily find standing when such claims are made.

Finally, Williams does not discuss any of the two exceptions to mootness. It appears that neither was raised, and neither was addressed by the Court. Both exceptions preserve Article III jurisdiction here even if this case were otherwise deemed to be moot.

IV. This case meets the mootness exception for "voluntary cessation" of conduct likely to recur.

As a matter of law, the same limit on borrowing, and thus the same substantial risk of default, will recur on January 2, 2025. The Defendants must show it is "absolutely clear" that this situation cannot "reasonably be expected" to happen. West Virginia v. Environmental Prot. Agency, 597 U.S. 697, 720 (2023) (internal citation and quotation marks omitted). As the Supreme Court stated in that case, this is a heavy burden of proof, and Defendants fall well short of meeting it. See id. at 719. In the various recent Supreme Court cases applying this exception to mootness, the *only* factor that is considered now is the likelihood of recurrence, with the burden placed on the government. See generally Roman Catholic Archdiocese v. Cuomo, 592 U.S. 14 (2020). There is no requirement that a party must make an additional showing that cessation of the challenged conduct has occurred to moot the specific case, and NAGE therefore need not make such a showing here. To determine whether an executive might reimpose a challenged order, perhaps the lack of intent to moot a case is relevant to a finding that the order is unlikely to recur. But in this case, the law, P.L. 118-5, is a *per se* guarantee of recurrence – far stronger than in West Virginia or Cuomo. That in itself distinguishes this case from ACLU of Mass. v. U.S. Conference of Bishops, 705 F3d 44 (1st Cir 2013), where that factor was relied upon to support a finding that there was no likelihood of recurrence. When the action is certain to recur, the existence of this intent one way or the other is irrelevant. It is resolved, *per se*, by the statute.

In rejecting the exception for voluntary cessation, Calvary did find significant that the Governor did not intend to moot the case before it. See Calvary Chapel of Bangor v. Mills, 52 F.4th 40, 48–49 (1st Cir. 2022). The Court in Calvary also relied on other evidence, including the Governor's intent, not contradicted, that she would not impose the allegedly unlawful order. As noted in that case, the voluntary cessation exception "'turns on the *circumstances of the particular case*.'" Calvary, 52 F.4th at 49 (quoting Boston Bit Labs, Inc. v. Baker, 11 F.4th 3, 10 (1st Cir. 2021) (emphasis in original)). In the circumstances of *this* particular case, it is ordained by law that future injury is certainly impending.

V. The mootness exception also applies for cases "capable of repetition but evading review."

As the Supreme Court stated in Federal Election Com'n v. Wisconsin Right to Life, Inc., "[o]ur cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged inequality.'" 551 U.S. 449, 461 (2007) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). Defendants do not present a consistent argument as to why this exception does not apply. On the one hand, Defendants claim there is no "plausible" argument that a default on the debt "will ever occur." On the other hand, Defendants also inconsistently claim that the duration of the "impasse" would be long enough to allow full litigation of the constitutional challenge here. In response, it is not just "plausible", but certain that default will occur on or a few days after January 2, 2025, if 31 U.S.C. § 3101(b) remains in effect. While Plaintiff cannot calculate the exact date of default under existing law, the Secretary of the Treasury does not challenge the gravity of the risk under that law. Nor has the Secretary of the Treasury supported the statement of the District Court that default would depend on the contingency of Congress adopting a budget. It is enough to note that with default a mere six months away, the United States in the next fiscal year starting on July 1, 2024, will likely have a budget deficit.

It is of course impossible to predict how long a debt impasse or period of default would occur, but the longer it lasts, the greater the harm, and the less likely that the federal judiciary could give a meaningful remedy in time to prevent lasting and irreparable economic harm to NAGE's members

Since both Defendants warned in 2023 of the grave risk of default under then-existing law, it follows that the Defendants will take the same view of that grave risk when that law goes back in effect. Defendants in this case as represented here take a different position – dismissing the law as mere conjecture or a hypothetical. However, on the date this reply brief was filed, the presumed leading candidate for President in the 2024 election is former President Donald Trump. On May 10, 2023, former President Trump urged the Congress to reject any increase or suspension of the statutory limit on indebtedness and to let default occur. See Mike Calia, "Trump urges GOP to let catastrophic debt default happen if Dems don't accept cuts," CNBC (May 10, 2023), available at https://www.cnbc.com/2023/05/11/trump-endorses-debt-ceiling-default.html. A total of 153 members of the House and Senate voted against the Fiscal Responsibility Act and would have allowed default to occur. Over 50 so called moderates who presumably voted for it have already announced they are leaving the House. Defendant Biden has given his view that there should be full litigation of the claim that a limit on indebtedness lawfully incurred by Congress is a violation of the Fourteenth Amendment. It is also beyond the power of Congress to enact under Article I. Any attempt by the President to comply with the limit by cancelling legislatively approved spending would violate Article I as well. See Clinton v. New York, 524 U.S. 417 (1998) (striking down line item veto). Plaintiff submits that under Article III, and under the time frame that now exists, it is the role of the federal courts to determine whether to grant relief in the present case.

CONCLUSION

For the foregoing reasons and those discussed in Plaintiff's opening brief, this Court should reverse the District Court's grant of Defendant's motion to dismiss and remand this matter back to the District Court for further proceedings.

Dated: June 20, 2024

Respectfully submitted,

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan
sliss@llrlaw.com
(First Cir. No. 77877)
Matthew P. Carrieri
mcarrieri@llrlaw.com
(First Cir. No. 1207125)
Lichten & Liss-Riordan, P.C.
729 Boylston St. Suite 2000
Boston, MA 02116
Phone: (617) 994-5800

Thomas H. Geoghegan
tgeoghegan@dsgchicago.com
(First Cir. No. 1198514)
Despres, Schwartz & Geoghegan, Ltd.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
Phone: (312) 372-2511

Patrick V. Dahlstrom,
pdahlstrom@pomlaw.com
(First Cir. No. 1173468)
Pomerantz, LLP
10 South LaSalle Street, Suite 3505
Chicago, Illinois 60603
Phone: (312) 377-1181

Attorneys for Plaintiff-Appellant
National Association of Government
Employees, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 3,104 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

Dated: June 20, 2024

/s/ *Shannon Liss-Riordan*
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2024, I electronically filed a copy of this Brief by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: June 20, 2024

/s/ *Shannon Liss-Riordan*
Shannon Liss-Riordan