Case No. 24-2080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.N., ET AL.,
Plaintiffs-Appellants,

v.

OREGON DEPARTMENT OF EDUCATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
Case No. 6:19-cv-00096-AA (Hon. Ann Aiken)

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MONTANA, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEVADA, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF IDAHO, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA IN SUPPORT OF PLAINTIFFS-APPELLANTS

BRAUNHAGEY & BORDEN LLP

Matthew Borden, Esq. (SBN: 214323)
borden@braunhagey.com
747 Front Street, 4th Floor
San Francisco, California 94111
Tel.: (415) 599-0210

Tabitha Cohen, Esq. (SBN: 5658000)
cohen@braunhagey.com
118 W. 22nd Street, 12th Floor
New York, NY 10011
Tel.: (646) 829-9403

Attorneys for Amici Curiae ACLU Foundation of Oregon, ACLU Foundation of Montana, ACLU Foundation of Nevada, ACLU Foundation of Northern California, ACLU Foundation of Idaho, ACLU Foundation of Washington, and ACLU Foundation of Arizona

CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Civil Liberties Union Foundation of Oregon, American Civil Liberties Union Foundation of Montana, American Civil Liberties Union Foundation of Nevada, American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation of Idaho, American Civil Liberties Union of Washington, and American Civil Liberties Union Foundation of Arizona, are non-profit entities that have no parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation of Oregon ("ACLU of Oregon"), American Civil Liberties Union Foundation of Montana ("ACLU of Montana"), American Civil Liberties Union Foundation of Nevada ("ACLU of Nevada"), American Civil Liberties Union Foundation of Northern California ("ACLU of NorCal"), American Civil Liberties Union Foundation of Idaho ("ACLU of Idaho"), American Civil Liberties Union Foundation of Washington ("ACLU of Washington"), and American Civil Liberties Union Foundation of Arizona ("ACLU of Arizona") are state affiliates of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embedded in the United States Constitution. Founded in 1920, the ACLU and its affiliates have long defended access to the courts and individual rights and liberties, including with respect to protecting the constitutional rights of students with disabilities.

Amici's interest in this case stems from their deep commitment to ensuring that all people, including students with disabilities, are provided with access to the

[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, nor any person other than *amici* and their members, contributed money to the preparation and submission of this brief. All parties have consented to the filing of the brief of *Amici Curiae*.

courts to litigate cases or controversies that impact their lives, rights, and wellbeing.

Amici Curiae ACLU of Oregon, ACLU of Montana, ACLU of Nevada, ACLU of NorCal, ACLU of Idaho, ACLU of Washington, and ACLU of Arizona respectfully submit this brief in support of Appellants J.N., et al.

INTRODUCTION

Amici are civil rights organizations that, among other things, bring impact litigation to enforce important constitutional and statutory rights. Cases *Amici* were involved in include *Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817 (9th Cir. 2020) (First Amendment right to report on protests), *Betschart v. State of Oregon*, 103 F.4th 607 (9th Cir. 2024) (Sixth Amendment right to counsel), *McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024) (First Amendment right to provide medical information about COVID-19), *Watters v. Otter*, 986 F. Supp. 2d 1162 (D. Idaho 2013) (First Amendment right to protest), *McCleary v. State*, 173 Wash. 2d 477 (2012) (adequacy of state funding for K-12 education), and *Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929 (N.D. Cal. 2015) (ADA and disability rights in prison). While each of these cases involved diverse facts and rights, in each one, the government argued that the case was moot in light of legal changes it made during the pendency of the litigation.

State governments are repeat litigants that have the unique ability to enact legislation during the pendency of litigation. Deploying this power has become an increasingly favored tactic by states seeking to elude the reforms sought by *Amici*

and to avoid adverse precedential opinions in plaintiffs' favor—the antithesis of *Amici*'s goals of enforcing important rights and creating binding precedent. If allowed to stand, the lower court's ruling would empower and encourage such behavior. This case thus presents an important issue for public interest organizations of all persuasions: can a state government moot litigation against a state agency by passing legislation during the pendency of a case, when the legislation provides less effective relief than the plaintiff would receive in litigation?

