No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATIONS, ET AL.,
Petitioners,

v.

YONAS FIKRE,
Respondent.

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

BRIEF OF PATRICK G. EDDINGTON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Patrick G. Eddington is a Senior Fellow at the Cato Institute specializing in issues at the intersection of constitutional rights and security. He has been an adjunct assistant professor at Georgetown University's Center for Security Studies in the Edmund Walsh School of Foreign Service and the McCourt School of Public Policy. A former CIA analyst, he has written extensively on federal government surveillance overreach and misconduct in publications across the political spectrum. His forthcoming book, *The Triumph of Fear: Domestic Surveillance and Political Repression from McKinley through Eisenhower* (Georgetown University Press, expected March 2025) is the first comprehensive examination of federal surveillance misconduct and overreach in over 40 years. Eddington received a BA in international affairs from Missouri State University in 1985 and an MA in national security studies from Georgetown University in 1992. Between 2004 and 2014, he served as communications director, and later as senior policy advisor, to then-Rep. Rush Holt (D-NJ). Eddington authored the first federal detainee video recording provision enacted into law (P.L. 111-84, Sec. 1080).

Eddington has an important and substantial interest in supporting a meaningful role for judicial oversight when Executive branch officials attempt to evade civil or criminal liability for official acts taken under color of law against U.S. Persons, either

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[1] Rule 37.6 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* and his counsel funded its preparation or submission.

domestically or overseas. He has particular concerns about the ability of plaintiffs to successfully challenge standing, mootness, executive privilege, state secrets, or other claims advanced by executive branch authorities in national security or law enforcement cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the executive branch asks the Court to turn the voluntary cessation doctrine on its head, but only when doing so benefits the government. Such a special rule for government defendants is not just inconsistent with precedent, history, and experience—it is also at odds with basic principles of the separation of powers. The judicial branch often serves as the only viable check on the executive and legislative branches. And when it does, it is vital that judicial review be realistic, searching, and engaged, not deferential.

The separation of powers is a fundamental aspect of our Constitution. The Framers understood that it is "essential to the preservation of liberty" that the different powers of government be exercised by separate, independent branches. THE FEDERALIST NO. 51, at 289 (James Madison) (Clinton Rossiter ed., 1999). Yet inevitably, there is a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" *INS v. Chadha*, 462 U.S. 919, 951 (1983). To protect liberty against this threat of encroachment, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, *supra*, at 290:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to

> those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.

Id. at 289–90.

Judicial review is a critical element of this separation of powers scheme. The separation of powers "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." THE FEDERALIST NO. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999). If the courts abdicate this role and fail to engage in a "thorough, probing, in-depth review" of executive or legislative acts, the judicial check becomes a mere pretense, undermining our constitutional system of checks and balances. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The special deference that some courts afford government litigants when they seek to have a case dismissed as moot is one such example.

The present case demonstrates the seriousness of this problem. Yonas Fikre, an American citizen, was placed on the No-Fly List in 2010 while he was out of the country. Fikre alleges that this was an attempt to coerce him into becoming a government informant. *See* Petition for a Writ of Certiorari at 3–4, *FBI v. Fikre*, 2023 U.S. LEXIS 2960 (No. 22-1178). Fikre attempted to appeal his placement on the list using DHS procedures, but these appeals were denied. Fikre was told only that he had been "identified as an individual who may be a threat to civil aviation or national security." *See id.* at 4. Fikre's placement prevented him from returning to the United States until 2015,

damaged his reputation, and destroyed his marriage. *See Fikre v. FBI* (*Fikre I*), 904 F.3d 1033, 1036 (9th Cir. 2018).

When Fikre sued in federal court to enforce his rights, the government removed him from the list—initially without explanation—and then argued that the case was moot. *See Fikre v. FBI* (*Fikre II*), 35 F.4th 762, 767 (9th Cir. 2022). The FBI has never conceded that its original decision to place Fikre on the No-Fly List was wrong, nor has it explained what changed such that Fikre no longer deserves placement on the list. *See* Brief in Opposition at 11–13, *FBI v. Fikre*, 2023 U.S. LEXIS 2960 (No. 22-1178).

