IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOE L. WILLS Plaintiff, v. UNITED STATES PAROLE COMMISSION and COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA, Defendants.	)	Civil Action No. 11-1464 (BAH) **Oral Hearing Requested**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Joe Wills has never been convicted of an offense involving sexual conduct. Only once has Mr. Wills even been accused of sexual misconduct: over 27 years ago, in 1984, when he was charged in D.C. Superior Court with assault with intent to rape. The government dismissed that charge in January 1986.

Nonetheless, the United States Parole Commission ("Parole Commission") has twice imposed the Special Sex Offender Aftercare Condition as a condition of Mr. Wills' supervised release, first in January 2009, and again in June 2011. The condition calls for an involuntary "mental health program . . . with special emphasis on long-term sex offender testing and treatment." As enforced by the Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA"), the Special Sex Offender Aftercare Condition has required Mr. Wills to undergo extraordinarily intrusive psychosexual therapy, and even to acknowledge a "need" for that unnecessary treatment. It has also required him divulge in explicit detail his sexual history, thoughts, and practices and subject himself to a polygraph examination.

The Court has before it two potentially dispositive motions regarding Defendants' imposition and enforcement of the Special Sex Offender Aftercare Condition. The first is Mr. Wills' Motion for Partial Summary Judgment (Doc. #12, hereinafter "MSJ"), where he argues that the Parole Commission violated the Fifth Amendment by imposing the Special Sex Offender Aftercare Condition without providing him a meaningful opportunity to contest it. The law on this issue is well-developed and overwhelmingly favorable to Mr. Wills. Four federal courts of appeals have considered how much process is due a plaintiff situated similarly to him—a supervised releasee who has never been convicted of a sex offense—and each one has held that, prior to being subjected to classification and treatment as a sex offender, the plaintiff should have been provided, at the very least, advance written notice, disclosure of any evidence against him, a hearing at which he could call witnesses and present documentary evidence, and a written statement of findings. *See* MSJ at 15-17.

The second motion before the Court is the instant one, Defendants' Motion to Dismiss (Doc. #14, hereinafter "MTD"). Defendants' sole argument is that the Parole Commission rendered this case moot by lifting the Special Sex Offender Aftercare Condition on September 7, 2011—a few weeks after Mr. Wills commenced this litigation and two days before Defendants were to respond to his then-pending Motion for Preliminary Injunction. MTD at 8.

The voluntary cessation exception to the mootness doctrine precludes Defendants from so easily escaping judgment. To carry their "heavy" burden of establishing mootness, *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953), Defendants must show that "there is no reasonable expectation . . . that the alleged violation will recur" and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *ABA v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) (quotation marks and citations omitted). They have not come

close. Defendants' mootness argument—based on the affidavit of a Parole Commission employee stating that he "does not expect" that the Special Sex Offender Aftercare Condition will be re-imposed, MTD at 8—leaves open the possibility that their unlawful conduct will recur and has already been rejected by a judge of this District on nearly identical facts. Moreover, the Parole Commission gives no indication that it recognizes the constitutional infirmities of its policy of providing minimal or no process prior to imposing "sex offender conditions." Defendants' continued defense of their unconstitutional policies increases the likelihood that the harm they have done to Mr. Wills will recur. It also all but guarantees that the same harm will continue to befall many others—that the Commission will continue, as a matter of course, to provide insufficient process prior to imposing onerous release conditions with only the flimsiest of bases. There is thus a powerful public interest in ensuring that the constitutionality of Defendants' conduct is adjudicated.

The pending motions, then, present the Court with a stark choice. It is Mr. Wills' view that the Court should continue to exercise jurisdiction over the case and adjudicate the lawfulness of Defendants' policies, as applied to him as well as to many others. It is Defendants' view that the Court should dismiss the case and leave them be—free not just to re-impose inappropriate sex offender conditions on Mr. Wills, again without providing him adequate process, but also to levy the same unlawful treatment on many other releasees under their authority.

PROCEDURAL HISTORY

On August 12, 2011, Mr. Wills filed his Complaint (Doc. #1), in which he alleged that, by imposing and enforcing the Special Sex Offender Aftercare Condition, Defendants violated his Fifth Amendment procedural and substantive due process rights, his First Amendment right to refrain from speaking, and the "reasonably related" standard that governs all supervised release conditions in the District of Columbia. The same day, Mr. Wills filed a Motion for

Preliminary Injunction (Doc. #2), in which he asked the Court to enjoin enforcement of the Special Sex Offender Aftercare Condition pending the outcome of this litigation.

On September 7, 2011, two days before Defendants' response to Mr. Wills' Motion for Preliminary Injunction was due, the Parole Commission issued a Notice of Action that removed the Special Sex Offender Aftercare Condition from the terms of Mr. Wills' supervised release. The following day, Mr. Wills withdrew his Motion for Preliminary Injunction (Doc. #6), while noting that the withdrawal was without prejudice to the claims for declaratory and permanent injunctive relief set forth in his Complaint.

Mr. Wills filed his Motion for Partial Summary Judgment (Doc. #12) on September 30, 2011, to which Defendants responded (Doc. #17) on November 14, 2011. Defendants filed their Motion to Dismiss (Doc. #14) on October 17, 2011. Mr. Wills responds here.

STANDARD OF REVIEW

"[A] court should only dismiss a complaint for lack of subject matter jurisdiction if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999) (internal quotation marks omitted). In ruling on a motion to dismiss,"[t]he Court must accept all factual allegations in the complaint as true and give the plaintiff the benefit of all reasonable inferences from the facts alleged." *Jackson v. United States Parole Comm'n*, 2011 U.S. Dist. LEXIS 97449, at *6 (D.D.C. Aug. 30, 2011). The plaintiff has the burden of establishing by a preponderance of the evidence that the court has subject matter jurisdiction. *American Farm Bureau v. United States EPA*, 121 F. Supp. 2d 84, 90 (D.D.C. 2000). However, where the defendant has voluntarily ceased its allegedly unlawful activity after the complaint was filed, and then moved to dismiss the lawsuit on mootness grounds, the defendant bears the "formidable

burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

ARGUMENT

I. Mr. Wills' Claims Avoid Mootness Under the Voluntary Cessation Exception to the Mootness Doctrine.

"As a general rule, a defendant's voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case." *ABA*, 636 F.3d at 648 (quotation marks and citations omitted). The Supreme Court has explained that the purpose of the voluntary cessation exception to the mootness doctrine is to ensure that defendants cannot escape judgment for their unlawful acts simply by reforming their ways in response to a lawsuit—particularly where there is a public interest in having the outcome decided:

> 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 a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

W. T. Grant Co., 345 U.S. at 632 (internal citations omitted).

"Voluntary cessation will only moot a case if there is no reasonable expectation . . . that the alleged violation will recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *ABA*, 636 F.3d at 648 (quotation marks and citations omitted). The burden is on Defendants to establish that their unlawful behavior will not recur—and that burden is a heavy one:

> [T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it <u>absolutely clear</u> that the allegedly wrongful

> behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, 528 U.S. at 189 (internal quotation marks and citations omitted and emphasis added).

