IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ELIJAH "LIJ" SHAW and PATRICIA "PAT" RAYNOR,	§	
Plaintiffs-Appellants,	§	
v.	§	M2019-01926-SC-R11-CV
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	§	
Defendant-Appellee.	§	

BRIEF OF AMICUS CURIAE HORWITZ LAW, PLLC IN SUPPORT OF APPELLANTS

DANIEL A. HORWITZ, BPR #032176
LINDSAY E. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
(615) 739-2888

Counsel for Amicus Curiae

Date: January 7, 2022

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

III. INTRODUCTION

"It is well settled that Tennessee law strongly favors the resolution of all disputes on their merits[.]" *Henley v. Cobb*, 916 S.W.2d 915, 916 (Tenn. 1996). This Court has stated as much "repeatedly" for a century. *See Fiske v. Grider*, 106 S.W.2d 553, 555 (Tenn. 1937) ("We have stated repeatedly that it is the policy of this court to have controversies between litigants determined upon their merits."). That policy is also reflected in Tennessee's Constitution itself. *See Kocher v. Bearden*, 546 S.W.3d 78, 85 (Tenn. Ct. App. 2017) ("The Tennessee Constitution expressly provides that 'all courts shall be open.'") (citing Tenn. Const. art. I, § 17).

The above notwithstanding, though, governmental litigants routinely engage in bad-faith gamesmanship in an effort to evade merits review. In lieu of adopting an appropriately "jaundiced attitude about permitting a litigant to cease its wrongful conduct temporarily to frustrate judicial review[,]" however, *Norma Faye Pyles Lynch Family Purpose L.L.C. v. Putnam Cnty.*, 301 S.W.3d 196, 205 (Tenn. 2009), some lower courts have been quick to bless the charade. In so doing, lower courts have afforded the government unwarranted special treatment that other litigants do not enjoy, and they have incentivized bad faith by governmental litigants in the process.

Whether or not Tennessee's courts have the power to adjudicate a particular controversy does not actually turn on the identity of the litigants involved in it, though. As a result, the Panel's Opinion below—which reflects that Metro was afforded special "solicitude" based on an unwarranted assumption that the Government "acts in good faith"—should be vacated. *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*,

No. M2019-01926-COA-R3-CV, 2021 WL 515887, at *6 (Tenn. Ct. App. Feb. 11, 2021) (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767–68 (6th Cir. 2019)). Thereafter, this Court should reevaluate Metro's mootness claim under a neutral standard that seeks to determine:

(1) Whether Metro has "completely and permanently abandoned the challenged practice[,]" *Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 207; and

(2) Whether "'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Sullivan v. Benningfield*, 920 F.3d 401, 405 (6th Cir. 2019) (cleaned up).

Alternatively, this Court should remand with instructions to reconsider Metro's voluntary cessation claim—following jurisdictional discovery, if appropriate—without according Metro any special solicitude or assuming Metro's good faith.

IV. LEGAL STANDARDS AND STANDARD OF REVIEW

"Deciding whether an issue is moot is a question of law." *Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *11 (Tenn. Ct. App. Dec. 12, 2019). Accordingly, when determining whether Metro's claim of voluntary cessation moots the Plaintiffs' claims, this Court reviews *de novo* the Panel's ruling that Metro enjoys special "solicitude because courts assume 'that the government acts in good faith.'" *Shaw*, 2021 WL 515887, at *5 (cleaned up).

V. ARGUMENT

A. THE GOVERNMENT SHOULD NOT RECEIVE SPECIAL SOLICITUDE OR ENJOY A SPECIAL PRESUMPTION OF GOOD FAITH REGARDING QUESTIONS OF SUBJECT MATTER JURISDICTION.

In *Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 206, this Court emphasized that it was "wary of adopting an approach to mootness through voluntary cessation that treats government litigants and private litigants differently." *Id.* Thus, regardless of whether or not the party asserting mootness is a governmental litigant, this Court held that "the burden of persuading a court that a case has become moot as a result of the voluntary cessation of the challenged conduct is and remains on the party asserting that the case is moot." *Id.* "However," this Court added, "when the party asserting that the case has become moot based on the cessation of its own conduct is a government entity or official, the court *may, if justified by the circumstances of the case*, require the opposing party to demonstrate why the proceeding should not be dismissed for mootness." *Id.* (emphasis added).

