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, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim for injunctive relief, which arose from the inconsistent enforcement by police officials of a longstanding regulation, is moot in light of their supervisor's directive mandating that the regulation be consistently enforced.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 745 F.3d 963. The opinion of the district court (Pet. App. 29a-70a) is reported at 788 F. Supp. 2d 1127.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2014. A petition for rehearing en banc was denied on October 17, 2014 (Pet. App. 72a-73a). The petition for a writ of certiorari was filed on January 13, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) has long prohibited by regulation the posting of materials on VA property unless approved by the head of the facility or his designee. Pet. App. 4a. In its current form, the regulation provides that "the displaying of placards or posting of materials on bulletin boards or elsewhere on property is prohibited, except as authorized by the head of the facility or designee or when such distributions or displays are conducted as part of authorized Government activities." 38 C.F.R. 1.218(a)(9). This regulation has been in effect, with only minor changes, since 1973. See 38 Fed. Reg. 24,365 (Sept. 7, 1973).

The VA Greater Los Angeles Healthcare System (VAGLA) provides Los Angeles area veterans with medical, surgical, and psychiatric care. Pet. App. 31a. As "one of the largest and most complex VA health care systems in the country," VAGLA provides inpatient mental health services and programs to address homelessness. *Ibid.* Among other services, VAGLA operates a domiciliary for approximately 250 homeless veterans. *Ibid.*

Petitioner is a veteran who believes that additional VAGLA property, including the lawn surrounding the West Los Angeles campus of VAGLA, should be converted to a residence for homeless veterans. Pet. App. 32a. In 2008, petitioner and others began holding weekly demonstrations adjacent to the campus. Petitioner initially hung flags, including the U.S. flag and POW/MIA banners, on the fence that surrounds the campus lawn. *Id.* at 7a. Although the hanging of flags and banners on the fence was in violation of 38 C.F.R. 1.218(a)(9), VAGLA police at first refrained from

issuing citations to demonstrators in an effort to de-escalate the situation and avoid weekly confrontations. Pet. App. 8a.

In 2009, petitioner began during his protests to hang the U.S. flag upside down, traditionally a symbol of disrespect or "dire distress." Pet. App. 8a & n.2 (citation omitted). VAGLA police approached petitioner and ordered him to hang the flag upright or remove it, and petitioner removed the flag. *Id.* at 8a. When he again began to hang the flag upside down, VAGLA police cited petitioner for violation of the regulation. *Id.* at 9a. Petitioner ultimately received six citations, all of which were dismissed. *Id.* at 9a-10a.

2. In March 2010, petitioner filed suit in the United States District Court for the Central District of California, asserting that the VA was engaged in viewpoint discrimination in violation of the First Amendment. Pet. App. 11a. Petitioner sought a declaration that the VA's conduct was unlawful. Compl. 9-10. He also sought a permanent injunction requiring that he be allowed "to hang the United States flag, hung [upside] down alongside the P.O.W./M.I.A. flag." *Id.* at 10.

In June 2010, the Associate Director of VAGLA sent by e-mail a directive to VAGLA police instructing them to "ensure that VA Regulation 38 CFR 1.218 is enforced precisely and consistently." Pet. App. 11a. The directive further specified that "this means that NO outside pamphlets, handbills, flyers, flags or banners, or other similar materials may be posted anywhere on VA Property (including the outside fence/gates). This includes any flags displayed in any position." *Id.* at 11a-12a. The directive further clarified

that the regulation applied only to protests on VA property and not to protests that were conducted on the public sidewalk. *Id*. at 12a. The record indicates that, since the directive was issued, "the agency's officials have not engaged in conduct similar to that challenged by the plaintiffs." *Id.* at 21a (citation omitted); see *id.* at 12a (police patrol captain's declaration "that the VAGLA police have been strictly enforcing § 1.218(a)(9) since the associate director's June 30, 2010 email").

