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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ISAI BALTEZAR & JULIE CHO,

Plaintiffs,

vs.

MIGUEL CARDONA, *in his official capacity as Secretary of Education*, & UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No. 20-CV-00455-EJD

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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

INTRODUCTION

More than four-and-a-half years ago, Plaintiffs Julie Cho and Isai Baltezar filed this case against the U.S. Department of Education and then-Secretary Betsy DeVos seeking to declare unlawful and vacate the 2019 Repeal of the 2014 "Gainful Employment" regulation, which was designed to protect students from postsecondary programs that provided insufficient value commensurate with the volume of debt students incurred to attend. With respect to certain claims, this Court has held that Plaintiffs' adequately alleged Article III standing and "stated a claim for relief." *See generally* Order on Defs.' Mot. to Dismiss 22, ECF No. 33; *see also* Order on Mot. for Part. Recons.4-7, ECF No. 44. After the Department sought again to dismiss the case, through a "Motion for Voluntary Remand Without Vacatur," the Court opted to hold the case in abeyance to give the Department time to effectuate a new regulation. ECF No. 73. At that time, the Department intended to complete the Repeal's replacement in 2022 to take effect in 2023. *See* Joint Status Report 3–4, ECF No. 74. The Department later delayed that schedule, *id.*, and finalized a new regulation in 2023 with a nominal effective date of July 2024.

The Department asserts that the stated effectiveness of the "2023 Rule" moots Plaintiffs' claims. *See* Defs.' Notice of Mot., Mot. to Dismiss, and Mem. in Supp. ("Defs.' Mem."), ECF No. 87. But the case is not moot where the actual effectiveness of the 2023 Rule will not come until at least July 2026. Until that time, millions of students will continue to suffer the consequences of the 2019 Repeal because the eligibility, disclosure, warning, and acknowledgement provisions of the 2023 Rule indisputably will not have any impact.

Moreover, Defendants' motion should be denied because this case fits squarely into the "voluntary cessation" exception to mootness, *i.e.*, where the Defendants' voluntary conduct (in this case, its promulgation of the 2023 Rule) has led to its mootness claim. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). Applying that exception here, the Department must establish that it is "absolutely clear" that the 2019 Rule will not again become operative. *Id.* But it cannot do that because pending litigation challenging the 2023 Rule seeks to do exactly that. This Court should follow the lead of the U.S. Court of Appeals for the Sixth Circuit, which has held that litigation challenging a superseding regulation creates a sufficient

possibility that the superseded regulation will become live again, rendering challenges to the superseded regulation to be not moot. *See Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020) (applying *Friends of the Earth v. Laidlaw*).[1]

STATEMENT OF ISSUES TO BE DECIDED

1. Are Plaintiffs' claims mooted by the 2023 Rule, where that Rule will do nothing until July 2026 to effect the injuries caused by the challenged 2019 Repeal?
2. Should this Court follow the lead of the U.S. Court of Appeals for the Sixth Circuit's application of the "voluntary cessation" exception and hold that the case is not moot when other litigants are actively seeking to reinstate the 2019 Repeal?

LEGAL STANDARD

"[T]he doctrine of mootness . . . addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia v. EPA*, 597 U.S. 697, 719 (2002) (internal marks and edits omitted). Where a plaintiff retains a personal stake, the case is not moot. *Id.* "In seeking to have a case dismissed as moot . . . the defendant's burden is a heavy one." *Nat'l Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found, Inc.*, 484 U.S. 49, 66 (1987)); *see also, e.g.*, *Friends of the Earth*, 528 U.S. at 191–92 ("[T]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.").

[1] Alternatively, the same prudential considerations that led this Court to hold the matter in abeyance—*i.e.*, the practical realities of rulemaking, the "creation of an effective gainful employment regulatory framework," and the "jurisprudential concerns" of the Department escaping judicial review; *see* Order Granting in Part and Denying in Part Defs.' Mot. for Volun. Remand Without Vacatur 8, ECF No. 73—suggest that the Court withhold ruling on Defendants' motion until after the District Court rules in the consolidated *Ogle/AACS* matters, *see* Defs.' Mem. 7, ECF No. 87, pending in the U.S. District Court for the Northern District of Texas.

