MOOT ELECTION DISPUTES: IF NOT NOW, WHEN?

Note

INTRODUCTION 782

I. MOOTNESS PRINCIPLES 784

   A. *Constitutional Origins* 784

   B. *A Mootness Exception: Disputes Capable of Repetition, yet Evading Review* 785

II. ELECTION DESIGN & DISPUTE ISSUES 786

III. HOW ARE ELECTION DISPUTES CAPABLE OF REPETITION YET EVADING REVIEW? 788

   A. *Supreme Court Precedent on Mootness in General* 788

   B. *Supreme Court Precedent on Mootness in Election-Related Practices* 790

   C. *Approaches Across Federal Courts* 791

      1. *The General Public Approach* 791

      2. *The Same Complainant Evidentiary Approach* 792

      3. *The No Contrary Evidence Approach* 793

IV. SUPREME COURT, REVISITED 794

   A. *Today's Supreme Court: Which Approach?* 795

   B. *Supreme Court: What About COVID-19?* 796

   C. *Which Approach Should It Be?* 798

CONCLUSION 799

MOOT ELECTION DISPUTES: IF NOT NOW, WHEN?

Note

INTRODUCTION

"Elections are 'of the most fundamental significance under our constitutional structure.'"[1]

The 2020 election cycle was the first of its kind: "the COVID-19 pandemic, an increase in mail-in voting, and Postal Service delays" to name a few.[2] The 2020 presidential election also had the largest voter turnout in American history[3] and featured the largest increase in voters between two presidential elections.[4] Most notably, though, the 2020 general election was the most litigious election: various individuals filed more than 400 lawsuits before Election Day[5] and another eighty-two lawsuits between Election Day and the date that Congress counted the Electoral College votes in January 2021.[6]

Pennsylvania was one of the states where much of this election litigation originated.[7] The Pennsylvania Democratic Party challenged a Pennsylvania law that required election officials to count mail-in ballots only if received by 8 PM on Election Day; the Pennsylvania Supreme Court then ordered election officials to count any mail-in ballot received within three days of Election Day as timely, absent any evidence that the ballot was mailed by Election Day.[8] The court grounded its authority to do so based on a clause in the Pennsylvania Constitution that "[e]lections shall be free and equal."[9]

When the Pennsylvania Republican Party moved for the United States Supreme Court to stay the state court's decision, the Supreme Court divided 4–4 on the motion.[10] The Pennsylvania Democratic Party then requested that the

---

1. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from the denial of certiorari) (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

2. *Id.* at 739 (Gorsuch, J., dissenting from the denial of certiorari).

3. Joshua Perry & William Tong, *Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence*, 53 CONN. L. REV. ONLINE, May 2021, at 6, 6.

4. Jacob Fabina, *Record High Turnout in 2020 General Election*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html.

5. Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/.

6. JACOB KOVACS-GOODMAN, STAN.-MIT HEALTHY ELECTIONS PROJECT, POST-ELECTION LITIGATION ANALYSIS AND SUMMARIES 3 (2021), https://web.mit.edu/healthyelections/www/sites/default/files/2021-06/Post-Election_Litigation_Analysis.pdf.

7. *Id.* at 4.

8. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from the denial of certiorari).

9. *Id.* at 733 (alteration in original) (quoting PA. CONST. art. I, § 5).

10. Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020).

Court grant certiorari, expedite review, and decide, with less than a week until Election Day, whether the Elections or Electors Clause of the U.S. Constitution is violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which federal elections should be conducted.[11] Despite a "strong likelihood that the State Supreme Court decision violate[d] the Federal Constitution," the Supreme Court denied the motion to expedite review: there was "simply not enough time . . . to decide the question before the election."[12] The Court ordered that county boards segregate ballots received later than the deadline set by the legislature but stated that its decision did not mean "that the state court decision must escape [its] review."[13]

The Supreme Court denied certiorari four months later.[14] The election was over and the Pennsylvania Supreme Court's decision to change the receipt deadline for mail-in ballots did not appear to change the outcome in any federal election.[15] But Justice Thomas, in his dissent from the denial of certiorari, wrote that the Court should still answer the question presented before the next election; he reasoned that courts are ill-equipped to address such problems through post-election litigation before December when the Electoral College casts its votes.[16] Most importantly, for this Note's purposes, Justice Thomas viewed the issue presented as capable of repetition yet evading review—an exception to the mootness doctrine that a case maintains a live dispute throughout the course of the litigation.[17] He asserted that the time to resolve this issue was now, before political parties and legislators confronted nonlegislative officials altering election rules again.[18] He highlighted the cyclical nature of election disputes: the Court failed to settle the dispute before the election and then failed, after the election, "to provide clear rules for future elections."[19] Thus, the basic question arises for post-Election Day litigation: If not now, then when, if at all, does the Court rule on the merits of election disputes?

In this Note, I show that federal courts differ on when the capable-of-repetition-yet-evading-review exception to mootness applies for post-Election Day litigation, with three different approaches being most prevalent among the

11. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1–2 (2020) (Alito, J., concurring with the denial of the motion to expedite consideration of the petition for writ of certiorari).

12. *Id.* at 2.

13. *Id.*

14. *Degraffenreid*, 141 S. Ct. at 732.

15. *Id.* at 738–39 (Thomas, J., dissenting from the denial of certiorari).

16. *Id.* at 735. Justice Thomas also highlighted that the day after the Supreme Court denied the Pennsylvania Republican Party's motion to expedite, "[t]he Eighth Circuit split from the Pennsylvania Supreme Court [by] granting a preliminary injunction against an attempt by the Minnesota Secretary of State to extend the legislature's deadline to receive ballots by seven days." *Id.* at 734 (citing Carson v. Simon, 978 F.3d 1051, 1059–60 (8th Cir. 2020)).

17. *Id.* at 737.

