No. 16-333

In The Supreme Court of the United States

KODY BROWN, MERI BROWN, JANELLE BROWN, CHRISTINE BROWN, ROBYN SULLIVAN,

Petitioners,

v.

JEFFREY BUHMAN, in his official capacity,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Tenth Circuit's decision in this case rewrote the law governing the stringent doctrinal requirements for invoking this Court's voluntary cessation doctrine, significantly expanding its scope and deepening a split of authority with the Second, Third, Eleventh, and D.C. Circuits. Respondent's efforts to reformulate the questions presented, deny the circuit split, minimize the significance of the error, and provide alternative rationales for the court of appeals' bottom-line conclusion all lack merit. This Court should grant certiorari and resolve the split of authority.

I. The circuit split is real and squarely presented.

A. The Courts of Appeals are divided over the proper legal test for adjudication of the voluntary cessation doctrine.

The court of appeals' decision in this case creates a square split with decisions of the Second, Third, Eleventh, and D.C. Circuits. See Pet. 9-18. In these circuits, a defendant seeking to moot a lawsuit by voluntary cessation of the complained about activity must do so "completely and irrevocably," and must demonstrate – against probing scrutiny of its timing and content – that he or she has not done so for the tactical purpose of depriving the court of jurisdiction.

Here, in contrast, the Tenth Circuit held that these legal boundaries on the voluntary cessation doctrine do not apply, and instead adopted a more permissive

approach that broadly "assess[es] the likelihood that defendants will recommence the challenged . . . conduct." App. 32 (citation omitted). Utilizing this disparate standard, it concluded that a newly adopted change in prosecution policy announced during the pendency of litigation was sufficient to moot a lawsuit under the voluntary cessation doctrine – irrespective of whether the defendant's change in behavior was tactical and calculated to "prevent adjudication of the federal claim on the merits," App. 53-55, and irrespective of whether the new executive policy is non-binding or revocable by future prosecutors. App. 48-51.

1. Respondent first observes that all thirteen courts of appeals accept the validity of *Laidlaw*. Opp. i, 13-14. But of course, neither party questions the validity of *Laidlaw*; indeed, Petitioners cite it in the very first sentence of their brief as the starting point to their analysis: a defendant asserting mootness by voluntary cessation bears "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Pet. i (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000)) (internal citations omitted).

The issue that divides the courts of appeals is not the validity of *Laidlaw*, but rather the extent to which it tolerates forms of voluntary cessation that are either (1) non-binding and revocable, or (2) expressly found to be tactical and calculated to prevent adjudication of the federal claim on the merits. Neither *Laidlaw* nor any of the other decisions of this Court cited by Respondent purport to resolve that circuit conflict.

Respondents wrongly describe these as "fact-bound differences that inevitably occur when courts apply the same legal standard to disparate facts." Opp. 14. The court of appeals' decision was not based on a factual dispute over whether Respondent's prosecution policy was irrevocable; indeed, the court accepted that it was not. See App. 48-51. Rather, the court concluded – contrary to its sister circuits – that irrevocability was not a *legal requirement* for mooting a case via voluntary cessation. *Id*. Similarly, the court of appeals accepted the proposition that Respondent's newly adopted prosecution policy may indeed have been tactically motived, but likewise dismissed this as immaterial. See App. 53-55.

2. Respondent next asserts that "courts generally accord a presumption of good faith to government defendants who voluntarily cease challenged conduct." Opp. 15. Notably, Respondent does not cite any supporting authority by this Court, as the courts of appeals are also divided on this point. See 15 James W. Moore, et al., *Moore's Federal Practice*, § 101.99[2], at 101.432.1-101.432.5 (3d ed. 2016) (Observing that while "[s]ome courts apply a presumption that the government officials are acting in good faith[,]" " . . . [n]ot all courts treat government defendants differently from other defendants when it comes to the voluntary cessation exception to mootness.") (collecting cases); see also *United States DOJ Fed. Bureau of Prisons Fed. Corr. Complex Coleman* v. *Fed. Labor Rels. Auth.*, 737 F.3d 779, 783 (D.C. Cir. 2013) (federal BOP held to "heavy burden" of demonstrating there was

"no reasonable expectation" it would resume the complained-of conduct). Thus, at most, Respondent points to an additional conflict of authority under the voluntary cessation doctrine.

