

The Point *Isn't* Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine

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ABSTRACT. In a case pending before the Supreme Court, a new issue has captured the spotlight: can New York City moot the first Second Amendment case to reach the Court in nearly a decade by amending the gun regulation at its center? This question has generated much discussion among the media and Court watchers, particularly following the submission of an explosive amicus brief from members of Congress demanding that the Court dismiss the case or risk being “re-structured.” The doctrine implicated by this question is voluntary cessation—a principle that prevents gamesmanship and preserves judicial resources by requiring defendants who change their conduct mid-litigation to prove that it is “absolutely clear” they will not restart their conduct if the case is dismissed as moot.

The Supreme Court has consistently applied this high standard to all defendants. But some lower courts have either misread or ignored the Court’s precedent, lowering the high bar of voluntary cessation when the defendant is a government entity. New York City argues for such a lowered bar in *New York State Rifle & Pistol Association, Inc. v. City of New York*, and the Court—while allowing the case to proceed—will consider this mootness issue at oral argument in December.

This Essay attempts to fill a gap in the scholarly literature by explaining why a lower standard for government defendants is both bad law and bad policy. There is not a shred of evidence that the Supreme Court has ever endorsed this relaxed approach and, returning to first principles, the theoretical justifications for such a policy do not hold up either. The Court should therefore—regardless of how it decides the case on the merits—reject the City’s attempt to water down the voluntary-cessation doctrine for government defendants and reaffirm its important procedural protection.

INTRODUCTION

Are government officials so inherently trustworthy that when they cease their allegedly illegal conduct mid-litigation, we should presume they really mean it?

That notion might have surprised James Madison, who famously justified the Constitution's system of checks and balances with the observation that we are governed by mere "men," not "angels."¹ For "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."² But this position has nonetheless been endorsed by some courts, commentators, and (to no surprise) government defendants themselves.

All agree that under ordinary Article III mootness principles, a private defendant's "voluntary cessation" of challenged conduct does not render a case moot unless the defendant shows it is "absolutely clear" that the conduct will not resume.³ This is a stringent standard designed to ensure that the defendant cannot "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."⁴ But, some argue, when the defendant is a *government entity* whose "voluntary cessation" consists of changing a challenged law, policy, or practice, courts should flip the burden: the *plaintiff* should have to show it is "virtually certain" that the old law "will be reenacted."⁵ Advocates for this position argue that because government defendants are "public servants, not self-interested private parties,"⁶ they will "act in good faith," rather than litigate strategically.⁷

The Supreme Court has not yet squarely addressed the propriety of this government-defendant-specific exception to the ordinary voluntary-cessation doctrine. But its best chance to do so may be currently before it, in *New York State Rifle & Pistol Association, Inc. v. City of New York*⁸ (*NYSRPA*). This case involves a New York City regulation that heavily restricted persons licensed to possess a gun at their home from transporting the gun anywhere except to one of seven shooting ranges located within city limits.⁹ The City defended the constitutionality of this ordinance through five years of litigation, winning in both the

1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. *Id.*

3. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (first quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); and then quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)).

4. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

5. *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)).

6. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009).

7. *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (quoting *Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992)).

8. 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (Jan. 22, 2019) (No. 18-280).

9. See *NYSRPA*, 883 F.3d at 53.

Southern District of New York and the Second Circuit.¹⁰ But earlier this year, the Supreme Court granted certiorari to review the Second Circuit's decision – a move widely viewed as an ill omen for the regulation¹¹ and as indicating that the Court sought to correct what some Justices had viewed as judicial treatment of the Second Amendment as a “disfavored right.”¹²

Fearing a major loss, the City sprang into action. In a matter of months, it proposed and adopted amendments to the challenged regulation, now allowing licensees to carry their guns to two new places—second homes and shooting ranges located outside the city—which happened to be the precise places to which the *NYSRPA* plaintiffs had alleged they wanted to transport their guns.¹³ The City then told the Supreme Court that the case was moot given its change in the law and the supposed presumption that government defendants' mid-litigation changes to the law are undertaken in “good faith” and “intended to be permanent.”¹⁴ A controversial amicus brief (authored by Senator Sheldon Whitehouse on behalf of himself and four other senators) went even further, asserting that if the Court did not dismiss the case as moot, it would reveal itself as merely a tool of “the big funders, corporate influencers, and political base of the Republican Party” and justify congressional efforts to “restructure[]” the Court.¹⁵

But whatever the ultimate right answer to the mootness question in *NYSRPA*,¹⁶ the real travesty would be if the Court accepted the City's invitation

10. See *id.* at 68; *NYSRPA*, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015).

11. E.g., Garrett Epps, *Supersizing the Second Amendment*, ATLANTIC (Jan. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/court-hears-gun-rights-case-ny-rifle-pistol-association-v-city-ny/581017> [<https://perma.cc/PBZ2-W6HM>].

12. *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari).

