PURCELL IN PANDEMIC

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The 2020 election season placed remarkable pressure on the U.S. election system. As the COVID-19 pandemic ravaged a politically polarized nation, American voters challenged a range of election regulations, looking to the courts for relief from laws that made voting particularly onerous during extraordinary circumstances. An examination of election law jurisprudence over this period reveals, among other things, the judiciary's repeated reliance on a single case: Purcell v. Gonzalez*. While its holding is less than clear, the decision in* Purcell*, at its core, governs the appropriateness of judicial intervention in election disputes on the eve of a political contest. The Court could have elucidated* Purcell*'s true meaning during this unique election cycle but, instead, it seems to have made matters worse. This Article argues that the Supreme Court's repeated invocation of* Purcell *during the 2020 election cycle introduced an empty vessel for unprincipled decisionmaking and inconsistent rulings that only served to aggrandize election-related concerns, ultimately harming the nation's most vulnerable voters. Part I describes the facts in* Purcell*, and what one might contend is its central holding. Part II highlights the chief deficiencies of the case, revealing a fundamental incoherence in its reasoning that augments the potential for government actors—including courts—to exploit* Purcell *in the lead up to an election. Part III examines more closely the judiciary's application of* Purcell *in the 2020 primaries and general election, revealing the dangers it poses to voting rights and the democratic process.*

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INTRODUCTION

When history is written, the 2020 election cycle will, for a panoply of reasons, rank among the country's most memorable and most consequential. At the start of the primary calendar, the country began to face a novel virus, leading to a public health crisis that has, as of the writing of this Article, lasted for over a year. The coronavirus outbreak quickly altered the core campaign issues. Americans who had only recently tuned into presidential impeachment proceedings soon found themselves confined at home focusing on the pandemic itself and the toll it was taking on the economy.[1] COVID-19's impact on election administration was also swift and stark, requiring election officials and lawmakers to innovate and demonstrate flexibility to safeguard the democratic process and, simultaneously, human lives.[2] Through it all, a record-breaking number of election-related lawsuits were filed to challenge, among other things, accommodations made to facilitate adherence to social distancing and other safety protocols as voting got underway.[3] Nevertheless, and almost surprisingly, there

[1] *See* Christina Wilkie, *Three Pillars of Trump's Case for Reelection Are Collapsing All at Once*, CNBC (Mar. 19, 2020), https://www.cnbc.com/2020/03/19/coronavirus-crisis-trumps-argument-for-reelection-is-collapsing.html (describing the dramatic reversal of Trump's re-election prospects following the Dow's plunge at the onset of the pandemic compared with his relatively high approval ratings post-impeachment acquittal just one month prior).

[2] *See COVID-19 and 2020 Primary Elections*, NAT'L CONF. STATE LEGISLATURES, (July 2, 2020), https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx (listing legislative and executive actions taken by states in response to COVID-19 and its effect on elections).

[3] Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS: FRONTLINE (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history ("With more than two months left in the year, 2020 has already outpaced the 196 election lawsuits filed before and after the 2000 election. . . ."). The Stanford-MIT Healthy Elections Project has catalogued 625 cases and appeals comprising 433 "case families (i.e. all cases and appeals arising from a single complaint) in 46 states plus D.C. and Puerto Rico" stemming from the pandemic alone. *See Covid-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu (last visited May 20, 2021); *see also* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 29 (2007) [hereinafter Hasen, *Untimely Death*] ("The rise in election law litigation since 2000 is part of a trend I have termed 'election law as . . . political strategy.'" (quoting Richard L. Hasen, *Beyond*

was unprecedented voter turnout. Despite the myriad attempts at voter suppression and interference as the pandemic ravaged the country, an unprecedented 158 million Americans—through sheer grit and with the assistance of dedicated election administrators—exercised their right to the franchise.[4]

The nontraditional nature of the election continued even after the votes were cast, as the presidency of Donald Trump, already unrivaled for its routine norm-breaking conduct, barreled towards its nadir. First was his use of the bully pulpit to propagate false—often racist—claims about voter fraud.[5] Following that came his obstinate refusal to concede the election even after pivotal states certified their results.[6] Next came a complex yet strikingly unsophisticated legal effort to disenfranchise millions of Americans, backed by a dozen-and-a-half Republican states' attorneys general and nearly two-thirds of that party's sitting members of the House of Representatives.[7]

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the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 944 (2005))).

[4] *See* Rani Molla, *Voter Turnout Is Estimated to Be the Highest in 120 Years*, VOX (Nov. 4, 2020, 8:45 AM), https://www.vox.com/2020/11/4/21549010/voter-turnout-record-estimate-election-2020; FED. ELECTION COMM'N, OFFICIAL 2020 PRESIDENTIAL GENERAL ELECTION RESULTS 8 (2021), https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf (placing the final popular vote tally at 158,383,403).

[5] *E.g.*, Brandon Tensley, *The Racist Rhetoric Behind Accusing Largely Black Cities of Voter Fraud*, CNN, https://www.cnn.com/2020/11/20/politics/trump-giuliani-black-cities-analysis/index.html (Nov. 20, 2020, 12:03 PM).

[6] *See, e.g.*, Melissa Quinn, *Pennsylvania Certifies Election Results, Confirming Biden Victory*, CBS NEWS, https://www.cbsnews.com/news/pennsylvania-certifies-presidential-election-results (Nov. 24, 2020, 7:42 PM) ("Mr. Trump has said he will not concede . . . ."); Andrew Oxford, *Arizona Secretary of State Certifies Election Results with Biden Winning State's 11 Electoral Votes*, AZCENTRAL, https://www.azcentral.com/story/news/politics/elections/2020/11/30/arizona-secretary-state-certify-election-results-monday/6444577002 (Nov. 30, 2020, 4:06 PM) ("Still, less than 2 miles from the [Phoenix] Capitol, several Republican legislators held an event with Trump campaign lawyers, including Rudy Giuliani, who claimed lawmakers could and should throw out the results of the election."); Kate Brumback, *Georgia Again Certifies Election Results Showing Biden Won*, AP NEWS (Dec. 7, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4eeea3b24f10de886bcdeab6c26b680a ("Georgia's top elections official on Monday recertified the state's election results after a recount requested by President Donald Trump . . . .").

[7] *See, e.g.*, Jim Rutenberg & Nick Corasaniti, *'An Indelible Stain': How the G.O.P. Tried to Topple a Pillar of Democracy*, N.Y. TIMES, https://www.nytimes.com/2020/12/12/us/politics/trump-lawsuits-electoral-college.html (Jan. 18, 2021); *see also* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 390 (3d Cir. 2020) ("The Campaign would have us set aside 1.5 million ballots without even alleging fraud."); Kelly v. Commonwealth, 240 A.3d 1255, 1256 (Pa. 2020) ("Petitioners sought to invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures[, or to have] the court disenfranchise all 6.9 million Pennsylvanians who voted in the General Election and instead 'direct[] the General Assembly to choose Pennsylvania's electors.'" (second alteration in original) (footnote omitted) (quoting Petition for Review at 24, Kelly v. Commonwealth, 240 A.3d 1255 (Pa. 2020) (No. 68 MAP 2020))); Motion for

Then the feather in the cap of the four-year term characterized by an unprecedented disparagement of democracy and the rule of law: The incumbent president incited his supporters to violently lay siege on the Capitol to thwart the counting of electoral votes—the culmination of the presidential election process.[8]

These major occurrences have, understandably, cast a shadow on many other events. As such, one might be forgiven for missing another important development: the Supreme Court's repeated invocation of *Purcell v. Gonzalez*.[9] In *Purcell*, the Court reversed a Ninth Circuit decision to enjoin a new Arizona voter identification law just two and a half weeks before the 2006 general election, finding that the appeals court failed to show both that it considered the timing of the election and that it evaluated the potential effect the injunction would have on voting.[10] The number of opinions from this past election cycle referencing the case that, among other things, urges courts to think twice before ruling in election challenges in the lead-up to voting was quite astounding.[11] For election law scholars and practitioners alike, 2020 will also be remembered as the cycle during which *Purcell* all but cemented its place in the pantheon of U.S. election-law principles. The year of the "pandemic primaries" and general presidential election might also be called the year of *Purcell*.

Scholars have criticized the Court following its 2006 *Purcell* ruling. Daniel Tokaji said the opinion could "charitably be described as careless," before predicting it would spell doom for plaintiffs in

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Leave to File Bill of Complaint at 40, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O15) (requesting that the Court "Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College").

[8] *See* Ryan Goodman, Mari Dugas & Nicholas Tonckens, *Incitement Timeline: Year of Trump's Actions Leading to the Attack on the Capitol*, JUST SECURITY (Jan. 11, 2021), https://justsecurity.org/74138/incitement-timeline-year-of-trumps-actions-leading-to-the-attack-on-the-capitol (providing "a detailed timeline of President Donald Trump's statements and actions relevant to the case that he incited the attack on the Capitol on Jan. 6, 2021"). Even after insurrectionists targeted the heads of our constitutional government, 147 federal lawmakers, including eight senators, objected to the electoral vote count on meritless claims. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html (Jan. 7, 2021).

[9] 549 U.S. 1 (2006) (per curiam).

[10] The Court vacated the Ninth Circuit's reversal of the district court specifically "[i]n 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"—that is, the Ninth's procedural failure to "give deference to the discretion of the District Court." *Id.* at 5.

[11] *See* discussion *infra* Part III.

Crawford v. Marion County Election Board.[12] Richard Hasen, who coined the phrase "*Purcell* principle," described the decision as "both overdetermined and undertheorized."[13] More recently, Nicholas Stephanopoulos asserted that even a decade and a half after the decision, *Purcell*'s holding "remains remarkably opaque."[14] Astute as these observations are, it is unclear whether anyone could have foreseen the full extent of *Purcell*'s potency—or envisioned the damage it was capable of causing. A sad, even if understandable, attempt to cope with the harsh realities of election administration has become unmoored from its purpose and origins. Simple guidance for judicial decisionmaking on the eve of elections has been thoughtlessly applied—and tragically overexploited—such that it has become part of the problem. Nothing proves this better than *Purcell* in the pandemic.

That is exactly what this Article contends. Unmasking *Purcell* during the pandemic reveals the principle as vacuous, self-contradictory, amorphous, and more prone to aggrandizing election-related concerns—including those that the Supreme Court suggested it should mitigate. Because it empowers the Court to frustrate carefully crafted opinions and orders, it remains susceptible to manipulation for political gain, and typically produces predictably partisan outcomes. A review of the Court's admonitions in the case, and its application in the 2020 cycle, exposes *Purcell* for what it actually is: an ersatz legal principle that risks corrupting the entire field.

The Article proceeds in three parts. Part I provides some background about *Purcell*. It describes the facts of the original case, as well as its central holding. Part II draws on some of the most salient scholarly critiques, highlighting some of *Purcell*'s chief deficiencies. To that, I add my own assessment: *Purcell* is mostly a charade. The holding possesses a certain superficial appeal but, when reduced to its core, *Purcell*'s tenets are either well-established or commonsensical. More problematic, however, is its incoherence. Its reasoning overempha-

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[12] Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1087 (2007); *see id.* at 1092 (expressing concern for the effect of *Purcell* on *Crawford*, which had recently been granted certiorari, and arguing that "the Court should have awaited a case presenting a more fully developed record"); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (affirming the lower courts' conclusion that "the evidence in the record was not sufficient to support a facial attack [by plaintiffs] on the validity of the entire statute").

[13] Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 440 (2016). Hasen defines "the *Purcell* principle" as "the idea that courts should not issue orders which change election rules in the period just before the election." *Id*. at 428.

[14] Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, TAKE CARE (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows.

sizes the threat of voter confusion relative to more important election concerns, yet the action the Court takes only exacerbates the potential for the very same confusion it was purportedly designed to combat. Also notable is what is absent from the decision. It provides no guidance as to the weight the principle carries or where it fits into the equitable relief analysis, and it ignores—and perhaps augments—the potential for government actors, including courts, to use *Purcell* to put their thumbs on the scale.

Finally, Part III briefly endeavors to demonstrate these points using some examples from the 2020 pandemic primaries and the general election. The extraordinary nature of the pandemic should arguably have revealed the limits of a principle governing the appropriateness of extraordinary election-related relief. Yet, virtually without fail, *Purcell*'s shortcomings were laid bare in the cases where the Court cited it or suggested that it applied. Far from contributing to election law jurisprudence, *Purcell* has constructed an empty vessel for unprincipled decisionmaking and consistently results in rulings that are detrimental to the nation's most vulnerable voters.

