

No. _____

**In The
Supreme Court of the United States**

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CHARLES CLARK, III; SOLID ROCK BAPTIST
CHURCH, New Jersey not-for-profit corporation;
BIBLE BAPTIST CHURCH OF CLEMENTON,
New Jersey not-for-profit corporation; CHARLES
CLARK, JR.; PASTOR ANDREW REESE,

Petitioners,

v.

GOVERNOR OF THE STATE OF NEW JERSEY;
ATTORNEY GENERAL OF THE STATE OF NEW
JERSEY; PATRICK J. CALLAHAN, Superintendent
of State Police and State Director of Emergency
Management in his official capacities,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Courts have struggled with mootness—a problem intensified recently with governments’ hefty issuances of recurrent orders. Improper dismissal of a case as moot enables a government defendant to jockey the court system “in a way that should not be countenanced.” *N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting). What is more, it closes the door to important constitutional claims that deserve their day in court while simultaneously allowing governments to remain unaccountable for the policies they set, carry out, and here, retain the authority to enforce again. In a divided decision that conflicts with many rulings of this Court and other circuits, the Third Circuit affirmed the District Court’s dismissal of Petitioners’ claim as moot, leaving Petitioners without relief. (App. 27). *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) rejected mootness when parties “remain under a constant threat” that the government may re-issue the challenged regulations. 141 S. Ct. 63, 68 (2020). Yet, the Fifth Circuit and others find mootness even when governments maintain the power to re-enact the regulations and would again, creating inter-circuit conflict. *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting) (“I would side with the First, Third, Fourth, and Seventh Circuits – and follow the Supreme Court’s guidance”). The questions presented are:

1. Whether under the voluntary cessation exception to mootness a government must satisfy the

QUESTIONS PRESENTED—Continued

“absolutely clear” standard and, if not, to what extent should the government be treated differently from private defendants.

2. Whether the government is owed a presumption of good faith under the voluntary cessation exception to mootness when it retains the authority and interest to reimpose its challenged policy.

3. Whether a claim is capable of repetition yet evading review when the government retains the authority to re-issue a restriction that imposes the same harm in the same way.

PARTIES TO THE PROCEEDING

Petitioners are Bible Baptist Church of Clementon, New Jersey, its pastor, Andrew Reese, Solid Rock Baptist Church of West Berlin, New Jersey, and its pastors, Charles Clark, Jr., and Charles Clark, III. Respondents are the State of New Jersey Governor, Attorney General, and Superintendent of State Police/State Director of Emergency Management in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners certify that they have no parent company, that no publicly held company owns 10% or more of their stock, and that no publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT OF RELATED PROCEEDINGS

This case is related to the following proceedings in the United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey.

Clark, et al. v. Governor of New Jersey, et al., 53 F.4th 769, 774 (3d Cir. Nov. 28, 2022) (affirming the district court order)

Solid Rock Baptist Church, et al. v. Governor of New Jersey, et al., 555 F. Supp. 3d 53 (D.N.J. Aug. 16, 2021) (denying Petitioners' motion for reconsideration and granting Respondents' motions to dismiss)

Solid Rock Baptist Church, et al. v. Governor of New Jersey, et al., 480 F. Supp. 3d 585 (D.N.J. Aug. 20, 2020) (denying Petitioners' motion for preliminary injunction)

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PETITION FOR WRIT OF CERTIORARI

Petitioners, two New Jersey churches and their three pastors, by and through their attorneys, respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Third Circuit Court of Appeals.

**OPINIONS BELOW**

The Third Circuit's November 28, 2022, *Clark v. Governor*, 53 F.4th 769 (3d Cir. 2022) decision is reproduced at App. 1. The District Court's August 16, 2021 decision denying Petitioners' reconsideration motion and granting Respondents' dismissal motion is reported at 555 F. Supp. 3d 53 (D.N.J. Aug. 16, 2021) and is reproduced at App. 2. The District Court's August 20, 2020, decision denying Petitioners' Emergency Motion for a Preliminary Injunction is reported at 480 F. Supp. 3d 585 (D.N.J. Aug. 20, 2020) and reproduced at App. 3.

