No. 16-333

In The Supreme Court of the United States

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

Petitioners,

v.

JEFFREY R. BUHMAN, in his official capacity,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners – stars of the reality television show *Sister Wives* – sued to have Utah's criminal bigamy statute declared unconstitutional. The district court dismissed their claims against two defendants (Utah's governor and attorney general) for lack of standing, based on the attorney general's policy of filing bigamy charges only against defendants who also commit collateral crimes. Respondent, the Utah County attorney and third defendant, adopted a virtually identical prosecution policy while this case was pending. The district court held that Respondent's policy did not moot Petitioners' claims. The Tenth Circuit reversed.

The questions presented are:

(1) Did the Tenth Circuit correctly hold, as the other twelve circuits have held, that the test from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), governs whether a defendant's voluntary cessation of challenged conduct moots a case?

(2) Should the Court grant certiorari to address the standard by which the circuits review factfinding supporting mootness – an issue expressly irrelevant to the Tenth Circuit's decision, and on which Petitioners identify no split?

PARTIES TO THE PROCEEDING

Petitioners are Kody Brown, Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan, a polygamous family originally from Utah but now living in Nevada. Petitioners were plaintiffs in the district court and appellees in the Tenth Circuit.

Respondent Jeffrey R. Buhman is the elected county attorney in Utah County, Utah, where Petitioners lived before relocating to Nevada. He is sued in his official capacity only. Because Respondent was the only defendant in Petitioners' suit whom the district court did not dismiss, he was the lone appellant in the Tenth Circuit and is the lone respondent here.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

BRIEF IN OPPOSITION

Respondent respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATUTORY PROVISION INVOLVED

Utah's bigamy statute currently provides:

> A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

Utah Code Ann. § 76-7-101(1). But the Utah Legislature has opened a bill for its 2017 general session that would change this definition by making its elements conjunctive instead of disjunctive.[1] *See infra* at 30-32.

STATEMENT OF THE CASE

Though their questions presented concern only justiciability and standards of review, Petitioners contend that the constitutionality of Utah's bigamy statute is the "core" issue in this case. Pet. 3. Accordingly,

[1] *See* H.B. 99, 2017 Leg., Gen. Sess. (Utah 2017), at http://le.utah.gov/~2017/bills/static/HB0099.html. The Utah Legislature's 2017 general session starts on January 23, 2017, and ends on March 9, 2017.

Respondent briefly describes that statute's historical context before recounting the proceedings below.

I. The Permanent Ban On Polygamy That Congress Made A Condition Of Utah's Admission To The Union Remains In Force Today.

1. When members of the Church of Jesus Christ of Latter-day Saints (LDS or Mormon Church) first entered the Salt Lake Valley in July 1847, polygamy was an LDS Church tenet. It remained so until September 24, 1890, when LDS Church President Wilford Woodruff "announced the official end of polygamy in what is known as the 'Manifesto.'" *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 927 (Utah 1993). To emphasize that the church meant what the Manifesto said, in 1892 the Utah Territorial Legislature – comprised largely of LDS Church members – criminalized polygamy "and similar offenses such as cohabitation." *Id.* at 927-28.

Two years later, in July 1894, President Grover Cleveland signed the Utah Enabling Act. *Id.* at 928. Building on Utah's territorial prohibitions, that act expressly conditioned Utah's admission to the Union on its adopting a perpetual constitutional ban on polygamy. The Enabling Act required Utah's constitution to state:

> That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of

> religious worship; *Provided*, That polygamous or plural marriages are forever prohibited.

Ch. 138, 28 Stat. 107, 108 (1894). The Enabling Act's polygamy ban, which Petitioners have not challenged in this case, was to be "irrevocable without the consent of the United States and the people of" Utah. *Id.* Utah's founders complied and adopted the ban, which remains part of Utah's constitution. Utah Const. art. III.

2. In light of the Utah Enabling Act and the Utah Constitution, bigamy is a crime in Utah. *See* Utah Code Ann. § 76-7-101(1) (the "Statute").

Even so, Utah prosecutors retain discretion over the Statute's enforcement. In 2011, Utah's then-Attorney General attested without contradiction that his policy was "not to prosecute polygamists under Utah's criminal bigamy statute for just the sake of their practicing polygamy." App. 9. Instead, his office charges bigamy "only against someone who *also* commit[s] child or spouse abuse, domestic violence, welfare fraud, or any other crime." *Id.* (emphasis added; internal quotation marks omitted). His "predecessors in recent memory" followed this same policy, and "he was unaware of cases brought against a polygamist just for violating the bigamy law in the last fifty years unless it is in conjunction with another crime." *Id.* (internal quotation marks omitted).

Given that enforcement policy, just ten defendants were charged statewide under the Statute between 2001 and 2011. App. 10. Six of those ten "were also

prosecuted for crimes other than bigamy, such as criminal non-support, unlawful sexual conduct with a minor, forcible sexual abuse, marriage license fraud, and insurance fraud." *Id.* at 11. The Attorney General's Office could not confirm whether charges besides bigamy were filed in the last four cases. But in three of those four, county prosecutors dismissed the bigamy charges, and in the fourth case the defendant was convicted of attempted bigamy in a county prosecution. *See id.*

3. Despite the Statute's infrequent use, and irrespective of the federal and state law mandating a prohibition on polygamy, the Statute "serves the State's" important "interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children." *State v. Green*, 2004 UT 76, ¶ 40, 99 P.3d 820, 830. "Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support." *Id.* Other courts agree that polygamy fosters those harms. *See Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, ¶¶ 8-9, at http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm. (findings by Supreme Court of British Columbia, that province's superior trial court, that "[w]omen in polygamous relationships . . . face higher rates of domestic violence and abuse, including sexual abuse," and that children in polygamous families "are also at enhanced risk of psychological and physical abuse and neglect").

