No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Petitioners,

v.

YONAS FIKRE,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* RESTORE THE FOURTH, INC. AND THE FORUM FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Restore the Fourth, Inc. (Restore the Fourth) is dedicated to robust enforcement of the Fourth Amendment to the Constitution, which guarantees the privacy of persons, homes, papers, and effects against unwarranted government intrusions. Restore the Fourth advances this mission by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises grassroots activities to bolster political recognition of Fourth Amendment rights. Restore the Fourth also files amicus briefs in major Fourth Amendment cases. *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Culley v. Marshall*, No. 22-585 (U.S. filed June 29, 2023); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Torres v. Madrid*, 141 S. Ct. 989 (2021) (No. 19-292).

The Forum for Constitutional Rights (FCR) is a general non-partisan public-benefit corporation that is organized and operated under Minnesota law. FCR offers public education about constitutional history and rights, including (but not limited to) the First Amendment. FCR files amicus briefs in cases that involve key constitutional protections. *See, e.g.,* Brief of *Amici Curiae* Forum for Constitutional Rights, *et al.,* in Support of Petitioner, *Ark. Times v. Waldrip*, No. 22-379 (U.S. filed Nov. 23, 2022).

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[1] This amici brief is filed in accordance with S. Ct. R. 37.3. No counsel for a party authored this amici brief in whole or in part; nor has any person or any entity, other than the named *amici curiae* and their counsel, contributed money intended to fund the preparation or submission of this amici brief.

SUMMARY OF THE ARGUMENT

Federal courts have a virtually unflagging obligation to exercise the jurisdiction given them. The voluntary-cessation doctrine holds federal courts to this duty. The doctrine establishes that a case is not moot just because a defendant claims to have changed its ways. Instead, the defendant bears the heavy burden of making it absolutely clear that its ceased conduct will not recur. Through this stringent requirement, the doctrine ensures that government misconduct does not elide judicial review.

In this case, the government seeks to lessen the standard to which government defendants are held under the voluntary-cessation doctrine. The Amici urge the Court to decline this invitation and go the opposite direction. The Court should hold that when it comes to applying the voluntary-cessation doctrine against government defendants, the doctrine's core purpose—having the legality of challenged practices settled—favors holding government defendants to a higher standard than private defendants.

The public emergencies of recent years bolster this prescription. "Emergency does not create power." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934). Emergency also does not "increase granted power" or lessen limits "imposed upon power granted." *Id.* Courts cannot then abdicate review of emergency powers, especially given how such powers tend to multiply and to endure long after the events justifying them. This includes when the government voluntarily ceases the use of a challenged emergency power before the completion of judicial review.

ARGUMENT

I. Voluntary cessation of challenged conduct does not moot a case or controversy unless the defendant makes it "absolutely clear" the challenged conduct will not recur.

The voluntary-cessation doctrine constitutes an exception to the "general rule" that an "appeal should be dismissed as moot" insofar as "an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible." *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). The doctrine provides that a defendant's mere "voluntary cessation of allegedly illegal conduct . . . **does not make the case moot**." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (bold added).

The Court has defined the voluntary-cessation doctrine in "stringent" terms: a defendant's voluntary cessation of challenged conduct will not end a case unless the defendant makes it "**absolutely clear**" that the challenged conduct "could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000) (bold added). The Court has further stressed that defendants carry a "**heavy burden**" under this rule as "the party asserting mootness." *Id.; see also, e.g., United States v. Concentrated Phosphate Export Ass'n, Inc.,* 393 U.S. 199, 203–04 (1968).

The voluntary-cessation doctrine operates this way—"militat[ing] against a mootness conclusion"—for two important reasons. *W. T. Grant Co.*, 345 U.S. at 632. **First**, there is a fundamental "public interest

in having the legality of . . . practices settled." *Id.* That interest collapses if judicial review must always yield to a defendant's "protestations of repentance and reform." *Id.* at 633 n.6. **Second**, any lesser rule would "grant defendants . . . a powerful weapon against public law enforcement." *Id.* at 632. The voluntary-cessation doctrine serves to ensure that a defendant may not "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until [the defendant] achieves his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

The Court has reiterated this understanding of the voluntary-cessation doctrine time and again. Two terms ago (in 2022), the Court rejected a mootness argument raised by the federal government to elide judicial review of controversial policy changes by the Environmental Protection Agency (EPA). *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). The government's mootness argument "boil[ed] down" to a bare promise not to reimpose the disputed policies. *See id.* The Court responded: "[w]e do not dismiss a case as moot in such circumstances." *Id.*

The Court reaffirmed that a defendant bears a "heavy" burden when asserting mootness based on the defendant's "voluntary conduct." *Id.* And in *West Virginia*, the government came nowhere close to meeting this heavy burden. The Court observed that at bottom, the government "'vigorously defended' the legality" of the challenged EPA policy changes. *Id.* The government "nowhere suggest[ed]" that if the EPA won in *West Virginia,* the EPA still would not reimpose the challenged policy changes. *Id.*

