No. 11-56256

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ROSEBROCK,

Plaintiff and Appellant,

v.

RONALD MATHIS, ET AL.,

Defendants and Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable S. James Otero, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND APPELLANT ROBERT ROSEBROCK'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

PAUL J. BEARD II, 210563
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29-2(a)-(b), Pacific Legal Foundation (PLF) files this amicus curiae brief in support of Appellant's petition for panel and *en banc* rehearing. PLF was founded more than 40 years ago, and is widely recognized as the largest and most experienced non-profit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide.

PLF's overarching mission is to advance individual freedom and private property rights, in part by challenging the actions of government entities and officials that exceed their constitutional authority. To that end, PLF has participated in several cases before this Court and others, including issues related to the First Amendment, particularly in the area of commercial speech. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island & Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *Bank of America v. City & County of San Francisco*, 309 F.3d 551 (9th Cir. 2002); *see also Smith v. Novato Unified School Dist.*, 150 Cal. App. 4th 1439 (2008) (holding that high-school student's political editorial was protected speech, and that school district's response to said editorial violated his constitutional and statutory rights). PLF attorneys also have published on First Amendment issues. *See*, *e.g.*, Paul J. Beard II & Robert Luther III, *A Superintendent's Guide to Student*

Free Speech in California Public Schools, In Synposium: Nike v. Kasky and The Modern Commercial Speech Doctrine, 12 U.C. Davis J. Juv. L. & Pol'y 381 (2008); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004).

As explained in its motion, PLF regularly engages in litigation against government defendants that implicates the voluntary cessation doctrine. Given its litigation background, PLF is interested in ensuring that government defendants are held to a robust burden of proof when they rely on that doctrine to moot challenges to their actions. PLF believes its experience with the voluntary cessation doctrine, along with First Amendment litigation, will provide a unique perspective and assist this Court in addressing the important issues in this case.

ARGUMENT

I

THE PANEL OR THE COURT *EN BANC* SHOULD REHEAR THE QUESTION OF WHETHER APPELLEES' INTEROFFICE EMAIL IS SUFFICIENT TO MOOT APPELLANT'S INJUNCTIVE-RELIEF CLAIM

Appellant Robert Rosebrock is a veteran who objects to the refusal of the Department of Veterans Affairs (VA) to use a lawn outside of a VA hospital in Los Angeles for the benefit of veterans, particularly homeless veterans. *Rosebrock v. Mathis*, 745 F.3d 963, 966 (9th Cir. 2014). He has organized weekly protests outside

the locked fence surrounding the hospital lawn to draw public attention to the matter; the protests have included the display of the American flag—sometimes up, but sometimes down (as a distress signal). *Id.* In response to these protests, the VA hospital and its police force have inconsistently enforced a federal regulation that, ***by its own terms***, allows them the discretion to allow or ban any expression on VA property, including certain kinds of flag displays. *Id.* at 966-67 (quoting 38 C.F.R. § 1.218(a)(9)[1]).

When Rosebrock has displayed the flag on the fence union-up, the VA hospital and police have allowed it. *Id.* at 969. When he has displayed it union-down (as a distress call), they have ordered it removed and cited him. *Id.* at 968. Rosebrock brought a First Amendment suit for declaratory and injunctive relief against the chief of police and the director of the VA hospital (hereinafter, "VA defendants"). *Id.* at 969.

The district court granted declaratory relief, but denied injunction relief. *Id.* at 970. The court denied Rosebrock his request for an injunction, in part on mootness grounds. *Id.* The court relied on the fact that, while the case was pending, an associate director at the VA hospital sent an email to its police force, instructing them

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[1] The regulation bans the distribution or display of materials on VA property "except as authorized by the head of the facility or designee or when such distributions or displays are conducted as part of authorized Government activities." 38 C.F.R. § 1.218(a)(9).

to consistently enforce the regulation by ensuring that no expression—including flag displays of any kind—occurred on VA grounds. *Id.* On that basis, the district court saw no reason to adjudicate Rosebrock's request for a permanent injunction. *Id.* This panel agreed. *Id.* at 974.

