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Foster v. Carson: The Ninth Circuit Misapplies the Capable-of-Retention-Yet-Evading-Review Exception to the Mootness Doctrine and Lends a Free Hand to Budget-Cutting State Officials

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FOSTER V. CARSON: THE NINTH CIRCUIT MISAPPLIES THE CAPABLE-OF-REPETITION-YET-EVADING-REVIEW EXCEPTION TO THE MOOTNESS DOCTRINE AND LENDS A FREE HAND TO BUDGET-CUTTING STATE OFFICIALS

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Abstract: In *Foster v. Carson*, public defender organizations and indigent defendants sued the chief justice of the Oregon Supreme Court for suspending appointments of indigent defense counsel. Before the parties could fully litigate the case, the chief justice reinstated appointments. Subsequently, the United States Court of Appeals for the Ninth Circuit dismissed the case as moot and held that the exception to the mootness doctrine for cases capable-of-repetition-yet-evading-review did not apply. A case falls under that exception when the party resisting mootness demonstrates that it was not possible to fully litigate the action before it ceased and there is a reasonable expectation that the party will be subjected to the same action in the future. Because the court concluded that it was not possible to fully litigate the case before the chief justice reinstated appointments, applicability of the capable-of-repetition-yet-evading-review exception depended only on whether there was a "reasonable expectation" that the injury would recur. When evaluated in light of U.S. Supreme Court and Ninth Circuit precedent, the facts in *Foster* support a finding that there was a reasonable expectation that the chief justice would again suspend funding for indigent defense counsel. The public interest in deciding the constitutionality of the chief justice's action further supports application of the exception.

Thanks to a prolonged economic recession, the escalating cost of domestic security, and unrelenting pressure not to raise taxes, state governments face crushing budget deficits.[1] The states faced a collective $200 billion shortfall for fiscal years 2001 through 2003.[2] As states struggle to find ways to reduce deficits, state programs and services are being reduced or altogether eliminated.[3] State and local judicial systems are not immune to these cuts.[4]

In response to Oregon's severe budget crisis, the Oregon State Legislature held five special sessions during the second half of 2002 to

1. *See* John M. Broder, *Despite Signs of Economic Recovery, States' Budgets Are Still Reeling*, N.Y. TIMES, Jan. 5, 2004, at A12; Michael Janofsky, *Deep Cuts Have Not Closed Deficit in Many States, Report Says*, N.Y. TIMES, Apr. 26, 2003, at A20.

2. Broder, *supra* note 1, at A12.

3. *See id.*; Janofsky, *supra* note 1, at A20.

4. *See* Foster v. Carson, 347 F.3d 742, 744 (9th Cir. 2003).

address the budget shortfall.[5] During these sessions, the legislature substantially cut funds available to the Oregon Judicial Department for its indigent defense counsel programs.[6] As a result, the chief justice of the Oregon Supreme Court, acting in his capacity as the administrative head of the Oregon Judicial Department, suspended appointments of indigent defense counsel between March 1, 2003 and June 30, 2003.[7] Indigent defendants charged with a variety of crimes[8] were denied counsel, and their cases were delayed until after June 30.[9]

Before the chief justice reinstated funding, a group of indigent defendants and defense counsel organizations had sued him in *Foster v. Carson*.[10] The plaintiffs claimed that the chief justice had violated their constitutional rights to counsel, due process, and equal protection when he suspended appointments of indigent defense counsel.[11] After the U.S. District Court for the District of Oregon had granted defendant's motion to dismiss, plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.[12] The Ninth Circuit dismissed the case as moot.[13]

The U.S. Supreme Court recognizes a number of exceptions to mootness, including the exception for cases capable-of-repetition-yet-evading-review.[14] For a case to fall under this exception, the party resisting mootness must demonstrate that the challenged action is too short in duration to be fully litigated before it ceases and that there is a reasonable expectation that the party will be subjected to the same action in the future.[15] The *Foster* court held that the exception did not apply because there was no reasonable expectation that the plaintiffs would again face a suspension of indigent defense counsel appointments.[16]

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5. *Id.* at 748; *see also* Appellants' Consolidated Opening Brief at 4–5, *Foster* (Nos. 03-035457 & 03-035458).

6. Appellants' Consolidated Opening Brief at 4–5.

7. *Foster*, 347 F.3d at 744.

8. *Id.*; *see also infra* note 135.

9. *Foster*, 347 F.3d at 744. This Note does not address the constitutional issues raised by the *Foster* plaintiffs or the plaintiffs' right to speedy trials.

10. 347 F.3d 742 (9th Cir. 2003). In addition to the chief justice, the plaintiffs also named the state court administrator and several Oregon judges as defendants. *Id.* at 742.

11. *Id.* at 745.

12. *Id.* at 749.

13. *Id.*

14. *See infra* Part I.A.

15. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

16. *Foster*, 347 F.3d at 748–49.

This Note argues that the Ninth Circuit erred in dismissing the *Foster* case as moot. Part I describes the mootness doctrine and details the capable-of-repetition-yet-evading-review exception as applied by the U.S. Supreme Court and the Ninth Circuit. Part II details the facts, procedural history, and holding of the *Foster* decision. Part II also summarizes information submitted to the *Foster* court by plaintiffs' counsel about Oregon's ongoing budget crisis. Part III then argues that under the reasonable expectation standard established by the U.S. Supreme Court and the Ninth Circuit, the issue in *Foster* is capable-of-repetition-yet-evading-review. Part III also argues that the public interest in settling the constitutionality of suspending indigent defense counsel appointments further weighed against holding the case moot. This Note concludes that the Ninth Circuit should have applied the capable-of-repetition-yet-evading-review exception instead of dismissing the case as moot.

I. CASES THAT ARE CAPABLE-OF-REPETITION-YET-EVADING-REVIEW ARE NOT MOOT

To satisfy the U.S. Constitution's jurisdictional requirements, federal courts must find both that the parties bringing the action have standing and that the action either is not moot or fits within one of the exceptions to the mootness doctrine.[17] Standing addresses whether the plaintiff is the proper party to bring the case before a federal court for adjudication.[18] To determine whether a case is moot, a court asks whether the "issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[19] For example, a case will become moot if an essential party dies during the appeals process[20] or if a student challenging a school policy graduates from the school.[21]

The U.S. Supreme Court has articulated four exceptions to the mootness doctrine.[22] One of these exceptions is that the action is

17. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

18. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 2.5.1, at 60 (2d ed. 2002).

19. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)) (internal quotations omitted).

20. Dove v. United States, 423 U.S. 325, 325 (1976).

21. Bd. of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975) (finding that students' constitutional challenge of rules governing the student newspaper became moot when all of the plaintiff students graduated).

