No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Petitioners,

v.

YONAS FIKRE,

Respondent.

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

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

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QUESTION PRESENTED

Whether the doctrine of voluntary cessation should apply equally to governmental and private defendants.

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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 takes no position on the ultimate issues in this case, but notes that a government penalizing someone simply because he is Muslim would be as clear a Free Exercise Clause violation as one might imagine. Becket submits this brief because it is concerned that one argument offered in petitioners' brief—that courts ought to presume that "the government acts in good faith when ceasing" challenged conduct—would arm governmental defendants with a powerful new tool for frustrating First Amendment rights.

Amicus' experience is 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. See *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (kosher accommodation granted mid-litigation in effort to moot lawsuit); *Moussazadeh* v. *Texas Dep't of Crim.*

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[1] No counsel for a party authored this brief in whole or in part and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Just., 364 F. App'x 110 (5th Cir. 2010) (same); *Guzzi* v. *Thompson*, No. 07-1537, 2008 WL 2059321 (1st Cir. May 14, 2008) (same). We have litigated cases challenging different iterations of the contraceptive mandate promulgated by federal officials under the Affordable Care Act. See, *e.g.*, Pl.'s Opp'n to Defs.' Mot. to Dismiss, *Belmont Abbey Coll.* v. *Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012) (No. 11-1989), ECF No. 24 (government policy change designed to delay nonprofit contraceptive mandate challenges so that for-profit challenges would reach this Court first); *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (same). And we have litigated many other cases where the government has sought to moot out cases partway through. See, *e.g.*, Pls.' Resp. to Def.'s Mot. to Dismiss, *McAllen Grace Brethren Church* v. *Jewell*, No. 7-cv-60 (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. Dec. 7, 2017), vacated, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018) (eligibility of houses of worship for emergency relief funds). As a result of these experiences, we filed an *amicus* brief in favor of neither party in *New York State Rifle & Pistol Association* v. *City of New York*, 140 S. Ct. 1525 (2020) (per curiam).

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 of allegedly unlawful conduct 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). That standard should apply just as rigorously to governmental defendants as to private ones.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus offers this brief to make a single point: governments should not get special treatment when it comes to voluntary cessation.

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. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)). 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 in cases involving private defendants. Here, however, the United States suggests the Court should adopt a standard that puts a much lighter burden on governmental defendants than private ones.

That gets 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 government's arguments here that it satisfies the ordinary standard are one thing. The government's arguments that it—solely because it is the government—should get a bespoke Article III standard are another. The Court should reject any notion that governmental defendants as such are afforded more lenient treatment in assessing whether their voluntary cessation has caused a case to go moot.

ARGUMENT

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

"[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 is if the defendant demonstrates it is "absolutely clear" that the practice "could not reasonably be expected to recur." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)). This "heavy" burden falls on the party asserting mootness: here, "the Government." *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, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-192 (2000), and thwart the "public interest in having the legality of the practices settled." *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974).

The government argues it has satisfied the ordinary standard here; on that argument *Amicus* takes no position. In tandem, the government suggests its burden should be lighter, solely because it is the government. According to the government, "absent some strong showing of bad faith," the "presumption of regularity" for government actions supports mootness in voluntary-cessation cases. Br.17-18. This should be so, the government implies, in any case "challenging governmental action"—from the No Fly List down to municipal licensing schemes. *Id.* at 18-19; see also Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J.F. 325, 333-334 (2019) (Davis & Reaves) (collecting cases from lower courts similarly adopting a presumption in favor of governments for purposes of voluntary cessation).

Whatever the Court thinks about the national-security context, this Court should reject any effort to dilute the mootness standard for governments *qua* governments. This Court has never suggested that government defendants should get special treatment under the voluntary-cessation doctrine. In fact, "to the extent government defendants are different from private defendants," those differences generally "make

them *more* likely to strategically moot cases, not less," Davis & Reaves 335—so creating a special standard for government defendants would be a mistake.

1. This Court "has on numerous occasions had the opportunity to consider whether a mid-litigation policy change by a government defendant mooted the appeal." Davis & Reaves 332. Never has it endorsed any presumption in favor of the government. To the contrary, the Court has repeatedly required government defendants to carry the same, heavy burden as any other defendant: to make "'absolutely clear' that [they] could not revert to" the challenged policy. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 457 n.1 (2017); see also, *e.g.*, *West Virginia* v. *EPA*, 142 S. Ct. at 2607 ("'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'"); *Parents Involved*, 551 U.S. at 719 (same); *In re Bright Ideas Co., Inc.*, 284 A.3d 1037, 1045 (D.C. 2022) (this Court has not "recognized such a presumption").

