No. _____

IN THE

Supreme Court of the United States

ROBERT ROSEBROCK,

Petitioner,

—v.—

BARTON HOFFMAN, ACTING POLICE CHIEF FOR THE VA OF GREATER LOS ANGELES, and STEVEN BAUM, ACTING DIRECTOR FOR THE VA OF GREATER LOS ANGELES, in their official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William B. Rubenstein
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7320

Peter J. Eliasberg
Counsel of Record
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 W. 8th Street
Los Angeles, CA 90017
(213) 977-5228
peliasberg@aclusocal.org

Attorneys for Petitioner

QUESTIONS PRESENTED

In *United States v. W.T. Grant*, 345 U.S. 629 (1953), and subsequent cases, this Court ruled that a defendant alleging that a case has become moot because it has voluntarily ceased its challenged activities shoulders the "heavy burden" of demonstrating that it is "absolutely clear" that the offending behavior is not reasonably likely to recur. *See, e.g.*, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *W.T. Grant*, 345 U.S. at 632-33. In this case, Petitioner alleged that Respondents had engaged in impermissible viewpoint discrimination under the First Amendment by permitting him to hang an American flag union side up on the perimeter fence of government property for more than a year, but barring him from doing so on multiple occasions when he hung it union side down. He sought two forms of injunctive relief: an order prohibiting future viewpoint discrimination (the prohibitory injunction), and an injunction requiring Respondents to permit him to hang the American flag union down for the period they had barred him from doing so (the reparative injunction). Months after Petitioner filed this lawsuit, Respondents' employee sent an internal e-mail announcing that they would no longer permit anything to be hung on the perimeter fence. Deepening a circuit split over the application of *W.T. Grant* to government defendants, the Ninth Circuit relied heavily on a "presumption of good faith" it afforded the government to conclude that the e-mail was sufficient to moot not only the prohibitory injunction, but also the reparative injunction.

Accordingly, the questions presented are:

1. Whether government defendants are subject to the same heavy burden of persuasion as all other defendants when they contend that a claim for injunctive relief is moot based on voluntary cessation – which is the rule the First, Eighth, and District of Columbia Circuits utilize – or whether government defendants are entitled to a presumption of good faith that effectively shifts the burden of persuasion on the mootness question to plaintiffs – as eight other circuits have held, including the Ninth Circuit in this case.

2. Whether a request for injunctive relief that would require a defendant to permit a plaintiff to engage in expressive activity that was previously barred in violation of the First Amendment is mooted by the closure of the forum, as the Ninth Circuit concluded, or is a form of available relief and thus not moot, as the Seventh Circuit has held?

PARTIES TO THE PROCEEDING

The Petitioner is Robert Rosebrock. The Defendants-Appellees in the proceedings below were sued in their official capacities only. The Respondents before this Court are Barton Hoffman, Acting Police Chief for the Veterans Administration of Greater Los Angeles, and Steven Baum, Acting Director for the Veterans Administration of Greater Los Angeles.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-28a) is reported at 745 F.3d 963. The district court's opinion on the cross-motions for summary judgment (App. 29a-70a) is reported at 788 F.Supp.2d 1187. The district court's judgment (App. 74a-75a) is unreported. The Ninth Circuit's order denying the petition for rehearing and rehearing *en banc* (App. 72a-73a) is unreported. The Ninth Circuit's order denying Petitioner's request to supplement the record (App. 71a) is unreported.

JURISDICTION

The Ninth Circuit entered its order denying the timely petition for rehearing and rehearing *en banc* on October 17, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides that the federal judicial power is limited to "Cases . . . [and] Controversies."

38 C.F.R. § 1.218(a)(9) states in pertinent part: "The . . . displaying of placards or posting of materials on bulletin boards or elsewhere on [Veteran's Administration] property is prohibited, except as authorized by the head of the facility or designee or when such distributions or displays are conducted as part of authorized Government activities."

INTRODUCTION

The federal courts have jurisdiction over cases and controversies. U.S. Const. art. III, § 2. In cases in which a plaintiff is seeking injunctive or declaratory relief, a defendant maintains the possibility of rendering a case moot by alleging that it has ceased engaging in the challenged activity. Rightly suspicious of the possibility that a litigant could make such a claim and then re-engage in the challenged activity shortly thereafter, this Court – more than half a century ago – adopted the so-called "voluntary cessation" rule. *See United States v. W.T. Grant*, 345 U.S. 629 (1953). Applying this rule, the Court has long held that a party alleging mootness on the basis of voluntary cessation shoulders the "heavy burden" of demonstrating that it is "absolutely clear" that the offending behavior is not reasonably likely to recur. *Friends of the Earth Inc. v. Laidlaw Env'tl. Servs Inc.*, 528 U.S. 167, 189 (2000). During the past 62 years, the Court has regularly applied this rule and never once altered it. *See, e.g., Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *Adarand Constructors v. Slater,* 528 U.S. 216, 222 (2000); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 289 n.10 (1982); *United States v. Concentrated Phosphate Export Ass'n.,* 393 U.S. 199, 203 (1968); *see also Already, LLC v. Nike, Inc.,* 133 S. Ct. 721, 727 (2013) (describing burden on party asserting mootness as "formidable"). Not once in more than 60 years of jurisprudence has this Court ever suggested that the voluntary cessation rule applies differently in cases involving government, as opposed to private, defendants.

In direct contradiction of this Court's consistent approach to voluntary cessation cases, eight federal courts of appeal – including the Ninth Circuit in this case – have created a jurisprudence that releases government defendants from the strictures of the heavy voluntary cessation burden. Specifically, these circuits presume government policy changes are made in good faith (or apply similar standards), thereby effectively shifting the burden to the plaintiff to show that recurrent wrongful behavior is likely to recur. In other words, these circuits approach voluntary cessation arguments by government officials in precisely the opposite manner that this Court's long-standing precedents mandate. By contrast, three circuits require all defendants, including government defendants, to satisfy the "heavy burden" with no presumption in their favor, while two circuits – explicitly noting the conflict in these two approaches – have declined to select an approach.

This inconsistency among circuits – and plain departure from this Court's precedent – has significant legal and practical import. It has created different outcomes in similar cases involving changes in policies or practices – as opposed to legislative amendments or repeals. Most importantly, though, the lower courts' deviation from this Court's precedent subverts the important policies served by the voluntary cessation doctrine. It enables government entities to evade review of a challenged practice or policy by temporarily ceasing wrongful conduct pursuant to informal administrative acts (here, merely sending one internal email) and thereby permits minor government officials to unilaterally divest the federal courts of Article III jurisdiction.

Claims of voluntary cessation mootness by local, state, and federal government officials arise with great regularity. The direct rejection of this Court's precedents, confusion among the lower courts, and the severe policy consequences generated by the deviation from this Court's long-standing precedents demand review.

STATEMENT OF THE CASE

1. The Facts. Petitioner, Robert Rosebrock, is a 72 year-old Vietnam veteran. App. 32a. Age has dissipated neither his fervent belief in the First Amendment right to freedom of speech nor enduring commitment to other veterans, particularly those who are homeless. App. 32a. This suit arises out of his First Amendment activity in support of veterans, and in opposition to the Department of Veterans' Affairs' ("VA") use of land for purposes unrelated to the care and shelter of veterans. App. 32a. Specifically, every Sunday since March 2008, he and other veterans have protested in front of a health care facility operated by the VA of Greater Los Angeles ("VAGLA"). App. 32a. The facility is surrounded by an expansive grass lawn that is enclosed by a perimeter fence. App. 32a. Petitioner selected that site because VAGLA uses it for a wide-variety of purposes unrelated to helping or housing struggling veterans. App. 32a. For example, VAGLA leases portions of the land to a private school, an entertainment company, and a soccer club.[1]

[1] In *Valentini v. Shinsecki*, the district court entered a judgment declaring that contracts between the VA and numerous commercial and other entities to use portions of the VAGLA property that Mr. Rosebrock has been protesting about were illegal and void. Judgment at 2-3, *Valentini v. Shinsecki*, No. 11-CV-0484 6, (C.D. Cal. Aug. 29, 2013), Document 142.

Petitioner believes that the area should be used to house homeless veterans because it was deeded to the U.S. for use as a veterans home in 1888. App. 32a; Excerpts of Record at 80-81, *Rosebrock v. Mathis*, No. 11-56256 (9th Cir. Jan. 29, 2013), Dkt. Entry 33.

Every Sunday for 66 weeks, Rosebrock hung one, and sometimes as many as 30, American flags on the perimeter fence during the Sunday demonstrations. App. 10a, 33a-35a. Petitioner testified that while he disagreed with VAGLA's use of the property, he hung the American flag during the demonstrations to express the protesting veterans' patriotism and support for the Nation's armed forces and veterans. App 33a. He specifically positioned his flag with the "union" – that is, the section encompassing fifty white stars in a blue field – in its typical, upward position. App. 33a. The VA never interfered with Petitioner's posting of the flag on its fence union up. App. 34a. In addition, a VAGLA police officer explicitly gave Petitioner permission to hang the American flag on the fence on two occasions after being told to do so by a VAGLA senior manager. App. 33a. And, after the officer notified the VAGLA Chief of Police that he had informed Rosebrock that he could hang the American flag on the perimeter fence, the Chief did nothing to countermand the officer's directions. Excerpts of Record, *supra*, at 172-174.

In June 2009, Petitioner viewed a "celebrity carnival" on the VAGLA lawn; immediately thereafter, he began hanging his flag on the fence with the union facing down. App. 35a, Excerpts of Record, *supra* at 82-83. Doing so is a "signal of dire distress in instances of extreme danger to life or

property." 4 U.S.C. § 8(a). Mr. Rosebrock altered his display of the American flag to sharpen his message and to convey that VAGLA's use of the land was placing the property, and the area's many homeless veterans, in danger. App. 35a, Excerpts of Record, *supra,* at 82-83.

As soon as Mr. Rosebrock altered the message the flag conveyed by hanging it union down, Respondents' agents began a pattern and practice of interfering with his display of the flag, which the district court subsequently held was illegal viewpoint discrimination. App. 8a-9a, 13a,. *First*, a VAGLA police officer ordered Petitioner either to display his flag union up or to remove it from the fence. App. 8a. *Second*, VAGLA's Associate Director sent Petitioner an email informing him that he could "'not attach the American flag upside down, anywhere on VA property including the perimeter gates, and that doing so 'is considered a desecration of the flag and is not allowed on VA property.'" App. 8a, 35a-36a. *Third*, over the next several months, VAGLA police issued six criminal citations to Petitioner, App. 9a, 36a-37a, for violating 38 C.F.R. § 1.218(a)(9), which provides that the "displaying of placards or posting of materials on bulletin boards or elsewhere on [VA] property is prohibited, *except as authorized by the head of the facility or designee*." (emphasis added). That regulation contains no standards that restrict the VA's exercise of discretion as to what displays to permit or forbid. *See* 38 C.F.R. § 1.218.

After the sixth citation, Petitioner stopped hanging his flag on the fence. App. 10a, 37a Four months later, he hung his flag union up on the fence in plain view of VAGLA police officers for approximately three hours during his weekly Sunday

protest. App. 10a, 37a. There was no interference from any VAGLA personnel. App. 10a, 37a. However, a week later, Petitioner hung his flag union down, and VAGLA police immediately demanded its removal. App. 10a, 37a. After Petitioner refused, VAGLA police took it down themselves. App. 10a, 37a.

2. The District Court Proceedings. In March 2010, Rosebrock filed this suit in the United States District Court for the Central District of California, against the VAGLA Director and Chief of Police in their official capacities,[2] alleging that VAGLA had engaged in viewpoint discrimination in violation of the First Amendment. App. 11a, 38a. Specifically, Petitioner alleged that Respondents violated his First Amendment rights when they or their employees permitted him to display an American flag union up but not union down. App. 12a-13a., 44a. The district court agreed, and, on cross-motions for summary judgment, granted Mr. Rosebrock's motion on holding that Respondents had engaged in viewpoint discrimination and entered a declaratory judgment in his favor. App. 12a-13a, 52a-58a, 70a.

Petitioner also sought two types of injunctive relief: an order enjoining Respondents from future viewpoint discrimination (the "prohibitory injunction") and an order requiring Respondent to allow Petitioner to hang an American flag union down on the fence for the same amount of time as Respondents had denied him the opportunity to do so

---

[2] The named defendants in the district court were Donna Beiter, formerly VAGLA's Director, and Ronald Mathis, formerly VAGLA's Chief of Police. They were sued in their official capacities only, and are thus not Respondents in this Court. *See* Fed. R. Civ. P. 25(d).

(the "reparative injunction"). App. 12a-13a.[3]

Respondents asserted that both forms of injunctive relief were moot because VAGLA's Associate Director sent VAGLA's police department an email in June 2010 – months after Rosebrock filed this lawsuit – requesting that 38 C.F.R. § 1.218(a)(9) be enforced "precisely and consistently," and that *all* displays on VA property be prohibited. App. 14a, 59a.[4] The district court agreed, holding "that the [respondent's] voluntary cessation of its inconsistent enforcement of § 1.218(a)(9) mooted the request for injunctive relief." App. 14a.[5]

3. Recurrent Illegal Conduct by Respondent After Dismissal for Voluntary Cessation. Petitioner timely appealed the denial of his two requests for injunctive relief to the Ninth Circuit on July 25, 2011. App. 13a. In January 2012, he moved to supplement the appellate record with evidence showing that, after the district court entered its judgment denying injunctive relief as moot based on

---

[3] Petitioner did not seek any monetary damages, only declaratory and injunctive relief.

[4] The email specifically stated:

> Please ensure that VA Regulation 38 C.F.R. 1.218 is enforced precisely and consistently. As we discussed, this means NO outside pamphlets, handbills, flyers, flags or banners or other similar materials may be posted anywhere on VA property (including the outside fence/gates). This includes any flags displayed in any position.

App. 11a-12a.

[5] Respondents did not assert in the district court that Mr. Rosebrock's claim for declaratory relief was moot, (App. 59a), and they did not appeal the entry of a declaratory judgment in his favor. App. 13a-14a.

the June 2010 email, Respondents had failed to comply with the email's terms. Appellant's Motion to Supplement Record on Appeal at 2-3, *Rosebrock v. Mathis*, No. 10-56256, (9th Cir. Jan. 18, 2012) Dkt. Entry 9-1. Specifically, Petitioner asserted that in November 2011, protesting Iraq War veterans were permitted to display a sign on the perimeter fence, *id.* at 3, 5-7, and Petitioner provided a photograph supporting that contention. *Id.* at 9. Although Petitioner explained that the evidence was relevant to the judgment that the claims for injunctive relief were mooted by the June 2010 email, the Ninth Circuit denied his motion without any explanation. App. 71a.

4. The Ninth Circuit Panel Majority. The Ninth Circuit affirmed the district court's denial of both the prohibitory and reparative injunction. App. 22a. The panel majority began its analysis by recognizing that this Court's decision in *Friends of the Earth,* 528 U.S. at 189, establishes that a party asserting mootness based on voluntary cessation must satisfy the "heavy burden" or "stringent standard," of proving that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." App. 15a. Yet, notwithstanding this burden, the majority approached the mootness question by "presume[ing] that a government entity is acting in good faith when it changes its policy." App. 15a. (citing *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010)).

The majority's analysis then proceeded in two parts. *First*, the majority characterized the government's actions in the case as re-committing to a pre-existing policy, rather than changing a policy, and concluded that its "confidence in the

Government's voluntary cessation is at an apex in this context." App. 18a-19a. *Second*, the majority considered five factors that it said were relevant under pre-existing Ninth Circuit precedent for determining whether a voluntary cessation, not reflected in statutory or regulatory changes, renders a case moot; it concluded that all five factors were met. App. 17a, 19a-21a.

Summarizing its holding, the Ninth Circuit wrote:

> We recognize that there are no procedural safeguards in place preventing VAGLA from changing course, a factor that countenances against mootness. But there is little reason to doubt VAGLA's recommitment to a preexisting policy in favor of consistently enforcing a longstanding regulation. Moreover, in light of the presumption that the Government acts in good faith, we have previously found the heavy burden of demonstrating mootness to be satisfied in "policy change" cases without even discussing procedural safeguards or the ease of changing course.
>
> In the end, we hold that the VA has satisfied its heavy burden of demonstrating mootness. We presume that the Government acts in good faith, and that presumption is especially strong here, where the Government is merely recommitting to consistent enforcement of one of its own longstanding regulations. In light of

> this and the other considerations outlined above, we do not think it reasonably likely that the objectionable conduct will recur.

App. 21a (internal citations omitted).

5. The Dissent. Judge Rawlinson disagreed with "the majority's conclusion that Mr. Rosebrock's First Amendment claim for injunctive relief ha[d] been rendered moot by an email 'instructing' the [VAGLA] police 'to consistently enforce' the regulation [§ 1.218(a)(9)] governing the posting of materials." App. 22a.

According to Judge Rawlinson, to satisfy the heavy burden of showing that wrongful behavior will not recur, the government must clearly establish a permanent change. App. 22a-23a. As an example, she explained that the government satisfied its heavy burden of showing voluntary cessation in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) because a "formal memorandum (not e-mail) changing the policy was issued by the Assistant Secretary for the Department of Housing and Urban Development." App. 27a. She also highlighted that "the policy change [at issue in *White*] protected First Amendment rights," and "was publicized in the media." App. 27a (citing *White*, 227 F.3d at 1243).

