THE BASIS FOR ELECTION EXCEPTIONALISM IN JUSTICIABILITY AND RELATED DOCTRINES: "CONSTITUTIONAL COMPENSATION" IN LIGHT OF *PURCELL*

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Pursuant to the so-called Purcell doctrine, lower federal courts (and perhaps the U.S. Supreme Court itself) are supposed to refrain from issuing remedies that would alter the rules for election administration in the run-up to Election Day. Whether or not the Purcell rule's purported justifications are persuasive (e.g., concerns about voter confusion, candidate and campaign expectations, smooth operation of election logistics), one tremendously problematic entailment of Purcell is that elections are held (and candidates are elected and policies are determined) even when serious doubt exists about the legality of the contests under federal statutes and the Constitution. Because of these deleterious consequences, we seek, making use of "compensation" theory, to identify ways that justiciability doctrines (e.g., mootness, first- and third-party standing, ripeness, vagueness, and overbreadth) and related constraints on access to federal fora can and should be overtly modified to offset Purcell's undesirable effects and to facilitate earlier and easier federal adjudication and remediation in election-related challenges. It turns out the foundation of such an election exceptionalism regarding access to federal courts has been partially (if inconsistently and haphazardly) laid by the Supreme Court, but the Court has never meaningfully tried to tie the various foundation beams together in a structurally sound and coherent way, much less describe and explain what the doctrinal edifice should look like and why. That is what we seek to do in this Article.

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TABLE OF CONTENTS

I. INTRODUCTION

In the summer of 2023, the Supreme Court decided what one prominent jurist dubbed the "the most important case for American democracy in the almost two and a half centuries since America's founding."[1] Whether or not this characterization of *Moore v. Harper*[2] was overstated, there is no denying the importance of the claim at the heart of the case, the so-called "Independent State Legislature" theory ("ISL")—elected state legislators may, when regulating federal elections, ignore the vetoes of Governors, the state-law rulings of the state courts, and the expressed wishes of state peoples as reflected in state constitutions. This ISL theory lurked menacingly in the presidential election of 2000,[3]

1. J. Michael Luttig, *There Is Absolutely Nothing to Support the 'Independent State Legislature' Theory*, ATLANTIC (Oct. 3, 2022), https://www.theatlantic.com/ideas/archive/2022/10/moore-v-harper-independent-legislature-theory-supreme-court/671625/ [https://perma.cc/RK9G-AT8G].

2. 600 U.S. 1 (2023).

3. Bush v. Gore, 531 U.S. 98, 111–22 (2000) (Rehnquist, J., concurring).

threatened to undermine the 2020 presidential election,[4] and loomed mischievously (in a beefed-up form) during the January 2021 attacks on democracy.[5] For these reasons, the theory's validity desperately needed to be resolved. Happily, the Supreme Court did the right thing in rejecting the premise of ISL theory (that elected state legislatures regulating federal elections cannot be constrained by substantive and procedural requirements in state constitutions), and indeed rejected this premise by an 8-0 vote.[6] This result on the merits surprised a lot of analysts, but even more surprising to many Court watchers was that the Court reached the merits at all. After certiorari was granted and oral argument was heard, the lower court whose judgment was under review (the North Carolina Supreme Court) took actions that, to some, rendered the dispute moot under conventional mootness doctrine.[7]

Three Justices indeed found the case to be moot. And the two of those three, who nonetheless opined on the merits, thought the Court's flouting of mootness doctrine was a bigger deal than its imperfect resolution of those merits.[8] And yet had the three Justices who believed the case was moot (along with the Solicitor General as amicus[9]) had their way, ISL would have continued to fester leading into the 2024 election season, a worrisome prospect to say the least. Indeed, the very possibility of mootness in *Moore v. Harper* places front and center much larger questions about the optimal timing and configuration of election-related challenges in federal court.

Of course, if the Supreme Court could easily have resolved another lawsuit raising the ISL issue before the 2024 primary- and general-election cycles kicked in, then the importance of reaching the merits in *Moore* would have been lessened. But getting a case all the way to the Supreme Court so quickly is hard under normal circumstances. And pre-election litigation is, the Court has made clear, anything but normal.

That election exceptionalism is the central takeaway of the so-called *Purcell* doctrine, first announced by the Court in 2006[10] and applied broadly yet

4. *See* Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 36–42 (discussing, among other cases, *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (mem.) and *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020) (mem.)).

5. *The January 6 Attack on the U.S. Capitol*, AM. OVERSIGHT (Sept. 26, 2023), https://www.americanoversight.org/investigation/the-january-6-attack-on-the-u-s-capitol [https://perma.cc/9JFQ-TY6G].

6. *See* Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2022–2023 CATO SUP. CT. REV. 275, notes 30-34 and accompanying text (all eight Justices who discussed the merits of ISL acknowledged that each state can confer power to fashion federal election regulations on an entity other than the state's ordinary elected legislature).

7. These actions generated two calls by the Supreme Court for additional briefing about the dispute's ongoing justiciability. *See* Moore v. Harper, 600 U.S. 1, 13–14 (2023).

8. *Id.* at 55 (Thomas, J., dissenting). To be clear, we think the case was not moot. See discussion *infra* at footnote 138.

9. *See* Letter from Elizabeth B. Prelogar, Solicitor General, to Scott S. Harris, Clerk, Supreme Court of the United States (May 11, 2023).

10. *See* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006).

cryptically ever since. In a series of cases, the Court has imposed remedial limitations on (especially lower) federal courts confronted with challenges to election administration just before an election takes place (a vaguely defined concept to be sure). The Court's basic message: lower courts should not "change the rules" governing federal elections "too close" in time.

In Part II of this Article, we explore the importance of *Purcell* and—while assuming some or all of the instincts underlying the *Purcell* doctrine are justifiable or in any event entrenched at the Court—we highlight some of the undesirable and under-analyzed side-effects *Purcell* has generated.[11] Our core concern is that the *Purcell* doctrine can, when combined with other litigation constraints, frequently preclude federal courts from enjoining and remedying likely illegal election schemes *before* binding elections take place. And if binding elections are held under constitutional clouds, the result is irreparable harm not just for the plaintiffs who were unable to vindicate their claims, but also to the entire polity that must endure the candidates who are chosen or the policy measures that are enacted. Just as First Amendment doctrine takes deep account of the interests of listeners—and not just speakers—in order to promote and indeed facilitate democratic self-governance, so too election-law-access-to-federal-courts doctrines must attend to the instrumental harm done to non-parties when litigation is deferred. Given these concerns, in Part III we invoke and explore "compensation" theory to identify ways the federal judiciary (especially the Supreme Court) can and should adapt other doctrines—particularly regarding justiciability—to offset the negative externalities *Purcell* creates in the foundationally important realm of elections.[12] Interestingly, and importantly, although the Court has not always been careful or consistent (or perhaps even consciously mindful) with regard to these considerations in applying justiciability and related doctrines (and the Court and various Justices have thus erred in some past cases), many of the Court's outcomes, and some of its reasoning, do lay the intellectual and doctrinal predicates for our arguments that the Court ought to explicitly and formally adapt such doctrines when addressing election disputes. Such self-conscious and overt doctrinal signaling by the Court is especially needed to induce lower courts to resolve election disputes in the right way and at the right time, since most such disputes have their final resolution in the lower courts. In Part IV we move beyond formal justiciability doctrines to canvas other areas of potential compensatory reform, including some aspects of federal court jurisdiction that may need to be addressed legislatively.[13]

11. *See infra* Part II.

12. *See generally* Vikram David Amar & Alan E. Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); *cf.* Frederick Schauer & Richard Pildes, *Election Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

13. *See infra* Part IV.

II. THE *PURCELL* PLATFORM

In *Purcell v. Gonzalez*,[14] the State of Arizona and officials from four Arizona counties sought emergency relief in the U.S. Supreme Court from an injunction entered by a two-judge motions panel of the Court of Appeals for the Ninth Circuit. The dispute involved Proposition 200, a measure Arizona voters approved in 2004 ostensibly to combat voting fraud by requiring voters to offer proof of citizenship when they register to vote and also to present identification before casting their ballots on Election Day.[15] Under Proposition 200, voters who lack the requisite ID may cast provisional ballots that will count only if they return to a designated site within five days to present acceptable identification.[16] The State also permits early voting prior to Election Day; during this early-voting period no identification is required (because, according to the State, there is adequate time to compare signatures on early-vote ballots to signatures on the registration rolls).[17]

Various plaintiffs filed a federal suit challenging Proposition 200's ID requirements in May of 2006. On September 6, the federal district court denied their request for a preliminary injunction, but it did not issue findings of fact or conclusions of law at that time. After plaintiffs appealed, the Clerk of the Court of Appeals sent out a briefing schedule under which briefs would be due on November 21, two weeks after the November 7 Election Day. Plaintiffs then sought from the Ninth Circuit an injunction pending appeal.[18] On October 5, after having received written submissions from the State and County defendants but without any oral argument, the two-judge motions panel issued a brief and unexplained order enjoining enforcement of Proposition 200's contested provisions pending resolution of the ongoing appeal.[19] Four days later the motions panel denied, again without explanation, a motion for reconsideration brought by the defendants.[20]

Another three days later, on October 12, the district court issued findings of fact and conclusions of law.[21] That court determined that "plaintiffs have shown a possibility of success on the merits of some of their arguments but the Court cannot say at this stage they have shown a strong likelihood."[22] The district court also found that the balance of hardships and the public interest militated against the grant of injunctive relief.[23]

At that point the defendants sought emergency relief in the Supreme Court from the Ninth Circuit's injunction. A week later on October 20, the high Court

14. 549 U.S. at 2.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 4.

issued a per curiam opinion,[24] in which it treated the State and county defendants' application for a stay of the Court of Appeals' temporary injunction as a certiorari petition and then vacated the Ninth Circuit's injunction and remanded the case for further proceedings. The Court observed that when:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases . . . . Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action . . . . It was still necessary . . . for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error . . . . [B]y failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate [and subsequent] findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals . . . . Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.[25]

The stated rationale of *Purcell* was somewhat cryptic but certainly could easily be understood in narrow terms; the Court of Appeals enjoined enforcement of election regulations without ever explaining why the district court had abused its discretion or erred as a matter of law in deciding to withhold relief. After all, the language in *Purcell* about how "[c]ourt orders . . . can themselves result in voter confusion [especially] [a]s an election draws closer" precedes a sentence that seeks to justify, rather than criticize, the Court of Appeals' decision to act and provide injunctive relief (as quickly as possible) when it did.[26] But such a narrow reading has not seemed to hold, and the language about the harms of judicial action and the need for "clear guidance" in the runup to an "impending election" has taken on a doctrinal life of its own. This consideration has ripened

24. There were no recorded dissents, but Justice Stevens did write a short concurrence underscoring the need for a better record on which to rule on the merits. *See id.* at 6 (Stevens, J., concurring).

25. *Id.* at 4–6.

26. *Id.* at 4–5.

into what courts and commentators refer to as the *Purcell* "principle"[27]—the notion that:

> [T]o avoid confusion among voters and election administrators, federal courts should generally not change the rules governing elections as Election Day approaches–meaning that injunctions against even unlawful election rules are increasingly disfavored as Election Day draws near. *Purcell* is not an argument against the power of lower [federal] courts to provide remedies for unlawful election laws; rather, it's an argument against allowing injunctions . . . to go into effect *too close to elections*. And although it's directed toward district courts, *Purcell* is as much a principle for appellate courts to apply (or have applied to them)–to justify stays of district court injunctions issued too close[] to an election, or, as the Supreme Court did with the Ninth Circuit in *Purcell* [itself], to wipe away emergency relief issued by courts of appeals.[28]

To the extent that *Purcell*'s essential but generalized insight is that changing election rules shortly before elections can wreak havoc both for the voters and election officials, that insight seems well-founded in common sense and may

27. *See, e.g.*, Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U.L. REV. 427, 428 (2016).

28. Steve Vladeck, *Another Bad Day for the* Purcell *"Principle,"* SUBSTACK: ONE FIRST (Dec. 11, 2023), https://stevevladeck.substack.com/p/57-another-bad-day-for-the-purcell [https://perma.cc/YAH8-ELDN] (emphasis added). For recent cases in which the *Purcell* doctrine has been placed at issue, see, *e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 882 (2022) (Kavanaugh, J., concurring) (explaining application of *Purcell* to stay district court's preliminary injunction); Andino v. Middleton, 141 S. Ct. 9 (2020) (Kavanaugh, J., concurring) (same); Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 424 (2020) (per curiam) (same); Pierce v. North Carolina State Bd. of Elections, 97 F.4th 194, 225−29 (4th Cir. 2024) (invoking *Purcell* to support affirming district court's denial of preliminary injunction).

not really be newfangled at all.[29] But the principle has certainly been undertheorized, underexplained,[30] and (ironically enough, given the doctrine's grounding in the need for clear rules) insufficiently defined, especially by the Supreme Court. For example, the principle would seem to derive from sound federal equity practice rather than any firm constitutional principle. Otherwise, changes in election rules announced shortly before elections by non-judicial actors (*e.g.*, state legislatures or election officials) should also be impermissible or at least strongly disfavored, and yet they are not (unless they are so new, unexpected, and close to an election so as to violate due process or republican government principles). Relatedly, the Supreme Court hasn't applied *Purcell* to invalidate *state* court injunctions issued close to Election Day. Even within the realm of federal courts (assuming the passage excerpted above is correct that *Purcell*'s admonitions apply to all federal courts), the scope of federal judicial relief to which *Purcell* is applicable remains murky. *Purcell*, as applied thus far to the cases of which we are aware, tweaks traditional "remedial" rules governing equitable interim remedies of stays and injunctions before final judicial resolution. Yet we suspect the Supreme Court would in an appropriate case extend *Purcell* even to final remedies—for example, if the Court issued a decision in late September or early October requiring a rule change for a November election, it might stay the remedial implementation of its own merits decision. So perhaps *Purcell*

29. The *Purcell* doctrine may be new in its present form, but lower courts (at least) have been denying pre-election injunctions for many decades based (at least) on administrability (though perhaps not voter-confusion) concerns. As the Supreme Court noted in Reynolds v. Sims, state courts under "well-known principles of equity" have "with[held] the granting of immediately effective relief in a legislative apportionment case" when "an impending election [was] imminent and a State's election machinery [was] already in progress." 377 U.S. 533, 585 (1964). Consider as well the federal district court's reasoning in *Dunn v. Blumstein*:

> We are faced at the outset by the problem of whether this is a proper case in which to consider the validity of the three-month residency requirement. The August 6, 1970, primary and general elections have already been held, and plaintiff will have met the three-month requirement by the time of the November general election. As indicated above, plaintiff originally desired to vote in the August elections, and, to do so, he requested that this court issue a temporary injunction which would have had the effect of opening the Davidson County voter registration rolls to him and to all others similarly situated so that they could participate.
>
> The temporary injunction was refused by this court on the ground that it would be "so obviously disruptive as to constitute an example of judicial improvidence . . . ."
>
> Controlling authority for such a view is found in Moore v. Ogilvie, 394 U.S. 814 (1969)—a case identical, in principle, to the one at bar. There, as here, preliminary extraordinary relief was withheld because of the administrative difficulties which would have been entailed by its implementation. The election was then conducted, and, as a result, the defendants argued that the case had been rendered moot.