22. *See* CHEMERINSKY, *supra* note 18, §§ 2.7.2–.5, at 114–27.

capable-of-repetition-yet-evading-review.[23] To establish that a case falls into the capable-of-repetition-yet-evading-review exception, the party resisting mootness must first demonstrate that it is not possible to fully litigate the challenged action before it ceases.[24] Next, the party must show that there is a reasonable expectation that it will be subjected to the challenged action in the future.[25] U.S. Supreme Court and Ninth Circuit cases applying the capable-of-repetition-yet-evading-review exception establish what constitutes a "reasonable expectation."[26] Federal courts do not recognize an exception to mootness for cases involving a strong public interest.[27] However, both the U.S. Supreme Court and the Ninth Circuit have held that a strong public interest in settling the legality of an action may weigh against a holding of mootness.[28]

A. U.S. Supreme Court Precedent Establishes a Flexible Doctrine of Mootness

Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases and controversies."[29] Cases and controversies consist of active disputes between two or more adversarial parties.[30] Limiting courts to resolving only live disputes helps to ensure that the judicial branch does not intrude upon the legislative and executive branches of the federal government.[31] To maintain their case or controversy, all parties must retain a personal stake in the litigation throughout all its stages.[32]

Courts have developed the related doctrines of standing and mootness to determine whether the issue being litigated presents a case or

23. *Id.* § 2.7.3, at 117.

24. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

25. *Id.*

26. *See* Honig v. Doe, 484 U.S. 305, 318–20 (1988); Murphy v. Hunt, 455 U.S. 478, 482 (1982); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

27. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

28. *See* County of Los Angeles v. Davis, 440 U.S. 625, 643–44 (1979); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1360 (9th Cir. 1986).

29. *See* U.S. CONST. art. III, § 2, cl. 1.

30. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

31. *Id.*

32. *See* Spencer v. Kemna, 523 U.S. 1, 7 (1998).

controversy.[33] The doctrines' common nexus in Article III has led the U.S. Supreme Court to describe mootness as "'standing in a time frame.'"[34] The Court has stated that "'[t]he requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'"[35] Although the Court has frequently emphasized the relationship between mootness and standing, it consistently treats mootness as a more flexible doctrine.[36]

The U.S. Supreme Court has articulated four exceptions that allow a federal court to retain jurisdiction over an otherwise moot case.[37] A case will not be moot when (1) the injured party faces collateral consequences stemming from the injury;[38] (2) the case is certified as a class action;[39] (3) one party voluntarily ceases the allegedly illegal action;[40] or (4) the action at issue is capable-of-repetition-yet-evading-review.[41]

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33. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000). There is some debate over whether the mootness doctrine is mandated by Article III. In *Honig v. Doe*, 484 U.S. 305 (1988), Chief Justice Rehnquist argued that the mootness doctrine does not derive from Article III: it is a prudential rule with "an attenuated connection [to Article III] that may be overridden where there are strong reasons to override it." *Id.* at 330–31 (Rehnquist, C.J., concurring). For a discussion of the constitutional roots of mootness, see generally Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992).

34. *Geraghty*, 445 U.S. at 397 (quoting Henry Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1384 (1973)).

35. *Id.* The definition of mootness as "standing in a time frame," which has been widely adopted by the lower courts and legal scholars, has been questioned by the Court. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court suggested that the definition is not comprehensive. 528 U.S. at 190.

36. *See Geraghty*, 445 U.S. at 400–01; *see also* Roe v. Wade, 410 U.S. 113, 125 (1973). There are circumstances where the likelihood that a defendant will resume the challenged behavior is too slim to support standing, but would be sufficient to save a case on appeal from dismissal as moot. *Friends of the Earth*, 528 U.S. at 190.

37. *See* CHEMERINSKY, *supra* note 18, §§ 2.7.2–.5, at 114–27.

38. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 7–10 (1998) (outlining the collateral consequence exception for both civil and criminal cases).

39. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 401–02 (1975) (holding that a court retains jurisdiction over a class action suit even if the named party's case has become moot).

40. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 189–90 (holding that a citizen suit under the Clean Water Act did not become moot when the permit holder began complying with its permit or when it shut down the offending facility).

41. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 318–20 (1988) (holding that a student's challenge of his suspension was not moot because the student retained the option to re-enroll in a California school).

B. *The Capable-of-Repetition-yet-Evading-Review Exception Requires There To Be a Reasonable Expectation That the Action Will Recur Rather Than a "Demonstrated Probability" of Recurrence*

The U.S. Supreme Court has developed a two-part test to determine if a case falls into the capable-of-repetition-yet-evading-review exception.[42] First, the duration of the action at issue must be too short for the parties to fully litigate its legality before it ceases.[43] Second, there must be a reasonable expectation that the party challenging the action will be subjected to the same action again.[44] Establishing such reasonable expectation does not require a party to provide a "demonstrated probability" of recurrence.[45]

In *Honig v. Doe*,[46] the Court concluded that establishing a reasonable expectation that an action will recur does not require a demonstrated probability of recurrence.[47] The *Honig* Court accepted a chain of probable events leading to the recurrence of the challenged action as sufficient to establish a reasonable expectation.[48] In *Honig*, two California students, John Doe and Jack Smith, sued the California superintendent of public instruction after they were expelled from high school for behavior related to their emotional disabilities.[49] Both students alleged that their expulsions violated the Education of the Handicapped Act (EHA).[50] After the district court and the Ninth Circuit had ruled in their favor, the U.S. Supreme Court granted certiorari.[51] At oral argument, the United States, appearing as amicus curiae, argued that the case was moot because Doe was no longer entitled to protection under the EHA due to his age, and Smith had moved out of the school district from which he had been expelled.[52]

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42. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

43. *Id.*

44. *Id.* Because the *Foster* court accepted that the suspension of funds for defense counsel was too short to be fully litigated, this Note focuses only on the court's application of the "reasonable expectation" requirement. Foster v. Carson, 347 F.3d 742, 746 (9th Cir. 2003).

45. *Honig*, 484 U.S. at 320 n.6.

46. 484 U.S. 305 (1988).

47. *Id.* at 320 n.6.

48. *See id.* at 321–23.

49. *Id.* at 312–16.

50. *Id.*

51. *Id.* at 316–17.

52. *Id.* at 318 nn.5–6.

The Court held that the case was moot for plaintiff Doe.[53] The EHA only applies to students between the ages of three and twenty-one, and Doe was twenty-four by the time the *Honig* case reached the Court.[54] Because the EHA no longer applied to Doe, there was no possibility that California would again deprive him of his rights under the EHA.[55]

However, because plaintiff Smith was only twenty when *Honig* reached the Court,[56] it was possible that California could again deny him his rights under the EHA.[57] The Court held that the capable-of-repetition-yet-evading-review exception applied to Smith[58] because there was a reasonable expectation that Smith would again be expelled from a California school.[59] For that to happen, the Court assumed that Smith would again enroll in a California school (even though he had not stated that he would do so), be placed in an environment where his behavior could not be adequately controlled, behave in an aggressive manner caused by his disability, and be expelled for that behavior.[60] Despite these assumptions, and the fact that Smith was nearly too old for the EHA to apply to him, the Court concluded that there was a reasonable expectation that a California school would again expel him.[61]

C. *Under Ninth Circuit Precedent, Courts May Find That a Reasonable Expectation Exists When There Is Some Indication That the Challenged Action Will Be Repeated, but Not When Recurrence of the Action Is "Highly Unlikely" or "Speculative"*

The Ninth Circuit has held that a party challenging an action must demonstrate "some indication that the challenged conduct will be repeated" in order to satisfy the reasonable expectation requirement of the capable-of-repetition-yet-evading-review exception.[62] Like the U.S. Supreme Court, the Ninth Circuit does not require a demonstrated

53. *Id.* at 318.
54. *Id.*
55. *Id.*
56. *Id.*
57. *See id.* at 320–23.
58. *Id.* at 323.
59. *Id.* at 319–20.
60. *See id.* at 320–23.
61. *Id.* at 323.
62. Alaska Ctr. for the Env't v. United States Forest Serv., 189 F.3d 851, 856 (9th Cir. 1999).

