No. 23-___

# In the Supreme Court of the United States

ZACHARY GREENBERG,

*Petitioner,*

v.

JERRY M. LEHOCKY, IN HIS OFFICIAL CAPACITY AS BOARD CHAIR OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

For two centuries, this Court has maintained the "time-of-filing" rule: "jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *E.g.*, *Conolly v. Taylor*, 27 U.S. 556, 565 (1829) (Marshall, C.J.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). In contrast, courts analyze mid-litigation developments as matters of mootness. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Petitioner Zachary Greenberg, a Pennsylvania-licensed attorney, sued to enjoin enforcement of a speech-regulating ethics rule. After the district court preliminarily enjoined enforcement of the rule, the government revised it and Greenberg supplemented his complaint to recount the new version of the rule.

Applying the long-standing "time-of-filing" rule, the district court analyzed the mid-litigation developments—the revision of the rule and a disavowing declaration from one of the twelve defendants—as matters of mootness, finding neither mooted Greenberg's challenge. App. 47a-74a.

The Third Circuit reversed, substituting a standing inquiry for a mootness one because Greenberg had amended his complaint to reflect the state's mid-suit revision of the rule. App. 18a n.4.

The question presented is:

Does amending or supplementing a complaint to include new factual developments absolve the government of its burden to prove mootness?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner plaintiff Zachary Greenberg is an individual person. Because Greenberg is not a corporation, Supreme Court Rule 29.6 does not require a corporate disclosure statement. Greenberg was appellee in the court below.

Respondent defendants are Jerry M. Lehocky, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; Dion G. Rassias, in his official capacity as Board Vice-Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; Joshua M. Bloom, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Celeste L. Dee, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Laura E. Ellsworth, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Christopher M. Miller, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Robert J. Mongeluzzi, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Gretchen A. Mundorff, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; John C. Rafferty, Jr., in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Hon. Robert L. Repard, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; David S. Senoff, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Shohin H. Vance, in his official capacity

as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Thomas J. Farrell, in his official capacity as Chief Disciplinary Counsel of the Office of Disciplinary Counsel; and Raymond S. Wierciszewski, in his official capacity as Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel. Respondents were appellants in the court below.

## STATEMENT OF RELATED PROCEEDINGS

*Greenberg v. Lehocky, et al.*, No. 22-1733 (3d Cir.) (opinion issued August 29, 2023; order amending caption issued September 22, 2023; order denying rehearing and rehearing en banc issued October 3, 2023)

*Greenberg v. Haggerty, et al.*, No. 20-3602 (3d Cir.) (order of voluntary dismissal issued March 17, 2021)

*Greenberg v. Haggerty, et al.*, No. 20-cv-03822-CFK (E.D. Pa.) (preliminary injunction issued December 8, 2020; opinion and permanent injunction issued March 24, 2022; final judgment issued March 24, 2022)

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Black letter law distinguishes standing from mootness: "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). Standing "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 735 (2008); *accord Carney v. Adams*, 141 S. Ct. 493, 499 (2020). Mootness, on the other hand, "concentrate[s] attention on the peculiar problems of a suit's death, rather than its birth." 13B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed.).

Thus, developments during the life of the lawsuit lead this Court to ask whether those developments moot the controversy by depriving the plaintiff of an ongoing stake. For example, if a defendant repeals and replaces a challenged statute during the litigation, that presents a question of mootness. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993). So too if the defendant disavows an intent to take the complained of action. *E.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91–93 (2013). Or if the defendant states its intent to rescind a challenged rule and engage in new rulemaking. *West Virginia v. EPA*, 142 S. Ct. 2587, 2606–07 (2022).

Distinguishing standing from mootness "matters because the Government, not [plaintiff], bears the burden to

establish that a once-live case has become moot." *West Virginia*, 142 S. Ct. at 2607. While the plaintiff bears the burden to show a justiciable controversy at the outset, the defendant bears a "heavy" and even "formidable" burden to show mootness from developments during the litigation. *Friends of the Earth*, 528 U.S. at 189, 190. A "plain lesson" is that "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (quoting *Friends of the Earth*, 528 U.S. at 190).

But what if a plaintiff files an amended or supplemental complaint to recite the mid-litigation developments? Specifically, what if a plaintiff bringing a constitutional challenge to a rule or policy supplements his complaint to assert the same claims against a revised version of the rule or policy without adding new claims or defendants? What then is the relevant point in time for analyzing plaintiff's standing?

Following this Court's guidance in *Rockwell Int'l Corp. v. U.S.*[1] and the longstanding "time-of-filing" rule, most courts look to the initial complaint—the time that a party first invokes federal jurisdiction. *Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 391 n.7 (6th Cir. 2022); *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 803 (9th Cir. 2020); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013); *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1366 n.3 (Fed. Cir.

[1] 549 U.S. 457, 473 (2007).

2010). Despite any supplemental complaint, mid-litigation developments like statutory revisions remain a question of mootness. *Zukerman v. USPS*, 961 F.3d 431, 441–45 (D.C. Cir. 2020); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1325–129 (11th Cir. 2001). But the Third Circuit now diverges, holding that a supplemental pleading resets the standing clock as if it were beginning new litigation. App. 18a n.4; *Lutter v. JNESO*, 86 F.4th 111, 124–26 (3d Cir. 2023) (explaining Third Circuit's standard post *Greenberg*). In the Third Circuit, defendants bear no burden to show mootness if the plaintiff supplements his complaint to reflect the changed circumstances. App. 18a. There alone plaintiffs bear a second burden of establishing standing anew. *Id.* at 22a n.5. This Court should grant certiorari to resolve the split and repudiate the Third Circuit's novel rule.

## OPINIONS BELOW

The Third Circuit's decision is reported at 81 F.4th 376 and is reproduced at App. 1a. The district court's decision granting summary judgment is reported at 593 F. Supp. 3d 174 and is reproduced at App. 34a. The district court's previous order granting a preliminary injunction is reported at 491 F. Supp. 3d 12, and is reproduced at App. 128a.