A. Defendants Have Not Carried Their "Heavy Burden" of Demonstrating That There Is No Reasonable Expectation That Their Wrongful Behavior Will Recur.

Defendants have not come close to carrying their "heavy burden." *Id.* It is well-settled that a defendant's own assurance that its allegedly illegal conduct will not recur is not sufficient to render a case moot. *See, e.g., W. T. Grant*, 345 U.S. at 633 (fact that defendant had "disclaimed any intention to revive" allegedly unlawful conduct "does not suffice to make a case moot"); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (case not moot despite appellees' voluntary cessation because "we have only appellees' own statement that it would be uneconomical for them" to engage in further misconduct and "[s]uch a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes"); *In re Center for Auto Safety*, 793 F.2d 1346, 1352 (D.C. Cir. 1986) (case not moot where "[t]he only assurance we have that the agency has permanently ceased its pattern of tardy fuel economy standards" is agency's own "bald assertion," made by affidavit to the court); *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1154 (9th Cir. 2006) (party's "representation that it has no intention" to repeat allegedly unlawful activity "does not make it 'absolutely clear'" that it will "permanently refrain," for "[i]f the opposite were true, any defendant could moot a preliminary injunction appeal by simply representing to the court that it will cease its wrongdoing").

But here, Defendants offer nothing more than their "own statement[s] . . . standing alone," *Concentrated Phosphate*, 393 U.S. at 203—or, more properly, statements by Defendants'

respective employees. Defendants' entire mootness argument rests on two declarations—one from CSOSA's Associate Director for Community Supervision Services, Thomas Williams, and the other from a Parole Commission Deputy Case Services Administrator, Kenneth Holland—in which their respective employees attempt to assure the Court that the Special Sex Offender Aftercare Condition will not be re-imposed. *See* MTD at 8; MTD Ex. 10 (Holland Decl.); MTD Ex. 11 (Williams Decl.).

Mr. Williams' declaration can be dealt with summarily. CSOSA does not have the statutory authority to impose release conditions; its role is limited to "supervis[ing]" D.C. Code offenders while they are on supervised release. D.C. Code § 24-133(c)(2). The Parole Commission is the agency with plenary authority to impose and modify supervised release conditions. *See* D.C. Code § 24-403.01(b)(6) (District of Columbia supervised releases are "subject to the authority of the United States Parole Commission until completion of the term of supervised release"); *Denson v. United States*, 918 A.2d 1193, 1195 (D.C. 2006) ("Under District of Columbia law, discretionary conditions of supervised release . . . are imposed not by the trial court, but by an independent administrative agency, the U.S. Parole Commission . . . ."). Mr. Williams' assurance that "[b]ased on Mr. Wills' current criminal record, CSOSA will not recommend the re-imposition" of the challenged condition, MTD Ex. 11 (Williams Decl.) ¶ 9, says nothing about the Parole Commission's position on the matter, and therefore does not advance Defendants' mootness argument.[1]

[1] In any event, Mr. Williams' statement—which comes with the caveat that CSOSA "will recommend" that the Commission re-impose the condition if it "learns of new sexual misconduct being committed by Mr. Wills," *id.*—suffers from the same infirmities as that of Mr. Holland, which are discussed at length below. *See infra* at 17-25. Even if his declaration were controlling, then, it would fail to moot the case for the same reasons that Mr. Holland's has.

The pertinent declaration comes from Mr. Holland, the Parole Commission Deputy Case Services Administrator. Mr. Holland states that he "do[es] not expect that the Parole Commission will re-impose the special sex offender condition unless new sexual misconduct by Mr. Wills were to raise a legitimate concern that such condition ha[s] become newly necessary." MTD Ex. 10 (Holland Decl.) ¶ 8. Mr. Holland's assurances are insufficient to moot the case, for many reasons. First and foremost, they are the very same assurances that another Parole Commission Case Services Administrator made by affidavit just a few months ago, in support of the Commission's motion to dismiss, on mootness grounds, another civil rights lawsuit challenging its imposition of sex offender conditions. Judge Huvelle flatly rejected the Commission's arguments in that case. *Jackson v. United States Parole Comm'n*, 2011 U.S. Dist. LEXIS 97449, at *2 (D.D.C. Aug. 30, 2011). Her decision relied heavily on *Goings v. Court Servs. & Offender Supervision Agency*, 786 F. Supp. 2d 48, 62-63 (D.D.C. 2011), still another challenge to the improper imposition of sex offender conditions, where this Court rejected mootness arguments from CSOSA that closely parallel those that Defendants make here.

That recent and highly persuasive precedent dictates the outcome of this case. Even if *Jackson* and *Goings* had never been decided, however, an application of the principles of voluntary cessation to the facts of this case shows that there are several independent reasons why Defendants have failed to meet their "heavy" burden of establishing that their unconstitutional conduct will not recur.

1. The Voluntary Cessation Holdings of *Jackson* and *Goings* Dictate the Outcome Here.

a. Judge Huvelle Rejected an Identical Attempt by the Parole Commission to Moot the Case in *Jackson*.

In March of this year, David Jackson, a parolee under the authority of the Parole Commission and the supervision CSOSA, filed a civil rights lawsuit against the Commission and several Commission and CSOSA officers. *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *1-3. He alleged that the defendants had imposed and enforced onerous and unjustified sex offender conditions on his parole—including the same Special Sex Offender Aftercare Condition at issue here—without providing him adequate process. *Id.* at *3-5. The Parole Commission responded by lifting the sex offender conditions a few weeks after Mr. Jackson filed suit and then moving to dismiss his lawsuit as moot—just as it has done here. *Id.* at *5. In support of its mootness argument, the Commission submitted the affidavit of one of its Case Services Administrators, which it said demonstrated that the Commission would not repeat its alleged misconduct—again, just as it has done here. *Id.* at *10-11.

Judge Huvelle held that the Parole Commission's conduct fell within the voluntary cessation exception to the mootness doctrine, and therefore denied the Commission's motion to dismiss. *Id.* at *8.[2] "[T]he government cannot escape the pitfalls of litigation," she explained, "by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff." *Id.* at *11-12 (quotation marks and citation omitted). She found that despite the fact that the Commission had lifted the challenged sex offender conditions, there

[2] Mr. Jackson also argued, as Mr. Wills does, that the "capable of repetition, yet evading review" exception to the mootness doctrine applied to his case. The court did not reach that issue because it found in his favor on the issue of voluntary cessation. *Id.*

remained a "reasonable chance" that the same dispute would again arise between the same parties because, the Commission's assurances notwithstanding, Mr. Jackson's "parole conditions may be reexamined at any time." *Id.* at *13. The judge wrote expansively of the vital role of the voluntary cessation exception to the mootness doctrine and skewered the Commission for falling within it:

> The rationale supporting voluntary cessation as an exception to mootness is that, without an order from the Court preventing it from continuing the allegedly illegal practice, the defendant is free to return to its old ways—thereby subjecting the plaintiff to the same harm but, at the same time, avoiding judicial review. This case illustrates the importance of this doctrine. Defendants do not allege that they have altered their procedures for imposing special parole restrictions or that the type of restrictions they impose have changed. Nor do they promise to refrain from imposing those restrictions on Jackson. All defendants offer is a declaration from a USPC administrator stating that she "does not expect" the parole officer supervising Jackson to request that the special parole restrictions be reimposed. . . . Because defendants remain free to return to their old, allegedly illegal ways, the voluntary cessation doctrine will be applied.