3. Despite mustering a conclusory denial, Respondent does not appear to directly contest Petitioners' identified split of authority between the approaches of the Second, Third, Ninth, Eleventh, and D.C. Circuits (all of which require a defendant's voluntary cessation to be "complete[] and irrevocabl[e]"), and the contrary approach of the panel decision below (which permits a finding of voluntary cessation even where the government's cessation policy is revocable, see App. 48-51, and even where the government continues to defend the constitutionality of the challenged law, see App. 51-53). Compare Opp. 17-20 with Pet. 9-14.

Instead, Respondent attempts to reformulate the circuit split as "a [claimed] conflict in this Court's own cases: between the formulations of the voluntary cessation standard in *Friends of the Earth* [v. *Laidlaw*] and *Davis*," Opp. 19, which he suggests has been since reconciled by this Court's subsequent decision in *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721 (2013). See Opp. 19-20. Respondent is wrong. No such conflict in this Court's own cases exists; *Davis*, *Laidlaw*, and *Already* are all in accord and none has been supplanted, either impliedly or expressly. Nor have the decisions of the courts of appeals that continue to faithfully apply *Davis*.

3.a. Respondent correctly acknowledges that the "complete[] and irrevocabl[e] eradicate[ion]" standard was first elucidated by this Court in *Cnty. of L.A.* v. *Davis*, which explained the stringent requirements of the voluntary cessation doctrine as follows:

> We recognize that as a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events *have completely and irrevocably eradicated the effects of the alleged violation*. *When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.* The burden of demonstrating mootness is a heavy one.

440 U.S. 625, 631 (1979) (citations and quotations omitted) (emphasis added). Respondent also correctly observes that two decades later in *Laidlaw*, this Court again spoke on that standard, explaining that a defendant invoking the voluntary cessation doctrine "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190 (citation omitted). But nothing in *Laidlaw* purported to reject or supplant the *Davis* test; indeed, all

the courts of appeals cited in Petitioners' brief continue to faithfully apply it. See Pet. 9-14.

3.b. Respondent's argument to the contrary is without merit: He suggests that this Court's intervening opinion in *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721 (2013) has "impliedly rejected" the irrevocability standard because it did not cite *Davis* in its discussion. See Opp. 19. Respondent is wrong.

Already considered whether and under what circumstances a trademark counterclaim defendant could moot an invalidity attack on its trademark by issuing a covenant-not-to-sue during the pendency of litigation. See *Already*, 133 S. Ct. at 725. To be sure, the *Already* Court concluded that Nike's issuance of a covenant-not-to-sue was sufficient to moot Already's counterclaims for invalidity. *Id*. at 728. But the Court's decision turned on *its express determination that the covenant was unconditional and irrevocable*:

> The breadth of this covenant suffices to meet the burden imposed by the voluntary cessation test. The covenant is unconditional and irrevocable. Beyond simply prohibiting Nike from filing suit, it prohibits Nike from making any claim or any demand. It reaches beyond Already to protect Already's distributors and customers. And it covers not just current or previous designs, but any colorable imitations.

Id. Quite plainly then, *Already* did not abandon the irrevocability standard; to the contrary, the case turned

in large part on the covenant's compliance with that standard. Contra Opp. 19-20.

