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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALREADY, LLC, DBA YUMS *v.* NIKE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 11–982. Argued November 7, 2012—Decided January 9, 2013

Nike filed this suit, alleging that two of Already's athletic shoes violated Nike's Air Force 1 trademark. Already denied the allegations and filed a counterclaim challenging the validity of Nike's Air Force 1 trademark. While the suit was pending, Nike issued a "Covenant Not to Sue," promising not to raise any trademark or unfair competition claims against Already or any affiliated entity based on Already's existing footwear designs, or any future Already designs that constituted a "colorable imitation" of Already's current products. Nike then moved to dismiss its claims with prejudice, and to dismiss Already's counterclaim without prejudice on the ground that the covenant had extinguished the case or controversy. Already opposed dismissal of its counterclaim, contending that Nike had not established that its covenant had mooted the case. In support, Already presented an affidavit from its president, stating that Already planned to introduce new versions of its lines into the market; affidavits from three potential investors, asserting that they would not consider investing in Already until Nike's trademark was invalidated; and an affidavit from an Already executive, stating that Nike had intimidated retailers into refusing to carry Already's shoes. The District Court dismissed Already's counterclaim, concluding that there was no longer a justiciable controversy. The Second Circuit affirmed. It explained that the covenant was broadly drafted; that the court could not conceive of a shoe that would infringe Nike's trademark yet not fall within the covenant; and that Already had not asserted any intent to market such a shoe.

Held: This case is moot. Pp. 3–15.

(a) A case becomes moot—and therefore no longer a "Case" or "Controversy" for Article III purposes—"when the issues presented are no

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longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy* v. *Hunt*, 455 U. S. 478, 481. A defendant cannot, however, automatically moot a case simply by ending its unlawful conduct once sued. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289. Instead, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 190. Pp. 3–4.

(b) Nike has the burden to show that it "could not reasonably be expected" to resume its enforcement efforts against Already. The voluntary cessation doctrine was not disavowed in *Deakins* v. *Monaghan*, 484 U. S. 193. There, the Court employed precisely the analysis the test requires, finding a case moot because the challenged action—pursuing a claim in court—could not be resumed in "this or any subsequent action" and because it was entirely "'speculative'" that any similar claim would arise in the future. *Id.,* at 201, n. 4. Pp. 5–6.

(c) Application of the voluntary cessation doctrine shows that this case is moot. Pp. 6–14.

(1) The breadth of the covenant suffices to meet the burden imposed by the doctrine. The covenant is unconditional and irrevocable. It prohibits Nike from filing suit or making any claim or demand; protects both Already and Already's distributors and customers; and covers not just current or previous designs, but also colorable imitations. Once Nike demonstrated that the covenant encompasses all of Already's allegedly unlawful conduct, it became incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities that would arguably infringe Nike's trademark yet not be covered by the covenant. But Already failed to do so in the courts below or in this Court. The case is thus moot because the challenged conduct cannot reasonably be expected to recur. *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U. S. 83, and *Altvater* v. *Freeman*, 319 U. S. 359, distinguished. Pp. 6–9.

(2) Already's alternative theories of Article III injuries do not save the case from mootness, because none of those injuries suffices to support Article III standing in the first place. Already argues that as long as Nike is free to assert its trademark, investors will hesitate to invest in Already. But once it is "absolutely clear" that challenged conduct cannot "reasonably be expected to recur," *Friends of the Earth*, *supra,* at 190, the fact that some individuals may base decisions on conjectural or hypothetical speculation does not give rise to the sort of concrete and actual injury necessary to establish Article III standing, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560. Already worries about its retailers, but even if a plaintiff may bring an

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invalidity claim based on a reasonable expectation that a trademark holder will take action against the plaintiff's retailers, the covenant here extends protection to Already's distributors and customers. Already also complains that Nike's decision to sue in the first place has led Already to fear another suit. But, since Nike has met its burden to demonstrate that there is no reasonable risk of such a suit, this concern is unfounded. Already falls back on the sweeping argument that, as one of Nike's competitors, it inherently has standing because no covenant can eradicate the effects of a registered but invalid trademark. The logical conclusion of this theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—*e.g.,* a trademark or the awarding of a contract—but this Court has never accepted such a boundless theory of standing.

