FEDERAL COURTS — MOOTNESS — EIGHTH CIRCUIT HOLDS CHALLENGE TO STATUTE NOT MOOTED BY 2014 ELECTION. — *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789 (8th Cir. 2016).

During the months or years between the filing of a lawsuit and its ultimate resolution, changes in circumstance may result in the parties' no longer having anything to gain or lose through the court's decision. When the slow pace of litigation thus results in a case no longer presenting a "live controversy,"[1] that case is moot, and generally no court will hear it.[2] One longstanding exception to this rule allows a court to entertain an otherwise-moot case that is "capable of repetition, yet evading review"[3] — where an alleged harm could be inflicted again, but where any claims stemming from that harm would inevitably be mooted before a court could adjudicate them. This exception is often invoked in challenges to the conduct of elections, specifically when a court is unable to hear and decide a case before Election Day.[4] Recently, in *Missourians for Fiscal Accountability v. Klahr*,[5] the Eighth Circuit held that challenges to a state election law brought by a nonprofit political organization were not moot, even though the election in question had long since passed.[6] The decision follows Supreme Court precedents that have facilitated judicial review of the electoral process through a lenient application of mootness doctrine.

Missourians for Fiscal Accountability (MFA) was founded less than two weeks prior to the November 2014 election as a "campaign committee" under Missouri law[7] and a "political organization" under the Internal Revenue Code.[8] Under section 130.011(8) of the Missouri Revised Statutes, a campaign committee "shall be formed no later than thirty days prior to the election" in which the group will participate.[9]

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[1] Honig v. Doe, 484 U.S. 305, 317 n.5 (1988).

[2] *See id.* at 317–18; *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 567 (2009). Judges and scholars have questioned whether mootness is a constitutional doctrine or merely a prudential concern. *See, e.g.*, *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring) (calling the connection between mootness and Article III "attenuated"); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 677 n.162 (2006) (surveying the debate over this question); Hall, *supra*, at 575–98 (arguing against a constitutional model of mootness).

[3] S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). This case did not use the term mootness, but it marked the first use of this exception. *See Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring).

[4] *See, e.g.*, Davis v. FEC, 554 U.S. 724, 735–36 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 461–64 (2007).

[5] 830 F.3d 789 (8th Cir. 2016).

[6] *Id.* at 796.

[7] *Id.* at 793 (citing MO. REV. STAT. § 130.011(8) (Supp. 2013)).

[8] *Id.* (citing I.R.C. § 527 (2012)).

[9] MO. REV. STAT. § 130.011(8).

In order to avoid violating this statute, MFA refrained from collecting or spending any money; rather, it sought an injunction challenging section 130.011(8) as an unconstitutional burden on its First Amendment rights.[10] The Western District of Missouri granted MFA its requested relief and enjoined the Missouri Ethics Commission (MEC) "from enforcing the thirty-day blackout period imposed by Section 130.011."[11] With the injunction in place, and with two days remaining before the election, MFA accepted contributions and made robocalls, spending $525.[12]

The following spring, the district court held that even though the case was not moot, it was no longer justiciable.[13] The court analogized to *National Right to Life Political Action Committee v. Connor*,[14] an Eighth Circuit decision regarding a challenge to a very similar state statute[15] during the 2000 election.[16] MFA's claim, like the comparable claim in *Connor*, was not moot because it was "capable of repetition yet evading review" — MFA might become involved in a future election at a similarly late date.[17] However, again following *Connor*, the district court found MFA's claims unripe because it had failed to show actual injury stemming from its late registration.[18]

On appeal, the Eighth Circuit reversed.[19] Writing for the majority, Judge Benton[20] first addressed MFA's standing.[21] In a First Amendment claim, the court wrote, MFA could establish standing by alleging that, under "credible threat of future prosecution," it had suffered "an ongoing injury resulting from the statute's *chilling effect* on [its] desire to exercise [its] First Amendment rights."[22] The court held that this requirement was fulfilled by MFA's having suffered self-censorship as

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10 *See Klahr*, 830 F.3d at 793. The suit was brought against James Klahr, in his official capacity as Executive Director of the Missouri Ethics Commission. *See* Missourians for Fiscal Accountability v. Klahr, No. 14-4287, 2014 U.S. Dist. LEXIS 155163, at *3 (W.D. Mo. Nov. 2, 2014).

