Nos. 23-235, 23-236

IN THE

Supreme Court of the United States

FOOD AND DRUG ADMINISTRATION, *et al.*,

Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, *et al.*,

Respondents.

DANCO LABORATORIES, L.L.C.,

Petitioner,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND AMERICAN ATHEISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GEOFFREY T. BLACKWELL
AMERICAN ATHEISTS, INC.
1517 North Stillman Street,
Suite 2
Philadelphia, PA 19121

PATRICK C. ELLIOTT
Counsel of Record
SAMANTHA F. LAWRENCE
FREEDOM FROM RELIGION
FOUNDATION
P.O. Box 750
Madison, WI 53701
(608) 256-8900
pelliott@ffrf.org

Counsel for Amici Curiae

326261

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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Interest of Amici[1]

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has more than 40,000 members, including members in every state and the District of Columbia. FFRF's primary purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. Additionally, almost all of FFRF's members consider access to reproductive healthcare a vital secular policy issue, and a recent membership survey showed that 98.8 percent of FFRF members support access to abortion care.

American Atheists, Inc., is a national 501(c)(3) civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected. In 2019, a national survey of atheists and nonreligious people identified

1. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

access to reproductive care as one of the community's top three priorities. Moreover, American Atheists opposes religiously motivated discrimination and regularly advocates for equal application of the law and equal access to the courts.

Amici's interest in this case arises from their position that religious ideology has always been and remains the primary threat to reproductive freedom in the United States. Religious liberty demands that religious ideology may not, in a secular, religiously pluralistic nation, be the basis of federal policy, especially that which denies people the freedom to make healthcare decisions. *Amici* also seek to protect equal access to courts by civil rights litigants. Courts must not put their thumb on the scales when it comes to jurisdictional matters in favor of Christian litigants, and foreclose access to courts to civil rights and other litigants.

Summary of Argument

Respondents lack standing to challenge the U.S. Food and Drug Administration's regulatory decisions in 2016 and 2021 concerning mifepristone. Article III requires a "proper party" to bring suit, which ensures that federal courts resolve only real cases or controversies. In this instance, anti-abortion advocates seek to use the courts to limit access to a safe and effective medication used for abortion. The Respondents have sought to reverse-engineer a way to challenge the use of mifepristone, but those attempts fall well short of the requirements of Article III.

First, Respondents have not demonstrated a "certainly impending" injury. The religious or moral objections by Respondents requires a highly speculative chain of events and relies on hypothetical injuries. The other alleged injuries are just a proxy for what Respondents really care about: their moral and religious objection to abortion. But, these conscience-based objections are not a catch-all for challenging federal regulations.

Second, Respondents' standing theory would grant judicial review over any number of implausible and hypothetical injuries. Within the ambit of the FDA, doctors could wield religious or moral objections as a basis for standing if they *might* treat a patient someday who *might* be harmed by an FDA-regulated medication. This is not only contrary to the Constitution, but is untenable in a secular nation where science, not dogma, must guide the FDA's regulatory decisions.

Finally, *Amici* are concerned about manipulation by courts of their jurisdiction in order to favor preferred litigants. Because jurisdiction is a prerequisite to judicial relief, such determinations become a means to limit judicial access for certain disfavored citizens. The Court has often turned away challenges that involve alleged civil rights violations, Establishment Clause violations, and environmental protection on the grounds that injuries are too generalized or too speculative, or that cases have been rendered moot by subsequent state action. Yet, the Court has often failed to scrutinize these limits on its Article III jurisdiction in cases involving Christian litigants who assert other constitutional violations. The Court must decide such issues in a uniform way to ensure that the judiciary is impartial.

Argument

I. Anti-abortion advocates are not the "proper party" to litigate the FDA's scientific assessment of the effectiveness and safety of medications used for abortion.

The underlying challenge in this suit concerns whether the FDA "acted within a zone of reasonableness," in making certain regulatory decisions relating to a medication that is used to safely terminate early pregnancies. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). However, a desire by anti-abortion advocates to "vindicate value interests" is not a sufficient injury under Article III, *See Diamond v. Charles,* 476 U.S. 54, 66–67 (1986), and such advocates lack a "certainly impending" injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (internal citation omitted).

