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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ISAI BALTEZAR & JULIE CHO,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, *et al*.,

Defendants.

Case No. 5:20-cv-455-EJD

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: October 17, 2024
Time: 9:00 a.m.
Place: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

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INTRODUCTION

Defendants have moved to dismiss this case as moot because the 2019 Rule at issue in this case is no longer in effect. Rather, it has been superseded by the Financial Value Transparency ("FVT") and Gainful Employment ("GE") rules (collectively, the "2023 Rule"), which were issued on October 10, 2023 and took effect on July 1, 2024. *See* 88 Fed. Reg. 70004 (Oct. 10, 2023). Plaintiffs fail to defeat mootness. First, Plaintiffs ignore that, even before the 2023 Rule, no redress was available for Plaintiffs' substantive claims, leading this Court to dismiss those claims for lack of standing. And the promulgation of the 2023 Rule has already redressed any asserted procedural defect in prior rulemaking. Now that the 2023 Rule has replaced the challenged 2019 Rule, redress continues to be unavailable through this case, notwithstanding Plaintiffs' claimed delay in experiencing the 2023 Rule's benefits. Second, Plaintiffs ignore Ninth Circuit authority recognizing that the "voluntary cessation" exception on which Plaintiffs rely is entirely inapplicable. The Department did not promulgate the 2023 Rule because of this case, and speculation about the outcome of other cases cannot avoid mootness. Finally, Plaintiffs ignore the obvious implications of their own argument—that their real remedy lies in attempting to support the 2023 Rule, not in futile efforts to overturn a superseded rule or resurrect an even earlier one that this Court recognized would provide no redress.

ARGUMENT

As Defendants explained in their opening brief, this case no longer involves a live case or controversy, and the Court must therefore dismiss this case for lack of subject matter jurisdiction. Def. Mot. [ECF 87] at 4-8. Indeed, the Supreme Court has repeatedly emphasized that "[t]he 'case or controversy' requirement is fundamental to the judiciary's proper role in our system of government." *Murthy v. Missouri*, 144 S. Ct. 1972, 1985 (2024) (internal quotation omitted). A federal court "can only review statutes and executive actions when necessary 'to redress or prevent actual or imminently threatened injury to persons caused by . . . official violation of law.'" *Id.* (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 491 (2009)). In the absence of

an ongoing case or controversy, "'the courts have no business deciding [the dispute], or expounding the law in the course of doing so.'" *Id.* (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)); *see also FDA v. All. for Hippocratic Med.,* 602 U.S. 367, 379 (2024) ("federal courts do not issue advisory opinions about the law").

Defendants further explained that courts overwhelmingly deem a case moot where the provision that a plaintiff challenges has been superseded by new legislation or rulemaking. Def. Mot. at 4-8. Indeed, Plaintiffs point out that the Ninth Circuit presumes a case is moot when new legislation supersedes a challenged statute, but they argue the presumption, set forth in *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1197, 1199 (9th Cir. 2019) (en banc), is inapplicable to regulatory changes. Pl. Opp. at 3 n.2.

This Court has already rejected a similar attempt to limit *Glazing Health*, instead recognizing the presumption applies to city ordinances. *GTE Mobilnet of Cal. Ltd. P'ship v. City of Los Altos*, No. 5:20-CV-00386-EJD, 2022 WL 3589490 at *4 (N.D. Cal. Aug. 22, 2022) (finding "no support" for the plaintiffs' contrary position). The Court further recognized that, because the record contained no evidence showing that the government was "likely to enact the same or substantially similar legislation in the future," but that, instead, the government had acted in good faith, the case was moot. *Id.* The same is true here. Agency rules, like legislation, are entitled to a presumption of good faith. *Cf. McDonald v. Lawson*, 94 F.4th 864, 869 (9th Cir. 2024). Although the case in *Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075 (N.D. Cal. 2015), was mooted by a statute, the court recognized that either "subsequent legislation or rulemaking" could supersede a challenged rule, thereby mooting the challenge. *Id.* at 1081; *see also Harrison v. Kernan*, No. 16-cv-07103, 2024 WL 812013, at *2 (N.D. Cal. Feb. 23, 2024) (case was moot where a state agency—the California Department of Corrections—issued new rules superseding the property possession rules that the plaintiff inmate challenged). Moreover, like statutes and ordinances, federal rules promulgated through notice and comment undergo a "rigorous process" that makes it unlikely an agency would or could temporarily amend a rule simply to moot a case

and avoid a court's adverse ruling. *Cf. Ramos v. Nielsen*, No. 18-cv-01554, 2023 WL 9002731, at *6–7 (N.D. Cal. Dec. 28, 2023).[1]

