No. 20-538

In The Supreme Court of the United States

RENTBERRY, INC., AND DELANEY WYSINGLE,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

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

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Is a government defendant that voluntarily ceases challenged unconstitutional action entitled to a greater presumption of "good faith" than a private defendant who voluntarily ceases challenged conduct?

2. Under Fed. R. Civ. Proc. 54(c), are successful civil rights plaintiffs proceeding under 42 U.S.C. § 1983 entitled to recover nominal damages as symbolic vindication of their rights regardless of whether they specifically request them in the prayer for relief?

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INTEREST OF AMICUS[1]

Since 1968, the National Right to Work Legal Defense Foundation, Inc. has been the Nation's leading advocate for employee free choice from compelled unionism. To advance employee freedom, Foundation staff attorneys have represented individual employees in over 3,000 cases before this Court, lower federal and state courts, and federal and state agencies.[2]

The Foundation has an interest in the question presented here because defendants in Foundation supported cases have used mootness as a legal strategy to escape judicial review. In several Foundation First Amendment cases, defendants have changed or pledged to alter unlawful policies after substantial litigation has occurred.[3]

In many Foundation funded cases, the defendant is either a labor union, a government entity, or both. These defendants have fiduciary and constitutional obligations to the employees Foundation lawyers represent.[4] Despite these obligations, union and government actors often fight employees' claims until a court

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[1] Both parties consented to the filing of this amicus brief under Supreme Court Rule 37.3(a). Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus made a monetary contribution to its preparation or submission.

[2] *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chi. Tchrs. Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

[3] *See, e.g.*, *Knox*, 567 U.S. at 307–08; *Hudson*, 475 U.S. at 305 n.14.

[4] *See*, *e.g.*, *Janus*, 138 S. Ct. at 2460, 2467–68.

can create binding precedent. Then they return or disclaim disputed fees—after vigorously defending their legality—to moot litigation. Courts that blindly find that such cases are moot allow wrongdoers to thwart judicial relief. Employees thus suffer from the violation of their constitutional rights and from the rigors of litigation without a legal remedy.

If the decision below stands, it will embolden constitutional wrongdoers to implement and maintain unconstitutional policies. Wrongdoers can evade liability for their illegal actions if they reverse course after being sued.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' brief forcefully shows why courts should not presume that a government defendant acts in good faith when it voluntarily ceases challenged conduct after litigation has begun. The Foundation submits this amicus brief to highlight another reason for reversing the lower court. Its decision conflicts with the Constitution's foundational principles and undermines the Constitution's separation of powers.

A. The Ninth Circuit's presumption of government good faith—after the government has violated the Constitution—conflicts with the Constitution's purpose and design. The Founders believed that human nature is fallible. Thus, while government is necessary, it is also dangerous and requires restraint. The Founders therefore rejected systems that fail to restrain human vice and mitigate injuries caused by government actors. To limit and restrain the government, the Founders enacted a written Constitution. The presumption of government good faith flips the

Constitution on its head. It allows the government to avoid accountability, and it inhibits individuals from obtaining judicial review to protect their fundamental rights.

B. The Ninth Circuit's presumption of government good faith conflicts with the Constitution's separation of powers. The Founders separated government power to prevent tyranny and protect individuals' fundamental rights. They expected that government officials would act self-interestedly and prevent other officials from exceeding their proper scope. But the lower court's decision undermines the separation of powers by allying the federal judiciary with state governments and the federal political branches to restrict individual rights. It favors government defendants over private individuals—tilting the scales of justice—and it blocks relief provided by Congress when government officials violate individuals' constitutional rights.

This Court should therefore grant the petition and reverse the Ninth Circuit's decision.

ARGUMENT

Whether government defendants that voluntarily cease challenged conduct are entitled to a good-faith presumption is an important and recurring question of federal constitutional law that affects peoples' ability to protect their fundamental rights.

A. The Ninth Circuit's presumption of government good faith conflicts with the Constitution's purpose and design to protect individual rights.