A. Respondents lack a "certainly impending" injury and thus are not a "proper party" as required by Article III.

The Constitution does not permit plaintiffs to invent speculative injuries as a basis for a "case or controversy." The Constitution also does not permit plaintiffs to litigate claimed moral or religious injuries via proxy by way of other speculative claims. Standing is not "an ingenious academic exercise in the conceivable." *Lujan*, 504 U.S. at 566, (quoting *United States v. Students Challenging Regul. Agency Procs. (SCRAP),* 412 U.S. 669, 688 (1973)). Rather, the plaintiff must be "the proper party" to bring the suit. *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976)).

The gist of the standing question is whether the party has "such a personal stake in the outcome of the controversy" in order to assure that there is "concrete adverseness . . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). There is a higher bar to standing when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else." *United States v. Texas*, 599 U.S. 670, 678 (2023) (citing *Lujan*, 504 at 562). When seeking prospective relief, the "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (citations omitted). In essence, a party who is not subject to an allegedly unlawful regulation themself must demonstrate a personal stake in the matter in the form of a "certainly impending" injury that is not hypothetical.

The common theme among the Respondents is that they oppose abortion and they generally have religious or moral objections that they identify as conscience objections.[2] This challenge does not concern any injured patients who have sued on their own behalf. It does not concern doctors who might prescribe the challenged medication. It does not concern doctors who are the primary care providers for patients who take the medication. It also does not

2. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 229 (5th Cir. 2023) ("Doctors allege that being made to provide this treatment conflicts with their sincerely held moral beliefs and violates their rights of conscience."); J.A. vol. 1, 142, 155, 167; Respondent All. Hippocratic Med. is an umbrella organization that currently represents several Christian anti-abortion organizations, including the Catholic Medical Association, the Christian Medical & Dental Associations, and the Coptic Medical Association of North America. J.A. vol. 1, 9–10.

concern a pharmaceutical company that alleges one of its medications has been improperly restricted by the FDA. Instead, this suit is an attempt by anti-abortion advocates to claim a hypothetical injury as a means to restrict a medication that is used to end unwanted pregnancies. The real source of Respondents' opposition to mifepristone is due to their opposition to abortion, based on moral or religious grounds. The hypothetical injuries stemming from Respondents' moral and religious qualms do not provide standing to challenge the FDA's regulatory decisions concerning mifepristone.

The anti-abortion advocates have asserted hypothetical injuries that are really a proxy for their moral and religious objections to abortion. Conscience-based objections to providing healthcare are not a catch-all for challenging federal regulations. Because the doctors are not themselves the "object of the government action or inaction" that they are challenging, standing is "substantially more difficult" to establish. *See Lujan*, 504 U.S. at 562 (citations omitted). They fail to meet any plausible demonstration of a "certainly impending" injury that is traceable to the regulatory actions of the FDA in 2016 and 2021.

Respondents present the Court with hypotheticals in an attempt to demonstrate an impending injury. Respondents assert generally that more doctors with ethical and medical objections to abortion will be "forced to participate in completing unfinished elective . . . abortions in emergency situations."[3] For example, the Fifth

3. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th at 258; J.A. vol. 1, 155, 167.

Circuit remarked that one claimed injury here involves Respondents conducting emergency room procedures on patients that violate Respondents' "sincerely held moral beliefs."[4]

However, the FDA regulations in question do not require Respondents to do anything. The FDA has taken no regulatory action relating to these doctors that threatens their rights of conscience. Rather, because of their posited moral and religious reasons, Respondents object to mifepristone being used to induce an elective abortion resulting in symptoms similar to miscarriage. Further, Respondents have not identified exactly when their rights of conscience will be harmed. Respondents also cannot connect such a threatened injury without using a convoluted chain of mere possibilities. Instead, Respondents have reverse engineered a means to challenge the availability of a medication in order to restrict how others might use it. As one district court remarked in another case brought by counsel for Respondents here, the suit is likely "a smoke and mirrors case or controversy from the beginning . . . ." *Telescope Media Grp. v. Lucero,* No. 0:16-cv-04094, 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021). Thus, this challenge involves "an ingenious academic exercise in the conceivable," *Lujan,* 504 U.S. at 566, rather than the proper role of Article III courts to resolve a certainly impending injury that is concrete.

4. *All. for Hippocratic Med.*, 78 F.4th at 222.

B. Respondents' standing theory grants Art. III jurisdiction over religious and moral objections that involve implausible and hypothetical injuries.

U.S. citizens have innumerable religious beliefs or moral viewpoints concerning almost all controversial topics, including abortion. A key question in this case is whether a special subset of religious individuals will be permitted to use the courts to restrict other citizens' rights and actions. The answer must be an unequivocal "no." The sweeping breadth of Respondents' standing theory would permit suits for concocted and theoretical injuries. Under Respondents' standing theory, at a minimum, doctors who have a mere *possibility* of treating patients who may suffer from improbable complications from a drug may utilize the courts as a proxy for the doctor's religious objections to the use of the drug.

Any alleged injury "must be legally and judicially cognizable." *U.S. v. Texas,* 599 U.S. at 676 (citing *Raines,* 521 U.S. at 819). This means that the "dispute is traditionally thought to be capable of resolution through the judicial process." *Id.* A desire to "vindicate value interests" or press "conscientious objection to abortion does not provide a judicially cognizable interest." *Diamond,* 476 U.S. at 66–67. Significantly, the Respondents have failed to adequately identify precedent, history, or tradition of U.S. courts resolving disputes with a similar proxy theory of injury. Respondents have failed to identify such precedent, history, or tradition because it does not exist. Instead, Respondents advance a broad view of standing with no basis in precedent that opens up federal agencies

to challenges premised on hypothetical injuries with a loose connection to religious or moral objections by the litigants.

Take for example a Catholic emergency room doctor who believes it is immoral to prescribe sildenafil citrate (Viagra) to an unmarried man.[5] Although the doctor does not prescribe the drug, the doctor may assert that she someday will treat an unmarried man who suffers complications from the drug given the prevalence of its use, and thus has the right to sue to limit the drug from the market.

Under Respondents' standing theory, a Muslim doctor who opposes the use of pork products in heparin[6] could sue because that doctor may some day treat a patient with complications from taking the drug and the doctor believes that treating such a patient would make him complicit in the patient's use of the drug. Given the prevalence of heparin and the opposition from some who

5. See John F. Brehany, *Should a Physician Prescribe Viagra to Unmarried Men?*, Catholic Med. Assoc. (June 26, 2009). https://www.cathmed.org/resources/should-a-physician-prescribe-viagra-to-unmarried-men/.

6. The FDA only recently encouraged alternatives to porcine heparin, which is standard in the U.S. ("[B]ovine lung heparin was voluntarily removed from the US market by manufacturers in the late 1990s and replaced by porcine heparin.") *See* U.S. Food & Drug Admin., *FDA Encourages Reintroduction of Bovine-Sourced Heparin* (Nov. 3, 2023), https://www.fda.gov/drugs/pharmaceutical-quality-resources/fda-encourages-reintroduction-bovine-sourced-heparin.

are Muslim,[7] such a case cannot be readily distinguished from Respondent's challenge.

Besides those with religious objections, medical professionals with moral objections could sue the FDA over its regulatory decisions if the professionals simply allege that they may some day treat a patient who takes a medicine or utilizes medical treatment that they oppose. For example, a doctor who opposes the use of animal products in medicine or who opposes animal testing may argue she is complicit in an immoral action if she *might* in the future treat a patient who has taken medications that, in her view, were unethically tested or manufactured. A 2004 study identified over 1,000 medications that contain pork or beef gelatin or stearic acid ingredients, which pose potential problems for certain religious practitioners.[8]

Similarly, a medical professional who has ethical or religious objections to in vitro fertilization could sue over FDA regulatory decisions regarding various drugs used during treatment. Under the Respondents' standing theory, any care provided by the medical professional that might become necessary at some future date of treatment

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7. There are a number of medications that contain ingredients that may be impermissible for some Muslims. See Jeffrey K. King et al., *Towards a Better Understanding Between Non-Muslim Primary Care Clinicians and Muslim Patients: A Literature Review Intended to Reduce Health Care Inequities In Muslim Patients*, Health Pol'y OPEN (Mar. 24, 2023), DOI: 10.1016/j.hpopen.2023.100092, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10297732/.

8. Sattar, S Pirzada, et al., *Patient and Physician Attitudes to Using Medications with Religiously Forbidden Ingredients*, Ann. Pharmacother (Nov. 2004), DOI: 10.1345/aph.1E001, https://pubmed.ncbi.nlm.nih.gov/15479773.

could warrant a sufficient connection to cause a certainly impending injury.

Under Respondents' theory, doctors are especially well placed to sue federal agencies over moral disagreement with regulatory decisions, as they provide medical care to all. This presumably would provide for doctors to litigate on behalf of hypothetical future patients who suffer complications from: taking medications, improper food contamination, environmental dumping, pollution, highway safety, vehicle safety, tobacco use, unsafe products sold in interstate commerce, or any other regulated action that might cause someone to seek medical attention.

Respondents' proxy theory of injury not only conflicts with precedent, it is untenable. Courts must not become the place for second-guessing regulatory decisions on the basis of moral and religious objections that have little to do with the safety or effectiveness of the regulated activity. Once the door is open for such challenges, there is little to prevent suits brought by reaching litigants who hope to use the courts to vindicate their personal religious and moral viewpoints.

II. The Court must not manipulate its jurisdiction in order to benefit preferred litigants.

Our courts cannot pick and choose when to ignore Article III. If a court's jurisdiction is circumscribed by Article III's case or controversy requirement, then the court must decline to hear the matter. If a court asserts it has jurisdiction to decide such cases, it must apply its jurisdiction uniformly to all litigants—not just to cases involving preferred litigants. Not only is the

judiciary's impartiality at stake, but access to justice for all citizens is at stake. By design, the question of standing is a prerequisite for judicial intervention that closes the courthouse door to some litigants. Any manipulation by courts on the basis of standing becomes a means to issue favorable decisions on the merits to one side. This Court must be a beacon of consistency for lower courts to follow. When the lower courts overreach and manipulate—or ignore—Article III, this Court must correct their course.

A. Article III standing is a bedrock constitutional principle that should not be readily manipulated by the courts.

The Court has identified standing as a "a bedrock constitutional requirement" that it applies "to all manner of important disputes." *U.S. v. Texas,* 599 U.S. at 675 (citations omitted); *See also, Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This Court has been clear, "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Raines,* 521 U.S. at 820 (citing *Allen v.* Wright, 468 U.S. 737, 752 (1984)). This is an "overriding and time-honored concern," which keeps the Court's power "within its proper constitutional sphere." *Id.* Thus, this Court steps on the power of a co-equal branch of government if it permits courts to hear an action that is premised on a manufactured "case or controversy."

Concerns over manipulation of jurisdictional requirements by the Supreme Court have been noted by multiple observers. *See* 13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed.) (recognizing that justiciability

determinations have sometimes led to "disingenuous manipulation."). As one scholar put it, "Many observers believe the manipulation of justiciability doctrine to be rampant."[9] Another scholar has analyzed the mechanisms by which courts manipulate outcomes by utilizing procedural, substantive, and justiciability principles.[10]

The Fifth Circuit's handling of this case stands as an example of jurisdiction manipulation. While the Fifth Circuit found standing here on the basis of Respondents' speculative future injuries, it has declined to engage in the same favorable treatment of those who are far more likely to suffer from threatened injuries. *See E.T. v. Paxton*, 41 F.4th 709, 716 (5th Cir. 2022) (holding that students with disabilities lacked standing to challenge order that prohibited school districts from requiring students to wear masks during the Covid-19 pandemic). It appears that the underlying merits of these cases crept into the Fifth Circuit's standing analysis, which amounts to manipulation of a bedrock constitutional principle.

Because jurisdiction is at the heart of the authority of federal courts, and because lower courts may seek to manipulate jurisdiction in favor of preferred litigants, this Court must decide such issues in a uniform and impartial way. To do otherwise is to sanction manipulation and to unconstitutionally elevate the rights of certain preferred litigants over others.

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9. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 655 (2006).

10. Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. Rev. 129, 134–35 (2020).

B. This Court routinely turns away civil rights plaintiffs who have stronger claims to Article III standing than Respondents.

Despite the importance of preserving equal access to the judiciary, in recent years this Court's decisions have created a gulf between the lenient standing principles applied to favored litigants and the strict standing principles imposed on disfavored litigants. This gap is likely to damage the legitimacy of the federal judiciary. A holding from this Court that Respondents have standing to bring this lawsuit based on the (entirely speculative) chance that one or more of their members may, one day in the indeterminate future, encounter a patient suffering complications from mifepristone specifically attributable to the FDA's 2016 or 2021 actions would drastically widen the gulf in standing jurisprudence.

The Court has strictly enforced jurisdictional requirements against certain types of plaintiffs, especially in lawsuits involving civil rights, the Establishment Clause, and environmental protection. What is concerning to *Amici,* and to many others watching the Court, is whether the Court will apply its jurisdictional framework in the same manner to all litigants. Atheists and members of religious minority groups who bring Establishment Clause claims ought not to face higher procedural and jurisdictional hurdles when seeking judicial relief than favored litigants seeking to enforce statutory or constitutional rights.[11] The

11. Beyond justiciability issues, Muslim litigants have faced substantial scrutiny of their religious liberty claims before the Supreme Court. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dunn v. Ray*, 139 S. Ct. 661 (2019) (vacating stay of execution of Muslim death row inmate who sought the comfort of an imam at his last moments of life).

same access to courts must be provided to all citizens, regardless of whether they identify as Christian, Muslim, Jewish, or atheist. Or, more broadly, if they seek to assert rights that are opposed by one religious segment of the population. If the Court finds that the asserted hypothetical injuries in this case warrant Article III jurisdiction, then the Court must uniformly apply such a determination.

1. Generalized Grievances

The Court has long admonished litigants and lower courts that the judicial system is not the forum for hearing "generalized grievances" arising from government actions, even where those actions conflict with fundamental constitutional principles, *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *see Baker v. Carr*, 369 U.S. at 208. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way,'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (quoting *Lujan* 504 U.S. at 560 n.1), rather than an injury "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Respondents, by seeking to address a harm shared by doctors generally—a desire not to see patients suffer side effects that require medical intervention—seek an exception to this rule but have fallen far short of establishing that such an exception would be appropriate.

The Court has repeatedly refused to grant standing in numerous contexts where litigants sought to vindicate rights or interests shared by broad segments of the population. In *Gill v. Whitford*, the Court explained that a voter lacked

standing to challenge an unlawful gerrymander unless they actually resided in a gerrymandered district and were therefore directly impacted by the allegedly unlawful government action. 585 U.S. ___, 138 S. Ct. 1916, 1931 (2018). Voters within the state but not directly impacted by the gerrymander alleged only a generalized grievance shared by all other similarly situated voters. *Id.*; *see also Lance v. Coffman*, 549 U.S. 437, 441–42 (2007) (rejecting the standing arguments raised by Colorado voters seeking to challenge a redrawn congressional map).

Similarly, plaintiffs who have environmental concerns have been turned away by the Court when they did not have a direct interest in the lands they sought to protect. *See Sierra Club v. Morton,* 405 U.S. 727 (1972); *Lujan,* 504 U.S. 555; *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

The Court has often found that litigants seeking to enforce the Establishment Clause lacked standing because the government action in question did not impact them directly. In *Valley Forge Christian College*, the Court, in part, found that plaintiffs who resided in Maryland could not challenge a transfer of property in Pennsylvania to vindicate their claim that the transfer violated the Establishment Clause. 454 U.S. at 471. In *Elk Grove Unified Sch. Dist. v. Newdow*, the Court concluded that a father lacked prudential standing to challenge the Pledge of Allegiance on behalf of his daughter when he did not have legal custody of the child at the time the Court of Appeals issued its decision. 542 U.S. 1, 17–18 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Absent standing as a custodial parent, Mr. Newdow had no greater interest

to challenge the Pledge of Allegiance than any citizen interested in the government conducting its business in accordance with the U.S. Constitution's requirements.

Here, the Respondents ultimately claim standing to challenge a regulatory action that does not govern their conduct, does them no harm not shared by all doctors, and in which there is no direct connection between them and the statutory regime they claim to be enforcing. Their grievances arose from an alleged failure on the part of the Petitioners to comply with the Federal Food, Drug, and Cosmetic Act and related amendments, thereby violating the Administrative Procedure Act, yet they are neither drug manufacturers, prescribing doctors, nor patients receiving prescription medication. The Respondents' connection to the FDA action they challenge is even more attenuated than that of the residents of a state concerned about gerrymandering in districts other than their own or the members of environmental groups who had never visited the lands they sought to protect. If standing doctrine is to have any consistency whatsoever, the Court should reject the Respondents' standing argument on this basis alone.

2. Speculative Injury

The developing chasm in standing jurisprudence now threatens to encroach upon the requirement that an injury be "actual and imminent," *Lujan*, 504 U.S. at 560, rather than speculative.

In *Laird*, this Court refused to accept arguments for standing advanced by individuals concerned about abuse of the U.S. Army's surveillance apparatus and the chilling effect the specific methods utilized had on individuals'

speech. 408 U.S. at 10. This Court explained that respondents' perception and beliefs regarding whether particular military activity was appropriate or dangerous, as well as respondents' "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to the respondents" were not "an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Id.* at 14 (*quoting United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)) The Court noted the continued force of this requirement in *Clapper*, stating that "[p]laintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the courts.'" 568 U.S. at 414 n.5.

In *O'Shea v. Littleton*, the Court held that Black city residents did not have standing to challenge a city's illegal criminal bond-setting, sentencing, and court fees because "anticipat[ing] whether and when these respondents will be charged with [a] crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture." 414 U.S. 488 (1974); *see also City of Los Angeles v. Lyons,* 461 U.S. 95, 104–06 (1983) (finding that Lyons lacked standing to enjoin illegal choke hold practices by police). "Such 'some day' [conjectures]—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

This Court, in *Trump v. New York*, rejected arguments from New York and other states that they had standing to challenge the apportionment resulting from the 2020 census because, at the time it was before the Court, the "case [was] riddled with contingencies and

speculation that impede[d] judicial review," including the necessary intervening acts of third parties (in particular the Executive Branch). 592 U.S. ___, 141 S. Ct. 530, 535 (2020).

Despite the Court's strict application of the concrete injury element of standing doctrine in the above cases, this Court and the courts below regularly ignore this requirement when it suits them. In *303 Creative LLC v. Elenis,* 600 U.S. 570 (2023), this Court ruled upon the merits of a Free Speech claim despite the lack of enforcement against a Christian website designer who claimed she intended to design wedding websites but would not do so for same-sex couples. *Amici* pointed out the standing defects in the business owner's case.[12]

In the case at bar, Respondents purported injury rests upon a chain of speculative events that appears never-ending. For them to be harmed by the challenged action of the FDA, a doctor in a state where the prescription of mifepristone is legal would have to prescribe the medication to a patient, that prescription would have to be enabled by either the 2016 or 2021 actions of the FDA challenged by the Respondents, the patient would need to suffer side effects while in the vicinity of the Respondents, those side effects would need to be severe enough to require medical intervention, the patient would have to seek treatment from one of the facilities employing Respondents, the patient would have to present

12. See Br. of the Freedom From Religion Found., Ctr. for Inquiry, Am. Humanist Ass'n & Am. Atheists as Amici Curiae in Support of Resp'ts, *303 Creative LLC v. Elenis,* 600 U.S. 570 (2023) (No. 21-476), https://www.supremecourt.gov/DocketPDF/21/21-476/233894/20220818140350294_21-476_Amicus%20Brief.pdf.

themselves to the Respondents, and there would need to be no other physicians at the facility able or willing to treat the patient. Each link in this chain is both speculative and involves the independent decisions of third parties. Far from being actual and imminent, the Respondents' injury is conjecture all the way down. Were this Court to accept the Respondents' standing arguments, it would throw open the door to whole new classes of litigation, above and beyond throwing out the decisions discussed above.

3. Mootness

Although not an element of Article III standing, the jurisdictional question of mootness is tightly entwined with standing. As this Court is fond of pointing out, a case or controversy must exist "throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013); *see also Va. House of Delegates v. Bethune-Hill*, ___ U.S. ___, 139 S. Ct. 1945, 1950–51 (2019); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013); *Alvarez v. Smith*, 558 U.S. 87, 92 (2009); *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 64 (1997); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). This requirement is strictly adhered to by this Court when addressing claims brought by disfavored plaintiffs but is often taken as merely a polite suggestion in cases where the majority is eager to address the merits of a favored litigant's claims.

In *Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154 (1995), the Court granted certiorari, then vacated and remanded the case with directions to dismiss as moot. The student-plaintiff who challenged prayer practices at her school had graduated. Circuit courts of appeals have similarly dismissed prospective relief claims by

Establishment Clause plaintiffs. *See Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003) (vacating injunctive and declaratory relief awarded to former cadets at state military college); *Doe v. Madison Sch. Dist. No 321,* 177 F.3d 789, 791 (9th Cir. 1999) (holding in part that Establishment Clause claim concerning school graduation prayers was moot after the student graduated)*; Bauchman for Bauchman v. W. High Sch.,* 132 F.3d 542, 548 (10th Cir. 1997) (finding that Establishment Clause claim by former Jewish student was moot after graduation).

Yet recently, in *Kennedy v. Bremerton Sch. District*, this Court departed significantly from this jurisdictional principle when it was confronted with a petitioner seeking reinstatement to his $5,304-per-year position as an assistant high school athletic coach. Suggestion of Mootness at 3, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) (No. 21-418). After commencing his lawsuit, the former coach left his full-time job, *id.* at 1, sold his house, *id.* at 1–2, relocated from Bremerton County, Washington, to Escambia County, Florida, *id.* at 1–2, where he purchased a new home, *id.* at 2. Despite the respondent specifically raising these issues to the Court, *see generally, id.*, the Court made no mention of this threshold jurisdictional question at either oral arguments or in its eventual opinion, nor did the Court issue any order addressing the question.[13] The Court ignored this basic jurisdictional question entirely.

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13. The coach, having been reinstated in the wake of the Court's decision, resigned after coaching a single heavily publicized game. Ed Komenda, *A Football Coach who Got Job Back After Supreme Court Ruled he Could Pray on the Field has Resigned*, Assoc. Press (Sept. 6, 2023), https://apnews.com/article/praying-high-school-football-coach-supreme-court-461b92b19ea395677657518914825573.

Likewise, plaintiffs challenging public health measures implemented during the COVID-19 pandemic were held to much looser requirements than others. In a per curiam decision, the Court ordered injunctive relief in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Dissenting justices noted the fact that the religious organizations seeking an injunction were no longer subject to restrictions implicating the Free Exercise Clause. *Id.* at 75 (Roberts, C.J., dissenting) ("None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions."); (Breyer, J., dissenting) ("[N]one of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications.").

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* the Court determined, in a footnote, that the case had not become moot despite the Missouri Governor providing the relief sought by the church. 582 U.S. 449, 457 n.1 (2017). The new Missouri Governor had directed the Department of Natural Resources to allow religious organizations to receive grants from the state. *Id.*

The Court has erected substantial barriers to plaintiffs who assert civil rights, Establishment Clause, or environmental protection claims. The court ought to apply the same scrutiny to claims asserted by Christian litigants who espouse arguments premised on moral and religious grounds. The Court must act as an impartial arbiter when it comes to justiciability determinations. Because these decisions foreclose access to courts, they must not be manipulated to provide judicial relief only to preferred litigants.

Conclusion

The judgment of the Fifth Circuit should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

Respectfully Submitted,

Geoffrey T. Blackwell
American Atheists, Inc.
1517 North Stillman Street,
Suite 2
Philadelphia, PA 19121

Patrick C. Elliott
Counsel of Record
Samantha F. Lawrence
Freedom From Religion
Foundation
P.O. Box 750
Madison, WI 53701
(608) 256-8900
pelliott@ffrf.org

Counsel for Amici Curiae