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An Oil Spill and Exceptions to the Mootness Doctrine: *Hornbeck v. Salazar* Erroneously Decided?

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Abstract

In April of 2010, the BP oil spill in the Gulf of Mexico created possibly the worst environmental disaster in United States history. In response, Department of Interior Secretary Kenneth Salazar, pursuant to powers granted to him by the Outer Continental Shelf Lands Act, imposed a six-month moratorium on all deepwater drilling at sea depths greater than 500 feet. Plaintiff drilling companies filed suit in the District Court of the Eastern District of Louisiana, seeking declaratory and injunctive relief against the moratorium, claiming it was arbitrary and capricious. The district court granted an injunction. While on appeal in the Fifth Circuit Court of Appeals, Secretary Salazar revoked the first moratorium and implemented a second moratorium in its place. The Fifth Circuit returned the case to the district court on a limited remand to determine whether Secretary Salazar had the power to revoke the first moratorium, the similarities between the two moratoriums, and if the injunction against the first moratorium was now moot. When the case returned to the Fifth Circuit,

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the court dismissed it as moot in an unpublished opinion.

This note analyzes three exceptions to the mootness doctrine to determine if the case was indeed moot. The three exceptions in question are voluntary cessation, capability of repetition yet evading review, and collateral consequences. This note argues that analysis of the three doctrines and relevant case law renders the conclusion that the instant case falls within the three exceptions to the mootness doctrine, and thus was not moot. Further, the case should have been decided in order to instruct the Department of Interior and other related agencies how to best formulate a response should a similar event happen in the future.

I. Introduction

The BP oil spill in the Gulf of Mexico, the result of a blown rig on April 20, 2010, may be regarded as the worst environmental disaster in American history. In response to the spill, President Obama requested Department of Interior ("DOI") Secretary Kenneth Salazar to conduct research and make recommendations on how to improve drilling safety and ameliorate the unfolding crisis. I*nter alia*, Secretary Salazar recommended a six-month moratorium on all deepwater drilling in the Gulf. On May 30, 2010, the six-month moratorium went into effect.

On June 7, 2010, drilling company Hornbeck Offshore Services sued in U.S. District Court for the Eastern District of Louisiana, seeking declaratory and injunctive relief against Secretary Salazar and other defendants, claiming the moratorium was arbitrary and capricious under the Administrative Procedures Act. More industry plaintiffs joined Hornbeck. On June 22, 2010, the court granted the injunction, holding the moratorium was arbitrary and capricious.[2] Secretary Salazar appealed to the Fifth Circuit Court of Appeals.

While the case was pending in the Fifth Circuit, Secretary Salazar revoked the moratorium, and placed a second moratorium in its place. As the first moratorium, 396 Fed. Appx. 147, no longer existed, Secretary Salazar claimed the case was now moot. The Fifth Circuit remanded to the district court to determine if Secretary Salazar had the authority to revoke the moratorium, the similarity between the two moratoriums, and if the preliminary injunction was moot. When the case was returned to the Fifth Circuit, the court dismissed it as moot in an unpublished opinion.[3]

This Note analyzes three exceptions to the mootness doctrine, all of which are applicable to the instant case. Voluntary cessation holds that a

2. Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627, 639 (E.D. La. 2010) (H*ornbeck* I).

3. Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 Fed. Appx. 147, 148 (5th Cir. Sept. 29, 2010) (unpublished) (H*ornbeck* II).

defendant's voluntary cessation of the practice at issue does not necessarily moot a case. Under wrongs capable of repetition yet evading review, if the challenged action was of a duration too short to be fully litigated before cessation, and there is a reasonable expectation the plaintiff will be subjected to the same action again, the case is not moot. If a second or collateral consequence remains after resolution of the plaintiff's original injury, the collateral consequences exception renders the case not moot.

Allowing the court to clarify the extent and scope of Secretary Salazar's power to take remedial action under the Outer Continental Shelf Lands Act would give the DOI guidance for the proper response to a future crisis. Further, if Secretary Salazar had known how to create a bona fide moratorium, the limited resources of the DOI and other agencies involved in the H*ornbeck* litigation could have been applied to the escalating crisis, rather than wasted in litigation.

Part II of this Note examines the events leading up to the Fifth Circuit dismissal of the case. Special focus is given to the proceedings prior to the issuance of the first moratorium, and the procedural history of the case as it went between the district court and Fifth Circuit. Part III analyzes the exceptions to the mootness doctrine. It begins with a look at the mootness doctrine generally, and then focuses on each exception individually, supported by case analysis. Finally, Part IV applies the mootness exceptions to the instant case. Comparing the instant case to controlling precedent yields that H*ornbeck* II should not have been dismissed as moot.