By contrast, she concluded that the Respondents had failed to satisfy their heavy burden in this case because the cessation occurred pursuant to an email rather than a formal memorandum, was from a local official not, as in *White*, a high-ranking executive branch official, and had the effect of "squelch[ing] the exercise of First Amendment activity, not protecting it, as was the case in *White*.

App. 27a. She concluded by stating that "[i]t is beyond dispute that this Vietnam-era veteran has earned the right to exercise the full panoply of First Amendment protections available in this country. We should not whisk away those rights with the flick of a pen." App. 28a.

6. Rosebrock's Petition for Panel Rehearing and Rehearing *En Banc*. On April 28, 2014, Rosebrock requested rehearing by the panel or rehearing *en banc* by the Ninth Circuit. Petition for Panel Rehearing and Rehearing *En Banc*, *Rosebrock v. Mathis*, No. 11-56256 (9th Cir. Apr. 28, 2014), Dkt. Entry 41-1. He explained that the panel majority's decision conflicted with decisions from this Court, other Ninth Circuit decisions, and decisions from other federal courts of appeals. The panel majority voted to deny rehearing, and Judge Rawlinson voted to grant it. App. 72a. The full Ninth Circuit was advised of Rosebrock's request for *en banc* rehearing. App. 73a. One judge requested a vote on the matter, but the request did not receive a majority of votes from non-recused active judges. App. 73a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEP AND ENTRENCHED CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER APPLICATION OF THIS COURT'S VOLUNTARY CESSATION DOCTRINE TO GOVERNMENT DEFENDANTS.

A. This Court has, for more than half a century, applied the same voluntary cessation rule to public and private defendants alike.

As noted above, the voluntary cessation rule is long-standing and serves a critical function. Once a plaintiff with standing brings a case challenging an ongoing pattern or practice in federal court and seeks injunctive relief, the defendant's activities are subject to review by that forum. If the defendant could walk into court, announce it had ceased engaging in the challenged activities and have the case declared moot on that basis, defendants would have near total power to divest the federal courts of jurisdiction in most every case seeking future relief. Worse, they could simply re-engage in the challenged activities the following day.

Guarding against this fundamental and obvious problem, this Court – more than half a century ago – adopted the so-called "voluntary cessation" rule. *See W.T. Grant*, 345 U.S. at 632-33. Specifically, the Court has held that a party alleging mootness on the basis of voluntary cessation shoulders the "heavy burden" of demonstrating that it is "absolutely clear" that the offending behavior is not reasonably likely to recur. *Friends of the Earth,* 528 U.S. at 189. In the past 62 years, the Court has

regularly applied this rule and never altered it. *See, e.g., Parents Involved*, 551 U.S. at 719; *Adarand,* 528 U.S at 222; *City of Mesquite*, 455 U.S. at 289 n.10; *Concentrated Phosphate Export Ass'n.,* 393 U.S. at, 203. *See also Nike,* 133 S. Ct. at 727 (describing burden on party asserting mootness as "formidable").

The Court has uniformly applied the "heavy" and "formidable" burden, without addition, subtraction, or qualification, in numerous cases in which the government asserted mootness based on its voluntary cessation of the challenged conduct, as well as when private parties did so. *Compare Parents Involved*, 551 U.S. at 719 (stating in case involving government defendant that "[v]oluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,'" and stating the burden to prove mootness is a "heavy" one that falls on the defendant); *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661 (1993) (same); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982) (same); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978) (same); *with Nike*, 133 S.Ct. at 727 (applying same rule when *private* defendant claimed case was moot); *Friends of the Earth*, 528 U.S. at 189 (same).

The only presumption this Court has ever adopted in voluntary cessation cases is a presumption *against* a party asserting mootness. *See Steel Co, v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998) ("[P]resumption" in voluntary cessation context refute[s] the assertion of mootness by a defendant who, when sued in a complaint that

alleges present or future injury, ceases the complained of activity.") (citing *W.T. Grant*, 345 U.S. at 632). *Cf. Adarand*, 528 U.S. at 221-22 (reversing holding of court of appeals that claim for injunctive relief against government defendant was moot because the court improperly placed the burden of showing likelihood of recurring improper conduct on the plaintiff). *See also* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. Rev. 1, 27 (1984) ("[W]here the defendant has suspended challenged conduct, the [Supreme] Court's mootness cases have instead established a powerful presumption favoring adjudication.").

This Court's rule that the burden of demonstrating mootness rests solely with the defendant also requires that courts not give any presumptions in the defendant's favor in determining whether a case has become moot. A presumption is nothing more than a form of burden shifting. *See Francis v. Franklin*, 471 U.S. 307, 315 (1985) (a presumption against the criminal defendant relieves the government of its affirmative burden of persuasion). Presumptions in favor of a party that has the sole burden of persuasion are impermissible. *See id.* at 315 (presumption against criminal defendant improper because it conflicts with the mandate that the burden of persuasion rests solely with the government). It is of no moment whether the Court treats the presumption as rebuttable or not. *See id.* at 317-18 (even where presumption is rebuttable, it still may not be utilized if it shifts the burden from the party that is supposed to bear it). The holding in *Franklin* rests on the Due Process requirement that the government bears the burden of persuasion to prove every element of a crime

beyond a reasonable doubt. *Id.* at 314. But, it also stands for the proposition that when one party bears the burden of persuasion – as this Court has consistently held the defendant does in the voluntary cessation context – then it is improper to shift the burden off that party by applying a presumption in its favor.

B. Many circuits, including the Ninth Circuit in this case, have adopted a different voluntary cessation doctrine for government defendants, in direct contravention of this Court's long-standing rule, while other circuits grant no presumption in favor of government defendants.

Despite this Court's consistent use of the same stringent voluntary cessation rule under which both public and private defendants bear the "heavy burden" of demonstrating mootness, a majority of circuits have rejected that uniformity and adopted tests that relieve *government* defendants, in particular, of the "heavy burden" of demonstrating that it is "absolutely clear" that the offending behavior is unlikely to recur. These deviations from Supreme Court precedent take several forms:

- The Eleventh Circuit has held that in evaluating claims of mootness based on voluntary cessation "when the defendant is not a private citizen but a government actor, 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) (citing *Coral Springs St. Sys., Inc. v. City of Sunrise*,

371 F.3d 1320, 1328-29 (11th Cir. 2004)) (emphasis in original).[6] *See also Doe v. Wooten*, 747 F.3d 1317, 1321 (11th Cir. 2014) (acknowledging both *Troiano* and that Eleventh Circuit treats government defendants differently from private defendants, but noting limitation on application of rebuttable presumption in favor of government defendants).

- The Third, Fifth, Ninth, and Federal Circuits have held that when the government says it has changed the alleged illegal conduct, that assurance is entitled to a "presumption of good faith." *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009*), aff'd on other grounds*, 131 S. Ct. 1651 (2011). *Accord Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (stating in voluntary cessation case that "[g]overnment officials are presumed to act in good faith") (citing *Bridge v. United States Parole Commission*, 981 F.2d 97, 106 (3d Cir. 1992)); *Rosebrock,* App. 15a (quoting *Am. Cargo*, 625 F.3d at 1180); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007).

[6] The Seventh Circuit cited this standard affirmatively in *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006), but as noted below, that Circuit generally appears to apply a slightly distinct approach.

- The Sixth and Seventh Circuits treat claims of voluntary cessation mootness by the government with "more solicitude" than claims by private defendants. *See Ammex, Inc. v. Cox,* 351 F.3d 697, 705 (6th Cir. 2003) ("[W]e noted that cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.") (internal quotations omitted); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (same). *See also Chicago United Indus. v. City of Chicago,* 445 F.3d 940, 947 (7th Cir. 2006) ("Comity, moreover—the respect or politesse that one government owes another, and thus that the federal government owes state and local governments—requires us to give some credence to the solemn undertakings of local officials.").
- Similarly, the Second Circuit has held that when the defendant is a government entity, "[s]ome deference must be accorded to a [legislative body's] representations that certain conduct has been discontinued." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992); *accord Holland v. Goord,* 758 F.3d 215, 224 (2d Cir. 2013); *Clear Channel Outdoor, Inc. v. City of New York,* 594 F.3d 94, 111 (2nd Cir.

2010).[7]

In each of these formulations, the circuits have rejected this Court's precedents by relieving the defendant of the "heavy burden" placed upon it by the voluntary cessation doctrine. *See, e.g., Troiano*, 382 F.3d at 1283 (when government states it has ceased challenged conduct burden shifts to plaintiff to show it will recur); *DeMos*s, 636 F.3d at 149-50 (once the government announces that it has changed a policy, the court presumes the government is not engaged in mere litigation posturing. And, unless plaintiff provides evidence to the contrary, the statement by the governmental defendant is sufficient to moot plaintiff's claim for injunctive relief).

The Seventh Circuit has explicitly acknowledged its rejection of this Court's precedent when addressing cases involving government

---

[7] *But see N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 185 (2d Cir. 2005) (rejecting government claim of mootness and stating "[w]e are unpersuaded that the EPA and the [New York Dept. of Environmental Control] on the basis of the voluntary agreement reached here, would not in the future sidestep the mandated Title V permit objection procedures."); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) (rejecting claim of mootness by governmental defendant without according any deference to the government).

The First Circuit, in one case, approached the Second Circuit's rule by stating that it gave "some weight" to the fact that the defendants were "high-ranking federal officials." *Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 56 (1st Cir. 2013). However, as described below, in so holding, the First Circuit explicitly declined "to join the line of cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application unless there is a clear declaration of intention to re-engage." *Id.* at n.10

defendants. *See Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) (noting the "general principle that a defendant's voluntarily cessation of challenged conduct will not render a case moot because the defendant remains 'free to return to his old ways'" and citing *W. T. Grant Co.*, 345 U.S. at 632-33, but stating that "this proposition is the appropriate standard for cases between private parties, but this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, 'when the defendants are public officials . . . we place greater stock in their acts of self correction, so long as they appear genuine.' *Magnuson v. City of Hickory Hill*s, 933 F.2d 562, 565 (7th Cir. 1991).").

By contrast, three other circuits continue to apply this Court's precedent faithfully. The District of Columbia Circuit places the burden of demonstrating mootness squarely on governmental defendants without any presumptions in their favor. *See United States DOJ Fed. Bureau of Prisons Fed. Corr. Complex Coleman v. Fed. Labor Rel. Auth.*, 737 F.3d 779, 783 (D.C. Cir. 2013) ("*Complex Coleman*") (quoting. *W.T. Grant, Co.,* 345 U.S. at 632)*; American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1006-07 (D.C. Cir. 1997) (quoting *W.T. Grant*, 345 U.S. at 632). Two other circuits, the First and the Eighth use the same approach. *See Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 56 & n.10 (1st Cir. 2013) (giving "some weight . . . to the fact that the defendants are high-ranking federal officials" but explicitly declining "to join the line of cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application

unless there is a clear declaration of intention to re-engage"); *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007) (stating in case involving governmental defendants: "The defendant faces a heavy burden of showing that 'the challenged conduct cannot reasonably be expected to start up again.' *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006), quoting *Friends of the Earth*, 528 U.S. at 189 . . . ."). *Conservation Law Found. v. Evans*, 360 F.3d 21, 25-27 (1st Cir. 2004) (stating the burden to demonstrate mootness rests with defendant and applying no presumption in favor of, or deference to, government defendant).

The final two Circuits (the Fourth and Tenth) have explicitly noted the conflict between the two approaches but have expressly declined to decide whether to adopt a standard in which government defendants are held to a lower burden of proof in the voluntary cessation context. *See Wall v. Wade*, 741 F.3d 492, 497-98 (4th Cir. 2014) (noting that the "defendants invite us to adopt an approach employed by several of our sister circuits, in which governmental defendants are held to a less demanding burden of proof than private defendants" but characterizing this as "a question which we expressly do not decide"); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010) ("We need not definitively opine here on what explicit measure – if any – of greater solicitude is due administrative agencies in the application of the voluntary cessation exception."). *See also Conference of Catholic Bishops*, 705 F.3d at 56 & n.10 (acknowledging split among circuits and declining to adopt public official exception).

C. The split in the circuits produces different results in similar cases.

The differences among the various voluntary cessation rules applied in the different circuits are not academic: They yield different results in similar cases, specifically those cases in which the government claims a case is moot because it has changed or stopped a challenged policy or practice, as opposed to repealing a challenged statute or ordinance.

A comparison of the decision in this case with a case from the D.C. Circuit involving similar facts is instructive. In *Complex Coleman*, 737 F.3d 779, the Federal Bureau of Prisons ("BOP") appealed an order of the Federal Labor Relations Authority requiring the BOP to negotiate with the prison guards union over union proposals relating to use of metal detectors in prisons. The union contended that the policy requiring all inmates to pass through the detectors created a bottleneck that threatened their members' safety. During the course of the litigation, BOP changed its policy from mandatory screenings to screenings "as needed," thereby eliminating the bottleneck safety issue. The BOP contended the change in its policy on use of metal detectors rendered the case moot. In assessing the BOP's voluntary cessation mootness claim, the D.C. Circuit did not give the government a "presumption of good faith," as the Ninth Circuit does. App. 15a, 21a. Nor did it hold that BOP's changed policy created a rebuttable presumption that required the union to demonstrate "that the objectionable behavior will *not* recur" as the Eleventh Circuit does. *Troiano*, 382 F.3d at 1283. It held that the government "must satisfy a heavy burden of demonstrating that "'there

is no reasonable expectation' that the alleged violation will recur.'" *Complex Coleman*, 737 F.3d at 783 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) quoting *W.T. Grant*, 345 U.S. at 633)). The court concluded that because the BOP retained discretion to decide how to utilize the metal detectors and because the BOP "can increase the number of inmates required to pass through the metal detectors, as it sees fit" (*id.* at 783), it had not satisfied its heavy burden to demonstrate mootness. *Id.*

As in the D.C. case, in this matter, Petitioner challenged the policy of a federal agency (VAGLA), here a viewpoint-based practice of allowing some displays and not others on its property. As in the D.C. case, in the midst of the litigation, the federal agency purported to change the challenged policy, here by virtue of an email from an agency official mandating consistent enforcement. As in the D.C. case, the federal agency here then contended that its change of policy rendered the case moot. Here, however, in assessing the federal agency's voluntary cessation claim, the Ninth Circuit deviated from this Court's precedent and the D.C. Circuit's approach of requiring that the government demonstrate that the alleged violation will not recur. Instead, the Ninth Circuit concluded that an e-mail distributed internally within VAGLA stating that police officers were not to permit any flags to be hung on the VA perimeter fence was entitled to a presumption of good faith. App. 15a. Relying heavily upon that presumption, the Ninth Court held Petitioner's claims for injunctive relief to be moot even though the e-mail was sent months after the lawsuit commenced; prior to the suit VA employees had permitted Mr. Rosebrock to hang the American Flag

union up every week for 66 consecutive weeks at the express direction of a VAGLA senior manager (App. 32a-33a.); the VA Police Chief had ratified the actions of a police officer who informed Mr. Rosebrock on two different occasions that he would be permitted to hang the American flag on the VA's perimeter fence during the many months he hung the flag on the fence union side up, Excerpts of Record, *supra*, at 172-174; and VAGLA personnel issued him six criminal citations and directed him to remove the flag on two other occasions when he displayed it union down. App. 9a, 37a.

Moreover, the VA retains *unfettered discretion* to permit postings on its fence under 38 C.F.R. § 1.218(a)(9). That regulation bars "displaying of placards or posting of materials on bulletin boards or elsewhere on [VA] property is prohibited, *except as authorized by the head of the facility or designee*." *Id.* (emphasis added). The regulation contains *no* standards that cabin the discretion VA officials have to permit or deny permission to display materials on VA property. *See* 38 C.F.R. § 1.218. Thus, the VAGLA can resume allowing Mr. Rosebrock, or others, to hang certain items on the fence "at any time, as it sees fit," just like the BOP in *Complex Coleman*. *See also American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1006 (D.C. Cir. 1997) (case challenging standard issued by agency not mooted by agency statement modifying application of standard because statement "could be withdrawn, it could be struck down by reviewing court, or it could be ignored by local EPA officials."). Indeed, the Ninth Circuit even acknowledged that "there are no procedural safeguards in place preventing VAGLA from changing course," and allowing officers to permit some displays on the fence but not others.

App. 21a. Nonetheless, the panel majority relied heavily on the presumption that the government is acting in good faith when it states it has changed the challenged conduct to conclude that Mr. Rosebrock's claim for an injunction barring the VA from future viewpoint discrimination was moot. App. 21a-22a.

Two cases involving prayers in prison provide a similar contrast. In *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007), plaintiffs sought injunctive relief against an Iowa prison program that required inmates to attend religious services and Bible study classes. After noting that the state legislature had terminated funding for the program, which had ended, defendants[8] argued that the case was moot because the plaintiffs had not shown "the potential recurrence of the unlawful action." *Id.* at 421. The Eight Circuit held the case not moot, stating that the defendants' argument "*misplace[d] the burden of showing the likelihood of recurrence.* 'The defendant faces a heavy burden of showing that the 'challenged conduct cannot reasonably be expected to start up again.'" *Id.* (emphasis added) (quoting, 451 F.3d at 503, quoting *Friends of the Earth,* 528 U.S. at 189).