4. Recent Utah Supreme Court and Tenth Circuit precedent rejects claims that the Statute is void

for vagueness; that it violates the Free Exercise, Due Process, and Equal Protection Clauses; and that it violates the rights of association and privacy. *Potter v. Murray City*, 760 F.2d 1065, 1068-71 (10th Cir. 1985); *State v. Holm*, 2006 UT 31, ¶¶ 50-87, 137 P.3d 726, 741-49; *Green*, 2004 UT 76, ¶¶ 16-52, 99 P.3d at 825-33.

II. The Tenth Circuit Dismisses Petitioners' Challenge To Utah's Bigamy Statute As Moot.

1. Petitioners live a polygamous lifestyle in accordance with their religious beliefs as members of the Apostolic United Brethren Church. In September 2010, they invited the world into their home by starring in a new cable television reality show called *Sister Wives*. On the show, Petitioners announced to the world "their religious belief in polygamy and defended their polygamist lifestyle." App. 5.

The day after the first episode aired, the Lehi Police Department publicly announced – in response to calls from the show's viewers – that it was investigating Petitioners for violating the Statute. One month later, the police department sent the results of its investigation to the Utah County Attorney's Office. That office followed its standard protocol and opened a case file. *See id.* at 6.

In January 2011, Petitioners moved to Nevada because, they said, they feared they would be prosecuted for violating the Statute. Respondent was quoted in a media report later that month "as saying that despite

the Browns' move, his office would not rule out the possibility of prosecution." *Id.*

2. In July 2011, before Respondent's office had finished its investigation, Petitioners challenged the Statute's constitutionality in a suit under 42 U.S.C. § 1983. They alleged that the Statute violated (facially or as applied) their substantive due process and freedom of association rights, and their rights under the Equal Protection, Free Exercise, Free Speech, and Establishment Clauses of the U.S. Constitution. *See* App. 6-7.

Petitioners named three defendants: Utah's governor, Utah's attorney general, and Respondent, the Utah County Attorney – all in their official capacities only. *Id.* at 6. Petitioners asked for (1) a declaration that the Statute was unconstitutional, (2) a preliminary and a permanent injunction, (3) attorney's fees, and (4) "such other relief as [the district court] may deem just and proper." *Id.* at 7. "[T]he complaint did not seek money damages." *Id.* at 8.

All defendants moved to dismiss the lawsuit. The district court granted the motion in part. It dismissed the governor and the attorney general, holding that Petitioners lacked standing to sue them in light of the attorney general's prosecution policy because no evidence implicated Petitioners in a collateral crime. *See supra* at 3; App. 8-11. But the district court denied Respondent's motion to dismiss. It reasoned that Petitioners "faced 'a credible threat of prosecution'" from the Utah County Attorney's Office, which lacked a

prosecution policy similar to the attorney general's. App. 11.

3. Four months later, Respondent renewed his motion to dismiss. He attached to his renewed motion a sworn declaration in which he attested that since his last motion he had "'adopted a formal office policy' regarding polygamy prosecutions" that "essentially adopts the AG Policy":

> The Utah County Attorney's Office will prosecute the crime of bigamy under [the Statute] in two circumstances: (1) When a victim is induced to marry through their partner's fraud, misrepresentation or omissions; or (2) When a person purports to marry or cohabits with another person in violation of [the Statute] and is also engaged in some type of abuse, violence or fraud.

Id. at 12. He further attested that this policy "was intended to prevent the future prosecution in Utah County of bigamous marriages entered into for religious reasons." *Id.* (internal quotation marks and alterations omitted). Respondent also attested that his office had cleared Petitioners of other prosecutable crimes. He confirmed that "the criminal case against [Petitioners] is closed and no charges will be filed against them for bigamy unless new evidence is discovered which would comport with the [policy] pertaining to the prosecution of bigamy crimes." *Id.* at 13. In short, Respondent's office investigated Petitioners – but it never charged them with bigamy (or any other crime). Respondent thus moved to dismiss the case as moot.

The district court denied Respondent's renewed motion. It thought the timing of the policy's adoption – four months after the other two defendants were dismissed based on an effectively identical policy – evinced a "strategic attempt to use the mootness doctrine to evade review." *Id.* The district court also faulted Respondent's policy because it "'does not reject the ability of Utah County to prosecute under the anti-bigamy statute' and 'reflects, at most, an exercise of prosecutorial discretion.'" *Id.*

4. Viewing the case as still presenting a live controversy, the district court granted summary judgment for Petitioners. It struck the Statute's "cohabitation" element, reasoning that it "violated the First Amendment's Free Exercise Clause, lacked a rational basis under the Fourteenth Amendment Due Process clause, and was void for vagueness." *Id.* at 14-15. It also held that Petitioners were entitled to "relief under the 'hybrid rights' theory of religious free exercise." *Id.* at 15. The district court next applied a narrowing construction to the Statute's "purports to marry" element to avoid "the same constitutional concerns addressed in relation to the cohabitation prong." *Id.* at 15-16. In a later order, the district court "construed the complaint to include a request for money damages but determined [Petitioners] had 'drop[ped]' this request in" supplemental briefing. *Id.* at 18-19. Thus the district court's final judgment awarded declaratory (but not injunctive) relief and attorney's fees under 42 U.S.C. § 1988. *Id.* at 19-20 & n.11.