## JURISDICTION

The Third Circuit issued its opinion on August 29, 2023, and Greenberg's petition for rehearing and for rehearing en banc on October 3, 2023. On December 8, 2023, Justice Alito extended the time for this petition to January 31,

2024. *See* No. 23A513. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article III vests "[t]he judicial Power of the United States" in the federal courts and limits that power to certain "Cases" and "Controversies." U.S. Const. art. III §§1–2.

The Free Speech Clause of the First Amendment prohibits Congress from abridging "the freedom of speech"; the Fourteenth Amendment extends that prohibition to the States and guarantees "due process of law." U.S. Const. amends. I, XIV.

## RULES INVOLVED

Rules 15(a) and (d) are reproduced at App. 162a. Pa. Rule of Prof. Cond. 8.4(g), as adopted on Jun. 8, 2020 is reproduced at App. 160a. Pa. Rule of Prof. Cond. 8.4(g), as amended and adopted on Jul. 26, 2021 is reproduced at App. 161a.

## STATEMENT OF THE CASE

### A. Pennsylvania adopts a variation of ABA Model Rule 8.4(g) and Petitioner Zachary Greenberg sues to stop it.

In 2016, the American Bar Association (ABA) introduced major changes to the antidiscrimination rule in its Model Rules of Professional Conduct, Rule 8.4(g). For decades, the rule narrowly classified as unethical any "conduct that is "prejudicial to the administration of justice" and limited the Rule's scope to work done "in the course of representing a client." Model R.P.C. 8.4(d), cmt. 3 (Am. Bar Ass'n 1998). It applied only to prejudice based on "race, sex, religion, national origin, disability, age, sexual orientation, [and] socioeconomic status." *Ibid.* But citing the "need for a cultural shift" among legal professionals, ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum 2 (Dec. 22, 2015), the ABA revised Rule 8.4(g) in 2016. The ABA expanded the rule to new categories of sanctionable harassment and applied it to speech deemed "derogatory or demeaning" or that "manifests bias or prejudice towards others" and is "harmful." Model R.P.C. 8.4(g), cmt. 3 (Am. Bar Ass'n 2016). And the ABA unmoored the rule to encompass "all conduct relating to the practice of law," expanding its jurisdiction to "bar association functions" and "social activities." *Id.* at cmt. 4. Critics complained that these changes left the rule "riddled with unanswered questions" about what lawyers can say and where they can say it without professional reprisal. Halaby & Long, *New Model Rule of*

*Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PRO. 201, 257 (2017).

The "cultural shift" invoked by the ABA mirrors the now ubiquitous impulses for "safetyism"—speech codes, book banning, and the like—that regulate many facets of American society. G. Lukianoff & J. Haidt, THE CODDLING OF THE AMERICAN MIND 268–69 (2018); *see also* App. 234a–246a (providing examples). As a result, about half of the citizenry today is afraid "to speak their minds," more than at any time since polling addressed this issue and four times as many as in the McCarthy era. Gibson & Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States*, 138(3) POL. SCI. Q. 361, 362–64 (2023). 8.4(g) imposes this trend on the legal profession.

Scholars and practitioners alike objected to the ABA's new rule as unconstitutional. *See, e.g.*, Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L. ETHICS. & PUB. POL'Y 135, 136 (2018); *see also* App. 265a–269a, Add. to Pet. C.A. Resp. Br. (compiling two dozen commentators and state authorities denouncing the model rule). Those objections may explain why only two states—New Mexico and Vermont—adopted Rule 8.4(g) in full. For the most part, other states either declined to adopt the rule or promulgated substantially narrower versions that remain tethered to the representation of a client or the administration of justice. *See e.g.*, La. Att'y Gen. Op. 17-0114 (2017); S.J. 0015, 2017 Leg., 65th Sess. (Mont. 2017); Tex. Att'y Gen. Op. KP-0123 (2016). But Pennsylvania is a notable

exception. In 2020, over a dissent, the Supreme Court of Pennsylvania approved a version of Rule 8.4(g) with few narrowing limitations. It forbade Pennsylvania attorneys from "knowingly manifest[ing] bias or prejudice" not just in the representation of a client, but also at CLE classes, bar association events, and bench-bar conferences. App. 130a–132a.

After Pennsylvania adopted the rule in June 2020, Petitioner Zachary Greenberg sued to enjoin it. Greenberg is a licensed Pennsylvania attorney and First Amendment activist who speaks throughout the Commonwealth on hot-button free speech issues, including at CLE events he teaches. App. 212a–216a. Greenberg's presentations mention epithets quoted in opinions or stories he's discussing. Stipulated List of Facts, Dkt. 53 ¶¶ 63–65.[2] His taboo language and defense of free speech inflame some audience members. For example, it is undisputed that some spectators at Greenberg's presentations expressed offense at what he said. App. 228a. Rule 8.4(g) opens the door to these offended individuals filing a complaint against Greenberg. To show this fear is not imagined, Greenberg catalogued several politically motivated complaints of "bias" against speakers for similarly controversial speech, including one against Fifth Circuit Judge Edith Jones that took two years to resolve when she spoke about racial disparities in criminal justice at the University of Pennsylvania Law School. App. 234a–257a.

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[2] "Dkt." refers to docket entries in *Greenberg v. Haggerty, et al.*, No. 20-cv-03822-CFK (E.D. Pa.). "C.A. Dkt." refers to docket entries in *Greenberg v. Lehocky, et al.*, No. 22-1733 (3d Cir.).

### B. The district court preliminarily enjoins the rule.

Greenberg's suit sought declaratory and injunctive relief against the Respondents tasked with enforcing the rule. App. 206a. After the parties certified that the record required no other facts or evidence before adjudication (Dkts. 17, 21, 22, 23), the district court heard the parties' cross-motions for preliminary injunction and dismissal. The defendants did not submit any evidence that excluded Greenberg's speech from 8.4(g)'s ambit; instead, they stipulated that no defendant has "issued any . . . opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." Dkt. 21 ¶ 70.

