# *NOTE*

## DISRUPTING ELECTION DAY: RECONSIDERING THE *PURCELL* PRINCIPLE AS A FEDERALISM DOCTRINE

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*The* Purcell *Principle—the doctrine that courts should refrain from changing election rules during the period of time close to an election—has long been misconstrued. Where the Principle operates, it creates a near-categorical bar to federal judicial relief in the upcoming election cycle; the provisions of federal law that would normally safeguard voting rights, govern redistricting, and supervise how a state can conduct its elections are paralyzed until after election day. Born and raised on the shadow docket, the Principle has been underdeveloped by the Supreme Court. The Court has provided little guidance as to what triggers the Principle or how it will be applied in future cases. And, in recent years, the doctrine has become increasingly powerful in shaping election law. With the 2024 elections quickly approaching, this Note seeks to shed light on* Purcell.

*The goals of this Note are twofold. First, I suggest that courts and scholars have been thinking about* Purcell *incorrectly. I argue that* Purcell *cannot be justified on the grounds of preventing voter confusion—as the case law and scholarship have suggested—but instead is better explained by federalism. Under this conception, the Court's historic applications of the doctrine make more sense. Second, I provide a new framework for understanding what triggers* Purcell. *In deciding whether the* Purcell *Principle should be applied, courts would reach more consistent, analytically sound results by asking whether judicial intervention would* disrupt *a state's administration of its*

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*elections. I provide four conditions for courts to consider in determining whether injunctive relief is disruptive. But these conditions can also provide insight to future litigants making decisions about where, when, and how to bring their election claims to avoid running into* Purcell*'s snare.*



## INTRODUCTION

On January 24, 2022, two decisions[1] of the U.S. District Court for the Northern District of Alabama held that the districting plan adopted by the State of Alabama for its 2022 congressional elections was "substantially likely" to violate Section 2 of the Voting Rights Act ("VRA").[2] The court preliminarily enjoined Alabama from using that map in the forthcoming election and required the state legislature to enact a new plan with a second Black-majority congressional district.[3]

[1] Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (per curiam), *aff'd sub nom.* Allen v. Milligan, 143 S. Ct. 1487 (2023); Caster v. Merrill, No. 21-cv-01536, 2022 WL 264819, at *3 (N.D. Ala. Jan. 24, 2022), *aff'd sub nom. Allen*, 143 S. Ct. 1487.

[2] *Singleton*, 582 F. Supp. 3d at 936.

[3] Id.

Two weeks later, and some nine months before the general election, however, the U.S. Supreme Court stayed the district court's decision, authorizing Alabama to nevertheless move forward with its tarnished map in November.[4] The only rationale provided for this stay came not from the Court—which issued an unexplained, unsigned order on its shadow docket[5]—but a concurrence from Justice Kavanaugh.[6] His basis for lifting the injunction rested on the *Purcell* Principle, a "bedrock tenet of election law" instructing that "federal district courts ordinarily should not enjoin state election laws in the period close to an election" and "federal appellate courts should stay injunctions when . . . lower federal courts contravene that principle."[7]

The effect of the Court's order was to allow the map to apply to the 2022 elections, but with future elections governed by its decision on the merits.[8] The map, enacted by a Republican-controlled legislature and signed by a Republican governor,[9] produced a safe Republican seat as opposed to one that likely would have elected a Democrat.[10] So on election day—as expected without the additional Black-majority district—six Republicans and one Democrat were elected to the U.S. House of Representatives from Alabama.[11]

[4] Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.).

[5] Id. Professor William Baude coined the term "shadow docket" to describe "everything *other* than the Court's 'merits docket.'" Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic, at xii (2023); see also William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 1 (2015) (pointing to "a range of orders and summary decisions that defy its normal procedural regularity").

[6] *Merrill*, 142 S. Ct. at 879–82 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.).

[7] Id. at 879–80.

[8] Id. at 882.