City of Mesquite is instructive. There, the defendant city "repeal[ed] * * * the objectionable language" in a challenged law after the district court held that law unconstitutional. 455 U.S. at 289. But this Court rejected the city's argument that the repeal rendered the case moot. Although the challenged language had been repealed, that "would not preclude [the city] from reenacting precisely the same provision if the District Court's judgment were vacated." *Ibid.* There was "no certainty" that the city "would not" revert; it was "free to return to [its] old ways." *Id.* at 289 & n.10. So the case was not moot.

In *New York State Rifle & Pistol Association* v. *City of New York*, meanwhile, this Court held that the repeal of a challenged law *did* moot a plaintiff's claims. 140 S. Ct. 1525 (2020) (*NYSRPA*) (per curiam). But that decision illustrates the relevant principles. Unlike in *City of Mesquite*, in *NYSRPA*, the defendant was *not* "free to return to [its] old ways." *City of Mesquite*, 455 U.S. at 289 n.10. Rather, in addition to New York City (the defendant) repealing its law, New York State (a nonparty) had passed a statute "making the old New York City ordinance illegal." *NYSRPA*, 140 S. Ct. at 1527-1528 (Alito, J., dissenting). So in *NYSRPA*, something *did* "preclude [the city] from reenacting precisely the same provision" after dismissal, *City of Mesquite*, 455 U.S. at 289—namely, binding state law.

The government argues that this case is closer to *NYSRPA* than to *City of Mesquite*. Br.18-19. That may or may not be, but the government's telling of those cases distorts their teachings.

First, citing a *City of Mesquite* footnote, the government says the Court there rejected mootness "because the city * * * had 'announced'" an intention to reenact the challenged law. Br.15 (quoting 455 U.S. at 289 n.11). But this turns a cherry on top into a *sine qua non*. Mesquite's *freedom* to revert, not its *intent* to do so, was the critical fact in *City of Mesquite*; the intent simply confirmed the freedom. That is why the Court mentioned Mesquite's "admission" (Br.18) only in a one-sentence footnote beginning with "Indeed." And that is why in *West Virginia* v. *EPA* this Court cited *City of Mesquite* to reject the government's invitation

to hold the case moot without any such announced intention. 142 S. Ct. at 2607 ("We do not dismiss a case as moot in such circumstances.").

As for *NYSRPA*, the government cites that case for the proposition that, "absent admissions like the one in *Mesquite*," "this Court generally presumes" governments' voluntary cessations are "in good faith." Br.18-19. But the one-paragraph per curiam *NYSRPA* opinion says nothing of the sort. The difference between *City of Mesquite* and *NYSRPA* was that in *City of Mesquite*, nothing stopped the city from resuming its challenged conduct, while in *NYSRPA*, something—binding state law—did. The net effect of the government's proposed reconciliation of these cases is to shift the burden from defendant to plaintiff. That contravenes the fundamental principle that in applying voluntary cessation, the onus is on the defendant to prove it *won't* revert, not on the plaintiff to prove it *will*. See, *e.g.*, *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 96 (2013) ("the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur"); *id.* at 102 (Kennedy, J., concurring) ("The burden was not on Already to show that a justiciable controversy remains."); *Parents Involved*, 551 U.S. at 719 ("a heavy burden that [defendant] Seattle has clearly not met").

2. Besides its lack of support in the cases, a special voluntary cessation rule for government defendants would "defy common sense." *Tucker* v. *Gaddis*, 40 F.4th 289, 295 (5th Cir. 2022) (Ho, J., concurring). Indeed, "a hard look at both the theoretical and practical justifications for the voluntary-cessation doctrine" shows that, if anything, the doctrine should apply *more* stringently in government-defendant cases, not

less. Davis & Reaves 328. "Government officials have stronger incentives and greater ability to engage in the strategic mooting of cases that this doctrine is designed to prevent[.]" *Ibid.* "Meanwhile, the kinds of cases in which governments and officials are typically defendants—often involving the Constitution and often of great interest to the public—are exactly the cases in which deliberate, selective mooting does the most harm[.]" *Ibid.*

First, government defendants, no less than private ones, have strong "incentives for strategic mooting" when facing "potentially enormous downstream consequences of an adverse result." *In re Bright Ideas,* 284 A.3d at 1048. In many circumstances, governmental defendants may be obligated to do so to defend the public trust. And the notion that state actors are inherently benign runs counter to the very premise of the statute under which most litigation against state actors takes place—Section 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).

