No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YONAS FIKRE

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a public-interest law firm committed to securing constitutional protections for individual liberty. We represent plaintiffs in federal courts nationwide, often requesting prospective declaratory and injunctive relief against government defendants. We confront voluntary-cessation issues regularly and have an interest in the proper resolution of this case.*

SUMMARY OF ARGUMENT

Across several fronts, the government's arguments for reversal misread mootness principles at a fundamental level. All told, its theory distills to an unprecedented proposition: government defendants can moot constitutional litigation by picking off the plaintiffs for "individualized" special treatment. Pet. Br. 31, 32. The government need not explain that treatment. Pet. Br. 12. It can carry on violating the rights of everyone else—everyone, that is, who is not actively suing it in federal court. Pet. Br. 32. And because, on the government's view, this conception of mootness is the "traditional" one (not customized for national-security agencies) it would, if accepted, extend to every government defendant nationwide. Pet. Br. 34.

The government's articulation of these principles conflicts with precedent at almost every turn—not just of this Court but of every geographic circuit in the Nation. It conflicts even with the government-friendly side of the split invoked in the government's cert petition. *Compare Long* v. *Pekoske*, 38 F.4th 417, 426 (4th Cir. 2022) (carving out a special approach for "this unique national-security

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* In accordance with Rule 37.6, no counsel for a party authored this amicus brief in whole or in part and no person other than the Institute for Justice, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

context"), *with* Pet. Br. 12 (urging a view of "traditional mootness principles" that would apply to all government defendants without distinction).

At a practical level, moreover, the government's view would offer a roadmap for state actors nationwide to moot constitutional cases. Under current precedent, a government defendant's best bet to moot such a case is by implementing an across-the-board legislative or policy change. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525 (2020) (per curiam). On the government's view, however, there's a better way: surgically pick off specific plaintiffs with unexplained, one-off special treatment—all while persisting in violating the rights of everyone else. Give Dick Heller a binding nonenforcement promise and keep enforcing your handgun ban against everyone else. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Give one to 303 Creative LLC and get your antidiscrimination law out of the federal courts. Promise to stop pursuing the Sackett family and keep enforcing the Clean Water Act broadly everywhere else. Which, as it happens, is precisely what the EPA in *Sackett* tried to do—a maneuver the Ninth Circuit rebuffed based largely on its first decision in this case. *Sackett* v. *EPA*, 8 F.4th 1075, 1084-86 (2021) (applying *Fikre* v. *FBI*, 904 F.3d 1033 (9th Cir. 2018)).

For its part, the government addresses none of the disruptive implications of its position. It addresses barely any of the relevant precedent. It even blurs mootness with standing. At base, its arguments for reversal raise an unusual number of under-developed issues and rest on an unusual number of unexplored assumptions.

Affirmance is simpler and requires addressing none of the government's more expansive theories. Whatever questions may exist at the margins, a nonnegotiable

minimum for mootness-by-voluntary-cessation is that the defendant at least *say* that it cannot or will not resume its allegedly wrongful conduct against the plaintiff. The government has not met that step-one requirement here, so the case is not moot.

On this point, the record is clear. "[T]he wrong at issue for mootness purposes is defined by the plaintiffs' theory set forth in the complaint." *Del Monte Fresh Produce Co.* v. *United States*, 570 F.3d 316, 323 (D.C. Cir. 2009). Here, the allegedly wrongful conduct respondent's complaint challenges is twofold: (1) the procedures used to place and keep him on the No Fly List, and (2) the government's alleged use of the list to coerce him into becoming an informant. Respondent undisputedly had standing to seek prospective relief for these claims when his case began. And whatever the merits of his claims, the government has nowhere forsworn subjecting him to the same allegedly wrongful conduct again. As the government points out, it has said that he will not be placed back on the No Fly List "based on the currently available information." Yet under no conception of the voluntary-cessation doctrine does that assurance "encompass[] all of [the] allegedly unlawful conduct" respondent's complaint alleges and seeks to remedy. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 94 (2013). Nothing illustrates the point so clearly as the government's chief authority: had Nike's trademark covenant merely promised not to resume targeting Already "based on the currently available information," its mootness motion would have fizzled at every level of the federal courts. The same result should obtain here. The Court can resolve this case on that narrow ground and leave for future cases the broader theories the government urges.

ARGUMENT

A. The judgment below can be affirmed without reaching most of the government's arguments.

The government invites the Court to hold that public defendants can moot civil-rights actions by singling out plaintiffs for unexplained, individualized special treatment. Such a rule finds support in neither this Court's precedent nor the precedent of the courts of appeals. *See* pp. 14-26, *infra*. Addressing it is also wholly unnecessary to resolving this case. Whatever difficult questions may exist at the margins, a nonnegotiable minimum for mootness-by-voluntary-cessation is that the defendant at least *say* that it cannot or will not resume its allegedly wrongful conduct against the plaintiff. Only with that first box checked do the slate of issues raised in the government's brief (good faith, individualized picking-off, defendants' burden, and so on) even enter the picture.

The government has not checked that first box here; despite every opportunity, it conspicuously has not forsworn resuming the allegedly wrongful conduct pleaded in respondent's complaint. That's ball game. The judgment below can be affirmed on that narrow basis, without reaching any of the more radical theories pressed in the government's brief.

