

10-2021

## Manufacturing Sovereign State Mootness

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### Repository Citation

Daniel Bruce, *Manufacturing Sovereign State Mootness*, 63 Wm. & Mary L. Rev. 287 (2021),  
<https://scholarship.law.wm.edu/wmlr/vol63/iss1/6>

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# NOTES

## MANUFACTURING SOVEREIGN STATE MOOTNESS

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## INTRODUCTION

The lead-up to the Supreme Court's Fall 2019 term was steeped in controversy. The Court's first gun rights case in nearly a decade, *New York State Rifle & Pistol Ass'n v. City of New York*, quickly became more about the far less exciting justiciability doctrine of mootness and the legitimacy of the Court than the Second Amendment.<sup>1</sup> Promptly after the Court granted certiorari, in a clear attempt to prevent the Court from creating unfavorable precedent, New York City repealed and amended its stringent gun transportation rule.<sup>2</sup> Then, for good measure, the state legislature passed a law rendering the city's old rule illegal.<sup>3</sup> To pile onto the controversy, a group of five United States senators submitted an unprecedented amicus brief ordering the Court to drop the case or face potential restructuring.<sup>4</sup> In a brief per curiam opinion, six Justices held that the city's repeal of the rule successfully rendered the case moot.<sup>5</sup> In his dissenting opinion arguing that the case was not moot and that New York's rule violated the Second Amendment, Justice Alito warned that the Court has "been particularly wary of attempts by parties to *manufacture mootness* in order to evade review."<sup>6</sup>

Despite Justice Alito's admonition, lower federal courts have not been so skeptical of defendants' attempts to evade review. This is particularly true in cases involving voluntary cessation by government defendants. Voluntary cessation, a general exception to the mootness doctrine, provides that a case does not become moot

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1. See 140 S. Ct. 1525, 1526 (2020) (per curiam).

2. See *id.* at 1527 (Alito, J., dissenting).

3. *Id.* at 1528.

4. Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 18, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) ("The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"); see also Robert Barnes, *Warning or Threat? Democrats Ignite Controversy with Supreme Court Brief in Gun Case*, WASH. POST (Aug. 16, 2019, 7:30 PM), [https://www.washingtonpost.com/politics/courts\\_law/warning-or-threat-democrats-ignite-controversy-with-supreme-court-brief-in-gun-case/2019/08/16/2ec96ef0-c039-11e9-9b73-fd3c65ef8f9c\\_story.html](https://www.washingtonpost.com/politics/courts_law/warning-or-threat-democrats-ignite-controversy-with-supreme-court-brief-in-gun-case/2019/08/16/2ec96ef0-c039-11e9-9b73-fd3c65ef8f9c_story.html) [https://perma.cc/R2QE-Q2P5].

5. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526.

6. *Id.* at 1533 (Alito, J., dissenting) (emphasis added) (citing *Knox v. Serv. Emps.*, 567 U.S. 298, 307 (2012)).

merely because the defendant ceases the challenged conduct.<sup>7</sup> However, many courts held that government defendants are entitled to a presumption that they act in good faith when strategically mooting cases by voluntarily ceasing the challenged conduct.<sup>8</sup> For instance, in a recent case, *Speech First, Inc. v. Killeen*, the Seventh Circuit held that state university officials were presumed to have acted in good faith when, mere days into litigation, they repealed a challenged university policy limiting students' free speech on campus.<sup>9</sup> Therefore, the students' challenge was moot.<sup>10</sup> These two cases—*New York Rifle* and *Killeen*—present the central question that motivates this Note: to what extent should public defendants be treated differently than private defendants when manufacturing mootness to evade judicial review?

The idea that public defendants should receive *any* special treatment in the mootness context has been subject to intense criticism among commentators. Most notably, in the lead-up to the *New York Rifle* decision, Joseph Davis and Nicholas Reaves—two prominent First Amendment litigators from the Becket Fund for Religious Liberty—urged the Supreme Court to take the opportunity to correct the lower courts' practice of blessing government abuse of the voluntary cessation doctrine.<sup>11</sup> Indeed, the Supreme Court has never adopted a presumption in favor of government defendants such as the one applied by the Seventh Circuit in *Killeen*,<sup>12</sup> and it failed to do so in *New York Rifle*. Rather, lower courts have created the presumption out of whole cloth, “invok[ing] purely prudential concerns about the supposed public-spiritedness of government litigants.”<sup>13</sup> While this prudential, good-faith presumption would be anathema to Framers like James Madison who knew that government is

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7. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000).

8. See *infra* Part II.B.

9. 968 F.3d 628, 645 (7th Cir. 2020) (“[W]hen the defendants are public officials ... we place greater stock in their acts of self-correction, so long as they appear genuine.” (citation omitted)).

10. *Id.* at 646.

11. See Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 325 (2019).

12. See *id.* at 332-35.

13. *Id.* at 328.

composed of men and not angels,<sup>14</sup> institutional concerns related to state sovereignty may justify the different treatment afforded to public defendants.

This Note attempts to fill a void in the literature by advocating for a presumption in favor of government defendants in voluntary cessation cases rooted more in structural, rather than merely prudential, justifications. In particular, the Note pulls from a more fully developed body of literature surrounding sovereign state standing to argue that the same principles of sovereignty that grant states broad standing to sue require courts to give more weight to exercises of state lawmaking authority to moot certain cases. However, this special treatment cannot exist in perpetuity. Once the state action becomes far enough removed from the sovereign lawmaking process—action by a university official, for instance—this structural justification no longer holds, and public litigants should be held to the same mootness standards as private defendants.

Part I of this Note summarizes the mootness doctrine and its various exceptions. Part II analyzes the varying approaches taken by federal courts in applying the voluntary cessation exception to public defendants. Part III provides an overview of state sovereignty and how that sovereignty applies in the mootness context. Part IV draws on principles of state sovereignty in the standing context to advocate a new standard to apply to voluntary cessation cases: the sovereignty standard. Finally, Part V applies the sovereignty standard to define the bounds of manufactured sovereign state mootness.

## I. MOOTNESS DOCTRINE AND ITS EXCEPTIONS

It is well settled that a federal court may only exercise jurisdiction over a case if an actual controversy persists throughout each stage of litigation.<sup>15</sup> If the dispute disappears after the filing of the suit, the case is considered moot.<sup>16</sup> Therefore, if a criminal

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14. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009); Davis & Reaves, *supra* note 11, at 326.

15. ERWIN CHERMERINSKY, FEDERAL JURISDICTION, § 2.5.3 (Wolters Kluwer, 7th ed. 2016).

16. *Id.* § 2.5.1.

defendant dies<sup>17</sup> or a student challenging a university's admission procedures completes his or her studies during appeal,<sup>18</sup> the federal court is without jurisdiction to hear the case.

The mootness doctrine is derived from both constitutional and prudential grounds. Article III of the Constitution extends federal jurisdiction only to "Cases" and "Controversies" and generally prohibits courts from issuing advisory opinions.<sup>19</sup> Therefore, a case that is moot does not present a justiciable controversy, and further resolution would cause the court to run afoul of that prohibition.<sup>20</sup> However, prudential factors, including conserving judicial resources and preserving the adversarial process, also animate the mootness doctrine.<sup>21</sup> Therefore, the Supreme Court has often taken a flexible approach to mootness by establishing a few exceptions to the doctrine,<sup>22</sup> particularly for those issues that are capable of repetition yet evading review and those that are resolved by a party's voluntary cessation of the challenged conduct.

