21-5334

ORIGINAL

No.

Supreme Court, U.S.
FILED
AUG - 6 2021
OFFICE OF THE CLERK

In the Supreme Court of the United States

Cecile A. Brown,

Petitioner,

v.

Solicitor General of the United States,

Respondent.

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

BRIEF APPELLANT OF PRO SE / PETITIONER FOR DECEASED Vet. William H. Ellis IN SUPPORT OF APPELLANT RESPECTING MOOTNESS

Party: Cecile A. Brown,
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SUPREME COURT, U.S.

QUESTION PRESENTED

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

The Supreme court has never suggested that government defendants should get special treatment under the voluntary-cessation doctrine.

Supreme Court should reject a presumption in favor of government defendants when applying voluntary – cessation principles.

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REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10, A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

- Cases resolving clear conflicts of law
- Important or unique cases
- Interesting cases

Appellate Jurisdiction.

Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action.

28 U.S. Code § 1251(a) - Original jurisdiction

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INTEREST OF THE *Appellant*[1]

Brown for Deceased Vet. William H. Ellis has represented deceased father since age 18 though VA, BVA, and now has to sue because VA did not pay at the finality of litigation case in December of 2020. Brown has a Bachelor's degree for AS, Business and intends to finish her degree in Business. She has appealed through the Ninth Circuit and now has to face the mootness doctrine with the Supreme Court. Brown is a substitute of claimant in her deceased father's case.

Brown has interest in the underlying merits of this case. *Brown requests the Supreme Court to address* all issues or the main question which is at issue in an action. Brown 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.

Brown experience shows that governmental defendants frequently use strategic policy changes to try to moot meritorious claims.

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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. No notice of blanket consent will be filed because of financial difficulty. Brown will not be appearing before the court only in writing. Please notify Brown at (318)528-0335 if exception is not acceptable.

In many of these situations, governmental defendants used strategically timed policy changes to try to preserve favorable outcomes or to avoid rulings against them. 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 curb 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. 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 191192, 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. That is not a 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. The notion that states 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-MPWCS, 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 Ninth 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 changes 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 receives 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 5156. 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. 16CV-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. 181192 (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

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motivated by fear of a Supreme Court loss—than when it is motivated by a change in administration that has different policy priorities.

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. 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.**

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
Executed on (8/6/2021).
("s"/Cecile A. Brown)".

Respectfully submitted.

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Appendix A to the Brief

"No judicially noticeable fact could contradict Brown's alleged facts claim." Whether or not there are judicially *noticeable facts available to contradict them, but a* complaint cannot be dismissed simply because the court finds the allegations to be improbable or unlikely."

1. The Court of Appeals incorrectly limited the power granted the courts to dismiss a frivolous case under § 1915(d). Section 1915(d) gives the courts "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id., at 327. Thus, the court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. However, in order to respect the congressional goal of assuring equality of consideration for all litigants, the initial assessment of the in forma pauperis plaintiff's factual allegations must be weighted in the [plaintiff's favor]. A factual frivolousness finding is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them, but a complaint cannot be dismissed simply because the court finds the allegations to be improbable or unlikely. The "clearly baseless" guidepost need not be defined with more precision, since the district courts are in the best position to determine which cases fall into this category, and since the statute's instruction

allowing dismissal if a court is "satisfied" that the complaint is frivolous indicates that the frivolousness decision is entrusted to the discretion of the court entertaining the complaint. Pp.31-33.

2. Because the frivolousness determination is a discretionary one, a § 1915(d) dismissal is properly reviewed for an [abuse of that discretion]. It would be appropriate for a court of appeals to consider, among other things, whether the plaintiff was proceeding pro se, whether the district court inappropriately resolved genuine issues of disputed fact, whether the court applied erroneous legal conclusions, whether the court has provided a statement explaining the dismissal that facilitates intelligent appellate review, and whether the dismissal was with or without prejudice. With respect to the last factor, the reviewing court should determine whether the district court abused its discretion by dismissing the complaint with prejudice or without leave to amend if it appears that the allegations could be remedied through more specific pleading, since dismissal under § 1915(d) could have a res judicata effect on frivolousness determinations for future in forma pauperis petitions. This Court expresses no opinion on the Court of Appeals' rule that a pro se litigant bringing suit in forma pauperis is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. Pp. 33-35.

3. 929 F.2d 1374, vacated and remanded.

