No. _____

In the Supreme Court of the United States

CAPTAIN MARIELLA CREAGHAN,
Petitioner,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE; FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE AIR FORCE; STEPHEN N. WHITING, LT. GEN., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMANDER; ROBERT I. MILLER, LT. GEN., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SURGEON GENERAL OF THE AIR FORCE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ERIN ELIZABETH MERSINO
Counsel of Record
RICHARD THOMPSON
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48105
(734) 827-2001
emersino@thomasmore.org

Counsel for Petitioner

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

QUESTION PRESENTED

The mootness doctrine has devolved into a court-sanctioned, childhood game of "I am not touching you." So long as the finger of the government's policy is no longer "touching" the plaintiff, lower courts deem a case to be moot, even when the policy could easily be reimposed and even when the rescission of the policy has left behind extant harm. Circuit courts are divided on how to apply the voluntary cessation doctrine. Understandably so, as it is difficult to read cases such as *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525 (2020) and *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) together and recognize one applicable standard. The D.C. Circuit's summary decision below exemplifies this problem. Without any attention to the voluntary cessation exception's "absolutely clear" standard, the court dismissed Petitioner's appeal because the government proverbially asserted that it is "not touching" the Petitioner.

The question presented is:

1. Whether under the voluntary cessation exception to mootness the government must satisfy the "absolutely clear" standard if it maintains the authority to reimpose the same policies, and, if not, to what extent should the government be treated differently from other defendants?

PARTIES TO THE PROCEEDING

Petitioner is Captain Mariella Creaghan. Respondents are Lloyd J. Austin III, United States Secretary of Defense; Frank Kendall, Secretary of the United States Air Force; Lt. Gen. Stephen N. Whiting, Commander of Space Operations Command; and Lt. Gen. Robert I. Miller, Surgeon General of the United States Air Force. Respondents are sued in their official capacity.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and has no parent company. She also certifies that no publicly held company owns 10% or more of a company to which Petitioner owns stock, and that no publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT OF RELATED PROCEEDINGS

This case is related to the following proceedings in the United States Court of Appeals for the District of Columbia and the United States District Court for the District of Columbia:

- *Creaghan v. Austin, et al.*, 2023 U.S. Dist. LEXIS 79825, at *1 (D.D.C. Mar. 10, 2023);

- *Navy SEAL v. Austin*, No. 22-5114, 2023 U.S. App. LEXIS 5843, at *1 (D.C. Cir. Mar. 10, 2023);

- *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1 (D.D.C. 2022).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

This case presents an important and recurring problem of what happens when the government voluntarily rescinds its policies when a case reaches appeal. There is a growing trend in most circuits that voluntary cessation outright moots a case and divests the courts of Article III jurisdiction. Little attention is paid to the ongoing harm of plaintiffs, the reality that the government is free to return to its old ways and reimplement the challenged policies, or that this practice allows the government to remain unaccountable for the definite consequences of its actions.

Indeed, the D.C. Circuit below, along with the Sixth, Eighth, and Ninth Circuits have all held that Article III requires dismissal of a case as moot when the government retains its power to reissue the same challenged restrictions in the future, without having to satisfy the "absolutely clear" standard. *Compare, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2594 (2022) *with Resurrection Sch v. Hertel*, 35 F.4th 524 (6th Cir. 2022), *Hawse v. Page*, 7 F.4th 685 (8th Cir. 2021), *and Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022). However, other circuits, such as the Fifth Circuit, caution that such holdings are an abuse of the mootness doctrine: "To be clear . . . [i]t shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens,

fundamental constitutional freedoms frequently suffer as a result." *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). And that is what happened here. Due to either "deference to public officials" or "fear of deciding [a] controversial case[]" or even out of "simple mistake" the fundamental freedom of religious liberty protected by the Religious Freedom Restoration Act has suffered.