Nor does *West Virginia v. EPA*, 597 U.S. 697 (2022), preclude application of the *Glazing Health* presumption to a superseding agency rule as Plaintiffs suggest. There, the question "boil[ed] down to" whether the agency's "representation" that "it has no intention of enforcing" the challenged plan mooted the appeal. 597 U.S. at 720. Although new rulemaking was underway, no final superseding rule had been issued; to the contrary, the Court suggested the resulting rule could reimpose the very emissions approach that the plaintiffs challenged. *See id*. That case is inapposite here, where a new superseding rule is already in effect.

Aside from their futile attempt to avoid the *Glazing Health* presumption, Plaintiffs propose two reasons this case is not moot. First, Plaintiffs argue that the 2023 Rule is not really in effect because they have not yet benefitted from it. Second, they argue that pending challenges to the 2023 Rule prevent Defendants from establishing, under the "voluntary cessation" exception, that it is "absolutely clear" that the 2019 Rule will not be reinstated. As discussed below, Plaintiffs err in their analysis of both issues. Contrary to their assertions, Defendants have established that this case is moot.

I. This Case Is Moot Because the 2019 Rule Is No Longer in Effect

Plaintiffs in this case challenged the 2019 Rule, not the 2023 Rule. *See* Compl. [ECF 1]. Their Complaint asks the Court to declare that the 2019 Rule violates the APA, set aside the

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[1] Defendants are aware of no Circuit authority rejecting the *Glazing Health* presumption where the superseding agency rule was promulgated through notice and comment. To the contrary, courts have cited the *absence* of notice and comment rulemaking as a sign the presumption may not apply. *E.g., Ramos*, 2023 WL 9002731, at *6–7 (concluding case was moot even though the determination at issue was not a statute or regulation); *Nat'l Audubon Soc'y v. Haaland,* No. 3:20-cv-00206, 2023 WL 5984204, at *10 n.104 (D. Alaska Sept. 14, 2023) (case involved agency policy, not a superseding rule "formally promulgated" through notice and comment).

2019 Rule; and enjoin Defendants from implementing the 2019 Rule. *See id.* at 121. As Defendants explained in their opening brief, this case is moot because the 2023 Rule superseded the 2019 Rule, and the 2019 Rule is no longer in effect. Once the 2023 Rule took effect on July 1, 2024, the relief that Plaintiffs seek—to set aside the 2019 Rule—was no longer available because a court cannot set aside a nonexistent rule. *See* Def. Mot. at 4-5; *N.D. v. Reykdal,* 102 F.4th 982, 989 (9th Cir. 2024) ("If there is no longer a possibility that [a litigant] can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction.").

Plaintiffs try to distort the issue by suggesting that whether "the 2023 Rule has taken effect" is "a matter of perspective." Pl. Opp. at 4. In so doing, they ignore the plain language of the 2023 Rule, which clearly states that it took effect on July 1, 2024. 88 Fed. Reg. at 70004 ("These regulations are effective July 1, 2024."). Plaintiffs then proceed to discuss various aspects of the *2023 Rule* and how and when those aspects might impact Plaintiffs. *See id.* But Plaintiffs do not point to any part of the *2019 Rule* that, in their view, is currently in effect, nor do they identify any certainly impending injury that this Court could redress by purporting to set aside the already-defunct 2019 Rule.