Where a defendant asserts that a case is moot due to its "voluntary cessation" of the challenged practice, it is "well settled" that the cessation "does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)); *see also West Virginia*, 597 U.S. at 720. In such cases, the case is not moot "unless the party asserting mootness satisfies the heavy burden of making it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 770 (9th Cir. 2022) (internal quotations omitted); *Sweet v. Cardona*, 641 F. Supp. 3d 814, 830–31 (N.D. Cal. 2022) (quoting *Pizzuto v. Tewalt*, 997 F.3d 893, 903 (9th Cir. 2021) ("Dismissal based on mootness . . . 'is justified only if it is absolutely clear that the litigant no longer has any need of the judicial protection that it sought.'") (alteration in original)).[2]

ARGUMENT

This case is not moot and should not be dismissed. The 2023 Rule is only nominally effective and does not yet impact Mr. Baltezar and Ms. Cho, who remain injured by the Repeal, have a personal stake in the litigation, and will benefit from the declaratory and injunctive relief they continue to seek. Even if the case would otherwise be moot, Defendants have not met their heavy burden—under the "voluntary cessation" exception—to show that it is "absolutely clear" the 2019 Repeal will not be reinstated considering the *Ogle*/*AACS* matters. This Court should follow the Sixth Circuit's approach in *Ohio v. EPA* and deny the Department's motion.

[2] Although *Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) applies a presumption of mootness to *legislative* changes to challenges to prior legislation, that decision is limited to legislation and ordinances. *See, e.g.*, *GTE Mobilnet of California Ltd. P'ship v. City of Los Altos*, No. 5:20-CV-00386-EJD, 2022 WL 3589490 at *3–4 (N.D. Cal. Aug. 22, 2022) (Davila, J.). Expanding *Glazing Health* to regulatory changes would conflict with the Supreme Court's subsequent opinion in *West Virginia v. EPA*, 597 U.S. at 719.

I. The government cannot meet its burden of establishing mootness because the 2023 Rule will not benefit students until 2026.

The Department's position rests entirely on its view that the 2023 Rule has taken effect. But the truth of that is a matter of perspective. From the Department's perspective, the back-end machinery necessary to implement the 2023 Rule is apparently turning. But from the vantage point of Plaintiffs and the millions of students who incur federal loans to attend postsecondary programs each year, the 2023 Rule has no present impact. Thus, the case is not moot.

Even if the 2023 Rule will someday protect students, none of the core components of the 2023 Rule—eligibility standards, student warnings, student acknowledgments, and disclosure provisions—has any "effect" until July 2026. As the Department recently explained "the earliest any GE program might lose Title IV eligibility under the GE Rule is 2026."[3] In addition, institutions are not required to warn students about potential eligibility loss until July 1, 2026. *Id.*; *see also* 34 C.F.R. § 668.605(a) (2024) (establishing that the student warnings "[b]egin[] on July 1, 2026"). The Department will not "establish and maintain a website with information about institutions and their educational programs" until July 1, 2026. 34 C.F.R. § 668.43(d)(1) (2024). Because information about programs and their metrics will not be available until July 2026, students enrolling in failing programs before that date will not be required to complete a pre-enrollment acknowledgment that that they have received information regarding the program's status. 34 C.F.R. § 668.407 (2024). During the next two years, 24% of students enrolled in GE programs will be enrolled in failing programs.[4]

Having published a regulation that does not immediately benefit students, the Department still contends that the Rule has "taken effect." But the precedent it chiefly relies upon, *see* Defs.' Mem. 4–5, ECF No. 87, does not support its argument as applied to the facts here, *i.e.*, where a new regulation nominally supersedes a challenged regulation, without any "effect" on the

[3] *See* Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. at 12, Ogle Sch. Mgmt. v. U.S. Dep't of Educ., No. 24-CV-00259-O (N.D. Tex. May 3, 2024), ECF No. 25. ("Ogle Br.").

[4] Ogle Br., *supra* n.3, at 12.

plaintiffs challenging the superseded regulation or the intended beneficiaries of that new regulation.

For example, in both *Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075 (N.D. Cal. 2015) and *Bullfrog Films, Inc. v. Wick*, 959 F.2d 778 (9th Cir. 1992), the cases were dismissed as moot after the challenged regulation was superseded by *legislation*. *See* Defs.' Mem. 4–5, ECF No. 87. In those cases, the agencies at issue were effectively prohibited by statute from readopting the challenged regulation, which is not the case here.