[9] Caster v. Merrill, No. 21-cv-01536, 2022 WL 264819, at *14–15 (N.D. Ala. Jan. 24, 2022); Brian Lyman, Gov. Kay Ivey Signs Off on Alabama Congressional, Legislative, SBOE Maps for 2022, Montgomery Advertiser (Nov. 4, 2021, 3:30 PM), https://www.montgomeryadvertiser.com/story/news/2021/11/03/alabama-congressional-state-house-maps-2022-headed-gov-kay-ivey/6258353001/ [https://perma.cc/RBY9-WLDR].

[10] Melissa Murray & Steve Vladeck, The Supreme Court's Voting Rights Act Ruling Is No Victory for Democracy, Wash. Post (June 8, 2023, 9:28 PM), https://www.washingtonpost.com/opinions/2023/06/08/supreme-court-alabama-redistricting-voting-rights-act/ [https://perma.cc/EB4X-9HYG].

[11] State of Ala., Canvass of Results: General Election, November 8, 2022, at 15–28 (2022), https://www.sos.alabama.gov/sites/default/files/election-data/2022-11/Final%20Canvass%20of%20Results%20%28canvassed%20by%20state%20canvassing%20board%2011-28-2022%29.pdf [https://perma.cc/5GRV-D9GD].

But months after the election had been held, the Supreme Court reversed course. A majority affirmed the district court's decisions and agreed that Alabama's plan was indeed unlawful.[12] As a result, the invocation of *Purcell* provided the State with a one-time get-out-of-jail-free card; the Court allowed Alabama to use its map in the 2022 midterms before an adverse decision later on the merits. Scholars have criticized the Court's use of the *Purcell* Principle—both on theoretical grounds and its application in this case specifically.[13] Indeed, some have even argued that the Republican Party owes its control of the House of Representatives in the 118th Congress to the Supreme Court's intervention in redistricting actions like this one leading up to the 2022 elections.[14]

That the *Purcell* Principle is controversial is perhaps unsurprising. When the Principle operates, it creates a "presumptive categorical bar"[15] to federal judicial relief in the upcoming election cycle. The provisions of both federal constitutional and statutory law that would normally protect voting rights, govern redistricting, and otherwise supervise how a state can conduct its elections are essentially put on hold until after the election at hand. Given the severity and categorical nature of its effect, great weight is thus placed on what *triggers* application of the *Purcell* Principle. I argue that what should trigger *Purcell* is *disruption* to a state's administration of its elections. This conception is different from that of other scholars and jurists, who claim that the Principle is guided by concerns of voter confusion. But disruption alone does not tell the full story either. Understanding *Purcell* also requires bringing to light the

[12] See Allen v. Milligan, 143 S. Ct. 1487, 1498 (2023).

[13] See Vladeck, supra note 5, at 226–27 (arguing that the Court has applied *Purcell* "inconsistently, and in a way that outwardly favors Republicans far more often than it does Democrats"). See generally Steve Vladeck, 31. Emergency Applications and the Merits, One First (June 12, 2023), https://stevevladeck.substack.com/p/31-emergency-applications-and-the [https://perma.cc/XT2Q-LLAT]; Ruoyun Gao, Note, Why the *Purcell* Principle Should Be Abolished, 71 Duke L.J. 1139 (2022); Harry B. Dodsworth, The Positive and Negative *Purcell* Principle, 2022 Utah L. Rev. 1081; Richard L. Hasen, Reining in the *Purcell* Principle, 43 Fla. St. U. L. Rev. 427 (2016); Michael T. Morley, Election Emergencies: Voting in Times of Pandemic, 80 Wash. & Lee L. Rev. 359, 425–28 (2023); Wilfred U. Codrington III, *Purcell* in Pandemic, 96 N.Y.U. L. Rev. 941 (2021).

[14] Murray & Vladeck, supra note 10.

