No. 14-884

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,

Respondents.

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

BRIEF OF *AMICI CURIAE* WESTERN CENTER ON LAW AND POVERTY, ADVANCEMENT PROJECT CALIFORNIA, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, EQUAL RIGHTS ADVOCATES, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, PUBLIC COUNSEL, THE IMPACT FUND, AND THE PRISON LAW OFFICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are nine non-profit organizations committed to preserving civil rights and liberties. Central to *Amici*'s work is the ability to meaningfully hold governmental entities and employees accountable in suits seeking injunctive relief. *Amici* also depend on established mootness standards to demonstrate that the government's "predictable protestations of repentance and reform" do not obviate the need for court intervention to create enforceable obligations.

Founded in 1999 by three veteran civil rights attorneys, Advancement Project California ("APC") is a next generation, multi-racial civil rights organization committed to transforming the large public systems that impact Californians. APC champions the struggle for greater equity and opportunity for all, fostering upward mobility in communities most impacted by economic and racial injustice. APC's current work focuses on issues of educational equity, community access to data, equity in public funding, and comprehensive and community-driven approaches to public safety. Central to all of APC's work is the ability to meaningfully hold government systems and actors accountable to its most vulnerable citizens and communities.

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for Petitioner and Respondents received timely notice of *Amici*'s intent to file this brief. This brief is filed with the written consent of all parties through letters of consent contemporaneously filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission.

preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Americans United regularly encounters mootness issues in its litigation of church-state cases.

Equal Rights Advocates ("ERA") is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and civil rights. Through litigation and other advocacy efforts, ERA has helped to expand workplace protections and conferred significant benefits on large groups of women and girls. ERA also assists hundreds of low-income individuals each year facing unfair, substandard, and unequal conditions on the job and at school through our toll-free, multi-lingual national Advice and Counseling service. ERA has participated as amicus curiae in scores of cases involving the interpretation and application of procedural rules and substantive laws affecting low-wage workers' employment rights and access to justice.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving the full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and those with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel to parties and amici in cases before the U.S. Supreme Court involving sexual orientation discrimination by the government, including as party counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal often litigates cases seeking injunctive relief to restrain unlawful government conduct, including discrimination against same-sex couples,

infringements on LGBT student expression, police practices targeting LGBT people, discriminatory employment practices by public employers, mistreatment of LGBT people in jails, prisons, and juvenile detention facilities, and discrimination on the basis of HIV status in government services and programs. Lambda Legal's ability to obtain lasting and enforceable relief in these situations, and to deter similar misconduct by other government defendants, would be substantially frustrated by an expansion of the voluntary cessation doctrine.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest organization that is incorporated under the laws of the State of California and has its headquarters in San Francisco, California. LAS-ELC, the oldest legal services organization west of the Mississippi River, was founded in San Francisco in 1916. LAS-ELC has for decades vigorously advocated on behalf of low-wage workers through its widely-recognized litigation program, often against governmental entities. Further, through its Workers' Rights Clinics and its Unemployment and Wage Claims Projects, the LAS-ELC provides counsel and representation to thousands of clients before administrative agencies. As an advocate for low-income workers, LAS-ELC is concerned with the standards by which the mootness doctrine is applied to claims brought on behalf of its clients.

Founded in 1970, Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Public Counsel is dedicated to advancing equal justice under law by delivering free legal services to indigent and underrepresented children, adults, and families throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and

mobilizing the pro bono resources of attorneys, law students, and other professionals. Public Counsel's staff of 71 attorneys and 50 support staff, along with over 5,000 volunteer lawyers, law students, and legal professionals, assists over 30,000 children, youth, families, and community organizations every year.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund is a California State Bar Legal Services Trust Fund Support Center, providing assistance to legal services projects throughout the State of California. The Impact Fund has served as counsel in a number of major civil rights class actions seeking injunctive and monetary relief, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

The Prison Law Office is a non-profit public interest law firm that provides free legal assistance to incarcerated individuals in state and local facilities regarding their conditions of confinement. The Prison Law Office engages in litigation aimed at securing injunctive relief to protect the rights of prisoners under the United States Constitution and other federal laws. The Ninth Circuit's holding in this case is of particular interest because a mootness issue often arises in these cases.

The Western Center on Law and Poverty, established in 1967, is California's oldest and largest support center for the State's many neighborhood legal services programs. The Western Center often represents low-income people in large-scale litigation – usually against government agencies – focusing on health, public benefits, and housing rights. All these cases seek prospective relief, and in many of the cases government agencies promise to provide the plaintiffs with

the relief sought in the suit. The ability to hold the government to its promises is critical to Western Center's mission and the interests of its clients.