**JURISDICTION**

The Third Circuit's order denying preliminary injunctive relief and dismissing the case in its entirety was entered on November 28, 2022. App. 1. The lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Const., Art. III § 2, cl. 1.



STATEMENT OF THE CASE

A. Factual Background

Appellants filed their initial Complaint against the New Jersey Governor, Attorney General, and Director of Emergency Management to challenge restrictions imposed upon them by, and seek injunctive relief against, the Governor’s and Emergency Management Director’s Executive and Administrative Orders closing and drastically reducing in-person church attendance. The Executive and Administrative Orders prohibited individuals from freely gathering indoors

for religious worship with more than a rigidly prescribed number of people, even despite the strict infection mitigation measures implemented by Petitioners to protect their attending worshippers. Upon the motions of Respondents, the District Court denied Petitioners' requested injunctive relief, giving them leave to amend their complaint. App. 91.

Petitioners filed an Amended Complaint, adding certain local officials as defendants. The District Court denied the Amended Complaint as moot on August 16, 2021.

After two decisions from this Court strongly questioned the constitutionality of church closure orders such as those in New Jersey, Petitioners moved the District Court to reconsider its request for injunctive relief from the Governor's church closure orders. State officials again moved the District Court to dismiss Petitioners' action as moot. On August 16, 2021, the District Court denied Petitioners' requested relief as being moot and dismissed the action. App. 57.

Petitioners then appealed to the Third Circuit to challenge the dismissal of their request for injunctive relief. The Third Circuit affirmed the District Court's mootness decision. App. 27. Petitioners now seek a writ of certiorari from this Court for its review of the Third Circuit's mootness order.

Local officials in the towns in which both Petitioner Churches are located issued several criminal complaints against the Petitioner Pastors for opening their churches for religious services in violation of the

Executive and Administrative church closure orders. App. 6. The criminal complaints were dismissed shortly before oral argument before the Third Circuit.

B. Procedural Background

Petitioners filed their initial Complaint challenging the State's Executive and Administrative Orders on June 3, 2020. Petitioners moved on First Amendment grounds for an emergency preliminary injunction to enjoin Respondents' enforcement of the challenged orders. App. 60. On August 20, 2020, after oral argument on the motion, the District Court issued its Order denying the preliminary injunction motion without prejudice and allowed Petitioners to amend their complaint. Petitioners filed their Amended Complaint on September 21, 2020. On December 18, 2020, and based upon intervening decisions from this Court, Petitioners moved the District Court to reconsider its order denying their preliminary injunction motion. The District Court denied Petitioners' motion for reconsideration and granted the Governor's dismissal motion. App. 57. Petitioners appealed to the Third Circuit.

On November 28, 2022, in a 2-1 decision, the Third Circuit affirmed the lower court's denial of Petitioners' Motion for Reconsideration and its grant of Respondents' dismissal motions. App. 28.

Judge Matey issued a strong dissent. App. 28-39. He first strongly disagreed with the majority drastically reducing the Respondents' burden of proof by

“recasting the heavy burden of absolute certainty with the light weight of mere skepticism and setting a much lower hurdle for the Governor to clear.” App. 34-35. Second, Judge Matey dissented from the majority conflating two separate mootness exceptions—each of which requires a different party to carry a distinct burden of proof—and then incorrectly placing the burden of proof upon Petitioners, rather than where it belonged, with Respondents. App. 35-37. Finally, Judge Matey dissented from the majority’s lack of guidance with regard to whether the “First Amendment protects [petitioners’ and millions of other New Jersey citizens’] religious obligations and faith tenets” from an Executive Order that “treats religious exercise worse than comparable secular activity.” He would have taken the opportunity to give New Jersey’s citizens “the guidance they are entitled to under the Constitution.” App. 38-39.