13. See 38 R.C.N.Y. § 5-23(a)(3) (2019); Respondents' Suggestion of Mootness at 1, 6-7, *NYSRPA*, No. 18-280 (U.S. July 22, 2019), https://www.supremecourt.gov/DocketPDF/18/18-280/108869/20190722151524926_18-280%20Suggestion%20of%20Mootness.pdf [<https://perma.cc/Z6BM-EDYB>]; Richard Wolf, *New York City Limits on Transporting Guns Eased to Get Supreme Court Challenge Dismissed*, USA TODAY (June 21, 2019), <https://www.usatoday.com/story/news/politics/2019/06/21/gun-rights-new-york-city-cases-rules-challenged-supreme-court/1525877001/> [<https://perma.cc/6BXT-AFZ8>].

14. Response to Respondents' Suggestion of Mootness at 17-20, *NYSRPA*, No. 18-280 (U.S. Aug. 1, 2019).

15. Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 9-18, *NYSRPA*, No. 18-280 (U.S. Aug. 12, 2019).

16. Aside from the alleged presumption that its own regulation change is intended to be permanent, the City argues that it satisfies even the ordinary voluntary-cessation standard because the New York State Legislature also adopted a statute allowing licensees to transport their handguns, which overrides any inconsistent local law. Respondents' Suggestion of Mootness, *supra* note 13, at 7, 16-17. Petitioners have responded that the “new state law is itself the

to dilute the voluntary-cessation doctrine in favor of government defendants. None who embrace this argument ground it in the text or original meaning of Article III. Instead, they invoke purely prudential concerns about the supposed public-spiritedness of government litigants. But a hard look at both the theoretical and practical justifications for the voluntary-cessation doctrine suggests the opposite. Government officials have stronger incentives and a greater ability to engage in the strategic mooting of cases that this doctrine is designed to prevent: stronger incentives because of their status as repeat litigants with a powerful interest in curating precedent, and more ability because governments are often immune from damages claims that would otherwise preclude mootness.¹⁷ Meanwhile, the kinds of cases in which governments and officials are typically defendants—often involving the Constitution and often of great interest to the public—are exactly the cases in which deliberate, selective mooting does the most harm, depriving the citizenry of certainty and clarity in the law, and preventing the final resolution of important legal issues.

It is easy to see how these concerns manifest in *NYSRPA*. The City admits that it changed its regulation not because of any newfound recognition that the old rule was wrong or unlawful. Rather, it changed the regulation because the Supreme Court granted certiorari—and because the City thought it would lose. In fact, it continues to defend the old ordinance on the merits.¹⁸ And although it invokes an alleged “presumption” that government litigants’ policy changes are intended to be permanent, it does not even claim that this is the case here.¹⁹

Similar attempts at strategic mooting litter the Federal Reporter. This behavior is common on the part of government defendants because the practical and legal incentives that give rise to it are common as well. And if government defendants are at least as likely as private parties to engage in the sort of conduct that the voluntary-cessation doctrine is supposed to prevent, watering down the doctrine in government-defendant cases would harm both good sense and the individual rights that suits against the government play such a critical role in vindicating.

product of an acknowledged City-orchestrated effort to frustrate” Supreme Court review, such that the City and State are not “genuinely independent actors.” Response to Respondents’ Suggestion of Mootness, *supra* note 14, at 28-29.

17. A change in future conduct does not moot a claim for actual damages. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77 (2013) (“Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations.”).
18. See generally Brief of Respondents, *NYSRPA*, No. 18-280 (U.S. Aug. 5, 2019) (defending what the City now calls the “former rule” on all substantive grounds).
19. See Response to Respondents’ Suggestion of Mootness, *supra* note 14, at 28 (emphasis removed).

If government officials want to show that a change in the law has mooted a case, they should be required to show that it is “absolutely clear” the challenged conduct will not recur – just like every other defendant.

I. GOVERNMENT DEFENDANTS STRATEGICALLY USE POST-LITIGATION POLICY CHANGES TO ATTEMPT TO MOOT CASES

NYSRPA is no anomaly. Indeed, during the drafting of this Essay, the New York City Council voted to repeal an ordinance in an explicit effort to moot another lawsuit.²⁰ As in *NYSRPA*, City officials expressed their support for the substance of the law – a ban on conversion therapy.²¹ But they (and the advocates who proposed the idea of the repeal) initiated the repeal as a matter of long-term strategy. Given the current makeup of the federal judiciary, a City official explained, the law might be “vulnerable” to being struck down on First Amendment grounds, which could in turn jeopardize similar legislative efforts elsewhere.²²

New York City has been unusually brazen about its motivations, but it is hardly the only government entity to use strategic mooting to play the long game. Other government defendants, too, frequently seek to worm their way out of bad precedent by strategically mooting cases that they fear they are likely to lose.