Blumstein v. Ellington, 337 F. Supp. 323, 324–25 (M.D. Tenn. 1970), *aff'd sub nom.* Dunn v. Blumstein, 405 U.S. 330 (1972); *see generally* Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941 (2021).

30. For a good example of how the Court invokes *Purcell* without any explanation of how or why the case and its doctrine apply, see Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024). And for a good example of how some members of the Court *seem* (without ever mentioning the *Purcell* case in particular) to be relying on some understanding of what, for *Purcell* doctrine purposes, constitutes the status quo, and what constitutes troubling temporal proximity to an election, see Republican Nat'l Comm. v. Mi Familia Vota, No. 24A164, 2024 WL 3618336, at *1 (S. Ct. Aug. 22, 2024) (disposing, on a divided basis but without explanation, of an Application whose briefing on all sides relied extensively on differing understandings of *Purcell*). For a perplexed reaction to the Court's resolution, see John Fritze, *The Supreme Court Has Ignited New Fears About How It May Handle Election Disputes*, CNN, https://www.cnn.com/2024/08/27/politics/supreme-court-election-purcell-principle/index.html (last updated Aug. 27, 2024, 2:57 PM) [https://perma.cc/P9YW-U4EG].

is better understood as a remedial constraint that applies to both interim and final relief rather than just the former.

As other commentators have demonstrated, what began in *Purcell* as a general reminder to federal courts to be careful about issuing equitable relief in the run-up to elections may have morphed over time into something close to a rigid remedial prohibition.[31] And, even beyond rigidity, the *Purcell* doctrine is certainly open to many criticisms.[32]

First, to the extent that *Purcell* is the true wellspring of the full-fledged doctrine with which it has come to be associated, it is worth mentioning that *Purcell* was itself a shadow-docket case,[33] decided without full briefing or any oral argument on any of the complicated questions of federal judicial equitable power or practice the ruling implicates.[34] It is troubling that a case making such important doctrine about the dangers of federal court proclamations close to elections was decided in a very cursory manner with such little deliberation.

Second, to the extent that the *Purcell* idea is applied reflexively based on (an unspecified) proximity to an election, it may be invoked when justificatory facts don't support it. By this we mean that not all judicial remedies close in time to all elections would create (a problematic level of) confusion or election-administration challenges, and yet the doctrine seems to assume that the harms it worries about always or nearly always exist. [35]

To this a third real-world criticism might be added: that aggressive application of the *Purcell* principle redounds more to the detriment of Democratic Party voters than Republican Party voters. We are not talking here about the appearance problems that arise when Republican-appointed judges seem more committed to *Purcell* than Democratic-appointed judges. We are simply suggesting that in today's America, the majority of challenges brought against election

31. Perhaps the Supreme Court's recent experience with state recalcitrance of the kind in the Alabama *Milligan* litigation will cause the Court to extend more leeway to lower federal courts. *See generally* Allen v. Milligan, 599 U.S. 1 (2023).

32. Codrington III, *supra* note 29, at 961; Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO STATE L.J. 1065, 1087 (2007); Hasen, *supra* note 27, at 464. Criticism of *Purcell* might be less forceful were *Purcell*'s application limited to instances in which the plaintiff could and should have brought the case earlier—a laches kind of reasoning. If a plaintiff challenging the way an election is slated to go forward unnecessarily sits on her rights before bringing the claim or slow-walks the litigation process after she files, she has less basis for complaining if the federal courts side (preliminarily or permanently) with her on the merits but withhold immediate relief for a then-imminent election. Yet *Purcell*'s invocation does not usually seem to depend on any *unnecessary delay* on the part of the challenger. *Cf.* Kim v. Hanlon, No. 24-1098, 2024 WL 1342568, at *46–47 (D.N.J. Mar. 29, 2024) (focusing on timeliness of the filing of the lawsuit and efficient case processing by the parties and the court as reasons not to apply *Purcell*). And, of course, if delay were to be characterized as unnecessary, then the federal courts would have to have been ready and willing to entertain the dispute earlier, which they have not always been. That is the point of this Article.

33. Harry I. Black & Alicia Bannon, *The Supreme Court 'Shadow Docket'*, BRENNAN CTR. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/5EXB-GFQ3].

34. Codrington III, *supra* note 29, at 947–48.

35. *Cf.* Kim v. Hanlon, 99 F.4th 140, 160 (3rd Cir. 2024) (finding that the district court's order altering the ballot close to the primary election would reduce rather than create more voter confusion). *See also* Hasen, *supra* note 27, at 457.

laws that allegedly violate federal constitutional and statutory limitations are brought by Democrat-leaning persons and groups.[36] It is problematic enough for a doctrine to permit binding elections to be held in the face of colorable constitutional and Voting Rights Act violations; it is more problematic still if such violations have, in practice, a partisan skew. To be sure, not all claims of voter suppression or dilution come from areas that tend to be less affluent, less white, and less Republican.[37] We occasionally see, for example, federal challenges to state redistricting plans in Blue states that are alleged to impermissibly create too many pro-minority districts, with white voters claiming racial discriminatory vote dilution. But we think the lion's share of cases in which *Purcell* is invoked involves challenges brought by Left-leaning plaintiffs or groups.

As important as these critiques are, the most fundamental (and to this point underdiscussed) problem with *Purcell* is that the doctrine seems to ignore, or at best, blithely accept, the harms to smoothly operating elections and democratic legitimacy (the ostensible bases of the *Purcell* doctrine itself) that occur when federal judicial relief is unavailable in the run-up to an election. *Purcell* takes the potential for voter confusion and election administrability as lexically superior to concerns over whatever flaws in a jurisdiction's election laws underlie the plaintiffs' challenge. In the context of *Purcell* itself, for example, if a federal judicial suspension of the voter ID requirement might have caused some confusion and even led some voters not to vote on Election Day (which is speculative enough) such that the integrity and legitimacy of the election were to be compromised, the same could be said (plausibly in an even more forceful manner) about allowing constitutionally questionable identification laws to be enforced in that very election.

Indeed, to the extent that *Purcell* forestalls resolution of important and oft-recurring election-related questions, the doctrine implicates the very heart of American democracy and republican government. As the Court observed in *Harper v. Virginia Board of Elections*, the so-called right to vote in the United States is fundamental because it is foundational; the right to vote is the most important means by which other important rights are generated and protected.[38] Any single election that is held in the face of serious doubts about its fairness and constitutionality is thus corrosive of democratic legitimacy in ways the *Purcell* doctrine seems not even to acknowledge, much less accommodate. And application of *Purcell* in some instances means more than simply deferring resolution of constitutional questions; because *Purcell* converts many pre-election challenges to

36. *See* Codrington III, *supra* note 29, at 967−68.

37. *See* Rick L. Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially in Danger*, FINDLAW (Mar. 26, 2008), https://supreme.findlaw.com/legal-commentary/about-face-the-roberts-court-sets-the-stage-for-shrinking-voting-rights-putting-poor-and-minority-voters-especially-in-danger.html [https://perma.cc/KZ57-D2DZ].

38. 383 U.S. 663, 667 (1966). One of us has recently explained that the Constitution is better understood as imposing a "duty" on States to run federal elections constrained by individual rights to nondiscrimination in those elections rather than as recognizing an individual "right to vote" per se. But a so-called "right to vote" still might serve as a useful colloquial expression. *See* Evan H. Caminker, *States' Duty Under the Federal Elections Clause and a Federal Right to Education*, 55 LOY. U. CHI. L.J. 403, 433−35 (2023).

post-election challenges, conventional mootness concerns can in some instances preclude the constitutional merits from ever being resolved. If the challenged election device was a good-for-one-election only affair, courts may never fully have a chance to weigh in on it.[39]

Yet *Purcell*'s insight that rulings shortly before elections can be disruptive ought not be dismissed altogether, because back-and-forth actions by federal courts leading into elections *do* impose costs. If we are to heed Purcell's basic admonition—cautioning federal courts against election remedies too close to elections—either because that makes some sense or because the *Purcell* doctrine, in any event, is here to stay, the question becomes how election challenges can best be heard and resolved in a way that respects people's rights to participate in democracy and safeguards the institutional capital and credibility of the federal courts.

Purcell thus places pressure on courts to decide challenges "far enough" (whatever that truly means) in advance of elections. But efforts along those lines can run into justiciability or other related remedial or jurisdictional constraints—e.g., standing, ripeness, and the like. *Our basic thesis in this Article is that justiciability doctrines and other jurisdictional constraints that can prevent timely/expeditious resolution of time-sensitive claims should be tweaked—that is, applied with more flexibility and nuance,*[40] *in election settings—in order to "compensate" for the Purcell remedial constraint by enabling earlier resolution of elections-rule challenges.*[41] We concede that even if our prescription is heeded, many variables will influence how much better things will be. We certainly acknowledge that sometimes election rules that generate challenges are themselves not adopted until close to an election, and also that litigants themselves face various constraints (beyond those created by judicial doctrines and legislative rules for litigation) in their ability to file suit early. And, depending on the factual complexity of particular cases, various factors may influence the speed of adjudication once cases are filed. But notwithstanding these real-world variables, we think more explicit, self-conscious, systematic and targeted attention to justiciability and related doctrines as they apply to *Purcell*-governed election cases would in the aggregate facilitate earlier and more satisfactory resolution.

39. Hasen, *supra* note 27, at 428. *Cf.* Pearson v. Callahan, 555 U.S. 223 (2009) (stating that qualified immunity, where the remedial constraint often means the legal issue remains unresolved, can create a vicious cycle because the alleged misconduct is more likely to recur); S.C. State Conf. of NAACP v. Alexander, No. 3:21-cv-03302-MGL-TJH-RMG, 2024 WL 1327340, at *2 (D.S.C. Mar. 28, 2024) (lower court withdrawing earlier-granted relief seemingly because of delay in Supreme Court's consideration of the merits and in light of temporal proximity to the upcoming election cycle).

40. We are not necessarily suggesting that the doctrines themselves need to be modified, but rather than the doctrines as they are currently articulated are sufficiently capacious to permit a *Purcell*-oriented practice of early-resolution favoring application.

41. We pointedly do not say "plaintiff friendly," as there may be circumstances under which it is a defendant or intervenor who seeks the relevant relief—see, e.g., intervenor-defendants in *Moore* who could have invoked our thesis if necessary to beat a *Purcell*-imposed deadline.

III. THE CASE FOR ELECTION EXCEPTIONALISM: WAYS IN WHICH JUSTICIABILITY CONCEPTS CAN AND SHOULD BE IMPLEMENTED TO FACILITATE MERITS RESOLUTION OF PRE-ELECTION CHALLENGES MORE SYSTEMATICALLY AND SELF-CONSCIOUSLY

Again, our general thesis is that courts should look for ways to increase the likelihood that pre-election challenges can move through the judicial system and be resolved quickly enough such that, if election-related rules are properly enjoined or other remedies are appropriate, courts can make such determinations before the *Purcell* principle's remedial cutoff is reached.

In this Part, we begin our larger enterprise by locating our inquiry within the more general concept of complementarity theory and exploring potential complementary adjustments, beginning with mootness (the topic we raised in connection with *Moore*). Mootness creativity holds some promise to compensate for *Purcell*'s problems, but it is also inadequate. We thus also discuss adjustments to standing doctrine (both first- and third-party) and ripeness issues. We draw in part on parallels to other access-to-federal-adjudication tweaks the Supreme and lower courts have made to address the needs of democracy. We then briefly discuss practical pros and cons of our general prescription.

In Part IV, we quickly touch on other justiciability-related judicial tweaks and legislative complements that Congress and procedural rule-makers might consider in this realm.[42]

A. Complementarity and Justiciability

1. Justiciability and Flexibility

The so-called justiciability doctrines giving shape to Article III's constraint that federal courts adjudicate only "cases" or "controversies" are well established.[43] To demonstrate constitutionally sufficient standing when suit is initiated, a plaintiff must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable judicial decision.[44] The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical,"[45] ensuring that the plaintiff has a "personal stake in the outcome of the controversy."[46] In addition, as a prudential matter, plaintiffs must generally assert violations of their

42. *See infra* Part IV.

43. U.S. CONST. art. III, § 2, cl. 1. These doctrines have been fairly stable for the past five decades, though few claim they are grounded in text, original meaning, or early practice. For a historical discussion of the development of justiciability doctrines, see, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064 (2015).

44. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021); Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157–58 (2014); Davis v. Fed. Election Comm'n, 554 U.S. 724, 733 (2008); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

45. *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); *Driehaus*, 573 U.S. at 158.

46. Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

own legal rights rather than violations of the rights of third parties not before the court.[47] The doctrines of ripeness and mootness focus on timing: ripeness doctrine precludes federal adjudication of claims that are premature, and mootness doctrine precludes adjudication of claims that have gone stale.[48]

Collectively, these doctrines are designed to serve both separation of powers values (by maintaining "the proper—and properly limited—role of the courts in a democratic society"[49]) and adjudicatory values (by "fram[ing] issues in a factual context suitable for judicial resolution" and ensuring adverse and zealous advocacy[50]). Importantly, as we explicate below in greater detail, each of these doctrines accommodates some flexibility or play in the joints, permitting their application in nuanced and context-specific ways.[51]

2. Complementarity Theory

Our overall thesis is a species of a genus of argument that one of us has previously termed doctrinal "complementarity."[52] The general notion is that many judicially crafted legal doctrines have the following two properties. First, they do not map perfectly onto their underlying constitutional meanings or values. As a result of this slippage, workable "constitutional tests frequently either overenforce or underenforce constitutional norms."[53] And second, discrete legal doctrines may interact with each other in ways that influence their ability to optimally enforce their motivating norms. Given these frequent properties, "sometimes the Court should consider pairs or perhaps even sets of doctrinal rules and should measure these rules against each other to achieve an optimal overall balance."[54] Put differently, "[i]n certain contexts, it makes sense to look at the big

47. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014). Two other prudential principles are "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).

48. *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 644–45 (2006) ("In crude terms, ripeness doctrine excludes some lawsuits as premature, while mootness screens out others as no longer proper for decision . . . .").