In the other cases the Department relies upon, the superseded regulation had an *immediate* effect. For instance, in *Ozinga v. Price*, the regulations changed to immediately establish an accommodation to the Affordable Care Act's contraception mandate. 855 F.3d 730, 734 (7th Cir. 2017). In *Gulf of Me. Fishermen's All. v. Daley*, the First Circuit held that a challenge to a fishery management framework was moot where the agency had replaced the framework with other policies that had taken effect to close certain areas to fishing. 292 F.3d 84, 87–88 (1st Cir. 2002). In *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, a procedural challenge was mooted when the agency—being sued over a deficient rulemaking process—conducted a fulsome rulemaking process and adopted a "rule that was essentially the same as the one it had previously issued." 680 F.2d 810, 813 (D.C. Cir. 1982). That second rule cured the procedural defects and took immediate effect. Likewise, in *Sannon v. United States*, Petitioners—a group of Haitian refugees—asserted that the Immigration and Naturalization Service ("INS") improperly narrowed the scope of the "exclusion" hearings and refused to consider Petitioners' claims for asylum. 631 F.2d 1247, 1250–51 (5th Cir. 1980). While the case was pending, INS adopted new regulations to "ensure that refugees wishing political asylum in this country will be permitted to raise asylum claims in their exclusion hearings." *Id.* at 1249. The Fifth Circuit held that the case was moot because the newly promulgated regulations were "immediately applicable to litigants," and that the regulations afforded "each named petitioner in the cases . . . exactly the [relief] . . . sought." *Id.* at 1250. And in *California Avocado Comm'n v. Johanns*, 1:01-CV-06578-REC-SMS, 2005 WL 1344203 at *2 (E.D. Cal. May 18, 2005) the

court relied on *Sannon* to hold that a rule that "immediately" replaced a challenged regulation governing avocado imports mooted the challenge to that prior regulation.

At bottom: the Department has based its motion on its unsupported view the nominal effectiveness of the 2023 Rule moots Plaintiffs' claims, even though neither Plaintiffs nor the intended beneficiaries of the Rule are "effect[ed]" by the new rule. But this cannot be the case where the Department has conceded that the 2019 Repeal continues to impede the application of the Higher Education Act's prohibition of sending Title IV federal student aid funding to programs that do not prepare students for gainful employment in a recognized occupation. *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 181 (D.D.C. 2015) (discussing the programmatic "boundaries" imposed by the Higher Education Act). As noted, twenty-four percent of students enrolled in GE programs will be enrolled in failing programs—*i.e.*, programs that are *statutorily ineligible* to enroll students who are using Federal Student Aid funding to pay for the programs. *See supra* n. 4. That is unlawful, is caused by the 2019 Repeal, and is the basis for Count 2 of Plaintiffs' complaint.[5]

[5] The Department continues to maintain that Counts 1–3 were dismissed. *See* Defs.' Mem. 7, ECF No. 87. Yet this case is properly governed by the Court's actual orders, not Defendants' wishful thinking of how Court should have ruled. As Plaintiffs have repeatedly demonstrated, *see, e.g.*, Joint Case Mgmt. Statement and Prop. Ord. 4, ECF No. 35, "the plain text of the Court's order [on the Motion to Dismiss] dismissed only the 'Disclosure Claims,' defined by the Court as ¶¶ 374–89 of the [] Complaint (corresponding to Count 4), and the 'Eligibility Claims,' defined by the Court as ¶¶ 390–441 of the [] Complaint (corresponding to Counts 5–10). *See* Order [Dkt. 29] at 13 (defining claims); *id.* at 17 (dismissing 'Disclosure Claims'); *id.* at 20 (dismissing 'Eligibility Claims'); *see also* Defs.' Mot. to Dismiss []Compl. [ECF No. 26] at 9 (dividing claims into three categories, Counts 1–3, Count 4, and Counts 5–11, but never squarely raising why . . . Plaintiffs did not have standing to bring Counts 1–3)." Almost four years after the Motion to Dismiss was decided, there can be no serious question the Motion to Dismiss Order dismissed only Counts 4–10, leaving 1–3 and 11 to proceed to the merits.