I

Purcell as Prologue

In May 2006, residents of Arizona, American Indian tribes, and community groups filed suit in federal district court challenging the state's new voter identification law, which required proof of citizenship to both register to vote and cast one's ballot on election day.[15] Plaintiffs also requested a preliminary injunction to bar the law's enforcement. The district court denied the request for relief in September in a summary order lacking factual findings and legal conclusions.[16] Plaintiffs appealed the denial, also requesting an injunction to prevent the law from being enforced for the upcoming election. In early October, pending appeal and upon consideration of "lengthy written responses from the State and the county officials," a two-judge motions/screening panel of the Ninth Circuit issued its own summary order.[17] While it, too, lacked an explanation, the order granted the interim relief requested; it enjoined the law's enforcement pending circuit disposition of the district court's decision and scheduled

[15] *Purcell*, 549 U.S. at 2–3.

[16] Order at 2, Gonzalez v. Arizona, No. 06-cv-01268 (D. Ariz. Sept. 11, 2006), ECF No. 183 (denying the motions for preliminary injunction and noting that "[d]etailed findings of fact and conclusions of law will follow"); *Purcell*, 549 U.S. at 3.

[17] *Purcell*, 549 U.S. at 3.

briefing, which would close two weeks after the election.[18] Days after the panel's decision, the district court issued a post hoc opinion articulating its factual findings and conclusions of law for its September order.[19] The court held that plaintiffs had demonstrated "a possibility of success on the merits," yet it was unable to conclude that this was "a strong likelihood."[20] The district court also found that the balance of hardships and the public interest favored the state, establishing support for its earlier decision to deny the injunction.[21] State and county officials appealed the Ninth Circuit's interlocutory injunction, requesting the Supreme Court vacate the order.[22]

The Court issued a per curiam order granting the request to vacate the injunction. In doing so, it offered its own cursory assessment, highlighting two key points as the rationale for its decision. First, it emphasized the destabilizing effect of judicial intervention in the political process on the eve of an election, specifically its potential to confuse *voters* and discourage their participation.[23] Moreover, it warned that "[a]s an election draws closer, that risk will increase."[24] Second, it admonished appellate courts to show some deference to lower courts' discretionary rulings and, when in disagreement, to provide explanatory facts and legal analysis.[25] Because the Court of Appeals did not extend this deference or justify its disagreement, the Supreme Court allowed the voter identification law to take effect.[26]

II
Parsing for Principle

While the initial response to *Purcell* was fairly limited, there was a steady uptick as courts began to rely on it with greater frequency. Overall, commentators have been cool to it, to say the least. Some

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[18] Order, Gonzalez v. Arizona, No. 06-16702 (9th Cir. Oct. 5, 2006); *see also* Gonzalez v. Arizona, 485 F.3d 1041, 1047 (9th Cir. 2007) (discussing the order on appeal).

[19] Gonzalez v. Arizona, No. CV 06-1268-PHX, 2006 WL 8431038 (D. Ariz. Oct. 12, 2006).

[20] *Id.* at *4 (quoting Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003) (per curiam)).

[21] *Id.* at *4, *9.

[22] *Purcell*, 549 U.S. at 2.

[23] *Id.* at 4–5. ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

[24] *Id.* at 5.

[25] *See id.* ("It was still necessary, as a procedural matter, 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.").

[26] *Id.* at 5 (noting the absence of any "explanation . . . by the Court of Appeals showing the ruling and findings of the District Court to be incorrect").

criticize the fact that *Purcell* is a product of the "shadow docket."[27] These cases are governed by processes that are even less transparent than the Court's already-opaque standard operating rules and are often resolved through scantly worded orders issued on a compressed timetable[28] that permits neither proper briefing nor oral argument.[29] Others have disparaged *Purcell*'s sloppy reasoning, which is thought to be a product of the Court's hasty review and disposition of the case.[30] Problematic still, is *Purcell*'s vague notion of election-eve: The decision implies the existence of a deadline after which judges should alter their normal conduct, but does not offer one.[31] Overall, the Court has failed "to articulate a deeper understanding of *Purcell*, including its contours and its potential exceptions."[32]

In light of these shortcomings, one might ask, what value does *Purcell* add? The short answer, frankly, is very little. Indeed, much of what the case might claim as its chief virtues is rather unremarkable because the principles it promulgates are either reasonably well-established or commonsensical. Furthermore, the stated yet unqualified need to avoid voter confusion, the Court's lodestar, is overemphasized in two ways: As applied to the facts in *Purcell* it seems speculative and self-defeating, and in general, it is afforded undue weight vis-à-vis other electoral legitimacy concerns. Perhaps most consequentially, the decision does not instruct courts on how they should

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[27] DAVID GANS, AM. CONST. SOC'Y, THE ROBERTS COURT, THE SHADOW DOCKET, AND THE UNRAVELING OF VOTING RIGHTS REMEDIES 16 (2020), https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf (arguing that the shadow docket produces rushed decisions which, in the context of *Purcell* and progeny, have limited the federal courts' power "to fashion voting rights remedies close to Election Day" in spite of precedent indicating otherwise).

[28] Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX, (Aug. 11, 2020, 8:30 AM), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman (quoting William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015)).

[29] Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

[30] *See, e.g.*, Hasen, *Untimely Death*, *supra* note 3, at 34 ("[G]iven the controversial empirical assumptions contained in the opinion, it is likely that at least the more liberal Justices on the Court did not have time to fully digest the significance and potential negative interpretations of the opinion."); *see also infra* notes 73–74 and accompanying text (emphasizing that *Purcell*'s concern with preventing confusion should not be considered an end in itself but rather a means to promote democratic legitimacy).

[31] Stephanopoulos, *supra* note 14 (referencing federal election laws to suggest that forty-five to sixty days might be a reasonable period).

[32] Derek T. Muller, *Justice Ginsburg Turns the "Purcell Principle" Upside Down in Wisconsin Primary Case*, EXCESS OF DEMOCRACY (Apr. 6, 2020), https://excessofdemocracy.com/blog/2020/4/justice-ginsburg-turns-the-purcell-principle-upside-down-in-wisconsin-primary-case.

balance these concerns, including the weight that the election's proximity should be given in deciding whether to grant the requested relief.[33] Alongside these failures is another lapse: The Court misapprehended the potential for *Purcell* to be exploited by partisans, while simultaneously forcing even well-intentioned judges to abdicate their role in ensuring electoral legitimacy at the risk of being reversed much closer to elections. In short, the Court's lack of forethought resulted in its promulgation of a principle that is not only vague and lacks coherence, but also risks exacerbating the problems it was meant to address—all the while posing injury to the most vulnerable voters.

A. Unremarkable Principles

Given its brevity and the absence of firm commands, it is difficult to extract "hard" rules from the *Purcell* opinion. However, if the decision could be said to offer any, there are three contenders. The first is that courts should proceed cautiously when deciding whether to intervene in the lead-up to an election.[34] The second is a call for reviewing courts to afford deference to the decisions of lower courts.[35] And the third is a general reminder to judges of the importance of showing their work.[36] To this end, the decision is unremarkable. These propositions represent well-established or commonsensical principles of jurisprudence.

From the case itself, its subsequent application, and the scholarly attention it has garnered, the first rule seems to be the opinion's primary takeaway.[37] Yet the instruction to exercise prudence as the election nears is hardly novel. In cases past, courts—including the Supreme Court itself—have intoned this cautionary verse. Take *Reynolds v. Sims*, for example.[38] *Reynolds* is among the most foundational election law cases, particularly for its promulgation of the "one

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[33] *See* Stephanopoulos, *supra* note 14 (noting that even the dissents from *Purcell*'s jurisprudence which have explored the timing of judicial intervention "have still been skimpy opinions that didn't purport to offer a comprehensive analytical framework"); *see also* discussion *infra* Section II.C.1.

[34] *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

[35] *See id.* at 5 ("It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court.").

[36] *See id.* ("There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect.").

[37] *See, e.g.*, Hasen, *supra* note 13, at 427–28 (noting how Justice Alito suggested the *Purcell* principle was "the apparent common thread" in a series of seemingly contradictory Supreme Court orders around the 2014 election).

[38] 377 U.S. 533 (1964).

person, one vote" principle.[39] Less frequently cited, however, is the Court's guidance about election-eve orders. Having deemed Alabama's state legislative districts unconstitutionally malapportioned, but facing an upcoming election,[40] the *Reynolds* Court acknowledged its position between the metaphorical rock and hard place. In the not-so-famous part of the notorious opinion, the Justices offered guidance to courts that, due to a time crunch, faced the prospect of conducting an election pursuant to an unlawful electoral scheme: "In awarding or withholding immediate relief, a court . . . should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."[41] Even as it instructed courts to act "sufficiently early to permit the holding of elections pursuant to [their remedial] plan[s] without great difficulty,"[42] the Court recognized that under "certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief."[43]

Nor was *Reynolds* a one-off. The Court has weighed in on other cases where the political calendar presented the real possibility of sanctioning a contest that suffered from illegal elements.[44] While the outcomes have varied, the guidance was invariable: Proceed with caution.[45] The notion that courts should intervene in an upcoming election only grudgingly is the legal equivalent of "measure twice, cut

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[39] *See id.* at 557–61.

[40] *Id.* at 584–85.

[41] *Id.* at 585.

[42] *Id.* at 586.

[43] *Id*. at 585; *see also* Hasen, *supra* note 13, at 442 & n.64 (citing *Reynolds* as an example of a 1960s redistricting case that sought to avoid disrupting voter expectations by making its changes effective the next election cycle).

[44] *See, e.g.*, Ely v. Klahr, 403 U.S. 108, 113 (1971) (affirming the district court's decision in choosing "what it considered the lesser of two evils," that "elections [would] be conducted under the legislature's" unconstitutionally malapportioned electoral plan because the election was looming and the new census figures would require a new district map); Whitcomb v. Chavis, 396 U.S. 1064, 1064–65 (1970) (denying a motion to vacate a stay of the district court order establishing a new legislative map during an election year, thus permitting an election to proceed under a scheme found to be unconstitutional); Williams v. Rhodes, 393 U.S. 23, 34–35 (1968) (requiring Ohio "to permit the Independent Party to remain on the Ballot," but not the Socialist Labor Party, because the Socialist Labor Party had been denied relief for requesting it "several days" after the Independent Party was granted identical relief, and that later relief could not "be granted without serious disruption of election process"); Toombs v. Fortson, 384 U.S. 210 (1966) (affirming the district court's requirement of new districts), *aff'g* 241 F. Supp. 65 (N.D. Ga. 1965).

[45] *See, e.g.*, *Ely*, 403 U.S. at 114–15 ("[T]he District Court should make *very* sure that the 1972 elections are held under a constitutionally adequate apportionment plan." (emphasis added)).

once." It is both sensible and well-established. In this regard, *Purcell* is not an outlier, but the norm, for the wariness it admonishes offers little beyond what courts already understood and, hopefully, heeded.

As for *Purcell*'s other two precepts, they seem even more elementary. The Court's instruction to defer to district court discretion is unexceptional, grounded in equitable principles as well as sound policy.[46] From a doctrinal perspective, deference is warranted because a decision "to deny as well as grant injunctive relief" is an "exercise of equitable discretion," and "the proper standard for appellate review is whether the District Court abused its discretion."[47] Deference is likewise appropriate as a matter of policy, particularly given the trial court's role as the primary factfinder and its proximity to the case specifics.[48] A presumption of honoring the judgment of the court that spent considerable time with the matter promotes the accuracy and fairness that comes from close and careful review. To be clear, a "reviewing court may decide . . . that the district court misinterpreted the evidence"[49] presented, thereby "find[ing] it necessary to refashion the remedies."[50] But such an assessment is very much in line with the expectation. This combination—that the doctrine governing injunctions largely rests decisionmaking with the trial court and the oft-repeated, widely accepted claim that presiding judges are best positioned to weigh the facts at hand—renders *Purcell*'s guidance about respect for lower court discretion quite unremarkable.

Nor is the admonition that lower courts should show their work remarkable either. In *Purcell*, the Court expressed a modicum of sympathy for the circuit panel, which was put in the unenviable position of reviewing a lower court order bereft of facts and analysis.[51] Nevertheless, the opinion chastised the panel for "failing to provide any factual findings or indeed any reasoning of its own," thus leaving the Justices similarly ill-situated and forcing them to evaluate a "bare order."[52]

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[46] Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (explaining the necessity "as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court").

[47] Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); *see also* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.").

[48] *See* Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 566 (1982) ("The standard of review of trial court decisions on injunctive relief is typically . . . the abuse of discretion," which "reflects an awareness that the trial judge may be in the best position to assess the likelihood of future violations.").

[49] *Id.*

[50] *Id.* (quoting SEC v. Advance Growth Cap. Corp., 470 F.2d 40, 53 (7th Cir. 1972)).

[51] *See Purcell*, 549 U.S. at 3.

[52] *Id.* at 5.