This strategic behavior is particularly easy to detect in prisoner litigation. When litigating against *pro se* prisoners, prison systems frequently fight to the end, expecting to win. But when a prisoner is represented by an experienced attorney, prison systems often try to cut and run in an effort to avoid a precedent-setting loss. This happened recently in the Florida prison system. Florida was one of the last states to deny Orthodox Jewish prisoners a kosher diet. For close to ten years, its prison system litigated against several *pro se* prisoners seeking a

20. Int. No. 1682-A (N.Y.C. 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4131680&GUID=FD897AED-F6C6-43F1-9F26-B84AAD575AC6> [https://perma.cc/7PHZ-ATHG]; see Tyler Blint-Welsh & Melanie Grayce West, *New York City Moves to Repeal Ban on Conversion Therapy in Effort to Protect Such Bans Elsewhere*, WALL ST. J. (Sept. 12, 2019), <https://www.wsj.com/articles/new-york-city-moves-to-repeal-ban-on-conversion-therapy-in-effort-to-protect-such-bans-elsewhere-11568326114> [https://perma.cc/6EPH-B2LW].

21. Anna Sanders, *NYC Council Wants to Repeal a Ban on LGBT Conversion Therapy*, N.Y. DAILY NEWS (Sept. 11, 2019), <https://www.nydailynews.com/news/politics/ny-city-council-repeal-ban-on-lgbt-gay-conversion-therapy-avoid-court-20190911-aftmbffxp5c7tfvndve6muoyg4-story.html> [https://perma.cc/57JR-RJCG].

22. *Id.*

religious accommodation, and each time the prison won on the merits.²³ But Florida changed course when a prisoner, bringing a similar challenge, was represented by competent counsel.²⁴ Now facing worse odds, the prison sought to moot the case by providing a kosher diet only to the prisoner's specific unit.²⁵ The Eleventh Circuit rejected Florida's transparent attempt to avoid judicial review, found that the case was not moot, and ruled against the state on the merits.²⁶ While the wrong result was avoided in this case, the point remains: the state's course-reversal was not a good-faith decision to take a different approach toward kosher diets going forward, but a strategic attempt to avoid judicial resolution of a case that it was (correctly) worried it would lose.²⁷

Similarly, in *Heyer v. United States Bureau of Prisons* a deaf prisoner sued the U.S. Bureau of Prisons for failing to provide a sign-language interpreter for religious services.²⁸ The prisoner was represented by a prominent law firm, and here again, the government sought to moot the appeal and avoid bad precedent by offering an interpreter to the plaintiff.²⁹ This convinced the district court to dismiss the case as moot, but the Fourth Circuit reversed, concluding that an "equivoca[l]," "mid-litigation change of course" does not satisfy the high bar necessary to moot a case.³⁰ Other courts, though, are not as strict: in *Guzzi v. Thompson*, a prisoner filed a civil-rights action also challenging the denial of a kosher diet.³¹ Here, Massachusetts succeeded in mooting the case by giving only

23. See, e.g., *Gardner v. Riska*, 444 F. App'x 353, 354 (11th Cir. 2011) (arising where a pro se prisoner was denied a kosher diet and the case was taken to final judgment); *Linehan v. Crosby*, No. 4:06-CV-00225, 2008 WL 3889604, at *1 (N.D. Fla. Aug. 20, 2008) (same).

24. *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 525, 530-32 (11th Cir. 2013). See generally Donald R. Songer et al., *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC'Y REV. 811 (1999) (highlighting the incentives of and advantages accumulated by repeat litigators and how this can lead to further success in the long term).

25. *Rich*, 716 F.3d at 530-32.

26. *Id.* at 532-34.

27. For other examples of states litigating strategically to avoid creating unfavorable precedent, see, for example, *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 786-87 (5th Cir. 2012), which arose from the Texas prison system's attempt to moot a kosher diet case by providing the plaintiff with kosher meals; and *Baranowski v. Hart*, 486 F.3d 112, 116-17 (5th Cir. 2007), which arose from the Texas prison system litigating a pro se kosher diet case to judgment.

28. 849 F.3d 202, 208 (4th Cir. 2017).

29. *Id.* at 220.

30. *Id.*

31. *Guzzi v. Thompson*, 470 F. Supp. 2d 17, 19-20 (D. Mass. 2007).

the plaintiff kosher meals and avoided the prospect of a systemic change in policy.³²

This conduct is not limited to prisoner litigation. In *Harrell v. Florida Bar*, for example, the government sought to moot a challenge to the state's advertising rules at the urging of their litigation counsel. The Florida Bar even departed from its own binding procedures to do exactly that.³³ Nonetheless, the Eleventh Circuit recognized this attempt to “manipulate the [c]ourt’s jurisdiction to insulate a favorable decision from review,” and rejected the assertion of mootness.³⁴ Similarly, in *Wilderness Society v. Kane County*, the Tenth Circuit did not take kindly to a press release and statement from the County Commission explaining that changes in the challenged law were an “express[]” attempt to “secure the most successful legal resolution to current federal roads litigation.”³⁵ The court found that the County’s change in the law constituted a “deliberate attempt to render the pending litigation moot.”³⁶

Nor is strategic mooting the only way government agencies manipulate litigation to avoid creating unfavorable precedent. For decades, the National Labor Relations Board has pursued a policy of “nonacquiescence” to the law of circuits that interpret the National Labor Relations Act differently from it, under which the Board simply ignores that law and continues filing agency proceedings and seeking to enforce orders against employers according to its own views of the statute.³⁷ That policy might be defensible if the Board were ultimately to seek certiorari of adverse circuit decisions, allowing the Supreme Court to settle the dispute with a nationally binding interpretation.³⁸ But instead, the Board refuses to seek certiorari, avoiding the risk that the Supreme Court will establish an interpretation it does not like and counting on the fact that most employers will settle rather than spend time and resources appealing its actions.³⁹ That practice earned a stern rebuke from a D.C. Circuit panel, which labeled the Board’s

32. The plaintiff in *Guzzi* agreed with Massachusetts that the issue underlying the case had been resolved “and that the appeal should be dismissed as moot.” *Guzzi v. Thompson*, No. 07-1537, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008) (per curiam).

