APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2789

[Filed September 8, 2023]

CHAD PARKER; REBECCA KENWICK-PARKER; MARK REDMAN; DONNA REDMAN, Appellants	)
v.	)
GOVERNOR OF PENNSYLVANIA; ATTORNEY GENERAL OF PENNSYLVANIA; SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH	)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No. 1-20-cv-01601)
U.S. District Judge: Honorable Jennifer P. Wilson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
On June 9, 2023

Before: HARDMIAN, AMBRO, and FUENTES,
Circuit Judges

App. 2

(Filed: September 8, 2023)

OPINION*

FUENTES, *Circuit Judge*.

Four Pennsylvania residents challenge the Commonwealth's implementation of emergency public health measures to combat the COVID-19 pandemic. The District Court deemed their claims nonjusticiable and dismissed them for lack of subject matter jurisdiction. We agree and will affirm.

I. Background

Beginning in March 2020, the Pennsylvania Department of Health (DOH) began to trace exposures to COVID-19 and impose quarantines on exposed individuals. According to its contract-tracing protocol, the DOH first contacts patients who tested positive for COVID-19 and asks for a list of "close contacts" they had while infectious.[1] Next, DOH sends each contact a letter directing the recipient to self-quarantine for 14

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

[1] *Parker v. Wolf*, 506 F. Supp. 3d 271, 274 (M.D. Pa. 2020), *aff'd*, 2021 WL 5492803 (3d Cir. Nov. 23, 2021). The District Court made factual findings in connection with Plaintiffs' prior motion for a preliminary injunction. Plaintiffs do not dispute the Court's description of the contact-tracing protocol, which accords with their own allegations in the Amended Complaint.

days.[2] The letter warns that if the recipient fails to quarantine voluntarily, then DOH may petition a court to impose an involuntary quarantine.[3] The DOH followed this protocol when Plaintiff Chad Parker tested positive for COVID-19 in July 2020: Parker was contacted, asked about his recent contacts, and directed to self-quarantine.

From July 2020 to June 2021, the DOH also required most individuals to wear face coverings when in public. In March 2021, the DOH amended this order to exempt individuals fully vaccinated against COVID-19 from masking in non-healthcare settings. The DOH lifted its statewide mask mandate effective June 28, 2021 and has not reimposed it.

Plaintiffs Chad Parker, Rebecca Kenwick-Parker, Mark Redman, and Donna Redman filed this suit in September 2020 to declare the DOH's contact tracing and masking regulations unconstitutional and enjoin their operation. The District Court denied Plaintiffs' motion for a preliminary injunction because it determined Plaintiffs' claims were not justiciable.[4] We affirmed on interlocutory appeal, reasoning that (1) Plaintiffs lacked Article III standing to enjoin the contact-tracing protocol; and (2) the DOH's withdrawal

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[2] *Parker*, 506 F. Supp. 3d at 274–75.

[3] *Id.* Despite this warning, Pennsylvania never petitioned for an involuntary quarantine during the pandemic. *Id.* at 275.

[4] *Parker*, 506 F. Supp. 3d at 292.

of the mask mandate rendered Plaintiffs' claims against it moot.[5]

During the pendency of *Parker I*, Plaintiffs amended their complaint to add several allegations not considered by the prior panel. Among other things, Plaintiffs now (1) allege that P.G., a minor child of Plaintiffs Mark and Donna Redman, experienced contact tracing in April 2021; (2) assert that the DOH's "contact tracing database was subject to a serious data breach, thereby compromising the confidential, private, and sensitive information of countless numbers of Pennsylvanians;"[6] and (3) separately challenge the March 2021 amendment to the mask mandate, which exempted vaccinated individuals.

The District Court dismissed the Amended Complaint after concluding that our opinion in *Parker I* foreclosed subject matter jurisdiction over Plaintiffs' claims. Plaintiffs again appeal.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's dismissal for lack of subject matter jurisdiction *de novo*.[7]

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[5] *Parker v. Governor of Pa.*, No. 20-3518, 2021 WL 5492803, at *2–4 (3d Cir. Nov. 23, 2021) ("*Parker I*").

[6] App. 65 ¶ 150.

[7] *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 632 (3d Cir. 2017).