Generally, a defendant cannot make a case moot by voluntarily ceasing the challenged conduct. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The burden is on the defendant to show that the case is moot. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). Nonetheless, the district court ruled that this case was moot because "the record did not indicate a lack of good faith on the government's part." *Fikre I*, 904 F.3d at 1037.

This special rule for government defendants, supposedly based on the "presumption of regularity" afforded government officials, flips the voluntary cessation doctrine on its head. In the normal case, the burden is on the defendant to show that it ceased its challenged conduct for a legitimate reason rather than to strategically moot the case. Yet when the government is the defendant, some lower courts have reversed this burden of persuasion. Under this flawed approach, the government is uniquely presumed to have acted legitimately, and the burden is instead on

the plaintiff to show that the cessation was strategic. Neither history nor experience support giving government defendants such a benefit of the doubt.

When courts refuse to look into the actions of government defendants with the same scrutiny that they would apply to private defendants, they abrogate their constitutional role to check executive or legislative overreach. The court of appeals correctly reversed, but this special rule for government defendants nonetheless continues to be applied in several circuits.

This Court has an opportunity to put an end to this double standard once and for all. The decision of the court of appeals should be affirmed, and the Court should make clear that the government is not entitled to a special exception under the mootness analysis.

ARGUMENT

Under Article III of the Constitution, the judicial power extends only to "Cases" and "Controversies." *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). Such a case or controversy must "persist throughout all stages of litigation." *West Virginia*, 142 S. Ct. at 2606 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)). "[W]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the case is moot "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

However, "[i]t is well settled that the 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*, 455 U.S. 283, 289 (1982). That's because a defendant who has voluntarily ceased the challenged conduct remains "free to return to his old ways." *United States v. Concentrated Phosphate Exp. Assn., Inc.*, 393 U.S. 199, 203 (1968). The burden is on the defendant to show that the case is truly moot. *See West Virginia*, 142 S. Ct. at 2607.

That burden is "heavy." *Friends of the Earth*, 528 U.S. at 189. The defendant is held to a "stringent" standard, which presumes that the dispute remains live unless "subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203) (emphasis added). Only when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" is the case moot. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This Court has never carved out an exception for government defendants, and it should not do so now.

I. THIS COURT HAS NEVER ENDORSED A SPECIAL RULE FOR GOVERNMENT DEFENDANTS IN VOLUNTARY CESSATION CASES.

This Court has set a consistent standard in its voluntary cessation cases: A defendant's mere promise that it will not resume challenged conduct does not suffice to moot a case. That principle can be traced back to the foundational case for the voluntary cessation exception, *United States v. W. T. Grant Co.*,

345 U.S. 629 (1953).[2] In that case, the defendant not only voluntarily ceased the challenged conduct but also disclaimed any intention to repeat that conduct in the future. *See id.* at 633. The Court nonetheless held that "Such a profession does not suffice to make a case moot . . . ." *Id.*

Fifteen years later, the Court affirmed this proposition. In *Concentrated Phosphate*, the Court stated that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 393 U.S. at 203. But it was not "absolutely clear" in that case, because the Court had "only appellees' own statement that it would be uneconomical for them to engage in" the challenged conduct in the future. *Id.* The Court affirmed that "Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes." *Id. See also Erie v. Pap's A.M.* 529 U.S. 277, 287–89 (2000) (refusing to declare the case moot in the face of an affidavit that the party had closed the business involved in the suit).

This Court has repeatedly applied the traditional voluntary cessation standard to *government* defendants. Recently in *West Virgina v. EPA*, the Court rejected a mootness argument that "boil[ed] down to [the Government's] representation that EPA [had] no intention of enforcing" the plan at issue prior to new rulemaking. 142 S. Ct. at 2607. The Court made

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[2] *See* Jonathan M. Janssen, *Far from a "Moot" Issue: Addressing the Growing Problem of Lower Courts' Presumption of Governmental "Good Faith" in Voluntary Cessation Cases*, 106 IOWA L. REV. 1443, 1452 (2021).

clear again that it does "not dismiss a case as moot in such circumstances," citing the "heavy" burden defendants face in voluntary cessation cases. *See id.*

Trinity Lutheran Church of Columbia, Inc. v. Comer was similar. Missouri offered grants to help schools and nonprofit daycare centers build playgrounds, but refused to give such a grant to plaintiff because plaintiff was a religious organization. *See* 582 U.S. 449, 453–55 (2017). Although the Missouri governor began giving grants to religious organizations on the same terms as secular organizations *after* suit was filed, this Court held that the case was not moot under traditional voluntary-cessation principles. *See id.* at 457 n.1.