In its opinion below, the Panel erroneously replaced this approach with an *assumption* that the Government's "good faith" warrants dismissal on mootness grounds whenever the Government asserts that it has voluntarily ceased challenged conduct. *Shaw*, 2021 WL 515887, at *5. In particular, as justification for its shadow-repeal of this Court's controlling precedent, the Panel indicated that it "[found] instructive the approach described by the Sixth Circuit in *Speech First, Inc.*, 939 F.3d 756 ," *id.*, wherein the Sixth Circuit held that:

> As the Ninth Circuit has commented, **government action receives [special] solicitude because courts**

> **assume "that [the government] acts in good faith."** *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (citation omitted). Namely, we presume that the same allegedly wrongful conduct by the government is unlikely to recur. *See Friends of the Earth*, 528 U.S. at 189, 120 S. Ct. 693. *See also* 13C Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. JURIS. § 3533.7 (3d ed. 2008) ("**Courts are more likely to trust public defendants to honor a professed commitment to changed ways**; individual public defendants may be replaced in office by new individuals, with effects that have little parallel as to private defendants; remedial calculations may be shaped by radiations of public interest; administrative orders may seem to die or evolve in ways that leave present or future impact unclear."). We have employed this solicitude for both legislative and non-legislative governmental actions. *See Hanrahan v. Mohr*, 905 F.3d 947, 961-62 (6th Cir. 2018); *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003).

Id. (emphases added) (quoting *Speech First, Inc.*, 939 F.3d 756, 767–68 (6th Cir. 2019)). Shortly after the Panel issued its decision below, another Panel of the Court of Appeals also extended the doctrine further, expressly adopting the view that governmental litigants enjoy a more lenient standard. *See Allen v. Lee*, No. M2020-00918-COA-R3-CV, 2021 WL 2948775, at *4 (Tenn. Ct. App. July 14, 2021), *appeal denied* (Nov. 19, 2021) ("this Court has recently endorsed the notion that the bar for showing mootness is lower when a governmental entity's conduct is at issue[.]") (citing *Shaw*, 2021 WL 515887, at *5 (quoting *Speech First*, 939 F.3d at 767–68)).

For the reasons detailed below, such special treatment of governmental litigants has no place in Tennessee's court system. Governmental litigants' lengthy history of bad faith also proves that

placing special trust in the Government is unwarranted. The Panel's contrary judgment—and the Court of Appeals' subsequent holding in *Allen v. Lee,* No. M2020-00918-COA-R3-CV, 2021 WL 2948775, at *4 (Tenn. Ct. App. July 14, 2021)—should be vacated accordingly.

1. Governmental litigants in Tennessee routinely engage in gamesmanship to frustrate merits review.

This Court has been appropriately "wary" of treating private litigants differently from governmental litigants where questions of justiciability are concerned. *Norma Faye Lynch Family Purpose L.L.C.*, 301 S.W.3d at 206. Recognizing that there are some meaningful differences between governmental litigants and private litigants, though, this Court has held that lower courts "may, if justified by the circumstances of the case, require the opposing party to demonstrate why the proceeding should not be dismissed for mootness" when a governmental litigant raises a mootness claim. *Id.* This standard differs markedly from one that reflexively affords governmental litigants "special solicitude" based on an "assump[tion]" that the Government—as compared with private litigants—acts in good faith, though. *Cf. Shaw*, 2021 WL 515887, at *5. Abundant experience also confirms that this Court's previous "war[iness]" to treat governmental litigants with special solicitude remains warranted. *Norma Faye Lynch Family Purpose L.L.C.*, 301 S.W.3d at 206.

Although the Panel's Opinion below improperly requires courts to assume otherwise, governmental litigants routinely act in *bad* faith in a strategic effort to frustrate merits review and evade judgments, rather

than the other way around. Thus, without flinching, governmental litigants will "reverse[] direction like a boomerang" whenever they perceive an advantage to doing so. *See FOP v. Metro. Gov't of Nashville & Davidson Cnty*, 582 S.W.3d 212, 216 (Tenn. Ct. App. 2019). Sometimes, the Government will even wait *until appellate oral argument* to announce a changed position. *Fisher v. Hargett*, 604 S.W.3d 381, 406 n.1 (Tenn. 2020) (Lee, J., concurring in part) ("at oral argument in this Court, the Defendants' attorney made a surprising concession . . ."). Thus, actual experience confirms that the Government engages in review-evading gamesmanship with considerable frequency. As detailed below, several recent examples illustrate the point.