#### *A. Capable of Repetition, Yet Evading Review*

Perhaps the most notable exception to mootness is for illegal conduct that is "capable of repetition, yet evading review."<sup>23</sup> This exception permits judicial review of certain injuries that are more likely to evade the litigation process because of their limited duration.<sup>24</sup> For the challenged illegal conduct to fit within this exception, it must (1) be reasonably likely to happen to the plaintiff again and (2) be so limited in duration that it is always likely to become moot before the litigation process is complete.<sup>25</sup>

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17. See *Dove v. United States*, 423 U.S. 325 (1976) (per curiam).

18. See *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (per curiam).

19. U.S. CONST. art. III, § 2; see *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

20. See *Baker*, 369 U.S. at 204.

21. CHEMERINSKY, *supra* note 15, § 2.5.1; see *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (articulating the common justifications for justiciability doctrines). See also Chief Justice Rehnquist's argument that the mootness doctrine is based solely on policy judgments and not "forced upon us by the case or controversy requirement of Art. III itself." *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, J., concurring).

22. CHEMERINSKY, *supra* note 15, § 2.5.1.

23. *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911).

24. CHEMERINSKY, *supra* note 15, § 2.5.3.

25. *Id.*

This exception may be applied in a variety of contexts, but examples of its application in election and education law are instructive. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the Supreme Court held that a challenge to a federal law restricting corporate expenditures in elections was not moot, despite the fact that the election had passed.<sup>26</sup> The Court reasoned that the organization was likely to run similar targeted ads in future elections and that the Federal Election Commission (FEC) was unlikely to refrain from prosecuting future violations.<sup>27</sup> However, in *DeFunis v. Odegaard*, the Court held that a student's challenge to a university's admissions procedure was moot because he was in his final semester of law school by the time the litigation reached the Supreme Court.<sup>28</sup> The Court reasoned that the challenged admissions procedure was unlikely to be applied to the petitioner again, and it was not likely to evade review because other students would bring a similar challenge if the procedures were not changed.<sup>29</sup> Therefore, a federal court may still exercise jurisdiction over a case that is reasonably likely to arise with the same plaintiff again.

### B. Voluntary Cessation

Another consequential exception to the mootness doctrine—and the principal focus of this Note—is voluntary cessation. This exception states that a case will not become moot merely because the defendant voluntarily ceases the challenged behavior if he or she is free to continue it at any time.<sup>30</sup> However, if “there is no reasonable expectation that the wrong will be repeated,” the case will be rendered moot.<sup>31</sup> Although the exception seems relatively simple, courts have struggled to articulate how likely the possibility of recurrence needs to be and what parties, if any, are entitled to a greater presumption of good faith.

In general, the defendant bears the burden of proving the challenged conduct is unlikely to recur. Justice Ginsburg characterized

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26. 551 U.S. 449, 463-64 (2007).

27. *Id.* at 463.

28. 416 U.S. 312, 318 (1974) (per curiam).

29. *Id.* at 318-19.

30. CHEMERINSKY, *supra* note 15, § 2.5.4.

31. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

this burden as “stringent,” noting that “[t]he ‘heavy burden of persua[ding]’ the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.”<sup>32</sup> Therefore, at least private defendants face an uphill battle in demonstrating that their ceased behavior will not recur.

While the Supreme Court has not articulated a specific standard, lower courts typically balance a variety of factors when determining whether the conduct is sufficiently likely to recur. For instance, “[a] defendant’s continued assertion of a right to engage in the allegedly wrongful conduct, despite having ceased to do so, will generally preclude a finding of mootness.”<sup>33</sup> However, such an assertion may be outweighed by other factors, such as a strong claim that the defendant will not engage in the conduct anyway.<sup>34</sup>

The Eleventh Circuit considers a three-factor test to determine whether the ceased conduct is likely to recur:

- (1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant’s cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability.<sup>35</sup>

In *Sheely v. MRI Radiology Network*, the Eleventh Circuit concluded that an Americans with Disabilities Act challenge to a medical facility’s service animal policy was not mooted by the fact that the facility implemented a new policy nine months into litigation.<sup>36</sup> Applying its three-factor test, the court found that (1) the prior policy was the result of a years-long refusal by the owner to not allow any animals whatsoever inside the facility, (2) the defendant’s eleventh-hour change in policy was clearly motivated by a desire to

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32. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 189 (2000) (second alteration in original) (quoting *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)).

33. 15 MARTIN H. REDISH, *MOORE’S FEDERAL PRACTICE* § 101.99[2][a] (3d ed. 2021).

34. *See Brown v. Buhman*, 822 F.3d 1151, 1176-77 (10th Cir. 2016) (holding that a prosecutor’s statement under penalty of perjury that he would not enforce a bigamy statute, despite his continued belief in its constitutionality, justified a finding of mootness).

35. *Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1184 (11th Cir. 2007).

36. *Id.* at 1189.



avoid liability, and (3) the defendant insisted that its actions were completely legal.<sup>37</sup>

Voluntary cessation advances both the constitutional and prudential justifications for mootness. If the challenged conduct has ceased and is unlikely to recur, then there is no live controversy for the federal court to hear pursuant to Article III's jurisdictional requirements.<sup>38</sup> However, if the ceased conduct is likely to continue, then there arguably is still a live controversy to be heard, given that the defendant is left to return to the illegal conduct without a judicial ruling.<sup>39</sup> Voluntary cessation also improves judicial decision-making by limiting judicial review to only those cases in which each litigant has a full adversarial stake in the litigation.<sup>40</sup> Further, voluntary cessation conserves judicial resources by allowing federal courts to dismiss cases in which a judicial intervention is no longer necessary to resolve a live controversy.<sup>41</sup> However, this rationale cuts both ways. Judicial resources may actually be wasted when the voluntary cessation occurs on appeal, for instance, requiring the court to dismiss a case that may present an important legal question with a strong factual record.<sup>42</sup>

Thus, courts have attempted to strike the proper balance in advancing both the constitutional and prudential justifications for mootness through two prominent exceptions to the doctrine: capable of repetition yet evading review and voluntary cessation. Voluntary cessation advances these justifications by permitting courts to retain jurisdiction over cases that still present constitutionally sufficient live controversies, despite the defendant's voluntarily ceased conduct, and to refuse to exercise jurisdiction over cases that constrain judicial resources or disrupt the adversarial process.

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37. *Id.* at 1185-87.

38. *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam).

39. *See id.* at 318.

40. *But see* Kremens v. Bartley, 431 U.S. 119, 134 n.15 (1977) ("The availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous *amici curiae* ready to assist in the decisional process, even though all of them 'stand like greyhounds in the slips, straining upon the start,' does not dispense with the requirement that there be a live dispute between 'live' parties before we decide such a question.").

41. *See* City of Erie v. Pap's A. M., 529 U.S. 277, 287 (2000) (reiterating the Court's commitment to intervening only in live controversies and not acting in an advisory capacity).

42. *See* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, J., concurring) (arguing for "relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after [the Court's] decision to grant certiorari or to note probable jurisdiction").

However, as the next Part explores, lower courts have continually struggled to apply the exception consistently and predictably across issues and parties.

## II. VOLUNTARY CESSATION APPLIED TO GOVERNMENT DEFENDANTS

Federal courts have particularly struggled to consistently apply the voluntary cessation doctrine to government defendants. While the consensus is that government defendants deserve special treatment in the voluntary cessation context, courts ground that special treatment in various rationales. The Supreme Court has held that statutory changes generally moot a case, unless it is reasonably likely that the statute will be reenacted.<sup>43</sup> However, from that deference, lower federal courts have created a presumption that all government officials act in good faith when voluntarily ceasing challenged conduct.<sup>44</sup> This Part separates a sample of voluntary cessation cases into two groups—(1) legislative-like action by elected officials and (2) discretionary action by unelected officials—to analyze how each of these standards applies, ultimately concluding that both are unworkable and built on shaky legal foundations.

