Michigan Law Review

Volume 121 | Issue 4

2023

Mooting Unilateral Mootness

Scott T. MacGuidwin
University of Michigan Law School

https://doi.org/10.36644/mlr.121.4.mooting

NOTE

MOOTING UNILATERAL MOOTNESS

*Scott T. MacGuidwin**

Several situations cause a case to be moot. These include settlement agreements, party collusion, changes in litigant status, and extrinsic circumstances thwarting the court from granting any relief. The final reason is unilateral mootness—when a defendant ends a lawsuit against a plaintiff's wishes by giving them everything for which they ask. In practice, this allows defendants to strategically stop lawsuits when it is clear they are not going to win. By doing so, they prevent the court from handing down adverse precedent and preserve the opportunity to engage in similar behavior with impunity. Courts have established a series of mootness exceptions to limit such gamesmanship. These exceptions are based on vague standards, which do little to guide judges making mootness decisions. The result is that some cases are heard on the merits, while other, nearly identical ones are dismissed. Unilateral mootness fails as a prudential doctrine. It struggles to limit disparate outcomes, prevent defendant gamesmanship, or save judicial resources, and alternative solutions do not fully address these three problems. This Note argues that the best recourse is to scrap unilateral mootness completely. Barring a settlement, collusion, or impossibility of relief, judges should never dismiss a case as moot.

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* J.D. Candidate, May 2023, University of Michigan Law School. Thank you to Professor Evan Caminker for his insightful and comprehensive feedback throughout the writing process and to Professor Daniel Deacon for his reactions to an early draft of this Note. I am immensely grateful for the work done by the *Michigan Law Review* editors, particularly Will Hanna, Noah Harrison, Hank Minor, Alex Noronha, Lara Ryan, and Annie Schuver. Finally, thank you to my wife Jennifer for her endless encouragement throughout the writing process.

 doi:10.36644/mlr.121.4.mooting

> *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. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.*
> *—Chief Justice John Marshall*[1]

INTRODUCTION

Chike Uzuegbunam was a student who wanted to share his Christian faith with classmates at Georgia Gwinnett College.[2] Uzuegbunam regularly handed out religious literature and spoke with interested students at the campus's outdoor plaza.[3] A campus police officer told him to stop.[4] School officials then informed Uzuegbunam that he needed to secure a permit to use one of two "free speech expression areas."[5] Combined, these zones accounted for only about 170 square feet of the eleven-million-square-foot campus.[6] The zones were open for two or four hours per weekday and were entirely closed during the weekend.[7] Undeterred, Uzuegbunam got a permit and went to a free speech zone to discuss his religious beliefs.[8] Police stopped him after twenty minutes.[9] The officer told Uzuegbunam that his speech was disturbing the peace and comfort of others.[10] Disruptive speech violated the student code of conduct.[11] Uzuegbunam decided to sue.[12]

Uzuegbunam sued college officials in federal court, alleging multiple First Amendment violations.[13] First, he argued that limiting students to tiny free speech zones violated his free speech rights in the traditional public forum of

1. Cohens v. Virginia, 19 U.S. 264, 404 (1821).

2. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021).

3. *Id.*

4. *Id.*

5. *Id.* at 796–797.

6. The zones composed only 0.0015 percent, *id.* at 797, of the 261-acre campus. *About GGC*, GEORGIA GWINNETT COLLEGE, https://www.ggc.edu/about-ggc [perma.cc/G36U-ZJEA].

7. First Amended Verified Complaint at 18, Uzuegbunam v. Preczewski, 378 F. Supp. 3d 1195 (N.D. Ga. 2018) (No. 16-cv-04658).

8. *Uzuegbunam*, 141 S. Ct. at 797.

9. *Id.*

10. *Id.*

11. *Id.*

12. Another student sharing Uzuegbunam's faith, Joseph Bradford, joined in the lawsuit. Bradford feared reprisal from the school following these events, so he decided not to speak about his faith. *Id.*

13. Uzuegbunam v. Preczewski, 378 F. Supp. 3d 1195, 1198–99 (N.D. Ga. 2018).

the campus outside of these zones.[14] Next, he alleged that the school's permit procedures were unconstitutional prior restraints.[15] The school lacked standards by which permits would be granted.[16] The school also lacked standards for campus officers to follow when silencing students.[17] Then, Uzuegbunam alleged that banning speech that causes student complaints constitutes unconstitutional viewpoint discrimination.[18] He sought an injunction to stop the university from enforcing the speech policy, a declaration that the actions violated the First Amendment, and an award for nominal damages.[19]

College officials, perhaps realizing they were wrong (or likely to lose), changed their free speech policies midway through the lawsuit.[20] The officials argued that with this policy change, Uzuegbunam received everything he wanted.[21] They moved to dismiss the case as moot, and the district court agreed.[22] Uzuegbunam appealed to the Eleventh Circuit, arguing that he was still entitled to nominal damages.[23] The Eleventh Circuit disagreed with Uzuegbunam, affirming the lower court.[24] To be clear, for the purposes of the appeal, Georgia Gwinnett College did violate Uzuegbunam's First Amendment rights.[25] Without an injunction or reprimand from the Eleventh Circuit, the college would be free to later return to its original policy. If it did, Uzuegbunam could not sue it again. By the time of the Eleventh Circuit's decision, he was no longer a student,[26] so he would not be affected by this new policy.

Mootness is a doctrine requiring judges to dismiss some cases rather than reach their merits. A case is moot when there are no live issues, parties lack a legally cognizable interest in the outcome, or a court cannot grant any relief.[27]

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14. First Verified Amended Complaint, *supra* note 7, at 61–62.

15. *Id.* at 61–64.

16. *Id.* at 62–63.

17. *Id.*

18. *Id.* at 66.

19. *Id.* at 78–79.

20. Uzuegbunam v. Preczewski, 378 F. Supp. 3d 1195, 1199 (N.D. Ga. 2018).

21. *See id.* at 1205 n.7.

22. *Id.* at 1198.

23. *See* Brief of Plaintiffs-Appellants at 32, Uzuegbunam v. Preczewski, 781 F. App'x 824 (11th Cir. 2019) (No. 18-12676).

24. *Uzuegbunam*, 781 F. App'x at 826.

25. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) ("For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights . . . .").

26. *Id.* (Roberts, C.J., dissenting).

27. Chafin v. Chafin, 568 U.S. 165, 172 (2013).

Governments and large corporations use mootness as a tool to vacate unfavorable decisions and avoid precedent limiting their unlawful actions.[28] Mootness prevents plaintiffs from vindicating their rights and impact litigation attorneys from establishing favorable precedent.[29]

The Supreme Court ultimately decided that Uzuegbunam's nominal damages claim could prevent mootness.[30] While this is good news for students challenging First Amendment violations, the outcome is unsatisfying. What exactly constitutes nominal damages? Some courts have valued nominal damages as being worth a single dollar.[31] Could defendants moot cases by paying plaintiffs this single dollar of "nominal damages"?[32]

Uzuegbunam continues a long trend of courts establishing exceptions when a case would otherwise be moot.[33] These exceptions help individuals vindicate their rights. In practice, however, plaintiffs do not advance their cases evenly. Similarly situated plaintiffs face different outcomes within and among circuits. These disparate outcomes stem from the vague doctrinal standards embodied in the mootness exceptions. Vagueness is particularly concerning in the mootness context because it harms judicial legitimacy, encourages defendant gamesmanship, and reduces judicial efficiency.

This Note proposes a novel solution: when constitutionally permitted, eliminate the mootness doctrine entirely. These are cases in which the defendant acts to moot a case despite the plaintiff's desire to continue litigating. I will refer to this as "unilateral mootness."[34] Unilaterally moot cases should either be heard on the merits or dismissed on other grounds, such as collusion, standing, or ripeness. Eliminating unilateral mootness would allow plaintiffs to vindicate their rights equally. And it would better address the concerns underlying existing mootness exceptions while imposing fewer costs on the doctrine itself.

In Part I, I argue that unilateral mootness is not a constitutional requirement. In Part II, I describe how vague standards in mootness exceptions lead to disparate dismissals among similarly situated litigants. In Part III, I outline

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28. *See* discussion *infra* Sections III.B, III.C.

29. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266 (2021).

30. *See Uzuegbunam*, 141 S. Ct. at 797. The Justices came to this conclusion after mulling over Taylor Swift's recent nominal damages victory. Transcript of Oral Argument at 75, *Uzuegbunam*, 141 S. Ct. 792 (No. 19-968). In that case, Taylor Swift secured one dollar in symbolic compensation from a Denver radio host who assaulted her. Mueller v. Swift, No. 15-cv-1974, 2017 WL 4237151, at *1 (D. Colo. Aug. 15, 2017). She won. *Id.*

31. *E.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 305 (2008) (Roberts, C.J., dissenting) ("Article III is worth a dollar.").

32. *See* discussion *infra* Section II.B.

33. *See* discussion *infra* Section II.A.

34. Several cases and scholarly pieces refer to the problem of defendants unilaterally mooting cases. Although the term "unilateral mootness" is not well established, it has appeared in at least some legal literature. *See, e.g.*, Ruby Emberling, Note, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505 (2021).

the harms of unilateral mootness to the public, litigants, and the judicial system. Finally, in Part IV, I conclude that alternative solutions fail to fully address the harms of unilateral mootness and do not provide meaningful benefits over eliminating mootness entirely.

I. UNILATERAL MOOTNESS AS A PRUDENTIAL DOCTRINE

Given this Note's goal of undermining the prudential bases of mootness, I must first show that dismissing moot cases is not a constitutional requirement.[35] Mootness as a prudential doctrine is not a novel concept.[36] This Note does not provide a full attack on the constitutional model of mootness. Instead, I aim to summarize prior arguments to establish a prima facie case that many moot cases do not constitutionally require dismissal. To do so, I first divide mootness into several discrete categories. Next, I show that the purported constitutional bases for mootness largely do not apply to unilateral mootness.

A. *Categories of Mootness*

Mootness arises in five situations: (1) the plaintiff agrees to end the lawsuit (voluntary dismissal); (2) the court can no longer grant any relief (defunct remedies); (3) the identity or motives of the litigants change in a way that undermines the adversarial process (collusion); (4) the status of the plaintiff changes, but not in a way that undermines the adversarial process (change in status); and (5) the defendant acts to end the lawsuit over the plaintiff's objections (unilateral mootness).[37] Cases often implicate several of these categories, adding to the confusion over the constitutionality of mootness. I will briefly describe each scenario.