The Fifth Circuit arrived at a different result in a case with almost identical facts, utilizing a different test from the one the Eighth Circuit applied. In *DeMoss v. Crain*, 636 F.3d 145 (5th Cir. 2011), plaintiff sought injunctive relief against a

[8] Defendants included the prison warden, officials from the state department of corrections, and Prison Fellowship Ministries, which the court treated as a state actor because it concluded it was acting jointly with the government in running the prison. *Prison Fellowship Ministries*, 509 F.3d at 422-

prison policy that barred certain inmates from attending religious services if they were confined to their cells for disciplinary reasons. Prior to the bench trial, defendant announced that it had abandoned the challenged policy. The Fifth Circuit held that defendant's announcement was sufficient to moot the challenge to the policy because the government was entitled to a presumption of good faith, and *plaintiff* had not introduced evidence that the announcement was "'a sham for continuing possibly unlawful conduct.'" *Id.* at 151 (quoting *Sossamon*, 560 F.3d at 325).

Thus, in the Fifth Circuit once the government announces it has changed its challenged policy the court will conclude a case is moot unless plaintiff bears the burden of introducing evidence that defendant intended to resume its challenged policy. In the *Prison Fellowship Ministries*, however, even though the defendants announced that the challenged program had been discontinued, the Eighth Circuit held that the case was not moot. 509 F.3d at 421. In so doing, that circuit implicitly rejected the approaches used in the Fifth, Ninth, and Eleventh Circuits, whereby once the defendant states a challenged program or policy is no longer in effect, it is up to plaintiff to show that it would be revived to prevent the claim for injunctive relief from being dismissed as moot. The Eighth Circuit also utilized a different approach from that employed in the Sixth and Seventh Circuits by not extending any special "solicitude" to the government defendant's claim that the case was moot because the challenged program was no longer operating. Nor did it impose a lesser burden on the government than it would impose on a private defendant who claimed the case was moot because it had stopped the practice the plaintiff

contended was illegal.

D. Giving a presumption in favor of the party claiming mootness undermines the important purposes that are served by this Court's long-standing and unwavering voluntary cessation rule.

This Court's long-standing, unwavering, and stringent voluntary cessation rule – one that makes no presumptions in favor of a party claiming mootness – serves a number of important goals. By contrast, the rebuttable presumption, the good faith presumption, the solicitude, and the deference tests all effectively shift the burden of proving mootness from the defendant to the plaintiff. By doing so, these tests create precisely the harm that the voluntary cessation doctrine is meant to guard against.

First, the traditional voluntary cessation rule prevents a defendant from having the case against it dismissed and then freely resuming the challenged conduct thereafter. This Court recently warned that absent this rigorous test, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Nike*, 133 S. Ct. at 727; *accord*, *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito J., dissenting); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1983); *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. at 203; *W.T. Grant*, 345 U.S. at 632.

A standard that weakens the voluntary cessation test for public defendants thus undermines

the Court's goal of "protect[ing] plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66-67 (1987) (quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)); *accord*, *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 (2001) (voluntary cessation "rule traces from principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."). Put simply, the voluntary cessation doctrine is a rule based on skepticism; within the context of skepticism, it is illogical to insert a presumption of good faith or deference.

Second, the traditional voluntary cessation rule protects against plaintiffs' and courts' investing substantial resources in a case only to see it dismissed based on little more than a defendant's promises of changed behavior. As this Court has stated – in a case involving a governmental defendant – litigants should not be put to such a risk:

> It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Adarand, 528 U.S. at 224. The traditional rule similarly protects the judiciary against wasteful expenditure of time and resources on cases that end up simply being dismissed. *See Friends of the Earth*,

520 U.S. at 190-92 ("[B]y the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.").

Third, the traditional rule furthers the public interest in having "the legality of the [challenged] practices settled." *W.T. Grant*, 345 U.S. at 632; *see also De Funis v. Odegaard*, 416 U.S. 312, 318 (1974). Explaining this important public interest, this Court has stated: "For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *W.T. Grant*, 345 U.S. at 632; *accord*, *City News & Novelty*, 531 U.S. at 284 (one purpose of the voluntary cessation rule is to prevent defendants from "evad[ing] judicial review.").

Fourth, the traditional rule perpetuates this Court's neutrality in determining federal jurisdiction. Petitioner is aware of no case in which this Court has held that the test for establishing whether there is a valid case or controversy varies according to the identity of the party. For example, a plaintiff invoking the jurisdiction of the federal courts bears the burden to establish standing by demonstrating injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court has never held that this requirement is relaxed when a government entity asserts that it has suffered an injury or that the injury-in-fact requirement under Article III is presumed satisfied when a government plaintiff alleges it has been injured unless the defendant demonstrates otherwise. *See generally Raines v. Byrd*, 521 U.S. 811 (1997).

Fifth, and perhaps most importantly, the traditional rule balances important interests concerning the separation of powers between the courts and other branches of government. Specifically, the traditional rule safeguards federal jurisdiction against possible gamesmanship by the other branches, limiting the ability of those branches to unilaterally divest the judiciary of jurisdiction solely upon, as in this case, a single email from a low level federal official. Federal jurisdiction is too weighty to entrust, *in toto*, to the political branches of government – but in essence, this is what eight circuits have done by subverting the traditional voluntary necessity rule with a "good faith" or similar presumption in favor of government defendants.

Only this Court can bring order to the way the federal courts of appeal address whether a claim for equitable relief has become moot when a government defendants asserts it has ceased a challenged policy or practice. And, only this Court can ensure that this question, which arises with regularity in the federal courts, is answered in a way that protects the important interests the Court's voluntary cessation rule serves.

II. THIS CASE INVOLVES AN ADDITIONAL CONFLICT BETWEEN THE SEVENTH AND NINTH CIRCUITS OVER THE QUESTION OF WHETHER CLOSING A FORUM AFTER LITIGATION IS FILED MOOTS A REQUEST FOR A REPARATIVE INJUNCTION AS A REMEDY FOR A FIRST AMENDMENT VIOLATION THAT CAUSES ONGOING HARM.

The panel majority's conclusion that the June 2010 email had mooted Mr. Rosebrock's request for a reparative injunction also creates a split with the Seventh Circuit, which reached the opposite conclusion on an almost identical mootness issue. *See Sefick v. Gardner*, 164 F.3d 370 (7th Cir. 1998) (Easterbrook, J.). In *Sefick*, the plaintiff alleged that the government had engaged in viewpoint discrimination when it rejected his application to display his sculpture in a federal courthouse lobby. *Id.* at 371. Well after the lawsuit began, the government announced that it would no longer permit any art exhibitions in the courthouse lobby (*id.* at 372), just as VAGLA announced by an internal e-mail during the pendency of this case that it would no longer permit materials on the VA fence. App. 11a-12a. Nonetheless, the Seventh Circuit unanimously held that the forum closure did not moot the plaintiff's request for injunctive relief because "a court could order Sefick's sculpture displayed as a remedy for a violation of his first amendment rights in 1996 and 1997, even though in 1998 the [defendant] stopped considering applications for new displays." *Sefick*, 164 F.3d at 372.

In this case, the divided panel held precisely the opposite: that the VAGLA's stated intention not to permit future postings on the fence mooted Petitioner's request for a reparative injunction. App. 21a. Whatever the merits of the panel's voluntary cessation analysis with respect to the prohibitory injunction, its conclusion that the 2010 e-mail mooted Mr. Rosebrock's request for a reparative injunction cannot be squared with Judge Easterbrook's opinion for the Seventh Circuit in *Sefick*.

The split raises an important question about what equitable remedies are available and appropriate for a plaintiff who alleges, or establishes, that the defendant is violating his rights under the First Amendment. The Ninth Circuit's holding that closing the forum after the case is filed moots a request for a reparative injunction is in tension with this Court's decisions on both mootness and appropriate equitable remedies. Thus, this Court should grant review to resolve this split in the circuits and bring the Ninth Circuit back in line with this Court's mootness and equity jurisprudence.

This Court has held that the "availability of [a] possible remedy is sufficient to prevent [a] case from becoming moot." *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992). This principle dates to the 19th century, when the Court held that a case becomes moot on appeal if "an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever." *Mills v. Green*, 159 U.S. 651, 653 (1895). It is irrelevant to the mootness analysis whether the injunctive relief the plaintiff seeks is "warranted" on the facts of the particular

case, so long as there is the possibility of *some remedy* if a violation is proven. *See*, *e.g.*, *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335-36 (2013). Moreover, even if the panel majority were correct that the 2010 e-mail had mooted Petitioner's request for a *prohibitory* injunction, that conclusion would not govern the independent question of whether Petitioner's request for a *reparative* injunction was moot. "Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 497 (1969).

Resolving the split between the Seventh and Ninth Circuit is also important because the panel majority's holding threatens to deprive plaintiffs who prevail in First Amendment actions of an important equitable remedy. As this Court has stated:

> A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. * * *. A proper remedy for an unconstitutional exclusion, we have explained, aims to eliminate [so far as possible] the discriminatory effects of the past, and to bar like discrimination in the future.

United States v. Virginia, 518 U.S. 515, 547 (1996) (brackets in original, internal quotations and citations omitted). The reparative injunction Mr. Rosebrock sought is the order that would come closest to putting him "in the position [he] would

have occupied in the absence" of Defendants' illegal conduct and "eliminat[ing] so far as possible the discriminatory effects of the past." *Id.* That is particularly true because the dispute over the ways VAGLA is using the land, which is the subject of Petitioner's demonstrations, is ongoing. Indeed, a federal district court has concluded that VAGLA has illegally contracted to allow numerous entities, such as a local private school, Sodexho Marriot Laundry Services, and the Westside Breakers Soccer Club to use the VAGLA property, *see* n.1, *supra*, and the VA has appealed that ruling. Thus, an injunction allowing Petitioner to express his viewpoint by hanging the flag union side down for the period of time Respondents illegally barred him from doing so – that is, between the time Respondents first prevented him from displaying the flag union down and the June 2010 email stating that no one was to be allowed to display anything on the perimeter fence – is the most appropriate remedy under this Court's equity precedent. By contrast, if the panel majority's decision is allowed to stand, defendants can easily prevent plaintiffs from obtaining this kind of remedy just by saying they will no longer allow any speech in the forum, thereby undermining an important equitable principle.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Peter J. Eliasberg
Counsel of Record
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 W. 8th Street
Los Angeles, CA 90017
(213) 977-5228
peliasberg@aclusocal.org

William B. Rubenstein
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7320

APPENDIX

OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ROSEBROCK
Plaintiff-Appellant,

v.

RONALD MATHIS, Chief of Police of The Veterans Administration Greater Los Angeles Healthcare System, in his official capacity; DONNA BEITER, Director of The Veterans Administration Greater Los Angeles Healthcare System, in her official capacity,
Defendants-Appellees.

No. 11-56256

D.C. No.
2:10-cv-01878
SJO-SS

OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
April 8, 2013—Pasadena, California

Filed March 4, 2014

Before: Ferdinand F. Fernandez, Johnnie B. Rawlinson, and Jay S. Bybee, Circuit Judges

Opinion by Judge Bybee;
Dissent by Judge Rawlinson

SUMMARY[*]

Mootness

The panel affirmed the district court's denial of plaintiff's request for injunctive relief after determining that the request was moot due to the Department of Veterans Affairs' recommitment to consistently enforce an existing regulation, 38 C.F.R. § 1.218, which prohibited the posting of materials on Veterans Affairs property except when authorized by the head of the Veterans Affairs facility in question or a designee of that individual, or when the posting of materials is part of authorized Government activities.

Plaintiff alleged that defendants failed to enforce the regulation when he and his fellow protestors hung the American flag union up on a fence surrounding VA property, but enforced the regulation when the protestors hung the American flag union down on the fence. The panel determined that, based on the record, this inconsistent enforcement stopped when an associate director of the VA Greater Los Angeles Healthcare System sent an e-mail to the VA police instructing them to consistently enforce the prohibition in the regulation.

The panel agreed with the district court that the Government's voluntary cessation of its inconsistent enforcement of § 1.218(a)(9) mooted the request for injunctive relief. The panel held that the Government satisfied its heavy burden of demonstrating mootness. Presuming that the Government acts in good faith, the panel determined

---

[*] This summary constitutes no part of the opinion of the court. It has been prepare by court staff for the convenience of the reader.

that the presumption was especially strong in this case, where the Government was merely recommitting to consistent enforcement of one of its own longstanding regulations.

Dissenting, Judge Rawlinson stated that defendants failed to establish that the new policy regarding enforcement was the kind of permanent change that proved voluntary cessation sufficient to moot plaintiff's claim for injunction relief. She stated that the email sent by the associate director was not protective of First Amendment rights, did not address the objectionable actions described in plaintiff's claim for injunctive relief, and was not publicly disseminated in such a way as to bind defendants in the future.

COUNSEL

Peter J. Eliasberg (argued), Hector O. Villagra and Jessica G. Price, ACLU Foundation of Southern California, Los Angeles, California, for Plaintiff-Appellant.

Indira J. Cameron-Banks (argued), Assistant United States Attorney, United States Department of Justice, Los Angeles, California; Andre Birotte Jr., United States Attorney, and Leon W. Weidman, Assistant United States Attorney (Chief of the Civil Division), United States Department of Justice, Los Angeles, California, for Defendants-Appellants.

OPINION

BYBEE, Circuit Judge:

Since 1973, a regulation promulgated by the Department of Veterans Affairs (VA), 38 C.F.R. § 1.218, has prohibited the posting of materials on VA property except when authorized by the head of the VA facility in question or a designee of that individual, or when the posting of materials is part of authorized Government activities. *See* 38 C.F.R. § 1.218(a)(9); *see also* Security, Law Enforcement, and Standards of Conduct on Veterans Administration Property, 38 Fed. Reg. 24,364, 24,365 (Sept. 7, 1973) (to be codified at 38 C.F.R. pt. 1). This case arises from the inconsistent enforcement of *§ 1.218* as applied to Robert Rosebrock.

Rosebrock is a veteran who objects to the failure of the VA to use a lawn outside of the Los Angeles Campus (LA Campus) of the VA Greater Los Angeles Healthcare System (VAGLA) for the benefit of veterans, and particularly homeless veterans. Since March 2008, Rosebrock and a group of like-minded veterans have protested weekly outside of the locked fence that surrounds the LA Campus lawn to draw public attention to the VA's failure to use the lawn for veterans. Although neither VAGLA nor the VA has ever had a general policy of inconsistent enforcement of the prohibition on posting materials in § 1.218, VAGLA and its police force inconsistently enforced the regulation in response to these protests. In particular, over a period of at least eight months, VAGLA and its police failed to enforce the regulation when Rosebrock and his fellow protestors hung the American flag union up on the fence surrounding the LA Campus lawn, but enforced the regulation when the protestors hung the American flag union down on the fence. Based on the

record before us, this inconsistent enforcement stopped on June 30, 2010, when a VAGLA associate director sent an e-mail to the VAGLA police instructing them to consistently enforce the prohibition in the regulation.

While the inconsistent enforcement was ongoing, Rosebrock filed a complaint in the United States District Court for the Central District of California, bringing a cause of action under the First Amendment, and seeking declaratory and injunctive relief. The district court ultimately granted summary judgment to Rosebrock with regard to declaratory relief, holding that the VA defendants violated Rosebrock's First Amendment rights by engaging in viewpoint discrimination, but the district court denied Rosebrock any injunctive relief. *Rosebrock* v. *Beiter*, 788 F. Supp. 2d 1127, 1140-49 (C.D. Cal. 2011). One of the rationales given by the district court for denying injunctive relief was that the request for injunctive relief had been mooted by the June 30, 2010 e-mail instructing the VAGLA police to enforce § 1.218 consistently. *Id*. at 1143-45.

Before us now is Rosebrock's appeal from the district court's denial of injunctive relief. We agree with the district court that Rosebrock's requests for injunctive relief are moot, and thus we affirm.

I

Pursuant to its authority to "make all needful rules and regulations for the governing of the property under [the Secretary of Veterans Affairs'] charge and control" under the National Cemeteries Act of 1973, Pub. L. No. 93-43, § 4, 87 Stat. 75, 79 (codified as amended at 38 U.S.C. § 901), the VA promulgated *38 C.F.R. § 1.218* in 1973. *See* Security, Law Enforcement, and Standards of Conduct on Veterans Administration

Property, 38 Fed. Reg. at 24,364-65. This subsection has not materially changed in the nearly forty years since its promulgation. *Compare* Security, Law Enforcement, and Standards of Conduct on Veterans Administration Property, 38 Fed. Reg. at 24,365 (subsection (i)), *with* 38 C.F.R. § 1.218(a)(9). Today's version reads as follows:

> Distribution of handbills. The distributing of materials such as pamphlets, handbills, and/or flyers, and the displaying of placards or posting of materials on bulletin boards or elsewhere on property is prohibited, except as authorized by the head of the facility or designee or when such distributions or displays are conducted as part of authorized Government activities.

38 C.F.R. § 1.218(a)(9). According to a declaration from the VAGLA police chief who is a defendant in this suit, VAGLA policy has always been strict enforcement of the prohibition on posting in § 1.218(a)(9). There is no evidence in the record suggesting that VAGLA or the VA has ever had a general policy of inconsistent enforcement. Accordingly, this case arises not from the regulation itself, or from a general VAGLA or VA policy with regard to its enforcement, but rather from inconsistent enforcement of the regulation by VAGLA and its police officers on the ground in this particular case.