1. On its face, the government's declaration forswears none of the allegedly wrongful conduct respondent's complaint challenges.

Voluntary-cessation cases can be thorny, but this one can be resolved using the doctrine's most basic principles. As the government acknowledges (Pet. Br. 14-15), a defendant's act of voluntary cessation will not moot a case unless the defendant "ma[kes] it absolutely clear that the allegedly wrongful behavior could not reasonably be

expected to recur." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 457 n.1 (2017) (citation omitted). In applying that standard, the analytic first step is to define the allegedly wrongful behavior: what is the plaintiff complaining about? *Zukerman* v. *U.S. Postal Serv.*, 961 F.3d 431, 442 (D.C. Cir. 2020) ("In any mootness inquiry, we must first 'defin[e] the wrong that the defendant is alleged to have inflicted.'"); *Clarke* v. *United States*, 915 F.2d 699, 703 (D.C. Cir. 1990) (en banc). Only by answering that first-order question can courts determine whether mootness is even plausibly on the table. If a defendant has in fact forsworn the allegedly wrongful conduct, then the courts must evaluate how much weight to give those assurances. (Often: none.) But if the defendant has *not* forsworn that conduct, mootness fails at the starting gate. For no matter whether a defendant is public or private, "[a]n incomplete response to the plaintiff's demands does not moot the action." 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.7, at 339 (3d ed. 2008) (*Federal Practice & Procedure*).

These principles apply straightforwardly here. The allegedly wrongful behavior at issue is defined by respondent's complaint. *Spomer* v. *Littleton*, 414 U.S. 514, 522 n.10 (1974); *Del Monte Fresh Produce Co.* v. *United States*, 570 F.3d 316, 323 (D.C. Cir. 2009). And the complaint here seeks relief against two alleged wrongs. It challenges the procedures used to place and keep respondent on the No Fly List as a violation of his procedural-due-process rights. Pet. App. 164a-67a (¶¶ 154-72). It also challenges, as a violation of substantive due process, the government's alleged use of the No Fly List to coerce respondent into becoming an informant. Pet. App. 125a, 167a-69a (¶¶ 2, 178, 181).

Whatever their merits, those claims have not been mooted. Take the Courtright declaration, the govern-

ment's chief basis for claiming mootness. The declaration advises that in 2016 respondent was removed from the No Fly List. Pet. App. 118a. Yet the government nowhere forswears subjecting respondent in the future to the same allegedly wrongful behavior that his complaint challenges. The declaration nowhere promises that he will not be placed back on the No Fly List using the same procedures that he asserts violate procedural due process. Nor, on his substantive-due-process claim, does it promise that he will not be placed back on the list to coerce him to act as an informant. That should be the end of the matter. Whether respondent's claims are winners or losers, "mootness must be determined solely by reference to the allegations of the complaining party." *Doe* v. *Harris*, 696 F.2d 109, 113 n.7 (D.C. Cir. 1982) (citation omitted). And the government has nowhere suggested—much less shouldered its "heavy," "stringent," and "formidable" burden of proving—that anything stops it from subjecting respondent to the same alleged wrongs against which his complaint seeks relief. *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 190 (2000).

The government emphasizes (over a dozen times) that, according to the Courtright declaration, respondent "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. That does not alter the above analysis. For example, the alleged wrong that forms the basis of respondent's procedural-due-process claim has nothing to do with the nature of the "information" used to place him on the No Fly List originally. Rather, the alleged wrong is a procedural one: the "operative complaint alleges that the government employed defective procedures in adding respondent to the No Fly List" and "provided inadequate procedures for seeking removal from that list." Pet. Br. 15. That makes

the government's promise (whatever its value) that any future listing "would . . . be based at least in part on new information" beside the point. Pet. Br. 17 (emphasis omitted). Respondent's claim is not about "information," new or old; it is "about the procedures." Pet. Br. 16; *cf. Clarke*, 915 F.2d at 703 ("[F]acts completely irrelevant to any intelligible formulation of plaintiffs' claim . . . are equally irrelevant to the mootness issue."). The government has nowhere suggested that those allegedly wrongful procedures cannot or will not be used against respondent again. So the case is not moot.

Already, LLC v. *Nike, Inc.*—the government's principal authority—drives home the point. 568 U.S. 85 (2013). There, Nike successfully mooted competitor Already's challenge to one of its trademarks by issuing Already a "Covenant Not to Sue." *Id.* at 88-89. Notably, however, it was the "breadth" of the covenant that sustained Nike's burden under the voluntary-cessation doctrine. *Id.* at 93. The covenant was "unconditional." *Id.* It "prohibit[ed] Nike from filing suit" against Already based on the challenged mark. *Id.* It "prohibit[ed] Nike from making any claim *or* any demand." *Id.* It "reache[d] beyond Already to protect Already's distributors and customers." *Id.* And it "cover[ed] not just current or previous designs, but any colorable imitations" that Already might ever make in the future. *Id.* Given "[t]he breadth of th[at] covenant," the Court concluded, Nike's binding promise not to enforce its mark "encompasse[d] all of [the] allegedly unlawful conduct" Already's complaint sought to remedy. *Id.* at 93-94.