With all necessary evidence before it, the district court found Greenberg had standing under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), because the rule objectively chilled his desired speech. App. 136a–152a. The court's standing analysis considered all arguments submitted by the parties and scrutinized the intricacies of the rule, including its supporting comments. *Ibid.* Ultimately, it found that the words "manifest bias or prejudice" were "a palpable presence" in the rule that "hang over Pennsylvania attorneys like the sword of Damocles." App. 147a. And the court declined Respondents' invitation to eschew jurisdiction by "trust[ing] them not to regulate and discipline . . . offensive speech" because the "plain language" of the rule gave them such authority. App. 148a. Pivoting to the merits, the district court held 8.4(g) exceeded the historical scope of Respondents' regulatory powers and did not implicate the narrow category of professional speech that warrants more deferential review.

App. 158a–159a. And, following *Matal v. Tam*, 582 U.S. 218 (2017), because Rule 8.4(g) sought to remove offensive "ideas or perspectives from the broader debate," the court held it was an unconstitutional viewpoint regulation subject to injunction. App. 162a, 165a. Respondents appealed.

### C. The Respondents revise the rule and Greenberg supplements his complaint to reflect the new rule.

The Respondents shifted strategy and abandoned their appeal in March 2021 to instead amend Rule 8.4(g). While the Supreme Court of Pennsylvania considered the rule's recommended revisions, the Respondents "chose to proceed on the same docket, continuing the pre-existing proceeding." App. 53a. And without any public notice and comment, they rolled out a new version of Rule 8.4(g), which the Supreme Court of Pennsylvania approved in July 2021. Dkt. 53 at ¶ 54. This roughly four-month process contrasted with the three years of "deliberation, discussion, and extensive study," 49 Pa. Bull. 4941 (Aug. 31, 2019), that Respondents exhausted before promulgating their now-defunct original rule.

In material form and function, the new Rule 8.4(g) is the same as the old regulation. Its jurisdiction still extends past client representation to legal committees, education seminars, conferences, and other bar-sponsored activities for legal education credit. Pa.R.P.C. 8.4(g) cmt. 3. It singles out the same disfavored subjects and uses the "same procedure" for enforcement as the original rule. Pa.R.P.C. 8.4(g); App. 44a. The substantive difference is

slim. Amended Rule 8.4(g) prohibits "harassment" defined beyond the ordinary legal meaning of the word to include "denigrat[ing], or show[ing] hostility or aversion toward a person" on any of the rule's protected bases, Pa.R.P.C. 8.4(g); while the original rule barred manifestations of bias and prejudice.

In response to the amended rule, Greenberg filed a supplemental complaint, incorrectly styled as an amended complaint, to update his pleading and account for the new text. App. 209a. The supplemental complaint did not name any new parties not named initially or automatically substituted under Fed. R. Civ. P. 25(d). Then, three months later—and more than a year into the litigation—Respondent Thomas Farrell, Chief Disciplinary Counsel of the Office of Disciplinary Counsel (ODC), declared that Greenberg's intended activities would not violate the rule and that ODC would not pursue discipline for such activities. Dkt. 56. But Farrell admitted his declaration did not bind the Disciplinary Board or its members; the Board played no role in its drafting; and, the Board has absolute discretion to remove Farrell and replace him with someone who would prosecute Greenberg under Rule 8.4(g) for the speech at issue. Dkt. 62 at 17–18. At first, Farrell maintained that ODC was bound to it by "official estoppel," but Respondents later abandoned that position on appeal. Tr. of Oral Arg. (C.A. Dkt. 137) at 8:8–11.

### D. The court again enjoins the rule.

The parties cross-moved for summary judgment before the district court. App. 36a. The court again engaged in a full jurisdictional analysis. App. 47a–74a. It considered not only standing and mootness (now at issue), but also

their jurisdictional relationship. "Standing ensures that each plaintiff has the 'requisite personal interest […] at the *commencement* of the litigation.'" App. 47a (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)) (emphasis added). While "[m]ootness 'ensures that the litigant's interest continues to exist throughout the lawsuit.'" App. 47a (quoting *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993)). The district court held Greenberg already demonstrated standing when the litigation began, App. 47a–49a, but still considered and rejected new factual and legal arguments against standing based on the amended rule and Farrell's declaration. App. 49a–55a.

The district court then addressed Respondents' jurisdictional arguments under mootness, though Respondents had not argued them as such. App. 55a–57a. It analyzed every plausible avenue for mootness: (a) whether the Farrell declaration sufficiently foreclosed enforcement; (b) whether Greenberg's intended speech implicates the amended rule; (c) "official estoppel" against the Respondents based on Farrell's declaration; (d) the credibility of enforcement against Greenberg; and (e) the differences between the original and amended Rule 8.4(g). App. 56a–74a. The court concluded that the non-binding, *ad hoc*, and expediently timed Farrell declaration did not moot the case. App. 56a–67a. And it concluded that the threat of disciplinary investigation—itself "trigger[ed]" by "each complaint that ODC receives"—also prevents mootness. App. 69a. Separately, the "insignificant" differences between the first and amended Rule 8.4(g) plus its

subjective application and enforcement meant Greenberg's speech remained chilled—and thus the amended rule also failed to moot his suit. App. 70a–74a.

Proceeding to the merits, the district court again held that Rule 8.4(g) regulated speech, not conduct, and that it was an unconstitutionally vague, overbroad, and viewpoint-discriminatory regulation. App. 74a–127a. The court entered summary judgment, and Respondents appealed again, with the caption changing to reflect the automatic substitution of officeholders. Fed. R. App. Proc. 43(c)(2).