II. The Oil Spill and Subsequent Litigation

On April 20, 2010, BP's Deepwater Horizon semi-submersible oil rig suffered a blowout, killing eleven workers.[4] This spill was the fourth major spill to occur in the Gulf of Mexico in the last fifty years.[5] In the month of July, the US government estimated that between 1.5 million to 2.5 million gallons of oil were leaking every day.[6]

In response to the spill, President Obama formed a partisan commission, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, to investigate "the facts and circumstances concerning the cause of the blowout."[7] The President also requested that DOI Secretary Salazar research and report what precautions and technologies should be required to improve the safety of oil and gas

4. H*ornbeck* I, 696 F. Supp. 2d at 630.

5. *Gulf Oil Spill* (National Geographic Channel Broadcast).

6. BP: *New Cap Has Stopped Flow of Gulf Oil*, NATIONAL PUBLIC RADIO, July 15, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=128545316.

7. H*ornbeck* I, 696 F. Supp. 2d at 630.

operations on the outer continental shelf.[8]

After a thirty-day examination with academics and respected experts, Secretary Salazar issued a Report on May 27, 2010.[9] The report recommended, among other things, a "six-month moratorium on permits for new wells being drilled using floating rigs . . . [and] an immediate halt to drilling operations on the 33 permitted wells, not including relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico."[10] The report also stated that "the recommendations contained in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering." However, this statement was "factually incorrect."[11] Five of the seven experts publically stated that they "do not agree with the six month blanket moratorium on floating drilling," and would have recommended a more limited moratorium.[12] This has caused many to question the "probity of the process that led to the Report."[13] Indeed, "[t]he Report makes no effort to explicitly justify the moratorium."[14]

After receiving a memorandum from Secretary Salazar directing him to inform the drilling companies of the six-month drilling moratorium,[15] the director of the Minerals Management Service ("MMS") ordered the Deputy Director of MMS to issue the following notice to drilling companies on May 30, 2010:

> The Six-Month Deepwater Moratorium . . . directs you to cease drilling all new deepwater wells . . . and puts you on notice that, except as provided herein, MMS will not consider for six months from the date of this Moratorium NTL drilling permits for deepwater wells and for related activities as set forth herein. For the purposes of this Moratorium NTL, "deepwater" means depths greater than 500 feet.[16]

On June 7, 2010, Hornbeck Offshore Services sued in the U.S. District

8. *Id.*

9. *Id.* at 630-31.

10. *Id.* at 631.

11. *Id.*

12. *Id.* ("The draft reviewed by the experts, for example, recommended a six-month moratorium on exploratory wells deeper than 1000 feet (not 500 feet) to allow for implementation of suggested safety measures.").

13. *Id.* at 631.

14. *Id.* ("[I]t does not discuss any irreparable harm that would warrant a suspension of operations, it does not explain how long it would take to implement the recommended safety measures.").

15. *Id.*

16. *Id.* at 631-32.

Court for the Eastern District of Louisiana, seeking declaratory and injunctive relief against Secretary Salazar, the DOI, MMS, and the Director of the MMS, for the drilling moratorium.[17] More industry plaintiffs joined two days later.[18] While the plaintiffs claimed the moratorium was arbitrary and capricious under the Administrative Procedures Act[19] ("APA"), Secretary Salazar contended the action was within the powers granted to him by the OCSLA.[20] The court heard an expedited hearing on June 21, 2010, to decide on a preliminary injunction prohibiting the government from enforcing the drilling moratorium.[21]

Plaintiffs maintained that the moratorium was not only arbitrary and capricious under the APA, but it would also have a damaging effect on the local economy and the economy in general,[22] while Secretary Salazar held that the moratorium was within the power vested to him through the OCSLA.[23] This Note does not evaluate the merits of either argument, it focuses instead on the Fifth Circuit's decision to dismiss the instant case's appeal as moot.