In *Parents Involved in Community Schools v. Seattle School District No. 1*, parents sued over their children being denied admission to particular schools because of their race under district integration plans in non-segregated districts. *See* 551 U.S. 701, 709–11 (2007). Even though the districts ceased using the challenged plans during the litigation, this Court found that the case was not moot because it was not "absolutely clear" that the districts would never reimpose the plans. *See id.* at 719 (quoting *Friends of the Earth*, 528 U.S. at 189).

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville involved Jacksonville offering preferential treatment to certain minority-owned businesses when awarding city contracts. *See* 508 U.S. 656, 658 (1993). During litigation, Jacksonville repealed the relevant ordinance and replaced it with another substantially similar ordinance. *See id.* at 660–61. This Court held that the case was not moot because "[t]here is no mere

risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so." *Id.* at 661–62.

City of Mesquite v. Aladdin's Castle involved a challenge to a licensing ordinance. *See* 455 U.S. 283, 286–87 (1982). During the course of the litigation, the city amended the ordinance to repeal the challenged language. *See id.* at 288. This Court held that the case was not moot because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision," and so the defendant was "free to return to his old ways." *Id.* at 289 n.10 (quoting *W. T. Grant Co.*, 345 U.S. at 632).

Indeed, this Court has never endorsed a special rule for government defendants in voluntary cessation cases. Where the Court has found a case against the government to be moot, it has done so based on something stronger than a mere promise not to resume the challenged conduct. Although the government has cited some of the following cases as establishing a special rule, not one actually does so. In those cases where the Court has made some positive reference to the statements of government officials when deeming a case moot, it did not find mootness based on government statements alone.

For example, although the Court found the case moot in *County of Los Angeles v. Davis*, it did not rely on the government's mere say-so. Instead, the Court independently examined the facts and held that the government had originally engaged in the challenged conduct only due to "unique" circumstances that were "no longer present." 440 U.S. 625, 632 (1979). Crucially, this holding was based on an *independent* review of the facts, not because the Court relied on the

government's mere promise. In dissent, Justice Powell argued that the county had "not disclaimed an intention to resume" the challenged conduct and that "a disclaimer—were it made" would not "satisfy the 'heavy burden' imposed upon a defendant seeking to have a suit dismissed as moot." *Id.* at 644–45 (Powell, J., dissenting). Nothing in the majority opinion contradicts this view of Justice Powell's.

In another case challenging a state law school's admission practices, the plaintiff had been provisionally admitted to the law school while the litigation proceeded. *DeFunis v. Odegaard*, 416 U.S. 312, 314–15 (1974). By the time the Court issued its decision, the plaintiff had been "irrevocably admitted to the final term of the final year of the Law School course." *Id.* at 317. The state then informed the Court that the law school had a "settled and unchallenged policy" of allowing those who had enrolled in a quarter to finish the quarter. *Id.* at 318. The Court therefore held that the case was moot because the plaintiff would "complete his law school studies at the end of the term for which he ha[d] now registered" no matter how the Court ruled. *Id.* at 319.

The Court made clear that it was the certainty of the plaintiff's graduation under this longstanding policy that mooted the case, not any voluntary cessation. The Court explicitly noted that the law school would likely have been unable to moot the case by merely changing its challenged admission standards and promising not to change them back. *See id.* at 318.

While the Court accepted the state's assurance that the plaintiff's registration for the quarter could not be revoked under the school's policies, it did so because

"the settled practice of the Court" was "to accept representations such as these as parameters for decision." *Id.* at 317. The petitioner quotes this language as supporting a presumption of regularity that supposedly requires deference to governmental statements in voluntary cessation cases. *See* Brief for the Petitioners at 18. But in context, the Court was not referring to any longstanding practice of accepting promises to refrain from conduct in the future. Rather, the Court was referring to a practice of accepting representations about a government entity's current and binding *policy*.