Id. at *15-16 (internal quotation marks and citations omitted).

Judge Huvelle's reasoning applies here with equal force. Here, as in *Jackson*, "Defendants do not allege that they have altered their procedures for imposing special parole restrictions or that the type of restrictions they impose have changed." *Id.* at *15. Here, as there, Defendants do not "promise to refrain from imposing those restrictions" on Mr. Wills. *Id.* And here, as there, "[a]ll [that] defendants offer" in support of their mootness argument "is a declaration from a USPC administrator." *Id.* A close comparison of the declarations that the Commission has relied on in the two cases shows just how deep the parallels run.

In *Jackson*, the Commission relied on the declaration of its employee, Deirdre Jackson, a "Case Services Administrator" whose duties "include making recommendations to the Commission concerning conditions of supervision for releasees under the Commission's jurisdiction." Ex. 1 (Jackson Decl.) ¶ 2. Here, the Commission relies on the declaration of its

employee, Mr. Holland, a "Deputy Case Services Administrator" whose duties "include making recommendations to the Parole Commission concerning conditions of supervision for releasees under the Commission's jurisdiction." MTD Ex. 10 (Holland Decl.) ¶ 2.

In her declaration in *Jackson*, Ms. Jackson attested that she "d[id] not expect" that the parole officer supervising Mr. Jackson would request that the Commission re-impose the challenged sex offender conditions "unless new sexual misconduct by Mr. Jackson were to raise a legitimate concern that such condition(s) have become newly necessary." Ex. 1 (Jackson Decl.) ¶ 10. Here, Mr. Holland has attested that he "do[es] not expect" that the Commission will re-impose the Special Sex Offender Aftercare Condition "unless new sexual misconduct by Mr. Wills were to raise a legitimate concern that such condition ha[s] become newly necessary." MTD Ex. 10 (Holland Decl.) ¶ 8.

The Commission argued in its *Jackson* motion to dismiss that the case was moot because, given Ms. Jackson's assurances, "[t]here is no reason to believe that Plaintiff will be subjected to the sex offender conditions again unless those provisions become necessary based on Plaintiff's actions"—meaning that the challenged conditions were "unlikely" to be re-imposed. Ex. 2 (Commission's *Jackson* MTD) at 8-9. This inspired Judge Huvelle to wonder whether the Commission "recogniz[ed] the weakness of [its] argument." *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *11. Undeterred, Defendants argue here that the case is moot because, given Mr. Holland's assurances, "there is no basis for the Court to conclude that Plaintiff will be subjected to the sex offender conditions again, unless those provisions become necessary as a result of

Plaintiff's own actions"—meaning that the condition is "unlikely" to be re-imposed. MTD at 15. The cases are twins.[3]

Defendants do not assert that *Jackson* was incorrectly decided, but instead attempt to distinguish the case on its facts. Defendants first argue that here, unlike in *Jackson*, "the Parole Commission states its reasons for removing the SOA condition of release in Plaintiff's case." MTD at 19. But merely to explain why a condition was lifted is not to make "absolutely clear," *Friends of the Earth*, 528 U.S. at 190, that it will not be re-imposed, or that it will only be imposed again along with adequate procedural protections. Moreover, the Commission's "reasons for removing" the condition are unconvincing. According to Mr. Holland, the Commission decided to withdraw the condition on September 7, 2011,

> after having reviewed Mr. Wills' current criminal history[] and new information concerning the 1984 charge for assault with intent to commit rape. . . . [T]he Commission determined that it was not necessary to continue imposing the sex

[3] Mr. Wills need only briefly address another claim that Defendants have reproduced verbatim, string cites and all, from their motion to dismiss in *Jackson*: the sweeping assertion that "[c]ourts in this jurisdiction have continuously held that the 'live' case or controversy component of a parole dispute ends when the Parole Commission alters or ends the conditions of parole." MTD at 9; *cf.* Ex. 2 (Commission's *Jackson* MTD) at 5-6 (same). As both *Jackson* and *Goings* demonstrate, the alteration or lifting of release conditions does not render a live controversy moot when there is a chance that they may be re-imposed. None of the five cases Defendants cite for their proposition is to the contrary, for in none of them did the plaintiff argue, as Mr. Wills does here (and as Mr. Jackson and Mr. Goings did before him), that his release conditions had been strategically lifted in response to litigation and could be re-imposed, such that the voluntary cessation exception to the mootness doctrine should apply. *See Spencer v. Kemna*, 523 U.S. 1, 3 (1998) (habeas corpus petition challenging parole revocation moot because petitioner had served entire sentence); *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998) (claim alleging miscalculation of parole date mooted by plaintiff's release on parole); *Chandler v. Kiely*, 539 F. Supp. 2d 220, 222 n.2 (D.D.C. 2008) (plaintiff's claim for injunctive relief from parole condition requiring GPS monitoring moot because device had been removed upon revocation of parole and return to prison); *Thorndyke v. Washington*, 224 F. Supp. 2d 72, 73 (D.D.C. 2002) (habeas corpus petition claiming illegal incarceration pending parole revocation decision mooted by issuance of decision); *Jackson v. McCall*, 509 F. Supp 504, 506 (D.D.C. 1981) (habeas corpus petition challenging delay prior to revocation proceeding moot when parole violator warrant withdrawn).

> offender condition[] based on its review of the information relating to [Mr. Wills'] charge . . . and because Mr. Wills has not committed any sex-related offenses since that time . . . .

MTD Ex. 10 (Holland Decl.) ¶¶ 7-8. Mr. Holland does not specify the nature of the "new information" to which he refers, and neither do Defendants, despite their drumbeat of citations to it. *See* MTD at 8, 11, 18, 19, 19-20 n.5. That is because there is no "new information." Neither the facts surrounding Mr. Wills' 1984 charge nor his record since (which includes no sexual charges or convictions) suddenly changed on September 7, 2011. The facts on that date were the same ones that existed on January 6, 2009, when the Commission first decided to impose the Special Sex Offender Aftercare Condition; on December 1, 2010, when it decided not to impose the condition upon returning Mr. Wills to supervision after a brief period of incarceration; and on June 24, 2011, when it decided to re-impose the condition. *See* Complaint ¶¶ 37, 52-53, 57. The only "new information" available to the Commission on September 7, 2011, had come to it a few weeks earlier, in the form of Mr. Wills' August 12, 2011, Complaint and Motion for Preliminary Injunction. In light of that fact, the Commission's insistence that "[u]nlike Judge Huvelle's finding in *Jackson*, the Parole Commission's removal of the special condition should not be viewed by this Court as a means for it to avoid litigation in this case," MTD at 19 n.5, cannot be taken seriously.