The Courtright declaration is materially different. At most, it says that, if respondent is put on the No Fly List again, that placement will be based "at least in part" on "*new* information." Pet. Br. 17. Yet under no conception of the voluntary-cessation doctrine does that assurance

"encompass[] all of [the] allegedly unlawful conduct" respondent's complaint alleges and seeks to remedy. *Already*, 568 U.S. at 94; Br. Amicus Curiae of United States, *Already, LLC* v. *Nike, Inc.*, No. 11-982, 2012 WL 3613368, at *22 (U.S. filed Aug. 23, 2012) ("It is . . . appropriate to require respondent to demonstrate that the covenant satisfies the demanding standard articulated in this Court's 'voluntary cessation' precedents."). Had Nike's covenant merely promised not to resume targeting Already "based on the currently available information," its mootness motion would have failed—spectacularly—at every level of the federal judiciary. The same result is warranted here. *See Federal Practice & Procedure* § 3533.7, at 350-51 ("It hardly need be added that mootness does not occur when there has been no change in the challenged activity, or when any change does not fully address the claimed illegality." (footnote omitted)).

2. The government nowhere rehabilitates the mismatch between its declaration and respondent's claims for relief.

Nowhere does the government reckon with the mismatch between the allegedly wrongful conduct respondent challenges and the conduct it claims to have discontinued. Nor do any of the government's arguments cast doubt on the analysis above.

a. The government contends (seemingly for the first time in its merits brief) that the Courtright declaration's reference to "currently available information" covers not just "information" but, more broadly, "any allegedly improper reasons that respondent thinks the government might have had for initially placing him on the No Fly List." Pet. Br. 17. With the declaration so construed, the government suggests that it has carried its burden of proving mootness.

That argument lacks merit. As an initial matter, the government's newest interpretation of its declaration addresses, at most, only one of respondent's two claims—his claim under substantive due process, not procedural due process. *See* pp. 5-7, *supra*. Even were the government's view of its declaration correct, therefore, it would not call into question the federal courts' jurisdiction over the case as a whole. *See Zukerman*, 961 F.3d at 443. At all events, the government's current reading of the declaration lacks weight as to the substantive-due-process claim as well. On that claim, the conduct respondent challenges is (among other things) the government's allegedly using the No Fly List to coerce him to act as an informant. Nothing in the declaration's reference to "currently available information" prevents the government from deploying those same alleged measures against respondent again.

b. The government asserts that respondent's claims are moot because he can only "speculat[e]" that he will once again face the government's allegedly wrongful conduct. Pet. Br. 16. But that blurs mootness with standing—a point underscored by the government's reliance (with a heavy-duty *cf.*) on standing precedent. Pet. Br. 33 (citing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410-12 (2013), and *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-06 (1983)). Not for the first time, that sleight of hand betrays a "basic flaw in the Government's argument." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022). For a "plain lesson" of this Court's justiciability decisions is that "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth, Inc.*, 528 U.S. at 190; *id.* at 190-91 (noting that describing mootness as "'standing set in a time frame'" should not obscure important differences between the two doctrines).

The government's reliance on *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278 (2001), and *Alvarez* v. *Smith*, 558 U.S. 87 (2009), is similarly misplaced. Pet. Br. 16, 31-33. Neither decision involved the voluntary-cessation doctrine. In *City News & Novelty*, it was the acts of the plaintiff, not the defendant, that "sap[ped] the controversy of vitality." 531 U.S. at 284 n.1. Voluntary-cessation principles thus had no application. *Id.* As for *Alvarez*, the government acknowledges that the Court "did not address the voluntary-cessation doctrine in particular." Pet. Br. 32. And for obvious reasons: far from trying to moot the case, the City of Chicago argued full-throatedly that it remained justiciable. Oral Arg. Tr., *Alvarez* v. *Smith*, No. 08-351, at 5-11 (U.S. Oct. 14, 2009); *cf. City News & Novelty, Inc.*, 531 U.S. at 284 (noting that concerns with "an arguable manipulation of our jurisdiction" are less acute when the party responsible for mooting the case "opposes a declaration of mootness").

At base, the government's framing reduces to a standard-issue mootness tactic: while giving a nod to its "burden of showing that the challenged conduct cannot reasonably be expected to recur" (Pet. Br. 16), it *sotto voce* passes off the burden to respondent. *See, e.g.*, Pet. Br. 16 ("[S]peculation is all that respondent offers here."). That maneuver was dispatched readily last year, in *West Virginia* v. *EPA*, and the same result should obtain here. "[T]he Government, not [respondent], bears the burden to establish that a once-live case has become moot." *West Virginia*, 142 S. Ct. at 2607. "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness . . . is [the government's] voluntary conduct.'" *Id.* And viewed through that lens, this case is not a close call. The government admits that respondent may be placed back on the No Fly List. Pet. Br. 33-34. It acknowledges that its listing decisions are based on "predictive

judgments" and may "at any time" result in someone's being re-added. Gov't C.A. Br. 36. And it pointedly has not forsworn subjecting respondent once again to the same allegedly wrongful conduct his complaint challenges. On this record, the government cannot be said to have carried its burden. Unmentioned by the government, in fact, is that the D.C. Circuit rejected a similar maneuver fully forty years ago. *Doe*, 696 F.2d at 112-13; *see also Federal Practice & Procedure* § 3533.7, at 345-48 ("Change only for the plaintiff . . . does not moot the claim, at least if there is a prospect that the plaintiff may again encounter the generally unchanged practice.").