The first case of mootness arises when the plaintiff agrees to end the lawsuit or abandons the case. This may arise from a lack of funds, a desire to stop litigating, or a settlement agreement. Dismissal in these cases should not be controversial—the parties have agreed to it. To put simply, there is no longer a controversy between the parties.[38]

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35. If mootness were truly a constitutional issue, then courts would have no authority to hear moot cases, even if prudential factors weigh in favor of hearing the case. This would moot this Note. Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

36. *See, e.g.*, *id.* at 341 (Scalia, J., dissenting) ("[T]he 'yet evading review' portion of our 'capable of repetition, yet evading review' test is prudential . . . .").

37. This list comprises all the moot scenarios outlined in 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3533–3533.8 (3d ed. 2008). This Note describes the moot scenarios with less granularity than Wright and Miller. For instance, "Abandonment" is a subset of voluntary dismissal, "Expired Orders" are a subset of defunct remedies, and "Superseding Legislation" is either a subset of defunct remedies or unilateral mootness, depending on the case. *See id.*

38. *See* U.S. CONST. art. III, § 2, cl. 1 (requiring, generally, that a controversy exist between parties for a situation to be within the federal judicial power).

The second case arises when extrinsic circumstances prevent the court from granting any relief. This category comprises a narrow set of cases in which the sole remedy is impossible for a court to grant or an element is now impossible to satisfy.[39] Suppose a plaintiff crafts a worthless wooden duck, which is promptly stolen by the defendant.[40] The relevant statutes do not provide for any compensatory or nominal damages, only injunctive relief. Now suppose the duck burns in a fire. The judge cannot order the defendant to return the duck because the duck no longer exists. No relief is available, so the case is moot. Similarly, suppose a plaintiff sues for defamation and later dies. Defamation lawsuits often require the plaintiff to prove damage to reputation. The deceased, however, have no entitlement to their reputation.[41] Because the plaintiff's estate cannot prove this element, the plaintiff's death will moot the case.

The third case of mootness arises when events occur midlawsuit that may undermine the adversarial process. Here, one party's ability to effectively litigate the case comes into question. One example of such an event would be collusion between the parties.[42] This can also occur when the identity or motives of a litigant change, such as during a change in presidential administration.[43] These cases are properly dismissed as moot, as they fail the adversity requirement of Article III.[44]

The fourth case arises when the status of a party changes but not in a way that implicates adversity. Here, the identity or status of a plaintiff changes midlitigation such that they cannot recover from a favorable decision. But unlike in cases of collusion, the events have not changed the incentives of either party in a way that affects their adversity. For instance, in *DeFunis v. Odegaard*, a rejected law school applicant challenged the University of Washington's affirmative action policy.[45] The university admitted him pursuant to a trial court injunction.[46] At the Supreme Court, the university confirmed that they would allow the student to complete his degree regardless of the decision.[47] The case was dismissed as moot because the student was no longer an applicant and "will never again be required to run the [gauntlet] of the Law

39. *See* WRIGHT ET AL., *supra* note 37, § 3533.3 (explaining that even peripheral claims to monetary or specific relief help a case avoid being mooted on defunct remedy grounds).

40. Example inspired by an anatine hypothetical discussed by Justice Neil Gorsuch. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1035 (2021) (Gorsuch, J., concurring).

41. Only a living person has an entitlement to their reputation. *See, e.g.*, Utah Animal Rts. Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1273 (10th Cir. 2004) (Henry, J., concurring). *Contra* DON HERZOG, DEFAMING THE DEAD (2017) (arguing that postmortem defamation should be cognizable).

42. *See, e.g.*, Lord v. Veazie, 49 U.S. (8 How.) 251, 254–56 (1850).

43. *See* discussion *infra* Section IV.C.2.

44. *See* discussion *infra* Section I.B.

45. *See* 416 U.S. 312 (1974).

46. *DeFunis*, 416 U.S. at 314–15.

47. *Id.* at 315–16.

School's admission process."[48] A favorable injunction would not benefit him, nor would a defeat harm him. As I will argue, these cases are not constitutionally required to be moot.[49]

The final case is unilateral mootness. Here, the defendant acts to end the lawsuit over the plaintiff's objections. Admittedly, in most cases, plaintiffs are elated when the defendant surrenders. The plaintiff, after all, receives exactly what they were asking for. But there is a subset of cases in which plaintiffs do not wish for the lawsuit to end this way. Conceptually, unilateral mootness can come in two varieties. I term the first variety "plaintiff madness." Here, "the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory."[50] In this situation, the defendant either realizes their mistake or does not want to deal with the hassle of a lawsuit.

I term the second variety of unilateral mootness "defendant gamesmanship." Here, the defendant strategically behaves to render a case moot, to vacate a prior unfavorable decision, or to preempt a near-certain unfavorable decision.[51] Mootness exceptions ostensibly allow judges to dismiss cases of plaintiff madness while preventing defendant gamesmanship.[52] But as this Note will show, the risks of plaintiff madness are small, and existing exceptions have largely failed to prevent defendant gamesmanship.

B. *Unilateral Mootness Does Not Implicate Article III Adversity Concerns of Underincentivized Parties*

Unilateral mootness does not require dismissal under Article III.[53] One purported constitutional basis for mootness stems from concerns about the adversity of the parties in the proceeding.[54] Under Article III, courts cannot adjudicate cases when parties are not adverse.[55] The Court has not clarified the definition of "adversity," but it often requires that parties "continue to

48. *Id.* at 318–20.

49. *See* discussion *infra* Section I.B.

50. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 85 (2013) (Kagan, J., dissenting).

51. *See* discussion *infra* Section III.B, III.C.

52. *See* discussion *infra* Section II.A.

53. For a fuller explanation of the prudential basis for mootness, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992), and Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009).

54. WRIGHT ET AL., *supra* note 37, § 3533.1 ("[C]oncern for effective adversary presentation remains part of the constitutional foundation for mootness.").

55. Admittedly, even the prospect that Article III requires adversity is controversial. *Compare* Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1027 n.4 (2017) (collecting Supreme Court decisions citing the need for adversity), *with* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 YALE L.J. 1346, 1357 (2015) (arguing that adverseness is not required by Article III).

have a 'personal stake' in the ultimate disposition of the lawsuit."[56] This "personal stake" is a "legally cognizable interest in the outcome."[57] In other words, to prevent dismissal, a plaintiff must be able to recover some legal remedy from the judgment. If a defendant gives a plaintiff everything they seek, the latter cannot recover any damages from the lawsuit.[58] This is how unilateral mootness could implicate adversity.

Adversity, however, is better understood not as a personal stake but as a set of circumstances that guarantee three functional goals are met. These functional goals include verifying that the parties are incentivized to adequately argue and present the issues,[59] ensuring such issues are sufficiently concrete,[60] and limiting interference with the political branches.[61] Barring collusion, these concerns are not implicated in unilateral mootness.

In cases of unilateral mootness, parties are still incentivized to argue and present the issues adequately. From the plaintiff's perspective, unilateral mootness is when the plaintiff remains adverse to the defendant *despite* the defendant's attempt to deprive the plaintiff of their legal interest in the case.[62] These plaintiffs choose to endure the high costs of litigation to present their case before the court.[63] From the defendant's perspective, things are more complicated. Suppose the defendant strategically ceases the challenged activity to render the case moot in the hopes of returning to the challenged conduct later.[64] Their motives for mooting the case are for personal gain. If this attempt were to fail, they would still fight tooth and nail to avoid losing. Now suppose the defendant realizes their mistake, voluntarily ceases the challenged conduct, expresses this to the plaintiff, and the plaintiff still wishes to litigate to spite the defendant. The defendant is unlikely to put up much of a fight. Nor will they sharply present the legal issues. Functionally, a defendant trying to make a case go away rather than effectively litigating is unlikely to create good precedent. These cases of plaintiff madness are more likely to implicate adversity concerns.

Adversity concerns for these cases, however, should not be overstated. The Federal Rules of Civil Procedure permit parties to stipulate to certain facts

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56. Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 478 (1990)).

57. *See id.*

58. *See id.*

59. *C.f.* Baker v. Carr, 369 U.S. 186, 204 (1962) ("[A] personal stake . . . sharpens the presentation of issues . . . .").

60. *See id.*

61. Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 665 (2014).

62. *See, e.g.*, Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CALIF. L. REV. 1385, 1417 (1974).

63. *See id.* at 1410 n.148.

64. *See, e.g.*, *id.* at 1414–18.

and interpretations of law when deciding a case.[65] Stipulations as to specific factual or legal conclusions do not implicate constitutional adversity concerns.[66] Stipulations do not collusively create precedent because these disputes were not litigated in the first place.[67] Similarly, such stipulations as to the proper disposition of the lawsuit would not create precedent. For the forlorn defendant facing a case of plaintiff madness, stipulating to every element of the plaintiff's claim might be the fastest way to end the case.[68] This would also allow the defendant to avoid a loss at the appellate level. Stipulating mitigates functional fears of a nonconfrontational defendant creating bad law. Of course, when a defendant's motives are aligned with the plaintiff's in a collusive manner, a judge can still dismiss the case. [69] In these cases, collusion, not unilateral mootness, is the reason for dismissal.

The requirement for a plaintiff to have a personal stake in the outcome of any case they bring is a recent invention of the mootness doctrine,[70] and there is no evidence the Framers imagined such a requirement.[71] Recent cases have also put the personal stake requirement into question. In *Uzuegbunam*, the student plaintiff had graduated, so the Court used nominal damages to give him a continued personal stake in the university policy.[72] The common law basis underlying *Uzuegbunam* suggests that nominal damages mirror their historical role in trespass actions.[73] But in these historical trespass actions, the personal stake that landowners had in nominal damages took the form of a court order proving ownership of the land.[74] The practical benefit was prospective relief, primarily preventing future claims of adverse possession.[75] Chike Uzuegbunam lacked any prospective relief and therefore also lacked a personal stake in receiving these nominal damages.[76] Even so, he advanced his case.

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65. FED R. CIV. P. 36.

66. *See id.*; Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850).

67. *See* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1224 (2011). Admittedly, some scholars have raised serious concerns about this practice improperly creating substantive law. *See generally id.*

68. Such admissions are unlikely to harm the defendant in future proceedings. FED. R. CIV. P. 36(b) ("An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."). Admittedly, defendants may be hesitant to make such stipulations, lest observers perceive these stipulations as an admission of guilt.

69. *See, e.g.*, *Lord*, 49 U.S. at 254–56.

70. Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1677 (1970).

71. *See* Kates & Barker, *supra* note 62, at 1409.

72. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 792 (2021).

73. *See id.* at 798.

74. *Id.*

75. *Id.*

76. Arguably, Uzuegbunam could have an expressive interest in ensuring that the university is punished for the way it treated him. But this argument is not compelling as an Article III rationale. *See* discussion *infra* Section IV.B.2.

C. *Unilateral Mootness Does Not Implicate the Concreteness Concerns of Advisory Opinions*

Moot cases are often described as "advisory opinions."[77] The modern understanding of the bar on advisory opinions includes functional concerns over the quality of these opinions. Advisory opinions lack the concreteness of a question "precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a [multifaceted] situation."[78] Without a concrete factual basis, dealing with an abstract problem is likely to result in a worse solution, one which is ungrounded in reality.[79] Moot cases are not abstract. Once a court determines that a plaintiff has standing and the case is ripe, the situation is sufficiently concrete. Intervening events do not lead to abstract, pretended controversies, nor do they make the factual basis of the case less concrete.

D. *Unilateral Mootness Does Not Implicate Separation of Powers Concerns*

Mootness may be rooted in separation of powers concerns.[80] Judges are loath to provide opinions about the validity of executive or legislative actions in nonadversarial and nonjudicial settings, lest they become vetoes on the political process.[81] Under this view, justiciability doctrines ensure that federal courts do not "intrude into areas committed to the other branches of government."[82] This concern of judges overstepping their role fails to justify unilateral mootness.

Suppose a government passes an unconstitutional law, and a court allows an aggrieved party to sue. This core power of judicial review does not infringe on the legislature's powers. But if this same law were repealed, then the plaintiff could no longer sue, as they would lack standing. Why would judicial review infringe on the legislature's powers after the law is repealed? While repeal may be a sign of the political process working properly, it could also indicate government gamesmanship. Government officials often repeal laws or accede to plaintiff demands as soon as a lawsuit is threatened for the express purpose of avoiding adverse precedent.[83] These same government actors often reengage in the same behavior as soon as the present plaintiff has been dealt with.[84]

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77. *See, e.g.*, *Uzuegbunam*, 141 S. Ct. at 803 (Roberts, C.J., dissenting).

78. United States v. Fruehauf, 365 U.S. 146, 157 (1961); *see also* Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772, 774 (1955).

79. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924).

80. *See* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374–76 (1974).

81. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96–97 (1968).

82. *Id.* at 95. *C.f.* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (arguing that standing is "a crucial and inseparable element" of the separation of powers).

83. *See* discussion *infra* Section III.B.

84. *See* discussion *infra* Section III.B.

The need to address unconstitutional measures may have motivated some of the mootness exceptions.[85]

Effective judicial review is a vital aspect of checks and balances.[86] By discarding a case as moot, federal courts fail to provide guidance to future litigants on whether future challenges could be mounted barring mootness.[87] Courts should be forthright if there is not any law to bear on a particular topic.[88] Courts should also be explicit if the judiciary cannot provide relief for other compelling reasons.[89]

Cases of unilateral mootness, unlike other categories of mootness, have a weak constitutional basis. These cases lack the common constitutional rationales of other cases dismissed on justiciability grounds. Given this weak constitutional grounding, judges should hear moot cases unless dismissal serves prudential goals.

II. VAGUENESS IN MOOTNESS DOCTRINE LEADS TO DISPARATE OUTCOMES

Professor Lea Brilmayer suggests that mootness derives value by permitting a "smooth allocation of power among courts over time."[90] She suggests that judges should not decide cases that are not adequately presented, including moot cases.[91] Under this view, mootness plays a similar role to stare decisis. While stare decisis reflects the respect courts have for earlier decisions, mootness reflects the respect courts have for future decisions. This rationale is undercut by the disparate impacts caused by the vague standards in the mootness exceptions and uncertainty following the recent decision in *Uzuegbunam*.

A. *Vague and Arbitrary Mootness Exceptions Lead to Disparities in Which Cases Are Heard on the Merits*

To mitigate the harms mootness can cause plaintiffs, the Court has carved out four exceptions for otherwise moot cases: (1) collateral injuries after redressing the main injury; (2) issues that are capable of repetition yet evade review; (3) mootness caused by a defendant's voluntary cessation; and (4) class

85. One such example would be "issues capable of repetition, but evading review." Discussion *infra* Section II.A.2 (cleaned up). Some scholars have used similar reasoning to suggest a cause of action for challenging unconstitutional laws that are designed to evade review. *See* Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L.J.F. 513 (2021). These arguments are beyond the scope of this Note.

86. *See* Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143, 172–73 (1991).

87. Discussion *infra* Section III.A.

88. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209 (1962).

89. *See, e.g.*, Holtzman v. Schlesinger, 414 U.S. 1304, 1309–10 (1973).

90. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 302 (1979).

91. *See id.* at 304.

actions.[92] Each of these exceptions is based on vague standards that require judges to draw conclusions based on their perceptions of the litigants' motives. As a result, two judges in the same circuit can reach different decisions based on identical facts.

The collateral consequences exception depends on judges' perceptions of which collateral injuries are "significant." The injuries capable of repetition exception similarly depends on judges' predictions of whether harms are "likely to recur." The voluntary cessation exception depends on judges' perceptions of the defendant's motives. And lastly, the "substantive" class action exception largely relies on the same vague standards of the other three primary exceptions.

1. Collateral Consequences

The collateral consequences exception to mootness occurs when a plaintiff suffers "collateral" harms even after the primary injury is remedied.[93] Cases should not be dismissed if a court's decision is likely to have some future effect.[94] In *Super Tire Engineering Co. v. McCorkle*, the Court held that employers could challenge a state law permitting striking workers to receive welfare benefits, even after the strike.[95] This case was not moot because a court decision could affect future labor negotiations.[96] Similarly, in *Carafas v. LaVallee*, the Court permitted a criminal defendant to challenge his conviction even after he was released from custody.[97] The Court held that his designation as a felon imposed sufficient collateral consequences to stave off mootness.[98] This designation disenfranchised him, limited his employment opportunities, and prevented him from serving as a juror.[99] The Court in *Sibron v. New York* held that the prospect of character impeachment in future trials could stave off mootness.[100]

Lower courts have not interpreted this decision exception as broadly. Many judges dismiss cases when collateral consequences seem unlikely to harm the plaintiff.[101] The Seventh Circuit requires that collateral consequences have a "substantial adverse effect on the interests of the petitioning

92. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 126–138 (Aspen Treatise Series, 6th ed. 2019).

93. *Id.* at 126.

94. *Id.* at 128.

95. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974).

96. *Id.* at 125.

97. 391 U.S. 234, 236–38 (1968).

98. *Carafas*, 391 U.S. at 237.

99. *Id.*

100. 392 U.S. 40, 55–56 (1968).

101. *See e.g.*, City of Berkeley v. U.S. Postal Serv., C 14-04916, 2015 WL 1737523, at *4 (N.D. Cal. Apr. 14, 2015); City of Streetsboro v. Fraternal Ord. of Police, No. 03 CV 1565, 2004 WL 3710234, at *4 (N.D. Ohio July 23, 2004).

parties."[102] The D.C. Circuit has limited the reach of *Super Tire* to times when consequences stem from the "ongoing impact of state law."[103] Each of these circuits' vague standards does little to help judges in deciding which cases advance.

The Supreme Court's efforts to clarify these vague standards have led to arbitrary distinctions. The Court in *Lane v. Williams* held that collateral effects are not sufficient when only "certain non-statutory consequences may occur," including "the sentence imposed in a future criminal proceeding."[104] It is hard to reconcile why impeachment of character can constitute a collateral consequence while effects on sentencing enhancements cannot.[105]

2. Issues Capable of Repetition but Evading Review

Another mootness exception arises when an injury is too short lasting for a court to decide the case on the merits.[106] Two criteria must be met for this exception: "(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."[107] Each of these two prongs is vague and has led to disparate outcomes.

a. Challenged Action Is Inherently Short-Lasting

For the first prong—whether a challenged action is inherently short lasting—judges must assess whether a particular case will be moot before the full appellate process is completed. This ultimately depends on two factors: (1) how long a controversy lasts and (2) how long cases take to litigate.

For the first factor, determining the duration of a controversy is often easy. A ten-day restraining order restrains for ten days.[108] Other cases are harder, requiring judges to examine how long categories of actions last on average.[109] This depends on how broadly one defines the category.

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102. Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs of Milwaukee, 708 F.3d 921, 932–33 (7th Cir. 2013) (quoting Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974)).

103. Atlas Brew Works, LLC v. Barr, 391 F. Supp. 3d 6, 14 (D.D.C. 2019), *aff'd*, 820 F. App'x 4 (D.C. Cir. 2020) (unpublished).

104. 455 U.S. 624, 632 (1982).

105. In *Lane*, the petitioner challenged a parole violation, which the Court held was unlikely to affect a judge's sentencing decisions. *Lane*, 455 U.S. at 630, 632–33.

106. CHEMERINSKY, *supra* note 92, at 128.

107. Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016) (alteration in original) (internal quotation marks omitted) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

108. Carroll v. President of Princess Anne, 393 U.S. 175 (1968).

109. Alvarez v. Hill, No. 04-CV-884, 2010 WL 3417840, at *3 (D. Or. Aug. 26, 2010), *aff'd*, 667 F.3d 1061 (9th Cir. 2012) (examining whether the "challenged action [is] 'routinely' too short to litigate fully" (quoting Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173–74 (9th Cir. 2002))).

