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 of *Amici Curiae* the Sikh Coalition and First Liberty Institute in Support of Respondent

John M. Reeves
Counsel of Record
Reeves Law LLC
7733 Forsyth Blvd.
Ste. 1100--#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com

Kelly Shackelford
Jeff Mateer
David Hacker
Hiram Sasser
First Liberty Institute
2001 W. Plano Parkway
Ste. 1600
Plano, TX 75035

Kayla Toney
First Liberty Institute
1331 Pennsylvania Ave. NW
Ste. 1410
Washington, DC 20004

Amrith Kaur Aakre
Marissa Rossetti
The Sikh Coalition
165 Broadway Street
Ste. 2359
New York, NY 10006

Counsel for *Amici Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI CURIAE[1]

The Sikh Coalition is the largest community-based civil rights organization working to protect Sikh Americans across the United States. Its goal is working towards a world where Sikhs, and other religious minorities in America, may freely practice their faith without bias and discrimination. Since its inception, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. This Court favorably cited the Sikh Coalition's amicus brief in its recent opinion holding that an employer seeking to defend a refusal to make a religious accommodation under Title VII must demonstrate that such an accommodation would result in a substantial burden to the employer and not just a *de minimis* inconvenience. *See Groff*, 600 U.S. at 465 ("[A] bevy of diverse religious organizations [including the Sikh Coalition] has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market.").

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. First Liberty provides pro bono legal representation to individuals and

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[1] No counsel for a party has authored this brief in whole or in part. No person aside from *amici curiae* has made a monetary contribution to fund this brief's preparation or submission.

institutions of all faiths—Catholic, Jewish, Muslim, Native American, Sikh, Protestant, the Falun Gong, and others. It has won several cases before this Court, including *Groff v. DeJoy*, 600 U.S. 447 (2023); *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022); *Carson v. Makin*, 596 U.S. 767 (2022); and *American Legion v. American Humanist Ass'n*, 139 S.Ct. 2067 (2019).

As *amici*, both the Sikh Coalition and First Liberty maintain an interest in protecting their clients' ability to seek full relief against religious discrimination—especially religious discrimination by the government. This includes declaratory and injunctive relief putting an end to such discrimination. But very often, the government will cease its conduct once litigation has begun and then seek dismissal due to mootness as an attempt to evade responsibility for its unlawful actions, while maintaining the option in the future to return to the conduct once the litigation ends. *See, e.g., U.S. Navy Seals 1-26 v. Biden*, 72 F.4th 666 (5th Cir. 2023); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012); *Burke v. Clarke*, 842 Fed.Appx. 828 (4th Cir. 2021).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Sikh Coalition and First Liberty fully agree with Fikre that a governmental entity can overcome the voluntary cessation doctrine by demonstrating that it has unambiguously repudiated the conduct in question. But we would go further than Fikre—while Fikre also takes the position that a governmental entity can institute "clearly effective barriers" to ensure that the conduct in question cannot reasonably be

expected to occur again, and that such barriers need not be accompanied by an unambiguous repudiation of the conduct in question, (Pet.Br.25-28), it is difficult to see how any governmental entity can, in fact, erect such barriers absent such a repudiation. As *amicus curiae* the Becket Fund notes in its brief, (Bkt.Br.13), a governmental entity—unlike a private entity—is always free to reverse course and return to the conduct at issue. The only practical way to ensure the voluntary cessation doctrine has any teeth against governmental entities is to require—in all circumstances—that such entities demonstrate they have unambiguously repudiated the conduct in question. This repudiation can take a variety of forms—the governmental entity can admit that the conduct is unlawful, or it can pay monetary damages as part of a settlement, or it can demonstrate that it no longer considers the original conduct to be sound policy. Regardless, the governmental entity must make clear that it no longer adheres to the conduct in question in a manner that would make it difficult—either politically or legally—for it to reinstitute the conduct without serious practical consequences to itself. To hold otherwise would impermissibly shift the burden to the plaintiff to demonstrate that the voluntary cessation doctrine *does* apply, contrary to this Court's precedents holding that it is the defendant's burden to prove that the doctrine does *not* apply.