While acknowledging that the oil spill was "an unprecedented, sad, ugly and inhuman disaster,"[24] the court granted the plaintiffs motion for preliminary injunction against the moratorium.[25] The court noted that the "plaintiffs have established a likelihood of successfully showing the Administration acted arbitrarily and capriciously in issuing the moratorium,"[26] since "the blanket moratorium, with no parameters, seems to assume that because one rig failed . . . all companies and rigs drilling new wells over 500 feet also universally present an imminent danger."[27] Further, "the effect on employment, jobs, loss of domestic energy supplies caused by

17. I*d*. at 632.

18. I*d*.

19. Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 Fed. Appx. 147, 149 (5th Cir. Sept. 29, 2010) (unpublished) (H*ornbeck* II). S*ee also* 5 U.S.C. § 706 (2)(A) (2011) (reviewing court may set aside an agency action if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

20. H*ornbeck* II, 396 Fed. Appx. 147 at 149. S*ee also* 43 U.S.C. § 1332(3) (2011).

21. H*ornbeck* I, 696 F. Supp. 2d at 632.

22. I*d*. ("[A]n estimated 150,000 jobs are directly related to offshore operations. The government admits that the industry provides relatively high paying jobs in drilling and production activities. Oil and gas production is quite simply elemental to Gulf communities…and Gulf production from these [drilling] structures accounts for 31% of total domestic oil production and 11% of total domestic, marketed natural gas production).

23. I*d*. at 633-35.

24. I*d*. at 638.

25. I*d*. at 639.

26. I*d*. at 638.

27. I*d*.

the moratorium . . . will clearly ripple throughout the economy in this region."[28]

Secretary Salazar, along with the other defendants from H*ornbeck* I, appealed the case to the Fifth Circuit Court of Appeals, and requested the court to stay the injunction pending their appeal.[29] The stay was denied.[30] On July 12, Secretary Salazar revoked the drilling moratorium, and issued a second in its place.[31] The H*ornbeck* II dissent notes that this second moratorium was almost identical to the first.[32] He then moved to "vacate the preliminary injunction as having been mooted by his second moratorium order."[33] The court ordered a limited remand to the district court to supplement the record and determine if Secretary Salazar had the authority to revoke the first moratorium, the similarity between the two, and if the preliminary injunction was moot.[34]

The district court found, on remand, that Secretary Salazar had the authority to revoke the first moratorium and impose the second, but the case challenging the validity of the first moratorium was not moot due to the voluntary cessation exception to the mootness doctrine.[35] When the case was returned to the Fifth Circuit, the court dismissed the appeal as moot, though not without criticism.[36]

This Note analyzes three exceptions to the mootness doctrine to determine if H*ornbeck* II should have been dismissed as moot.

III. The Mootness Doctrine

A. The Mootness Doctrine Generally

A discussion of the mootness doctrine begins with the doctrine of standing. Standing is "an essential and unchanging part of the case-or-

28. I*d*. at 639.

29. Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 Fed. Appx. 147, 149 (5th Cir. Sept. 29, 2010) (unpublished) (H*ornbeck* II).

30. I*d*.

31. I*d*.

32. I*d*.

33. I*d*.

34. I*d*. at 150.

35. I*d*.

36. S*ee id*. (Dennis, J., dissenting) ("Now, in a surprising turnabout, the majority, apparently having received unexpected answers from the district court, dismisses the appeal without deciding anything, on the mistaken theory that the question of the first moratorium's alleged arbitrariness is moot or no longer before us and that, therefore any further ruling by us in this appeal would be purely an advisory opinion. This decision shirks our responsibility to render judgment upon the matter before us.").

controversy requirement of Article III."[37] This "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."[38] To invoke a federal court's jurisdiction, a party must demonstrate three things. First, an injury in fact that is concrete and particularized, and actual or imminent.[39] Next, a "causal relationship between the injury and the challenged conduct" which can be traced to an action by the defendant, not an independent action of the court.[40] Last, the likelihood the injury will be "redressed by a favorable decision," meaning the chance of obtaining relief from a favorable decision that is "not too speculative."[41]

The three aforementioned requirements are necessary for a litigant to bring a "live case" for a federal court to exert jurisdiction over a case that does not satisfy those requirements would be outside the federal judicial power of our democratic system and "infringe on the province of the legislative and executive branches."[42] If the requirements for a live case are not met, if "there no longer is an actual controversy between adverse litigants,"[43] the case is moot.[44]

The mootness doctrine holds that "an actual controversy must exist at all stages of federal court proceedings . . . [and] if events subsequent to the filing of the case resolve the dispute, the case should be dismissed as moot."[45] The Supreme Court explained that "mootness [is] the doctrine of standing in a time frame . . . [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness),"[46] though not all Supreme Court Justices agree with the 'standing in a time frame' characterization.[47]

37. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663 (1993) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

38. *Id*. (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

39. *Id*. (citing *Lujan*, 504 U.S. at 560).

40. *Id*. (citing Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976)).

41. *Id*. at 663-64 (citing *Allen*, 468 U.S. at 752).

42. Michael Ashton, *Note: Recovering Attorney's Fees With The Voluntary Cessation Exception To Mootness Doctrine After* Buckhannon Board And Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 977 (2002) (quoting *Allen*, 468 U.S. at 750).