5. Respondent timely appealed to the Tenth Circuit. Before argument, that court asked the parties to brief whether Petitioners' claims remained justiciable in light of Respondent's policy. *Id.* at 20-21. After argument, it held that the case was moot because Petitioners "faced no credible threat of prosecution" for two independent reasons. *Id.* at 33.

First, the case was moot under the voluntary cessation doctrine. That doctrine, the Tenth Circuit explained, "prevent[s] gamesmanship." *Id.* at 29. The Tenth Circuit quoted the rule from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), that a "defendant's voluntary cessation" of challenged conduct moots a case only "if the defendant carries 'the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" App. 29 (citation omitted). Though "heavy" and "stringent," *id.* at 30 (internal quotation marks omitted), that "burden is not insurmountable, especially in the context of government enforcement," *id.* at 31. The government's "self-correction . . . provides a secure foundation for mootness so long as it seems genuine." *Id.* at 32 (internal quotation marks omitted; alteration in original).

Under those rules, Respondent's prosecution policy mooted the case. "That policy forbids enforcing the Statute against [Petitioners], making it clear that prosecution of [Petitioners] 'could not reasonably be expected to recur.'" *Id.* at 33 (*quoting Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013)). It was

undisputed that Petitioners fell outside the two categories of persons prosecutable under Respondent's policy – as Respondent attested, Petitioners had not induced a person to marry them through misrepresentations, and they had not committed collateral crimes. *Id.* at 37-38. And "[c]lose scrutiny of the relevant facts does not suggest that" Respondent's testimony was an "attempt[ ] to deceive the court." *Id.* at 38. Nor was the new policy's timing noteworthy; before this case, Respondent "had never before received a police report alleging violations of the Statute unconnected to a collateral crime such as fraud or abuse." *Id.* "That suggests why" Respondent's office "in 2010 had no formal policy regarding polygamy prosecutions." *Id.* Thus, far from showing that the policy constituted Respondent's attempt "'to evade judicial review, or to defeat a judgment, by *temporarily* altering questionable behavior,'" the record instead showed that his office "has adopted, and intends to abide by, a policy under which [Petitioners] face no threat of prosecution." *Id.* at 40 (citations omitted).

Second, Petitioners' "case also became moot because their move to Nevada, their successive declarations, and the passage of time eventually eliminated [Respondent's] authority under Utah law to prosecute" them. *Id.* at 41-42. Mr. Brown "told the district court in a July 2012 declaration – submitted two months after [Respondent] stated under oath that [his office] had closed its case against [Petitioners] – that '[w]e have decided to stay in Nevada in the foreseeable future to avoid uprooting our children again and subjecting

them to the continued public recriminations made under the Utah law.'" *Id.* at 42. "There is nothing further in the record that suggests [Petitioners] have reversed this decision." *Id.* at 43. Furthermore, Petitioners have lived outside of Utah for more than five years – longer than Utah's four-year statute of limitations. *See id.* Those facts established that "[u]nless and until [Petitioners] return to Utah," Respondent "could not, based on the law and the record, prosecute them even if he wished to do so." *Id.* at 44-45. "For this independent reason, [Petitioners] face no credible threat of prosecution." *Id.* at 45.

The Tenth Circuit then rejected Petitioners' four arguments against mootness, *id.* at 46-57, and remanded the case with instructions to vacate the district court's judgment, *id.* at 57-58.

5. After the Tenth Circuit denied Petitioners' request for rehearing en banc, *id.* at 81-82, Petitioners timely sought certiorari.

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REASONS FOR DENYING THE PETITION

The Tenth Circuit's decision is not certworthy. That conclusion follows from the petition's contents as well as its omissions. As to its contents, neither purported split it alleges in fact exists. And the decision is correct on the merits.

As to its omissions, pending amendments to the Statute would moot Petitioners' claims – irrespective

of the Tenth Circuit's decision – by making the Statute's elements conjunctive. Nor do Petitioners adequately invoke review of the Tenth Circuit's alternative holding that the case is moot not only because of Respondent's policy *but also* because Petitioners moved to Nevada and Utah's statute of limitations has since run.

Splitless, correct decisions laden with vehicle problems never have warranted review. Now is no time to change course. Certiorari should be denied.

I. The Circuit Splits That Petitioners Ask This Court To Resolve Do Not Exist, And The Tenth Circuit Correctly Applied This Court's Precedents.

A. The Courts Of Appeals Uniformly Apply *Friends Of The Earth* To Assess Mootness Based On A Defendant's Voluntary Cessation.

1.a. The voluntary cessation doctrine reconciles Article III's jurisdictional requirement that "an actual controversy must exist . . . through all stages of the litigation," *Already*, 133 S. Ct. at 726 (internal quotation marks omitted), with the goal of preventing a party from "temporarily altering questionable behavior" in order to "evade judicial review, or . . . defeat a judgment," *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

The "stringent" standard by which courts sift a defendant's voluntary reforms that moot a case from

those that do not is well established: "'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth*, 528 U.S. at 189 (*quoting United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). *Friends of the Earth* emphasized that rule by repeating it twice. *See* 528 U.S. at 190; *id.* at 193. And since then, six majority opinions of this Court have cited *Friends of the Earth* for this rule, never varying its formulation.[2]

1.b All thirteen courts of appeals have received the message. Each one has applied *Friends of the Earth*'s standard to assess whether a defendant's voluntary cessation of challenged conduct mooted a case.