11 *Klahr*, 2014 U.S. Dist. LEXIS 155163, at *13. In evaluating MFA's likelihood of success on the merits, the court found that "the blackout period [did] not appear defensible as a means of promoting the State's interest in informing the voters," *id.* at *6, because voters would be able to glean almost no relevant information from the mere knowledge of a campaign committee's existence thirty days prior to an election, *id.* at *6–8.

12 *See Klahr*, 830 F.3d at 793.

13 Missourians for Fiscal Accountability v. Klahr, No. 14-4287, 2015 U.S. Dist. LEXIS 54295, at *1, *12 (W.D. Mo. Apr. 27, 2015).

14 323 F.3d 684 (8th Cir. 2003).

15 MO. REV. STAT. § 130.011(10) (2000) (setting a continuing committee formation deadline).

16 *Klahr*, 2015 U.S. Dist. LEXIS 54295, at *5.

17 *Id.* at *6; *see id.* at *6–7 (citing *Connor*, 323 F.3d at 690, 692).

18 *Id.* at *14.

19 *Klahr*, 830 F.3d at 792.

20 Judge Benton was joined by Judge Loken.

21 *See Klahr*, 830 F.3d at 793–95.

22 *Id.* at 794 (quoting Ward v. Utah, 321 F.3d 1263, 1267 (10th Cir. 2003)).

it reasonably refrained from "soliciting and/or accepting contributions or pledges" for the eleven days before it was granted an injunction.[23]

Turning to mootness, the court first held that the passing of the 2014 election had not mooted the case because, although MEC had yet to impose a fee on MFA for violating the formation deadline, it could still do so "at any time."[24] The court then explained, in the alternative, how MFA's claims fell within the "capable of repetition yet evading review" exception to mootness.[25] Emphasizing that the "capable of repetition" prong did not require repetition to be "more probable than not,"[26] the circuit relied, as had the district, on a comparison to *Connor*.[27] Judge Benton quoted *Connor*'s list of the unpredictable events that might encourage political participation close to an election, and stated that MFA, if it were to participate again, would have to "reform as a campaign committee" and would again "face the specter of section 130.011's formation deadline and MEC's policies on fees."[28] The self-censorship harms that MFA suffered were thus capable of repetition in a future election.[29]

Finally, Judge Benton addressed ripeness, the ground on which the district court had dismissed MFA's claims. He explained the basis for ripeness doctrine — the need for courts to avoid "premature adjudication" of "abstract disagreements" where harm has not yet been suffered — and again looked to *Connor*.[30] In *Connor*, National Right to Life Political Action Committee's (NRLPAC) claims were unripe because NRLPAC had not clearly identified a threat to its constitutional rights in the form of fees or other action that MEC had taken against it as a result of its too-late filing.[31] Here, however, MFA had presented evidence of MEC's regular imposition of fees on late-forming committees.[32] Thus, the self-censorship MFA undertook to avoid such penalties was actual harm and had established ripeness.[33]

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[23] *Id.*; *see also id.* at 794–95 (noting the threat of civil penalties in MO. REV. STAT. § 130.072 (Supp. 2013) and MEC's stated policy of imposing fees for late registration).

[24] *Id.* at 795.

[25] *Id.* (quoting Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684, 691 (8th Cir. 2003)). After finding the election *had* mooted MFA's claims, the district court applied this exception, saving the case from mootness. *See* Missourians for Fiscal Accountability v. Klahr, No. 14-4287, 2015 U.S. Dist. LEXIS 54295, at *6–7 (W.D. Mo. Apr. 27, 2015).

[26] *Klahr*, 830 F.3d at 795 (quoting Honig v. Doe, 484 U.S. 305, 318 n.6 (1988)).

[27] *See id.* at 795–96 (citing *Connor*, 323 F.3d at 691–92 (holding that the plaintiffs' challenge fell within the exception in part because "any number of events" might cause the plaintiffs to again participate at the last minute, *id.* at 692)).

[28] *Id.* at 796.

[29] Judge Benton never explicitly stated that the exception would apply, but his analysis clearly implied that it would. *See id.* at 795–96.

[30] *Id.* at 796 (quoting *Connor*, 323 F.3d at 692); *see also id.* at 796–97.

[31] *Connor*, 323 F.3d at 693–94; *see also Klahr*, 830 F.3d at 797.

[32] *Klahr*, 830 F.3d at 797.