The cases that the Court in *DeFunis* cited as precedent for this "settled practice" confirm that the Court was not suggesting a practice of accepting mere promises as sufficient to moot the case. *Gerende v. Board of Supervisors of Elections*, for example, asked whether a state law required office seekers merely to swear they did not support the violent overthrow of the government, or whether the law required a broader affirmation of belief. *See* 341 U.S. 56 (1951). Maryland's highest state court had interpreted the law narrowly, and the Maryland Attorney General had "declared that he would advise the proper authorities" to apply the law according to that narrow construction. *See id.* at 56–57. On that understanding, the Court upheld the oath requirement.

The Court later reaffirmed that it was not bound to accept the government's promise that it won't resume challenged conduct. *See Whitehill v. Elkins*, 389 U.S. 54, 57–58 (1967). In *Whitehill*, the Court refused to rely on the Maryland's Attorney General's statement that the statute would be applied a certain way. *See id.* at 57–59. Instead, the Court interpreted the statute

and found it unconstitutional. *See id.* at 60–62. The Court clarified that it had chosen to accept the narrower construction in *Gerende* as a matter of constitutional avoidance. *See id.* at 58. The circumstances in *Gerende* would have been very different had the Maryland Attorney General first interpreted the requirement broadly and then changed course. But because the Maryland Attorney General had consistently held the narrow view of the law, *Gerende* was not a "voluntary cessation" case.

Ehlert v. United States, 402 U.S. 99 (1971), the third case *DeFunis* cited, is similarly inapposite. *Ehlert* concerned not a governmental promise regarding future conduct but rather the government's interpretation of a regulation. Specifically, the case concerned an interpretation that received *Seminole Rock/Auer* deference. *See id.* at 105. In line with those precedents, the Court deferred to the government's interpretation of the regulation at issue. But the Court explicitly stated that if, "contrary to that assurance," the government later interpreted the regulation differently, "a wholly different case would be presented." *Id.* at 107. The government's views had weight in the case only because of separate deference doctrines governing administrative law, *not* because of any special trust in the government's promise to refrain from conduct.

Finally, *Law Students Civil Rights Research Council, Inc. v. Wadmond* similarly involved the government's interpretation of a regulation. *See* 401 U.S. 154, 162 (1971). The Court deferred to the state agency's interpretation because it was made by "the very state authorities entrusted with the definitive interpretation of the language of the Rule." *Id.* at 162–

63. Again, *Wadmond* was not a case of voluntary cessation.

All other precedents that supposedly support deference to governmental promises in mootness cases likewise concerned more than a mere promise. *Already* involved a legally binding covenant, not a mere statement by the defendant. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013). *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983), involved the voluntary acts of a third-party nondefendant and not the defendant. *See id.* at 71–72.

City News & Novelty v. City of Waukesha involved the unusual circumstance of the *plaintiff* trying to moot the case, rather than the defendant. *See* 531 U.S. 278 (2001). Plaintiffs generally do not have an incentive to strategically moot their own cases. *City of Erie v. Pap's A.M.* was an exception, because mooting the case would have left the lower court ruling in the plaintiff's favor intact. *See id.* at 283–84.

SEC v. Medical Committee for Human Rights wasn't even a voluntary cessation case. Instead, the case was moot because the plaintiffs managed to get the relief they were seeking. The plaintiffs had sued because they wanted their proposal voted on by the company's shareholders, but the company omitted the proposal from its yearly proxy statements. *See* 404 U.S. 403, 404 (1972). During the course of the litigation, the company added the proposal to a proxy statement, and the proposal was voted down by the shareholders. *See id.* at 405–06. Thus, this Court ruled that the case was moot. *See id.* at 406.

In sum, this Court has consistently held that the defendant's voluntary cessation of challenged conduct does not necessarily moot the case, even when the

defendant promises not to resume the challenged conduct. And the Court has not treated government defendants any differently in that regard.