The lower court accepted Respondents' claim that they have rescinded the policies that substantially burdened Captain Creaghan's sincerely held religious beliefs. In truth, however, the policies remain in place today. Both Department of the Air Force Instruction (DAFI 52-201) and Department of Defense Instruction 1300.17 govern the religious exemption process in the Air Force and centralize it. *Doster v. Kendall*, 54 F.4th 398, 405, 409 (6th Cir. 2022). Adherence to these existing policies led to Respondents granting *zero* religious exemptions to any servicemember who wished to remain in the Air Force out of the *ten thousand* who applied. *Id.* at 409. Respondents' policies made a sham out of the Religious Freedom Restoration Act. And Captain Creaghan continues to be harmed by these policies and Respondents' decisions.

Justice Gorsuch warns that "we may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring). And yet, the court below and other circuits have interpreted the mootness doctrine as not just a shelter, but as a repellant to spurn its ordinary

Article III duties when the government presents a mere showing that it is not "*at present*" enforcing the challenged policies. *Resurrection Sch.*, 35 F. 4th at 542 (Bush, J., dissenting) (emphasis in original).

There is a stark difference between how the circuits apply and analyze exceptions to the mootness doctrine. Some circuits, such as the D.C. Circuit in the opinion below, find mootness even when the government maintains the power to re-enact its regulations and sees no harm in repeating its actions in the future. App. at 1-3; *see also Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting) (noting the inter-circuit conflict and stating, "I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance").

To resolve the conflict between the lower courts and "[w]ith the circuits apparently divided" on how to apply voluntary cessation exception to the mootness doctrine, this petition "require[s] action from the Supreme Court to get things back on track." *Tucker* 40 F.4th at 297 (Ho, J., concurring); *Brach*, 38 F.4th at 18 (Paez, J., dissenting). The lower courts would benefit from clarification from this Court.

OPINIONS BELOW

The D.C. Circuit's decision is reproduced at App. 1. It is unpublished but available at 2023 U.S. App. LEXIS 5843 (D.C. Cir. Mar. 10, 2023). The District Court's decision appears at 607 F.Supp.3d 131 and is reproduced at App. 4.

JURISDICTION

The D.C. Circuit's order denying preliminary injunctive relief and dismissing the appeal was entered on March 10, 2023. App. 1. The lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., art. III § 2, cl. 1.

The U.S. Constitution grants authority to Congress to regulate the military. U.S. Const., art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces."); *see also Chappell v. Wallace*, 462 U.S. 296, 302 (1983)

(acknowledging Congress' "plenary constitutional authority over the military").

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb, *et seq*.) and made it expressly applicable to any "branch, department, agency, instrumentality, and official . . . of the United States[.]" 42 U.S.C. § 2000bb-2(1).

Under the RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The RFRA protects "any exercise of religion." *Id*. at §§ 2000bb-2(4), 2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under the RFRA, the government must demonstrate that the challenged action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Mariella Creaghan is a devout Catholic who serves as a Captain in the United States Space Force. App. at 4, 10. Captain Creaghan believes that human life begins at conception. App. at 10. The practice of using human cells and cell lines from children killed by abortion violates her religious beliefs. App. at 10. As noted by the District Court, Captain Creaghan has provided "a litany of

supporting documents from religious figures in her life testifying to the sincerity of her belief and its connection to her Catholic faith." App. at 10.

On August 24, 2021, Respondent Secretary of Defense Austin ordered all branches of the military to undergo vaccination for COVID-19. App. at 6. On September 3, 2021, Respondent Secretary Kendall initially ordered all members of the Air Force and Space Force to be fully vaccinated within two months. App. at 6-7. On December 7, 2021 Respondent Secretary Kendall issued another order outlining that the process for obtaining an exemption to the COVID-19 vaccination would be available for "medical, religious, or administrative" reasons. App. at 7.[1] As found by the District Court, "[t]he recognition of these exemptions was largely perfunctory, as requests for COVID-19 vaccination exemptions are governed by the same rules and regulations, active since 2018, that govern all other requests for exemptions from other vaccinations." App. at 7. These rules and regulations for processing exemption requests remain unchanged today.

Pursuant to Respondents' policies, a servicemember seeking a religious exemption must submit a written request to her commanding officer. App. at 8 (citing AFI 48-110_IP (Oct. 7, 2013) as amended (Feb. 16, 2018)). The servicemember's commanding officer reviews the request, and the

---

[1] https://www.af.mil/Portals/1/documents/2021SAF/12_Dec/Supplemental_Coronavirus_Disease_2019_Vaccination_Policy.pdf, last visited June 6, 2023.

servicemember is then counseled by their commanding officer and military medical provider. App. at 8. The servicemember's chaplain must also review the request for sincerity. App. at 8. "With these three assessments in hand, the omnibus request is reviewed by each commanding officer in the [servicemember's] chain of command." App. at 8.