18. *Id.*

19. *Id.*

courts. Part I examines the constitutional origins of mootness principles and the Supreme Court's jurisprudence on the mootness exception that concerns the focus of this Note—the capable-of-repetition-yet-evading-review exception. Part II provides an overview of constitutional provisions that speak to election design and principles that the Supreme Court has recognized in election and election law dispute cases. Part III offers an analysis of what precedent may or may not be applicable for understanding the exception's application in election and election law challenges. This Part also explains the three approaches that federal courts use to apply the capable-of-repetition aspect of the exception: (1) those that require the issue be capable of repetition with the general public (the "general-public approach"); (2) those that require the issue be capable of repetition with the same complaining party and that the complaining party provide evidence (the "same-complainant-evidentiary approach"); and (3) those that seem to assume the issue is capable of repetition with the same complaining party in the absence of evidence to the contrary (the "no-contrary-evidence approach"). Subpart IV.A proposes that should a moot election challenge be brought before the Supreme Court in the future, the Court will likely use the same-complainant-evidentiary approach or the no-contrary-evidence approach. Subpart IV.B entertains how the Supreme Court may apply this exception in the context of COVID-19 if the Court were to grant certiorari and address any mootness issues and how federal courts have applied this exception during the pandemic. Finally, Subpart IV.C argues that federal courts should analyze moot post-election litigation issues under the no-contrary-evidence approach's framework.

I. MOOTNESS PRINCIPLES

A. Constitutional Origins

Article III, Section 1 of the U.S. Constitution vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[20] But because "the judiciary is beyond comparison the weakest of the three departments of power,"[21] the Constitution limits federal courts' jurisdiction to specific "cases" and "controversies."[22]

> [T]hose two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. . . . [T]hose words limit the business of

20. U.S. CONST. art. III, § 1.

21. THE FEDERALIST NO. 78 (Alexander Hamilton).

22. U.S. CONST. art. III, § 2, cl. 1.

> federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.[23]

Accordingly, federal courts' "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."[24]

Mootness principles can be traced in American case law as far back as 1893 when the Supreme Court stated that federal courts are "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."[25] "No stipulation of parties or counsel . . . can enlarge the [Court's] power."[26] Thus, a legal interest in the outcome must exist until the dispute is resolved,[27] and the availability of an effective remedy in resolving such a dispute is often an important consideration in this inquiry.[28] Within this constitutionally mandated[29] mootness rule, the Supreme Court has carved out three exceptions to allow federal courts to exercise jurisdiction over moot cases: voluntary cessation, cases that are capable of repetition yet evade review, and class actions.[30] The remainder of this Note will focus on the second exception.

B. *A Mootness Exception: Disputes Capable of Repetition, yet Evading Review*

Federal courts may review a dispute that is otherwise moot if the dispute is capable of repetition yet evading review. A dispute is capable of repetition yet evading review when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[31]

---

23. Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

24. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

25. California v. San Pablo & T.R. Co., 149 U.S. 308, 314 (1893).

26. *Id.*

27. Leila Hatem, Note, *Missing the Mark:* NYSRPA *As a Vehicle to Clarify Inconsistencies in Mootness Doctrine*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 236, 238–39 (2021).

28. Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CALIF. L. REV. 1385, 1389 (1974); *see also* Richard H. Fallon, Jr., *The Linkage Between Justiciability & Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 652 (2006).

29. *See* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374–75 (1974). *But see* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 563–64 (2009) (suggesting the exceptions to mootness are "based on prudential considerations," which is "hard to reconcile with the conventional understanding of mootness as a constitutionally mandated jurisdictional bar").

30. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 119, 124, 128 (4th ed. 2011).

31. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)); *see also* Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Davis v. FEC, 554 U.S. 724, 735 (2008).

The first prong of this exception generally depends on whether the underlying merits question would evade review in the future because the dispute involves matters of such short duration.[32] Pre-*Dobbs v. Jackson Women's Health Organization*, one of the quintessential disputes that otherwise evaded review was a pregnant woman's constitutional challenge to an abortion regulation; once a woman gave birth, abortion was no longer an option for terminating that pregnancy. And "the normal 266-day human gestation period is so short that [a] pregnancy will come to term before" the parties could litigate the challenge to its conclusion.[33]

The second prong of this exception "requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party"[34]—that the party "will again be subjected to the alleged illegality . . . or will be subject to the threat of prosecution under the challenged law."[35] No fixed probability is necessary to pass this prong, but some practitioners suggest that the importance of the underlying issue may count for or against a court's decision on this issue.[36] When a case fails on this prong, courts will often categorize the possibility of repetition as "speculative, conjectural, . . . theoretical[ly] possib[le],"[37] or not reasonable.[38]

II. ELECTION DESIGN & DISPUTE ISSUES

The Constitution provides that the design of election procedures is the job of state and federal legislators: "The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[39] And for presidential elections, "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[40]

On the one hand, the Supreme Court has "repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close

32. 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533.8.2 (3d ed. 2008).

33. Roe v. Wade, 410 U.S. 113, 125 (1973), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

34. *Wis. Right to Life*, 551 U.S. at 463 (internal quotations omitted) (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam)).

35. *Id.* (internal quotations omitted) (citation omitted).

36. WRIGHT & MILLER, *supra* note 32, § 3533.8.1.

37. *Id.* (internal quotations omitted).

38. *Id.* § 3533.8.1, n.12.