### E. The Third Circuit reverses, finding Greenberg lacks standing to challenge the amended rule.

On appeal the Third Circuit panel reversed. It held that mid-case developments—the amended rule and Farrell's declaration—implicated standing, not mootness, "because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." App. 18a n.4. This shifted the burden off the Respondents (to prove the case moot) and on to Greenberg to freshly demonstrate standing under the supposedly new circumstances. App. 18a–20a. On standing, the panel found that Greenberg's intended speech would not implicate the amended rule because it was not "directed" at others nor "knowing[ly]" discriminatory. App. 21a–23a. And because Greenberg now had to prove standing at the time of his subsequent complaint—brought about by Respondents' strategic decision to amend the rule rather than appeal— the Farrell declaration protected him from hypothetical enforcement of Rule 8.4(g) in the court's eyes. App. 23a & n.5. Finally, the Third Circuit dismissed Greenberg's claims of chilled

speech based on the "specter of disciplinary proceedings." App. 27a. In doing so, the panel remarked that Greenberg's concerns are "largely informed by his perception of the social climate, not Rule 8.4(g)," App. 29a—an assertion at odds with the ABA's statement that the rule reflected its desire for a "cultural shift." ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum 2 (Dec. 22, 2015). And it concluded that the investigation of Judge Jones—prompted by a deluge of complaints about her allegedly insensitive speech at the University of Pennsylvania law school—did not pose a "credible threat" to Greenberg. App. 25a n.6, 30a.

Greenberg petitioned the Third Circuit for rehearing or reconsideration en banc to correct the panel's decision, raising the panel's conflation of standing with mootness, its disregard of the time-of-filing rule, and its departure from the law of other circuits. The Third Circuit denied rehearing. App. 167a.

## REASONS FOR GRANTING THE PETITION

Every day, litigants across the country amend and supplement their complaints in federal court. These litigants rely on the time-tested rule that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*). They can no longer rely on that rule in the Third Circuit following its split from other circuits.

Jurisdictional outcomes ought not turn on whether a plaintiff sues in Philadelphia, Pennsylvania, or Philadel-

phia, Mississippi. The Court should grant certiorari to secure uniformity and consistency on a significant matter of federal jurisdiction.

## I. The Third Circuit diverges on how to analyze jurisdiction in the context of amended and supplemental complaints.

For two centuries, it has been "quite clear" "that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (Marshall, C.J.). "Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly v. Taylor*, 27 U.S. 556, 565 (1829) (Marshall, C.J.). This "time-of-filing" rule is "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570–71 (2004) (citing casebooks). The principle is "well-established"[3] and "consistently

[3] *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991).

held,"[4] "longstanding"[5] and "venerable,"[6] even "pellucid."[7] Put simply, the time-of-filing rule forms one of the most, if not the most, fundamental pillars of federal jurisdiction jurisprudence. And it applies to questions of Article III standing as it does to other elements of subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 735 (2008).

Two decades ago, this Court clarified how the time-of-filing rule interacts with amended pleadings. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). *Rockwell* answers that question by distinguishing between the state of things and the originally alleged state of things. *Id.* at 473. While "courts look to the amended complaint to determine jurisdiction," jurisdiction still "depends on the state of things *at the time of the action brought*." *Id.* at 474, 473 (emphasis added; quotation and citation omitted). In other words, courts should (1) look the amended complaint (2) to see what it says about the state of things at the time of the case was filed. *Greenberg* ignores (2).

In the wake of *Rockwell*, most circuits properly assess standing "as of the time when [plaintiff] commenced suit, relying on the allegations in the operative amended complaint." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975

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[4] *Id.*

[5] *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

[6] *DM Arbor Court, Ltd. v. City of Houston*, 988 F.3d 215, 219 (5th Cir. 2021).

[7] *Hotze v. Hudspeth*, 16 F.4th 1121, 1127 (5th Cir. 2021) (Oldham, J., dissenting).

F.3d 788, 803 (9th Cir. 2020) (citation omitted). In *Gonzalez*, the plaintiff challenged ICE immigration detainers. *Id.* at 800. Immediately after Gonzalez filed his complaint, ICE cancelled his detainer and the sheriff's department released him. *Ibid.* Subsequently, his amended complaints added another named plaintiff. *Ibid.* The government disputed Gonzalez's standing to seek prospective injunctive relief, but *Gonzalez* found he "had standing . . . when he commenced suit" even though the detainer no longer existed when he amended his complaint. *Id.* at 803. Having assured standing, *Gonzalez* concluded that the government could not carry the "heavy burden" of establishing mootness. *Id.* at 806 (internal quotation omitted).[8]

Take, as another example, a Tenth Circuit case, *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143 (10th Cir. 2013) ("*SUWA*"). *SUWA* involved environmental groups' challenge to administrative leasing decisions. *Id.* at 1151. A year after filing suit, the groups amended their complaint to extend their challenge to another decision that came during the litigation. *Ibid. SUWA* "examine[s] the allegations in SUWA's Amended Complaint" "focus[ing] on whether SUWA had standing when the original complaint was filed . . . ." *Id.* at 1153.

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[8] Although Gonzalez brought a class action complaint, the Ninth Circuit's decision does not turn on this distinction. Class actions can sometimes proceed after events moot the individual claims of the named representative. *See, e.g.*, *Deposit Guar. Nat. Bank v. Roper*, 445 U.S 326 (1980). Yet the fact that a suit is a class action "adds nothing to the question of standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (internal quotation omitted). Thus, unsurprisingly, *Gonzalez*'s reasoning employed the general time-of-filing rule without remarking on the case's putative class action status.

The Sixth Circuit may have the most robust precedent of any. In that Circuit, the operative date for determining standing is the one that adds the relevant plaintiff to the action, notwithstanding a later amendment to the complaint. *Barber v. Charter Twp. of Springfield, Mich.*, 31 F.4th 382, 391 n.7 (6th Cir. 2022). "[I]f a plaintiff possesses standing from the start, later factual changes cannot deprive the plaintiff of standing. Those changes will create 'mootness' issues and trigger that doctrine's more forgiving rules." *Fox v. Saginaw Cty.*, 67 F.4th 284, 294–95 (6th Cir. 2023) (citations omitted). Developments during the litigation, even when they are acknowledged in an amended complaint, are "entirely irrelevant to the question of standing." *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir.2004); *Barber*, 31 F.4th at 394 (Readler, J., dissenting) (quoting *Lynch*).