II. A SPECIAL RULE FOR GOVERNMENT LITIGANTS IS NOT SUPPORTED BY HISTORY, OR EXPERIENCE.

The voluntary cessation doctrine is rooted in a rational suspicion that a defendant may be trying to strategically avoid judicial review. Because voluntary cessation leaves a defendant "free to return to his old ways," courts rightly place the burden on a defendant to show that the case is truly moot. *See West Virginia*, 142 S. Ct. at 2607.

By contrast, special deference to governmental statements rests on the theory that courts should place a special trust in the government that they would not give other defendants. For example, some courts suppose that government defendants are "public servants, not self-interested private parties," and that their public-spiritedness will cause them to not act strategically. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). On this view, courts should assume that "government officials tell the truth about why they have taken specific actions; have properly discharged their official duties; have acted with proper motives; and are generally truthful, ethical, and professional." 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, 326 (2019). As one lower-court opinion summarized: "unlike in the case of a private party, we presume the government is acting in good faith." *Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010).

Courts embracing the special rule in cases of voluntary cessation have acknowledged that it flips the normal presumption in mootness inquiries on its head. The Eleventh Circuit has stated that "[g]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004). That circuit has held that for government defendants, "there is a rebuttable presumption that the objectionable behavior will *not* recur." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) (emphasis in original). In total, at least six circuits have imposed a lighter burden upon government defendants in voluntary cessation cases. *See* Davis & Reaves, *supra*, at 333.

The district court in this case initially held that the government's voluntary removal of Fikre from the No-Fly List sufficed to moot the case because there was "not any evidence in the record" that the removal was to strategically moot the case rather than a legitimate change of mind. *Fikre v. FBI (Fikre i)*, No. 3:13-cv-00899-BR, 2016 U.S. Dist. LEXIS 133307, at *24 (D. Or. Sept. 28, 2016). That reversed the burden of proof under the voluntary cessation doctrine, making the plaintiff show that the challenged conduct would resume rather than making the defendant show that it would not. When the Ninth Circuit initially reversed and remanded, the district court again found the case moot, this time based on the government's declaration that it would not re-add Fikre to the No-Fly List "based on currently available information." *Fikre v. Wray* (*Fikre ii*), No. No. 3:13-cv-00899-MO, 2020 U.S. Dist. LEXIS 145667, at *8 (D. Or. Aug. 12, 2020). Because a

defendant's mere promise that it will not resume challenged conduct does not ordinarily suffice to moot a case, the district court's decision can only be explained by a special solicitude to the government.

Not only is this contrary to this Court's precedents, it is unsupported by history and experience.

A. Special Deference to the Government's Statement Is Unsupported by History.

Although courts have long adopted a "presumption of regularity" for certain government *processes*, that history does not justify a newfound presumption of good faith for government actors in voluntary cessation cases.

The "presumption of regularity" has its roots in an English common law maxim, known by a Latin phrase that translates to "All things are presumed to have been done regularly and with due formality until the contrary is proven." Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729, 734 (2022). English courts frequently held that "the presumption, that every man has conformed to the law, shall stand till something shall appear to shake that presumption." *Id.* For instance, in the 1789 case *Rex v. Gordon*, prosecutors were allowed to show that the decedent was the parish constable merely through witness testimony that he was generally known as such. The presumption of regularity meant that the prosecutors did not have to prove that the decedent was duly elected to the office. *See id.*

Courts in the early United States cited such cases with approval. *See id.* This Court summarized the presumption in 1816: "It is a general principle to presume that public officers act correctly until the

contrary be shown." *Ross & Morrison v. Reed*, 14 U.S. (1 Wheat.) 482, 486 (1816). While this language may seem broad, in context the word "correctly" was limited to procedural steps. In practice, this principle was mainly invoked to cover minor evidentiary deficiencies or similar technicalities. *See* Gavoor & Platt, *supra*, at 735. As summed up by Justice Story, the law presumes "that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done." *Pres., Dirs. & Co. of Bank v. Dandridge*, 25 U.S. (12 Wheat.) 64, 70 (1827). Put simply, the presumption is that officials have acted in compliance with required procedures.