On September 30, 2021, Captain Creaghan requested a religious exemption from COVID-19 vaccination. On October 18, 2021, a chaplain determined that Captain Creaghan sincerely held a religious belief that disallowed her from undergoing COVID-19 vaccination as the available vaccinations were developed with the use of aborted fetal cell lines. App. at 11.

Captain Creaghan's direct commanding officer, approved her request for a religious exemption. Captain Creaghan's commanding officer found that "[t]he projected impact to [her] unit" of issuing the religious exemption "is low." App. at 11. Her commanding officer also stated that her "unit 'has backup personnel available to provide positional coverage in the event of any operations personnel requiring quarantine." App. at 11. He also noted that Captain Creaghan had "supplied sufficient medical evidence indicating presence of the SARS-CoV-2 antibody." App. at 11. Captain Creaghan's Delta

commander also approved her request for a religious exemption. App. at 11.[2]

However, rather than allowing Captain Creaghan's commanders to have final decision-making authority, Department of the Air Force Instruction (DAFI 52-201) "centralizes the process." *Doster v. Kendall*, 54 F.4th 398, 407 (6th Cir. 2022);[3] *see also* App. at 8. In total the religious exemption process follows eleven steps, a much more lengthy and toilsome process than those required to obtain an administrative or medical exemption. *Doster*, 54 F.4th at 407.

At some point, Captain Creaghan's exemption request went to the "Religious Resolution Team" (RRT) comprised of one commander, a chaplain, a public affairs officer, and a staff judge advocate outside of Petitioner's chain of command. App. at 8. When Captain Creaghan was notified that the RRT would be outside of her chain of command and instead run by Air Force leadership at Joint-Base Anacostia-

---

[2] The District Court acknowledged that the recommendation of Captain Creaghan's commanding officer, "ratified by his commanding officer, is entitled to its own due regard as an exercise of military expertise and judgment. As Plaintiff's commanding officer, he understands her role better than anyone else[.]" App. at 27.

[3] In *Doster*, a unanimous panel of the Sixth Circuit, affirmed the lower court's order to grant a preliminary injunction against Respondents. 54 F.4th at 442. *Doster* has since been remanded for the district court to "review this mootness question in the first instance." *Doster v. Kendall*, 65 F.4th 792, 793 (6th Cir. 2023).

Bolling, her commander requested for either him or her Delta commander to participate on the board and speak to Captain Creaghan's position and duties. App. at 48. Her Commander's request was denied. App. at 48. The RRT was entirely run by the Air Force with no representation from the Space Force. App. at 49. No one on the RRT met with or interviewed Captain Creaghan or conducted an inquiry into lesser restrictive alternatives available that would have not substantially burdened her religious beliefs. App. at 49. No one on the RRT had ties to Captain Creaghan's unit or first-hand knowledge of her job duties. App. at 49. The RRT who reviewed Captain Creaghan's exemption request acted against the advice and conclusions of Captain Creaghan's chaplain, commanding officer, and Delta commander, and recommended to deny her an exemption. App. at 11-12.

Next, Captain Creaghan's request was forwarded to the commander of the relevant Major or Field Command. It is at this point where Respondent Lt. Gen. Stephen N. Whiting simply adopted the conclusions of the RRT and denied Captain Creaghan's exemption.