### A. Legislative-Like Action by Elected Officials

Legislative-like action by elected officials is generally sufficient to render a case moot. This typically occurs through statutory changes in response to litigation. The Supreme Court has rather consistently rejected the idea that a legislature's mere ability to reenact the challenged statute after a dismissal justifies applying the voluntary cessation exception.<sup>45</sup> Rather, the Court focuses on whether a reasonable probability of reenactment exists.<sup>46</sup> If so, the Court will apply voluntary cessation and the statutory change will not moot the case.<sup>47</sup> As Dean Chemerinsky puts it, "[t]he key

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43. See *Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

44. See, e.g., *Speech First, Inc. v. Killeen*, 968 F.3d 628, 646 (7th Cir. 2020).

45. See *CHEMERINSKY*, *supra* note 15, § 2.5.4 ("Usually, a statutory change is enough to render a case moot, even though the legislature possesses the power to reinstate the allegedly invalid law after the lawsuit is dismissed.")

46. See *id.*

47. See *id.*

appears to be that cases will not be dismissed as moot if the Court believes that there is a likelihood of reenactment of a substantially similar law if the lawsuit is dismissed.”<sup>48</sup> However, the Court’s application of this principle makes it clear that it is by no means a tenable, consistently applied standard; it fails to account for important principles of state sovereignty and gives judges too much discretion in determining when a law is sufficiently likely to be reenacted.

*New York Rifle* is the most recent example of how difficult the Court’s statutory change rule is to apply in practice. The petitioners in *New York Rifle* brought a Second Amendment challenge against a New York City ordinance that prohibited “premises license” holders from transporting their firearms outside of the home, except to a few preapproved ranges outside of the city.<sup>49</sup> The city vigorously defended the ordinance in lower courts, and both the district court and Second Circuit upheld the law.<sup>50</sup> However, once the Supreme Court granted certiorari, the city amended the ordinance to permit premises license holders to transport weapons to a broader range of locations, provided that they traveled directly to and from those destinations.<sup>51</sup> For good measure, the New York state legislature passed a law abrogating any city ordinance that limited the ability of premises license holders to transport their firearm to any authorized range, competition, or second home.<sup>52</sup> Then, the city dropped its defense of the law, arguing before the Supreme Court that the case was now moot.<sup>53</sup>

In a brief per curiam opinion, the Court held that the statutory change sufficiently mooted the case.<sup>54</sup> However, the Court provided little reasoning and cited almost none of its past voluntary cessation cases to justify its holding.<sup>55</sup> Still, one may gather that the Court believed that the city was sufficiently unlikely to reenact a similar ordinance, particularly given the state legislature’s abrogation of any such law. Indeed, the Court has held as much in the

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48. *Id.*

49. *See id.* at 1525, 1530 (2020) (Alito, J., dissenting).

50. *See id.* at 1532.

51. *Id.*

52. *Id.*

53. *See id.* at 1532-33.

54. *Id.* at 1526 (per curiam).

55. *See id.*

past. In *Kremens v. Bartley*, the Court held that Pennsylvania's complete repeal of challenged mental health admission procedures that permitted involuntary confinement of juveniles "clearly moot[ed]" the case.<sup>56</sup> Thus, the *New York Rifle* decision is at least consistent with the Court's precedents that a statutory change is sufficient to moot a case.

However, the *New York Rifle* Court failed to distinguish its other precedents acknowledging that a statutory change does not always moot a case. For instance, in *City of Mesquite v. Aladdin's Castle, Inc.*, the Court held that a city's repeal of vague language in a licensing ordinance did not moot a vagueness challenge because the repeal "would not preclude [the city] from reenacting precisely the same provision if the District Court's judgment were vacated."<sup>57</sup> While the ordinance in *New York Rifle* would face two steps to reenactment, repeal of the state statute *and* the city ordinance, perhaps distinguishing it from *City of Mesquite*, the obviously friendly New York legislature would likely prove to be only a minor hurdle.

Further, in *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, the Court held that an equal protection challenge to the city's minority preference contracting ordinance was not mooted when the city repealed and replaced the ordinance during litigation.<sup>58</sup> The Court reasoned that not only was the city free to reenact a similar ordinance, but it already had enacted one with the same constitutional infirmities as the first.<sup>59</sup> In his vigorous *New York Rifle* dissent, Justice Alito made a similar argument that the case could not be moot because the amended law "[did] not give petitioners all the *prospective relief* they [sought]."<sup>60</sup> The petitioners sought "'unrestricted access' to ranges, competitions, and second homes outside of New York City," but the new amended ordinance still required direct travel between the gun owner's home and the second location.<sup>61</sup> Therefore, according to Justice Alito, the parties "still possessed 'a concrete interest, however small,

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56. 431 U.S. 119, 129 (1977); *see also* *Massachusetts v. Oakes*, 491 U.S. 576, 576 (1989) (holding that an amendment to the challenged child pornography statute mooted the case).

57. 455 U.S. 283, 289 (1982).

58. 508 U.S. 656, 662 (1993).

59. *See id.*

60. 140 S. Ct. 1525, 1533 (2020) (Alito, J., dissenting).

61. *Id.*

in the outcome of the litigation.”<sup>62</sup> Yet the majority failed to consider any of these similarities to its contradictory case law.

The *New York Rifle* decision reveals that the Supreme Court’s application of the voluntary cessation doctrine to statutory changes is neither tenable nor consistently applied. Lower courts also struggle to apply the standard to the analogous but distinct area of regulatory changes. These sometimes legislative-like actions by unelected government officials present an interesting combination of both the statutory-like procedures addressed above and the discretionary action by government officials addressed below. While some courts treat regulatory changes somewhat differently than statutory changes or official action, the difference does not warrant exhaustive discussion. Rather, the Sixth Circuit’s rule is instructive: “[W]here a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions.”<sup>63</sup> Therefore, regulatory changes may be subject to both the reasonable probability of the enactment test and the good faith presumption, depending on which category the change most mimics.<sup>64</sup>

Ultimately, whether grounded in the likelihood of reenactment<sup>65</sup> or a presumption of good faith granted to lawmakers,<sup>66</sup> the Court’s mootness standard for legislative-like action by elected officials leaves much to be desired. A standard grounded in structural sovereignty would better respect the state’s inherent lawmaking authority and alleviate many headaches for both public and private litigants.

### *B. Discretionary Action by Unelected Officials*

Federal courts generally treat voluntary cessation by government officials with more solicitude than private defendants. While courts

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62. *Id.* at 1534-35 (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 307-08 (2012)).

63. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019).

64. *See id.*

65. *See City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982).

66. *See Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016) (presuming that state legislature repealed bridge tolls in good faith); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1341 (11th Cir. 2004) (applying the good faith presumption to hold that a city’s repeal of a sign ordinance rendered the case moot).

often use the broad term “government officials” in these cases, they more specifically involve discretionary actions taken by unelected government officials.<sup>67</sup> The Supreme Court has never adopted a different standard to be applied to such actions. However, most federal circuits have adopted a presumption that such public defendants act in good faith in voluntarily ceasing challenged conduct.<sup>68</sup> This presumption is most clearly applied in cases involving university officials. This Note will focus on the Seventh Circuit’s recent decision in *Speech First, Inc. v. Killeen* to explore the contours of the good faith presumption and demonstrate why it is an unsound doctrine divorced from the constitutional structure of Article III.