Amici have a strong interest in apprising the Court of the significant adverse consequences the decision below, if allowed to stand, would inflict on non-profit organizations' ability to protect constitutional and statutory rights against governmental intrusion. The Ninth Circuit's decision departs from this Court's precedent, as well as decisions by other circuits, and has far-reaching consequences for plaintiffs who seek equitable remedies. Unless the Court intervenes, plaintiffs who seek to hold governmental entities or employees accountable will be deprived of an important equitable remedy.

SUMMARY OF ARGUMENT

In a ruling unmoored from this Court's precedents, the Ninth Circuit split with two other circuits by holding that a request for a reparative injunction permitting Petitioner to hang the American flag, union down, for the amount of time his First Amendment rights were violated was mooted by an inter-office email purporting to close the subject forum to all types of speech after the suit was commenced. Presented with facts materially indistinguishable from those previously confronted by the Seventh and Second Circuits, a divided Ninth Circuit panel chose not to follow those reasoned decisions. Instead, it expanded the mootness doctrine beyond the boundaries set by this Court by finding that an inter-office email, which provided no reliable indication of official agency policy or acknowledgment of error, mooted a request for a reparative injunction.

The Ninth Circuit's decision invites, and indeed encourages, governmental defendants to evade review of a challenged practice or policy by simply sending an inter-

office email or letter. This flies in the face of a party's "heavy burden" of establishing mootness by demonstrating that it is "absolutely clear" that the offending behavior is not reasonably likely to recur. *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The costs of this decision are particularly high for *Amici* because

Accordingly, *Amici* respectfully request that this Court grant the petition for certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WILL HARM PLAINTIFFS SEEKING TO MEANINGFULLY HOLD GOVERNMENTAL ENTITIES AND EMPLOYEES ACCOUNTABLE IN SUITS FOR INJUNCTIVE RELIEF.

This Court has always placed on the party alleging mootness the "heavy burden" of demonstrating that it is "absolutely clear" that the challenged behavior is not reasonably likely to recur. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *Friends of the Earth*, 528 U.S. at 189; *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 661 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This standard is stringent. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off . . . .") (citation omitted); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("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.").

For more than a year, the Respondent governmental officials allowed Petitioner to hang an American flag union up, as well as another item, on a fence surrounding a health care facility operated by the U.S. Department of Veterans Affairs ("VA"). Pet. App. 8a-10a, 32a, 33a-35a. In June 2009, Petitioner hung the American flag union *down* on the fence to express his view that the VA was not using the land that had been deeded for veterans' benefit for its intended purpose. Pet. App. 35a. The VA then sent him an email stating 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." Pet. App. 8a, 35a-36a. Over the next few months, the VA also issued six criminal citations to Petitioner; four of the citations expressly mentioned that the flag was hung union down. Pet. App. 9a, 36a-37a. Three months after Petitioner filed suit for violation of his First Amendment rights, a local associate director of the VA sent an internal email to the VA police requesting that VA Regulation 38 C.F.R. § 1.218(a)(9) be enforced "precisely and consistently," and that *all* displays on VA property be prohibited. Pet. App. 14a, 59a. The VA regulation provides broad authority to VA officials to allow exceptions for favored viewpoints. 38 C.F.R. § 1.218(a)(9).

The Ninth Circuit concluded that this internal email satisfied the VA's heavy burden of demonstrating mootness under the voluntary cessation doctrine. The court therefore held moot Petitioner's request for a reparative injunction that

would have permitted him to hang the American flag, union down, on the fence for the amount of time that the VA had allowed him to hang the flag union up. Pet. App. 21a.

The Ninth Circuit's decision sets a remarkably low bar for showing mootness. The ruling expands the mootness doctrine in a manner that would bar necessary relief in other cases where a governmental official sends an inter-office email or letter purporting to change the government's future conduct. Indeed, under circumstances such as those here — where the email or letter does not even acknowledge the illegality of the prior censoring of speech — there are no safeguards to prevent future First Amendment violations, such as instructions or training tools, much less any enforceable change in policy.

Regulations or statutes that rely upon the exercise of discretion by enforcing authorities are often the subject of litigation that challenges policies enacted or modified by email or memorandum. For example, in *Catholic Social Services, Inc. v. Meese*, 685 F. Supp. 1149 (E.D. Cal. 1988), a telex construing a regulation resulted in the disqualification of thousands of applicants for amnesty under the Immigration Reform and Control Act. Under the Ninth Circuit's decision, the mere retraction of that telex could have been the basis for mooting the case even though the challenged policy could have easily been subsequently reinstated.

