No. 25-10843

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KANDACE EDWARDS, ON BEHALF OF HERSELF AND THOSE SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

RANDOLPH COUNTY SHERIFF, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 3:17-cv-00321

BRIEF OF *AMICUS CURIAE* THE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION IN SUPPORT OF PLAINTIFF-APPELLANT

Elizabeth R. Cruikshank
Counsel of Record
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-4048
erc56@georgetown.edu

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case and were omitted from the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

1. The Institute for Constitutional Advocacy and Protection
2. Elizabeth R. Cruikshank
3. Seth Wayne

Pursuant to Fed. R. App. P. 26.1(a), amicus the Institute for Constitutional Advocacy and Protection is not a publicly held corporation and does not have any parent corporations. No publicly held corporation owns 10 percent or more of the stock of amicus. Amicus is not aware that any publicly held corporation has a direct financial interest in the outcome of this litigation.

/s/ Elizabeth R. Cruikshank
Elizabeth R. Cruikshank

Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Institute for Constitutional Advocacy and Protection ("ICAP") uses strategic legal advocacy to defend constitutional rights and values while working to restore confidence in the integrity of governmental institutions. A key area of ICAP's litigation and policy focus is reforming policing and criminal justice. ICAP attorneys regularly litigate cases against state and local governments involving unconstitutional pretrial detention practices, prison conditions, unfair fines and fees, and police misconduct. In ICAP's work, government defendants regularly implement new rules, laws, or policies after being sued, and then seek dismissal on mootness grounds. ICAP's clients and mission rely on courts' faithful implementation of justiciability doctrines, including the voluntary cessation standard, to ensure that challenged unconstitutional practices do not resume once litigation is dismissed. ICAP accordingly has a significant interest in this case.[1]

[1] No party's counsel authored this brief in whole or in part. No person, other than amicus curiae's counsel, funded the preparation or submission of this brief. All parties consented to the filing of this brief.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing Plaintiff's claims because it found it was limited to reviewing the face of the bail policy introduced after this litigation was initiated despite having made factual findings that Defendants were not prevented from returning to their prior conduct.

SUMMARY OF ARGUMENT

The Supreme Court has long been concerned about civil defendants claiming to have stopped challenged conduct to avoid liability, only to resume as soon as the case is dismissed. The voluntary cessation doctrine limits this gamesmanship by requiring defendants who claim their post-lawsuit changes have mooted the case to prove the challenged conduct will not recur. Otherwise, the legality of the original conduct remains within the court's jurisdiction. That longstanding doctrine is an important tool to settle unresolved legal questions and ensure defendants do not improperly evade judicial review.

Here, Defendants unilaterally promulgated a new bail rule after being sued over their bail practices and then moved to dismiss claiming mootness. The district court found that the circumstances surrounding the introduction of the new rule presented a significant risk the originally challenged conduct would recur. Nevertheless, it interpreted *Schultz v. Alabama*, 42 F.4th 1298 (11th Cir. 2022), to require it to engage in a new type of review that differs from the voluntary cessation framework.

Specifically, the district court concluded that although Defendants are at risk of continuing or returning to their old practices, the case is moot as to those practices. Instead, once defendants introduce a new policy, *Schultz* limits the court to reviewing the face of that rule, voluntary cessation doctrine notwithstanding. But

Schultz does not control. The *Schultz* analysis was based on *Pugh v. Rainwater*, 483 F.3d 778 (5th Cir. 1973), an earlier decision about pretrial detention practices. In *Rainwater*, however, this Court addressed a situation where the Florida Supreme Court had enacted a new statewide rule by legislative process, and this Court implicitly assumed that the challenged conduct would not recur.

By contrast, in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), this Court found that a new, hastily issued bail order promulgated by a single defendant was insufficient proof that the challenged bail practices would not resume following dismissal. Therefore, the lawsuit against the original practices was not moot, and it was within the district court's jurisdiction to enjoin those practices. The same is true here, and *Walker* controls.