The district court granted summary judgment to petitioner with regard to his request for declaratory relief, concluding that VAGLA's prior inconsistent enforcement of its regulation had amounted to impermissible viewpoint discrimination. Pet. App. 55a-58a, 70a. In light of the directive, however, the court denied as moot petitioner's request for prospective injunctive relief. *Id.* at 59a-62a, 70a. In the alternative, the court held that such relief was not appropriate because "the balance of hardships does not tip in [petitioner's] favor," *id.* at 65a, and he had not shown "that his request for a permanent injunction is in the public interest," *id.* at 69a-70a. See *id.* at 62a-70a. The court concluded that petitioner's "request for a permanent injunction to allow him to display the United States flag * * * [upside] down on the Perimeter Fence is indefensible." *Id.* at 70a.

3. Petitioner appealed the denial of injunctive relief, and the court of appeals affirmed. Pet. App. 1a-28a. The court observed that "voluntary cessation can yield mootness if a 'stringent' standard is met: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 15a

(quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). It further explained that "[t]he party asserting mootness bears a 'heavy burden' in meeting this standard." *Ibid.* (quoting *Friends of the Earth*, 528 U.S. at 189). Although courts "presume that a government entity is acting in good faith when it changes its policy," the government "still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Ibid.* A change in policy "will not necessarily render a case moot, but it may do so in certain circumstances." *Id.* at 16a (citation omitted).

For several reasons, however, the court of appeals concluded that the June 2010 e-mail "did not effect a policy change in the typical sense." Pet. App. 18a. First, the VA's regulation "has been in place, virtually unchanged, for nearly forty years." *Ibid.* Moreover, "the only evidence in the record addressing VAGLA's or the VA's policy regarding enforcement of the regulation suggests that VAGLA's policy has been consistent enforcement." *Ibid.* Any concern "that the purported change in policy may be gamesmanship * * * is not present here." *Id.* at 19a. The court explained that the June 2010 directive "is more aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a long-standing regulation—not as a policy change." *Ibid.* Under those circumstances, the court's "confidence in the Government's voluntary cessation is at an apex." *Ibid.* (citation omitted).

The court of appeals also concluded that, even if the directive were treated as a policy change, the government had "satisfied its heavy burden of demon-

strating mootness." Pet. App. 21a. The court examined a non-exhaustive list of factors sometimes considered in change-of-policy cases, all of which pointed to mootness: "First, the June 30, 2010 e-mail was a clear statement, broad in scope, and unequivocal in tone." *Id.* at 19a. "Second, the e-mail fully addressed all of the objectionable measures that the Government officials took against the plaintiff in this case." *Id.* at 20a (brackets, citation, and quotation marks omitted). Third, "the record strongly suggests" that petitioner's "case was the 'catalyst' for VAGLA's recommitment to strict enforcement of § 1.218." *Ibid.* "Fourth, at this point, the VA's recommitment to strict enforcement of its longstanding regulation occurred a fairly long time ago." *Id.* at 21a; see *ibid.* (e-mail was sent "more than three years ago"). "Finally, based on the record before us, since the recommitment the agency's officials have not engaged in conduct similar to that challenged by [petitioner]." *Ibid.* (brackets, citation, and quotation marks omitted).

The court of appeals concluded "that the VA has satisfied its heavy burden of demonstrating mootness" because, based on all the factors discussed, "we do not think it reasonably likely that the objectionable conduct will recur." Pet. App. 21a. If such impermissible conduct *did* recur, however, petitioner "is well-armed with his declaratory judgment." *Id.* at 21a-22a.

Judge Rawlinson dissented. Pet. App. 22a-28a. Although she agreed with the majority as to the applicable legal framework, including the conclusion that a policy change set forth in a memorandum could moot a controversy, she would have held that the circumstances in this case were not sufficient to demonstrate a permanent change in policy. *Id.* at 27a-28a. In her

view, the June 2010 directive was insufficient because it "was not protective of First Amendment rights, did not address the objectionable actions described in Mr. Rosebrock's claim for injunctive relief, and was not publicly disseminated in such a way as to bind VAGLA in the future." *Ibid.*

ARGUMENT

The ruling of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. There is no dispute that, as the court of appeals recognized, "voluntary cessation [of a challenged practice] can yield mootness if a 'stringent' standard is met: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Pet. App. 15a (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). There is also no dispute about who bears the burden of proof: "The party asserting mootnesss bears a 'heavy burden' in meeting this standard." *Ibid.* (quoting *Friends of the Earth*, 528 U.S. at 189).