49. Allen v. Wright, 468 U.S. 737, 750 (1984).

50. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 14 (1984); *see, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (standing doctrine designed to guarantee a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues").

51. Scholars may disagree as to whether this is a feature or a bug, but it is a given. *See, e.g.*, Fallon, Jr., *supra* note 43, at 1064 (accepting "the fragmentation of standing law as a fact of life," courts and scholars "should attempt to identify how generally stated rules or principles apply differently in coherently distinguishable contexts").

52. *See* Evan H. Caminker, *Context and Complementarity Within Federalism Doctrine*, 22 HARV. J.L. & PUB. POL'Y 161, 171 (1998) (referencing a general "principle of doctrinal complements").

53. *Id.* at 163 (quoting Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword*: *Implementing the Constitution*, 111 HARV. L. REV. 54, 66 (1997)). This is true even for text-based interpretive projects: "it seems obvious that the content of constitutional doctrine is nonidentical with the semantic content of the constitutional text." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 104 (2010).

54. Caminker, *supra* note 52, at 163.

picture and assess the merit of a particular doctrine in light of other existing or potential doctrines that impact the same values."[55] The notion of doctrinal complementarity introduces a legitimate source of path-dependency other than the traditional norm of stare decisis, according to which courts should modify or apply doctrine B in order to compensate for some suboptimal impact of the way they have defined or applied doctrine A.[56]

Both Professors Daryl Levinson and Richard Fallon, Jr., subsequently applied similar reasoning to the closer-to-home context of judicial remedies.[57] Professor Levinson illustrated and defended the practice by which courts frequently consider interactions between substantive rights and their remedies before fine-tuning the doctrines governing one or both—for example, defining the scope of unreasonable searches and seizures in light of the remedial exclusionary rule, and vice versa.[58] Professor Fallon then brought justiciability into the picture.[59] He observed and defended that, "when the Supreme Court feels apprehensions about the availability or non-availability of remedies, it sometimes responds by adjusting applicable justiciability rules, either to dismiss the claims of parties who seek unacceptable remedies or to license suits by parties seeking relief that the Court thinks it important to award."[60] Fallon then incorporated Levinson's observations to view the triumvirate of justiciability, substantive rights, and remedies as often interactive and collectively calibrated.[61]

Our thesis fits snugly into this complementarity concept. In the special context of federal court challenges to election-related schemes,[62] courts should tailor justiciability doctrines to compensate for rather than compound the negative effects of the remedial *Purcell* principle in order to optimize the overall goals of federal adjudication. Without violating any constitutionally imposed constraints, federal courts may and should work the play in justiciability's joints in order to maximize the possibility that election-related challenges can be resolved well, fairly, and also expeditiously to reduce the likelihood that illegal election cycles are insulated from effective judicial review. Arguably no area of constitutional law is more fundamental than the rules surrounding elections. Just as voting is a

55. *Id.* at 169. Professor Caminker's article illustrates the concept of doctrinal complementarity primarily by identifying symbiotic relationships among heretofore-viewed-as-discrete federalism doctrines, including the scope of congressional power to enforce federal law, various state sovereign immunity rules, state anti-commandeering rules, and federal court abstention requirements. *Id.* at 164–68. The article later ruminates about interactions between federalism and separation of powers doctrines, including how some mentioned above relate to congressional jurisdiction-stripping powers, presidential officer-removal powers, and judicial *stare decisis* constraints. *Id.* at 170–71.

56. *Id.* at 169–70.

57. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Fallon, Jr., *supra* note 48.

58. *See* Levinson, *supra* note 57, at 860, 893–96.

59. Fallon, Jr., *supra* note 48, at 636.

60. *Id. See also* Fallon, Jr., *supra* note 43, at 1110–11 (urging the Court to acknowledge that, in some circumstances, standing is "enmeshed with concerns about the propriety of particular kinds of remedies"). For discussion of overbreadth claims, *see infra* notes 197–203 and accompanying text.

61. Fallon, Jr., *supra* note 48, at 643–44 (explaining broader thesis).

62. Our general analysis might apply as well to state court adjudication, in those states that choose to embrace an analogy to federal justiciability requirements.

fundamental right (in the sense that all other rights depend on it, as the Court reminded in *Harper*[63]), elections are a fundamental pillar of the Republic. No interests could be greater than ensuring the reality and appearance that elections are administered consistent with supreme law.

This distinctively important character of elections helps explain how our complementarity proposal differs from Fallon's framework in two important respects. First, Fallon focuses on contexts in which courts have reason to either avoid or impose a remedy for a legal violation.[64] But we are agnostic on whether any particular suit calls for any particular remedy; we merely insist that courts have a proper time period in which they can make that assessment. Second, Fallon considers trans-substantive, ad hoc balancing, and substantive rights-specific approaches before endorsing only the latter.[65] By contrast, our thesis is triggered by the legal regime being challenged—rules related to election administration—but not necessarily the specific substantive rights at stake. Challenges to election rules might present a host of different substantive legal claims, including Article I and II duties that states participate in federal-officer selection, Twelfth and Twentieth Amendment rules governing presidential and vice-presidential selection; various rights-protecting provisions (including the First, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments); and various federal statutes (such as the Voting Rights Act).[66]

As discussed above, the *Purcell* principle, when invoked, typically[67] precludes a plaintiff from enjoining an allegedly illegal election-related rule prior to an imminent election. As a result, once the challenged election-related event occurs, the question immediately arises as to whether the plaintiff's challenge has become moot. So we'll first consider whether and how mootness rules could be applied to permit continuing adjudication post-election cycle #1 to make sure the issue is resolved before election cycle #2. Then we'll move back in time to consider whether and how standing and ripeness rules should be applied to facilitate early legal challenges to cycle #1 rules so that courts can issue appropriate remedies before the *Purcell* principle remedial constraint ever kicks in.

63. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966). *See supra* note 38 and accompanying text.

64. *See* Fallon, Jr., *supra* note 48, at 692–704.

65. *Id*. at 654–55.

66. *See* Amar & Amar, *supra* note 4, at 43–50.

67. We say "typically" because we believe the *Purcell* principle is generally invoked by courts to preserve the status quo, meaning the challenged election can go forward can go forward under the rules that have been enacted or implemented prior to the litigation. *See supra* notes 26–37 and accompanying text. But we can imagine *Purcell* being applied to reinstate a longstanding district court remedial decree that relevant actors planned around that was upset or vacated by a Court of Appeals' ruling too close to an election.

B. Post-Election Mootness

1. Mootness and the Flexible "Capable of Repetition Yet Evading Review" Exception

As a general matter, an Article III case or controversy becomes "moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[68] The underlying concern is that, when "there is no reasonable expectation that the wrong will be repeated," the court may no longer "grant any effectual relief to the prevailing party" such that "any opinion as to the legality of the challenged action would be advisory."[69] Post-suit events that commonly moot cases include: a party passes away; the parties settle the dispute; the plaintiff's status changes so she is no longer subject to the challenged rule or action; the challenged rule is repealed or expires; or the defendant ceases the challenged conduct.[70] Under traditional mootness standards, the holding of an election would seem to moot any challenge to the rules governing the administration of that particular election.[71] But mootness doctrine has long contained exceptions.[72] The one most relevant here is for actions that are "capable of repetition yet evading review" (hereinafter CORYER).[73] More specifically, a "dispute qualifies for that exception only if (1) there is a reasonable expectation that the same complaining party will be subjected to the same [kind of alleged illegality] again"[74] after mootness occurs (such that the issue is "capable of repetition"); and (2) the challenged action inevitably persists in its duration for a period too short to be fully litigated prior to its cessation or expiration, that is, prior to the mootness occurring (such that the issue will repeatedly "evade review").[75]

68. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (citations omitted).

69. *Id.* (citations omitted).

70. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 143–44 (8th ed. 2021) (providing examples).

71. *Id.* at 152–54.

72. Especially given these exceptions, some Justices and scholars have argued that the dismissal of moot cases is prudentially motivated rather than constitutionally required. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring):

> The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.

See generally Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992) (mootness doctrine is prudential rather than constitutionally required); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009) (mootness doctrine is largely prudential).

73. As Dean Chemerinsky explains, "some injuries occur and are over so quickly that they will always be moot before the federal court litigation process is completed. When such injuries are likely to recur, the federal court may continue to exercise jurisdiction over the plaintiff's claim notwithstanding the fact that it has become moot." CHEMERINSKY, *supra* note 70, at 150. Other mootness exceptions cover cases in which there are collateral injuries, in which the defendant voluntarily ceases her allegedly illegal conduct yet remains free to resume it, and in which a class action is properly certified. *See id.* at 146–49, 155–64.

74. United States v. Sanchez-Gomez, 584 U.S. 381, 390 (2018); *see also, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007).

75. *Wis. Right to Life*, 551 U.S. at 462.

Turning to the second part of the formulation, given the complexity of much election-related litigation and the short and recurring timeline between elections (typically two or four years between general elections, and typically only a few months between primary and general elections), many suits challenging election-related rules cannot be fully litigated before the impending election occurs. That does not mean, of course, that the issue might not recur, and be fully litigated, within some unspecified future election cycle. Under our prescription, one important election-law-specific modification to mootness doctrine would be the explicit clarification that "evading review *before the next election*" can suffice to evade review within the meaning of the exception, because (as emphasized earlier), the holding of elections under constitutional cloud creates a distinctive and irreparable harm that ought to be mitigated rather than replicated.[76]

A perhaps more complex and case-specific issue is whether the "capable of repetition" ("COR") component is also satisfied. As explained and illustrated below, each of the three components of that test—reasonable expectation, same party, and same action—are fuzzy.[77] Happily, even without considering the remedial pressure of *Purcell*, courts have often been quick to apply these terms flexibly to preserve jurisdiction over election-related litigation even after the challenged election occurs. But not always; application of these test components has not been entirely consistent.[78] Thus it is worth pressing our point that *Purcell* provides even greater reason to apply the CORYER exception liberally in election-related challenges.

The COR requirement of a "reasonable expectation" of recurrence is fuzzy on its face. For decades, the Court suggested that this COR test is identical to the standing requirement of "imminent" and non-speculative injury.[79] More recently, however, the Court has clarified that the CORYER "reasonable expectation" of recurrence requirement is less demanding than standing's "imminent" requirement: "there are circumstances in which the prospect that a defendant will

76. *Compare* Joyner v. Mofford, 706 F.2d 1523, 1527 (9th Cir. 1983):

> "Evading review" for the purpose of the exception . . . only means that in the ordinary course of affairs it is very likely to escape review. Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws—including the one under consideration here—could never reach appellate review.

See, e.g., Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000) (state residency requirement for candidates meets "yet evading review" standard because "[t]he short span of time between the filing deadline and the election makes such a challenge evasive of review").

77. *See infra* notes 78–136 and accompanying text.

78. *See infra* note 138 (discussing Justice Thomas's differential treatment of the CORYER exception in two elections cases raising the same legal issue).

79. *See, e.g.*, Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'") (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) and Henry Paul Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)). Given the Court's longstanding equation of imminent injury in the standing and mootness contexts, it is perhaps understandable that the Court has sometimes applied standing doctrine where mootness doctrine seems applicable because the initially challenged conduct had already occurred. *See, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 153–54, 164–68 (2014).

engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."[80] In any event, both "imminent" and "reasonable expectation" are inherently subjective standards that give courts "substantial discretion in deciding what is a sufficient likelihood of future injury . . . to justify invoking this exception."[81]

The "same party" test would seem more straightforward.[82] And yet, experience shows otherwise. Perhaps most famously in *Roe v. Wade* and other abortion cases,[83] as well as some election cases described below, the Court "did not specifically inquire whether the plaintiff in particular was likely to suffer the same harm in the future."[84] Indeed, Justice Scalia once accused the Court in these cases of "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*"—while urging the Court to confine such prior cases to their facts.[85]

Although since then the Court continues to mouth the words "same party," functionally, one can—and the Court sometimes does—loosen this constraint by broadening the "same action" about which that same party may complain. If "same action" requires literally identical conduct and injury, many election-related complaints will not likely recur. But if "same action" includes similar conduct by similar parties creating similar injuries, the COR exception expands considerably.

In some but not all cases challenging election rules, the Court has—without making explicit that the election-setting deserves any special generosity—applied one or more of these doctrinal components loosely in order to permit invocation of the CORYER exception. Here are a few illustrative cases:

Consider *Golden v. Zwickler*, in which the Court unanimously held moot a challenge to a New York statute criminalizing the distribution of anonymous literature in connection with an election campaign.[86] Plaintiff Zwickler had been convicted (later reversed on state grounds) of anonymously distributing leaflets

80. Friends of the Earth, Inc., v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 190 (2000). While *Laidlaw* itself addressed the "voluntary cessation" mootness exception, the Court noted that the CORYER exception "could not exist" if the two imminence standards did not diverge. *Id.* at 189–90. The Court further explained that, while the plaintiff bears the burden of demonstrating imminence for standing purposes, the party claiming mootness (often the defendant) bears the burden of demonstrating non-imminence. *Id*. at 190. Moreover, mootness determinations may uniquely be influenced by concerns about judicial resources, *id.* at 191−92 ("by the time mootness is an issue, the case has been brought and litigated, often (as here) for years" and "[t]o abandon the case at an advanced stage may prove more wasteful than frugal"), and courts' interest in "preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000).

81. CHEMERINSKY, *supra* note 70, at 155.

82. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 450 (2007) (referencing the "same party" test).

83. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973) (observing that "[p]regnancy often comes more than once to the same woman," but never inquiring whether Jane Roe herself reasonably expected not merely to again become pregnant but also to again seek an abortion in Texas).

84. CHEMERINSKY, *supra* note 70, at 151 (highlighting abortion and election cases).

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

86. 394 U.S. 103, 110 (1969).

criticizing congressional candidate Abraham Multer in 1964.[87] Zwickler sued to enjoin the statute's enforcement during the 1966 congressional election (in which the same candidate planned to run again) "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966."[88] By the time the Court fully considered the case, the 1966 election had passed and Multer had been elected to the Supreme Court of New York, making it unlikely he would again run for Congress.[89] The Court brusquely dismissed Zwickler's alleged intent to distribute anonymous leaflets pertaining to future elections as "wholly conjectural" and held he was not entitled to declaratory relief.[90]

Yet just one month later, in *Moore v. Ogilvie*, the court refused to hold moot a challenge by 26 independent candidates for the office of presidential Elector to an Illinois statute requiring for such independent candidates to obtain a large number of qualified voter signatures in order to appear on the ballot.[91] The candidates were refused ballot access for the 1968 presidential election, which was held before the Supreme Court heard their appeal.[92] By way of explanation, the Court said simply this: "But while the 1968 election is over, 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. The problem is therefore 'capable of repetition, yet evading review.'"[93] The Court seemingly ignored the "same party" expectation requirement, failing to mention let alone inquire as to whether any of the plaintiff candidates would ever seek election again.[94]

Several years later, the Court again notably ignored the "same party" restriction in *Dunn v. Blumstein*, in which a new resident challenged Tennessee's state and county durational residency requirements for voter registration.[95] The plaintiff had already satisfied the county's three-month requirement before the 1970 election in which he wished to vote, and he had long satisfied the state's one-year requirement by the time the Court heard his appeal in 1972 months ahead of the next election.[96] Nonetheless, the Court applied the CORYER mootness exception, with but this reasoning: "the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class

87. *Id.* at 104–06.