probability of recurrence.[63] The Ninth Circuit will not, however, apply the exception when repetition of the challenged action is "highly unlikely"[64] or "too speculative to prevent mootness."[65] Determining whether a case has become moot often involves a "'highly individualistic . . . appraisal of the facts.'"[66]

The Ninth Circuit has established a low threshold for demonstrating a reasonable expectation that a challenged action will recur.[67] That standard is met when the party challenging the action establishes "some indication" that the action will be repeated.[68] For example, in *Miller ex rel. NLRB v. California Pacific Medical Center*,[69] the court applied the U.S. Supreme Court's holding in *Honig* that the complaining party "'need not show that there is a "demonstrated probability" that the dispute will recur.'"[70] In *Miller*, the National Labor Relations Board (NLRB) sought a preliminary injunction to restore the collective bargaining status of the California Nurses Association (CNA) with the California Pacific Medical Center (CPMC) pending resolution of an unfair labor charge.[71] CNA lost its collective bargaining status during the merger of two other hospitals into CPMC.[72] Prior to an en banc rehearing, the NLRB issued its final decision on the underlying unfair labor charge, which rendered the preliminary injunction unnecessary.[73] Because CPMC continued to undergo restructuring and because it held contracts with five other unions, the Ninth Circuit concluded that there was a reasonable expectation that the NLRB would again seek injunctive relief against CPMC in an unfair labor proceeding.[74]

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63. Barilla v. Ervin, 886 F.2d 1514, 1520 (9th Cir. 1989) (discussing *Honig*).

64. Unabom Trial Media Coalition v. United States Dist. Court for the E. Dist. of Cal., 183 F.3d 949, 953 (9th Cir. 1999); Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998).

65. Dilley v. Gunn, 64 F.3d 1365, 1369 (9th Cir. 1995).

66. *Alaska Ctr.*, 189 F.3d at 856 (quoting 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533 (2d ed. 1984)).

67. *See Barilla*, 886 F.2d at 1520.

68. *Alaska Ctr.*, 189 F.3d at 856.

69. 19 F.3d 449 (9th Cir. 1994) (en banc).

70. *Id.* at 454 (quoting *Barilla*, 886 F.2d at 1520 (discussing Honig v. Doe, 484 U.S 305 (1988))).

71. *Id.* at 451.

72. *Id.*

73. *Id.* at 453.

74. *Id.* at 454.

The Ninth Circuit will not apply the exception when a recurrence of the challenged action is "highly unlikely"[75] or "speculative."[76] In *Mayfield v. Dalton*,[77] the court noted that "'speculative contingencies afford no basis for . . . passing on the substantive issues'" of a case.[78] The plaintiffs, two marines, challenged the constitutionality of a Department of Defense (DOD) policy requiring tissues sample for DNA analysis from all members of the armed services.[79] By the time the case reached the Ninth Circuit, both plaintiffs had left active duty, allowing the DOD to argue that the case had become moot.[80] The marines countered that their case was not moot because they were subject to recall to active duty in the event of a national emergency.[81] The *Mayfield* court held that the case was moot because there was no reasonable expectation that the marines would again have to submit DNA samples.[82] The marines' recall to active duty "could happen only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable."[83] In addition, the Ninth Circuit concluded that several changes made by the DOD to its DNA sampling program after the plaintiffs had brought suit had "materially alter[ed] many aspects of the policy that [the marines] challenged" and rendered it unlikely that they would again be subjected to the challenged DNA sampling program.[84]

Similarly, in *Dufresne v. Veneman*,[85] the Ninth Circuit held that the case was moot after concluding that the recurrence of the challenged

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75. Unabom Trial Media Coalition v. United States Dist. Court for the E. Dist. of Cal., 183 F.3d 949, 953 (9th Cir. 1999); Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998).

76. Dilley v. Gunn, 64 F.3d 1365, 1369 (9th Cir. 1995).

77. 109 F.3d 1423 (1997).

78. *Id.* at 1425 (quoting Preiser v. Newkird, 422 U.S. 395, 403 (1975) (quoting Hall v. Beals, 396 U.S. 45, 49 (1969) (internal quotations omitted))).

79. *Id.* at 1424. The plaintiffs argued that the lack of safeguards guaranteeing privacy of DNA donors violated their Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* The plaintiffs also feared that genetic information obtained from the samples would be used to discriminate against applicants for insurance, benefit programs, or jobs. *Id.*

80. *Id.* at 1425.

81. *Id.*

82. *Id.* at 1426.

83. *Id.* at 1425.

84. *Id.* at 1425–26. The changes included shortening the retention period of samples and implementing a mechanism for service members to request destruction of their DNA samples upon separation from the military. *Id.*

85. 114 F.3d 952 (9th Cir. 1997).

action was "too remote to preserve a live case or controversy."[86] Valerie Dufresne alleged that California's use of chemical pesticides against Mediterranean fruit flies exacerbated her Chronic Fatigue Syndrome.[87] She sued several federal and California officials to enjoin the spraying of pesticides to combat future fruit fly infestations.[88] Before the *Dufresne* case reached the Ninth Circuit, California agriculture officials reported to the court that they had eradicated the fruit fly by using sterile insects,[89] and that they had found no live fruit flies in California since 1995.[90] California officials anticipated that any future outbreak would also be combated with sterile insects.[91] Based on the eradication of the fruit fly and the new, pesticide-free method of combating future infestations, the *Dufresne* court held that the case was moot.[92]

D. *Both the U.S. Supreme Court and the Ninth Circuit Allow the Public Interest to Weigh Against Mootness in Determining the Legality of an Action*

Federal courts do not recognize a general exception to mootness for cases with a continuing public interest.[93] However, the public interest in having the legality of an issue settled will weigh against mootness provided the case satisfies one of the recognized exceptions to mootness.[94] The U.S. Supreme Court and the Ninth Circuit have considered the public interest in cases applying both the capable-of-

86. *Id.* at 955.

87. *Id.* at 954. A support group for sufferers from Chronic Fatigue Syndrome joined Dufresne's suit as plaintiffs. *Id.* at 952.

88. *Id.* at 954. Dufresne initially sought monetary damages, but dropped that claim before the case reached Ninth Circuit. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 955.

93. *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). Some state courts explicitly recognize an exception to mootness for public interest. *See, e.g.*, Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks, 48 P.3d 1165, 1168 (Alaska 2002) (recognizing the public interest exception to the mootness doctrine in Alaska); Hart v. Dep't of Soc. & Health Servs., 111 Wash. 2d 445, 447–51, 759 P.2d 1206, 1208–09 (1988) (outlining the extensive use of the public interest exception to mootness in Washington).