Such a denial was commonplace. "Despite thousands of requests, commanders have denied exemptions with limited individual-specific analysis." *Doster*, 54 F.4th at 408. Of the Air Force's 500,000 servicemembers, 10,000 requested a religious exemption from COVID-19 vaccination. *Doster*, 54 F.4th at 405. Of these 10,000 requests, the Air Force granted 135 exemptions, but only to servicemembers

who already had solidified their plans to leave the service. *Id.* The 135 exemptions were granted only to servicemembers who nearly qualified for an administrative exemption "because they would soon retire." *Id.* at 409. Respondents have admitted that they have "granted zero religious exemptions to anyone who does not plan to leave the service within a year." *Id.*[4]

Therefore, it was not surprising that when Captain Creaghan appealed the denial of her request for a religious exemption, Respondent Lt. Gen. Robert Miller denied it using the same standard language used in most of the servicemembers' denial memorandums. App. at 12-13; *see also Doster*, 54 F.4th at 409.[5] After Captain Creaghan exhausted her appeals, Respondents threatened that if she did not undergo vaccination for COVID-19 they would "take any number of disciplinary or administrative actions

---

[4] Pentagon Press Secretary John F. Kirby, when speaking on behalf of Secretary of Defense Lloyd J. Austin, in remarks on December 16, 2021, stated "…what we want is 100 percent vaccination."
https://www.defense.gov/News/Transcripts/Transcript/Article/2877275/pentagon-press-secretary-john-kirby-holds-an-off-camera-press-briefing/, last visited June 6, 2023.

[5] The Memorandum issued by the Acting Inspector General (IG) of the Department of Defense (DoD) also indicated "a trend of generalized assessments rather than individualized assessment that is required by Federal law[.]" https://trmlx.com/dodig-memo-to-secdef-highlights-deliberate-violation-of-federal-law-within-the-dod/, last visited June 6, 2023.

against [her] for continued religious objection." App. at 13.

B. Procedural Background

Captain Creaghan filed her Complaint in the District Court and moved for a preliminary injunction to enjoin Respondents' policies and actions that continue to substantially burden her religious exercise. App. at 4. On May 12, 2022, the District Court denied the motion. App. at 4-33. Captain Creaghan appealed. App. at 1-3. On March 10, 2023, the D.C. Circuit on its own motion dismissed Captain Creaghan's appeal as moot. App. at 3.

The D.C. Circuit dismissed the appeal "[i]n light of the January 10, 2023 Memorandum issued by the Secretary of Defense rescinding the military's COVID-19 vaccination mandate for all service members and the subsequent directives formally implementing the Secretary of Defense's recission of the COVID-19 vaccination requirement[.]" App. at 3. The lower court specifically recognized in its order that it was Respondents' cessation of their implementing directives that triggered its finding on mootness.

In a similar challenge, the Eighth Circuit contrastingly held that the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. ___, H.R. 7776, 117th Cong. (2022) ("FY 2023 NDAA") presented a "statutory change that discontinue[d] a challenged practice[.]" *Roth v. Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023). The FY 2023 NDAA, however, only requires that the Secretary

of Defense rescind "the memorandum dated August 24, 2021." It does not address the policies and practices of the Respondents, including the policies still in place today such as Department of Defense Instruction 1300.17[6] and DAFI 52-201,[7] which have substantially burdened Captain Creaghan's and other servicemembers' sincerely held religious beliefs.[8]

The general nature of an NDAA is "to specify the budget needs for the Department of Defense." *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1131 (10th Cir. 2006). It is "enacted each fiscal year" for the purpose of "author[izing] appropriations." *Id.*[9] Since, the authorization of appropriations does not address Respondents' defense policies on a comprehensive

---

[6] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf, last visited June 6, 2023.

[7] https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf, last visited June 6, 2023.

[8] The District Court found that the rules and regulations at issue for Captain Creaghan's motion for a preliminary injunction were in place "since 2018" and "govern all other requests for exemptions[.]" App. at 7. These rules and regulations governing the exemption process and how religious liberty is treated in the Air Force remain in place today and are unaffected by the FY 2023 NDAA or Respondents' subsequent memorandums.

[9] Presidents have not always implemented NDAAs. For example in 2016, President Obama signed the NDAA but did not authorize members of his cabinet or the executive branch to carry out the policy in the NDAA that he opposed. https://obamawhitehouse.archives.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal, last visited June 6, 2023.

level, it fails to provide lasting relief for servicemembers beyond this fiscal year. Therefore, even if this Court were to determine that recession of the Respondents' August 24, 2021 Memorandum resolves Captain Creaghan's pending claims for the moment (it doesn't as it fails to address Respondents' policies and actions), her appeal would still not be moot because the 2023 fiscal year will likely expire before this case is fully litigated.