The Court has approached legislative efforts to moot cases with the same discerning eye. In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), the Court rejected an assertion of mootness based on a city's deletion of objectionable terms from a challenged ordinance. *Id.* at 288. The Court noted that the city remained free to "reenact[] precisely the same provision" once the case ended. *Id.* The city provided "no certainty that a similar course would not be pursued" if the city's amended ordinance was "effective to defeat federal jurisdiction." *Id.*

Over the years, the Court has carefully shielded the voluntary-cessation doctrine against defendants' efforts to soften the doctrine. Consider *Northeastern Florida Chapter of the Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). A city argued mootness based on its enactment of a "new ordinance differ[ing] in certain respects from the old one." *Id.* at 662. The Court rejected this analysis: "if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.*

Chief Justice Marshall observed two centuries ago that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. 264, 404 (1821). Against this backdrop, the voluntary-cessation doctrine helps to ensure that the doors of federal courts remain open to everyone who seeks the "protection of the laws"—especially against the government. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The doctrine reaffirms that our nation is "a government of laws, and not of men." *Id.*

II. Courts should hold the government to a higher standard—not a lesser one—under the voluntary-cessation doctrine.

Despite the Court's stringent articulation of the voluntary-cessation doctrine, courts have seen fit to invert the doctrine's core tenets when government-based defendants assert mootness. The Third Circuit has declared that when the government voluntarily ceases disputed conduct, it is "unreasonable to expect . . . future constitutional violations will recur" unless the plaintiff "rebut[s]" the "presumption" that the government "act[s] in good faith." *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012). Such reasoning eliminates the defendant's "heavy burden" to prove mootness by showing it is "absolutely clear" the defendant's challenged conduct will not recur. *Laidlaw,* 528 U.S. at 189. Now plaintiffs must prove that their cases remain live despite a government defendant's cessation of challenged conduct.

The Eighth Circuit has enforced the voluntary-cessation doctrine in similar pro-government terms. The circuit maintains that "statutory changes that discontinue a challenged practice are usually enough to render a case moot, **even if the legislature possesses the power to reenact the statute** after the lawsuit is dismissed." *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) (bold added). Such reasoning flies in the face of this Court's decision in *City of Mesquite*, which holds government discontinuance of a challenged practice does *not* moot a case so long as the government remains free to "reenact[] precisely the same provision" once the case ends. *Id.; see Ne. Fla. Chapter*, 508 U.S. at 662 (same point).

Yet, the beat goes on. In *U.S. Navy Seals 1–26 v. Biden*, 72 F.4th 666 (5th Cir. 2023), the Fifth Circuit summarizes this reality: "[t]he voluntary cessation analysis is somewhat different with respect to a government defendant. Governmental entities bear a lighter burden in proving that the challenged conduct will not recur . . . ." *Id.* at 673. On this basis, the circuit dismissed-as-moot an appeal brought by American soldiers challenging the Navy's COVID-19 vaccination policies. *See id.* at 670, 673. The circuit reached this conclusion even though—as Judge Ho noted in dissent—"the Navy has not confessed error" and the Navy remained free to rescind its new policy "unilaterally at any time, without legislation or even the need for notice and comment." *See id.* at 677. As far as the circuit was concerned, the Navy's "official assurances assuage[d] any concern that the Navy is trying to duck judicial scrutiny." *Id.* at 673.

In this case, the government asks the Court to reach the same conclusion about the government's placement of Respondent Yonas Fikre on the No Fly List. The government maintains that Fikre's case is moot because: (1) the government has removed from Fikre from the No Fly List; and (2) the government has assured the courts below that the government will not put Fikre on the No Fly List "in the future based on . . . currently available information." Pet. i. The government makes no concession of error; nor does the government even claim to have ended the policies that put Fikre on the No Fly List in the first place. The government demands special treatment: "absent some strong showing of [governmental] bad faith," the Court should "presum[e]" the government is entitled to a mootness finding. Br. 17–18.

Amicus Becket Fund for Liberty warns the Court against the government's stratagem. Becket shows that unlike private defendants, government defendants are "generally both *readier* and *abler* . . . to use voluntary cessation to strategically moot claims." Becket Br. 3. This leads Becket to urge that the "doctrine of voluntary cessation should apply equally to governmental and private defendants." Becket Br. 3–4. Otherwise, the doctrine cuts against the very values that the doctrine is meant to secure: "judicial economy," the "public interest," and "the integrity of the legal process itself." *Id.*

Amici Restore the Fourth and FCR agree with Becket's call against any loosening of the voluntary-cessation doctrine for government defendants. But in Restore the Fourth and FCR's view, the doctrine calls for courts to hold government defendants to a *higher* standard than private defendants. Becket proves why in terms of: (1) the government having very "strong 'incentives for strategic mooting'"; and (2) the government being "repeat litigants" far more than private defendants. Becket Br. 9–10. But the Court need look no further than its own principal justification for the voluntary-cessation doctrine: the "public interest in having the legality of . . . practices settled." *W. T. Grant Co.*, 345 U.S. at 632.