94. *See* County of Los Angeles v. Davis, 440 U.S. 625, 643–44 (1979); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

repetition-yet-evading-review and voluntary cessation exceptions to mootness.[95]

Throughout the U.S. Supreme Court's development of the exceptions to mootness, the Court has also considered the public interest in settling the legality of a challenged action.[96] In *Southern Pacific Terminal Co. v. ICC*,[97] the Court applied the capable-of-repetition-yet-evading-review exception for the first time and considered the public's interest in settling the legality of a two-year order issued by the Interstate Commerce Commission (ICC).[98] Although the order had expired before the case reached the Court, the Court refused to dismiss the case as moot because review of the ICC "ought not to be . . . defeated, by short-term orders, capable of repetition, yet evading review."[99] The *Southern Pacific* Court went on to quote *Boise City Irrigation and Land Co. v. Clark*,[100] a Ninth Circuit mootness decision, to support its proposition that the case was not moot.[101] The *Boise City* court considered the "propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."[102]

In *United States v. W.T. Grant Co.*,[103] the U.S. Supreme Court held that the voluntary cessation exception,[104] "together with a public interest in having the legality of the practices settled, militate[d] against a

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95. *See W.T. Grant Co.*, 345 U.S. at 632 (applying the voluntary cessation exception); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515–16 (1911) (applying the capable-of-repetition-yet-evading-review exception); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994) (applying the capable-of-repetition-yet-evading-review exception); Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1358–59 (9th Cir. 1986) (applying the voluntary cessation exception to mootness).

96. *See S. Pac. Terminal Co.*, 219 U.S. at 515–16.

97. 219 U.S. 498 (1911).

98. *Id.* at 515–16.

99. *Id.* at 514–15.

100. 131 F. 415 (9th Cir. 1904). In *Boise City*, the court held that the appellant's challenge of a municipal ordinance fixing the water rate did not become moot when the ordinance expired. *Id.* at 419.

101. *S. Pac. Terminal Co.*, 219 U.S. at 516.

102. *Boise City*, 131 F. at 419.

103. 345 U.S. 629 (1953).

104. The "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Id.* at 632. The voluntary cessation exception prevents a defendant who has ceased the challenged activity from resuming the activity once the case is dismissed as moot. United States v. Concentrated Phosphate Exp. Co., 393 U.S. 199, 202–03 (1968).

mootness conclusion."[105] The federal government brought suit against the director of W.T. Grant Company, who was also the director of three other corporations, for violations of the Clayton Act.[106] Because the case was the first opportunity for the Court to consider the Clayton Act's prohibition of interlocking corporate directors, the Court concluded that there was a public interest in reaching the merits of the case.[107]

Based on the U.S. Supreme Court's decisions in *Southern Pacific Terminal Co.* and *W.T. Grant*, the Ninth Circuit has considered the public interest in determining the legality of a challenged action in cases where it has applied both the capable-of-repetition-yet-evading-review and voluntary cessation exceptions.[108] After holding that the capable-of-repetition-yet-evading review exception applied in *Miller*, the court stated that "the public interest weighs heavily in favor of our resolving this appeal."[109] The court reasoned that it was important for both the NLRB and employers to know what criteria courts would apply in reviewing preliminary injunctions issued by the NLRB.[110]

In *Armster v. United States District Court for the Central District of California* (*Armster II*),[111] the Ninth Circuit considered the public interest in settling the constitutionality of suspending federal civil jury trials.[112] The *Armster II* decision followed the court's earlier decision in *Armster v. United States District Court for the Central District of California* (*Armster I*)[113] that such suspension was unconstitutional.[114] In

105. *W.T. Grant Co.*, 345 U.S. at 632.

106. *Id.* at 630.

107. *See id.* at 632.

108. *See* Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987) (applying the capable-of-repetition-yet-evading-review exception and citing *W.T. Grant* in support of the proposition that public interest weighs against mootness); Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1360 (9th Cir. 1986) (applying the voluntary cessation exception and citing *Southern Pacific Terminal Co.*, *Boise City*, and *W.T. Grant* in support of the proposition that there is a strong public interest when the court decides important precedential issues); Olagues v. Russoniello, 797 F.2d 1511, 1517 (9th Cir. 1986) (applying the capable-of-repetition-yet-evading review exception and citing *W.T. Grant* for the proposition that a strong public interest weighs against mootness).

109. Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

110. *Id.* The Ninth Circuit has also considered a public interest in a wide variety of legal issues. *See, e.g.*, Greenpeace Action v. Franklin, 982 F.2d 1342, 1348 (9th Cir. 1992) (considering the public interest in pollock fishing in the Gulf of Alaska); *Alaska Fish & Wildlife Fed'n*, 829 F.2d at 939 (considering the public interest in Native American hunting of migratory birds); *Olagues*, 797 F.2d at 1517 (considering the public interest in alleged voter rights violations).

111. 806 F.2d 1347 (9th Cir. 1986).

112. *See id.* at 1360–61.

113. 792 F.2d 1423 (9th Cir. 1986).

June 1986, the Administrative Office of the United States Courts sent a memorandum to all district judges suggesting that they suspend civil jury trials until September 30, 1986 in response to a federal budget shortfall.[115] The *Armster I* petitioners sought writs of mandamus from the Ninth Circuit requiring district judges who followed the memo's suggestion to impanel juries and proceed with civil trials.[116] The *Armster I* court held that suspending civil jury trials in response to a budget shortfall violated the Seventh Amendment.[117]

On the same day that the *Armster I* court released its decision, Congress approved a supplemental appropriations bill that eliminated the budget shortfall.[118] The Administrative Office subsequently rescinded its recommendation to suspend civil jury trials.[119] Based on that rescission, the Justice Department filed a motion to vacate the *Armster I* decision for mootness, which was addressed by the Ninth Circuit court in *Armster II*.[120] The *Armster II* court rejected the Justice Department's motion for three reasons.[121] First, the court's holding in *Armster I* addressed the district judges' suspension of jury trials and not the Administrative Office's recommendation.[122] Consequently, rescission of that recommendation was not a "sufficient basis for mooting [the] decision regarding the constitutional obligation of the . . . district courts."[123] Second, at the time the *Armster I* court rendered its decision, it had before it a case or controversy meeting the Article III justiciability requirements.[124] An appellate court is not required to dismiss a case as moot based on events that occur after it has rendered its final judgment.[125] Third, the voluntary cessation exception to mootness

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114. *Id.* at 1425.

115. *Id.* at 1424.

116. *Id.*

117. *Id.* at 1425. The *Armster I* court declined to issue the writs of mandamus choosing instead to rely on the district judges to voluntarily reinstate jury trials. *Id.* at 1431.

118. Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1350 (9th Cir. 1986) (finding that Congress approved the Supplemental Appropriations Bill, H.R. 4515, on June 26, 1986); *Armster*, 792 F.2d at 1423 (submitting decision on June 26, 1986).

119. *Armster*, 806 F.2d at 1350.

120. *Id.*

121. *Id.* at 1353.

122. *Id.*

123. *Id.* at 1354.

124. *Id.*

125. *Id.* at 1355. Appellate courts do have discretion to vacate earlier decisions, but the *Armster II* court noted no reason to exercise that discretion. *Id.* at 1355–57.

prevented the case from being moot.[126] The court held that each of these three grounds was alone sufficient to require it to deny the Justice Department's motion.[127]

After applying the voluntary cessation exception, the *Armster II* court reasoned that the strong public interest in determining the constitutionality of suspending jury trials further weighed against mootness.[128] The court stated that the Ninth Circuit "has long held that there is a strong public interest in the court's resolving important precedential issues, a public interest that militates against a finding of mootness in cases presenting such issues."[129] The court also concluded that "[c]learly, the 'flexible character of the [Article] III mootness doctrine' encompasses consideration of the public interest in safeguarding fundamental constitutional rights."[130]

In sum, the mootness doctrine recognizes an exception for cases capable-of-repetition-yet-evading-review. The exception is applicable where a challenged action is too short in duration to be fully litigated and when there is a reasonable expectation that the complaining party will be subjected to the same action in the future. Neither U.S. Supreme Court nor Ninth Circuit decisions applying the exception require that there be a demonstrated probability that the challenged action will recur. However, no reasonable expectation exists when the recurrence of the challenged action is "highly unlikely" or "speculative." Both the U.S. Supreme Court and the Ninth Circuit have bolstered the application of exceptions to mootness with considerations of the public interest in settling the legality of a challenged action.