[15] Morley, supra note 13, at 427; see also Hasen, supra note 13, at 443 (referring to *Purcell* as "a per se rule to not allow last-minute judicial changes to election rules"). Justice Kavanaugh has also recognized that the "Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election." Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.).

constitutional theory that is underlying the doctrine: federalism[16] (as applied here, the idea that decisions about election procedures are primarily the province of the states).

Even though *Purcell* is supposedly about confusion—indeed, everyone says as much—this Note will demonstrate that rationale does not adequately explain the case law. In practice, the Supreme Court's applications of the Principle are better rationalized by federalism and disruption; both are necessary to trigger *Purcell*. Viewing *Purcell* as a part of the Court's commitment to federalism is important not only to explain *when* and *why* the Principle should be invoked, but it also harmonizes this doctrine with the Roberts Court's jurisprudence in other areas of election law and beyond. Further, because application of the Principle will effectively neuter election law in the federal courts for a given election cycle, my proposed disruption framework is useful to future litigants making strategic decisions about *where*, *when*, and *how* to bring their claims.

On their face, the Supreme Court's applications of *Purcell* may seem partisan. Professor Steve Vladeck, for example, has characterized the *Purcell* Principle as "[h]ow the [c]urrent Court [u]ses the Shadow Docket to [h]elp Republicans."[17] And Professor Wilfred Codrington has described it as "an empty vessel for unprincipled decisionmaking and inconsistent rulings."[18] But this Note suggests there may be an unarticulated rationale that better accounts for the Court's decisions in this area. In doing so, I do not purport that this is the "true" motivation guiding *Purcell* or what individual Justices are necessarily thinking. Rather, this Note offers federalism as an alternate, novel ground in a framework that seeks to make the Court's applications of the Principle more coherent. If you reconsider *Purcell* as a federalism principle with

[16] Federalism can broadly be defined as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." Federalism, Black's Law Dictionary (11th ed. 2019).

[17] Vladeck, supra note 5, at vii. In May 2024, however, the Supreme Court applied *Purcell* to hand what appeared to be a victory to Democrats—staying a district court injunction that paved the way for Louisiana to use a redistricting map with an additional majority-Black district in November. See Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024) (mem.); Nina Totenberg, Supreme Court Upholds Louisiana Redistricting Plan, NPR (May 15, 2024, 6:44 PM), https://www.npr.org/2024/05/15/1250937356/supreme-court-louisiana-redistricting [https://perma.cc/E8Y9-RDL8].

[18] Codrington, supra note 13, at 941.

me and read these cases through the lens of disruption, you just might be disabused of your cynicism.

This Note proceeds in three Parts. Part I introduces the origins of the *Purcell* Principle and its professed rationales: preventing voter confusion, providing clear guidance to the states, and deferring to the district court. It then surveys the development of the doctrine by reviewing each case in which the Supreme Court has applied the *Purcell* Principle or otherwise discussed it. Part II then analyzes whether the three rationales announced in *Purcell* are supported by the subsequent case law. (This Note contends they aren't.) Having chipped away at those rationales, Part III argues that the Principle is better understood as being justified by the Court's concerns with federalism. Federalism requires insulating to some degree the ability of the state to dictate the rules that govern its elections. If *Purcell* is defined by the power of federal courts vis-à-vis the states, the Court's historic applications of the Principle and the Principle's limits make more sense. Reconceptualizing the doctrine in this way, I propose a new framework to explain what should trigger *Purcell*. In deciding whether the Principle ought to be applied, courts would reach more consistent, analytically sound results by asking whether judicial intervention would *disrupt* a state's administration of its elections. If an order changing the election rules or procedures would be disruptive, the Principle is invoked and operates as a near-total bar on judicial relief. But where intervention wouldn't be disruptive, *Purcell* does not govern and a federal court's decision to enjoin that state procedure is permissible. I conclude by proposing four conditions necessary for finding disruption, which courts can look to in determining whether the Principle should be applied in a given case.