[33] *Id.*

Judge Arnold dissented.[34] He argued that the case was moot: the election was over, the ballot measure that MFA had advocated for had passed, and MFA had dissolved as a campaign committee.[35] He distinguished *Connor*, noting first that NRLPAC had established a "continuing committee" to address pro-life concerns that were likely to recur in future elections, while MFA had established a "campaign committee" directed at a discrete issue and had filed a termination statement.[36] Claims that MFA would be harmed in a future election were "much too speculative."[37] As a result, MFA's harm, if any, was not sufficiently capable of repetition. Next, Judge Arnold disputed the majority's claim that, because MEC could impose fees at any time, the case was not mooted in the first place.[38] MFA, in its campaign committee form, had long since ceased to exist, and nothing in the record indicated that MEC would — or even could — penalize a defunct campaign committee.[39] Judge Arnold also disagreed on ripeness, finding MFA's speculation of future participation did not indicate "certainly impending" future harm.[40] In closing, he questioned whether MFA even had standing, arguing that any "self-imposed silence . . . was not objectively reasonable," since section 130.011(8) forbids only late committee formation, not advocacy itself.[41]

Klahr's discussion of the "capable of repetition" exception exemplifies the federal courts' consistently prudential approach to mootness evaluation in election law cases. The probabilistic evaluations necessary to find "a reasonable expectation that the same complaining party [will] be subject to the same action again"[42] permit a variety of analytical approaches and are difficult to make with any level of uniformity across cases with wildly differing facts. The Supreme Court has been consistent, however, in taking a lenient and speculative approach to evaluating whether a plaintiff's harm is likely to recur in election-related disputes.[43] The *Klahr* majority's application of the exception is

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[34] *Id.* at 798 (Arnold, J., dissenting).

[35] *Id.*

[36] *Id.* at 798.

[37] *Id.*

[38] *Id.* at 799.

[39] *Id.*

[40] *Id.* (quoting Parrish v. Dayton, 761 F.3d 873, 876 (8th Cir. 2014)); *see also id.* (ripeness discussion).

[41] *Id.* at 800.

[42] Spencer v. Kemna, 523 U.S. 1, 17 (1998) (alteration in original) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481 (1990)).

[43] *See, e.g.*, Davis v. FEC, 554 U.S. 724, 736 (2008) (finding alleged harm caused by self-financing restrictions capable of repetition where candidate had made a public statement expressing his intent to run for Congress again); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462–63 (2007) (finding this case "fit comfortably" in the "capable of repetition" exception, *id.* at 462, where advocacy group had "credibly claimed that it planned on running 'materially similar'" ad-

in line with this guidance and employs a plaintiff-friendly approach to analysis that is very much warranted by the uniquely cyclical nature of elections and the importance of their fair conduct to a successful democracy.

The "capable of repetition" exception, requiring probabilistic assessments and at least some speculation about future events, is inherently difficult to apply in a consistent fashion[44] and allows considerable leeway for prudential concerns to shape its application. The Supreme Court has sent mixed signals about the exception, at times urging that it applies "only in exceptional situations,"[45] but elsewhere arguing (over a dissent by Justice Scalia) that only a "reasonable expectation," and not a "demonstrated probability," of repetition is required.[46] Furthermore, the doctrine, recited in *Klahr*, specifically requires a court to find a "reasonable expectation that the *same complaining party* will be subject to the same action again,"[47] but the Court's analysis does not always strictly focus on the specific party bringing the suit. The Court sometimes looks closely at the unique parties involved in a suit,[48] but, in other cases, it speculates about a plaintiff in terms that could apply to any similarly situated individual.[49] Seeking to explain the Court's varying approaches, Professor Richard Fallon has argued that prudential considerations often shape the Court's analysis of the "capable of repetition" exception.[50] Professor Matthew Hall has been more direct, accusing the courts of "commonly — even routinely — relax[ing] each of the nominal requirements" of the exception.[51] Whether the Court is struggling to achieve

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vertisements during future blackout periods, *id.* at 463 (quoting Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195, 197 (D.D.C. 2006))).

[44] *See* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.8.1 (3d ed.) (Westlaw) (last visited Oct. 18, 2016) ("There is no set probability number that separates a sufficient prospect of repetition from an insufficient prospect.").

[45] Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (finding insufficient likelihood of plaintiffs again being subjected to an unprovoked chokehold by police officers, *id.* at 108–09). The Court was not universally opposed to the exception in this era, having applied it the previous Term in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982).

[46] Honig v. Doe, 484 U.S. 305, 318 n.6 (1988) (quoting *id.* at 333 (Scalia, J., dissenting)).