Should the district court's approach be affirmed, defendants would be empowered to avoid judicial review by claiming changed policies without proving that the prior conduct could not recur, or ever stopped in the first place, severely limiting the ability of public-interest organizations to hold government entities accountable for violating the Constitution. This is precisely what the voluntary cessation doctrine was designed to prevent.

STATEMENT OF THE CASE

In May 2017, Kandace Kay Edwards filed this lawsuit on behalf of a putative class, alleging that Defendants' bail practices violate the rights of indigent people arrested in Randolph County by requiring those unable to pay bail to remain in jail for weeks before being heard about whether they should be released pending trial. Ms. Edwards, an Army National Guard veteran, was nearly eight months pregnant when she was jailed for being unable to pay a $7,500 bond after being accused of forging a $75 check. Doc. 129 ¶33. Facing weeks in jail because of her indigency, Ms. Edwards filed suit the day after her arrest.

In September 2017, shortly after their first motions to dismiss were denied, Defendants issued a new "Standing Order Regarding Pre-Trial Appearance, Establishment of Bonds in Advance of Initial Appearance, and Individualized Determinations of the Necessity and Ability to Post Bond" ("Standing Order"). On the very same day, they filed new motions to dismiss. Docs. 67 & 69. Defendants made clear that the Standing Order was issued in response to this lawsuit. Doc. 67 at 27. Nevertheless, they argued—without having engaged in any discovery about their practices—that the district court was limited to considering the procedures outlined in the Standing Order, and that those procedures both satisfied constitutional scrutiny and mooted the case. *Id.* at 25. That motion was denied in

March 2018, Doc. 97, and after additional litigation the case was stayed pending resolution of *Schultz v. Alabama*, 42 F.4th 1298 (11th Cir. 2022).

In *Schultz*, the defendants had similarly issued a new standing bail order after being sued over pretrial detention practices. *Id.* at 1320. In granting a preliminary injunction, the district court observed that "[t]he parties have conformed their evidence, and the Court conforms its analysis, to [defendants'] new pretrial procedures." *Schultz v. State*, 330 F. Supp. 3d 1344, 1349 n.1 (N.D. Ala. 2018), *rev'd and remanded*, 42 F.4th 1298. In that posture, this Court decided that the plaintiff's challenge to the defendants' *former* practices was moot. *Id.* (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1055, 1058 (5th Cir. 1978)). It further opined the case *as a whole* was not moot in light of voluntary cessation principles, *id.* at 1321 (citing *Walker v. City of Calhoun*, 901 F.3d 1245, 1270 (11th Cir. 2018)), and it retained jurisdiction to evaluate the facial constitutionality of the new standing bail order. *Id.* at 1321.

After *Schultz*, Defendants here filed new motions to dismiss, Docs. 190 & 191, the Judicial Defendants arguing that under *Schultz*, Ms. Edwards had standing only to challenge the facial validity of the Standing Order. Doc. 191 at 9-12. Defendants contended that they were not obligated to show a change in actual practices under the Standing Order and that Plaintiff was not entitled to develop the record. *Id.* at 11-12. The direct implication of their argument is that the mere

existence of the Standing Order was sufficient to insulate their past or present *practices* from constitutional scrutiny unless a new plaintiff filed a new lawsuit. Plaintiff responded that the court should not consider the Standing Order without giving her the opportunity to test Defendants' compliance with the Order through discovery. Doc. 194 at 12-13.