## I. HISTORY AND APPLICATIONS OF THE *PURCELL* PRINCIPLE

The *Purcell* Principle has been discussed by the Justices in fourteen cases from 2006—when its eponym, *Purcell v. Gonzalez*, was handed down—through the Supreme Court's 2023 Term. This Part demonstrates how the Principle has evolved by examining each of those cases, starting with *Purcell* itself. A review of the case law reveals how the Court's applications of the Principle over time have strayed from the rationales originally announced in *Purcell*, indicating that a different framework is needed to explain the doctrine.

### *A.* Purcell v. Gonzalez*: A Principle Is Born*

In 2004, Arizona voters approved Proposition 200, a ballot initiative that purported to "combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day."[19] Voters brought suit in federal district court in May 2006, seeking to challenge those requirements.[20] Plaintiffs also requested a preliminary injunction to bar the law's enforcement in the upcoming 2006 midterm elections. Without issuing findings of facts or conclusions of law, the district court denied preliminary relief on September 11, 2006.[21]

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit, again requesting an injunction. This time, however, the request was granted. On October 5, the Ninth Circuit enjoined Arizona from enforcing the new provisions.[22] Because the court set a briefing schedule on the merits that concluded two weeks after election day, the voter ID laws were poised to remain benched for the midterms. But the Supreme Court then granted certiorari to review the Ninth Circuit's decision.[23]

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[19] Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam).

[20] Id. at 3. At the time, Arizona was a covered jurisdiction under Section 5 of the VRA, so it was required to preclear the provision before it could take effect. Id. at 2. The U.S. Attorney General precleared the procedures in May 2005. Id. at 3.

[21] Gonzalez v. Arizona, No. 06-cv-01268, 2006 WL 3627297, at *9 (D. Ariz. Sept. 11, 2006) (noting that "[d]etailed findings of fact and conclusions of law will follow").

[22] The Ninth Circuit's order is not reported, but it can be viewed on the court's docket and is quoted in the Ninth Circuit's subsequent decision. See Gonzalez v. Arizona, No. 06-16702 (9th Cir. Oct. 5, 2006), ECF No. 12; Gonzalez v. Arizona, 485 F.3d 1041, 1047 (9th Cir. 2007) ("The court enjoins implementation of Proposition 200's voting identification requirement in connection with Arizona's November 7, 2006 general election; and enjoins Proposition 200's registration proof of citizenship requirements so that voters can register before the October 9, 2006 registration deadline. This injunction shall remain in effect pending disposition of the merits of these appeals.").

On October 12, a week after the Ninth Circuit entered its injunction, the district court entered findings of fact and law supporting its decision. Gonzalez v. Arizona, No. 06-cv-001268, 2006 WL 8431038, at *1 (D. Ariz. Oct. 12, 2006). The court concluded that "[p]laintiffs have shown a possibility of success on the merits of some of their arguments but the Court cannot say that at this stage they have shown a strong likelihood." Id. at *4 (internal quotation marks omitted) (citation omitted).

[23] *Purcell*, 549 U.S. at 2. For reasons that are not immediately clear, the Court construed the plaintiffs' motion to stay the injunction as a petition for certiorari, "an incredibly rare occurrence." Dodsworth, supra note 13, at 1089 n.45; see also Orin Kerr, Supreme Court Allows Voter ID Law, Volokh Conspiracy (Oct. 20, 2006, 5:05 PM), https://volokh.com/posts/1161378321.shtml [https://perma.cc/22DJ-X6D4] (referring to the Court's action as "something rare enough to seem sort of like a lightning bolt from above").