Already's policy objection that dismissing this case allows Nike to bully small innovators does not support adoption of this broad theory. Granting covenants not to sue may be a risky long-term strategy for a trademark holder. And while accepting Already's theory may benefit the small competitor in this case, it also lowers the gates for larger companies with more resources, who may challenge the intellectual property portfolios of more humble rivals simply because they are competitors in the same market. This would further encourage parties to employ litigation as a weapon against their competitors rather than as a last resort for settling disputes. Pp. 9–14.

(d) No purpose would be served by remanding the case. Already has had every opportunity and incentive to submit evidence in the proceedings below. It has refused, at every stage of the proceedings, to suggest that it has any plans to design a shoe that violates the Air Force 1 trademark yet falls outside the covenant. And while the courts below did not expressly invoke the voluntary cessation standard, their analysis addressed the same questions this Court addresses here under that standard. Pp. 14–15.

663 F. 3d 89, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which THOMAS, ALITO, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 11–982

ALREADY, LLC, DBA YUMS, PETITIONER *v.* NIKE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[January 9, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The question is whether a covenant not to enforce a trademark against a competitor's existing products and any future "colorable imitations" moots the competitor's action to have the trademark declared invalid.

I

Respondent Nike designs, manufactures, and sells athletic footwear, including a line of shoes known as Air Force 1s. Petitioner Already also designs and markets athletic footwear, including shoe lines known as "Sugars" and "Soulja Boys." Nike, alleging that the Soulja Boys infringed and diluted the Air Force 1 trademark, demanded that Already cease and desist its sale of those shoes. When Already refused, Nike filed suit in federal court alleging that the Soulja Boys as well as the Sugars infringed and diluted its Air Force 1 trademark. Already denied these allegations and filed a counterclaim contending that the Air Force 1 trademark is invalid.

In March 2010, eight months after Nike filed its complaint, and four months after Already counterclaimed,

Nike issued a "Covenant Not to Sue." Its preamble stated that "Already's actions . . . no longer infringe or dilute the NIKE Mark at a level sufficient to warrant the substantial time and expense of continued litigation." App. 96a. The covenant promised that Nike would not raise against Already or any affiliated entity any trademark or unfair competition claim based on any of Already's existing footwear designs, or any future Already designs that constituted a "colorable imitation" of Already's current products. *Id.,* at 96a–97a.

After issuing this covenant, Nike moved to dismiss its claims with prejudice, and to dismiss Already's invalidity counterclaim without prejudice on the ground that the covenant had extinguished the case or controversy. Already opposed dismissal of its counterclaim, arguing that Nike had not established that its voluntary cessation had mooted the case. In support, Already presented an affidavit from its president, stating that Already had plans to introduce new versions of its shoe lines into the market; affidavits from three potential investors, asserting that they would not consider investing in Already until Nike's trademark was invalidated; and an affidavit from one of Already's executives, stating that Nike had intimidated retailers into refusing to carry Already's shoes.

The District Court dismissed Already's counterclaim, stating that because Already sought "to invoke the Court's declaratory judgment jurisdiction, it bears the burden of demonstrating that the Court has subject matter jurisdiction over its counterclaim[ ]." Civ. No. 09–6366 (SDNY, Jan. 20, 2011), App. to Pet. for Cert. 25a. The Court read the covenant "broad[ly]," concluding that "any of [Already's] future products that arguably infringed the Nike Mark would be 'colorable imitations' " of Already's current footwear and therefore protected by the covenant. *Id.,* at 29a, n. 2. Finding no evidence that Already sought to develop any shoes not covered by the covenant, the Court

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