33. 608 F.3d 1241, 1267 (11th Cir. 2010).

34. *Id.* at 1266 (alteration in original) (quoting *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 288 (2000)).

35. 581 F.3d 1198, 1214 (10th Cir. 2009), *rev’d on other grounds*, 632 F.3d 1162 (10th Cir. 2011) (en banc).

36. *Id.* at 1215.

37. See *Ins. Agents’ Int’l Union*, 119 N.L.R.B. 768, 773 (1957).

38. See Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 100 (2003).

39. *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 23-25, 28 (D.C. Cir. 2016).

conduct “bad faith litigation,” required the Board to pay an appealing employer’s attorneys’ fees, and “admonish[ed]” its “administrative hubris.”⁴⁰

In short, government defendants often seek to avoid creating adverse precedent that will preclude desired policy ends, even if that means “losing a few battles to still win the war.”⁴¹ One tool in their arsenal is a mid-litigation change in the law specifically designed to moot a concerning case. The evidence shows that governments deploy this tool with some frequency.

II. THE SUPREME COURT HAS NEVER SUGGESTED THAT GOVERNMENT DEFENDANTS SHOULD GET SPECIAL TREATMENT UNDER THE VOLUNTARY-CESSATION DOCTRINE

Unsurprisingly, then, the Supreme Court has on numerous occasions had the opportunity to consider whether a mid-litigation policy change by a government defendant mooted the appeal. Sometimes it did⁴² and sometimes it did not,⁴³ but in none of these cases did the Court endorse a carveout from ordinary voluntary-cessation principles. Instead, the Court has consistently applied the same strict voluntary-cessation standard across the board. Even when the government has changed the challenged law, policy, or practice, it must show—without any presumption or burden-shifting—that it is “absolutely clear” the conduct will not resume.⁴⁴

In the case *City of Mesquite v. Aladdin’s Castle, Inc.*, for instance, a city “repeal[ed] the objectionable language” in an ordinance after a district court held the ordinance unconstitutional. Nonetheless, the Supreme Court applied the “absolutely clear” standard and held that the case was not moot because there was “no certainty” that the city would not “reenact[] precisely the same provision if the District Court’s judgment were vacated.”⁴⁵ Likewise, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that a church’s challenge to a Missouri policy was not moot even though the policy had been changed

40. *Id.* at 25, 27, 29.

41. *Id.* at 28.

42. See, e.g., *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 474 (1990).

43. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982).

44. *Id.* at 289 n.10 (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)). Indeed, the Supreme Court does not take kindly to “postcertiorari maneuvers designed to insulate a decision from review by this Court” and views such actions “with a critical eye.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012); see also *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 288 (2000) (“Our interest in preventing litigants from attempting to manipulate the Court’s jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here.”).

45. *Mesquite*, 455 U.S. at 289.

because “[t]he Department has not carried the ‘heavy burden’ of making ‘absolutely clear’ that it could not revert to its policy of excluding religious organizations.”⁴⁶ And again, *Parents Involved in Community Schools v. Seattle School District No. 1* reaffirmed the Supreme Court’s view 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,’” even in the case of a government defendant such as the school district there.⁴⁷

Further confirming this point, the Supreme Court in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville* applied *Mesquite* and explained that the issue in *Mesquite* had not gone moot “because the defendant’s ‘repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated.’”⁴⁸ The “mere risk” of reenactment in *Mesquite* was what kept the case alive.⁴⁹ Simply put, nothing in the Supreme Court’s voluntary-cessation jurisprudence suggests that the standard is different for government defendants. Quite the opposite: the Court has unwaveringly applied *Mesquite*’s “absolutely clear” standard.

Despite this guidance from the Supreme Court, at least six circuits have placed a “lighter burden” on the government to show that a case is moot.⁵⁰ These courts find “government actors[’]” status as “public servants, not self-interested private parties” entitles them to “a presumption of good faith.”⁵¹ Therefore,

46. 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

47. 551 U.S. 701, 719 (2007) (alteration in original) (quoting *Laidlaw*, 529 U.S. at 189).

48. 508 U.S. 656, 662 (1993) (quoting *Mesquite*, 455 U.S. at 289).