But a minority of courts have errantly focused on *Rockwell*'s instruction to "look to the amended complaint to determine jurisdiction" without recognizing that the allegations that matter are those referencing the time of the initial pleading. This petition provides an opportunity for the Court to clarify *Rockwell*, as the decision below falls into this trap, concluding that "[t]he amendment to Rule 8.4(g) raises an issue of standing and not mootness because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." App. 18a n.4.

Besides misapprehending *Rockwell*, *Greenberg* offers two cases to support its conclusion. But neither does.

The first case *Greenberg* cites, *Persinger v. SW Credit Sys., L.P.*, 20 F.4th 1184 (7th Cir. 2021), does not address the relevant question of what point in time controls. That

is unsurprising because the case involved no amended complaint. No. 19-cv-853 (S.D. Ind.).

The second, *GAF Bldg. Materials Corp. v. Elk Corp of Dallas*, 90 F.3d 479 (Fed. Cir. 1996), directly contradicts *Greenberg*'s conclusion. *Greenberg* quotes *GAF* as if Greenberg's "subsequent pleading" was the relevant "complaint under consideration." But *GAF* looked to the *original* complaint and would have come out differently had it considered facts at the time of the amended pleading. GAF sought a declaratory judgment that it did not infringe a pending but unissued patent. *Id.* at 480. Following the patent's issuance, GAF amended its complaint. *Ibid. GAF* held that neither the issuance of the patent nor GAF's amendment cured the lack of jurisdiction based on "facts existing at the time the complaint under consideration was filed." *Id.* at 483. Thus, *GAF* affirmed dismissal. *Ibid.* If it had instead considered facts at the time of the amended complaint, the patent's issuance would have provided standing.

While *GAF*'s conclusion about whether a supplemental pleading can confer standing is controversial,[9] the Federal Circuit has repeatedly and explicitly reaffirmed

[9] This petition involves whether a supplemental pleading can *oust* standing that existed at the time of the initial pleading, but the opposite question—whether a supplemental pleading can *confer* standing that did not exist at the time of the initial pleading—also deeply divides the circuits. *See Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (cataloging six circuits that answer yes, and three that answer no); *see also United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) (following "the longstanding rule that the amendment process cannot be used to cre-

*GAF*'s holding that the relevant time is "the date of the original complaint" not the "amended complaint." *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1366 n.3 (Fed. Cir. 2010). "The initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended." *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005).

After Greenberg petitioned for rehearing, the Third Circuit issued a separate decision expounding, refining, and attempting to rehabilitate *Greenberg's* rule. *See Lutter v. JNESO*, 86 F.4th 111, 124–26 (2023). *Lutter* characterizes Greenberg's revised pleading as a Rule 15(d) supplemental complaint rather than a Rule 15(a) amended complaint. *Id.* at 126. *Lutter* is correct on this score because supplemental complaints "deal with events subsequent to the pleading to be altered and represent additions to or continuations of the earlier pleadings." 6A Charles Allan Wright, Arthur Miller, & Mary Kay Kane, FED. PRAC. & PROC. § 1504 (3d ed. 2020); *accord United States v. Russell*, 241 F.2d 879, 881–83 (1st Cir. 1957). Before the codification of the federal rules, the equity practice was the same: a "supplemental bill [was] a mere adjunct to the original bill." *Shaw v. Bill*, 95 U.S. 10, 14

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ate jurisdiction retroactively where it did not previously exist" (internal quotation omitted)). Four members of this Court once declared that the time-of-filing rule should apply "categorically" to jurisdiction-destroying changes but less strictly to jurisdiction-perfecting changes. *Grupo Dataflux*, 541 U.S. at 583–84 (Ginsburg, Stevens, Souter, Breyer, JJ., dissenting).

(1877). Rule 15(a) amended complaints, by contrast, "relate to matters that occurred prior to the filing date of the original pleading and entirely replace the earlier pleading." Wright & Miller, § 1504.

Greenberg's revised complaint—filed following Pennsylvania's 2021 amendment to 8.4(g)—is supplemental. App. 209a. It continues to allege the same facts about the 2020 state of the world, brings the same causes of action against the same parties, and seeks the same remedies as his initial complaint. *Compare* App. 174a, *with* App. 209a. Although Greenberg incorrectly styled his updated pleading an "amended complaint," courts and parties "frequently" "confuse[]" "the distinction between an amended and a supplemental pleading." Wright & Miller, § 1473. "These misnomers are not of any significance" and do not prevent courts from proceeding under the correct subsection. Wright & Miller, § 1504; *accord Russell*, 241 F.2d at 882 ("of no moment"); *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1073 (9th Cir. 1989) ("immaterial").

Unlike *Greenberg*, *Lutter* does acknowledge the venerable "time-of-filing" rule. 84 F.4th at 125. But it cabins that rule to amended complaints; supplemental complaints like Greenberg's that "substantively affect[]" existing claims and relief do restart the standing clock. *Id.* at 125–26. *Lutter* does not resolve the circuit conflict opened in *Greenberg*. *Gonzalez* and *SUWA* both involve functionally supplemental complaints, yet still apply the time-of-filing rule. As in *Greenberg*, the two cases *Lutter* cites in support of the supposed "supplemental complaint

exception" to the time-of-filing rule provide no real support.[10]

Other cases involve even more similar postures, with supplemental complaints filed to extend constitutional challenges to revised policies, rules, or statutes. In *Horton v. City of St. Augustine*, the plaintiff challenged an anti-busker ordinance on its face. 272 F.3d 1318, 1322 (11th Cir. 2001). After the plaintiff obtained a preliminary injunction, the city repealed and replaced the ordinance. *Id.* at 1323–24. Horton followed with a supplemental complaint raising the same challenges to the new law. *Id.* at 1325–26. *Horton* did not reset the standing clock by treating the supplemental complaint as the inception of litigation. *Contra Greenberg*; *Lutter*. It analyzed the legislative amendment as a matter of mootness, and concluded that the case was not moot. *Id.* at 1326–29; *accord* Section II, *infra* (detailing this Court's jurisprudence of mootness through legislative amendments).