88. *Id.* at 105–06.

89. *See* Zwickler v. Koota, 389 U.S. 241, 242–45 (1967) (explaining procedural history); *id.* at 253 (discussing possible mootness).

90. *Golden*, 394 U.S. at 109–10.

91. 394 U.S. 814, 818–19 (1969).

92. The Court actually refused a request to expedite review several weeks before the election, citing the "physical impossibility" of the state's effectuating any relief in time. *Id.* at 815−16 (quoting Moore v. Shapiro, 393 U.S. 814, 814 (1968)).

93. *Moore*, 394 U.S. at 816 (citation omitted).

94. *See generally id.*

95. *See generally* 405 U.S. 330 (1972).

96. *See id.* at 333 n.2.

of people affected by the presently written statute."[97] The Court additionally distinguished *Hall v. Beals*, in which the Court found a similar challenge moot after Colorado amended and substantially shortened its residency requirement.[98] This juxtaposition suggests the Court was focused in *Dunn* on whether the state statute would apply to future elections, but it further underscores the Court's failure to address whether the same plaintiffs would ever face the same injury in future elections. And that seems unlikely, unless the plaintiff left Tennessee to take up residency in another state and then moved back into Tennessee within a year (or three months) of an upcoming election.[99] The *Dunn* Court clearly did not care about the likelihood that the plaintiff himself would ever confront Tennessee's residency hurdles again[100]—a sentiment echoed in subsequent residency requirement challenges.[101]

In *Storer v. Brown*, several would-be congressional and presidential candidates and their supporters sued to enjoin California's burdensome ballot-access requirements prior to the 1972 election cycle.[102] The Court again rejected a suggestion of mootness based on CORYER, with this succinct statement: "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.'"[103] Once more, the Court said nothing about the "same party" requirement.[104]

97. *Id.*

98. *Id.*; 396 U.S. 45, 48–50 (1969).

99. The Court in *Hall* considered the analogous possibility: the same plaintiffs "will face disenfranchisement in Colorado in 1972 only in the unlikely event that they first move out of the State and then re-establish residence there within two months of the presidential election in that year." *Hall*, 396 U.S. at 49. But there, the Court unsurprisingly concluded that "such speculative contingencies afford no basis for our passing on the substantive issues." *Id.*

100. Some commentators have reasonably questioned why CORYER was invoked in *Dunn*, given that the case purported to be a class action. *See* Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 903 (1983) ("If [class] certification conferred legal status upon the claims of the class and if there were always class members with *current* claims, what did it matter . . . that the claims were 'capable of repetition?' And in what sense were they 'evading review'?") (emphasis in original).

101. *See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) (perfunctorily embracing CORYER mootness exception in challenge to residency requirement: "Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'") (citing Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) and Moore v. Ogilvie, 394 U.S. 814, 816 (1969)).

102. 415 U.S. 724, 726–27 (1974).

103. *Id*. at 737 n.8 (citing *Rosario*, 410 U.S. at 756 n.5; *Dunn*, 405 U.S. at 333 n.2; *Moore*, 394 U.S. at 816)).

104. The Court did note that the COR exception "in the context of election cases is appropriate when there are 'as-applied' challenges as well as in the more typical case involving only facial attacks." The Court explained that adjudicating as-applied challenges "will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* Because as-applied challenges can raise context-specific issues, they seemingly call into question the "same action" CORYER component along with the "same party" component. *See infra* notes 111–22 and accompanying text (discussing *Fed. Election*

Within a few years, the Court started paying more attention to the "same party" component, even while finding the CORYER exception met. For example, in *First National Bank of Boston v. Bellotti*, a group of companies challenged a Massachusetts criminal statute prohibiting them from spending money to influence referendum votes on non-pocketbook issues.[105] The companies sought to influence a 1976 referendum proposing a graduated income tax, and the Court invoked the CORYER mootness exception when it addressed the companies' appeal long after the referendum was defeated.[106] This time, when explaining why there is "a reasonable expectation that the same complaining party [will] be subjected to the same action again,"[107] the Court actually did support its claim. "The 1976 election marked the fourth time in recent years" that voters faced a graduated income tax referendum, and it was reasonable to believe the amendment effort would continue as Massachusetts was a significant outlier on this issue.[108] And the complaining companies, given their track record, could credibly "insist that they will continue to oppose" the reform effort.[109] "Insist" may be a low bar, but at least the Court connected the reasonable expectation to these plaintiffs and not just other potential challengers.[110]

But soon after the Court started paying more attention to party-specific circumstances, the Court started relaxing the "same action" requirement. In *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("WRTL"), the Court considered an ideological nonprofit advocacy group's suit to enjoin the FEC from enforcing against it the Bipartisan Campaign Reform Act's criminal ban on using corporate funds to pay for certain "electioneering communications" within thirty days prior to a primary federal election or sixty days prior to a general federal election.[111] Prior to the blackout period preceding the November 2004 general election, WRTL broadcast radio ads encouraging voters to complain to Wisconsin's Democratic Senators for allegedly "using the filibuster delay tactic to block

Comm'n v. Wis. Right to Life, Inc, 551 U.S. 449 (2007), and other same-action cases). The Court's language also suggests placing some weight on the importance of adjudicating election challenges before it's too late.

Many lower courts have read *Dunn* and its progeny essentially to redline the "same party" requirement in election cases. *See, e.g.*, Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000) ("*Dunn* . . . proceeded to the merits without examining the future political intentions of the challengers."); Hall, *supra* note 72, at 590 ("[C]ourts have nonetheless frequently disregarded this so-called [same party] 'requirement' and held claims not to be moot despite the lack of any reasonable likelihood that the same complaining party would again be subject to the same action.").

105. 435 U.S. 765, 767 (1978).

106. *Id.* at 774–76.

107. *Id.* at 774 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)) (alteration in original).

108. *Id.* at 775, 775 n.9.

109. *Id.* at 775.

110. The Court did the same in *Norman v. Reed*, 502 U.S. 279 (1992), when it invoked the CORYER exception in a challenge by party organizers to an Illinois statute imposing ballot access restrictions on "new" political parties. The organizers successfully secured ballot access for a 1990 county election through a Supreme Court stay, but the election was held before the Court heard the appeal. The Court cryptically stated that "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990." *Id*. at 288. Perhaps the Court felt it unnecessary to offer further support for the assertion because a successful challenge would generate other favorable collateral consequences. *Id.*

111. 551 U.S. 449, 457–60 (2007).

federal judicial nominees from a simple 'yes' or 'no' vote" for confirmation.[112] WRTL sought the injunction to protect itself from criminal sanctions so it could continue running the ad campaign within the blackout period.[113] Entertaining the appeal long after the 2004 election cycle, the Supreme Court invoked the CORYER mootness exception after concluding "there exists a reasonable expectation that the same controversy involving the same party will recur."[114]

The Court found the "same party" component satisfied because "WRTL credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period" and indeed it had already sought another preliminary injunction "based on an ad it planned to run during the 2006 blackout period."[115] As observed in previous cases, that's a fairly generous assumption—depending on what "materially similar" ads might mean. The 2004 ads over which WRTL sued concerned the purported filibustering of favored judicial nominees.[116] It seems highly speculative whether, by the time the Court issued its opinion some three years later, pro-life judicial nominees would remain in the nominations pipeline and especially whether Wisconsin's senators would still be filibustering or otherwise stonewalling their confirmation. Of course, the WRTL group might have other pro-life reasons for favoring or disfavoring particular candidates in future elections. But if other motivations for running ads pointing to other legislative "misconduct" qualifies as "materially similar" to the 2004 ads, it is only because the "same party" determination presumes a broad definition of "same controversy."

This can be seen even more clearly by doubling back to the "YER" doctrinal requirement and carefully examining the Court's analysis of it. The FEC argued that the two-year window between general elections provides "ample time for parties to litigate their rights before each [statutory] blackout period."[117] The Court dismissed this assertion, in large part because "groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period," preventing them from "knowing well in advance" what ads they might "want to run" as the next election approaches.[118] So if WRTL cannot predict the issues about which it might want to run ads in future election cycles (which supports the YER finding), how can the Court confidently predict for COR purposes

112. *Id.* at 458−59.

113. *Id.* at 460.

114. *Id.* at 464.

115. *Id.* at 463−64. The Court folded its "reasonable expectation" finding into this statement by relying solely on the "credible" claim of planning. In many contexts, the Court dismisses claims that plaintiffs will repeat criminal behavior. *See, e.g.*, United States v. Sanchez-Gomez, 584 U.S. 381, 391 (2018) (quoting O'Shea v. Littleton, 414 U.S. 448, 497 (1974)):

> [W]e have consistently refused to "conclude that the case-or-controversy requirement is satisfied by" the possibility that a party "will be prosecuted for violating valid criminal laws." We have instead "assume[d] that [litigants] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct."

But the Court often ignores this assumption where, as here, plaintiffs challenge criminal prohibitions on First Amendment grounds or in electoral contexts. *See, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

116. *Wis. Right to Life*, 551 U.S. at 449.

117. *Id.* at 462.

118. *Id.*

that WRTL will itself ultimately choose to run "materially similar" ads within future blackout periods at all, let alone ads raising the same controversy—unless "same controversy" encompasses pretty much any ads about any issue?

And this time, the Court said so out loud. The FEC noted that, especially because WRTL brought an as-applied challenge,[119] recurrence of the "same controversy" means future ads that share "all 'the characteristics that the district court deemed legally relevant'" on the merits.[120] But the Court replied that "[t]he FEC asks for too much":

> Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively . . . mak[e] [this mootness] exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC. Here, WRTL credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period, and there is no reason to believe that the FEC will 'refrain from prosecuting violations' of [the statute].[121]

Just so: the "same party" component is satisfied because the "same controversy" is liberally defined.[122]

Most recently, in *Republican Party of Pennsylvania v. Degraffenreid*, three Justices would have extended WRTL's capacious reasoning in a dispute arising during the 2020 presidential general election.[123] Fearing that coronavirus pandemic concerns and postal service delays would hold up the mailing or delivery of many mail-in ballots, the Pennsylvania Democratic Party sued state officials in state court seeking an injunction extending the statutory ballot-receipt deadline beyond election evening.[124] The Pennsylvania Supreme Court held that a state constitutional provision guaranteeing "free and equal" elections authorized it to extend the deadline by three days.[125] The Republican Party of Pennsylvania and state Senate leaders intervened to assert that the state court's override of the stat-

119. The Court had previously rejected a facial challenge to the statute. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

120. *Wis. Right to Life*, 551 U.S. at 463.

121. *Id.*

122. Compare, for example, Davis v. Fed. Election Comm'n, 554 U.S. 724, 735 (2008), in which the Court relied on *WRTL* to hear a different challenge to the same federal campaign statute. Under the so-called "Millionaire's Amendment," a congressional candidate's personal campaign spending beyond a certain threshold automatically relaxed the statutory constraints on their opponents' ability to accept campaign contributions and coordinated party expenditures. Davis initially challenged this asserted penalty for self-financing as applied to him in the 2006 general election. Hearing Davis' appeal post-election, the Court found the CORYER exception satisfied because Davis "made a public statement expressing his intent to [self-finance another bid for a House seat]" and he had twice done so in the past. *Id.* at 735−36. By contrast to WRTL, here the relevant facts and law would be virtually identical in the upcoming election—and thus no stretch of the CORYER components was required.

123. *See* 141 S. Ct. 732, 732–40 (2021) (Thomas, J., Alito, J., & Gorsuch, J., dissenting from denial of certiorari) (mem.).

124. *Id.* at 733.

125. *Id.*

utory deadline violated the "independent state legislature (ISL) doctrine" assertedly entailed by the federal Constitution's Electors Clause.[126] While expedited review and stays were sought, the state agreed to segregate the ballots received under the extended deadline.[127] By the time the Supreme Court considered the intervenors' petition for certiorari, the election had been held and the number of segregated ballots could not "have changed the outcome in any federal election."[128] The Court, without explanation, denied the intervenors' certiorari petitions.[129] Both Justice Thomas and Justice Alito (joined by Justice Gorsuch) wrote separately to explain why they dissented from the Court's denial due to the general importance of addressing the ISL question and the particular advantages of doing so well before the next relevant election.[130]

The dissenting Justices all invoked the CORYER exception to justify hearing the case post-election—and defined "subject to the same action again" capaciously. Justice Thomas said just this:

> [T]here is a reasonable expectation that these petitioners—the State Republican Party and legislators—will again confront nonlegislative officials altering election rules. In fact, various petitions claim that no fewer than four other decisions of the Pennsylvania Supreme Court implicate the same issue. Future cases will arise as lower state courts apply those precedents to justify intervening in elections and changing the rules.[131]

This cryptic explanation reflects a loose application of doctrinal standards. Whether future state courts will again enjoin mail-in ballot deadlines turns on highly speculative assumptions about the recurrence of pandemics and postal failures or similar triggers.[132] And Justice Thomas's more sweeping prediction of future-but-unspecified interventions that "chang[e] the rules" makes the repeat-play expectation more "reasonable" but only by broadening the "same action" definition to include any asserted violation of the independent state legislature doctrine—no matter which non-legislative actor purports to make what kind of rule change that allegedly contravenes what kind of state constitutional provision.[133]

126. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [presidential] Electors . . . .").

127. Republican Party of Penn. v. Boockvar, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

128. *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from denial of certiorari).

129. *Id.* at 732.

130. Justice Thomas argued that the judiciary is ill-equipped to address the ISL question through post-presidential election litigation for three reasons: (1) firm Electoral Count Act deadlines require quick final determinations; (2) mail-in ballot disputes involve an increasing percentage of total votes and ballot review is fact- and labor-intensive; and (3) courts may face "untenable" post-election remedial choices. *Id.* at 735−37 (Thomas, J., dissenting from denial of certiorari); *see also id.* at 739 (Alito, J., dissenting from denial of certiorari) ("[A] decision would provide invaluable guidance for future elections.").