Amicus supports panel or *en banc* rehearing on the question of whether Rosebrock's injunctive-relief claim is moot. Even under the more lax standard applied by the panel, which relied on a "good faith" presumption in VA defendants' favor, one interoffice email by a low-level VA official is insufficient to moot a First Amendment claim for injunctive relief. Among other things, the email "was not protective of First Amendment rights, did not address the objectionable actions described in [Rosebrock's] claim," and "was not publically disseminated in such a way as to bind [VA defendants] in the future." *Id.* at 977 (dissent). Indeed, the very regulation that VA defendants promise to uniformly enforce (to squelch *all* expression) gives them significant discretion to pick and choose what expression to ban. 38 C.F.R. § 1.218(a)(9). Despite the email, the risk that VA defendants will revert to discriminatory violation of Rosebrock's First Amendment rights is sufficiently great to defeat mootness.

For these reasons, and all the reasons stated in Rosebrock's petition, the panel or the Court *en banc* should grant rehearing.

II

THE "GOOD FAITH" PRESUMPTION IN FAVOR OF GOVERNMENT HAS NO PLACE IN THE VOLUNTARY CESSATION ANALYSIS

A. Relevant Supreme Court Precedents Do Not Countenance a "Good Faith" Presumption

In holding that the request for a permanent injunction was moot, the panel presumed that the VA defendants' assurances that they would cease their discriminatory enforcement of the speech ban were made in "good faith." Indeed, the panel cited the "good faith" presumption in its short opinion no less than four times. *Rosebrock*, 745 F.3d at 971, 974 n.11. According to the panel, "[w]e presume that a government entity is acting in good faith when it changes its policy," and "[o]ur confidence in the Government's voluntary cessation is at an apex in this context." *Id.* at 971. The panel's crediting of the VA defendants' interoffice email with a "good faith" presumption cannot be squared with the precedents applying the voluntary cessation doctrine, and raises serious public policy concerns.

"It is well settled 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal citation and quotation marks omitted). But for over 60 years, the Supreme Court has recognized a very limited exception: "A case might become moot if

subsequent events make it ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 170 (emphasis added); *see also Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (same); *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated."). As the Supreme Court warned in a recent 2013 decision: "Otherwise, a defendant could 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." *Already*, 133 S. Ct. at 727.

These precedents establish a presumption in favor of the *plaintiff* in voluntary cessation cases. Even in the face of law-abiding assurance by the defendant, the presumption is that the plaintiff's claim remains live. *Friends of the Earth*, 528 U.S. at 189; *see also* Richard Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 58 N.Y.U. L. Rev. 1, 27 (1984) (The only presumption the Supreme Court has established in voluntary cessation cases is a "powerful presumption favoring adjudication" and against mootness.). This means that the burden of proof—comprising the burdens of production and

persuasion[2]—rests entirely with the defendant; it is for the defendant to establish that the alleged cessation of the challenged conduct moots the case, not for the plaintiff to establish the opposite. The Supreme Court consistently and unqualifiedly has held that "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with ***the party asserting mootness***." *Id.* at 189 (emphasis added); *U.S. v. The Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (citing "the heavy burden of persuasion which we have held rests upon those in appellees' shoes"). That burden has been described as "stringent," "heavy," and "formidable." *Friends of the Earth*, 528 U.S. at 189-90.

Despite the Supreme Court's long-established framework for deciding mootness under the voluntary cessation doctrine, the panel's opinion confusingly injects into that doctrine the notion of a "good faith" presumption in favor of the VA defendants. As a practical matter, the presumption makes the voluntary cessation analysis difficult to undertake. On the one hand, the defendant bears the heavy burden of establishing that the change in unlawful conduct will not recur; on the other hand, the defendant is effectively entitled, from the start of the analysis, to a legal presumption that the unlawful conduct will not recur. In effect, the defendant is

[2] 29 Am. Jur. 2d Evidence § 171("The 'burden of proof' is said to 'comprise' the burdens of production and persuasion.").

asked to satisfy a burden that the court immediately relieves with its "good faith" presumption.

