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, in their official capacities,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

This Court has long held that a defendant alleging that it has voluntarily ceased challenged behavior bears a "heavy burden" of demonstrating the truth of that assertion before it can unilaterally strip a federal court of subject matter jurisdiction on mootness grounds. Despite that unwavering doctrine, a number of circuits – including the Ninth Circuit in this case – have adopted a rule providing that a government defendant's assertion of cessation is entitled to a presumption of good faith, a presumption that defies this Court's rulings, creates a split in the Circuits, and engenders different outcomes in similar cases. Respondents' three-point opposition does little to upset those conclusions.

The lower courts' good faith approach to voluntary cessation in government cases is an issue that arises regularly; directly affects the relationship between the executive branch and judiciary; defines the scope of federal jurisdiction; and has spurred an entire jurisprudence at odds with this Court's.

Respondents' attempt to harmonize the panel's holding that Petitioner's request for a reparative injunction was moot with the Seventh Circuit's contrary holding is based on an immaterial factual distinction between the cases that does not resolve the conflict. Nor does Respondents' Brief in Opposition address, much less dispute, the importance of either of the questions presented, which Petitioner demonstrated in his petition.

I. RESPONDENTS ARE INCORRECT THAT ALL CIRCUITS ARE IN AGREEMENT AND UNIFORMLY FOLLOW THIS COURT'S VOLUNTARY CESSATION PRECEDENTS.

Respondents attempt to minimize the importance of the good faith presumption in three ways, [a] suggesting it is somehow an occasional or informal doctrine, BIO 9; [b] contending that where it is employed, courts are nonetheless faithful to this Court's precedents by simultaneously "recogniz[ing] that government defendants bear a 'heavy burden' of demonstrating mootness," BIO 8; and [c] stating that such good-faith statements are "not necessarily dispositive" but are considered along with all of the facts in the case. BIO 8-9. Each argument fails.

a. *Clear Circuit Split.* Respondents contend that "*some* circuits have *sometimes* given statements from government officials a presumption that those statements were made earnestly and in good faith," BIO 8 (emphasis added), as if the good faith presumption were an occasional, isolated whimsy of a few lower court judges. In fact, *eight* Circuits employ a legal standard that requires a presumption in favor of, or deference to, governmental assertions of cessation, *institutionalizing* a practice inconsistent with this Court's precedents and in conflict with the three Circuits that remain faithful to those precedents.

* The Eleventh Circuit requires a rebuttable presumption in favor of the government when it claims mootness based on voluntary

cessation. *See Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur.").

* The rule in the Third, Fifth, Ninth, and Federal Circuits requires that a governmental assurance that it has ceased the challenged conduct is entitled to a presumption of good faith. *See 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"). *Accord*, Pet. App. 15a (citing *Am. Cargo Transp., Inc. v. United States,* 625 F.3d 1176, 1180 (9th Cir. 2010)); *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011) (*per curiam*); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007).

* 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); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (same).

* The Second Circuit's rule provides that courts give claims by government entities that a case is moot because they have ceased the challenged conduct "some deference." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992).

* By contrast, the First, Eighth, and District of Columbia Circuits utilize a legal standard that provides for no presumptions in favor of, or deference or solicitude to, government *or* private defendants. *See, e.g., U.S. DOJ Fed. Bureau of Prisons Fed. Corr. Complex Coleman v. Fed. Labor Rels. Auth.*, 737 F.3d 779, 783 (D.C. Cir. 2013); *ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 56 & n. 10 (1st Cir. 2013); *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007).

Three different Circuits have expressly noted the Circuit split that Respondents seek to deny. *See Wall v. Wade*, 741 F.3d 492, 497-98 (4th Cir. 2014) ("[D]efendants 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 this is "a question which we expressly do not decide"); *ACLU of Mass.*, 705 F.3d at 56 n.10 ("[W]e do not 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."); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010) (noting that some circuits employ voluntary cessation rules that "effectively place[] a comparatively lighter burden of proof on governmental officials," but concluding that "[w]e 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.").

b. *Clear Rejection of this Court's Precedents.* Given the unavoidable conclusion that the Circuits are split on how to treat voluntary cessation arguments by government defendants, Respondents focus on the fact that all Circuits commence their legal analysis by citing to this Court's "heavy burden" standard in voluntary cessation cases. BIO 8. The logic of their argument is that this pledge of allegiance forgives everything that follows. But formal fealty cannot excuse actual infidelity, especially when what follows is a good faith presumption that effectively undermines the "heavy burden" that this Court has imposed.