III. Analysis

Plaintiffs argue that the District Court erred by dismissing this case because newly added factual allegations and other developments since *Parker I* render their claims justiciable. We disagree that Plaintiffs have established a live controversy and will affirm the District Court.

A. Article III Standing

We first examine Plaintiffs' renewed attempt to establish an ongoing or imminent injury arising from the DOH's contact-tracing protocol. To establish standing to sue, Plaintiffs must show that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[8] Plaintiffs seek only prospective relief, and so they must show an ongoing or "certainly impending" future injury to pursue their claims.[9]

In *Parker I*, we held that Plaintiffs lacked an ongoing or imminent injury arising from contact tracing.[10] Plaintiffs alleged two relevant injuries at the time: (1) the future threat of being subjected to the program and (2) voluntary changes they have made to their behavior to avoid contact tracing.[11] We explained

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[8] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

[9] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

[10] *Parker I*, 2021 WL 5492803, at *2–3.

[11] *Id.* at *2.

that while Chad Parker previously encountered contact tracing, this "[p]ast exposure to conduct" did not render a future injury imminent.[12] We also credited the District Court's thorough factual analysis of the contact-tracing procedure, which concluded that the risk of future exposure depends on an "attenuated chain of events" initiated by third parties.[13] The necessary "guesswork as to how independent decisionmakers will exercise their judgment" precluded a finding of imminent injury.[14] And we rejected Plaintiffs' alleged change in behavior as a valid injury, as parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[15]

Plaintiffs do not ask us to depart from our reasoning in *Parker I*, but they allege two new harms arising from contact tracing that the prior panel did not consider.[16]

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[12] *Id.* (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

[13] *Id.* at *3.

[14] *Id.* (quoting *Clapper*, 568 U.S. at 413).

[15] *Id.* (quoting *Clapper*, 568 U.S. at 416).

[16] Plaintiffs do argue that *Parker I* is not binding because it was a nonprecedential decision issued on a motion for a preliminary injunction. True enough, "findings of fact and conclusions of law made in conjunction with [a] preliminary injunction are indeed preliminary" and "do not foreclose any findings or conclusions to the contrary based on the record as developed at final hearing." *New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 519 (3d Cir. 1995). Yet the jurisdictional law applied at the preliminary

They first attempt to repackage their behavioral argument by asserting a "chilling effect" on their freedom to associate.[17] But just as a plaintiff cannot manufacture harm through voluntary changes in behavior, a subjective "chilling injury" does not support Article III standing to challenge a state regulation absent "evidence that the government action has a present and concrete effect."[18] As Plaintiffs cannot show an imminent or ongoing exposure to the contact-tracing protocol, they cannot allege a present and concrete effect.

Next, Plaintiffs assert a new injury stemming from the DOH's ongoing storage of confidential information in a contact-tracing database, which allegedly experienced a "serious data breach" of an uncertain nature.[19] We have held, however, that a plaintiff cannot establish an ongoing or imminent injury simply through allegations that "an unknown hacker . . .

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injunction stage is the same law we must now apply here. The discretionary "law of the case" doctrine counsels against revisiting legal issues decided in *Parker I* absent (1) new evidence; (2) supervening law; or (3) clear error in the prior ruling that creates manifest injustice. *Pub. Int. Rsch. Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116–17 (3d Cir. 1997).

Plaintiffs do not argue that clear error or supervening law requires us to reconsider *Parker I*, and so we limit our analysis to newly raised facts and legal issues the prior panel did not consider.

[17] Appellants' Br. at 45.

[18] *Salvation Army v. Dep't of Cmty. Affs. of State of N.J.*, 919 F.2d 183, 193 (3d Cir. 1990).

[19] App. 65 ¶ 150.

potentially gained access to sensitive information" in a large data breach.[20] Plaintiffs have not otherwise identified a concrete harm stemming from the DOH's storage of information, and so they cannot rely on the alleged breach in security to show an Article III injury.[21] They therefore lack standing to enjoin the DOH's contact-tracing protocol.[22]

B. Mootness

We last address Plaintiffs' contention that their claims against the DOH's defunct mask mandate remain live. A claim ordinarily becomes moot when events after the complaint's filing make it impossible

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[20] *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 156 (3d Cir. 2022) (emphasis removed) (citing *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42–43 (3d Cir. 2011)).

[21] *See Clemens*, 48 F.4th at 152–56.