*Zukerman v. United States Postal Serv.* is of a piece with *Horton*. 961 F.3d 431 (D.C. Cir. 2020). There, a plaintiff alleged that the USPS's custom stamp policy violated

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[10] The first is *Greenberg* itself, which is wrong for the reasons provided in this petition. The second, *Common Cause/Ga. v. Billups*, supposedly "evaluat[ed] plaintiffs' Article III standing based on a subsequent complaint challenging a revised statute." *Lutter*, 84 F.3d at 126 (citing 554 F.3d 1340, 1347–52 (11th Cir. 2009)). While technically true, *Common Cause*'s standing analysis did not involve or address the later occurring facts. Thus, it's not clear how a mootness analysis could have even applied. And *Common Cause* appears consistent with the historical rule that adding plaintiffs in a revised pleading resets the standing clock. 554 F.3d at 1348 & 1351-52. Greenberg's supplemental complaint introduces no new parties.

his free speech rights by discriminating on viewpoint. *Ibid.* Mid-litigation, USPS adopted a superseding policy, and Zukerman filed a supplemental complaint to challenge the new policy. *Id.* at 437–38, 439–40. Like *Horton*, *Zukerman* analyzed the justiciability of the supplemental complaint as a matter of mootness, not standing, and again found that the government had not met its burden. *Id.* at 441–45.

The Third Circuit's reinvention of the time-of-filing rule does not just contradict other circuits, it contravenes this Court's precedent applying the doctrine to *supplemental complaints*. In *Anderson v. Watt*, this Court refused to reset the jurisdictional clock after the plaintiffs filed a partially supplemental complaint that alleged that after the filing of the complaint, one of the executor plaintiffs revoked his executorship. 138 U.S. 694, 708 (1891).

So too, *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union R. Co.* 270 U.S. 580 (1924). There, the plaintiff sought remand to file a supplemental complaint to reflect the ICC's post-complaint action. *Id.* at 586. This Court denied the motion: "The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought." *Ibid.*

Not only is there no jurisprudential grounding for *Lutter*'s "supplemental complaint exception" to the time-of-filing rule, *Lutter*'s distinction is counterintuitive. A supplemental complaint serves as an adjunct to the initial complaint, which remains active. On the other hand, an amended complaint "supersedes" the antecedent complaint, which "no longer performs any function in the

case." Wright & Miller, § 1476. It seems odd that supplemental complaints would trigger a new time-of-filing when amended complaints remain anchored to initial complaints that have become a dead letter.

Thus, the district court below appropriately considered jurisdictional facts existing when the suit launched, as pled in the supplemental complaint. *See* App. 48a–49a (citing cases).[11] Outside the Third Circuit, Greenberg's supplemental complaint, challenging 8.4(g) as amended, would not change the calculus. *See, e.g.*, *Horton*, *Zuckerman*, *SUWA*.

## II. The decision below departs from this Court's foundational Article III jurisprudence.

"[J]urisdiction once acquired is not defeated by a change in circumstances." *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998) (citing *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (Marshall, C.J.)). This pedigreed "time-of-

[11] District courts have reached mixed results after *Rockwell*. *Contrast e.g.*, *Edelhertz v. City of Middletown*, No. 12-cv-1800 VB, 2013 U.S. Dist. LEXIS 114686, 2013 WL 4038605, at *3 (S.D.N.Y. May 6, 2013) (following the time-of-filing rule); *United States ex rel. Carter v. Halliburton Co.*, 144 F. Supp. 3d 869, 882 (E.D. Va. 2015) (same); *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 261–62 (E.D. La. 2011) (same), *with Kelly v. Vesnaver*, No. 16-CV-883, 2018 WL 1054827, 2018 U.S. Dist. LEXIS 30748, at *9 (E.D.N.Y. Jan. 11, 2018) (isolating *Rockwell*'s sentence and confusing the allegation of amended complaint with the *time* of the amended complaint); *Evanston Ins. Co. v. Dan Ryan Builders, Inc.*, 2017 WL 262620, 2017 U.S. Dist. LEXIS 8320, at *8 n.13 (D. Md. Jan. 20, 2017) (same); *United States ex rel. Digit. Healthcare, Inc. v. Affiliated Comput. Servs.*, 778 F. Supp. 2d 37, 48 n.6 (D.D.C. 2011) (same).

filing" doctrine serves an important function. It keeps standing and mootness in their own spheres. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 190–92 (2000). Although the analogy is "not comprehensive,"[12] "mootness represents a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the lawsuit." Wright & Miller § 3533.1. Indeed, mootness is the "chief exception" to the time-of-filing doctrine. *Walters*, 163 F.3d at 432.

At the time of filing, Greenberg challenged enforcement of Pennsylvania's initial version of 8.4(g), prohibiting him from "manifest[ing] bias or prejudice" in his CLE lectures. Audience members had conveyed that his presentations (including the mention of specific epithets) offended them. App. 141a. Defendants stipulated that they had not "issued any . . . opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." *Greenberg v. Haggerty*, Dkt. 21 ¶ 70, No. 2:20-cv-03822-CFK (E.D. Pa. Oct. 30, 2020). Such stipulations matter. *303 Creative LLC, v. Elenis*, 143 S. Ct. 2298, 2312–13, 2316–19 & n.5 (2023).

After the district court concluded Greenberg possessed standing, App. 136a–149a, the defendants did not prosecute an appeal. Instead, they revised the rule, and later submitted a declaration of Disciplinary Counsel Farrell asserting that he did not interpret Greenberg's speech to violate the rule. Rather than claiming the new circum-

[12] *Id.* at 190.

stances mooted the case, defendants insisted that Greenberg lacked standing. But the district court refused to allow defendants to "turn back the clock to the commencement of the case." App. 53a.