Disability-rights statutes and regulations place obligations upon governments to "reasonably modify" policies, practices, or procedures, as well as obligations for self-evaluation, public notice, and adoption of grievance procedures. 28 C.F.R. §§ 35.130(b)(7), 35.105, 35.107. The full promise of these mandates is compromised unless all the

governmental choices relevant to their implementation are subject to appropriate judicial review.

Similar issues arise in the environmental context. Under the Clean Water Act, the U.S. Forest Service has a non-discretionary duty to enforce Best Management Practices ("BMPs") to protect water courses when authorizing the construction of logging roads in national forests. Notwithstanding this obligation, Forest Service personnel sometimes fail to enforce BMPs in particular forests, leading to degraded waterways. Under the Ninth Circuit's decision, a case brought to compel enforcement of BMPs might be mooted as soon as a Deputy Forest Supervisor sends an inter-office email stating, "Please ensure that all BMPs continue to be enforced." The government would not even need to mitigate the past degradation because requests for reparative injunctions are mooted under the Ninth Circuit's decision.

The ruling below could likewise impact suits under the Federal Land Policy Management Act, which requires the Bureau of Land Management ("BLM") to "take any action necessary to prevent unnecessary or undue degradation of [public] lands." 43 U.S.C. § 1732(b). Environmental groups periodically sue BLM for authorizing activities on public land, such as uncontrolled use of off-road vehicles or mining in sensitive areas, that would cause such "undue degradation." Under the Ninth Circuit's decision, these suits will potentially be mooted any time the BLM withdraws authorization for an activity.

Controversies involving religious speech in public fora could also often evade needed judicial review under the Ninth Circuit's decision. For example, municipalities often allow various groups to erect displays expressing their religious

viewpoints on governmental property during the holiday season. Sometimes, however, governmental bodies deny access to such fora based on the viewpoint expressed by a display. *See, e.g.*, *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995). The Ninth Circuit's decision would permit governments to moot such controversies merely by sending an internal e-mail that can be countermanded as soon as the case is dismissed.

In sum, the Ninth Circuit's decision will bar necessary relief in cases where plaintiffs are seeking to meaningfully hold governmental entities and employees accountable.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SEVENTH AND SECOND CIRCUITS ON MATERIALLY INDISTINGUISHABLE FACTS.

The Ninth Circuit's decision raises important questions as to whether: (1) closing a forum to all speech can moot a controversy where the "no-display" policy is not implemented by statute or regulation; (2) a government's voluntary cessation can moot a request for a *reparative* injunction (not a prohibitory injunction); and (3) an inter-office email should be placed on the same footing as statutes and regulations. Other circuits have resolved the precise questions presented here in a manner diametrically opposed to the Ninth Circuit's holding.

A. The Ninth Circuit's Decision Cannot Be Reconciled With The Seventh Circuit's Holding That A Policy Change Closing A Forum To All Types Of Speech Does Not Moot A Case.

In *Sefick v. Gardner*, 164 F.3d 370 (7th Cir. 1998), the Seventh Circuit ruled that an artist's action challenging denial of his application to display a satirical sculpture in a federal courthouse was not mooted merely because the government promulgated a policy that no displays of any kind would be allowed in that building. *Id.* at 372. The plaintiff's application was made under the Public Buildings Cooperative Use Act. *Id.* at 371. In response to the government's denial of the application, the plaintiff sued, alleging viewpoint discrimination. *Id.* After the suit was filed, the government closed the federal courthouse to all displays regardless of their content. *Id.* at 372. The Seventh Circuit held that the government's post-suit no-display policy did not moot the case because it was "not implemented by statute or regulation and could be changed again." *Id.*

The Ninth Circuit, in direct contrast, concluded that the government's closing of a forum to all types of speech without a change in policy that was implemented by any statute or regulation was sufficient to moot a request for a reparative injunction. Pet. App. 21a. The VA's June 30, 2010 email did not constitute a policy change implemented by any statute or regulation. Instead, the June 30, 2010 email asked that the VA police enforce 38 C.F.R. § 1.218. Pet. App. 14a, 59a. This VA regulation prohibits "the displaying of placards or posting of materials on bulletin boards or elsewhere on property . . . *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) (emphasis added). Thus, to the extent the June 30, 2010 email purported to close the forum to all types of speech, it went far beyond the regulation it cited, which gives the VA discretion to allow any speech it chooses.