This Court has been down this road as well, rejecting a similar implication of mootness three Terms ago. In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, the Court entertained a challenge to a state's most restrictive covid-related attendance-zone rules, even though the plaintiffs' properties had been "reclassified" from the state's most restrictive zones to a less restrictive one mid-suit. 141 S. Ct. 63, 68 (2020) (per curiam). Despite that reclassification, the Court held, "[i]t is clear that this matter is not moot." *Id.* (citing, *inter alia*, *Friends of the Earth, Inc.*, 528 U.S. at 189). The overall regime remained in force. The state governor "regularly change[d] the classification of particular areas without prior notice." *Id.* And nothing prevented him from relisting the plaintiffs back to the most restrictive zones at any time. *Id.* Against that backdrop, not one Member of the Court "suggest[ed] this case is moot or otherwise outside our power to decide." *Id.* at 72 (Gorsuch, J., concurring). Nor is there any reason to think the analysis would have been different had New York's governor thought to say that, going forward, his zone listings "would have to be based at least in part on new information." Pet. Br. 17 (emphasis omitted). Jurisdictionally, respondent's case is no different.

c. The government's appeal to the "presumption of regularity" is likewise misplaced. Pet. Br. 17-19. To start, even unambiguous representations by government defendants do not earn the thumb on the scale the government suggests. Without dissent, for example, this Court has held that government defendants' "good-faith representation that they had no intention of" resuming a challenged program did not moot the federal courts' power to make "a final and binding determination of the legality of the old practice." *Quern* v. *Mandley*, 436 U.S. 725, 733-34 n.7 (1978) (citing *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)); *see generally* pp. 15-18, *infra* (discussing lower courts' varying approaches to the mooting effect of formal legislative or policy changes). That is doubly true where, as here, the government has resolutely *not* said it will refrain from subjecting the plaintiff to the allegedly wrongful behavior his complaint seeks to remedy. As one treatise has synthesized, "[t]he tendency to trust public officials is not complete," it is not "invoked automatically," and it in no way permits a government defendant to "moot the action" by way of "[a]n incomplete response to the plaintiff's demands." *Federal Practice & Procedure*, § 3533.7, at 339.

d. The government hints (but does not say outright) that the Court should ascribe significance to the fact that respondent earlier "agreed that his request for injunctive relief with respect to his No Fly List claims is moot." Pet. Br. 29. That appears to overstate the scope of the parties' stipulation: respondent agreed to abandon, not *all* requests for injunctive relief with respect to his No Fly List claims, but only a specific "request for an injunction requiring the Government to remove him from the No Fly List." D. Ct. Doc. 102, at 2. Thus, respondent's operative complaint continues to seek not just declaratory relief, but injunctive relief relating to, for example, the

procedures that he asserts violate procedural due process. Pet. App. 170a-71a. More broadly, a plaintiff's choice to disclaim one aspect of relief does not bear on the voluntary-cessation analysis for the remaining remedies. If a plaintiff agrees to forgo a specific form of relief, then (almost by definition) there is no longer a live controversy as to that relief. *Cf. Acheson Hotels, LLC* v. *Laufer*, 601 U.S. __, __ (2023) (slip op. at 3). As to the other sought-after relief, however, the defendant must bear its usual burden if it seeks to moot the case by voluntary cessation.

e. The government also points out that it has been more than seven years since it removed respondent from the No Fly List. Pet. Br. 15-16. In so noting, the government (for reasons unclear) appears at times careful to avoid saying that respondent has never been put back on the list in reality—only that he "does not allege" as much. Pet. Br. 5-6, 16. *But see* p. 10, *supra* (noting that the burden is the government's, not respondent's). Yet whatever that phrasing may signify, the government's choice to shop its mootness theories through the courts for seven years cannot transform a live case into a moot one when (at risk of belaboring the point) nothing stops it from resuming its allegedly wrongful conduct at any time. Nor has this Court ever suggested that a defendant can run out the clock on Article III by pressing meritless mootness arguments for so long that they become winning ones. *Cf. Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (rejecting government's bid for mootness even though challenged program had lain dormant for more than five years).

f. Lastly, the government warns that permitting cases like respondent's to proceed would allow "all United States individuals who were once but are no longer on the No Fly List to secure advisory opinions regarding the lawfulness of their former placement . . . ." Pet. Br. 35.

That is not quite right. Any such individuals would need to have had Article III standing when they filed their action; likely, that means they (like respondent) would need to have been actively on the No Fly List "at the time the complaint was filed." *Friends of the Earth, Inc.*, 528 U.S. at 184. And if, as here, the government were then to plead voluntary cessation without, at a minimum, actually forswearing the wrongful conduct alleged in the complaint, then the case would not give rise to an advisory opinion but (if successful) a judgment securing effectual relief in a live controversy. Contrary to the government's suggestion, that prospect does not promise "little meaningful benefit." Pet. Br. 36. Quite the opposite: it is the cornerstone of our judicial system. *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013).