Petitioner nevertheless asserts that the courts of appeals are divided about whether "a different voluntary cessation doctrine [applies to] government defendants." Pet. 16. According to petitioner, eight circuits "have rejected this Court's precedents" by adopting a presumption of good faith on the part of government defendants, thereby "relieving [such defendants] of the 'heavy burden' placed upon [them] by the voluntary cessation doctrine." Pet. 19; see Pet. 16-19 (citing cases from the Second, Third, Fifth,

Sixth, Seventh, Ninth, Eleventh, and Federal Circuits). By contrast, petitioner asserts, three other circuits "continue to apply this Court's precedent[s] faithfully." Pet. 20; see Pet. 20-21 (citing cases from the First, Eighth, and D.C. Circuits).

Petitioner is mistaken about the existence of disagreement among the courts of appeals. All circuits, including the eight that he asserts are unfaithful to this Court's precedents, recognize that government defendants bear a "heavy burden" of demonstrating mootness. See, *e.g.*, *Wisconsin Right to Life, Inc.* v. *Barland*, 751 F.3d 804, 831 (7th Cir. 2014) ("formidable burden"); *Wall* v. *Wade*, 741 F.3d 492, 497 (4th Cir. 2014) ("heavy burden"); *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) aff'd, 131 S. Ct. 1651 (2011) ("heavy burden"); *Rothe Dev. Corp.* v. *Department of Def.*, 413 F.3d 1327, 1333 (Fed. Cir. 2005) ("heavy burden"); *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) ("heavy burden"); *Ammex, Inc.* v. *Cox*, 351 F.3d 697, 705 (6th Cir. 2003) ("heavy burden"); *Ragsdale* v. *Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) ("heavy burden"). In accordance with this Court's instructions, those circuits will not find a case moot unless it is "absolutely clear the allegedly wrongful behavior" is not likely to recur. *Doe* v. *Wooten*, 747 F.3d 1317, 1323-1324 (11th Cir. 2014) (quoting *Friends of the Earth*, 528 U.S. at 189).

To be sure, courts have sometimes given statements from government officials a presumption that those statements were made earnestly and in good faith. See Pet. 16-18 (citing cases).[1] That is not the

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[1] Courts also appropriately take account of whether the governmental policy change is "cemented by statute or some other iner-

same, however, as relieving the government of its burden to demonstrate that a challenged policy or practice will not recur: Even a good-faith statement that the government intends not to resume a challenged practice is not necessarily dispositive, and must be considered along with all the other "facts and circumstances of a particular case." *Doe*, 747 F.3d at 1323.

The three circuits identified by petitioner do not hold otherwise. Rather, they agree that a policy change can moot a legal controversy even if the policy may in theory later be reversed by government officials. See *American Civil Liberties Union* v. *United States Conference of Catholic Bishops*, 705 F.3d 44, 56 (1st Cir. 2013) (*ACLU*) (controversy mooted where high-ranking officials "have, as a matter of policy, abandoned the prior practice and adopted a concededly constitutional replacement"); *Larsen* v. *United States Navy*, 525 F.3d 1, 3-4 (D.C. Cir.) (challenge to Navy's alleged quota policy for hiring chaplains mooted by Navy's voluntary abandonment of policy, where "the Navy has never said it will reenact the [challenged] Policy"), cert. denied, 555 U.S. 1071 (2008); *McCarthy* v. *Ozark Sch. Dist.*, 359 F.3d 1029, 1035 (8th Cir. 2004) (claims of children who sought to attend public school without being immunized were