The Tenth Circuit did so here. It stated that a "defendant's voluntary cessation may moot a case . . . if the defendant carries 'the formidable burden of showing it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" App. 29 (*quoting Already*, 133 S. Ct. at 727). And it noted that this "Court has described this burden as 'heavy' and 'stringent.'" *Id.* at 29-30 (citations omitted). Applying

[2] *Already*, 133 S. Ct. at 727-29; *Pac. Bell Tel. Co. v. Linkline Commcns., Inc.*, 555 U.S. 438, 447 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000); *Adarand Constrs., Inc. v. Slater*, 528 U.S. 216, 222 (2000).

that rule to these facts, it held that Respondent's prosecution policy "forbids enforcing the Statute against [Petitioners], making it clear that prosecution of [Petitioners] 'could not reasonably be expected to recur.'" *Id.* at 33 (*quoting Already*, 133 S. Ct. at 727). Accordingly, the policy "rendered this case moot." *Id.*

In cases that Petitioners do not cite, the other twelve circuits also have applied *Friends of the Earth* to assess whether a government defendant's voluntary cessation of challenged conduct mooted the case.[3] To be sure, the circuits reached varying conclusions on mootness after applying that standard. But those are fact-bound differences that inevitably occur when courts apply the same legal standard to disparate facts.

1.c. Deciding whether a defendant has carried its burden to make it "'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,'" App. 29 (*quoting Already*, 133 S. Ct. at 727), requires an analysis "'highly sensitive to the facts of a given case,'" *id.* at 38 (*quoting ACLU of Mass. v. U.S.*

[3] *See, e.g.*, *Mendez-Soto v. Rodriguez*, 448 F.3d 12, 15 (1st Cir. 2006); *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003); *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014); *K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981-82 (6th Cir. 2012); *DLJ Farm LLC v. U.S. EPA*, 813 F.3d 1048, 1050-51 (7th Cir. 2016); *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012); *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 594-95 (11th Cir. 2013); *Sands v. NLRB*, 825 F.3d 778, 784-85 (D.C. Cir. 2016); *Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009).

Conf. of Catholic Bishops, 705 F.3d 44, 56 (1st Cir. 2013)). Even so, courts consider similar factors in that analysis, all contemplated by *Friends of the Earth*. Disparate circuit answers under those factors are fact-bound disparities; they do not trace to variances in the legal rules or factors themselves.

Three such factors bear discussion here. First, courts generally accord a presumption of good faith to government defendants who voluntarily cease challenged conduct. "[G]overnment 'self-correction . . . provides a secure foundation for mootness so long as it seems genuine.'" *Id.* at 32 (*quoting Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1118 (10th Cir. 2010)). "Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). The Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits agree.[4] A plaintiff can rebut that presumption based on the facts in any given case; the Tenth Circuit did not hold otherwise in applying this factor here.

Second, courts consider the timing of the defendant's changed conduct. This factor cuts both ways. Courts have a duty "to beware of efforts to defeat

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[4] *Holland v. Goord*, 758 F.3d 215, 224 (2d Cir. 2014); *Marcavage*, 666 F.3d at 861; *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990); *Fed'n of Advert. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003); *Rosebrock*, 745 F.3d at 971; *Atheists of Fla.*, 713 F.3d at 594.

injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *United States v. W.T. Grant Co.*, 345 U.S. 629, 635 n.5 (1953) (internal quotation marks omitted). Yet "mootness is more likely if . . . the case in question was the catalyst for the agency's adoption of the new policy." *Rosebrock*, 745 F.3d at 972 (internal quotation marks omitted).

In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), for example, plaintiffs sued HUD investigators for allegedly violating their civil rights during a Fair Housing Act investigation. *Id.* at 1220. After the plaintiffs sued, the assistant secretary for the Office of Fair Housing and Equal Opportunity ("FHEO") issued a memorandum that prohibited certain HUD investigator conduct in future FHA investigations. The Ninth Circuit held that the memorandum mooted the plaintiffs' claims because it addressed "all of the objectionable measures that HUD officials took against the plaintiffs in this case." *Id.* at 1243. And the court found "it is clear that the [FHEO] memorandum represents a permanent change in the way HUD conducts FHA investigations, not a temporary policy that the agency will refute once this litigation has concluded." *Id.*

Like the Ninth Circuit in *White*, the Tenth Circuit here stated that a "government official's decision to adopt a policy in the context of litigation *may* actually make it more likely that the policy will be followed, especially with respect to the plaintiffs in that particular

case." App. 39 (emphasis added). Contrary to Petitioners' mischaracterization, the Tenth Circuit did not hold that all "[s]tate and local government actors within the Tenth Circuit can dispose of constitutional challenges to lawsuits by changing their enforcement polices during the pendency of litigation." Pet. 19. Instead, the Tenth Circuit's inquiry remains: How does the timing of the policy change inform whether a defendant's "allegedly wrongful behavior" could "reasonably be expected to recur?" *Already*, 133 S. Ct. at 727.