Beyond the impracticality of applying the presumption, it is legally problematic, because it cannot be reconciled with the Supreme Court's precedents. A "good faith" presumption in favor of the defendant necessarily shifts the burden of production on the question of mootness onto the plaintiff. Fed. R. Evid. 301 ("In a civil case, . . . the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.").[3] Here, the panel's "good faith" presumption effectively required Rosebrock to produce evidence showing that, despite the VA defendants' assurances to the contrary, they would continue to act unconstitutionally in respect to his First Amendment rights. Having to produce evidence of the *non-existence* of a presumed fact—i.e., that the VA defendants' cessation assurances were made in bad faith and therefore should not be credited—is itself a "stringent," "heavy," and "formidable" burden. And it was

[3] Some courts have observed that presumptions rooted in the substantive law at issue, and predating Rule 301, may have no effect on the burden of production. *See, e.g.*, *James v. River Parishes Co., Inc.*, 686 F.2d 1129, 1132-33 (5th Cir. 1982) (presumption long a part of the fabric of maritime and admiral law was not subject to Rule 301). Here, the panel's "good faith" presumption was not derived from any substantive law; to the contrary, it contradicts the principles of voluntary cessation, including the heavy burden that rests entirely on the defendant to prove mootness under that doctrine.

Rosebrook who was required to satisfy it. The presumption cannot be reconciled with the rule that the party claiming mootness following voluntary cessation must bear the full burden of proof. *See, e.g.*, *W.T. Grant*, 345 U.S. at 633.

The panel or the Court *en banc* may conclude that the "good faith" presumption referred to in the panel's opinion does nothing to affect the VA defendants' burden of proof. But if this were true, then repeated citations to the presumption would serve no substantive purpose. If anything, it would simply confuse the voluntary cessation analysis, making it unclear to future parties and courts what role (if any) the presumption should play in deciding mootness claims. In any event, whether or not the presumption is meant to affect the burden of proof, the voluntary cessation issue requires rehearing without the "good faith" presumption. G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, Creighton L. Rev. at 383 (Feb. 1992) ("Here is the bottom line on presumptions. They are inextricably confused devices used to move burdens from one party to another and to allow judges to comment on the value of evidence.").

B. Circuit Courts That Have Relied on a "Good Faith" Presumption Are Misguided

Several federal circuit courts of appeals, including this Court, have recognized a "good faith" or similar presumption in the voluntary cessation context in the past,

but to benefit only ***government*** defendants.[4] *See, e.g.*, *America Cargo Transport, Inc. v. U.S.*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("But, unlike in the case of a private party, we presume the government is acting in good faith."); *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."). In addition to vitiating the heavy burden of proof that the Supreme Court unequivocally has assigned to the party claiming mootness, there is no justification for the courts' discriminatory use of the presumption.

First, none of the decisions offers any explanation as to why government defendants should be entitled to a "good faith" presumption that they will not repeat their unlawful acts, while private defendants should be met with distrust. In *Ragsdale*—an oft-cited authority for the presumption—the Seventh Circuit simply "note[d]" in passing that "government officials ha[ve] been treated with more solicitude by the courts than similar action by private parties." *Ragsdale*, 841 F.2d at 1365. Its reason? "[S]uch self-correction provides a secure foundation for a

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[4] *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring, to deny mootness, "clear showings " of governmental "desire to return to the old ways"); *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."); *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (noting that cessation of conduct by the government is "treated with more solicitude . . . than similar action by private parties").

dismissal based on mootness ***so long as it appears genuine***." *Id.* (emphasis added). In other words, government's assurances should be presumed to be made in good faith, so long as they *appear* to be made in good faith. Other than citing one decision of this Court, the panel opinion similarly offers no justification for reliance on a "good faith" presumption in favor of government defendants.

Second, no reason justifies presumptively believing government defendants' assurances more than those of private defendants. Indeed, if anything, the opposite is more accurate. Government defendants have "unlimited resources" to defend themselves in litigation, and they "litigate[] for principle or policy." The Honorable Loren A. Smith, *Why a Court of Federal Claims?*, 71 Geo. Wash. L. Rev. 773, 782 (2003); *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1336 (1999) ("Moreover, government possesses virtually unlimited resources. This means, for example, that it can litigate strenuously and at great length.").