Given Plaintiffs' reliance on the notion that this challenge to the 2019 Rule somehow entitles them to immediate benefits from the 2023 Rule, this Court's prior rulings on Plaintiffs' standing bear emphasis. This Court already recognized at the outset of this case that Plaintiffs lacked standing to raise substantive challenges to the 2019 Rule. Order of Sept. 3, 2020 [ECF 33], at 20. The Court held that Plaintiffs' challenge to the repeal of a transparency framework that left school disclosure requirements entirely to the Secretary's discretion did not identify a cognizable informational injury and was not redressable. *Id.* at 16-17 ("None of the plaintiffs have alleged that they have 'been deprived of information' that 'a statute requires the government or a third party to disclose' to them," [n]or could they," and "the Court has no power to mandate that the [disclosure] template include specific information"). The Court further held that Plaintiffs' challenge to the repeal of a prior accountability framework for GE programs was

not redressable because Plaintiffs failed to show the Department could implement the framework even if it were reinstated, given the unavailability of a key required data element (Social Security earnings data). *See id.* at 19-20. The Court therefore dismissed Plaintiffs' substantive challenges to those frameworks. *Id.* at 20. And although the Court allowed Plaintiffs' procedural claim in Count 11 to proceed, the Court has since recognized that a new rulemaking process would redress Count 11 by "allow[ing] the public an opportunity to comment on the sources upon [which] the [Department] relies and Defendants the opportunity [to] consider amending the GE Rule to use a different source of annual earnings data." Order of Sept. 29, 2021 [ECF 44], at 7 n.3. That new rulemaking has already occurred, resulting in the 2023 Rule, which in fact does allow for a different source of annual earnings data. *See* 34 C.F.R. § 668.2 (defining "Federal agency with earnings data").

The undeniable conclusion is that no redress is available for Plaintiffs' challenge to the 2019 Rule, and that was already true for Plaintiffs' substantive claims even before the 2019 Rule was superseded by the 2023 Rule. Plaintiffs continue to ignore the Court's reasoning when dismissing their substantive claims and suggest that the Court could still provide redress for Count 2 of their Complaint, which asserts that the 2019 Rule contravenes the Higher Education Act ("HEA")'s requirement that GE programs prepare students for gainful employment. Pl. Opp. at 6; Compl. ¶¶ 362-64. But the only redress Plaintiffs sought in their Complaint was to set aside the 2019 Rule, and the Court has already recognized that that remedy would not redress Plaintiffs' asserted injuries. Order of Sept. 3, 2020 [ECF 33], at 20. Plaintiffs try to rely on a technicality in the way the Court's prior order defined "Disclosure Claims" and "Eligibility Claims," but they have never contested the fact that the Court's *reasoning* in its September 3, 2020 Order applies equally to all Plaintiffs' substantive claims, including Counts 1-3. Even now, Plaintiffs make no attempt to explain how their Count 2 could lead to any meaningful remedy. Instead, they baldly assert, with no support, that if they were to prevail in Count 2's challenge to the 2019 Rule, that holding could somehow impact the Department's ability to ensure that GE

programs prepare students for gainful employment in accord with the HEA. But setting aside the 2019 Rule cannot achieve that result for the very reasons this Court explained in its September 3, 2020 Order. Meanwhile, the 2023 Rule already seeks to ensure that GE programs prepare students for gainful employment in accord with the HEA. Plaintiffs' apparent view that the 2019 Rule must be deemed in effect until they—as "intended beneficiaries" of the 2023 Rule—reap its intended benefit, Pl. Opp. at 6, ignores that any benefits conferred by the 2023 Rule derive from that Rule and cannot be accelerated by invalidating the already-superseded 2019 Rule. Rather, to the extent Plaintiffs believe the 2023 Rule is deficient, they must address those claims to the 2023 Rule, not the superseded 2019 Rule.

Plaintiffs thus fail to distinguish the many cases cited in Defendants' opening brief that recognize that, once a rule has been superseded, any litigation challenging that rule becomes moot. Plaintiffs suggest that, in those cases, the superseding statute or rule "took immediate effect." Pl. Opp. at 5. But this case is equally as moot as the cases identified in Defendants' opening brief because the 2023 Rule took immediate effect, and thereby superseded the 2019 Rule, on July 1, 2024.

Plaintiffs misapprehend the courts' reasoning in those cases. The key question is whether the new provision supersedes the challenged provision as a matter of law—not whether the new provision has an immediate practical impact on the plaintiff. No redress is available regarding a superseded provision because it already has no legal effect, and any opinion addressing its merits would be purely advisory. Thus, in *Twitter, Inc.*, the court deemed the plaintiffs' challenge moot because the challenged rule was "supplant[ed]" by superseding law and thus "ha[d] no legal effect"; any assessment by the court of whether the superseded rule was defective would therefore amount to an impermissible advisory opinion. *Twitter, Inc.*, 139 F. Supp. 3d at 1082; *see also Bullfrog Films, Inc. v. Wick*, 959 F.2d 778, 780–81 (9th Cir. 1992) (government's appeal was moot because the provisions deemed invalid by the district court had been "supplanted"). In *Ozinga v. Price*, 855 F.3d 730 (7th Cir. 2017), the court recognized that a challenge to a