That government defendants are opportunists like so many others should come as no surprise to this Court, which has increasingly encountered governmental efforts to evade review by "moving the goalposts" mid-litigation. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021); see also, *e.g.*, *NYSRPA*, 140 S. Ct. at 1531 (Alito, J., dissenting) (city suddenly abandoned law it long claimed was "necessary to protect the public safety"). These efforts took particularly egregious form during COVID. See, *e.g.*, *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020)

(Governor's reclassification of COVID zone did not moot case). But governmental efforts to manipulate the federal courts' jurisdiction have not abated since the pandemic ended. See *Vitagliano* v. *County of Westchester*, petition for cert. pending, No. 23-74 (County quickly abandoned abortion-clinic bubble zone law after certiorari petition was filed after defending it vigorously below).

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 operations across a variety of endeavors. Thus, they have a powerful incentive to pick and choose their cases—strategically mooting cases that would set precedent they don't like, while fully litigating cases that would set precedent they do like.

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 Jewish prisoners. Over the course of nearly a decade, the Florida Department of Corrections 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. 6-cv-225, 2008 WL 3889604, at *1 (N.D. Fla. Aug. 20, 2008) (same). But when it faced a Jewish prisoner represented by counsel, it attempted to moot the case

on the eve of oral argument in the Eleventh Circuit by announcing the rollout of a new kosher dietary policy, albeit one that would be implemented only at the plaintiff's prison unit. *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013). 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 Crim. Just.* 703 F.3d 781, 786 (5th Cir. 2012) (Texas attempted to moot kosher diet case by represented prisoner).[2]

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

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[2] *Amicus* represented the prisoner plaintiffs in *Rich* and *Moussazadeh*.

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 often insulate them from damages claims—making it much easier to strategically moot cases. Voluntary cessation has no effect on damages claims. *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 608-609 (2001). But damages are not as readily available against governmental defendants as against private ones. 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). And many statutes, like the Administrative Procedure Act and the Prison Litigation Reform 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 PLRA).

All that is why the government here can brush off damages with the observation that "respondent identifies no cause of action or waiver of sovereign immunity that would afford such retrospective relief." Br.16. Of course, this won't always be true.[3] But the fact that governmental defendants sometimes can be sued *only*

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[3] In *Vitagliano*, for example, the plaintiff has a cause of action supporting damages—§ 1983—and is suing a non-immune defendant—a county. Reply Br. at 2-5, *Vitagliano* v. *County of Westchester*, No. 23-74 (Nov. 2, 2023). So regardless of voluntary cessation, the United States's argument here only underscores that *Vitagliano* and cases like it aren't moot.

for injunctive or declaratory relief, even if their actions have caused severe injury in the past, is all the more reason for courts to remain vigilant in assessing voluntary cessation.

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*, 568 U.S. at 93 (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 agencies. See *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 220-221 (2016).

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"). And even when the officials remain the same, their positions can change based on a 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 Neal Devins &

Saikrishna Bangalore 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-3539, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018). That dispute was not resolved until almost a decade after the first lawsuit was filed.

Examples like this demonstrate why the government's emphasis on "good faith" misses the mark. Br.18. While "bad faith" of course *supports* a finding that a case remains live, cf. *ibid.*, the premise underlying the "absolutely clear" standard is not that defendants routinely harbor a secret, nefarious intent to resume the challenged conduct at the first opportunity. It is that they are free to reinitiate that conduct in the future (whether they planned to do so all along or not). *That* is what creates the continuing harm and potential waste of judicial resources. See *Laidlaw*, 528

U.S. at 191-193 ("argument from sunk costs"). And the "opportunities and incentives for government defendants are obvious," *Tucker*, 40 F.4th at 295 (Ho, J., concurring), even more than for private defendants.

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.

* * *

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. Yet all too often, lower courts "[l]ook[] the other way when government claims mootness"—employing the "excessive sense of deference to public officials" that the government suggests this Court should now make into law. *Tucker*, 40 F.4th at 293, 296 (Ho, J., concurring). However the Court rules in this case, it should decline that invitation.

CONCLUSION

The Court should hold that the voluntary cessation doctrine applies equally to governmental and private defendants.

Respectfully submitted.

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