Consider, for instance, the Government's conduct in *Tennesseans for Sensible Election Laws*, 2019 WL 6770481, at *11. There, following a cornucopia of misbehavior, a governmental litigant received an adverse merits judgment that forbade it from assessing a facially discriminatory fee against some political speakers but not others. *See id.* Between the trial court's judgment and appeal, though, the General Assembly modestly amended the statute in an effort to moot the plaintiff's claim. *Id.* at *12. Thereafter, the Government urged the Court of Appeals to dismiss the plaintiff's claim on mootness grounds, asserting that the statute "has recently been amended to require *all* PACs—both political-party and non-political-party PACs, to pay an annual registration fee."[1]

The Government was shamelessly lying, though. In truth, even

[1] *See* **Attach. 1**, Br. of Appellant at 25–26, Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics and Campaign Finance, No. M2018-01967-COA-R3-CV (Tenn. Ct. App. Apr. 1, 2019).

after the amendment was enacted, "only multicandidate political campaign committees [had to] pay the fee, while other types of political campaign committees [did] not." *See Tennesseans for Sensible Election Laws*, 2019 WL 6770481, at *12. The Government also continued to lie about this critical fact for years afterward[2]—even though the Court of Appeals had already pointed out that it was not true. Appropriately, however, at every stage of proceedings, reviewing courts abided by this Court's precedent and treated the Government's mootness claim with *skepticism*—rather than reflexively assuming governmental good faith that did not exist.

Additionally, consider a recent lawsuit filed by inmates who sued to enjoin "White County's sterilization-for-sentencing-credits program[.]" *Sullivan*, 920 F.3d at 405. In advance of—and during—that litigation, the governmental defendants issued a series of modifications to the program that were designed to frustrate and evade merits review. *Id.* at 407 ("This third order clarified that, even though the second order purported to discontinue the sterilization-for-sentencing-credits program, inmates who opted to undergo sterilization *before* the second order was issued were still eligible to receive the sentencing credit."). Thereafter, the governmental defendants insisted that the plaintiff's claims were moot based on the defendants' voluntary cessation of the

[2] *See* **Attach. 2**, Order on Def.'s Mot. For Relief from J. at 3, ¶ 10, *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics and Campaign Finance*, No. 18-0821-III (Davidson Co. Chancery Ct. Dec. 16, 2021) ("Defendant argues that it is entitled to relief from this Court's 2018 Judgment because the amended Statute now applies to all PACs[.]").

challenged practice, and they contended that the inmates' claims should be dismissed as a result. *Sullivan*, 920 F.3d at 410 ("Defendants first argue that, even if Plaintiffs initially had standing to bring these claims, the claims are now moot, because the challenged order has been rescinded, and Tennessee has passed a new law making the challenged practice illegal.").

Upon review, though, the Sixth Circuit held otherwise. In particular, the Sixth Circuit observed that while "[r]epeal of a challenged law can, in some cases, render a case or controversy moot," *id.* (citing *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997)), "a case or controversy 'does not cease to exist merely by virtue of a change in the applicable law.'" *Id.* (quoting *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 835 (6th Cir. 2016)). Instead, "[a] defendant's voluntary cessation of a challenged practice moots a case only in the 'rare instance' where 'subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* (cleaned up). After applying this standard, the Sixth Circuit concluded that "neither of the changes to the law has ceased the allegedly unconstitutional differential treatment that any of the Plaintiffs faced, and they do not moot Plaintiffs' claims." *Id.* at 411. Upon remand, a permanent injunction that actually had the effect of terminating the challenged program was entered against

the Government as a consequence.[3]

Such false and otherwise unsupported claims of voluntary cessation are not the only examples of governmental litigants' bad-faith attempts to evade merits review, either. Consider, for instance, the Tennessee Board of Parole's behavior in recent litigation regarding the newly enacted Reentry Success Act of 2021. There, at the outset of litigation, the Board of Parole represented to a trial court that an inmate's claim was *unripe*—and that the trial court lacked subject jurisdiction to adjudicate the claim as a consequence—because a case-relevant date had not yet been reached.[4] Thereafter, however, following an adverse merits ruling,[5] the Board of Parole turned around 180 degrees and maintained that dismissal was warranted because the relevant date *had come and gone nearly two years before* the petitioner's lawsuit was filed.[6]

---

[3] *See* **Attach. 3**, Order, *Sullivan et al. v. Benningfield and Shoupe*, No. 2:17-cv-0052 (M.D.T.N. May 20, 2019).

[4] *See* **Attach. 4**, Tr. of Proceedings at 7:17–8:10, *Hughes v. Tennessee Board of Parole*, No. 21-618-II (Davidson Co. Chancery Ct. Aug. 20, 2021) ("[A]s Counsel will agree, Mr. -- Mr. Hughes has not reach -- reached his release eligibility date. We – I pulled a calculation on it just before I filed my appearance a couple weeks ago. And at that point he was at December 31st [2021] as his release eligibility date. And so any of the relief sought here, it -- it's just not ripe. . . . So it -- it's not ripe because the release eligibility date has not come up. I mean, certainly once that release eligibility date hits, then a petition could be filed in the case. We'd be ripe at that point.").

[5] *See* **Attach. 5**, Mem. and Order, *Hughes v. Board of Parole*, No. 21-618-II (Davidson Co. Chancery Ct. Sep. 24, 2021).

