



October 6, 2023

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Molly Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Gilley v. Stabin, Nos. 23-35097 and 23-35130

Re: Defendants-Appellees/Cross-Appellants' FRAP 28(j) Letter

Dear Ms. Dwyer:

On September 29, the Supreme Court granted the government's petition for a writ of certiorari in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *cert. granted*, 2023 WL 6319658 (U.S. Sept. 29, 2023) (No. 22-1178).

Fikre is the principal authority relied upon by Plaintiff Bruce Gilley in support of his argument that the voluntary cessation exception to the mootness doctrine saves his claims for prospective relief from becoming moot. (See Third Brief on Cross-Appeal at 68–73.) The district court in this case also relied upon *Fikre* in holding that Gilley's claims are not moot. (See 1-ER-12–17.)

But the holding and reasoning of *Fikre* is contrary to that of other circuit courts, *see Long v. Pekoske*, 38 F.4th 417, 426–27 (4th Cir. 2022); *Mokdad v. Sessions*, 876 F.3d 167, 169–71 (6th Cir. 2017), and the Supreme Court's order granting certiorari suggests that it may reverse (or adopt different reasoning than) *Fikre*.

In its successful petition for certiorari, the government argued that *Fikre* erred by making “the repudiation of past conduct or ‘acquiesce[nce] to the righteousness of the plaintiff’s contentions’ a requirement of mootness.” Petition at 15 (alteration in original). That reasoning, according to the government, “confuses mootness with an admission of liability on the merits.” *Id.* at 14.

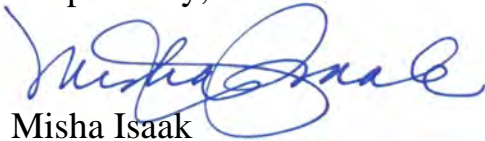
Likewise, the government argued that *Fikre* erred by conditioning the mootness of a claim on broader changes in policy and disregarding the presumption of good faith

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afforded to government actors. *Id.* at 15–18. “[A]s this Court’s decision in *Already* makes clear, a defendant’s challenged conduct can reasonably be expected not to recur for individualized reasons even in the absence of a broad change in policy.” *Id.* at 15 (citing *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013)). And, “in addressing the mootness of claims challenging governmental action, this Court generally presumes that . . . the government acts in good faith when ceasing” its challenged conduct. *Id.* at 17–18 (collecting cases).

A copy of the government’s successful petition for certiorari is attached.

Respectfully,



Misha Isaak
Counsel for Defendants-Appellees/Cross-Appellants

In compliance with FRAP 28(j), counsel certifies that the body of this letter contains 337 words.