ARGUMENT

I. This Court's precedents support the creation of such a bright-line rule mandating that a governmental defendant repudiate the conduct at issue as part of its heavy burden of demonstrating an exception to the voluntary cessation doctrine.

The voluntary cessation doctrine prevents dismissal on mootness grounds if a defendant voluntarily ceases the alleged unlawful conduct during the course of the litigation. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). This prevents a defendant from "engag[ing] in unlawful conduct, stop[ing] when sued to have the case declared moot, then pick[ing] up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id*. Once a defendant voluntarily ceases conduct during the litigation, the presumption is that this does *not* moot the case. In other words, the plaintiff does not bear the burden of proving that a live case and controversy still exists. Rather, it is the *defendant's* duty to prove that the voluntary cessation doctrine is inapplicable. This is a high burden for the defendant to satisfy. *See Friends of the Earth, Inc. v. Laidlaw Env't Serv., Inc.*, 528 U.S. 167, 190 (2000). Under this Court's precedents, the only way a defendant can satisfy this burden is by repudiating the alleged conduct.

This Court first explicitly applied the voluntary cessation doctrine to a government entity in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). There, the plaintiff brought suit against a city alleging that one of its ordinances was unconstitutionally vague. *Id*. at 286-87. But during the litigation, the city

repealed the language in question within the ordinance. *Id.* at 288-89. This Court nevertheless held that the repeal did not moot the case because the city, as the defendant, had failed to satisfy its burden of overcoming the void for vagueness doctrine. "[T]he city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision . . . ." *Id.* at 289. Indeed, the city admitted it intended to re-enact the same language in the event this Court declared the case to be moot. *Id.* at 289, 289 n.11. The city had thus failed to satisfy its burden of proving "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . . ." *See id.* at 289 n.10 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-04 (1968)).

This rule mandating repudiation was further refined in *Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). During litigation, the city defendant repealed the ordinance being challenged and replaced it with one that, practically speaking, differed little from the original one. *See id.* at 660-61. "There is no mere risk," this Court concluded, "that [the city] will repeat its allegedly wrongful conduct; it has already done so." *Id.* at 662. It also emphasized that *Aladdin's Castle* rejects the notion "that it is only the possibility that the *self-same* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.* at 662. The fact that the city defendant failed to renounce the

conduct in question demonstrated that it failed in its burden of overcoming the voluntary cessation doctrine.

Along similar lines, the defendant failed to satisfy its burden of overcoming the voluntary cessation doctrine in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). That case involved a challenge to a state law prohibiting the granting of funds to religious organizations for making playground surfaces but allowing such funds to go to secular organizations. *Id.* at 453-54. After this Court granted certiorari, the state's governor announced that religious organizations would be able to apply for such grants just like secular groups. *Id.* at 457 n.1. But this announcement was not accompanied by an explicit repudiation of the former conduct. There was no declaration by the state that it either viewed the former conduct as bad policy or that it viewed the conduct as unlawful. *Compare with Yellen v. United States House of Representatives*, 142 S.Ct. 332 (2021) (vacating as moot a judgment after the President rescinded the conduct in question as being "not a serious policy solution" and a "waste of money," Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021)).

It is true that this Court held litigation against governmental conduct moot absent any repudiation of the conduct in both *Trump v. Hawaii*, 138 S.Ct. 377 (2017) and *Burke v. Barnes*, 479 U.S. 361 (1987). But both of those cases, when read in context, show that the voluntary cessation doctrine never applied in the first place because in neither case did the defendants *voluntarily* cease doing the conduct in question. Rather,

in both instances, the challenged laws expired by virtue of their own operation. *See Hawaii*, 138 S.Ct. at 377; *Burke*, 479 U.S. at 363-64. "[A] statute that expires by its own terms does not implicate [the risk that the defendant will resume the conduct]. Why? Because its lapse was predetermined and thus not a response to litigation. So unlike a post suit repeal that might not moot a case, a law's automatic expiration does." *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020).