II. THE NINTH CIRCUIT HELD *FOSTER V. CARSON* MOOT AND THE CAPABLE-OF-REPETITION-YET-EVADING-REVIEW EXCEPTION INAPPLICABLE

In response to a severe state budget crisis, the chief justice of the Oregon Supreme Court, acting as the administrative head of the state

126. *Id.* at 1357.

127. *Id.* at 1353. When there are two or more grounds on which an appellate court may rest its decision and the court adopts all of those grounds, each of those grounds is the judgment of the court and of equal validity with the other grounds. United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924). None of the grounds are considered dicta. *Id.*

128. *Armster*, 806 F.2d at 1360.

129. *Id.*

130. *Id.* (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980)).

judiciary, issued the Budget Reduction Plan (BRP) that suspended appointments of indigent defense counsel between March 1 and June 30, 2003.[131] In *Foster v. Carson*, the plaintiffs brought suit challenging the constitutionality of the suspension.[132] Before the Ninth Circuit heard the case, the BRP had expired.[133] The Ninth Circuit held that the expiration of the BRP mooted the case and rejected the plaintiffs' argument that the capable-of-repetition-yet-evading-review exception applied.[134]

A. In Foster, *the Plaintiffs Challenged the Oregon Chief Justice's Suspension of Indigent Defense Counsel Appointments*

The BRP issued by the chief justice cut off funding for the appointment of indigent defense counsel for nine non-violent offenses.[135] In response to the BRP, Metropolitan Public Defender Services, Inc., Public Defender Services of Lane County, the District Attorney for Lane County, and several indigent defendants brought suit in state court.[136] After the state court dismissed the action, the plaintiffs sued the chief justice in the U.S. District Court for the District of Oregon,[137] alleging that the BRP violated their rights under the First, Sixth, and Fourteenth Amendments.[138] The plaintiffs requested that the district court declare that the suspension of funding was unconstitutional and void.[139] The district court held that all plaintiffs had standing but dismissed the case

131. Foster v. Carson, 347 F.3d 742, 744 (9th Cir. 2003).

132. *Id.*

133. *Id.* at 745.

134. *Id.* at 745–48.

135. *Id.* at 744. Offenses included certain misdemeanors, misdemeanor probation violations, adult property and drug felonies, and adult controlled substance possession felonies. *Id.* The BRP also closed all offices of the Oregon courts on Fridays. *Foster*, 347 F.3d at 744. At the initial court appearance, affected cases were to be rescheduled for a court appearance in the next budget period, which began on July 1, 2003. *Id.*

136. *Id.* at 745.

137. *Id.* at 742. The defendants also included the state court administrator and several Oregon judges. *Id.*

138. *Id.* at 745.

139. *Id.* at 746. The plaintiffs also sought costs and fees and any other relief that the court deemed appropriate. *Id.*

on *Younger* abstention grounds.[140] Plaintiffs then appealed to the Ninth Circuit.[141]

B. *The* Foster *Court Held That the Case Was Moot*

On appeal, the Ninth Circuit held that the *Foster* case was moot.[142] By the time the court heard the case, the chief justice had allowed the BRP to expire, and the Oregon State Legislature had passed a new state budget that removed the short-term need to suspend funds for indigent defense counsel.[143] With this funding restored, the *Foster* court concluded that it could neither provide any additional relief to the plaintiffs nor undo the harm caused by the delay in the appointment of counsel.[144]

C. *The* Foster *Court Also Held That the Capable-of-Repetition-yet-Evading-Review Exception Did Not Apply*

The court rejected the plaintiffs' contention that capable-of-repetition-yet-evading-review exception applied to the case.[145] The court agreed that because the parties had made all possible efforts to expeditiously litigate the case before the BRP expired, the BRP was too short in duration to be fully litigated before it ceased.[146] However, the court held that the plaintiffs had not established a reasonable expectation that the chief justice would again cut funding for indigent defense counsel.[147]

The *Foster* court held that the *Armster II* decision provided neither controlling nor persuasive authority for applying the capable-of-repetition-yet-evading-review exception.[148] In so holding, the court rejected the plaintiffs' use of the *Armster II* case as "authority for finding that the . . . exception applies due to the importance of this case."[149] The

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140. *Id.* at 745. Federal courts will not enjoin enforcement of state law unless the facts demonstrate that an injunction is necessary to prevent irreparable harm to the plaintiff. Younger v. Harris, 401 U.S. 37, 43 (1971).

141. *Foster*, 347 F.3d at 745.

142. *Id.* at 746.

143. *Id.* at 745.

144. *Id.* at 746.

145. *Id.* at 748–49.

146. *Id.* at 746.

147. *Id.* at 748.

148. *Id.*

149. *Id.* at 746.

court distinguished the *Armster II* decision based on its unique procedural posture.[150] After the *Armster I* case was decided on its merits, the Justice Department moved for dismissal of the case as moot based on the developments that occurred post judgment.[151] The *Armster II* court considered the Justice Department's motion to dismiss.[152]

The *Foster* court explained that Ninth Circuit precedent did not allow the capable-of-repetition-yet-evading-review exception to apply when the plaintiffs demonstrated only "a mere possibility that something *might* happen."[153] To support this proposition, the court cited *Mayfield* and *Dufresne*.[154] The court noted that *Foster* presented a more difficult question of mootness than *Dufresne* because Oregon's budget crisis, unlike the Mediterranean fruit fly, had not been eradicated.[155] However, the court concluded that the prospect of a future funding suspension, like the possibility of future DNA tests in *Mayfield* or future pesticide spraying in *Dufresne*, depended on "speculative contingencies."[156] In *Foster*, those contingencies included Oregon's economic condition, indigent defense counsel funding choices made by the legislature, demand for indigent defense counsel, and the chief justice's reaction to any budget shortfall.[157] These unknown contingencies, the court reasoned, outweighed the fact that the chief justice had suspended funding once before.[158] The court considered that fact to be the only support for the plaintiffs' argument that the capable-of-repetition-yet-evading-review exception saved the case from mootness.[159] The court placed little weight on the plaintiffs' contention that the five special legislative sessions cutting funds from the 2001–2003 budget after it had been passed indicated that a passed budget did not guarantee funding.[160]

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150. *Id.* at 747.

151. Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1350 (9th Cir. 1986).

152. *Id.*; *see also supra* notes 77–92 and accompanying text.

153. *Foster*, 347 F.3d at 748.

154. *Id.*

155. *Id.*

156. *Id.* at 748–49.

157. *Id.* at 748.