The district court agreed with Defendants. It concluded that *Schultz* limited constitutional challenges to bail practices "to facial constitutional challenges to the operative Standing Order *if* that order was promulgated *after* the initiation of the suit and the plaintiff was *not* detained pursuant to that new order." Doc. 208 at 24-25 (emphasis in original). Per the district court, Ms. Edwards (and therefore the class) lacked standing to bring as-applied challenges to the Standing Order. *Id.* at 27. It therefore dismissed "any and all pattern, practice, policy, or procedure claims to the bail system that do not directly target the facial terms of the new 2017 Standing Bail Order." *Id.* at 31. Evaluating that Order,[2] the district court found it constitutionally

[2] In facially reviewing the Standing Order, the district court followed *Schultz* and required Plaintiffs to show there is "no set of circumstances" where the law would be valid. Doc. 208 at 25 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The indiscriminate use of this test in constitutional challenges should be rejected. As the Supreme Court has repeatedly recognized since *Salerno*, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. EEC*, 558 U.S. 310, 331 (2010); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (warning courts deciding facial challenges not to "speculate about 'hypothetical' or 'imaginary' cases"); *City of Chicago v. Morales*, 527 U.S.

sound. Notably, the court denied Plaintiff's Sixth Amendment right-to-counsel claim because although the Standing Order did not provide for the appointment of counsel at bail hearings, it did not *prohibit* counsel from appearing. *Id.* at 51-52.

ARGUMENT

The district court fundamentally misapplied foundational principles of standing and mootness. It also misapplied this Court's precedent. If the district court's interpretation of the rules governing mootness and standing in the context of voluntary cessation were affirmed, this approach would undermine over a century of Supreme Court precedent and existentially threaten equitable suits seeking to curb illegal government action and potentially any suit seeking to enjoin unlawful conduct.

41, 55-56 n.22 (1999) (if there is "a clear standard for facial challenges, it is not the *Salerno* formulation," and it is "doubtful" it would be appropriate for a federal court to apply the *Salerno* standard in any case); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012) ("The idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority.") (collecting cases).

Indeed, this Court has acknowledged that the "no set of circumstances" language is merely "a description of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1256 (11th Cir. 2022) (quoting *Doe*, 667 F.3d at 1123). That is, "the question *Salerno* requires [the court] to answer is whether" a challenged statute "fails the relevant constitutional test," not whether there is some "hypothetical situation" in which the challenged law "could be validly applied." *Id.* Nevertheless, the misuse of the *Salerno* standard in this case and others has stubbornly persisted.

I. The Voluntary Cessation Doctrine Was Created to Prevent This Outcome.

The Supreme Court has long been aware of the risk that defendants will seek to evade judicial review by claiming to have stopped whatever conduct a plaintiff has challenged in litigation. For more than a century the Court has maintained the voluntary cessation doctrine to mitigate that risk. By concluding that standing, rather than mootness, provided the appropriate framework under which to consider Defendants' revised Standing Order, the district court fundamentally erred.

Standing and mootness go hand in hand. Standing requires a plaintiff to show that she suffered an injury that is traceable to the defendant's conduct and that a favorable decision from the court would redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Article III standing must be determined as of the time at which the plaintiff's complaint is filed." *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003). But the Article III question changes after the litigation is initiated. *Id.*

That is where mootness comes into play. The Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 288, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)). Thus, a plaintiff must have

standing based on the facts when the lawsuit is filed, but whether the plaintiff may maintain the lawsuit in light of changed factual circumstances after the lawsuit commences is a mootness question.

A particular category of changed factual circumstances is relevant here: the situation that arises when a defendant claims to have ceased the challenged conduct after being sued. In such circumstances, it is "well settled" that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the illegality of the practice." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). The voluntary cessation rule is "designed to prevent gamesmanship." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016).

More than a century of case law illustrates the kinds of circumstances under which the voluntary cessation doctrine applies and the harms it prevents. In 1897 the Supreme Court considered whether an antitrust case against a railroad association should be dismissed because the association was dissolved after the lawsuit was initiated. *See United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 307 (1897).

The Court concluded that the dissolution did not deprive it of jurisdiction to consider the case on its merits, because the suit asked the court not only to dissolve the association but also to rule on its legality and enjoin the defendants from forming other, similar associations in the future. *Id.* at 308. Since the defendants in that case did not "admit to the illegality" of their conduct at the time the complaint was filed, dismissal was inappropriate. *Id.* The Court opined that if getting rid of the association alone would defeat suit, defendants could simply dissolve and re-form their association whenever challenged, thereby "discover[ing] an effectual means to prevent the judgment of this court being given upon the question really involved." *Id.* at 309.