But this, too, is a basic tenet of judicial decisionmaking, established both in procedure and in underlying normative principles that guide judicial reasoning. First off, the Federal Rules demand as much, at least from district courts. Rule 52(a) requires courts to "state the findings and conclusions that support" their decisions to grant or deny interlocutory injunctive relief.[53] Indeed, *Purcell* cites that rule.[54] And while there is "no universal reason-giving requirement" that binds all federal judges,[55] there is a reasonable expectation for them to provide their rationale "when the absence of reasons would entirely frustrate review."[56]

Even more, though, the notion that courts should articulate the reasons for their decisions is critically rooted in normative principles of institutional legitimacy and efficacy. Summary orders inherently lack "the transparency that is fundamental to the credibility of the courts,"[57] and judges, who operate in a uniquely inaccessible and unaccountable manner, should be sensitive to that.[58] Additionally, in failing to detail their rationale or provide specificity, courts issuing summary orders offer minimal guidance to the parties to the action, affected outsiders, and (if they are afforded precedential weight) similarly situated persons.[59] This decreases the overall utility of summary orders. To be sure, courts can—and frequently do—issue them, and may even have good (albeit unstated) reasons for doing so.[60] Yet in practice, such orders tend to relate to housekeeping matters that require little explanation, routine questions that are easily dispensed

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53 FED. R. CIV. P. 52(a)(2).

54 *Purcell*, 549 U.S. at 5.

55 Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 495 (2015).

56 *Id.* at 534; *id.* at 536 ("In short, so long as the record available to the reviewing court enables some form of review, there is no reason-giving requirement bearing on federal judges.").

57 Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1211 (2012).

58 *See id.* at 1208 ("[W]hen laws originate in the judiciary they have the potential to be more opaque because the process by which they are created is not directly accessible. The merit of the transparency of the procedure is just as vital as the integrity of the resulting law itself."); *see also* Hasen, *supra* note 13, at 462 (describing the benefits of courts providing reasoned justifications for their decisions).

59 *See* N.Y. Cty. Laws.' Ass'n, *Summary Orders: Report of Joint Subcommittee on Use of Summary Orders by the United States Court of Appeals for the Second Circuit*, 62 BROOK. L. REV. 785, 791 (1996) ("Summary orders by their nature contain only an abbreviated discussion of the facts of the particular case and a conclusory discussion of the applicable law.").

60 *See* Cohen, *supra* note 55, at 514 (arguing that in addition to "efficiency reasons," there are also "institutional and cognitive reasons" for summary decisionmaking).

with, and affirmances of lower courts' reasoned holdings.[61] Otherwise, judgments lacking explanation of the facts and legal reasoning should be a rarity, as they become indistinguishable from mere fiat and threaten the institutional credibility of the courts.[62] Even if there is no firm positive requirement, courts should, as a normative matter, be in the habit of publicly justifying their rulings—especially when the underlying matter concerns the democratic process. To the extent that *Purcell* calls for this, it states something rather obvious.

In terms of actual instruction, *Purcell* is far from remarkable. The notion that courts should generally restrain any impulse to intercede when an election is looming is as commonplace as it is advisable. This is even more so the case for the suggestions that reviewing courts ought to show deference to lower courts, and that all courts should show their work. Aside from lumping three garden-variety instructions together in a single case, then, it is unclear what *Purcell*'s holding adds.

B. Voter Confusion: An Overemphasized and Underinclusive Principle

Beyond its obvious instructions, *Purcell*'s only other major takeaway seems to be the need for courts to be on their guard for voter confusion.[63] But the heavy emphasis on this concern was unwarranted in two respects. In general, the Court overstated voter confusion as a problem vis-à-vis other democratic legitimacy concerns, and

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[61] *See* N.Y. Cnty. Laws.' Ass'n, *supra* note 59, at 790 ("[S]ummary orders are overwhelmingly used to affirm lower court decisions.").

[62] *See* Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . ."); *see also* Adam Liptak, *Missing from Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html ("If courts don't have to defend their decisions, then they're just acts of will, of power. They're not even pretending to be legal decisions.").

[63] Scholars who have analyzed this aspect of *Purcell* have thoughtfully suggested that the anti-confusion rationale should apply to *election administrators* in addition to voters, given that court orders issued late in the election cycle might also impact their work. *See, e.g.*, Hasen, *supra* note 13, at 441 (arguing that "electoral chaos can ensue when election officials face conflicting court orders on how to run an election" because "changing election procedures just before the election can be difficult," especially if it requires retraining "cadres of poll worker volunteers . . . on new rules or procedures close to the election"); Stephanopoulos, *supra* note 14 ("Beyond the possibility of voter confusion, then, courts contemplating action close to election day should evaluate the risk of administrator error."). While the potential for judicial decisions to result in election administrator confusion is a reasonable consideration, the *Purcell* decision itself never raised it.

on the facts of the case, the Court exaggerated the potential for it to manifest. At the same time, its treatment of voter confusion was underinclusive. The Court focused on the potential for court-initiated voter confusion to the exclusion of politician-caused confusion, something that is at least equally problematic. Nowhere did the Court explain its decision to overemphasize the anti-confusion rationale on one hand, and ignore it on the other, revealing one of *Purcell*'s most critical shortcomings.

In *Purcell*, the Court asserted that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion," a "risk [that] will increase" as Election Day nears.[64] The order's phrasing suggests that the concern about voter confusion was intricately—almost intrinsically—tied to the timing of the election. The goal is not just to minimize confusion, but to minimize it immediately before the election when it may have the greatest impact. Perhaps erroneous and conflicting messages about the election may be corrected, but corrections are of little use if made at the last minute because they may not be conveyed broadly before voters make essential election-related decisions.

The Court's focus on confusion is unsurprising. Minimizing confusion has long been accepted as a legitimate state objective in election law cases.[65] But while the goal of promoting stability in the lead-up to elections is reasonable, *Purcell* does not explain that there is a broader concern driving the focus on confusion: democratic legitimacy. Confusion might lead to mistakes in voting or decreased participation.[66] Either result, if sizable enough, would detract from the election's authoritativeness because it would not reflect the actual will of the people.[67] As such, preventing confusion should not be thought

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[64] Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam).

[65] *See, e.g.*, Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228–29 (1989) (acknowledging the state's legitimate interest in protecting "voters from confusion and . . . fostering an informed electorate," but invalidating the prohibition on primary endorsements for limiting information which might further that goal).

[66] *See* Yelena Dzhanova, *Election Officials Fear Voting Changes Will Confuse Voters in November*, CNBC (July 11, 2020, 9:15 AM), https://www.cnbc.com/2020/07/11/election-officials-fear-changes-could-confuse-voters-in-november.html ("Voting officials are concerned that drastic changes to election procedures in response to the coronavirus will confuse voters in November."); Danielle Root & Aadam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:03 AM), https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections (describing the sources and effects of voter confusion).

[67] *See* James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, 2020 U. CHI. L. REV. ONLINE 24, 31 (discussing how disenfranchisement efforts may threaten the legitimacy of electoral results).

of as an end in itself. Rather it should be considered a means to preserving democratic legitimacy.

If the overarching concern is the election's legitimacy, then confusion stemming from rule uncertainty should not be the only—or even the principal—worry. Elections can be administered in a variety of ways that might not be confusing but would nevertheless be deemed illegitimate. For example, a law categorically barring Black Americans from participating would cause little confusion. Yet an election conducted under such conditions would be unconstitutional,[68] and its results would lack legitimacy.[69] In a less extreme (and more likely) example, if eligible voters were discouraged or wholly prevented from participating due to intimidation, the threat of violence, or for fear of their health, the legitimacy of the outcome could likewise be cast in doubt.[70] Undoubtedly, confusion leading to depressed voter turnout is problematic. But that is because a mandate from an election in which all who are entitled to participate and want to participate do not participate due to some outside force—be it confusion stemming from rule uncertainty, discriminatory rules, or conditions that pose a risk to one's safety and well-being—can hardly be called a mandate at all.[71]

Despite the Court's failure to discuss and properly situate voter confusion within the broader context of democratic legitimacy, *Purcell* implied elsewhere that these other concerns should not be subordinated. Before suggesting that sustaining the injunction could result in voter confusion, the Court raised a separate concern: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government," and those "who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."[72] The suggestion here—that preventing the voter ID law from taking effect might lead to depressed turnout because it would discourage segments of the electorate afraid of illegal vote dilution from partici-

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[68] *See* U.S. CONST. amend. XV (guaranteeing the right to vote to citizens regardless of race).

[69] *See* Gardner, *supra* note 67, at 30 ("[E]lectoral legitimacy . . . is often considered to be threatened when abstention is involuntary and selective––when it is the result, that is to say, of discrimination.").

[70] *See, e.g.*, Eugene D. Mazo, *Voting During a Pandemic*, 100 B.U. L. REV. ONLINE 283, 292 (2020) (arguing that it is unclear how the various states' mail-in and absentee ballot rules will impact who votes but if the result is a "severe downward pressure on turnout" it "may pose a threat to the democratic legitimacy of whoever wins").

[71] *See* Gardner, *supra* note 67, at 25 (noting that "if turnout is unusually low due to involuntary exclusion of large numbers of voters," then "the risks to democratic legitimacy . . . are disturbingly high").

[72] Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam).

pating—is as incredible as it is audacious.[73] The assertion is also noteworthy because, if taken seriously, it could have significant ramifications for legal analysis.[74] Putting that aside, however, the statement endeavors to show that confusion is not the only threat to an election's legitimacy. Other concerns, like fear-induced diminished participation, may be just as substantial or even more so.[75] *Purcell*'s shift in focus from the risk of rule uncertainty to lower participation stemming from the perception of fraud highlights the existence of other election concerns.

Where *Purcell* did address the potential for voter confusion, it overemphasized its risk of undermining the legitimacy of the election. In reviewing the district court ruling, the appeals court was obligated to consider, among other factors, those "specific to election cases," the opinion read.[76] "Court orders affecting elections, especially conflicting

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[73] Professor Hasen cogently explains why this is a strange assertion that deserves little, if any, credence. First, the Court assumes, without any evidence, that people "are deterred from voting out of fear that their legitimately cast votes will be diluted by the votes of those committing voter fraud." Hasen, *Untimely Death*, *supra* note 3, at 35. Second, the claim ignores what evidence does exist, which "seems to suggest that *voter identification requirements* are more likely to depress turnout than to increase it." *Id.* at 36. Furthermore, the statement minimizes (or perhaps flatly disregards) the decrease in Black "voter confidence in the electoral process" stemming from voter ID laws. *Id.* And finally, and most bizarrely, the Court's suggestion that "it is appropriate to balance *feelings* of disenfranchisement against *actual* disenfranchisement" signals that such "misperceptions" can "trump the fundamental right to vote." *Id*.

[74] The 2016 cycle, and even more the 2020 cycle, illustrate the grave flaw in the Court's reasoning. Following Donald Trump's numerous, unsubstantiated claims of widespread and outcome determinative voter fraud, there has been an increase in the perception of many that their votes have been diluted. *See* Mark Jurkowitz, *Republicans Who Relied on Trump for News More Concerned than Other Republicans About Election Fraud*, PEW RSCH. CTR. (Jan. 11, 2021), https://www.pewresearch.org/fact-tank/2021/01/11/republicans-who-relied-on-trump-for-news-more-concerned-than-other-republicans-about-election-fraud. Of course, the mere perception of illegal dilution, without more, cannot countenance a measure that would impair the fundamental right to vote for others. But under the Court's rationale, it might be justified. While not the focus of this Article, much—and perhaps not enough—can be said about the problematic nature of this claim in *Purcell*.

[75] The text of the three "Enforcement Acts" that sought to enforce the Fourteenth and Fifteenth Amendments are prime examples of Congress's reaction to fear-induced diminished participation; these acts reflect a desire to ensure democratic legitimacy by protecting African Americans from election-motivated violence and intimidation rooted in pervasive notions of white supremacy. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871); *see also* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 237–38 (1990) ("A law forbidding such exclusionary practices can be seen as a reflection of legislative concern that officials elected only by a self-selected subgroup of the people—in this case, whites—are not truly representative, and are therefore of possibly suspect legitimacy."); *id*. at 236–45 (discussing the Enforcement Acts as measures to enhance democratic legitimacy because of their aim of ensuring the consent of the governed).

[76] *Purcell*, 549 U.S. at 4.

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."[77] But it is worth inquiring how much this general statement pertains to the facts of *Purcell*. Despite the Court's suggestion, it is far from clear that enjoining the enforcement of a voter ID law would cause confusion—or at least the type that would *depress* turnout. While halting or eliminating a barrier to voting could confound some, there is no good reason to believe that it would confuse voters in a way that would lead to their disenfranchisement, voluntary or otherwise.[78] If anything, blocking the law in these circumstances—even at the last minute—would stand to increase turnout, as eligible voters lacking the necessary identification would have greater incentive to go to the polls.[79] By failing to recognize the unlikelihood that rule uncertainty would result in disenfranchisement, the *Purcell* Court gave undue weight to the voter confusion rationale.