1. The Ninth Circuit's presumption that the government acts in good faith when it voluntarily stops

violating peoples' rights conflicts with the Constitution's philosophy of human nature. Protecting fundamental rights is the Constitution's raison d'être. To that end, the Constitution created judicial review—among many other "checks and balances"—to restrain government and prevent abuse. Judges should not presume government good faith.

The Founders rejected the view that human beings are infallible—especially when given power.[5] They designed the judiciary as a check on overzealous officials.[6] As Madison wrote in *Federalist* 55: "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[7] Alexander Hamilton likewise reasoned that humans need courts because "of the folly and wickedness of mankind."[8] Conflict occurs because "men are ambitious, vindictive, and rapacious." Selfishness, jealousy, and the love of power "have a general and almost constant operation upon the collective bodies of society."[9] The Founders thus believed that limitation and restraint

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[5] *See* 1 William Blackstone, *Commentaries* *41 ("[I]f our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.").

[6] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 124–26 (2015) (Thomas, J., concurring).

[7] *The Federalist* No. 55 (James Madison). The Founders also recognized human virtue, as Madison writes in Federalist 55. But they rejected policies that ignore human vice.

[8] *The Federalist* No. 78 (Alexander Hamilton).

[9] *The Federalist* No. 6 (Alexander Hamilton).

of government are necessary because governments consist of human beings.

Madison also made this point in *Federalist* 51. He wrote that the need for restraints "to control the abuses of government" is "a reflection on human nature."[10] Government itself, Madison stated, is "the greatest of all reflections on human nature":

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[11]

The Founders thus understood government's existence as proof that human beings are not angels and that human beings need a system to counteract human corruption.

The Founders drew on well-known sources for this conclusion. Sir William Blackstone, for example, espoused the Founders' philosophy. He considered government necessary because of human nature. In his classic work, *Commentaries on the Laws of England*, he described the reason for government. He wrote that government exists because of human "weakness and imperfection."[12]

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[10] *The Federalist* No. 51 (James Madison).

[11] *Id.*

[12] 1 William Blackstone, *Commentaries* *47.

In *Common Sense*, Thomas Paine similarly detailed the Founders' philosophy of government and human nature that shaped the Constitution. He wrote that government exists because of "our wickedness," and it is necessary to "restrain[] our vices."[13] Like Madison, Paine reasoned that government is unnecessary otherwise. Government, "like dress, is the badge of lost innocence." If conscience were "clear, uniform, and irresistibly obeyed, man would need no other lawgiver." But government is necessary because that is not the case.[14]

Thus, because humans are not angels, government is necessary. But because humans are not angels, the Founders considered government dangerous. Based on these premises, John Adams captured the Founders' conclusion: "There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty."[15] Government offers fallible human beings great power. The Founders therefore concluded that people must limit and restrain government. As Blackstone expressed, less government is less dangerous.[16]

Presuming government good faith—in the face of strong, contrary incentives—conflicts with the Consti-

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[13] Thomas Paine, *Common Sense* (1776), *reprinted in* 1 *The Writings of Thomas Paine* 67, 69 (Moncure Daniel Conway ed., New York, G.P. Putnam's Sons 1894).

[14] *Id.*

[15] John Adams, Notes for an Oration at Braintree (1772), *in* 2 *The Adams Papers, Diary and Autobiography of John Adams* 56–61 (L. H. Butterfield. et al. eds., 1961).

[16] 1 William Blackstone, *Commentaries* *127 n.8.

tution's tacit philosophy of human nature. The Founders warned that people should not trust individuals in power.

2. The Ninth Circuit's presumption of government good faith reverses the Founders' verdict rejecting systems that fail to counteract human nature and vindicate individual liberties. The Founders resisted "Utopian speculations" and other philosophies that assume human beings are angels and can achieve heaven on earth.[17] The Founders recognized human virtue. But they failed to accept solutions that ignore human vice. The Founders thus opposed dictatorship and pure democracy because neither mitigates human fallibility or limits power's corrupting sway.