In the mid-20th century, the Court addressed a challenge to split-day contracts that allowed employers to avoid paying overtime. Before trial, the respondent stopped using those contracts and adopted different compensation plans. The Court found that this development did not eliminate its jurisdiction to consider the challenge because "a controversy between the parties over the legality of the split-day plan still remains." *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944). Although the practice was discontinued, the respondent had "consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." *Id.* Accordingly, there was "an

actual controversy, and adverse interest," "with a subject-matter on which judgment of the court can operate." *Id.*

The Court elaborated upon this principle in another case from the same era:

> [V]oluntary 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. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (citations omitted). Although the challenged activities had ceased, the Court retained authority to provide a remedy: "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *Id.* at 633.

Thus, it is initially "the plaintiff's burden ... to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Afterward, if the defendant changes its conduct during the litigation, it "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*; *see also W.T. Grant*, 345 U.S. at 633 (defendant bears "heavy" burden to prove mootness through voluntary cessation).

That burden "holds for governmental defendants no less than for private ones." *FBI v. Fikre*, 601 U.S. 234, 241 (2024). That does not mean defendants cannot cure illegal conduct voluntarily. Indeed, it benefits everyone if malfeasants take heed of unlawful activity identified in lawsuits and stop before being ordered to do so. But to prevent gamesmanship, when such a cure is claimed, a defendant must do more than say it no longer is committing misconduct—it must show it.

This Court has found that "governmental entities and officials have ... considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities," *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017), where a plaintiff challenges a "statute, ordinance, rule, or policy" that the government has subsequently "formally rescinded." *See Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1268 (11th Cir. 2020). Accordingly, if a "challenged statute[] or other similar pronouncement" has been officially repealed, this Court weighs several factors to determine whether there is a "reasonable expectation" that "the government defendant will reverse course and reenact the repealed rule." *Id.* (quoting *Flanigan's*, 868 F.3d at 1256) (internal quotation marks omitted).

But this grant of goodwill to government defendants is, and ought to be, a narrow one. It is limited to circumstances where the government has "formally rescinded" the official pronouncement, necessarily satisfying its burden of making

it "absolutely clear that the allegedly wrongful behavior … could not reasonably be expected to recur." *Id.* (quoting *Flanigan's*, 868 F.3d at 1256).

This is for good reason: The government is not immune from the precise gamesmanship the Supreme Court has been concerned about since the 19th century. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 720 (2022) (denying mootness to government defendant where it retained the authority to impose its previous regulation and continued to defend its prior approach); *United States v. Sanchez-Gomez*, 584 U.S. 381, 386 n.1 (2018) (finding government defendant's decision to rescind policy did not moot case because it admitted it would reinstate if not bound by the court's rule); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 n.1 (2017) (finding case not moot because state agency could resume its prior discriminatory practices); *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561-63 (D.C. Cir. 2016) (finding government defendant had not established mootness because it was withholding lawful remedy from applicants who litigated against it). Indeed, commentators have found that government defendants "frequently seek to worm their way out of bad precedent by strategically mooting cases that they fear they are likely to lose." Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J. F. 325, 329 (2019). Jurists, too, have decried misapplication of mootness doctrines to allow government defendants to avoid accountability:

> Just stop engaging in the challenged conduct, declare that there's no need for an injunction, and see if enough compliant and deferential judges agree. ... It shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens, fundamental constitutional freedoms frequently suffer as a result.

Tucker v. Gaddis, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring); *see also, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 340 (2020) (Alito, J., dissenting, joined by Gorsuch, J., and Thomas, J.) (mootness decision in favor of government defendants "permits [the Supreme Court] docket to be manipulated in a way that should not be countenanced"); *Hawse v. Page*, 7 F.4th 685, 698 (8th Cir. 2021) (Stras, J., dissenting) (criticizing mootness finding for government defendant who "reserved the right" to impose new restrictions).