39. U.S. CONST. art. I, § 4, cl. 1.

40. U.S. CONST. art. II, § 1, cl. 2.

to an election—a principle often referred to as the *Purcell* principle."[41] "Running elections state-wide is extraordinarily complicated and difficult" and "pose[s] significant logistical challenges" to where "state and local election officials need substantial time to plan for [those] elections."[42] So, election law challenges brought before Election Day are often unsuccessful because "*Purcell* protects the status quo."[43] In pre-election challenges to election laws themselves, the *Purcell* principle reflects a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled."[44]

But on the other hand, "postelection litigation is truncated by firm timelines"[45] because "[e]lections must end."[46] Congress has set "the Tuesday next after the first Monday in November" as Election Day for presidential elections.[47] Under a "statutory safe-harbor provision, a State has about five weeks to address all disputes and make a 'final determination' of electors if it wants that decision to 'be conclusive.'"[48] Once states certify their election results by this safe-harbor day, presidential electors (i.e., the Electoral College) then meet "on the first Monday after the second Wednesday in December" to cast their electoral votes for who will assume the office of the President in January of the next year.[49] These "[f]ive to six weeks [between Election Day and the safe-harbor day] for judicial testing is difficult enough for straightforward cases. For factually complex cases, compressing discovery, testimony, and appeals into this timeline is virtually impossible."[50] Based on both of these timelines and justiciability principles, "the postelection system of judicial review . . . . generally cannot restore the state of affairs before an election."[51] Once states certify their results and the Electoral College meets in December, "[a] decision in these [election] cases would not have any

---

41. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)); *see also* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stay).

42. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stay).

43. Carson v. Simon, 978 F.3d 1051, 1062 (8th Cir. 2020).

44. *Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring in grant of applications for stay) (stating that "even heroic efforts [in response to a federal district court's preliminary injunction regarding redistricting in Alabama] likely would not be enough to avoid chaos and confusion").

45. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from the denial of certiorari).

46. *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Gorsuch, J., concurring in denial of application to vacate stay).

47. 3 U.S.C. § 1.

48. *Degraffenreid*, 141 S. Ct. at 735 (Thomas, J., dissenting from the denial of certiorari) (quoting 3 U.S.C. § 5).

49. 3 U.S.C. § 7, *amended by* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136. Stat 4459.

50. *Degraffenreid*, 141 S. Ct. at 735 (Thomas, J., dissenting from the denial of certiorari).

51. *Id.* at 737.

implications regarding the . . . election."[52] Any ongoing litigation that challenges election laws or election results no longer presents a live case or controversy; these election disputes that often evade review before Election Day because of the *Purcell* principle then become moot after states certify their election results.

III. HOW ARE ELECTION DISPUTES CAPABLE OF REPETITION YET EVADING REVIEW?

More often than not, federal courts do not rule on election law challenges in pre-Election Day litigation if the challenge is brought close in time to Election Day under the *Purcell* principle.[53] And even if *Purcell* does not apply, federal courts usually do not have enough time to rule on the merits of election law challenges.[54] Finally, post-Election Day litigation is likely to no longer present a live case or controversy once states certify their election results.[55] Given this catch-22-like dilemma, when, if at all, do federal courts decide election disputes?

Subpart III.A first explains some general rules on mootness and the exception that is the focus of this Note. This Subpart highlights prior cases where the Supreme Court announced principles that, at first blush, may appear to apply to election dispute cases generally. Subpart III.B then describes some of the Court's mootness and capable-of-repetition precedent on election-related practices that hinge more specifically on a person's right to vote or ability to be placed on an election ballot as a candidate. Subpart III.C explains and differentiates the three approaches that exist among federal courts when parties or courts invoke this exception in cases involving election-related practices.

A. Supreme Court Precedent on Mootness in General

The capable-of-repetition-yet-evading-review exception to mootness is appropriate in election disputes that involve as-applied challenges and those that involve facial challenges to election laws.[56] Like a pregnant woman's constitutional challenge to an abortion law,[57] a plaintiff challenging an election regulation usually satisfies the evading-review prong because the plaintiff "has only a few months before the remedy sought is rendered impossible by the

52. *Id.* at 738–39 (Gorsuch, J., dissenting from the denial of certiorari).

53. *See supra* Part II.

54. *Id.*

55. *Id.*

56. *See* Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

57. *See supra* Subpart I.B.

occurrence of the relevant election."[58] But even when satisfying the evading-review prong is doubtful, Justice Scalia once suggested in a dissent that the evading-review prong of the exception "is prudential; whether or not that criterion is met, a justiciable controversy exists."[59]

As for the second prong, "for a question to be capable of repetition, it is not necessary to predict that history will repeat itself at a very high level of specificity."[60] Instead, as Justice Scalia wrote for a plurality in *Wisconsin Right to Life*, the capable-of-repetition prong requires a "'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'"[61] The "same controversy [is] sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality,'. . . or 'will be subject to the threat of prosecution' under the challenged law."[62]

Notably, though, *Wisconsin Right to Life* involved a nonprofit that sought a declaratory judgment that certain provisions of a federal election campaign reform act violated the First Amendment.[63] There, the majority ruled that the part of the act that prohibited use of corporate funds to finance electioneering communications during pre-federal election periods violated corporations' free speech rights; the majority also held that the challenge was not moot even though the election had passed.[64] Almost a year later, in *Davis v. FEC*, the Court ruled that a challenge to a different provision of the same federal election campaign reform act that imposed different campaign contribution limits on candidates competing for the same congressional seat was not moot even though the election was over.[65] The Court reasoned that the factual circumstances closely resembled *Wisconsin Right to Life* from the prior year and that the petitioner-candidate, Davis, had made a public statement expressing his

58. Lawrence v. Blackwell, 430 F.3d 368, 371 (6th Cir. 2005); *see also* Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988) (stating the "[t]he likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time . . . is slim at best"). *But see* Fleming v. Gutierrez, 785 F.3d 442, 446 (10th Cir. 2015) (ruling that an election law dispute would not evade review because the "[v]oters' complaint . . . sought permanent injunctive relief regarding 'all future elections,'" which was still pending in the district court); Freedom Party of N.Y. v. N.Y. State Bd. of Elections, 77 F.3d 660, 663 (2d Cir. 1996) (ruling that an election law dispute will not evade review if a "prompt application for a stay pending appeal can preserve an issue for appeal").