B. The government's arguments for reversal, if accepted, would have destabilizing results far beyond the national-security context.

Affirming on the ground detailed above has the added virtue of reserving several difficult questions raised by the government's arguments for reversal. At bottom, the government submits that it (and any other public defendant) can moot civil-rights actions by picking off plaintiffs for one-off, unexplained special treatment—all while persisting in violating the rights of everyone else. As discussed above, that theory does not need to be addressed in this case; given the studious non-assurances in its Courtright declaration, the government has not even arguably picked off respondent himself. The unacknowledged, disruptive implications of the government's theory further counsel in favor of resolving this case on that narrower ground.

1. The government's account of the voluntary-cessation doctrine conflicts with precedent nationwide.

Doctrinally, the government's brief diverges from precedent nationwide.

a. *Good faith.* The government posits that a presumption of "regularity" and "good faith" always acts as a (perhaps dispositive) thumb on the scale whenever government defendants forswear resuming allegedly wrongful conduct. Pet. Br. 18. As discussed (at 12), any such presumption is unavailable where, as here, the government hasn't actually forsworn the allegedly wrongful conduct. The government's categorical rule also overlooks the decisions of this Court and an entrenched body of precedent in the courts of appeals.

i. This Court has concluded that statutory amendments or formal repeals or expirations of government policies may moot forward-looking relief. *E.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). Assurances and representations, by contrast, typically do not. *See*, *e.g.*, *Quern*, 436 U.S. at 733-34 n.7; *cf. West Virginia*, 142 S. Ct. at 2607. Likewise in the lower courts. While the precise standard varies by circuit, the big-picture approach is this: a legislative amendment (or a policy change of sufficient formality) may support the conclusion that the challenged conduct is not reasonably likely to recur, but, contrary to the government's view here, that solicitude does not extend to every conceivable act of voluntary cessation by a government defendant. For example—

The **D.C. Circuit** holds that "structural obstacles to reimposing a challenged law—such as a full repeal and the need to undertake new lawmaking—generally moot a case." *Alaska* v. *U.S. Dep't of Agric.*, 17 F.4th 1224, 1229

n.5 (2021). But "actions that can be reversed at the stroke of a pen or otherwise face minimal hurdles to re-enforcement" do not. *Id.* So, for instance, the court has held that an agency could not moot a plaintiff's challenge to the revocation of her public-housing voucher merely by restoring the voucher and making "a meager 'promise not to' revoke" it again. *Hardaway* v. *D.C. Hous. Auth.*, 843 F.3d 973, 980 (D.C. Cir. 2016). "[C]ourts never permit parties to deprive them of jurisdiction through a mere 'wave of [the] hand,'" the court observed. *Id.*

The **Second Circuit** has reasoned that "deference to [a] legislative body's decision to amend [a challenged law] is the rule, not the exception," in evaluating mootness. *Lamar Advert. of Penn, LLC* v. *Town of Orchard Park*, 356 F.3d 365, 377 (2004) (Sotomayor, J.). The court has emphasized, though, that "some deference does not equal unquestioned acceptance," and it has denied mootness when "[t]here are simply too many questions . . . for [the court] to conclude that it is 'absolutely clear' that the parties will not resume the challenged conduct." *Mhany Mgmt., Inc.* v. *Cnty. of Nassau*, 819 F.3d 581, 604-05 (2d Cir. 2016).

The **Third Circuit** has remarked that "[g]overnment officials are presumed to act in good faith" and concluded, for example, that a formal regulatory change mooted a request for prospective relief. *Marcavage* v. *Nat'l Park Serv.*, 666 F.3d 856, 861 (2012) (citation omitted). For less structural acts of voluntary cessation, however, the court holds government defendants to the same "heavy burden" as private litigants—doing so in one case at the urging of the federal government. *United States* v. *Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004).

The **Fifth Circuit** "assume[s] that formally announced changes to official governmental policy are not

mere litigation posturing" but holds that an act of voluntary cessation will not moot the case if there is not in fact "a formal policy change." *Pool* v. *City of Houston*, 978 F.3d 307, 314 (2020) (citation omitted).

The **Sixth Circuit** employs a sliding scale. If a government "enact[s] new legislation or repeal[s] the challenged legislation," that change "will presumptively moot the case unless there are clear contraindications that the change is not genuine." *Speech First, Inc.* v. *Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). "[W]here a change is merely regulatory," by contrast, "the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions." *Id.* And—most relevant here—"[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.*

The **Seventh Circuit** "presume[s] that an agency acts in good faith when it alters its course of action." *Driftless Area Land Conservancy* v. *Rural Utilities Serv.*, 74 F.4th 489, 493 (2023) (Easterbrook, J.). Even so, "[a]n agency's decision to change course does not moot a lawsuit when the change is 'not implemented by statute or regulation and could be changed again.'" *Id.*

The **Ninth Circuit** (as shown in the decision below) "presume[s] that [a government defendant] acts in good faith" but holds that "the government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent.'" Pet. App. 37a (quoting *McCormack* v. *Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)).

