Nos. 24-354, 24-422

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL., *Respondents*.

SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION, ET AL., *Petitioners*,
v.
CONSUMERS' RESEARCH, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed by law. It often litigates issues involving repeat agency action and thus has a substantial interest in this Court's resolution of the question added by the Court: Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This case is not moot. Article III demands a live controversy at all stages of a judicial proceeding. When a challenged action subsides during the proceeding but can reasonably be expected to recur, a live controversy remains. The plaintiff still faces injury from the defendant, and judicial resolution would inform the parties' legal rights.

Some courts have required plaintiffs in cases that are "capable of repetition" to show that they sought preliminary relief to forestall the end of the initial challenged action. That requirement has no place in Article III's mootness inquiry, for several reasons.

First, mootness under Article III can be avoided merely by showing that the challenged action is "capable of repetition." Repeat injury that can reasonably be expected is enough to avoid mootness, just as future injury can be sufficient for standing at the outset—though the standard for mootness is relaxed given that the initial injury has already been shown. In both cases, a federal court has before it a real-world case or controversy. The common characterization of this doctrine as the "capable of repetition, yet evading review" *exception* is a misnomer. Article III mootness can brook no "exception," and cases that are "capable of repetition" in this sense are simply not moot. What's more, whether the case would otherwise "evade review" because of the duration of the challenged action or average litigation length is irrelevant to Article III. All that's necessary is that a future injury of the same nature as the one that gave rise to the case can reasonably be expected. Applying this understanding

of Article III here, a quarterly fee imposed on the plaintiffs is easily "capable of repetition," so the courts have jurisdiction regardless of whether monetary recovery is possible.

The same jurisdictional conclusion applies even under the Court's articulation of the "evading review" prong of this mootness doctrine. That prong considers two elements: the expected length of the challenged action before its own cessation or expiration, and average length of considered litigation through appeal. An average full federal litigation is longer than three months. The added requirement that some Courts of Appeals have imposed—that the plaintiff move for preliminary relief or seek various forms of expedition—has no bearing on any proper inquiry. That is because Article III cares about the real-world case or controversy, not litigation strategy or tactics. Whether a plaintiff *asks* for preliminary relief has no necessary real-world consequence. And preliminary relief is not a full adjudication, anyway.

Adopting this added requirement would be highly disruptive to federal litigation. Lower courts applying this rule have jurisdictionally barred plaintiffs for all manners of supposed shortcomings, demanding that they move for injunctions, stays, expedition, and much else. If applied broadly, the rule would thus lead to rushed litigation that discourages thorough presentation of the issues and subjects litigants—and courts—to needless emergencies.

Plaintiffs seeking to vindicate legal rights before federal courts with an unflagging obligation to hear proper cases should not be turned away based on this artificial barrier. This case is not moot.

ARGUMENT

I. This case is not moot under Article III.

Federal courts have jurisdiction to decide "Cases" or "Controversies." U.S. Const. art. III, § 2. "[A] federal court's duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, but it persists throughout the life of the proceedings." *Fed. Bureau of Investigation* v. *Fikre*, 601 U.S. 234, 244 (2024). In other words, "a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed.'" *United States* v. *Juv. Male*, 564 U.S. 932, 936 (2011) (quoting *Arizonans for Off. English* v. *Arizona*, 520 U.S. 43, 67 (1997)). "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* at 936 (cleaned up).

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Ibid.* (cleaned up).

"But a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin* v. *Chafin*,

568 U.S. 165, 172 (2013) (cleaned up). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ibid.* (cleaned up).

Difficulties in applying the mootness requirement have often arisen in two circumstances: (1) when the defendant voluntarily ceases its challenged conduct; and (2) when the challenged conduct otherwise subsides but the plaintiff may face it again. On the first, "a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *Fikre*, 601 U.S. at 241. And on the second, under current doctrine, courts will still decide the case "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (cleaned up).