59. Honig v. Doe, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting), *superseded by statute*, Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

60. *Degraffenreid*, 141 S. Ct. 732, 739 (Alito, J., dissenting from the denial of certiorari); *see also* FEC v. Wis. Right to Life, 551 U.S. 449, 463 (2007).

61. *Wis. Right to Life*, 551 U.S. at 463 (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam)); *see also* Davis v. FEC, 554 U.S. 724, 736 (2008) (ruling that the plaintiff satisfied the capable-of-repetition prong because he "made a public statement expressing his intent to" engage in conduct that would place him in conflict with challenged regulations again).

62. *Wis. Right to Life*, 551 U.S. at 463 (internal citation omitted).

63. *Id.* at 460.

64. *Id.* at 481–82. Chief Justice Roberts wrote the majority opinion, which Justice Scalia joined.

65. *Davis*, 554 U.S. at 735.

intent to self-finance another bid for a House seat.[66] Arguably, though, *Davis* did not involve an election law challenge that directly hinged on the manner or results of the election itself. Instead, *Davis*, like *Wisconsin Right to Life*, involved a challenged law that affected political speech rights and not any voter's right to cast a vote in the election or any individual's opportunity to run as a candidate.[67]

B. *Supreme Court Precedent on Mootness in Election-Related Practices*

So what about election law challenges that implicate a person's right to vote or ability to be placed on an election ballot as a candidate? Interestingly enough, Justice Scalia noted in his dissent in *Doe v. Honig*, a non-election law case the Supreme Court decided nineteen years before *Wisconsin Right to Life*, that "some of our election law decisions . . . differ from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large."[68] For example, in *Storer v. Brown*, the Court ruled that an issue involving ballot access restrictions on independent candidates was capable of repetition; the Court reasoned that although "[t]he 1972 election is long over, . . . the issues [are] properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."[69] And in *Moore v. Ogilvie*, the Court ruled that the mootness exception applied to an election law challenge concerning independent candidate qualifications.[70] There, the Court reasoned that the burden "placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935."[71] In both *Storer* and *Moore*, the Court did not seem to engage in any analysis of whether the original plaintiffs would be subject to the same issue again. The Court instead emphasized that the challenged laws remained in effect so long as a future challenge, presumably brought by anyone with standing, was possible.

66. *Id.* at 735–36. Justice Alito wrote the majority opinion, which Justice Scalia joined.

67. *See Wis. Right to Life*, 551 U.S. at 457 (stating that "[p]rior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech"); *see also Davis*, 554 U.S. at 739 (stating that BCRA "requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations"). *But see* Stop Reckless Econ. Instability Caused by Democrats v. FEC, 814 F.3d 221, 231 (4th Cir. 2016) (classifying *Wis. Right to Life* and *Davis* as "election cases").

68. Honig v. Doe, 484 U.S. 305, 335–36 (1988) (Scalia, J., dissenting) (emphasis omitted).

69. Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

70. Moore v. Ogilvie, 394 U.S. 814, 815–16 (1969).

71. *Id.* at 816.

C. Approaches Across Federal Courts

Thus, the question arises: In election disputes, do federal courts apply the capable-of-repetition prong of the mootness exception with a specific focus on the same complaining party, like the Supreme Court did in *Wisconsin Right to Life* and *Davis*, or with a focus on the broader public, like the Court did in its earlier cases, *Storer* and *Moore*?

In applying the capable-of-repetition prong to an election dispute, federal appellate courts tend to adopt one of three approaches: (1) the general-public approach, which dispenses with the same-party requirement completely; (2) the same-complainant evidentiary approach, which adopts the same-party requirement and requires some sort of evidence from that party; and (3) the no-contrary-evidence approach, which presumes that the same party will be subject to the same action again unless evidence to the contrary exists. I discuss each approach in turn.

1. The General Public Approach

Three federal circuits—the United States Courts of Appeals for the Fifth Circuit,[72] Sixth Circuit,[73] and Ninth Circuit[74]—take the approach that Justice Scalia identified in his dissent in *Honig*[75] and that the majority's opinion in *Storer*[76] applied: whether the same issue will recur between the defendant and other members of the public at large. To determine whether the controversy is capable of repetition, these courts will not refuse to invoke the exception just because a plaintiff fails to allege whether the challenged law will apply to him in the future[77] or that the same dispute will arise in the future. And when a political candidate challenges the election laws, these courts do not require a plaintiff–candidate to express whether he intends to seek reelection in the future because these courts assume that enforcement of the challenged law is itself capable of repetition.[78] These courts view "the fact that the controversy almost invariably will recur with respect to some future potential candidate or voter in [the state] [a]s sufficient to meet the [capable of repetition] prong because it is somewhat

72. *See, e.g.*, Kucinich v. Tex. Democratic Party, 563 F.3d 161, 164–65 (5th Cir. 2009).

73. *See, e.g.*, Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 560 (6th Cir. 2021) ("The [capable of repetition] prong is 'somewhat relaxed in election cases.'" (citation omitted)).

74. *See, e.g.*, Caruso v. Yamhill Cnty. *ex rel* Cnty. Comm'r, 422 F.3d 848, 853 (9th Cir. 2005).

75. Honig v. Doe, 484 U.S. 305, 335–36 (1988) (Scalia, J., dissenting).

76. Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

77. *Kucinich*, 563 F.3d at 164–65 (refusing to dismiss the case as moot even though the plaintiff–candidate did not state he intended to run for the same office again in the future).