The district court was exactly right; "intervening circumstance[s]" during litigation implicate "mootness, not standing." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). Confusing the two domains is a "basic flaw" fundamentally reassigning the burdens of proof. *Ibid.*

Precedent leaves no doubt that the two specific intervening events here ((1) Pennsylvania's mid-litigation revision of the challenged rule and (2) one defendant's mid-litigation disavowal of intent to take the complained of action) are prototypical questions of mootness, not standing.

1. Voluntary withdrawal and replacement of a challenged rule or policy. *E.g.*, *Ne. Fla. Chapter of Assoc. Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 661–62 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also United States v. Washington*, 142 S. Ct. 1976 (2022). *Northeastern Florida Chapter* details the applicable standard. The case is not moot when the amended rule, statute, or policy is "sufficiently similar" "that it is permissible to say that the challenged conduct continues" even if it threatens plaintiff to "a lesser degree than the old one." 508 U.S. at 662 & n.3. "An amendment that does not satisfy the principles championed by the plaintiffs ordinarily does not moot a request for prospective relief." Wright & Miller § 3533.6.

2. A defendant's disavowal of intent to take the complained of action. *E.g.*, *W. Va. v.* EPA, 142 S. Ct. at 2606–07 (intention not to enforce); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91–93 (2013) (covenant not to sue); *Pool v. City of Houston*, 978 F.3d 307, 313–14 (5th Cir. 2020) (disavowal of enforcement); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767–70 (6th Cir. 2019) (one official's statement limiting enforcement plans and "affirm[ing] students' free speech rights"); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) ("temporary policy" becoming permanent forbearance); *see also FBI v. Fikre*, No. 22-1178 (U.S.) (disavowing declaration).

Mootness standards are "notoriously strict." *W. Va. v. EPA*, 142 S. Ct. at 2628 (Kagan, J., dissenting). And defendants bear a "heavy" burden to prove mootness from their "voluntary conduct." *Id.* at 2607 (quoting *Friends of the Earth*, 528 U.S. at 189).

Relying on *Already* and *Northeastern Florida Chapter*, the district court held neither the revision to 8.4(g) nor the non-binding Farrell declaration mooted the controversy. App. 55a–74a. As alleged in Greenberg's supplemental complaint, the revised rule threatens Greenberg and other Pennsylvania attorneys just like the initial rule. App. 73a–74a. Defendants have never claimed the revision effected a sea change; they continue to defend the initial rule. App. 61a–64a. The district court then offered several reasons that defendants could not meet their "heavy burden" of showing that the expedient, ad hoc, non-binding, and qualified Farrell declaration moots Greenberg's claims. App. 56a–69a, 99a–100a; *contrast Al-*

*ready*, 568 U.S. at 93 (covenant sufficient to overcome voluntary cessation rule when "unconditional and irrevocable"). Again, on appeal, defendants did not contest the mootness determination or the predicates of that determination (for example, *eleven* of the twelve defendants had not accepted, let alone endorsed, the disavowal).

While members of this Court do not always agree on applying mootness doctrine, they consistently agree that mid-litigation developments implicate that doctrine rather than standing. *E.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York,* 140 S. Ct. 1525 (2020) (legislative amendment); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016) (offer of judgment). Lower courts generally do too. *E.g.*, *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 536 (6th Cir. 2001) (Boggs, J., dissenting) (agreeing mootness doctrine applies; disagreeing on result). Here, if the Third Circuit had applied a mootness test, there is little doubt Greenberg would have prevailed. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (conveniently timed repudiation of challenged policy); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) (Alito, J.) ("an amendment does not moot the claim if the updated statute differs only insignificantly from the original").

But rather than ask whether the revised version of 8.4(g) continued the controversy under *Northeastern Florida Chapter*, *Greenberg* ignores Greenberg's litigation in federal court for a year and a half. Mootness raises different efficiency concerns than standing because discontinuation of a case deep into litigation "may prove more wasteful than frugal." *Friends of the Earth*, 528

U.S. at 192 (discontinuation "may prove more wasteful than frugal"). And rather than hold defendants to their "heavy burden" to show that Farrell's disavowing declaration mooted the controversy, the Third Circuit, drawing on standing precedent, put the burden on Greenberg "to show some objective reason to believe Defendants would change their position." App. 23a n.5 (citation and brackets omitted).

In essence, the decision below chisels a sizable chunk out of this Court's mootness jurisprudence. One cannot reconcile the decision below with *Northeastern Florida Chapter*, *Friends of the Earth,* and *Already* unless Greenberg's supplemental complaint reset the litigation clock. Not only is that position misguided for the reasons discussed in Section I, this Court has affirmatively counseled that amending one's complaint "to attack the newly enacted legislation" is proper. *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972). That is how extended challenges "should [be] raised." *Lamar Adver. of Penn., LLC v. Town of Orchard Park*, 356 F.3d 365, 378 (2d Cir. 2004) (Sotomayor, J.). *Griffin v. County School Board of Prince Edward County*, for example, endorsed the use of a supplemental complaint to extend a school-segregation equal protection challenge to defendants' mid-litigation decision to close the public schools entirely. 377 U.S. 218, 226–27 (1964). None of these cases suggest that such an amendment would transform the question of mootness into one of standing.

If *Greenberg* and *Lutter* are correct that supplemental complaints effectively trigger a new time of filing, there are two possible results. Either the realm of standing will

devour the realm of mootness, or, more likely, plaintiffs will simply avoid updating their pleadings.

## III. The Third Circuit's novel rule complicates jurisdiction, begets gamesmanship, and will impoverish the public record.