158. *See id.*

159. *Id.*

160. *Id.*

D. *Information Introduced by the* Foster *Plaintiffs in a Supplemental Brief Suggested that Oregon's Budget Crisis Had Not Ended*

The *Foster* plaintiffs submitted a supplemental memorandum to the court suggesting that Oregon's budgetary crisis was far from resolved and establishing that the Oregon legislature anticipated future funding suspensions for indigent defense counsel.[161] The memorandum outlined events that had occurred subsequent to the expiration of the BRP.[162] The Oregon legislature balanced the 2003–2005 biennial budget by passing a package of spending and revenue bills that included a controversial three-year income tax surcharge.[163] While *Foster* was before the Ninth Circuit, voters opposing the income tax surcharge were mounting an effort to repeal it through a special referendum.[164] In a referendum held in January 2003, Oregon voters rejected a smaller income tax surcharge that the legislature had enacted in response to the severe budget deficit.[165] Anticipating that voters might also reject the surcharge used to balance the 2003–2005 biennial budget, the legislature included certain provisions in House Bill 5077[166]—one of the bills passed to balance the budget—that would disappropriate funds to various state agencies in the event voters repeal the income tax surcharge.[167] Among the agencies

161. *See* Appellants' Supplemental Memorandum at 1–4, *Foster* (Nos. 03-035457 & 03-035458).

162. *See id.* The facts reported by the plaintiffs in their supplemental memorandum are supported by media coverage of the Oregon legislature's efforts to balance the budget and the resulting voter action to repeal the income tax surcharge. *See infra* notes 163–168 and accompanying text.

163. Appellants' Supplemental Memorandum at 5; Janine Har & David Hogan, *227 Days: The House Wraps Up the 2003–2005 Budget and Decides a Flurry of Other Bills*, THE OREGONIAN, Aug. 28, 2003, at A1.

164. Appellants' Supplemental Memorandum at 4–5; James Mayer, *Antitax Referendum Filing Starts Clock*, THE OREGONIAN, Aug. 30, 2003, at E1. On February 3, 2004, Oregon voters overwhelmingly rejected the state legislature's tax surcharge in a statewide referendum. James Mayer & Dave Hogan, *Voters Trounce Tax-Hike Measure*, THE OREGONIAN, Feb. 4, 2004, at A1.

165. Appellants' Supplemental Memorandum at 4; James Mayer, *Legislature Signs off on Tax Increase: The Vote: The Stage Is Set for a Budget and Adjournment After the House Accepts a Three-Year Income Tax Surcharge*, THE OREGONIAN, Aug. 21, 2003, at A1; *see also* OR. SEC'Y OF STATE, 2003 JANUARY SPECIAL ELECTION ONLINE VOTER'S GUIDE, *at* http://www.sos.state.or.us/elections/jan282003/guide/toc.htm; OR. SEC'Y OF STATE, JANUARY 28, 2003, SPECIAL ELECTION: STATE MEASURE NO. 28, at 1, *available at* http://www.sos.state.or.us/elections/jan282003/s03abstract.pdf (providing official results of the special election).

166. H.R. 5077, 72d Legis. Assem., Reg. Sess., 2003 Or. Laws ch. 710.

167. *Id.* §§ 88–89; Appellants' Supplemental Memorandum at 5; James Mayer, *Senate Approves Spending for Schools*, THE OREGONIAN, Aug. 26, 2003, at B1.

targeted by House Bill 5077 is the Oregon Judicial Department, which stands to lose $14,414,400 for indigent defense services.[168]

In sum, the chief justice of the Oregon Supreme Court suspended funds for the appointment of indigent defense counsel. On appeal, the *Foster* court held that the case was moot because the suspension of funds had been lifted. The court also held that the capable-of-repetition-yet-evading-review exception to mootness did not apply because there was no reasonable expectation that the plaintiffs faced injury from a future suspension of funds. In a supplemental brief filed with the court, the *Foster* plaintiffs presented evidence that Oregon's budget crisis was ongoing and that the Oregon legislature anticipated voter rejection of a key income tax surcharge. Without that surcharge, the Oregon Judicial Department was again at risk of a substantial budget cut.

III. THE CAPABLE-OF-REPETITION-YET-EVADING-REVIEW EXCEPTION PREVENTED *FOSTER* FROM BEING MOOT

Under both U.S. Supreme Court and Ninth Circuit precedent, there was a reasonable expectation in *Foster* that the chief justice would again suspend funding for indigent defense counsel.[169] While neither court imposes a rigid standard for demonstrating that a reasonable expectation exists, the prevailing Ninth Circuit standard requires that the recurrence of the injury be more than "highly unlikely" or "speculative."[170] The facts before the *Foster* court established a reasonable expectation that the action would recur; such recurrence was neither "highly unlikely" nor "speculative."[171] The public interest in the legality of the chief justice's action further supports application of the capable-of-repetition-yet-evading-review exception.[172]

A. The Foster *Plaintiffs Presented Facts Demonstrating a Reasonable Expectation That the Chief Justice Would Again Suspend Funds for Indigent Defense Counsel*

Neither U.S. Supreme Court nor Ninth Circuit precedent imposes a stringent standard for establishing a reasonable expectation that an

168. Or. H.R. 5077, § 88; Appellants' Supplemental Memorandum at 6.

169. *See infra* Part III.A.

170. *See supra* Part I.B–C.

171. *See infra* Part III.A.

172. *See infra* Part III.B.

action will recur.[173] A party may demonstrate a reasonable expectation by demonstrating "some indication" of recurrence.[174] However, the Ninth Circuit will not apply the capable-of-repetition-yet-evading-review exception when the recurrence of the challenged action is "highly unlikely"[175] or "speculative."[176] As in both *Honig* and *Miller*, the facts in *Foster* indicated that the challenged action would recur and that such recurrence was neither "highly unlikely" nor "speculative."[177] The *Foster* court relied on *Mayfield* and *Dufresne* as authority for finding that the capable-of-repetition-yet-evading-review exception did not apply.[178] However, unlike *Foster*, the facts in both *Mayfield* and *Dufresne* demonstrated that the recurrence of the challenged action was "highly unlikely" and "speculative."[179]

Both the U.S. Supreme Court in *Honig* and the Ninth Circuit in *Miller* held that there was a reasonable expectation that a challenged action would recur.[180] In *Honig*, the U.S. Supreme Court held that there was a reasonable expectation that California would again violate Smith's rights under the EHA.[181] In order for that to occur, Smith would have to re-enroll in a California school, be placed in an environment where his behavior could not be controlled, act in an aggressive manner caused by his disability, and be expelled for his behavior.[182] The Court concluded that this chain of events constituted a reasonable expectation even though Smith had expressed no intention to re-enroll in a California school and had less than a year remaining before the EHA no longer applied to him.[183] Similarly, in *Miller*, the Ninth Circuit held that there was a reasonable expectation that CPMC would face a future NLRB

173. *See* Honig v. Doe, 484 U.S. 305, 320 n.6 (1988); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

174. Alaska Ctr. for the Env't v. United States Forest Serv., 189 F.3d 851, 856 (9th Cir. 1999).

175. Unabom Trial Media Coalition v. United States Dist. Court for the E. Dist. of Cal.,183 F.3d 949, 952–53 (9th Cir. 1999); Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998).

176. Dilley v. Gunn, 64 F.3d 1365, 1369 (9th Cir. 1995).

177. *See infra* notes 189–192 and accompanying text.

178. Foster v. Carson, 347 F.3d 742, 748 (9th Cir. 2003).

179. *See infra* notes 194–202 and accompanying text.

180. *See* Honig v. Doe, 484 U.S. 305, 322–24 (1988); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

181. *Honig*, 484 U.S. at 322–24; *see also supra* notes 46–61 and accompanying text.