### 1. *Killeen and the Good Faith Presumption*

The Seventh Circuit articulated the typical presumption of good faith applied to government defendants in *Killeen*. In that case, petitioners challenged several policies promulgated by the University of Illinois as unconstitutional restrictions on student speech.<sup>69</sup> One of those policies prohibited students from posting election materials about off-campus elections without prior approval from the university.<sup>70</sup> However, weeks after the lawsuit was filed, university officials repealed the prior approval rule through a formal process in the university senate.<sup>71</sup> Through a sworn declaration of its associate dean of students, the university asserted that it had no intentions of reenacting the provision.<sup>72</sup> The university argued the case was thus moot.<sup>73</sup>

The Seventh Circuit agreed, asserting that, as “a public entity and an arm of the state government of Illinois,” the university “receives the presumption that it acts in good faith.”<sup>74</sup> Therefore, the

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67. For simplicity, this Section will usually refer to these actors as “government officials.” Elected members of the legislature are also “government officials,” but courts generally treat their actions under the standards discussed in Part II.A.

68. See Davis & Reaves, *supra* note 11, at 326.

69. *Speech First, Inc. v. Killeen*, 968 F.3d 628, 632 (7th Cir. 2020).

70. *Id.* at 636.

71. *Id.*

72. *Id.*

73. *Id.* at 654.

74. *Id.* at 646.

university's good faith act of rescinding its prior approval rule successfully mooted the case.<sup>75</sup> The court appeared to ground the presumption in the requirement that for a case to be moot it must be absolutely clear the challenged action will not continue.<sup>76</sup> In doing so, the court reflected a common theme among federal circuits: because government officials are presumed to act in good faith, their voluntarily ceased conduct is sufficiently unlikely to recur.<sup>77</sup>

In dissent, Judge Michael Brennan argued that the repeal of the prior approval rule did not moot the case.<sup>78</sup> While acknowledging that public officials do benefit from a presumption of good faith, Judge Brennan argued that the presumption is not absolute.<sup>79</sup> Rather, the manner in which the public entity voluntarily ceases is significant.<sup>80</sup> The university's formal amendment procedures were self-imposed and could be swiftly undone, and the associate dean's statement was not binding on the university senate.<sup>81</sup> Therefore, the university failed to meet its heavy burden that the prior approval rule would not be reenacted, even if the university, as a public defendant, benefits from a presumption of good faith.<sup>82</sup>

Other circuits embrace a standard similar to Judge Brennan's. For instance, the Sixth Circuit has held that, while the good faith presumption applies to government officials, mootness standards sometimes require more: "If the discretion to effect the change lies

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75. *Id.*

76. *See id.* at 645 ("Indeed, a case will become moot only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000))). The court also pointed to the legislative-like procedure of the university's formal amendment process to indicate that the policy was reasonably unlikely to recur. *See id.* at 646.

77. *See, e.g.,* *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (asserting petitioner failed to make the requisite showing of bad faith by government officials necessary to show the challenged policy was likely to recur); *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009) (noting the standard that "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith" is consistent with *Laidlaw's* "heavy burden"); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) ("[W]e presume that the same allegedly wrongful conduct by the government is unlikely to recur.").

78. *See Killeen*, 968 F.3d at 648 (Brennan, J., dissenting).

79. *Id.* at 655.

80. *Id.*

81. *Id.* at 654, 657.

82. *Id.* at 657.

with one ... individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim.”<sup>83</sup> And still others reject the good faith presumption altogether, instead choosing to hold public defendants to the same heavy burden as private defendants.<sup>84</sup>

## 2. *The Defects of Good Faith*

Several defects inherent in the good faith presumption warrant its eradication. First, the standard is simply unworkable. Although both the majority and dissent in *Killeen* claimed to apply the presumption, they disagreed significantly over its scope and the importance of accompanying procedures to the analysis.<sup>85</sup> Further, the presumption is not applied consistently to similar actions by public officials. This is most evident in the Sixth Circuit’s decision in *Speech First, Inc. v. Schlissel*, where the court held that a university’s voluntary cessation of an almost identical policy did not moot the case despite the presumption.<sup>86</sup>

Second, unlike other aspects of justiciability doctrines, the presumption finds no roots in Article III of the Constitution. The nexus between a government actor’s good faith and the existence of a live case or controversy is tenuous at best.<sup>87</sup> Further, deferring to the supposed public-spiritedness of government actors is drastically different than other prudential aspects of mootness, such as preserving judicial economy and improving judicial decision-making, and does little to advance those prudential aims.<sup>88</sup>

Third, the good faith presumption is antithetical to the Framers’ conception of republican governance. James Madison famously posited “that we are governed by mere ‘men,’ not ‘angels.’ For ‘[i]f angels were to govern men, neither external nor internal controls

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83. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019).

84. *See, e.g.*, U.S. Dep’t of Just. Fed. Bureau of Prisons Fed. Corr. Complex Coleman, Fla. v. Fed. Lab. Rels. Auth., 737 F.3d 779, 783 (D.C. Cir. 2013).

85. *Compare supra* notes 74-77 and accompanying text, *with supra* notes 78-81 and accompanying text.

86. 939 F.3d at 770.

87. *See supra* Part I.B.

88. *See supra* Part I.B.



on government would be necessary.”<sup>89</sup> And while one of the aims of republican governance is to place virtuous individuals in positions of power,<sup>90</sup> Madison also recognized that even virtuous rulers are inclined to tyranny.<sup>91</sup> Even if certain government defendants are entitled to deference in the voluntary cessation context, the standard used to grant this deference should not perpetuate such tyranny.

These defects certainly provide no justification for the good faith presumption’s continued application. Federal courts, public defendants, and private litigants would benefit from a clearer, more consistently applied mootness standard grounded in structural, rather than merely prudential, justifications.

### III. MANUFACTURED MOOTNESS AND STATE SOVEREIGNTY

Courts should first look to general principles of state sovereignty to determine whether certain actions by government defendants—even those actions in response to litigation—warrant deference in the mootness context. The concept of state sovereignty has prompted hundreds of years of debate within judicial opinions and academic literature. This Note does not attempt to meaningfully add to that important, ongoing debate. Rather, this Part summarizes generally accepted principles of state sovereignty and ultimately adopts a conception that respects both the sovereignty of the people as well as the inherent sovereignty of representative government institutions.

#### *A. Popular Sovereignty vs. Government Sovereignty*

At the heart of the debate surrounding state sovereignty is the distinction between popular sovereignty and government sovereignty. In their basic forms, each theory attempts to define where the locus of political authority resides within our constitutional

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89. Davis & Reaves, *supra* note 11, at 326 (alteration in original) (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

90. See THE FEDERALIST NO. 57, at 290 (James Madison) (Ian Shapiro ed., 2009) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society.”).

91. See THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (“Ambition must be made to counteract ambition.”).

framework. Popular sovereignty suggests such authority lies solely with “We the People,”<sup>92</sup> while government sovereignty suggests it resides in the institutions of government themselves.<sup>93</sup> This debate is important in discerning whether government defendants should receive any deference—rooted in structural *or* prudential concerns—in the voluntary cessation context.

The classical conception of sovereignty originated in Europe in the sixteenth century and represents the purest form of government sovereignty.<sup>94</sup> Classical sovereignty emanated from the unitary authority of the monarch.<sup>95</sup> Therefore, sovereignty “had to reside in only one place.... [It] could not be divided or shared.”<sup>96</sup> Sovereignty included the power to make law, to declare war, to announce judgements, to tax, and to coin money.<sup>97</sup> Even those who ascribed to social contract theories of governance “posited that men conferred all of their powers and strength upon one man or one assembly of men,” thereby relinquishing all sovereignty to the state.<sup>98</sup>

Most agree that the Framers explicitly rejected the classical view of sovereignty in drafting the United States Constitution.<sup>99</sup> However, the extent to which they did so is still hotly debated,<sup>100</sup> and the Framers provided little guidance themselves. The Constitution’s endeavor to divide and limit sovereignty among three coequal branches of the federal government, as well as between the federal and state governments, certainly is a direct repudiation of the classical view that sovereignty must reside in a single person or institution.<sup>101</sup> And unlike the Articles of Confederation, the Constitution

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92. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-27, 1429-30 (1987) (arguing for “a reaffirmation and strengthening of the Federalist vision” that sovereignty resides principally in the people of the United States as a whole).