49. *Id.*

50. *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009) (“[W]e assume that formally announced changes to official governmental policy are not mere litigation posturing.”); see also *Speech First, Inc. v. Schlissel*, No. 18-1917, 2019 WL 4582834, at *6 (6th Cir. Sept. 23, 2019) (“Although the bar is high for when voluntary cessation by a private party will moot a claim, the burden in showing mootness is lower when it is the government that has voluntarily ceased its conduct.”); *Marcavage v. Nat’l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (alteration in original) (quoting *Bridge v. U.S. Parole Comm’n*, 981 F.2d 97, 106 (3d Cir. 1992)) (finding case moot because “[g]overnment officials are presumed to act in good faith”); *Chapman Law Firm Co. v. Greenleaf Const. Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007) (noting that the court “was required to assume that the Government would carry out the corrective action in good faith”); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) (“[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.”); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (“[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.”).

51. *Sossamon*, 560 F.3d at 325.

courts sometimes “assume that formally announced changes to official governmental policy are not mere litigation posturing.”⁵² They thus flip the usual burden of proof, requiring plaintiffs to show it is “virtually certain” the *government* will reenact the challenged law.⁵³ Some of these courts have argued that their decisions align with Supreme Court precedent, while others have dismissed the relevant portions of *Mesquite* as “dicta and therefore not controlling.”⁵⁴

These decisions invert ordinary mootness law, allowing a government actor to raise a “rebuttable presumption that the objectionable behavior will not recur.”⁵⁵ The “heavy burden” of proving mootness has thus, in practice, “not prevented governmental officials from . . . moot[ing] a case” because “even when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots the case.”⁵⁶ As a result, “the cases are legion . . . where the repeal of an allegedly unconstitutional statute was sufficient to moot litigation challenging the statute.”⁵⁷

52. *Id.*; see also, e.g., *Marcavage*, 666 F.3d at 861 (quoting *Bridge v. U.S. Parole Comm’n*, 981 F.2d 97, 106 (3d Cir. 1992)) (“[G]overnment officials are presumed to act in good faith.”); *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.”).

53. *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (1994)); see also *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (quoting 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.6 (3d ed. 2008)) (requiring plaintiff to make a “clear showing[]” that the government’s change is insincere).

54. *Fed’n of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003). This argument grossly misreads *Mesquite*. The *Mesquite* Court’s opinion first gives a nod to the uniformity of the voluntary-cessation doctrine, explaining the “well settled” principle “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.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). The Court then notes that here, “the city’s repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated,” and that “[t]here is no certainty that a similar course would not be pursued” if the case were dismissed as moot. *Id.* The Court’s analysis thus focused entirely on the possibility of reenactment; only in a footnote did the Court mention in passing that “[i]ndeed, the city ha[d] announced” an intention to reenact the challenged law. *Id.* at 289 n.11. There is nothing to suggest that this was integral to—or even a factor in—the Court’s mootness analysis.

55. *Troiano*, 382 F.3d at 1283 (emphasis omitted).

56. *Rio Grande Silvery Minnow*, 601 F.3d at 1116.

57. *Nat’l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1333–34 (11th Cir. 2005); see also *id.* at 1333 (“[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.” (quoting *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004))).

There are signs, however, that some lower-court judges are beginning to recognize that this loosening of the voluntary-cessation doctrine for government defendants is inconsistent with the Supreme Court's approach. In *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, for instance, a Ninth Circuit panel held (under *Mesquite* and the Supreme Court's "absolutely clear" standard) that when a government defendant makes a "change in the law . . . prompted by an adverse district court ruling, an appeal is generally not moot."⁵⁸ The panel explicitly rejected earlier decisions that had "flipped *City of Mesquite's* rule" and put the burden on the plaintiff to *disprove* mootness in certain cases involving government defendants.⁵⁹ Also, despite language in some earlier cases seeming to endorse the idea that plaintiffs have to show it is "virtually certain that [a] repealed law will be reenacted" to avoid mootness,⁶⁰ the D.C. Circuit recently reaffirmed that a government defendant must show with "certainty" that it will "forego reinstating the" challenged policy in order to moot a pending appeal of that policy.⁶¹

III. COURTS SHOULD REJECT A PRESUMPTION IN FAVOR OF GOVERNMENT DEFENDANTS WHEN APPLYING VOLUNTARY-CESSATION PRINCIPLES

Turning away from where the law currently stands, a look at the incentives created by (and the theoretical justifications for) the voluntary-cessation doctrine shows that, to the extent government defendants are different from private defendants, those differences make them *more* likely to strategically moot cases, not less. This is the case for at least five reasons.

First, as the prisoner and other examples above demonstrate, government defendants are no less vulnerable than private ones to the temptation that motivates the voluntary-cessation doctrine—the desire "to strategically alter [their] conduct in order to prevent or undo a ruling adverse to [their] interest."⁶² Lawyers representing government entities in litigation have the same duty to zealously advocate for their clients as lawyers representing private clients. And the

58. 903 F.3d 829, 840 (9th Cir. 2018), *rev'd en banc*, No. 16-15588, 2019 WL 5797212 (9th Cir. Nov. 7, 2019) (en banc).