The recession of the August 24, 2021 memorandum imposed by the FY 2023 NDAA is only as effective as Respondents' policies, procedures, and processes allow it to be. And Respondents' offending policies, procedures, and processes still remain in place despite the memorandum's recission. In following these policies, procedures, and processes, Respondents continue to base their decisions on the vaccination status of religious individuals, without providing an exemption. Captain Creaghan's Individual Medical Readiness (IMR) status still indicates that she is classified as "not medially ready." App. at 37. The RFRA is not satisfied by continuing to disadvantage and discriminate against religious individuals through policies, procedures, and processes that carry out the objective of the now-rescinded memorandum. The effect is the same, whether inflicted by a memorandum or whether inflicted by a policy. And the substantial burden of the consequences imposed on Captain Creaghan is the same, whether spearheaded by a memorandum or carried out by a policy.

Captain Creaghan's principal argument is that Respondents failed to conduct an individualized assessment of her exemption request, as is required under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b)(2) (RFRA). This failure has and continues to substantially burden Captain Creaghan's religious exercise. Respondents adamantly argue that they have followed the RFRA. Based on Respondents' assumption, from which Captain Creaghan seeks redress, Respondents denied her request for a religious exemption and have and continue to impose punishment against her. Respondents continue to believe they correctly followed the RFRA, they continue to reject Captain Creaghan's concerns regarding the treatment of her sincerely held religious beliefs, and they could reimpose punishment against her. Nothing would stop Respondents from punishing Captain Creaghan for violating a lawful order. The order is only lawful, however, if Respondents properly followed the RFRA in carrying out its polices, such as Department of Defense Instruction 1300.17 and DAFI 52-201. If the lower court were to find that Respondents misapplied the RFRA in denying Captain Creaghan's religious exemption, then the order Captain Creaghan violated should never have been issued against her, as it violated the RFRA and would be deemed unlawful. Captain Creaghan has not obtained full relief. *See* App. at 37-40. She sought injunctive relief to protect her right to religious exercise from being substantially burdened by Respondents. And she still deserves that protection now.

REASONS FOR GRANTING THE PETITION

The decision below allows government defendants to avoid redress for unconstitutional policies they vigorously defend, leaving unaddressed the harm the policies continue to inflict. The consequences of that error are real. The circuit courts have made a mess of this Court's mootness doctrine and its exceptions. Intervention is necessary to resolve the conflict between the circuits and the holdings of this Court. *Tucker*, 40 F.4th at 297 (Ho, J., concurring); *Resurrection Sch.*, 35 F.4th at 532 (Bush, J., dissenting, joined by Siler and Griffin, JJ.); *Brach*, 38 F.4th at 18 (Paez, J., dissenting, joined by Berzon, Ikuta, Nelson, and Bress, JJ.).

I. The Court Should Grant Certiorari to Clarify whether Voluntary Cessation Requires Government Defendants to Meet the "Absolutely Clear" Standard or, if Not, What Standard the Lower Courts Should Apply.

In summarily dismissing Captain Creaghan's appeal as moot, the D.C. Circuit deepened an existing conflict between the circuits and disregarded this Court's longstanding precedent that under the voluntary cessation exception, Respondents must prove—to an "absolutely clear" standard—that it is unreasonable to believe they will reimpose the same policies or resort to the same actions again. The lower court's order conflicts with this Court's holdings in *Already, LLC v. Nike*, 568 U.S. 85, 91(2013); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Friends of the Earth, Inc.*

v. Laidlaw Env. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). The stringent standard articulated by this Court in these holdings serves an important purpose. The standard curbs the harm that results when disputes are dismissed for mootness only to arise again when the defendant resumes its prior conduct. It curtails irreparable harm to Petitioner's constitutional rights, as well as harm to the public interest, the integrity of the legal process, and to judicial economy.

The D.C. Circuit, however, is not alone in its laissez-faire approach. Other circuit courts have applied a "lighter burden" specifically to governmental defendants. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009); *but see Tucker,* 40 F.4th 292 (refusing to apply a lower standard to a government actor who does not disallow the challenged behavior). In these circuits, "government actors" are entitled to "a presumption of good faith" because "they are public servants, not self-interested private parties." *Sossamon,* 560 F.3d at 325. These circuits "assume that formally announced changes to official governmental policy are not mere litigation posturing." *Id.*; *see also, e.g.*, *Marcavage v. National Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) ("[G]overnment officials are presumed to act in good faith."); *Troiano v. Supervisors of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur.").