The **Eleventh Circuit** has "give[n] government actors 'more leeway than private parties in the presumption that they are unlikely to resume illegal activities.'" *Doe* v. *Wooten*, 747 F.3d 1317, 1322 (2014). But the court has "emphasize[d] that the government actor is entitled to this presumption only *after* it has shown unambiguous termination of the complained of activity." *Id.*

Of course, none of this is to say the lower courts are uniform on this question. The standards above differ from one another in some respects. And other circuits have been at times unclear on their approaches. The **Eighth Circuit**, for instance, has described the burden placed on government defendants as "slightly less onerous" than that placed on private ones. *Prowse* v. *Payne*, 984 F.3d 700, 703 (2021). The **Tenth Circuit** has said that "solicitude" for a government defendant's voluntary cessation "is 'not . . . invoked' automatically." *Prison Legal News* v. *Fed. Bureau of Prisons*, 944 F.3d 868, 881 (2019). The **First Circuit** has aired a possible distinction between acts of legislative bodies and those "of private, municipal, and administrative defendants." *Town of Portsmouth* v. *Lewis*, 813 F.3d 54, 59 (2016). And (outside the No Fly List context) the **Fourth Circuit** has reserved whether government defendants should get special solicitude at all. *Long* v. *Pekoske*, 38 F.4th 417, 425 (2022).

ii. The government confronts none of the precedent above. Instead, it obscures the line many of those decisions have drawn: it relies mainly on cases involving the mooting effect of legislative or policy changes and then—in a sentence—slips in that "[t]here is no sound reason to treat No Fly List claims any differently . . . ." Pet. Br. 19. As detailed above, however, decades of voluntary-cessation precedent does in fact treat such ad hoc, discretionary acts differently than legislative or policy-wide ones. The government nowhere addresses that weight of

authority. Nor does most of the precedent it cites involve either mootness or even jurisdiction. *See* Pet. Br. 18. And its one case that is even arguably topical, *DeFunis* v. *Odegaard*, was self-consciously not about voluntary cessation, but about a mooting development that arose in the ordinary course. 416 U.S. 312, 318 (1974) (per curiam) ("[M]ootness in the present case depends not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation."). Across barely three pages of briefing, in short, the government's "good faith" analysis skates past decades of this Court's precedent and the varied approaches of the lower courts—all while urging a categorical rule that lacks any support of its own.

b. *Explanations*. Another of the government's proposed rules is similarly in tension with precedent. In faulting the decision below, the government asserts that government defendants "need not provide an explanation for [their] past conduct . . . in order to establish mootness." Pet. Br. 12. Yet here also, a slate of decisions recognize that the unexplained nature of a plaintiff-specific *volte-face* may indeed be a relevant data point in weighing whether a defendant has proven mootness. As articulated by the Seventh Circuit, for example, "[a] decision supported by less evidence or less thought might more reasonably be expected to recur." *EEOC* v. *Flambeau, Inc.*, 846 F.3d 941, 949-50 (2017). The Eleventh Circuit has likewise reasoned that "whether [an agency's] decision was 'well-reasoned'" can inform the courts' judgment about whether the change is "likely to endure." *Harrell* v. *Fla. Bar*, 608 F.3d 1241, 1267 (2010) (rejecting mootness argument where agency "acted in secrecy, meeting behind closed doors, and, notably, failing to disclose any basis for its decision"). This Court, too—in one of its leading decisions on the subject—rejected a bid for mootness in part because one of the defendant's proffered explana-

tions for its voluntary cessation was unsound. *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968).

As with its treatment of "good faith," so too here: the government's analysis begins and ends with the unexplored assumption that it "need not provide an explanation for its past conduct." Pet. Br. 12. Whether or not that assumption holds water in some cases—for example, when the legislature outright repeals a challenged statute—the decisions above show that it does not hold water in all. The government nowhere acknowledges those decisions (or others, to similar effect). It nowhere tries to reconcile its rule with the analysis used in those decisions. It nowhere explains whether its view, if accepted, would call into question, or even abrogate, standards that have long been in force in the lower courts—*e.g.*, the Eleventh Circuit's described above. As with other issues in its brief, the government devotes all of one drive-by sentence to a topic that could fill a cert petition in its own right.

c. *Repudiation*. Also questionable is the government's view that the decision below erred in "mak[ing] repudiation of the past conduct . . . a rigid requirement to establish mootness." Pet. Br. 24. As respondent points out (Resp. Br. 25), the court of appeals announced no such rigid requirement. Rather, the court observed that a government defendant's "unambiguous renunciation of its past actions" is simply a relevant data point in predicting whether those actions are reasonably likely to recur. Pet. App. 40a. For its part, the government appears to agree; it acknowledges that "a repudiation of the challenged conduct might have some evidentiary value to a court's evaluation of the likelihood that a defendant will 'return to his old ways.'" Pet. Br. 23. And this Court has recognized the logical converse of this proposition: that a government defendant's "vigorous[] defen[se]" of an old policy—its

choice to stand by it rather than repudiate it—is a relevant data point in the voluntary-cessation analysis. *West Virginia*, 142 S. Ct. at 2607 (citation omitted). The government's criticism of the court of appeals' reasoning on this front thus appears to be less a dispute about the legal standard and more a quarrel with how one factor in the lower court's analysis cashed out in this case. Pet. Br. 12.