[6] *See* **Attach. 6**, Resp't.'s Mot. to Alter or Amend at 2, No. 21-0618-II (Davidson Co. Chancery Ct. Oct. 22, 2021) (seeking to alter or amend the adverse merits judgment because "March 17, 2020 is Mr. Hughes' release eligibility date[.]").

Upon review, rather than affording the Government an unwarranted presumption of good faith, the Government was instead ordered to furnish a witness "to testify regarding . . . [the Board's] inconsistent positions" on the matter.[7] Unsurprisingly, when the time came to do so, no witness could.[8] Had the Government been afforded special solicitude and an unwarranted presumption of good faith, though, the petitioner involved would still be illicitly incarcerated today.

The reality that governmental litigants employ a strategy of manufacturing false claims in order to evade merits review will not come as a surprise to the Appellee, either. Consider, for example, a recent case in which—pre-suit—Metro "approved as to form and legality"[9] a flagrantly unconstitutional censorship provision in a public employee's severance agreement that Metro's School Board had unambiguously made "effective . . . and binding upon each Board member individually."[10] The censorship provision irked individual Board members whose speech had been unlawfully restricted by it, prompting them to sue to invalidate it. On the eve of an adverse merits ruling (and through appeal thereafter), though, Metro asserted—with a straight face—that the censored Board Members "did not have standing to sue" because the

---

[7] *See* **Attach. 7**, Order, *Hughes v. Board of Parole*, No. 21-618-II (Davidson Co. Chancery Ct. Nov. 8, 2021).
[8] *See generally* **Attach. 8**, Tr. of Proceedings, *Hughes v. Board of Parole*, 21-618-II (Davidson Co. Chancery Ct. Nov. 19, 2021).
[9] *See* **Attach. 9**, Ex. #1 to Pl.'s Compl., *Frogge, et al. v. Joseph, et al.*, Case No.: 20-420-IV (Davidson Co. Chancery Ct. May 4, 2020) at 7.
[10] *Id.* at 2, ¶ 1(f)(2).

contract at issue "could never be enforced against them"[11] and was never "intend[ed] . . . to be interpreted as infringing upon anyone's free speech rights."[12] That Metro's assertion was—as the trial court recognized—a textually unsupportable "strategic litigation position"[13] that had been invented by Metro's counsel out of thin air in an attempt to evade a merits judgment apparently was not an obstacle to presenting it.

Governmental litigants will act in bad faith to evade merits review in any number of other instances, too. For example, the Government will raise frivolous administrative exhaustion claims that are designed to delay and obstruct merits review[14]—including exhaustion claims that the Government *is actually aware are baseless* and which conflict with the Government's simultaneous position in administration proceedings themselves.[15] The Government will also encourage federal courts not to adjudicate certain claims by arguing that state courts should have the opportunity to do so in the first instance[16]—then turn around and tell

---

[11] **Attach. 10**, Br. of Appellant, *Frogge, et al. v. Joseph*, et al., No. M2020-01422-COA-R3-CV (Tenn. Ct. App. June 23, 2021).
[12] *Id.* at 10.
[13] **Attach. 11**, Mem. and Order at 14, *Frogge et al. v. Joseph et al.*, No. 20-420-IV(III) (Davidson Co. Chancery Ct. Sept. 14, 2020).
[14] **Attach. 12**, Rejoinder of Tennessee Board of Law Examiners to Pet'r's Reply in Supp. of his Verified Pet. for Review and Writ of Cert., *Gluzman v. Tennessee Board of Law Examiners*, No. M2016-02462-SC-BAR-BLE (Tenn. Jan. 23, 2017).
[15] **Attach. 13**, Hudson Dep. at 64:9–65:19, *Gilliam v. Gerregano*, No. 21-0606-III (Davidson County Chancery Ct. Aug. 12, 2021).
[16] *See* Brief of the States of Tenn., at al. as Amici Curiae Supporting Respondents, at 8, Minn. Voters Alliance v. Mansky (No. 16-1435), https://www.supremecourt.gov/DocketPDF/16/16-

state courts that litigants must go to "a federal district court" if they want their civil claims redressed.[17]

