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United States Court of Appeals
Tenth Circuit

July 6, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAN ROBERT; HOLLIE MULVIHILL; and other similarly situated individuals,

Plaintiffs - Appellants,

v.

LLOYD J. AUSTIN, in his official capacity as Secretary of Defense, U.S. Department of Defense; XAVIER BECERRA, in his official capacity as Secretary of the U.S. Department of Health and Human Services; ROBERT CALIFF, in his official capacity as Commissioner of the U.S. Food and Drug Administration,

Defendants - Appellees.[1]

No. 22-1032
(D.C. No. 1:21-CV-02228-RM-STV)
(D. Colo.)

ORDER

Before **HOLMES**, Chief Judge, **McHUGH**, and **EID**, Circuit Judges.

EID, Circuit Judge.

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[1] During the pendency of this appeal, Appellants left active service in the United States Armed Forces. The original case caption reflected their previous respective ranks while actively serving in the military. The updated caption mirrors Robert and Mulvihill's new status.

Plaintiff-Appellants Dan Robert and Hollie Mulvihill are former members of the United States Armed Forces who object to the military's past COVID-19 vaccination requirement. They sued the Department of Defense ("DoD"), the Food and Drug Administration, and the Department of Health and Human Services, claiming to bring the action on behalf of themselves and all other similarly situated service members and alleging that DoD lacked authority to require they receive a COVID-19 vaccine. The district court found that the allegations were not justiciable, declined to certify a class, denied a request for costs and attorneys' fees, and dismissed the complaint. Robert and Mulvihill appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we grant the government's motion to dismiss this case as moot.[2]

I.

Appellants object to the military's previous COVID-19 vaccination requirement. When this suit was filed, Robert was actively serving in the United States Army and Mulvihill was actively serving in the United States Marine Corps; both were subjected to the prior vaccination requirement at the time. Following litigation, the district court dismissed their complaint as non-justiciable. Appellants timely appealed. But after the district court made its decision, Robert and Mulvihill both separated from the Armed

[2] Another jurisdictional hurdle Appellants must clear is Article III standing. But "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012) (cleaned up). We decline to address standing and resolve this case on mootness concerns alone. *See Dunn v. Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (holding that DoD's rescission of the vaccination requirement mooted an appeal of the denial of a preliminary injunction); *Short v. Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (same).

Forces. Before oral argument, the government filed a motion contending that Appellants' departure from the military moots this case. The government also believes that legislative and executive branch action offers another reason this appeal is moot. On January 10, 2023, in accord with the National Defense Authorization Act for Fiscal Year 2023, Secretary of Defense Lloyd J. Austin rescinded the military's COVID-19 vaccination requirement. Dep't of Def., *Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces* (Jan. 10, 2023), *available at* https://perma.cc/L9L2-PF6F.[3]

II.

"The Constitution gives federal courts the power to adjudicate only genuine Cases and Controversies." *Kerr v. Polis*, 20 F.4th 686, 692 (10th Cir. 2021) (en banc) (cleaned up). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . [and] requires a party seeking relief to have suffered, or be threatened with, an actual injury traceable to the appellee and likely to be redressed by a favorable judicial decision by the appeals court." *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 879 (10th Cir. 2019) (cleaned up). "Thus, even where litigation poses a live controversy when filed, the doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties'

[3] On January 12, 2023, this Court directed the parties to file simultaneous briefs addressing whether this appeal is moot due to the fact that Secretary Austin rescinded the COVID-19 vaccination requirement for military service members.

rights nor have a more-than-speculative chance of affecting them in the future." *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016) (cleaned up).

"Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *Id.* at 1113 (cleaned up). "As Article III requires an actual controversy, we lack subject-matter jurisdiction over a case that is moot. We review mootness determinations de novo. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022) (cleaned up). "The crucial question is whether granting a *present* determination of the issues offered . . . will have some effect in the real world." *Id.* (emphasis added) (cleaned up). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* (cleaned up).

III.

Robert and Mulvihill sought declaratory and injunctive relief, as well as costs and attorneys' fees. Their supplemental briefing before this Court does not ask for back pay as a form of relief, but refers to Appellants losing opportunities and back wages due to DoD's rescinded COVID-19 vaccination requirement.

"We take a claim-by-claim approach to mootness and must decide whether a case is moot as to each form of relief sought." *Id.* (cleaned up). "The defendant bears the burden of establishing that a once-live case has become moot." *Id.* (cleaned up). "An injunctive relief claim becomes moot when the plaintiff's continued susceptibility to

injury is no longer reasonably certain or is based on speculation and conjecture." *Id.* (cleaned up). "Similarly, a declaratory relief claim is moot if the relief would not affect the behavior of the defendant toward the plaintiff." *Id.* (cleaned up).

a.

