No. 23-1867

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

v.

JANET LOUISE YELLEN, in her official capacity as Secretary of Treasury, and 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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC ON BEHALF OF PLAINTIFF-APPELLANT NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.

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INTRODUCTION

The standing claim of the Plaintiff-Appellant, the National Association of Government Employees, Inc. (NAGE), in the underlying action is based on an injury in fact that was caused when the Secretary of the Treasury declared a debt issuance suspension period pursuant to 5 U.S.C. § 8438(g) on January 13, 2023. From that date forward, during the suspension period, the Secretary of the Treasury defaulted on the government's *obligation* to pay interest on Treasury security and notes due to NAGE's members who were participants in the voluntary defined contribution Thrift Savings Plan's G Fund. In addition, the Secretary also suspended reinvestment in new investments in the G Fund, which the government was obligated to make on behalf of NAGE's members as part of their defined contribution investment plan.

Nowhere in the decision dated November 1, 2024, is the injury-in-fact claimed by NAGE noted above referenced or considered as the basis for NAGE's standing. Indeed, the decision states that standing was based on "injuries that would materialize only in the event of a default by the U.S. federal government." National Association of Government Employees v. Yellen, No. 23-1867, Slip Op. at 9 (1st Cir. Nov. 1, 2024). Based on that "premise," it "would require us to disregard Congress's long and unfailing history of intervening before the debt limit is reached." Id., at 9-10. However, the premise that the decision proposes is not the

basis of the injury claimed by NAGE. The language of the decision evinces that the court did not consider the essential facts of NAGE's injury, which occurred when the Secretary failed to pay interest on the G Fund and reinvest in the G Fund as required under the defined contribution plan commencing on January 13, 2023. Instead, the court solely focused on the date when the U.S. will no longer be able to meet all its obligations in full and on time, i.e., the date of the government's "bankruptcy." See Id., at 10.

Clearly, NAGE members will face additional injuries should the government run out of funds to pay its debts, including defaulting on all Treasury notes and satisfying its obligations under the law and by contract. Indeed, NAGE's members will be further injured by lay-offs, furloughs, working without pay, and missed paychecks, in addition to the continuing failure of the government to pay interest and reinvest in the G Plan and other government savings plans. However, those injuries are in addition to what the NAGE's members who invest in the G Plan have already experienced. The decision does not address the Secretary's failure to pay interest for approximately five months on any of the Treasury notes held by NAGE members in the G Fund, which payments were resumed only because a subsequent action by Congress temporarily postponed and extended the debt limit ceiling through January 1, 2025, pursuant to the Fiscal Responsibility Act, P.L. 118-5 § 401. The decision found a lack of standing only by omitting any reference

to the suspension of interest payments on G Fund securities for almost four months until NAGE challenged the default on the debt on May 8, 2023.

In addition, the decision conflicts with both Supreme Court precedent and at least one decision in this Circuit in denying that there is an exception for mootness when – as in this case – the government has ceased the challenged conduct. The Fiscal Responsibility Act, which became law on June 5, 2023, did not end the challenged conduct but stated that the same debt ceiling that led the Secretary to suspend interest payments to the G Fund participants would go back into effect on January 2, 2025. The Supreme Court has held that the government has a heavy burden to establish that the conduct challenged is certain not to recur. See West Virginia v. EPA, 597 U.S.697. 700 (2022). Contrary to West Virginia, the decision found the exception applies only if the government withdrew the action to moot the litigation. See Slip Op. at 14. West Virginia, however, held that "unless it is absolutely clear that" the government's "behavior could not reasonably be expected to recur," then "voluntary cessation does not moot a case." Id., citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S 701, 719 (2007). Accordingly, there is no such requirement that the mootness exception applies only if the government withdraws the action to moot the litigation. The decision makes matters even worse in footnote four by saying proof of intent is unnecessary if the executive withdraws the action "unilaterally." Still, such proof

of intent is necessary here. Moreover, the decision as to why the standards are different is unclear.

Finally, while the decision may have omitted the allegation of a default on the interest, it supports the finding that, notwithstanding the Fourteenth Amendment, the government may default on the public debt. No court has upheld the authority of the Secretary of the Treasury to suspend payment on any portion of the national debt, as is the case here. It makes a nullity of the command of Section Four of the Fourteenth Amendment: "The validity of the public debt shall not be questioned."