2. The government's arguments implicate serious, unexplored questions about public defendants' ability to pick off plaintiffs.

Beyond the doctrinal conflicts, the government's submission invites serious practical concerns and implicates fundamental questions about the limits of government defendants' ability to strategically moot civil-rights cases.

a. In practice, the government's view of the voluntary-cessation doctrine would, if accepted, offer a roadmap for public defendants to moot constitutional cases. At base, the government's submission is this: it can moot civil-rights actions by picking off plaintiffs for "individualized" special treatment. Pet. Br. 31, 32. It need not explain that treatment. Pet. Br. 12. It can persist in violating the rights of everyone else—everyone, that is, who is not actively suing it in federal court. Pet. Br. 32. And the picked-off plaintiff can resist this maneuver (perhaps?) only by making "some strong showing of bad faith." Pet. Br. 18.

Not only would such a standard conflict with existing precedent, it would destabilize some of the most important cases on federal-court dockets. The government holds out its view of the standard as the "traditional" one—not a bespoke one for national-security agencies alone—meaning that, if accepted, it would apply not just to a subset of agencies represented by the Department of Justice but to every state and local government actor nationwide. *See* Pet. Br. 12. And the opportunities for

mischief would not be lost on many. Across the Nation, federal and state defendants could try to strategically moot constitutional cases—not by implementing across-the-board legislative or policy changes (*e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. 1525), but by surgically picking off the specific plaintiffs and leaving the challenged law in place for everyone else. For many governmental bodies, such a strategy might, in their minds, be the most public-spirited tactic available. In the early 2000s, for instance, the District of Columbia believed firmly that its handgun law was critical to protecting countless citizens from death and violent crimes. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). A litigant in D.C.'s shoes might well calculate that the potential harm from the federal courts' invalidating that law would vastly outweigh the harm of issuing an individualized, unexplained, binding promise not to enforce the law against Dick Heller. And to the next plaintiff. And the one after that. Why just those people? The District "need not provide an explanation." Pet. Br. 12. Why no one else? The District need not "identify a change to its policies and procedures." Pet. Br. 12. Full stop.

Nor is *Heller* an outlier example. A cautious Colorado might have decided the harm caused by giving 303 Creative LLC and its owner a binding, clear, and perpetual will-not-enforce promise would be easily outweighed by the benefit of keeping the state's antidiscrimination law away from this Court. *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023). California officials might have reckoned that giving Americans for Prosperity Foundation and its co-plaintiff an ad hoc, binding exemption from the state's donor-disclosure law would be a small price to pay for keeping that law in effect for all other charitable organizations. *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373 (2021). The EPA might have determined that

the environmental effects of a court decision narrowing the Clean Water Act would be far more damaging than would handing Michael and Chantell Sackett an individualized free pass in perpetuity. *Sackett* v. *EPA*, 598 U.S. 651 (2023). In fact, that seems to be precisely what the agency tried to do—in a gambit the Ninth Circuit rejected based largely on its original decision in this case. *Sackett* v. *EPA*, 8 F.4th 1075, 1084-86 (2021) (applying *Fikre* v. *FBI*, 904 F.3d 1033 (9th Cir. 2018)).

On this front, too, the government's brief offers no solutions. It is no answer to say, for example, that the government's view of voluntary cessation would cause problems only in the context of requests for prospective relief, not damages. In any constitutional challenge brought against federal or state-level actors (so, every example above), damages are either unavailable or—under current immunity doctrines—often very nearly so. *E.g.*, Pet. Br. 16. Nor is it any answer to say that some civil-rights cases are brought by associational plaintiffs or as putative class actions, where the plaintiffs may be harder to strategically pick off. *See, e.g.*, *Sparger-Withers* v. *Taylor*, 628 F. Supp. 3d 821, 828-29 (S.D. Ind. 2022) (relying on the class-action-specific "inherently transitory" doctrine). Many cases are not susceptible to associational-standing suits or class-action procedures. As this Court's merits docket illustrates, some of the most important cases in the Nation (and ones government defendants may be most eager to jettison) are brought by individuals or entities on behalf of themselves alone.

b. The government's arguments also implicate a deeper concern: their logical endpoint would appear to let government defendants pick off plaintiffs even when the open, avowed, and sole reason is to moot the plaintiff's case and keep violating the rights of everyone else. In response to the *Heller* example above, for instance (and the

others), the government's analytic move here could be to say that such a brazen bid to duck jurisdiction might satisfy whatever "strong showing of bad faith" would keep the case alive. Pet. Br. 18. But setting aside the difficulty of proving such motives, it is not obvious whether, under the government's theory, a provable act of strategic, plaintiff-specific mooting would in fact be grounds for denying a government defendant's mootness motion.