This Court's voluntary cessation precedents have *never* utilized any presumption or deference in favor of defendants, and it has uniformly applied the same rule to all defendants, public or private. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (government defendant); *Friends of Earth Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000) (applying same rule when private defendant claimed case was moot); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); Pet. 13-14 (citing cases).

The voluntary cessation doctrine is one rooted in *skepticism*, which is reflected in this Court's unwillingness to moot a claim for injunctive relief whenever a defendant claims to have altered its behavior. A good faith presumption cannot logically be squared with that skepticism because it relieves

government defendants of the "heavy burden" of showing that they will not resume their unlawful conduct.

Since the first enunciation of the voluntary cessation rule more than 60 years ago, this Court has noted that an allegation of voluntary cessation might strip a federal court of jurisdiction and that "courts have rightly refused to grant defendants such a powerful weapon," *W. T. Grant Co.*, 345 U.S. at 632, instead reiterating that it is the "duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform." *Id.* n. 5 (quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)). For that reason, this Court has insisted that the defendant alleging mootness based on voluntary cessation bears a "heavy" (*Parents Involved,* 551 U.S. at 719), or "formidable" burden. *Already L.L.C. v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). Such a formidable burden is logically inconsistent with a presumption of good faith. *Francis v. Franklin*, 471 U.S. 307 (1985) (holding that because government bears burden of persuasion in criminal case, it would be improper employ a presumption against the defendant).

It is also inconsistent with this Court's approach in other areas where the Court's jurisprudence demands skepticism, and this Court has therefore insisted that government assertions "must necessarily receive a most searching examination," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (internal quotation and citations omitted). Thus, the Court has reversed lower courts for giving deference to the very officials

whose assertions they are supposed to be skeptical about. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (holding lower courts erred in "confin[ing] the strict scrutiny inquiry in too narrow a way by *deferring* to the University's good faith in its use of racial classifications.") (emphasis added); *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005) ("[D]eference is fundamentally at odds with [strict judicial scrutiny]. We put the burden on state actors to demonstrate that their race-based policies are justified."); *United States v. Virginia*, 518 U.S. 515, 528, 555 (1996) (noting that the Court of Appeal had reviewed government's asserted purpose in engaging in gender discrimination "deferentially" and holding that such review was inconsistent with "heightened scrutiny.")

So obvious is the inconsistency between the heavy burden required by the Court and the presumption in favor of, or deference to, the government adopted by eight circuits that the Seventh Circuit even acknowledges that it does *not* follow this Court's voluntary cessation doctrine with government defendants. *See Fed'n of Adver. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 929 (7th Cir. 2003) (noting *W. T. Grant* standard but limiting it to "cases between private parties" and holding it "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.") (internal quotation omitted). The Seventh Circuit's forthright observation applies to the other circuits that utilize a

good faith presumption or deference to the government but not private defendants: none follows this Court. Respondents' suggestion that those Circuits' formal recitation of the "heavy burden" test excuses their actual application of a contradictory test is unconvincing.

c. *Like Cases are not Treated Alike.* As shown in the Petition, the different rules employed by different circuits make like cases come out differently. Pet. 22-27. Respondents contend that these different outcomes are completely fact-driven. BIO 12-14. Yet they cannot dispute that one Circuit in each of the two paired-case examples – although mouthing a "heavy burden" standard – granted a good faith presumption to the government while the other did not. That alone shows that the different cases were treated differently.

Respondents' description of the lower court cases is further belied by the language and reasoning of those cases. For example, if the Fifth Circuit's required presumption in favor of the government were irrelevant to the outcome in *DeMoss*, 636 F.3d 145, as Respondents assert, then that court would not have stated "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties, [and] [w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." *Id.* at 150-151 (quoting *Sossamon v. Texas*, 560 F.3d 316, 325 (2009)). Nor can Respondents' assertion that it was only the facts

of *DeMoss* that controlled the outcome be squared with the Fifth Circuit's requirement that placed on *plaintiff* the burden of introducing evidence that the government was engaged in litigation posturing once the government alleged a policy change. *Id.* ("DeMoss has presented no evidence from which this court can conclude [defendants'] 'voluntary cessation is a sham for continuing possibly unlawful conduct.'") (quoting *Sossamon,* 560 F.3d at 325).

II. THE DECISION THAT PETITIONER'S REQUEST FOR A REPARATIVE INJUNCTION WAS MOOT DIRECTLY CONFLICTS WITH A SEVENTH CIRCUIT DECISION.