The Court of Appeals here focused on the second circumstance, which this Court has labeled "the established exception to mootness for disputes capable of repetition, yet evading review." *Ibid.*; see Pet. 13a. But this label obscures the reality that under Article III, a controversy presenting a repeat injury to the plaintiff is not moot at all. And because a controversy involving repeat injury is not moot, the length of the action—or, whether the controversy might "evade review"—is irrelevant to a proper Article III mootness inquiry. Applying these principles here, because there is no dispute about the "near certainty" that at least

some of the plaintiffs would suffer the same injury, Pet. 14a, this case is not moot. These three points are discussed in turn.

A. A reasonable expectation of future injury is enough to avoid mootness.

First, the capable-of-repetition "exception" is "not really [an] exception[] at all." T. Lindley, *The Constitutional Model of Mootness*, 48 B.Y.U. L. Rev. 2151, 2158 (2023). Instead, both the voluntary cessation and capable-of-repetition doctrines "are consistent with the requirement that a plaintiff have suffered harm or be sufficiently likely to suffer harm in the future." *Ibid.* So when a plaintiff is reasonably expected to suffer harm from a defendant, the controversy simply is not moot. Though "the presently inflicted harm ceases," "there is still a future, threatened harm," so "there remains a case or controversy under Article III in the traditional sense." *Id.* at 2162.

Start with the voluntary cessation doctrine. The Court rarely uses the word "exception" to describe that doctrine. Rather, it typically says that "[v]oluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (cleaned up). Under this formulation, unless the defendant meets the "heavy burden" of showing that the behavior will not recur, the case is "not moot." *Ibid.*; see also *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal

of power to hear and determine the case, i.e., does not make the case moot."). As this explanation suggests, voluntary cessation cases do not constitute "exceptions" to mootness. Rather, they satisfy Article III's requirement of a nonmoot case.

Turn now to the capable-of-repetition doctrine. The critical "question the voluntary cessation doctrine poses" is the same one that matters to the capable-of-repetition doctrine: "Could the allegedly wrongful behavior reasonably be expected to recur" against the same plaintiff? *Already*, 568 U.S. at 92; see *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 170 (2016). (The issue of wrongful conduct recurring against *other* parties is not presented here.) "Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 213–14 (2000) (Scalia, J., dissenting) (quoting *Honig* v. *Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting, joined by O'Connor, J.)).

"[J]ust as the initial suit could be brought (by way of suit for declaratory judgment) before the defendant actually violated the plaintiff's alleged rights, so also the initial suit can be continued even though the defendant has stopped violating the plaintiff's alleged rights." *Id.* at 213. Almost a century ago, this Court "dispelled [any] doubts" "about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 126 (2007) (Scalia, J.). "[S]o long as the case retains the essentials of an

adversary proceeding, involving a real, not a hypothetical, controversy," a suit seeking declaratory relief presents an Article III case. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 264 (1933). "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function." *Id.* at 263. The same logic applies when a case is capable of repetition. The reasonable expectation of future injury means that "the decision of the question of law" will "directly affect[]" "valuable legal rights," *id.* at 262, even if "the practical impact of any decision is not assured." *Chafin*, 568 U.S. at 175.

This understanding accords with standing doctrine, too. For purposes of analyzing standing at the outset, the Court has held that "future injuries" "'may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *Dep't of Com.* v. *New York*, 588 U.S. 752, 767 (2019) (quoting *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014)). Of course, the plaintiff's showing under the capable-of-repetition doctrine should generally "be 'easier' as a practical matter than establishing standing in a pre-enforcement challenge." Lindley, *supra*, at 2182. That is because "in a capable of repetition case, the plaintiff will have already proven" "that (1) the defendant has engaged in the conduct, and . . . is unlikely to cease [it], (2) the defendant's general type of conduct is capable of inflicting the harm alleged, and (3) the plaintiff has already engaged in a course of conduct

that resulted in the harm being inflicted." *Ibid.* The plaintiff need only show "that the defendant will continue to engage the conduct (or is likely to engage in the conduct in the future), and that the plaintiff will again engage in the relevant course of conduct." *Ibid.*; cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (emphasizing the distinction between the standing and mootness inquiries).