The second factor, the duration of litigation, is influenced by the court, the litigants, and the complexity of the case. The D.C. Circuit opted for a fixed time, deciding that "orders of less than two years' duration ordinarily evade review."[110] Other courts analyze this factor by considering the average length of the appellate process.[111] This strange approach selectively dismisses cases based on how effectively the court manages its docket. It also ignores judges' ability to speed up certain cases. The Supreme Court, for example, decided *United States v. Nixon* sixteen days after oral arguments.[112] Several circuits, recognizing this ability for expedited review, find cases moot when plaintiffs fail to ask for such review.[113] This requirement puts plaintiffs in a tough spot. 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.

b. Injury Likely to Happen to the Plaintiff Again

Nebraska Press Ass'n v. Stuart offers an example of the second prong: injuries likely to happen to the plaintiff again.[114] There, a state court prohibited those attending a trial from reporting on the proceedings.[115] By the time the Supreme Court heard the case, the gag order had ended.[116] The case was not moot, however, because the defendant might have had his conviction reversed, and prosecutors might have sought similar gag orders.[117] At other times, the Court has forecasted lower probabilities of future injuries. In *City of Los Angeles v. Lyons*, police stopped a Black motorist for a traffic stop. Despite the motorist "offer[ing] no resistance or threat whatsoever," the police used a chokehold, "rendering him unconscious and causing damage to his larynx."[118] The Court, denying injunctive relief, held that the motorist did not "make a reasonable showing that he will again be subjected to the alleged illegality."[119] Justice Thurgood Marshall, in dissent, noted that this traffic stop occurred during a five-year period in which "LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations."[120] To get around these issues evading review, some circuits have allowed this exception to extend to others challenging the

110. Burlington N. R.R. v. Surface Transp. Bd., 75 F.3d 685, 690 (D.C. Cir. 1996).

111. *See e.g.*, Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173–74 (9th Cir. 2002).

112. 418 U.S. 683, 683 (1974).

113. *See, e.g.*, Empower Texans, Inc. v. Geren, 977 F.3d 367, 371–72 (5th Cir. 2020); Hamamoto v. Ige, 881 F.3d 719, 723 (9th Cir. 2018).

114. 427 U.S. 539, 546–47 (1976).

115. *Nebraska Press Ass'n*, 427 U.S. at 542.

116. *Id.* at 546.

117. *Id.* at 546–47.

118. City of Los Angeles v. Lyons, 461 U.S. 95, 97–98 (1983).

119. *Id.* at 101, 109.

120. *Id.* at 116 (Marshall, J., dissenting).

same policy after it becomes moot to the original plaintiff.[121] Others have not.[122]

One statute that often leads to disparate mootness outcomes is the Individuals with Disabilities Education Act (IDEA). IDEA and its predecessor, the Education of the Handicapped Act (EHA), both guarantee an "appropriate public education" for all disabled students.[123] School districts determine this appropriate education through individualized education programs (IEPs).[124] These IEPs are reviewed annually,[125] so challenges to these programs often implicate mootness. One such case is *Honig v. Doe*.[126] Jack Smith's IEP recommended that he be placed on a half-day schedule.[127] Despite this IEP, the school assigned him to a full-day program, leading to behavioral challenges for Smith.[128] The school suspended him indefinitely.[129] During this period, another student, John Doe, sued another school on similar grounds for violating the EHA.[130] Fearing litigation, Smith's school canceled his hearing and gave his grandparents the choice of a continued education at the school or home tutoring.[131] They chose the latter option.[132] Smith then joined Doe's lawsuit.[133] Smith no longer faced expulsion or suspension proceedings, nor did he reside within the school district.[134] Yet the Court held that the case was not moot.[135] The Court noted that given Smith's history of behavior, the inherent subjectivity with IEPs, and the possibility of harm in other school districts, injury was likely to reoccur.[136]

Some circuits have rejected similar IDEA challenges if the legal controversy is too "sharply focused on a unique factual context."[137] For instance, the D.C. Circuit held that a challenge to an IEP's prescribed class sizes was moot

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121. Ukrainian-Am. Bar Ass'n v. Baker, 893 F.2d 1374, 1377 (D.C. Cir. 1990). But the D.C. Circuit only extends this exception when litigants challenge an underlying policy, not the handling of a specific incident. Qassim v. Bush, 466 F.3d 1073, 1076 (D.C. Cir. 2006).

122. *E.g.*, Van Wie v. Pataki, 267 F.3d 109, 114 (2d Cir. 2001).

123. Honig v. Doe, 484 U.S. 305, 308 (1988); *About IDEA*, U.S. DEP'T OF EDUC., https://sites.ed.gov/idea/about-idea [perma.cc/LK9X-T6QX].

124. 20 U.S.C. § 1414(d).

125. *Id.* § 1414(d)(4)(A); *see, e.g.*, *Honig*, 484 U.S. at 311.

126. 484 U.S. 305.

127. *Id.* at 314–15.

128. *Id.* at 315.

129. *Id.*

130. *Id.* at 313–14.

131. *Id.* at 315.

132. *Id.*

133. *Id.*

134. *Id.* at 318.

135. *Id.* at 319–20.

136. *Id.* at 320–22.

137. J.T. v. District of Columbia, 983 F.3d 516, 524 (D.C. Cir. 2020) (quoting Spivey v. Barry, 665 F.2d 1222, 1234–35 (D.C. Cir. 1981)); *see also* Nathan M. v. Harrison Sch. Dist. No. 2, 942 F.3d 1034, 1041–44 (10th Cir. 2019).

when the IEP expired at the end of the school year.[138] Although the same class size problems were likely to arise in each subsequent year's IEP, the challenge did not fit this mootness exception because each year would invoke "materially different factual context[s]."[139] Circuits with the distinction between "unique" and "broad" factual contexts do not share a test on differentiating between the two.[140] For this reason, other circuits reject this distinction.[141]

3. Voluntary Cessation

The voluntary cessation exception arises when the defendant ceases the challenged activity in a way that fails to make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[142] This exception requires courts to analyze the defendant's motives and to predict the future effect that dismissal will have on a defendant's behavior. Vague standards within circuits have led to disparate outcomes for materially similar facts, and arbitrary distinctions between circuits have led to a disparate application of this exception.[143]

Circuits face the unenviable challenge of establishing a neutral way of assessing the intent of defendants. The Fifth Circuit provides government defendants with a presumption of mootness and "solicitude" while simultaneously requiring them to surpass the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[144] Plaintiffs can rebut this (contradictory) presumption of mootness with the *Fenves* test.[145] One aspect of this test requires a judge to assess the motives of the defendant by examining whether the timing of the voluntary cessation is suspicious.[146] Defendants act suspiciously, for example, by changing policies after losing in district court[147] or before oral argument.[148] Actions that lead to favorable vacatur are also suspicious.[149] Executive orders

138. *J.T.*, 983 F.3d at 522–24.

139. *Id.* at 525.

140. *See id.* at 524.

141. *E.g.*, K.A. *ex rel.* F.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1201 (11th Cir. 2013).

142. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n., 393 U.S. 199, 203 (1968)).

143. *Compare J.T.*, 983 F.3d at 523, *with K.A.*, 741 F.3d at 1200.

144. Texas v. Biden, 20 F.4th 928, 963–64 (5th Cir. 2021) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quotation omitted)), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022).

145. Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020).

146. *Id.* at 328; *see also* Texas v. Biden, 20 F.4th at 962.

147. *Speech First, Inc.*, 979 F.3d at 329.

148. *See e.g.*, Texas v. Biden, 20 F.4th at 963–64.

149. *Id.* at 956–57 (rejecting the government's argument that redrafting a government policy after losing in court can vacate a judgment).

expiring on their own terms, however, are not suspicious.[150] While case law can provide more guidance over time, the stepwise procedure of assessing which defendants are suspicious gives judges a great deal of power in deciding which cases advance.

Because each circuit clarifies these vague standards differently, the circuits have begun to diverge. These circuit splits lead to disparate outcomes depending on where litigants file their cases. Consider prison litigation. The Fourth Circuit rejected a prison's attempt to moot a deaf inmate's disability rights challenge by providing him with a sign-language interpreter.[151] Similarly, the Eleventh Circuit rejected a prison's attempt to moot a Jewish inmate's religious challenge to his meals by providing kosher diets to the prisoner's unit.[152] The First Circuit, on the other hand, held that a prison successfully mooted a Jewish prisoner's case by providing him kosher meals, even if it did not implement any systemic policy changes.[153]

4. Class Actions

Other mootness exceptions address the problem of defendants staving off class certification by mooting class representatives' individual cases.[154] The class action exceptions arise when the class representatives' claims become moot while other class members have nonmoot claims. Courts have established two types of exceptions to address this situation: a class certification exception to "enable a class action to continue notwithstanding the subsequent mootness of the class representative's claims"[155] and substantive exceptions.[156]

The class certification exception states that class actions are not moot so long as the class certification decision has been made.[157] This exception applies even if the class certification is rejected[158] and no other mootness exception applies.[159] Mootness, however, can still stymie class representatives. Courts have split as to whether precertification mooting of a plaintiff's claim moots the class action.[160] Additionally, in the similar Fair Labor Standards Act

150. Spell v. Edwards, 962 F.3d 175, 179 (5th Cir. 2020) (mooting a challenge to COVID-19 stay-at-home orders after orders expired).

151. Heyer v. U.S. Bureau of Prisons, 849 F.3d 202, 219–20 (4th Cir. 2017).

152. Rich v. Sec'y, Fla. Dep't of Corr., 716 F.3d 525, 530–32 (11th Cir. 2013).

153. Guzzi v. Thompson, No. 07-1537, 2008 WL 2059321 (1st Cir. May 14, 2008); *see also* Guzzi v. Thompson, 470 F. Supp. 2d 17, 19–20 (D. Mass. 2007).

154. 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:9 (6th ed.), Westlaw (database updated June 2022).

155. *Id.*; *see also id.* §§ 2:10–11.

156. *Id.* §§ 2:12–16.

157. *Id.* § 2:10; *see also* Sosna v. Iowa, 419 U.S. 393, 399–401 (1975).

158. *See, e.g.*, Deposit Guaranty Nat'l Bank of Jackson v. Roper, 445 U.S. 326 (1980).

159. *See* RUBENSTEIN, *supra* note 154, § 2:10; *see, e.g.*, Kremens v. Bartley, 431 U.S. 119, 133 (1977).

160. RUBENSTEIN, *supra* note 154, § 2:11.

(FLSA) context, plaintiffs *cannot* argue any class action exception for mootness, regardless of certification status.[161] Lastly, the Court has "explicitly refused to address the lingering collateral question of whether a named plaintiff may appeal an adverse class certification decision after voluntarily settling his or her individual claim."[162]

Substantive exceptions largely mirror the exceptions applicable to individual claims, including issues capable of repetition but evading review[163] and voluntary cessation.[164] The exception for unaccepted Rule 68 offers will be discussed later in this Note.[165]

B. *Unpredictable Nominal Damages after* Uzuegbunam

The common law dictates which remedies are appropriate in redressing a plaintiff's injury.[166] These include compensatory damages, injunctions, prospective relief, and declaratory relief.[167] For a remedy to stave off mootness, it must redress the underlying injury. Awards such as attorneys' fees[168] and costs of the lawsuit[169] are insufficient. *Uzuegbunam* left open the question of whether nominal damages are available when other relief can be established. Suppose a state employee is fired for his political speech. The employee sues, alleging a First Amendment violation. The government employer rehires the employee, fully compensates them with back pay, and stipulates that they will end this policy. Unlike in *Uzuegbunam*,[170] economic damages were available and paid to the plaintiff. Could the employee continue their lawsuit by arguing for nominal damages? *Uzuegbunam* allows for at least three possibilities.