43. ERWIN CHEMERINSKY, FEDERAL JURISDICTIONS 129 (Vicki Been et al., eds., 5th ed. 2007).

44. Ashton, *supra* note 43.

45. CHEMERINSKY, *supra* note 44.

46. *Id*. (quoting United States Parole Comm'n. v. Geraghty, 445 U.S. 388, 397 (1980)) (quotations omitted).

47. *See* Friends of the Earth, Inc., v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 190 (2000)) (Ginsburg, J.) ("[T]he description of mootness as "standing set in a time

The Supreme Court has noted the "flexible character of the Article III mootness doctrine,"[48] embodied in the four exceptions to the mootness doctrine: voluntary cessation, capable of repetition yet evading review, collateral consequences, and class action. Of interest to this note are the first three exceptions.

B. The Voluntary Cessation Exception

The voluntary cessation exception to the mootness doctrine holds that a defendant's voluntary cessation of a disputed practice does not render a case moot,[49] for "if it did, the courts would be compelled to leave [the] defendant . . . free to return to his old ways."[50] Indeed, the standard to determine if the defendant's voluntary conduct mooted a case is "stringent."[51] "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[52] The burden of showing the court the practice will not reasonably be expected to recur falls on the party claiming mootness.[53]

In F*riends of the* E*arth*, multiple citizens groups brought suit against Laidlaw Environmental Services under the Clean Water Act seeking declaratory and injunctive relief and an award of civil penalties.[54] Laidlaw moved for summary judgment, claiming the plaintiffs presented no evidence showing injury in fact, thus lacked standing to bring suit.[55] The district court rejected the motion for summary judgment, finding plaintiffs had standing "by the very slimmest of margins," and awarded plaintiffs a civil penalty, but declined the injunctive relief because defendants had been in compliance with its permit for some time."[56] Plaintiffs appealed, alleging the penalty was inadequate, while defendants cross-appealed, claiming plaintiffs lacked standing.[57]

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frame" is not comprehensive . . . a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to occur."). B*ut see id*. at 212 (Scalia, J., dissenting) ("I am troubled by the Court's too-hasty retreat from our characterization of mootness as the 'doctrine of standing set in a time frame.'").

48. CHEMERINSKY, *supra* note 44, at 131(quoting G*eraghty*, 445 U.S. at 400).

49. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982).

50. I*d*. (quoting U.S. v. W. T. Grant Co., 345 U.S. 629, 632 (1953)).

51. F*riends of the* E*arth*, 528 U.S. at 189.

52. I*d*. (quoting U.S. v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968)).

53. I*d*.

54. I*d*. at 176-177.

55. I*d*. at 177.

56. I*d*.

57. I*d*. at 179.

Without reaching the standing question, the Fourth Circuit Court of Appeals ruled the case was moot because "the only remedy currently available to [petitioners] - civil penalties payable to the government - would not redress any injury" petitioners had suffered.[58]

According to the defendant, after the Fourth Circuit ruling, but before the Court granted certiorari ("cert"), the polluting entity in question was closed and discharges ceased.[59] The Court hence granted cert to answer whether "a defendant's compliance with its permit after commencement of litigation does not moot claims for civil penalties under the Act."[60]

In finding the plaintiffs did indeed suffer injury-in-fact, the Court explained, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[61] In addition, "civil penalties . . . afford redress to citizen plaintiffs who are injured or threatened[62] with injury as a consequence of ongoing unlawful conduct." After concluding the plaintiffs had standing, the court turned to the mootness issue.[63]

Laidlaw asserted that the "closure of its Roebuck facility, which took place after the Court of Appeal issued its decision, mooted the case."[64] In dismissing this assertion, the Court noted that the "facility closure . . . might moot the case, but . . . only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur.[65] Further, "the effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter."[66] The case was remanded.[67]

More analogous to the present case, "compliance with a court order renders a case moot only if there is no possibility that the allegedly offending behavior will resume once the order expires or is lifted."[68]

In *Vitek v. Jones*, appellee prisoner was transferred to a mental hospital pursuant to a Nebraska statute that provided for the involuntary commitment of prisoners who "'suffers from a mental disease or defect' that

58. *Id.*
59. *Id.*
60. *Id.* at 180.
61. *Id.* at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).
62. *Id.* at 186.
63. *Id.*
64. *Id.* at 193.
65. *Id.*
66. *Id.*
67. *Id.* at 195.
68. CHEMERINSKY, *supra* note 44, at 143.