Thomas Hobbes shared some of the Founders' presuppositions about human nature. But he argued that totalitarianism—absolute government—is the solution. Hobbes theorized that life in the state of nature—human beings' natural state without government—would be unlivable. Each person would have an equal claim to everything in the world. Thus, the state of nature would lead to a "war of every man against every man."[18] He famously described life in the state of nature as "solitary, poor, nasty, brutish, and short."[19]

But the Founders rejected Hobbes's solution. They did not accept that surrendering absolute power to people who would make the state of nature unlivable

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[17] *The Federalist* No. 6 (Alexander Hamilton).

[18] Thomas Hobbes, *Leviathan* 64 (London, George Routledge and Sons 1889) (1651).

[19] *Id.* at 65.

solves the problem. They instead posited that the fundamental problem is that human beings are selfish and corrupt. Surrendering absolute power to the government therefore does not solve the problem—it aggravates it. Thus, Paine wrote in *Common Sense* that "government, even in its best state, is but a necessary evil; in its worst state an intolerable one."[20] Lord Acton summarized the Founders' understanding of human beings and power: "Power tends to corrupt and absolute power corrupts absolutely."[21]

Even if humans were not corrupt, the Founders thought that it was unwise to presume government good faith. Although some officials might act prudently in good faith, Madison countered that "[e]nlightened statesmen will not always be at the helm."[22] Blackstone likewise argued that relying on government officials' integrity is foolish. Even a perfect dictator is flawed because there is no guarantee that successors will share his virtues. The best government is limited and restrained: "[it] has no power to do wrong, yet all the prerogatives to do good."[23] The Founders sought to maximize human virtue and minimize human vice.

The Founders also rejected pure democracy as a solution to protect individual liberty because it ignores

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[20] Thomas Paine, *Common Sense* (1776), *reprinted in* 1 *The Writings of Thomas Paine* 67, 69 (Moncure Daniel Conway ed., New York, G.P. Putnam's Sons 1894).

[21] Letter from Lord Acton to Archbishop Creighton (April 5, 1887), https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence.

[22] *The Federalist* No. 10 (James Madison).

[23] 1 William Blackstone, *Commentaries* *126 n.5.

human nature.[24] In Plato's Republic, he argued that democracy leads to tyranny.[25] He thought that democracy is unstable and invites tyrants to seize power. The Founders readily agreed. Pure democracies unleash majoritarian passions that often overwhelm reason. When a group becomes a crowd, Madison observed, "passion never fails to wrest the scepter from reason."[26] Thus, unaided democracy induces mob rule, and it lacks the necessary safeguards to protect liberty and thwart imprudence. The majority can legally tyrannize the minority.

Alexander Hamilton observed that "ancient democracies . . . never possessed one feature of good government."[27] Athens, for example, destroyed itself. Demagogues often manipulated Athens's democracy and fatally incited war with Sparta.[28] After starting the war, Athens refused initial Spartan peace offers and broke a peace treaty, which had stopped the war, ending in Athens's demise. Madison noted that democracies have been "short in their lives" and "violent in their deaths."[29] The Founders thus concluded that governments often do not act in good faith or for the

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[24] *The Federalist* No. 10 (James Madison) (Democracies "have ever been found incompatible with personal security, or the rights of property").

[25] Plato, *Republic* 262 (C.D.C. Reeve ed., Hackett Publ'g Co. 2004) (360 BC).

[26] *The Federalist* No. 55 (James Madison).

[27] Alexander Hamilton, Speech at New York Ratifying Convention (1788), *in* 2 *The Works of Alexander Hamilton* 426, 440 (John C. Hamilton ed., New York, John F. Trow 1850).

[28] *The Federalist* No. 6 (Alexander Hamilton).

[29] *The Federalist* No. 10 (James Madison).

best interests of their people. Government requires checks and balances.

Democracy fails, according to Madison, because it has "no cure for the mischiefs of factions" and vice caused by human nature.[30] The Founders did not believe that some voters caused democracies to fail—and that better voters would have caused them to succeed. Madison stated that even if "every Athenian citizen [had] been a Socrates, every Athenian assembly would still have been a mob."[31] Because he explained that the cause is "sown in the nature of man."[32] The flaw in pure democracy and dictatorship is the same: human fallibility. The cause "cannot be removed."[33] Madison stated that we can only "control[] its effects."[34] The Founders therefore rejected policies that presume government good faith. Government deference reverses the Constitution's essential framework.

