UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3806, 20-3815 Caption [use short title] State of New York, et al v. Walsh, et al

Motion for: Vacatur of District Court Decision and Judgment

Set forth below precise, complete statement of relief sought:

As set forth in the attached memorandum, Intervenors-Appellants oppose Appellant Department of Labor's motion to dismiss this appeal as moot. But if the Department's motion is granted, then in the alternative Intervenors-Appellants move for vacatur of the district court decision and judgment as is standard in such cases.

MOVING PARTY: International Franchise Ass'n, et al **OPPOSING PARTY:** State of New York, et al

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Maurice Baskin **OPPOSING ATTORNEY:** Steven Wu

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Court- Judge/ Agency appealed from: District Judge Woods (S.D.N.Y.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: December 8, 2021

Signature of Moving Attorney:

/s/Maurice Baskin **Date:** 10/15/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, *et al*, **Plaintiffs-Appellees,** **vs.** **MARTIN J. WALSH, *et al*,** **Defendants-Appellants,** **INTERNATIONAL FRANCHISE ASSOCIATION, *et al*,** **Intervenors-Appellants.**	)	**Consolidated Case Nos. 20-3806; 20-3815**

INTERVENORS-APPELLANTS' OPPOSITION TO MOTION TO DISMISS THE APPEAL AND, ALTERNATIVELY, MOTION FOR VACATUR OF THE DISTRICT COURT DECISION

Intervenors-Appellants International Franchise Association, the Chamber of Commerce of the United States of America, the HR Policy Association, the National Retail Federation, the Associated Builders and Contractors, and the American Hotel and Lodging Association (the "Intervenors-Appellants") oppose the motion of the U.S. Department of Labor (the "Department") to dismiss the present appeal as moot. As the sole ground for its motion, the Department states it has rescinded the Joint Employer Rule at issue in this case. That ground is insufficient to render the case moot for the reasons discussed below, and respectfully the Court should deny the

Department's motion. Alternatively, if the Court grants the Department's motion, then the Intervenors-Appellants move for *vacatur* of the district court decision - standard practice in this Circuit for appeals rendered moot. The Department has stated it does not oppose Intervenors-Appellants' motion for vacatur; while the State Plaintiffs have indicated their opposition.

BACKGROUND

On April 9, 2019, the Department issued a Notice of Proposed Rulemaking to clarify the Department's Joint Employer standard under the Fair Labor Standards Act, for the purpose of clarifying and unifying myriad inconsistent rulings of courts around the country on this important issue.[1] After receiving over 57,000 comments during the comment period, the Department issued the Rule on January 16, 2020, with an effective date of March 16, 2020. SPA 191. On February 26, 2020, the State Plaintiffs filed suit to vacate the Rule and enjoin its implementation. JA 30. After finding (erroneously) that the State Plaintiffs had standing to sue, the district court ultimately determined on cross-motions for summary judgment that one provision of the Rule was severable and should remain in effect, but that the bulk of the Rule should be vacated. JA 25-26; SPA 87. The consolidated appeals followed, the case

[1] *See* Joint Employer Status under the Fair Labor Standards Act, Docket No. WHD-2019-0003, *Unified Agenda & Docket Details*, https://beta.regulations.gov/docket/WHD-2019-0003/unified-agenda.

has been fully briefed by the parties, and oral argument has been calendared for December 8, 2021. ECF No.133.

On March 12, 2021, the Department published a Notice of Proposed Rulemaking (NPRM) proposing to rescind the Rule. 86 Fed. Reg. 14,038 (Mar. 12, 2021). Throughout the NPRM, the Department made clear that the primary reason for the proposed rescission of the Rule was that the district court ordered the Rule vacated. The NPRM quoted from the district court decision extensively and claimed support for rescission from the district court's findings. *Id*.

On March 31, 2021, the Department filed a motion seeking to hold this appeal in abeyance for six months to allow the Department time to review and analyze the NPRM comments and make a final determination regarding rescission of the Rule. ECF No. 90. This Court denied the Department's motion. ECF No. 97.

On July 30, 2021, the Department issued a final rule to rescind the Joint Employer Rule. 86 Fed. Reg. 40,939 (hereafter the "Rescission Rule"). The Department then delayed the effective date of the Rescission Rule until October 5, 2021. One day later, on October 6, 2021, the Department filed its Motion to Dismiss this appeal on the grounds that the case is moot.