REASONS FOR GRANTING THE PETITION

The Third Circuit’s decision mandates that this Court review the rights of New Jersey’s churches, church leaders, and parishioners to freely practice their faith without state control during times of crisis when religious practice is most needed. Respondent New Jersey officials currently do not acknowledge that either this Supreme Court or the Federal Constitution in any way limit the Governor’s emergency powers over gathering for religious worship in churches. Respondents’ ignoring constitutional boundaries during the recent pandemic resulted in Petitioner

churches' doors being forced to remain closed, church attendance for public worship severely limited, and multiple criminal charges against Petitioner Pastors who reopened their churches during the pandemic. The most basic exercise of religious freedom, free worship in the church of one's choice, stands at risk in New Jersey. Petitioners, as well as other people and organizations of faith throughout the country, need this Court's guidance as to the limits upon the State's authority to force churches to close during a time of emergency when they need to be open the most.

This case presents a recurring problem that arises when government defendants assert that their actions moot the very case against it, thereby depriving courts of their Article III jurisdiction to hear the case and controversy. Petitioners brought a First Amendment challenge to the New Jersey Respondents' COVID-19 response measures that required Petitioner Churches and Pastors to change how they carried out religious assembly and worship in New Jersey. Respondents' COVID-19 orders ultimately resulted in the three Petitioner Pastors being charged by local law enforcement officials with numerous administrative violations for conducting religious worship services within Petitioner Churches during Spring 2020 contrary to the Governor's COVID-19 edicts. The Governor's edicts severely restricted or altogether deprived Petitioner Pastors of their First Amendment right to conduct public religious worship services within Petitioner Churches' sanctuaries. The State of New Jersey held in abeyance the criminal prosecutions against the

pastors pending the District Court's consideration of Petitioners' preliminary injunction motion.

Petitioners moved the District Court for emergency preliminary injunctive relief from the church closure orders and from further state charges for conducting religious worship services. After a telephonic hearing, the District Court denied Petitioners' emergency motion, but allowed Petitioners leave to amend their Complaint.

Thereafter, Petitioners amended their Complaint and then, citing recent Supreme Court decisions on the issue of government closure of churches during the pandemic, moved the District Court for reconsideration of its former denial of their emergency motion for injunctive relief. The District Court denied Petitioners' request for injunctive relief and granted Respondents' motion to dismiss.

Petitioners appealed to the Third Circuit, which affirmed the District Court's mootness by a 2-1 decision. Shortly before the scheduled oral argument before the Third Circuit, and almost two years after the State filed the charges against Petitioner Pastor and Petitioners filed their initial action, local prosecutors finally dismissed the criminal charges against Petitioner Pastors.

During the course of the COVID-19 pandemic, Respondents' executive orders at issue herein were modified and then rescinded, although Respondents still fully retain the right to reissue the orders should events dictate.

This case reflects a troubling trend in some circuits of allowing government defendants to moot a pending case by simply rescinding the challenged regulation prior to the courts' being able to decide the constitutionality of the claims against them, thus allowing the government to remain unaccountable for the legal ramifications of their unilaterally promulgated policies. Indeed, the Third, Sixth and Ninth Circuits have entrenched themselves in the extreme position that Article III requires dismissal of a case as moot even though the government retains its power to, and continues to profess it could, reissue the same challenged restrictions again.

The dissent in the case below clearly chafes against the majority turning a blind eye to the government changing its COVID-19 orders so as to make a current First Amendment legal challenge to the orders disappear. Other circuits also caution against such decisions as an abuse of the mootness doctrine: "To be clear, it's not supposed to be this way. It shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens, fundamental constitutional freedoms frequently suffer as a result." *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). And that is what happened to Petitioners here.

What remains is a confusing difference between the circuits in how to apply and analyze exceptions to the mootness doctrine. To resolve the conflict between the lower courts and “[w]ith the circuits apparently divided” on the scope of the mootness doctrine, this petition “require[s] action from the Supreme Court to get things back on track.” *Tucker, supra*, 40 F.4th 289, 297 (5th Cir. 2022); *Brach v. Newsom*, 38 F.4th 6, 18 (9th Cir. 2022) (Paez, J., dissenting).

This Court has granted certiorari on matters partially addressing the issue in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), but has not yet been able to definitively instruct lower courts regarding the scope and application of the “voluntary cessation” and the “capable of repetition yet evading review” exceptions to the mootness doctrine. Compare *Brach*, 38 F.4th at 15-18 to *Tucker*, 40 F.4th at 289-93. The Court should grant certiorari and provide clarity on whether this Court meant what it said in *Roman Catholic Diocese* and *Tandon* or spoke through its silence in *N.Y. State Rifle & Pistol Ass’n*. The circuit courts need this Court to explain when the mootness doctrine allows government defendants to evade determinations on the constitutionality of their regulations by rescinding them or allowing them to expire on appeal.