However the standard is applied, the voluntary cessation rule is a necessary bulwark to avoid granting defendants "an effectual means to prevent the judgment of th[e] court being given upon the question really involved." *Trans-Mo. Freight*, 166 U.S. at 309. Unless a defendant who claims to have changed its ways after being sued proves it cannot revert to its old practices, those old practices are within a federal court's jurisdiction to adjudicate, and within its power to enjoin.

II. This Court's Decision in *Walker*, Not *Schultz*, Controls.

This Court is no stranger to this concern. Indeed, this Court previously recognized the applicability of the voluntary cessation doctrine to pretrial detention in *Walker*, another case in which the defendants issued a new standing order while the litigation was in progress. In the later *Schultz* case, however, the panel improperly imported standing considerations into a context in which mootness doctrines ought to have governed, confusing the analysis. In so doing, it relied on an earlier opinion addressing pretrial detention practices, *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).[3] But in *Rainwater*, the challenged conduct became moot only after the state supreme court promulgated a new statewide rule resulting from extensive legislative process and deliberations, *id.* at 1055 n. 1—a very different factual situation from the instant case. *Walker* is the relevant binding precedent here, and *Schultz*, which is irreconcilable with it, does not control.

In *Rainwater*, following commencement of a class action challenging bail practices, the Florida Supreme Court—after extensive deliberations, including committee presentations by plaintiffs' counsel—adopted a new statewide rule of criminal procedure that resolved many of the plaintiffs' objections. *See* 572 F.2d at 1055 n.1. Accordingly, the Fifth Circuit decided that a ruling on the former practices

[3] "[D]ecisions of the United States Court of Appeals for the Fifth Circuit" handed down before September 30, 1981, are "binding as precedent in the Eleventh Circuit." *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

had "lost its character as a present, live controversy and [wa]s therefore moot." *Id.* at 1058. In so doing, it relied upon three other cases where statewide legislative action changing the challenged statutory regime mooted the case. *See id.* (citing *Kremens v. Bartley*, 431 U.S. 119 (1977); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412 (1972); and *Hall v. Beals*, 396 U.S. 45 (1969)). It therefore determined that because the new rule was facially constitutional, "further adjudication of the merits of a constitutional challenge ... should await presentation of a proper record reflecting [its] application." *Id.*

Critically, in none of those cases—*Rainwater*, *Kremens*, *Diffenderfer*, or *Hall*—did the court reference voluntary cessation doctrine or analyze whether the defendants might resume their prior practices. It was implicit in each case that, because the rule change resulted from official legislative enactments, the challenged regime had been fundamentally altered. *C.f., e.g.*, *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("a statutory change … is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed" unless "it is virtually certain that the repealed law will be reenacted"). *Rainwater*'s judgment was directed at that factual circumstance and thus did not purport to modify the voluntary cessation rule. It has no bearing on situations like this one, where a court has made findings that the circumstances surrounding adoption of a new rule create a high risk prior practices

will resume. *Edwards v. Cofield*, 301 F. Supp 3d 1136, 1142-44 (M.D. Ala. 2018) (finding "a sufficiently reasonable expectation ... that Defendants will revert to their earlier challenged conduct if their motion to dismiss is granted").

In *Walker*, on the other hand, this Court applied the *Flanigan's* test for governmental voluntary cessation and found it compelling that the bail process there was shrouded in secrecy and not changed by legislative act but instead on the whim of a single judge. *Walker*, 901 F.3d at 1270-71 (citing *Flanigan's*, 868 F3d at 1248). Unlike in *Rainwater*, the risk that the challenged activity could resume after the litigation ended was too high to justify mootness. This Court thus stated that the "challenge to the original bail policy was not moot," and "the district court therefore did not err in declaring the original bail policy to be unconstitutional, and accordingly may enjoin the City's future use of that policy." 901 F.3d at 1271. Just as the Supreme Court has maintained for decades, "the court's power to grant injunctive relief survive[d] discontinuance of the illegal conduct," *W.T. Grant*, 345 U.S. at 633. *Rainwater* and *Walker* are therefore perfectly coherent.