This presumption of regularity was not limited to the actions of executive officials. It was frequently used to presume the validity of court proceedings. *See* Gavoor & Platt, *supra*, at 735. It even applied to private parties generally:

> the law . . . presumes that every man, in his private and official character, does his duty, until the contrary is proved; will presume that all things are rightly done, unless the circumstances of the case overturn this presumption . . . .

Dandridge, 25 U.S. at 69–70. Purchasers of land, married couples accused of bigamy, and carriers changing freight rates, among others, enjoyed the presumption. *See Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 760–61 (2005).

But crucially, this original presumption of regularity did *not* include a presumption that officers acted in good faith. *See* Gavoor & Platt, *supra*, at 734–

36, 743. The presumption was about certain required formalities having been performed, not about the motives of the parties who performed them. *See Tecom*, 66 Fed. Cl. at 758–59. Even an exceptional case like *Crowell v. M'Fadon*, 12 U.S. 94 (1814), involved mere presumption of compliance with procedure rather than good faith.[3]

The only significant scholarship arguing that the presumption of regularity historically included a broader presumption of good faith appears to be a recent student note. *See The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2435–2436 (2018) [hereinafter *Executive Branch*]. But the article's historical evidence is unconvincing.

First, the article cites only one case from before the twentieth century. *See Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 457–58 (1890). And the article admits that this case involved "toy[ing] with aggressive scrutiny, invalidating state administrative schemes and subjecting decisionmaking processes to exacting review." *Executive Branch* at 2436. Furthermore, the article only provides citations to four other cases from before the seminal case *United States v. Chem. Found., Inc.*, 272 U.S. 1 (1926) [hereinafter

[3] In *Crowell*, a customs collector seized a vessel under a statute requiring him to seize the vessel if he believed that its crew intended to violate an embargo law. The court presumed that the officer had true belief of that intent. *See* 12 U.S. at 98. Ultimately, the Court presumed that the officer acted in accordance with statutory requirements, putting *Crowell* in line with other early cases applying the presumption of regularity. It just so happens that in *Crowell* the statutory requirements involved the officer's state of mind.

Chemical Foundation], *see id.* at 2431 n.4, 2436 n.37, 2436 n.45, 2445 n.118, 2447 n.138. And two of those cases do not support a presumption of good faith, relating merely to procedural requirements and the accuracy of factual determinations. *See id.* at 2445 n.118, 2447 n.138.[4]

More fundamentally, the article misinterprets the general historical practice. The article claims that the presumption of regularity included "a presumption that the government acted without illicit motive." *Id.* at 2444. But the article conflates the legal *grounds* to challenge an action with the presumptions as to the motives of those actions. To the extent that questionable government actions could not be legally challenged in early America, this was because illicit motive was usually not an independent ground for invalidating government action. In other words, actions could potentially be challenged for lacking statutory or constitutional authorization, but they could not be challenged solely on grounds of bad faith. This inability to challenge an action on grounds of bad faith does not mean good faith was *presumed* by early courts—rather, the question whether an act was in good or bad faith typically did not determine the case's outcome and therefore was not analyzed by the court.

[4] This Court has held that agency actions are only legally effective if done according to legislatively mandated procedures and rules of decision. *See Wichita R.R. & Light Co. v. Pub. Utils. Comm'n* 260 U.S. 48, 59 (1922). And in *United States v. Nix*, this Court presumed that a marshal's testimony about the number of miles his deputies traveled was correct despite the marshal's lack of personal knowledge on the accuracy of the reported mileage. *See* 189 U.S. 199, 205–06 (1903).

In the first few decades of the new nation, the acts of government officials were controlled in three ways; "political control by elected officials; administrative control through hierarchal supervision; and legal control through judicial review." Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1657 (2007). However, judicial review of executive actions was much more limited than it is today. Direct review of administrative action and injunctive relief was restricted to ministerial matters with no discretion involved. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1399 (2010).