Third, courts properly find mootness when the facts persuade them that the defendant's change is not just a "temporar[y] altering" of "questionable behavior." *City News & Novelty*, 531 U.S. at 284 n.1. But this Court has never held that mootness "require[s] absolute certainty that the controversy will not arise again." Br. for United States as *Amicus Curiae* at 24 n.4, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013) (No. 11-982) (filed Aug. 23, 2012); *see also Sossamon*, 560 F.3d at 325 (mootness does not "require some physical or logical impossibility that the challenged policy will be reenacted"). Instead, "the defendant's obligation is to show it is absolutely clear that 'the allegedly wrongful behavior could not *reasonably* be expected to recur'" – not to show that "resumption of" the defendant's conduct is "impossible." App. 30 & n.16 (emphasis added).

2. Despite the thirteen circuits' agreement on the correct legal standard and factors, Petitioners contend that the Tenth Circuit's decision creates a split

with "the Second, Third, Ninth, Eleventh, and D.C. Circuits."[5] Pet. 9. According to Petitioners, those circuits "expressly" require "a defendant's cessation of conduct . . . to be complete and irrevocable, and to have not been motivated by a desire to deprive the court of jurisdiction and avoid the consequences of the lawsuit." *Id.* Petitioners misread the cases upon which they base that purported split.

2.a. The language upon which Petitioners principally rely comes from *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). *Davis* "recognize[d] 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.' " *Id.* at 631 (*quoting W.T. Grant*, 345 U.S. at 632). It then stated that a case may yet become moot if "(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." *Id.* (internal quotation marks, citations, and alterations omitted). The Second, Third, Eleventh, and D.C. Circuit cases upon which Petitioners rely quote that language from *Davis* directly (or from a prior circuit case *quoting Davis*). *See Mhany Mgmt.*, 819 F.3d at 603;

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[5] *See* Pet. 10-13 (citing *Mhany Mgmt. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013); *Harrell v. Fla. Bar*, 608 F.3d 1241 (11th Cir. 2010); *True the Vote, Inc. v. IRS*, 831 F.3d 551 (D.C. Cir. 2016); *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006)).

DeJohn, 537 F.3d at 309; *Harrell*, 608 F.3d at 1265; *True the Vote*, 831 F.3d at 561; *Qassim*, 466 F.3d at 1075.

So what Petitioners effectively claim – as they arguably acknowledge (Pet. 22-23) – is a conflict in this Court's own cases: between the formulations of the voluntary cessation standard in *Friends of the Earth* and *Davis*. But just four Terms ago, this Court implicitly rejected that very claim in *Already*. There is no reason to revisit that claim here.

The petitioner in *Already* contested the court of appeals' conclusion that Nike, Already's competitor, could moot a trademark-infringement dispute by voluntarily issuing a covenant not to sue Already over the trademarks at issue. *See* 133 S. Ct. at 725-76. Already's merits brief argued at length about what burden Nike had to carry to voluntarily moot the case. *See* Br. for Petr. at 22-30, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013) (No. 11-982) (filed Aug. 16, 2012). In so doing, it purported to distinguish Nike's burden under *Friends of the Earth*, *see id.* at 23, 25-26, from Nike's purported burden under what Already called "[t]he complete mootness test, as articulated by this Court in *County of Los Angeles v. Davis*," *id.* at 26. Already then argued that Nike should lose for failing to have satisfied "both prongs of the test articulated in *Davis*." *Id.* at 26-27.

Yet *Davis* appears nowhere in *Already*'s careful, thorough discussion of the voluntary cessation standard – a conspicuous absence, given *Davis*'s lengthy

treatment in Already's brief. Instead, this Court unanimously decided *Already* under *Friends of Earth* exclusively. *See* 133 S. Ct. at 727-30.

There was no reason for the Court to accept the petitioner's invitation in *Already* to address a purported conflict between *Friends of the Earth* and *Davis*. As the United States' amicus brief in *Already* explained, the *Davis* "formulation, which the Court has not invoked in more recent cases, *see Friends of the Earth*, 528 U.S. at 190, is simply another way to state the requirement that the defendant's cessation must eliminate any continuing concrete interest in the controversy." Br. for United States as *Amicus Curiae* at 24 n.4, *Already*, No. 11-982. The Eleventh Circuit – in the case that Petitioners contend establishes the split – supports that conclusion. It reasons that *Davis*'s formulation states "[i]n other words" the *Friends of the Earth* standard. *Harrell*, 608 F.3d at 1265.

So in the United States' and Eleventh Circuit's views, which Respondent shares, *Friends of the Earth* and *Davis* are consistent. Accordingly, there is no split between the Second, Third, Eleventh, and D.C. Circuit cases upon which Petitioners rely (citing *Davis*) and the Tenth Circuit's decision here (applying *Already* and *Friends of the Earth*). Rather, the courts of appeals conduct the same analysis (albeit using different language) to answer the same overarching "question the voluntary cessation doctrine poses: Could the allegedly wrongful behavior reasonably be expected to recur?" *Already*, 133 S. Ct. at 727.

2.b. Petitioners' alleged split between the Tenth and Ninth Circuits is even less colorable. Like the decision here, each Ninth Circuit case that Petitioners cite applies *Friends of the Earth* to assess mootness due to a defendant's voluntary cessation. *See McCormack*, 788 F.3d at 1024-25; *Bell*, 709 F.3d at 898-901. Unlike the decision here, those decisions held that the defendants' voluntary conduct did not moot the case. But those different outcomes are factbound.

McCormack concluded that a prosecutor's offer of transactional immunity to a defendant against whom a judge had dismissed charges, *see* 788 F.3d at 1022-23, did "not by itself make it 'absolutely clear' that the prosecution of [the plaintiff] would never recur," *id.* at 1025. *Bell* concluded that a police chief's "special order" not to enforce two vagrancy ordinances in certain contexts, *see* 709 F.3d at 894-95, did not satisfy his "heavy burden to make it 'absolutely clear that the allegedly wrongful behavior – the alleged unconstitutional enforcement of the Ordinances – could not reasonably be expected to recur,'" *id.* at 901.