superseded rule is not redressable; "[a]ny injunction directed to the prior regulations . . . necessarily would be meaningless as those regulations no longer exist." *Id.* at 735; s*ee also Gulf of Maine Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (when a regulation "is no longer in effect because it has been replaced," the court "has no means of redressing either procedural failures or substantive deficiencies associated with [the] regulation that is now defunct"). It is the "promulgation of new regulations" that serves to moot a challenge to the now-defunct rule. *See id.*; *cf. Cal. Avocado Comm'n. v. Johanns*, No. CVF016578RECSMS, 2005 WL 1344203, at *2 (E.D. Cal. May 18, 2005) (recognizing that, under the APA, "an amended rule as promulgated is final and supersedes the earlier rule," so the rule challenged in that case "ceased having legal effect" on the date that a new rule went into effect).

At bottom, Plaintiffs simply ignore the obvious difference between a rule's effective date, on the one hand, and the time it may take the Department to implement certain aspects of the rule, on the other. Again, any quarrel Plaintiffs have with the Department's implementation of the 2023 Rule would have to be addressed through a challenge to that rule.

II. The Voluntary Cessation Exception Does Not Save This Case From Dismissal

Plaintiffs contend that, under the "voluntary cessation" exception to mootness, Defendants bear the burden to show that it is "absolutely clear" that the 2019 Rule will never be reinstated and that Defendants cannot meet this burden due to pending challenges to the 2023 Rule in other courts. Pl. Opp. at 7 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). However, the voluntary cessation exception does not apply here. That exception "is grounded in concerns that a party may be manipulating the judicial process through the false pretense of singlehandedly ending a dispute," but may "resume the challenged activity once the court dismisses the challenge." *Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1128 (D.C. Cir. 2024) (internal quotation omitted). But the exception "does not apply automatically whenever the prospect of mootness is raised by a party's voluntary conduct." *Id.* The D.C. Circuit "declined to apply the doctrine when a federal agency granted a plaintiff an

exemption from a challenged regulation and there was no plausible argument the agency had done so 'to manipulate the judicial process.'" *Id.* (quoting *Alaska v. U.S. Dep't of Agric.*, 17 F.4th 1224, 1230 (D.C. Cir. 2021); *cf. Greenwald v. Becerra*, No. CV 17-797, 2024 WL 3617466, at *7 (D.D.C. Aug. 1, 2024) (rejecting possibility that agency could manipulate the judicial process where it could not "simply turn around and reimplement" the superseded requirements; rather, future substantive changes to the superseding rule would have to follow "detailed procedures including notice and comment" rulemaking).

In the Ninth Circuit, the voluntary cessation exception does not apply unless the defendant's "cessation" of the challenged conduct has "arisen *because of* the litigation." *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 723–24 (9th Cir. 2024) (quoting *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996)); *see also Adams v. Grossmont Cuyamaca Cmty. Coll. Dist.*, No. 23-cv-1220, 2024 WL 1146642, at *4 (S.D. Cal. Mar. 15, 2024) ("voluntary cessation" exception did not apply because defendants' rescission of the challenged vaccine requirement was "because of the pandemic's changing landscape," not "because of litigation"); *Harrison*, 2024 WL 812013, at *2 (challenge to superseded policy was moot because presumption that the agency acted in good faith applied and there was no basis to think the new policy was adopted because of the litigation).

Here, the Department did not go through months of negotiated and notice and comment rulemaking to promulgate the 2023 Rule because of this case, and Plaintiffs do not suggest otherwise. Plaintiffs erroneously assume the "voluntary cessation" exception automatically applies, ignoring the Ninth Circuit authority limiting the exception to instances where the cessation was due to litigation. *See* Pl. Opp. at 3. Because the exception does not apply under Ninth Circuit law, Plaintiffs' reliance on the Sixth Circuit's divergent application of the exception in *Ohio v. EPA*, 969 F.3d 306 (6th Cir. 2020), is misplaced. In *Ohio*, the court followed an automatic approach to the voluntary cessation exception that both the D.C. and Ninth Circuits have rejected. The court thus ignored the underlying purpose of the exception—to

address a defendant's intentional manipulation of the judicial process. It refused to deem the case before it moot, not because the agency might voluntarily reinstate the superseded rule at issue in the case, but solely because another court might overturn the new rule and force the agency to reinstate the superseded rule against its will. *See Ohio*, 969 F.3d at 310.