The Ninth Circuit's decision conflicts with the Seventh Circuit's holding in *Sefick* raises a question of exceptional importance: whether closing property to all speech eliminates a controversy if, as here, the "no-display" policy is not implemented by statute or regulation and can be changed at any time. A directive to enforce a "no-display" regulation that provides broad authority to allow exceptions for favored viewpoints fails to meet the government's high burden of showing that voluntary cessation results in mootness. When a regulation, like the VA regulation, provides for unfettered discretionary authority to allow speech, the government must provide a further level of codification to formalize and entrench any policy that purports to entirely close a forum. *Cf. City of Mesquite*, 455 U.S. at 289 (finding that an action was not mooted by a city's repeal of objectionable language in an ordinance because the city's repeal would not preclude it from reenacting precisely the same provision). The VA's directive certainly did not propose any changes that were implemented by any new statute or regulation. Accordingly, the Ninth Circuit's decision cannot be reconciled with *Sefick*.

B. The Ninth Circuit's Decision Cannot Be Reconciled With The Second Circuit's Holding That A Letter Is Insufficient To Moot A Case.

In *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), the Second Circuit held that a letter from the government does not satisfy the

government's "formidable burden" of making "absolutely clear" that the challenged conduct "could not reasonably be expected to recur." *Id.* at 327 (citing *Friends of the Earth*, 528 U.S. at 190, 193). The New York State Department of Environmental Conservation ("DEC") contended that its letter of commitment that it would remedy specified deficiencies mooted a challenge to the Environmental Protection Agency's decision not to issue a notice of deficiency to the DEC under the Clean Air Act. *Id.* The DEC argued that the letter "brought the [challenged] program into compliance by identifying both the actual changes made by the State as well as the changes it intended to make." *Id.*

The Second Circuit ruled that the commitment letter did not moot the case because it was not "absolutely clear" that the identified problems would not recur. *Whitman*, 321 F.3d at 327; *see also Seidemann v. Bowen*, 499 F.3d 119, 128-29 (2d Cir. 2007) (noting that the Second Circuit's holding in *Whitman* concluded "that although state agency's implementation of changes promised in letter of commitment indicated degree of 'good faith,' actions were insufficient to 'carr[y] the formidable burden of making absolutely clear that the problems identified . . . could not reasonably be expected to recur'").

The Ninth Circuit's decision directly conflicts with the Second Circuit's holding in *Whitman*. Like the governmental letter in *Whitman*, the email in this case cannot meet the government's "high burden" of making "absolutely clear" that the challenged conduct is not reasonably expected to recur. The email was sent internally from a local associate director of the VA to the VA police. This kind of internal communication cannot create any legal obligations or establish that the challenged conduct likely will not recur.

Moreover, a new local associate director of the VA will eventually replace the director who sent the June 30, 2010 email. That e-mail will not be binding on the new director, who could at any time allow the local facility to exercise the discretion expressly granted in 38 C.F.R. § 1.218(a)(9) to authorize or prohibit specific speech. *See United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness."). As there has been no acknowledgment that the challenged practice itself was unlawful or prohibited, and no injunction has issued, there is nothing to prevent the resumption of the challenged conduct. Resolving the split between the Second and Ninth Circuits will secure uniformity on the issue of whether a governmental defendant can moot a case by merely sending an inter-office email or letter purporting to change its future course of conduct.

C. The Ninth Circuit's Decision Cannot Be Reconciled With The Seventh Circuit's Holding That A Government's Voluntary Cessation Cannot Moot A Request For A Reparative Injunction.

In *Sefick*, the Seventh Circuit also held that a government's voluntary cessation cannot moot a request for a reparative injunction. The plaintiff requested that he be permitted to display his satirical sculpture in the federal courthouse as a remedy for the government's allegedly unconstitutional refusal to allow him to display the sculpture. *Sefick*, 164 F.3d at 372. The Seventh Circuit concluded that this request for relief was not mooted by the government's closure of the forum to all speech, explaining that "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 [General Services Administration] stopped considering applications for new displays." *Id.*

This Court's precedent similarly establishes that voluntary cessation is insufficient to moot a claim for injunctive relief if there is an injunctive remedy that would repair or mitigate past harm. *See Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992) ("[A]vailability of [a] possible remedy is sufficient to prevent [a] case from becoming moot"); *Knox*, 132 S. Ct. at 2287 ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.") (internal quotation marks and citations omitted); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (same); *Mills v. Green*, 159 U.S. 651, 653 (1895) (holding that a case becomes moot 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*") (emphasis added).

The Ninth Circuit held that the VA's closure of VA property to all kinds of speech mooted Petitioner's request for an injunction allowing him to hang the flag union down for a period equal to the amount of time that the VA had allowed him to hang the flag union up. This ruling directly conflicts with the Seventh Circuit's holding in *Sefick* that such reparative relief for past violations cannot be mooted by prospective policy changes, as well as with this Court's precedents. Resolving the split between the Seventh and Ninth Circuits will secure uniformity on the issue of whether a request for a *reparative* injunction (not a prohibitory injunction) can be mooted by a defendant's voluntary cessation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 23, 2015