The district court in this case, however, reached a contradictory conclusion: that despite the likelihood that Defendants will return to their prior practices, Ms. Edwards's claims against things prior to the issuance of the Standing Order are moot, and she is limited to challenging the face of the new policy. *See* Doc. 208 at 48. This deviation appears to stem from a misreading of *Rainwater* and *Walker* by the

majority in *Schultz*. Because the district court in *Walker* had enjoined the *new* policy *in addition* to the original challenged practices, this Court determined that it should review that aspect of the injunction as well. Finding that the new policy was facially constitutional, it held that while an injunction against the old practices was within the district court's power, an injunction against the new policy was not. *Walker*, 901 F.3d at 1272. That makes sense. The risk that defendants could return to their old practices cannot justify enjoining a new policy that is facially lawful. The remedy is to enjoin only the prior unconstitutional conduct, as *Walker* recognized.

In *Schultz*, however, the panel majority muddied these issues. The confusion appeared to stem from a dispute about whether the intervenor was bringing a facial or as-applied challenge to the bail system. Addressing this disagreement, the majority held that the intervenor could not "trace his injury to the current operative bail system, and thus may not challenge it on an as-applied basis." *Schultz*, 42 F.4th at 1319. It then decided that the intervenor's challenge should be construed as a facial challenge to the *new* bail system. *Id.* The panel majority found that Article III standing principles demanded that any challenge to the new policy be limited, as it was in *Rainwater* and *Walker*, to its actual language. It *then* proceeded to apply the test for mootness and voluntary cessation, and it found that there was a substantial risk that defendants would resume their prior challenged conduct. Accordingly, it

determined that its jurisdictional power over the case (exclusively construed as a facial challenge to the new policy) remained.[4]

The majority in *Schultz* cited *Walker*'s mootness holding only tangentially. *Walker* evaluated whether the new policy made its review of the *original* challenged practices moot (and found it did not, in line with decades of Supreme Court precedent). 901 F.3d at 1271. The majority in *Schultz*, on the other hand, having already found the case moot as to the challenged practices, cited *Walker* to justify its conclusion that mootness did not prevent it from ruling on the facial constitutionality of the *new* policy (which the plaintiffs' complaint had not challenged). 42 F.4th at 1320. That conclusion defies logic. The case was not moot in *Schultz* because, unlike in *Rainwater*, the panel found that the defendants there might continue or return to their old practices despite the new rule. *See* 42 F.4th at 1321 (favorably citing *Walker*'s holding that the defendants were not prevented from reverting to their old policy). And if the defendants might return to their old practices, the district court should have been able to assess whether *those practices*

[4] Crucially, *Schultz*'s holdings appear to be premised on the assumption, without evidence, that the new bail policy had in fact modified defendants' behavior. *See, e.g.*, 42 F.4th at 1321 (describing the challenged bail practices as "defunct"). That assumption necessarily underlies the majority's finding, seemingly on principles of redressability, that the intervenor's challenge to the original bail procedures was moot and that standing existed only as to the face of the new bail policy. But it is directly contradicted by the finding later in the same opinion that voluntary cessation principles prevented mootness, which was not the case in *Rainwater*.

were illegal and issue any appropriate relief. That is what the Supreme Court meant when it said that "the voluntary abandonment of a practice does not relieve a court of adjudicating its legality." *Gray v. Sanders*, 372 U.S. 368, 376 (1963). Of course, a court could also look at the new policy to see if it was facially lawful when determining the scope of relief; but the fact that it was also empowered to consider the new policy did not bear on whether it had jurisdiction to assess any of the originally challenged practices. *See City of Mesquite*, 455 U.S. at 289 (abandonment of a challenged practice is a prudential consideration "bearing on the question of whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.")