The Government will not hesitate to make "blatant factual misrepresentations," either. *Friedmann v. Parker*, No. 3:21-CV-00721, 2021 WL 5494522, at *1 n.2 (M.D. Tenn. Nov. 23, 2021) ("In the Answer to the Complaint, Defendants deny that two cells are "known or referred to as ... 'iron man' cells," that "Unit 1 has 'iron man' cells," and that Mr. Friedmann's "cell is an 'iron man' cell." (Doc. No. 16 ¶¶ 18, 41). This is remarkable given Defendants' own exhibits contain a TDOC report *signed by multiple Defendants* that describes Mr. Friedmann's cell as "an iron man cell." (Doc. No. 15-4 at 15). The Court resolves "disputed" facts in Mr. Friedmann's favor where the record contradicts Defendants' denials. **The Court warns Defendants there may be repercussions for future blatant factual misrepresentations presented to it**." See Fed. R. Civ. P. 11.") (emphasis added). It will also outright invent law when necessary, *see, e.g., State v. Allen*, 593 S.W.3d 145, 154 n.13 (Tenn. 2020) ("We also are unaware of any rule or precedent authorizing the criminal court to allow the TBI to intervene in either an open or closed criminal case[.]"), and it will encourage courts—including this Court—to do the same. *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 59 n.14 (Tenn. 2018) ("Metro and the Commission urge that we afford our

1435/35139/20180212140354363_16-1435%20Amici%20Brief%20States.pdf.

[17] **Attach. 14**, Tr. of Proceedings at 19:23–25, T*ennesseans for Sensible Election Laws v. Slatery, et al.*, No. 20-0312-III (Davidson Co. Chancery Ct. May 7, 2020).

decision prospective application. . . . What Metro and the Commission suggest is tantamount to inviting us to judicially amend the statute."). Further, when circumventing a merits ruling is desirable, the Government will unflinchingly attempt to circumvent a merits ruling. *See, e.g., Green Party of Tenn. v. Hargett*, 791 F.3d 684, 698 (6th Cir. 2015) ("it was well within the district court's authority to order a fee enhancement based on a party's repeated efforts to circumvent its ruling."). The Government will unapologetically violate court orders when it deems doing so desirable, too. *See, e.g., Tennesseans for Sensible Election Laws*, 2019 WL 6770481, at *8 ("The trial court found that the State 'inexplicably failed to comply' with its order, and we agree."). *See also Recipient of Final Expunction Order in McNairy County Circuit Court v. Rausch, et al.* Case M2021-00438-SC-R11-CV (Tenn. Aug. 19, 2021) (review pending); Sandy Mazza, *Judge slaps Metro government with contempt ruling in Airbnb fight*, THE TENNESSEAN (Mar. 6, 2019), https://www.tennessean.com/story/news/2019/03/06/nashville-airbnb-fight-metro-government-contempt-ruling/3084862002/.

These examples—all recent—are not and do not purport to be exhaustive. And taken together, the ultimate point is this: Governmental litigants are no more trustworthy than private litigants; the Government has enormous incentives to act in bad faith to evade merits review when it has behaved unlawfully; and the Government frequently acts on those incentives by behaving dishonestly. Given this reality, governmental litigants are undeserving of special solicitude, and c*ontra Allen*, 2021 WL 2948775, at *4 ("this Court has recently endorsed the notion that the bar

for showing mootness is lower when a governmental entity's conduct is at issue[.]"), the Government's bar should be placed at exactly the same height that private litigants must clear when claims of mootness are raised. This Court should accordingly reaffirm its commitment not to treat "government litigants and private litigants differently" when a party raises a claim of mootness based on voluntary cessation, *see Norma Faye Lynch Family Purpose L.L.C*, 301 S.W.3d at 206, and it should reject the Panel's unwarranted assumption of good faith and its provision of "special solicitude" regarding governmental litigants as a consequence. *Shaw*, 2021 WL 515887, at *5 (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767–68 (6th Cir. 2019)).

2. Tennessee's public policy favors merits review, and Article III requirements do not apply in Tennessee's courts.

Litigation is expensive. Indeed, "[c]ivil litigation is *prohibitively* expensive for the vast majority of Americans, roughly 40% of whom lack the means to pay even a $400 emergency expense without going into debt." *See* Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020), https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/ (emphasis added) (citing Soo Youn, *40% of Americans Don't Have $400 in the Bank for Emergency Expenses: Federal Reserve*, ABC NEWS (May 24, 2019)). Accordingly, under traditional circumstances, even citizens who are entitled to declaratory judgments and injunctions against the Government will never seek them, because they quite literally cannot afford to vindicate their rights.

Where constitutional and civil rights are at stake, however, 42 U.S.C. § 1988(b) typically provides the solution. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks omitted). Accordingly, the United States Supreme Court has held that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). *See also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In *Newman, supra*, 390 U.S., at 402, 88 S. Ct., at 966, we held that in absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff"); *Hensley*, 461 U.S. at 429 ("a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") (internal quotation marks omitted).