The decision below deprives private citizens of their right to seek redress against government officials for unconstitutional policies which they vigorously defend and claim the authority to re-enact at will. The consequences of that error are dramatic, both for

Petitioners and for precious First Amendment values. Unless this Court grants review, the decision below will prevent important constitutional claims from ever seeing the light of day. It has already been cited by the Western District of Pennsylvania in support of the court's mootng a challenge as to whether the Pennsylvania's governor retains the power to reinstate the same COVID-19 regulations in the future. *See Pletcher v. Giant Eagle Inc.*, 2022 U.S. Dist. LEXIS 222623 (W.D. Pa. Dec. 7, 2022). Surely, the power Congress granted to Article III judges to hear cases and controversies was never meant to eliminate cases where the Petitioners have not yet obtained all the prospective or declaratory relief they sought.

The First Amendment rights of these Petitioners, and citizens like them, to challenge arbitrary state action are currently dependent upon their state and Federal circuit of residence. A disparity of protection for First Amendment conduct exists between the Federal circuits. This Court's guidance is necessary to resolve the conflict the decision below imposes on the holdings of other circuits and this Court. *See, e.g., Brach*, 38 F.4th at 18 (Paez, J., dissenting, joined by Berzon, Ikuta, Nelson, and Bress, JJ.) and *Tucker*, 40 F.4th at 297 (Ho, J., concurring).

I. The Court Should Grant Certiorari to Clarify Whether Voluntary Cessation Requires Government Defendants to Meet the “Absolutely Clear” Standard or, if Not, What Standard the Lower Courts Should Apply.

In holding that the government’s voluntary cessation of the challenged orders mooted Petitioners’ entire case, the Third Circuit deepened an existing conflict between the circuits and disregarded this Court’s longstanding precedent that under this exception, a respondent must prove to an absolutely clear standard that the case is moot. While the majority’s decision below pays lip service to this controlling standard, it actually subtly shifted the Governor’s heavy burden of absolute certainty to Petitioners, expecting them to have offered absolute proof that the controversy had not ended.

Instead of following this Court’s voluntary cessation standard of requiring Respondents to bear the burden of proof, the Third Circuit imposed upon Petitioners the lesser burden of showing that a live controversy remained for a court to determine. App. 12. The Third Circuit crafted its own standard of “reasonable likelihood that the State will tempt fate by reimposing restrictions disfavoring religion” (App. 24) and then expected Appellants to bear the burden of proof. “Appellants offer nothing more than speculation to suggest that we have a live controversy here.” App. 27. The Third Circuit thereby subtly rejected decades of this

Court's voluntary cessation holdings that imposes the burden of proof upon the state, not the plaintiff.

But the stringent standard adopted by this Court serves important purposes. This Court's standard curbs the harm that results when disputes are dismissed for mootness only to arise again when the defendant simply resumes its prior conduct. The standard further protects against irreparable harm both to precious First Amendment rights and to the public interest, the integrity of the legal process, and to judicial economy.

Other circuits than the Third Circuit have applied a "lighter burden" specifically to governmental defendants. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). In these circuits, government actors are entitled to "a presumption of good faith" because "they are public servants, not self-interested private parties." *Id.*, at 325. These circuits "assume that formally announced changes to official governmental policy are not mere litigation posturing." *Id.*; see also, e.g., *Marcavage v. National Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) ("[G]overnment officials are presumed to act in good faith."); *Troiano v. Supervisors 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.>").

Still other circuits have gone even further, flipping the burden of proof to require that the plaintiff demonstrate it is "virtually certain" that the government will

reenact the challenged law. *Chemical Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). And while some circuits have at least tried to reconcile their decisions with this Court's precedents, others have simply declared that relevant portions of this Court's holdings are "dicta and therefore not controlling." *Federation of Advert. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 n.5 (7th Cir. 2003).