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tial form." Pet. App. 19a; see *id.* at 16a; *Troiano* v. *Supervisor of Elections in Palm Beach Cnty.*, 382 F.3d 1276, 1283 n.4 (11th Cir. 2004). Petitioner cites (Pet. 16-17) the Eleventh Circuit's decision in *Troiano* as conflicting authority, but that court has subsequently made clear that there must be an "unambiguous termination" of the challenged policy. *Doe*, 747 F.3d at 1322. Here, the VA's policy regarding displays on VA property takes the form of a full-dress regulation, and the June 2010 directive by the Associate Director of VAGLA unambiguously recommitted the facility to precise and consistent enforcement of that regulation.

moot where "the amended immunization statute and its implementing regulations make clear that the statutory exemption now available to all the individual Schoolchildren provides precisely this relief"). These courts also agree that the analysis is "highly sensitive to the facts of a given case." *ACLU*, 705 F.3d at 56. There is no disagreement worthy of this Court's review.[2]

Given the circumstance-dependent nature of the mootness inquiry, it is unsurprising that different cases will produce different outcomes. But tellingly, even the circuits that petitioner accuses of "deviati[ng] from Supreme Court precedent" (Pet. 16) have *rejected* governmental assertions that a challenged practice will not recur. See, *e.g.*, *Wisconsin Right to Life*, 751 F.3d at 831 ("[The government's] inconsistent and shifting positions do not give us much confidence in its representation that it will not enforce the statute."); *Doe*, 747 F.3d at 1324 ("These statements do not carry the day for the BOP, because it is

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[2] Amici Western Center on Law & Poverty argue (Br. 12) that the decision below created a disagreement with the Second Circuit about whether "a letter from the government" can moot a case. But the case they cite, *New York Pub. Interest Research Grp.* v. *Whitman*, 321 F.3d 316 (2d Cir. 2003), certainly did not say that a letter from the government can *never* moot a case. Rather, it simply held that the particular letter at issue, in which the State Department of Environmental Conservation stated that it had made some changes and "intended to make" others, did not show that the alleged problems would not recur. *Id.* at 327. Notably, while the Second Circuit viewed the letter as "indicative of a degree of good faith," *ibid.*, it nevertheless ruled that the State had not carried its burden to demonstrate mootness—belying petitioner's claim that ascribing good faith to governmental assurances is equivalent to relieving the government of its burden of proof.

the BOP's burden to show that Mr. Doe will not be moved, not Mr. Doe's burden to show he will."); *Wall*, 741 F.3d at 497 (rejecting mootness claim based on "[u]nsubstantiated assurances in [government defendants'] appellate brief"); *Rothe Dev. Corp.*, 413 F.3d at 1334 (rejecting mootness claims because "the government has not provided sufficient evidence that the allegedly offending conduct will not recur"); *Tsombanidis*, 352 F.3d at 574 ("The Fire District has not met its heavy burden" of demonstrating mootness despite statements by officials that they had abandoned the challenged policy.); *Ammex*, 351 F.3d at 705 ("The Attorney General's withdrawal [of a Notice of Intended Action] thus does not make it absolutely clear that the enforcement action is not reasonably likely to recur."); *Ragsdale*, 841 F.2d at 1366 (rejecting State's mootness argument because "the State's position on this provision is asserted only in this litigation"). In all circuits, it is the facts and circumstances of a particular case that will determine whether a governmental defendant has met its "heavy burden" of establishing mootness.

The decision below is no different. The court of appeals did not simply accept the VA's representation that it would enforce its policy consistently and evenhandedly. Instead, the court relied on several different factors that, in combination, led it to conclude that the challenged practice was highly unlikely to recur. See Pet. App. 19a ("The fact that the Government's 'voluntary cessation' is more aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a longstanding regulation—not as a policy change—increases our confidence."); *id.* at 19a-21a (applying five non-exhaustive

factors, all of which point to mootness). That approach is fully consistent with the way mootness claims are evaluated in all other circuits.

b. In an attempt to prove the existence of a disagreement that is "not academic" (Pet. 22), petitioner identifies two pairs of cases that supposedly show how different approaches have led to different outcomes. Pet. 22-26. But those cases in fact demonstrate the opposite: In each, the court required the government to carry its burden of demonstrating that the challenged conduct could not reasonably be expected to recur. And in each, the court was sensitive to the facts and circumstances at issue.