Those factbound differences do not result, as Petitioners contend, from a different legal rule that precludes a finding of mootness when the voluntary cessation consists of "the government . . . changing its" discretionary "enforcement policy during the pendency of litigation." Pet. 8. Nor could the Ninth Circuit have adopted such a rule without abrogating its decision in *White*, which, as explained, is consistent with the Tenth Circuit's decision here.

Though Petitioners do not acknowledge *White*'s import, *Bell* does: "*White* establishes that a policy change may be sufficient to meet the stringent standard for proving a case has been mooted by a defendant's voluntary conduct." 709 F.3d at 900. The critical issue remains whether the facts surrounding the policy change provide "assurances," *id.*, and "establish with . . . clarity," that "the new policy is the kind of permanent change that proves voluntary cessation," *id.* at 901, rather than a "temporary policy" ripe for quick abandonment, *White*, 227 F.3d at 1243. Given the facts here and in *White*, those defendants cleared that hurdle; in *Bell* and *McCormack*, the defendants did not. Such factbound differences do not merit plenary review.

2.c. Neither do Petitioners' repeated references to a split based on the "suspicious" or "strategic[]" timing of a defendant's voluntary cessation (Pet. 3, 8-14, 19) summon a bogeyman, much less a certworthy one. The circuits agree that the change's timing is relevant to the mootness inquiry. *See supra* at 15-17. But the logical end of Petitioners' argument is that a discretionary change in governmental policy – an apt description of *most* governmental policy changes – in anticipation of or during a lawsuit *always precludes* a finding of mootness. That argument eviscerates the voluntary cessation doctrine whenever the government is a defendant; it would require overruling numerous cases holding that such policy changes *have* mooted cases.

If that is not the logical end of Petitioners' argument, their argument must accommodate the proposition that a government defendant's discretionary policy change in anticipation of or during litigation *sometimes* though *not necessarily* moots a case. That is all the Tenth Circuit suggested here. App. 39-41. The other circuits in Petitioners' alleged split are in accord.[6] So Petitioners' complaint about the Tenth Circuit's decision boils down to a factbound disagreement about whether *their* claims were moot on *these* facts. That issue is not certworthy.

3. Respondent briefly responds to other "misstatement[s] of fact [and] law in the petition." S. Ct. Rule 15.2.

First, Petitioners incorrectly assert that the Tenth Circuit "minimized" the *Friends of the Earth* standard. Pet. 22. The footnote to which Petitioners refer contains a string cite of this Court's cases for the objectively verifiable proposition that this "Court

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[6] *See, e.g.*, *Holland*, 758 F.3d at 220, 224 (RFRA challenge to state prison's urinalysis policy mooted by policy change made "after seven years of litigation"); *Marcavage*, 666 F.3d at 861 (National Park Service regulations adopted while case was pending mooted § 1983 claims because "there is no indication" that regulations were "adopted to avoid an adverse judgment in this case and will be abandoned once this case becomes final"); *White*, 227 F.3d at 1243; *Rosebrock*, 745 F.3d at 971-74; *Atheists of Florida*, 713 F.3d at 581-84, 594-95 (Establishment Clause claim over prayers at city council meeting mooted by resolution adopted three weeks after lawsuit filed); *Sands*, 825 F.3d at 785 (NLRB carried its "heavy burden" to show case was mooted by actions taken "after Sands petitioned for review").

sometimes omits 'absolutely' from its *subsequent* analysis" after it *first* states the standard, "instead using the 'reasonably be expected' language as shorthand." App. 29-30 & n.16 (emphasis added). But later in that same footnote, the Tenth Circuit reiterated the test: "the defendant's obligation is to show it is *absolutely clear* that 'the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (emphasis added). Nothing in that footnote "minimizes" the *Friends of the Earth* standard.

Second, Petitioners' allegation that Respondent plans to use the Statute "as a tool to conduct investigations and searches of cohabitating plural families at will," thereby subjecting them to "the constant threat of being subject to a different and easier threshold for searches," is, at best, fearmongering. Pet. 20. They cite nothing in (or out of) the record to support their assertion that Respondent's office plans to use the Statute that way. Their accusation is particularly unfounded given Respondent's undisputed testimony that he adopted his new policy "'to prevent the future prosecution in Utah County of bigamous marriages entered into for religious reasons.'" App. 12.

Third, this is a uniquely bad vehicle to address how a state defendant's "continu[ing] to maintain that the [challenged] law is both constitutional and necessary for future investigations," Pet. 19, affects the mootness inquiry. No other case cited in the petition involves a challenge to a state law arising from a congressional condition on the state's admission to the Union. So whatever light a state's continuing defense

of a statute may shed on mootness in other cases, it is uniquely inapposite to these proceedings about Utah's bigamy statute.

* * *

For all their errors on the voluntary cessation question, Petitioners nail the most important score: They are, at best, "persons *formerly* threatened with prosecution under" the Statute. *Id.* at 21 (emphasis added). They face no *current* or *continuing* threat that Respondent will prosecute them in Utah, away from their new Nevada home. The case is moot for the reasons the Tenth Circuit correctly explained, based on legal rules that do not conflict with other circuits' precedent. Certiorari should be denied.