In *Trinity Lutheran*, this Court held the government defendant to the "absolutely clear standard." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). This Court noted:

That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed.2d 610 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations.

Id. But then three years later in *N.Y. State Rifle & Pistol Ass'n*, this Court accepted certiorari to review the Second Circuit's decision that upheld the constitutionality of New York City's restrictions limiting the

transportation of firearms. 140 S. Ct. at 1526. While the case was pending before this Court, New York City enacted a new rule to govern the transportation of firearms. *Id.* Importantly, this Court’s per curiam opinion did not moot the entire case but only the pending appeal. This Court vacated the opinion of the Second Circuit and remanded the case for further proceedings. *Id.* at 1526-27. While New York City’s rule change implicated the voluntary cessation doctrine and the city argued for this Court to adopt a standard lower than “absolutely clear” for government defendants, the short per curiam opinion does not explicitly adopt a lower standard, nor did it overrule this Court’s earlier precedent.

Judge Alito’s dissent, joined by Justice Gorsuch and in part by Justice Thomas, questioned the wisdom of dismissing a case as moot based upon a government’s decision to change course during the pendency of the appeal. *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1528. The dissent emphasized the “heavy burden” placed on the party asserting mootness, *id.* (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)), and instructed that a case “becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1528 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

The Third Circuit below failed to apply the “absolutely clear” standard articulated in this Court’s quintessential voluntary cessation cases, such as *Laidlaw* and *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S.

283 (1982), and its more recent holdings in *Trinity Lutheran*. But the Third Circuit even failed to follow the more generalized holding in *N.Y. State Rifle & Pistol Ass’n*. In all this confusion, this much is clear: the decision below squarely conflicts with other circuits and the holdings of this Court, and clarification by this Court is desperately needed. This Court should grant certiorari to resolve the proper analysis of the voluntary cessation exception.

II. Circuit Courts Disagree Over Whether the Government is Owed a Presumption of Good Faith Under the Voluntary Cessation Exception When the Government Retains the Authority and Interest to Reimpose the Challenged Policy.

The decision below appears to be premised upon Respondents being owed a presumption of good faith because “the accumulation of . . . changed circumstances thus make the return of the same pandemic and the same restrictions unlikely.” App. 20. The majority, finding “no reason to doubt the sincerity of that justification” of the changed COVID-19 circumstances, applied “the presumption of good faith” upon Respondents. App. 21. Thus, Respondents were held to almost no burden at all after they alleged that the complained-of religious gathering prohibitions had all gone away.

The dissent below expressed skepticism over the majority’s requiring “no more than the [government’s]

say-so” that Petitioners would remain unthreatened by his future policies. Respondents could point to no withdrawal of the Governor’s “statutory authority to act at his pleasure[, t]he state’s Constitution has not been altered, and no court, including ours, has stepped up to consider the rights reserved by the First Amendment.” App. 34, Dissent. In short, the majority did not require Respondents to meet their heavy burden of demonstrating that their prohibitions upon Petitioners’ in-church religious worship would never be returned. The Third Circuit’s presumption of the government’s good faith voluntary cessation of its challenged conduct does not meet this Court’s requirement that the government carry its “heavy” burden of showing that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007).” *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022).

In this case, the majority’s presumption of the government’s good faith creates intra-circuit conflict and conflicts with this Court’s precedent.

The majority decision below is not alone in its abandonment of this Court’s analysis in its other voluntary cessation cases. *See, e.g., City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In *Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022), for example, the en banc Ninth Circuit held the government deserved the

presumption of good faith under the voluntary cessation exception when it retained the authority to reenact the same regulations and continued to defend the constitutionality of its regulations. *Brach*, 38 F.4th at 12-15. Yet, the Ninth Circuit majority at least analyzed whether the government disavowed reenactment of the school closure orders at issue in that case, holding that “most importantly” the government had ‘unequivocally renounced’ reenactment of the challenged orders in the future. *Id.* at 13 (internal quotations omitted) (citing *Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019)).

In this case, the Governor has never disavowed the authority to reenact the challenged restrictions. The Governor has provided no assurances that he will never again close churches. He has made no concessions of illegality, no foresworn future restrictions, no divesting of power. The state’s Constitution has not been altered, and no court has specifically considered the rights reserved by the First Amendment in relation to governmental restrictions and closure of churches in America. Governor Murphy retains his statutory authority to act at his pleasure.