The critical point, however, is that when the injury can reasonably be expected to recur, "a case based on th[e] dispute remains live," *Turner* v. *Rogers*, 564 U.S. 431, 439 (2011)—rather than being excepted from the mootness requirement. See also *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (explaining the capable-of-repetition doctrine as leading to "a conclusion of nonmootness"), *overruled on other grounds by Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Of course, the voluntary cessation and capable-of-repetition doctrines are not identical, as shown by the differential placement of the burden to show mootness or nonmootness. The Court has said that the capable-of-repetition "doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). That burden is consistent with the general requirement that the plaintiff prove jurisdiction—with some skepticism of claims of future injury. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Under voluntary cessation, by contrast, the defendant's affirmative effort to nullify the suit justifies requiring the *defendant* to "show that the

practice cannot reasonably be expected to recur"—"a formidable burden." *Fikre*, 601 U.S. at 241 (cleaned up); see also Lindley, *supra*, at 2181 (accounting for this differential burden because under voluntary cessation, "[t]he same conduct would naturally give rise to the same controversy," "eliminat[ing] the need for the plaintiff to establish that the future harm . . . creates the same controversy").

Yet under both doctrines, the central question is the likelihood of repeat injury. The capable-of-repetition doctrine is thus no more an "exception" to mootness than the voluntary cessation doctrine. Neither doctrine "excepts" an action from the Article III requirement of an ongoing case or controversy. Contra Federal Petitioners' Br. 16 (referring to "the capable-of-repetition exception" to "the case-or-controversy requirement").

If the rule were otherwise, and a likelihood of repeat injury were not enough to avoid mootness, then Article III could not countenance any "exception." Article III's mootness requirement, like standing and ripeness, is a "means of defining the role assigned to the judiciary in a tripartite allocation of power." *Spencer* v. *Kemna*, 523 U.S. 1, 11 (1998) (cleaned up). "In our system of government, courts have no business deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already*, 568 U.S. at 90 (cleaned up). Thus, Chief Justice Rehnquist argued that "[i]f our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading

review than we would to decide cases which are 'moot' but raise no such questions." *Honig*, 484 U.S. at 330 (concurring opinion).

Chief Justice Rehnquist followed that reasoning to conclude that mootness is not required by Article III. If that were right, then the continuing validity of this case is confirmed by this Court's "recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)); see *Cohens* v. *Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). If mootness were prudential, its only place in federal adjudication should be in weighing equitable relief—not in limiting a court's jurisdiction.

This Court, however, has established the role of mootness within Article III. See *Already*, 568 U.S. at 90–91; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *S. Pac. Terminal Co.* v. *Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911). Justice Scalia explained that mootness, like standing, has "deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition." *Honig*, 484 U.S. at 339 (dissenting opinion); see *id.* at 339–42 (tracing this history). The capable-of-repetition doctrine "merely defines those situations in which a seemingly moot case still meets [A]rticle III's

requirement of a genuine, concrete controversy." *Nat'l Broad. Co.* v. *Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1029 n.3 (CA11 1988) (Tjoflat, J., dissenting). And courts should not "confuse[] mootness with the merits"—including any equitable considerations related to an appropriate declaratory or injunctive remedy. *Chafin*, 568 U.S. at 174. There can be no mootness exception. As a matter of Article III, cases involving injuries that can reasonably be expected to recur against the same plaintiff simply are not moot.

B. Whether a case "evades review" is irrelevant.

Next, the Court has articulated another prong of the capable-of-repetition doctrine focusing on whether the case "evades review"—whether "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Wisconsin Right To Life*, 551 U.S. at 462 (cleaned up). This prong should have no relevance under Article III.

Even if the challenged action could be long enough on recurrence to be fully litigated, litigation length has no bearing on Article III's mootness question. Rather, all that matters is whether the plaintiff is reasonably expected to suffer a similar injury by the defendant. When that is true, a controversy still exists, regardless of whether the original or a new case might have been fully litigated before a change in conduct occurred.

A change in conduct means that "the harm that gives rise to an Article III case or controversy shifts from a harm that is currently being suffered to one that will be suffered in the future." Lindley, *supra*, at

2181. But if the capable-of-repetition prong has been established, then the future injury is sufficient and no justiciability problem has arisen. No further analysis is necessary. Neither is a new lawsuit. Both the duration of the challenged conduct and the predicted length of a full adjudication are irrelevant.

