

No. 26-18

In the Supreme Court of the United States

GARY WESTCOTT, ET AL.,
Petitioners,

v.

VOICE OF THE EXPERIENCED, ET AL.,
Respondents.

GARY WESTCOTT, ET AL.,
Petitioners,

v.

VOICE OF THE EXPERIENCED, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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REPLY

Respondents’ rejection of settled precedents confirms that summary reversal is warranted. They say it is not “obvious[]” that “90 days is categorically insufficient to litigate an appeal” because this Court could issue a decision on its emergency docket within that time. BIO.17. That is astonishing. Setting aside that an emergency-docket decision is not “*plenary review* by this Court,” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (emphasis added), this Court’s precedent could not be “clear[er]”: Periods of up to two years are “too short” for an issue to be fully litigated “through the [lower] courts (and arrive here) prior to its ‘expiration,’” *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (citing cases). In fact, the ink is barely dry on this Court’s statement that “three months” plainly is too short. *FCC v. Consumers’ Research*, 606 U.S. 656, 671 n.1 (2025). It is thus remarkable to see respondents suggest otherwise—and that should tell the Court all it needs to know to order summary reversal.

The Fifth Circuit’s erroneous decision in *Smith v. Edwards*, 88 F.4th 1119 (5th Cir. 2023), is barring appellate review of every 90-day, prison-conditions injunction in that court’s jurisdiction—including where a district court “refus[es] to abide by” the Prison Litigation Reform Act’s (PLRA) procedures, which respondents do not even try to defend. App.5a (Jones, J.); App.12a (Ho, J.) (“troubling series of actions”); App.15a (Wilson, J.) (“I am deeply skeptical that this pattern complies with the PLRA’s statutory parameters.”). This is a textbook candidate for summary reversal, or at least plenary review.

ARGUMENT

I. SUMMARY REVERSAL IS WARRANTED.

The Fifth Circuit committed two distinct errors in refusing to apply the capable-of-repetition-yet-evading-review mootness exception where a PLRA injunction expires by operation of law after 90 days. *See* 18 U.S.C. § 3626(a)(2). *First*, the Fifth Circuit believes (Pet.19-21) that 90 days is not “necessarily too short a time fully to litigate” an appeal. *Smith*, 88 F.4th at 1126. *Second*, the Fifth Circuit believes (Pet.22-24) that the prospect of meaningful review *by the Fifth Circuit* within 90 days is sufficient to displace the mootness exception. Respondents have no serious answers on either score.

A. Ninety Days Is Insufficient to Fully Litigate an Issue.

Start with the Fifth Circuit’s erroneous view that 90 days is sufficient to fully litigate an issue. Citing this Court’s emergency docket, respondents say this is not an “obvious[]” error because a defendant might be able to secure emergency-docket relief. BIO.17. But emergency-docket review is not “*plenary review* by this Court.” *Bellotti*, 435 U.S. at 774 (emphasis added). And the prospect of emergency-docket relief *always* exists—yet that has not changed this Court’s determination that periods of 12 months, 18 months, and two years are too short to fully litigate an issue. *Turner*, 564 U.S. at 440.

Respondents thus propose a new rule to sidestep the wall of precedents foreclosing the Fifth Circuit’s 90-day view. They say that perhaps the capable-of-

repetition-yet-evading-review mootness exception should not apply to “interlocutory rulings,” or at least not “in the same way” as in other contexts. BIO.16. And they fold that proposal into a broader claim that, because the district court has now entered final judgment in Louisiana’s favor, Louisiana can no longer obtain review of the district court’s failure to comply with the PLRA’s procedures in issuing the expired injunctions. *Id.* at 12-14, 16-17. That argument is meritless for four reasons.

First, to be clear, the Fifth Circuit did not adopt respondents’ “interlocutory rulings” argument, which respondents never raised below—and in fact, the Fifth Circuit and eight other circuits have rejected it. *See infra* Section II.

Second, respondents cite no authority suggesting that Louisiana lost its appellate rights because the Fifth Circuit panels erroneously declined to reach the merits before the district court entered judgment. If anything, respondents have things exactly backwards: This Court prefers *not* to grant review before judgment. *See, e.g., Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (Thomas, J.); *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., respecting the denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). That Louisiana could not outrun the district court’s judgment is thus no strike against the State.

Third, in all events, this Court frequently has applied the capable-of-repetition-yet-evading-review mootness exception to review interlocutory rulings that expired before the underlying proceedings ended.

