No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL,

Petitioners,

v.

THE CITY OF NEW YORK AND THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY RESPECTING MOOTNESS

LUKE W. GOODRICH
Counsel of Record
JOSEPH C. DAVIS
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W.
Suite 700
Washington, DC 20036
lgoodrich@becketlaw.org
(202) 955-0095

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the doctrine of voluntary cessation applies less stringently to governmental defendants than to private ones.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

Becket has no interest in the underlying merits of this case. Becket is concerned, however, that the argument offered in respondents' suggestion of mootness—that "a governmental defendant's change in law [falls] beyond the reach of the voluntary cessation doctrine," (at 18)—would arm governmental defendants with a powerful new tool for frustrating constitutional rights.

Our experience shows that governmental defendants frequently use strategic policy changes to try to moot meritorious religious-liberty claims, meaning that a robust voluntary cessation doctrine is critical to protecting religious liberty in a wide variety of contexts. For example, we have litigated the issue of voluntary cessation in cases seeking to protect the free exercise rights of prisoners, *Rich* v. *Secretary, Florida Department of Corrections*, 716 F.3d 525 (11th Cir. 2013); *Moussazadeh* v. *Texas Department of Criminal Justice*, 364 F. App'x 110 (5th Cir. 2010); *Guzzi* v. *Thompson*, No. 07-1537, 2008 WL 2059321 (1st Cir. May 14, 2008), cases challenging different iterations of the contraceptive mandate promulgated by federal officials under the Affordable Care Act, Pl.'s Opp'n to

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution toward its preparation or submission. All parties have filed a notice of blanket consent with the Clerk.

Defs.' Mot. to Dismiss, *Belmont Abbey Coll.* v. *Sebelius*, No. 1:11-cv-01989-JEB (D.D.C. Apr. 23, 2012), ECF No. 24, and many others. See, *e.g.*, Pls.' Resp. to Def.'s Mot. to Dismiss, *McAllen Grace Brethren Church* v. *Jewell*, No. 7:07-cv-00060 (S.D. Tex. Mar. 10, 2015), ECF No. 58 (religious use of eagle feathers); *Harvest Family Church* v. *FEMA*, No. H-17-2662, 2017 WL 6060107 (S.D. Tex.), vacated, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018) (eligibility of houses of worship for emergency relief funds).

In many of these situations, governmental defendants used strategically timed policy changes to try to preserve favorable outcomes or to avoid rulings against them. We offer this brief to encourage the Court to apply its ordinary test for voluntary cessation—that voluntary cessation does not moot a case unless the defendant shows it is "absolutely clear" that the challenged conduct cannot be expected to recur, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)—just as rigorously to governmental defendants as to private ones.

INTRODUCTION AND SUMMARY OF ARGUMENT

If angels were to govern men, the doctrine of voluntary cessation would be unnecessary. Courts could trust that when the government ceased questionable conduct, that conduct would not recur. But in a government of mere mortals, the government has just as much incentive as a private party—and even more opportunity—to use voluntary cessation to strategically moot cases.

Accordingly, this Court has adopted a stringent standard for assessing claims of mootness based on a defendant's voluntary cessation of challenged conduct: the defendant must show it is "absolutely clear" that the conduct cannot be expected to recur. *Laidlaw*, 528 U.S. at 189 (citing *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). This standard curbs the harms that result when disputes are dismissed for mootness only to arise again when the defendant resumes the prior conduct—harms to judicial economy, to the public interest, and to the integrity of the legal process itself.

This standard has worked well for many years—at least for private defendants. Some lower courts, however, have softened the "absolutely clear" standard for governmental defendants, holding that governmental defendants face a lighter burden to establish mootness. But this has things exactly backwards. Government defendants are generally both *readier* and *abler* than private defendants to use voluntary cessation to strategically moot claims—readier, because they are repeat litigants with a strong interest in curating precedent, and abler, because they are often immune

from damages claims that defeat a claim of mootness. Meanwhile, cases against the government—often involving the Constitution and often of great interest to the wider public—are exactly the cases for which the public interest in settling important legal questions is at its apex.