ARGUMENT

This Court's review is essential to reverse the serious flaws in the district court decision. In recent years, the Department's enforcement standard for determining "joint employer" status under the FLSA has shifted back and forth based on the political persuasion of the Administrations in office. Now the pendulum has swung again, and the Department's motion seeks to evade review of questions that have been repeatedly asked and answered differently by different administrations. The rule of law requires a judicial resolution of the important questions presented by the district court's erroneous decision, which otherwise will continue to have harmful effects on the Department's enforcement of the FLSA. Failing to resolve these issues will cause significant harm to the interests of the Intervenors representing a broad cross-section of regulated stakeholders under the Joint Employer Rule. For the reasons set forth below, the Department's motion should be denied. At a minimum, this Court should vacate the district court decision, in keeping with its standard practice.

I. The Department's Voluntary Withdrawal of the Joint Employer Rule Does Not Shield It From Judicial Review.

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528

U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). A defendant's voluntary cessation of challenged conduct only renders a case moot if the defendant meets its "formidable burden" of demonstrating both that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (quotation omitted). Put simply, the defendant must "show[] that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 603-04 (quoting *Laidlaw*, 528 U.S. at 190). Courts look at voluntary cessation of challenged conduct particularly skeptically where it "appear[s] to track the development" of the litigation. *Id*. at 603. *Cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (viewing the United States' "post certiorari maneuvers designed to insulate a decision from review … with a critical eye").

A. The Department Cannot Show That The Issues Here Are Completely And Irrevocably Eradicated.

Contrary to the Department's motion, this appeal raises fundamental questions of statutory interpretation under the FLSA that have not been erased or resolved by the Department's rescission of the Joint Employer Rule. The district court erroneously concluded that the Department was barred by the statute from adopting a clear and common-sense standard for determining joint employer status,

based primarily on the text of Section 203(d) of the FLSA. The Department expressly relied on the district court's decision in rescinding the Rule. Unless the district court's opinion is reconsidered (and reversed) in this appeal, the regulated community – millions of businesses and their employees – will be left without redress.

This is an instance of an issue that is repeating itself but evading review. Although the Department has voluntarily ceased its challenged practice by rescinding the Rule for now, it is not "absolutely clear" that the allegedly wrongful behavior will not recur. *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d at 603. Since at least the Obama Administration, the views of the Department on the proper standards for enforcing the "joint employer" concept under the FLSA have swung back and forth, creating confusion and uncertainty on the part of the regulated community. *See* ECF Doc. No. 59, Opening Brief of Intervenors-Appellants, pp. 4-13; ECF Doc. No. 60, Opening Brief of the Department, pp 4-7. Contrary to the Department's motion, the most recent pendulum swing by the Department cannot be said to be the last. Review by this Court of the district court's decision is therefore the only way to resolve the ongoing dispute over the Department's proper role in enforcement of the joint employer standard under the FLSA.

The Department's Motion fails to address the continuing harm a dismissal would impose on the Intervenor-Appellants, by denying them the right to establish

in this appeal the validity of the Department's previous enforcement standard under the FLSA, after the Department has chosen no longer to defend its own previous position. The Department addresses only the impact on the *Plaintiffs*' interests resulting from the Department's action in rescinding the challenged rule. But the Intervenor-Appellants remain in need of appellate relief, both as to the district court's decision and the Department's decision to rescind its own rule.

The manner in which the Department withdrew the Joint Employer Rule, relying heavily on the district court's erroneous decision, demonstrates how easily the Rule could be reinstated, in whole or in part, either by the current Administration or a subsequent one. Given these circumstances, there is no question that the Department is "free to return to [its] old ways," absent judicial review, which "together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Moreover, the timing of the Department's motion to dismiss for mootness raises suspicion. In the context of voluntary cessation, timing is an element often weighed by this Circuit, as it may suggest an intent to thwart jurisdiction. *Mhany Mgmt.*, 819 F.3d at 604. For example, in *Nat. Res. Def. Council v. U.S. Dep't of Energy*, the court "viewed skeptically" the Department of Energy's mootness claim where "DOE did not say a word to the Court or [the plaintiff] … until two days

before oral argument." 362 F. Supp. 3d 140. Because, in part, the court found that the "timing suggests an intent to thwart [its] jurisdiction" it concluded that "DOE has not carried its heavy burden" of mooting the litigation. *Id.*

So too here. When the Department originally asked for this appeal to be held in abeyance, the Department informed the Court that it would require six months to decide whether to withdraw the Joint Employer Rule. ECF Nos. 90, 97. After the Court declined to hold the appeal in abeyance, the Department concluded its NPRM in less than four months and issued its Rescission Rule on July 28, 2021. Despite its "continuing duty to inform the Court of any development which may conceivably affect the outcome of litigation," *Mhany Mgmt*, 819 F.3d at 604, the Department neither informed the Court of its withdrawal of the Joint Employer Rule nor alerted the Court to potential mootness issues until after the Court announced oral argument would take place in December. Docket No. 126.

