



Washington Examiner

Government antics in court need to be held to account

Nicole Russell

August 9, 2019

Often in religious liberty cases or other pertinent constitutional issues like gun rights, government entities change tune on clearly unconstitutional policies right before they know they're about to lose. In other words, private citizens utilize significant resources fighting for their constitutional rights, only for government to promise they won't violate those rights again, and often that person's case becomes moot.

The only problem is the government often doesn't hold to its promise. This causes the same cases to be brought to court over and over, clogging up the court system, wasting resources, and ensuring the government is held to a lower standard than the rest of us and thus can't be trusted. It's time for that to end.

In a recent amicus curiae, the Becket Fund for Religious Liberty asked the Supreme Court to tell the government to knock it off and quit employing the kind of government gamesmanship that has previously forced the ACLU and the Cato Institute to become allies in opposition to the government. (Interestingly, the amicus brief accompanies a gun rights case, but they don't address the specific merits of the case.)

Here's an excellent example from [Becket's brief](#), describing what this looks like in real life:

"The state prison system was one of the last large prison systems to refuse kosher diets to Orthodox Jewish prisoners. Over the course of nearly a decade, it litigated several cases to judgment against pro se plaintiffs, obtaining rulings that it was not required to provide a kosher diet [...] But when it faced an Orthodox Jewish prisoner represented by counsel, it attempted to moot the case on the eve of oral argument in the Eleventh Circuit by announcing a new kosher dietary policy that would be implemented only at the plaintiff's prison unit [...] The Eleventh Circuit saw through this transparent attempt to evade its jurisdiction, but the point remains: Governmental defendants are sophisticated, repeat litigators that will strategically use voluntary cessation to try to pick and choose their cases."

It's not just religious liberty; this has come up in cases addressing the free exercise rights of prisoners, the contraception mandate, gun rights, and even nude dancing. In every case, the common denominator is that government skirts responsibility for infringing on constitutional rights, but like a schoolyard bully who runs away just as the teacher wises up to his antics, they rarely face significant consequences. "In many of these situations, governmental defendants used strategically timed policy changes to try to preserve favorable outcomes or to avoid rulings against them," the brief reads.

What makes this worse is that when the government claims it won't infringe on the constitutional rights of the person or group at hand, the court often believes the government and doesn't hold it to the high standard it would for a private entity, allowing the case to be labeled as moot and kicking the can further down the road. This is nonsense.

The government that works for the people and by the people should be held to an even higher standard than a private entity. The government should not be able to get to the litigation equivalent of the point of no return and apologize, argue the case is moot, and promise it won't step on the toes of religious liberty advocates anymore — especially when it knows full well that it will be at this juncture again with another group and another constitutional right.

Luke Goodrich, an attorney at the Becket Fund for Religious Liberty, and the author of the brief, said in an email, "'We're from the government and we're here to help' is often a sham in litigation. The government has just as much incentive as any other litigant to game the system and avoid rulings against it, so it should be held to the same high standard as every other litigant when claiming a case is moot."

It's time to hold the government accountable for stepping on the constitutional rights of so many. It's time for the government to be held as accountable as the rest of us and for their gamesmanship to be a thing of the past.