Of special significance: The upshot of a fee-shifting statute like 42 U.S.C. § 1988(b) is not merely that some litigants get their attorney's fees back at the end of a case. Instead, far more importantly, it enables public interest lawyers to accept civil rights cases "pro bono with an expectation of seeking attorney's fees from the losing party if their client[] prevail[s,]" *see In re Nathaniel C.T.*, 447 S.W.3d 244, 247 (Tenn. Ct. App. 2014), thereby resulting in civil rights grievances being vindicated that otherwise would never have been filed at all. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) ("That a nonprofit legal services organization may contractually have agreed not to charge *any* fee of a

civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way."). *Bowers ex rel. Alexander S. v. Boyd*, 929 F. Supp. 925, 933 (D.S.C. 1995), *aff'd sub nom. Burnside v. Boyd*, 89 F.3d 827 (4th Cir. 1996) ("Defendants suggest in their memorandum that because Nelson Mullins entered the case on a pro bono basis, it would not be appropriate to award attorneys' fees to this firm. Defendants cite no authority for this proposition, and the court's own independent research has disclosed none. Indeed, every court that has considered the question has concluded to the contrary."). *See also Ramos v. Lamm*, 713 F.2d 546, 551 (10th Cir. 1983) ("[T]he defendants argue that fee awards to public interest lawyers, those employed by public interest organizations or those in private practice who donate their services to such organizations, should be calculated differently than awards to lawyers in private practice who would personally receive the benefit of the awards. We reject this contention. We agree with most courts that have considered the issue that calculating attorney's fees for public interest lawyers and private firm lawyers in the same manner furthers the legislative intent underlying 42 U.S.C. § 1988.") (collecting cases).

The flip side of § 1988(b)'s fee-shifting provision, though, is that litigants do not "prevail" within the meaning of that statute simply because their lawsuit causes a governmental defendant to change its behavior. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) ("Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.' The

question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not."). Instead:

> In order to "prevail," and thus to become eligible for attorney's fees, a party must have obtained a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S. Ct. 1835. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." *Id.* Only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* at 604, 121 S. Ct. 1835 (internal quotation marks omitted).

Toms v. Taft, 338 F.3d 519, 528–29 (6th Cir. 2003) (citing *Buckhannon Bd. & Care Home*, 532 U.S. at 605). Thus, a meritorious lawsuit that brings "about a voluntary change in the defendant's conduct"—without more—does not result in a fee award under § 1988(b). *Buckhannon*, 532 U.S. at 601.

With the above context in mind, a relaxed voluntary cessation standard that assumes the Government's good faith and makes it easy for governmental litigants to evade merits judgments through "voluntary" post-litigation changes in challenged behavior does not merely deprive most litigants of the opportunity to shift fees in individual cases. Instead, it ensures that the overwhelming majority of meritorious claims *will never be filed in the first place*. The reason why is simple: Even if a claim is meritorious and would result in a fee award if it reached

judgment, what typical attorney will devote tens—if not hundreds—of thousands of dollars in fees and expenses to a case on a contingent basis when the Government can always circumvent a judgment and avoid payment of a fee award by "voluntarily" changing its behavior on the eve of a judgment being issued?

That governments routinely adopt this approach in a strategic effort to circumvent review and evade merits judgments—even after years and millions of dollars have been devoted to litigation—is not a secret. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) ("After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city"); *id.* at 1527–28 (Alito, J., dissenting) ("once we granted certiorari, both the City and the State of New York sprang into action to prevent us from deciding this case. Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance."). And while that problem may be pervasive in the federal court system, this Court need not—and should not—replicate it in Tennessee's.

As noted above, "[i]t is well settled that Tennessee law strongly favors the resolution of **all disputes** on their merits[.]" *Henley*, 916 S.W.2d at 916 (emphasis added). Further, unlike federal courts, "Tennessee's courts do not have a constitutional limitation on their jurisdiction similar to the 'case or controversy' requirement in Article III, Section 2 of the United States Constitution." *State ex rel. Cunningham*

v. Farr, No. M2006-00676-COA-R3-CV, 2007 WL 1515144, at *2 (Tenn. Ct. App. May 23, 2007). The United States Supreme Court has additionally made clear that it did not intend for its Article III jurisprudence to apply to state courts—"even when they address issues of federal law, as when they are called upon to interpret the Constitution . . . ." *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute."). Consequently—even though governmental litigants in this State routinely insist otherwise—it has long been settled that Tennessee's courts may adjudicate claims for declaratory relief without regard to the narrower strictures of Article III.