'cannot be given proper treatment' in prison."[69] The district court held that this transfer "without adequate notice and opportunity for a hearing deprived him of liberty without due process" pursuant to the Fourteenth Amendment.[70] The court permanently enjoined appellee's transfer without these procedures.[71] Appellee was subsequently paroled, but sent back to prison for violating parole.[72] The district court found that "the parole and revocation thereof did not render the case moot because appellee was still subject to being transferred to the mental hospital."[73] In affirming that the case was not moot, the Court stated "[u]nder these circumstances, it is not 'absolutely clear,' absent the injunction, that the State's alleged wrongful behavior could not reasonably be expected to recur."[74]

C. Wrongs Capable of Repetition Yet Evading Review Exception

In finding a case not moot due to wrongs capable of repetition yet evading review, a case must satisfy two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[75]

The D.C. Circuit explains that "[b]y 'evading review' 'the Supreme Court has meant evading Supreme Court review.'"[76] Hence, "agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration."[77] Further, "[a]nother area where the Court often has applied this exception to the mootness doctrine is for challenges to election laws."[78]

In M*urphy v.* H*unt*, appellee was denied bail due to his particular offense in Nebraska state court, pursuant to the Nebraska Constitution.[79] While his trial was pending in state court, appellee filed a complaint under 42 U.S.C § 1983 in district court, claiming that provision of the Nebraska

69. 445 U.S. 480 (1980).

70. I*d*.

71. I*d*.

72. I*d*.

73. I*d*.

74. I*d*. at 481.

75. Murphy v. Hunt, 455 U.S. 478, 482 (1982) (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)).

76. Del Monte v. U.S., 570 F.3d 316, 322 (D.C. Cir. 2009) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

77. I*d*. (quoting Pub. Utils. Comm'n v. FERC, 236 F.3d 708, 714 (D.C. Cir. 2001)).

78. CHEMERINSKY, *supra* note 44, at 137. *See* First Nat'l. Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972).

79. M*urphy*, 455 U.S. at 480.

Constitution violated his civil rights, and sought declaratory and injunctive relief.[80] While the district court case was pending, appellee was convicted of his charges in Nebraska state court, and he appealed to the Nebraska Supreme Court.[81] The district court then dismissed his claim, but the Eighth Circuit reversed, finding his bail denial violated his Eighth Amendment right.[82]

The Supreme Court reversed, however, finding that the Eighth Circuit's application of the capable of repetition yet evading review exception was misplaced.[83] A per curium majority explained that the exception requires a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party . . . [w]e detect no such level of probability in this case."[84] As "[t]here is no reason to expect that all three of Hunt's convictions will be overturned on appeal," there is no reasonable expectation he will be eligible for bail again, and hence the case is moot.[85]

Nebraska Press Association v. Stuart presents the exception in the context of prior restraint on speech.[86] A multiple homicide trial in a Nebraska state court drew large local and national attention.[87] Reasoning that prejudicial news would make it difficult to impanel an impartial jury, the judge granted a restrictive order.[88] Among other things, the order prohibited those in attendance of the trial from releasing any evidence or testimony.[89] Petitioners from the press moved in district court to have the order vacated.[90] The district court judge modified the restrictive order, but kept many of the provisions.[91] The Nebraska Supreme Court upheld the findings of the district court, and the Supreme Court granted cert to address the "important issues raised by the district court order as modified by the Nebraska Supreme Court."[92] Before the case reached the Supreme Court, the defendant was convicted of murder and sentenced to death.[93]

Though the order in question expired when the jury was impaneled

80. *Id.*
81. *Id.*
82. *Id.* at 480-81.
83. *Id.* at 483.
84. *Id.* at 482 (quoting Weinstein v. Bradford, 423 U.S. at 149).
85. *Id.* at 483.
86. 427 U.S. 539 (1976).
87. *Id.* at 542.
88. *Id.*
89. *Id.*
90. *Id.* at 543.
91. *Id.*
92. *Id.* at 546.
93. *Id.*

approximately four months earlier, the Court held the case was not moot, as it was indeed capable of repetition, yet evading review.[94] First, if the defendant's conviction was reversed and another trial ordered, "the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [his] retrial."[95] Second, the "Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus 'capable of repetition.'"[96] Further, since these orders are short-lived, they will evade review if the case was dismissed for mootness.[97]

D. Collateral Consequences Exception

Where "a secondary or 'collateral' injury survives" after the resolution of the plaintiff's principle injury, the collateral consequences exception renders the case not moot.[98] This is possibly seen most starkly in criminal cases, where a "defendant continues to face adverse consequences of the criminal conviction."[99] Just as criminal convictions can result in a loss of voting privileges or a bar from obtaining certain occupational licenses, the Court has held "even if the primary injury, incarceration, no longer exists, the secondary or collateral harms are sufficient to prevent the case from being dismissed on mootness grounds."[100] However, the collateral consequences exception is also seen in the civil arena, concerning such issues as back pay and injunctions.[101]

Super Tire Engineering Company v. McCorkle presents the paradigm case of collateral consequences.[102] At the time, New Jersey workers were "eligible for public assistance through state welfare programs."[103] When their employees went on strike, two corporations filed suit in District Court for declaratory

94. *Id.*

95. *Id.*

96. *Id.* at 546-47.