Ultimately, the panel opinion silently extinguishes the deeply rooted voluntary cessation mootness framework. Immediate disavowal in defendants' "first substantive response to the complaint is distinct from a disavowal" strategically submitted after over a year of litigation, after preliminary injunction, after stipulating defendants had issued no opinions on the application of 8.4(g) to Greenberg's speech, after an aborted appeal, and after the defendants submitted non-material revisions to 8.4(g) without including Farrell's gloss in the text or comments. App. 54a.

Defendants play games with voluntary cessation to strategically avoid litigation. Davis & Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of Voluntary-Cessation Doctrine*, 129 YALE L.J. FORUM. 325, 329–31 (2019) (providing examples nationwide); Amicus Br. of the Liberty Justice Ctr. at 2-3, *FBI v. Fikre*, No. 22-1178 (U.S. December 19, 2023) (providing others). "[A]cts of strategic mooting litter the Federal Reporter." *Tucker v. Gaddis*, 40 F.4th 289, 294 (5th Cir. 2022) (Ho, J., concurring) (internal quotation omitted). "Judicial acceptance of such gamesmanship harms both good sense and individual rights and deprives the citizenry of certainty and clarity in the law by preventing the final resolution of important legal issues." *Ibid.* (simplified).

Avoiding that gamesmanship is a major feature—if not the entire point—of the heavy burden defendants must carry to prove actual mootness. Since the Court's early mootness cases, it has distinguished defendants' intervening action from "the plaintiff's own act" or "a power beyond the control of either party." *Mills v. Green*, 159 U.S. 651, 654 (1895). The former does not "deprive[]" courts of "the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit." *Ibid.*

Avoiding gamesmanship is also a feature of the time-of-filing rule. Take the context of removal. "As the party invoking federal jurisdiction, [the defendants] had to establish that all elements of jurisdiction . . . existed at the time of removal. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018). But once defendant has removed a case, plaintiffs cannot defeat jurisdiction by pleading different facts. *See canonically St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283 (1938).

The decision below does more than reopen the door to gamesmanship. It blows the door off its hinges by demanding the opposing party prove non-mootness. App. 23a n.5. It allows parties to "turn back the clock to the commencement of the case" and evade judicial review, a result neither "equitable, nor efficient." App. 53a; *accord Friends of the Earth*, 528 U.S. at 192.

Beyond preventing gamesmanship, the traditional time-of-filing rule's "reliability as a convenient bright-line mechanical rule that is clearly compatible with general notions of the attachment of jurisdiction has assured its

uninterrupted continuation from the beginning." *Rowland v. Patterson*, 882 F.2d 97, 98 (4th Cir. 1989) (en banc). It "insures greater certitude in making the jurisdictional determination" by "provid[ing] a uniform reference point." *Id.* at 100. In contrast, the Third Circuit's novel rule depends on subjective evaluation of whether a supplemental complaint alleges post-suit developments that "substantively affect" the plaintiffs' "claims and requested relief." *Lutter*, 86 F.4th at 126. How that standard cashes out in any case is opaque.

Imagine a student litigates for years an ongoing violation of her constitutional rights at school. After she graduates, she files a supplemental complaint advising the court of her graduation and amending her prayer for relief to seek expungement of the school's record of her unlawful punishment. Again, a classic issue of mootness. *Cf. Defunis v. Odegaard*, 416 U.S. 312 (1974). But the Third Circuit would now treat this as question of standing. What if the plaintiff's first complaint already sought expungement of interim records? Does the supplemental complaint's extension to final records "substantively affect" the relief sought? What if the change is even more minor than that? Jurisdictional questions ought not turn on how many angels dance on the head of a pin. "[W]hen judges must decide jurisdictional matters, simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 558, 595 (2013). "[P]redictability and uniform application" form the foundation of any "good jurisdictional rule." *Exch. Nat'l Bank of Chicago v. Daniels,* 763 F.2d 286, 292 (7th Cir. 1985) (Easterbrook, J.).

Even if the Third Circuit's new rule is workable, it makes for poor policy. "The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 580 (2004). "[W]hether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future." *Id. at* 580–81.

The Third Circuit's rule turns Rule 15(d) into a trap for the unwary. Its approach diverges from this Court's admonition that the Federal Rules' "simplified pleading system . . . was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Pleading ought not devolve into "game of skill in which one misstep by counsel may be decisive to the outcome." *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (internal quotation omitted). Rather, pleading standards should "facilitate a proper decision on the merits." *Id.* at 182 (internal quotation omitted).

If litigants respond to the Third Circuit's rule by simply abandoning the procedural device of supplemental pleading, that would be as unfortunate. Litigants would lose a valuable tool "to achieve an orderly and fair administration of justice." *Griffin v. County Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964). The judicial system would lose a tool to "promote as complete an adjudication of the dispute between the parties as is possible."

*LaSalvia v. United Dairymen of Ariz.*, 804 F.2d 1113, 1119 (9th Cir. 1986) (internal quotations omitted).

Policy changes raising questions of mootness do not become matters of standing simply because the plaintiff revises his complaint to cover the new policy. There is no qualitative difference between a plaintiff who amends his complaint to acknowledge the changed state of the facts, and one who instead waits to introduce evidence during dispositive motion practice. But there is a practical difference: the Third Circuit's rule discourages plaintiffs from maintaining an accurate public record on the federal docket. And that undermines the "structural interest" in "opening the judicial system to public inspection" of an accurate, up-to-date, and comprehensive record of judicial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (plurality op.). Stale pleadings would impede the public's right of access. *Cf. Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) ("a necessary corollary of the right to access is a right to timely access"). Thus, the decision below harms not only litigants and the judicial process, but also any citizen bystanders who seek to access information in federal cases.

In this case, the Third Circuit's rule leads to a particularly pernicious outcome. Pennsylvania has hung a vague and viewpoint-discriminatory "Sword of Damocles" over all Pennsylvania attorneys. App. 147a. But all the attorneys can do is wait for case-by-case adjudication. App. 30a (Ambro, J., concurring). The rule's "chilling effect" on their protected speech "in the meantime" makes such "case-by-case adjudication intolerable." *Bd. of Airport*

*Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 576 (1987).

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## CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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