II

VAGLA is one of the largest and most complex VA healthcare systems in the country. The LA Campus is the only VAGLA location in the Los Angeles region where complex medical, surgical, and psychiatric care

is offered. Rosebrock and other veterans protest for three to four hours each Sunday outside of the locked fence that surrounds the LA Campus lawn to draw public attention to the VA's failure to use the lawn for veterans. During these protests, which began on March 9, 2008, Rosebrock initially hung the American flag union up on the fence, along with a POW/MIA banner. Sometimes, Rosebrock would also hang a Vietnam unit flag and a "Support Our Troops" banner on the fence. When Rosebrock hung the American flag union up, he intended to express patriotism, and a message of honor and support for the U.S. military. VAGLA police had informed Rosebrock that the posting of materials on the LA Campus fence was prohibited by federal regulations, but, in spite of the broad prohibition in § 1.218(a)(9), they had also informed him, incorrectly, that there was an exception covering the American flag and POW/MIA banner.[1]

VAGLA police and staff did not confront Rosebrock about hanging the Vietnam unit flag and "Support Our Troops" banner—neither of which was covered by the stated exception—until November 30, 2008, when a VAGLA police sergeant asked Rosebrock to remove them. Consistent with the stated exception, the VAGLA police sergeant told Rosebrock that the union-up American flag and POW/MIA banner, which were right next to the flag and banner that had to be removed, could remain on the fence. For the seven months following this confrontation, Rosebrock

[1] Nothing in the record suggests that any of the VAGLA police officers involved were "designees" of the head of the LA Campus who could authorize Rosebrock to hang the American flag or POW/MIA banner under § 1.218(a)(9).

continued to hang the union-up American flag and the POW/MIA banner on the fence, and the VAGLA police did not interfere. According to VAGLA, VAGLA and its police refrained from citing Rosebrock to avoid confrontation with demonstrators, which VAGLA feared could escalate the fervor of the protests. VAGLA and its police, many of whom were veterans themselves, were also reluctant because many of the demonstrators were elderly veterans.

Rosebrock grew increasingly upset with the situation involving the lawn, and, as a result, beginning on June 14, 2009, he started to hang the American flag union down rather than union up. In hanging the flag union down, Rosebrock meant to convey an entirely different message than the message he had intended to convey by hanging the flag union up. Specifically, the union-down flag was intended to convey a "distress call" regarding the VA's use of land that, in Rosebrock's opinion, rightfully should be used for veterans.[2]

A week after he first hung the flag union down, VAGLA police approached Rosebrock and ordered him to hang the flag union up or remove it, and Rosebrock complied by removing the flag. Shortly thereafter, on June 26, 2009, Rosebrock received an e-mail from a VAGLA associate director saying that he could "not attach the American flag, upside down, anywhere on VA property including [the] perimeter gates," and that doing so "is considered a desecration of the flag and is not allowed on VA property." This e-mail did not

---

[2] Under 4 U.S.C. § 8, which is intended to guarantee that the American flag is treated with respect, "[t]he flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property." 4 U.S.C. § 8(a).

authorize Rosebrock to post any materials on VA property.[3]

On July 24, 2009, a VAGLA police patrol captain sent an e-mail to VAGLA police officers instructing them to issue citations to Rosebrock under § 1.218(a)(9) if they observed him hanging any signs or flags on the fence. According to VAGLA, it began taking action once Rosebrock began hanging the flag union down, because VAGLA received complaints from patients who were upset at seeing the union down flag and Rosebrock himself complained that he had been threatened by individuals offended at the display. Believing that the VA was attempting to impermissibly restrict his speech, Rosebrock continued to hang the flag union down during his Sunday protests. Between July 2009 and September 2009, a period during which Rosebrock hung the American flag only union down on the fence, Rosebrock received six citations in the mail pursuant to § 1.218(a)(9). Four of the citations explicitly mentioned that the flag was hung union down. Presumably, the VAGLA police officers who had previously felt uncomfortable confronting Rosebrock felt less uncomfortable now that they were confronting him for hanging the flag union down, a sign of disrespect to our flag and country or a signal of immediate distress, and now that Rosebrock's actions had led to complaints from patients and threats to Rosebrock's safety.[4] All of

---

[3] Because this e-mail merely told Rosebrock that he could not post certain materials on VA property, and did not authorize Rosebrock to post any other materials, we do not view this as evidence of a general VAGLA policy of inconsistent enforcement of § 1.218(a)(9).

[4] Though the decision by VAGLA to refrain from enforcing § 1.218 against Rosebrock until he began hanging the flag union down demonstrates that VAGLA elected to enforce its

the citations were dismissed at the request of an Assistant United States Attorney.

In February 2010, Rosebrock prominently hung American flags union up on the fence with VAGLA police nearby, but they did not interfere with Rosebrock's display or cite him. That same month, after Rosebrock had not hung the American flag union down on the fence for some time to avoid being cited, Rosebrock hung the flag union down again and was told by the VAGLA police to remove the flag and his POW/MIA banner from the fence. When Rosebrock refused, the VAGLA police removed the flag and banner.

In sum, based on the record before us, for at least eight months after Rosebrock began sometimes hanging the flag union down on the fence, and even after a VAGLA police patrol captain told VAGLA police officers to cite Rosebrock under § 1.218(a)(9) if he hung any sign or flag on the fence, VA representatives only cited Rosebrock or interfered with his activity if he hung the flag union down.[5]

---

regulation inconsistently in this instance, VAGLA's actions in this particular case do not demonstrate that VAGLA's general policy was inconsistent enforcement. As we say elsewhere in this opinion, the only evidence regarding VAGLA's general policy suggests that the policy has been strict enforcement of the prohibition on posting in § 1.218.

[5] The dissent argues that 38 C.F.R. § 1.218(a)(9), by its plain terms, may not "even apply to Mr. Rosebrock's act of hanging the American flag" because Rosebrock did not distribute anything and a "flag" differs from a "pamphlet" "flyer" or "handbill." Dissent at 26-27. We agree that the words of a governing text are a paramount concern, but unlike the dissent, we consider the whole text and give effect to every word therein. *Int'l Ass'n of Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1051 (9th Cir. 2004) ("[i]n analyzing a

In March 2010, Rosebrock filed a complaint in the United States District Court for the Central District of California, bringing a cause of action under the First Amendment, and seeking declaratory and injunctive relief. Rosebrock filed a motion seeking a preliminary injunction against the VAGLA police that would prevent them from citing him for hanging the American flag union down on the LA Campus fence. The district court denied the motion, and we affirmed in an unpublished decision. *See Rosebrock v. Mathis*, 400 F. App'x 261 (9th Cir. 2010).

On June 30, 2010, the VAGLA associate director who had previously sent Rosebrock the e-mail about hanging the flag union down sent an e-mail directive to the VAGLA police, which said the following:

> I would like to confirm my office's previous instructions to you and your department. Please ensure that VA Regulation 38 CFR 1.218 is enforced precisely and consistently. As we discussed, this means that NO outside

---

statutory text, we do not look at its words in isolation."); *In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000) ("[w]e have consistently . . . reject[ed] interpretations that would render a statutory provision . . . a nullity"). Here, § 1.218(a)(9) prohibits individuals from distributing written materials, *and* it prohibits "displaying of placards or posting of materials on bulletin boards or elsewhere on property." *See, e.g., Webster's II New Riverside University Dictionary* 388, 918 (describing display as "[t]o put forth for viewing: EXHIBIT" and post as "[to put up (an announcement) in a place of public view.") So, even though Rosebrock did not distribute written materials, § 1.218(a)(9) still applies because he "displayed" and "posted" "materials"—including various flags and banners—on the VAGLA's property.

> pamphlets, handbills, flyers, flags or banners, or other similar materials may be posted anywhere on VA Property (including the outside fence/gates). This includes any flags displayed in any position. Further, the regulation only extends to VA Property. Therefore, it does NOT include the public sidewalk outside of VA Property. Accordingly, protests and/or demonstrations (including flags in any position) that take place off VA Property (on the public sidewalk) should not be interfered with. Also, please make sure that this information is disseminated to all officers who patrol the VA grounds and to the rest of your department. If you have any questions or concerns, please contact me. Thanks.

In a declaration, the VAGLA police patrol captain who sent the July 2009 e-mail to VAGLA police officers about Rosebrock said it was her understanding that the VAGLA police have been strictly enforcing § 1.218(a)(9) since the associate director's June 30, 2010 e-mail.

A few months after the June 30, 2010 e-mail, the parties filed cross-motions for summary judgment with regard to declaratory relief and permanent injunctive relief. In his motion for summary judgment, Rosebrock sought two forms of injunctive relief: (1) a "preventive injunction" forbidding the defendants from committing viewpoint discrimination against Rosebrock going forward, and (2) a "reparative injunction" requiring the defendants to allow Rosebrock to hang the American flag union down on the LA Campus fence for 66 weeks—the amount of

time, according to Rosebrock, that VA officials allowed Rosebrock to hang the flag union up on the fence without interference.

The district court granted summary judgment to Rosebrock with regard to declaratory relief, holding that the VA defendants violated Rosebrock's First Amendment rights by engaging in viewpoint discrimination, *Rosebrock*, 788 F. Supp. 2d at 1140-43, but denied Rosebrock any injunctive relief, id. at 1143-49. The district court denied injunctive relief on two independent bases: first, it held that the request for a permanent injunction was mooted by the VAGLA associate director's June 30, 2010 e-mail closing the fence to all forms of speech, *id.* at 1143-45; and second, it held that a permanent injunction was not appropriate because the balance of equities did not tip in Rosebrock's favor and a permanent injunction would not be in the public's interest, *id.* at 1145-49.[6] The district court entered a declaratory judgment in favor of Rosebrock on his First Amendment claim. Rosebrock timely appealed, and seeks the two types of permanent injunctive relief denied him by the district court.[7]

---

[6] Rosebrock points out that the district court's order was not clear as to whether both grounds for its decision—mootness, and the appropriateness of permanent injunctive relief—applied to both requests for injunctive relief. He reads the district court's order as denying the preventive injunction based on mootness and denying the reparative injunction on the merits. We disagree with Rosebrock's reading of the district court's order. Nothing in the order suggests that the mootness analysis was limited to the request for a preventive injunction. Because we agree with the district court that Rosebrock's requests for both types of injunctive relief are moot, we need not reach the merits of the requests, and thus we need not comment on the district court's consideration of the merits.

[7] The defendants did not appeal the summary judgment against

III

The district court held that the June 30, 2010 e-mail instructing the VAGLA police force to enforce § 1.218(a)(9) precisely and consistently mooted Rosebrock's request for a permanent injunction by closing the LA Campus fence as a forum for all speech. That is, the district court held that the Government's voluntary cessation of its inconsistent enforcement of § 1.218(a)(9) mooted the request for injunctive relief. We agree with the district court.[8]

A

A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (per curiam)). "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union,*

---

them with respect to Rosebrock's request for declaratory relief, so we need not consider the district court's holding with regard to viewpoint discrimination.

[8] We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's mootness determination de novo. *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). Factual determinations underlying the district court's mootness determination are reviewed for clear error. *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010).

Local 1000, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (internal quotation marks omitted)). But voluntary cessation can yield mootness if a "stringent" standard is met: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth,* 528 U.S. at 189. The party asserting mootness bears a "heavy burden" in meeting this standard. *Id.*

We presume that a government entity is acting in good faith when it changes its policy, *see Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010), but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again. *White v. Lee,* 227 F.3d 1214, 1243-44 (9th Cir. 2000); *see also Bell v. City of Boise*, 709 F.3d 890, 898-99 & n.13 (9th Cir. 2013).

"[A] case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision." *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991). "A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Chem. Producers & Distribs. Ass'n v. Helliker,* 463 F.3d 871, 878 (9th Cir. 2006). By contrast, "repeal or amendment of an ordinance by a local

government or agency does not necessarily deprive a federal court of its power to determine the legality of the practice" at issue, *Bell,* 709 F.3d at 899 (internal quotation marks omitted), though it may do so in certain circumstances, *see Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1031-32 (9th Cir. 2006) (holding that amendments to city ordinances had rendered facial challenges to those ordinances moot). Particularly relevant to this case, a policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot, *see, e.g., Bell*, 709 F.3d at 899-901, but it may do so in certain circumstances, *see, e.g., White*, 227 F.3d at 1242-44.[9]

---

[9] The dissent argues this case is more like *Bell* than *White* because the policy change in *Bell*, like the recommitment to the regulation here, "'could be easily abandoned or altered in the future.'" Dissent at 24-25 (quoting *Bell*, 709 F.3d at 900-01). The dissent also argues that this case differs from *White* because the policy change here prohibited expressive activity, whereas the permanent policy change in *White* protected First Amendment rights. Dissent at 27.

The comparison to *Bell* is flawed. The plaintiff there challenged an ordinance that criminalized sleeping in public, and the Government argued the claim was moot because the Chief of Police issued a Special Order that prohibited law enforcement from enforcing the ordinance under certain circumstances. 709 F.3d at 893-95. But the Special Order could not repeal the ordinance. The ordinance remained in effect, so law enforcement could have legally enforced the ordinance after Plaintiff Bell's case was dismissed. By contrast, here, there is no issue with the established law, and the goal is for VAGLA police to enforce the law as they should have been doing all along. In other words, the goal is following the law as written, whereas in *Bell* the officers were instructed *not* to follow the law under poorly defined circumstances.

Further, the policy change here is substantially similar to the change in *White*. There, a high-ranking official issued a memorandum that addressed problematic Government conduct

We have not set forth a definitive test for determining whether a voluntary cessation of this last type—one not reflected in statutory changes or even in changes in ordinances or regulations—has rendered a case moot. But we have indicated that mootness is more likely if (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone," *Id.* at 1243; (2) the policy change fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case", *id.*; (3) "th[e] case [in question] was the catalyst for the agency's adoption of the new policy," *id.*; (4) the policy has been in place for a long time when we consider mootness, *see id.* at 1243-44 & nn. 25, 27; and (5) "since [the policy's] implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[ ]," *id.* at 1243.[10] On the other hand, we are less inclined to find mootness where the "new policy . . . could be easily abandoned or altered in the future." *Bell,* 709 F.3d at 901.

---

and instructed them about First Amendment concerns related to an already-existing law. 227 F.3d at 1243. Here, the associate director's e-mail resolves the conduct that harmed Rosebrock because the message instructed officers to apply the existing regulation consistently, so as to avoid content-based discrimination. Further, like the memorandum in *White, id.* at 1242, the e-mail emphasized the importance of First Amendment rights: "protests and/or demonstrations . . . that take place off VA Property . . . should not be interfered with." In this situation, the associate director could not have done anything more to trumpet the superiority of the Constitution. After all, she could not legally encourage First Amendment activity on VAGLA's property that would violate 38 C.F.R. § 1.218(a)(9).

[10] We emphasize that the considerations discussed here do not provide an exhaustive or definitive list.

Ultimately, the question remains whether the party asserting mootness "has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur." *White*, 227 F.3d at 1244.

B

In this case, the VA action in question—the June 30, 2010 e-mail—did not effect a policy change in the typical sense because 38 C.F.R. § 1.218 has been in place, virtually unchanged, for nearly forty years, and the only evidence in the record addressing VAGLA's or the VA's policy regarding enforcement of the regulation suggests that VAGLA's policy has been consistent enforcement. The June 30 e-mail seems more aptly described as reemphasizing, or recommitting to, an existing policy. In fact, by its own terms, the e-mail "confirm[ed] . . . previous instructions" to the VAGLA police. Of course, in a world of limited resources, such a reemphasis or recommitment can always be fairly characterized as a policy change, but we do not think this a distinction without a difference. In fact, we see this distinction as cutting both ways.

On the one hand, this distinction highlights that this was really a problem of enforcement, and problems of enforcement may persist in spite of an announced recommitment to a policy. If VAGLA and its police allowed its regulation to be violated in the past without any response, the announced recommitment to a policy may not prevent similar decisions from being made in the future. Similarly, if VAGLA and the veterans on the VAGLA police force were not comfortable interfering with elderly veterans' proper display of the American flag before, perhaps that will not change even if the brass has announced a recommitment to consistent enforcement. On the other hand, the concern

with policy changes that are not cemented by statute or some other inertial form—that the purported change in policy may be gamesmanship—is not present here. Inconsistent enforcement of § 1.218(a)(9) was never general VAGLA or VA policy in the first place, and VAGLA's recommitment to strict enforcement makes it particularly unlikely that VAGLA will change its policy in the future.

On balance, we find the latter point more compelling. We have little concern that the VA is engaged in gamesmanship where, as here, the VA states that it will be more vigilant in following a previously existing policy of consistent enforcement of a longstanding regulation. Our confidence in the Government's voluntary cessation, *see Am. Cargo Transp.*, 625 F.3d at 1180, is at an apex in this context. The fact that the Government's "voluntary cessation" is more aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a longstanding regulation—not as a policy change—increases our confidence that "the challenged conduct cannot reasonably be expected to recur." *White,* 227 F.3d at 1244. Nonetheless, the considerations we have previously emphasized in cases involving policy changes not embodied in statutes or otherwise procedurally protected are instructive here, so we proceed to examine this case within that loose framework.

C

All of the factors that suggest mootness in "policy change" cases are present here. First, the June 30, 2010 e-mail was a clear statement, broad in scope, and unequivocal in tone. *See id.* at 1243. The e-mail insisted that § 1.218 be "enforced precisely and

consistently," emphasizing that this directive meant that "NO outside pamphlets, handbills, flyers, flags or banners, or other similar materials may be posted anywhere on VA Property." The e-mail also asked its recipients to "make sure that [the directive would be] disseminated to all officers who patrol the VA grounds and to the rest of [their] department."