97. *Id.* At 547.

98. CHEMERINSKY, *supra* note 44, at 132 (quoting Sibron v. New York, 392 U.S. 40, 53 (1968)). However, some scholars maintain the collateral consequences exception is not an exception at all, because the case was never moot. *See id.* ("[A]ctually the case is not moot because some injury remains that could be redressed by a favorable court decision.").

99. *Id.*

100. *Id.* *See Sibron*, 392 U.S. at 55 (1968) (criminal convictions entail adverse legal consequences). *See also* Carafas v. LaVallee, 391 U.S. 234 (1968) (defendant cannot engage in certain businesses as a result of his conviction).

101. CHEMERINSKY, *supra* note 44, at 134.

102. 416 U.S. 115 (1974).

103. *Id.* at 116.

and injunctive relief, claiming that their striking employees "had received and would continue to receive public assistance" through New Jersey welfare programs, and this "constituted an interference with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act."[104] Before the court heard the case, the strike ended and the employees returned to work.[105] The district court denied plaintiff's relief and dismissed the case, and on appeal, the Third Circuit dismissed for mootness.[106] The court granted cert to decide on the mootness issue.[107]

Though the strike ended, the "petitioners and New Jersey officials may still retain sufficient interests and injury as to justify the award of declaratory relief."[108] Unlike the cases cited by respondents, the government activity in the instant case "has not evaporated or disappeared, and by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties."[109] Here, because the said law is still in effect, the "challenged governmental action has not ceased."[110] To require a live labor dispute is to ask too much. Instead, "[i]t is sufficient . . . the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest."[111] Further, "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender."[112]

On the other hand, *Spencer v. Kemna* exemplifies a claim too weak for the petitioner to be suffering from collateral consequences.[113] In 1992, the Missouri Board of Probation and Parole revoked petitioner's parole.[114] After not receiving relief from the Missouri state courts, petitioner filed a writ of habeas corpus in district court, "alleging that he had not received due process in the parole revocation proceedings."[115] Before the district court responded, however, petitioner was released from prison, and his habeas petition was dismissed.[116] The Eighth Circuit affirmed the ruling, holding the claim was moot because petitioner "suffered no 'collateral consequences' of

104. *Id.* at 117-19.
105. *Id.* at 120.
106. *Id.* at 121.
107. *Id.*
108. *Id.* at 122.
109. *Id.* at 122.
110. *Id.* at 123.
111. *Id.* at 125-26.
112. *Id.* at 126.
113. 523 U.S. 1 (1998).
114. *Id.*
115. *Id.* at 5.
116. *Id.* at 6.

the revocation order."[117] The Court granted cert to decide if the "petitioner's subsequent release caused the petition to be moot."[118]

The Court could find no "continuing collateral consequence" of petitioner's parole revocation, and hence dismissed the case as moot.[119] Citing a sequence of cases, the majority ran though a brief history of the collateral consequences doctrine[120], observing that the Court now proceeds to "accept the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction",[121] to their disapproval.[122] The Court noted that parole revocations do not entail the same "adverse collateral legal consequences [as] most criminal convictions".[123] As such, petitioner failed to bring a live case or controversy, and his case was dismissed as moot.[124]

IV. The Mootness Exceptions Applied to H*ornbeck* II

A. Voluntary Cessation

As discussed *supra*, the voluntary cessation exception holds that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, and that mere voluntary cessation of allegedly illegal conduct does not moot a case. As the district court noted in H*ornbeck* II, "in light of the voluntary cessation exception to the mootness doctrine, the case challenging the validity of the DOI's first moratorium was not moot."[125] The court most likely made this assertion because the defendant (Secretary Salazar) voluntarily ceased the

117. I*d*.

118. I*d*. at 7.

119. I*d*. at 8.

120. St. Pierre v. United States, 319 U.S. 41, 87 (1943) (moral stigma is not a collateral consequence); Carafas v. LaVallee, 391 U.S. 234, 237 (petitioner's conviction is a collateral consequence because he cannot engage in certain businesses or vote in any election in New York State); Pollard v. United States, 352 U.S. 354 (1957) (a convict, who already served his time, presents a live case challenging his sentence); Evitts v. Lucey, 469 U.S. 387 (1985) (because respondent had not been pardoned, his habeas challenge was not moot).