If the Court was truly concerned about eleventh-hour voter confusion, it would have condemned the imposition of *any* last-minute election rule changes. But instead, it made clear that *Purcell* applies to the judiciary only.[80] Assume, as the Court must, that parties look to the latest regulations to prepare for elections. Each successive rule change invites the potential for greater uncertainty. However, this potential confusion depends on the substantive nature of the new rule—the differential between it and the prior rule—and the ability to communicate the change. It is wholly independent of the actor imposing the rule change. For all its focus on confusion, then, *Purcell* is woefully underinclusive. As a result, it suffers from a serious problem: the "final mover."

The "final mover" phenomenon can be framed in basic economic terms. While the upsides to being the first in a market are more obvious, there are also advantages to entering later, namely information and innovation. Because later actors have the benefit of the leader's hindsight, they can "identify a superior but overlooked

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[77] *Id.* at 4–5.

[78] *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1739 (2008) (summarizing their findings that fears of voter fraud "while held by a sizable share of the population, do not have any relationship to a [survey] respondent's likelihood of intending to vote or turning out to vote").

[79] *See* Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 747–50 (2015) (summarizing the empirical research on how voter ID laws impact voter turnout and concluding that the results are mixed).

[80] *See Purcell*, 549 U.S. at 4–5 ("*Court orders* affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." (emphasis added)).

product position" or "undercut the pioneer on prices," enabling them to "beat[] the pioneer at its own game."[81] Our constitutional system is structured with checks and balances such that politicians should act as pioneers and courts, exercising judicial review, act as final movers. However, *Purcell* frustrates this arrangement: By establishing a date after which *courts* must refrain from intervening, it also creates a window during which nonjudicial actors can freely engage in unchecked election rulemaking. Politicians can always be the final movers. Aware of as much, they and their allied election officials will have a perverse incentive to game the system by altering the rules at the judicial intervention cutoff point.[82] They might adopt new laws and regulations designed to give them an electoral advantage, and even ones that would be deemed unlawful.[83] Beyond the problem of cravenly self-interested and potentially illegal conduct, those election-eve changes could also result in voter confusion. There are, to be sure, legitimate reasons—constitutional, prudential, institutional, and otherwise—for the principle to restrain the court only.[84] But by doing so, *Purcell* opens society up to potentially graver problems. It invites strategic manipulation of election rules—and even the imposition of illegal ones—by nonjudicial actors, while failing to address the very potential for last-minute confusion that it purportedly seeks to combat.

The other problem implicates the judiciary alone. *Purcell*'s emphasis on confusion alone, irrespective of its potential risk to voter turnout and electoral legitimacy, puts the squeeze on judges by manu-

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[81] Venkatesh Shankar, Gregory S. Carpenter & Lakshman Krishnamurthi, *Late Mover Advantage: How Innovative Late Entrants Outsell Pioneers*, 35 J. MKTG. RSCH. 54, 54 (1998); *see also* Bill Green, *Uber, Lyft, and Facebook All Share 1 Thing in Common—And It's Not What You Want for Your Business: Being First Isn't Always Best*, INC. (Aug. 28, 2017), https://www.inc.com/bill-green/want-to-be-the-next-uber-lyft-or-facebook-you-migh.html ("Pioneers usually die of bug bites and dysentery.").

[82] *See* David H. Gans, *How John Roberts Quietly Made It Harder to Vote*, SLATE (Oct. 2, 2020, 2:46 PM), https://slate.com/news-and-politics/2020/10/how-john-roberts-made-it-harder-to-vote.html (arguing that the *Purcell* principle "effectively reduces the right to vote to a second-class right and inevitably harms marginalized and less-powerful citizens" because "[i]f courts announce that they will essentially never intervene, they invite partisan manipulation of our democracy").

[83] *See supra* note 68 and accompanying text (discussing a hypothetical law categorically barring Black Americans from voting).

[84] *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 295 (2007) ("Courts are justifiably wary of interfering in the outcome of the political process, both to protect themselves and to protect the democratically elected branches. To the maximum extent possible, the people, not the courts, should choose their representatives.").

facturing a catch-22 situation in which the court, as an institution, is bound to lose. Judges, like political actors, have an incentive to weigh in on challenges before the election. Even absent political motivations, they are likely to want to halt or displace an illegal rule or, at a minimum, make a determination as to its potential impact. Unlike political actors, however, courts 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.[85] If they do intervene, their rulings are subject to being revised or displaced on appeal by a court that faces the same time pressures and whose order will, by necessity, issue even closer to the election. Whether correct or not, these rulings progressively create greater potential for confusion. When the litigation eventually comes up against *Purcell*'s red line, courts will be faced with a choice: review the claims of illegality and address the meritorious ones, or abstain to avoid confusion, thus sanctioning the potentially unlawful status quo. Going with the former option to mitigate problematic rules in advance of the election risks reversal for intervening too late in the calendar. Choosing the latter only frustrates the purpose and structure of the judiciary, amounting to an abdication of the job.

Purcell demonstrated this scenario. Even before the Supreme Court issued its limited guidance, the district and appeals courts sought to settle the dispute provisionally by giving instructions in advance of the election to ensure that it would be governed by rules that were both clear and lawful. But if each ruling is even more destabilizing than the one that precedes it, the Supreme Court will always create the greatest potential for confusion because it will inevitably render its decision closer to the election than any other court.[86] According to *Purcell*'s rationale, one should expect the Court to be the most reluctant to weigh in. Yet when presented with the option to intervene or abstain, the Court chose the former; it issued its order to reverse the appeals court on October 20—some two weeks after the panel's decision, and two weeks before the election. The Court rationalized its decision paradoxically, arguing that its vacatur was both "[i]n

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[85] *See* Rick Hasen, *Supreme Court: Election Litigation That Doesn't Come Too Early Comes Too Late*, ELECTION L. BLOG (Apr. 1, 2021, 6:47 AM), https://electionlawblog.org/?p=121414 (making an April's Fool's Day "joke" which highlights the timing dilemma that *Purcell* creates for election rule challenges).

[86] *See Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1191 (2006) ("These deadlines also mean that deterrence will be amplified at each stage of judicial review: if a lower court is deterred from ordering a change in election procedure, an appellate court is even more likely to be deterred because its review will occur even closer to an election.").

view of the impending election," and due to "the necessity for clear guidance to the State of Arizona."[87] Despite its framing of the situation as one in which its hands were tied, in vacating the appellate decision the Court made a conscious choice—even if a difficult one—to defend the structure and purpose of the judiciary as an institution even at the risk of causing late breaking voter confusion. From its position atop the judicial branch, the Court can be the final mover. That is, it can always *choose* to preserve the appellate structure and referee the political process even moments before the election. But in exercising that right, it must concede that its decision will contribute to the very confusion that *Purcell* purportedly seeks to minimize.

Underlying the Court's singular focus on voter confusion is, presumably, a sincere aim to secure broad participation and electoral legitimacy. But *Purcell* is uniquely troubling for neglecting to align its emphasis on confusion with this broader goal. Some "policies are incapable of causing voter confusion," and not all confusion, even late in the election cycle, creates the risk of disenfranchisement or illegitimacy.[88] Likewise, there are an array of things other than confusion that can lower voter turnout, and an even greater number of things that can delegitimize an election—all of which can arise in the lead-up to voting. Even assuming that confusion should be a court's primary concern, however, *Purcell*'s narrow focus on the principle comes at a cost. The knowledge of a judicial cutoff date creates bad incentives for nonjudicial actors with the greatest stake in the election's outcome, while weighing most heavily on the courts that we expect to mitigate flaws in the political process. In its preoccupation with confusion, *Purcell* "*assume[s]* that this probability is high," where it "should *assess* it based on the best available evidence."[89] This blind obsession with an utterly speculative claim is unwarranted, as it creates perverse incentives and results in action that is contradictory and self-defeating.

C. Phantom Principles

What one does not say can be just as important as what one does. So too with *Purcell*. Here I focus on two phantom principles, things that the Court should have said or accounted for but did not. First, *Purcell* offers no clear indication as to how its concerns should be considered in a court's equitable analysis. Second, it provides no reason to counter the perception—and perhaps reality—that the Court is falling prey to the partisan voting wars. Taken together, these phantom prin-

[87] Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).
[88] Stephanopoulos, *supra* note 14.
[89] *Id.*

ciples give *Purcell* a malleable quality that promotes inconsistency and unfairness in emergency election suits.

1. Weight and Fit

Purcell suggests that lower courts should consider the timing of the election before issuing an opinion that changes the rules. Wholly lacking from the decision, however, is guidance as to where the election's proximity should factor into courts' analyses and the weight that it should be afforded. Given the scholarly attention that this lapse has garnered, it is fair to say it is the most consequential of *Purcell*'s phantom principles.[90] While there are various ways that courts can take *Purcell* into account, the absence of clear instruction is problematic as it can result in inconsistency among lower courts, unfairness to the parties, and a waste of judicial resources. Indeed, *Purcell*'s failure to clarify this point of ambiguity only exacerbates the confusion that stems from this anti-confusion principle.

Litigants in election and nonelection suits alike regularly request (and oppose) equitable relief, in the form of injunctions and stays, to alter (or maintain) the status quo. While injunctions and stays differ,[91] "the mechanisms . . . share similar standards,"[92] with both tests taking into account the same, well-established factors.[93] Courts determine their appropriateness by evaluating the likelihood that the applicant will succeed on the merits of the case, the potential for harm to ensue—and the extent of that harm—should relief be granted or denied, and the public interests served by an order.[94] But "[a]ll of this

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[90] *See, e.g.*, GANS, *supra* note 27, at 3 (commenting that *Purcell* resulted in a rule that "prevents courts from stopping late-breaking acts of voter suppression"); Hasen, *supra* note 13, at 443–44 (arguing that courts should consider factors in addition to timing when "deciding whether or not to issue orders affecting elections in the period close to the election"); Stephanopoulos, *supra* note 14 ("[C]ourts shouldn't hesitate to step in if their remedies won't baffle voters . . . and couldn't feasibly have been imposed sooner.").

[91] *See* Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 890–92 (2018) (pointing out the following points of difference between injunctions and stays: functionality, the amount of justification they require, the burden they place on the court and parties, their procedural posture).

[92] *Id.* at 890.

[93] *See id.* at 889 ("Although the procedural posture of stays pending appeal differs significantly from that of preliminary injunctions and temporary restraining orders, federal courts treat these three procedural mechanisms similarly.").

[94] *See id.* at 890 n.121 (comparing the injunction standards set out in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) with the stay standards set out in *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *see also* Hasen, *supra* note 13, at 435 ("Although the Supreme Court standards for (1) granting a stay, (2) vacating a stay, and (3) issuing an injunction differ somewhat . . . the standards all weigh the same issues of likelihood of success on the merits, irreparable injury to the parties, and the public interest.").

complex balancing was missing in *Purcell*,"[95] even as the Court chided the appeals court for failing to consider the potential for confusion given the election's proximity.[96] Because the Court elided these considerations and offered a generalized pronouncement, it did not provide specificity as to how—or whether—its ruling comports with the standard equitable analyses.

Having decided that the merits question is close or weighs in favor of the applicant for equitable relief, there are a few ways courts might reasonably contend with *Purcell*'s concern with voter confusion when an election is looming. First, it might fit in the part of the analysis that considers the balance of hardships or the harm to the parties. The applicant's burden to persuade the court that "the real-world implications" of allowing the law to take effect would "be of serious and irreversible consequence,"[97] in this context, would require a showing that postelection remedies are insufficient or unavailable. That likely means convincing the court that unjustified disenfranchisement would ensue because "there can be no do-over and no redress" for depriving the fundamental right to vote after the election has occurred.[98] Courts could then account for *Purcell* in their fact-based inquiry into countervailing harms. In addition to any harm that the defendants raise on behalf of themselves and interested parties, judges can consider the election's proximity; the court could evaluate the likelihood that an order would lead to voter confusion and consequent disenfranchisement. If the agency's professed harms (combined with the decreased voter turnout due to confusion) outweigh the disenfranchisement of the applicant, then the agency wins on this prong, and the court could be justified in permitting the rule to remain in place during the pendency of the election.

Alternatively, *Purcell* could figure into the public interest prong. The Court might find that, on balance, the attendant hardships favor the plaintiff. Only then would it consider the impact of a late-stage court intervention on the public, specifically the potential for voter confusion to ensue. In fact, this is where *Purcell* most logically fits, and taking its concerns into account here would also be consistent with the "standard formulation" for equitable relief because

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95 Hasen, *supra* note 13, at 443.

96 *See* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (vacating the Court of Appeals ruling while noting that "[a]s an election draws closer, [risk of voter confusion] will increase").