4. See denton v hernandez, 504 u.s. 25, 33 1992.

5. As we stated in Neitzke, a court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," 490 U. S., at 327, a category encompassing allegations that are "fanciful," id., at 325, "fantastic," id., at 328, and "delusional," ibid. As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely. Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be "strange, but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan, canto XIV, stanza 101 (T. Steffan, E. Steffan & W. Pratt eds. 1977).

6. Therefore, if it appears that frivolous factual allegations could be remedied through more specific pleading, a court of appeals reviewing a § 1915(d) disposition should consider whether the District

Court abused its discretion by dismissing the complaint with prejudice or without leave to amend. Because it is not properly before us, we express no opinion on the Ninth Circuit rule, applied below, that a pro se litigant bringing suit in forma pauperis is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. E. g., Potter v. McCall, 433 F. 2d 1087, 1088 (1970); Noll v. Carlson, 809 F. 2d 1446 (1987).

7. With respect to this last factor: Because a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations. It could, however, have a res judicata effect on frivolousness determinations for future in forma pauperis petitions.

See, e. g., Bryant v. Civiletti, 214 U. S. App. D. C. 109, 110-111, 663 F. 2d 286, 287-288, n. 1 (1981) (§ 1915(d) dismissal for frivolousness is res judicata); Warren v. McCall, 709 F. 2d 1183, 1186, and n. 7 (CA7 1983) (same); cf. Rogers v. Bruntrager, 841 F. 2d 853, 855 (CA8 1988) (noting that application of res judicata principles after § 1915(d) dismissal can be "somewhat problematical"). Therefore, if it appears that frivolous factual allegations could be remedied through more specific pleading, a court of appeals reviewing a § 1915(d) disposition should consider whether the District Court abused its discretion by dismissing the

complaint with prejudice or without leave to amend. Because it is not properly before us, we express no opinion on the Ninth Circuit rule, applied below, that a pro se litigant bringing suit in forma pauperis is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. E. g., Potter v. McCall, 433 F. 2d 1087, 1088 (1970); Noll v. Carlson, 809 F. 2d 1446 (1987).

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (8/6/2021).
("s"/Cecile A. Brown)".

Respectfully Submitted,

"/s/[Cecile A. Brown]"

Cecile A. Brown
Signature
Name
3222 Violet St. A
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8/6/2021
Date

Name of court: U.S. Court of Appeals for the Ninth Circuit
Title: Statement why appeal should move forward.
Date of Entry: July 3, 2021.
No. 21-35383
No. 21-35386
No.35428; Name of Judges who acted on appeal: BARRY G. SILVERMAN, JACQUELINE H. NGUYEN and RYAN D. NELSON.

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Appendix C to Brief

Government Abuse of the Voluntary-Cessation Doctrine

II. THE SUPREME COURT HAS NEVER SUGGESTED THAT GOVERNMENT DEFENDANTS SHOULD GET SPECIAL TREATMENT UNDER THE VOLUNTARY-CESSATION DOCTRINE

The Court has consistently applied the same strict voluntary-cessation standard across the board. Even when the government has changed the challenged law, policy, or practice, it must show— without any presumption or burden-shifting—that it is "absolutely clear" the conduct will not resume. 44

Parents Involved in Community Schools v. Seattle School District No. 1 reaffirmed the Supreme Court's view that "[v]oluntary 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,'" even in the case of a government defendant such as the school district there. 47

Further confirming this point, the Supreme Court in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville applied Mesquite and explained that the issue in Mesquite had not gone moot "because the defendant's 'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'" 48 The "mere risk" of reenactment in Mesquite was what kept the case alive. 49

Simply put, nothing in the Supreme Court's voluntary-cessation jurisprudence suggests that the standard is different for government defendants. Quite the opposite: the Court has unwaveringly applied Mesquite's "absolutely clear" standard.

III. COURTS SHOULD REJECT A PRESUMPTION IN FAVOR OF GOVERNMENT DEFENDANTS WHEN APPLYING VOLUNTARY - CESSATION PRINCIPLES

First, as the prisoner and other examples above demonstrate, government defendants are no less vulnerable than private ones to the temptation that motivates the voluntary-cessation doctrine— the desire "to strategically alter [their] conduct in order to prevent or undo a ruling adverse to [their] interest." 62 Lawyers representing government entities in litigation have the same duty to zealously advocate for their clients as lawyers representing private clients.

Government defendants therefore have a strong incentive to be strategic about which cases they litigate to judgment—to litigate fully only those cases that they think they will win and to moot the rest, preventing unfavorable precedent that could affect their operations in a variety of different areas.