Second, the e-mail fully "addresse[d] all of the objectionable measures that [the Government] officials took against the plaintiff[ ] in this case." *See id.* With the fence effectively closed as a forum for speech, the VA cannot engage in viewpoint discrimination with regard to the speech allowed in this forum.[11]

Third, although the record does not demonstrate definitively that Rosebrock's case was the "catalyst" for VAGLA's recommitment to strict enforcement of § 1.218, *see id.*, the record strongly suggests that this is so. In particular, the e-mail was sent shortly after Rosebrock filed his suit, and it mentions "flags in any position," "flags displayed in any position," and the

---

[11] Rosebrock contends that the discretion allowed to the "head of the facility or designee" under § 1.218(a)(9) to authorize displays on VA property prevents the e-mail from mooting his request for permanent injunctive relief. But there is no evidence in the record suggesting that the head of the LA Campus or any designee will use this discretion to commit viewpoint discrimination now that VAGLA has recommitted to strict enforcement of the prohibition in § 1.218. Especially in light of the fact that VAGLA's general policy has never been inconsistent enforcement, and in light of the faith we place in the Government, *see Am. Cargo Transp.*, 625 F.3d at 1179-80, we do not take the June 30, 2010 e-mail as a cagy recommitment to strict enforcement of a regulation made with the knowledge that the discretion afforded by the regulation will serve as a loophole allowing ongoing viewpoint discrimination through inconsistent enforcement.

"outside fence/gates,"—seemingly references to Rosebrock's case.

Fourth, at this point, the VA's recommitment to strict enforcement of its longstanding regulation occurred a fairly long time ago. *See id.* at 1243-44 & nn. 25, 27. The VAGLA associate director sent the e-mail on June 30, 2010, more than three years ago.

Finally, based on the record before us, "since [the recommitment] the agency's officials have not engaged in conduct similar to that challenged by the plaintiffs." *See id.* at 1243.

D

We recognize that there are no procedural safeguards in place preventing VAGLA from changing course, a factor that countenances against mootness. *See Bell,* 709 F.3d at 900-01. But there is little reason to doubt VAGLA's recommitment to a preexisting policy in favor of consistently enforcing a longstanding regulation. Moreover, in light of the presumption that the Government acts in good faith, we have previously found the heavy burden of demonstrating mootness to be satisfied in "policy change" cases without even discussing procedural safeguards or the ease of changing course. *See, e.g., Am. Cargo Transp.*, 625 F.3d at 1179-80.

In the end, we hold that the VA has satisfied its heavy burden of demonstrating mootness. We presume that the Government acts in good faith, and that presumption is especially strong here, where the Government is merely recommitting to consistent enforcement of one of its own longstanding regulations. In light of this and the other considerations outlined above, we do not think it reasonably likely that the objectionable conduct will recur. If it does, Rosebrock is

well-armed with his declaratory judgment and can pursue relief in a new suit.

IV

Rosebrock's requests for injunctive relief were properly dismissed as moot. The judgment of the district court is **AFFIRMED**.

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that Mr. Rosebrock's First Amendment claim for injunctive relief has been rendered moot by an e-mail "instructing" the Veteran Affairs Greater Los Angeles Healthcare System [VAGLA] police "to consistently enforce" the regulation governing posting of materials. *Majority Opinion*, p. 4-5.

As the majority opinion acknowledges, voluntary cessation of challenged conduct renders a case moot only if the party asserting mootness meets the "heavy burden" of establishing that "subsequent events [have] made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Majority Opinion*, p. 15 (quoting *Friends of the Earth Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610) (emphasis added).

The majority opinion also concedes that when the government asserts mootness as a result of a change in policy, it is unlikely to prevail if the "government is otherwise unconstrained should it later desire to reenact the [offending] provision," or more accurately in this case, later desire to permit

discriminatory enforcement. *Majority Opinion*, p. 15 (quoting *Coral Constr. Co. v. King* Cnty, 941 F.2d 910, 928 (9th Cir. 1991)) (alterations omitted). Indeed, the majority and I agree that a determination of mootness is inappropriate if a newly adopted policy "could be easily abandoned or altered in the future." *Majority Opinion*, p. 17 (quoting *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)). But we part company in our respective applications of these agreed upon principles. The majority is of the view that the Department of Veteran Affairs (VA) met its "heavy burden" and I am of the view that it did not.

From where I sit, the history of this case aligns more closely with *Bell* than it does with *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the case most heavily relied upon by the majority for its substantive analysis. *See Majority Opinion*, pp. 19-21. In *White*, we concluded that federal officials from the Department of Housing and Urban Development (HUD) had met their "heavy burden" of establishing mootness due to a "permanent change" by HUD in the way investigations are conducted. *White*, 227 F.3d at 1244.

The plaintiffs in *White* brought an action against HUD officials, alleging that they were harassed and investigated solely because they exercised their rights under the First Amendment to protest against the conversion of a hotel into housing for homeless persons. *See id.* at 1220-21, 1225. As a direct result of the lawsuit filed by the Plaintiffs, the Assistant Secretary of HUD for Fair Housing and Equal Opportunity issued a memorandum entitled "Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints That May Implicate the First Amendment." *Id.* at 1242. The memorandum was accompanied by a press release explaining that the

plaintiffs' activities were protected by the First Amendment and that the guidelines set forth in the memorandum were developed in response to plaintiffs' protected activities. *See id.* Importantly, the memorandum trumpeted the supremacy of First Amendment rights, stating that "where [Fair Housing Act] concerns intersect with First Amendment protections, HUD officials must defer to the latter: the Department chooses to err on the side of the First Amendment." *Id.* at 1243 (internal quotation marks omitted). We concluded that this public, detailed, contrite and emphatic renunciation of its past policy represented "a permanent change" by HUD that mooted the plaintiff's request for injunctive relief. *Id.* at 1243.

The facts of the case we decide today are closer to those we considered in *Bell*. *Bell* involved a city ordinance that criminalized sleeping in a public or private structure or motor vehicle, without the permission of the owner. *See* 709 F.3d at 893. Plaintiffs filed an action pursuant to 42 U.S.C. § 1983 asserting that the ordinance "ha[d] the effect of criminalizing homelessness and constitutes cruel and unusual punishment . . ." *Id.* (internal quotation marks omitted). The district court determined that Plaintiffs' claims for prospective injunctive relief were mooted due to the issuance of a Special Order by the Chief of Police that prohibited enforcement of the ordinance "when a person is on public property and there is no available overnight shelter. . . ." *Id.* at 895.

We contrasted the Special Order in *Bell* with the "entrenched and permanent policy issued in *White*. . . ." *Id.* at 900 (citation omitted). We noted that the new policy in *White* "was designed to *protect* the First Amendment rights of parties subject to HUD

investigations . . ." *Id.* "[T]he new policy . . . was fully supportive of First Amendment rights, addressed all of the objectionable measures that HUD officials took against the plaintiffs, and . . . confessed that plaintiffs' case was the catalyst for the agency's adoption of the new policy. . . ." *Id.* (quoting *White*, 227 F.3d at 1243 & n.25) (alterations and internal quotation marks omitted).

We distinguished the Special Order at issue in *Bell*, concluding that the Special Order "lack[ed] the assurances present in *White*." *Id.* We noted the significance of the new policy in *White* "address[ing] *all* of the objectionable measures that HUD officials took against the plaintiffs." *Id.* (citation and internal quotation marks omitted) (emphasis in the original). "In contrast, the Special Order fail[ed] to fully address Plaintiffs' allegations . . . Moreover, . . . the authority to establish policy . . . [was] vested entirely in the Chief of Police, such that the new policy regarding enforcement of the Ordinances could be easily abandoned or altered in the future." *Id.* at 900-01. We concluded: "Simply put, Defendants have failed to establish with the clarity present in *White* that the new policy is the kind of permanent change that proves voluntary cessation." *Id.* at 901.

The change in policy upon which the majority opinion relies is an e-mail from the associate director of VAGLA. *See Majority Opinion*, pp. 11-12. As noted in the majority opinion, the e-mail directed the VAGLA police to "ensure that VA Regulation 38 C.F.R. 1.218 is enforced precisely and consistently." *Id.*, p. 11.[1]

---

[1] 38 C.F.R. § 1.218(a)(9) provides in pertinent part:

> Distribution of handbills. The *distributing* of materials *such as pamphlets, handbills, and/or flyers*, and the

As a preliminary matter, it could be convincingly argued that 38 C.F.R. 1.218(a)(9) does not even apply to Mr. Rosebrock's act of hanging the American flag. This portion of the regulation is directed by title toward the distribution of handbills, and its content prohibits *distributing* handbills and similar items such as pamphlets, flyers, and placards, all of which are written materials. *See, e.g., Webster's Ninth New Collegiate Dictionary* 550, 849 (1984) (describing a handbill as "a small *printed* sheet" and a pamphlet as "an unbound *printed* publication") (emphases added).

It is an elementary principle of legislative interpretation that words of a feather flock together. *See In re W. States Wholesale Nat. Gas Antitust Litig.*, 715 F.3d 716, 734 n.13 (9th Cir. 2013) ("*Noscitur a sociis* means that a word is known by the company it keeps . . ." (citation and internal quotation marks omitted); *see also United States v. Kimsey*, 668 F.3d 691, 701 (9th Cir. 2012) (holding that statutory terms "grouped in a list should be given related meaning" and "[t]hat several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well") (citations omitted). One would be hard pressed to group "flag" with the other words included in the regulation provision. In

---

> displaying of *placards* or posting of materials on bulleting boards or elsewhere on property is prohibited, except as authorized by the head of the facility or designee.

(Emphasis Added).

This is the provision that was enforced against Mr. Rosebrock.

fact, these words could readily be adapted to an elementary school vocabulary exercise:

flyer handbill flag pamphlet

Which of these words does not belong?

This exercise underscores the likely inapplicability of the regulation provision to Mr. Rosebrock's conduct, especially when one considers that he was not actually distributing anything. And if the provision did not apply to Mr. Rosebrock's activities, the violation of this Vietnam Veteran's First Amendment rights would be even more egregious, and could not be mooted by an e-mail "ensuring" enforcement of an inapplicable regulation provision.

Even if the provision did apply to Mr. Rosebrock's activities, his claim for injunctive relief was not mooted by the referenced e-mail. In *White*, we relied on the fact that the formal memorandum (not e-mail) changing the policy was issued by the Assistant Secretary for the Department of Housing and Urban Development. *See White*, 227 F.3d at 1242. In this case, the e-mail (not formal memorandum) was authored by a local associate director. In *White*, the policy change protected First Amendment rights. *See id.* at 1243. Here, the e-mail prohibited all expressive activity. In *White*, the change in policy was publicized in the media, with positive remarks about the importance of First Amendment rights. *See id*. The e-mail in this case took great pains to squelch the exercise of First Amendment activity and was distributed only to the VAGLA police.

Like the Special Order in *Bell*, the e-mail in this case "lacks the assurances present in *White*." *Bell,* 709 F.3d at 900. The e-mail was not protective of First Amendment rights, did not address the objectionable

actions described in Mr. Rosebrock's claim for injunctive relief, and was not publicly disseminated in such a way as to bind VAGLA in the future. *See id*. As in *Bell*, "Defendants have failed to establish with the clarity present in *White* that the new policy is the kind of permanent change that proves voluntary cessation" sufficient to moot Mr. Rosebrock's claim for injunctive relief. *Id.* at 901.

It is beyond dispute that this Vietnam-era veteran has earned the right to exercise the full panoply of First Amendment protections available in this country. We should not whisk away those rights with the flick of a pen. I respectfully dissent.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT ROSEBROCK, an individual,

Plaintiff,

v.

DONNA BEITER, DIRECTOR OF THE VERTANS ADMINISTRATION GREATER LOS ANGELES HEALTHCARE SYSTEM, in her official capacity; RONALD MATHIS, CHIEF OF POLICE OF THE VETERANS ADMINISTRATION GREATER LOS ANGELES HEALTHCARE SYSTEM, in his official capacity.

Defendants.

NO. CV 10-01878 SJO (SSx)

ORDER DENYING IN PART AND GRANTING IN PART DENFENDANT'S MOTION FOR SUMMARY JUDGMENT [Docket No. 32]; DENYING IN PART AND GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Docket No. 37]

This matter is before the Court on Defendants Donna Beiter and Ronald Mathis (collectively, "Defendants") and Plaintiff Robert Rosebrock's ("Plaintiff") separate Motions for Summary

Judgment, filed on October 18, 2010 and October 25, 2010, respectively. (Docket Nos. 32, 37.) Plaintiff submitted an Opposition to Defendants' Motion on November 1, 2010.[2] Defendants submitted an Opposition to Plaintiff's Motion on the same date. The parties filed their respective Replies on November 8, 2010.[3] Both of the parties filed Evidentiary Objections. Defendants also submitted a Statement of Genuine Issues of Disputed Facts, while Plaintiff declined to do so.[4] The Court found these matters suitable for disposition without oral argument and vacated the hearings set for November 15, 2010. *See* Fed. R. Civ. P. 78(b). Plaintiff submitted a Supplement to his Motion on December 20, 2010. (Docket No. 55.) For the following reasons, Defendants' and Plaintiff's Motions for Summary

---

[2] Defendants filed a "Notice of Non-Receipt of Opposition to Federal Defendants' Motion for Summary Judgment" on October 27, 2010. Defendants requested the Court to "take appropriate action pursuant to Local Rule 7-12." (Notice of Non-Receipt 3:1-2.) Plaintiff filed an Opposition to Defendants' Notice of Non-receipt on November 29, 2010, stating that it believed the deadline was November 1, 2010. The Court granted leave for Plaintiff to file his Opposition by November 1, 2010.

[3] Defendants filed a Reply that was twelve pages long. The Court's Initial Standing Order mandates that "[n]o reply may exceed five pages." (Standing Order ¶ 19.) Because Defendants failed to comply with the Initial Standing Order, the Court declines to read Defendants' Reply after the fifth page. The parties are on notice that the Initial Standing Order should be followed.

[4] The Court rules on Defendants' and Plaintiff's Evidentiary Objections in a separate Order that will issue concurrently with this Order. Defendants' and Plaintiff's Evidentiary Objections are OVERRULED IN PART AND SUSTAINED IN PART. The Court also finds that Defendants do not present any genuine issues of disputed facts to preclude the Court from entering summary judgment.

Judgment are GRANTED IN PART AND DENIED IN PART.

I. FACTUAL AND PROCEDURAL BACKGROUND

The United States Department of Veterans Affairs ("VA") is a federal agency charged with administering "the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301 (2006); (*see also* Decl. of Lynn Carrier ("Carrier Decl.") in Supp. of Defs.' Mot. ¶ 2.) The VA Greater Los Angeles Healthcare System (the "VAGLA") is one of the largest and most complex VA health care systems in the country. (Carrier Decl. ¶ 2.) Its mission is to provide high quality health care services to eligible veterans throughout the Los Angeles region. (*Id.*) The VAGLA provides the most comprehensive homelessness program within the agency to address the needs of veterans, including a domiciliary that houses approximately 250 veterans. (Decl. of Ralph D. Tillman in Supp. of Defs.' Reply ("Tillman Decl.") ¶ 4.) While the VAGLA has numerous locations throughout the region, its West Los Angeles campus (the "VAGLA Campus") is the only location where complex medical, surgical, and psychiatric care is offered. (Carrier Decl. ¶ 2.) The VAGLA Campus cares and treats homeless veterans, veterans who have recently returned from combat, and those suffering serious psychiatric conditions such as post traumatic stress disorder. (Tillman Decl. ¶ 3.) Pursuant to sharing agreements, non-healthcare related events are held on the VAGLA Campus on certain occasions, but revenues from those events are deposited directly into funds that maintain and improve the property. (*Id.* ¶ 4.)

The VAGLA Campus contains a large grasslawn, called the "Great Lawn." (*See* Rosebrock Decl. ¶ 3.) The Great Lawn has a perimeter fence around it (the "Perimeter Fence"). (*Id.*; Carrier Decl. ¶ 5.) A gate that leads into the Great Lawn (the "Gate") is located at the intersection of San Vicente and Wilshire Boulevards in Los Angeles. (Rosebrock Decl. ¶ 3; Carrier Decl. ¶ 5.) Directly in front of the Gate is approximately 50-75 feet of VA property separated from the public sidewalk by low, widely spaced concrete barriers (the "Entrance Area"). (Carrier Decl. ¶ 5; Rosebrock Decl. ¶ 3.) The Entrance Area is also demarcated from the public sidewalk by color; it is a darker gray. (Rosebrock Decl. Ex. 1; Carrier Decl. Ex. 1.)

Plaintiff is a 68-year-old Vietnam War-era veteran. (Rosebrock Decl. ¶ 2.) Age has neither mellowed him nor dissipated his passion. He and a number of fellow veterans have been demonstrating in the Entrance Area and the public sidewalk every Sunday since March 9, 2008. (*Id.*) Plaintiff protests the VA's refusal to develop the Great Lawn into a shelter for homeless veterans or to use the land for the benefit of veterans. (*Id.* ¶ 5.) Plaintiff objects to what he perceives to be a pattern of transferring portions of the VAGLA Campus to other entities for use unrelated to the care and shelter of veterans. (*Id.* ¶¶ 6, 7.) The protests last on average around three to four hours. (*Id.* ¶ 8.)

On March 9, 2008, Plaintiff and his fellow protestors began their regular Sunday demonstrations. (Rosebrock Decl. ¶¶ 5, 8.) During Plaintiff's first demonstration, Sergeant Nathaniel Webb ("Webb"), a VA police officer, expressly stated to Plaintiff that "his group would be prohibited from

hanging any signs, placards or flags from the VA fence or on VA property." (Dep. Nathaniel Webb ("Webb Dep.") 7:5-8, 53:14-18, 54:12-15, 55:25-56:6.) Webb, however, explained that Plaintiff could hang "flags of the United States of America or prisoner of war." (*Id.* at 53:18-19.) Plaintiff responded that he understood and would comply. (*Id.* at 53:22-23.) Prior to the demonstration, Jim Duvall ("Duvall"), a Senior Manager for the Public Affairs Department of the VAGLA, had communicated to Webb that Plaintiff would be protesting. (*Id.* at 55:5-10.) Duvall instructed Webb to let Plaintiff "be on that area of the VA property that was designated at the [intersection of] Wilshire and San Vicente [Boulevards], but . . . [to] prohibit[] [Plaintiff] from hanging any signs or placards on VA fence line." (*Id.* at 57:4-9.) "The only exception[s] . . . [to the prohibition were] the flag of the United States of America and the POW flag." (*Id.* at 57:9-11.)