Again, take it from Justice Scalia: "the probability of recurrence between the same parties is essential to [courts'] jurisdiction." *Honig*, 484 U.S. at 341 (dissenting opinion). It is also sufficient to avoid mootness. Thus, Justice Scalia said, "the 'yet evading review' portion of our 'capable of repetition, yet evading review' test is prudential; whether or not that criterion is met, a justiciable controversy exists." *Ibid.*; accord Lindley, *supra*, at 2177 ("Whether a case evades review is merely a prudential prong, and it is not a prerequisite to a federal court hearing a case that is otherwise capable of repetition to the plaintiff."). And as explained above, this Court has since rejected layering prudential requirements on to Article III's baseline: "A court with jurisdiction has a 'virtually unflagging obligation' to hear and resolve questions properly before it." *Fikre*, 601 U.S. at 240.

Comparing the capable-of-repetition doctrine with the voluntary cessation doctrine drives the point home. Under the voluntary cessation doctrine, what matters "alone" is "the potential for a defendant's future conduct." *Id.* at 244. "[W]hether a defendant repudiates its past actions" only matters to the extent that the repudiation gives evidence "about its future conduct." *Ibid.* The focus is whether the defendant can "reasonably be expected to do again in the future what it is alleged to have done in the past." *Id.* at 242. The

predicted length of the defendant's conduct relative to average litigation length does not appear to matter in voluntary cessation cases.

No more should it be relevant to the capable-of-repetition doctrine how the timing of a new lawsuit might run. "[S]electively dismiss[ing] cases based on how effectively the court [might] manage[] its docket" both is "strange" and has nothing to do with jurisdiction. S. MacGuidwin, *Mooting Unilateral Mootness*, 121 Mich. L. Rev. 641, 655 (2023). The original lawsuit is not moot, so there is no basis to avoid adjudicating it. The Court should abandon the "evades review" prong of the doctrine.

C. This case is not constitutionally moot.

Applying the proper Article III mootness test to this case is straightforward. It appears to be indisputable that this controversy over the fee from 2022's first quarter "is capable of repetition because there is 'a reasonable expectation'—indeed, a near certainty—'that [a plaintiff with standing] will be subjected to the same action again.'" Pet. 14a. The federal Petitioners explain that "the FCC calculates a new contribution factor every quarter," Br. 15, as it is required by regulation to do. See 47 C.F.R. § 54.709. Thus, like appropriate declaratory judgment cases, this case "is manifestly susceptible of judicial determination": "It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 242 (1937); cf. *Consumers' Research* v. *FCC*, 88 F.4th 917, 923 (CA11 2023) (explaining that an identical case

would "present[] a proper pre-enforcement review" question).

All this brings us to the question presented by this Court: "Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit." As the above discussion suggests, whether the challengers sought preliminary relief, or could seek preliminary relief in a new lawsuit, is irrelevant because it sheds practically no light on the reasonable expectation that a plaintiff will be injured again by a defendant. Preliminary relief often turns on reasons other than "the ultimate merits." See *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 398 (1981); see also *Starbucks Corp.* v. *McKinney*, 602 U.S. 339, 345 (2024) (listing traditional four factors). A party's decision whether to *seek* preliminary relief may be influenced by even more reasons. And none of those reasons matters to the mootness question of whether there remains a reasonable expectation of repeat future injury. "'The Constitution deals with substance,' not strategies." *Fikre*, 601 U.S. at 241 (quoting *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1867)).

To be sure, several Courts of Appeals have adopted a gloss on the capable-of-repetition doctrine "emphasizing the offended party's ability and obligation to use available remedies to ensure that review is not evaded in the future." 13C E. Cooper, *Federal Practice & Procedure* § 3533.8.2 (3d ed. June 2024 update). Though courts have discussed remedies like "interlocutory injunctions, stays, and expedited appeals," "[e]nthusiasm for the opportunities to avoid mootness" has been "carried to the point of observing that a party should default or disobey, incurring

sanctions." *Ibid.* (collecting cases). Even prior attempts at preliminary relief are sometimes not enough, on the logic that a party that makes a better "showing" *could* get relief. *Bayou Liberty Ass'n, Inc.* v. *U.S. Army Corps of Eng'rs*, 217 F.3d 393, 399 (CA5 2000).