It is vital therefore that this Court review the merits of the district court's decision and reverse the court's ruling so that the ongoing confusion as to what sort of Joint Employer Rule is permitted under the FLSA can be resolved.

B. The Department's Cited Cases Do Not Support Mootness Here.

The Department cites only a handful of cases in which withdrawal of an agency rule during a pending court challenge was deemed enough to render an

appeal moot.[2] Each of those cases, however, is distinguishable from the present appeal.

In *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020), a challenged New York City gun control rule was withdrawn because of changes to governing state law that occurred while the challenge was pending in the Supreme Court. *See* Def. Mot. at 3. Here, however, there has been no similar change to governing law: The Fair Labor Standards Act.

In *American Freedom Defense Initiative v. Metropolitan Transportation Auth.*, 815 F.3d 105, 109 (2d Cir. 2016), plaintiffs challenged the constitutionality of the Metropolitan Transportation Authority's content-based refusal to allow certain ads to be posted on subway trains. The defendant rendered the case moot by allowing the ads to be posted. *See* Def. Mot. at 3. Here, however, the opposite has taken place. The Department has withdrawn a rule it deemed too favorable to the business interests of the Intervenor-Appellants and others, thereby increasing the likelihood that their members will be harmed by being found to be joint employers.

Finally, *Harrison & Burrows Bridge Constructors, Inc. v. Cuomo*, 981 F.2d

[2] The Department's introductory section (Dept. Mot. at 2) cites two cases having nothing to do with voluntary agency action mooting a case. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (document production case rendered moot by plaintiffs' failure to seek equitable relief); *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (complaint seeking injunction to stop a construction project rendered moot by completion of the project while suit was pending).

50, 61 (2d Cir. 1992), is inapposite as it deals solely with a governing statutory amendment that rendered moot a constitutional challenge. So too is *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), as it deals with a trademark dispute between private parties which was rendered moot by their entry into a covenant not to sue.

II. At A Minimum, The Court Should Vacate The District Court's Order.

If the Court chooses to grant the Department's motion to dismiss for mootness, then at a minimum and in the alternative, the Intervenor-Appellants move for vacatur of the district court's September 8, 2020 decision. The Department does not oppose vacatur, but the State Plaintiffs do.

The "ordinary practice" of this Court "in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss." *Cracco v. Vance*, 830 Fed. Appx. 43, 45 (2d Cir. 2020) (vacating district court decision after finding mootness); *see also Hassoun v. Searls*, 976 F.3d 121, 125 (2d Cir. 2020) (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 71 (1997) and *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). "The reason for this is . . . to avoid giving preclusive effect to a judgment never reviewed by an appellate court." *Cracco v. Vance*, 830 Fed Appx. at 45-46 (quoting *N.Y.C. Emps.' Ret. Sys. v. Dole Food Co., Inc.*, 969 F.2d 1430, 1435 (2d Cir. 1992); *see also Bragger v. Trinity Cap. Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) ("intervening mootness" carries a "general duty to vacate and dismiss" "a judgment appealed from").

Where the government seeks to moot an appeal by reversing course, courts have recognized that vacatur is proper. For example, in *Cracco*, this Court ordered the district court decision vacated after the repeal of a governing state statute mooted the appeal. 830 Fed. Appx. at 45-46. Similarly, in *Hassoun*, the Court found that the government-appellant's appeal was the result of "the natural and apparently long-anticipated result of the government's immigration enforcement efforts" when it deported the appellant to a third country. 976 F.3d at 131 (internal citation and quotation omitted). In reaching this conclusion, the Court granted the government's motion to vacate the district court's decision after finding the appeal before the Court moot. *Id*. at 135.The same result occurred in those cases cited in the Department's motion where mootness was found to have arisen during the appeal.[3]

CONCLUSION

For the foregoing reasons, this Court should deny the Department's Motion to Dismiss the present appeal. Alternatively, if the Court chooses to grant the Department's motion, then the Court should also grant the Intervenors-Apellants' motion to vacate the district court decision.

Respectfully submitted,

/Maurice Baskin

[3] See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. at 1526 (judgment vacated); *Knaust v. City of Kingston*, 157 F.3d 88 (same).

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the above-named counsel hereby certifies that this memorandum complies with the type-volume limitation of the Federal Rules of Appellate Procedure. As measured by the word processing system used to prepare it, this memorandum contains 2,556 words.

/s/Maurice Baskin

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2021, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/Maurice Baskin