[22] Plaintiffs' Amended Complaint also newly alleges that in April 2021 a school official instructed the Redmans' son, P.G., to quarantine at home because he was exposed to COVID-19 at school. App. 60–61 ¶¶ 133–35. The DOH then made several attempts to contact the Redmans, but Plaintiffs do not allege that the Redmans ever responded to these inquiries or faced any further consequences as a result. App. 61–62 ¶¶ 136–40.

Plaintiffs have not raised, and have therefore waived, any argument that their allegations about P.G. further their claim of future harm. In any case, the experience of P.G.—a nonparty to this litigation—does not render *future* harm to *Plaintiffs* any less speculative. *See Parker I,* 2021 WL 5492803, at *2 (citing *City of Los Angeles*, 461 U.S. 95 at 102).

for the court to grant effective relief,[23] but there are two narrow exceptions to this rule. First, the voluntary cessation of conduct does not render a case moot if the alleged wrongdoer "could reasonably be expected to engage in the challenged behavior again."[24] Second, an otherwise moot claim may proceed in "exceptional situations where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[25] "There must be more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability."[26]

In *Parker I*, we held that the DOH's decision to lift the mask mandate in June 2021 rendered Plaintiffs' challenges to it moot.[27] We concluded that neither exception to the mootness doctrine applied because the mandate "expired based on the availability of vaccines" and Plaintiffs failed to show there was a "reasonable expectation that a statewide mask order will be

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[23] *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021).

[24] *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020).

[25] *Cnty. of Butler*, 8 F.4th at 231 (citations omitted).

[26] *Id.* (citation omitted).

[27] *Parker I*, 2021 WL 5492803, at *4.

reinstated."[28] One development since *Parker I* merits brief discussion, but it does not disturb our prior and present conclusion that Plaintiffs do not show a statewide mask mandate is expected to recur.

Effective September 7, 2021, the DOH issued a mask mandate for school children. Plaintiffs argue that the DOH's continued willingness to require masking, albeit on a smaller scale, supports their argument that a statewide mask mandate is reasonably likely to recur and renders their claims justiciable. But Plaintiffs are incorrect for a simple reason: the Pennsylvania Supreme Court subsequently held that the school mask mandate exceeded DOH's statutory authority and struck it down.[29] So, far from supporting jurisdiction, this development in state law makes a resurrection of a statewide mask mandate even less likely. Plaintiffs' challenge to the mask mandate therefore remains moot and nonjusticiable.[30]

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[28] *Id.*

[29] *See Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452 (Pa. 2021). Pennsylvania voters amended the state constitution on May 18, 2021 to give the legislature unilateral power to terminate the Governor's emergency declaration by a simple majority; the legislature did precisely that on June 10, 2021. *Id.* at 457–58. The Pennsylvania Supreme Court then held that, absent an emergency declaration, DOH lacked the legal authority to issue a mask mandate. *Id.* at 486–87. The Governor has not redeclared an emergency related to COVID-19.

[30] Insofar as Plaintiffs separately challenge the DOH's March 2021 amendment to the mask mandate, which necessarily expired along with the mandate itself, their claims are moot for the same reasons.

IV. Conclusion

For the foregoing reasons, we will affirm the order of the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 1:20-CV-01601
Judge Jennifer P. Wilson

[Filed September 13, 2022]

CHAD PARKER, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
TOM WOLF, in his official capacity as Governor of the State of Pennsylvania, *et al.*,	)
Defendants.	)
	)

ORDER

This case involves allegations of constitutional deprivations during the COVID-19 pandemic. Plaintiffs Chad Parker, Rebecca Kenwick-Parker, Mark Redman, and Donna Redman (collectively, "Plaintiffs") commenced this action on September 3, 2020. (Doc. 1.) On October 6, 2020, Plaintiffs filed a motion for preliminary injunction, seeking to enjoin Defendants Pennsylvania Governor Tom Wolf, Attorney General Josh Shapiro, and Secretary of Health Dr. Rachel Levine (collectively, "Defendants") from enforcing Pennsylvania's mask mandate and contact tracing

program. (Doc. 17.) An evidentiary hearing was held before then-Chief Judge John E. Jones, III, who issued an order denying the motion on December 11, 2020, stating that Plaintiffs lacked standing to bring these claims. (Doc. 34.) Plaintiffs appealed that ruling to the Third Circuit Court of Appeals. (Doc. 36.) All case management deadlines were adjourned pending final resolution of Plaintiffs' motion for preliminary injunction. (Doc. 26.)