The City nonetheless invites this Court to bless the lower courts' doctrinal drift, arguing that governmental defendants, unlike private ones, can be trusted to make policy changes "in good faith." Suggestion 17-18. But even accepting this (debatable) proposition, it wouldn't get the City where it needs to go. The need for a stringent voluntary cessation standard depends not on a defendant's suspect motives at the time it changes its conduct, but on the defendant's *opportunity* to revert to its previous conduct in the future. That opportunity exists in spades for governmental defendants. Policy changes, unlike injunctions, do not bind lawmakers in the future. And because government personnel change with every election, the official deciding whether to resume a discontinued policy may be different from the one who decided to discontinue it in the first place, with different views about the policy's legality, defensibility, or wisdom.

The doctrine of voluntary cessation, then, serves particularly important purposes for governmental defendants. And the Court should decline the invitation to water it down—at least until we're governed by angels.

ARGUMENT

I. The doctrine of voluntary cessation should apply equally to governmental and private defendants.

1. "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." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The only exception to this rule is if the defendant demonstrates it is "absolutely clear" that the practice "could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). This standard is "stringent," and the "heavy burden" of meeting it falls on the defendant—"the party asserting mootness." *Ibid.*

This standard serves important purposes. If a defendant's voluntary change of conduct mooted a case, "the courts would be compelled to leave '[t]he defendant * * * free to return to his old ways,'" no matter how far the litigation has progressed. *City of Mesquite*, 455 U.S. at 289 n.10 (citation omitted). This would both waste judicial resources, *Laidlaw*, 528 U.S. at 191-192, and thwart "the public interest in having the legality of the practices settled." *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974).

In applying this standard, the Court has not distinguished between governmental and private defendants. Rather, the Court has held governmental defendants to the same high standard. In *City of Mesquite*, for instance, the defendant city "repeal[ed] the

objectionable language" in an ordinance after a district court held the ordinance unconstitutional; nonetheless, this Court held the case was not moot because there was "no certainty" that the city would not "reenact[] precisely the same provision if the District Court's judgment were vacated." 455 U.S. at 289. More recently, this Court has repeatedly applied the "absolutely clear" standard against governmental defendants, never suggesting that the standard for governmental defendants is different than for private ones. See, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("The Department has not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." (quoting *Laidlaw*, 528 U.S. at 189)); *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist., No. 1*, 551 U.S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur[.]").

2. Nevertheless, some lower courts have applied a "lighter burden" to governmental defendants. *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). According to these courts, "government actors" are entitled to "a presumption of good faith" because "they are public servants, not self-interested private parties." *Ibid.* Thus, courts "assume that formally announced changes to official governmental policy are not mere litigation posturing." *Ibid*; see also, *e.g.*, *Marcavage* v. *National Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) ("[G]overnment officials are presumed to act in good faith."); *Troiano* v. *Supervisors of Elections*,

382 F.3d 1276, 1283 (11th Cir. 2004) ("[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur."). Other courts go even further, flipping the burden of proof and requiring the *plaintiff* to show it is "virtually certain" that the *government* will reenact the challenged law. *Chemical Producers & Distributors Ass'n* v. *Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). While some of these courts have tried to reconcile their decisions with this Court's precedents, others have simply declared that the relevant portions of *City of Mesquite* are "dicta and therefore not controlling." *Federation of Advert. Indus. Representatives, Inc.* v. *City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003).

The City now asks the Court to endorse these lower-court decisions and hold that governmental defendants are entitled to a "presumption * * * that the new law has been enacted in good faith and is intended to be permanent." Suggestion at 17. This, the City says, largely places "a governmental defendant's change in law * * * beyond the reach of the voluntary cessation doctrine." *Id.* at 18. But there is no good reason to treat voluntary cessation by governmental defendants more leniently than voluntary cessation by private defendants. If anything, the unique features of governmental defendants suggest that they should be held to an even higher standard.