[47] *Klahr*, 830 F.3d at 795 (emphasis added) (quoting Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684, 691 (8th Cir. 2003)).

[48] *See, e.g.*, *Honig*, 484 U.S. at 320 (holding that the case was not moot because the plaintiff was likely to repeat misconduct that led to his injury because "[he was] unable to govern his aggressive, impulsive behavior"); Golden v. Zwickler, 394 U.S. 103, 109 (1969) (finding plaintiff unlikely to be denied the right to distribute anonymous election-related handbills again because the candidate he had opposed was now a judge and would not run again).

[49] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973) (holding an abortion case not moot when plaintiff was no longer pregnant because "[p]regnancy often comes more than once to the same woman").

[50] Fallon, *supra* note 2, at 678 (finding the exception is often applied when the Court "plainly wishes to enable rulings on the merits of unresolved, sometimes important issues" but must avoid issuing an advisory opinion).

[51] Hall, *supra* note 2, at 590.

consistency or consciously "relaxing" its standards, it is clear that the "capable of repetition" exception allows courts the flexibility to choose from a variety of analytical methods, some of which deemphasize the need for evidence relating to the individual claimant before the court.

When applying the "capable of repetition" exception to election cases, however, courts have been consistent in opting for analyses that require minimal evidence about a specific plaintiff. In these cases, the courts regularly take plaintiffs at their word or speculate about their involvement in future elections in terms that might apply equally to any politically active group or individual. In *Davis v. FEC*,[52] penalties that a candidate incurred for violating self-financing laws were deemed capable of repetition based on the candidate's public statement that he intended to self-finance another run[53] — a low evidentiary threshold considering that any plaintiff asserting the "capable of repetition" exception would presumably express an intent to reexpose itself to harm (as MFA did).[54] Similarly, in *FEC v. Wisconsin Right to Life, Inc.*,[55] a challenge "fit comfortably" within the exception[56] based on a plaintiff's expressed intent to engage in "materially similar" advocacy in the future,[57] even though its claim entailed an "as applied" challenge,[58] a category of challenge where the inherent specificity of the plaintiff's situation makes repetition even less likely. Prior to *Klahr*, the Eighth Circuit had established an even more lenient, less plaintiff-specific approach in *Van Bergen v. Minnesota*.[59] There, a former gubernatorial candidate "ha[d] not stated with certainty" any plans to run again, but the court, relying on its own speculation, found sufficient "probability that he [would] continue to work to spread his views and influence the outcome of elections," and saved his challenges from mootness.[60] MFA arguably displayed even more uncertainty than the plaintiff in *Van Bergen*. It claimed it would be harmed again "if and when it chooses to" participate in future elections,[61] strongly implying that, at the moment, it had no specific plan for further participation.

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[52] 554 U.S. 724 (2008).

[53] *Id.* at 736.

[54] *See Klahr*, 830 F.3d at 796.

[55] 551 U.S. 449 (2007).

[56] *Id.* at 462.

[57] *Id.* at 463 (quoting Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195, 197 (D.D.C. 2006)).

[58] *Id.* (quoting Storer v. Brown, 415 U.S. 724, 737 n.8 (1974)) (noting that the "capable of repetition, yet evading review" exception could apply to an "as applied" challenge).

[59] 59 F.3d 1541 (8th Cir. 1995) (per curiam).

[60] *Id.* at 1547.

[61] *Klahr*, 830 F.3d at 796 (quoting Plaintiff's Answer to the Court's Order to Show Cause at 1, Missourians for Fiscal Accountability v. Klahr, No. 14-4287, 2015 U.S. Dist. LEXIS 54295 (W.D. Mo. Apr. 27, 2015)).

In election law cases, it is justifiable and even necessary for courts to employ a consistently lenient application of mootness doctrine that allows nonmootness to be established through general rather than plaintiff-specific analyses. Many of the prudential concerns underlying the "capable of repetition but evading review" exception are especially compelling when elections are at issue.[62] First, the temporal limitations created by campaign periods and election dates make "evasion of review" a greater problem in election law cases than in many other contexts.[63] Second, the cyclical nature of elections means that repetition of a given harm is inherently more likely than it is in other contexts where repetition of certain case elements is not similarly ingrained. Third, the importance of fair elections to a functioning democracy urges that we allow political actors their day in court whenever feasible.