93. See Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 335 (2005) (“[T]he concept of sovereignty can only serve its purposes if we accept that the states are the institutions that exercise ‘sovereign’ powers.”).

94. See *id.* at 239.

95. *Id.*

96. *Id.* at 240.

97. *Id.* at 239 (citing JEAN BODIN, ON SOVEREIGNTY 1-4 (Julia Franklin ed., 1992)).

98. *Id.* at 240 (describing Thomas Hobbes’s conception of an “omnipotent sovereign” necessary to ensure security and to prevent political and social discord).

99. See, e.g., *id.* at 241.

100. See, e.g., *id.* at 335; Amar, *supra* note 92, at 1429-30.

101. Zick, *supra* note 93, at 241.

contains no reference to the sovereignty of the states.<sup>102</sup> Further, the writers of the Federalist Papers strongly appealed to principles of popular sovereignty. In Federalist No. 46, James Madison asserted that “the ultimate authority, wherever the derivative may be found, resides in the people alone,”<sup>103</sup> and in Federalist No. 49, he continued, “the people are the only legitimate fountain of power.”<sup>104</sup> Therefore, the Framers clearly intended to counteract the tyranny of classical government sovereignty with the liberty of republican popular sovereignty.

However, it is not clear that the Framers intended to eradicate government sovereignty altogether. To the contrary, the Federalist Papers are laced with reassurances that the states would retain certain elements of sovereignty. In Federalist No. 32, Alexander Hamilton posited that “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not ... *exclusively* delegated to the United States.”<sup>105</sup> Further, in Federalist No. 39, James Madison asserted that the states would retain “a residuary and inviolable sovereignty over all ... objects” not enumerated to the federal government.<sup>106</sup> Thus, it appears equally as clear that the states retained some semblance of sovereignty post-ratification.

This ambiguity also pervades Supreme Court jurisprudence. Since the founding, the Court has taken various approaches to state sovereignty, which Professor Timothy Zick distills into four different “eras” of sovereignty: (1) presovereignty, (2) quasi-classical sovereignty, (3) shared sovereignty, and (4) late sovereignty.<sup>107</sup>

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102. Compare ARTICLES OF CONFEDERATION of 1777, art. II (“Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.”), with U.S. CONST. pmbl. (“*We the People* of the United States ... do ordain and establish this Constitution.” (emphasis added)).

103. THE FEDERALIST NO. 46, at 239 (James Madison) (Ian Shapiro ed., 2009).

104. THE FEDERALIST NO. 49, at 256 (James Madison) (Ian Shapiro ed., 2009).

105. THE FEDERALIST NO. 32, at 155 (Alexander Hamilton) (Ian Shapiro ed., 2009).

106. THE FEDERALIST NO. 39, at 197 (James Madison) (Ian Shapiro ed., 2009); *see also id.* at 195 (asserting that the people were to ratify the Constitution “not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong”).

107. Zick, *supra* note 93, at 243-46.

The presovereignty period is characterized by seminal cases such as *Chisholm v. Georgia*<sup>108</sup> and *Martin v. Hunter's Lessee*,<sup>109</sup> in which the Marshall Court often refused to recognize state sovereignty in its effort to craft a strong national government.<sup>110</sup> Once those concerns abated, the Court was more willing to recognize state sovereignty over areas of purely "local" concern, resulting in an era of quasi-classical sovereignty and the popular conception of "dual sovereignty."<sup>111</sup> However, this goldilocks conception of state sovereignty could not withstand the pressures of the expanding national authority of the New Deal Era, ushering in an era of shared sovereignty.<sup>112</sup> This era was characterized by notions of "cooperative federalism," in which the states merely filled gaps in national authority and the Court reduced the Tenth Amendment's attempt to reserve *some* sovereignty for the states to a mere "truism."<sup>113</sup> Thus, except for the brief period encompassing the quasi-classical era, the Supreme Court has severely limited state sovereignty throughout its history.

In contrast, the modern Court has ushered in an era of late sovereignty characterized by a reassertion of the sovereign role of states in federalism.<sup>114</sup> Indeed, the Court often "flatly proclaim[s] that the states are 'sovereign,' based solely upon their status as states."<sup>115</sup> Under this conception of sovereignty, the Court has invalidated many intrusions on state governments, including expanding protections from civil suit through sovereign immunity<sup>116</sup> and prohibiting the conscription of state officers and legislatures to

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108. 2 U.S. 419 (1793).

109. 14 U.S. 304 (1816).

110. Zick, *supra* note 93, at 243; *see also Chisholm*, 2 U.S. at 452 ("[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty.").

111. Zick, *supra* note 93, at 244 (citing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) for the proposition that local concerns such as "[m]anufactur[ing]" fell within the exclusive jurisdiction of sovereign states, "while 'commerce' was held to constitute an exclusively national matter").

112. *Id.*

113. *Id.* at 245 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

114. *Id.*

115. *Id.* (emphasis omitted).

116. *See Alden v. Maine*, 527 U.S. 706, 730-31 (1999) (holding that Congress may not use its Article I powers to abrogate state sovereign immunity).

enforce federal law.<sup>117</sup> The Court's jurisprudence indicates that neither government sovereignty nor popular sovereignty has won the day. For now, it appears that the states do enjoy certain sovereign characteristics.

*B. Sovereignty and Mootness*

Rather than wade deeper into the sovereignty debate, this Note adopts the assertion—supported by the apparent intent of the Framers, modern federalism jurisprudence, and many constitutional scholars—that the states are indeed sovereign.<sup>118</sup> Indeed, this is necessary for sovereignty to play any meaningful role in our constitutional system:

Sovereignty retains meaningful content ... only when it resides at least partially in governments, not solely in the hands of the people themselves, because 'the people' have no efficient method of expressing or enforcing their 'sovereignty' in response to the real challenges regularly faced by political actors on the national stage.<sup>119</sup>

Therefore, this Note rejects pure popular sovereignty, as well as pure government sovereignty, opting instead for a standard that properly respects the ultimate sovereignty of the people who consented to the constitutional system, as well as the derivative sovereignty possessed by those representative institutions they established.

This is all that is necessary to achieve the modest goals of this Note. If pure popular sovereignty reigns, then all government defendants should be treated completely equal to private defendants—a notion that is clearly disfavored among most federal courts.<sup>120</sup> And if pure government sovereignty reigns and sovereign acts should receive deference in the mootness context, then all government

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117. See *Printz v. United States*, 521 U.S. 898 (1997) (state executive officials); *New York v. United States*, 505 U.S. 142 (1992) (state legislatures).

118. Zick, *supra* note 93, at 335 (“[T]he concept of sovereignty can only serve its purposes if we accept that the states are the institutions that exercise ‘sovereign’ powers.”).

119. Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2069 (2011).

120. See *supra* Part II.

defendants should receive an absolute right to manufacture mootness. By adopting a moderate approach to sovereignty—one that focuses on the sovereign authority exercised by government institutions on behalf of sovereign citizens<sup>121</sup>—manufactured mootness is properly limited to those government defendants exercising their sovereign interests to moot litigation.