II. The *Ogle/AACS* litigation means that is not "absolutely clear" that the 2019 Repeal will not be reinstated.

If the Court concludes that the case is moot, because mootness was created through the Department's voluntary actions—the adoption of the 2023 Rule—the Department bears the burden of showing that it is "absolutely clear" that the wrongful behavior could not be reasonably expected to recur. *Friends of the Earth*, 528 U.S. at 190. As the Supreme Court has made clear, "maneuvers designed to insulate a decision from review . . . must be viewed with a critical eye." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012).

The Department fails to meet this burden because of the ongoing *Ogle/AACS* litigation. If the *Ogle/AACS* Court grants the relief requested in that case, the entire basis for suggesting that this case is moot disappears. The Department cannot demonstrate that it is "absolutely clear" that this will not happen. It naturally follows that Plaintiffs' action herein cannot be moot.

The Department's contention that *Ogle/AACS* is irrelevant is directly contradicted by the Sixth Circuit's decision in *Ohio v. EPA*, 969 F.3d at 310.[6] There, plaintiffs challenged a 2015

[6] Plaintiffs do not suggest that the mere existence of any litigation challenging the 2023 Rule would suffice to defeat the Department's suggestion of mootness. Instead, Plaintiffs contend that *Ogle/AACS* are serious lawsuits, brought by sophisticated parties and experienced attorneys, that pose significant challenges to the 2023 Rule. Although the *Ogle* court denied plaintiff's motion for preliminary injunction, it specifically noted that the "holding [was] not a substitute for a merits-based decision," and that "Plaintiffs may ultimately succeed upon review of the full administrative record at summary judgment." *See* Order, Ogle Sch. Mgmt. v. U.S. Dep't of Educ., No. 24-CV-00259-O at 11 (N.D. Tex. June 20, 2024), ECF No. 31. The seriousness of the legal issues raised in those cases is also reflected in the fact that the parties jointly proposed filing 50-page opening briefs to support Summary Judgment (*i.e.*, double the length ordinarily allowed under the N.D. Texas Local Rules). *See* Prop. Amended Briefing Schedule, American Ass'n of Cosmetology Schs. v. U.S. Dep't of Educ., No. 23-CV-01267-0 (N.D. Tex. July 12, 2024), ECF No. 25.

regulation issued by the EPA and the Army Corps of Engineers (collectively, "EPA"). After the District Court denied a preliminary injunction, the EPA repealed and replaced the 2015 regulation. *Id.* at 308. On appeal of the denied injunction, the Sixth Circuit held that although the denial of the preliminary injunction was mooted by the repeal and replacement, the pendency of separate litigation challenging the repeal and replacement created a "fair prospect that the [challenged] conduct [*i.e.*, the 2015 regulation] will recur in the foreseeable future." *Id.* at 310. The Sixth Circuit then noted: given the "proliferation of nationwide injunctions" and the substantial litigation challenging the regulations, it "cannot exclude the possibility that . . . the 2015 Rule might again take effect nationwide. Indeed, that is presumably why the plaintiffs in many of those cases are litigating them; and that eventuality would violate what the States say are their rights under the law. This case, therefore, remains a live one." *Id.* That exact principle applies here. *See also* 13C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Juris. § 3533.6 (3d ed. 2024) (noting that "[a]mendments of administrative regulations may provide special reasons for avoiding mootness," including where it is possible that "another court will order reinstatement of a rule abandoned by the agency."); *cf. Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 162 (2d Cir. 2010) (parties continue to have a "legally cognizable interest" where disposition of the dispute could affect other proceedings).

The cases cited by the Department, Defs.' Mem. 8, ECF No. 87, do not help its argument. In *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468 (D.C. Cir. 2014), there was no pending litigation against the superseding rule; the court specifically noted that it was refusing to hypothesize about litigation that *could* be filed. *Id.* at 473 (stating that mootness determinations should not be impacted by the court hypothesizing that "a whole other set of rules, not at issue in the present case, *or so far as appears even challenged in any proceeding*, may be invalid") (emphasis added). Here, no such hypothesizing is required; the *Ogle/AACS* plaintiffs are actively seeking to vacate the 2023 Rule. Defendants appear aware of this point, choosing to excise this critical language from their brief and replacing it with an ellipsis. *See* Defs.' Mem. 8, ECF No. 87. Thus, Defendants are left with *New York v. Raimondo*, No. 1:19-CV-09380, 2021 WL 1339397 (S.D.N.Y. Apr. 9, 2021), *i.e.*, an unpublished, district court opinion from New York

that we respectfully suggest is not as persuasive as the unanimous three-judge panel of the U.S. Court of Appeals for the Sixth Circuit.