131. *Id.* at 737−38 (Thomas, J., dissenting from denial of certiorari).

132. Note that all of the injunctions to which Justice Thomas adverted applied to only the 2020 and not future election cycles.

133. *Degraffenreid*, 141 S. Ct. at 738 (Thomas, J., dissenting from denial of certiorari). The Court's move to expand the notion of "same controversy" just after it started enforcing the notion of "same party" is a great example of doctrinal complementarity in action.

Justice Alito doubled down, asserting that the argument for mootness:

> does not acknowledge the breadth of the Pennsylvania Supreme Court's decision [which] claims that a state constitutional provision guaranteeing "free and equal" elections gives the Pennsylvania courts the authority to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections . . . . That issue is surely capable of repetition in future elections. Indeed, it would be surprising if parties who are unhappy with the legislature's rules do not invoke this decision and ask the state courts to substitute rules that they find more advantageous.[134]

And "[i]n order 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."[135] Again, it is apparently enough that Republican party or legislative leaders will reasonably likely face any non-legislative actor's deviation from any statutory election rules.[136]

By describing these dissents' (or previous Courts') CORYER exceptions as playing somewhat fast and loose with the formal doctrinal requirements, we certainly do not mean to be critical here—indeed, just the opposite. We are trying to highlight that, at least in elections cases as relevant here, Justices on many occasions have treated mootness as a flexible doctrine for which exceptions may often be found where immediate review "would be greatly beneficial."[137] In many circumstances, we agree with Justice Thomas that a "decision to leave election law hidden beneath a shroud of doubt is baffling."[138]

134. *Id.* at 739 (Alito, J., dissenting from denial of certiorari).

135. *Id.* (citing Fed. Election Comm'n. v. Wis. Right to Life, Inc., 551 U.S. 449, 463 (2007)).

136. Because the Court simply denied the petitions for certiorari without explanation, we don't know whether any of the other six Justices did so because they viewed the dispute as moot, or whether they merely found the cases not cert-worthy for other reasons (one of which we explore below, see discussion *infra* Subsection III.B.2).

137. *Degraffenreid*, 141 S. Ct. at 738 (Alito, J., dissenting from denial of certiorari).

138. *Id.* (Thomas, J., dissenting from denial of certiorari). This view renders equally "baffling" Justice Thomas's treatment of mootness when the Supreme Court next had the opportunity to address the independent state legislature theory, albeit in the context of congressional elections governed by the slightly different textual injunction that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. In *Moore v. Harper*, the Court rejected an ISL challenge to the North Carolina Supreme Court's decision to enjoin the state legislature's congressional redistricting scheme after the state court determined it constituted a political gerrymander that violated various state constitutional provisions. 600 U.S. 1, 7–10 (2023). The U.S. Supreme Court reasoned that the case had not become moot prior to its decision even though the North Carolina court subsequently overruled its interpretation of state constitutional law, because the initial state court injunction had ongoing effects. *Id.* at 14−16. Justice Thomas, joined on this point by both Justices Gorsuch and Alito, dissented on the ground that the subsequent state court overruling meant that any decision on the ISL would have no legal or practical effect. *Id.* at 41−55 (Thomas, J., dissenting).

We happen to believe that the Court has the better of the argument, for the reasons Chief Justice Roberts offered in the majority opinion, and also for additional reasons discussed in Vikram David Amar & Jason Mazzone, *The Court Should Maintain Optionality in Resolving the So-Called "Independent-State-Legislature" (ISL) Theory by Granting Cert. in* Huffman v. Neiman, *Right Away As the Justices Chew on Whether* Moore v.

And that's our central point. The Supreme Court, in deed if not word, has traditionally endorsed a relaxed approach to the CORYER exception in election-related cases. That inclination is especially necessary and laudatory in a post-*Purcell* world. Permitting a court to continue adjudicating a challenge to election-related rules even after the targeted election has passed increases the likelihood that any illegalities can be addressed before *Purcell* again precludes an effective remedy before the next election cycle, and the next, etc. Plasticizing the CORYER doctrine is an appropriate complementary response to *Purcell* as courts strive to optimize adjudicatory goals in this context.[139]

2. Modifying Mootness Is an Incomplete Response

All this said, relaxing the CORYER exception after an election is a frustratingly incomplete complementary move in the face of *Purcell*'s remedial constraint, for both case-specific and general reasons. First, in some cases, countervailing contextual concerns militate against using the CORYER exception to continue the initial suit. Second, in some contexts, immediate post-election resumption of litigation may require courts to face difficult remedial choices. Third and most significantly, while the CORYER exception may help avoid insulating election cycle #2 et seq. (that is, the next and subsequent election cycles) from inappropriate substantive legal requirements, by definition it does nothing to counter *Purcell*'s insulation of election cycle #1 (the one that just occurred).

First, recall that the CORYER exception is prudential: although a court may, consistently with Article III, adjudicate an otherwise moot case if the exception is satisfied, the court is not obligated to do so.[140] And sometimes there may be good reason to let the case die. We think *Degraffenreid* provides a good example.[141] Recall that the Court decided not to review the challenge to Pennsylvania's court-modified deadline for counting presidential mail-in ballots, in a context where the number of affected ballots could not have influenced the result

Harper *Is Moot*, JUSTIA (May 1, 2023), https://verdict.justia.com/2023/05/01/the-court-should-maintain-optionality-in-resolving-the-so-called-independent-state-legislature-isl-theory-by-granting-cert-in-huffman-v-neiman-right-away-as-the-justices-chew-on [https://perma.cc/F9LJ-VBFJ]. Justice Thomas's dissenting reasoning ignores his own view expressed elsewhere that jurisdiction turns on the technical binding force of injunctions rather than predictive impacts on party behavior. Moreover, in light of Justice Thomas's position in *Degraffenreid*, 141 S. Ct. at 737–38 (Thomas, J., dissenting from denial of certiorari), it is striking that he nowhere even *mentions* the possibility that the similarly postured ISL issue satisfies the CORYER mootness exception in *Moore*. *See Moore*, 600 U.S. at 40–65 (Thomas, J., dissenting). It is difficult to imagine why the asserted legal and factual injury facing Republican legislative leaders in North Carolina is any less likely to repeat than the almost-equivalent injury facing Republican legislative leaders in Pennsylvania. And Justice Thomas's arguments for addressing the issue long before the next election cycle in the former case seem largely applicable to the latter case. *See Degraffenreid*, 141 S. Ct. at 732–33, 737 (Thomas, J., dissenting from denial of certiorari).

139. *See* Fallon, Jr., *supra* note 48, at 677−78 ("[S]everal of the [mootness] exceptions appear to reflect judgments about the practical necessity of making judicial remedies available.").

140. Treating the CORYER exception as discretionary does not run afoul of the "principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." Lexmark Int'l, Inc. v. Status Control Components, Inc., 572 U.S. 118, 125−26 (2014) (internal quotations omitted). Leaving aside that exceptions to this supposed obligation abound, if a court decides there is good reason not to invoke the CORYER exception then technically the case remains moot and the principle does not apply.

141. *See generally Degraffenreid*, 141 S. Ct. 732 (2021).

of that particular election.[142] The dissenters suggested the case was a good vehicle for addressing the ISL merits for that very reason—"a decision . . . would not have any implications regarding the 2020 election."[143] We respectfully disagree. True, a decision embracing the ISL challenge would not have justified a remedy changing the *actual outcome* of the Pennsylvania electoral college vote and thus the outcome of the national presidential election. But, as one of us has previously argued, such a ruling on the merits would have risked casting doubt on the entire presidential election *in the court of public opinion*.[144] President Trump and many supporters were already claiming that the Pennsylvania election dispute was merely the tip of the iceberg in the sense that many state courts and election officials had modified or overridden many different legislatively mandated voting rules.[145] Had the Supreme Court ruled soon after the presidential election that the Pennsylvania Supreme Court's deadline extension violated the putative independent state legislative doctrine embedded within Article II—even if the Court issued merely prospective relief given the too-few ballots at stake in this particular dispute—the Court might well have poured fuel on the fire of post-election protests and inadvertently bolstered claims of an illegitimate presidency.[146] By declining to adjudicate the *Degraffenreid* dispute, the Court cleared the decks to consider the ISL claim in a somewhat delayed and much less fraught context, which it eventually did by reviewing and deciding *Moore* in the context of congressional rather than presidential elections and district-drawing rather than vote-counting.[147] That's not to say the *Moore* decision wouldn't still raise retroactive questions about the 2020 presidential election had the Court embraced the ISL theory; but as between the two contexts and timings, *Moore* was considerably less likely to stoke partisan warfare.[148]

142. *Id.*

143. *Id.* at 738 (Alito, J., dissenting from the denial of certiorari).

144. *See* Vikram David Amar & Jason Mazzone, *Why the Supreme Court Was Right Last Week to Deny Review of the Pennsylvania Supreme Court Decisions Handed Down Prior to the 2020 Election*, JUSTIA (Mar. 5, 2021), https://verdict.justia.com/2021/03/05/why-the-supreme-court-was-right-last-week-to-deny-review-of-the-pennsylvania-supreme-court-decisions-handed-down-prior-to-the-2020-election [https://perma.cc/85KR-KAAY].

145. *See, e.g.*, Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, For Stay and Administrative Stay at 3, Texas v. Pennsylvania, 141 S. Ct. 1230 (mem.) (No. 155).

146. And recall that the Court's concern that people who (rightly or wrongly) view elections as tainted by fraud might be "chilled" from voting in future elections undergirds its reasoning in *Purcell* itself. *See* discussion *supra* at Part II. So, any decision to avoid the merits in *Degraffenreid* based on the concern sketched here would reflect an extension of the Court's reasoning in *Purcell* and its progeny.

147. *See* discussion *supra* Part I (discussing *Moore v. Harper*, 600 U.S. 1 (2023)).

148. Most scholars and the *Moore* litigants have assumed (and some have explicitly asserted) that the ISL challenge equally applies (or not) to congressional and presidential elections. In our view, the textual argument for ISL theory is even weaker with respect to the language of Art. II governing presidential selection than to the language of Art. I governing congressional elections. *See, e.g.*, Amar & Amar, *supra* note 4, at 36; Brief of Amici Curiae Professors Akhil Reed Amar, Vikram David Amar & Steven Gow Calabresi at 30–31, Moore v. Harper, 143 S. Ct. 2065 (2023).

We think it unlikely that the majority in *Degraffenreid* pulled its punches because it already sensed that it would soon put the kibosh on the independent state legislative theory in *Moore* or some other case heading its way. Two of the six Justices in the *Degraffenreid* majority (Chief Justice Roberts and Justice Kavanaugh) had

Second, as Justice Thomas noted in his *Degraffenreid* dissent from denial of certiorari (which some folks have referred to as his "dissental"),[149] immediate post-election adjudication can sometimes place courts in a remedial bind. If a court concludes that voters relied on illegal election procedures, for example, the court "must choose between potentially disenfranchising a subset of voters and enforcing the election provisions" notwithstanding their illegality, at least where ordering a new election is not a viable option.[150] By contrast, "[s]ettling rules well in advance of an election rather than relying on postelection litigation ensures that courts are not put in that untenable position."[151]

Whether or not one agrees with our assessment of the downsides of immediately reaching the merits in *Degraffenreid* and/or Justice Thomas's concerns about specific remedial choices, the general point remains. For any number of case-specific reasons, invoking the CORYER exception to adjudicate an election-related challenge immediately after the election dust settles may be a bad idea—bad enough to outweigh the value of forestalling a future (re)application of *Purcell* and thus to counsel restraint in the immediate case.

Third and more fundamentally, relaxing the CORYER exception to compensate for the *Purcell* principle often does nothing to counter *Purcell*'s complete insulation of election cycle #1 from legal challenge. As described above through the case law,[152] the CORYER exception generally becomes relevant only assuming the first election was held despite the pending legal challenge to its constitutive rules (one exception being *Harper*, where the mootness question arose because of developments concerning the makeup and attitude of the state court from which federal review was sought). Put differently, a *Purcell*-compensatory CORYER application merely reduces the likelihood of two (or indefinite) consecutive allegedly illegal elections, but it does nothing to address—or, more pointedly, redress—the first. In this regard, we should reiterate and make explicit the undeniable reality that each election is uniquely important with respect to the decisions the voters make at that single moment in time, decisions (as to candidates and policies) that will ramify into the future. Consider once again, in this vein, *Moore v. Harper*.[153] Even if the case had technically been moot,[154] and even if the Court could have been confident that the ISL question would recur at some point in, say, the next four or five years in such a way that it could have been litigated all the way to the Supreme Court, the issue should properly have been considered "evading review" (in a way that other issues that may recur on

clearly signaled in recent shadow-docket opinions that they were open to the ISL claim on the merits. So, we think the *Degraffenreid* majority decided not to continue hearing *Degraffenreid* at a point when its members could not be sure how the Court would eventually resolve the ISL dispute.

149. Although it doesn't exactly roll off the tongue, "dissental" is the term increasingly used to describe a dissent from a court's denial of discretionary review, as opposed to, say, a dissent from a ruling on the merits or a dissent from a ruling on the justiciability of a dispute. *See, e.g.*, Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601, 604 (2012).

150. *Degraffenreid*, 141 S. Ct. at 736 (Thomas, J., dissenting from the denial of certiorari).

151. *Id.* at 737.

152. *See supra* Section III.B.

153. *See generally* 600 U.S. 1 (2023).

154. As noted earlier, we do not think it was. *See supra* note 138.

that time line would not) *insofar as it would have evaded review prior to the next round of federal elections, given that each election cycle is uniquely important—constitutional flaws in any single election are truly irreparable in the sense that nothing can ever be done to undo the damage to democracy*.[155]

As long as it continues to reign, the *Purcell* principle means the results of some challenged elections will stand (despite their questionable legality) because of timing. Surely some of these claims are actually meritorious, meaning the *Purcell* constraint inevitably leads to some illegal and illegitimate elections—a consequence all should decry as undesirable and acknowledge as irremediable.[156] And even unmeritorious-but-unresolved challenges to election rules can undermine "[c]onfidence in the integrity of our electoral process [which] is essential to the functioning of our participatory democracy."[157] As the Court proclaimed in *Purcell* itself, an "incorrect allegation, left to fester without a robust mechanism to test and disprove it, 'drives honest citizens out of the democratic process and breeds distrust of our government.'"[158]

In sum, given *Purcell*'s remedial constraint, relaxing CORYER requirements in election cases is a proper and beneficial compensatory move—but it is no panacea. In many cases and contexts, overcoming post-election mootness remains at best a second-best solution, and one that needs to be supplemented. We now turn to what we think is a potentially more powerful solution, when it is available, and consider ways in which courts might complement *Purcell* (and post-election CORYER deftness) with justiciability flexibility to resolve election-related disputes *in advance of* election cycle #1 so *Purcell*'s remedial constraint never triggers.

