IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, *et al.*,

Plaintiff,

v.

PAMELA BONDI, *et al.*,

Defendants.

Case No. 4:24-cv-01473-SEP

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In two consecutive election cycles, the Federal Government announced on barely a day's notice that it was going to send federal election monitors into Missouri polling locations in direct violation of Missouri law. As the Federal Government tacitly concedes by citing press releases going back to 2004, these announcements always arrive just one or two business days before an election. And while the Federal Government *now* stresses its duty to negotiate with the Secretary of State, the complaint pleads (and it is undisputed) that the Federal Government chose *not* to inform the Missouri Secretary of State before sending 11th-hour notices in 2024 and 2022.

The Federal Government thinks this case is moot because the 2024 election has passed, but this is exactly the type of action where mootness does not apply—an election case involving a perennial question of law. *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 691 (8th Cir. 2003). Mootness even more clearly does not apply where, as here, the Federal Government has a long practice of informing States of the Federal Government's actions at the last minute, "without specifically citing *any* federal authority," and without "attempt[ing] to communicate any rationale" to the "Secretary of State." ECF 1 at ¶¶ 1, 21. Indeed, the need to resolve this

legal issue on a normal time frame (not in rushed litigation the day before an election) is paramount. As the Federal Government conceded, this Court denied a TRO because it determined that the expected harm was minimal, but the Court did so because the Federal Government *affirmatively misinformed* the Court about the extent of federal poll monitoring. ECF 15. The actual amount of federal poll monitoring was *seven times* as high as what the Federal Government incorrectly told this Court. *Id.*

Against all this, the Federal Government improperly relies on factual assertions outside the complaint. In particular, the Federal Government stresses that the most recent attempt to install federal poll monitors was made under a settlement agreement that has since been terminated. But the government admits it has sent federal poll monitors to Missouri many other times in recent years without settlement agreements, ECF 22-1 at 3, and the now-expired settlement does not affect the questions Missouri's lawsuit seeks to settle: (1) whether the Federal Government has statutory authority to enter polling locations contrary to Missouri law and (2) whether it is arbitrary and capricious for the Federal Government to spring these issues on the Missouri Secretary of State at the last minute, without identifying authority under which it purports to act. The Federal Government has not committed to refraining from sending poll monitors into Missouri. The controversy thus remains live.

FACTS

"For the second election cycle in a row, the Department of Justice, at the 11th hour, [] announced an intent to displace state election authorities." ECF 1 at ¶ 1. On the Friday before the 2024 election, "DOJ announced … its intent to displace Missouri law and place unauthorized poll monitors in polling locations in the City of St. Louis." *Id.* And on the day before the 2022 election, DOJ announced that it would send election monitors to polling locations in Cole County, Missouri.

ECF 22-2 at ¶¶ 3–4; *see also* ECF 1 at ¶ 22. DOJ has done this to dozens of jurisdictions across the United States in every federal election "for at least the last 20 years." ECF 22-1 at 2 & n.2.

STANDARD OF REVIEW

In considering a movant's facial attack on subject matter jurisdiction, this Court must take the allegations pleaded in the complaint as true and construe all reasonable inferences in the Plaintiff's favor. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).

ARGUMENT

DOJ tries to dismiss this case as moot, but at least two doctrines apply to save this case from mootness: the capable-of-repetition doctrine and the voluntary-cessation doctrine.

I. This issue is capable of repetition yet evades review.

Like almost all other election cases, this case fits neatly into the exception for cases that are capable of repetition but evade review. "This exception will rescue an otherwise moot claim if (1) the challenged conduct is of too short a duration to be litigated fully prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Connor*, 323 F.3d at 691. "Election issues are 'among those most frequently saved from mootness by this exception.'" *Id.* (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995)); *see also Van Bergen*, 59 F.3d at 1547 (collecting cases). Both factors are easily satisfied.