Taken as a whole, this Court's precedents demonstrate that for a governmental defendant to overcome its heavy burden of demonstrating the conduct in question is not likely to occur again, it is not enough for the defendant to simply repeal the conduct. It must also, in some way, repudiate that conduct. This does not necessarily mean that the defendant has to confess error and declare that the conduct is illegal. But it must make clear in some way that there is no reasonable chance that it will return to the conduct in the future. This can include declaring that the old conduct was bad policy and as a result needs to be abandoned.

While it is true that such declarations cannot, of themselves, prevent the governmental defendant from subsequently changing its mind and returning to its former conduct, they make it far less likely that such a return will happen. For one, if a governmental defendant repudiates the conduct on policy reasons, the political consequences of subsequently changing its mind and reinstituting the conduct will make it unlikely that it will do so. In addition, any subsequent reinstatement of the conduct following a prior

repudiation would make it far less likely for it to succeed in terminating the conduct a second time as a means of ending a lawsuit, as the court would have no reason to believe its second claim of repudiation after reversing on the first. In other words, "Fool me once, shame on you. Fool me twice, shame on me."

II. Absent any requirement that the governmental defendant repudiate the conduct in question, the burden will unfairly shift to the plaintiff to prove that the voluntary cessation exception applies.

It is critical that this Court make clear that governmental defendants bear the same "heavy burden" as non-governmental defendants to demonstrate that the ceased conduct in question cannot reasonably be expected to occur again. *See Friends of the Earth*, 528 U.S. 189. Several lower court opinions demonstrate the unfair advantage given to the government absent such a requirement. In all instances, the burden has unfairly shifted to the plaintiff.

In *U.S. Navy Seals 1-26*, the Fifth Circuit held moot the Navy's vaccine mandate due to Congress passing superseding legislation overriding the Navy's policy. *Id.* at 671. But despite this rescission, "[t]he Secretary of Defense maintained his fervent opposition to Congress's repeal of his mandate." *Id.* at 677 (Ho, J., dissenting). The secretary also told military commanders of the armed forces that they could still consider vaccination status in making deployment decisions. *Id.* at 671. The Navy also "refused to admit illegality or assure the SEALs that their religious

convictions would be respected in the future." *Id*. at 677 (Ho, J., dissenting). It also conceded that "it could implement a new vaccine mandate in the future." *Id*. at 674. In other words, while Congress rescinded the Navy's vaccination mandate, the Navy still sought to implement as much as it possibly could under the circumstances. At no time did the Navy distance itself on either legal or policy grounds from the actual vaccination mandate.

Despite this lack of repudiation, the Fifth Circuit held that the government, as the defendant, was entitled to a presumption that it was acting in good faith and that, absent any evidence to the contrary, it was not changing course as a mere litigation tactic. *Id*. The Fifth Circuit held the voluntary cessation doctrine inapplicable and dismissed the case as moot. *Id*. at 674, 676.

Along similar lines, the D.C. Circuit shifted the burden from the governmental defendant to the plaintiff in *Alaska v. United States Dep't of Agric.*, 17 F.4th 1224 (D.C. Cir. 2021). There, a state brought suit against the Department of Agriculture challenging the validity of an administrative rule prohibiting road construction on any National Forest System lands. *Id*. at 1226. During the litigation, the Department issued a new rule exempting the relevant land at issue in the litigation from the regulation. *Id*. The D.C. Circuit concluded that this rendered the case moot, despite the Department not in any way repudiating the policy. *See id*. at 1329. "[T]o determine whether the [rule in question] will be reapplied . . . would require us to speculate about future actions by policymakers." *Id*.

Furthermore, the court would not "impute voluntary cessation where nothing suggests it." *Id*. at 1228 n.3.