182. *Honig*, 484 U.S. at 320–23.

183. *See id.* at 322–24.

unfair labor dispute based on its ongoing reorganization, large size, and collective bargaining agreements with five other unions.[184]

The facts before the *Foster* court indicated that the chief justice would again be forced to suspend funding for indigent defense counsel. As part of the 2003–2005 balanced budget, the Oregon legislature approved an income tax surcharge as a necessary source of revenue.[185] The possibility that Oregon voters would reject the surcharge was more than merely speculative—a smaller tax surcharge had been rejected by referendum in January 2003.[186] In response, the Oregon legislature enacted provisions that would automatically disappropriate funds to state agencies in the event that Oregon voters repeal the tax surcharge.[187] These automatic cuts include $14,414,400 from the budget for indigent defense services.[188]

In *Foster*, as in *Honig* and *Miller*, the facts provided "some indication" that the challenged action would recur and demonstrated that such recurrence was neither "highly unlikely" nor "speculative."[189] In *Honig* and *Miller*, the recurrence of the challenged action relied on a series of events not guaranteed to occur.[190] In both cases, the courts held that there was a reasonable expectation that the challenged action would recur and applied the capable-of-repetition-yet-evading-review exception.[191] The facts in *Foster* similarly support a conclusion that the chief justice will again face a funding shortage requiring a suspension of indigent defense counsel appointments.[192]

Unlike in *Foster*, the recurrence of the challenged action in *Mayfield* was "highly unlikely" and "speculative."[193] In *Mayfield* the plaintiffs'

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184. *Miller*, 19 F.3d at 454; *see also supra* notes 69–74 and accompanying text.

185. *See supra* note 163 and accompanying text.

186. *See supra* note 165 and accompanying text.

187. *See supra* note 167 and accompanying text.

188. H.R. 5077, § 88, 72d Legis. Assem., Reg. Sess., 2003 Or. Laws ch. 710, § 88; *see also supra* note 168 and accompanying text.

189. *Compare* Honig v. Doe, 484 U.S. 305, 322–24 (1988) (holding that there was a reasonable expectation that the plaintiff would re-enroll in a California school, misbehave because of his disability, and be expelled for that misbehavior) *and Miller*, 19 F.3d at 454 (holding that it was likely that a hospital would again take action leading to an NLRB proceeding) *with supra* notes 185–188 and accompanying text (suggesting that Oregon's ongoing budget crisis will result in a future suspension of indigent defense counsel appointments).

190. *See Honig*, 484 U.S. at 322–24; *Miller*, 19 F.3d at 454.

191. *See Honig*, 484 U.S. at 322–24; *Miller*, 19 F.3d at 454.

192. *See supra* notes 163–168 and accompanying text.

193. Mayfield v. Dalton, 109 F.3d 1423, 1425 (9th Cir. 1997).

suit became moot when both marines left active duty.[194] In addition, because the DOD had changed its DNA sampling program, the marines would not be subjected to the same program even if they were recalled.[195] There was no evidence of a national emergency that would necessitate military recalls nor was there evidence suggesting that the plaintiffs, out of all recently discharged members of the Marine Corps, would be targeted for any such recall.[196] Furthermore, there was no indication that the DOD intended to revert to the version of its DNA sampling program challenged in the original suit.[197] In contrast, the facts presented by the *Foster* plaintiffs demonstrated that Oregon's budget crisis would continue and that the state legislature would again cut funding to indigent defense counsel.[198]

The facts in *Dufresne* also demonstrated that the future use of pesticides was both highly unlikely and speculative.[199] In *Dufresne*, the effectiveness of the sterile insects—no live Mediterranean fruit flies had been found in California since 1995—and the assertion by California officials that sterile insects would be used to combat any future infestations removed any reasonable expectation that the state would again use chemical pesticides.[200] As the *Foster* court acknowledged, Oregon's budget crisis, unlike the Mediterranean fruit fly, had not been "eradicated."[201] In addition, no Oregon officials asserted that future suspensions of indigent defense counsel would be unnecessary due to an improved method of addressing state budget shortfalls.[202]

The Ninth Circuit has acknowledged that determining whether a case has become moot requires a "'highly individualistic . . . appraisal of the

194. *Id.*

195. *See id.* at 1426.

196. *See id.* at 1425–26.

197. *See id.*

198. *Compare id.* at 1425 (holding that there was no reasonable expectation that marines would be recalled to active duty) *with* Foster v. Carson, 347 F.3d 742, 748 (9th Cir. 2003) (holding that there was no reasonable expectation that the plaintiffs would again be subjected to a suspension of indigent defense counsel appointments), *and* Appellants' Supplemental Memorandum at 1–4, *Foster* (Nos. 03-035457 & 03-035458) (providing facts supporting the ongoing nature of Oregon's budget crisis and the likelihood of future cuts to indigent defense counsel budgets).

199. Dufresne v. Veneman, 114 F.3d 952, 954 (9th Cir. 1997).

200. *See id.* at 954–55.

201. *Foster*, 347 F.3d at 748.

202. *See id.* at 746–48.

facts.'"[203] As in *Honig* and *Miller*, the facts before the *Foster* court established a reasonable expectation that the challenged action would recur.[204] Finding a reasonable expectation in *Foster* is further supported when the facts in that case are compared with the facts of both the *Mayfield* and *Dufresne* cases.[205]

B. *The Strong Public Interest in Settling the Legality of Suspending Indigent Defense Counsel Appointments Bolsters Application of the Capable-of-Repetition-yet-Evading-Review Exception to* Foster

Under U.S. Supreme Court and Ninth Circuit precedent, courts can weigh the public interest in settling the legality of an issue against mootness.[206] The Ninth Circuit may consider the public interest after finding that either the capable-of-repetition-yet-evading-review or voluntary cessation exceptions to mootness applies.[207] Even though the *Foster* court correctly held that the *Armster II* decision did not provide authority for applying the capable-of-repetition-yet-evading-review exception,[208] the *Armster II* decision provides persuasive authority for allowing the public interest in judging the constitutionality of indigent defense counsel suspensions to weigh against mootness.[209] Based on both U.S. Supreme Court and Ninth Circuit precedent, the *Foster* court should have allowed the public interest in determining the constitutionality of suspending indigent defense counsel appointments to weigh against mootness.[210]

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203. Alaska Ctr. for the Env't v. United States Forest Serv., 189 F.3d 851, 856 (9th Cir. 1999) (quoting 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533 (2d ed. 1984)).

204. *See supra* notes 163–168, 189–191 and accompanying text; text accompanying note 192.

205. *See supra* notes 194–202 and accompanying text.

206. *See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

207. *See* Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987) (applying the capable-of-repetition-yet-evading-review exception and citing *W.T. Grant* in support of the proposition that public interest weighs against mootness); Olagues v. Russoniello, 797 F.2d 1511, 1517 (9th Cir. 1986) (applying the capable-of-repetition-yet-evading review exception and citing *W.T. Grant* for the proposition that a strong public interest weighs against mootness).

208. Foster v. Carson, 347 F.3d 742, 748 (9th Cir. 2003).

209. *See* Armster v. United States Dist. Court for the Cent. Dist. of Cal., 806 F.2d 1347, 1360 (9th Cir. 1986).

210. *See infra* notes 231–239 and accompanying text.