These decisions place the requirement to pursue preliminary relief within the "evades review" prong of the doctrine. See 13C *Federal Practice & Procedure*, *supra*, § 3533.8.2; see also *Empower Texans, Inc.* v. *Geren*, 977 F.3d 367, 371 (CA5 2020) (collecting cases). But as discussed above, that prong has no place in Article III mootness. Thus, whether the challengers here sought preliminary relief is irrelevant to the continuing jurisdiction of the federal courts over this case. With "near certainty," Pet. 14a, a plaintiff here can reasonably be expected to suffer the same injury from a defendant, so Article III jurisdiction exists.

II. This case is not moot under this Court's precedents.

Even if the Court were to apply the "evades review" prong of the inquiry—whether "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration," *Wisconsin Right To Life*, 551 U.S. at 462—the case is still not moot. The type of review that might otherwise be evaded is "considered plenary review," through the whole appellate process. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976). And under this Court's precedents, "pregnancy at nine months and elections spaced at yearlong or biennial intervals" have a sufficiently "short duration" to "not preclude challenge." *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974). The shorter three-

month period here "do[es] not last long enough for complete judicial review." *Ibid.*

A party's litigation strategy—including whether the party seeks preliminary relief—has no bearing on this conclusion. Principally, that is because Article III's jurisdictional inquiry looks to the real world, not court tactics within a case. Under Article III, federal courts "review statutes and executive actions when necessary to redress or prevent actual or imminently threatened injury to persons caused by official violation of law." *Murthy* v. *Missouri*, 603 U.S. 43, 56–57 (2024) (cleaned up). What matters is that the controversy is "actual." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 337 (2016) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). Put another way, Article III looks for "a real controversy with real impact on real persons." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 424 (2021) (quoting *American Legion* v. *American Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring in judgment)); see also 13B *Federal Practice & Procedure*, *supra*, § 3533.1 (describing Article III's "core" as "a search for the possibility that granting a present determination of the issues offered, and perhaps the entry of more specific orders, will have some effect in the real world").

For these reasons, a party "cannot manufacture its own standing" for an Article III case. *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024). On the flip side of the coin, even if "the parties agree on the merits" of a legal question, Article III jurisdiction still exists if the case "presents real-world consequences." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 212 (2020).

Applying those principles here, whether a party has moved for preliminary relief does not change the nature of the real-world controversy. The underlying controversy—here, a quarterly imposition of fees—is either "too short to be fully litigated prior to cessation or expiration," *Wisconsin Right To Life*, 551 U.S. at 462, or it is not. Whether a plaintiff in a particular case *could* have avoided the mootness issue entirely by moving for (and being lucky enough to receive) preliminary relief says nothing about the comparison between the challenged action and the length of a full litigation.

To illustrate the point, consider two hypothetical plaintiffs, each of whom sues the same defendant on the same day with the same claim against an action that, like the one here, lasts 90 days. Plaintiff 1 moves for every conceivable relief—a temporary restraining order, a preliminary injunction, expedited briefing, and concomitant emergency appeals. All are denied, perhaps with the court relying on the proposition that "preliminary injunctive relief should not be given merely to forestall possibly mooting events." 13B *Federal Practice & Procedure*, *supra*, § 3533.1. Plaintiff 2 simply files the complaint. When the 90-day action expires, the real-world controversy in each case is the same. It makes no difference that Plaintiff 1 moved umpteen motions for preliminary relief.

One might object that Plaintiff 1 *could* have gotten preliminary relief. True enough, but why would that matter to whether "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration"? *Wisconsin Right To Life*, 551 U.S. at 462. "Cessation or expiration" refers to the *ex*

ante nature of some real-world consequence, not the possibility of a judicially imposed change. And preliminary relief is not a full litigation, but "only the parties' opening engagement." *Sole* v. *Wyner*, 551 U.S. 74, 84 (2007). What's more, cases granting preliminary relief are often *slower* to proceed to final resolution, given the possibility of an interim appeal and stays. See, *e.g.*, *Mukasey* v. *ACLU*, 555 U.S. 1137 (2009) (denying certiorari of an appeal after final judgment in a case in which the initial preliminary injunction had been entered a decade prior and was reviewed by this Court, see *ACLU* v. *Mukasey*, 534 F.3d 181, 185–86 (CA3 2008)).