Justice Brett Kavanaugh raised the first possibility in his concurrence in *Uzuegbunam*.[171] Under this view, nominal damages are real injuries, though paltry ones worth only a dollar. So long as the state employer adds one dollar of nominal damages to a Rule 68 offer of back pay, or a Rule 67 deposit into

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161. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) ("[E]ven if respondent were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness."); *see* discussion *infra* Section III.C.

162. RUBENSTEIN, *supra* note 154, § 2:10; *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 n.10 (1980).

163. *See* RUBENSTEIN, *supra* note 154, § 2:13; *see also* discussion *supra* Section II.A.2.

164. RUBENSTEIN, *supra* note 154, § 2:14; *see also* discussion *supra* Section II.A.3.

165. *See* discussion *infra* Section III.C.

166. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797–98 (2021).

167. *See Uzuegbunam*, 141 S. Ct. 792.

168. Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990).

169. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

170. *Uzuegbunam*, 141 S. Ct. at 797.

171. *Id.* at 802 (Kavanaugh, J., concurring) ("[A] defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits.").

court, the case should be dismissed.[172] The government avoids unfavorable precedent for the low price of one dollar. But this approach undercuts the value of having nominal damages at all. Rather than acting as a tool to vindicate rights, nominal damages act as a trap for the unwary defendant who fails to add an extra dollar when fully compensating a plaintiff. After the Supreme Court's decision in *Uzuegbunam*, school officials tried to dispose of Uzuegbunam's case this way.[173] On remand, the district court rejected this attempt.[174]

The second possibility is that nominal damages are available only when economic damages cannot be proven or are unavailable. This approach follows the common law reasoning of *Uzuegbunam*.[175] Historically, nominal damages served as a method of declaratory relief when "no general declaratory judgment act" existed.[176] One example of this was a completed trespass to property.[177] Owners would vindicate their rights by suing for nominal damages for the completed trespass to declare their property boundaries indirectly.[178] In the government employer hypothetical, the remedy of back pay and statutory damages precludes the possibility of nominal damages. The employee's case would therefore be moot.

The third possibility is that nominal damages can stave off mootness even when other relief is available—which is supported by the discussion in *Uzuegbunam* regarding the concreteness of nominal damages.[179] This possibility endorses the impulse to provide nominal damages as a way for plaintiffs to vindicate their rights. Under an expansive view of nominal damages, any constitutional or statutory injury to a plaintiff could give rise to damages beyond purely economic damages.[180] No change in defendant behavior could moot the lawsuit, and cases of unilateral mootness would no longer be moot. The Tenth and Eleventh Circuits raised this fear of "mooting mootness" before *Uzuegbunam*.[181] Less expansive views could prevent *Uzuegbunam* from mooting mootness, but this would lead to more disparate outcomes until the Court

172. Assuming, of course, that none of the mootness exceptions are triggered. *See* discussion *supra* Section II.A.

173. Uzuegbunam v. Preczewski, No. 16-CV-04658, 2021 WL 6752235, at *2 (N.D. Ga. Dec. 22, 2021).

174. *Id.* at *7.

175. *See Uzuegbunam*, 141 S. Ct. at 797–98.

176. *Id.* at 798 (quoting DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 636 (5th ed. 2019)).

177. *Id.*

178. *Id.*

179. *Id.* at 801 ("Despite being small, nominal damages are certainly concrete.").

180. *See id.* at 802 (holding that nominal damages redress a violation of a legal right).

181. *See* Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1270 (11th Cir. 2017) ("[Nominal damages] drastically reduce, if not outright eliminate, the viability of the mootness doctrine . . . ."); Utah Animal Rts. Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1266 (10th Cir. 2004) (McConnell, J., concurring) ("[N]o constitutional case would ever become moot.").

explains the meaning of "nominal damage." In the government employer hypothetical, the case would not be moot so long as the plaintiff is entitled to nominal damages.

Overall, this third possibility seems to be the most likely outcome given the expansive language of *Uzuegbunam*. Because the Court has not yet clarified what constitutes nominal damages, this will be up to lower courts to determine. Nominal damages have opened another door to further judicial confusion and disparate outcomes.

Mootness doctrine treats similar litigants differently. The four mootness exceptions are based on vague standards, leading to uncertainty and disparate outcomes within and between circuits. The Supreme Court's recent opinion in *Uzuegbunam* leads to more uncertainty as to which plaintiffs facing unilateral mootness can advance their claims. Current doctrine harms the public and plaintiffs.

III. HARMS OF UNILATERAL MOOTNESS TO THE PUBLIC AND PLAINTIFFS

The vagueness and resulting disparate outcomes in mootness doctrine harm judicial legitimacy. Unilateral mootness leads to government and corporate defendants engaging in gamesmanship. Unilateral mootness also costs more judicial resources than it saves.

A. *Vague Standards and Disparate Outcomes Harm Judicial Legitimacy*

Threshold determinations are easily manipulable, and many believe that they permit judicial activism.[182] Vague standards exacerbate this problem.[183] Admittedly, the standards guiding standing and ripeness are also vague. But vagueness in mootness is especially harmful because it enables defendant gamesmanship midlawsuit—often only after it becomes clear that the defendant will lose.[184] Given that mootness is on weaker constitutional footing than these other doctrines,[185] curtailing vagueness by eliminating mootness raises fewer constitutional concerns. Lastly, unlike for issues of standing and ripeness, allowing more cases to reach the merits is likely to *save* judicial resources rather than open the floodgates.[186]

Judges do their best to operate ethically and to not let their biases influence their legal decisionmaking.[187] Still, the presence of disparate outcomes

182. *See, e.g.*, Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 322 (1989).

183. *See* United States v. Windsor, 570 U.S. 744, 785 (2013) (Scalia, J., dissenting).

184. *See* discussion *infra* Section III.B.

185. *See* discussion *supra* Part I.

186. *See* discussion *infra* Section III.D.

187. Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, 104 JUDICATURE, no. 3, 2020, at 75, 76–77.

reveals two closely related problems. First, dismissing moot cases deprives litigants, judges, and the public of the judge's analysis of the merits. Second, these disparate outcomes may harm the public's perception of the judiciary.

1. Dismissal of Moot Cases Stymies the Public from Assessing the Legality of These Cases on the Merits

Judges often reach different results in cases with similar facts. Much of jurisprudence is dedicated to the role that broad standards play in legal systems.[188] Vague mootness standards, however, differ from vague standards underlying the merits of the claim. Deciding cases on the merits benefits litigants, the public, and the judiciary.

Decisions on the merits assist both current and future litigants. Giving reasons on the merits shows current litigants respect.[189] It also informs future litigants of the legality of the challenged practices. If a decision favors the defendant, it reduces the chilling effect for future defendants and stops continued harassment by plaintiffs. Similarly, a decision favoring the plaintiff would deter the illegal activity and would permit future plaintiffs to use the case as precedent. Mootness is particularly harmful to plaintiffs in qualified immunity cases, which require plaintiffs to prove that a constitutional right is "clearly established" to advance their case.[190]

Judicial reasoning on the merits is also valuable to present and future judges.[191] One benefit of precedent is that it "allows each judge to build on the wisdom of others."[192] Judges often adopt reasoning from other circuits, states, or foreign systems.[193] Judges also use horizontal precedent to unveil and correct flawed lines of reasoning.[194]

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188. *See, e.g.*, RONALD DWORKIN, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 81, 130 (1978).

189. *E.g.*, Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 583 (2020).

190. *Cf.* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." (quoting Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring) (alteration in original))). Admittedly, mootness would preclude a court from deciding qualified immunity only when the defendant fully compensates the plaintiff before the court decides whether the official has qualified immunity.

191. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 65–69 (2016).

192. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422–23 (1988).

193. *See, e.g.*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1049–50 (1985); Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243, 280 (2018).

194. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

Finally, addressing a case on the merits provides many benefits to the public.[195] Unpopular decisions can spur legislative change. In *Kelo v. City of New London*, a homeowner challenged her city's use of eminent domain, which forced her from her home to make way for a Pfizer research facility.[196] The Court held that economic revitalization justified the city using eminent domain to seize the homeowner's "Little Pink House."[197] This decision was wildly unpopular.[198] Soon after, President George W. Bush restricted the federal government's use of eminent domain through an executive order.[199] Forty-seven states then enacted eminent domain reform laws.[200] Asking the average voter to understand the intricacies of justiciability doctrine is unreasonable. Disposing of these cases on mootness grounds means they are never brought to light, denying the public an opportunity to respond.

2. Disparate Outcomes Resulting from Vague Mootness Standards Harms the Public Perception of Courts

Disparate dismissal of cases based on vague standards harms the public perception of the courts. Professor Ashley S. Deeks argues that the federal judiciary maintains legitimacy through reason-giving to the public.[201] She argues that because federal judges are unelected, they instead foster legitimacy through "highly developed norms and practices of reason-giving."[202] Reason-giving builds legitimacy by showing that the decision was constrained by established legal principles.[203] It also makes outcomes more palatable for the losing party.[204] Decisions based on mootness are certainly reasoned decisions. But the nature of mootness decisions leads them to fail on both accounts. The vague standards and disparate outcomes show how *un*constrained these decisions tend to be. The nature of threshold dismissals risks litigants feeling that their case was not heard.

The vague mootness standards do little to constrain judges. Reason-giving legitimizes the judiciary because it constrains decisionmakers.[205] A reason

195. Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612 (2020).

196. 545 U.S. 469 (2005).

197. *Kelo*, 545 U.S. 469. This case inspired the film, LITTLE PINK HOUSE (Korchula Productions 2017).

198. John Paul Stevens, Kelo*, Popularity, and Substantive Due Process*, 63 ALA. L. REV. 941, 941 (2012) ("*Kelo* . . . is the most unpopular opinion that I wrote during my thirty-four year tenure on the Supreme Court.").

199. Exec. Order No. 13,406, 3 C.F.R. § 235 (2007).

200. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J.F. 82, 88 (2015).

201. Deeks, *supra* note 195, at 629–30.

202. *Id.*

203. *See id.* at 630–31.