#### IV. INSIGHTS FROM SOVEREIGN STATE STANDING

These same sovereign interests arise in the context of another amorphous justiciability doctrine: standing. Insights from the robust literature surrounding sovereign state standing—particularly, when a state may assert sufficient sovereign interests to manufacture such standing—are instructive. Because standing and mootness are very similar justiciability doctrines that serve almost identical constitutional and prudential aims,<sup>122</sup> it seems natural to look toward standing doctrine for guidance in applying mootness doctrine more predictably. After all, “mootness [is] ‘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).’”<sup>123</sup> And it is said that states enjoy “special solicitude” in the standing arena based on their status as sovereign representatives of the people.<sup>124</sup>

This Part outlines particular aspects of sovereign state standing doctrine that will animate the discussion around sovereign state mootness. Part IV.A briefly summarizes the doctrinal background and central purposes of standing doctrine. Part IV.B then explores some sovereign justifications for a robust state standing doctrine and how those sovereign interests relate to mootness.

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121. See Crocker, *supra* note 119, at 2069.

122. Compare *supra* Part I.B., with *infra* Part IV.A.

123. U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)). But see *Friends of the Earth, Inc. v. Laidlaw Env’t Servs.*, 528 U.S. 167, 189-90 (2000) (asserting that this description “is not comprehensive”).

124. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

### A. *Shared Purposes and Rationales of Standing Doctrine*

Similar to mootness, standing is a justiciability doctrine grounded in both constitutional and prudential concerns. Standing doctrine, much like its mootness counterpart, finds its roots in the case or controversy requirement of Article III.<sup>125</sup> Standing also serves an important function in preserving the separation of powers by limiting judicial review solely to those issues that are the proper province of the judiciary.<sup>126</sup> Further, standing serves the same prudential aims of judicial economy and sound judicial decision-making as mootness.<sup>127</sup> Requiring each litigant to have a concrete stake in the outcome of the case deters frivolous litigation by those with only a generalized interest in the outcome and ensures that each side of the case is presented by a sufficiently motivated advocate.<sup>128</sup> These constitutional and prudential concerns lie at the heart of each of the standing requirements.

While standing, much like all justiciability doctrines, is rather amorphous, its traditional definition contains three requirements: injury in fact, causation, and redressability.<sup>129</sup> The plaintiff's asserted injury must be derived from the "invasion of a legally protected interest" that is (1) "concrete and particularized" and (2) "actual or imminent, not 'conjectural' or 'hypothetical.'"<sup>130</sup> Moreover, the injury must be "fairly ... trace[able]" to the defendant's action and "likely" to be "redressed by a favorable [court] decision."<sup>131</sup> Despite the Court's attempt in cases such as *Lujan v. Defenders of Wildlife* to clearly define the standing doctrine, these requirements have often been applied inconsistently and incoherently across cases.<sup>132</sup> As discussed below, this is particularly true when states, not individuals, assert standing to sue.

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125. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

126. See *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

127. See CHEMERINSKY, *supra* note 15, § 2.3.1.

128. *Id.*

129. *Lujan*, 504 U.S. at 560-61.

130. *Id.* at 560 (citations omitted).

131. *Id.* at 560-61 (first alteration in original) (citations omitted).

132. See CHEMERINSKY, *supra* note 15, § 2.3.1.

*B. Sovereign Interests, State Standing, and Sovereign State Mootness*

Special problems arise when states, as opposed to individuals, assert invasions of a legally protected interest. States generally assert injuries to their proprietary, quasi-sovereign, and sovereign interests in order to sue in federal court. And just as a state may manufacture standing based on its sovereign interests, so should a state be able to manufacture mootness pursuant to those same interests.

*1. Overview of State Interests*

Scholars identify three main categories of asserted state interests in the standing context. Proprietary interests encompass a state's ability to sue to protect common law interests available to any private litigant.<sup>133</sup> These include causes of action in tort or contract law and typically derive from a state's status as a property owner.<sup>134</sup> Given that these interests only implicate the state's action as any other private litigant, the interests clearly cannot serve as a justification for treating the government differently with respect to mootness.

Similarly, quasi-sovereign interests provide little guidance in the mootness context. These encompass a state's interest "in the well-being of its populace,"<sup>135</sup> and implicate state sovereignty in that they "stem from the state's role as 'protect[or of] its citizens' general interests."<sup>136</sup> However, they are *quasi*-sovereign in that they are derived from interests of the state citizenry and not held independently by the state itself in its sovereign capacity.<sup>137</sup> While such interests were historically derided as generalized grievances by federal courts,<sup>138</sup> they became an integral component of the "special

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133. See Crocker, *supra* note 119, at 2055-56.

134. See *id.* at 2056.

135. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

136. Crocker, *supra* note 119, at 2064 (alteration in original) (citing Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 432-33 (1995)).

137. See *id.* at 2068.

138. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 432-33 (1995) (discussing how early cases addressing quasi-sovereign interests required a showing of injury to both state property and citizen welfare). *But see Alfred L. Snapp & Son*, 458 U.S.



solicitude” afforded states in the Supreme Court’s seminal state standing case, *Massachusetts v. EPA*.<sup>139</sup> However, such interests are relatively inapplicable to the mootness context. A state can assert these unique interests as a plaintiff, but it is unclear when, if ever, a state would assert its quasi-sovereign interests as a defendant in order to moot litigation.

Rather, a state’s pure sovereign interests—derived from independent governance rather than collective representation—will form the backbone of the type of interests a state may assert to strategically moot litigation. Sovereign interests include a state’s interest in its core ability to govern.<sup>140</sup> These interests may take on a variety of different forms, including “[g]overning [i]nterests” and “[e]nforcement [i]nterests.”<sup>141</sup> Governing interests are implicated “[w]hen a state sues to establish its authority to exercise legislative, executive, or judicial power within a particular territory or over a particular subject matter.”<sup>142</sup> In doing so, the state typically seeks to vindicate its interest against another government to protect its inherent sovereignty, most often in border disputes.<sup>143</sup> Enforcement interests are implicated when a state seeks to enforce its laws against individuals.<sup>144</sup> States exercise their sovereign authority to pursue certain interests through legislation, and enforcement of those interests, particularly in federal court, is an essential aspect of state sovereignty.<sup>145</sup>

While the Supreme Court was initially reluctant to acknowledge state standing to sue on its sovereign interests, the modern Court has routinely accepted state sovereign standing. Famously, in *Chisholm v. Georgia*, the Court refused to recognize state sovereignty altogether, resulting in intense backlash and the adoption of

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at 602; *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); Crocker, *supra* note 119, at 2065-66 (acknowledging the gradual recognition of quasi-sovereign interests in *Alfred L. Snapp & Son* and *Tennessee Copper*).

139. 549 U.S. 497, 520 (2007).

140. *See* Woolhandler & Collins, *supra* note 138, at 411.

141. *Id.*

142. *Id.*

143. *See id.*

144. *Id.*; *see also* Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr. & Wesley G. Russell, Jr., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89, 109 (2012) (“This unique, sovereign power of states—to enact and enforce a code of laws—makes them unlike any other litigant.”).