78. *See id.* at 165; *see also Caruso*, 422 F.3d at 853 (stating that the Ninth Circuit "[has] rejected the analogous argument that a candidate's challenge to an election law is not moot '*only* when [the] candidate plans to seek reelection'" (citing Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000))).

relaxed in election cases."[79] The Sixth Circuit has even recently stated that "[t]o be capable of repetition, 'the chain of potential events does not have to be air-tight or even probable.'"[80] But at least the Sixth Circuit has provided that a "challenged action . . . is not capable of repetition if it is based on a unique factual situation."[81]

2. *The Same Complainant Evidentiary Approach*

Five federal circuits—the United States Courts of Appeals for the Second Circuit,[82] Seventh Circuit,[83] Eighth Circuit,[84] Eleventh Circuit,[85] and D.C. Circuit[86]—take a second approach that requires the plaintiff to provide some sort of evidence to show that the controversy will recur with respect to that same complaining plaintiff. These courts posit that the Supreme Court's precedents in *Wisconsin Right to Life* and more recent decisions post-*Storer* and post-*Honig* require that the plaintiff "demonstrate a reasonable expectation that he will be subject to the challenged laws again."[87] And more specifically, the plaintiff must demonstrate "that there is a reasonable expectation that 'materially similar' circumstances will recur."[88] An organization or candidate's statement that a candidate will run again for the same office or a party's suggestion that it will be subject to the same law again will satisfy the capable-

79. Graveline v. Benson, 992 F.3d 524, 533 (6th Cir. 2021) (first alteration in original) (quoting Lawrence v. Blackwell, 430 F.3d 368, 372 (6th Cir. 2005)).

80. Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 560 (6th Cir. 2021).

81. *Id.*

82. *See, e.g.*, Van Allen v. Cuomo, 621 F.3d 244, 247 (2d Cir. 2010) (dismissing the case because it would be "'mere speculation' that the dispute will recur" when the plaintiff did "not indicate that he . . . intend[ed] or ha[d] already attempted to change his party enrollment again").

83. *See, e.g.*, Gill v. Scholz, 962 F.3d 360, 363 n.3 (7th Cir. 2020) (holding that a "justiciable controversy remained under the 'capable of repetition, yet evading review' doctrine" because the plaintiff "was unable to litigate his claims before the . . . election was held, and he has expressed his intent to run for office" again in the next election).

84. *See, e.g.*, Ark. AFL-CIO v. FCC, 11 F.3d 1430, 1436 (8th Cir. 1993) ("[T]he fact that the situation has already recurred once, coupled with the Committee's assertion that they expect further recurrences, satisfies the . . . prong . . . .").

85. *See, e.g.*, Hall v. Sec'y, Ala., 902 F.3d 1294, 1302 (11th Cir. 2018) ("The fact that the Supreme Court has expressly found that the same complaining party rule is satisfied in election law cases counsels against interpreting *Storer* as dispensing with the rule.").

86. *See, e.g.*, Holmes v. FEC, 823 F.3d 69, 71 n.3 (D.C. Cir. 2016) ("[T]here was 'a reasonable expectation [the plaintiffs] will again be subject to [the Act's] per-election contribution limit' because they had 'aver[red] that they intend to make such contributions in the future.'" (alterations in original) (citation omitted)).

87. Whitfield v. Thurston, 3 F.4th 1045, 1047–48 (8th Cir. 2021) (ruling the appeal was moot and that the exception did not apply because the challenger's candidacy ended and the candidate did "not indicate[] whether he intend[ed] to run as an Independent again" despite the court's "direct inquiries . . . at oral argument").

88. *Hall*, 902 F.3d at 1298 (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 463 (2007)) (ruling that there was only a "theoretical possibility" and not a "reasonable expectation that Hall w[ould] have an opportunity during his life to run or vote in a special election for a U.S. House seat in Alabama" based on statistics that special elections for any U.S. House seat in Alabama only occur about every twenty years).

of-repetition prong.[89] But these courts view a plaintiff's failure to suggest so as precluding the exception's application to the case.[90] The Eleventh Circuit has justified this preclusion: assuming a controversy is capable of repetition for the complaining party is "purely theoretical" when that complaining party is a private individual who does not indicate that the controversy is capable of repetition.[91] But even when the complaining party indicates *some* possibility of recurrence, neither a blanket assertion that the "same issue is likely to come up again" nor a candidate's statement that "he intends to run for an unspecified office" in the future is enough to satisfy the capable-of-repetition prong.[92]

3. The No Contrary Evidence Approach

Finally, four federal circuits—the United States Courts of Appeals for the First Circuit,[93] Third Circuit,[94] Fourth Circuit,[95] and Tenth Circuit[96]—fall in the middle of the other two approaches. These courts do not seem to require any evidence from the complaining party that suggests a reasonable expectation of recurrence. But these courts also do not view the capable of repetition inquiry as one that extends beyond the complainant to the broader public.[97]

Some of these circuits have refined their case law on the capable-of-repetition prong to create more nuances among the circuits in this middle-ground approach. For example, the Third Circuit specifies that its inquiry of whether a challenge is capable of repetition hinges on whether there is "evidence to the contrary."[98] If not, then the court has "every reason to expect the same parties to generate a similar, future controversy subject to identical

89. Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 692 (2d Cir. 2013) (ruling that a party's challenge was capable of repetition because the "complaint clearly allege[d] that the organization plan[ned] to do 'materially similar' advertising in 'materially similar situations in the future,' and . . . that 'New York law w[ould] apply'"); *see also Holmes*, 823 F.3d at 71 n.3.

90. *See* Van Allen v. Cuomo, 621 F.3d 244, 247 (2d Cir. 2010); *see also* Wood v. Raffensperger, 981 F.3d 1307, 1318 (11th Cir. 2020) (dismissing the case as moot because the plaintiff did "not suggest that this situation might recur").

91. *Wood*, 981 F.3d at 1318.

92. Sloan v. Caruso, 566 F. App'x 98, 99 (2d Cir. 2014) (rejecting the argument that the same issue was likely to come up again based on the plaintiff's statement that he intended to run for an unspecified office in the next election cycle).

93. *See, e.g.*, Gaspee Project v. Mederos, 13 F.4th 79, 84 (1st Cir. 2021).

94. *See, e.g.*, Belitskus v. Pizzingrilli, 343 F.3d 632, 648–49 (3d Cir. 2003).