3. The Ninth Circuit's presumption of government good faith conflicts with the Constitution's purpose. The Founders enacted a written Constitution to limit and restrain the government. The Founding generation deeply understood the need to restrain government after fighting a war for independence because of government tyranny. "In questions of power," Thomas Jefferson reasoned, "let no more be heard of confidence in man, but bind him down from mischief by the

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[30] *Id.*

[31] *The Federalist* No. 55 (James Madison).

[32] *The Federalist* No. 10 (James Madison).

[33] *Id.*

[34] *Id.*

chains of the Constitution."[35] The Founders championed government restraints through constitutional checks and balances. Chief Justice John Marshall explained that peoples' security from government misconduct depends on "the imposition of adequate constitutional restrictions."[36]

The primary purpose of a *written* constitution, according to Chief Justice Marshall, is to limit government power.[37] In *Marbury v. Madison*, he argued that the judiciary is an important vehicle to enforce those limits. If officials can simply ignore constitutional limitations, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."[38] A nation's written constitution is its fundamental law "and consequently the theory of every such government must be, that an act . . . repugnant to the constitution, is void. This theory is essentially attached to a written constitution and is consequently to be considered . . . as one of the fundamental principles of our society."[39]

The Constitution restricts the federal government by carefully outlining its power and role. It grants legislative power to Congress, executive power to a president, and judicial power to the Supreme Court and

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[35] Thomas Jefferson, Draft of Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540, 543 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1876).

[36] *Fletcher v. Peck*, 10 U.S. 87, 144 (1810).

[37] *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803).

[38] *Id.* at 177.

[39] *Id.*

other inferior courts that Congress establishes.[40] And it carefully grants specific legislative, executive, and judicial powers. The sole reason that it precisely grants powers—and excludes others—is to limit the government. Absolute rulers do not need a written constitution to grant or regulate their power. Thus, the Constitution exists—instead of nothing—to limit and restrict the government. It is meaningless otherwise.

Yet many in the Founding generation were not satisfied with the Constitution at the beginning. Even though the federal government only possessed powers that the Constitution granted and necessarily implied, many still feared that the government would invade their fundamental rights. Patrick Henry, for example, expressed the need to limit and restrict the government: "I dread the depravity of human nature. I wish to guard against it by proper checks, and trust nothing to accident or chance. I will never depend on so slender a protection as the possibility of being represented by virtuous men."[41] But he opposed the Constitution without amendments to restrict the government.

The Federalists, on the other hand, argued that amendments were redundant and unnecessary since the Constitution did not give the federal government power to violate fundamental rights. But because of the Founding generation's distrust of government and

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[40] *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 67 (2015).

[41] Patrick Henry, Speech at the Virginia Convention (June 12, 1788), *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 313, 327 (Jonathan Elliot ed., 2d ed., Washington, Taylor & Maury 1854).

view of human nature, the Founders added the Bill of Rights to the Constitution. The Bill of Rights prohibits the federal government from interfering with matters that—from the Founders' viewpoint—the federal government has no power to regulate. The Tenth Amendment doubly clarifies that the federal government does not possess powers that the Constitution does not grant or necessarily imply.

The Fourteenth Amendment likewise limits the power of state governments. Because many states failed to fulfill the Founders' promise of liberty in the Declaration of Independence, the United States added the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The presumption of good faith was again not enough to protect liberty. The Fourteenth Amendment critically prohibits states from violating individuals' fundamental rights, and it created an enforcement mechanism to enact legislation to prevent state tyranny.

The Ninth Circuit's presumption of government good faith in a First Amendment case is antithetical to the Constitution's purpose—enshrined in the Fourteenth Amendment—to limit and restrict state government. Mootness doctrine must cohere with the Constitution's fundamental and foundational principles. The lower court's interpretation of the voluntary cessation exception to mootness does not. The presumption of good faith protects government from liability and prevents individuals from obtaining judicial review to protect their fundamental rights.