121. I*d*. at 10.

122. S*ee id*. at 12 (Scalia, J.) ("[T]he practice of presuming collateral consequences . . . sits uncomfortably beside the 'long-settled principle that standing cannot be "inferred argumentatively from averments in the pleadings," but rather "must affirmatively appear in the record"'") (quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990)).

123. I*d*. at 12 (quoting S*ibron*, 392 U.S. at 55 (1968)).

124. I*d*. at 18.

125. Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 Fed. Appx. 147, 150 (5th Cir. Sept. 29, 2010) (unpublished) (H*ornbeck* II).

challenged practice (the first moratorium).

In F*riends of the* E*arth*, defendant Laidlaw claimed that closing their polluting facility and ceasing discharges put them in compliance with their permit, and thus mooted plaintiff's claims for civil damages.[126] In holding the case was not mooted, the court asserted that the "facility closure . . . might moot the case, but . . . only if one or other of the events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur,[127] and "compliance with a court order renders a case moot only if there is no possibility that the allegedly offending behavior will resume once the order expires or is lifted."[128]

In the instant case, there is not a possibility that the allegedly offending behavior will resume; *it has resumed*. By lifting the first moratorium and implementing the second, Secretary Salazar has resumed the allegedly offending behavior. Certainly, lifting the first moratorium and implementing the second should not have mooted plaintiff's action for injunctive and declaratory relief against the first moratorium.

Appellee prisoner in V*itek v. Jones* was transferred without notice or hearing to an involuntary commitment mental hospital.[129] He filed suit, and the district court found that the transfer without hearing or notice violated his due process.[130] The court permanently enjoined the transfer absent those procedures.[131] After appellee was paroled, but sent back to prison for violating his parole, the court found that the parole and revocation did not moot the case because he could still potentially be sent back to a mental hospital.[132] The case was not moot because absent an injunction, it was not absolutely clear the State's wrongful behavior would not recur.[133]

Likewise, in the present case, the district court granted an injunction over the first moratorium but that injunction was lost with the revocation of the first moratorium. The V*itek* court noted that absent an injunction, it was not absolutely clear the State's wrongful behavior would not recur, and thus the case was not moot. Here, that fear came true. As the district court placed an injunction only over the first moratorium, the defendant's alleged wrongful behavior recurred with the issuance of the second moratorium. H*ornbeck* II should not have been mooted so the court could have decided if the first moratorium should have been enjoined, thus instructing whether to enjoin similar future moratoriums.

126. Friends of the Earth v. Laidlaw Envtl. Services, 528 U.S. 167, 183 (2000).
127. I*d*. at 186.
128. I*d*.
129. Vitek v. Jones, 445 U.S. 480 (1980).
130. I*d*.
131. I*d*.
132. I*d*.
133. I*d*. at 481.

B. Wrongs Capable of Repetition Yet Evading Review

This exception requires (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to he same action again.[134] The D.C. Circuit instructs that "[b]y "evading review . . . the Supreme Court has meant evading Supreme Court review."[135] Hence, "agency actions of less than two years' duration cannot be "fully litigated" prior to cessation or expiration."[136]

By revoking the first moratorium, the DOI made the challenged action (the moratorium) too short to be fully litigated prior to its cessation or expiration, fulfilling prong one of the test. Likewise, prong two of this test is clearly satisfied; the complaining party (plaintiffs) were subjected to the same action again (the second moratorium). The first moratorium was thus capable of repetition, yet evading review.

In M*urphy v*. H*unt*, appellee was denied bail pursuant to a Nebraska statute, and while his trial was pending in Nebraska state court, he filed suit in district court alleging civil rights violations, and sought declaratory and injunctive relief.[137] While his case was pending in district court, he was convicted of his charges in Nebraska state court, and appealed to the Nebraska Supreme Court.[138] The district court ruled his case moot, but the 8th Circuit reversed. The Supreme Court reversed again, finding this was not a case of capable of repetition yet evading review, because there is no reasonable expectation that all three of appellee's convictions will be overturned on appeal, thus no reasonable expectation he will be subjected to bail again, hence the case was moot.

Unlike M*urphy*, here there is plainly a reasonable expectation plaintiffs will be subjected to the challenged action because *they already are subjected to the challenged action*. For the case to be mooted, the burden is on defendants to show the challenged action cannot reasonably be expected to recur. That burden is obviously failed with the imposition of the second moratorium.