95. *See, e.g.*, Nelson v. Warner, 12 F.4th 376, 385 (4th Cir. 2021).

96. *See, e.g.*, Parker v. Winter, 645 F. App'x 632, 634–35 (10th Cir. 2016).

97. *Id.* at 634 ("Claims fall within this exception when . . . there was a reasonable expectation that the same complaining party would be subjected to the same action again." (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975))); *Belitskus*, 343 F.3d at 648; *Gaspee Project*, 13 F.4th at 84; N.C. Right to Life Comm. Fund for Indep. Pol. Expenditures v. Leake, 524 F.3d 427, 435 (4th Cir. 2008).

98. *Belitskus*, 343 F.3d at 648 n.11 ("[I]t is reasonable to expect political candidates to seek office again in the future."); *see also* Merle v. United States, 351 F.3d 92, 95 (3d Cir. 2003) (ruling that it was "reasonable to expect that [the plaintiff] will wish to run for election . . . at some future date" without the plaintiff's allegations of intent to do so).

time constraints."[99] The First Circuit seems to follow the Third Circuit's "evidence to the contrary" approach[100] but also gives the "benefit of the doubt" to the complaining party when the party has a demonstrated record of being subject to the law that it challenges in that dispute.[101] And even when no demonstrated record of being subject to the law exists, the First Circuit has still found the capable-of-repetition prong satisfied.[102] Likewise, the Fourth Circuit does not require evidence of[103] or a statement suggesting[104] that the controversy is capable of repetition as to the same complaining party. And the Tenth Circuit has ruled that the capable-of-repetition prong "is likely satisfied" when a plaintiff is capable of being subject to the same laws in the future.[105]

IV. SUPREME COURT, REVISITED

Based on the divide among federal courts on the application of the capable-of-repetition prong in the context of election disputes, three questions arise. First, what will the Supreme Court do the next time it confronts what may be a moot election challenge? Second, how does the Court view this exception's application in the context of COVID-19? And third, how should the Court view this exception's application? I address each question in turn.

99. *Belitskus*, 343 F.3d at 648 n.11 (quoting Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 95 F.3d 253, 257 (3d Cir. 1996)).

100. *See Gaspee Project*, 13 F.4th at 84 (holding the dispute not moot because "the Act is still on the books, and the appellants assert—without contradiction—that they plan to engage in similar advocacy during future election cycles"); *see also* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 37 n.12 (1st Cir. 1993) (holding the dispute not moot because the plaintiff had not ruled out or renounced possible candidacies).

101. Libertarian Party of N.H. v. Gardner, 843 F.3d 20, 24 (1st Cir. 2016) ("giv[ing] the 'benefit of the doubt'" to the Party because the Party "has a demonstrated (albeit episodic) record of seeking statewide ballot access in New Hampshire").

102. Libertarian Party of N.H. v. Gardner, 638 F.3d 6, 13 (1st Cir. 2011) (ruling that the capable-of-repetition prong was satisfied even though the circumstances giving rise to the challenge had never occurred before because their occurrence this one time "alone may encourage . . . others" to seek the same ballot access).

103. See Nelson v. Warner, 12 F.4th 376, 385 (4th Cir. 2021) (citing *N.C. Right to Life Comm. Fund for Indep. Pol. Expenditures v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008), for the proposition that a challenge is capable of repetition "based on a reasonable expectation that the challenged provisions would apply in a future election"). *But see* Stop Reckless Econ. Instability Caused by Democrats v. FEC, 814 F.3d 221, 230 (4th Cir. 2016) (concluding that the court disagreed with the contention that "in election-related cases, the same-complaining-party element need not be satisfied").

104. *See Leake*, 524 F.3d at 435; *see also* Lux v. Judd, 651 F.3d 396, 401 (4th Cir. 2011) (holding that the plaintiff's statement that he was "considering running in a future election" was sufficient for the capable-of-repetition prong).

105. Parker v. Winter, 645 F. App'x 632, 635 (10th Cir. 2016) (stating that "there is no evidence in the record that Mr. Parker intends to run for elected office again, [but that] the second factor is likely satisfied because 'he is certainly capable of doing so'" (quoting Lawrence v. Blackwell, 430 F.3d 368, 371 (6th Cir. 2005))).

A. Today's Supreme Court: Which Approach?

The Supreme Court has not stated that its jurisprudence dismisses the same-complaining-party component as part of the capable-of-repetition prong during the last twenty years. I conclude that the Court is likely to fall into either the same-complainant evidentiary approach, the second approach, or the no-contrary-evidence approach, the third approach, based on how Justice Thomas and Justice Alito analyzed the issue in their dissents in *Republican Party of Pennsylvania v. Degraffenreid.*

Justice Thomas's dissent in *Republican Party of Pennsylvania v. Degraffenreid*, introduced at the beginning of this Note, cited *Davis* for what the exception's application requires: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[106] Justice Thomas posited that the case easily satisfies the evading-review prong because "the Pennsylvania Supreme Court issued its decision about six weeks before the election, leaving little time for review in this Court."[107] But, per Justice Thomas, what satisfies the capable-of-repetition prong is that "there is a reasonable expectation that . . . the State Republican Party and legislators . . . will again confront nonlegislative officials altering election rules."[108] Justice Thomas may have applied *Davis*'s principles for the same-complaining-party requirement, unlike the general-public approach that *Storer* and Justice Scalia's dissent in *Honig* suggested. He may have also relied on the Pennsylvania Republican Party's statement in briefing that the Party would "face the same issues in future cases" because "future litigants will surely try to obtain similar relief" after "having witnessed [the Pennsylvania Democratic Party's] success in this matter."[109] The Party viewed the state supreme court's "willingness to modify legislatively-enacted rules governing a federal election" likely to persist because "the only record before it belies any claim for such a modification."[110] Whether Justice Thomas would have argued for the exception to apply despite the Party's statements in briefing remains unknown. So, this Note presumes that Justice Thomas would likely fall within the same-complainant evidentiary approach and require the complainant to provide evidence of an intent to run again for that same office in the future and evidence of material similar circumstances in the future.