In particular, approximately a century ago, both this Court and the United States Supreme Court separately upheld Tennessee's Declaratory Judgment Act against claims that the jurisdiction that it confers is unduly broad. As this Court thereafter explained in *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 n.3 (Tenn. 2008):

> this Court upheld the constitutionality of Tennessee's Declaratory Judgment Act shortly after it was passed. *Miller v. Miller*, 149 Tenn. 463, 261 S.W. 965 (1924); *see also Justiciability of Suits for Declaratory Judgments—Federal Rule*, 11 Tenn. L.Rev. 294 (1933). In a case involving facts similar to the case at bar, the United States Supreme Court also affirmed the constitutionality of our Act. *Nashville, C. & S.L. Ry. v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L. Ed. 730

> (1933). The Court noted that the "Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies." *Id.* at 264, 53 S. Ct. 345.

Id.

With this context in mind, Article III's limitations—including issues of mootness arising from voluntary cessation—do not bind Tennessee's courts. They also were never intended to apply in Tennessee's courts, even when Tennessee's courts "are called upon to interpret the Constitution[.]" *ASARCO*, 490 U.S. at 617. Accordingly, this Court's "repeatedly" articulated policy favoring the resolution of controversies on their merits can, may, and ought to prevail over any countervailing federal Article III limitations, which do not apply in Tennessee's court system at all. *See Fiske*, 106 S.W.2d at 555 ("We have stated repeatedly that it is the policy of this court to have controversies between litigants determined upon their merits."). Consequently, this Court's standard for evaluating when a governmental litigant's voluntary cessation moots a plaintiff's claim should be determined by reference to Tennessee's longstanding public policy favoring merits resolutions, rather than being determined by reference to whether it falls in lockstep with limitations imposed by Article III.

B. WHETHER A LITIGANT HAS "COMPLETELY AND PERMANENTLY ABANDONED A CHALLENGED PRACTICE" AND "COMPLETELY AND IRREVOCABLY ERADICATED THE EFFECTS OF THE ALLEGED VIOLATION" ARE FACT-DEPENDENT CLAIMS THAT MUST BE SUPPORTED BY EVIDENCE, AND OPPOSING PARTIES MUST BE AFFORDED AN OPPORTUNITY TO TEST THEM.

To determine whether a case should be dismissed as moot based on

a claim of voluntary cessation, the ultimate question is whether a litigant has "completely and permanently abandoned the challenged practice" such that "it is absolutely clear that the allegedly wrongful conduct cannot be reasonably expected to recur." *See Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 205–07. Such instances are "rare," and to moot a claim, a litigant's voluntary cessation must have "completely and irrevocably eradicated the effects of the alleged violation." *See Sullivan*, 920 F.3d at 410 ("A defendant's voluntary cessation of a challenged practice moots a case only in the 'rare instance' where 'subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'") (citing *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530–31 (6th Cir. 2001) (quoting *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979))). Put another way: "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party[.]'" *Chafin v. Chafin,* 568 U.S. 165, 172 (2013) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012)). Thus, the burden of demonstrating mootness in the context of voluntary cessation is a "heavy" one. *Id.* ("Defendants bear a 'heavy' burden to demonstrate mootness in the context of voluntary cessation.") (citing *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003)).

To be sure, courts "may, if justified by the circumstances of the case, require the opposing party to demonstrate why the proceeding should not

be dismissed for mootness" when a governmental litigant raises a mootness claim. *Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 206. However, such circumstances require—at minimum—a fact-dependent inquiry, and a Government attorney's say-so alone does not suffice to satisfy it. Several reasons support this conclusion.

First, the Government's attorneys frequently lack any actual authority to bind governmental bodies or elected officials—even though they commonly purport to have such authority while attempting to secure the dismissal of a plaintiff's claims. *See, e.g., Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) ("[W]e know of nothing that *requires* us to accept representations from the City's counsel under the circumstances presented here. To begin with, it is not at all clear what representations we received, if any. Second, it is not clear that counsel can bind either the legislative body of the City or its police department.").

Second, governmental officials can be, are, and often *must be* replaced in short order, and their replacements may and often do have different views on whether a challenged practice ought to resume. *Cf. Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (holding that interpretation of statute offered by Attorney General was not binding, because "he may change his mind about the meaning of the statute; and he may be replaced in office").

Third, most simply, counsel's statements "are not evidence." *See In re Estate of Dunlap*, No. W2009-00794-COA-R3-CV, 2010 WL 681352, at *3 (Tenn. Ct. App. Feb. 26, 2010) (citing *Oakes v. Oakes*, 235 S.W.3d 152,

158 (Tenn. Ct. App. 2007) (citation omitted) (holding that statements of counsel are not evidence); *Outpatient Diagnostic Center v. Christian*, No. 01 A. 01-9510-CV-00467, 1997 WL 210842, at *2 (Tenn. Ct. App. Apr.30, 1997) (noting that factual assertions in unverified pleadings, briefs, and arguments of counsel are not evidence)). As a result, statements by counsel are not admissible as evidence regarding—let alone conclusive of—whether a governmental defendant actually intends to "completely and permanently abandon[] []a challenged practice" such that it is "it is absolutely clear that the allegedly wrongful conduct cannot be reasonably expected to recur." *See Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 205–07.