ARGUMENT

I. THE DECISION FAILS TO ACKNOWLEDGE OR ADDRESS THE INJURY-IN-FACT ARISING FROM THE SECRETARY'S FAILURE TO PAY INTEREST ON OR REINVEST IN THE BONDS UNDER THE G FUND.

The decision failed to address the Secretary's failure to pay interest or reinvest in Treasury bonds that comprise the G Fund, the defined contribution plan of NAGE members, which they argued as the basis of their injury in fact:

> 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 the 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.

Reply Brief of Plaintiff-Appellant at 1.

While the decision makes passing reference to "pausing investments," there is no reference to the existing default on the interest due to the bondholders represented by NAGE. See, e.g., Slip Op. at 11. Yet this was the crux of the injury-in-fact, which Plaintiff-Appellant NAGE repeatedly argued in the briefing and the oral argument. There is no reference in the decision to the failure to pay the interest earned on the bonds to the government employees who invested in the G Fund, which lasted for four months when NAGE sought legal relief.

By failure to make any specific reference to this basis of the injury-in-fact at the time of filing, the decision chooses to describe the complaint as alleging only "future harm." In so doing, the opinion was able to analogize the case to Williams v. Lew, 819 F.3d 466 (D.C. Cir. 2016), where the court found a lack of standing when a private investor alleged only a risk of a future injury from a general default. But in this case, unlike Williams, the Secretary had reneged on the interest payment due to the creditors represented by NAGE. Put simply, there had been no default in Williams, but a default had occurred here, a repudiation of the obligation to pay the Plaintiff-Appellant's members unless or until Congress enacted subsequent legislation and afforded the Secretary the remedy or means to make the members whole.

II. IN DENYING THE MOOTNESS EXCEPTION FOR VOLUNTARY CESSATION OF CHALLENGED CONDUCT, THE DECISION'S RATIONALE IS IN CONFLICT WITH SUPREME COURT AND CIRCUIT LAW.

Calling for en banc review is the court's explanation in footnote four of the decision as to why the voluntary cessation doctrine sometimes requires specific intent to moot the case before it and sometimes does not. This Circuit is now left without a coherent legal standard. The decision continues to hold in this case – but not in others – that *sometimes* there must be a showing of specific intent to moot the case, but not always. First, it is contrary to Supreme Court precedent to maintain that there is no longer a requirement to show specific intent to moot a case for the exception to apply. The Supreme Court has held that regardless of whether or not the executive was trying to moot an ongoing case, the government has a heavy burden to show the challenged conduct will not recur. See West Virginia v. EPA, 597 U.S. 697, 700 (2023): Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020). The First Circuit cited the Supreme Court's decision in the Roman Catholic Diocese of Brooklyn in Bayley's Campground Inc. v. Mills and found that failure of the government's failure to carry its burden that an action was not likely to recur established an exception to mootness. See Baileys' Campground Inc., 985 F.3d 153, 157-158 (1st Cir. 2021).

In footnote four of the court's decision here, the court says that this case is somehow different because – paradoxically – the Secretary is more "constrained"

to withdraw the action. But this leaves the case law in chaos, with no clear standard for when specific intent is required and when it is not. The court's attempt to explain the difference in footnote four suggests that the panel itself is unsure when there must be specific intent and when not, as it seems to depend on the amount of executive discretion. The panel says that it is more uncertain than in West Virginia whether the challenged conduct will recur. However, the burden is on the government to show that it will *not recur*. As to when the specific intent showing applies and when it does not, the panel ends with a sentence suggesting it is anyone's guess: "We need not be as unforgiving of executive officials like those in this case, whose ability to backtrack their cessation of challenged conduct is at the mercy of decidedly independent legislative bodies." Slip Op. at 14 n. 4. This is a new legal standard in this Circuit, and it is entirely unclear how this is to be applied or even in plain language what the decision means.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests that the court grant its petition for rehearing and an en banc hearing.

Dated: November 15, 2024

Respectfully submitted,

/s/ *Patrick V. Dahlstrom*

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(d)(3)(A) because this petition contains less than 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and

2. This petition 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: November 15, 2024

/s/ *Patrick V. Dahlstrom*
Patrick V. Dahlstrom

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, I electronically filed a copy of this Petition by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: November 15, 2024

/s/ *Patrick V. Dahlstrom*
Patrick V. Dahlstrom