Still other circuits have gone even further, flipping the burden of proof to require that the plaintiff demonstrate it is "virtually certain" that the government will reenact the challenged law. *Chemical Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). And while some circuits have at least tried to reconcile their decisions with this Court's precedents, others have simply declared that relevant portions of this Court's holdings are "dicta and therefore not controlling." *Federation of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003).

In *Trinity Lutheran*, this Court seemingly accepted as obvious that a government defendant must be held to the "absolutely clear standard." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). This Court noted:

> That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert

> to its policy of excluding religious organizations."

Id. But then three years later in *N.Y. State Rifle & Pistol Ass'n*, this Court accepted certiorari to review the Second Circuit's decision that upheld the constitutionality of New York City's restrictions limiting the transportation of firearms. 140 S. Ct. at 1526. While the case was pending before this Court, New York City enacted a new rule to govern the transportation of firearms. *Id.* This Court's per curiam opinion did not moot the entire case but only the pending appeal. This Court vacated the opinion of the Second Circuit and remanded the case for further proceedings, which could include "developing the record more fully." *Id.* at 1526-27 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482-483 (1990)). While New York City's rule change implicated the voluntary cessation doctrine and the city argued for this Court to adopt a standard lower than "absolutely clear" for government defendants, the short per curiam opinion does not explicitly adopt a lower standard, nor did it overrule this Court's earlier precedent.

Judge Alito's dissent, joined by Justice Gorsuch and in part by Justice Thomas, questioned the wisdom of dismissing a case as moot based upon a government's decision to change course during the pendency of the appeal. *N.Y. State Rifle & Pistol Ass'n,* 140 S. Ct. at 1528. The dissent emphasized the "heavy burden" placed on the party asserting mootness, *id.* (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)), and that a

case "becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *N.Y. State Rifle & Pistol Ass'n,* 140 S. Ct. at 1528 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) and adding emphasis). The dissent applied the "absolutely clear" standard and recognized that petitioners had not obtained all the prospective relief they sought.

And last term in *West Virginia v. EPA*, this Court seemingly boomeranged back again to its position in *Trinity Lutheran* and its enforcement of the "absolutely clear standard." 142 S. Ct. at 2607 (citing *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (holding that vigorously defending the constitutionality of the challenged governmental policy precluded the finding of a presumption of governmental good faith under the voluntary cessation exception)). [10] Yet, this Court's

---

[10] Similar to the government's stance in *West Virginia v. EPA*, Respondents have "vigorously defend[ed] the legality of [their] approach." *Id*. Respondents, including Respondent Secretary Austin, have continued throughout the litigation to defend their policies and actions. https://www.militarytimes.com/news/pentagon-congress/2022/12/04/keep-covid-19-military-vaccine-mandate-defense-secretary-says/, last visited June 6, 2023. Respondent Secretary Austin would even prefer that "adverse actions placed in the military personnel records of those who refused to be vaccinated . . . remain in their official military personnel file." https://www.thecentersquare.com/national/plaintiff-attorneys-lawsuits-against-dod-to-continue-despite-recision-of-vaccine-mandate/article_7a9a7952-891a-11ed-a867-5bae725eaa08.html, last visited June 6, 2023. Even the recission memorandum referenced in the D.C. Circuit's dismissal order defends Respondents' actions and claims that they complied with the RFRA when accessing the servicemembers' exemption

voluntary cessation analysis in *West Virginia v. EPA* and *Parents Involved* conflicts with the en banc Ninth Circuit's reasoning in *Brach*, in which the government was seemingly given the presumption of good faith even when it retained the authority to reenact the same regulations and continued to defend the constitutionality of its regulations. 38 F.4th at 12-15.[11]

In stark contrast is the Fifth Circuit's holding in *Tucker v. Gaddis*. Here, the Fifth Circuit refused to grant the government defendant a presumption of good faith when "the government has not even bothered to give" the plaintiff "any assurance that it will permanently cease engaging in the very conduct that he challenges." 40 F.4th at 293. During oral argument in *Tucker*, the government "would *not* guarantee" that it would refrain from reenacting a similar policy "in the future, but instead would reserve the question in light of potential 'time,

---

requests. App. at 1, https://www.af.mil/Portals/1/documents/2023SAF/PolicyUpdates/L6JT_SecAF_Signed_DAF_guide_Adverse_Actions_Religious_Requests_24Feb23.pdf, last visiting (stating that "[a]t the time the actions were taken, they were appropriate, equitable and in accordance with valid lawful policy in effect at the time").