C. Pre-Election First-Party Standing & Ripeness Doctrines

Other things being equal, the better way to complement *Purcell*'s remedial constraint would be to enable and encourage courts to adjudicate election-rule challenges sufficiently in advance of the targeted election so that *Purcell* never comes into play. One way to do this is to relax, to the extent consistent with

155. Again, the so-called right to vote is preservative of virtually all other rights. *See supra* note 38 and accompanying text.

156. "Obtaining prospective relief before an election is particularly important, as the harms that occur if a state is allowed to enforce an unconstitutional law during an election are detrimental and irreversible: people will be denied their legitimate right to vote and may be chilled in exercising the franchise." Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 690 (2009); *see also* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1645 (2009) ("A victory for individual voting rights plaintiffs is quite often a pyrrhic one, if applied to a narrow class of plaintiffs and only after the winner of the election has been determined."). And it should not be lost that most challenged but insulated elections are "most likely to adversely affect . . . minority voters, third-party candidates, and minor political parties" because they are most likely disadvantaged by electoral rules established by politically accountable state actors. Douglas, *supra*, at 682.

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

158. *Id.* (Thomas, J., dissenting from the denial of certiorari) (quoting Purcell v. Gonzales, 549 U.S. 1, 4 (2006)).

constitutional requirements, the application of standing and ripeness doctrines so that initial challenges can get off the ground sooner.

As described above, standing requires a plaintiff to demonstrate a "concrete and particularized" "actual or imminent" injury in fact that is caused by the defendant's challenged conduct and will likely be redressed by a favorable judicial decision.[159] In election-related cases, the most likely contested standards—imminence of future injury, causation, and likelihood of judicial redress—are comparative concepts and may be flexibly and contextually applied.

Perhaps the most prominent election-related standing decision in recent times is *Susan B. Anthony List v. Driehaus*, involving a pre-enforcement challenge to an Ohio statute criminalizing the publication of certain "false statements" about candidates during a political campaign.[160] During the 2010 election cycle, Susan B. Anthony List ("SBA"), a pro-life advocacy organization, publicly criticized Representative Steve Driehaus and other Congresspersons for supporting "taxpayer-funded abortion" by voting for passage of the Affordable Care Act ("ACA").[161] Driehaus responded by filing a complaint with the Ohio Elections Commission alleging that SBA falsely claimed be had voted for taxpayer-funded abortion.[162] After the Commission found probable cause to believe SBA violated the statute but during further proceedings, SBA filed suit in federal court seeking to enjoin future enforcement of the statute as violating its free speech rights.[163] After Driehaus lost his reelection bid in November 2010 and withdrew his Commission complaint, SBA amended its complaint to challenge the Ohio statute both facially and as applied.[164] SBA's suit was consolidated with a separate suit filed by another advocacy group desiring to make the "same or similar statements" about other federal candidates.[165]

The Supreme Court held that the plaintiff organizations credibly alleged a sufficiently imminent future threat of enforcement against them of the false statement statute to satisfy standing requirements.[166] While Driehaus himself would not likely be a future campaign target, having joined the Peace Corps on a two-year assignment after losing the 2010 election,[167] the Court accepted the organizations' declared intention to target other ACA-supporting candidates with the "taxpayer-supported abortion" tag.[168] The Court explained that the Commission

159. *See* discussion *supra* at Subsection III.A.1.

160. 573 U.S. 149, 151–52 (2014).

161. *Id.* at 153–54.

162. *Id.* at 154.

163. *Id.*

164. *Id.* at 155.

165. *Id.* at 155–56. The lower courts framed the justiciability issues as concerning standing and ripeness. *Id.* at 156. The Supreme Court followed suit, perhaps to correct what it ultimately perceived as the lower courts' errors. But because SBA brought suit before the 2010 election based on its pre-election statement intentions, arguably the Court also faced a mootness concern: even if the organizations had standing and brought a ripe challenge when the suit was initiated, the 2010 election can be viewed as a mooting event that should have prompted the Court to consider the CORYER exception.

166. *Id.* at 164.

167. *Id.* at 156.

168. *Id.* at 162.

(and presumably a state prosecutor) might view that statement as "false" even while the organizations insisted it was accurate and thus might well enforce the statute.[169] So both organizations "alleged a credible threat of enforcement" that would cause injury.[170]

Another important election-related standing case came a few decades earlier. In *Federal Election Commission v. Akins*,[171] standing was recognized on behalf of a group of voters who were challenging a determination by the Federal Election Commission ("FEC") that a particular organization—the American Israel Public Affairs Committee ("AIPAC")—did not constitute a "political committee" for purposes of the Federal Election Campaign Act of 1971. Given the FEC's interpretation and application of the Act, AIPAC was not required to disclose contributions, expenditures and member identities. The Court found standing, rejecting arguments that plaintiffs did not have a constitutionally cognizable interest permitting federal court review. According to the Court:

> [t]he 'injury-in-fact' respondents have suffered consisted of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt [respondents'] claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election.[172]

In response to the most forceful counterargument made by the FEC and the dissenters—that the informational injury of which respondents complained was insufficiently concrete and particular—here is what the Court said:

> We conclude that . . . the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.[173]

Thus, the Court—albeit without detailed explanation or connection to other doctrines of federal judicial access—highlighted the election-related nature of the dispute as a distinctive and important reason for applying the "concreteness and particularity" requirement of standing more broadly than it perhaps would be applied in other settings.

169. *Id*. at 161.

170. *Id*. Recall that this conclusion rests in tension with the Court's "consistent[ ] refus[al] to 'conclude that the case-or-controversy requirement is satisfied by' the possibility that a party 'will be prosecuted for violating valid criminal laws.'" United States v. Sanchez-Gomez, 584 U.S. 381, 391 (2018) (quoting O'Shea v. Littleton, 414 U.S. 488, 497 (1974)).

171. 524 U.S. 11 (1998).

172. *Id*. at 21.

173. *Id*. at 24–25.

In theory, standing is a "who" inquiry, whereas ripeness (like mootness) is a "when" question. In the real world, however, many cases can be understood in terms of whether an actual injury by a particular plaintiff exists (standing) but can also be seen as focusing on whether the plaintiff has *yet* suffered an injury (in which case ripeness is the appropriate frame.) It is therefore not surprising that, in *Driehaus*, a ripeness issue was implicated alongside the standing question. And also unsurprisingly, the Court was similarly generous in finding ripeness, even if the Court didn't adequately explain its generosity by reference to election-law-related considerations.[174] The constitutional prong of ripeness doctrine asks whether "the injury is speculative and may never occur,"[175] essentially (as noted above) the same inquiry as actual imminence for standing, and thus in this sense "the Article III standing and ripeness issues in this case 'boil down to the same question.'"[176] The prudential prongs of ripeness doctrine ask whether the factual record is sufficiently developed and whether denial of judicial relief at this stage would cause undue hardship to the parties.[177] The Court found these factors "easily satisfied here": the challenge is purely legal and requires no further factual development; and denying prompt judicial review would impose a hardship on the organizations by requiring them to refrain from core political speech or risk criminal prosecution.[178]

Driehaus nicely exemplifies a relatively relaxed application of standing and ripeness principles in the electoral context. So long as constitutional minima are satisfied, a generous approach to justiciability can facilitate early election-rule challenges to minimize confrontation with *Purcell*.[179]

174. *Driehaus*, 573 U.S. at 167.

175. CHEMERINSKY, *supra* note 70, at 129.

176. *Driehaus*, 573 U.S. at 157 n.5 (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007)).

177. *See id.* at 167; *see also* CHEMERINSKY, *supra* note 70, at 131 ("[R]ipeness is said to enhance the quality of judicial decision making by ensuring that there is an adequate record to permit effective review.") (citing Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967)).

178. *Driehaus*, 573 U.S. at 167–68. This kind of flexible analysis might have permitted, and encouraged, a variety of possible litigants in the dispute in Colorado over whether the state could invoke Section 3 of the Fourteenth Amendment to exclude Donald Trump from the primary ballot relating to the 2024 presidential election to bring that question in federal court early, such that the Supreme Court would not have been as time-pressured as it ended up being in resolving Trump v. Anderson. 601 U.S. 100 (2024). One of us has argued that the ultimate opinions the Court produced were poorly reasoned, and more time for briefing and deliberation might have resulting in better-reasoned and better-explained opinions. Vikram David Amar & Jason Mazzone, *The Court's Misplaced Emphasis on Uniformity in Trump v. Anderson (and Bush v. Gore)*, JUSTIA.COM (March 25, 2024), https://verdict.justia.com/2024/03/25/the-supreme-courts-misplaced-emphasis-on-uniformity-in-trump-v-anderson-and-bush-v-gore [https://perma.cc/JFA4-FNPH].

179. In a sense, our position on standing and ripeness inverts one proposed by Professor Richard Re, in which he argues that standing doctrine is and should be applied in a relative sense: whether a court should grant a plaintiff standing turns, at least in large part, on whether she is the "best" plaintiff relative to others who might bring the same or similar legal claim. *See* Richard Re, *Relative Standing*, 102 GEO. L.J. 1191, 1209 (2014). He too suggests that standing should be evaluated with the overall goal of effective remediation to redress violations of rights. *See id.* at 1197 ("Relative standing, by contrast, fulfills a practical purpose consistent with deeply rooted principles of judicial legitimacy: federal courts may adjudicate a dispute when doing so in necessary to remedy a violation of law."). In this sense, his approach embraces a within-doctrine notion of complementarity.

D. Pre-Election Third-Party Standing

On top of the constitutional standing requirements of an injury in fact caused by the defendant and redressable through judicial relief, the Supreme Court has overlaid additional "prudential" standing requirements. These include a presumptive bar on so-called third-party standing: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" who aren't before the court.[180] The Court has offered several justifications: a fairness concern that the absent right-holder "will be bound by the courts' [adverse] decisions under the doctrine of *stare decisis*";[181] an institutional concern for potentially unnecessary constitutional litigation, as the right-holder might not ever need or choose to enforce her own rights;[182] a process concern that absent right-holders "usually will be the best proponents of their own rights";[183] and a process concern that absent right-holders might provide a sharper set of facts with respect to as-applied challenges.[184] The Court has long made clear that the general limits on third-party standing "are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint'" and thus are subject to exceptions and waiver.[185]

Given this limitation's foundation in prudence, the Supreme Court has occasionally permitted litigants satisfying basic standing doctrine to raise legal claims on behalf of absent right-holders. Courts generally permit third-party standing "upon finding (i) some sort of 'relationship' between the litigants . . . and those whose rights they seek to assert and (ii) some sort of impediment to

That said, Professor Re views relativistic standing notions as a shield, a reason to *deny* standing to someone who might satisfy the minimal requirements but be a "weaker" advocate than someone else. *Id.* at 1209–10. We are unpersuaded by this application of relativistic thinking for reasons ably explained by Fallon. *See* Fallon, Jr., *supra* note 48, at 660. By contrast, we argue that *Purcell* provides a reason to *grant* standing to someone who might not be the "best" advocate along other dimensions but becomes a *better* advocate by virtue of suing earlier enough so she is more likely to beat the *Purcell* deadline.

180. Warth v. Seldin, 422 U.S. 490, 499 (1975).

181. Singleton v. Wulff, 428 U.S. 106, 114 (1976).

182. *Id.* at 113–14.

183. *Id.* at 114.

184. *See* Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 287–302 (2015) (tracing the historical development of the Court's refusal to entertain third-party standing on prudential grounds); CHEMERINSKY, *supra* note 70, at 92 (discussing the same).

185. Craig v. Boren, 429 U.S. 190, 193−94 (1976). The Court momentarily cast some doubt on this characterization when it announced in *Lexmark Int'l, Inc. v. Status Control Components, Inc.*, that the notion of prudential standing limits lies "in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." 572 U.S. 118, 125–26 (2014) (internal quotations omitted). But the Court has subsequently reaffirmed third-party standing doctrine's prudential status. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2117 (2020) (third-party standing "rule that a party cannot ordinarily 'rest his claim to relief on the legal rights or interests of third parties'" is "prudential" and "does not involve the Constitution's 'case-or-controversy requirement.'"). Justice Thomas alone currently promotes the contrary view. *See, e.g.*, *id.* at 2143−46 (Thomas, J., dissenting); *see also* CHEMERINSKY, *supra* note 70, at 91−92.

third-parties' effective assertion of their own rights."[186] At various times and in various contexts, the Court has construed these criteria more or less liberally.[187]

These two criteria comfortably fit many election-related challenges, and they can plausibly be stretched to fit many others. For example, many election-related cases involve candidates or parties seeking ballot access or eligibility or to avoid other kinds of process burdens or gerrymandering disadvantages; they arguably have a special "relationship" with voters who might support them.[188] Conversely, voters who challenge various burdens on their ability to register or vote may claim a special "relationship" with their preferred candidates or even other voters.[189]

With respect to the right-holder impediment—a criterion that the Court appears to honor in the breach[190]—that concept, defined capaciously, applies to many election-related challenges. Costs alone might deter the average voter from suing, and many election-related rules tend to disadvantage persons without means.[191] But uniquely relevant here is that the *Purcell* principle itself may make it more difficult for a right-holder to enforce her own rights—not because she theoretically cannot sue herself, but simply because she may be unable to vindicate her own rights for the upcoming election if she waits too long and thus runs into *Purcell*'s remedial constraint. Put differently, if a third-party brings a suit well before the next election cycle, one can speculate that a right-holder is less likely to self-enforce because she might wait too long. This admittedly converts the third-party criterion from "do right-holders face some generic impediment to self-enforcement" to "will right-holders plausibly run into some difficulties if they later attempt self-enforcement"—but the latter way of conceiving the criterion seems perfectly consistent with the exception's spirit and purpose.[192]

So, with respect to both the special relationship and the right-holder impediment prongs, applying them liberally to support broad third-party standing in

186. Fallon, Jr., *supra* note 48, at 673; *see* CHEMERINSKY, *supra* note 70, at 92−97 (discussing all three exceptional factors); Hall, *supra* note 72, at 617.

187. For a particularly generous application, see *Craig*, 429 U.S. at 195 (upholding third-party standing for a beer vendor challenging a statute prohibiting young males from buying beer for violating the would-be customers' equal protection rights).

188. Such a relationship is often captured by the notion that candidates and voters have first-party "associational rights" under the First Amendment, see, e.g., Storer v. Brown, 415 U.S. 724, 729 (1974); Anderson v. Celebrezze, 460 U.S. 780, 806 (1983); but this relationship can be generalized to apply even for claims under other constitutional provisions, including the Equal Protection Clause or Article I. *See* U.S. CONST. amend XIV, § 1; *id.* art. I.