The same cannot be said of private defendants, who, because of their concerns for controlling costs and protecting their reputations, have a natural aversion to litigation and re-litigation of claims. This reality strongly suggests that, if any "good faith" presumption is appropriate, it should be conferred only on private defendants. Few private defendants want (or can afford) to find themselves back in court for the same misconduct they promised to abandon. On the other hand, because policy and

political considerations often drive government decisionmaking, as opposed to the need to contain litigation costs, government actors are relatively *less* likely to be averse to the re-litigation of claims that their representations helped to moot.

C. A "Good Faith" Presumption Is Especially Improper in the Context of Fundamental Constitutional Rights Challenges

Ensuring that government defendants satisfy their heavy burden of proving mootness is especially important in the constitutional context, where fundamental rights are often at issue. Far from granting government defendants a "good faith" presumption of any kind, courts in many such constitutional cases subject them to heightened or strict scrutiny. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007) (surveying the history and use of strict scrutiny in the areas of free speech, free association, and free exercise). For example, in First Amendment cases implicating fundamental rights—like freedom of speech, equal protection, and property rights—government defendants must demonstrate that their policies are narrowly tailored to achieve a compelling governmental interest. *See, e.g.*, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve

a compelling governmental interest, and must be narrowly tailored to further that interest."); *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994) (holding that government had not met its burden of demonstrating that its permit conditions were roughly proportional to the impact of the proposed project); *id.* at 398 (dissent) ("In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate 'rough proportionality' between the harm caused by the new land use and the benefit obtained by the condition.").

This heightened or strict scrutiny of government actions and policies does not allow for "good faith" presumptions. Consider the Supreme Court's skepticism of government in the takings context. *Dolan*, along with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), are precedents that protect property owners against unconstitutional permit conditions. They ensure that conditions do not effect takings without just compensation—in violation of the Fifth Amendment's Takings Clause—by requiring that the government prove that the conditions mitigate for impacts caused by the property owner's proposed project. The cases provide a bulwark against "extortionate demands" for land and money that government agencies routinely make against property owners in need of permits to make use of their lands. *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2589-90 (2013). In a significant indictment against government actors, the *Koontz* Court observed that "land-use permit applicants are especially vulnerable to the type

of ***coercion*** that the unconstitutional conditions doctrine prohibits," whereby "the government can ***pressure*** an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* at 2594 (emphasis added). How can government actors who engage in "extortion" (the Supreme Court's own words) nevertheless be entitled to a "good faith" presumption when they promise to obey the Constitution?

The Supreme Court has been similarly skeptical of government's alleged "good faith" in the race-discrimination context. As Professor Fallon observes about the Court's precedents in this area, "[i]n recent years, the Supreme Court has sometimes asserted unequivocally that strict scrutiny aims to unmask forbidden motivations" behind policies that unconstitutionally discriminate on the basis of race. Fallon, *Strict Judicial Scrutiny*, at 1309 (citing, among other cases, *Johnson v. California*, 543 U.S. 499 (2005), and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989)). For example, in *Grutter v. Bollinger,* the Supreme Court refused to accept at face-value a public university's assurances that its racially discriminatory admissions policy was created in good faith to benefit the entire student body. The Court explained that "[a]bsent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of

racial inferiority or simple racial politics." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), *superseded on other grounds*.

In other words, government's motives in carrying out a policy or practice are *not* entitled to a "good faith" presumption—especially when it comes to individuals' constitutional rights. Just as courts should not defer to government's assurances that its otherwise-unconstitutional conduct has been undertaken with the best of intentions, so too should they not defer to government's assurances that it will permanently discontinue that conduct. Especially where, as here, a government defendant has been declared to have acted unconstitutionally—and continues to enjoy the discretion to revert back to its unconstitutional practice—the "good faith" presumption is unjustified.

CONCLUSION

For the foregoing reasons, Rosebrock's petition should be granted.

DATED: May 8, 2014.

Respectfully submitted,

s/PAUL J. BEARD II
PAUL J. BEARD II

Counsel for Amicus Curiae
Pacific Legal Foundation

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s/PAUL J. BEARD II
PAUL J. BEARD II

Counsel for Amicus Curiae
Pacific Legal Foundation

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