3.c. Moreover, many of the circumstances that made *Already* an appropriate case for certiorari apply with equal force here. As Justice Kennedy observed in a concurring opinion, "relatively few cases [had] discussed the meaning and effect of covenants not to sue in the context of ongoing litigation," *Already, LLC*, 133 S. Ct. at 734 (2013) (Kennedy, J., concurring); accordingly, he urged that "[c]ourts should proceed with caution before ruling that they can be used to terminate litigation." *Id*. But by granting certiorari, this Court provided important guidance to the courts of appeals in clarifying the circumstances under which such a covenant may properly moot a case. This Court should similarly intervene here to clarify the extent to which a newly adopted prosecution policy may do the same.

4. Respondent's attempt to discount the circuit split between the Tenth and Ninth Circuits is also unavailing. Opp. 21-22. Contrary to his suggestion, the Ninth Circuit decisions he cites follow the irrevocability standard either directly or impliedly by requiring voluntary cessation to be "entrenched" and "permanent." See *McCormack* v. *Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015); *Bell* v. *City of Boise*, 709 F.3d 890, 898-901 (9th Cir. 2013); *White* v. *Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (observing that "a government agency's moratorium that by its terms was not permanent would not moot an otherwise valid claim for injunctive relief.") (citation and quotation omitted). Although arguably less direct than the other identified circuits, the

Ninth Circuit's "entrenched and permanent" standard nonetheless squarely conflicts with the Tenth Circuit's opinion below, which dismissed as immaterial the revocable nature of the alleged voluntary cessation. See App. 48-51.

5. Finally, Respondent errs in discounting the split over whether a government defendant is legally permitted to make tactical use of the voluntary cessation doctrine to prevent a court from reaching the merits. Respondent attempts to reframe this as a dispute over merely whether "the change's timing is *relevant* to the mootness inquiry." Opp. 22 (emphasis added). This is incorrect. While it is true that other circuits agree that timing is relevant to the determination of *whether* the government has acted tactically, the Tenth Circuit has held that *even if* "the prosecutor ruled out prosecution because he wished to prevent adjudication of the federal claim on the merits," App. 54-55, he may still avail himself of the voluntary cessation doctrine. As previously noted, this contradicts the positions of its sister circuits. Pet. 10-12.

B. The Courts of Appeals are divided over the appropriate standard of review applicable to the voluntary cessation doctrine.

The courts of appeals are similarly divided over the appropriate standard of review. Contrary to Respondent's attempted reformulation of the question presented, see Opp. i, the district court in this case resolved a disputed factual issue (namely, whether

Respondent's newly adopted prosecution policy was tactically motivated to defeat jurisdiction) in favor of the Browns, which was then supplanted by the Tenth Circuit on appeal under a de novo standard of review. As outlined in Petitioners' opening brief, had the court of appeals followed the clear-error or abuse-of-discretion standards employed by its sister circuits, the district court's factual findings would have held and Respondent's mootness claim would necessarily fail.

1. As explained in Petitioners' opening brief, the district court's adjudication of underlying factual issues was not limited to the four corners of the complaint. Pet. 16-17; contra Opp. 27. Instead, the district court examined the timing and circumstances of Respondent's new prosecution policy, and concluded that it was motivated by the tactical aim of depriving the court of jurisdiction:

> [T]he timing of the policy implementation, lack of any public notice, and lack of reasoning given for adopting the policy suggest that the policy was implemented, not to provide a remedy to Plaintiffs in this case, but instead to evade review of Plaintiffs' claims on the merits.

App. 78; see also App. 71-75.

1.a. The court of appeals supplanted this finding, see App. 55-56, applying a de novo standard of review for evaluating underlying factual findings relating to voluntary cessation claims. See App. 32 ("We have

addressed the standard of review for mootness based on voluntary cessation. . . . We referred to this assessment as a 'factual inquir[y]' and said '[o]ur review of this question is de novo.'") (quoting *Rio Grande Silvery Minnow* v. *Bureau of Reclamation*, 601 F.3d 1096, 1122 (10th Cir. 2010)).