1. The Federal Government surprisingly contests the first factor, but this is the prototypical instance where "the challenged conduct is of too short a duration to be litigated fully." Courts have concluded that litigation timelines shorter than a year are too short to be fully litigated prior to cessation. *E.g.*, *Raak Law v. Gast*, 686 F. Supp. 3d 774, 780 (S.D. Iowa 2023). The Federal Government announced its intent to send poll monitors into Missouri less than two business days before the election. This forced the parties and this Court to address issues at breakneck speed

without discovery or factual development. Indeed, the Federal Government falsely told this Court that poll monitors would visit only one location—which the government admits factored into this Court's denial of the TRO—when in fact federal poll monitors visited seven locations. ECF 15. No doubt that (serious and prejudicial) misstatement was unintentional, but it highlights the need for the State to be able to litigate these issues on a timespan greater than one day.

Against this, the Federal Government stresses that the settlement agreement the government says it had with the City of St. Louis has been terminated. But the government misunderstands the nature of the State's claims. The complaint does not mention settlement agreements at all. The complaint instead challenges the Federal Government's authority to send in federal poll monitors, contrary to Missouri law, without clear federal authority preempting state law. And the complaint complains about the Federal Government's longstanding policy of announcing poll monitors at the last minute "without specifically citing *any* federal authority," and without "attempt[ing] to communicate any rationale" to the "Secretary of State." ECF 1 at ¶¶ 1, 21. The Federal Government seems to recognize this is a problem, stressing it has a duty to "negotiat[e]" with the Secretary of State. ECF 22-1 at 11. But there is no dispute the Federal Government has continually failed to negotiate ahead of time. It did not do so in 2024 or 2022.

In short, the settlement does not factor into the claims in the complaint. The Federal Government cannot enter into a settlement purporting to displace Missouri law in the first place unless it has statutory authority to displace Missouri law. And the Federal Government's obligation to properly notify the Secretary of State also exists regardless of whether the Federal Government has entered into a settlement agreement to which the Secretary of State is not a party.

2. Second, there is a reasonable expectation that the same complaining party will be subject to the same action again. When an event happens in consecutive election cycles, there is a reasonable expectation that the plaintiff could face the same harm again as a matter of law. *See Connor*, 323 F.3d at 691–92. The Federal Government has sent election monitors to Missouri in two consecutive federal elections and three out of the last five. ECF 1 at ¶¶ 1, 22; ECF 22-1 at 3; ECF 22-2 at ¶¶ 3–4. And each time the government has done so, it has failed to provide the Secretary of State more than two business days of notice.

The Federal Government assumes that terminating the settlement agreement with the City of St. Louis is enough to show that this case is not capable of repetition. *See* ECF 22-1 at p. 10. But the government did not rely on any settlement to send monitors to Cole County in 2022 or St. Louis in 2016. ECF 22-1 at 11. And the State's complaint raises claims that do not depend on the existence or absence of a settlement agreement. Those claims are upstream. The State asserts (1) that the Federal Government lacks statutory authority to displace state poll monitors—regardless of whether the Federal Government seeks to do so through a settlement agreement or more directly—and (2) that the Federal Government at least must give proper notice and a reasonable explanation to state election authorities. Here, for example, DOJ flipped its position after the lawsuit was filed. While it originally said it would "Monitor Polls in [St. Louis] for Compliance with Federal Voting Rights Laws," ECF 1-2, it later said it was monitoring for compliance with the ADA. *See* ECF 22-1 at 4.

The Federal Government is also wrong when it asserts that there is no evidence that they will ever monitor another election over Missouri's objection. *See id.* at 11. True, the government backed down in the face of the Secretary of State's opposition in 2022, but they did not in 2024. And just because they backed down in 2022 does not mean they will back down again in the future.

Noticeably absent from the Federal Government's motion is *any* assurance that the government will not send polling monitors to the State in the future over objection. If the Federal Government would agree not to send in poll monitors over the Secretary of State's objection, then this case would be easy to settle. But the Federal Government will not make that agreement. That weighs strongly in favor of finding that this case is capable of repetition.