97 Pedro, *supra* note 91.

98 *Id.* at 881 (quoting Fla. Democratic Party v. Detzner, No. 16CV607, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16 2016)); *see also* Hasen, *Untimely Death*, *supra* note 3, at 37 ("If a . . . law is indeed disenfranchising, there is likely no effective post-election remedy to restore the right to vote.").

preventing widespread voter confusion immediately prior to an election is inherently in the public interest.[99] While *Purcell*'s language suggests that this is where the concern should be factored in,[100] the inconsistency among lower courts applying it belies any contention that its writing is a model of clarity.[101] Because "[t]he public interest has never been understood as a factor that can justify an injunction when the balance of equities does not,"[102] a court finding that a rule change would result in hardship to the public *as interested parties* might never even address the public interests at stake. In either case, courts should be attuned to the public interest in making election-eve rulings, "balanc[ing] the disenfranchisement if they do interfere . . . against the disenfranchisement if they don't . . . ."[103] If a court finds that the "latter is larger than the former, the judicial calculus should tilt in favor of enjoining or otherwise amending the illegal policy."[104]

Of course, determining where *Purcell* fits into the equitable analysis presumes that it actually fits into the analysis at all. Courts might consider *Purcell* as a distinct consideration, perhaps creating "a presumption against . . . judicial intervention near an election."[105] The question, then, would be whether the presumption was rebuttable or irrebuttable. However, merely establishing *Purcell* as a rebuttable presumption offers little guidance without determining the strength of that presumption, which ought to relate to the probability or universality of its underlying rationale.[106] Given that the potential for both confusion and disenfranchisement can vary based on the rule, it would

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99 Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 552 n.156 (2010) (citing eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006)).

100 *See* 549 U.S. at 4 ("[T]he Court of Appeals was required to weigh, *in addition* to the harms attendant upon issuance or nonissuance of an injunction . . . ." (emphasis added)); *see also* Hasen, *supra* note 13, at 441 ("These special [confusion] concerns in election cases should have counted toward the public interest factor . . . .").

101 *Compare, e.g.*, Priorities USA v. Nessel, 978 F.3d 976, 985 n.3 (6th Cir. 2020) (considering *Purcell* in the public interest prong), *with* N.J. Press Ass'n v. Guadagno, No. 12-06353, 2012 WL 5498019, at *7 (D.N.J. Nov. 13, 2012) (considering *Purcell* in the harms analysis).

102 Goldstein, *supra* note 99, at 522 n.156, 533 n.196 ("[T]he conventional formulation of the public interest factor allows the public interest to be used to *restrain* the issuance of an injunction, not to justify it.").

103 Stephanopoulos, *supra* note 14.

104 *Id.*

105 *Id.*

106 *See* Steven C. Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards 13 (Nov. 6, 2017) (unpublished manuscript), https://ssrn.com/abstract=3068157 ("The presumptions would apply to categories of conduct with common elements that are predictors of the likely outcome [and] . . . would be based on logic, economic analysis, both theoretical and empirical, and judicial experience.").

seem better to avoid a general presumption against judicial intervention and, instead, resolve the matter through factual inquiry based on the standard equitable analysis. Establishing *Purcell* as an irrebuttable presumption would, in effect, bar judicial intervention entirely. But a categorical bar to relief because of an impending election would thwart the purpose of having equitable remedies in the first instance. It would render inutile the very "prophylactic remedy" at the courts' disposal that could put wrongfully disenfranchised voters in "the rightful position"—a "consensus . . . goal of equitable relief"—in the time preceding the election.[107] Such a rule not only fails to reflect what courts do,[108] it also would be normatively bad for reasons that purportedly justified the Court's intervention in prior election cases.[109]

Without guidance as to how *Purcell* should be factored into their decisions, courts are left to their own devices. This is problematic for several reasons. First, it creates the potential for disparate treatment. Courts might be presented with the same set of facts yet, depending on how they believe *Purcell* should be considered, reach different outcomes. Identical claims might support relief if *Purcell*'s concerns factor into the public interest considerations, but not if they establish a strong or irrefutable presumption. Second, how courts weigh *Purcell* will influence government officials' decisionmaking in designing and enacting election measures. Whereas a fact-intensive balancing of harms and the public interest would promote rigorous pre-enactment analyses, a stronger presumption of court abstention gives officials little incentive to assess the legality and impact of their policy proposals due to the low risk that they will be enjoined. Finally, clarifying how *Purcell* should be taken into account would also aid judicial decisionmaking regarding resource allocation. If *Purcell* is just one consideration in the equitable analysis, courts might prioritize election cases on their docket in the pre-election period. If *Purcell* functions as a virtual or absolute bar to late intervention, then it would make sense, from the perspective of judicial economy, for courts to afford these cases no priority because their ruling will not have an impact on how the election is administered.

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107 Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 389 n.274 (2002).

108 *See* Huefner, *supra* note 84, at 286 ("Courts are understandably more reluctant to order an injunction on the eve or in the middle of an election than well before it. Nevertheless, many examples exist of judicial intervention in an election already underway.").

109 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 108 (2000) (per curiam) ("The press of time does not diminish the constitutional concern.").

Purcell might be factored into the traditional equitable relief tests or it might stand for the presumption against judicial intervention. In either case, courts faced with requests for relief later in the election cycle should undertake fact-based inquiries into challenged election rules, assessing things like the probability that altering them will foment voter confusion—and to what extent—as well as the likely impact on turnout. But where *Purcell* fits into their analyses and the weight afforded to it matters. It has relevance for doctrinal consistency and party fairness, and shapes how lawmakers and courts conduct themselves in the pre-election period. The obvious importance of these matters that implicate the right to vote counsels that they be clearly set out well in advance of the election. This is yet another area in which *Purcell* failed.

2. Impartiality and Nonpartisanship

Finally are the issues of impartiality and nonpartisanship. These traits are essential to the judiciary, as fairness to the litigants and the legitimacy of the outcome depend on the absence of any relevant bias.[110] Moreover, the increasingly politicized nature of the judicial selection process and the hyperpartisan environment in which judges operate makes it especially important for those overseeing election-related disputes to remain above the fray and signal as such.[111] In this regard, *Purcell* falls short. Despite its brevity, and the fact that the lower courts had split on the case, the *Purcell* opinion reads as unbalanced. While the opinion never applies the test for evaluating the constitutionality of election laws, its flippant discussion of the state's interest and the potential burdens—key considerations in the test—reverses the order in which they are traditionally analyzed. Then, instead of offering a fresh and thoughtful legal discussion of those interests, the Court advances an argument that appears inherently partisan. And as for *Purcell*'s language, it too is skewed, in both quality and quantity. Whereas the Court could have drafted the opinion carefully and evenly to set the tone for lower courts and lawmakers alike, it seems to have used the case to send smoke signals about how it would approach future voting rights cases. In doing so, it missed an opportunity to assuage critics of one of their most potent, yet predictable, critiques.

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[110] *See* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 511 (2014) (discussing the "parties" and "the public" as among the "audiences" or beneficiaries of judicial impartiality).

[111] *See generally* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. (forthcoming 2021) (highlighting the increasing partisanship in federal judiciary appointments and its effect on presidential election dispute outcomes).

After laying out the facts of the case in the first part of the order, the Court moves on to section two, which is seemingly devoted to setting out the legal standards and analysis. Instead of opening the section with a broad principle or rule statement that captures the importance of elections, however, the section begins by articulating the state's "compelling interest in preserving the integrity of its election process," citing *Eu v. San Francisco County Democratic Central Committee*.[112] Immediately after, it dives into a discussion of the perils of voter fraud. This is deeply troubling for a couple reasons.

First, the opinion represents a departure from the traditional order of analysis for election regulations. Cases that challenge laws as infringing on the right to vote are resolved in accordance with the *Anderson-Burdick* balancing test. Under that test, a court "must *first* consider the character and magnitude of the asserted injury to the rights protected . . . . It *then* must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."[113] Only then will a court be "in a position to decide" the matter.[114] This ordering is important. By addressing the encumbrances on the franchise first, determining if they are "severe" or "reasonable, nondiscriminatory restrictions," courts can then decide the appropriate standard of scrutiny and, ultimately, whether the law's burdens are justified.[115] The order also makes sense practically, as it puts the voter's claims before what is, in effect, the government's defense. *Purcell* fails to mention *Anderson-Burdick*, which itself is problematic because *Anderson-Burdick*—not *Eu*—articulates the rule that governs the merits dispute. As a consequence, when the Court briefly mentions the relevant considerations, it inverts the order in which they should be analyzed. This partial engagement seems to expose the Court's thinking on the merits case, notwithstanding its disclaimer that it takes no view on it.[116] To the extent that the Court was going to openly ruminate under the rubric of the prevailing stan-

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[112] Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

[113] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (explaining that under the *Anderson* test, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance'" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

[114] *Anderson*, 460 U.S. at 789. Notably in both cases that make up the standard, the Court considers the claims before the state's justification.

[115] *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289).

[116] *See Purcell*, 549 U.S. at 5 ("We underscore that we express no opinion here on the correct disposition . . . of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases.").

dard, it should have been consistent for the sake of impartiality and the perception thereof.

Far from a harmless lapse, the reordering only adds to what amounts to *Purcell*'s pattern of unevenness. Indeed, by beginning with the line from *Eu*, and specifically the word "integrity," the Court adds a subtle, yet unmistakable, partisan veneer to its analysis.[117] As written, the section leaves readers with the impression that "preventing voter fraud" is the paramount concern for ensuring election integrity.[118] This hardly seems impartial, especially in a case where the plaintiffs raise their own election integrity concern: disenfranchisement. But the Court does not frame the plaintiffs' claim in terms of election integrity; it never suggests that the reason the state should be attuned to disenfranchisement is that it, too, could undermine the integrity of the democratic process. That is because the word "integrity" has deep partisan connotations.[119] It is meant to imbue the voter identification and other measures with an air of respectability, even in the face of claims that they disenfranchise segments of the electorate who tend to vote for Democrats—most notably, people of color and the poor.[120] Where the Court does suggest that disenfranchisement might fit under the umbrella of election integrity concerns, it is only in reference to the disenfranchisement that some might *feel* in the absence of voter identification measures.[121] In its embrace of the phrase in this context, and its failure to disabuse the notion that state-driven disenfranchisement is also a matter of election integrity, the Court's opening salvo plays into the partisanship that

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[117] *Id.* at 4 (quoting *Eu*, 489 U.S. at 231).

[118] *Id.* at 4.

[119] *See, e.g.*, VERNON J. EHLERS, FEDERAL ELECTION INTEGRITY ACT OF 2006, H.R. REP. NO. 109-666, at 3–4 (2006) (arguing that "[t]he purpose of . . . the Federal Election Integrity Act of 2006 is to protect the franchise and reduce the opportunities for, and incidence of, vote fraud," and highlighting a photo identification requirement as "a basic and necessary step to preserve the integrity of the voting process" from fraud and double voting); Peter Kirsanow, *Where's the Integrity?*, NAT'L REV. (Sept. 25, 2006, 2:00 PM), https://www.nationalreview.com/2006/09/wheres-integrity-peter-kirsanow (describing the assertion from political opponents that there is "little evidence of the voter fraud the [Federal Election Integrity] Act seeks to remedy or prevent" as "absurd"). Notably, the Court issued its opinion in *Purcell* as Congress was actively considering the Federal Election Integrity Act of 2006, and the legislative record makes several mentions of the Arizona voting law, with Republicans suggesting it is a laudable example of efforts to ensure integrity.

[120] *See generally* Fresh Air, *Trump's Election Integrity Commission Could Have a 'Chilling Effect' on Voting Rights*, NPR (May 17, 2017, 1:47 PM), https://www.npr.org/2017/05/17/528769195/trumps-election-integrity-commission-could-have-a-chilling-effect-on-voting-righ (discussing disenfranchisement caused by strict voter ID—among other—requirements, which particularly impact people of color, as well as older and younger people).

[121] *See supra* notes 65–66 and accompanying text.

surrounds the debate over election regulations in general, and in particular, those like the law at issue in *Purcell*.

Finally, if the ordering and the framing is not telling enough, the attention given to the claims and how they are characterized should be. The sheer amount of ink spilled over the specter of voter fraud relative to the potential for disenfranchisement suggests that the former was always driving the opinion. Only after its five-sentence ode to "election integrity" does the Court glibly mention voters' "strong interest" in the franchise.[122] Beyond these quantitative differences, there are also qualitative ones. First is the fact that the state's interest in election integrity is bolstered with two powerful, full-sentence quotations from caselaw, including one from the much-revered *Reynolds v. Sims*.[123] The plaintiffs' interest in voting, in contrast, is worth the lesser effort of extracting just three words.[124] Second is the Court's broader terminology choices. Whereas the Court employs direct and strident language to present the problems associated with voter fraud—it "breeds distrust," undermines "[c]onfidence," and discourages "honest citizens"—the few words it dedicates to disenfranchisement, like "much debated," "might," and "would caution . . . careful consideration," are passive, vapid, and utterly feeble.[125]

The partisan system of election administration in the United States, particularly in the current climate of extreme political polarization, can take a toll on Americans' faith in the election results.[126] "Emergency election litigation" only contributes to this problem, as it "has the added peril of being fraught with potential partisanship—or at least the appearance thereof."[127] This effect is even greater when

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[122] *Purcell*, 549 U.S. 1, 4 (2006).