189. The Court has not always/generally been open to such arguments in, say, the districting context. *See, e.g.*, Gill v. Whitford, 585 U.S. 48, 65–69 (2018).

190. The Court typically suggests that both a special relationship and an impediment to right-holder enforcement are necessary to support third-party standing. But in many cases, the Court seems to place little if any weight on the impediment prong. *See, e.g.*, *Craig* , 429 U.S. at 193–94; Lea, *supra* note 184, at 302 n.169 (some courts never inquire about right-holder impediments; others hold that obstacles such as cost or desired privacy are sufficient).

191. *See, e.g.*, Douglas, *supra* note 156, at 691 ("There are some voters who will find that the burdens of challenging a law far outweigh the benefits, even though a state's election practice is infringing their rights.").

192. *See, e.g.*, Lea, *supra* note 184, at 330−31 (arguing that mootness concerns, such as for minor right-holders or pregnant women, should qualify as impediment for purposes of third-party standing exceptions).

election-related cases is a workable and appropriate complement to *Purcell*'s remedial limitations.

E. Analogies to Relaxation of Other Justiciability and Access-to-Prompt-Review Hurdles in Democracy/Election-Related Settings

Our observations and prescriptions here also find strong support by analogy to other well-established exceptions to the bar on third-party standing: the so-called First Amendment "overbreadth doctrine"[193] and the generous approach to "vagueness" challenges in speech cases.[194] Overbreadth doctrine permits an injured party who meets constitutional standing requirements but whose own speech or association activities are unprotected to nonetheless "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."[195] The Court typically justifies this overbreadth exception based on the "chilling effect" that speech-prohibiting statutes frequently cause: "[litigants] are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[196]

193. *See* cases *infra* note 196.

194. *See* cases *infra* note 204–05.

195. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980); *see, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Thornhill v. Alabama, 310 U.S. 88, 95–96 (1940); CHEMERINSKY, *supra* note 70, at 97–98.

196. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); *see, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003); *Citizens for a Better Env't*, 444 U.S. at 634; Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977); NAACP v. Button, 371 U.S. 415, 433 (1963); CHEMERINSKY, *supra* note 70, at 98; Lea, *supra* note 184, at 297; Hall, *supra* note 72, at 617; Persily & Rosenberg, *supra* note 156, at 1652–53.

Some scholars claim that First Amendment overbreadth doctrine is better explained on grounds unrelated to prudential standing exceptions and more aligned with rules governing the propriety of facial as opposed to as-applied challenges. One theory is that plaintiffs in First Amendment overbreadth cases (and, indeed, plaintiffs permitted to raise facial challenges in other contexts) are actually representing their own first-party rights not to be subject to an invalid legal rule. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1326–27 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 246–48 (1994); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984). Others focus on a First Amendment-context inversion of the presumption of severability; if statutory provisions or applications are presumed or deemed inseverable, then the statute's application to a first party can rise or fall with a third-party right-holder's legal complaint. *See* Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269, 279–91 (2000) (arguing that questions about facial challenges usually reduce to questions about severability); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 887 (2005) ("[E]xisting scholarship generally agrees that the debate regarding the availability of facial challenges is, at bottom, fundamentally a debate about severability."). *See, e.g.*, Fallon, Jr., *supra* note 48, at 675–76 (describing Henry Monaghan's argument and then conceding "Monaghan may be right: First Amendment doctrine may embody a substantive rule limiting the presumption of statutory severability.").

Each of these various alternative explanations have their critics. *See, e.g.*, Lea, *supra* note 184, at 315–28 (criticizing the so-called valid-rule theory of overbreadth and questioning *jus tertii* inseverability doctrine as a surrogate for overbreadth); Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 42–49 (2021) (criticizing valid-rule theory). *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 667 (2010) ("[C]ommentators are in disagreement over whether

The Court occasionally suggests that First Amendment overbreadth doctrine fits into the traditional exception to the third-party standing bar because the chilling effect itself creates a cognizable "impediment" to the right-holders' assertion of their own rights.[197] But the Court more frequently justifies overbreadth doctrine by appealing to the fundamental importance of the free exchange of ideas,[198] which in turn is inextricably linked to the health of our foundational system of democratic governance. As the Court explained in *Thornhill v. Alabama*:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government . . . Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.[199]

Both the narrower and broader justifications for First Amendment overbreadth doctrine apply as well to litigation challenging election-related rules. First, at least a subset of election regulations can impose a similar chilling effect on would-be voters and even candidates. Some do so by imposing clear burdens

the facial and as-applied challenges categories are driven primarily by severability, the relevant substantive constitutional doctrine, or a mixture of the two.").

Addressing these alternative theories and critiques is beyond our reach in this Essay. For present purposes, it suffices to note two things. First, this body of scholarship notwithstanding, the Supreme Court has "repeatedly characterized First Amendment overbreadth doctrine" as a "relaxation of standing rules." *See* Fallon, Jr., *supra* note 48, at 675. And second, as traditionally understood, overbreadth doctrine permits a litigant to raise an as-applied challenge on behalf of hypothetical and absent right-holders, rather than raise a facial challenge as these alternative theories generally suggest.

197. *See, e.g.*, *Brockett*, 472 U.S. at 503 (referencing "those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid").

198. *See, e.g.*, *Hicks*, 539 U.S. at 119 (noting that chilling effect "harm[s] . . . society as a whole, which is deprived of an uninhibited marketplace of ideas"); Bigelow v. Virginia, 421 U.S. 809, 816 (1975) (overbreadth "exception to the usual rules governing standing . . . reflects the transcendent value to all society of constitutionally protected expression"); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (overbreadth doctrine reflects view that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights").

199. 310 U.S. 88, 95 (1940) (cited in *Schaumburg*, 444 U.S. at 634); *see, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *see also* United States v. Hansen, 599 U.S. 762, 770–71 (2023) (citation omitted) ("Overbroad laws 'may deter or chill constitutionally protected speech,' and if would-be speakers remain silent, society will lose their contributions to the 'marketplace of ideas.'"); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 (1991):

> As philosophers and legal theorists have demonstrated, the First Amendment protects rights that are valued for their relationship both to our concept of autonomous personhood and to our democratic form of government. First Amendment rights are therefore special, and any chill of their exercise gives rise to extraordinary constitutional concern.

This foundation helps to explain why "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." *Bates*, 433 U.S. at 380.

for exercising election-related rights,[200] and others do so by creating the potential for voter confusion which—indulging the underlying premise of the *Purcell* principle—itself can chill voting and related behavior.[201] More significantly, election-related rules that arguably violate federal constitutional or statutory law compromise, in an even more direct and thorough-going way, "the machinery that fundamentally actuates our nation's participatory democracy."[202] Given that courts generously permit third-party standing to enhance the protection of First Amendment rights that are instrumental to democratic self-government, the same generosity seems easily deserved to ensure the legality of election-related rules that more directly constitute our democratic processes.[203]

To the same effect is a close cousin to overbreadth doctrine: the Court's willingness to permit individuals as to whom the law clearly applies to nonetheless challenge the vagueness of a law because the effect that the vagueness may have on the exercise of free speech rights related to democratic self-governance.[204] As Justice Scalia put the point for the Court in a prominent vagueness case:

> A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. . . . Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others," we have relaxed the requirement in the First Amendment context, permitting plaintiffs to argue that a statute is [invalid] because it is

200. The law at issue in *Republican Party of Penn. v. Degraffenried* would fall into this category, by deterring people from voting by mail on or right before election day, even if the state constitution so permitted. *See* 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from a denial of certiorari).

201. *Degraffenried* also illustrates this concern. *Id.* at 732–34. *See also* Douglas, *supra* note 156, at 685: Given the importance of voting, we should be extremely concerned about the chilling effect of a law that suppresses political participation. For example, a person who might be exempted from showing a photo identification based upon the Court's reasoning in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) might choose not to go to the voting booth because he or she incorrectly believes that the law validly applies to all voters.

202. Caminker, *supra* note 38, at 422. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 625–26 (1969) ("[S]tatutes distributing the franchise constitute the foundation of our representative society."); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society . . . [and] the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."); Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)); Burson v. Freeman, 504 U.S. 191, 198 (1992) ("[T]he right to vote . . .[lies] at the heart of our democracy."); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . regarded as a fundamental political right, because preservative of all rights.").

203. *See* Douglas, *supra* note 156, at 685 ("Facial overbreadth applies to speech because of the importance of free speech to our democracy . . . . The right to vote, which is at the core of the political process, should similarly receive this special kind of protection."); *cf.* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment) ("This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation.").

204. *See, e.g.*, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982).

> unclear whether it regulates a substantial amount of protected speech.[205]

Yet another relevant analogy (though not technically a justiciability constraint) is abstention doctrine, as the Court "ha[s] been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."[206] Most circuit courts of appeals have created exceptions to normal (*Pullman*) abstention rules for First Amendment cases; federal courts don't need to wait for state courts to interpret statutes giving rise to First Amendment challenges. Like the final judgment rule discussed below, abstention (whatever it is—some say it is an interpretation of federal jurisdictional statutes; others say it reflects general judicial power discretion built on federalism/comity values) is not grounded in hard notions of Article III justiciability—but it does influence the "when" of litigation, at least with respect to federal court resolution of the merits (*i.e.*, it permits lower federal courts to engage the merits sooner as compared to relying on Supreme Court review of a final state court decision reaching the merits).[207] The justifications for First Amendment abstention exceptionalism (grounded in the chilling effect and importance of free speech to democratic governance), like those underpinning overbreadth's permission of third-party standing, also apply to the electoral context.

So, the tradition (sometimes explicit and sometimes implicit) of accommodating justiciability limitations to compensate for the negative consequences such limitations create in election/democracy-related cases is quite venerable.

Unfortunately, the Supreme Court seems to be running in the wrong direction in more recent election-rule cases. For example, in *Washington State Grange v. Washington State Republican Party*, the Court confronted a modified blanket primary system, which allowed any candidate to express their own "party preference" on a unified primary ballot.[208] Political parties brought a facial challenge, arguing that this candidate self-identification mechanism would likely confuse voters in circumstances where the named party actually disavowed rather than endorsed the self-identifying candidate (as the ballot would suggest).[209] The plaintiff political party claimed this potential confusion burdened its First Amendment right to avoid forced (apparent) association with a disfavored candidate.[210]

Before rejecting the claim on the merits, the Court articulated a general reluctance to consider facial challenges.[211] The Court recognized some internal

205. United States v. Williams, 553 U.S. 285, 304 (2008) (quoting *Hoffman Estates*, 455 U.S. at 494–95).

206. City of Houston v. Hill, 482 U.S. 451, 467 (1987).

207. *Id.*; *see* Sisney v. Kaemingk, 15 F.4th 1181, 1190 n.2 (8th Cir. 2021). For another example of First Amendment abstention exceptionalism, see Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520, 528 (9th Cir. 2015).

208. 552 U.S. 442, 447–48 (2008).

209. *Id.* at 449–50.

210. *Id.* at 452–53.

211. *Id.* at 450–51.

disagreement as to the applicable standard,[212] but all facial challenges require the Court to consider a statute's application in circumstances beyond those actually facing the first-party plaintiff. The Court explained that "[f]acial challenges are disfavored for several reasons."[213] First, "[c]laims of facial invalidity often rest on speculation," especially when state courts "have had no occasion to construe the law in the context of actual disputes . . . or to accord the law a limiting construction . . . ."[214] Second, facial challenges counter the general "principle of judicial restraint" counseling against deciding constitutional questions before it is necessary.[215] Finally, "facial challenges threaten to short circuit the democratic process" where the resulting remedy frustrates "the will of the people."[216]

The Court did acknowledge, in a footnote, the traditional First Amendment overbreadth rule that carves through these generic concerns—which, technically, would seem to apply here given the plaintiff's right to a (dis)association claim.[217] The Court rejoined, somewhat obscurely, that "[w]e generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law."[218] This suggests a pleading failure rather than a conceptual constraint; but at the very least the Court missed an opportunity to explore whether the justifications for free speech overbreadth might extend to all election-related litigation for the reasons offered above.[219]

On the merits, the Court revealed a penchant "for avoiding facial invalidations if at all possible"[220]—even in contexts that bring the *Purcell* principle front and center. This election-related challenge rested on the claim that "voters will be confused as to the meaning of the [candidates'] party-preference designation."[221] But the Court characterized this claim as "sheer speculation [that] depends on the belief that voters can be 'misled' by party labels."[222] The Court recognized that "[o]f course, it is possible that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the [political]

212. *Id*. at 449 (citations omitted):

> Under *United States v. Salerno* . . . a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.,* that the law is unconstitutional in all of its applications . . . . While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "plainly legitimate sweep."

213. *Id*. at 450.

214. *Id.*

215. *Id.*

216. *Id*. at 451.

217. *Id.* at 449 ("Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'") (quoting New York v. Ferber, 458 U.S. 747, 770 (1982)).

218. *Id.* (quoting N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988)).

219. *See supra* notes 197–203 and accompanying text.

220. Persily & Rosenberg, *supra* note 156, at 1664.

221. *Wash. State Grange*, 552 U.S. at 454.

222. *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 220 (1986)).

parties," but the Court cannot endorse a facial challenge "based on the mere possibility of voter confusion" absent an "evidentiary record" of such.[223] This seems like quite a brusque dismissal of the plaintiff's legitimate concerns, in a world where similar un-evidenced assumptions about the possibility of voter confusion worked by eleventh-hour rules changes underlie *Purcell*'s remedial constraint. If assumptions about voter confusion are sufficient to truncate remedies, then we feel they ought to be sufficient to justify earlier judicial intervention. The Court's reluctance to entertain facial rather than merely as-applied election-related challenges "means, in turn, that the laws will have to be in effect for a while before they are challenged, and that they will cause damage in the interim, at a minimum."[224]

The Court quickly followed *Washington State Grange* with *Crawford v. Marion County Election Board*, in which it similarly set a high bar for and then rejected a facial challenge to an Indiana statute requiring in-person voters to present government-issued photo identification.[225] The Court reaffirmed that plaintiffs bringing facial challenges even to election-related rules "bear a heavy burden of persuasion."[226]A plurality of three Justices rejected the facial challenge on the merits, finding the pre-enforcement evidence of voting burdens sketchy and incomplete and concluding that the photo identification requirement has a "plainly legitimate sweep" justified by the state's "precise interests."[227] Three other Justices agreed that facial challenges to election regulations should face high hurdles—and also argued that only facial challenges should be permitted, discounting the relevance of significant voting restrictions imposed on discrete individuals or subsets of voters.[228]

These cases reflect a tightening of both jurisdictional and merits standards in election-related cases.[229] Our suggestion that courts should compensate for the *Purcell* principle by considering election challenges earlier rather than later thus asks courts to move in a different direction.[230]

223. *Id.* at 455 (citations omitted); *see id*. at 457 ("Each of [the challenger's] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, we cannot assume that Washington's voters will be misled.").