III. Plaintiffs' requested remedies will have a real-world impact.

Finally, the Department contends that the litigation must be moot because there "is no . . . relief that Plaintiffs can obtain." Defs.' Mem. 6–7, ECF No. 87. Not so. Plaintiffs have long sought both a declaration that the 2019 Repeal was unlawful and a vacatur of the 2019 Repeal. Both remedies will provide non-speculative benefits to Plaintiffs, who continue to be injured by the Department's 2019 Repeal, affording them a "personal stake in the outcome of this lawsuit," which is the hallmark of the mootness inquiry. *West Virginia*, 597 U.S. at 719.

First and foremost, the declaratory and injunctive relief Plaintiffs seek will protect Plaintiffs from once again becoming subject to an unlawful regulation (the 2019 Repeal) that the *Ogle/AACS* plaintiffs are actively working to reinstate. Vacatur of the 2019 Repeal fundamentally alters the relief available to the *Ogle/AACS* plaintiffs; if the 2023 Rule is vacated in *Ogle*, the relief sought here will protect Ms. Cho and Mr. Baltezar from, once again, being harmed by an unlawful regulation (the 2019 Repeal) that the *Ogle/AACS* plaintiffs are actively working to reinstate. Stated otherwise: absent vacatur here, if the *Ogle/AACS* plaintiffs are successful, Mr. Baltezar and Ms. Cho will be in the *exact* same position they were in nearly five years ago, having been deprived of their rights to have their claim adjudicated. The declaratory and injunctive relief protects Mr. Baltezar and Ms. Cho from this non-speculative risk of injury.

The harms that vacatur here would protect against are far from hypothetical. Rather, the Department has admitted in *Ogle*—via an affidavit from Undersecretary James Kvaal—the "immense" injuries that would result if the *Ogle/AACS* plaintiffs are successful:

> Title IV aid, funded by taxpayers, would continue to be funneled to GE programs that do not provide good value for students and instead leave them with debt they cannot afford to repay. **The resulting harms to students and to taxpayers [will] be immense. Students who sought vocational training at these programs with the expectation that doing so would prepare them to enter a profession to earn more than they could otherwise [will] instead continue to face the adverse consequences of unaffordable debt or low earnings.** Even students who ultimately are able to access certain mechanisms that are designed to mitigate harms to borrowers—for example, the Department's improved income-driven repayment plans and discharge programs—will still have to

> endure the struggle of trying to manage their debt before they obtain such relief. Any amount that students do not repay will be covered by the Department, shifting the cost of poor programs to taxpayers.

Decl. of James Kvaal at ¶ 17 in *Ogle*, ECF No. 25-1 (emphasis added). These are the injuries that this Court can protect against.

Second, a declaration that the 2019 Repeal was unlawful will substantively impact future attempts to interpret and apply the operative "gainful employment" language. *Cf. Indigenous Envtl. Network v. Trump*, 541 F. Supp. 3d 1152, 1159 (D. Mont. 2021) (declining to find mootness when declaratory relief regarding executive branch authority would limit "future assertions" of unlawful authority by future administrations). Plaintiffs have long maintained that the Department premised the 2019 Repeal on a mistaken view that Congress did not intend for the Department to interpret the "gainful employment" language. *E.g.*, Compl. ¶ 189. Plaintiffs' position is consistent with the 2014 Department, the 2023 Department, and holdings by the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Courts for the District of Columbia and Southern District of New York. *Id.* Because the 2019 Repeal stands alone in its interpretation of statutory authority, vacatur of the 2019 Repeal will materially impact future efforts to regulate under the "gainful employment" statute. *Cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2276 (2024) (Gorsuch, J., concurring) (noting that a "*consistent* line of decisions representing the wisdom of many minds . . . [is] generally considered stronger evidence of the law's meaning) (emphasis added).

CONCLUSION

For the reasons stated herein, Defendants' motion should be denied.

Respectfully submitted,

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Date: August 1, 2024