3. *First*, government defendants, no less than private ones, have a strong "incentive * * * to strategically alter [their] conduct in order to prevent or undo a ruling adverse to [their] interest." *E.I. Dupont de Nemours & Co.* v. *Invista B.V.*, 473 F.3d 44, 47 (2d Cir.

2006). In many circumstances, governmental defendants are obligated to do so to defend the public trust. And the notion that state actors are inherently trustworthy runs counter to the very premise of the statute under which most litigation against state actors takes place—§ 1983—which was enacted because "Congress * * * realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

This case is illustrative. The City didn't change its policy because it had a Second Amendment epiphany or felt a renewed commitment to protecting its citizens' constitutional rights. Instead, it admits that it changed its policy due to "this Court's grant of certiorari"—*i.e.*, because it thought it would lose. Suggestion at 13. Nobody blames the City for wanting to avoid an adverse ruling; but neither should courts presume governmental defendants have purer motives than private ones.

Second, far more than the average private defendant, governmental defendants are repeat litigants. They employ a large share of the American workforce, manage large bureaucracies, and face a variety of lawsuits that can significantly affect their internal operations across a variety of endeavors. Thus, they have a powerful incentive to pick and choose their cases—strategically mooting cases that would set bad precedent, while fully litigating cases that would set helpful precedent.

This is particularly common in the prison context, where state prison systems often litigate cases to judgment against pro se prisoners while attempting to moot cases brought by competent counsel. In Florida,

for example, the state prison system was one of the last large prison systems to refuse kosher diets to Orthodox Jewish prisoners. Over the course of nearly a decade, it litigated several cases to judgment against pro se plaintiffs, obtaining rulings that it was not required to provide a kosher diet. See, *e.g.*, *Gardner* v. *Riska*, 444 F. App'x 353, 354 (11th Cir. 2011) (pro se prisoner denied kosher diet, case taken to final judgment); *Linehan* v. *Crosby*, No. 4:06-cv-00225-MP-WCS, 2008 WL 3889604, at *1 (N.D. Fla. Aug. 20, 2008) (same). But when it faced an Orthodox Jewish prisoner represented by counsel, it attempted to moot the case on the eve of oral argument in the Eleventh Circuit by announcing a new kosher dietary policy that would be implemented only at the plaintiff's prison unit. *Rich,* 716 F.3d at 532. The Eleventh Circuit saw through this transparent attempt to evade its jurisdiction, but the point remains: Governmental defendants are sophisticated, repeat litigators that will strategically use voluntary cessation to try to pick and choose their cases. See also *Baranowski* v. *Hart*, 486 F.3d 112, 116 (5th Cir. 2007) (Texas prison system litigated pro se kosher diet case to judgment); *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 786 (5th Cir. 2012) (Texas attempted to moot kosher diet case by represented prisoner).

Similarly, in *Heyer* v. *United States Bureau of Prisons*, a deaf prisoner sued the United States Bureau of Prisons under RFRA and the First Amendment for refusing to provide a sign-language interpreter for religious services. 849 F.3d 202, 219-220 (4th Cir. 2017). Faced with sophisticated counsel, the government tried to moot the case by offering an affidavit stating that an interpreter would be provided going forward

"if necessary." *Id.* at 220. Although the district court dismissed the claim as moot, the Fourth Circuit held that an "equivoca[l]," "mid-litigation change of course" was not enough. *Ibid.* In *Guzzi* v. *Thompson*, by contrast, facing a potentially far-reaching appellate loss in a case involving the denial of kosher diets, the Massachusetts prison system successfully mooted an appeal by ordering that the individual plaintiff receive kosher meals—without agreeing to a system-wide change of policy. 2008 WL 2059321, at *1.