One common example arises from trial court orders sealing pre-trial proceedings or restraining publications and broadcasting. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), for example, the Court reviewed the constitutionality of a trial court’s order closing a suppression hearing to the public and sealing the hearing transcript. *Id.* at 376. The dispute was “technically moot” because the hearing had long since concluded and the petitioner had received the hearing transcript following a guilty plea. *Id.* at 376 & n.4. Applying the mootness exception, however, the Court recognized that “[t]he order closing a pretrial hearing is too short in its duration to permit full review.” *Id.* at 377. Similarly, in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court reviewed a trial court’s gag order imposed until “the jury was impaneled,” which “expired by its own terms” when the jury was, in fact, impaneled. *Id.* at 546. The mootness exception was appropriately applied because “these orders are by nature short-lived.” *Id.* at 547.¹

Another example arises from this Court’s consideration of procedural challenges to interim agency orders overtaken by final orders while litigation is pending. In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Court considered whether an agency violated an employer’s due process rights by not holding an evidentiary hearing before ordering the employer

¹ Compare BIO.16 (“Petitioners cite no precedent from this Court applying the capable-of-repetition exception to an interlocutory litigation ruling.”), with Pet.22, 23 (citing *Nebraska Press Association*).

to preliminarily reinstate its employee. *Id.* at 256 (plurality op.).² While litigation over that preliminary-reinstatement order was pending, the agency issued a final-reinstatement order which—this Court recognized—“now” embodied the employer’s “obligation to reinstate [the employee] and pay back wages” that formerly “flow[ed] from” the preliminary-reinstatement order. *Id.* at 257–58. The Court nonetheless applied the mootness exception to “the controversy between [the employer] and the [agency] as to the constitutional adequacy of the [agency’s] procedures prior to the issuance of the preliminary reinstatement order.” *Id.* at 258. That is because “[t]he duration of the preliminary order was too short for [the employer’s] challenge to be fully litigated.” *Id.*

These precedents foreclose respondents’ citationless suggestion that the 90-day injunctions in this case are somehow immune from the mootness exception for issues capable of repetition yet evading review. Indeed, that is especially so because the merits issue Louisiana seeks to litigate in the Fifth Circuit—whether the district court repeatedly failed to comply with the PLRA’s procedures before entering preliminary relief, Pet.13-15, 25-29—is exactly the type of challenge this Court considered in *Brock*. It is an attack on the “procedures prior to the issuance of the preliminary [] order.” *Brock*, 481 U.S. at 258. “The duration of the preliminary order was too short for [Louisiana’s] challenge to be fully litigated.” *Id.* And thus

² Although the Court issued splintered opinions on the merits, that all nine Justices decided the case on the merits illustrates unanimity on the plurality’s assessment of jurisdiction.

the mootness exception applies to this “controversy.” *Id.*

Fourth, this disposes of respondents’ bizarre claim (BIO.12-14) that the district court’s intervening final judgment mooted the already-moot serial injunctions. *Cf.* *Game of Thrones, What Is Dead May Never Die* (HBO, aired on Apr. 15, 2012).

Gannett, Nebraska Press Association, and *Brock* all demonstrate that respondents are wrong—but respondents’ contention also makes no sense: Nobody disputes that the district court’s injunctions expired while Louisiana’s Fifth Circuit appeals were pending, rendering those appeals moot unless a mootness exception applies. The district court’s subsequent judgment thus had precisely zero effect on the underlying legal question: whether the district court violated the PLRA’s procedures by entering those injunctions in the first place. *Contra* BIO.13 (misdirecting attention to an “Eighth Amendment analysis” that Louisiana has disavowed seeking to litigate).

Respondents’ apparent inability to find any on-point authority confirms as much. Their principal cited cases had nothing to do with the mootness exception for issues capable of repetition yet evading review, and they say nothing about procedural problems that do not live long enough to see final judgment. *See Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007); *Smith v. Ill. Bell Tele. Co.*, 270 U.S. 587, 588-89 (1926); *Shaffer v. Carter*, 252 U.S. 37, 44 (1920) (cited at BIO.12-13). Insofar as respondents try to glean support from this Court’s “final judgment” cases applying 28 U.S.C. § 1291, *see* BIO.16 (citing

Ortiz v. Jordan, 562 U.S. 180 (2011)), those cases are even further afield. For one thing, the Fifth Circuit plainly has jurisdiction below under 28 U.S.C. § 1292(a)(1). For another thing, because Louisiana *won* at final judgment, it cannot otherwise obtain review of the district court’s PLRA violations. And for still another thing, if Louisiana had *lost* at final judgment, respondents’ position is that the district court’s PLRA violations would be “moot and insulated from appellate review.” BIO.16.³ That is not the law.