To be sure, *Ohio* presented a unique situation where 15 other pending cases challenged the superseding rule. *Id.* Indeed, the Wright & Miller quote in Plaintiffs' brief, Pl. Opp. at 8, references the *Ohio* case as its sole example. Meanwhile the same Wright & Miller section states more broadly that "[t]he fact that independent litigation challenges the new enactment . . . is not likely to defeat mootness" because "[c]ourts are not interested in predicting the outcome or consequences of proceedings in another court, nor in retaining jurisdiction as an opportunity for collateral attack on another court's eventual judgment." *See* 13C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Juris. § 3533.6 (3d ed. 2024). Here, in contrast to *Ohio*, only one consolidated challenge is pending in another court, and that court has already denied a preliminary injunction. Order of June 20, 2024, *Ogle School Mgmt., LLC v. U.S. Dep't of Educ.*, No. 4:24-cv-259-O (N.D. Tex.) [ECF 31], at 7, 11. This Court would merely be speculating regarding the outcome of that case. But in any event, Ninth Circuit law conclusively rejects the Sixth Circuit's approach in *Ohio*. Because the 2023 Rule was not promulgated because of this case, the "voluntary cessation" exception does not apply. Instead, the *Glazing Health* presumption of mootness applies as discussed above and requires the conclusion that this case is moot. [2]

III. Plaintiffs Must Address Any Continuing Concerns to the 2023 Rule

Plaintiffs devote a final section of their brief to the notion that setting aside the 2019 Rule would "provide non-speculative benefits to Plaintiffs." Pl. Opp. at 9. But Plaintiffs identify no such benefits, and Defendants explained above why there would be none. Instead, because

[2] Speculation about the outcome of another case would not provide a "reasonable expectation," based on evidence in the record, that the Department would choose to re-promulgate the 2019 Rule, *Glazing Health*, 941 F.3d at 1199, as Plaintiffs concede by failing to argue otherwise.

Plaintiffs lack standing to assert any substantive claims, and their procedural claim has already been redressed through the rulemaking that led to the 2023 Rule, no meaningful relief is available through this case. Ironically, Plaintiffs cite a Department declaration submitted in support of the 2023 Rule—the Rule that superseded the 2019 Rule—as establishing the importance of the Department's regulation of GE programs. Pl. Opp. at 9-10. Yet a prior Department declaration submitted in this case explained that setting aside the 2019 Rule would not allow the Department to regulate GE programs because the Department could not perform the calculations called for by the preceding rule. Declaration of Diane Auer Jones ¶ 7 [ECF 26-1]. Plaintiffs suggest this Court's statutory interpretation would somehow have an impact, but in fact it would be merely an advisory opinion. Plaintiffs again suggest—as they have repeatedly argued in the past—that setting aside the 2019 Rule as a hypothetical exercise, even though it is no longer in effect, would serve as a backstop so that the previous rule—the one that this Court has recognized cannot be implemented—could spring back into effect just in case the 2023 Rule is set aside. But their hypothetical remains pure speculation, again ignoring the very issues that led this Court to hold Plaintiffs lack standing to assert their substantive claims in the first place.

In sum, Plaintiffs make clear that their true intent in opposing dismissal here is to collaterally oppose other litigants' challenges to the 2023 Rule. That does not defeat mootness under Ninth Circuit law. If Plaintiffs wish to support the 2023 Rule, they may seek to do so in the pending challenge to that Rule in another court. *Cf. Twitter, Inc.*, 139 F. Supp. 3d at 1082 (recognizing that, to the extent the plaintiff had ongoing concerns, "its challenge would need to be addressed to the new legislation," not the superseded law); *Ozinga,* 855 F.3d at 735 (plaintiff "is free to file a new suit if it believes the [superseding rule] is flawed in some way"). But their claims here are moot and must be dismissed.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, this case should be dismissed as moot.

DATED: August 22, 2024

Respectfully submitted,

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