"[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886). Meeting this danger requires courts to "adher[e] to the rule that constitutional provisions for the security of person and property should be liberally construed." *Id.*

That means courts must settle the legality of "silent approaches and slight deviations" before they become larger problems—a reality that counsels more rigorous application of the voluntary-cessation doctrine against the government. *Id.*

The COVID-19 pandemic and police responses to civil protests in recent years illustrate this point. The fleeting nature of emergencies often means that government leaders will voluntarily end their use of emergency powers long before suits challenging these powers can be fully adjudicated. These powers still have long-term effects, reshaping official sensibilities about the limits of government authority. History teaches "the tendency of a principle to expand itself to the limit of its logic." CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921). Holding government defendants to a higher standard under the voluntary cessation doctrine ensures courts are able to meet this danger—no matter how popular (or unpopular) the government's emergency powers may be.

In *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020), two religious institutions challenged state pandemic restrictions limiting in-person attendance at religious services while also allowing "essential" businesses to "admit as many people as they wish." *Id.* at 66. After the religious institutions filed suit, the governor issued new executive orders allowing houses of worship to "hold services at 50% of their maximum occupancy." *Id.* at 68. The government then argued to this Court that since the governor had rescinded and replaced the challenged pandemic restrictions on houses of worship with new limits, the plaintiffs' legal challenges were now moot. *Id.*

The Court said 'no': "[t]he [g]overnor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected areas from attending religious services before judicial relief can be obtained." *Id.* The legality of the government's pandemic restrictions had to be settled. In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court reaffirmed this view: "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." *Id.* at 1297. Otherwise, simply by "moving the goalposts," the government would in effect retain unreviewable "authority to reinstate" any challenged COVID-19 restriction "at any time." *Id.*

The events following the May 2020 police killing of George Floyd in Minneapolis also show the value of holding government defendants to higher standard under the voluntary-cessation doctrine. Reporters sued both city and state officials for allowing indiscriminate police violence against reporters who covered the protests that followed Floyd's death.[2] The reporters' suit explained that while "[t]he violence against journalists [had] ceased, for now," the "chill on their First Amendment right[s]" remained as did the "physical damage" done by the police.[3]

The need for judicial intervention then became plain as the police subjected reporters to a fresh round of indiscriminate violence during the protests that

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[2] Class Action Complaint, *Goyette v. City of Minneapolis*, No. 20-cv-1302 (D. Minn. June 2, 2020) (ECF No. 1).

[3] Second Amended Complaint at 2, *Goyette*, No. 20-cv-1302 (D. Minn. July 30, 2020) (ECF No. 53).

followed the police killing of Daunte Wright.[4] The reporter-plaintiffs ultimately secured a six-year monitored injunction against state law enforcement.[5] Approving the injunction, the district court noted the "significant public interests" served by the order (i.e., by settling the legality of the police's conduct).[6] These interests included protection of the reporters' "First Amendment and Fourth Amendment rights" and protection of "the public's ability to learn about ongoing events of public importance."[7]

The preceding cases reflect that "in a crisis," the judiciary is "perhaps the only institution that is in any structural position to push back against . . . potential overreaching." *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 899 (W.D. Pa. 2020), *mooted by statute*, 8 F.4th 226 (3d Cir. 2021). Constitutional liberties "are not fair-weather freedoms." *Butler,* 486 F. Supp. 3d at 928. The Constitution "sets certain lines that cannot be crossed, even in an emergency." *Id.* But those lines become meaningless when government defendants may readily moot efforts to enforce them. The voluntary-cessation doctrine prevents this—and does so best when courts hold the government to a higher standard (versus a merely equal one).

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[4] *See* ACLU-MN, *ACLU-MN Sues to Stop Attack on Journalists Covering Daunte Wright Protests* (Apr. 14, 2021), https://bit.ly/37T8xBE ("Over the past few days, Minnesota State Patrol have shot journalists from the Twin Cities and across the nation with rubber bullets, pepper sprayed them, and arrested or threatened them with arrest . . . .").

[5] Order Granting Pls.' Mot. for Monitored Injunction at 2, *Goyette*, No. 20-cv-1302 (D. Minn. Feb. 8, 2022) (ECF No. 316).

[6] *Id.*

[7] *Id.*

CONCLUSION

"Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). But as a practical matter, such amendment tends to occur so long as government defendants may elide judicial review by claiming their voluntary cessation of challenged conduct ends litigation. The Court's innovation of the voluntary-cessation doctrine meets this danger—but only so long as courts apply the doctrine against the government in a truly stringent manner, consonant with all the resources that the government may deploy to claim mootness.

Respectfully submitted,

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