On October 20, in an unsigned opinion without the benefit of full briefing and oral argument, the Court vacated the Ninth Circuit's injunction and put Proposition 200's provisions back into effect.[24] The Supreme Court did not resolve the merits, but rather vacated the injunction because the court of appeals failed to weigh "considerations specific to election cases."[25] These special considerations are what became known as the *Purcell* Principle.[26] But what are they? While the Court did not neatly formulate a list or multifactor test, three separate concerns are discernible from the Court's brief opinion.[27]

The first is voter confusion. Court orders intervening in an election can "result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[28] Second, the Court emphasized "the necessity for clear guidance to the State."[29] And third, deference should have been given to the decision of the district court.[30]

The Court struck down an injunction because these three considerations were not properly weighed by the court below. But in creating a new legal doctrine out of whole cloth, *Purcell* raised more questions than it answered: Do these three "considerations" always determine whether the Principle should be invoked? Must a lower court run afoul of all three to merit reversal? How close to an election is "too close" in order to trigger these considerations? Must evidence be presented that voters will actually be confused? What is the baseline against which to measure voter confusion? How much deference ought to be given to the district court? And does it matter whether the district court decision rests on a developed record? The Section that follows begins to grapple with these questions by analyzing the applications of the Principle in the cases that followed *Purcell*.

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[24] *Purcell*, 549 U.S. at 6.

[25] Id. at 4–6 ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.").

[26] See Hasen, supra note 13, at 441. While Professor Richard Hasen coined the term "*Purcell* principle," it has since been used by the Court itself.

[27] Some scholars have omitted the deference rationale in their discussions of *Purcell*. See, e.g., Dodsworth, supra note 13, at 1090; Gao, supra note 13, at 1147.

[28] *Purcell*, 549 U.S. at 4–5.

[29] Id. at 5.

[30] 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.").

### *B.* Purcell*'s Progeny*

Through the Court's 2023 Term, *Purcell v. Gonzalez* has been cited in twenty Supreme Court cases. This includes citations in majority opinions, concurring opinions, and dissenting opinions,[31] as well as those from both the Court's emergency docket and regular docket. Table 1 outlines these cases.

The first two columns provide the name of the Supreme Court case in which *Purcell v. Gonzalez* was cited and the corresponding year. The third column indicates whether the Court's reference to *Purcell* in each case actually concerned the *Purcell* Principle.

[31] Pierce v. N.C. State Bd. of Elections, 97 F.4th 194, 247 (4th Cir. 2024) (Gregory, J., dissenting) ("Around [2018], members of the Supreme Court writing separately began to cite *Purcell* in support of blocking district and appellate court rulings that the authoring justice believed came too close to an election. However, no precedential Supreme Court opinion has ever addressed *Purcell*'s proper scope. . . . But in the absence of a Supreme Court majority opinion sufficient to clarify *Purcell*'s proper application, we must make the most of these separate writings." (citations omitted)).

Throughout this Note, I have endeavored to be clear about when *Purcell* is cited and discussed by the Supreme Court in a majority opinion, as opposed to in separate concurring and dissenting opinions of individual Justices. A recent Fifth Circuit case indicates the importance of this distinction. In a concurrence on behalf of nine judges, Judge Oldham described *Veasey v. Perry*, *Merrill v. People First of Alabama*, *Andino v. Middleton*, *Raysor v. DeSantis*, *Moore v. Harper*, and *Merrill v. Milligan* as cases where the "Supreme Court" "cit[ed] *Purcell*." Petteway v. Galveston County, 87 F.4th 721, 723 (5th Cir. 2023) (en banc) (Oldham, J., concurring) (citations omitted). However, as the discussion of each case *infra* will reveal, *not a single one* of the citations to *Purcell* actually came from the Supreme Court as a majority; each occurred in a separate opinion signed by less than a majority of the Court. Professor Steve Vladeck first pointed out this inaccuracy. See Steve Vladeck (@steve_vladeck), X (Dec. 7, 2023, 10:26 PM), https://twitter.com/steve_vladeck/status/1732964965194014973?s=46&t=D1R-qZ21lThGySVOkgIevQ [https://perma.cc/29F8-SNKR] ("In defending the en banc Fifth Circuit's reliance on the Purcell principle in issuing a stay in the Galveston case, Judge Oldham points to six examples in which he claims that #SCOTUS 'cit[ed] Purcell.' Just one problem: *None* of the six orders he invokes . . . cited Purcell." (quoting *Petteway*, 87 F.4th at 723)).