[11] Differing from this Court opinion in *Arizona v. Mayorkas*, No. 22-592, 2023 U.S. LEXIS 2062 (May 18, 2023), this petition does not center on the declaration of the COVID-19 emergency. Instead, Captain Creaghan seeks redress from the Respondents' still existing policies and practices, such as DAFI 52-201, that fail to follow the RFRA and to remedy still existing harm due to Respondents' policies, actions, and decisions.

space, and security concerns.'" *Id*. The Fifth Circuit held "[i]f anything, it is far from clear that the government has ceased the challenged conduct *at all*, let alone with the permanence required under the 'stringent' standards that govern the mootness determination when a defendant claims voluntary compliance." *Id*.

In his concurrence in *Tucker*, Judge Ho recognizes the inter-circuit split that now plagues the voluntary cessation doctrine: "our sister circuits enabled public officials to avoid judicial review by dismissing the claims against them as moot—despite the fact that the officials refused to promise never to return to their challenged conduct." (citing App. 1-65 and *Hawse v. Page*, 7 F.4th 685, 699 (8th Cir. 2021) (Stras, J., dissenting)). In short, "[w]ith the circuits apparently divided on these questions," the lower courts now "require action from the Supreme Court to get things back on track." *Tucker*, 40 F.4th at 489 (Ho, J., concurring).

And in his Ninth Circuit dissent, Judge Paez highlights the circuit split, regarding whether the court should inquire if the government has retained the power to reenact the challenged restriction. *Brach*, 38 F.4th at 17 (Paez, J., dissenting). A minority of cases, including the decision below, do not inquire whether the government retains the authority to reinstitute the restriction. *Id*. Judge Paez's then concludes: "I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance—and find that the Governor's continuing authority . . . is a crucial factor in this

analysis." *Id.* at 18. The inter-circuit conflict and the lower courts' inquiry into the extent to which the government's authority to re-issue its policies should be resolved by this Court.

This Court should grant certiorari to resolve what is the proper analysis of the voluntary cessation exception to the mootness doctrine.

II. This Case Presents an Exceptionally Important Question Warranting Review.

The decision below is plainly wrong and will have untenable consequences, both for Petitioner and future litigants from across the political spectrum and faced with a wide-ranging and unknowable array of issues. Under the decision below, a government may violate a person's constitutional rights without any redress if it claims, "we are not doing that anymore." The government need not show it will not resume the challenged action. Instead, the decision below allows the lower courts to freely dismiss cases against the government with no assertion that the government has indeed changed its ways. And the summary nature of the D.C. Circuit's dismissal reflects the low standard to which consideration of the mootness doctrine has divulged.

One of the great provinces of the exceptions to the mootness doctrine is to prevent the government from evading judicial review. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1

(2001). These exceptions vindicate the public interest by encouraging review of "the legality of the [government's] practices." *W.T. Grant Co.*, 345 U.S. at 632. And this interest is at its pinnacle when the government is accused of violating an individual's constitutional rights, cases which frequently carry broad implications for the general public. The decision below forecloses this important function. It weakens the Article III authority of the courts and aggrandizes the mootness doctrine; it makes it harder for the lower courts to address the inevitable missteps of the government and leaves those seeking redress of their fundamental rights with no recourse.

This Court should grant certiorari now to resolve the great disparity by which the lower courts apply the mootness doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the D.C. Circuit.

Respectfully submitted,

Erin Elizabeth Mersino
Counsel of Record
Richard Thompson
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
Ann Arbor, MI 48105
(734) 827-2001
emersino@thomasmore.org

Counsel for Petitioner