That logical stopping point of the government's arguments would seem to be an important one to have clarity on. Yet to the extent they touch on the issue at all (and it's not much), both parties appear to assume without further inquiry that such plaintiff-specific picking-off—if broad, binding, and definitive enough—could indeed moot this case. Respondent suggests that a "binding commitment to avoid reinjuring the plaintiff" might have a mooting effect—even were the government to carry on with the same allegedly unconstitutional practices for everyone else. Resp. Br. 16. The government seems to approach the issue from much the same premise, asserting that the case is moot because "[t]he challenged conduct . . . cannot reasonably be expected to recur *with respect to respondent*" specifically. Pet. Br. 32. As framed by the parties, the issue is not so much whether governments *can* pick off a specific plaintiff to skirt jurisdiction; it's how much they must *promise* the plaintiff in order to get away with it.

There are good reasons to doubt that premise—and certainly it should not be accepted on faith. This Court's decision in *Already, LLC* v. *Nike* perhaps can be read as having signed off on *private* companies' mooting inconvenient lawsuits by "issuing covenants in the rare case where the little guy fights back" and carrying on, business-as-usual, as to everyone else. 568 U.S. at 98; Br. Amicus Curiae of United States, *Already*, 2012 WL 3613368, at *14 (arguing that private defendants can moot cases by

singling out adversaries for unique treatment, "even if [their] abandonment of the challenged conduct was prompted by a desire to moot the case and avoid adjudication"). Yet it is not obvious the same principle would extend to *government* defendants. Nike owes no constitutional duty to deal equally and impartially with its competitors. But governmental actors are different. They operate under an "obligation to govern impartially" that is "as compelling as [their] obligation to govern at all." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). For a government defendant to strategically exempt people from an otherwise-applicable law—and to do so to extinguish the courts' power to decide the law's validity—would thus raise unique concerns that are absent in purely private litigation. (Equal protection is an obvious one.) Whatever might be said of defendants in the private sector, government defendants have no legitimate interest in singling out plaintiffs to thwart federal-court jurisdiction.

The government nowhere addresses this issue or offers any limit to its call for unexplained, individualized mooting. Yet for cases involving government defendants, much of the existing voluntary-cessation apparatus (and much of the precedent the government's brief ignores) serves to address precisely this phenomenon. In civil-rights cases, for instance, the doctrine often tests not just whether the defendant can resume its conduct as to the specific plaintiff, but whether it is picking off that plaintiff for an illegitimate purpose: to extinguish jurisdiction and free itself to continue violating the rights of others. In articulating the doctrine, in fact, one court of appeals has expressly contrasted "broad shift[s] in policy that affect[] all or most" regulated persons with "an individually targeted effort to neutralize [the specific plaintiff's] lawsuit." *Ciarpaglini* v. *Norwood*, 817 F.3d 541, 545 (7th Cir. 2016). The presumption of good faith likewise tracks this

understanding. System-wide acts of voluntary cessation often enjoy such a presumption in part because they apply to everyone equally. Ad hoc acts of executive forbearance, in contrast, pose a special risk of the government's acting for an illegitimate end: picking off Person *A* to duck judicial review and preserve its power to target Persons *B* through *Z* unchecked.

We could go on, but the bottom line is this: the government's framing and its arguments for reversal raise an unusual number of under-briefed issues and rest on an unusual number of unexplored assumptions. That treatment counsels strongly against resolving this case on broader grounds than necessary, and as detailed above (at 4-14) a narrower one is readily available: whatever hard questions may linger at the margins, a government defendant cannot be said to have ceased its allegedly wrongful conduct when it has not forsworn resuming that allegedly wrongful conduct.

C. If the judgment below is not affirmed, any decision in the government's favor should be confined to the national-security context.

1. Nothing prevents the Court from affirming the court of appeals' judgment on the basis detailed above. That narrow ground is fairly included within the government's question presented. Pet. I. It has been argued by respondent. Resp. Br. i, 35-37; *cf.* Oral Arg. Tr., *Moore* v. *United States*, No. 22-800, at 117-18 (U.S. Dec. 5, 2023) (contending, more broadly, that the Court "can affirm on an alternative ground, even one that the party didn't raise"). And though the Court of course "reviews judgments, not statements in opinions," *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (citation omitted), the ground for affirmance detailed above is not inconsistent with the reasoning of the court's opinion below. If anything, the court

of appeals indulged the government more than it needed to; it could have summarily rejected the government's arguments based simply on the mismatch between the wrongs alleged in respondent's complaint and the conduct the government says it has ceased.

2. Throughout its brief, the government cites the "national-security context" to support reversing the judgment below. Pet. Br. 12-13, 18, 34-36. The government nowhere denies, however, that its rule of decision would extend to all government defendants nationwide—federal, state, and local alike. Pet. Br. 34 (urging the Court to "adher[e] to traditional mootness principles" (capitalizations altered)). Its references to national security thus have no evident bearing on the merits of its position. If the government has unique national-security concerns, it can urge a unique national-security mootness rule. Many such rules exist already. Sensitive information can be submitted under seal or *in camera*, as respondent's brief ably demonstrates. Resp. Br. 46-47. The state-secrets doctrine has even been held to support outright dismissal of certain claims. Similarly for Article III mootness, the tail shouldn't wag the dog. If the government contends (either, belatedly, in this case or in a future one) that national-security concerns should inform the mootness analysis in No Fly List cases, any such mootness analysis should be unambiguously cabined to cases that present those national-security concerns. *Long*, 38 F.4th at 425-26 (doing just that).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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