Petitioners demonstrated a split between the Ninth Circuit's approach to injunctive relief in this case and the Seventh Circuit's approach in an analogous case. Pet. 31-32. Here, Petitioner sought an injunction ordering the Respondents to permit him to display his flag union down for a period comparable to the period he was unconstitutionally denied that right. The Ninth Circuit held that the VA's alleged return to its "nothing on the fence" policy mooted this request. Pet App. 13a. In the Seventh Circuit case, plaintiff sought an injunction ordering the defendants to permit him to display a sculpture in a courthouse lobby on the basis that his application to do so had been unconstitutionally rejected. The court held that the defendant's later adoption of a "no displays in the lobby" policy did not moot the claim for injunctive relief because "a court could order [his] sculpture displayed as a remedy for

a violation of his first amendment rights . . . even though . . . the [defendant had] stopped considering applications for new displays" after the case began. *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998) (Easterbrook, J.).

Respondents contend the cases are distinguishable because the regulation in this case always barred fence displays while the rule at issue in *Sefick* had once permitted displays in the courthouse. BIO 15-16. In fact, the VA did not enforce the regulation in this case – Petitioner was able to hang his flag on the fence for more than a year so long as he did so in a manner acceptable to the VA – so the baseline here is much like the "displays in the courthouse" baseline in *Sefick*.

Respondents' distinction is also meaningless, no better than saying this case is about a fence while that case was about a lobby. The test for evaluating whether a claim for injunctive relief is *moot* is whether there is any available remedy, (*Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)), not whether the remedy plaintiff seeks is "warranted" on the facts of the case. *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1335-36 (2013). An order directing Respondents to permit Petitioner to hang his flag union down to repair their unconstitutional actions is an available remedy, which is materially indistinguishable from an order directing the defendants in *Sefick* to display plaintiff's sculpture. Unless the Court addresses this split, First Amendment plaintiffs seeking injunctive relief in the Ninth Circuit and other circuits that may follow the panel's holding, will be denied the

relief that comes closest to remedying the harm resulting from a constitutional violation, as required by this Court's precedent. *See Virginia*, 518 U.S. at 547.

III. THIS CASE IS A GOOD VEHICLE FOR REVIEW OF THE QUESTIONS PRESENTED.

Finally, Respondents trot out three familiar tropes to try show that this case is not a good vehicle for reaching the key legal issues splitting the circuits below, but none sticks.

First, Respondents argue that because Petitioner's declaratory judgment binds the Respondents, it "provides yet another reason 'that the challenged conduct cannot reasonably be expected to start up again.'" BIO 16. Respondents can present that argument on remand if they choose. *See Fisher*, 133 S. Ct. at 2421 (remanding for application of proper legal standard).

But the declaratory judgment does not alter the fact that the opinion below holds that courts in the Ninth Circuit *must* give the government a good faith presumption, Pet. App. 15a, and the panel cited to and relied on that presumption in reaching its decision. Pet. App. 20a, 21a. Therefore, this case cleanly presents the question whether differential treatment of public and private defendants is appropriate for courts to utilize in deciding claims of voluntary cessation mootness.

Second, Respondents argue that the district court's holding that the balance of equities did not

support injunctive relief "provides an independent reason why Petitioner would not obtain relief even if his request were not moot." BIO 17. That, too, is beside the point at this stage. The Ninth Circuit did not review the district court's balancing of the equities because it deemed the case moot based on the voluntary cessation doctrine. Pet. App. 13a. That petitioner may or may not succeed on his request for injunctive relief in future proceedings does not mean that this case is a bad vehicle to decide the threshold jurisdictional question raised by the Petition. *See, e.g., Fisher*, 133 S. Ct. at 2421 (remanding for application of proper legal standard).

Third, Respondents point to the nature of the cessation in this case, noting that it is an alleged return to an existing policy rather than a change of policy. BIO 17. In fact, there is no evidence supporting the panel's assertion that the e-mail that it concluded mooted the claim for injunctive relief marked a return to a prior policy of forbidding all postings on the VA's perimeter fence. The only evidence the Ninth Circuit cited to – a declaration by the former VA Police Chief – merely stated that the VA had always had "a strict 'no unauthorized posting policy'", which is consistent with the unbridled discretion 38 C.F.R. § 1.218 gives the VA to permit postings or prohibit them. Pet. App. 6a; Supplemental Excerpts of Record Vol. II, at 66, *Rosebrock v. Mathis*, No. 11-56256 (9th Cir. Jan. 29, 2013), Dkt. Entry 32-2.

But, even if the single e-mail at issue signified a resumption of past practice, it does not detract from a central fact: the Ninth Circuit adjudicated

the case as a voluntary cessation case and accorded the government a presumption of good faith, thereby deepening the split in the Circuits. If anything, the underlying fact makes this a particularly good vehicle for this Court's review because, as Respondents note, the Ninth Circuit showed special solicitude for the government given the claim of an age-old no-fence-hanging policy, thus squarely framing the question presented.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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