In *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024), the Supreme Court affirmed the "virtually unflagging obligation" of the federal courts to resolve cases and controversies before them, unless subsequent events provide the plaintiff "all the relief he might have won" in litigation. *Id*. at 240. Even under the most benign circumstances, broad legislative dictates, no matter how well-intentioned, can rarely provide the same relief as a concrete injunction against a state agency because it is often unknowable what effect legislation will have in reality, or if and how it will be enforced, and any relief may take years. When a state agency suddenly reverses field after vehemently resisting compliance with federal law, as the Oregon Department of Education ("ODE") did here, true mootness is even more doubtful. Nothing could be more profound than the realities in this case, where after five years of litigation and legislation that supposedly

mooted it, hundreds of students in Oregon are still receiving limited in-class instruction per day and enduring the same violations of the IDEA and ADA that spurred the underlying lawsuit.

Relaxing the heavy mootness standard, as the district court did here, is contrary to Article III and will have profound effects beyond this particular case. It will frustrate the missions of public interest groups, hinder the development of the law, and waste judicial and party resources on iterative lawsuits. For all these reasons, this Court should reverse the decision below.

AMICI CURIAE

Amici Curiae ACLU of Oregon, ACLU of Montana, ACLU of Nevada, ACLU of NorCal, ACLU of Idaho, ACLU of Washington, and ACLU of Arizona, are non-profit organizations that seek to protect individuals' access to the Courts to protect and preserve their rights.

Amicus ACLU of Oregon is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Oregon, including by defending and advancing the principles embodied in the U.S. and Oregon constitutions. Cases in which the ACLU of Oregon has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *Index Newspapers LLC v. United*

States Marshals Service, 977 F.3d 817 (9th Cir. 2020) and *Betschart v. State of Oregon*, 103 F.4th 607 (9th Cir. 2024).

Amicus ACLU of Montana is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Montana, including by defending and advancing the principles embodied in the U.S. and Montana constitutions. Cases in which the ACLU of Montana has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *Yellow Kidney, et al. v. Montana Office of Public Instruction, et al.*, No. DDV-21-0398 (Cascade Cnty. Mont. filed July 22, 2021).

Amicus ACLU of Nevada is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Nevada, including by defending and advancing the principles embodied in the U.S. and Nevada constitutions. Cases in which the ACLU of Nevada has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *Doe v. Elko Cnty*., No. 3:13-CV-00165-LRH, 2014 WL 56139, at *1 (D. Nev. Jan. 6, 2014).

Amicus ACLU of NorCal is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of California, including by defending and advancing the principles

embodied in the U.S. and California constitutions. Cases in which the ACLU of NorCal has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024) and *Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929 (N.D. Cal. 2015).

Amicus ACLU of Idaho is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Idaho, including by defending and advancing the principles embodied in the U.S. and Idaho constitutions. Cases in which the ACLU of Idaho has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *Watters v. Otter*, 986 F. Supp. 2d 1162 (D. Idaho 2013).

Amicus ACLU of Washington is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Washington, including by defending and advancing the principles embodied in the U.S. and Washington constitutions. Cases in which the ACLU of Washington has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *McCleary v. State*, 173 Wash. 2d 477, 540 (2012).

Amicus ACLU of Arizona is a statewide non-profit and non-partisan public interest organization whose mission is to support and protect civil liberties within the state of Arizona, including by defending and advancing the principles embodied in the U.S. and Arizona constitutions. Cases in which the ACLU of Arizona has participated in which the government defendant asserted mootness based on a mid-litigation change in legislation or policy include *Toomey v. Arizona*, No. 4:19-CV-00035-RM-MAA, 2023 WL 6377273, at *6 (D. Ariz. Sept. 29, 2023).

Amici have a strong interest in ensuring that the mootness doctrine is not interpreted in a way that procedurally denies individuals *Amici* represent with meaningful opportunities to pursue their cases and obtain relief.

ARGUMENT

No matter how well-intentioned the Oregon legislature may have been in passing S.B. 819, the legislation does not fully remedy plaintiffs' harms. The lower court did not amply consider whether S.B. 819 would provide plaintiffs with the same relief they would have obtained through litigation. Adopting this relaxed mootness standard will enable other state actors to avoid accountability by making mid-litigation legislative or policy changes that do not actually remedy plaintiffs' claims.