During their subsequent protests, Plaintiff and other demonstrators hung the United States flag, union up, and P.O.W./M.I.A. banners on the Gate and Perimeter Fence. (Rosebrock Decl. ¶ 10.) They displayed the American flag to show patriotism, even while disagreeing with the VAGLA. (*Id.* ¶ 9.) Plaintiff also hung a "Support Our Troops" banner and a Vietnam Unit flag on certain occasions. (*Id.* ¶¶ 11-12.) On some Sundays, the demonstrators hung as many as 30 United States flags on the fences surrounding the Great Lawn. (*Id.* ¶ 19, Ex. 5.) The protestors also held the United States flag, union down, during the protests to send out a "distress call" and to bring attention to the perceived gross injustice of the VAGLA's land use policy. (Decl. of Indira J. Cameron-Banks in Supp. of Defs.' Opp'n ("Cameron-

Banks Decl.") Ex. 10.) From March 9, 2008, to November 30, 2008, the VA police made no contact with the demonstrators to express disapproval or to prohibit the display of the United States flag or the P.O.W./M.I.A. flag on the Perimeter Fence. (Rosebrock Decl. ¶ 10.)

On or about November 30, 2008, Webb approached Plaintiff during a demonstration and ordered him to remove a "Support Our Troops" banner and a Vietnam Unit flag. (Rosebrock ¶ 10; Webb Dep. 67:4-15.) Webb informed Plaintiff that he was in violation of 38 C.F.R. section 1.218(b)(22)4[5] ("section 1.218") for hanging the banner and flag on VA property. (Webb Dep. 67:4-15.) Webb permitted Plaintiff to display the United States flag, right-side up, and the P.O.W./M.I.A. flag on the Perimeter Fence. (Rosebrock ¶ 10.) Plaintiff and his fellow demonstrators removed the Support Our Troops banner and the Vietnam Unit flag. (*Id.*)

After the November 30, 2008 incident, Plaintiff sent a letter to the VA, reporting that he and his demonstrators believed Webb harassed them and suppressed their speech. (Carrier Decl. Ex. 2.) As a follow up to that letter, Bob Handy ("Handy") - a veteran, chair of the Veterans Caucus for the California Democratic Party, and a fellow demonstrator - e-mailed the VA Chief of Staff Colonel Thomas Bowman to request that he be provided:

---

[5] Under 38 C.F.R. section 1.218(b), a schedule of offenses and penalties is listed. Specifically, section 1.218(b)(22) sets a $25 penalty for violating section 1.218(a)(9), which prohibits "the displaying of placards or postings of materials on bulletin boards or elsewhere on [VA] property." 38 C.F.R. § 1.218(a)(9).

> ALL GOVERNMENT, [sic] CODES OR OTHER LAWS THAT REGULATE PUBLIC DISPLAYS ON OR NEARS [sic] VETERANS['] HOMES, additionally those codes, rules or other restrictions concerning the requirements of temporar[il]y attaching signs, banners or other material specifically on the fencing, walls, or other barriers to veterans['] homes.

(*Id.*) After several e-mail communications back and forth, including an e-mail sent by Handy to the Secretary of Veterans' Affairs Erick Shinseki, Handy received an answer from Lynn Carrier ("Carrier"), Associate Director of the VAGLA. (*Id.*) On February 6, 2009, Carrier pointed Handy to section 1.218 and explained that, "[c]onsistent with [the] regulation, [the VAGLA does] not allow displays of placards or other material on the perimeter fencing of the property." (*Id.*)

On June 14, 2009, Plaintiff began to hang the United States flag with the union down on the Perimeter Fence. (Rosebrock Decl. ¶ 14.) Plaintiff asserts that he grew increasingly frustrated with the VAGLA for not developing the Great Lawn for the shelter and care of homeless veterans. (*Id.*) He hung the American flag inverted to express a different message, not of patriotism or support for military veterans, but as a distress call. (*Id.* ¶ 15.) Defendants assert that several complaints were lodged with the VAGLA by patients regarding Plaintiff's display of an inverted American flag on the Perimeter Fence. (Carrier Decl. ¶ 12.) On two separate occasions, Plaintiff was threatened with physical violence. (*Id.*, Exs. 3-4.) Then, on June 26, 2009, Carrier sent an e-

mail to Plaintiff to inform him that he "may not attach the American flag, upside down, on VA property, including [the] perimeter gates." (*Id.* Ex. 7.) She explained that hanging the United States flag, union down, "is considered a desecration of the flag and is not allowed on VA property." (*Id.*)

On June 30, 2010, Carrier issued an e-mail directive to the VA police department that VA police officers were required to enforce section 1.218 precisely and consistently." (Carrier Decl. Ex. 8.) She asked that no outside pamphlets, handbills, flyers, flags or banners, or other similar materials be posted anywhere on VA property, including the Perimeter Fence. (*Id.*) Specifically, Carrier asked that no flags in any position be displayed. (*Id.*) Carrier, however, stated that the regulation extended only to VA property and that demonstrations on the public sidewalk should not be interfered. (*Id.*) On July 24, 2009, Kathy Treadwell ("Treadwell"), Patrol Captain for the VA police, relayed the instructions to VA police officers that Plaintiff and his fellow demonstrators were not authorized to hang any items on the Perimeter Fence. (Decl. of Kathy Treadwell in Supp. of Defs.' Reply ("Treadwell Decl.") ¶ 2, Ex. 1.) Treadwell ordered VA officers "to not make contact with such individuals but instead to issue [a citation]." (*Id.* Ex. 1.) The citations were to be issued to Plaintiff and sent by certified mail. (*Id.* Ex. 1.) Treadmill instructed her officers as such because she felt Plaintiff and his demonstrators purposefully antagonize VA officers in an effort to engage them into confrontations. (*Id.* ¶ 3.) Plaintiff and his demonstrators capture photographs and videos of the VA officers and publicize the altercations on the Internet. (*Id.*; Cameron-Banks

Decl. Exs. 9-11.) In promulgating the instructions she believed VA police officers, many of whom are veterans themselves, were reluctant to enforce section 1.218 strictly because of the potential publicity the enforcement would bring upon them. (Treadwell Decl. ¶ 3.) Plaintiff received a citation dated July 26, 2009, in the mail for "unauthorized demonstrations or service in a national cemetery or on other VA property." (Rosebrock Decl. ¶ 21, Ex. 7.) On July 26, 2009, Plaintiff had hung the United States flag, upside down, on the Perimeter Fence during a demonstration. (*Id.* ¶ 22.) plaintiff received five additional citations under section 1.218(a)(9) in August and September of 2009. (*Id.*) Three of these citations mentioned that Plaintiff had hung the United States flag, union down. (*Id.*) The citations were subsequently dismissed by Assistant United States Attorney Sharon K. McCaslin. (*Id.* ¶ 23.) The VA police have not issued any citations to Plaintiff since the charges relating to the previous citations were dropped. (Carrier Decl. ¶ 14.)

On February 21, 2010, Plaintiff and his fellow demonstrators held their 100th demonstration. (Rosebrock Decl. ¶ 25.) During that specific demonstration, Plaintiff displayed the United States flag with the union up on the fence for approximately three hours in the presence of VA police. (*Id.* Ex. 9.) The VA police neither interfered with the display of the United States flag, right-side up, nor cited Plaintiff. (*Id.* ¶ 25.) A week later, Plaintiff hung the United States flag inverted on the Perimeter Fence. (*Id.* ¶ 26, Ex. 10.) Within two and one-half hours, the VA police demanded that the flag be removed. (*Id.*) When Plaintiff refused, the VA police removed the flag themselves. (*Id.* ¶ 28, Ex. 11.)

Plaintiff filed a Complaint against Defendants on March 16, 2010, alleging violations of the First Amendment and the Fourteenth Amendment. Within six days, Plaintiff filed a Motion for Preliminary Injunction. On June 30, 2010, the Court denied Plaintiff's Motion for Preliminary Injunction. Plaintiff filed a Notice of Appeal to the Ninth Circuit on July 15, 2010. The Court of Appeals affirmed the Court's denial. (Docket No. 53.)

II. LEGAL STANDARD

A. Summary Adjudication

Federal Rule of Civil Procedure ("Rule") 56(a) mandates that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations and quotations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 325. Rather, the

moving party's initial burden "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment [and] [f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See Anderson*, 477 U.S. at 249. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

III. DISCUSSION

A. The First Amendment

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow,and . . . inflict great pain." *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207, 1220 (2011). The freedom to use speech, as well as symbolic or expressive conduct, in such a manner without censorship or restriction from

the Government is enshrined in the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I; *see also Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."). "[T]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). It has oft been described as an expression of "the most cherished" of our democratic ideals. *See United States v. Robel*, 389 U.S. 258, 264 (1967).

The privileges afforded by the First Amendment, however, are not absolute. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *see also Greer v. Spock*, 424 U.S. 828, 836 (1976) ("The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'"). Indeed, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). The Government "has power to preserve the property under its control for

the use to which it is lawfully dedicated." *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

"In assessing a First Amendment claim relating to speech on government property, the first step is to identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002) (citing *Cornelius*, 473 U.S. at 797). Three separate categories of fora exist. *See Preminger v. Peake (Preminger II)*, 552 F.3d 757, 765 (9th Cir. 2008). If the forum is public, such as streets and parks that traditionally have been devoted to expressive activity, "speakers can be excluded . . . only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. The second category is composed of designated public for a – "public property which the state has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In designated public fora, the Government is "bound by the same standards as appl[ied] in a traditional public forum." *Id*. at 46. In sharp contrast, "a more lenient standard applies" to nonpublic fora. *See Sammartano*, 303 F.3d at 965. The Government may restrict access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. Stated differently, "the [G]overnment violates the First Amendment when it denies access to a speaker solely

to suppress the point of view he espouses on an otherwise includible subject." *Id.*

B. The VAGLA Campus, Including Its Perimeter Fence, Is a Nonpublic Forum.

The parties seemingly agree that the VAGLA Campus is a nonpublic forum. (Pl.'s Mot. 7:9-8:13 (applying the more lenient standard applicable to nonpublic fora); Defs.' Mot. 5:7-8.) The mission of the VAGLA is to provide quality health care services to eligible veterans, such as complex medical, surgical, and psychiatric care, not to provide space for public discourse. (*See* Carrier Decl. ¶ 2.) The VAGLA Campus, including its Perimeter Fence, cannot be described as a forum that traditionally has been devoted to expressive activity, such as a public street or park. *See Cornelius*, 473 U.S. at 800. Moreover, Plaintiff does not point to evidence in the record showing that the VAGLA Campus, including the Perimeter Fence, was affirmatively opened by the Government "as a place for expressive activity."[6] *See*

[6] The Court duly notes that "Plaintiff may have been authorized, either explicitly or implicitly" to display the American flag on the Perimeter Fence by Defendants. (Defs.' Reply 4:3-4.) "[T]he First Amendment allows the government to open [a] non-public forum for limited purposes." *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007). The "limited public forum is a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (alteration in original). Thus, the Perimeter Fence may be categorized as a "limited public forum." This, however, does not change the Court's analysis. Though Defendants may have opened the Perimeter Fence, they are still permitted to exclude speech so long as the exclusion is reasonable in light of the

Perry Educ. Ass'n, 460 U.S. at 45-46; *see also Center for Bio-Ethical Reform, Inc. v. City of Honolulu*, 455 F.3d 910, 919 (9th Cir. 2006) ("Designated public fora are nonpublic fora that the government ***affirmatively opens*** to expressive activity.") (emphasis added). Though Plaintiff does not directly argue, he passingly provides testimony that he remembers signs being posted on the Perimeter Fence advertising local drama productions. (Rosebrock Decl. ¶ 4.) This evidence does not show that the posted signs were affirmatively permitted by the VAGLA, which would have turned the Perimeter Fence into a designated public forum. Without evidence that the VAGLA "intentionally designated" the Perimeter Fence "a place or means of communication as a public forum," the VAGLA Campus and the Perimeter Fence constitute a nonpublic forum. *See Cornelius*, 473 U.S. at 800.

In fact, the Ninth Circuit and several sister circuits have held that VA medical centers like the VAGLA Campus constitute nonpublic fora. *See Preminger v. Principi (Preminger I)*, 422 F.3d 815, 824 (9th Cir. 2005) ("The purpose of [VA Medical Centers] is not to facilitate public discourse; to the contrary, the VA has established the facilit[ies] to provide for veterans who require long-term nursing care."); *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1313 (Fed. Cir. 2008) ("We agree with the government that VA Medical Centers, exemplified by the Menlo Park Medical Center, constitute nonpublic fora."); *United States v. Fentress*, 241 F. Supp. 2d 526 (D. Md. 2003) ("A VA hospital, however, is a nonpublic forum."). Applying Ninth Circuit

---

purpose served by the forum and is not based on viewpoint. *See Flint*, 488 F.3d at 831.

precedent, the Court finds that the VAGLA Campus, including its Perimeter Fence, is a nonpublic forum.

Accordingly, neither the VAGLA Campus nor the Perimeter Fence upon which Plaintiff previously hung the United States flag is a public forum.

C. Section 1.218(a)(9), Which Prohibits Posting of Materials on VA Property, Is Facially Reasonable in Light of the Mission of the VAGLA Campus and Is Viewpoint Neutral.

Plaintiff expressly states that he "is not challenging the VA regulations." (Pl.'s Mot. 1:16-17.) He "does not contend that 38 CFR [sic] § 1.218(a)(9) is viewpoint discriminatory." (*Id.* at 12:11-12.) In fact, Plaintiff begrudgingly admits that section 1.218(a)(9) "prevent[s] individuals from hanging anything on the perimeter fence surrounding [the VAGLA Campus]." (*Id.* at 12:9-12.) Plaintiff instead challenges Defendants' alleged "pattern of viewpoint discriminatory *enforcement* of the regulation." (*Id.* at 12:12-13; Pl.'s Opp'n 16:16-28.)

The VA Regulation at issue is section 1.218(a)(9), which provides that "the displaying of placards or posting of materials . . . is prohibited, except as authorized by the head of the facility or designee or when such distributions or displays are concluded as part of authorized Government activities." 38 C.F.R. § 1.218(a)(9). Section 1.218(a)(9) is viewpoint neutral; it prevents any unauthorized speaker from posting any material, not just from one side of a debate. *See id.* The regulation also serves legitimate purposes. The restriction of expressive conduct "to avoid violating the trust of [the VAGLA Campus]'s patients" is a "reasonable" rationale. *See Preminger*

II, 552 F.3d at 767. Moreover, permitting expressive conduct at the VAGLA Campus would divert limited resources to the supervision of the conduct, thereby compromising the VAGLA's ability to provide health care services to veterans. *See id.* at 765. Plaintiff seemingly does not dispute the reasonableness and viewpoint neutrality of section 1.218(a)(9). (*See generally* Pl.'s Mot.; Pl.'s Opp'n.) Accordingly, as conceded by Plaintiff, section 1.218(a)(9) is reasonable and does not facially transgress the First Amendment.

D. The Uneven Enforcement of Section 1.218(a)(9) Violated the First Amendment.

Plaintiff asserts that section 1.218(a)(9) has not been applied evenhandedly, and that the selective enforcement is unconstitutional viewpoint discrimination of Plaintiff's speech. (Pl.'s Mot. 11:5-13:22); *see also Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("selective exclusions" from a forum is a violation of the First Amendment). Defendants counter that the VAGLA reasonably restricted Plaintiff's speech in a viewpoint neutral manner. (Defs.' Mot. 4:21-7:19.)

1. The VAGLA Possessed Reasonable Rationales for Prohibiting the Displaying of the United States Flag, Union Down.

As aforementioned, to determine whether exclusion of speech from a nonpublic forum is constitutionally permissible, the Court must examine two factors. *See Preminger II*, 552 F.3d at 765. The first factor is whether the exclusion was "reasonable in light of the purpose served by the forum."

Cornelius, 473 U.S. at 806. Defendants allege that, pursuant to Ninth Circuit precedent, the enforcement of section 1.218(a)(9) was reasonable because the speech was disruptive to the operations and mission of the VAGLA; specifically, Defendants assert that the flying of the American flag inverted was "upsetting patients and visitors" and causing "security threats." (Defs.' Mot. 6:4-6; Defs.' Opp'n 3:22-28.)