145. *See* Woolhandler & Collins, *supra* note 138, at 411.

the Eleventh Amendment.<sup>146</sup> In *Georgia v. Stanton*, the Court outright refused to recognize sovereign state standing in Georgia's challenge to the Reconstruction Acts, holding that sovereignty rights present pure political questions.<sup>147</sup>

Despite this early trend against sovereign state standing, modern cases have recognized a state's ability to sue on its sovereign interests.<sup>148</sup> For instance, *South Carolina v. Katzenbach* permitted state standing to sue on state sovereignty grounds.<sup>149</sup> In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, the Supreme Court expressly recognized “[t]wo sovereign interests”: “First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.”<sup>150</sup> And in *Virginia House of Delegates v. Bethune-Hill*, the Court expressly stated that “[o]f course, ‘a State has standing to defend the constitutionality of its statute.’”<sup>151</sup> Therefore, invasions of sovereign interests clearly present litigable injuries upon which states may sue.<sup>152</sup>

## 2. Manufactured Sovereign State Standing

A controversial implication of granting states standing based on sovereign interests is the ability for a state to manufacture standing through legislation. For example, a state can theoretically pass legislation that directly conflicts with a federal law in order to challenge the constitutionality of the federal law. Based on the

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146. 2 U.S. 419, 472-73 (1793); see also Crocker, *supra* note 119, at 2057 & n.14.

147. 73 U.S. 50, 77 (1867) (“[T]he rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights ... is presented by the bill, in a judicial form, for the judgment of the court.”).

148. This is consistent with the modern Court's conception of state sovereignty. See *supra* Part III.A.

149. See 383 U.S. 301, 323-29 (1966).

150. 458 U.S. 592, 601 (1982).

151. 139 S. Ct. 1945, 1951 (2019) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

152. See Crocker, *supra* note 119, at 2063-64 (“[O]nly once, with the whole of Reconstruction at stake in *Stanton*, did [the Court] expressly deny a state standing to vindicate its sovereign interests.... [T]he Court has since ... recogniz[ed] states' sovereign interests as enforceable in federal courts.”).

sovereign standing doctrine outlined above, the state would have a legally protected interest in its core ability to enact and enforce its legal code, granting it standing to challenge a contrary federal law.<sup>153</sup>

This was the exact issue presented by Virginia's challenge to the Affordable Care Act (ACA). In March 2010, as President Obama's signature health care law awaited final passage in Congress, Virginia passed the Virginia Health Care Freedom Act (VHCFA).<sup>154</sup> The VHCFA provided that "[n]o resident of this Commonwealth ... shall be required to obtain or maintain a policy of individual insurance coverage."<sup>155</sup> This provision operated as a direct response to the ACA's individual mandate and was a clear attempt to create state standing to challenge the constitutionality of the ACA.

The district court held that Virginia did have standing and found the individual mandate unconstitutional.<sup>156</sup> However, the Fourth Circuit disagreed.<sup>157</sup> It held that the challenge was not predicated on Virginia's sovereign interests because the VHCFA was merely declaratory and contained no enforcement provision.<sup>158</sup> Therefore, the ACA's individual mandate did not threaten "Virginia's power to create *and enforce* a legal code."<sup>159</sup> Rather, the VHCFA merely announced "an unenforceable policy goal" rooted in the state's "attempted vindication of its *citizens'* interests."<sup>160</sup> Thus, the Fourth Circuit characterized Virginia's asserted interest as merely a quasi-sovereign interest in protecting its citizens from the enforcement of federal law.<sup>161</sup>

In an older case, *Massachusetts v. Laird*, the Massachusetts state legislature sought to manufacture standing to challenge the constitutionality of the Vietnam War by passing a statute prohibiting its citizens from engaging in foreign combat not authorized by Congress

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153. See *Va. House of Delegates*, 139 S. Ct. at 1951.

154. See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267 (4th Cir. 2011).

155. *Id.* (alteration in original) (quoting VA. CODE ANN. § 38.2-3430.1:1 (2010)).

156. *Id.* at 266.

157. *Id.*

158. *Id.* at 269-70.

159. *Id.*

160. *Id.* at 269, 271.

161. See *id.* at 271.

pursuant to the War Powers Clause.<sup>162</sup> The Massachusetts statute faced the same troubles with respect to sovereign versus quasi-sovereign interests as the VHCFA.<sup>163</sup> The state asserted its quasi-sovereign interest in protecting its citizens from the detrimental impacts of an allegedly unconstitutional war;<sup>164</sup> however, it likely could have asserted a sovereign interest in enforcing a legal code designed to protect its own citizens. Regardless, the Supreme Court summarily denied the state's complaint without comment.<sup>165</sup> However, Justice Douglas wrote an impassioned dissent urging the Court to grant Massachusetts standing, implicitly recognizing the possibility of manufactured sovereign standing.<sup>166</sup>

Despite federal courts' apparent skepticism toward manufactured sovereign standing and the Fourth Circuit's alarmist discussion of its implications in the VHCFA decision, scholars assert that there is no compelling distinction between regular sovereign standing and manufactured sovereign standing.<sup>167</sup> To truly respect the structural characteristics of sovereign states inherent in our Constitution, courts must recognize this peculiar consequence of sovereign standing.<sup>168</sup> Moreover, alarmist worries about the deleterious effects of such behavior are likely misplaced. Instances of manufactured standing simply do not arise with sufficient regularity to justify intruding on such a core component of state sovereignty, and states are almost always able to assert some other sufficient injury.<sup>169</sup> The ability to manufacture standing in certain instances is a peculiar characteristic of sovereignty that warrants a closer look at how sovereign states may also manufacture mootness.

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162. 400 U.S. 886, 886 (1970) (Douglas, J., dissenting); *see also* Crocker, *supra* note 119, at 2076.

163. *See Virginia ex rel. Cuccinelli*, 656 F.3d at 271.

164. *See* Crocker, *supra* note 119, at 2076-77.

165. *Laird*, 400 U.S. at 886.

166. *See id.* at 887-91 (Douglas, J., dissenting).

167. *See* Crocker, *supra* note 119, at 2099 (“[R]especting states’ fundamental constitutional sovereignty is surely sufficient justification for tolerating a minor strain on the judiciary.”). *But see* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 878 (2016) (asserting that states do not have the same interest in mere “declaratory” laws—such as the VHCFA—and therefore “need not have standing ... to protect the ‘continued enforceability’ of a law that will never be enforced”).

168. *See* Crocker, *supra* note 119, at 2099.

169. *See id.*

### 3. *Sovereign Interests and Manufactured Mootness*

Just as states have standing to protect their sovereign interests—and even the ability to manufacture standing in their sovereign capacity—states should be able to assert those same interests in order to moot litigation in their sovereign capacity. This is consistent with states’ sovereign governing and enforcement interests.<sup>170</sup> The implicit recognition of this basic characteristic of sovereignty likely motivates courts’ decisions to treat public defendants differently in the voluntary cessation context. Further, courts’ failure to ground that distinction in structural sovereignty principles has likely led to the confusion and disparate application of voluntary cessation to public defendants.<sup>171</sup>

Just as a sovereign state has an interest in enacting and enforcing a legal code,<sup>172</sup> it likewise has an interest in amending or repealing a previously enacted legal code, even in response to litigation. And that decision should be given deference by federal courts in the voluntary cessation context. Therefore, it is the sovereign act itself—not a diminished likelihood of recurrence or a presumption of good faith—that triggers mootness.

This is not to say that all sovereign acts altering a challenged legal code are sufficient to render the challenge moot. The act must still provide the challengers with all of the relief they seek.<sup>173</sup> Therefore, Justice Alito’s discussion of whether the amended ordinance in *New York Rifle* granted gun owners all of the relief they sought becomes even more relevant.<sup>174</sup> Further, as the Supreme Court held just last term, viable claims for money damages—including nominal damages—are sufficient to maintain a live, redressable injury and preclude mootness.<sup>175</sup> This should provide

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170. See Woolhandler & Collins, *supra* note 138, at 411.

171. See *supra* Part II.

172. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

173. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1533-35 (2020) (Alito, J., dissenting).