During the pendency of Plaintiffs' appeal, Plaintiffs filed an amended complaint on May 25, 2021, adding a claim challenging the Commonwealth's "vaccination policy."[1] (Doc. 42.) Defendants moved to dismiss the amended complaint for lack of standing and failure to state a claim upon which relief can be granted on June 8, 2021. (Doc. 45.) A brief in support was filed on June 22, 2021. (Doc. 46.) Plaintiffs timely filed a brief in opposition on July 5, 2021. (Doc. 47.) Defendants filed a reply brief on July 19, 2021. (Doc. 50.)

The Third Circuit Court of Appeals affirmed the court's order denying Plaintiffs' motion for preliminary injunction on November 23, 2021. (Doc. 51.) In its opinion, the Third Circuit held that this court correctly concluded that Plaintiffs lack standing to challenge the contact tracing program and that the challenge to the mask mandate claim is moot because the mandate

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[1] The vaccination policy is defined as a policy whereby vaccinated individuals were excused from certain COVID-19 restrictions, including the requirement to wear a face mask. (Doc. 42, ¶ 82.) Plaintiffs alleged that this policy discriminated against people who opposed the COVID-19 vaccine and discriminates in favor of those who were vaccinated over those who were not vaccinated. (*Id.*)

expired by its own terms in June 2021. (Doc. 52-1, p. 6.)[2] Because the amended complaint was filed after the order denying the motion for preliminary injunction was filed, this issue was not addressed by the Third Circuit. The court ordered the parties to submit supplemental letter briefs on the issue of whether the mootness analysis the Third Circuit applied to the mask mandate claim also applies to the vaccination policy claim. (Doc. 53.) Defendants submitted their letter brief on July 29, 2022. (Doc. 54.) Plaintiffs submitted their letter brief on August 8, 2022. (Doc. 55.) The motion to dismiss is therefore ripe for resolution.

A. Contact Tracing Program

In the December 11, 2020 order denying Plaintiffs' request for preliminary injunction, the court held that none of the Plaintiffs' alleged injuries were sufficient to confer Article III standing because Plaintiffs failed to establish any of the following: (1) future injury from the contact tracing program is either likely or "certainly impending," instead relying on a highly attenuated chain of events; (2) any present, cognizable injuries that were related to contact tracing; and (3) that such injuries would be redressable by a favorable ruling. (Doc. 34, p. 21.) The Third Circuit affirmed the order, holding that "plaintiffs have not established that they or their close contacts face 'certainly impending' contact tracing" and that "plaintiffs' behavioral changes may be burdensome, but the plaintiffs themselves made those

[2] For ease of reference, the court utilizes the page numbers if the CM/ECF header.

changes in response to a fear of contact tracing that is not certainly impending," and therefore, Plaintiffs had not adequately demonstrated an injury in fact. (Doc. 52-1, pp. 7–8.)

It is well established that a federal court has "an independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Because it is clear that Plaintiffs do not have standing to challenge the contact tracing program, all claims in the complaint related to the contact tracing program are dismissed.

B. Mask Mandate

In the December 11, 2020 order, the court held that Plaintiffs lacked standing to challenge the mask mandate because under a theory of present and ongoing harm in the form of compelled speech, Plaintiffs could not meet the "particularity" or "redressability" requirements for standing. That is because every citizen in the Commonwealth was subject to the mask mandate and because it was too speculative to conclude that the injuries would be alleviated by an injunction preventing only Defendants from enforcing the mask mandate. (Doc. 34, pp. 33–37.) Under the alternate theory seeking pre-enforcement review, Plaintiffs lacked standing because they did not sufficiently establish an intention to engage in the proscribed conduct (violating the mask mandate) and there was no credible threat of future enforcement. (*Id.* at 38–40.)

The Third Circuit affirmed the order, but rather than addressing standing, the court held that the mask mandate expired by its own terms several months prior, thus making any challenge to the mask mandate moot. (Doc. 52-1, p. 8.) The Third Circuit further held that neither of the possible mootness exceptions applied. (*Id.* at 8–10.)