204. *Id.* at 630.

205. *See id.* at 628–29.

"creates a kind of promise about future behavior, which itself serves as a constraint."[206] Although judges may feel constrained by the mootness standards, the evidence of disparate outcomes suggests a wide range of outcomes. Many judges also use mootness as a constitutional avoidance technique.[207]

Decisions based on mootness are unlikely to be palatable to the losing party. A decision on threshold considerations may lead the losing party to feel that they were not heard by the judge.[208] Although judges are less likely than the general population to act on biases when factors like race are made explicit, they are still susceptible to using heuristics in making decisions.[209] Further, public perception does not hinge on a judge's actual biases. The presence of mootness exceptions may lead skeptics to believe judges are distorting the factors. Public perception is an important aspect of the proper functioning of legal systems. In the military context, even the *appearance* of impropriety may be sufficient to dismiss charges.[210] When possible, judges should say the quiet part out loud. Federal courts must prevent the perception of judges picking and choosing mootness exceptions to dispose of unfavorable cases.

B. *Unilateral Mootness Permits Government Gamesmanship*

Government actors often use mootness to evade unfavorable precedent. Indeed, governments have used mootness to infringe on individual liberties in cases across the political spectrum. Eliminating unilateral mootness would better allow the judiciary to check the other branches, better protecting individual liberties and minority interests.[211]

By mooting cases that are likely to lose on appeal, government defendants insulate their behavior from judicial review.[212] Government defendants can lose a case, claim voluntary cessation prior to appeal, and vacate the unfavorable decision below.[213] The Court has held that the practice of vacating judgments on appeal is an "extraordinary remedy,"[214] which should only occur when the mooting event is "happenstance"[215] or the "unilateral action of the

206. *Id.* at 628.

207. *See, e.g.*, United States v. (Under Seal), 757 F.2d 600, 603 (4th Cir. 1985).

208. *See* Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 LA. L. REV. 831, 846 (2004).

209. Donald et al., *supra* note 187, at 76–77.

210. *See, e.g.*, United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013). Thank you to Will Hanna for this insight.

211. *Cf.* THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.").

212. Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 341 (2019).

213. *Id.* at 335. Can a defendant do the same when a decision is pending en banc review? It depends. *See* Emberling, *supra* note 34.

214. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994).

215. Arizonans for Off. English v. Arizona, 520 U.S. 43, 71–72 (1997).

party who *prevailed* in the lower court."[216] This language suggests that losers cannot vacate cases.[217] In practice, judges take a more flexible approach. The Supreme Court continues to vacate plaintiffs' favorable decisions when they believe that no defendant gamesmanship is afoot.[218] When the Court is suspicious, it "remand[s] the case to the District Court with leave to the appellants to amend their pleadings."[219] Lower courts do the same.[220]

Mootness has been used as a tool to silence the constitutional rights of incarcerated people.[221] Prison systems fight tooth and nail against pro se prisoners but often "cut and run" when these same prisoners retain effective counsel, offering settlements or fixing problems at the individual level.[222] In other instances, wardens transfer inmates to a different prison and promise not to transfer them back.[223] Nonetheless, these cases are considered moot because the original prison's maltreatment of these inmates is not "capable of repetition."[224]

Mootness has also been used to silence the constitutional rights of firearm owners in New York City. In *New York State Rifle & Pistol Ass'n (NYSRPA)*, the petitioners challenged a regulation restricting licensed gun owners from transporting firearms outside their homes.[225] After the Court granted certiorari, the city amended the relevant laws, adding narrow exceptions for second homes and gun ranges.[226] These, incidentally, were the locations where the

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216. *Bonner Mall*, 513 U.S. at 23 (emphasis added).

217. *See id.* at 27 ("To allow a party . . . to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.").

218. *See, e.g.*, Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021) (mem.) (vacating preliminary judgment favorable to plaintiffs after government voluntarily ceased challenged policy); *Innovation Law Lab v. Mayorkas*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/innovation-law-lab-v-mayorkas [perma.cc/NTE9-M4SH].

219. Diffenderfer v. Cent. Baptist Church of Mia., Fla., Inc., 404 U.S. 412, 415 (1972) (per curiam); *see also* Karcher v. May, 484 U.S. 72, 83 (1987) ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.").

220. *See, e.g.*, Texas v. Biden, 20 F.4th 928, 942 (5th Cir. 2021) ("The Government boldly proclaimed that DHS's unilateral decision to issue new memoranda *required* us to give DHS the same relief it had previously hoped to win on appeal—namely, vacatur of the district court's injunction and termination of MPP. . . . The Government's litigation tactics disqualify it from such equitable relief.").

221. *See, e.g.*, Tamika D. Temple, *Mooted and Booted: How the Mootness Doctrine Has Been Used to Silence Violations of Prisoners' Constitutional Rights*, 45 T. MARSHALL L. REV. 117 (2021).

222. *See* Davis & Reaves, *supra* note 212, at 329–31 (listing examples of such cases).

223. Temple, *supra* note 221.

224. Temple, *supra* note 221, at 124; *see, e.g.*, Meneweather v. Ylst, No. 92-15206, 1994 WL 96267 (9th Cir. Mar. 22, 1994), at *2; Tucker v. Dall. Cnty. Sheriff's Dep't, No. 3-04-CV-1630-B, 2004 WL 2296814, at *2 (N.D. Tex. Oct. 13, 2004); McKinnon v. Talladega County, 745 F.2d 1360, 1361–62 (11th Cir. 1984).

225. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

226. *Id.*

petitioners wished to take their firearms.[227] New York claimed the amendments were made in good faith.[228] Last year, the LGBTQ-friendly city council made the puzzling move of repealing a ban on conversion therapy.[229] One council member explained the strategy was to moot existing lawsuits and reinstate the measures once the makeup of the federal judiciary was more favorable.[230] Ultimately, the Court dismissed *NYSRPA* as moot.[231]

Eliminating unilateral mootness would protect plaintiffs from gamesmanship. Defendants could no longer vacate unfavorable decisions. Prisons could no longer avoid adverse court decisions by transferring prisoners back and forth. Additionally, the Court would either need to address the merits of the *NYSRPA* decision or use another method to sidestep a decision.[232] Such a decision would afford plaintiffs the relief they were seeking or put New York on notice that the Court considers these actions constitutionally questionable.

C. *Unilateral Mootness Permits Corporate Gamesmanship*

Unilateral mootness permits large corporations to evade precedent and class actions. One example includes collective actions under the Fair Labor Standards Act (FLSA). In *Genesis Healthcare Corp. v. Symczyk*, the Court held that these actions are not justiciable when the individual plaintiff's claim is moot.[233] There, the Court dismissed the action based on the lower court's finding that the defendant's settlement offer provided the plaintiff full relief.[234] This decision endorsed the practice of defendants paying off individual plaintiffs to stave off FLSA collective actions. The Court held in *Campbell-Ewald Co. v. Gomez* that unaccepted settlement offers to named representatives cannot moot a putative class action.[235] The case did not address, however, whether a class action or other collective action can be maintained if the named representative's claim is mooted in some other method of precertification.[236] Circuits continue to invoke *Genesis Healthcare* in the class action context, permitting defendants to moot cases by exploiting a question that *Campbell-*

227. Suggestion of Mootness at 12, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280).

228. Response to Respondents' Suggestion of Mootness at 17–20, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280).

229. *See* Davis & Reaves, *supra* note 222, at 329.

230. *See id.*

231. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526–27.

232. The Court could use constitutional avoidance if some construction of the original statute avoided the Second Amendment issue, but this dodge would be far more visible to the public than dismissing on mootness grounds.

233. 569 U.S. 66, 69 (2013).

234. *See Genesis Healthcare Corp.*, 569 U.S. at 72–73 (stating that overruling the Third Circuit's finding would be impermissible in the absence of a cross-petition from respondent).

235. 577 U.S. 153, 162 (2016).

236. *See Campbell-Ewald Co.*, 577 U.S. at 165–66.

Ewald left unsolved: If a defendant deposits the full relief into the named plaintiff's bank account, can the court enter judgment on this offer?[237]

Some circuits see these unsolicited payments by the defendant as gamesmanship.[238] The D.C. Circuit, however, views a case as moot so long as a plaintiff has received full monetary damages, even if the named plaintiff refuses to cash the check.[239] Some district court judges in other circuits have followed the D.C. Circuit's lead.[240] The Second Circuit, while refusing to moot cases for that reason,[241] does permit a court to enter judgment for the named plaintiff on an unaccepted settlement offer.[242] This approach still prevents class certification.[243] The Ninth Circuit has held that depositing full relief in escrow does not constitute acceptance.[244] But it regularly permits courts to enter judgment on unaccepted offers when the defendant "unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory."[245]

Permitting defendants to moot cases in this fashion presents several problems for plaintiffs. First, entering judgments on Rule 68 settlement offers allows companies to pick off individual plaintiffs to preempt class actions. Further problems arise when circuits moot these cases. When a case is mooted, defendants avoid adverse precedent. Because mootness does not constitute a "victory" under attorney fee-shifting statutes, some plaintiffs (or their attorneys) may lose more money in litigation than they receive from the defendant.[246] Attorneys may be less willing to represent such plaintiffs if they cannot recover their fees from the defendant.

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237. *Id.*

238. *See* Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81, 94 (1st Cir. 2021); Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541 (7th Cir. 2017).

239. *See* Sands v. NLRB, 825 F.3d 778, 782 (D.C. Cir. 2016) (holding that a plaintiff "[w]ith a refund of her dues in hand . . . can no longer claim her payment of dues as the basis for her interest in this matter"); *see, e.g.*, Mundo Verde Pub. Charter Sch. v. Sokolov, 315 F. Supp. 3d 374 (D.D.C. 2018).

240. *E.g.*, LaSpina v. SEIU Pa. State Council, No.18-2018, 2019 WL 4750423, at *12 (M.D. Pa. Sept. 30, 2019) (uncashed checks are sufficient to moot cases); Gray v. Kern, 143 F. Supp. 3d 363, 367 (D. Md. 2016).

241. Geismann v. ZocDoc, Inc., 909 F.3d 534, 537 (2d Cir. 2018).

242. Leyse v. Lifetime Ent. Servs., LLC, 679 F. App'x 44, 48 (2d Cir. 2017); Bais Yaakov of Spring Valley v. Educ. Testing Serv., No. 13-CV-4577, 2021 WL 323262 (S.D.N.Y. Feb. 1, 2021).