Petitioners from the press appealed a restrictive order over press coverage of a homicide trial in N*ebraska* P*ress* A*ssociation*. *v*. S*tuart*, claiming prior restraint on speech.[139] Before their appeal could reach the Supreme Court, the homicide trial concluded.[140] The Court found their case not moot

134. I*d*.
135. I*d*.
136. I*d*.
137. Murphy v. Hunt, 455 U.S. 478, 480 (1982).
138. I*d*.
139. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 543 (1976).
140. I*d*. at 546.

because it was capable of repetition, yet evading review.[141] First, if a new trial was ordered for the defendant, the court could impose a similar restraining order.[142] Second, prosecutors could seek similar orders in future trials, thus the practice is capable of repetition.[143] Lastly, because these orders are short lived, compared to the time it takes a case to reach the Court, they will likely evade review.[144]

Nebraska Press Association is closely analogous to the instant case. The Court made three observations in concluding the case was not moot due to the capable of repetition, yet evading review exception. First, if a new homicide trial was ordered, the court could impose a similar restraining order. The court ordering another restraining order is strikingly similar to the DOI imposing another moratorium - *which already happened*. Second, prosecutors could seek similar orders in the future, making the practice capable of repetition. Again, the imposition of the second restraining order makes clear this is not a practice capable of repetition, but a repeated practice. Lastly, the orders at issue in *Nebraska Press Assn*. were short lived, thus capable of evading review. Discussed *supra*, agency actions of duration less than two years will evade review because the Supreme Court in such a short time will not decide upon them. By virtue of the fact the moratorium in question was mandated for six months, it would evade review. For these three aforementioned reasons, the instant case is not moot because it is capable of repetition, yet evading review.

C. Collateral Consequences

Discussed *supra*, where a secondary or collateral injury remains after the resolution of the plaintiff's principle injury, the collateral consequences exception renders the case not moot.

In *Super Tire*, plaintiff employers brought suit for declaratory and injunctive relief against a New Jersey law that gave welfare assistance to their striking employees, claiming that was an interference with free labor policy and collective bargaining protected in the Labor Management Relations Act.[145] Before the district court decided the case, the strike ended, and the employees returned to work.[146] The district court dismissed the case as moot, and the Third Circuit affirmed.[147] The Court reversed, finding

141. *Id*.
142. *Id*.
143. *Id*. at 547.
144. *Id*.
145. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 118-19 (1974).
146. *Id*. at 120.
147. *Id*. at 121.

because the law was still in effect, the government action has not ceased,[148] and continues to have a substantial adverse effect on the petitioning parties.[149] Indeed, to render this case not moot, litigants must just show "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest."[150]

Likewise, in the instant case, though the first moratorium was lifted, the second moratorium remains, thus exemplifying a *Super Tire* "immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." In addition, the second moratorium is "almost identical to the first, reaching similar offshore drilling activities, for the same six-month duration and based largely upon the same administrative record."[151]

Further, the moratorium(s) affect not only the plaintiff's present interest, but also the public at large. As the district court in *Hornbeck* I noted, "courts have held that in making the determination of irreparable harm, 'both harm to the parties and to the public may be considered,'"[152] and indeed, the "effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as the plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region."[153] Thus, the collateral consequences of the first moratorium extend not only to the plaintiff drilling companies, but also to all members of the public, both directly and indirectly affected.

V. Conclusion

Evidenced in the argument above, the *Hornbeck* II court should not have dismissed the case as moot. Many (hopefully all) would agree that something needed to be done, immediately, to address the unfolding oil spill disaster. Secretary Salazar, in his position as head of the department of State charged with protecting America's natural resources, was correct in taking action that he determined was necessary to alleviate the situation and was within his powers granted by OSCLA. However, *Hornbeck* II should have been ruled upon to determine the extent and scope of the Secretary's powers under OSCLA and the APA — not as a condemnation against his

148. *Id.* at 123.

149. *Id.* at 122.

150. *Id.* at 125-26.

151. Hornbeck v. Salazar, 396 Fed. Appx. 147, 149-50 (5th Cir. Sept. 29, 2010) (*Hornbeck* II).

152. Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627, 639 (E.D. La. 2010) (*Hornbeck* I) (quoting In re Nw. Airlines Corp., 349 B.R. 338, 384 (S.D.N.Y. 2006)).

153. *Id.*

actions — but to give guidance and direction on how to best formulate a response, should a similar situation arise in the future. The H*ornbeck* I district court found that the Secretary's first moratorium was arbitrary and capricious. If the Secretary had known in advance how to best craft an appropriate moratorium, the precious resources of the DOI (and other agencies involved), that were wasted on litigation, could have been put towards addressing the crisis at hand.

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