[123] *Id.* ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964))); *see also id.* ("A State indisputably has a compelling interest in preserving the integrity of its election process." (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989))).

[124] *Purcell*, 549 U.S. at 4 ("Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972))).

[125] *Id.* at 4.

[126] *See* Chad Vickery & Bailey Dinman, *Should We Experiment with Election Administration in the U.S?*, COMPAR. JURIST (Sept. 19, 2020), https://comparativejurist.org/2020/09/19/should-we-experiment-with-election-administration-in-the-u-s ("[T]he structure of election administration . . . is often politicized; in 24 states, the elected secretary of state . . . serves as the chief election official. As political divisions have grown more severe in the United States, this partisan leadership structure is likely contributing to declining trust in election outcomes.").

[127] Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, 5:28 PM), https://www.scotusblog.com/2020/10/symposium-

the litigation concerns "hot-button issues like voter ID that have a pronounced partisan valence."[128] Where *Purcell*, an emergency appeal concerning a voter identification law, could have tempered the concerns over partisanship, it exacerbated them. The order's inverted analysis, embrace of the partisan dichotomy of "integrity," and quantitative and qualitative language differences belie its claim that the Court had "no opinion here on the correct disposition" of the merits.[129] Where the Court should issue opinions that inspire presiding judges to aspire to their branch's highest values, *Purcell* is laden with text and subtext that reeks of partiality and even partisanship. In issuing a slapdash opinion—bereft of cogent arguments and lacking a clearly articulated standard to guide itself and the judiciary—the Court constructs a hollow shell. By drafting it so one-sidedly, it cues other courts to mimic its behavior and opens the judiciary to predictable attacks.

III
Pandemic as Proof

Since *Purcell* was issued a decade and a half ago, it has been cited in many federal judicial opinions.[130] Insofar as *Purcell* might offer greater insight into how courts have apprehended the threadbare principles, a more comprehensive examination of its application could be edifying. Short of that, however, the Court's treatment of *Purcell* during the 2020 election cycle arguably provides the best context for discerning its meaning and scope. Due to the COVID-19 pandemic "[t]he 2020 election may go down as one of the most administratively challenging elections in American history."[131] It spawned a wave of lawsuits across the country alleging that certain regulations impaired the right to vote in the pandemic even if they might not have consti-

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the-particular-perils-of-emergency-election-cases (arguing that Justices may easily become "overridden" by political instinct in rendering emergency election opinions due to the litigation's "fast-moving" nature).

[128] Tokaji, *supra* note 12, at 1067.

[129] *Purcell*, 549 U.S. at 5.

[130] *See* Election L. Ohio State, *The* Purcell *Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSblog, https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures (last visited June 24, 2021) (explaining how *Purcell* has been used in decisions upholding a Texas voter ID law and overruling a Wisconsin district court order which extended the absentee ballot submission deadline in response to the COVID-19 pandemic).

[131] Charles Stewart III, MIT Election Data + Sci. Lab, How We Voted in 2020: A First Look at the Survey of the Performance of American Elections 34 (2020), https://electionlab.mit.edu/sites/default/files/2020-12/How-we-voted-in-2020-v01.pdf (surveying voter experiences and behaviors in national elections).

tuted burdens during a normal election cycle.[132] In response, defendants repeatedly invoked *Purcell* to support their contention that courts lacked authority to mandate changes. Given the unprecedented and extraordinary nature of the crisis-stricken environment, it seemed well-suited for testing the extent of *Purcell*'s wariness of awarding extraordinary relief.[133] That is to say, if any exceptions or limiting principles apply to *Purcell*, the extreme conditions of conducting an election during a global health crisis should have revealed them. Thus, the period from February through November—from the earliest reported U.S. COVID-19 cases to the final casting of votes—offers not just a conveniently limited window, but also an eminently relevant one. The opinions rendered during that period should be illuminating.

And in many regards, they were.[134] An examination of the Supreme Court's orders revealed an overemphasis on voter confusion. As in *Purcell*, the rule changes at issue in the pandemic cases created minimal prospects for actual confusion—or at least the sort that would decrease voter turnout. Thus, the Court's repeated references to its anti-confusion principle amounted to little more than rhetoric. Furthemore, despite *Purcell*'s admonition for judges to both show their work and afford deference to lower courts,[135] the Court seemed to dispense with these concerns, showing no real interest in the district and appellate courts' decisionmaking rationale. Nor did the Court provide any specific guidance to clarify the weight that *Purcell* should be given or where the election's proximity fits in the analysis for equitable relief. Nevertheless, with limited exception, the Court's decisions suggest that *Purcell* constitutes a categorical ban on judicial intervention on the eve of an election. The Court showed even less concern for the perception of partisanship, as the bulk of its decisions were made along predictable partisan lines. And while the Court provided a small measure of doctrinal clarity, suggesting that *Purcell* applies only to federal courts, the change in the Court's composition renders that proposition tenuous. In sum, *Purcell* in the pandemic both succeeded and failed: It successfully maintained its reputation as jurisprudential

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132 *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 276 (2020) (summarizing the core legal theory of these cases to be that a law "ordinarily might appear to be a minor burden on voters, such as returning absentee ballots by a set deadline, becomes a severe burden when voters," due to the pandemic, "cannot vote safely in person and cannot receive an absentee ballot to return by the set deadline").

133 *See* THE FEDERALIST NO. 83 (Alexander Hamilton) ("The great and primary use of a court of equity is to give relief in extraordinary cases.").

134 It is important to bear in mind that the assessments are based on inferences from a handful of short per curiam decisions, dissents, and orders lists.

135 Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).

muddle, yet failed to meet the moment and the needs of American democracy in crisis.

A. Confusion

In case after case, the Court made no attempt to go beyond paying mere lip service to voter confusion, *Purcell*'s primary concern. Not only did the Court repeatedly fail to probe lower court findings to evaluate the actual likelihood of confusion and consequent disenfranchisement, but much of its own action increased the potential for last-minute confusion in a way that could aggrandize the disenfranchisement problem. With the core justification for *Purcell* neither rigorously examined nor thoughtfully applied to the specific facts of each case, the confusion rationale seems like a speculative front.

The *Republican National Committee v. Democratic National Committee* decision is illustrative.[136] In that case, the Supreme Court granted an application to stay a district court order, affirmed in part by the Seventh Circuit, extending Wisconsin's absentee ballot receipt deadline to accommodate voting during the pandemic.[137] The case is notable for many reasons. It was the Court's first decision related to the 2020 election cycle. Likewise, it was decided during COVID-19's initial surge—when little was known about the virus beyond its deadliness—which forced many states, including Wisconsin, to take extraordinary measures like imposing stay at home orders.[138] And importantly, *Republican National Committee v. Democratic National Committee* relied heavily on *Purcell*. The case very much set the stage for pandemic-related election litigation at the Supreme Court.

In its order, the Court cited "the wisdom of the *Purcell* principle," asserting that its purpose was to prevent "this kind of judicially created confusion."[139] To support its contention, the Court highlighted the fact that the district court instructed state election officials to refrain from releasing election results until the new ballot receipt date, questioning the order's efficacy.[140] But it is a stretch to describe this as support. Despite its passing reference, the Court failed to explain the precise nature of "this kind" of confusion that would be brought on by

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136 140 S. Ct. 1205 (2020) (per curiam).

137 *Id.* at 1208.

138 *See* Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1200 fig.1 (2020) (providing the type and duration of COVID-19 stay-at-home orders by state from March through May 2020).

139 *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

140 *Id.*

the district court order.[141] While the lower court's action may have been extraordinary, it was hardly confusing. Instead of inquiring into whether voter confusion would materialize, including the type of confusion that would discourage voters from participating, the Court simply proclaimed it.[142] Had the Court actually assessed the likelihood that the district court order would result in voter confusion—or better yet, further confusion[143]—it might have found that voters were very much tracking the latest election news and that the chances were quite low. And in the off chance that greater confusion would have ensued, it is unlikely that an extended ballot deadline would have resulted in greater disenfranchisement. In fact, the opposite would have been more likely because voters would have had more time and more reliable information to help them navigate the changes.

Assuming that *Purcell*'s concern with confusion should have been the priority in that test case, the Court's action in *Republican National Committee v. Democratic National Committee* served only to frustrate the stated objective of limiting it. That is because when the Court intervened, it upended the status quo—and did so even closer to the election.[144] Prior to the stay, voters were ostensibly preparing for the election to proceed in accordance with the instructions in the lower court's, circuit-affirmed decision. Upon receiving word of the Supreme Court's late-breaking order, however, voters had to scramble to alter their plans. The irony of this was not lost on Justice Ginsburg who, writing for the dissent, noted that the Court's last-minute rule change was "sure to confound election officials and voters."[145] Indeed, if *Purcell* truly "counseled hesitation when the District Court acted" five days before the primary election, as the per curiam order claimed, then the Supreme Court's "intervention" *on the day before the election* was "all the more inappropriate."[146]

The confusion charade was perhaps even worse in *Raysor v. DeSantis*, where the Court was presented with facts that raised a serious prospect of voter confusion but failed to take action to miti-

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[141] *Id.*

[142] The Court suggested that information leaks about the earlier returns would compromise the election because voters who had yet to cast their ballots might alter their behavior. *Id.* at 1207–08. However, this focus on the lower court's inability to prevent strategic late voting only supports my larger point that *Purcell* overemphasizes voter confusion and underemphasizes other important values.

[143] Due to partisan infighting among the state's political leadership, the election took on an on-again, off-again character. *See infra* Section III.E.

[144] The decision was issued on April 6, 2020, just one day before the election was scheduled to take place. *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

[145] *Id.* at 1210 (Ginsburg, J., dissenting).

[146] *Id.* at 1210–11.

gate it.[147] In declining to vacate the Eleventh Circuit's stay of an injunction, *Raysor* let a rule go into effect that the district court found to be in violation of three separate provisions of the Constitution and likened to a poll tax.[148] After a trial, the district court enjoined a Florida law that rendered former felons ineligible to vote until they paid any "legal financial obligations" owed, which included a range of costs and fees aimed at "funding the government in general or specific government functions."[149] Importantly, the district court's order did not alter the existing state of affairs. On the contrary, it sought to make permanent the preliminary injunction that had been both in effect for ten months and previously affirmed by the Circuit.[150] So when the Circuit stayed the injunction on July 1—just nineteen days before the deadline to register for the state's primary—*that* decision altered the status quo.[151] In doing so, the Eleventh Circuit created the real potential for voter confusion just weeks before the August 18 primary election.

Even worse, however, was Florida's admission: Under its current system, it could not verify whether former felons had satisfied their debt or inform them how much remained outstanding.[152] As a conse-

147 140 S. Ct. 2600 (2020).

148 *See* Jones v. DeSantis, 462 F. Supp. 3d 1196, 1203, 1231–34, 1250 (N.D. Fla., 2020) (holding that a Florida rule which conditioned voting for citizens with felony convictions on payments of fees constituted an unconstitutional tax on voting in contravention of the Twenty-Fourth Amendment, furthering an Eleventh Circuit injunction of a rule which conditioned ex-felon voting on payments of amounts exceeding the citizen's ability to pay in *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020)). All of this, of course, stemmed from the earlier action by state lawmakers to limit the effect of Amendment 4, the change to the state's constitution that requires formerly incarcerated Floridians to have their right to vote restored after "completion of all terms of sentence." *Id.* at 1205. After the constitutional ballot initiative succeeded—garnering the support of nearly two-thirds of Florida voters—the Republican-led legislature responded by adopting legislation defining the financial obligations as part of one's term, effectively narrowing the class of formerly incarcerated persons who would be re-enfranchised. *Id.* at 1206. That legislation preconditioning the right to vote on the payment of the fees was the basis for this litigation. *Id.* at 1203–04. For general background on Florida's voting law and the district court's order, see Steven Lemongello & Mark Skoneki, *Federal Judge Rules Florida Ex-Felons Can Vote Despite Fines or Fees*, ORLANDO SENTINEL (May 26, 2020), https://www.orlandosentinel.com/politics/os-ne-amendment-4-judge-ruling-sunday-20200524-h5axxddum5do5mayjf3xlzqmqe-story.html.

149 *Jones*, 462 F. Supp. 3d at 1206–07.

150 *Raysor*, 140 S. Ct. at 2603 (Sotomayor, J., dissenting) ("Precisely because the District Court's decision in *Jones II* tracked the Eleventh Circuit's decision in *Jones I*, the stay upends the legal status quo nearly a year after the preliminary injunction took effect.").

151 *See* Jones v. Governor of Fla., No. 20-12003-AA, 2020 WL 4012843, at *1 (11th Cir. July 1, 2020).