Instead of seeking direct review, citizens challenging discretionary acts had to sue officials under traditional common law remedies such as trespass and replevin, and the officials would plead as a defense that they had acted in accordance with statutory grants of authority. *See id.* at 1379; Mashaw, *Reluctant Nationalists*, *supra*, at 1674; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947–48 (2011). As part of such suits, courts would decide *de novo* whether the officials' actions were legally authorized. *See* Merrill, *supra*, at 947–48. The suits were brought against officials in their private capacities rather than the government, the normal remedy was damages rather than injunctive relief, and liability accrued when officials acted illegally rather than unreasonably. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787–1801, 115 YALE L.J. 1256, 1334

(2006). Officials could not even use the claim that they were acting according to presidential instruction as a defense if such instruction was itself contrary to statute. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Ex parte Gilchrist*, 10 F. Cas. 355 (C.C.D.S.C. 1808).[5]

This focus on legal authorization rather than reasonableness or good faith went both ways. There was no such thing as an abuse of discretion—an act within the legal discretion of the official was lawful, regardless of whether the act was reasonable or in bad faith. *See* Mashaw, *Reluctant Nationalists*, *supra*, at 1686–88, 1736. One example is *Otis v. Watkins*, 13 U.S. (9 Cranch) 339 (1815). In that case, a customs official had seized the plaintiff's vessel and cargo under a statute permitting such seizure if the official believed that the vessel intended to violate a statutory embargo. *See id.* at 354–55. The plaintiff sued the customs official for trespass. This Court held that the seizure was valid because the statute only required the official's honest belief; that belief did not need to be reasonable. *See id.* at 355–56. *Otis* shows that the validity of official action depended solely upon statutory authorization, which is why courts did not

[5] Grants of public benefits were adjudicated very differently than infringements on private rights. Only infringements on private rights required court review; grants of public benefits were reviewed through administrative determinations. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855); Merrill, *supra*, at 947. Such administrative determinations received essentially no judicial review in the antebellum United States. *See* Mashaw, *Reluctant Nationalists*, *supra*, at 1726, 1736. Instead, aggrieved claimants used an administrative petition process—*see id.* at 1652, 1673, 1688—or petitioned Congress, *see id.* at 1710, 1726, 1731.

look further into motive than whatever the statute required.

The Court took the same approach in *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825). That case was a suit brought by the United States[6] against a federal official named Morris for not providing the proceeds of a sale of condemned goods. Although a court judgment seemingly required the official to provide the proceeds of the condemnation, the Treasury Secretary had statutory authority to instead remit the forfeited goods back to the original owner so long as the goods had not been sold and the proceeds distributed, and the Secretary had granted such a remittance. Mashaw, *Reluctant Nationalists*, *supra*, at 1688.

The Court ruled in favor of the federal official, holding that the discretion granted to the Treasury Secretary was final regardless of whether any particular use of that discretion was reasonable. This Court held that federal courts could not "call in question the competency of the evidence, or its sufficiency, to procure the remission. The Secretary of the Treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision." *Morris*, 23 U.S. at 284–85. The Court explicitly held that even evidence of willful negligence or fraud would not matter to the legality of the executive action. *See*

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[6] Technically, the suit was brought by a collector and a surveyor in the name of the United States. The proceeds of the condemnation were supposed to be split between the United States and the collector and surveyor. *See* Mashaw, *Reluctant Nationalists*, *supra*, at 1688.

id. at 285. By this standard, even bad faith actions could be lawful.

Even *Chemical Foundation*, often considered the progenitor of the modern "presumption of regularity" doctrine,[7] has traces of this traditional concept of review of administrative actions. The United States had sued to set aside sales of several patents to the Chemical Foundation on the basis that the sales were induced through fraudulent misrepresentation to government officials. *See Chemical Foundation*, 272 U.S. at 4. This Court upheld the sales, holding that the lower-court findings of no fraud were not clearly erroneous. But this Court also stated that "[t]he validity of the reasons stated in the [executive official's] orders, or the basis of fact on which they rest, will not be reviewed by the courts." *Id.* at 15. In other words, the *question* of good faith was unreviewable under the doctrine of the time, which is far different from *answering* the question using a presumption favoring the government.

Marbury v. Madison held similarly in *dicta*. While the case involved a ministerial act where the officer had no discretion, Chief Justice Marshall stated that it is not "[t]he province of the court . . . to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. 137, 170 (1803).

It is true that courts examined government actions for good faith in some government contracting cases starting in the 1870s. *See Tecom*, 66 Fed. Cl. at 764–

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[7] *See, e.g.*, Gavoor & Platt, *supra*, at 732.