---

106. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 737 (2021) (Thomas, J., dissenting from the denial of certiorari) (internal quotation omitted) (citation omitted).

107. *Id.*

108. *Id.*

109. Reply Brief in Support of Petition for a Writ of Certiorari at 7, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2020) (No. 20–542), 2020 WL 7481662, at *7.

110. *Id.*

Justice Alito, in his separate dissent, focused on the same parties rather than the general public in his analysis of the capable-of-repetition prong. He argued that "a 'reasonable expectation' that the parties will face the same question in the future" existed and "that the question will evade future pre-election review, just as it did in these cases."[111] Both dissents do not engage in what the Pennsylvania Republican Party suggested in its reply brief or below. But Justice Thomas and Alito also suggested that they would analyze an election or election law challenge under *Davis* or *Wisconsin Right to Life* instead of *Storer*, regardless of whether it implicated the Free Speech Clause, voter qualifications, or independent candidate qualifications. A majority of the Court could easily adopt this mode of analysis, especially when considering what some have called the age of the Court's "conservative supermajority."[112]

Lower federal courts that adopt the general-public approach would likely have found that the question presented in *Degraffenreid* was capable of repetition, even if a different political party or private citizen challenged the state court's conduct. Courts under the same-complainant-evidentiary approach likely would not have found the exception applicable if the Pennsylvania Republican Party had not mentioned in its reply brief that the Party had a reasonable expectation for the state supreme court and Pennsylvania Democratic Party to engage in this type of conduct again in the next election cycle. And even then, it is possible that those courts would say that such an allegation that a state court will engage in such conduct is speculative or theoretical, just like the Eleventh Circuit did in a rare special elections case.[113] But the no-contrary-evidence approach would likely have reached the same result as the general-public approach but with different reasoning: that it is reasonable to expect that state courts may engage in this type of conduct in the future and that the Republican Party of Pennsylvania itself would likely challenge the conduct, assuming that no-contrary-evidence as to both aspects of this analysis exists.

B. *Supreme Court: What About COVID-19?*

The COVID-19 pandemic's continued existence over the last few years has brought about another interesting question: Are challenges to election results

111. *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from the denial of certiorari).

112. Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/; *see also* Charles Cameron & Jonathan P. Kastellec, *Conservatives May Control the Supreme Court Until the 2050s*, WASH. POST (Dec. 14, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/; Nina Totenberg, *Supreme Court's New Supermajority: What It Means for* Roe v. Wade, NPR (Dec. 31, 2020, 10:42 AM), https://www.npr.org/2020/12/31/951620847/supreme-courts-new-supermajority-what-it-means-for-roe-v-wade; Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

113. *See* Hall v. Sec'y, Ala., 902 F.3d 1294, 1298 (11th Cir. 2018).

and election laws during COVID-19 capable of repetition yet evading review? Justice Alito's dissent in *Degraffenreid* provides some insight. Per Justice Alito, the Court does not have to factor in whether it can reasonably expect to see a recurrence of the COVID-19 pandemic circumstances of fall 2020 for a challenge brought during COVID-19 to be capable of repetition in the future.[114]

Yet lower federal courts have seemed to apply the exception in almost the exact opposite way when taking COVID-19 into account. Even circuits that have completely dismissed the same-complaining-party requirement in prior election cases have ruled that "in the election context, . . . lawsuits challenging election procedures in light of the COVID-19 pandemic and attendant restrictions are not capable of repetition, yet evading review."[115] These courts, even courts that adopt the general-public approach and make what one could argue as generous presumptions, viewed COVID-19 as a "unique factual situation" that makes election disputes during the pandemic those "rare election cases where the challenged action is not capable of repetition."[116] In an action to enjoin a county's administration of drive-thru voting in the November 2020 election, the Fifth Circuit even went so far as to state that the plaintiffs failed to point to "any evidence in the record . . . that [the] [c]ounty w[ould] offer that sort of voting again in the future, let alone that it w[ould] offer it in such a way as to evade judicial review."[117]

But consider mail-in voting's likely continued presence in future elections.[118] The circumstances that made election challenges not capable of repetition during the first year of COVID-19 may be capable of repetition at the level demanded by the Supreme Court.[119] Perhaps any post-election litigation that results from the 2024 presidential election and state primaries will provide insight as to how federal courts will apply this exception three to four years post-pandemic. What may have divided federal courts before—the same-

114. *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from the denial of certiorari).

115. Resurrection Sch. v. Hertel, 11 F.4th 437, 453 (6th Cir. 2021) (citing Thompson v. DeWine, No. 21-3514, 2021 WL 3183692, at *1 (6th Cir. July 28, 2021)), *rev'd en banc*, 35 F.4th 524 (6th Cir. 2022); *see also* Wright v. Ziriax, 499 F. Supp. 3d 1080, 1089 (W.D. Okla. 2020) ("Other cases that have analyzed this issue have also concluded that restrictions imposed by coronavirus COVID-19 are not 'capable of repetition, yet evading review.'" (emphasis omitted)); Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 560–61 (6th Cir. 2021) (stating that "the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle" because of vaccination rates and treatments, meaning that "[t]here is not a reasonable expectation that . . . the public will face the same burdens as voters did in the fall of 2020").

116. *Hargett*, 2 F.4th at 561.

117. Hotze v. Hudspeth, 16 F.4th 1121, 1124 (5th Cir. 2021).

118. *See* Mark Brown, *Count on Future Mail Voting—Even if Hundreds of Thousands of Ballots Are Still Being Counted*, CHI. SUN TIMES (Nov. 10, 2020, 5:39 PM), https://chicago.suntimes.com/columnists/2020/11/10/21559467/voters-mail-balloting-illinois-future-yarbrough-elections-pandemic-early-counting. Interestingly enough, though, even if mail-in ballots and drive-thru voting persist in future elections, the Fifth Circuit has hinted that challenges to such election laws may not evade review to where the mootness exception would apply. *See Hotze*, 16 F.4th at 1124.