In *Armster II*, the court denied the Justice Department's motion to vacate the *Armster I* decision as moot on three independently sufficient grounds.[211] The court's second ground for denying the motion was the procedural posture of the case.[212] The Justice Department argued that the Administrative Office's post-judgment rescission of its recommendation to suspend jury trials rendered the case moot.[213] The court disagreed and held that it was not required to vacate a judgment as moot based on events that occurred after it had entered that judgment.[214] The court went on to hold that the voluntary cessation exception to mootness provided a third ground for denying the Justice Department's motion.[215] After applying the voluntary cessation exception, the court emphasized that the Ninth Circuit "has long held that there is a strong public interest in the court's resolving important precedential issues, a public interest that militates against a finding of mootness in cases presenting such issues."[216]

While the *Foster* court correctly held that the *Armster II* decision was neither controlling nor persuasive authority for applying the capable-of-repetition-yet-evading-review exception, its holding relied on inappropriate grounds.[217] The *Foster* court rejected the use of the *Armster II* decision as precedent because the case's procedural posture differed from that of *Foster*.[218] However, the *Armster II* court addressed the case's procedural posture and held that it was one of the three independent grounds for denying the motion to vacate as moot.[219] When an appellate court relies on several independent grounds in its holding, each of those grounds is a valid judgment of the court.[220] Therefore, the *Armster II* court's application of the voluntary cessation exception and the consideration of public interest retain their precedential value even

211. *Armster*, 806 F.2d at 1353.

212. *Id.*

213. *Id.* at 1350–51.

214. *Id.* at 1354–57.

215. *Id.* at 1357–61.

216. *Id.* at 1360.

217. *See infra* notes 218–221 and accompanying text.

218. Foster v. Carson, 347 F.3d 742, 746–48 (9th Cir. 2003).

219. *See Armster*, 806 F.2d at 1350.

220. United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); *see also supra* note 127 and accompanying text.

though the *Armster II* case had a different procedural posture than the *Foster* case.[221]

The *Armster II* court's consideration of the public interest in applying the voluntary cessation exception does not support applying the capable-of-repetition-yet-evading-review exception to *Foster* based only on the public interest in determining the constitutionality of the chief justice's actions.[222] As the U.S. Supreme Court did in *W.T. Grant*,[223] the *Armster II* court held that the public interest weighed against a finding of mootness after it had already determined that the voluntary cessation exception applied.[224] It did not rely on the public interest alone as grounds for applying the voluntary cessation exception.[225] The *Foster* court was correct when it refused to apply the capable-of-repetition-yet-evading-review exception based only on the public interest.[226]

Although the *Armster II* decision does not support using the public interest as the sole basis for applying the capable-of-repetition-yet-evading-review exception to *Foster*,[227] it does support allowing the public interest in determining the constitutionality of a challenged action to weigh against mootness.[228] The *Armster II* court reasoned that it should avoid precluding judicial review of allegedly unconstitutional behavior unless it is "abundantly clear" that it is required to do so by the limitations of the mootness doctrine.[229] The court went on to state that "[c]learly, the 'flexible character of the [Article] III mootness doctrine' encompasses consideration of the public interest in safeguarding fundamental constitutional rights."[230]

The *Foster* court should have allowed the public interest in determining the constitutionality of the chief justice's suspension of

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221. *See* Sze v. INS, 153 F.3d 1005, 1009 (9th Cir. 1998) (citing *Armster II* in applying the voluntary cessation exception); *see also* Smith v. Univ. of Wash., Law Sch., 233 F.3d 1188, 1194 (9th Cir. 2000) (citing *Armster II* as authority for the proposition that the voluntariness of cessation is relevant to determining the likelihood of recurrence).

222. *See Armster II*, 806 F.2d at 1357–61 (considering the public interest after holding that the voluntary cessation exception applied).

223. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

224. *Armster*, 806 F.2d at 1360.

225. *Id.*

226. *See* Foster v. Carson, 347 F.3d 742, 748 (9th Cir. 2003).

227. *See supra* notes 222–226 and accompanying text.

228. *Armster*, 806 F.2d at 1360–61.

229. *Id.* at 1360.

230. *Id.* (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980)).

indigent defense counsel appointments to weigh against mootness.[231] Both the U.S. Supreme Court and the Ninth Circuit have recognized that the public interest in determining the legality of a challenged action may militate against mootness.[232] The Ninth Circuit has a long history of considering the public interest[233] in cases involving both the capable-repetition-yet-evading-review and voluntary cessation exceptions.[234] There is a strong public interest in determining the constitutionality of suspending indigent defense counsel appointments similar to the public interest at stake in *Armster II*.[235] Oregon, along with many of her sister states,[236] continues to face a severe budget crisis that threatens the availability of funds for indigent defense counsel.[237] By holding the case moot, the *Foster* court avoided deciding whether the Oregon chief justice's actions were unconstitutional and left him, and officials in other states, free to restrict indigent defendants' access to counsel in the future.[238] As the Ninth Circuit stated in *Boise City*, there is "propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."[239]

IV. CONCLUSION

The Ninth Circuit should have held that the capable-of-repetition-yet-evading-review exception applied to *Foster*. Determining whether a case is moot depends on an analysis of the facts in each case, and the facts, as

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231. *See infra* notes 232–239 and accompanying text.

232. *See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 454 (9th Cir. 1994).

233. *See* Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904).

234. *See* Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987) (applying the capable-of-repetition-yet-evading-review exception and citing *W.T. Grant* in support of the proposition that public interest weighs against mootness); Olagues v. Russoniello, 797 F.2d 1511, 1517 (9th Cir. 1986) (applying the capable-of-repetition-yet-evading-review exception and citing *W.T. Grant* for the proposition that a strong public interest weighs against mootness); *Armster*, 806 F.2d at 1360–61 (applying the voluntary cessation exception and considering the strong public interest in the constitutionality of suspending jury trials).

235. *Compare* Foster v. Carson, 347 F.3d 742, 744 (9th Cir. 2003) (challenging the constitutionality of suspending indigent defense counsel appointments), *with Armster*, 806 F.2d at 1350 (challenging the constitutionality of suspending the appointment of juries in federal civil cases).

236. *See supra* notes 1–2 and accompanying text.

237. *See supra* notes 163–168 and accompanying text.

238. *See Foster*, 347 F.3d at 748–49.

239. Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904).

in *Foster*, may plausibly support different conclusions. However, when examined in light of U.S. Supreme Court and Ninth Circuit mootness precedent, the facts in *Foster* establish a reasonable expectation that the Oregon chief justice will again suspend the appointment of indigent defense counsel. Strong opposition to the income tax surcharge from Oregon voters makes it likely that automatic funding cuts for indigent defense counsel will be triggered.

The U.S. Supreme Court has long recognized that mootness is a more flexible doctrine than standing and that public interest may weigh against dismissing a case as moot. Determining the constitutionality of the chief justice's actions in *Foster* bolsters the application of the capable-of-repetition-yet-evading-review exception. By refusing to decide the *Foster* case on its merits, the Ninth Circuit sent a powerful and dangerous message to cash-strapped state governments and agencies: short-term suspensions of funding will avoid challenge in federal courts when they expire before the court hears the case. Nothing in the *Foster* decision prevents the Oregon chief justice, or any other judicial official, from suspending funds for indigent defense counsel each time the Oregon Judicial Department faces a budget shortfall.