"If developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698–99 (3d Cir. 1996). The mask mandate expired by its own terms on June 28, 2021. (*See* Doc. 52-1, p. 3.) Thus, the court is unable to grant the requested relief relating to the mask mandate. Therefore, all claims in the complaint related to the mask mandate are dismissed as moot.

C. Vaccination Policy

Plaintiffs' challenge to the vaccination policy was brought in the amended complaint. (Doc. 42.) Plaintiffs define the vaccination policy as the policy implemented by Defendants whereby vaccinated persons were excused from certain COVID-19 restrictions, specifically the requirement to wear a face mask. (*Id.* ¶ 82.) Plaintiffs argue that this policy unlawfully discriminates against people who oppose the COVID-19 vaccine. (*Id.* ¶ 83.)

In their supplemental letter brief, Defendants argue that the vaccination policy is simply a reframing of Plaintiffs' challenge to the mask mandate, so the

mootness analysis applies equally to the vaccination policy. (Doc. 54, pp. 1–2.) Defendants also argue that the vaccination policy does not fall into either mootness exception. (*Id.* at 2.) Thus, Defendants assert that there is nothing for this court to enjoin because none of the conditions or orders giving rise to this litigation are in effect. (*Id.*)

Plaintiffs first contend that the Third Circuit's decision is not binding on this court when deciding the motion to dismiss. (Doc. 55, p. 1.) Next, Plaintiffs argue that COVID-19 cases are on the rise and the Third Circuit improperly relied on Defendants' representations about the mask mandate. (*Id.* at 1–2.) Plaintiffs then contend that the mask mandate was amended a few times, making it an on-again-off-again restriction, rather than a single regulation with a definitive end date. (*Id.* at 2.) Further, Plaintiffs assert, in cursory fashion, that the controversy falls within the "voluntary cessation" and "capable of repetition yet evading review" exceptions to mootness. (*Id.* at 2–3.) However, Plaintiffs do not support this argument with caselaw. Lastly, Plaintiffs "challenge each Defendant to file a sworn declaration under penalty of perjury and subject to contempt proceedings in this Court that neither he/she nor his/her governmental office/agency will impose any type of mask or vaccine mandate related to COVID-19." (*Id.* at 3.)

As indicated above, the mask mandate expired by its own terms on June 28, 2021, making this claim moot unless an exception to the mootness doctrine applies. The "capable of repetition yet evading review" exception to mootness is a narrow exception that

applies only in unusual situations. *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017). For the exception to apply, "(1) the challenged action [must be] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [must be] a reasonable expectation that the complaining party will be subject to the same action again." *Id.* The challenge Plaintiffs pose at the end of their letter brief attempts to place the burden on Defendants to prove that the mask mandate will not recur. However, the burden is on Plaintiffs to demonstrate that the challenged conduct is capable of repetition yet evading review. *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 231 (3d Cir. 2021) (holding that the burden is on the party seeking to have their claim excepted from mootness based on the "capable of repetition yet evading review" exception). In order to carry this burden, Plaintiffs must show that there is more than a theoretical possibility of the action occurring against them again, and it must be a reasonable expectation or a demonstrated probability. *Id.* (citing *Murphy v. Hunt*, 455 U.S 478, 482 (1982)). On this score, Plaintiffs have done nothing more than quote a paragraph of their amended complaint in which they aver that "Defendant Wolf will continue to issue executive orders in light of the declared COVID-19 pandemic and the recurrence of the spread of this virus." (Doc. 55, p. 3.) The reference to Plaintiffs' own allegation–without more–is not sufficient to meet the standard. Plaintiffs have failed to carry their burden of demonstrating a reasonable expectation that they will be subject to the same vaccination and mask mandate orders again.

Finally, the court agrees with the Court of Appeals that because the mask mandate expired by its own terms, rather than as a response to litigation, the voluntary cessation doctrine does not apply. (Doc. 52-1, pp. 8–9) (citing *Trump v. Hawaii*, 138 S. Ct. 377 (2017)). The same logic applies to the vaccination policy. Therefore, neither mootness exception applies. Because the court is unable to grant the requested relief relating to the vaccination policy, all claims in the complaint related to the vaccination policy are dismissed as moot.

For these reasons, **IT IS ORDERED THAT** Defendants' motion to dismiss is **GRANTED**. The Clerk of Court is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: September 13, 2022