Governor Murphy merely assured the majority below that “there are no *current* plans to reimpose the capacity limits,” reminded the Court of the severe circumstances that left no room to accommodate religious services, and referred to his beneficent *current* decision to “decline to reimpose . . . capacity limits on religious gatherings.” App. 31, emphasis in original. It must be emphasized that the Governor did not recognize that

he *could not* reimpose his limits on religious worship, he merely assured the majority below that he *would not* limit worship at that time. (*Id.*)

In stark contrast with the decision below is the Fifth Circuit’s holding in *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022), in which the circuit refused to grant the government defendant a presumption of good faith when “the government has not even bothered to give [plaintiff] any assurance that it will permanently cease engaging in the very conduct that he challenges.” *Id.*, at 293.

In his concurrence in *Tucker*, Judge Ho recognized the inter-circuit split that now plagues the voluntary cessation doctrine: “our sister circuits enabled public officials to avoid judicial review by dismissing the claims against them as moot—despite the fact that the officials refused to promise never to return to their challenged conduct. *See Hawse [v. Page]*, 7 F.4th 685 [(8th Cir. 2021)] and *Resurrection School [v. Hertel]*, 35 F.4th 524 [(6th Cir. 2022)].” *Id.* at 296 (Ho, J., concurring). In short, “[w]ith the circuits apparently divided on these questions,” the lower courts now “require action from the Supreme Court to get things back on track.” *Tucker*, 40 F.4th at 297 (Ho, J., concurring).

III. This Case Presents Exceptionally Important Questions That Warrant This Court’s Review.

The decision below is plainly wrong and will have frightening consequences, both for Petitioners and future litigants from across the political spectrum.

Under the decision below, a government may violate a person's constitutional rights without any redress if it claims that an outside force caused it to change its policies. The government need not show it will not resume the challenged action. Indeed here, the government expressly continued to cling to his challenged powers and actions that originally gave rise to the legal challenge throughout the progress of the case.

The decision below allows the Third Circuit to dismiss constitutional cases challenging the government with no proof that the government has changed or will change its ways. Instead, the Court leaves unaddressed the irreparable harm caused by the loss and the threatened loss of Petitioners' treasured constitutional rights, not to mention the harm to their personal right to worship in their church.

Surely such a flawed circuit holding cannot stand. One of the great provinces of the exceptions to the mootness doctrine is to prevent the government from evading judicial review. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) and *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). These mootness exceptions vindicate the public interest by encouraging review of "the legality of the [government's] practices." *W.T. Grant Co.*, 345 U.S. at 632. And this interest is at its pinnacle in cases in which the government is accused of violating an individual's constitutional rights. These cases frequently carry broad ramifications for the general public. The decision below forecloses this important function, making it harder for this Court to settle the legality of a government's

practices and leaving without redress those, who like Petitioners, wish to find answers and redress for overreaching and harmful government action. The decision below assuredly will result in intolerable and inequitable findings of mootness that specifically disadvantage controversial cases and claims seeking to correct a state's infringement upon its citizens' precious First Amendment rights.

Litigants during the pandemic have called upon this Court's emergency docket to resolve important violations of constitutional rights. *See generally, Tandon, supra*, and *Roman Catholic Dioceses, supra*. The decision below would incentivize, and frequently require, litigants to challenge the government's infringement of their constitutional rights on an emergency basis to obtain a ruling from the court before the government unilaterally rescinds its challenged actions and claims mootness. The decision below will necessitate more emergency appeals in the circuit courts and more emergency applications before this Court. Litigants who face the deprivation of their constitutional rights will be unable to trust that the matter will be timely resolved in the circuit courts in the ordinary course of litigation. Instead, more cases will be determined via emergency motions for injunctive relief and emergency applications to this Court's emergency docket. The Third Circuit decision below sends one "palpable" message: if one does not seek to rectify the loss of his/her constitutional freedoms through the filing of

emergency means, the case will never reach resolution before first becoming moot.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the Third Circuit.

Respectfully submitted,

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