B. The Circuits Are Not Split On The Standard Of Review For Facts Supporting A Voluntary Cessation Holding.

Petitioners contend that the Tenth Circuit's decision "compound[s]" a circuit split "on the applicable standard of review concerning the voluntary cessation doctrine." Pet. 14. According to Petitioners, the Tenth Circuit here reviewed de novo the "district court's underlying factual findings related to its adjudication of the voluntary cessation doctrine," while the Second, Seventh, Eleventh, and D.C. Circuits apply "clear error or some form of abuse of discretion" review. *Id.* Not so.

1. Most prominent among those misleading assertions is Petitioners' contention that here the Tenth Circuit reviewed the underlying facts de novo. On the

contrary: "[I]n this case, no evidentiary hearing was held, the parties did not contest the facts in each other's declarations, and the district court needed only to resolve the legal question of mootness, not resolve disputed issues of fact relating to justiciability." App. 32-33. Accordingly, the Tenth Circuit's holding that Petitioners "faced no credible threat of prosecution once" Respondent announced his policy *expressly did not depend* on whether its "consideration of the underlying facts is plenary or deferential." *Id.* It would have reached the same conclusion under *any* standard of review.

To be sure, the Tenth Circuit quotes its prior statement in *Rio Grande Silvery Minnow*, 601 F.3d at 1122, calling an assessment of "the likelihood that defendants will recommence the challenged, allegedly offensive conduct" a "factual inquir[y]" that it reviews "*de novo*." App. 32. But that statement did not cabin the Tenth Circuit's review here. As noted, the Tenth Circuit expressly refrained from applying a particular standard of review here because the standard made no difference. Accordingly, Petitioners' contentions that in *this* case the Tenth Circuit reviewed "factual conclusions of the district court de novo" (Pet. 16) and "held that all district court conclusions related to voluntary cessation should be reviewed de novo" (*id.* at 21) are false.

2. Petitioners' contentions about other circuits' standards of review suffer from similar infirmities.

For example, their contention that the D.C. Circuit reviews for clear error any factfinding supporting mootness (Pet. 14-15) selectively quotes only the latter of two statements of that court's standard.

The former statement, which Petitioners omit, provides that the D.C. Circuit's review "for mootness depends on the posture in which the motions were presented to the trial court." *True the Vote*, 831 F.3d at 555 (internal quotation marks and alterations omitted). "When a district court relies either on the complaint standing alone or on the complaint supplemented by the undisputed facts evidenced in the record, *our review is de novo*." *Id.* (internal quotation marks omitted; emphasis added). Only if a district court "determines disputed factual issues" in deciding mootness does the D.C. Circuit review those findings for clear error. *Id.* (internal quotation marks omitted). Because the district court did not determine disputed facts here (*see* App. 32), the D.C. Circuit would have applied the same de novo standard that Petitioners erroneously attribute to the Tenth Circuit.

Petitioners also err (Pet. 15) by alleging a split with *Pensacola Motor Sales Inc. v. Eastern Shore Toyota, LLC*, 684 F.3d 1211 (11th Cir. 2012). Constitutional mootness was not even at issue there: "As the Supreme Court explained a long time ago, even when voluntary cessation of unlawful conduct does not moot a claim (*and there is no argument here that it did*), a court has equitable discretion about whether to issue an injunction after the conduct has ceased." *Id.* at 1220 (emphasis added). Petitioners fail to explain how a

case that did not present or decide the question that the Tenth Circuit decided here can create a circuit split.

Petitioners' reliance on *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992), to establish a split falters for the same reason – it addressed prudential, not constitutional, mootness. "While ordinarily the voluntary cessation of allegedly illegal conduct does not deprive a federal court of jurisdiction, such action does bear on whether the court should, *in the exercise of its discretion, dismiss the case as moot*." *Id.* at 59 (emphasis added). That language can refer only to prudential mootness; this Court for decades has made clear that if a case is *constitutionally* moot "the defendant is entitled to a dismissal *as a matter of right*." *W.T. Grant*, 345 U.S. at 632 (emphasis added). And the notion that a court of appeals might apply a more deferential standard to review a discretionary dismissal for prudential mootness (as in *Harrison & Burrowes Bridge*) than to review a mandatory dismissal for constitutional mootness (as in the decision below) is unremarkable – hardly the stuff of real circuit splits deserving plenary review.[7]

[7] Petitioners' contention that "the Tenth Circuit has previously acknowledged" (in *Rio Grande Silvery Minnow*) this purported split fails for the same reason. Pet. 2. The "Tenth Circuit" never acknowledged such a split. Instead, the dissenting opinion suggested it, *see* 601 F.3d at 1134-35, but the majority opinion reconciled the purported disagreement based on the distinction between prudential and constitutional mootness, *see id.* at 1121-28.

Kikumura v. Turner, 28 F.3d 592 (7th Cir. 1994), is also inapposite. There, a prisoner sought injunctive and declaratory relief for a warden's policy that prohibited him from receiving Japanese-language mail. *See id.* at 594. The Seventh Circuit addressed whether the warden's adopting a new foreign-language-mail policy during the case "renders the matter moot." *Id.* at 597.

The trouble for Petitioners is that the district court in *Kikumura* never passed on the mootness question. In fact, the district court "did not address [Kikumura's] claims for declaratory or injunctive relief" at all. *Id.* at 596. So the Seventh Circuit *itself* decided *in the first place* whether the new mail policy mooted the case. It concluded that a live case remained, based on its *own* finding that the warden's "policies regarding foreign language publications have apparently ebbed and flowed throughout the course of the litigation." *Id.* at 597. The Seventh Circuit's statements about its own "exercise of judicial discretion," *id.* – in a case where it obviously did not review factfinding supporting a district court's mootness holding *because neither one existed* – cannot create a split with the Tenth Circuit's decision, which *actually reviewed* a district court's mootness holding in light of undisputed facts.