59. *Chambers*, 903 F.3d at 842. The en banc Ninth Circuit reversed, endorsing, in a terse opinion, other lower courts' view that "legislative actions should not be treated the same as voluntary cessation of challenged acts by a private party." *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, No. 16-15588, 2019 WL 5797212, at *3 (9th Cir. Nov. 7, 2019) (en banc).

60. *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)).

61. *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 651 (D.C. Cir. 2019).

62. *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006).

government's interest often prioritizes long-term administrative ease or efficiency over assertions of individual rights.⁶³ Indeed, Congress enacted the statute under which most claims against government defendants arise, 42 U.S.C. § 1983, precisely because it “realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights.”⁶⁴

Of course, government litigants also owe greater obligations to the public than do private ones; the government is not “an ordinary party” but “a sovereign whose obligation” is “that justice shall be done.”⁶⁵ But experience shows that government litigants themselves do not view these higher obligations as precluding them from taking post-litigation actions openly designed to avoid creating adverse law. Consider a legal question parallel to the one so far considered in this Essay – whether government defendants can take post-litigation action (here, settling a case) not to avoid the creation of new adverse precedent but to eliminate, through vacatur, adverse precedent already created. For decades, courts and commentators criticized this practice, arguing that it undermines the public interest in the accumulation of precedent by allowing “a losing party with a deep pocket” to wipe away adverse decisions.⁶⁶ But the U.S. Solicitor General's Office embraced it, precisely *because* it gave the government a way to undo “the preclusive or precedential effects” of decisions it found “unacceptable.”⁶⁷ In *U.S. Bancorp Mortgage. Co. v. Bonner Mall Partnership*, the Court generally rejected vacatur after settlement, prioritizing the value of judicial precedents “to the legal community as a whole” over parties' private interests in curating case law.⁶⁸ And

63. See, e.g., *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (describing the “classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions”). See generally Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 421 (2000) (“The empirical results support the hypothesis that the selectivity matters: the government petitions so little that the Court is constrained in its certiorari choices, and the docket will overall appear more favorable to the government than the Court would want. In brief, the government will not appeal cases where it fears an adverse decision.”).

64. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

65. *Berger v. United States*, 295 U.S. 78, 88 (1935).

66. *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); see also Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CALIF. L. REV. 867, 885-90 (1997) (discussing the appeal of vacatur to repeat players and one-shot litigants, and whether vacatur is a tool of the wealthy).

67. Brief for the United States as Amicus Curiae Supporting Respondents, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (No. 92-1123), cert. dismissed as improvidently granted, 510 U.S. 27 (1993).

68. 513 U.S. 18, 26-27 (1994).

the Court has never suggested that lower courts should change their calculus just because the party seeking vacatur happens to be the government.⁶⁹

Second, government defendants are repeat litigants, to a much greater extent than most private defendants. Indeed, one study estimated “that the U.S. government has been involved in over half the published decisions by the U.S. Courts of Appeals” between 1946 and 1988.⁷⁰ Governments manage millions of employees, oversee complex bureaucracies, and regulate many aspects of citizens’ economic and social lives – activities that give rise to a predictable array of lawsuits. Government defendants therefore have a strong incentive to be strategic about which cases they litigate to judgment – to litigate fully only those cases that they think they will win and to moot the rest, preventing unfavorable precedent that could affect their operations in a variety of different areas.

Unlike governments, however, private defendants do not exist in perpetuity. The typical private defendant cannot safely predict that if she strategically moots one case, she will have the chance to litigate others later. And in any event, private defendants usually care less about the legal principles that will emerge from their case than about its concrete effect on the challenged action – making strategic mooting a much less attractive course. Individual plaintiffs often have only one day in court, and its specific result matters. Yet all agree that private defendants face a high bar to prove mootness despite voluntary cessation – and the cases in which the Supreme Court refused to find mootness demonstrate just how high that bar is. In *Friends of the Earth, Inc. vs. Laidlaw Environmental Services (TOC), Inc.*, for example, the Court refused to find mootness even though the defendant’s “entire incinerator facility . . . was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased.”⁷¹ Likewise, in *City of Erie v. Pap’s A. M.*, the Court held that shuttering the defendant’s business and selling the land under it constituted mere voluntary cessation that was not enough to moot the case.⁷² These actions are plainly more difficult to reverse than a mere government’s policy change, yet they did not result in mootness.

69. Indeed, some courts and commentators have stressed that vacatur after settlement is particularly troubling when engaged in by the government, for many of the same reasons identified by this Essay with respect to voluntary cessation. See *Reidell v. United States*, 47 Fed. Cl. 209, 212-13 (2000) (“As an insititutionalized party, the United States can consider ‘long term’ implications of judicial decisions in a way that almost all Plaintiffs, who do not usually reappear in this Court, do not Thus, if permitted . . . the United States might be tempted to use the technique of settlement conditioned on vacatur to eradicate unfavorable decisions.”); Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions Upon Settlement*, 27 J. MARSHALL L. REV. 689 (1994).

70. Donald R. Songer et al., *supra* note 24, at 830 (1999); see also Purcell, *supra* note 66, at 887 (arguing that the government is “the ultimate repeat player”).