**Table 1.** Supreme Court Cases Citing *Purcell*

| Case Name | Year | ***Purcell*** **Principle Case?** |
|---|---|---|
| *Crawford v. Marion County Election Board* | 2008 | No |
| *Riley v. Kennedy* | 2008 | No |
| *Doe v. Reed* | 2010 | No |
| *Arizona v. Inter Tribal Council of Arizona, Inc.* | 2013 | No |
| *Veasey v. Perry* | 2014 | Yes |
| *Benisek v. Lamone* | 2018 | Yes |
| *North Carolina v. Covington* | 2018 | Yes |
| *Brakebill v. Jaeger* | 2018 | Yes |
| *RNC v. DNC* | 2020 | Yes |
| *Raysor v. DeSantis* | 2020 | Yes |
| *Andino v. Middleton* | 2020 | Yes |
| *Merrill v. People First of Alabama* | 2020 | Yes |
| *DNC v. Wisconsin State Legislature* | 2020 | Yes |
| *Republican Party of Pennsylvania v. Degraffenreid* | 2021 | Yes |
| *Brnovich v. DNC* | 2021 | No |
| *Merrill v. Milligan* | 2022 | Yes |
| *Moore v. Harper* | 2022 | Yes |
| *Rose v. Raffensperger* | 2022 | Yes |
| *Labrador v. Poe ex rel. Poe* | 2024 | No |
| *Robinson v. Callais* | 2024 | Yes |

As Table 1 indicates, not every case that cites *Purcell* involves the *Purcell* Principle itself. Rather, the citations to *Purcell* can be divided into two categories: First, there are cases that do invoke the Principle—in other words, cite *Purcell* in connection with whether injunctive relief is appropriate based on the proximity of the decision to grant that relief in relation to an election. These have typically arisen in connection with a request to stay or vacate the stay of a lower court's order. Second, there are those cases where *Purcell* is cited for other reasons, such as the right to vote or election integrity.[32] This Note is concerned only with the former

[32] In *Crawford v. Marion County Election Board*, Justice Souter cited *Purcell* in connection with the "fundamental right to vote" and the compelling interest of "preventing voter fraud." 553 U.S. 181, 210, 225 (2008) (Souter, J., dissenting) (quoting *Purcell*, 549 U.S. at 4). Similarly, in *Doe v. Reed*, the Court quoted from *Purcell* regarding the State's interest in rooting out voter fraud. 561 U.S. 186, 197 (2010) (citation omitted). Justice Thomas also quoted from *Purcell* in dissent. Id. at 228 (Thomas, J., dissenting) ("Just as '[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,' so too is citizen *participation* in those processes, which necessarily entails political speech and association under the First Amendment." (alteration in original) (quoting

category of cases. I have marked these with a "Yes," identifying them as a *Purcell* Principle case in Table 1, and I discuss each in turn.

*1. Early Cases*

In the early cases citing *Purcell* regarding the timing of an upcoming election, little analysis was given to how the Principle should be applied generally, beyond the facts of the given case.

*Veasey v. Perry* came first.[33] At issue was Texas Senate Bill 14 ("SB 14"), which required voters to present certain photo identification at the polls.[34] On October 9, 2014, the district court issued an opinion that it would "enter a permanent and final injunction against enforcement of the voter identification provisions" in SB 14.[35] The Fifth Circuit, citing *Purcell*, stayed the district court's order on October 14.[36] And four days later, the Supreme Court denied an application to vacate the stay, allowing the law to remain in effect.[37]

*Purcell*, 549 U.S. at 4)). And in *Brnovich v. Democratic National Committee*, upholding a law placing restrictions on ballot collection, the Court noted that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." 141 S. Ct. 2321, 2347 (2021) (quoting *Purcell*, 549 U.S. at 4).