States often try to moot litigation through the enactment of legislation or policies mid-litigation to escape having to make the changes requested by the

plaintiff and to avoid making precedent that will foreclose future rights violations by the state. *See* Austin Deramo, *Manufactured Mootness: How the Supreme Court's Decision in New York State Rifle & Pistol Association Highlights the Need for Congress to Define the Term "Prevailing Party",* 16 Liberty U.L. Rev. 273, 288-89 (2022). Because states enjoy immunity from damages, impact litigation seeking injunctive and declaratory relief is often the target of government efforts to strategically moot claims during the pendency of litigation. 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. 325, 325 (2019); Catherine Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLS L. Rev. 1087 at 1092, 1120-21 (2007); Deramo, *supra*.[2]

As detailed above, *Amici* have all repeatedly been involved in litigation in which state actors attempted to moot the case *in media res* by passing a law, ordinance or regulation. In those circumstances, this Court has recognized that merely changing a policy or passing a law does not render a case moot absent further proof of whether the changes actually leave nothing left to be litigated. In *Betschart v. Oregon*, for example, this Court upheld an injunction against the state

[2] In contrast, even cases seeking nominal damages can survive. *See*, *e.g.*, *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021).

for failing to provide counsel to thousands of indigent defendants. 103 F.4th 607 (9th Cir. 2024). This Court acknowledged that "Oregon is reforming [its public defense] system through state legislation. For example, effective January 2024, the PDSC was abolished and replaced with a new agency in the state government." *Id.* at 613 n.1. However, this Court also found that "[d]espite these early reforms, the crisis persists," and so these ongoing constitutional violations required judicial intervention. *Id.*

Correctly construed and applied, the stringent test for mootness should preclude states from strategically trying to moot cases through legislation that provides inferior results to litigation. If allowed to stand, the district court's ruling would significantly harm public interest litigation by depriving vulnerable litigants of relief in a vast array of circumstances, interfering with the establishment of precedent, and creating a costly cycle of litigation that needlessly consumes judicial and party resources.

In addition to reversing the district court, this Court should clarify that the strict test for mootness does not allow the government to moot cases through passing legislation or issuing regulations unless the government proves that its voluntary cessation will actually provide identical relief to what the plaintiff could obtain through litigation.

I. LEGISLATION PASSED DURING LITIGATION RARELY SATISIFIES THE STRINGENT MOOTNESS STANDARD IN A CASE AGAINST A STATE AGENCY

Both the U.S. Supreme Court and this Court have repeatedly emphasized that government defendants must meet an extremely high standard to moot litigation by requiring them to demonstrate that there is no relief a court could possibly issue to provide additional relief, particularly in the context of reviewing important rights. *See e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006); *Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 862 (9th Cir. 2017).

When a state government attempts to manufacture mootness in a suit against a state agency by passing legislation in the midst of litigation, this standard is extremely hard to satisfy. Unlike litigation, which resolves a concrete case or controversy, legislation often creates a more abstract alteration of rights. It is especially suspect as a means for resolving legal disputes when a state government, having violated the plaintiffs' constitutional or statutory rights, reverses itself after years of litigation and claims to have completely eliminated the problems giving rise to the case by passing a statute or regulation.

First, unlike a government agent or agency, such as ODE, that can be ordered to comply with the law, legislation comes from the branch of government

that cannot enforce the law. As a result, the passage of a law, even if done in good faith, does not necessarily translate into agency action. The books are filled with unenforced laws. *See, e.g.*, B. Depoorter & S. Tontrup, *The Costs of Unenforced Laws: A Field Experiment*, Social Science Research Network (2016), https://www.law.nyu.edu/sites/default/files/upload_documents/Tontrup,%20The%20Costs%20of%20Unenforced%20Laws%20L%20%26%20E%20Workshop%202016.9.21.pdf; Zachary S. Price, *Reliance on Nonenforcement*, 58 Wm. & Mary L. Rev. 937 (2017); Nathan Cortez & Lindsay F. Wiley, *Hortatory Mandates*, 91 Washington L. Rev. 617 (2023).

More significantly, history is laden with situations where the executive and legislature are at odds over a law or policy, and a law is not enforced or implemented in the way that the legislature intended. *See*, *e.g.*, M. Rappaport, *The Unconstitutionality of "Signing and Not Enforcing,"* 16 Wm. & Mary Bill Rts. J. 113 (2007); George R. Rogers*, Legislative Intent vs. Executive Non-Enforcement: A New Bounty Statute as a Solution to Executive Usurpation of Congressional Power*, 69 Indiana University L.J. 1257 (1994); Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, Congressional Research Service (2014), https://crsreports.congress.gov/product/pdf/R/R43708; Jeffrey A. Love and Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Michigan L. Rev. 1195 (2014); Daniel T. Deacon, *Deregulation*

Through Nonenforcement, 85 New York University L. Rev. 795 (2010); Daniel Stepanicich, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 University of Pennsylvania Journal of Constitutional Law 1507 (2016).

These concerns are all the more pronounced when the state agency being sued, such as ODE, is the one violating the law in the first instance. Under those circumstances, the executive entity that has been resisting compliance with the law often maintains the same *de facto* policies, biases, and inaction that gave rise to the litigation.