71. *Friends of the Earth, Inc. v. Laidlaw Envntl. Servs. (TOC), Inc.*, 528 U.S. 167, 179 (2000).

72. 529 U.S. 277, 287-88 (2000).

There is no good reason to weaken this standard for changes undertaken by defendants guaranteed to be around to play the long game.

Third, government defendants often are not susceptible to the antidote for mootness: damages claims. Typically, only claims seeking forward-looking relief, like injunctions, can become moot; claims seeking compensation for past harm remain live regardless of whether the defendant changes its behavior.⁷³ But government defendants frequently cannot be sued for damages, because, unlike private defendants, they are shielded by a variety of constitutional and statutory immunities. Sovereign immunity generally shields the federal government and states from damages claims.⁷⁴ Individual government officials are protected from damages claims by virtue of qualified immunity.⁷⁵ Some statutes waive immunity for the government, but often only for suits seeking forward-looking relief.⁷⁶ And by their very nature, many claims against the government, especially those asserting the violation of constitutional rights, assert “abstract” harms that are difficult to reduce to a monetary figure recoverable as damages.⁷⁷

In many cases against the government, then, the only viable claims are those seeking injunctive and declaratory relief—the very types of claims vulnerable to being mooted by a government defendant’s strategic change in behavior. By contrast, private defendants lack similar insulation from damages claims—giving them less incentive to seek to moot cases through voluntary cessation.

Fourth, legal and practical factors unique to government defendants make their mid-litigation policy changes particularly likely to be fleeting. For one thing, government actors are nearly always free as a matter of law to reverse course and reenact a policy previously changed to moot a case, as “statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute.”⁷⁸ Nor are administrative actions “carved in stone”; indeed, agencies are expected to reconsider their policy decisions “on a continuing basis.”⁷⁹ Contrast this with private corporations, whose boards can reach agreements and formulate policies that constrain the corporation going forward. In

73. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77 (2013).

74. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

75. *E.g.*, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

76. *E.g.*, *Sossamon v. Texas*, 563 U.S. 277, 280 (2011) (Religious Land Use and Institutionalized Persons Act); *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) (“[M]onetary relief is severely circumscribed by the terms of the Prisoner Litigation Reform Act.”).

77. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (“[T]he abstract value of a constitutional right may not form the basis for § 1983 damages.”).

78. *Dorsey v. United States*, 567 U.S. 260, 274 (2012); *see also Mayor of the City of New York v. Council of the City of New York*, 38 A.D.3d 89, 97 (2006) (same, for state legislature).

79. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984)).

Already, LLC v. Nike, Inc., for example, the Supreme Court held an appeal moot on the ground that the private defendant had entered into an “unconditional and irrevocable” agreement reversing the challenged conduct.⁸⁰

Moreover, there is a straightforward reason why government defendants may see fit to revert to conduct previously abated for mootness purposes: the relevant government officials may have changed. Elections have consequences, and it is common for new government officials to have a different opinion on the importance and legal defensibility of a policy abandoned by their predecessors.⁸¹ Indeed, even the same officials sometimes shift legal positions in response to changed public opinion. Particularly on the sort of hot-button issues likely to generate serious litigation, elected officials may be motivated “to take litigation positions that reflect their legal policy preferences and resonate with their political base” — which are not necessarily the ones most consistent with current law or the government’s previous litigation positions.⁸²

Recent litigation illustrates these concerns. In *ACLU of Massachusetts v. United States Conference of Catholic Bishops*, for example, the plaintiff claimed that the federal government violated the Establishment Clause by giving a grant to a religious organization to assist human-trafficking survivors because the organization would not spend the money on abortions or contraceptives.⁸³ While the case was ongoing, a new President with “different policy perspectives” was elected, and the government allowed the grants to expire.⁸⁴ The government then argued that this policy change made the case moot. The district court disagreed, applying the voluntary-cessation doctrine and explaining that because “policies (and administrations) can change,” there was no “assurance that the challenged action will not be repeated.”⁸⁵ But the First Circuit reversed.⁸⁶ Just as the district court had predicted, however, when the next President took office, the government resumed awarding the same type of grants to the same religious organization, which triggered yet another round of litigation involving the same

80. 568 U.S. 85, 93-94 (2013).

81. See *Brand X*, 545 U.S. at 981-82 (“[A] change in administrations” may result in “reversal of agency policy”); see also, e.g., Transcript of Oral Argument at 32, *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (No. 11-1285) (Roberts, C.J.) (“It’s perfectly fine if you want to change your position, but don’t tell us it’s because the Secretary has reviewed the matter further Tell us it’s because there is a new Secretary.”).

82. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 *YALE L.J.* 2100, 2149 (2015).

83. 705 F.3d 44, 48 (1st Cir. 2013).

84. *Id.* at 56.

85. *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 481 (D. Mass. 2012).