Private defendants, by contrast, don't live a perpetual life. They don't have as many opportunities to strategically moot a case so they can live to fight another day. Instead, they must often win their case or no case at all. Yet for private actors, this Court has consistently enforced an appropriately high bar to prove mootness in the face of voluntary cessation. In *Laidlaw*, for example, this Court enforced the voluntary cessation doctrine despite the fact that "the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased." 528 U.S. at 179. Similarly, *City of Erie* v. *Pap's A.M.* held that closing down a business and selling the property on which it operated was insufficient to moot the case. 529 U.S. 277, 287-288 (2000). These actions are far more permanent than a mere change in government policy—yet the Court declined to find mootness.

Third, governmental defendants enjoy statutory and constitutional immunities that insulate them from damages claims—making it much easier to strategically moot cases. Sovereign immunity restricts damages against the federal government and the

states. *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). Qualified immunity restricts damages against government officials. *E.g., Pearson* v. *Callahan,* 555 U.S. 223, 231 (2009). Many statutes, like the Administrative Procedure Act, the Prison Litigation Reform Act, and the Religious Land Use and Institutionalized Persons Act, waive the government's immunity only for suits seeking injunctive or declaratory relief. *E.g.*, *Smith* v. *Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) ("[M]onetary relief is severely circumscribed by the terms of the Prisoner Litigation Reform Act."); *Sossamon* v. *Texas*, 563 U.S. 277, 280 (2011) (RLUIPA). And even under § 1983, damages are often unavailable given the difficulty of assigning a dollar figure to the "abstract value of a constitutional right." See *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 (1986) ("[T]he abstract value of a constitutional right may not form the basis for § 1983 damages."). Thus, in many cases, governmental defendants can be sued *only* for injunctive or declaratory relief—even if their actions have caused severe injury in the past.

Private defendants, by contrast, don't enjoy governmental immunity. Thus, they're more likely to be sued for damages. And the existence of a damages claim prevents them from mooting the case by voluntary cessation. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-609 (2001).

Fourth, even when governmental defendants want to make a policy change permanent, they face limitations on their ability to do so. The board of a private corporation can make agreements and adopt policies that bind the corporation into the future. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 93 (2013) (dismissing

appeal because agreement mooting the case was "unconditional and irrevocable" and thus prevented the private defendant from ever changing its position). But "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute." *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012). The same is true of state legislatures and administrative agencies. See *Mayor of the City of New York* v. *Council of the City of New York*, 38 A.D.3d 89, 97 (2006) (state legislature); *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) (agency).

Beyond that, the government officials charged with making, enforcing, and defending the laws can change with each election. New officials often take a different view of the legality, applicability, or wisdom of a policy adopted by their predecessors. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) ("a change in administrations" may result in "reversal of agency policy"); see also, *e.g.* Transcript of Oral Argument at 32, *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88 (2013) (No. 11-1285) (Roberts, C.J.) ("It's perfectly fine if you want to change your position, but don't tell us it's because the Secretary has reviewed the matter further * * * . Tell us it's because there is a new Secretary."). And even when the same officials remain in office, they sometimes change their position based on the shifting political climate. This is especially true on controversial issues, where elected officials have an incentive "to take litigation positions that reflect their legal policy preferences and resonate with their political base." See Devins & Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2149 (2015).

For example, in *ACLU of Massachusetts* v. *United States Conference of Catholic Bishops*, the ACLU alleged that the federal government violated the Establishment Clause by awarding a grant to a religious organization to care for survivors of human trafficking, because the religious organization would not use the funds to provide abortions or contraception services. 705 F.3d 44, 48 (1st Cir. 2013). During the litigation, a new President took office, and the agency let the grants expire. *Id.* at 50-51, 56. The government then argued that this change in conduct—spurred by the "different policy perspectives" of the new administration—mooted the case, and the court agreed. *Id.* at 51-56. Predictably, when the Presidency changed hands again, the agency began awarding the same type of grants to the same religious organization, and the ACLU sued again. *ACLU of N. Cal.* v. *Azar*, No. 16-CV-03539-LB, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018). That dispute was not resolved until almost a decade after the first lawsuit was filed. See also, *e.g.*, Petition for Writ of Certiorari at 1-3, *Little Sisters of the Poor Jeanne Jugan Residence* v. *California*, No. 18-1192 (U.S. Mar. 13, 2019) (recounting "parade of dueling [contraceptive] mandate cases" occasioned by one administration's imposition of requirement that objecting religious employers provide health plans that include contraceptives and the next administration's exemption of those objectors); Reply to Pls.' Resp. to Notice Regarding Issuance of Notice of Proposed Rulemaking to Amend Challenged Regulations at 1-2, *Franciscan Alliance, Inc.* v. *Azar*, No. 16-108 (N.D. Tex. June 12, 2019), ECF No. 163 (arguing that current administration's proposed repeal of previous administration's regulatory definition of "sex" to include