Petitioner first compares (Pet. 22-23) the decision below to *United States Department of Justice Federal Bureau of Prisons Federal Correctional Complex Coleman* v. *Federal Labor Relations Authority,* 737 F.3d 779 (D.C. Cir. 2013) (*Complex Coleman*), which involved a labor dispute regarding the use of metal detectors in a prison. The prison union had alleged that the prison's use of metal detectors would cause a "bottleneck problem." *Id.* at 783. In response, the Bureau of Prisons (BOP) issued a directive stating its intention to use the metal detectors only "as needed," rather than universally. *Ibid.* The court there concluded that the dispute had not become moot: "It is clear from this directive that the agency can increase the number of inmates required to pass through the metal detectors at any time, as it sees fit, and reintroduce the bottleneck problem that the Union seeks to address." *Ibid.*

Thus, *Complex Coleman* did not turn on whether the BOP was afforded a presumption of good faith; there was never any question that the BOP would

follow through on its directive, and indeed the court assumed that it would. Rather, the directive simply did not resolve—and therefore could not moot—the union's "bottleneck" concerns.

The governmental directive at issue in this case, by contrast, unambiguously applies to prohibit recurrence of the dispute. It provides that "NO outside pamphlets, handbills, flyers, flags or banners, or other similar materials may be posted anywhere on VA Property (including the outside fence/gates). This includes any flags displayed in any position." Pet. App. 11a-12a. Thus, the directive requires VAGLA police to strictly and evenhandedly enforce VA regulations with regard to any item petitioner may post on the fence in the future. See *id.* at 20a ("[T]he e-mail fully addressed all of the objectionable measures that the Government officials took against the plaintiff in this case." (brackets, citation, and quotation marks omitted)). And, indeed, there is no record evidence that the VA has done otherwise during the four-and-a-half years since the issuance of the directive.[3] See *id.* at 21a ("[S]ince the recommitment the agency's officials have not engaged in conduct similar to that challenged by [petitioner]." (brackets and citation omitted)).

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[3] Petitioner suggests that "the VA retains unfettered discretion to permit postings on its fence" because the regulation allows exceptions to the general prohibition "as authorized by the head of the facility or designee." Pet. 24 (emphasis omitted) (quoting 38 C.F.R. 1.218(a)(9)). This argument is simply a red herring. Petitioner does not allege that VAGLA has ever invoked the "head of facility" exception in a manner relevant to this case. And as the court of appeals noted, "there is no evidence in the record suggesting" that it will do so in the future. Pet. App. 20a n.11.

Petitioner also compares "[t]wo cases involving prayers in prison." Pet. 25. In *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007), the Eighth Circuit addressed a challenge to the State's funding of a religious rehabilitation program. The governmental defendants argued that the dispute had become moot because the program's funding had "expired by its own terms" earlier that year. *Id.* at 421. The court of appeals held that the challenge to the program was not moot, however, because the defendants never gave "any assurance that they will not resume the prohibited conduct." *Ibid.* As in *Complex Coleman*, the question was not whether to presume that government assurances were made in good faith; rather, no such assurance had been given.

By contrast, mootness was found in *DeMoss* v. *Crain,* 636 F.3d 145, 151 (5th Cir. 2011) (per curiam), where the plaintiff sought an injunction against the State's policy of preventing inmates from attending religious services while confined to their cells for disciplinary reasons. Crucially, the prison directors announced that "the cell restriction policy had been abandoned and that all inmates on cell restriction would be allowed to attend religious services." *Ibid.* The case was found to be moot, therefore, based on "formally announced changes to official governmental policy"—something that was lacking in *Prison Fellowship Ministries*. *Ibid.* (citation omitted).[4]

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[4] Other authorities cited by petitioner (Pet. 19, 21-25) stand only for the uncontroversial proposition that a change in policy will not moot a case if the revised policy does not fully address the plaintiff's allegations. See *Lankford* v. *Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (amendment to state Medicare plan did not moot con-