B. This Court’s Review, Not a Court of Appeals’ Review, Is Required.

Similarly meritless is respondents’ claim that the Fifth Circuit has not taken a position on whether meaningful review by this Court, as opposed to the Fifth Circuit, is necessary.

Respondents pretend not to know the Fifth Circuit’s position, BIO.17-18, *while not disputing* that periods of up to two years are too short for an issue to be fully litigated “through the [lower] courts (and arrive here) prior to [their] ‘expiration.’” *Turner*, 564 U.S. at 440. There is thus no plausible reading of *Smith* other than Louisiana’s: It “rests on the hypothetical that (a) *the Fifth Circuit* can expedite proceedings quickly enough so that (b) *the Fifth Circuit* can issue a merits decision within 90 days of the injunction’s issuance.” Pet.24; *see Smith*, 88 F.4th at 1126 (reasoning that, if the appellant immediately identifies the impending

³ That respondents are actively attempting to unsettle the final judgment, BIO.14 n.1, confirms that it would be inappropriate to credit respondents’ argument.

mootness issue, the Fifth Circuit could “set a more expedited briefing schedule and perhaps adjudicate[] the appeal before the preliminary injunction expire[s]”). As *Smith*’s own author confirmed, the Fifth Circuit locates “meaningful review” (App.16a) in the Fifth Circuit’s own ability to adjudicate an appeal within 90 days. *Cf.* Pet.24 (noting the Fifth Circuit’s inability to complete its own review within 90 days multiple times in this case). And that is obvious error.⁴

II. ALTERNATIVELY, PLENARY REVIEW IS WARRANTED.

Louisiana equally welcomes plenary review. Respondents do not seriously dispute that the Fifth Circuit’s approach conflicts with the decisions of every sister circuit. So instead, respondents try to move the goalposts.

They principally complain that “every court of appeals to have addressed in a published opinion whether the expiration of a preliminary injunction under the PLRA moots an appeal of the injunction has answered yes.” BIO.20 (citing cases). That “broader” (BIO.21) claim concededly is not presented in Louisiana’s petition. And it is misleading:

- The D.C. and Fourth Circuits did not address any mootness exceptions at all in *Banks v.*

⁴ Respondents include (BIO.17) carefully worded language that appears designed to imply that this issue was waived below; it was not. As respondents do not contest, although the panels below were bound by *Smith*, Louisiana expressly preserved the *Smith* issue in both panel- and en banc-stage briefing in *VOTE III*, as well as en banc-stage briefing in *VOTE II*. *See* Pet.14-16 (providing citations).

Booth, 3 F.4th 445 (D.C. Cir. 2021), and *Cano v. South Carolina Department of Corrections*, 2024 WL 4501805 (4th Cir. Oct. 16, 2024).

- The Ninth Circuit agreed with Louisiana on the 90-day problem: “It is likely true that because of the brief duration of a preliminary injunction under the PLRA, many such appeals (as here) will not be fully litigated before the injunction expires.” *Ahlman v. Barnes*, 20 F.4th 489, 494 (9th Cir. 2021). But it held that the second element (whether the issue was capable of repetition) was not “satisfied [t]here,” *id.*—a question that is not presented here, although the element is satisfied, *see infra* Section III.
- The Eleventh Circuit held that “Florida ha[d] not demonstrated a probability that any additional injunction” would evade review. *United States v. Sec’y, Fla. Dep’t of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2025). Louisiana demonstrated that here—three times in one case.
- The Third Circuit’s unpublished claim that “these preliminary injunctions do not evade review because the District Court can prevent future injunctions from expiring under the PLRA” makes no sense—a district court’s choice to let its 90-day injunctions expire is precisely what gives rise to this recurring mootness problem. *Victory v. Berks Cnty.*, 789 F. App’x 328, 333 n.5 (3d Cir. 2019).

If anything, these inapposite decisions underscore the frequency with which mootness problems similar to Louisiana’s have arisen.