The majority in *Schultz* did not address that incongruity. Nor did it overrule *Walker*'s holding that, whatever the new policy said, the old practices were unconstitutional and a return to them could be properly enjoined. For those reasons, *Schultz* is irreconcilable with *Walker* and does not control this case. *See, e.g.*, *Rodemaker v. City of Valdosta Bd. of Educ.*, 110 F.4th 1318, 1326 (11th Cir. 2024) (where sequential precedential circuit decisions cannot be reconciled, the "well-established approach to resolving conflicts in [circuit] precedent" is to follow "the earliest precedent that reached a binding decision on [an] issue" (quoting *Washington v. Howard*, 25 F.4th 891, 899 (11th Cir. 2022))). *Rainwater* also does

not control because it involved a legislative enactment of the new rule, making it highly unlikely that the defendants might return to their prior conduct. The relevant portion of *Walker*, which was ignored by the district court here, provides the applicable framework, and *Schultz* should be confined to its facts.

III. Applying the Framework in *Walker* and Controlling Supreme Court Precedent, This Case Should Proceed.

This case is not moot because Defendants cannot meet their "formidable burden of showing that it is absolutely clear" they could not and would not continue or resume their prior unlawful practices. *Friends of the Earth*, 528 U.S. at 190. The Standing Order was issued by a single Defendant, not as part of a legislative process, after the litigation was initiated. There is no evidence Defendants are prevented from continuing or returning to their prior practices.[5] The district court, in fact, found a substantial risk of exactly that. *Edwards*, 301 F. Supp 3d at 1142-44. Following *Walker* and over a century of Supreme Court precedent, Ms. Edwards should be allowed to proceed with her challenge to the bail practices that caused her alleged unlawful detention and, if they are found to be unconstitutional, secure forward-

[5] Plaintiff has consistently argued that "factual development will show that Randolph County's actual bail practices do not conform with the 2017 Standing Bail Order and that this order does not otherwise replace or meaningfully change the bail system that existed in Randolph County prior to its enactment." Doc. 208 at 16.

looking equitable relief prohibiting Defendants from continuing or returning to those practices.

To find otherwise would negate the voluntary cessation rule. To put it simply, here is what happened: Ms. Edwards, a private individual, believed the government was violating her constitutional rights (and those of other similarly situated people). She brought suit to stop the government from continuing to do so.[6] The government, after unsuccessfully trying to dismiss the case for other reasons, presented the district court with a new policy concocted by a single defendant and said it would act differently in the future. It then argued that it need not provide any proof about what it was, in fact, doing. Instead, whether or not the government had actually stopped violating the law, it claimed that its new policy bound the court to consider only Ms. Edwards's arguments as applied to the face of that document, not what was happening in the real world. The district court, citing *Schultz*, agreed. *See* Doc. 208. at 32 ("*Schultz* requires that a county's new standing bail order be the anchor for challenges to a county's bail system irrespective of any evidence as to the validity, veracity, and implementation of such an order.").

This approach is dangerous and undermines the longstanding principles of voluntary cessation. Under the district court's analytical framework, a defendant

[6] Ms. Edwards was released but remained class representative because of the inherently transitory nature of pretrial detention. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991).

would no longer have to show that it could not return to its prior conduct, or even that it had actually stopped that conduct in the first place. Nor could plaintiffs make any showing on that question. Defendants would have only to present a new rule, policy, or governing document that purported to require a change in policy. Once it did so, discovery would halt, facts would become inconsequential, and judicial review would be strictly confined to the face of that document. *See* Doc. 208 at 39 n.11 ("[U]nder *Schultz*'s jurisdictional logic, practice and custom evidence is irrelevant.").