86. 705 F.3d at 51-56.

plaintiff.⁸⁷ In all, the dispute took nearly a decade to resolve—wasting judicial resources that could have been saved by applying the voluntary-cessation doctrine.⁸⁸

In addition to showing why the vagaries of politics recommend a vigorous voluntary-cessation doctrine for government defendants, this analysis also demonstrates why some lower courts' emphasis on the government's supposed "good faith" is ultimately beside the point. At bottom, the "absolutely clear" standard is justified not by a suspicion that some defendants may secretly plan to resume the challenged conduct as soon as the case is over, but by the fact that they can. It is this *ability* to reinitiate challenged conduct that creates the continuing harm and the potential waste of judicial resources if a case is declared moot deep into litigation—the "argument from sunk costs" the Court has invoked in support of the "absolutely clear" standard.⁸⁹ That ability exists in spades for government defendants—and political shifts give them the motivation to exercise it.

Finally, even setting aside discouraging gamesmanship and preserving judicial resources, the voluntary-cessation doctrine serves another important purpose: advancing the public's interest in having "the legality of the [challenged] practices settled."⁹⁰ And cases against government defendants—often involving constitutional questions of intense interest to the citizenry at large—implicate this interest far more than most private-versus-private cases do. Weakening voluntary cessation for government defendants therefore makes it harder for courts to resolve the sorts of legal questions that most need resolving. It also makes it more difficult for plaintiffs to prove that a constitutional right is "clearly established"—a necessary prerequisite for overcoming qualified immunity, and thus for holding government officials liable for constitutional violations even in those cases that do *not* go moot.⁹¹ As Judge Sutton explained when advocating for a more relaxed approach to qualified-immunity analysis (an approach later adopted and favorably cited by the Supreme Court),⁹² if lower courts frequently avoid saying what the law *is* and instead just conclude that a right is not clearly established, "there is a risk that some constitutional guarantees would never

87. *ACLU of N. Cal. v. Azar*, No. 16-CV-03539, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018).

88. *Id.*

89. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-93 (2000).

90. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *accord City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (one purpose of the voluntary cessation rule is to prevent defendants from "evad[ing] judicial review").

91. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

92. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (quoting *Lyons v. City of Xenia*, 417 F.3d 565, 581 (Sutton, J., concurring)).

become established (or would only slowly become established)[.]”⁹³ So too here: if government entities are allowed to moot unfavorable cases, they can prevent the buildup of case law necessary to hold them accountable for future constitutional violations.

Courts should decline to give government defendants special treatment in applying the voluntary-cessation doctrine. A close look at its purposes shows that government defendants have as much or more incentive as do private defendants to engage in the type of conduct the doctrine is designed to discourage—and when they do, they create especially severe forms of the types of harms that the doctrine is designed to prevent.

CONCLUSION

Like private actors, governments can and will seek to manipulate a court’s jurisdiction to moot an unfavorable case. But unlike private actors, if a government succeeds in insulating its conduct from judicial review, the consequences are far more dire: the coercive power of the political branches is left unchecked by the judiciary,⁹⁴ and important constitutional issues may remain unresolved, permitting future government actors to engage in identical illegal conduct. It is of course possible that in many instances the government’s change of policy reflects a true change of heart. But both law and experience undermine the notion that courts should treat government defendants as inherently more honest and trustworthy than private ones.

Governments are sophisticated, repeat litigators, frequently immune from claims for damages. As explained above, evidence confirms theory: government entities can and do selectively change laws and policies mid-litigation to advance their longer-term interests. And worse still, lower-court deference to the government’s voluntary cessation has been fashioned out of whole cloth. It has no basis in the Supreme Court’s precedent, as the Court has consistently applied the same “absolutely clear” standard to all defendants.

Yet many lower courts persist in this error, frequently citing and applying cases that favor government assertions of mootness—even at times requiring plaintiffs to produce evidence that the government’s change in the law is insincere (a potentially impossible task). But all is not lost. By agreeing to consider the mootness issue in *NYSRPA*, the Supreme Court now has the opportunity to

93. *City of Xenia*, 417 F.3d at 581 (Sutton, J., concurring).

94. THE FEDERALIST NO. 78, *supra* note 1, at 466 (Alexander Hamilton) (quoting MONTESQUIEU, THE SPIRIT OF LAWS 202 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748)) (“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.”).

set the record straight and confirm that government defendants are subject to the same voluntary-cessation standard as everyone else.⁹⁵ This would not only correct lower courts' interpretation of Supreme Court precedent, but would protect and advance the important interests underpinning the voluntary-cessation doctrine.

The authors are both counsel at the Becket Fund for Religious Liberty. The views expressed here do not necessarily reflect those of Becket or its clients. Much of this Essay is drawn from an amicus brief in support of neither party filed by our firm in New York State Rifle & Pistol Ass'n, Inc. v. City of New York. See Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party Respecting Mootness, NYSRPA, 139 S. Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280), https://www.supremecourt.gov/DocketPDF/18/18280/111041/20190801164732356_NY%20State%20Rifle%20Assn%20Final%20Final.pdf [<https://perma.cc/Y5ZM-DXW>].

95. The Supreme Court issued an order noting that “[t]he question of mootness will be subject to further consideration at oral argument, and the parties should be prepared to discuss it.” Order, *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, No. 18-280 (U.S. Oct. 7, 2019).