To determine—as a matter of fact—whether a challenged practice has been permanently abandoned, though, evidence matters. Thus, where—as here—a governmental litigant insists that a case is moot on voluntary cessation grounds but concedes that a statutory change is only temporary, *see* Br. of Appellee at 12 ("The new provisions of METROPOLITAN CODE § 17.16.250(D) expire on January 27, 2023 'unless extended by resolution by the metropolitan council.'"), courts should require more than an attorney's say-so that the challenged practice will never resume again. Instead, courts should require a governmental litigant to come forward with actual, admissible evidence—a sworn affidavit from an appropriate witness, a formal stipulation authorized by the party, a legislative resolution disavowing enforcement, or some other evidence that actually demonstrates the Government's complete and permanent intention to abandon a challenged practice—before dismissing a case as moot.

Given that an assertion of voluntary cessation presents a fact-dependent claim that a reviewing court has lost subject matter jurisdiction, under appropriate circumstances, opposing parties should also be able to test a litigant's claim of voluntary cessation—including with discovery as necessary—in the same manner as other fact-dependent jurisdictional disputes. *See, e.g., First Cmty. Bank, N.A. v. First Tenn. Bank*, 489 S.W.3d 369, 406 (Tenn. 2015) ("we hold that determining whether to permit limited discovery prior to ruling on a motion to dismiss for lack of personal jurisdiction is an extremely fact-based determination that is best left to the discretion of the trial court."); *Midwestern Gas Transmission Co. v. Reese*, No. M2005-00805-COA-R3-CV, 2006 WL 468688, at *12 (Tenn. Ct. App. Feb. 24, 2006) ("a court's subject matter jurisdiction may be questioned in two ways—'facial' challenges or 'factual' challenges."). To offer an example of what such discovery might look like under the circumstances of this case, consider that Metro enforced the since-temporarily-repealed provision at issue in this case for many years. During the course of such enforcement, Metro may have filed suit—as it often does[18]—against violators in its Environmental Court and obtained permanent injunctions forbidding future violations of the challenged provision.

Under such circumstances, discovery revealing that Metro has not sought dissolution of injunctions that it obtained under the challenged provision would tend to undermine Metro's as-yet-untested

[18] *See, e.g., Metro. Gov't of Nashville & Davidson Cnty. v. Jones*, No. M2020-00248-COA-R3-CV, 2021 WL 1590236, at *1 (Tenn. Ct. App. Apr. 23, 2021), *appeal denied* (Oct. 14, 2021).

representation on appeal that "because the challenged provision has been repealed and replaced, it has been completely and permanently abandoned by the Metropolitan Government[.]" *See* Br. of Appellee at 29. Because courts have "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given[,]" *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), courts should also inquire into the factual bases for a claim of voluntary cessation—on their own, if necessary—before dismissing a plaintiff's case as moot. *Cf. Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction"); *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.").

For all of these reasons, whether a litigant has "completely and permanently abandoned a challenged practice" and "completely and irrevocably eradicated the effects of the alleged violation" are fact-dependent inquiries. *See Norma Faye Pyles Lynch Family Purpose L.L.C.*, 301 S.W.3d at 205–07; *Sullivan*, 920 F.3d at 410. As such, they must be supported by evidence before courts accept them, and a Government lawyer's say-so alone does not suffice. An opposing party must also be afforded the opportunity to test such factual claims—including with discovery, if necessary—before a motion to dismiss a plaintiff's complaint based on a claim of voluntary cessation is granted.

VI. CONCLUSION

For the foregoing reasons, this Court should **REVERSE**.

Respectfully submitted,

By: /s/ Daniel A. Horwitz

DANIEL A. HORWITZ, BPR #032176
LINDSAY E. SMITH, BPR #035937
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
(615) 739-2888

Counsel for Amicus Curiae

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-VI) contains 6,735 words pursuant to § 3.02(a)(1)(c), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of January, 2022, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

Lora Barkenbus Fox
Catherine J. Pham
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
lora.fox@nashville.gov
cate.pham@nashville.gov

Counsel for the Metropolitan Government

Jason I. Coleman (#031434)
1200 Clinton Street, # 205
Nashville, TN 37203
Tel: (615) 383-6431
Email: jason.coleman@beacontn.org

Paul V. Avelar* (AZ Bar #23078)
Keith E. Diggs* (AZ Bar #32692)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Email: pavelar@ij.org
Email: kdiggs@ij.org

Counsel for Plaintiffs/Appellants Elijah Shaw and Patricia Raynor