243. *Leyse*, 679 F. App'x at 48; *Bais Yaakov of Spring Valley*, 2021 WL 323262.

244. *See* Chen v. Allstate Ins. Co., 819 F.3d 1136, 1138 (9th Cir. 2016).

245. Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 954–55 (9th Cir. 2013) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 85 (2013) (Kagan, J., dissenting)); *see, e.g.*, Rueling v. MOBIT LLC, No. CV-18-00568, 2018 WL 3159726, at *4 (D. Ariz. June 28, 2018), *aff'd*, 804 F. App'x 618 (9th Cir. 2020).

246. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1538 (2020) (Alito, J., dissenting) ("[D]ismissing the case as moot means that petitioners are stuck with the attorney's fees they incurred . . . .").

D. *Unilateral Mootness Fails to Save Judicial Resources*

Justiciability doctrines are often justified by concerns of judicial economy.[247] Standing, for instance, permits courts to save their limited resources for disputes in which parties have concrete, redressable stakes in the outcome of their case.[248] These concerns are misguided for mootness.

Unilaterally moot cases are often dismissed at the appellate stage after one or more judges have already decided the case on the merits. Often a great deal of judicial resources has already been used, and "abandonment of the case may prove more wasteful than frugal."[249] The judicial resources rationale certainly cannot explain the Court's decision in *NYSRPA*; the litigants ultimately returned to the Supreme Court, succeeding on similar grounds as the first case.[250] When judicial resources are a concern, strengthening standing or ripeness doctrines would be more effective in limiting cases than mootness.

Admittedly, dismissing a moot case shortly after a complaint has been filed may conserve resources. But even mooting cases at early stages may ultimately prove to be more costly. Many of these cases are later relitigated—at times by the same parties. In one case, the Trump Administration allowed a challenged Obama-era policy to expire midlitigation.[251] A court dismissed the case as moot, citing the recent change in presidential administration.[252] Soon after, the Biden Administration reinstated this same policy.[253] This rigmarole took nearly a decade to resolve. Litigating the merits in the first instance would have been a far more efficient use of resources.

IV. Alternative Solutions Fail to Fully Address Vague Standards

While many scholars have proposed reforms to simplify mootness, these solutions fail to address the root of the problem: vague standards that lead to disparate outcomes and gamesmanship. The solution that best remedies the problems with current mootness doctrine and upholds the prudential goals of mootness is to eliminate the unilateral mootness doctrine.

247. *See* Levit, *supra* note 182, at 325 (arguing that several of Judge Posner's decisions on criminal procedure are motivated by his concerns of judicial economy); *see, e.g.*, Dunton v. County of Suffolk, 748 F.2d 69, 70 (2d Cir. 1984).

248. *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 191 (2000).

249. *See id.* at 170.

250. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

251. Davis & Reaves, *supra* note 212, at 339–40 (2019).

252. *Id.*

253. *Id.*

A. *Simplifying the Doctrine Is Not Enough*

Many scholars and judges have proposed alternatives to simplify the mootness doctrine in hopes of improving judicial efficiency or remedying defendant gamesmanship. But these solutions fail to address disparate outcomes in lower courts and replace one vague factor-based test with another.

1. Abandoning Mootness at the Supreme Court

As discussed above, one problem underlying the prudential basis of mootness is that other justiciability doctrines are far more likely to save judicial resources.[254] Chief Justice William Rehnquist's solution was that the Supreme Court should abandon mootness.[255] In his view, once a case has advanced to the Supreme Court, any possible gains of judicial resources are lost.[256]

This view fails to capture the potential judicial resources lost with mootness dismissals at lower courts. Consider a habeas corpus case at a federal appellate court. This case could have traversed state proceedings, the U.S. Supreme Court, state post-conviction review, the U.S. Supreme Court again, and a federal habeas corpus district court. Lower courts also face these judicial economy concerns.

Further, vague standards in threshold decisions are *least* relevant at the Supreme Court. The Supreme Court already has a great deal of discretion over which cases it hears through grants of certiorari. The specter of courts dodging certain cases through threshold determinations concerns lower courts because mandatory jurisdiction is more common.

2. Factor-Based Analyses of Mootness

Another problem of mootness is that litigants and the public are often deprived of precedent. Don Kates and William Barker suggest that judges should ask whether the resources required to decide an otherwise moot case are outweighed by prudential concerns.[257] Kates and Barker would have judges look at the (1) probability of recurrence, (2) need for judicial review of controversies otherwise evasive of review, and (3) social costs of continued uncertainty in the law.[258] They also suggest that the substantive area of law should play a role, with cases in certain areas of law being more easily mooted than others.[259]

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254. Standing and ripeness determinations take place prior to determining cases on the merits. All details necessary for these determinations are present at the start of the lawsuit, unlike in mootness where new considerations arise.

255. *See* Honig v. Doe, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring).

256. *Id.*

257. *See* Kates & Barker, *supra* note 62, at 1412–13.

258. *Id.* at 1413.

259. *Id.* at 1413 n.158.

The first two factors are largely incorporated into the current mootness doctrine, and they fail to provide clear guidelines for judges. The probability of recurrence factor asks judges to predict the future activity of others. Judges, however, often disagree when assessing these probabilities.[260] As examples of cases where mootness might impose high social costs, Kates and Barker provide expressive conduct regulations,[261] habeas corpus cases,[262] and welfare proceedings.[263] It is unclear why expressive claims are more important than any other moot cases. Which social costs are sufficiently weighty depends on the judge's political or philosophical preferences. Such decisions are akin to judges picking out their friends at a cocktail party.[264] Judges should not be the only ones to decide which social issues deserve immediate adjudication.

3. "Real Effects" Model of Mootness

One way to resolve gamesmanship is to simply ask whether resolution of the case will have some effect in the real world.[265] Existing mootness exceptions already capture much of this understanding. For example, the "wrongs capable of repetition" exception stems from a view that others are "likely to be hurt in the future without a federal court ruling."[266] For voluntary cessation, cases are not moot because a favorable decision "will have the effect of preventing the defendant from reinstituting the challenged practice."[267] This model simplifies these exceptions by having judges decide cases on the merits

260. *Compare* Mancusi v. Stubbs, 408 U.S. 204, 206 (1972) (New York's resentencing of a defendant after the court of appeals concluded that a sentence-enhancing predicate conviction was unconstitutional did not moot the case where the defendant challenged the validity of the later sentence, and the state had an ongoing interest in the validity of prior conviction), *with id.* at 219 (Marshall, J., dissenting) ("[T]he possibility that this controversy will be revived is too remote and speculative to keep the case alive . . . ."); *compare* City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983), *with id.* at 135–36 (Marshall, J., dissenting); *compare* Hodgers-Durgin v. de la Vina, 165 F.3d 667, 674 (9th Cir. 1999), *with id.* at 680 (Sneed, J., dissenting); *compare* Davis v. Thornburgh, 903 F.2d 212, 222 (3d Cir. 1990), *with id.* at 232 (Becker, J., concurring in part and dissenting in part); *compare* Knox v. McGinnis, 998 F.2d 1405, 1414–15 (7th Cir. 1993), *with id.* at 1415 (Reynolds, J., concurring); *compare* Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 795–96 (8th Cir. 2016), *with id.* at 798 (Arnold, J., dissenting); *compare* ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 691–92 (6th Cir. 2007) (Gibbons, J., concurring), *with id.* at 699 (Gilman, J., dissenting).

261. Kates & Barker, *supra* note 62, at 1429.

262. *Id.* at 1430.

263. *Id.* at 1430–31.

264. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (Amy Gutmann ed., new ed. 2018) ("[L]egislative history is extensive, and there is something for everybody. . . . [T]he trick is to look over the heads of the crowd and pick out your friends.").

265. *See, e.g.*, Utah Animal Rts. Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1271 (10th Cir. 2004) (Henry, J., concurring); Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000).

266. *See* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 698 (1990).

267. *See id.* at 699.

when a decision could "have some effect—altering someone's behavior, changing somebody's rights or duties."[268]

Defining this "real effect" is still vague. Under a broad view, the outcome of any lawsuit will change one's rights or duties, as an unfavorable judgment will constrain the defendant. Even if a judge merely reaffirms a preexisting obligation, this could be construed as imposing a greater duty by making that obligation clearer. A narrower view could require a "tangible" change, such as exchanging goods or ceasing an activity one is performing. This view is complicated by the role of nominal damages after *Uzuegbunam*.

One option is for courts to follow the strategy used in defining injury-in-fact in prudential standing decisions: allowing for common law injuries and statutorily defined injuries to suffice. Ceding this decision to the legislature may reduce the specter of disparate judicial outcomes. Prudential standing doctrine suggests this may not be easy. One issue in standing doctrine is determining how clear a statute must be to define an injury or "real effect." Given the lack of clarity present in prudential standing decisions, this change is unlikely to substantially remedy the disparate effects of the current model of unilateral mootness.

B. *Expanding the Mootness Exceptions Is Unwise*

Other solutions aim to clarify existing mootness exceptions. These could mitigate the disparate outcomes among circuits at the cost of the Supreme Court making these judgments. The benefit is that individual litigants would be treated alike. The cost is that classes of litigants may be treated differently than other, similarly situated groups.

1. Expanding Voluntary Cessation

One way to address government gamesmanship is to hold government actors to the same standard as private defendants in voluntary cessation cases. While the Supreme Court and some circuits have applied the same burden for all defendants,[269] other circuits have applied a lower burden for government actors,[270] assuming that these actors are more trustworthy than private defendants.[271] Proponents argue that government defendants are often *more* incentivized to engage in gamesmanship as they are repeat litigants that want to avoid adverse precedent.[272] One approach is to require both governments and

268. *See id.* at 698.

269. *See* Davis & Reaves, *supra* note 212, at 332–33, 335 (providing examples from the D.C. Circuit, Ninth Circuit, and the Supreme Court).

270. *See id.* at 342 n.50 (collecting cases from the Third, Fifth, Sixth, Seventh, Eleventh, and Federal Circuits).

271. *See id.* at 325–26, 333–34.