Weakening voluntary cessation for government defendants therefore makes it harder for courts to resolve the sorts of legal questions that most need resolving. It also makes it more difficult for plaintiffs to prove that a constitutional right is "clearly established"—a necessary prerequisite for overcoming qualified immunity, and thus

for holding government officials liable for constitutional violations even in those cases that do not go moot. 9

Courts should decline to give government defendants special treatment in applying the voluntary-cessation doctrine. A close look at its purposes shows that government defendants have as much or more incentive as do private defendants to engage in the type of conduct the doctrine is designed to discourage—and when they do, they create especially severe forms of the types of harms that the doctrine is designed to prevent.

Like private actors, governments can and will seek to manipulate a court's jurisdiction to moot an unfavorable case. But unlike private actors, if a government succeeds in insulating its conduct from judicial review, the consequences are far more dire: the coercive power of the political branches is left unchecked by the judiciary, 94 and important constitutional issues may remain unresolved, permitting future government actors to engage in identical illegal conduct. It is of course possible that in many instances the government's change of policy reflects a true change of heart. But both law and experience undermine the notion that courts should treat government defendants as inherently more honest and trustworthy than private ones.

Governments are sophisticated, repeat litigators, frequently immune from claims for damages. As explained above, evidence confirms theory: government entities can and do selectively change laws and policies mid-litigation to advance their longer-term interests. And worse still, lower-court deference to the government's

voluntary cessation has been fashioned out of whole cloth. It has no basis in the Supreme Court's precedent, as the Court has consistently applied the same "absolutely clear" standard to all defendants.

Yet many lower courts persist in this error, frequently citing and applying cases that favor government assertions of mootness—even at times requiring plaintiffs to produce evidence that the government's change in the law is insincere (a potentially impossible task). But all is not lost. By agreeing to consider the mootness issue in NYSRPA, the Supreme Court now has the opportunity to set the record straight and confirm that government defendants are subject to the same voluntary-cessation standard as everyone else. 95 This would not only correct lower courts' interpretation of Supreme Court precedent, but would protect and advance the important interests underpinning the voluntary-cessation doctrine.

The Supreme Court has long interpreted this language to mean that federal courts have jurisdiction to decide only those cases in which the parties have concrete interests that will be resolved by a judicial decision. Those tangible interests must be present at every stage of the lawsuit, the court has said, from initial filing to final decision.

There are exceptions to the mootness doctrine. Perhaps the most notable exception applies when the case involves circumstances that exist only for a short, fixed time period and that may be over by the time the litigation reaches the Supreme Court. In cases involving pregnancy and abortion, for example, a woman will almost certainly have either terminated the pregnancy or delivered a baby well

before the dispute can reach the appellate stages. The Supreme Court has carved out an exception for cases that are "capable of repetition, yet evading review." In other words, if the issues may arise again and will often or always face timing challenges, the federal courts should not dismiss such cases for mootness and may continue to hear the litigation.

Another exception to mootness occurs when the defendant in the case voluntarily decides to halt the contested practice that is the basis of the lawsuit. Because the defendant's cessation of activity is voluntary, the theory goes, the defendant could also decide to resume the contested activity after the case is dismissed as moot. Therefore, courts should be cautious in dismissing for mootness in such circumstances.

The Supreme Court should not dismiss case that have become moot after the Court has taken them for review. Honig v. Doe, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring).

***Please determine the legality of the practice and issue ruling according to a matter of law.**

A major consideration in the disposition of moot appeals should be, of course, that injustice be avoided in the immediate situation, and in certain cases this means that vacation rather than dismissal is the preferable decree. A prospective order to comply with a statute is a simple illustration. If the statute is repealed while an appeal is pending, quite clearly the Supreme Court should vacate so that the defendant cannot be required to perform in accordance with the repealed statute.8 ' Another

illustration is where the moot ness can be remedied by a proper amendment of the pleadings. In such cases, the Court should remand to the trial court for further proceedings.8 2 In some situations, the continuation of an order or judgment may hamper a person or tend to bring him into disrepute. If there is a mandamus order to a public official, and the order is complied with before the appeal is heard, it probably is desirable to vacate for this reason.8 3 Other situations may involve paternity or bastardy proceedings, where marriage has subsequently occurred. In such cases, the interest of the child as well as the parties in litigation must be considered.