Defendants next try to distinguish *Jackson* by arguing that here, "[u]nlike in *Jackson*, the Parole Commission does state the circumstances under which it would consider re-imposing [the challenged] condition." MTD at 19. But the opposite is true. Not only did the Commission "state the circumstances under which it would consider re-imposing" the challenged conditions in *Jackson*, but as Mr. Wills has already detailed, *supra* at 11, that statement mirrors the one that it has made here.

Finally, Defendants claim that here, unlike in *Jackson*, "CSOSA's actions and representations by its representative support the statement of the Parole Commission." MTD at 19. Mr. Wills has explained above why that has little force: the Parole Commission, not CSOSA, has the authority to impose and modify conditions of supervised release. *Supra* at 7. It is also not an actual point of distinction. No CSOSA representative submitted an affidavit in *Jackson* because, at the time of Defendants' motion to dismiss there, Mr. Jackson's parole supervision had been transferred from CSOSA to the United States Probation Office ("USPO") for the Eastern District of Virginia. Ex. 1 (Jackson Decl.) ¶ 3. The USPO, for its part, did indicate, as CSOSA's representative has indicated here, its disinclination to recommend re-imposition of the condition. *Id.* ¶¶ 9-10. The case was still not moot. *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *18.

Defendants' mootness argument is indistinguishable from the one that the Commission advanced in *Jackson*. A dismissal here would be irreconcilable with Judge Huvelle's decision there.

b. This Court Rejected CSOSA's Similar Effort to Moot the Case in *Goings*.

Nor could a dismissal here be reconciled with this Court's decision in *Goings*. There, CSOSA played the part that the Parole Commission has played here: it imposed an onerous set of sex offender conditions on the plaintiff's probation, including sex offender treatment and a ban on his contact with his own children.[4] *Goings*, 786 F. Supp. 2d at 56-57. One day prior to

[4] This posture, wherein CSOSA had imposed release conditions, as opposed to merely enforcing them, was both anomalous and the subject of dispute between the parties. CSOSA argued that its actions were authorized by the interstate compact under which Mr. Goings' probation supervision was transferred from Florida, where he was sentenced, to the District of Columbia, where he resided; Mr. Goings disputed that authority. The dispute had no bearing on the Court's ruling on the issue of mootness.

having to respond to Mr. Goings' motion for preliminary injunction, which challenged the conditions on substantive and procedural due process grounds, CSOSA lifted one of the conditions (an internet restriction) and eased another (the absolute ban on his contact with his own children). *Id.* at 59. It then argued that its modifications had mooted the case. *Id.* at 61. This Court disagreed, holding that "the defendant's [post-complaint] modification of the conditions amounts to a voluntary cessation, and thus falls squarely into an exception to the mootness doctrine." *Id.*

Goings is not distinguishable, as Defendants argue, on the grounds that here the Commission "unconditionally lifted the single condition of release that [Mr. Wills] is challenging in this case." MTD at 18. Defendants cannot, as an initial matter, actually mean "unconditionally," since they describe elsewhere in the same motion the conditions under which the Parole Commission will re-impose the condition. *See id.* at 8. They appear to mean "completely." Even then, Defendants fall flat with their "distinction," just as the Parole Commission did when it ventured the same one in *Jackson*:

> Defendants attempt to distinguish *Goings* by pointing out that, in that case, the CSOSA had altered "*some*, but not all" of the conditions, while here, all of the conditions that Jackson objects to have been removed. (Defs.' Reply at 5.) However, the Court in *Goings* was clear that even those conditions that had been altered could be "re-impose[d]," and, therefore, the defendants had failed to show that there was "no reasonable expectation that the alleged violation will recur."

Jackson, 2011 U.S. Dist. LEXIS 97449, at *14 (emphasis in original).

Nor is *Goings* distinguished by the fact that Defendants' representatives assure the Court that the condition will not be re-imposed "unless Plaintiff commits a new act of sexual misconduct" or "unless Plaintiff's actions require it." MTD at 18. CSOSA made the same assurance in support of its mootness argument in *Goings*:

> CSOSA lifted the no contact condition after it had gained sufficient information during the initial risk assessment regarding plaintiff to determine that the condition was not necessary. . . . For his part, plaintiff contends that he is not going to engage in any other sexual misconduct. In these circumstances, there is simply no "reasonable expectation" that plaintiff will again be subjected to the no contact condition.

Ex. 3 (excerpt from CSOSA's Opposition to Plaintiff's Motion for Preliminary Injunction in *Goings*) at 16.[5]

The posture of this case matches that of *Goings*. "Despite modification" of the conditions of Mr. Wills' release, the Commission "leaves open the possibility that it could re-impose" the Special Sex Offender Aftercare Condition. *Goings*, 786 F. Supp. 2d at 63. As in *Goings*, then, Mr. Wills' claim "is not moot." *Id.*

2. Even Apart from the Precedent of *Jackson* and *Goings*, the Controversy Remains Live Under the Well-Settled Principles of Voluntary Cessation.

Jackson and *Goings* provide more than an ample basis for the Court to deny Defendants' Motion to Dismiss. However, even apart from that precedent, there are several independent reasons why Defendants have failed to meet the stringent voluntary cessation standard.

[5] It is true that here, unlike in *Goings*, CSOSA has transferred Mr. Wills out of its Sex Offender Unit. MTD at 18. But as discussed, it is the Parole Commission's orders, not CSOSA's supervision decisions, that dictate whether Mr. Wills will again be subject to the Special Sex Offender Aftercare Condition. For instance, for several weeks after Mr. Wills was released to its supervision in January 2009, CSOSA was unaware that the Parole Commission had imposed the Special Sex Offender Aftercare Condition as a condition of his release, and therefore supervised him in its General Supervision Unit. *See* Complaint ¶¶ 33-42. Upon learning that the Commission had in fact put the condition in place, CSOSA transferred Mr. Wills to the Sex Offender Unit. *Id.* ¶¶ 39-42. *Jackson*, too, demonstrated that the locus of the plaintiff's supervision is not dispositive. The plaintiff there had not just been transferred out of CSOSA's Sex Offender Unit; the Parole Commission had transferred him out of CSOSA's supervision entirely, to another state. Ex. 1 (Jackson Decl.) ¶ 3. Yet Judge Huvelle held that there remained a reasonable chance that the Commission would re-impose the challenged sex offender conditions. *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *18.

a. Mr. Holland Acknowledges That the Parole Commission Will Re-Impose the Condition in Certain Circumstances—Including the Very Ones Underlying Its Previous Violation.