Separately, *Riley v. Kennedy* concerned whether the Supreme Court of Alabama's invalidation of an election law required the State to preclear the prior practice before it went back into effect. 553 U.S. 406, 426 (2008). Before striking down the law, the Alabama Supreme Court had refused to stay the upcoming special election pending its decision on the merits. Id. at 415. The U.S. Supreme Court determined that conducting one election using the unconstitutional practice did not render preclearance necessary in order to revert to the prior procedure; the Court explained that "we have recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." Id. at 426 (citing *Purcell*, 549 U.S. at 5–6). And in *Labrador v. Poe ex rel. Poe*, Justice Kavanaugh cited *Purcell* as an example of an "important decision[] for the Nation" made on the Court's emergency docket. 144 S. Ct. 921, 934 (2024) (Kavanaugh, J., concurring in the grant of stay, joined by Barrett, J.) (citations omitted).

[33] 574 U.S. 951 (2014) (mem.).

[34] Veasey v. Perry, 769 F.3d 890, 891–92 (5th Cir. 2014).

[35] Veasey v. Perry, 71 F. Supp. 3d 627, 707 (S.D. Tex. 2014) ("To preserve that right, the Court, pursuant to its equitable powers and to redress the VRA claims of discriminatory result and discriminatory purpose, will enter a permanent and final injunction against enforcement of the voter identification provisions . . . ."). The final judgment was not entered until October 11. See Final Judgment, Veasey v. Perry, No. 13-cv-00193 (S.D. Tex. Oct. 11, 2014), ECF No. 633.

[36] *Veasey*, 769 F.3d at 892 ("This is not a run-of-the-mill case; instead, it is a voting case decided on the eve of the election. The judgment below substantially disturbs the election process of the State of Texas just nine days before early voting begins.").

[37] *Veasey*, 574 U.S. at 951.

While the Court did not issue an opinion discussing the case's relationship to *Purcell*, Justice Ginsburg did in dissent. Just as the Ninth Circuit in *Purcell* erred by *entering* an injunction, the dissent reasoned that the Fifth Circuit erred in *staying* the district court's injunction here. The court "accorded slim, if any, deference" to the district court's judgment, which rested its injunction on an extensive record following a full trial.[38] The dissent also explained that the injunction would not "disrupt" the State's electoral processes because it merely required Texas to "reinstate the voter identification procedures it employed for ten years."[39] Finally, since the district court established an expedited schedule back in November 2013, "Texas knew full well that the court would issue its ruling only weeks away from the election. The State thus had time to prepare for the prospect of an order barring the enforcement of [SB] 14."[40]

While the court of appeals in *Purcell issued* the injunction and the court of appeals in *Veasey stayed* the injunction, the ultimate outcome was the same following review in the Supreme Court: the challenged laws were permitted to go in effect for the upcoming election. And while the injunction had been entered 33 days before the election in *Purcell*, here it was even closer at 26 days.[41]

Next, in *Benisek v. Lamone*, voters brought a challenge seeking to enjoin Maryland's congressional election under a map that it alleged was

[38] Id. (Ginsburg, J., dissenting, joined by Sotomayor & Kagan, JJ.).

[39] Id. at 952.

[40] Id.

[41] Throughout this Note, I refer to how close certain court decisions came in relation to election day. The process I used to determine the relevant number of days for each case is as follows: I started with the date that the *lower* federal court entered an injunction. I then located the date of the next upcoming election. The election day date was obtained from the lower court or Supreme Court opinions (where available) or from Ballotpedia where the specific date was not referenced in a court opinion. I then calculated the number of days between the injunction date and election day by using an online day calculator. See Time and Date, Days Calculator: Days Between Two Dates, https://www.timeanddate.com/date/duration.html [https://perma.cc/BW2H-K9CV] (last visited July 22, 2024). Where both a primary and general election were implicated, I calculated the number of days to each election day. The number of days between the lower court's decisions and the relevant election date(s) are collected and outlined in Tables 2 and 3, *infra*.