152 *Raysor*, 140 S. Ct. at 2601 (Sotomayor, J., dissenting) ("Based on the State's estimates . . . the District Court noted that Florida officials would need about six years to determine how much (if anything) currently registered voters (to say nothing of those who seek to register) must pay to vote.").

quence, the tens of thousands of Floridians who had registered in reliance on the district and circuit courts' opinions not only faced uncertainty about their legal eligibility to vote, but the prospect of criminal prosecution if they guessed wrong.[153] The Supreme Court disregarded this patently confusing scenario and offered no justification. As Justice Sotomayor wrote in her dissent, the Court was presented "with an appellate court stay that disrupt[ed] a legal status quo and risk[ed] immense disfranchisement—a situation that *Purcell* sought to avoid."[154] Yet rather than using the opportunity to remedy a truly Kafkaesque situation, "the Court balk[ed]."[155] As in *Republican National Committee v. Democratic National Committee*, the Court in *Raysor* employed the empty rhetoric of confusion without bothering to substantiate it, only to intervene at the last minute in a way that stood to increase actual confusion and disenfranchisement.[156]

The stated motivation for the *Purcell* decision was the goal of minimizing confusion in the lead-up to elections to ensure maximum voter turnout. Lower courts applying *Purcell* attempted to honor this objective in the way one would expect: by acknowledging the realities of the world, evaluating the specific facts of the cases before them, analyzing the law, and tailoring remedies designed to promote stability and maximum voter participation. The Supreme Court made no comparable effort. When presented with the cases on appeal, it offered superficial praise for *Purcell*—if it offered anything at all—while declining to engage in a manner consistent with its underlying rationale. In fact, the Court's action ran counter to *Purcell*'s core rationale, only aggrandizing the problem of last-minute confusion in an environment already beset with pandemic-induced chaos. When put to the test, the Court's concern about confusion rings hollow. More problematically, the empty obsession with the speculative problem seems deceitful.

B. Deference and Transparent Decisionmaking

Beyond raising the specter of confusion while only aggrandizing its prospects, the Court's pandemic orders ignored *Purcell*'s other admonitions. Indeed, on at least two occasions the Court gave short

153 *Id.* at 2603.

154 *Id.*

155 *Id.*

156 In yet another standout case, the Court carved out an exception to its ruling, an implicit acknowledgement that the remedy would have increased confusion. *See* Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020) (staying an order enjoining a South Carolina "witness requirement" for absentee ballots, "except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply" with the requirement).

shrift to its earlier statements that the lower court opinions warrant deference and that reviewing courts should be transparent in their decisionmaking. Whereas in *Purcell*, the Court reversed the Ninth Circuit for failing to adhere to these principles, it showed indifference when the appeals courts flouted them during the 2020 contests. Even more, the Court itself flagrantly disregarded them.

Once again, *Raysor* illustrates this practice. As previously noted, the Eleventh Circuit issued its decision in the Florida case, staying the district court's injunction with less than three weeks to the close of registration for the primary.[157] While some of the legal arguments may be complex, the larger takeaway is simple: Despite the fact that the district court conducted an eight-day trial and painstakingly articulated its rationale for the injunction in a 125-page opinion,[158] the appeals court halted the trial court's decision in a brief summary order that *failed to provide any reasoning for its action*.[159] The Circuit thus violated *Purcell* in not one, but two regards. First, it ignored the instruction for reviewing courts "to give deference to the discretion of the District Court."[160] At the same time, the Circuit offered "no explanation . . . showing the ruling and findings of the District Court to be incorrect."[161] The Supreme Court then issued its own summary order, also failing to articulate its rationale,[162] while letting the Eleventh Circuit's "bare order" remain in effect.[163] These failures were, as the dissent wrote, "the precise error[s] this Court corrected in *Purcell*."[164] Thus, in its own scant order, the Supreme Court validated the Circuit's decision to flout its earlier instructions while ignoring the thousands of Floridians left in limbo.

The Court took similar action in *Merrill v. People First of Alabama*[165] except with two key differences: It *vacated* an injunction that was *supported by both* the district and appellate courts. Following an eleven-day trial, the district court ruled that the Alabama Secretary of State's decision to ban curbside voting during the pandemic—in a state where poll workers were powerless to "turn away voters who do

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157 *See supra* notes 148–57 and accompanying text.

158 *See Raysor*, 140 S. Ct. at 2601 (Sotomayor, J., dissenting) ("[T]he District Court entered a permanent injunction and issued its factual findings and legal conclusions in a 125-page opinion.").

159 *See* Jones v. Governor of Fla., No. 20-12003-AA, 2020 WL 4012843, at *1 (11th Cir. July 1, 2020).

160 Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).

161 *Raysor*, 140 S. Ct. at 2602 (citing *Purcell*, 549 U.S. at 5).

162 *See id.* at 2600 (containing no reasoning or substance in the majority opinion).

163 *Id.* at 2602 (Sotomayor, J., dissenting).

164 *Id.*

165 141 S. Ct. 25 (2020).

not wear masks, or turn away voters who have a known case of COVID-19"—violated the First and Fourteenth Amendments and the Americans with Disabilities Act.[166] The district court laid out its rationale in an opinion that spanned over one hundred pages,[167] concluding that prohibiting the practice was unlawful because it "imposes a significant burden on [Plaintiffs'] voting rights," which "the State's interests . . . do not justify."[168] Accordingly, it enjoined the state from enforcing the Secretary's policy, thereby permitting willing counties to allow the accommodation. On review, the Eleventh Circuit affirmed this part of the ruling, thus declining to vacate the injunction.[169] However, neither the district court opinion nor the appeals court's partial affirmance was enough to appease the Court. Issuing yet another per curiam order without any reasoning, the Court stayed the injunction less than two weeks before the general election.[170]

In *Raysor*, the Supreme Court ruled against the only court that offered support for its finding that the regulation at issue was unconstitutional. In *Merrill*, it reversed the judgment of two courts, despite their agreement that the state's policy was unlawful. In each case, the Court dispensed with its admonition that deference is due to the findings of lower courts and that reviewing courts should be transparent in their decisionmaking. By failing to explain its own departure from these principles, the Court left two of the clearest, most commonsensical parts of *Purcell* by the wayside. Yet this seemed of no moment to the Court which, instead, left us with the task of trying to reconcile utterly inconsistent rulings. Where the Court could have exercised discipline and respect for its earlier ruling, it chose the contrary. It opted for a display of unbridled power.

C. Weight and Fit

Even as it ignored *Purcell*'s most intelligible elements, the Court spent precious little time elucidating the decision's most opaque one: how much weight judges should give to the election's proximity. This is most telling from the fact that, despite issuing a succession of opinions relying on *Purcell*, the Court offered no guidance as to how its considerations fit into the analysis for equitable relief. Without any clarification, lower courts and the Supreme Court itself were left to

166 People First of Ala. v. Merrill, 491 F. Supp. 3d, 1076, 1160 (N.D. Ala. 2020).

167 *See id.*

168 *Id.* at 1154.

169 People First of Ala. v. Sec'y of State for Ala., 815 F. App'x 505, 516 (11th Cir. 2020).

170 Merrill v. People First of Ala., 141 S. Ct. 25, 25 (2020) (granting the stay on October 21, 2020).

debate the extent to which *Purcell* constrains their ability to remedy unlawful measures in the lead-up to elections.

As the pandemic continued to take its toll, the Court issued nearly a dozen orders in cases that clearly implicated *Purcell*. In some of them, the justices referenced *Purcell* explicitly, whether in the per curiam order,[171] concurrence,[172] or dissent.[173] In all of them, *Purcell* was raised in the decisions of the courts below. Yet in none of these circumstances did the Court openly engage with equitable relief factors, and only in concurring and dissenting opinions was *Anderson-Burdick* ever mentioned.[174] Therefore, the answer to whether *Purcell* creates a consideration or a presumption remains inconclusive. And as a result, courts will continue to muddle through the legal morass.

And yet, if one were to read between the lines—the few lines that the Court bothered to include in its spate of decisions—one would not be faulted for concluding that the real answer is that "it does not matter." Gauging from the rulings in the overwhelming majority of the Court's pandemic orders, where and how *Purcell* fits technically is of little consequence because it seems to operate as a near categorical bar to judicial intervention. Irrespective of the gravity of the constitutional violation alleged, and despite the lack of explanation from reviewing courts that failed to show deference to the lower court, the Court halted virtually all judicial changes to election laws in advance of the election.[175]

This was made apparent at the pandemic's onset, when things were most uncertain, as *Purcell* kept lower courts from trying to make up for a surge in absentee requests and backlogs in the mail that kept voters from receiving their ballots.[176] It was made apparent again later in the summer, when a partisan-motivated state law and a summary order created voter confusion, and *Purcell* permitted residents to wallow in limbo at the risk of criminal prosecution.[177] *Purcell* not only

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171 *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam).

172 *See, e.g.*, Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31–32 (2020) (Kavanaugh, J., concurring).

173 *See, e.g.*, Raysor v. DeSantis, 140 S. Ct. 2600, 2600, 2602–03 (2020) (Sotomayor, J., dissenting); Merrill v. People First, 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting).

174 *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 33, 35 (2020) (Kavanaugh, J., concurring); *id.* at 41 (Kagan, J., dissenting).

175 The most notable exception to this pattern was due to a distinction between actions by federal judges and state actors. *See infra* Section III.D.

176 *See Republican Nat'l Comm.*, 140 S. Ct. at 1206–07 (citing the "wisdom of the *Purcell* principle" in staying the district court's injunction requiring "the State to count absentee ballots postmarked after April 7, 2020").

177 *See supra* notes 148–54 and accompanying text.

prevented the relaxation of absentee ballot witness requirements that clearly violated the medical community's call for social distancing,[178] but also kept local governments from voluntarily using curbside voting to minimize the risk of viral transmission to their most vulnerable residents.[179] In case after case, the Court swatted pleas of desperate voters, discrediting itself and its earlier claim that "[t]he press of time does not diminish the constitutional concern."[180]

The Supreme Court has had fourteen years to make sense of *Purcell*. It also had advanced warning, at least as early as April 2020, that the judiciary would be barraged with claims of unconstitutional infringements on the right to vote.[181] In repeated instances leading up to important 2020 election deadlines, the Court shirked the opportunity—its responsibility—to elucidate a murky principle of its own creation. Instead, it opted to provide courts with no "more guidance than . . . an occasional sentence or two in its stay rulings."[182] At the same time, the Court was almost unvarying in its unwillingness to grapple with regulations that created obstacles for Americans seeking to exercise the franchise during a global pandemic. Regardless of the magnitude of the harm they might pose to the parties or the public, and irrespective of their tendency to "result in voter confusion" or give voters "incentive to remain away from the polls,"[183] election laws appeared immune to challenge, making lawsuits an exercise in futility. This supreme obliqueness notwithstanding, over the course of the pandemic *Purcell*'s true meaning became all too clear. The suggestion that "courts should ordinarily not alter the election rules on the eve of an election" is now an implicit, yet sharp, rebuke of any jurist who hazards to alleviate constitutional injury even in the most *extraordinary* circumstances.[184]

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178 *See* Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (granting a stay in part of the district court's preliminary injunction enjoining South Carolina's absentee ballot witness requirement).

179 *See supra* notes 167–72 and accompanying text.

180 Bush v. Gore, 531 U.S. 98, 108 (2000) (per curiam).

181 *See, e.g.*, Pam Fessler, *Coronavirus May Reshape Who Votes and How in the 2020 Election*, NPR (Apr. 10, 2020, 5:00 AM), https://www.npr.org/2020/04/10/831059882/coronavirus-may-reshape-who-votes-and-how-in-the-2020-election (describing how the pandemic caused disruptions as early as April).

182 Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 645 (7th Cir. 2020) (Rovner, J., dissenting).

183 Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam).

184 Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam); *see also* Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, 2020 U. CHI. L. REV. ONLINE 18, 22 ("Absent from this reprimand was any recognition that what courts should 'ordinarily' do might *not* be what they should do when a pandemic is raging.").

D. Limits to Federal Courts

The Court did explicitly clarify one point: *Purcell* applies to federal courts only. While in the original case, the Court reviewed the decision of federal district and appellate courts, the order mentioned "[c]ourt orders affecting elections" generally.[185] But in three pandemic cases, the Court offered the clearest indication that *Purcell* only binds the federal judiciary.[186] Still, even this is tenuous. Given the change in the Court's composition, it is far from certain that this limitation will remain in effect over the long term.

The first order, in *Republican Party of Pennsylvania v. Boockvar*,[187] was issued on October 19, 2020. In a single sentence, the Court denied the application for an emergency stay of the Pennsylvania Supreme Court's decision mandating that ballots received within three days of Election Day be counted if they were not clearly postmarked after Election Day.[188] Importantly, the Pennsylvania Supreme Court rendered its judgment based on its interpretation of the Pennsylvania constitution and the state election code.[189] Equally important is that the denial was the result of a 4–4 deadlock, with Chief Justice Roberts siding with the Court's three liberals.