In *Preminger II*, 552 F.3d at 766, the Ninth Circuit held that a concern over disruptions and interference with patient care and a desire to retain patients' trust were reasonable rationales for restricting speech at a VA medical center. The plaintiffs sought to register veterans on VA property. *Id.* at 761-62. VA personnel and police officers barred the plaintiffs from registering voters pursuant to a VA regulation that prohibits partisan activities. *Id.* at 762; *see also* 38 C.F.R. § 1.218(a)(14)(ii). The defendants alleged that the restriction on the speech was reasonable in light of the purpose of the VA medical center. *Preminger II*, 552 F.3d at 766. The Ninth Circuit agreed. *Id.* The appellate court concluded that permitting plaintiffs to register voters "would invite requests from other[s]" and that "supervising numerous voter registration campaigns would . . . divert[] resources vital to the residents' treatment." *Id.* Moreover, the Ninth Circuit held that permitting plaintiffs to register voters at the medical center "would give the appearance of favoring [one party] over other parties." *Id.* at 767. The court determined that this appearance, in turn, may lead the patients to distrust the VA and undermine its ability to care for the veterans. *Id.*

Here, Defendants' proffered rationales are similarly reasonable and legitimate in light of the purpose of the VAGLA Campus. As in *Preminger II*, 552 F.3d at 766, the primary mission of the VAGLA Campus is to provide high quality health care services to eligible veterans. (Carrier Decl. ¶ 2.) The act of flying the United States flag, union down, has already diverted limited, vital resources from the caring of veterans. (*Id.* ¶ 12.) On at least two occasions, Plaintiff was personally threatened by individuals who were offended by the display of the American flag with the union down. (*Id.* Exs. 3-4.) Rather than focus on the medical and psychological needs of veterans, some of whom served recently in Afghanistan and Iraq, the VAGLA has had to siphon attention and resources to supervise property and protestors. Further, allowing Plaintiff free use of the Perimeter Fence would force the VAGLA to similarly provide space for protesters on other contentious issues. Supervising the use of the perimeter Fence and addressing security threats, as in *Preminger II*, would divert valuable attention and resources from the mission of the VAGLA Campus.

The VAGLA also has a legitimate concern that the hanging of the United States flag, union down, undermines patients' trust in the VAGLA. The trust of the veterans, who the VAGLA and its personnel serve, is an essential element to properly treating the patients. It is not far fetched to conclude that patients will refuse treatment or disobey instructions from VAGLA personnel if they perceive the VAGLA to have endorsed the disrespecting and dishonoring of the United States flag.

Accordingly, the VAGLA had reasonable and legitimate justifications to enforce section 1.218(a)(9) in light of the purpose of the VAGLA Campus.

2. Precluding Plaintiff from Hanging the American Flag with the Union Down Was Unconstitutional Viewpoint Discrimination.

Defendants contend that the VAGLA did not restrict "Plaintiff's ability to convey his opinion"because Plaintiff is permitted to hold his protest in front of the Perimeter Fence. (Defs.' Mot. 6:1-3.) They also argue that the impetus to strictly enforce section 1.218(a)(9) was not a motivation to silence Plaintiff, but instead was a need to address the complaints by patients. (Defs.' Opp'n 5:2-7.)

a. The VAGLA Properly Considered the Disruptions Flying the American Flag Upside Down Would Have Had on Its Mission to Provide Health Care for Veterans.

Plaintiff vehemently argues that Defendants may not "discriminate[] between different kinds of speech on the basis of the listener reaction to that speech." (Pl.'s Opp'n 14:20-22; *see also* Pl.'s Reply 2:10-17.) Plaintiff contends that the VAGLA, by giving weight to the patient's negative reaction to his speech, did not have a neutral justification for restricting the speech. (Pl.'s Opp'n 14:20-22.) As support, Plaintiff cites to a number of Supreme Court and Ninth Circuit cases. (Pl.'s Mot. 13:18-22; Pl.'s Opp'n 14:22-28.)

Unfortunately, the cases offered by Plaintiff are inapposite. The cases generally relate to

restriction of speech in public fora. In *Forsynth County v. Nationalist Movement*, 505 U.S. 123, 127 (1992), a white supremacist group sought to march down public streets and conduct a rally in a public square. In *Center for Bio-Ethical Reform, Inc. v. Los Angeles*, anti-abortion activists displayed photographs of aborted fetuses on the public streets outside a middle school's campus. 533 F.3d 780, 784-86 (9th Cir. 2008) ("Plaintiffs sought to express their anti-abortion message on a public street, a traditional public forum."). As Plaintiff acknowledges, the Perimeter Fence is neither a traditional public forum nor a designated public forum. (*See* Pl.'s Mot. 7:9-8:13.) This distinction makes all the difference. A more lenient standard applies when the Government seeks to restrict speech in a nonpublic forum like the VAGLA Campus's Perimeter Fence. *See Sammartano*, 303 F.3d at 965.

More importantly, both the Supreme Court and the Ninth Circuit have held that the Government may consider listeners' reactions, such as disruptions and controversies that the speech may create, when deciding whether to restrict speech in a nonpublic forum. *Cornelius*, 473 U.S. at 810 ("[Courts cannot] ignore the teachings of . . . [the Supreme] Court that the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."). The Supreme Court has held that the mere possibility of disruptions and controversies is sufficient justification to deny access to a nonpublic forum. *Perry Educ. Ass'n*, 460 U.S. at 52 n.12 ("[T]here is no showing in the record of past disturbances . . . or evidence that future disturbance would be likely. We have not required that such proof

be present to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function."); *but see Norse v. City of Santa Cruz*, 629 F.3d 966, 979 (9th Cir. 2010) ("Even in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive.") (Kozinski, J., concurring). The Supreme Court also has recognized that content-based restrictions by the Government may be reasonable in order to minimize "the appearance of favoritism, and the risk of imposing upon a captive audience." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974). Following Supreme Court precedent and as noted above, the Ninth Circuit in *Preminger II*, 552 F.3d at 767, found no violation of the First Amendment when a VA medical center restricted speech after considering its patients' negative reaction to that speech. *See also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999) (affirming the constitutionality of a public entity's decision to exclude "controversial topics" in light of the audience's maturity, the desire to disassociate itself from the speech, and the need to avoid the appearance of endorsing a specific view).

Accordingly, Plaintiff is mistaken when it asserts that Defendants may never give weight to the audience's negative reaction to speech in a nonpublic forum. The VAGLA was constitutionally permitted to consider the disruptions and controversies that the hanging of the United States flag, union down, had caused and would have further caused.

b. Section 1.218 Was Not Enforced in a Viewpoint Neutral Manner.

Though Defendants' consideration of hopatients and visitors will react to Plaintiff's speech was reasonable, Defendants may have still violated the First Amendment if the exclusion of Plaintiff's speech was because of viewpoint discrimination. *See Cornelius*, 473 U.S. at 811 ("The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *DiLoreto*, 196 F.3d at 969 ("Although the District's decision not to post [a religious] ad was reasonable . . . it may still [have] violate[d] the First Amendment if it discriminate[d] on the basis of viewpoint, rather than content."). The Supreme Court has long held that the Government has the "right to make distinctions in access on the basis of subject matter and speaker identity," *Perry Educ. Ass'n*, 460 U.S. at 49, but "must not [make distinctions] based on the speaker's viewpoint," *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998). In cases where the Supreme Court and the Ninth Circuit have upheld the constitutionality of the Government's restriction of speech based on the audience's reaction, such exclusions from nonpublic fora have been based on subject matter. *See, e.g.*, *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (solicitation); *Preminger II*, 552 F.3d at 767 (partisan groups and activities); *DiLoreto*, 196 F.3d at 969 (religion). Therefore, whether Defendants' enforcement of section 1.218(a)(9) was constitutional turns on whether the enforcement was viewpoint neutral. It was not.

I. Plaintiff Conveyed a Different Viewpoint when He Hung the American Flag Upside Down.

Defendants insist that enforcing section 1.218(a)(9) when Plaintiff had hung the American flag, union down, was not viewpoint discrimination because Plaintiff expressed the same viewpoint when he hung the American flag, union up. (Defs.' Mot. 6:28-7:9.) In Defendants' minds, Plaintiff conveyed in both circumstances his disagreement with the VAGLA's refusal to develop the Great Lawn for the shelter and care of veterans. (Defs.' Mot. 7:1-7.) The Court is not persuaded.

Plaintiff's motivation for hanging the flag in different positions may have been the same, but the messages conveyed were markedly different. When Plaintiff first hung the United States flag, right-side up, he "was expressing the message that . . . almost everyone perceives when they see the flag displayed that way - a message of patriotism." (Rosebrock Decl. ¶ 9.) He sought to make a statement "that whatever [his] disagreement with the VA, [he and the protestors] were proud and patriotic Americans." (*Id.*) Defendants mount no opposition to Plaintiff's argument that the act of displaying the American flag in its traditional position is an expression of reverence and loyalty to our collective identity as a nation. No binding case law acknowledging this obvious fact is needed, but there are many from the highest court in the land. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 405 (1989) ("Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'"); *Smith v. Goguen*, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting) ("[The American flag] is

not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood - a history compiled by generations of our forebears and contributed to by streams of imigrants [sic] from the four corners of the globe . . . ."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943) ("Causes and nations . . . seek to knit the loyalty of their following to a flag . . . .").

Plaintiff's expression of patriotism stands in stark contrast to his subsequent "signal of dire distress . . . [and] of extreme danger to life or property." 4 U.S.C. § 8(a); *see also The Laura*, 81 U.S. 336, 337 (1871) (A captain of a ship "ordered the flag to be raised Union down" because he had "extreme anxiety for the safety of all on board."). The message Plaintiff intended to show when he hung the American flag with the union down was "not to express [his] patriotism or support for military veterans." (Rosebrock Decl. ¶ 15.) Rather, he hoped to send a clear message that "the VA was endangering the land and . . . in so doing, VA officials were endangering the veterans." (*Id.*) An inverted flag signifies "what the flag's [aforementioned] powerful message does not encompass . . . : dissent." *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1224 (9th Cir. 2003). Case law from other district courts supports this conclusion. *See Roe v. Milligan*, 479 F. Supp. 2d 995, 998-99 n.2 (S.D. Iowa 2007) (recognizing that "[a]n inverted flag . . . by law is considered a signal of dire distress" and that the plaintiffs displayed the flag as a form of protest). In fact, Defendants acknowledge the distinction between Plaintiff's expressive acts. Even if "[t]he only distinction . . . by the varied position of the flag is Plaintiff's own personal frustration," that frustration

nonetheless created two different viewpoints, two divergent messages: one of fidelity to country and another of fierce dissent.

Lastly, Defendants assume that symbols may only carry one viewpoint or one message. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Barnette*, 319 U.S. at 632. "Such adornments have multiple meanings, including but not limited to conveying allegiance to a particular institution or a broad band of convictions, values, and beliefs." *Berner v. Delahanty*, 129 F.3d 20, 29 (1st Cir. 1997). Here, Plaintiff placed multiple meanings into the display of the American flag. When he hung the flag, union up, he was expressing: (1) his disagreement with the VAGLA's land use policy; and (2) his patriotism. When he hung the flag inverted, however, he was exhibiting: (1) his opposition to the VAGLA's land use policy; but also (2) "a signal of dire distress"; and (3) a modicum of disrespect to the American flag.[7] Simply because Plaintiff's motivation, or perhaps one viewpoint, overlapped does not mean that the two opposing displays of the United States flag expressed the same viewpoints. *See Barnette*, 319 U.S. at 632-33 ("A person gets from a symbol the meaning he puts into

[7] The Court fully concedes that Plaintiff previously declared "[he] did not intend to demonstrate disrespect to the flag." (Decl. of Robert Rosebrock in Supp. of Pl.'s Prelim. Inj. ¶ 8.) Yet, there can be no doubt that Plaintiff was fully cognizant of the symbolism behind his decision to display the flag with the union down and how other people may interpret such a drastic act. Indeed, Carrier informed Plaintiff of how disrespectful the act of displaying the American flag inverted is. (*See* Rosebrock Decl. ¶ 17.)

it, and what is one man's comfort and inspiration is another's jest and scorn."). And undoubtedly, it wasthe difference in viewpoints that disturbed Defendants and spurred them to selectively enforce section 1.218(a)(9). It is nonsensical to conclude that the contents of Plaintiff's expressive acts were one and the same; because if that were so, then patients and visitors would not have complained (*see* Carrier Decl. ¶ 12), nor would the VA police have reacted so manifestly different.

Accordingly, the Court finds that Plaintiff conveyed differing viewpoints when he displayed the American flag properly and when he hung the flag inverted.

ii. Plaintiff's Speech Was Excluded Because of His Viewpoint, Not the Subject Matter.

The Court must next determine whether Plaintiff's speech was excluded from the Perimeter Fence because of viewpoint or subject matter. As previously mentioned, restriction based on the former category is impermissible, while the latter is not. *See Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 280 (9th Cir. 1997) ("The government may reasonably restrict expressive activity in a nonpublic forum on the basis of content, so long as the restriction is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.") (quotations omitted). Therefore, even if the display of the American flag in various positions represented different viewpoints, the exclusion of the inverted flag would not violate the First Amendment if it were based on subject matter.

Defendants fail to argue that the exclusion of Plaintiff's speech was based on subject matter rather than viewpoint. (*See generally* Defs.' Mot.; Defs.' Opp'n; Defs.' Reply.) The Court independently questions if Defendants' enforcement of section 1.218(a)(9) against the display of the American flag, union down, may be characterized as a restriction based on subject matter jurisdiction. The Court does so out of respect for the gravity of the constitutional claim asserted and the ramifications the claim may have on all parties involved.

"[I]t must be acknowledged, the distinction [between viewpoint and subject matter] is not a precise one." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995). The "distinction is one between 'subject matter' (content) and 'a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered' (viewpoint)." *PMG Int'l. Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1171 (9th Cir. 2002). "The test is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum." *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 912 (9th Cir. 2007) *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 375 (2008). Often, "the level at which 'subject matter' is defined can control whether discrimination is held to be on the basis of content or viewpoint." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001).

For the case at hand, the subject matter may properly be characterized as either postings or commentary on the VAGLA's land use policy. Applying either of these broad subject matters, it is evident that Defendants permitted certain

viewpoints included in the subject matters, while they disallowed others. The VA police granted Plaintiff permission to hang the United States flag and the P.O.W. flag, but not other forms of postings. (*See* Webb Dep. 53:18-19, 67:4-15.) In the alternative, the VA police allowed Plaintiff to express disagreement cloaked in a patriotic symbol, but not strong dissent through a signal of dire distress. Therefore, Defendants' selective enforcement was "an effort to suppress the [Plaintiff]'s activity due to disagreement with . . . [his] view," *Lee*, 505 U.S. at 679, not because of an evenhanded exclusion of a subject matter.

The Court finds *Brown v. California Department of Transportation*, 321 F.3d at 1223-24, instructive and directly on point. In *Brown*, the Ninth Circuit held that the defendant agency's selective enforcement of its permit policy constituted impermissible viewpoint discrimination. *Id.* at 1224. The permit policy forbade individuals from displaying any messages on highway overpasses, which the appellate court determined to be "nonpublic fora." *Id.* at 1222. The defendant agency did not prohibit the display of American flags, nor required a permit for their display. *Id.* at 1220. When the plaintiffs hung an anti-war banner on a highway overpass, police officers "immediately removed the banner" because it supposedly posed a safety threat to drivers. *Id.* The Court of Appeals held that "the flag's powerful message does not encompass, for many . . . exactly that which [the plaintiffs] voice[d]: dissent." *Id.* at 1224. By excluding the plaintiffs' message of dissent, but allowing others to express their loyalty and patriotism for our great nation, the

defendant agency had curtailed the plaintiffs' freedom of speech. *See id.*

Here, section 1.218(a)(9) precludes any unauthorized speaker from posting any material on the Perimeter Fence. Yet, Defendants permitted Plaintiff to display the United States flag like the defendant agency did in *Brown*, 321 F.3d at 1220. Defendants then selectively excluded a viewpoint that could not have been encompassed by the United States flag hung with the union up. The Court is not persuaded by Defendants' argument that the VA police did not strictly enforce section 1.218 against Plaintiff and the protestors because they feared harsh enforcement tactics against elderly veterans would be misconstrued by the public. (Defs.' Reply 4:1-5:10.) The Court acknowledges the undisputed record shows that Plaintiff and fellow protestors, in many instances, sought to antagonize the VA police and to publicize their encounters. (Cameron-Banks Decl. Exs. 9-11.) Nonetheless, the record also shows that Plaintiff and his fellow demonstrators were very cooperative with VA police when told that they could not hang any postings other than the P.O.W.flag and the American flag with the union up. (Webb Dep. 53:22-23; Rosebrock Decl. ¶ 10.) Consistently, agents of Defendants "either explicitly or implicitly" authorized Plaintiff to convey one viewpoint, but denied him any opportunity to convey another. (Defs.' Reply 4:3-4.) Pursuant to Ninth Circuit precedent, Defendants' prohibition of the display of the inverted American flag, while permitting the display of it with the union up, constituted viewpoint discrimination.

E. Defendants May Close the Perimeter Fence from All Forms of Speech, Thereby, Mooting Plaintiff's Request for a Permanent Injunction.

Defendants claim that Plaintiff's request for a permanent injunction is moot because the VA police have been enforcing section 1.218 uniformly and the directive from Carrier unequivocally prohibits selective enforcement against Plaintiff's speech. (Defs.' Mot. 7:21-9:4.) Citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000), Plaintiff argues that Defendants' "voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." (Pl.'s Reply 4:12-24.) Plaintiff also asserts that the change in the policy resulted only because of this litigation and that nothing prevents Defendants from enforcing section 1.218(a)(9) in an uneven manner. (*Id.* at 4:15-19.) In addition, Plaintiff states that "Defendants' vigorous defense of the legality of their actions shows that [Plaintiff]'s equitable claims are [not] moot." (*Id.* at 4:22-24.)[8]

---

[8] Plaintiff's arguments are unpersuasive. First, *Friends of the Earth, Inc.*, 528 U.S. at 174, is inapposite because the case did not involve First Amendment rights and the decision did not analyze whether the Government may close a forum, as is the case here. Ninth Circuit case law clearly establishes that the Government, as a property owner and manager, has the right to close a previously opened forum from speech. Were the Court to find *Friends of the Earth, Inc.* applicable, the Court would still find Plaintiff's request for equitable relief moot. Though Plaintiff provides an accurate statement from *Friends of the Earth, Inc.*, Plaintiff ignores the Supreme Court's pronouncement in that very same decision that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be

The parties, however, miss an important point: the VAGLA is constitutionally permitted to close the Perimeter Fence as a forum for all future speech. Because Defendants have closed the forum, Plaintiff's request for equitable relief is moot. *See, e.g.*, *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031-32 (9th Cir. 2006) (deeming moot a challenge to a street banner ordinance because an amendment precluded all private parties from the forum).