This case provides a concrete example, where students continued to receive shortened school days ("SSDs"), and ODE continued to fail to investigate or monitor the number of "informal removals" notwithstanding the change in state law. Despite the passage of S.B. 819 in July 2023, at least 738 students with disabilities remained on SSDs as of October 2023, which is at least one *more* student than in October 2022, prior to the passage of the law. (*See* AOB at 20, 2-ER–46).

This evidence demonstrates that even if on paper S.B. 819 fixed ODE's policies, which it does not for the reasons given by Appellants (AOB at 17-20, 26-39), this case still would not be moot because the legislation, alone, does not account for how that policy is carried forth by agency and school officials in its

interpretation, application, and practice. Whether the continued improper use of SSDs for students with disabilities has resulted from gaps in the legislation, a failure to appropriately implement or enforce the tenets of the legislation in practice, something else, or a combination of factors, is of no moment. Regardless of the reason, plaintiffs still maintain live claims for which a court could provide relief.

Second, legislation rarely provides the same relief as an injunction against a state agency because it is framed broadly, rather than specifically. It is often speculative how legislation will be interpreted, and there is rarely a one-to-one relationship between a piece of legislation, regulation, or policy and the relief that a particular plaintiff is seeking in court. Lawsuits, especially public interest cases seeking injunctive or equitable relief, are targeted and direct mechanisms to achieve specific relief for a particular wrong. Legislation or policy changes are often a poor methodology for addressing the cases or controversies brought before the courts, as they oftentimes do not go all the way to address the real problems giving rise to a particular lawsuit.

Moreover, the legislation itself may contain exemptions and exceptions that have the ability to swallow the rule. For example, S.B. 819 § 6 exempts SSDs for purposes of "discipline." Passing such a law does not provide class members with everything they would have obtained in court absent substantial proof by the state

that this amorphous exemption will not be used to achieve the same shortened school day problem that existed before the law was passed.

Third, legislation is often slower than declaratory or injunctive relief. Declaratory judgments immediately clarify the parties' rights, duties, or obligations under the law, and injunctions may often be enforced immediately, as well. Legislation, on the other hand, may take years to implement, and even then, years to enforce in any individual instance (assuming there is an enforcement mechanism and the executive will enforce the legislation, *see supra* pp. 11-13.) Even upon a showing that any given legislation may theoretically address a plaintiff's concerns if and when the legislation is eventually fully implemented and enforced, that future regime does not resolve the plaintiff's immediate and ongoing harms in the meantime.

Thus, to meet its "formidable burden" of proving that its voluntary cessation establishes mootness, a state faced with an imminent court order must prove that in actuality, its legislative changes provide the same relief. *Friends of the Earth, Inc*., 528 U.S. at 190; *see also United States v. W.T. Grant Co*., 345 U.S. 629, 632-33 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not . . . make the case moot, [unless] the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one.") (internal quotations omitted).

The district court did not properly engage in such analysis here because hundreds of students with disabilities remain on SSDs despite the passage of S.B. 819, which shows that the legislation did not in fact provide plaintiffs' requested relief. The district court reasoned that because plaintiffs "challenge[] systemic policies and practices that result in inappropriate use of SSDs" and not whether any individual student with a disability is illegally placed on one, the fact that *hundreds* of individual students with disabilities are still placed on SSDs following the passage of S.B. 819 is irrelevant to the determination as to whether "ODE has in place procedural safeguards that comply with the state's general supervision obligations." (*See* 1-ER-15–16.) But the fact that hundreds of students with disabilities are still on SSDs in significant numbers proves that, for a number of the reasons above, the state's legislation did not fix the systemic issues and practices that result in the continued and illegal overuse of SSDs for students with disabilities.

The district court also reasoned that the government is afforded a "presumption of good faith," but relied on precedent involving a challenge to an *existing* state law that was then repealed or one that ceases to apply during the pendency of the litigation. (*See* 1-ER–2324, citing *Brach v. Newsom*, 38 F.4th 6, 14 (9th Cir. 2022); *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014)). A presumption of good faith, however, should not apply to the opposite situation,

such as here, in which a state legislature or agency enacts or implements a *new* law or policy mid-litigation that may or may not resolve the plaintiffs' claims in practice. Moreover, even if a state legislature or agency were entitled to a presumption of good faith, that presumption is rebutted here by ODE's real-world results. For that reason, the order dismissing the case should be reversed.