B. The Ninth Circuit's presumption of government good faith undermines the Constitution's separation of powers because it consolidates government power against individuals and blocks relief for individuals provided by Congress.

1. The Ninth Circuit's presumption of government good faith undercuts the Constitution's separation of powers. It allies the federal judiciary with other federal branches and state governments against individuals struggling to protect their fundamental rights.

In a letter to James Madison, Thomas Jefferson defined the separation of powers as "the spirit of the Constitution."[42] Washington similarly cited the separation of powers as the Constitution's chief attribute and evidence of political science's progress. He wrote that the Constitution provides "more checks and barriers against the introduction of tyranny" than any government had in history.[43]

The Founders believed that separating power among the branches of the federal government and dividing power between the federal government and states would prevent tyranny and oppression. Neither the states nor federal government branches could, ac-

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[42] B.L. Rayner, *Sketches of the Life, Writings, and Opinions of Thomas Jefferson* 369 (New York, A. Francis & W. Boardman 1832).

[43] Letter from George Washington to Marquis de LaFayette (February 7, 1788), *in* 9 *The Writings of George Washington* 316, 318 (Jared Sparks ed., Boston, Russell, Odiorne & Metcalf, Hilliard, Gray & Co. 1835).

cording to Madison, "transcend their legal limits without being effectually checked and restrained by the others."[44]

Madison explained that the Constitution gives officials in each branch the "means and personal motives to resist encroachments of the others."[45] The Founders thought that self-interested officials would pursue their own interests and thus prevent other officials from expanding their powers. The Constitution—based on its philosophy of human nature—uses ambition "to counteract ambition."[46]

The Founders also believed that consolidated power ends in tyranny. In his Farewell Address, Washington warned that the "love of power, and proneness to abuse it, which predominates in the human heart" will consolidate the powers of government and produce "despotism."[47] He therefore urged government officials to "confine themselves within their respective Constitutional spheres."[48]

The constitutional separation of powers doctrine fails in practice when federal branches and state governments work together to undermine individuals' fundamental rights. Thus, courts should not presume that other federal branches and state governments act in good faith when they voluntarily cease conduct that infringes fundamental rights.

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[44] *The Federalist* No. 48 (James Madison).

[45] *The Federalist* No. 51 (James Madison).

[46] *Id.*

[47] George Washington, Farewell Address (September 17, 1796), *in* 12 *The Writings of George Washington* 214, 226 (Jared Sparks ed., Boston, Am. Stationers' Co. 1837).

[48] *Id.*

2. The Ninth Circuit's rule creates a government alliance that favors government officials over private individuals. The Constitution created a federal judiciary with independent power to protect individuals' fundamental rights and check government officials. The lower court's rule, however, establishes special, judicially asserted defenses for government officials that tilt the scales of justice. To obtain relief, private individuals must litigate against the government and disprove the judicial presumption of government good faith. In circuits that follow the lower court's approach, government officials can presumptively escape liability and strategically evade judicial review. The rule creates an uphill battle for private individuals. The government benefits at injured individuals' expense.

3. The Ninth Circuit's presumption of government good faith also undercuts relief Congress provided. After the American people amended the Constitution to add the Fourteenth Amendment, Congress passed Section 1983. In so doing, it provided a vehicle to remedy government violations of individuals' civil and constitutional rights. Congress provided nominal damages as a remedy.[49] Congress included nominal damages—maintaining the common law tradition—to vindicate individuals' rights when other remedies do not exist. The lower court's presumption of government good faith strips plaintiffs of that remedy under the guise of judicial restraint.

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[49] 42 U.S.C. § 1983 (including "actions at law," which encompasses the nominal-damages claims available at common law).

CONCLUSION

Because the Ninth Circuit's decision conflicts with the Constitution's foundational principles and undermines its separation of powers—thus creating an important and reoccurring question of federal constitutional law—the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 23, 2020.