Chief among the reasons why Defendants have failed to make "absolutely clear [that] the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 190, is that Mr. Holland has affirmatively stated that the Commission will re-impose the challenged condition if "new sexual misconduct by Mr. Wills were to raise legitimate concern that such condition ha[s] become newly necessary." MTD Ex. 10 (Holland Decl.) ¶ 8. While Defendants evidently consider this a minor caveat, it is in fact an admission large enough to swallow the Commission's purported disavowal of its unlawful behavior.

Mr. Wills has complained that the Parole Commission twice inappropriately imposed the Special Sex Offender Aftercare Condition as a condition of his release, the first time without providing him any process at all, and the second time after allowing him only to submit a written objection. *See* Complaint ¶¶ 38, 57. He has alleged that the purported basis for the condition, his 1984 dismissed charge of assault with intent to rape, does not substantiate it, and that, given the liberty interests at stake, he should have been provided a full adversarial hearing prior to its imposition. *See id.* ¶¶ 70-75, 76-81; *see also* MSJ at 15-17. Mr. Holland's statement leaves open numerous scenarios under which these very constitutional violations may recur.

According to Mr. Holland, should the government again dismiss a charge of sexual misconduct against Mr. Wills, the Commission will again impose the Special Sex Offender Aftercare Condition, again without providing Mr. Wills with the process that he says he is due[6]—so long the charge merits the Commission's "legitimate concern." In fact, the

[6] Defendants make much of the fact that, if the Commission decides to re-impose the Special Sex Offender Aftercare Condition, Mr. Wills will have a ten-day window in which to submit a written "comment" on the condition, MTD Ex. 10 (Holland Decl.) ¶ 9, arguing that that

Commission need not wait for a charge of sexual misconduct, or even an arrest. Any allegation of sexual misconduct during the remaining years of Mr. Wills' supervised release, from any source—a probation officer, a polygrapher, a jilted lover, a mortal enemy—could raise a "concern" sufficient for the Commission to re-impose the Special Sex Offender Aftercare Condition, no hearing required. Indeed, Defendants need not even re-impose the Special Sex Offender Aftercare Condition itself for their unlawful conduct to recur. If, over the course of Mr. Wills' supervised release, the Commission imposes any sex offender condition that implicates a liberty interest—GPS monitoring, restrictions on computer use, an order that Mr. Wills stay away from minors—without providing Mr. Wills notice and a hearing, it will have repeated the allegedly unlawful conduct that it purports to have ceased. *See* Complaint ¶¶ 64-68 (describing "the Parole Commission's practice of providing constitutionally inadequate process prior to imposing sex offender conditions of supervised release").

It is presumably the presence of these and similar possibilities that led Judge Huvelle to conclude, after considering assurances identical to Mr. Holland's, that the case was not moot because, as Mr. Jackson had correctly argued, "his parole conditions may be reexamined at any time." *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *13.[7]

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procedure will constitute "notice and an opportunity to be heard," MTD at 16. But the Commission does not moot Mr. Wills' claims simply by guaranteeing such paper "process" in the future, for that is the very "process" that Mr. Wills received prior to the Commission's June 2011 imposition of the challenged condition—one that he has alleged was constitutionally insufficient. *See* Complaint ¶ 57. As Judge Huvelle said in response to the Commission's identical argument in *Jackson*, "[t]his is not a mootness argument, but, rather, an invitation to rule on the merits of Jackson's claim." *Jackson*, 2011 U.S. Dist. LEXIS 97449, at *17-18.

[7]To be clear, Mr. Wills is not arguing, as Defendants predicted he would, that the case is not moot because "there is the potential for him to engage in sexual misconduct." MTD at 12 n.4. Rather, his point is that according to Mr. Holland, the condition may be imposed even in the absence of actual, adjudicated sexual misconduct—just as it has been before. And this is not even to mention the possibility that Mr. Wills' supervised release could be revoked for a non-

b. The Parole Commission's Record of Arbitrary Action Increases the Likelihood that the Alleged Violations Will Recur.

The Parole Commission's record of arbitrary decision-making in Mr. Wills' case undermines Mr. Holland's assurance that its misconduct will not recur. Over the past three years alone, the Commission has twice decided to impose the Special Sex Offender Aftercare Condition—failing, in both instances, to provide Mr. Wills a meaningful opportunity to contest it—only to reverse itself both times. *See* Complaint ¶¶ 37-38, 52-53, 57; MSJ at 10 ¶ 38. While the facts of Mr. Wills' case have remained static, the Commission has spun around them like a top. Courts have held that defendants with such a history of arbitrary action cannot be trusted when they claim to have permanently ceased challenged activity. *See Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 48-49 (1st Cir. 2010) (affirming district court holding that voluntary cessation did not moot case because defendant's "prior pattern of contradictory behavior [left] the Court with no assurance that the alleged constitutional violations [would] not recur"); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (alteration to challenged prison library access policy did not moot case because "[e]ven assuming that the [new] policy meets constitutional standards on its face, given the Department's history of allegedly denying access arbitrarily and the vagueness of the new policy, it cannot be said 'with assurance' that there is no 'reasonable expectation' that the alleged violations will recur").

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sexual offense, his conditions re-evaluated, and sex offender treatment re-imposed. Courts are mixed on whether the possibility of such a scenario alone is sufficient to defeat mootness. *Compare Meza v. Livingston*, 607 F.3d 392, 400 (5th Cir. 2010) (weighing, as part of voluntary cessation analysis, fact that "the alleged wrongful behavior of the Board—requiring Meza to register as a sex offender without due process of law—could recur to Meza if his mandatory supervision is revoked again") *with Jackson*, 2011 U.S. Dist. LEXIS 97449, at *12 (plaintiff's "argument that the restrictions could be re-imposed if he were found to have violated his parole, returned to prison, and again released on parole fails because Jackson himself is able —and indeed required by law—to prevent such a possibility from occurring" (internal citations and quotation marks omitted)).

The one clear principle that emerges from the Parole Commission's actions, both here and in *Jackson*, is that it is willing to move quickly to alter release conditions in order to avoid litigation, without changing the unlawful policies underlying the conditions. It is precisely such cynically strategic behavior that the doctrine of voluntary cessation was developed to combat. *See W. T. Grant Co.*, 345 U.S. at 632 n.5 ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." (internal quotation marks omitted)); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007) ("[T]he fact that the voluntary cessation only appears to have occurred in response to the present litigation . . . shows a greater likelihood that it could be resumed."); *U.S. v. Government of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) (defendant government's termination of allegedly unlawful contract did not moot case where "[t]he timing of the contract termination—just five days after the United States moved to invalidate it, and just two days before the District Court's hearing on the motion—strongly suggests that the impending litigation was the cause of the termination").

c. The Parole Commission's Continued Defense of Its Policies Further Increases the Likelihood That the Alleged Violations Will Recur.