That is true even if, as here, the plaintiff challenged defendants' actual practices and not a prior formal policy. Indeed, it would appear to apply even if the challenged practices *violated* a prior rule the same defendants had promulgated. Any doubts about the value of the new document—say, if it were drafted by a single defendant immediately after losing a motion to dismiss with the admitted purpose of defeating the litigation—would bear on whether mootness barred the court from hearing the case at all, but would not permit the court to look beyond the document's four corners.

In short, the district court's rule means that a defendant can successfully defeat a class action challenging even flagrantly illegal conduct by issuing a new document—after it is sued—that on its face requires lawful action in the future. Because no plaintiff can maintain standing to challenge anything outside the face of

the new rule and the government need not show any actual proof of changed behavior, dismissal would occur as a matter of course. That is, the new rule would prevail even if the defendant continued acting illegally without skipping a beat. Although the district court interpreted *Schultz* as somehow limited to cases challenging unlawful pretrial detention, there is no principled way to distinguish that context from any other in terms of federal court jurisdiction. Defendants would have a new "powerful weapon against public law enforcement." *W.T. Grant*, 345 U.S. at 932.

The Supreme Court cases establishing the voluntary cessation doctrine would have been resolved very differently under the district court's rule. In *Walling*, for example, had the Court applied the district court's rule, it would not have had jurisdiction to invalidate the illegal split-day contracts because the defendants had adopted new compensation plans after the suit was filed. 323 U.S. at 44. The Court would be limited by standing principles to assessing the face of those new compensation plans. Of course, that is not what it held. As far as amicus is aware, the district court's approach in this case looks nothing like the analysis in any of the many Supreme Court decisions about voluntary cessation. *See, e.g.*, *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 309 (1986) (ruling on "original" challenged union fee collection procedure and finding it unconstitutional despite union adopting new escrow protocol during the case); *City of Mesquite*, 455

U.S. at 290 (ruling that language legislatively removed from ordinance during the case was constitutionally valid).

Defendants may argue that nothing in the district court's scheme would prevent another plaintiff affected by the same illegal activities after the Standing Order was issued from filing a new suit. But upon being served a second complaint challenging the very same conduct, the government could once again issue a new, revised document promising again to act lawfully, and once more secure dismissal. As that cycle repeated, the government would evade accountability ad infinitum. Indeed, the analysis mandated by the district court would deprive federal courts of jurisdiction even if the government's open, avowed, and sole reason for enacting a rule were to moot the plaintiff's case and continue violating the rights of would-be class members. Defendants would have an "effectual means to prevent the judgment of this court being given upon the question really involved in this case." *Trans-Mo. Freight*, 166 U.S. at 309.

This doctrine would significantly curtail all types of federal court litigation, but would be particularly destructive to the kinds of public interest litigation pursued by organizations like the undersigned amicus. Amicus regularly brings civil rights claims against jurisdictions that subsequently proclaim to have modified their conduct based on a new procedure, rule, or policy promulgated during the course of the litigation, even when defendants maintain the legality of the original challenged

activities. In some cases those new promulgations have substantially resolved the conduct that prompted the plaintiffs' complaints; in others they have not. As is to be expected, the government's actions do not always match what it claims to be doing on paper. And even when they do, they may not remain so in perpetuity. Therefore, it is important in such circumstances that federal courts maintain their power to dictate what the Constitution requires. Only then can "the public interest in having the legality of the practices settled," *W.T. Grant*, 345 U.S. 932, be vindicated.

CONCLUSION

For the reasons set forth above, amicus urges that the district court's order be reversed.

Respectfully submitted,

Elizabeth R. Cruikshank
Counsel of Record
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 662-4048
erc5@georgetown.edu
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on June 27, 2025, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Elizabeth R. Cruikshank
Elizabeth R. Cruikshank

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i), and 11 Cir. R. 32-4 because it contains 6396 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 11 Cir. R. 32-3 because it has been prepared in a proportionally spaced typeface using Microsoft Word (14-point Times New Roman), and is double-spaced.

/s/ Elizabeth R. Cruikshank
Elizabeth R. Cruikshank