"gender identity" would "likely moot" challenge to previous version of regulation).[2]

Examples like these demonstrate why the City's emphasis on "good faith" misses the mark. Suggestion at 17. The premise underlying the "absolutely clear" standard is *not* that defendants may harbor a secret, nefarious intent to resume the challenged conduct at the first opportunity, but that they are *free* to reinitiate it in the future (whether they planned to do so all along or not). That freedom is what creates the continuing harm and the potential waste of judicial resources—the "argument from sunk costs" to which this Court has attributed the "absolutely clear" standard. *Laidlaw*, 528 U.S. at 191-193. And it applies just as much to governmental defendants as to private ones. If anything, a government's change in policy is more troubling in circumstances like this one—where it is motivated by fear of a Supreme Court loss—than when it is motivated by a change in administration that has different policy priorities.

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[2] The State of Michigan has aptly demonstrated how quickly and easily the government can change litigation positions by withdrawing its name from numerous amicus briefs immediately following a change of administrations—with its only explanation being the administration change itself. See, *e.g.*, Mot to Withdraw the State of Michigan from March 19, 2018 Amicus Br. in Supp. of Def.-Appellant, *Freedom From Religion Found., Inc.* v. *County of Lehigh*, No. 17-3581 (3d Cir. Jan. 29, 2019); Mot. to Withdraw the State of Michigan from April 26, 2018 Amicus Br. in Supp. of Defs.-Appellants, *Gaylor* v. *Mnuchin*, 919 F.3d 420 (7th Cir. 2019); Mot. to Withdraw the State of Michigan from June 13, 2018 Amicus Br. in Supp. of Def.-Appellee, *Horton* v. *Midwest Geriatric Mgmt., LLC*, No. 18-1104 (8th Cir. Jan. 29, 2019).

Finally, a key purpose served by the doctrine of voluntary cessation is to vindicate the public's interest in having "the legality of the [challenged] practices settled." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); see also *Odegaard*, 416 U.S. at 318. This interest is at its peak when a governmental defendant is accused of violating constitutional rights—an issue which may have broad ramifications for the general public. Thus, weakening the doctrine of voluntary cessation for governmental defendants has it precisely backwards: It makes it harder for courts to settle the legality of practices with broad public implications, and easier to resolve parochial, private disputes.

In short, there is no reason to give governmental defendants special deference when trying to pick and choose which cases reach final judgment. If anything, governments should be held to a higher standard because they have more opportunity and ability to strategically moot cases, and because the harm to the public interest is greater.

CONCLUSION

This case illustrates why governmental defendants should *not* get special treatment when trying to moot a case. The City has just as much incentive as a private defendant to avoid an adverse ruling. It is a sophisticated, repeat litigator with an incentive to pick and choose its cases. It benefits from immunities that make it harder to bring viable claims for damages, despite past alleged violations of constitutional rights. Any number of political circumstances could cause the City to resume its challenged conduct. And the case cuts to the heart of important constitutional issues with broad public interest. Regardless of what the

Court ultimately decides on the question of mootness or on the merits, it should reject the claim that governmental defendants get special treatment under the doctrine of voluntary cessation.

Respectfully submitted.

LUKE W. GOODRICH
Counsel of Record
JOSEPH C. DAVIS
NICHOLAS R. REAVES
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W.
Suite 700
Washington, DC 20036
lgoodrich@becketlaw.org
(202) 955-0095

Counsel for Amicus Curiae

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