In *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d at 970, the Ninth Circuit made clear in no uncertain terms that "[t]he government has an inherent right to control its property, which includes the right to close a previously open forum." *See also Perry Educ. Ass'n*, 460 U.S. at 46 ("[A] State is not required to indefinitely retain the open character of the [designated public forum] . . . ."); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571 (9th Cir. 1984) ("[T]he City was not required to open the [forum] and is not required to leave it open indefinitely . . . ."). The Court of Appeals held that "[c]losing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access . . . [to a nonpublic forum]." *DiLoreto*, 196 F.3d at 970. Thus, when the school district in *DiLoreto*

---

expected to recur." *Id.* at 170. Defendants carry their burden of persuading the Court that the VAGLA will apply section 1.218(a)(9) evenhandedly. Second, whether a change of policy is impelled by litigation is not relevant as to the issue of mootness. *See White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (where litigation "was the catalyst for the agency's adoption of a new policy"). Third, the directive is "broad in scope and unequivocal in tone," which supports Defendants' assertion that the policy change is permanent. *See id.*

closed an advertising space on a school's baseball field fence rather than post a religious advertisement, the Ninth Circuit found no constitutional violation. *Id.* at 970. Subsequent Ninth Circuit case law has reaffirmed that the Government "may close the [designated or limited public] fora whenever it wants." *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004), *cert. denied sub nom. Seattle Hous. & Res. Effort v. Potter*, 545 U.S. 1127 (2005).

Moreover, "[a]n injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief." *Salazar v. Buono*, ___ U.S. ___, 130 S. Ct. 1803, 1816 (2010). "[A] court must never ignore significant changes in the law or circumstances underlying an injunction [request] lest the [sought after] decree be turned into an 'instrument of wrong.'" 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2961 (2d ed. 1995) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932)). As such, the Supreme Court has held that a district court commits an "error" when it does not acknowledge "substantial change in circumstances bearing on the propriety of [a] requested [equitable] relief." *Salazar*, 130 S. Ct. at 1816.

Here, as in *DiLoreto*, 196 F.3d at 970, Defendants closed the nonpublic forum, the Perimeter Fence, from any postings. All private individuals are precluded from hanging the P.O.W. flag and the American flag, with the union up or down. Previously, the VA police had an unwritten policy of permitting the display of the P.O.W. flag and the American flag, union up, on the Perimeter Fence. (Webb Dep. 57:4-11.) On June 30, 2010,

Carrier issued a directive to the VA police department that VA police officers must enforce section 1.218 "precisely and consistently." (Carrier Decl. Ex. 8.) Carrier expressly mandated that no flags in any position be displayed, thereby closing the Perimeter Fence to all speech. (*See id.*) Pursuant to Ninth Circuit law, the closing of the Perimeter Fence to all postings was constitutional and made Plaintiff's request for equitable relief unviable. In addition, the broad and unequivocal directive from Carrier represents a "substantial change in circumstances" that bear on the appropriateness of Plaintiff's request.

Accordingly, Plaintiff's request for equitable relief is moot because Defendants are constitutionally permitted to close the Perimeter Fence from any postings.

F. The Court also Denies Plaintiff's Request for a Permanent Injunction Because Plaintiff Fails to Establish that Equitable Relief Is Appropriate.

In addition to the fact that Defendants have closed the Perimeter Fence as a forum for speech, Plaintiff's request for permanent injunction is untenable. He has not established that the balance of equities tips in his favor or that a permanent injunction is in the public interest.

A plaintiff seeking a permanent injunction must establish that: (1) he actually succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *See Winter*, 129 S. Ct. at 374 (elements for preliminary injunction); *see also Amoco*

Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546, n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). "While a First Amendment claim 'certainly raises the specter' of irreparable harm and public interest considerations," proving the success on the merits "is not enough." *See Dish Network Corp. v. FCC*, ___ F.3d ___, 2011 WL 651935, at *3 (9th Cir. 2011); *see also Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007) ("But simply raising a serious claim is not enough to tip the hardship scales."). To obtain a ermanent injunction, a plaintiff "must also demonstrate that he is likely to suffer irreparable injury in the absence of a [permanent] injunction, and that the balance of equities and the public interest tip in his favor." *Klein v. City of San Clemente*, 584, F.3d 1196, 1207 (9th Cir. 2009); *see also Winter*, 129 S. Ct. at 381 ("The factors examined above - the balance of equities and consideration of the public interest - are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent.").

1. The Balance of Equities Does Not Tip in Plaintiff's Favor.

The Court is tasked with the difficult responsibility of weighing the infringement of Plaintiff's First Amendment right, on one hand, against the probable disruptions to complex, life sustaining medical and psychological services for veterans, on the other hand. Plaintiff contends that the balance of equities tips in his favor because the protection of his First Amendment right "is not

merely a benefit to [him] but to all citizens." (Pl.'s Mot. 17:7-9.) In addition, Plaintiff seemingly argues that the balance of equities tips in his favor automatically following his success on the merits. (*Id.* at 17:11-13 ("the balance-of-hardship requirement[] is satisfied where First Amendment protections are at issue").) Defendants are silent on whether Plaintiff has established that a permanent injunction is warranted. (See generally Defs.' Mot.; Defs.' Opp'n; Defs.' Reply.)

In contrast to Plaintiff's assertion, the Supreme Court has held that a permanent injunction "does not follow from success on the merits as a matter of course." *Winter*, 129 S. Ct. at 381. In fact, "it would be an abuse of discretion to enter a permanent injunction" without the Court first examining the balance of equities between Plaintiff and Defendants. *See id*. Plaintiff also misconstrues the balance of hardship requirement as between the public and the VAGLA. (*See* Pl.'s Mot. 17:7-9.) In doing so, Plaintiff is confusing the public interest requirement with the balance of equities requirement. *See Sammartano*, 303 F.3d at 974 ("The public interest inquiry primarily addresses impact on non-parties rather than parties."). The Court "look[s] at [the public interest] factor separately, not simply as part of the balancing of hardships." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003). Were Plaintiff's request for a permanent injunction granted, the injunction would only allow Plaintiff to display the American flag inverted on the Perimeter Fence, not other members of the public. *Compare* (Pl.'s Mot. 17:9-10) *with Int'l Soc'y for Krishna Consciousness v. Kearness*, 454 F. Supp. 116, 125 (E.D. Cal. 1978) (where a city ordinance relating to

solicitations affected all residents, not just the plaintiff). Thus, the proper analysis is the weighing of hardships between Plaintiff and the VAGLA.

After careful thought and review of the record, the Court finds that the balance of hardships does not tip in Plaintiff's favor. First, Plaintiff has been able to exercise his First Amendment right through the exhibition of the American flag, union down, in "other forums available for displaying Plaintiff's message." *See Seattle Mideast Awareness Campaign v. King Cnty.*, ___ F. Supp. 2d ___, 2011 WL 649488, at *11 (W.D. Wash. 2011) (considering the availability of other fora in analyzing the elements outlined in Winter, 129 S. Ct. at 374). Plaintiff admits that Defendants never prevented him from holding the American flag inverted. (*See* Rosebrock Decl. ¶ 24; Cameron-Banks Decl. Ex. 10.) Plaintiff was, and continues to be, able to convey his disagreement with the VAGLA's land use policy, provide a signal of great distress, and showcase disrespect of the American flag within 50 feet of the Perimeter Fence for all the world to witness. (Rosebrock Decl. ¶ 24.) Thus, Plaintiff's "inability to demonstrate freely on [the Perimeter Fence] is not a hardship. . . . [He] may demonstrate in a designated area adjacent to [the Perimeter Fence] in full view of any motorist" or pedestrian who traverses the intersection of San Vicente and Wilshire Boulevards. *See Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986) (finding the balance of hardships did not favor the plaintiff). Plaintiff fails to realize that "[t]he First Amendment does not guarantee an optimal setting for speech at all times and places." *Id.* Second, the irreparable harm that the permanent injunction will cause to the VAGLA's mission and the

medical care it provides is severe. Plaintiff prays the Court to grant him permission to display the American flag inverted for 66 weeks without regard to the havoc that such a decision may have on the VAGLA's mission and the veterans it serves. (Pl.'s Mot. 20:20-21.) As stated above, perceptions that the VAGLA endorses such disrespect for the American flag will likely "violat[e] the trust of [the] patients." *See Preminger II*, 552 F.3d at 767. That trust is integral for the VAGLA to care for our brothers, sisters, sons, and daughters who have sacrificed immeasurably for our country. Credibility, once lost, is not easily regained, if at all. Without that trust, veterans who are patients may very well question the VAGLA's instructions, diagnoses, and prescriptions; Defendants' ability to provide proper health care will be jeopardized. Further, the VAGLA and Defendants are obligated to care for those who have risked life and limb for this country. *See* 38 U.S.C. § 301. They are also knowledgeable and experienced in providing for complex medical and psychological care, expertise that the Court lacks. Thus, when Defendants state that granting Plaintiff's request would hamper their mission to provide quality health care to veterans, some deference should be given to that assessment.

Furthermore, granting Plaintiff's request for a permanent injunction would divert limited resources away from the caring of veterans to the supervising and enforcing of the injunction. Security threats have already arisen on at least two separate occasions. (Carrier Decl. ¶ 12.) Defendants would have to commit time and money to ensure that Plaintiff's American flag, union down, is not disturbed by third parties and that Plaintiff is not physically attacked on the VAGLA Campus.

The hardships on Defendants will be far-reaching and likely irreparable, and therefore, the balance of equities weighs against granting of Plaintiff's request for equitable relief. Accordingly, Plaintiff's request for a permanent injunction is unjustifiable.

2. A Permanent Injunction Is Not in the Public Interest.

Plaintiff's request for equitable relief is also inappropriate because the permanent injunction will not serve the public interest. Plaintiff asserts that "[u]pholding the First Amendment and ensuring that the government respects the fundamental principle of viewpoint neutrality is in the public interest." (Pl.'s Mot. 17:15-18:13.) Defendants do not address the issue. (*See generally* Defs.' Mot.; Defs.' Opp'n; Defs.' Reply.)

The Ninth Circuit has instructed that "[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Sammartano*, 303 F.3d at 965 (edit in original); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). The public interest is involved when "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). "In considering the public interest, [the Court] may [also] consider the hardship to all individuals . . . not limited to parties, as well as the indirect hardship to their friends and family

members . . . ." *Golden Gate Rest. Ass'n v. City of San Francisco,* 512 F.3d 1112, 1126 (9th Cir. 2008). As with the balance of equities factor, it is an abuse of discretion for a court to enter a permanent injunction without consideration of the public interest. *See Winter,* 129 S. Ct. at 381; *Stormans, Inc.*, 586 F.3d at 1140 ("The district court clearly erred by failing to consider the public interest at stake."). A plaintiff bears the initial burden of showing that the injunction is in the public interest. *See Winter*, 129 S. Ct. at 374.

Plaintiff is correct that courts "consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano*, 303 F.3d at 974. Nonetheless, "[t]he public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Id*. Such was the case in *Preminger I*, 422 F.3d at 826, where the Ninth Circuit held that the public interest did not require an injunction because: (1) "the VA ha[d] a competing public interest in providing the best possible care . . . for the veterans seeking services from the [VA medical center]"; and (2) "because other means [were] available for [the plaintiffs to conduct their First Amendment activities]." Other courts have similarly held that "the public interest is . . . served by maintaining uninterrupted medical care and continuity of care for wounded veterans, service members, and their families." *See, e.g., Magnum Opus Techs., Inc. v. United States*, 94 Fed. Cl. 512, 551 (2011); *IDEA Int'l, Inc. v. United States*, 74 Fed.

Cl. 129, 143 (2006) ("The interests of the military families bear repeating as part of the public interest."); *PGBA, LLC v. United States*, 60 Fed. Cl. 196, 221 (2004) (holding that the public interest is served through medical services for veterans and families of service members).

The public interest does not require entry of a permanent injunction. Here, as in *Preminger I*, 422 F.3d at 826, the countervailing interest is "the public interest in providing the best possible care . . . for the veterans seeking services from the [VAGLA] Campus." *See also Stormans, Inc.*, 586 F.3d at 1139 ("The general public has an interest in the health of state residents.") (quotations omitted). Also similar to *Preminger I*, Plaintiff has other means to convey his signal of great distress. Plaintiff may display the American flag inverted on the public sidewalk approximately 50 feet away from the Perimeter Fence. (*See* Rosebrock Decl. ¶ 24; Cameron-Banks Decl. Ex. 10.) Plaintiff is able to reach the same audience with the same message. Lastly, the tremendous hardships to the veterans, their family members, and visitors to the VAGLA Campus weigh against finding that a permanent injunction is in the public interest. *See Golden Gate Rest. Ass'n*, 512 F.3d at 1126. When Plaintiff's speech disrupts services or diverts resources away from veterans, family members and visitors are also harmed. Because of these compelling reasons, Plaintiff fails to meet his burden of showing that the permanent injunction is in the public interest. *See City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933) ("Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling."). Accordingly, Plaintiff has not

established that his request for a permanent injunction is in the public interest.

In sum, Plaintiff has established that his First Amendment right was violated as a matter of law when Defendants committed impermissible viewpoint discrimination. The granting of Plaintiff's request for a permanent injunction does not, however, follow as a matter of course. Plaintiff's conviction to shine light on the plight of homeless veterans is undoubtedly laudable. In his zealous quest to right a perceived wrong, Plaintiff may in fact cause greater harm to the very community he seeks to serve. He desires to turn an equitable remedy into an instrument of wrong. Plaintiff's request for a permanent injunction to allow him to display the United States flag with the union down on the Perimeter Fence is indefensible and DENIED.

IV. RULING

For the foregoing reasons, Plaintiff's and Defendants' Motions for Summary Judgment are **GRANTED IN PART AND DENIED IN PART**. As a matter of law, Defendants violated Plaintiff's First Amendment right by practicing viewpoint discrimination through selective enforcement of 38 C.F.R. section 1.218. Plaintiff's request for a permanent injunction, however, is **DENIED** because his request is moot and he has not met his burden to show that such equitable relief is appropriate.

IT IS SO ORDERED.

Dated: May 26, 2011

/s/ S. James Otero
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ROSEBROCK Plaintiff-Appellant, v. RONALD MATHIS, Chief of Police of The Veterans Administration Greater Los Angeles Healthcare System, in his official capacity; DONNA BEITER, Director of The Veterans Administration Greater Los Angeles Healthcare System, in her official capacity, Defendants-Appellees.	No. 11-56256 D.C. No. 2:10-cv-01878-SJO-SS Central District of California, Los Angeles

ORDER

Appellant's Motion to Supplement Record on Appeal, filed on January 18, 2012, is DENIED. Appellant's Request for Judicial Notice, filed on January 18, 2012, is GRANTED.

FILED	FOR THE COURT:
March 4, 2013	MOLLY C. DWYER CLERK OF COURT
	By: Wendy Lam Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

October 17, 2014

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ROBERT ROSEBROCK	No. 11-56256
Plaintiff-Appellant,	D.C. No. 2:10-cv-01878-SJO-SS
v.	Central District of California, Los Angeles
RONALD MATHIS, Chief of Police of The Veterans Administration Greater Los Angeles Healthcare System, in his official capacity; DONNA BEITER, Director of The Veterans Administration Greater Los Angeles Healthcare System, in her official capacity,	
Defendants-Appellees.	

ORDER

Before: FERNANDEZ, RAWLINSON, and BYBEE, Circuit Judges.

A majority of the panel voted to deny appellant's petition for rehearing. Judge Rawlinson voted to grant the petition for rehearing. Judge Fernandez recommended to deny the petition for

rehearing en banc, Judge Rawlinson voted to grant it, and Judge Bybee voted to deny it.

The full court has been advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed April 28, 2014, is DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT ROSEBROCK, an individual,

Plaintiff,

v.

DONNA BEITER, DIRECTOR OF THE VERTANS ADMINISTRATION GREATER LOS ANGELES HEALTHCARE SYSTEM, in her official capacity; RONALD MATHIS, CHIEF OF POLICE OF THE VETERANS ADMINISTRATION GREATER LOS ANGELES HEALTHCARE SYSTEM, in his official capacity.

Defendants.

NO. CV 10-01878 SJO (SSx)

JUDGMENT

This matter came before the Court on Defendants Donna Beiter and Ronald Mathis (collectively, "Defendants") and Plaintiff Robert Rosebrock's ("Plaintiff") separate Motions for Summary Judgment, filed on October 18, 2010 and October 25, 2010, respectively. (Docket Nos. 32, 37.) After full consideration of all admissible evidence and documents submitted, the Court granted in part and denied in part Defendants' and Plaintiff's Motions for Summary Judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Plaintiff on his First Amendment claim.

IT IS SO ORDERED.

Dated: June 7, 2011

/s/ S. James Otero
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE