No. 25-50

IN THE
Supreme Court of the United States

MIKE FITZHUGH, SHERIFF, RUTHERFORD COUNTY, TENNESSEE, ET AL.,
Petitioners,

v.

BRADLEY PATTON,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Court should grant review. The circuits are split on whether a class action can proceed when the named plaintiff's claims become moot before he files a class-certification motion. Patton acknowledges a split but gerrymanders a line between "inherently transitory" cases and "pick-off" cases. To justify that line, though, Patton adopts a radical position. He claims that the inherently transitory exception creates a *sui generis* exemption from Article III's live-interest requirement—meaning that, for transitory claims (and transitory claims only, apparently), there's no need for a class-based "legal interest separate and apart from that of the named plaintiff." Opp. 27. A creative attempt to avoid the split, to be sure. But it's wrong. Saying nothing of the Article III problems it creates, no circuit embraces Patton's logic. The circuits treat pick-off and transitory cases as equivalent and explicitly acknowledge the split raised here.

If the decision below had adopted Patton's position, the Court would *really* need to step in. A split would still exist in the inherently transitory context. And Patton's rule would authorize federal courts to issue *merits* rulings in burdensome class-action litigation *when no plaintiff has a live interest in the case.* That cannot be right.

The circuits are split. The question is important. And no vehicle issue exists. This case warrants review.

ARGUMENT

I. The Courts of Appeals Are Divided on the Question Presented.

Patton cannot paper over the split here. He concedes that the petition "identif[ies]" a "circuit split," but then attempts to cast that split as "involv[ing] a different mootness exception—the so-called 'picking off' exception." Opp. 10. The problem is, to create a distinction between "inherently transitory" and "pick-off" cases, Patton must reframe the doctrine in a way that the circuits (on both sides of the split) reject. And it's all for naught: Even accepting his imagined divide between pick-off and transitory cases, a 4-1 split remains. So no matter how thin one tries to slice it, the circuits are divided over a threshold Article III rule in class actions.

A. Patton cannot obscure a clear circuit split by conjuring an artificial divide between inherently transitory and pick-off cases.

Article III doctrine is clear: "A case becomes moot … when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike,* 568 U.S. 85, 91 (2013) (quotations omitted). Generally, a named plaintiff must maintain a live interest until class certification, at which point a class-based Article III interest arises. *United States v. Sanchez-Gomez*, 584 U.S. 381, 386 (2018). The Court has recognized limited exceptions to that general standing-at-certification rule. Pet. 5. For those exceptions, the circuits agree that if a named plaintiff's claim becomes moot before certification, the case becomes moot unless some class-based interest keeps it alive. Pet. 11-17. They simply disagree on timing. Some say the class-based interest arises upon the filing of the class complaint; others say it's upon the filing of the class-certification motion. *Id.* All agree, though, that the question of *when* a class-based interest arises does not turn on *why* a named plaintiff's claim becomes moot.

Unsurprisingly, then, the circuits "blend the 'picking off' exception with the 'inherently transitory' exception." *Wilson v. Gordon*, 822 F.3d 934, 948 (6th Cir. 2016); *see Sos v. State Farm Mut. Auto. Ins.*, No. 21-11769, 2023 WL 5608014, at *10 (11th Cir. 2023) (noting that the Eleventh Circuit "and other courts have found it appropriate to blend the 'picking off' and 'inherently transitory' exceptions"). From an Article III standpoint, there's "no difference" when a case becomes moot "by the defendant's purposive acts rather than by the naturally transitory nature of the controversy." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981). Either way, there must be a class-based interest for the case to proceed. That's why courts recognize that mootness does not hinge on whether "a claim [is] transitory by its very nature" or "transitory by virtue of the defendant's litigation strategy." *Pitts v. Terrible Herbst,* 653 F.3d 1081, 1091 (9th Cir. 2011); *see Chen v. Allstate Ins.*, 819 F.3d 1136, 1143 (9th Cir. 2016) (treating "picking off the named plaintiffs" as a subsect of "inherently transitory" claims). Indeed, the Sixth Circuit below relied almost entirely on "pick-off" cases to support its "inherently transitory" holding. *Compare* Pet.App.21a-22a (citing *Lusardi*, *Lucero*, *Richardson*, *Pitts*, and

Stein), *with* Opp. 13 (decrying reference to these same cases).

To create separation between transitory and pick-off cases, Patton concocts a radical new theory. A class action with an inherently transitory claim, he says, can proceed "not because the unnamed class members have … a 'legal status'" that maintains a live interest in the case; but because the inherently transitory exception suspends Article III's live-interest requirement altogether. Opp. 27. Put differently, he claims that the inherently transitory exception is an exception not to the general standing-at-certification rule, but to *Article III*'s requirement that there must be a live, class-based "legal interest." Opp. 27-29; *infra* 9-12.

Whatever the merits of that theory, no circuit (on either side of the split) adopts it. They all claim jurisdiction by identifying a class-based interest. The Tenth Circuit, for example, says that "a nascent interest attaches to the proposed class upon the filing of a class complaint." *Lucero v. Bureau of Collection Recovery*, 639 F.3d 1239, 1249 (10th Cir. 2011). The Third Circuit, too, recognizes "a live interest" from "the date of the filing of the complaint." *Richardson v. Bledsoe*, 829 F.3d 273, 280 (3d Cir. 2016) (quotations omitted). And the Sixth Circuit below likewise held that "the filing of a class-action complaint is enough to save the claims from being mooted." Pet.App.19a. Other circuits conclude that the interest arises only on the filing of the motion for class-certification. *See* Pet. 11-14 (compiling). But everyone agrees there must be a live class-based interest to save the case from mootness.

In short, Patton reimagines the inherently transitory exception to peel off the pick-off cases. But no court (or scholar) agrees that the inherently transitory exception somehow suspends Article III's requirement that *some party* have a live interest in the case at all times. And so long as that live-interest requirement remains, there is no reason whatsoever to differentiate between transitory and pick-off cases. *Why* a case becomes moot doesn't change *when* a class-based interest arises. That timing question—when the class-based interest arises—is what divides the circuits and demands review.

B. If Patton's imagined line between transitory and pick-off cases did exist, the case would only be more certworthy. It would mean that the Sixth Circuit blew a hole in Article III's jurisdictional minima—greenlighting class-action cases to head all the way to trial without a party that has a live interest. *See infra* 10-11. It would also mean that the "circuits differ on whether to treat 'picking off' as a separate mootness exception or as a type of 'inherently transitory' claim." *Freund v. McDonough*, 114 F.4th 1371, 1380 n.8 (Fed. Cir. 2024). Again, Petitioners are aware of no circuit that says a class-based interest is required for pick-off cases but not for inherently transitory cases. *See supra* 2-5. But if any circuit does, that itself would create a circuit split.

C. Finally, even narrowing the inquiry to cases involving the inherently transitory exception, a clear split remains. It just gets more lopsided against the Sixth Circuit, with four circuits rejecting the position taken below.

1. Patton admits (at 16) that "two [of the cited decisions] from the First Circuit and one from the Fourth Circuit" "did not involve the picking-off exception." But he claims that those cases did not address the question presented here. That's wrong.

The First Circuit, in *Cruz v. Farquharson*, noted that some courts have held "that a class action may endure even though the named plaintiff's claims have become moot, as long as a motion for class certification is pending at the time that mootness overtakes the plaintiff's claims." 252 F.3d 530, 534 n.3 (1st Cir. 2001). But because "no such motion was pending when the claims of the named plaintiffs … became moot," it dismissed. *Id.* Patton notes (at 17-18) that the court declined to apply the inherently transitory exception for additional reasons. True enough. But alternative holdings are hardly unusual.

In any event, the First Circuit has since made clear that *Cruz*'s holding on class-certification motions (again, made in the inherently transitory context) "preclud[es]" any argument that the mere filing of a class complaint creates an "interest in having a class certified" sufficient "to defeat … mootness." *Bais Yaakov of Spring Valley v. ACT*, 798 F.3d 46, 50-51 (1st Cir. 2015). Indeed, the court held that "absen[t] … en banc review," *Cruz* governs *even in the pick-off context* if no "motion for certification was pending when the plaintiff's individual claims became moot." *Id.*; *see supra* 3-4. So whatever Patton thinks about footnote 3 of *Cruz*, the First Circuit thinks it binds—in *both* inherently transitory and pick-off cases.

Nor can Patton dodge the Fourth Circuit's decision in *Nestler v. Board of Law Examiners of North Carolina*, 611 F.2d 1380 (4th Cir. 1980), by framing it as resting on separate grounds. *See* Opp. 18-19. Again, alternative holdings exist. And *Nestler* squarely addressed the question presented. Pet. 14. But don't take the petition's word for it. Other courts have read *Nestler* to hold that "a motion for class certification … is the essential prerequisite to the inherently transitory class exception." *Webber v. Norwalk*, No. 5-4219, 2007 WL 7698736, at *8 (D. Ariz. Feb. 8, 2007); *see Cristiano v. Cts. of Justs. of the Peace*, 115 F.R.D. 240, 246 n.6 (D. Del. 1987). Patton is conspicuously silent on these readings of *Nestler*.

2. Patton can't relegate the Fifth and Seventh Circuits' detailed analyses to the pick-off context either. Opp. 14-15.

The Fifth Circuit, in *Fontenot v. McCraw*, held that the inherently transitory exception does not apply when there is "no certification motion … even pending" at the time a plaintiff's claims become moot. 777 F.3d 741, 751 (5th Cir. 2015); *see* Pet. 11-12. Patton claims (at 14) this language "appeared only in its explanation of why the picking-off exception did not save the case from mootness." Not true. *Fontenot* recognized that prior Fifth Circuit precedent (*Zeidman*) equated "the inherently transitory exception to mootness and the strategic picking off of named plaintiffs' claims" for purposes of the relation-back doctrine. 777 F.3d at 750 (quotations omitted). "*Zeidman* acknowledged that the *Sosna*-created relation back doctrine had previously been applied only in cases where the plaintiffs' claims were 'inherently transitory,'" but it determined that "pick off" cases were "no less inimical to procuring judicial review than is the inherently transitory nature of a substantive claim." *Id. Fontenot* then said that it is "clear from *Genesis Healthcare* and *Zeidman*" that "*any extant exception*"—meaning both inherently transitory and pick-off—would have to be "extended for [the] plaintiffs to avoid mootness" in their "putative class action" because "not only had the district court not ruled on the [their] certification motion … , but *no certification motion was even pending*" when the case became moot. *Id.* at 750-51 (emphasis added). *Fontenot* thus addressed the inherently transitory exception.

The Seventh Circuit likewise does not permit class actions to proceed under the inherently transitory exception when the named plaintiff's claims become moot before the filing of a class-certification motion. Pet. 12-13. Patton claims (at 14-15) that *Damasco* was limited to "the context of the picking-off exception." Wrong again. *Damasco* considered *both* pick-off and inherently transitory exception arguments, *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895-97 (7th Cir. 2011). And it ultimately framed its holding in broad Article III terms, not around one exception or the other. Pet. 12 (quoting *Damasco*, 662 F.3d at 896). Indeed, when addressing the "inherently transitory" argument, the court explicitly said: "*As we have discussed*, any class member following in Damasco's footsteps can avoid the barrier he now faces simply *by moving to certify a class when filing suit*." *Damasco*, 662 F.3d at 897 (emphasis added). So the bottom line is that the Seventh Circuit requires a class-certification motion filed *before* a named plaintiff's claim becomes moot for the inherently transitory exception to apply. *Id.* at 896. And it takes a hyper-strict view—noting that a plaintiff can "mov[e] to certify a class when filing suit." *Id.* at 897.

District courts in the Seventh Circuit recognize that *Damasco*'s rule applies "whatever the reason for individual mootness." *Fulton Dental, LLC v. Bisco*, No. 15 C 11038, 2016 WL 4593825, at *12 (N.D. Ill. Sept. 2, 2016); *see Smith v. Specified Credit Ass'n*, No. 14 C 06496, 2015 WL 468871, at *3 (N.D. Ill. Jan. 30, 2015) (similar).

Even artificially narrowed, the split is 4-1.

II. The Decision Below Is Incorrect.

The decision below is wrong. Article III does not allow a plaintiff with a moot claim to litigate a case on the mere possibility that he might one day file a class-certification motion that might solidify a separate legal interest for unnamed class members. Pet. 20-25. A class-based interest attaches only when the class is certified or when a plaintiff moves for class certification. Pet. 21-22. And only that live, class-based interest can prevent the case from becoming moot. *See* Pet.

21; *Already*, 568 U.S. at 90-91; *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021).

Pointing to *Sosna*, Patton argues that inherently transitory claims can proceed even absent a class-based "legal interest separate and apart from that of the named plaintiff." Opp. 27-29. But *Sosna* specified that any limited exception it creates "in no way detracts from the firmly established requirement[s]" of Article III. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). And even when it recognized the inherently transitory exception, the Court assumed the existence of a class-certification motion. *Id.* at 402 n.11 ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on *a certification motion*." (emphasis added)). Nothing in *Sosna*, then, suggests—let alone "recognize[s]," Opp. 29—a wholesale exemption from Article III's live-interest requirement.

And that makes sense. Imagine that a putative class-action plaintiff *never* moves for class certification. When does that plaintiff's claim become moot under the Sixth Circuit's approach? At summary judgment? At trial? *See* Pet. 23. Patton's answer: Never. Opp. 28-29. As he sees it, a federal court retains jurisdiction through discovery, dispositive motions, and even trial, without any class-certification motion and without any party with a live interest. *Compare* Pet. 23 *with* Opp. 28-29. That's because, he says, the inherently transitory exception "preserves jurisdiction from the moment the complaint is filed," whether or not "a named plaintiff might someday move for class certification." Opp. 28. In other words, Article III's bedrock requirement of a live dispute "throughout the proceedings" simply doesn't apply. *Uzuegbunam*, 592 U.S. at 282. That conception of Article III is astounding.

The Sixth Circuit's rule creates serious asymmetrical-preclusion problems, too. Pet. 23-24. Under it, plaintiffs—really, "lawyers without existing clients," *Haddock v. United States*, 161 Fed. Cl. 6, 20 (2022)—can file suit and strategically defer seeking class certification. Pet. 23-24. That way, if dismissal is granted, the class is not bound, and the plaintiffs remain "free to file another suit … present[ing] the same arguments." *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir. 2007) (Easterbrook, C.J.). Patton (at 29) downplays this risk, insisting that "any adverse judgment on the merits would … bind all members" of any class that is "eventually certified." But that rebuttal presumes both the filing of a certification motion (which he says is not required, Opp. 28-29) *and* resolution of that motion *after* resolution of the merits (which won't happen). Patton's head-in-the-sand response to gamesmanship is a luxury that class-action defendants can't afford.

Nor can Patton bolster the Sixth Circuit's appeal to "practical" considerations. Pet.App.25a. The First, Fifth, and Seventh Circuits have recognized that courts can adhere to Article III and ensure resolution of transitory claims by requiring plaintiffs to "simply fil[e] motions for class certification with the complaint." Pet. 25 (cleaned up). Patton claims such a motion would be "premature," "meritless," and "wasteful." Opp. 3-4, 9, 25, 30. At the same time, though, Patton repeatedly claims that the inherently transitory exception applies only when the "existence of a class of persons suffering the deprivation is *certain*." Opp. 1, 3, 11, 22-23, 27, 30. It's hard to see how a class-certification motion that identifies a "certain" class could be meritless. And if somehow the contours of the class are so ill-defined that a plaintiff could only file a "premature and meritless placeholder motion[]," Opp. 3-4, then there cannot possibly be a class-based "live interest in the case." Opp. 27 (cleaned up); *see* Pet. 25.

III. The Question Presented Is Important, Recurring, and Squarely Presented.

This petition raises an important question about the scope of Article III jurisdiction in class actions. Pet. 17-20. Patton identifies no obstacle to this Court's review of that question and makes little effort to dispute its importance. Opp. 29-30. He simply claims that he is right on the merits, so there is no risk of "advisory opinions" or federal overreach. *Id.*

But this Court needs to grant review to ensure just that. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotations omitted). And the Article III stakes here could not be higher, given the burdens of class actions and the "[f]ederalism concerns" at play. Br. of *Amici Curiae* Alabama, *et al.*, 2. If federal courts can issue merits rulings and order class-wide relief *when no party to the suit has a concrete stake in* *the action*, Pet. 17-20, this Court needs to be the one to say so.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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