In *Klahr*, the majority's application of the "capable of repetition" exception displayed an awareness of these prudential considerations and employed a speculative method of analysis that mirrored the Supreme Court's approach to election law disputes.[64] Rather than focus on the plaintiff at hand, the majority quoted language from *Connor* that might apply to any election committee.[65] The only characteristic unique to MFA that the majority emphasized was a stated purpose of "educat[ing] [the] general public on issues concerning fiscal responsibility,"[66] but this mission does not necessarily require last-minute formation of campaign committees (and might not even require participation in elections). Regarding future participation, Judge Benton viewed as sufficiently determinate MFA's claims that it might become involved in another election after the deadline,[67] and he proceeded to import speculative scenarios from *Connor* as examples.[68] The court did not violate any relevant doctrine; it is correct that any of the circumstances described could come to fruition and result in this particu-

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[62] See Hall, *supra* note 2, at 599–618, for the argument that the courts ought to approach *all* mootness determinations prudentially when "the plaintiff's personal stake" is at issue, *id.* at 599. *See also* Honig v. Doe, 484 U.S. 305, 331–32 (1988) (Rehnquist, C.J., concurring) (urging an additional exception to mootness when a case has been mooted after the Court has agreed to hear it); Fallon, *supra* note 2, at 639–89 (arguing that remedial concerns play a large role in justiciability determinations).

[63] This concern is especially problematic since ripeness concerns will often prevent courts from reviewing challenges to election provisions in advance of elections.

[64] *See, e.g.*, Davis v. FEC, 554 U.S. 724, 735–36 (2008).

[65] *See Klahr*, 830 F.3d at 796 (quoting Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684, 692 (8th Cir. 2003)).

[66] *Id.*

[67] *Id.* ("MFA alleged it 'will once again be harmed . . . *if* and when it [participates in similar fashion again].'" (emphasis added) (quoting Plaintiff's Answer to the Court's Order to Show Cause, *supra* note 61, at 1)).

[68] *Id.* ("[A]ny number of events . . . might cause [the committee] to become involved . . . within thirty days of an election." (alterations and first omission in original) (quoting *Connor*, 323 F.3d at 692)).

lar plaintiff's violating section 130.011(8) again. However, the vague and nonspecific nature of these hypotheticals indicates that the court may have been concerned primarily with the need to review the statute's constitutionality for the sake of future similarly situated plaintiffs.

The dissent raised issues that the majority could have found doctrinally crucial, but which are unimportant to a court concerned primarily with a prudential need to allow review of a statute that might harm other future political actors. Judge Arnold would have required MFA to present evidence of future participation, and he identified significant differences between MFA and *Connor*'s plaintiff.[69] *Connor*'s "continuing committee . . . suggested future participation," while MFA had formed only a "campaign committee," which had since terminated.[70] Such differences make it substantially less likely "that the same complaining party [will] be subject to the same action again,"[71] but the majority was unconcerned by these differences, finding speculative descriptions of possible future scenarios no less sufficient than they were in *Connor*.[72] While Judge Arnold is correct that the concerns he raised could be dispositive if the court were to focus strictly on the specific plaintiff before it, his call for strict application of that requirement is out of step with the relevant election law precedent.

In *Klahr* and similar cases, the courts facilitate the democratic process by allowing for litigation of election-related disputes. A prudential approach to mootness determinations is critical to the courts' ability to play this role. A strict application of the same-plaintiff requirement that would demand a clear demonstration of likely future participation might limit plaintiffs' opportunities to challenge unfair election practices, and could even incentivize legislatures to draft election regulations with temporal limitations designed to render them effectively unreviewable. Clearer guidance from the Supreme Court about the prudential concerns influencing its mootness decisions in election disputes might further facilitate judicial review by encouraging more leniency from those, like Judge Arnold, who would stringently apply the same-plaintiff requirement. Nonetheless, as the *Klahr* majority demonstrates, prudential concerns are present in the courts' decisions of election law cases, and the electoral system is better safeguarded as a result.

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[69] *Id.* at 798 (Arnold, J., dissenting).

[70] *Id.* MFA continued to exist as a political organization, *id.* at 795–96 (majority opinion), and it was in that capacity that it had originally brought suit, *see* Missourians for Fiscal Accountability v. Klahr, No. 14-4287, 2014 U.S. Dist. LEXIS 155163, at *1 (W.D. Mo. Nov. 2, 2014).

[71] Spencer v. Kemna, 523 U.S. 1, 17 (1998) (alteration in original) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481 (1990)).

[72] *See Klahr*, 830 F.3d at 795–96.