119. *See Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from the denial of certiorari) (stating that "it is not necessary to predict that history will repeat itself at a very high level of specificity" in determining whether a question is capable of repetition).

complaining-party issue—may dissolve or shift within the next few years based on federal courts' responses to post-pandemic changing circumstances in general and in the context of elections.[120]

C. Which Approach Should It Be?

So, the final question arises: Which approach should federal courts adopt? While the distinction may seem subtle, I ultimately conclude that federal courts should adopt the no-contrary-evidence approach—the approach taken by the First, Third, Fourth, and Tenth Circuits.

At first blush, the general-public approach seems appealing. Courts look more generally at whether the law is capable of repetition with the general public or another political candidate, not that specific party. But if that is the case, then what is the point of the exception hinging on the same complaining party? It seems that if courts dispense with the same-complaining-party requirement, then almost any election dispute would satisfy the capable-of-repetition prong, but not all election disputes may be so capable of repetition to warrant judicial resources.

But should we require a party—a voter, political party, or political candidate—to provide evidence that the dispute is capable of repetition with regard to that party itself, like the same-complainant-evidentiary approach requires? The justification for this may be strong when dealing with individual-voter and political-party challenges. But one may be hesitant to say the same for political candidates. A requisite statement of intent to run again for that same political position from a political candidate challenging a ballot access restriction may create some difficulties; political candidates may face backlash in the future if they do not run again. And some candidates may want to strategically delay announcing their intentions to run again for the same office. Do we want political candidates, especially independent candidates who are often the ones challenging ballot access restrictions, to be hesitant to bind themselves in the eyes of the media for future political campaigns?[121] One's instinct may be to say no, contrary to some courts' requirement of repetitive capability as to the individual complainant.

And even if the complaining political candidate does not provide evidence of an intent to run in the future, the court can look at whether there is any evidence to the contrary, much like the third approach. Yet the pushback is that

120. Interestingly enough, the few federal courts that have found election challenges capable of repetition yet evading review during the COVID-19 pandemic have not provided much insight into their reasoning. *See e.g.,* Win v. Cegavske, 570 F. Supp. 3d 936, 941 (D. Nev. 2021) (briefly reasoning that "[t]he inherently brief duration of an election is almost invariably too short to enable full litigation on its merits" (internal quotations omitted) (citation omitted)).

121. *See, e.g.*, Max Brantley, *Tim Griffin Abandons Race for Governor, To Run for Attorney General Instead*, ARK. TIMES: ARK. BLOG (Feb. 8, 2021, 7:15 AM), https://arktimes.com/arkansas-blog/2021/02/08/tim-griffin-abandons-race-for-governor-to-run-for-attorney-general-instead.

the second prong—that there be a reasonable expectation that the controversy will recur with regard to the same complaining party—is really just a pleading requirement and that these types of disputes could just be brought by an independent candidate's political party, rather than the candidate itself, if the dispute involves a ballot access restriction for independent candidates. Even if the candidate brings a challenge, such a statement in its pleadings is not the same as making a public statement on social media or at a public event of an intention to run again for that same office in the future. Plus, the candidate that sues is already putting themselves out there to where perhaps the statement of intent to run in the future has de minimis impact on the candidate himself or herself. And on the flipside, the statement of intent to run in the future could be viewed as a form of manufacturing the issue to be capable of repetition as to that candidate.

Yet the no-contrary-evidence approach seems to be the best of both worlds. A complaining party does not get a free pass if the circumstances seem so far-fetched to repeat themselves. But a court is not going to dismiss a case just because a candidate fails to provide any evidence of a statement to rerun for the *same* political office in the future. Pre-*Dobbs*, courts did not require abortion plaintiffs to indicate whether they had plans to become pregnant in the future. Likewise, one could argue today that courts should not require political candidates to indicate that they have full intentions of running for the same office again in the future. Instead, courts should evaluate all the facts and circumstances to determine whether this challenge brought by this complaining party could recur again in the future. Utilizing judicial "horse-sense" may be an inefficient use of resources that results in both horizontal and vertical inequity among plaintiffs, but adopting an "evidence to the contrary" rule of thumb, much like the Third Circuit, may reach more accurate outcomes than concluding that the dispute is capable of repetition with the same complaining party merely by the complainant's statement that he or she intends to run for the same office again in the future.

CONCLUSION

"Elections are 'of the most fundamental significance under our constitutional structure.'"[122] "Through them, we exercise self-government. But elections enable self-governance only when they include processes that 'giv[e] citizens (including the losing candidates and their supporters) confidence in the fairness of the election.'"[123] But if federal courts across the country are divided on when they can decide what appear to be moot cases under the capable-of-

122. *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from the denial of certiorari) (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

123. *Id.* at 734 (quoting Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay)).

repetition-yet-evading-review exception, what confidence remains in the fairness of elections? "That is not a prescription for confidence."[124] Perhaps federal courts in 2024 will provide some confidence for our voters should any moot post-Election Day litigation arise regarding the next presidential election.

*Katherine T. Oglesby**

124. *Id.* at 735.

* Juris Doctor Candidate (May 2023), University of Alabama School of Law. This Note originated as an independent study overseen by Professor Tara Leigh Grove. To Professor Grove, thank you for your invaluable guidance and insight. To Volumes 73 and 74 of the *Alabama Law Review*, thank you for the feedback, contributions, and edits. To my parents Edward and Melanie Oglesby, my sister Kristin Oglesby, and Ben Bryles, thank you for your unwavering support. And to my niece, Mary Elizabeth, thank you for all the joy that you have brought to my life. I hope this Note inspires you to stay curious and never stop learning.