Neither the Fifth Circuit's approach in *U.S. Navy Seals 1-26* nor the D.C. Circuit's approach in *Alaska* can be justified under this Court's precedents. This Court emphasizes that the party seeking to defeat the voluntary cessation doctrine "bears the formidable burden of showing that it is absolutely clear from the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Whether the government is acting in "good faith" as the Fifth Circuit termed it is irrelevant to whether it will re-enact the conduct in the future. And the D.C. Circuit's reference about needing to avoid "speculat[ing] about future actions by policymakers," *Alaska*, 17 F.4th at 1229, ignores how, under *Friends of the Earth*, the presumption is that the defendant *will* re-engage in the conduct in question unless it proves otherwise. Indeed, its declaration about not "impos[ing] voluntary cessation where nothing suggests it" ignores how, in that case, it was undisputed that the governmental defendant *had* voluntarily ceased the conduct in issue. Under this Court's precedents, it was that defendant's duty to prove that it would not re-engage in that conduct, but the D.C. Circuit instead presumed that, in the absence of any evidence, it would *not*.

By contrast, the Fourth Circuit applied the correct approach in *Burke v. Clarke*, 842 Fed.Appx. 828 (4th Cir. 2021). A Rastafarian prisoner challenged a grooming policy forbidding him from wearing dreadlocks. *Id*. at 831. During litigation, the prison

dropped this policy and allowed prisoners to wear dreadlocks. *Id.* at 831. Despite this change, the Fourth Circuit correctly held that the prison had failed to sustain its burden under the voluntary cessation doctrine. It noted that while the prison insisted it did not have any intention of reviving the old policy, it also maintained it had the authority to do so, and refused to admit that the policy was unlawful. *Id.* at 836.

Had the Fourth Circuit followed the approaches of the Fifth and D.C. Circuits, it would have reached the opposite conclusion. It would have concluded that the prison was entitled to a presumption of "good faith," and that in any event it was too speculative to consider what type of policy it may enact in the future. In addition, it would have presumed, given the lack of evidence to the contrary, that there was no reasonable likelihood that the prison would re-enact the policy in question.

Similar to the situation in *Burke*, members of the Sikh community have faced repeated threats to have their beards shaven while in prison. Maintaining unshorn hair is an essential element of Sikh beliefs, yet through this country prisons repeatedly attempt to violate such beliefs by insisting they shave their beards as part of prison policy. Prisons can—and do—attempt to moot litigation challenging such policies by transfering Sikh prisoners from a facility with such a policy to a facility lacking such a policy. *See*, *e.g.*, Letter of the Sikh Coalition to the U.S. Department of Justice, Civil Rights Division (May 24, 2021), bit.ly/3RnlB52. This is a classic example of a situation calling for application of voluntary cessation doctrine would.

Under the Fourth Circuit's approach, such a transfer would be insufficient to overcome the voluntary cessation doctrine, whereas under the Fifth and D.C. Circuits this would likely be enough to moot the case. If the Sikh community is to have any hope of vindicating its right to religious freedom in prison, the Fourth Circuit's correct approach to the voluntary cessation doctrine must be applied nationwide.

The only way to prevent an approach like that of the Fifth and D.C. Circuits is to require that a governmental defendant explicitly repudiate the conduct in question. As noted above, this does not necessarily mean it has to agree that the conduct is illegal. It can, as an alternative, make clear that there are strong policy reasons for the change. So long as the governmental entity gives some evidence that it has not merely changed the conduct in question, but also abandoned it altogether, this Court's requirement that the defendant—and not the plaintiff—bear the burden of showing an exception to the voluntary cessation doctrine will be the law of the land.

CONCLUSION

This Court should affirm the Ninth Circuit.

Respectfully submitted,

John M. Reeves
Counsel of Record
Reeves Law LLC
7733 Forsyth Blvd.
Suite 1100--#1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com

Kelly Shackelford
Jeff Mateer
David Hacker
Hiram Sasser
First Liberty Institute
2001 W. Plano Parkway
Suite 1600
Plano, TX 75035

Kayla Toney
First Liberty Institute
1331 Pennsylvania Avenue NW
Suite 1410
Washington, DC 20004

Amrith Kaur Aakre
Marissa Rossetti
The Sikh Coalition
165 Broadway Street, Suite 2359
New York, NY 10006

Counsel for *Amici Curiae*