272. *See id.* at 335–37 (describing how government defendants are often repeat litigants, incentivized by administrative ease and a desire not to set adverse precedent).

private defendants to show that it is "absolutely clear" that the challenged conduct will not recur.[273]

Describing government action in voluntary cessation terms is strange. When describing an individual or a corporate defendant, the concept of voluntary cessation makes sense. An individual can swear under oath that they will not engage in a particular action again. Governments, however, are made up of groups of people. A government actor or legislature can agree not to undertake a certain action, but they cannot bind future legislatures. Police departments and government agencies settle cases all the time. But with voluntary cessation, no settlement is made, and a court never determines that the defendant did anything wrong. Even if a government actor could bind their successors, this action creates serious democratic concerns. Federal courts should not be able to bind governments for behaviors that have not yet been held to be unconstitutional. In short, government actors are constitutionally prohibited from committing to nonrepetition. No government defendant could ever satisfy the "absolutely clear" standard. This would permit plaintiffs to continue any lawsuit, even when the government actor stopped the challenged activity. Admittedly, this solves the problem of vague standards governing voluntary cessation. But in practice, this would hold governments to a *more* stringent standard than corporate defendants.

2. Expanding Collateral Consequences: Expressive Remedies

Other solutions addressing defendant gamesmanship expand the category of collateral consequences. These solutions allow plaintiffs to evade mootness by claiming that nominal damages or admissions of liability are necessary to remedy harms rooted in values such as dignity, respect, and vindication.[274] The most comprehensive overview of an approach to expanding collateral consequences is Professor Rachel Bayefsky's recent article on expressive remedies.[275] Bayefsky characterizes dignitary harms as those that exclude or treat others as lesser.[276] Practically, this could allow plaintiffs to recover attorneys' fees for an otherwise moot case, so long as the remedy on the merits is an expressive one.[277] These approaches are likely to exacerbate the problem of docket control, and they fail to clarify vague standards.

An expressive approach to justiciability would exacerbate the problem of docket overload. Allowing expressive or dignity harms as a redressable injury-in-fact would seem to implicate standing as well as mootness. Aspects of dig-

273. *See id.* at 329.

274. *See* Bayefsky, *supra* note 29, at 1265.

275. *See id.*

276. *See id.* at 1266–67.

277. *See id.* at 1265–66.

nity and respect are an anomaly outside the discrete common law torts of defamation and battery.[278] Without a limiting factor, anybody who perceives a wrong and demands an apology could get their day in court. A large number of damages express more respect for the plaintiff.[279] This suggests that even favorable state court judgments could be subject to collateral attacks if the plaintiff feels undercompensated. Permitting expressive harms as injuries-in-fact is akin to an individual challenging a "disagreeable war."[280] Bayefsky curbs this docket overload problem by limiting dignity torts to a subset of dignity harms.[281] Reducing docket overload, however, exacerbates the vagueness problem.

Expressive approaches increase vagueness. Dignity and respect hold many contradictory definitions.[282] Bayefsky offers several factors to identify harms to dignity, including intentionality, relation of violation to disrespectful treatment, and identity of the parties.[283] She instructs judges to examine the "costs and benefits of granting a particular remedy."[284] These standards are vaguer than those underlying the current mootness exceptions. To Bayefsky, dignity resonates in progressive "movements challenging racial injustice, unequal treatment of women, and stigmatization of same-sex relationships."[285] Other judges appeal to dignity when striking down pro-choice legislation as unconstitutional.[286] Rather than dignity serving as an egalitarian tool,[287] it may risk making more concrete and visible the inherent distinctions that exist in our society.[288]

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278. Aspects of dignity and respect have limited judicial precedent in aspects of antidiscrimination and equal protection law. *See* Bayefsky, *supra* note 29, at 1269–70, 1294. Dignity has also played a role in assessing federal court's original jurisdiction. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

279. *See* Bayefsky, *supra* note 29, at 1267.

280. *Cf.* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89–90.

281. *See* Bayefsky, *supra* note 29, at 1299–1300.

282. *See, e.g.*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

283. Bayefsky, *supra* note 29, at 1311–12.

284. *Id.* at 1268.

285. *Id.* at 1265 (footnotes omitted).

286. For example, the first German abortion case held that laws permitting abortion were in violation of the German Basic Law's dignity provision. *See* McCrudden, *supra* note 282, at 709 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (Ger.). Compare this with the Supreme Court's use of dignity in striking down laws restricting abortion. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

287. *See* Bayefsky, *supra* note 29, at 1290.

288. The classical Romans based dignity in an idea that one is "worthy of . . . honour and respect because of a particular status that he or she had." *See* McCrudden, *supra* note 282, at 656–57 (2008).

C. *Eliminating Unilateral Mootness Is the Best Solution*

1. Mooting Mootness Is Good Policy

Eliminating unilateral mootness reduces vagueness, gamesmanship, and inefficiency. This change also simplifies the doctrine. Barring suspected collusion, the intent of the litigants would be irrelevant to the analysis. Judges would no longer need to assess whether an issue is "capable of repetition, but evading review."[289] Similarly, they would not need to assess the likelihood of a defendant returning to the challenged action. Special carve-outs for class actions would be unnecessary, as litigants would no longer require a continued personal stake in the litigation.

This also has several benefits over the alternatives. For one, it is easier to apply. Rather than assessing an array of factors, all cases of unilateral mootness will move forward.[290] This approach is neutral. It does not treat any area of law or injury differently. Nor does it require line drawing, which could treat similarly situated classes of litigants differently.[291]

This solution is not perfect. It would permit some cases of "plaintiff madness" (cases in which a defendant no longer wishes to litigate) to advance. For these cases, the defendant may stipulate to all the facts that the plaintiff requests to bring a quick end to the lawsuit. This would end the case without setting collusive precedent.

2. Mooting Mootness Does Not Impact Concerns over Adversity

As a point of clarification, this Note's solution should be understood only as eliminating unilateral mootness when other grounds for mootness are not present. For instance, when a case implicates unilateral mootness and collusion, the case should still be dismissed on collusion grounds. These cases often arise when the parties' motives or identities change. One example of this would be *Biden v. Sierra Club* (originally *Trump v. Sierra Club*).[292]

In *Biden v. Sierra Club*, an environmental group challenged the Department of Defense's transfer of funds to build a wall on the U.S.-Mexico border.[293] After the Ninth Circuit enjoined the Trump Administration from

289. *See* discussion *supra* Section II.A.2.

290. Calls to simplify judicial decisionmaking are far from a new concept. In the Federalist Papers, Hamilton calls for "avoid[ing] . . . arbitrary discretion in the courts" as a means to create consistency in the judiciary, as well as efficiency and "utility." *See* THE FEDERALIST NO. 78 (Alexander Hamilton). While Hamilton writes to promote stare decisis, this proposal to eliminate additional considerations for the Court similarly promotes consistency and efficiency. As explained *infra* in Section IV.C.2, judges must exercise some discretion in determining whether there is collusion.

291. *See* discussion *supra* II.A.1 regarding the mootness exception for impeachment purposes but not for sentence enhancements for parole violations.

292. 142 S. Ct. 56 (2021) (mem.).

293. 963 F.3d 874, 879–80 (9th Cir. 2020).

redirecting the funds, President Trump filed for writ of certiorari.[294] One month later, President Biden, on the day of his inauguration, issued a proclamation cutting all funding to the border wall.[295] Biden then moved to remove this case from the Court's February argument calendar and hold it in abeyance, which the Court granted.[296] The Court then granted his motion to vacate the Ninth Circuit's decision.[297] Had the Court denied this motion, President Biden would be in the strange position of defending a policy he does not support. Courts have several ways to reach the same result even without unilateral mootness.

To begin, the Court may dismiss the case if it doubts the government's ability to adequately litigate the case. The Court has a broad power to vacate any judgment under certain circumstances.[298] These circumstances include new federal statutes, changed factual circumstances, and confessions of error taken by the solicitor general or state attorneys general.[299] This proposal would not deprive the Court of these tools. Lower courts also have a broad power to dismiss cases sua sponte on justiciability grounds.[300] For lower courts, dismissal based on confessions of error should be limited to cases in which there is a serious risk of collusion, including situations in which the identity or motives of one party has changed in some significant way. Such cases may require vacatur—though collusion, not unilateral mootness, would be the grounds for vacating the decision below.

Moreover, the Court could halt proceedings until the necessary adversity returns. If litigants are at the trial stage, courts should stay the case and hold it in abeyance until such adversity is restored. Federal courts employ this procedure in habeas corpus cases when a petitioner has failed to exhaust all available state remedies.[301] This approach also mitigates the risks that plaintiffs cannot recover based on the statute of limitations or new standing issues. If the case is at the appellate stage, the court could dismiss the appeal and let the lower decision stand without disrupting or vacating the case.[302] If a future administration chooses to appeal the judgment, then they may do so. But this should not be objectionable to either party. The plaintiffs maintain their fa-

294. Brief for the Petitioners, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (No. 20-138), 2020 WL 7263506.

295. Proclamation No. 10142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021).

296. Biden v. Sierra Club, 141 S. Ct. 1289 (2021) (mem.).

297. Biden v. Sierra Club, 142 S. Ct. 56 (2021) (mem.).

298. Lawrence *ex rel.* Lawrence v. Chater, 516 U.S. 163, 166 (1996) (per curiam) (citing 28 U.S.C. § 2106).

299. *Id.* at 166–67.

300. *See, e.g.*, Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, 331–32 (5th Cir. 2002).

301. *See generally* Rhines v. Weber, 544 U.S. 269 (2005).

302. *See* discussion of vacatur *supra* Section III.B.

vorable judgment, one with which the defendants ostensibly agree. If the defendants disagree with this holding, then they are adverse and should fight it in court.

Proposed alternatives to scrapping unilateral mootness fail to capture the key problem of vague standards leading to disparate outcomes. These proposals only address a subset of these problems or replace vague standards with their own vague or policy-oriented alternatives. Eliminating unilateral mootness, on the other hand, clarifies standards in a neutral manner, which solves the disparate outcomes and gamesmanship present in current doctrine. Existing mechanisms would mitigate the risks of cases with inadequate adversity.

Conclusion

The judicially created concept of unilateral mootness has little basis in its alleged constitutional or prudential rationales. Instead, the doctrine leads to disparate outcomes for litigants, enables defendant gamesmanship, and incurs costs to the judicial system. Eliminating unilateral mootness addresses all these problems. Plaintiffs could fully litigate their cases, vindicate their rights, and memorialize their victories through precedent. Future litigants, judges, and the public would all benefit from the reasoning of these decisions. Mitigating these disparate outcomes would also improve public perceptions of the court. Deciding these cases would save judicial resources by preventing these similar cases from being fully relitigated each time the defendant engages in the challenged behavior. Lastly, this solution targets the worst forms of gamesmanship while leaving most justiciability doctrines in place. Unilateral mootness cannot be fixed. Scrapping it is the best option.