174. See *id.*

175. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021); see also 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3 (3d ed. 2020) (“Untold numbers of cases illustrate the rule that a claim for money damages is not moot, no matter how clear it is that the claim arises from events that have completely concluded without any prospect of recurrence. The Supreme Court has made the point several times. Lower courts enforce the principle continually.”); *N.Y. Rifle*, 140 S. Ct.

protection for plaintiffs facing a more government-friendly mootness standard. However, the state's sovereign act of lawmaking should create a strong presumption of mootness.

There is little cause for worry about recognizing states' sovereign ability to moot challenges to their sovereign interests. Just as in the context of manufactured standing, there are inherent limitations to a state's ability to manufacture mootness at will.<sup>176</sup> The group of entities that possess the power to strategically moot cases based on sovereign interests is relatively small, limited primarily to elected government officials exercising legislative-like action. Therefore, despite the fact that states face an infinite number of suits against them, it is unlikely that a state will be able to strategically moot cases with impunity.<sup>177</sup> Moreover, a much more powerful tool than judicial resolution exists to keep sovereign strategic mootings in check: political accountability. Presumably, a citizenry fed up with a constant flip-flopping of consequential laws in order to avoid litigation will be able to proverbially "vote the bums out."<sup>178</sup> This political accountability provides an important check on any potential abuse of a more deferential standard for government defendants.

Thus, the same sovereign interests that grant states broad standing equally justify manufactured sovereign state mootness. And limiting the state's ability to engage in strategic mootings solely to litigation that involves a challenge to the state's sovereign lawmaking authority should assuage fears that governments could manipulate federal jurisdiction and violate rights with impunity.

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at 1526.

176. However, concerns about manufactured standing still abound. *See, e.g., Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267 (2011). *But see Crocker, supra* note 119, at 2099.

177. *See* Tara Leigh Grove, *Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1887 (2019) (acknowledging that a finite number of state attorneys general with limited resources supports the argument that "broad state standing will not flood the federal courts with cases").

178. *See id.* (acknowledging that political restraints may prevent state attorneys general from abusing broad state standing).

## V. PUTTING IT ALL TOGETHER: WHEN MAY STATES MANUFACTURE MOOTNESS?

The foregoing discussion presents a new standard to apply to acts of voluntary cessation by public defendants, what this Note calls the sovereignty standard. This Part applies the sovereignty standard to the same categories of government action discussed in Part II: legislative-like action by elected officials and discretionary action by unelected officials.

### *A. Legislative-Like Action by Elected Officials*

States should always be permitted to strategically moot a case by repealing or amending a challenged law, so long as the change affords the challenger all of the relief he or she seeks. This strikes right at the heart of the state's sovereign interest in enforcing a legal code<sup>179</sup> and is consistent with much of the Supreme Court's application of voluntary cessation to statutory changes.<sup>180</sup> Therefore, this sovereignty-based standard is unlikely to change the outcome of any of the Supreme Court's statutory changes precedents.

The sovereignty standard would be unlikely to be outcome-determinative if applied to the Supreme Court's past statutory changes cases. For instance, returning to *New York Rifle*, New York City's repeal of its gun ordinance and the state legislature's abrogation of similar laws is a clear example of a state asserting its sovereign interest in repealing and amending a legal code in order to moot litigation.<sup>181</sup> Therefore, the challenge is likely to remain moot under the sovereignty standard.<sup>182</sup> Further, the equal protection challenge in *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville* is likely to remain not

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179. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); Crocker, *supra* note 119, at 2063-64; Cuccinelli et al., *supra* note 144, at 109.

180. See *N.Y. Rifle*, 140 S. Ct. at 1526; *Kremens v. Bartley*, 431 U.S. 119, 125-27 (1977).

181. See *N.Y. Rifle*, 140 S. Ct. at 1526.

182. This is, of course, assuming that the majority was correct in asserting that the amended ordinance gave the gun owners the precise relief they requested. See *id.*

moot given that the Court found that the amended ordinance contained the same constitutional infirmities as the first.<sup>183</sup>

Similarly, the sovereignty standard is unlikely to affect the outcome of many regulatory changes cases. However, the standard may provide better justifications for how to approach certain regulatory changes. Again, taking the Sixth Circuit's rule as a model, regulatory changes that are subject to formal, legislative-like procedures are more akin to statutory changes and subject to similar accountability protections.<sup>184</sup> Therefore, such regulatory changes may enjoy the same level of deference as sovereign state decisions to amend or alter a statute.<sup>185</sup> However, those regulatory changes that are "ad hoc, discretionary, and easily reversible" are not sufficiently analogous to the state's sovereign lawmaking authority to warrant special treatment.<sup>186</sup> In that sense, such changes are more like discretionary actions taken by unelected government officials and should be subject to the same heavy burden as private defendants in the voluntary cessation context.

Even though the standard advocated by this Note likely does not change the ultimate outcome of many of the Supreme Court's statutory or regulatory changes cases, adopting a standard grounded in state sovereignty—not judicial determinations about the likelihood of reenactment or prudential assessments of good faith—better respects the sovereign judgments of elected officials. Such a standard is likely to result in a more consistent application of voluntary cessation doctrine to government defendants.

### *B. Discretionary Action by Unelected Officials*

Voluntary cessation of discretionary action by unelected government officials is almost never sufficiently related to the state's sovereign interest in governing or enforcing a legal code to justify a relaxed standard. As action becomes removed from the state's sovereign governing and enforcement interests, the sovereignty

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183. See 508 U.S. 656, 662 (1993).

184. See *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019).

185. See *supra* Part II.A.

186. See *Schlissel*, 939 F.3d at 768.



rationale falls apart.<sup>187</sup> Officials that are “public” only in the sense that they are employed by a government entity, such as university officials, do not benefit from the same sovereignty concerns as the state legislature or elected executive officials.<sup>188</sup> Therefore, such government officials should be held to the same voluntary cessation standards as private litigants.

When government officials’ acts of voluntary cessation must meet the same heavy burden as private litigants, the potential dangers of manufactured mootness are mitigated. For instance, in *Killeen*, if the university officials did not receive the benefit of a good faith presumption, they would have had to prove that no possibility existed that the prior approval rule would be reenacted.<sup>189</sup> In that case, just as Judge Brennan concluded, self-imposed procedures and noncommittal statements are unlikely to satisfy such a rigorous standard.<sup>190</sup>

Therefore, the sovereignty standard does away with the good faith presumption and requires almost all unelected government officials voluntarily ceasing discretionary actions to meet the same rigorous voluntary cessation standard applied to private litigants.

## CONCLUSION

This Note presents an alternative standard for applying the mootness doctrine’s voluntary cessation exception to public defendants. Rather than relying on judicial determinations of the likelihood that a government policy will be reenacted or prudential considerations of the supposed good faith of public officials, this Note focuses on a standard grounded in state sovereignty. The same sovereign governing and enforcement interests that provide states broad standing to sue in federal court grant states the sovereign authority to alter a legal code in order to moot litigation. However, this justification applies only to actions taken in close proximity to the

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187. The state’s governing and enforcement interests are almost always associated with the state legislature or elected executive officials. See Cuccinelli et al., *supra* note 144, at 109.

188. Action by such public officials is more analogous to state proprietary interests than purely sovereign interests. See *supra* Part III.B.

189. See *Friends of the Earth, Inc. v. Laidlaw Env’t Servs.*, 528 U.S. 167, 189 (2000).

190. See *Speech First, Inc. v. Killeen*, 968 F.3d 628, 657 (7th Cir. 2020) (Brennan, J., dissenting); *Schlissel*, 939 F.3d at 768.

state's sovereign lawmaking authority. Therefore, public officials removed from that lawmaking process—such as university officials—must meet the same heavy burden faced by every private litigant in voluntary cessation cases.

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