We start with Appellants' claim for declaratory relief. Their complaint asked the district court to "declare that any order issued by DoD requiring the Plaintiffs to receive inoculation with COVID-19 vaccines are per se unlawful." App'x Vol. I at 30. This claim is moot for two reasons. First, the claim is moot because Appellants left military service. *Schell*, 814 F.3d at 1113 (cleaned up) ("[T]he existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction."). Mulvihill departed military service before oral argument, and Robert's retirement was completed shortly thereafter. Appellants cannot be subjected to any vaccine requirement associated with service in the military because they no longer serve in the military. *Smith*, 44 F.4th at 1247 (cleaned up) ("A case becomes moot when . . . the parties lack a legally cognizable interest in the outcome."). Thus, we lack jurisdiction over Appellants' moot claim.

Second, Appellants' claim is also moot because Congress passed legislation requiring DoD to rescind the COVID-19 vaccine mandate, and the Secretary of Defense has since done so. *See Dunn v. Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023); *Short v. Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023). Appellants cannot be subject to a vaccine requirement that no longer exists. *Smith*, 44 F.4th at 1247 (cleaned up) ("[T]he case is moot if the dispute is no longer

embedded in any actual controversy about the plaintiffs' particular legal rights."); *see also Schell*, 814 F.3d at 1114 (cleaned up) ("Thus, even where litigation poses a live controversy when filed . . . a federal court [must] refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.").

It is true that federal courts recognize two exceptions to the mootness doctrine. "[U]nder the voluntary cessation exception to mootness, a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Prison Legal News*, 944 F.3d at 880 (cleaned up). We "view voluntary cessation with a critical eye, lest defendants manipulate jurisdiction to insulate their conduct from judicial review." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016) (cleaned up). However, "[t]he voluntary cessation exception does not apply, and a case is moot, if the defendant carries the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Prison Legal News*, 944 F.3d at 881 (cleaned up). "Even when a legislative body has the power to reenact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute." *Smith*, 44 F.4th at 1250 (cleaned up).

The second exception is conduct capable of repetition yet evading review. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). "Under this exception, which courts reserve for exceptional situations, issues under review are not moot if they (1) evade review because the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) are capable of repetition, such that

there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* (cleaned up).

Neither mootness exception saves this claim. The voluntary cessation exception offers Appellants no relief because the government has met its arduous burden of showing the allegedly wrongful behavior could not reasonably be expected to recur. *Prison Legal News*, 944 F.3d at 881. Neither does the capable of repetition but evading review exception benefit Appellants. The duration of the challenged action—here DoD's past vaccine mandate as applied to Robert and Mulvihill—was not too short to be fully litigated before its expiration. *Fleming*, 785 F.3d at 445. Furthermore, nothing in the record leads to a reasonable expectation they will be subjected to the same action again. *Id.* Appellants are no longer actively serving in the military and the Secretary of Defense has rescinded the challenged policy. This is not the exceptional situation the exception is designed for. *Id.*

b.

We turn to Robert and Mulvihill's injunctive relief claim. They asked the district court to "[e]njoin [] DoD from vaccinating any service members . . . ." App'x Vol. I at 31. This claim fares no better than the declaratory relief claim. Congress's revocation of DoD's vaccine mandate, and DoD's implementation of Congress's instruction, means there is no more vaccine mandate to enjoin. The claim is therefore moot.

c.

Next, we address Appellants' request for "costs and attorneys' fees." App'x Vol. I at 31. Robert and Mulvihill raised the matter below, but failed to discuss it in their

briefing before this Court. "We routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief . . . ." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 773 (10th Cir. 2013) (cleaned up). "Stated differently, the omission of an issue in an opening brief generally forfeits appellate consideration of that issue." *Id.* (cleaned up). We decline to consider Robert and Mulvihill's request for costs and attorneys' fees.

d.

We finish our review with Appellants' cursory mention of lost opportunities and back pay. Robert and Mulvihill's supplemental briefing superficially alleges they "continue to lose opportunities and back[]pay" because of the now-rescinded vaccine mandate. Aplt. Supp. Br. at 1. But they failed to allege lost opportunities or back pay in the district court. "[A]bsent extraordinary circumstances, arguments raised for the first time on appeal are waived." *Little v. Budd Co., Inc.*, 955 F.3d 816, 821 (10th Cir. 2020), *as corrected* (Apr. 6, 2020). "This is true whether the newly raised argument is a bald-faced new issue or a new theory on appeal that falls under the same general category as an argument presented at trial." *Id.* (cleaned up). Robert and Mulvihill have waived any argument involving lost opportunities or back pay.

IV.

We GRANT the government's motion to dismiss and DISMISS this appeal as moot.

Entered for the Court

Allison H. Eid
Circuit Judge