Perhaps the clearest indication that the Parole Commission's unlawful conduct is reasonably likely to recur is that the Commission has done nothing to change the policies underlying it. The Commission has not acknowledged that it was unconstitutional to impose the Special Sex Offender Aftercare Condition without providing Mr. Wills meaningful process, nor does it promise in the future to provide more robust process, to Mr. Wills or anyone else. Instead, it continues to defend its practices, as evidenced by its vigorous opposition to Mr. Wills' motion for summary judgment on his procedural due process claim. *See* Defendants' Opposition

to Plaintiff's Motion for Partial Summary Judgment (Doc. #17). There, the Commission argues that "the existing procedural framework that was used in this case to impose the SOA condition of release should remain intact because it provides sufficient due process." *Id.* at 32. It insists, in a section heading, that "The Current Procedural Framework For Imposing Special Conditions of Release Should Remain Intact Despite The Risk Of Error That May Occur." *Id.* at 29.

Just as a history of arbitrary action makes a defendant's unlawful conduct more likely to recur, so too, courts have held, does its defense of the unlawful policies that led to the conduct at issue. That was the case in *Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982). The plaintiff in *Doe* sought injunctive and declaratory relief after federal and District of Columbia law enforcement officers obtained his psychiatric records without his consent. *Id.* at 110. After the officers submitted declarations attesting that the records had not been and would not be used and offered to surrender the documents to the court, the district court held that the case was moot. *Id.* at 110-11. The D.C. Circuit, in a unanimous opinion by now-Justice Ginsburg, reversed. *Id.* at 112. The problem was that the defendants had "maintain[ed] adamantly" that their conduct was lawful, which left it "hardly apparent that the official conduct Doe assails . . . [would] not recur." *Id.* The court explained that "when a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition." *Id.* at 113. Had the government defendants, on the other hand, "taken the position that the subpoena of Doe's files was an unfortunate mistake," then the court "might [have] incline[d] toward the district court's view that the risk of recurrence was slight." *Id.* at 113 n.6 (noting that "[o]ther courts have agreed that the government's refusal to concede official wrongdoing bears on the likelihood of recurrence central to a mootness inquiry").

The same is true here. Had the Commission acknowledged that the Special Sex Offender Aftercare Condition should never have been imposed and agreed that it must provide Mr. Wills a hearing before re-imposing it (or any other condition that implicates a liberty interest), this case might well be moot. Instead, the Commission has given no indication that it respects its constitutional obligations, and thus no indication that it will abide by them. Under *Doe* and numerous cases that have come after it, a live controversy remains. *See In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (although agency's allegedly unlawful conduct had ceased, its "refusal to admit the illegality of its past conduct heightens the probability that the agency will once again fail to meet statutory deadlines in the future," and thus creates "some cognizable danger of recurrent violation"); *Am. Lands Alliance v. Norton*, 360 F. Supp. 2d 1, 7 (D.D.C. 2003) (challenge to agency policy not moot, even after agency purportedly stopped following it, because agency "continues to affirmatively acknowledge[] the validity" of the policy); *Gray Panthers Project Fund v. Thompson*, 273 F. Supp. 2d 32, 36 (D.D.C. 2002) (in light of defendant agency head's "failure to confess error regarding his past conduct," court "cannot be convinced that the violations will not reoccur, absent the court's involvement").

d. Mr. Holland's Declaration Does Not Bind the Commission.

Finally, even if Mr. Holland's assurances did not contain the loopholes that they do, they still would not suffice to moot the case—because they do not bind the Commission. As a Deputy Case Services Administrator, Mr. Holland does not make decisions on behalf of the Commission. He merely "mak[es] recommendations to the Parole Commission concerning conditions of supervision." MTD Ex. 10 (Holland Decl.) ¶ 2. As the Parole Commission recently reported to Congress, it is its "Chairman and Commissioners" who have the authority to "establish conditions of release" and "modify parole conditions and/or revoke the parole or

mandatory/supervised releases of offenders who have violated the conditions of supervision."[8] Thus, when the Commission decided to lift the Special Sex Offender Aftercare Condition in response to Mr. Wills' lawsuit, it was a Commissioner, not Mr. Holland (or any other Case Services Administrator) who made the decision. *See* MTD Ex. 9 (Sept. 7, 2011 Parole Commission Notice of Action, ordering: "Reopen and withdraw the Sex Offender Aftercare Treatment Special Condition . . . [p]ursuant to 28 C.F.R. § 2.28(a)"); 28 C.F.R. § 2.28(a) (stating that a "Regional Commissioner may reopen a case"). Indeed, there is no indication that Mr. Holland had a role, even that of a mere adviser, in the decisions that led to the imposition, lifting, re-imposition, and re-lifting of the Special Sex Offender Aftercare Condition in Mr. Wills' case, or that he will play a part in any future decisions.

The D.C. Circuit has expressed skepticism of mootness arguments from government defendants that similarly rely on the assurances of officers without the authority to implement them. In *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988), where the plaintiff challenged the Air Force's practice of withholding certain documents requested pursuant to the Freedom of Information Act, the United States argued "that the Air Force's promise to desist from following the challenged practice should render this suit moot." That "promise" was delivered in the affidavit of an Air Force major, which assured the district court that "the contested practice will not be reinstated." *Id.* at 492. The case, however, was not moot, because the government's "promise" came, as it does here, from a source without authority: "[The major] does not pretend to speak for her superiors, nor have they signed affidavits pledging future compliance." *Id.* With the additional consideration of the agency's history of

[8] *See* United States Parole Commission FY 2012 Performance Budget, Congressional Submission (Feb. 2011) at 4, *available at* www.justice.gov/jmd/2012justification/pdf/fy12-uspc-justification.pdf (last visited Nov. 17, 2011).

noncompliance—another factor present here—the court found that "the Government has not come close to satisfying the *heavy burden* of demonstrating that there is no reasonable expectation . . . that the alleged violation will recur." *Id.* at 491-92 (internal quotation marks omitted; emphasis in original).

Moreover, even if Mr. Holland's assurances could be ascribed to the Parole Commission itself, there is no guarantee that the Commission would adhere to them under different leadership. Administrations change. Commissioners retire, or are replaced. Mr. Wills will be on supervised release until 2015. "[C]ourts have refused to dismiss cases where a governmental body discontinued a wrongful practice and promised not to resume it, since present intentions may not be carried out, and it is not certain that changes in leadership or philosophy might not result in reinstitution of the [challenged] policy." *United Food and Commercial Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 430 (8th Cir. 1988) (internal quotation marks omitted) (cited with approval in *Am. Lands Alliance v. Norton*, 360 F. Supp. 2d 1, 7 (D.D.C. 2003)). *See also Northland Family Planning Clinic*, 487 F.3d at 342 (issuance of state Attorney General's opinion interpreting abortion statute did not remove plaintiffs' fear of prosecution and thus moot case because "the current Attorney General could change it whenever he sees fit, as could any future Attorneys General").