2. Petitioner is also incorrect (Pet. 31-34) that the decision below conflicts with the Seventh Circuit's holding in *Sefick* v. *Gardner*, 164 F.3d 370 (7th Cir. 1998), cert. denied, 527 U.S. 1035 (1999). There, the plaintiff alleged that the government had violated his First Amendment rights by denying him permission to display a satirical sculpture in the lobby of a courthouse, citing "construction activity and security concerns." *Id.* at 371. While his case was pending, the government adopted a new policy under which it would "not authorize displays of any kind" in the courthouse lobby. *Id.* at 372. The Seventh Circuit held that the case was not moot, in part because the change in policy was "not implemented by statute or regulation and could be changed again," and in part because "a court could order Sefick's sculpture displayed as a remedy for a violation of his first amendment rights in 1996 and 1997, even though in 1998 the [agency] stopped considering applications for new displays." *Ibid.*

Petitioner argues that *Sefick* creates a split with the decision below, because the court of appeals declined his request for a "reparative injunction" authorizing him to hang the U.S. flag upside-down on the

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troversy where CMS had "neither approved nor rejected the amended plan, [and] Missouri may seek further amendment at any time"); *Conservation Law Found.* v. *Evans*, 360 F.3d 21, 26 (1st Cir. 2004) (case not moot where "challenged regulation [was] * * * only superficially altered by a subsequent regulation"); *American Iron & Steel Inst.* v. *Environmental Prot. Agency*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (per curiam) (where agency used erroneous figures in rulemaking, controversy not mooted merely by issuing guidance alerting regional offices to the issue, because there were "numerous ways" that the faulty standard could be enforced).

VAGLA fence for 66 weeks. Pet. 5, 32; see Pet. App. 13a n.6 (stating, without further explanation, that petitioner's request for a reparative injunction is moot). In *Sefick*, however, the allegation was that the artist had impermissibly been denied permission to display his artwork under the policy then in effect. The Seventh Circuit suggested that a potential remedy might be to grant the artist the permission that he was wrongfully denied, notwithstanding the change in policy. 164 F.3d at 372. Here, by contrast, the display of flags on VA property was *always* a violation of existing regulations. As petitioner acknowledged in the district court, the VA's longstanding regulation—which was in effect at all times relevant to this litigation—prohibits "individuals from hanging anything on the perimeter fence." Pet. App. 44a (quoting petitioner's motion). The circumstances in *Sefick* were not comparable.

3. Three additional factors make this case a particularly bad vehicle for addressing whether a request for injunctive relief is moot notwithstanding governmental assurances that a challenged practice has ceased.

First, petitioner has already obtained through litigation a declaratory judgment that VAGLA's inconsistent enforcement against him of the VA's regulation was unconstitutional. That judgment, which was not appealed, binds the very same parties against whom petitioner seeks injunctive relief. See Pet. App. 21a-22a ("[Petitioner] is well-armed with his declaratory judgment."). The declaratory judgment therefore provides yet another reason "that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189.

Second, in rejecting petitioner's request for an injunction, the district court held, in the alternative to its mootness ruling, that petitioner was not entitled to relief for an additional reason: "He has not established that the balance of equities tips in his favor or that a permanent injunction is in the public interest." Pet. App. 62a. That alternative ruling provides an independent reason why petitioner would not obtain relief even if his request were not moot.

Third, unlike almost all of the other cases that petitioner cites, this case does not involve a change in governmental policy. Rather, as the court of appeals held, the June 2010 directive "is more aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a longstanding regulation—not as a policy change." Pet. App. 19a. The court recognized that challenged behavior is less likely to recur where the government recommits to an existing policy rather than adopting a new one. See *ibid.* ("Our confidence in the Government's voluntary cessation is at an apex in this context." (citation omitted)); see also *Clear Channel Outdoor, Inc.* v. *City of New York*, 594 F.3d 94, 111 (2d Cir.) ("Plaintiffs' speculation that the City will fail to enforce its regulations is insufficient."), cert. denied, 131 S. Ct. 414 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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