224. Hasen, *supra* note 37.

225. *See generally* 553 U.S. 181 (2008).

226. *Id*. at 200.

227. *Id*. at 200−03.

228. *Id.* at 208 (Scalia, J., concurring in the judgment). *See, e.g.*, Persily & Rosenberg, *supra* note 156, at 1670.

229. Our dissatisfaction with current judicial attitudes concerns both (1) whether courts have been too unwilling to consider facial challenges (rejecting third-party standing or overbreadth analyses), *see supra* Sections III.D–E; and (2) whether courts considering facial challenges have been too quick to reject challenges on the merits—i.e., embracing Justice Scalia's position in *Crawford* that "we should consider only facial challenges and they will almost always lose." *See Crawford*, 553 U.S. 204–09 (Scalia, J., concurring in the judgment). The thesis of this article really cuts against only (1): we are trying to convince courts to entertain election-related challenges at the earliest stage possible even where standing rules might otherwise counsel jurisdictional dismissals. But if the courts listen to us and hear cases earlier, perhaps they might reconsider (2) as well.

230. *See* Douglas, *supra* note 156, at 675−76 ("By rejecting virtually all facial challenges, the Court has signaled that most election laws probably pass muster for at least one election cycle.").

F. Balancing Complementarity Concerns

Part II of this Article identified the costs of the *Purcell* principle's remedial constraint: some election results will be determined by rules that are properly considered illegal, including some that might be declared such long after the first and perhaps more election cycles are completed.[231] Part II also identified ways in which election-related litigation might avoid this fate—here, through more remedial-sensitive application of justiciability doctrines—to help courts properly and effectively bring more election cycles into legal compliance and thus promote the constitutional norm of democratic legitimacy.[232]

Critics may worry, however, that our proposal to increase timely resolution of election-related challenges might itself come at a cost. First, some might worry that a loosening of justiciability rules might lead to poorer quality judicial decision-making because the rules are designed in part to ensure high-quality decision-making. For example, standing and ripeness rules serve, in part, to ensure that plaintiffs will advocate competently and zealously for their positions and that factual records will be adequate to support sound reasoning.[233] This is a legitimate concern, but one we feel is best handled by courts in a case-by-case application of our complementarity thesis.

With respect to competent and zealous advocacy, it is commonplace to recognize that standing doctrine as currently constituted and applied is not particularly responsive to these concerns. To be sure, current doctrine may work prophylactically in gross to exclude from federal court litigation plaintiffs who would be particularly weak advocates. But this is a pretty minimal bar. As scholars before us have observed, many plaintiffs granted standing are not likely to be the best advocates for their positions, and many plaintiffs denied standing are likely to be better advocates than others who could satisfy Article III concerns in their stead.[234] As we see it, if indeed there is a case in which a court has serious concerns that the plaintiff before it is unlikely to litigate competently and/or zealously, then the court shouldn't invoke our *Purcell*-based rational for an especially plaintiff-favorable application of justiciability doctrine. But we think it's unlikely for there to be many such cases in which the plaintiff satisfies the Article III minima. This is especially true in the mootness context, where presumably the plaintiff was once a perfectly appropriate challenger and the only question is whether she remains such.[235] We think the same applies to election-related challenges at the outset, which are almost always brought by self-interested and sufficiently funded litigants to satisfy the requirements for a high-quality adjudicatory environment.

Similar concerns may arise to the extent that factual records may be less developed in suits filed long before the challenged election will occur. But this

231. *See supra* Part II.
232. *See supra* Part II.
233. *See supra* Subsection III.A.1.
234. *See, e.g.*, Re, *supra* note 179, at 1195–97.
235. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring).

concern is a case-specific one. *Washington State Grange* and *Crawford* provide examples of cases where Court describes the records as insufficiently developed—though these discussions are on the merits of the (failed) facial challenge, not an argument about ripeness.[236] On the other hand, *Washington State Grange* and *Crawford* suggest that in some election cases the Court doesn't care that the precise facts can't yet be known.[237] And of course some election-related cases are not very fact-dependent, such as *Moore v. Harper*.[238] Overall, we acknowledge that the state of the record is a relevant factor in the appropriate timing of merits resolution, but we can envision plenty of cases in which the challenge is essentially one of the meaning of state and federal law, and the needed factual development can occur relatively quickly and in advance of the actual casting of ballots.

Furthermore, in general, these objections hold even less weight for mootness CORYER than for standing. In most mootness cases there should be no/little concern about the factual record and adversariness.[239] The only question is whether there is an unusual circumstance in which the mooting event changes incentives or has the effect of reducing zeal. But mootness for *Purcell* should rarely if ever produce that concern.

Critics may also claim that expediting litigation by applying justiciability doctrines loosely risks making courts look partisan, as if they are bending the rules to make sure they have time to invalidate election rules (which might predictably help one political party over another). We don't find much to this criticism, in part because, as we noted above, the *Purcell* remedial constraint might itself appear partisan or at least dismissive of legitimate voting rights claims.[240] So if this concern for the appearance of illegitimacy isn't strong enough to overcome the Court's support for the *Purcell* principle, it surely isn't strong enough to warrant eschewing efforts to facilitate earlier resolution of legal challenges.

In addition, our proposed compensatory judgments will be much less visible than invoking *Purcell*. Nothing on the face of a judicial opinion upholding third-party standing or finding CORYER appliable will necessarily reveal a partisan-driven thumb on the scale. And if the opinion chooses to explain that it uses a low hurdle for COR or imminence or whatever because of *Purcell*, then the court will reveal itself as sensibly compensating for a remedial concern at the back end rather than prejudging the merits on the front end.

Our bottom line is that here, as in most important areas of constitutional law, while there are arguments on both sides, application of judgment based on first constitutional principles tips the balance. While not everyone will necessarily see things the same way, we hope that those who share our super-strong commitment to having constitutional and statutory voting rights vindicated as

236. *See generally* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

237. *See generally Wash. State Grange*, 552 U.S. 442; *Crawford*, 553 U.S. 181.

238. *See generally* 600 U.S. 1 (2023).

239. *See supra* Subsections III.B.1–2.

240. *See supra* notes 36−39 and accompanying text.

much as is reasonably possible will agree with us that, absent a case-specific concern (such as record ripeness), leaning towards early litigation and resolution will beneficially and optimally balance against the *Purcell* principle.[241]

IV. OTHER IDEAS ABOUT SPEEDIER ADJUDICATION

Our attention thus far has focused on Court-fashioned justiciability doctrines that can and should be implemented by the federal courts in distinctively flexible ways in election settings, so as to counteract the deleterious (if necessary) effects generated by adherence to the *Purcell* doctrine. In our final substantive section, we briefly identify other potential areas of federal jurisdictional reconsideration and reform, some of which involve not doctrinal refinements but instead legislative tweaks to federal procedural rules and practices to facilitate faster adjudication specifically in the election realm. Our thoughts and suggestions in this section are not intended to be comprehensive or fully refined; instead they are offered to spur more detailed additional thinking by judges, academics and policymakers in keeping with our general prescription about the need to "compensate" for *Purcell*'s effects.

A. Other Timing-Related Jurisdictional Doctrines

One candidate for reconsideration in the context of election cases is the so-called "final judgment rule," which (as applied to the U.S. Supreme Court) is embodied in 28 U.S.C. § 1257 and generally permits the Court to review "state litigation only after the highest state court in which judgment could be had has rendered a [f]inal judgment or decree."[242] Notwithstanding the seemingly absolute character of § 1257's prohibition, the Court has acknowledged "that the rule ha[s] not been administered in such a mechanical fashion and that there [are] circumstances in which there has been a 'departure from the requirement of finality for federal appellate jurisdiction.'"[243] One setting in which the final judgment rule has been relaxed and interlocutory review has been allowed is free speech disputes. The famous *Cox Broadcasting* case is illustrative, involving the question whether the First Amendment permits tort liability to be imposed on a reporter and a television station for mentioning the name of a rape and murder victim, which the reporter learned from publicly available records. The defendant television station attempted to invalidate the state statute creating tort liability but lost in the Georgia Supreme Court. Because no trial had been yet held, there was no final judgment against the station. Rather than wait for such a trial, the station sought review in the U.S. Supreme Court, where a majority of Justices

241. *See* Codrington III, *supra* note 29, at 959 ("[C]ourts are in a unique competition with time; they must try to intercede late enough for the matter to be ripe and to issue a ruling on a fully developed and carefully reviewed record, but early enough to meet Purcell's murky deadline.").

242. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476–77 (1975).

243. *Id.* at 477. A parallel provision of the federal code imposes an analogous final-judgment requirement for federal appellate court review of lower federal court decisions. *See* 28. U.S.C. § 1291.

agreed to review the case notwithstanding the absence of a final judgment because, according to the Court:

> even if the appellants . . . [were to] prevail[] at trial [on nonconstitutional grounds] and ma[ke] unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after the trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' [and] 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.'[244]

As discussed earlier, the underlying commonality between free-speech/free-press claims on the one hand and election litigation on the other—that they both involve instrumental and irreparable interests that transcend those of the claimants themselves and that are central to democratic self-governance—argues for similar treatment with respect to expedient access to federal judicial resolution.[245]

But the connection between application *vel non* of the final judgment rule in the two settings need not be left to general implication. The case that the *Cox Broadcasting* Court relied on most explicitly in deciding to review the Georgia Supreme Court's ruling was one that explicitly featured the tight connection between free speech and free elections. In *Miami Herald Publishing Company v. Tornillo*[246] (decided the year before *Cox Broadcasting*), the Court exercised interlocutory review in the context of a challenge between a newspaper and a candidate for political office. Candidate Tornillo sued the *Miami Herald* for refusing, in apparent violation of a Florida statute, to publish his reply to an earlier *Herald* editorial questioning his qualifications and fitness for office. A Florida trial court had ruled the statute unconstitutional but, as in *Cox Broadcasting*, the state supreme court reversed, upholding the statute against a First and Fourteenth Amendment challenge, and remanded the case for trial. When the newspaper then sought review, the U.S. Supreme Court accepted the case, observing that regardless of how the merits were to be decided, it would be "intolerable to leave unanswered, under these circumstances" this important and unsettled constitutional question.[247]

Thus, the groundwork for overtly declaring election disputes as warranting differential treatment under the final judgment rule has already been laid. Whether by the Court formalizing its already flexible interpretation of federal

244. *Cox*, 420 U.S. 469, at 485–86.

245. *See supra* notes 198−203 and accompanying text. For other examples of relaxation of the final judgment rule in First Amendment settings, *see* National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), and Fort Wayne Books v. Indiana, 489 U.S. 46 (1989).

246. 418 U.S. 241 (1974).

247. *Id.* at 247 n.6.

statutes embodying the final judgment requirement to make clear that election cases form a distinct category for exception, or by Congress revising the text of the relevant statutes themselves, expeditious review on the merits by federal appellate courts in election challenges ought, on our account, to be more clearly and formally facilitated.[248]

B. Other Timing-Related Non-Jurisdictional Mechanisms for Judicial Expedition for Congress/Rules Committees to Explore

In addition to the final judgment rule, we conceive of several other aspects of federal civil litigation that might be revised or expedited to facilitate timely yet fully informed resolution of election challenges. Among those that come to our minds are: more expansive use of three-judge panels with direct appeal to the Supreme Court, tinkering with filing and briefing deadlines, shortening intervention deadlines, expediting or truncating trial discovery for cases that turn largely on legal interpretations, explicit prioritization of election challenges within the federal docket (as some statutes have done[249]), issuing rulings with summary explanation in advance of full-blown justificatory opinions that take more time,[250] and the judicial consideration of potential remedies (perhaps with the assistance of special masters) during, and not just after, the merits have been adjudicated. We fully acknowledge that careful adjudication takes time and thought by parties, amici and jurists—the Court has been roundly criticized for making significant law in the shadow-docket setting. And we also recognize that many of our suggestions for areas to explore might require action not just by judges but by Congress. Those are two reasons we are not advancing specific, detailed proposals for change in any of the areas listed above; but if we are right that election cases are distinct (as *Purcell* itself recognizes), that distinctiveness calls for creativity and deliberation regarding all of the mechanisms that can be improved to produce more timely (yet still deliberate) resolution of litigation bearing so centrally on democratic self-governance.

248. In this vein, after the Court asked for supplemental briefing in *Moore v. Harper* on whether the final judgment rule had been satisfied and then found that one of the exceptions mentioned in *Cox* applied, the Court reached the right result but missed an opportunity to highlight the relevance of election-related cases and the similarity to *Tornillo*.

249. *See, e.g.*, Fed. Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449, 462 (2007) ("BCRA[] command[ed] that the cases be expedited 'to the greatest possible extent,' . . . ."); Buckley v. Valeo, 424 U.S. 1, 8 n.4 (1976) (quoting statute providing that "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.").

250. *Cf.* United States v. Perez-Garcia, Nos. 22-60314, 22-50316, 2023 WL 2596689 (9th Cir. Jan. 26, 2023) (granting relief followed by full opinion). We recognize that the Ninth Circuit's grant of preliminary relief without explanation seemed to trouble the Court in *Purcell* itself, but we are talking here not about preliminary relief but relief after adjudication on the merits.

V. CONCLUSION

Court-fashioned doctrines, even laudable ones, can create unanticipated or undesired consequences; where possible, the Supreme Court (and policymakers) should use the "complementarity" notion to mitigate negative consequences even through separate doctrinal modifications. The *Purcell* principle is a very attractive setting for compensatorily adjusting rules regulating access to and timing of federal court litigation, tailored for the election-challenge setting—that go to the when and who of federal litigation. Indeed, as we have described, there are at least eight doctrinal rules relating to timely access to federal adjudication (mootness, first-party standing, ripeness, third-party standing, vagueness, overbreadth, abstention and the final judgment rule) for which the Supreme and other federal courts have already acknowledged (albeit inconsistently and without much explanation), via particular case resolutions and the articulation of permissible grounds for deviating from general rules, an exceptionalism for cases that implicate democratic self-governance. We suggest that the linkages we observe that add up to a sensible election exceptionalism be explicitly understood, surfaced, and explained by the Court, for the sake of consistent application not just by the Court itself but by the lower courts too, and also for the benefit of Congress and other rulemaking bodies who should prioritize timely resolution for challenges to the way democracy is administered.