Further, even setting aside the questionable authority behind Mr. Holland's statement, it is by no means clear how assurances made in a declaration, submitted as an attachment to a motion in a dismissed case, would actually bind the Parole Commission to anything. How would Mr. Wills enforce the Commission's "promise"? This is not a novel concern. After the plaintiffs in *American Hosp. Ass'n v. Sullivan*, 1990 U.S. Dist. LEXIS 6306, at *12 (D.D.C. May 24, 1990) challenged the defendant agency heads' application of certain Medicare policies, the

defendants "committed to th[e] court that they [would] not enforce the policies." Because the defendants' promise was unenforceable, however, it could not moot the case: "Defendants' commitment to this court of non-enforcement was voluntarily made, and so it could just as easily be voluntarily withdrawn." *Id.* at *13. In *Fund for Animals v. Jones*, 151 F. Supp. 2d 1, 5 (D.D.C. 2001), likewise, the federal defendants presented "signed assurances by agency heads" as a demonstration of their intent to comply with the statute under which plaintiff had sued. However, because "the affidavits . . . [were] not binding," and "given the federal defendants' history of non-compliance" with the statute, the court held that the case was not moot. *Id.* at 7. *See also Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 563 (2d Cir. 1991) (defendant's assertion to court that it would not sue plaintiff in future did not moot plaintiff's declaratory judgment action because defendant had not "entered into a binding, judicially enforceable agreement" (quotation marks omitted)); Moore's Federal Practice - Civil § 101.99 (courts weighing voluntary cessation arguments consider the "enforceability of a defendant's promise or representation that it will not resume the allegedly impermissible conduct").

B. The Effects of Defendants' Violations Have Not Been Completely and Irrevocably Eradicated.

While a persuasive demonstration that the alleged violations are not reasonably likely to recur—a showing that Defendants have not made and cannot make—is a necessary condition to a successful mootness argument, it is not a sufficient one. Defendants must also show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *ABA*, 636 F.3d at 648 (quotation marks and citations omitted). They have not and cannot.

Defendants appear to assume that, with the issuance of the Parole Commission's September 7, 2011, Notice of Action lifting the Special Sex Offender Aftercare Condition, all of

the ill effects of their unlawful conduct were washed away. Not so. To begin, notwithstanding Defendants' assurance to the Court that "CSOSA stopped implementing this condition once the Parole Commission removed it from Plaintiff's case," MTD at 16, CSOSA in fact retained Mr. Wills in its Sex Offender Unit for nearly six weeks after the Commission removed the condition, requiring him to report to the Unit weekly, as usual, throughout that period. In fact, Mr. Wills was scheduled to meet with his Sex Offender Unit supervising officer on the morning of October 17, 2011, the day Defendants filed their Motion to Dismiss. The officer did not appear for the meeting and failed to answer or return Mr. Wills' repeated calls. Defendants' statement in their Motion to Dismiss that "Plaintiff is no longer being supervised by the Sex Offender Unit of CSOSA," MTD at 5, came as news to Mr. Wills.

More importantly, even after the Parole Commission's belated decision to lift the Special Sex Offender Aftercare Condition, and after CSOSA's belated decision to transfer Mr. Wills out of its Sex Offender Unit, the "effects of the alleged violation" remain. The Fifth Circuit has explained why the government's eventual removal of the label of "sex offender" from a releasee does not dissolve the stigma created by the initial branding. *Coleman v. Dretke*, 409 F.3d 665, 667-68 (5th Cir. 2005) ("*Coleman II*"). The circuit court had previously held that the state had unconstitutionally required Coleman, a parolee, to attend sex therapy and register as a sex offender without providing him due process. *Coleman v. Dretke*, 395 F.3d 216, 219 (5th Cir. 2004) ("*Coleman I*"). In denying a rehearing *en banc*, a majority of that court rejected the dissent's argument that the case had become moot because the registration requirement had been dropped. *Coleman II*, 409 F.3d at 668. The majority cited *Vitek v. Jones*, 445 U.S. 480, 492 (1980), where the Supreme Court identified a liberty interest in avoiding the stigma associated

with compelled mental health treatment, in support of its holding that removal of Coleman's name from the sex offender registry had neither cured him of stigma nor mooted the case:

> *Vitek* does not require publication to establish stigma. In fact, the plaintiff in *Vitek* had not been required to register the fact of his classification as mentally ill, and the Court nowhere indicated that his treatment providers would not keep his records confidential. . . . Whether or not Coleman must now list his name on an official roster, by requiring him to attend sex offender therapy, the state labeled him a sex offender—a label which strongly implies that Coleman has been convicted of a sex offense and which can undoubtedly cause "adverse social consequences." . . . The stigma aspect of the case is thus not mooted by the state's decision to remove Coleman from its sex offender registry.

Coleman II, 409 F.3d at 668 (internal citations omitted). The Fifth Circuit rejected the same argument last year in *Meza v. Livingston*, which involved a similar challenge to sex offender classification and treatment on procedural due process grounds:

> [I]t is impossible for the defendants to un-ring the bell that was rung when Meza was required to register as a sex offender. The stigma that attached to Meza when he was required to register remains, regardless of whether his name is currently on a sex offender registry. The stigmatizing effects of registering as a sex offender still follow Meza . . . .

607 F.3d 392, 399 (5th Cir. 2010) (citation omitted). The same, of course, is true in Mr. Wills' case. The "stigmatizing effects" of his classification and treatment as a sex offender—through his placement in CSOSA's Sex Offender Unit, his mandatory sex offender treatment, and the compulsory (and inaccurate) publication of his status as a "sex offender," *see* Complaint ¶¶ 37, 40, 43-51, 53-59; MSJ at 9 ¶ 37—"still follow" Mr. Wills. Those effects will not be "completely and irrevocably eradicated," *ABA*, 636 F.3d at 648 (quotation marks and citations omitted), absent a declaration from this Court that his classification as a sex offender was never warranted.