Thus, requiring parties to move for preliminary relief is unjustified even on the assumption that whether a case "evades review" has any relevance to Article III mootness.

III. Requiring parties to seek preliminary relief would needlessly disrupt litigation.

Adopting the rule imposed by some lower courts and holding this case moot on the ground that the plaintiffs should have sought preliminary relief would have negative consequences for ordinary litigation, including muddying mootness rules, imposing arbitrary time constraints, and causing more emergency litigation.

First, the logic of a preliminary relief requirement would make the "evading review" prong "virtually impossible to meet." *Washington Post* v. *Robinson*, 935 F.2d 282, 287 n.6 (CADC 1991). It would be the rare case indeed in which a court could not find *some* way in which a hypothetical plaintiff could file faster, move

for quicker relief, seek expedited briefing, ask for reconsideration, file an appeal, seek mandamus, ask for certiorari before judgment, default, be held in contempt—the list goes on. Courts that apply a preliminary relief requirement have based mootness findings on these sorts of possibilities, often "coupled with an observation that the parties should have made better use of these procedures to avoid mooting the present case." 13C *Federal Practice & Procedure*, *supra*, § 3533.8.2 (collecting cases); see, *e.g.*, *Armstrong* v. *FAA*, 515 F.3d 1294, 1296 (CADC 2008) (noting that the litigant "filed a motion to extend the time to file his reply brief by two weeks," and admonishing that "[a] litigant cannot credibly claim his case 'evades review' when he himself has delayed its disposition"). Courts whose "virtually unflagging" "obligation [is] to hear and decide cases within [their] jurisdiction" should not erect these artificial barriers to vindication of rights. *Susan B. Anthony List*, 573 U.S. at 167 (cleaned up).

Second, requiring plaintiffs to seek preliminary relief would impose arbitrary time constraints on cases. Aware that courts may consider every move—including simple two-week extensions—to have drastic jurisdictional consequences, plaintiffs will be forced to rush through litigation. They will refuse reasonable extensions and spam other parties and courts with filings, all in service of avoiding a possibility that a court will think they did not move quickly enough. Defendants will try to create delay. And since what matters to courts that apply a preliminary relief requirement is what the plaintiff has done—rather than whether the relief is or may be granted—the plaintiff faces a perverse incentive to

make slapdash arguments simply to avoid a mootness bar. See MacGuidwin, *supra*, at 655 ("Plaintiffs may fear that expedited review will lead to less careful consideration of the facts and law. They must balance the risk of dismissal on mootness grounds with the risk of a rushed decisionmaking process.").

Third and relatedly, all this will lead to unnecessary disruption in the courts, "wreaking havoc with the court[s'] multitude of scheduling priorities" on every level. *Washington Post*, 935 F.2d at 287 n.6. There will be more time-sensitive motions and more emergency appeals. As members of this Court have recognized, "forc[ing] judges into making rushed, high-stakes, low-information decisions at all levels" is "not always optimal for orderly judicial decisionmaking." *Labrador* v. *Poe*, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) (cleaned up) (first quotation); *id.* at 930 (Kavanaugh, J., concurring) (second quotation); see also *id.* at 934–35 (Jackson, J., dissenting); *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring); *Whole Woman's Health* v. *Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

In sum, "[t]here is no need to manipulate constitutional doctrine and hold" cases moot based on average litigation length and a subjective assessment of a plaintiff's litigation tactics. *Chafin*, 568 U.S. at 178. Doing so would not only disrupt courtrooms, but also "close the door to the resolution of the important questions these concrete disputes present." *Super Tire*, 416 U.S. at 127.

CONCLUSION

For these reasons, this case is not moot.

Respectfully submitted,

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