The Federal Government relies on *Noem v. Haaland* to support its argument, but that case is inapposite. 41 F.4th 1013 (8th Cir. 2022). That case, which did not involve an election, was moot after July 4th because the Department of the Interior denied South Dakota's request to put on a July 4th fireworks display at Mount Rushmore citing "the then-current state of COVID-19" and situational "wildfire risks." *Id.* at 1015–17. COVID, of course, was a once-in-a-century pandemic, and drought conditions change year to year (or even week to week). There was no reason to believe those specific conditions would persist the next year. *Id.* at 1016–17. But this lawsuit asserts that the Federal Government has no lawful authority to send monitors to polling locations, ECF 1 at ¶¶ 29–39, and whether the Federal Government is allowed to send monitors to polling locations over a State's objection is a pure question of law. More specifically, the questions here are whether the Federal Government has any authority preempting Missouri's law and whether, even if the Federal Government has that authority, it can announce its intent to do so at the 11th hour, without any explanation or citation of authority, and without discussing the matter with the Secretary of State first—as the Federal Government has tried to do three times since the 2016 election. Those are not questions that will vary with the vagaries of droughts and once-a-century pandemics.

The Federal Government's reliance on the settlement agreement is especially unpersuasive because the government has never provided any evidence that the Secretary of State was consulted

on that matter. A settlement agreement with St. Louis cannot bind the State, and contracts signed in Missouri are void as against public policy when they conflict with state law, as the St. Louis settlement agreement did. *See, e.g.*, *State ex rel. Nixon v. Alternate Fuels, Inc.*, 158 S.W.3d 811, 814 (Mo. App. S.D. 2005). If the Federal Government wanted to enter into an agreement, the Secretary of State was a necessary party.

In other words, pointing to the settlement does not eliminate the issues raised in the complaint. For the Federal Government to rely on the settlement, it would still have to show that it has the lawful authority to enter into the settlement. In other words, it would still have to show it has authority to enter a polling location in Missouri notwithstanding Missouri law to the contrary. And even if the Federal Government could rely on the settlement agreement, the issue would remain whether the Federal Government could, consistent with the APA, issue an 11th-hour announcement of poll monitors without any explanation of legal authority. With or without the settlement, the issues in the complaint remain the same: does the Federal Government have authority to preempt state law, and is it arbitrary and capricious to announce poll monitors at the 11th hour without any advance notice to the Secretary of State and without any notice of the authority on which the Federal Government purports to rely?

II. The Federal Government cannot establish voluntary cessation.

In addition, the case is not moot because the Federal Government has not established all the elements to prove voluntary cessation. The Federal Government points out that it has terminated the settlement agreement. Even if that were relevant, "a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (citation omitted). In attempting to make this showing, the defendant has a "formidable burden." *Id.*

The Federal Government cannot satisfy that burden. The Federal Government's practice of sending poll monitors into Missouri, contrary to Missouri law, and doing so at the 11th hour without explanation can "reasonably be expected to recur." The government admits it has issued these press releases at the 11th hour in every election over the past 20 years, ECF 22-1 at 2, and has done so in three out of the last five Missouri elections. In addition, in *every* notice cited by the Federal Government but one, the government failed to state the specific legal basis for its attempt to use federal poll monitors. And the Federal Government does not dispute it never gave advanced notice to the Secretary of State in any of these instances.

* * *

The Federal Government could make this go away simply by agreeing not to send election monitors into Missouri if the Missouri Secretary of State objects. But the government has declined to do so. Given that the government has sent monitors into Missouri twice in the last two election cycles, including over Missouri's objections, Missouri has more than enough basis to believe that the Federal Government's actions will repeat.

CONCLUSION

The motion to dismiss should be denied.

Dated: April 17, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on April 17, 2025, a true and accurate copy of the foregoing document was electronically filed through the Court's CM/ECF System and that a copy of the foregoing will be sent via email to all parties by operation of the Court's electronic filing system, consistent with Federal Rule of Civil Procedure 5(b).

I further certify that the foregoing document contains 8 pages, exclusive of matters designated for omission.

/s/ Victoria S. Lowell