Turning to whether 90 days is too short to fully litigate an issue, respondents ignore that question. They reprise (BIO.21) their view that interlocutory rulings should not receive the benefit of the exception for issues capable of repetition yet evading review. But they do not cite a single case adopting their view. They concede that the Third and Ninth Circuits apply the mootness exception to “an order granting or denying preliminary relief for a limited period of time.” BIO.22. And in fact, respondents are being modest: Seven other circuits—including the Fifth Circuit in a PLRA case—have rejected respondents’ rule, too. *See Robinson v. NCAA*, 172 F.4th 271, 283-85 (4th Cir. 2026); *Taylor v. Hooven*, 184 F.4th 485, 491-92 (6th Cir. 2026); *Florida v. HHS*, 19 F.4th 1271, 1279-86 (11th Cir. 2021); *Kansas by & through Kan. Dep’t for Child. & Fams. v. SourceAmerica*, 874 F.3d 1226, 1236-39 (10th Cir. 2017); *Aamer v. Obama*, 742 F.3d 1023, 1042 (D.C. Cir. 2014); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1022-23 (8th Cir. 2003); *Ruiz v. Johnson*, 178 F.3d 385, 389-91 (5th Cir. 1999).

As for the Fifth Circuit’s solitary position that its own review (as opposed to this Court’s review) suffices, respondents merely repeat their claim that the Fifth Circuit “has not decided that issue.” BIO.23. Wrong. *Supra* Section I.B. If the Court were not inclined to summarily reverse, therefore, it should at least grant plenary review.

III. THERE IS NO VEHICLE ISSUE.

Respondents include two last-ditch vehicle arguments, both meritless.

First, respondents dispute whether Louisiana would be entitled to “summary reversal” as opposed to “summary vacatur.” BIO.18. (Louisiana is fine with either.) They raise that question to dispute whether Louisiana satisfies the “capable of repetition” part of the mootness exception. That is a question for the Fifth Circuit, not this Court. And at least five Fifth Circuit judges have already answered that question in Louisiana’s favor. App.8a. For good reason: Louisiana has faced the same PLRA mootness problem multiple times in the same lawsuit—and it will continue to face that problem every time a district court enters a 90-day, prison-conditions injunction. Put otherwise, “there is a more than ‘reasonable’ likelihood that [Louisiana] will again be ‘subjected to the same action.’” *Turner*, 564 U.S. at 440.

Respondents try to avoid this fact by changing the relevant “issue.” They complain that, “[w]hen the injunction at issue in *VOTE III* expired in November 2025, there was no pending motion for preliminary relief.” BIO.17. They also claim that every expired injunction had different parameters, and now facts on the ground are different after trial. BIO.19-20. All to say (in their view) that it is “entirely speculative whether [Louisiana] would again be subject to any form of preliminary relief in this case.” *Id.*

That is misdirection. *One*, that ignores the likelihood that Louisiana will again be subject to a 90-day, prison-conditions injunction, which plaintiffs request in virtually all prison cases. *See* Pet.27-28. *Two*, respondents paper over everything that happened *until* the *VOTE III* injunction expired.

Here is what they told the district court: (1) they allowed the *VOTE I* injunction to expire by operation of law in October 2024 because the “heat season had passed,” Dist.Ct.ECF.201-1 at 4; (2) after the 2024-2025 winter passed, they requested the *VOTE II* injunction in March 2025 in anticipation of “dangerously hot weather conditions fast approaching,” Dist.Ct.ECF.304 at 2; *see* Dist.Ct.ECF 201-1 at 2 (“another heat season fast approaching”); and (3) “[i]n anticipation of the expiration of the [*VOTE II*] injunction” on August 20, 2025, respondents requested the *VOTE III* injunction “providing the same relief,” Dist.Ct.ECF.304 at 3; *see* Dist.Ct.ECF.281 at 2 (“extreme heat is anticipated to persist well after August 21, 2025”); Dist.Ct.ECF.280-1 at 2 (urging “an identical successive preliminary injunction”). In other words, both the 90-day *VOTE II* injunction and the 90-day *VOTE III* injunction were foreseeable after plaintiffs repeatedly and urgently asked for them. Respondents cannot now ignore that the mootness problem predictably repeated itself.

Second, citing their contrived concern about the district court’s judgment, respondents claim that there will be “other, cleaner” opportunities to correct *Smith*. BIO.4, 24. As explained above, the judgment is irrelevant, but if anything, it underscores why the Court *should* grant review: The same mootness problem arose three different times in the same case; respondents do not even try to defend the district court’s clear disregard for the PLRA’s procedures; and despite being subjected to those unlawful injunctions, Louisiana won at final judgment. This is the perfect case for correcting the Fifth Circuit’s errors and allowing the

Fifth Circuit, in turn, to correct the district court's PLRA errors so that Louisiana and the other Fifth Circuit states may receive the express protections of the PLRA in their voluminous prison litigation.

CONCLUSION

The Court should grant the petition and summarily reverse or, alternatively, grant plenary review.

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