The following week, the Court rejected another application. This time, however, it was asked to vacate the Seventh Circuit's stay of a federal district court order that, among other things, extended the deadline in Wisconsin for receiving absentee ballots by six days.[190] The district court's decision to enjoin the state's regular deadline was based on the burden it posed on the right to vote under the U.S. Constitution.[191] In siding with the Court's conservatives, Chief Justice Roberts issued a concurrence explaining his reasoning for permitting the rule change in Pennsylvania to remain in effect while disallowing it in Wisconsin. "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election

185 *Purcell*, 549 U.S. at 4.

186 To be clear, the Court has suggested this in earlier cases. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. at 1207 ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); Republican Nat'l Comm. v. Common Cause R.I., 141 S. Ct. 206, 206 (2020) ("[H]ere the state election officials support the challenged decree, and no state official has expressed opposition.").

187 141 S. Ct. 643 (2020).

188 *Id.* at 643 ("Application for stay presented to Justice Alito and by him referred to the Court denied.").

189 *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 352 (Pa. 2020).

190 Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020).

191 *See* Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 799 (W.D. Wis. 2020) (discussing the *Anderson-Burdick* balancing test "to determine whether an election law unconstitutionally burdens a citizen's right to vote").

regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations . . . ."[192]

Two days later, the Court issued its final pre-election order in *Moore v. Circosta*,[193] which rejected yet another emergency application. The Court was asked to vacate the Fourth Circuit's decision to let stand a state court consent decree in which the North Carolina state board of elections agreed to extend the ballot receipt deadline by six days. Chief Justice Roberts sided with the Court's liberals to sustain the Circuit's opinion, thereby leaving the state court-approved deadline extension intact. The Court issued its order over a noted dissent by conservatives, and despite an explicit statement from the Circuit's dissenting judges arguing that *Purcell* should also apply to state court and agency conduct as well.[194] Taken together, the three orders issued in the last weeks before the election provide the greatest measure of clarity about the *Purcell* principle. Where election eve rule changes are made at the behest of states—whether by state courts or other government officials—federal courts may not intercede.

This clarification is tenuous, however. The decision in *Boockvar* was split, with four justices on either side.[195] At the time of its issuance, then-Judge Barrett was a week from being confirmed as Associate Justice Barrett.[196] And though she was a sitting justice when the Court issued its ruling in *Moore v. Circosta* (the other case seeking review of state officials' conduct), the order noted that Justice Barrett had not taken part in the decision. Therefore, the pivotal orders establishing *Purcell* as a constraint only on federal courts do not have the clear backing of a majority. While it is unclear how Justice Barrett would have decided, there is greater reason to believe that she would have sided with the Court's conservative wing than with its liberals.[197]

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192 *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring).

193 141 S. Ct. 46 (2020).

194 Wise v. Circosta, 978 F.3d 93, 116 (4th Cir. 2020) (Wilkinson, J. and Agee, J., dissenting) ("But there is no principled reason why this [*Purcell*] rule should not apply against interferences by state courts and agencies.").

195 Republican Party v. Boockvar, 141 S. Ct. 643, 643 (2020) ("Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would grant the application.").

196 *See* Amy Howe, *Barrett Confirmed as 115th Justice*, SCOTUSBLOG (Oct. 26, 2020, 11:34 PM), https://www.scotusblog.com/2020/10/barrett-confirmed-as-115th-justice (noting that Justice Barrett was confirmed on October 26, 2020, a week after *Boockvar* was decided).

197 It is possible that Justice Barrett would adhere to the strain of federalism that drove the Chief Justice to side with the liberals in *Boockvar* and *Circosta*. Given her originalist approach to constitutional interpretation, however, it seems more likely that she would have agreed with the conservatives, who would reject rule changes based on *Purcell* and their deep embrace of the independent state legislative doctrine. *See Moore*, 141 S. Ct. at 48 (Gorsuch, J., dissenting) (arguing that in addition to "invit[ing] confusion," the changes

Until the Court is faced with another election-eve controversy, the single greatest point of certainty about *Purcell* will remain shaky.

E. Partisanship

While reaching the correct outcome in a case is essential, "[e]nsuring that the public perceives and accepts a remedy as fair is equally important to the legitimacy of an election remedy."[198] Courts should be particularly sensitive to this notion when their decisions rely on a case like *Purcell*, which fails to establish a clear standard and, thus, gives politically driven courts the opportunity to use it in furtherance of their politically desired ends. This possibility, in turn, increases the risk of public hostility due to the perception that courts are, in fact, acting in this manner. Because a last-minute "ruling in favor of the . . . candidate" of the same party affiliation risks "placing the Court firmly in the middle of the political morass, rather than above it,"[199] each instance in which *Purcell* is invoked to resolve a case along partisan lines represents a blow to the Court's legitimacy. Nevertheless, the Court ruled in this precise way time and again during the pandemic litigation, portraying it as unconcerned with the legitimacy of its rulings in the eyes of the public.

It should have been obvious to the Court from the very start that the public might perceive its decisions as motivated by partisanship. One scholar quipped that the caption of the first case, *Republican National Committee v. Democratic National Committee*, "at least had the virtue of candor."[200] Sadly, the lurid facts underlying the case showed that this characterization was no exaggeration. In Wisconsin, the governor, a Democrat, and the Republican-controlled legislature were in a standoff leading up to the state's April presidential primary election, which also featured a high-profile race for a seat on the state's supreme court.[201] Their disagreement was whether to make further accommodations for voters in light of the spike in COVID

"offend the Elections Clause's textual commitment of responsibility for election lawmaking to state and federal legislators, they do damage to faith in the written Constitution as law, . . . and to the authority of legislatures"). This, of course, in addition to the pattern of partisanship noted *infra* Section III.E.

198 Huefner, *supra* note 84, at 290.

199 Robbins, *supra* note 57, at 1214.

200 Foley, *supra* note 127.

201 *See* Zach Montellaro, *Coronavirus Crashes the Wisconsin Primary*, POLITICO (Mar. 31, 2020, 5:35 PM), https://www.politico.com/news/2020/03/31/coronavirus-crashes-wisconsin-primary-157722.

cases.[202] First, the legislature rejected the governor's proposal to ease the state's voter ID law, registration requirements, and ballot receipt restrictions; then the governor called a special session to address the election concerns but was snubbed when the legislature gaveled in and out within seconds; finally, the governor sought to postpone the contest until the summer, issuing an executive order that the state supreme court invalidated along partisan lines.[203]

At that point, the federal district court decision to extend the ballot receipt date made its way to the U.S. Supreme Court. There, the Court's five Republican-appointed justices ruled for the RNC, prevailing over the four appointed by Democrats, who sided with the DNC. Clear differences aside, and in a case whose outcome would advantage one political party over the other in the heat of an election, both the majority and dissent avoided hinting at partisanship. And while the Court attempted to frame the case as presenting just a "narrow question,"[204] the ugly partisan facts remained.

For nonlegal audiences—and even many legal ones—the partisan implications of the decision were not the sideshow, but the main attraction.[205] As one reporter noted, the suit raised much broader questions than the Court would—or could—admit: "[W]hether the empowered conservative majority has the situational awareness to navigate the dire situation that faces the country, and whether it can avoid further displays of raw partisanship that threaten to inflict lasting institutional damage on the court itself."[206] Even after answering with a sardonic "no," the Court did nothing to dispel the

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[202] *See id.* (noting that "Republican state legislative leaders balked at [Governor Evers's] request [to mail every voter an absentee ballot in light of COVID-19 concerns], calling it logistically impossible").

[203] *See* Natasha Korecki & Zach Montellaro, *Wisconsin Supreme Court Overturns Governor, Orders Tuesday Elections to Proceed*, POLITICO, https://www.politico.com/news/2020/04/06/wisconsin-governor-orders-stop-to-in-person-voting-on-eve-of-election-168527 (Apr. 6, 2020, 7:59 PM).

[204] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020) (per curiam).

[205] *See, e.g.*, Scott Bauer & Steve Peoples, *Wisconsin Moves Forward with Election Despite Virus Concerns*, AP (Apr. 6, 2020), https://apnews.com/article/97db30e6564b9b5eedfc300234ea6630 ("[T]he conservative-controlled Wisconsin Supreme Court . . . said [the Democratic governor] didn't have the authority to reschedule the race. . . . Conservative justices on the U.S. Supreme Court . . . block[ed] Democratic efforts to extend absentee voting . . . split[ting] 5-4, with the five Republican-appointed justices siding with the national . . . party to . . . expand[] absentee voting."); Linda Greenhouse, *The Supreme Court Fails Us*, N.Y. TIMES (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html ("Was I the only one left in suspense on Monday, holding out hope that the five Republican-appointed Supreme Court justices would put partisanship aside and let the District Court order stand?").

[206] Greenhouse, *supra* note 205.

narrative that it was engaging in political—not legal—decisionmaking. When the questions re-arose, in case after pandemic case, the Court simply shrugged, issuing per curiam orders that broke down along partisan lines.

To be sure, the lineup did not strictly adhere to this pattern in *every* case. Justice Breyer did not join the rest of the liberal bloc in signing on to Justice Sotomayor's dissenting opinion in *Raysor*, for example, and in *Middleton*, the liberal bloc noted no disagreement with the outcome.[207] But silence does not necessarily signify agreement, and this type of departure was the exception, not the rule.[208] Where the justices would fall in the pandemic cases was fairly easy to predict because their opinions largely correlated with their partisan affiliation.

Partisan splits in high Court decisions are nothing new, particularly in election law cases.[209] But that does not make them any less troubling. Worse still is when these divisions occur while the election is actually underway, and the chief justification for them is a murky, ill-defined principle employed as a substitute for traditional legal analysis and reasoned decisionmaking. All too often, this is exactly what occurred during the 2020 election cycle. "Even assuming that all the justices were acting in good faith based solely on their fundamentally divergent jurisprudential perspectives, the fact that this jurisprudential divergence was fully congruent with the different partisan backgrounds of the justices inevitably created an awkward appearance in an election case."[210] More than just "an awkward appearance,"[211] *Purcell* in the pandemic demonstrates, at best, the dispiriting reality of "polarization over voting rules and their judicialization by an increas-

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[207] *See* Raysor v. DeSantis, 140 S. Ct. 2600, 2600–03 (2020) (Sotomayor, J., dissenting) (joined by Justices Ginsburg and Kagan); Andino v. Middleton, 141 S. Ct. 9 (2020) (demonstrating no disagreement on the part of Justices Breyer, Ginsburg, Sotomayor, and Kagan).

[208] The other notable exception was Chief Justice Roberts's break in a couple of cases with the Court's other conservatives based on his view that *Purcell* applies to federal courts only. *See supra* Section III.D.

[209] *See, e.g.*, Bush v. Gore, 531 U.S. 98, 123–31 (2000) (per curiam) (demonstrating the partisan split through Justices Stevens, Souter, Ginsburg, and Breyer dissenting from the per curiam decision); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–93 (2010) (illustrating the divide with Justices Kennedy, Scalia, Thomas, Alito, and Chief Justice Roberts on one side, while Justices Stevens, Ginsburg, Breyer, and Sotomayor dissented); Shelby Cnty. v. Holder, 570 U.S. 529, 534–59 (2013) (revealing the partisan split with Chief Justice Roberts delivering the majority opinion, joined by Justices Scalia, Thomas, Kennedy, Alito, and Justice Thomas concurring, while Justices Ginsburg, Sotomayor, Kagan, and Breyer dissented).

[210] Foley, *supra* note 127.

[211] *Id.*

ingly polarized judiciary."[212] At worst, in the midst of a literal disaster scenario, the principle permits partisanship—not the constitutional or equitable principles—to drive legal decisions over who deserves access to the vote.

Conclusion

Given the passage of time since it was decided, a deeper examination of *Purcell* is warranted. Still, it seems like no rush of judgment to say that the opinion leaves much to be desired. Masquerading as well-reasoned and principled, *Purcell* is both unremarkable for its broader pronouncements, and problematic for its lack of clarity and the perverse incentives it creates. It is self-contradictory, it undermines the judiciary's role to ensure a fair political process, and it frequently works to the detriment of the voters. Nowhere does *Purcell* suggest that it should serve as "a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists."[213] And yet, due to the Supreme Court's uncritical applications of it in *Republican National Committee v. Democratic National Committee* and other cases reviewed during the pandemic, *Purcell* "stands to become a major impediment to judicial protection of voting rights."[214] *Purcell* only sullies U.S. election law jurisprudence and the recurring references to it do not bode well for American democracy. So, to those who find themselves facing obstacles to voting in this undefined period before an election, the future may be very bleak. In the words of one eminent jurist: "Good luck and G-d bless," because "[y]ou are going to need it."[215]

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[212] Richard L. Hasen, *Optimism and Despair About a 2020 'Election Meltdown' and Beyond*, 100 B.U. L. Rev. Online 298, 301 (2020).

[213] People First of Ala. v. Sec'y of State for Ala., 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, J. and Pryor, J., concurring) (denying stay of injunction).

[214] Hasen, *supra* note 132, at 282.

[215] Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 656 (7th Cir. 2020) (Rovner, J., dissenting).