Petitioners' reliance on *Kikumura* is particularly puzzling because the Seventh Circuit committed the same purported foul that Petitioners call on the Tenth Circuit here – "engag[ing] in independent factfinding, conducting a sua sponte review of the documentary evidence." Pet. 16. But on that issue, *Kikumura* does no

more than follow this Court's lead in *Already*, where the mootness holding turned in part on the petitioner's failure to offer evidence – either "on appeal to the" circuit court or "before [this Court]," 133 S. Ct. at 732 – that could have established the existence of a live controversy. So unless *Already* and *Kikumura* were wrongly decided, Petitioners' objection to such "independent factfinding" does not support review, even if that objection accurately reflected the Tenth Circuit's decision here.

II. Pronounced Vehicle Problems Disqualify This Case From Plenary Review.

Petitioners' failure to identify a split with the Tenth Circuit's correct decision is just one reason this case is a poor candidate for certiorari. A number of vehicle problems also preclude further review.

A. Changes Proposed To Utah's Bigamy Statute Would Moot Petitioners' Claims Irrespective Of The Tenth Circuit's Decision.

According to Petitioners, the Statute's principal constitutional defect is that it bans voluntary cohabitation. Pet. 3. But imminent legislative action may cure that alleged defect.

The Statute presently states the elements of bigamy in the disjunctive: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing

the other person has a husband or wife, the person purports to marry another person ***or*** cohabits with another person." Utah Code Ann. § 76-7-101(1) (emphasis added). But in its 2017 general session the Utah Legislature is set to consider amendments that would make the Statute's elements conjunctive:

> A person is guilty of bigamy when, knowing [~~he~~] the person has a husband or wife or knowing the other person has a husband or wife, the person purports to marry [~~another person or cohabits with another~~] and cohabitates with the other person.

H.B. 99, § 1, 2017 Leg., Gen. Sess. (Utah 2017), at http://le.utah.gov/~2017/bills/static/HB0099.html. If H.B. 99 passes, no longer would the Statute ban "the mere practice of cohabitation by married persons." Pet. 4. Instead, the amended Statute plainly would ban a married defendant's cohabitating with another person only if that married defendant *also* purported to marry the person with whom he or she cohabitated.

That is precisely the type of "significant amendment to challenged legislation" that "a string" of this Court's cases holds "ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief." *Fed'n of Advert. Indus. Reps.*, 326 F.3d at 930 (citing, *inter alia*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415 (1972)). Indeed, H.B. 99 does not resemble the types of insincere statutory changes that this Court has previously held did not moot a case. The

Utah Legislature has not "announced" its "intention" to pass H.B. 99 but immediately thereafter revert to the current version. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.11 (1982). Nor do H.B. 99's proposed amendments "differ[]" from the current Statute "only in some insignificant respect," *N.E. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) – they *change the elements*, fatally undermining Petitioners' contention that the Statute unconstitutionally criminalizes only private, consensual conduct.

The legislative process's uncertainties make it impossible to know when during Utah's 2017 general legislative session (from January 23 to March 9) H.B. 99 might pass both Utah houses and be signed by the governor. That raises a harmful and ironic prospect: If this Court grants certiorari to review the Tenth Circuit's splitless decision on voluntary cessation mootness, a pending statutory change could in turn moot the grant of certiorari – wasting whatever significant time the parties would have by then devoted to merits briefing. That problem alone disqualifies this case from plenary review.

B. Intrinsic Vehicle Problems Also Preclude Plenary Review.

1. Petitioners have trained all their fire on just the first of two separate, independent reasons the Tenth Circuit held that this case is moot. Their argument focuses entirely on Respondent's prosecution

policy. *See* Pet. 9-14; App. 37-41. At best, they glance by (Pet. 16-17) the Tenth Circuit's second holding: that Petitioners' relocation to Nevada, and the running of Utah's statute of limitations since their move, also "eliminated [Respondent's] authority under Utah law to prosecute" them. App. 42. Petitioners thus have failed adequately to invoke this Court's review of that "independent reason" why they "face no credible threat of prosecution." *Id.* at 45. So even if this Court were to reverse the Tenth Circuit's conclusion on voluntary cessation, the judgment below would not change, meaning any decision from this Court on the Tenth Circuit's splitless voluntary cessation holding would lack real-world effect and be merely advisory.

2. This is a poor vehicle to address Petitioners' second alleged (and illusory) split – on the standard by which the circuits review facts supporting a voluntary cessation holding – for the reason discussed above: The Tenth Circuit did not specify which standard it applied, but held that the facts supported mootness under *any* standard of review. App. 32-33. Because Petitioners cannot disprove on this record that the Tenth Circuit reviewed the facts under their preferred deferential standard, this question is not squarely presented.

3. Petitioners' explicit request for error correction on the "independent and discrete matter" of their purported request for money damages deserves scant discussion. Pet. 23-24. No error is apparent in the Tenth Circuit's holdings on this issue. But even if error were apparent, the question is not properly presented:

The district court held that Petitioners had "waived any request for damages," and they did "not renew[] any request for damages on appeal." App. 18-19, 35-37 & n.19.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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