II. RELAXING THE LEGAL STANDARD TO ALLOW STATES TO STRATEGICALLY GET RID OF LITIGATION WILL HAVE DELETERIOUS CONSEQUENCES

The district court's decision will have adverse consequences on *Amici* and a wide range of other organizations that bring strategic litigation because it will frustrate the enforcement of important rights, enable states to strategically bend the arc of the law, and result in iterative, wasteful litigation.

A. Failure to Stringently Apply the Voluntary Cessation Doctrine Deprives the Public of Answers to Important Legal Questions

The voluntary cessation doctrine serves the important purpose of advancing the public's interest in having "the legality of the [challenged] practices settled." *United States v. W.T. Grant Co*., 345 U.S. 629, 632 (1953); *see also DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *accord City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (one purpose of the voluntary cessation rule is to prevent defendants from "evad[ing] judicial review"); Davis, *supra* at 325.

Absent strict enforcement of the mootness standard, states have the ability to curate what legal issues get decided and in what context. *See, e.g.,* Deramo, *supra* at 292; Davis, *supra* at 337 ("government defendants often seek to avoid creating adverse precedent that will preclude desired policy ends," and so have "a strong incentive to be strategic about which cases they litigate to judgment—to litigate fully only those cases that they think they will win and to moot the rest, preventing unfavorable precedent that could affect their operations in a variety of different areas.").

Cases challenging the legality of government defendants' practices around important rights—such as those in this case and those that *Amici* often litigate—especially implicate the public's interest and are especially critical for the courts to settle. "Weakening voluntary cessation for government defendants therefore makes it harder for courts to resolve the sorts of legal questions that most need resolving." Davis, *supra* at 340. As such, "if government entities are allowed to moot unfavorable cases, they can prevent the buildup of case law necessary to hold them accountable for future constitutional violations." *Id*. at 341.

B. Misapplying the Voluntary Cessation Doctrine Will Create a Wasteful Cycle of Litigation and Prevent Litigants from Obtaining Relief

Finding mootness in the absence of any prospect for declaratory, injunctive, or equitable relief from a court with regard to the issues giving rise to the litigation

will also result in iterative litigation because the underlying legal question remains unresolved. Further, the district court relied on both S.B. 819 and on ODE's "policy change, but one not contemplated in S.B. 819" "to provide resources, technical assistance, and training" in determining that plaintiffs' claims are moot. (1-ER-25–26.) Agency policies, however, are easily changed and can fluctuate with the political winds.

If cases are immediately declared moot on the basis of mid-litigation legislation or policy changes without an opportunity for the courts to provide clarity on what state agency action actually complies with federal legal standards through declaratory, injunctive, or equitable relief, plaintiffs and legal organizations such as *Amici* will be trapped in an endless cycle of litigation around the same repeat issues against the same repeat defendants without ever reaching an answer on what the law requires of them. In other words, "[i]f the case is now declared moot this will not eradicate the controversy, it will simply remain undecided." *Rosenfeld v. S. Pac. Co*., 444 F.2d 1219, 1222 (9th Cir. 1971).

Policies are, by their very nature, reversible and changeable. Even "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute." *Dorsey v. United States*, 567 U.S. 260, 274 (2012); *see also Mayor of City of New York v. Council of City of New York*, 38 A.D.3d 89, 97 (2006) (same, for state legislature); Jonathan M. Janssen, *Far from A "Moot" Issue:*

Addressing the Growing Problem of Lower Courts' Presumption of Governmental "Good Faith" in Voluntary Cessation Cases, 106 Iowa L. Rev. 1443, 1471 (2021) (a government "cannot guarantee that a future administration will not reverse course" because "government *always* has the potential to change the law, one way or another.").

Both these concerns are present here. Oregon's legislative changes and ODE's policy changes are unfixed and there is no relevant judicial precedent setting forth the federal disability rights standards by which ODE must abide. If the judgment is allowed to stand, plaintiffs' issues and claims will inevitably continue, repeat, and iterate indefinitely. So, too, will the issues and claims of existing and future public interest litigation plaintiffs.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: August 27, 2024

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ Matthew Borden*
Matthew Borden

Attorneys for Amici Curiae

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned counsel is unaware of any related cases pending in this Court.

Dated: August 27, 2024

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ *Matthew Borden*
Matthew Borden

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on August 27, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: August 27, 2024

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ Matthew Borden*
Matthew Borden

Attorneys for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 24-2080

1. I am the attorney or self-represented party.

2. **This brief contains 4,140 words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

3. I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☒ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties.
- [ ] a party or parties are filing a single brief in response to multiple briefs.
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/Matthew Borden* **Date** August 27, 2024