1.b. Although the court of appeals stated in passing that its ruling did not turn on "plenary or deferential" review, App. 33, it did not purport to conduct an alternative analysis under either a clear-error or abuse-of-discretion standard of review (or even mention these standards), and indeed offered no deference to the district court, which had spent two years adjudicating the case. Respondent identifies no version of clear-error or abuse-of-discretion review that would allow such findings to be summarily reversed. Should this Court adopt either the clear-error or abuse-of-discretion approaches used in other circuits, it would necessarily follow that the court of appeals erred by failing to conduct that analysis – thus requiring at the very least a remand with instructions to apply the appropriate standard.

2. Respondent contends that although the D.C. Circuit reviews disputed findings of fact under a clear-error standard, it reviews undisputed facts de novo. Opp. 27. This is correct, but again unresponsive to the petition. As noted above, the district court resolved a disputed factual issue in Petitioners' favor, and it was this *disputed* factual finding that was supplanted de novo. Supra _[¶¶ 1 and 1a]_. At best, Respondent urges a different standard of review for what he appears to

regard as a mixed issue of law and fact. This is an argument for the merits stage.

3. Respondent also contests the dissenting opinion of Judge Henry, who criticized the Tenth Circuit's de novo review of voluntary cessation cases, expressly noting its departure from several sister circuits' use of an abuse-of-discretion standard. See Opp. 28, n.7; see also *Rio Grande Silvery Minnow*, 601 F.3d at 1134-35 (Henry, J., dissenting). According to Respondent, these contrary circuit decisions can be distinguished because they were adjudicating a "prudential" rather than "constitutional" form of mootness. See Opp. 28-29 & n.7. But he can cite no authority from this Court to support that distinction, as the courts of appeals are also divided on this point. See 15 James W. Moore, et al., *Moore's Federal Practice*, § 101.91, at 101.351-101.354 (3d ed. 2016) (Noting that "some courts refer to two kinds of mootness: constitutional mootness and prudential mootness," but observing that the claimed distinction "runs serious risks" owing to vagueness concerns.) (collecting cases). Regardless, should Respondent believe that deferential forms of review should be limited to prudential mootness, this too is an argument for the merits stage.

II. The questions presented are important and should be resolved in this case.

Respondent also urges (Opp. 30-34) this Court to deny review for a variety of prudential reasons. None of his concerns has merit.

1. Respondent's suggestion that the parties' dispute has been cured by a proposed bill in the Utah legislature, see Opp. 30-32, is incorrect. This Court has never held that a non-enacted legislative proposal can moot a lawsuit; to the contrary, even duly enacted statutory changes are not necessarily sufficient to establish mootness. See *City of Mesquite* v. *Aladdin's Castle*, 455 U.S. 283, 289 (1982) ("In this case 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."). The proposal of a bill falls far short of any authority supporting voluntary cessation.

2. The court of appeals' sua sponte conclusion that the case has been mooted by the Browns' relocation to Nevada to avoid prosecution, and the subsequent running of the statute of limitations during the pendency of this litigation, equally implicates the questions presented in this petition. Contra Opp. 32-33. The statute of limitations is only relevant if Respondent's non-binding new prosecution policy has in fact mooted the case and extinguished the possibility of prosecution on their return. Otherwise, the Browns are left in the position of moving their family back to Utah under the specter of Respondent's office – or any subsequently elected Attorney General – publicly threatening them with prosecution once again. Similarly, the court of appeals' sua sponte finding that the Browns' relocation to Nevada moots the case depends directly on its de novo supplantation of the district court's contrary conclusion that "[i]t is clear that the

Browns would like to return to Utah" and that they expect to do so once the fear of prosecution is lifted. Compare App. 41-50 with 850 F. Supp. 2d at 1244 and 1254; see also Pet. 16-17. Thus, a decision by this Court adopting Petitioners' positions on the questions presented would similarly require (at the very least) a remand with instructions to apply the appropriate rules of law.

3. Finally, Petitioners have no agenda to ask this Court to revisit any of its holdings on money damages without invitation from the Court. See Opp. 33-34.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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