67. This exception to the general rule that courts did not examine questions of good faith made sense, because contract law, beginning in the late nineteenth century, generally required good faith by the contracting parties. *See, e.g.*, Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 564–65 (2006). Such cases were fundamentally contract cases that happened to involve the government as a party, rather than challenges to uniquely governmental conduct. Furthermore, the relevant cases are nearly all from the twentieth century and none earlier than 1876, and so they are not very probative of original historical doctrine. *See Tecom*, 66 Fed. Cl. at 764–67.

The irrelevance of good faith in this era was encapsulated in *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347 (1868):

> [T]he general doctrine . . . [is] that an officer to whom public duties are confided by law . . . is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. . . . [T]he law reposes this discretion in him for that occasion, and not in the courts.

Id. at 352. It is a mistaken reading of history to suggest that courts in this era assumed government officials to act in good faith. Rather, courts did not need to examine the question of good faith. The determinative legal question in this era was whether officials acted within their legal authority, not the motivations behind those actions.

Overall, the presumption that government officials act in good faith—and its extension to the voluntary cessation doctrine—is not supported by history.

B. Experience Shows the Government Should Not Receive Special Deference in Mootness Cases.

Finally, the presumption that government officials generally act reasonably and with good faith is not supported by experience. There have been numerous examples of government officials acting unreasonably and with improper motives in litigation.

In 2019, New York City repealed a conversion-therapy law in the face of a First Amendment lawsuit. At least one city official admitted that it did so to avoid creating a precedent against similar statutes. *See* Davis & Reaves, *supra*, at 329. The city Speaker continued to defend the substance of the law, admitting why it was repealed: "The sad reality is the courts have changed considerably over the last few years, and we cannot count on them to rule in favor of much-needed protections for the LGBTQ community." Anna Sanders, *NYC Council Wants to Repeal a Ban on LGBT Conversion Therapy*, N.Y. DAILY NEWS (Sept. 11, 2019).[8]

In another case, the Florida prison system unsuccessfully tried to moot a case to avoid a challenge to their prison practices. The state spent a decade litigating lawsuits brought by Orthodox Jewish prisoners requesting a Kosher diet. *See* Davis & Reaves, *supra*, at 329–30. The state fought these suits vigorously when the plaintiffs were represented *pro se*.

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[8] *Available at* https://perma.cc/57JR-RJCG.

Yet when a plaintiff came along with effective outside representation, Florida tried to moot the case by granting *that prisoner alone* an accommodation, while not changing the general policy. *See id.* at 330. Although Florida lost that case, *see id.*, Massachusetts won an almost identical case. *See id.* at 330–31.

A similar case involved a deaf prisoner suing the U.S. Bureau of Prisons to get a sign language interpreter for religious services. *See id.* at 330. Because this plaintiff was represented by a prominent law firm, the government attempted to moot the case by promising to provide an interpreter to that prisoner alone. *See id.* at 330. The Fourth Circuit rejected the government's claim that the case was moot. *See Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 220 (2017).

Florida has tried to strategically moot a challenge to the state's advertising rules for lawyers. During the litigation, the Bar violated its own procedures to find that the slogan at issue was actually legal, contrary to its previous decision regarding the slogan. *See* Davis & Reaves, *supra*, at 331. The Eleventh Circuit rightly rejected the claim that this reversal had mooted the case. *See Harrell v. Fla. Bar*, 608 F.3d 1241, 1267–68 (11th Cir. 2010). Similarly, the Tenth Circuit rejected a county's claim of mootness when the county commission stated in a press release that it had amended the challenged law to "secure the most successful legal resolution to current . . . litigation." Davis & Reaves, *supra*, at 331 (quoting *Wilderness Soc'y v. Kane County,* 581 F.3d 1198, 1214 (10th Cir. 2009)).

Government defendants are just as prone to abusing the voluntary cessation doctrine as private

defendants, meaning there's no reason to carve out a special rule in their favor.

CONCLUSION

For the foregoing reasons, and those described by Respondent, the Court should affirm the Ninth Circuit.

Respectfully Submitted,

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