"Fraud On the Court by An Officer of The Court" And "Disqualification Of Judges, State and Federal"

1. Who is an "officer of the court"?

   A judge is an officer of the court, as well as are all attorneys. A state judge is a state judicial officer, paid by the State to act impartially and lawfully. A federal judge is a federal judicial officer, paid by the federal government to act impartially and lawfully. State and federal attorneys fall into the same general category and must meet the same requirements. A judge is not the court. People v. Zajic, 88 Ill.App.3d 477, 410 N.E.2d 626 (1980).

2. What is "fraud on the court"?

   Whenever any officer of the court commits fraud during a proceeding in the court, he/she is engaged in "fraud upon the court". In Bulloch v. United

States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function --- thus where the impartial functions of the court have been directly corrupted." "Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Kenner v. C.I.R., 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final."

3. What effect does an act of "fraud upon the court" have upon the court proceeding?

   "Fraud upon the court" makes void the orders and judgments of that court. It is also clear and well-settled Illinois law that any attempt to commit "fraud upon the court" vitiates the entire proceeding. The People of the State of Illinois v. Fred E. Sterling, 357 Ill. 354; 192 N.E. 229 (1934)

("The maxim that fraud vitiates every transaction into which it enters applies to judgments as well as to contracts and other transactions."); Allen F. Moore v. Stanley F. Sievers, 336 Ill. 316; 168 N.E. 259 (1929) ("The maxim that fraud vitiates every transaction into which it enters ..."); In re Village of Willowbrook, 37 Ill.App.2d 393 (1962) ("It is axiomatic that fraud vitiates everything."); Dunham v. Dunham, 57 Ill.App. 475 (1894), affirmed 162 Ill. 589 (1896); Skelly Oil Co. v. Universal Oil Products Co., 338 Ill.App. 79, 86 N.E.2d 875, 883-4 (1949); Thomas Stasel v. The American Home Security Corporation, 362 Ill. 350; 199 N.E. 798 (1935). Under Illinois and Federal law, when any officer of the court has committed "fraud upon the court", the orders and judgment of that court are void, of no legal force or effect.

4. What causes the "Disqualification of Judges?"

   Federal law requires the automatic disqualification of a federal judge under certain circumstances. In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994). Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the

appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process."). That Court also stated that Section 455(a) "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). In Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972), the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice." The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). A judge receiving a bribe from an interested party over which he is presiding, does not give the appearance of justice. "Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself sua sponte under the stated circumstances." Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). Further, the judge has a legal

duty to disqualify himself even if there is no motion asking for his disqualification. The Seventh Circuit Court of Appeals further stated that "We think that this language [455(a)] imposes a duty on the judge to act sua sponte, even if no motion or affidavit is filed." Balistrieri, at 1202. Judges do not have discretion not to disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify himself as required by law, then the judge has given another example of his "appearance of partiality" which, possibly, further disqualifies the judge. Should another judge not accept the disqualification of the judge, then the second judge has evidenced an "appearance of partiality" and has possibly disqualified himself/herself. None of the orders issued by any judge who has been disqualified by law would appear to be valid. It would appear that they are void as a matter of law, and are of no legal force or effect. Should a judge not disqualify himself, then the judge is violation of the Due Process Clause of the U.S. Constitution. United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause."). Should a judge issue any order after he has been disqualified by law, and if the party has been denied of any of his / her property, then the judge may have been engaged in the Federal Crime of "interference with interstate commerce". The judge has acted in the judge's personal capacity and not in the judge's judicial capacity. It has been said

that this judge, acting in this manner, has no more lawful authority than someone's next-door neighbor (provided that he is not a judge). However, some judges may not follow the law. If you were a no represented litigant, and should the court not follow the law as to non-represented litigants, then the judge has expressed an "appearance of partiality" and, under the law, it would seem that he/she has disqualified him/herself. However, since not all judges keep up to date in the law, and since not all judges follow the law, it is possible that a judge may not know the ruling of the U.S. Supreme Court and the other courts on this subject. Notice that it states "disqualification is required" and that a judge "must be disqualified" under certain circumstances. The Supreme Court has also held that if a judge wars against the Constitution, or if he acts without jurisdiction, he has engaged in treason to the Constitution. If a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction, and that suggest that he is then engaging in criminal acts of treason, and may be engaged in extortion and the interference with interstate commerce. Courts have repeatedly ruled that judges have no immunity for their criminal acts. Since both treason and the interference with interstate commerce are criminal acts, no judge has immunity to engage in such acts. **>HAS NO IMMUNITY IN SUCH ACTS<.**

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (8/6/2021). ("s"/Cecile A. Brown)".

Respectfully submitted,

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Contents of Appendix:

Name of court: U.S. Court of Appeals for the Ninth Circuit
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