II. Defendants' Unlawful Conduct Is Also Capable of Repetition, Yet Evading Review.

Mr. Wills' claims also avoid mootness under the "capable of repetition, yet evading review" exception to the mootness doctrine. The "challenged action was in its duration too short

to be fully litigated prior to its cessation or expiration," and "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

The D.C. Circuit "has held that agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). Defendants have twice imposed the Special Sex Offender Aftercare Condition on Mr. Wills' supervised release, and in neither instance was it in place for as much as two years. Most recently, it lasted for less than three months—from June 24, 2011, when the Commission granted CSOSA's request to add the condition, to September 7, 2011, when the Commission lifted the condition in response to this lawsuit. It is clear that the "challenged action was in its duration too short to be fully litigated." *Hunt*, 455 U.S. at 482.[9]

As for *Hunt*'s second prong, for all of the reasons cited in Mr. Wills' discussion of voluntary cessation, *supra* at 17-25, there remains a "reasonable expectation" that Mr. Wills will "be subjected to the same action again." *Hunt*, 455 U.S. at 482. Rather than repeat those reasons here, Mr. Wills notes only the following Supreme Court dictum regarding the flexibility of the "capable of repetition" standard: "[I]n numerous cases decided both before and since *Hunt* we have found controversies capable of repetition based on expectations that, while reasonable, were

[9] It is important to note that "fully litigated" does not refer to the review of the District Court, as Defendants suggest, MTD at 14, but rather to Supreme Court review. *See Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011) (challenged action will "evade review" if it is "in its duration too short to be fully litigated through the state courts (and arrive here) prior to its expiration" (internal quotation marks omitted)); Moore's Federal Practice - Civil § 101.99 ("By 'evading review,' the Supreme Court means evading Supreme Court review. In other words, for an action to be fully litigable, there must be time for it to be decided by the Supreme Court before it ceases or expires.").

hardly demonstrably probable." *Honig v. Doe*, 484 U.S. 305, 320 n.6 (1988). He surely passes that test.

III. A Dismissal on Mootness Grounds Would Run Contrary to the Public Interest.

Finally, the public interest in adjudicating the constitutionality of Defendants' conduct provides a further reason why the Court should not dismiss the case as moot. The Parole Commission maintains its policy of providing little or no process prior to imposing conditions of release that implicate liberty interests, particularly those applied to so-called "sex offenders." Mr. Wills has not just challenged the application of that policy to himself; he has complained of its ongoing impact on the many others situated similarly to him. *See, e.g.*, Complaint ¶ 65 (alleging that "[a]s a matter of routine practice, the Parole Commission imposes sex offender conditions without offering supervisees any process"); *id.* ¶ 67 (alleging that "when CSOSA petitions the Parole Commission to modify a supervisee's release conditions by adding sex offender conditions, the Parole Commission, as a matter of routine practice, grants CSOSA's request after providing supervisees only a cursory paper objection process"); *id.* ¶¶ 63-64 (alleging that as a result of "the Parole Commission's practice of providing constitutionally inadequate process prior to imposing sex offender conditions of supervised release," "[n]umerous other supervised releasees have, like Mr. Wills, been subjected to substantively unreasonable sex offender conditions imposed by the Parole Commission and enforced by CSOSA").[10]

[10] There is law in this Circuit suggesting that, even if an individual plaintiff's claim is truly moot—*i.e.*, if neither the voluntary cessation nor the capable of repetition, yet evading review exception applies—the fact that he has also challenged the government's underlying policy will save his case from mootness if the plaintiff would have standing to bring a purely forward-looking challenge to the policy. *See City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994) ("[T]his circuit's case law provides that if a plaintiff's specific claim has been mooted, it may nevertheless seek declaratory relief forbidding an agency from

While Mr. Wills does not have access to the exact number of District of Columbia conditional releasees affected by the Parole Commission's unlawful policies, there is evidence that the figure is disturbingly high. Paul Brennan, a supervisor in CSOSA's Sex Offender Unit, recently wrote that "[a]pproximately 700 of CSOSA's offender population are considered to be sex offenders."[11] Some percentage of that number is on probation, and thus not under the authority of the Parole Commission. But it is Mr. Wills' claim that the remainder—those who are on supervised release or parole—are currently subject to onerous sex offender conditions at the hands of the Commission, without having receiving adequate procedural protections. Moreover, Mr. Brennan acknowledged that "[a]pproximately 40%" of those 700—some 280 District of Columbia releasees—are "on supervision for an offense that is not one of sexual abuse by statute." *Id.* It thus appears that many others have been subject to the particular form of procedural due process violation of which Mr. Wills has complained—imposition of sex offender treatment on one who has never been convicted of a sexual offense, without notice and an adversarial hearing. Because these many others have not had a proper chance to contest their sex offender conditions, there is every reason to believe that, as in Mr. Wills' case, those conditions are substantively unreasonable. *See* D.C. Code § 24-403.01(b)(6); 18 U.S.C. § 3583(d); 18 U.S.C. § 3553(a)(1)-(2) (special conditions of supervised release must be

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imposing a disputed policy in the future, so long as the plaintiff has standing to bring such a forward-looking challenge and the request for declaratory relief is ripe."). Because, for all of the reasons argued above, Mr. Wills' claims are not moot—under both the voluntary cessation and capable of repetition, yet evading review exceptions—he has not sought to take advantage of the *City of Houston* avenue for saving a moot case from dismissal. The portion of Defendants' brief aiming to foreclose that argument thus has no application here. *See* MTD at 10-11 (arguing that Mr. Wills cannot meet *City of Houston* standard for saving from dismissal cases where "a plaintiff's claim against an agency is moot").

[11] Paul S. Brennan, "Sex Offender Supervision in the Nation's Capital" (Dec. 10, 2010), *available at* www.govloop.com/profiles/blog/show?id=1154385%3ABlogPost%3A1063704 (last visited Nov. 16, 2011).

"reasonably related" to the nature and circumstances of the supervisee's instant offense, his history and characteristics, and the sentencing goals of deterrence, protection of the public, and rehabilitation).

The public interest in ensuring that the harm that has been done to Mr. Wills does not continue to befall these many others militates strongly against a mootness finding. *See Meza*, 607 F.3d at 400 (citing fact that "as many as 6,900 current [Texas] inmates are subject to have sex offender conditions, including sex offender registration, imposed upon them in the future, despite the fact that they have not been convicted of a sex crime," in support of its holding that plaintiff's challenge to that practice was not moot). *See also W. T. Grant Co.*, 345 U.S. at 632 (holding that "a public interest in having the legality of the practices settled[] militates against a mootness conclusion"); *Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (noting that some Supreme Court decisions on mootnesss "dispens[e] with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the *defendant and the other members of the public at large*" (emphasis in original)); *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007) (holding that whether alleged violation would be repeated against particular criminal defendant challenging pre-trial shackling policy "makes no material difference . . . because a future charge assuredly will be brought against someone, and the shackling policy would similarly escape review," and noting that "[f]or this reason, we have held that a case is capable of repetition when the defendants are challenging an ongoing government policy"); Moore's Federal Practice - Civil § 101.99 (stating that "the determination as to whether the voluntary cessation exception should be applied" includes consideration of "the public interest in having the case decided on its merits" and that "cases in which [the] underlying claim has significant constitutional overtones, or . . . that present an issue

of public importance . . . generally survive claims of mootness because the plaintiff, typically, will not only challenge specific or isolated actions taken by a defendant, but also the ongoing policy that prompted the action").

CONCLUSION

For the reasons stated, the Court should deny Defendants' Motion to Dismiss and adjudicate the merits of Mr. Wills' claims.

Respectfully submitted,

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