For example, in *Purcell v. Gonzalez*, the lower court injunction was entered by the Ninth Circuit on October 5, 2006. Gonzalez v. Arizona, No. 06-16702 (9th Cir. Oct. 5, 2006), ECF No. 12. The relevant upcoming election day was on November 7, 2006. Purcell v. Gonzalez, 549 U.S. 1, 3 (2006) (per curiam) (referencing "the upcoming November 7 election"). There are 33 days between October 5, 2006, and November 7, 2006.

an unconstitutional partisan gerrymander.[42] Plaintiffs represented to the district court that injunctive relief would need to be "granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season."[43] Yet, the district court did not issue its decision denying preliminary injunctive relief until August 24, 2017.[44] Affirming that decision almost ten months later, the Supreme Court cited *Purcell*. The Court held that "a due regard for the public interest in orderly elections supported the District Court's discretionary decision to deny a preliminary injunction."[45] As in *Purcell*, the district court did not afford injunctive relief. But here, that decision came 306 days before the next primary election and 439 days before election day in the general.[46]

Similarly, in *North Carolina v. Covington*, voters alleged that the North Carolina General Assembly racially gerrymandered its state legislative districts.[47] On January 21, 2018, the district court approved a special master's recommended redistricting plan.[48] Before the Supreme Court, the defendants argued that the district court abused its discretion by arranging for a special master—rather than the state legislature—to draw the remedial map.[49] But the Court affirmed the court-drawn remedy, citing *Purcell*, and explained that "the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections."[50]

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[42] 138 S. Ct. 1942, 1945 (2018) (per curiam); Benisek v. Lamone, 266 F. Supp. 3d 799, 802 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942.

[43] *Benisek*, 138 S. Ct. at 1945.

[44] *Benisek*, 266 F. Supp. 3d at 799, 816.

[45] *Benisek*, 138 S. Ct. at 1944–45. *Benisek* is the only case referencing the *Purcell* Principle in which the Court heard oral argument before issuing the relevant decision. See Transcript of Oral Argument, *Benisek*, 138 S. Ct. 1942 (No. 17-333).

[46] While the lower court here declined to enter an injunction, the process for calculating the number of days remains the same. The lower court entered its decision on August 24, 2017. *Benisek*, 266 F. Supp. 3d at 801. The 2018 general election was held on November 6, 2018. See id. at 802 ("Plaintiffs seek preliminary injunctive relief in the form of an order barring the State from enforcing the 2011 redistricting plan and requiring the State to implement a new map in advance of the 2018 midterm elections."); Ballotpedia, Maryland Election 2018, https ://ballotpedia.org/Maryland_elections,_2018 [https://perma.cc/L9KF-VBCJ] ("November 6, 2018: General election"). The 2018 Maryland primary election was held on June 26, 2018. Id. ("June 26, 2018: Primary election"). There are 306 days between August 24, 2017, and June 26, 2018, and 439 days between August 24, 2017, and November 6, 2018.

[47] 138 S. Ct. 2548, 2550 (2018) (per curiam).

[48] Covington v. North Carolina, 283 F. Supp. 3d 410, 414 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548.

[49] *Covington*, 138 S. Ct. at 2253.

[50] Id. at 2253–54 (citing *Purcell*, 549 U.S. at 4–5).

Unlike in most of the cases where *Purcell* is referenced, an emergency application to stay the district court's order was not at issue in *Covington*. In fact, the Court had previously denied (in part) a stay pending appeal with no mention of *Purcell*.[51] And notably, the Supreme Court again greenlit the district court's intervention here. While the Court recognized that "[s]tate legislatures have primary jurisdiction over legislative reapportionment," the district court did not abuse its discretion in determining that "'providing the General Assembly with a second bite at the apple' risked 'further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle.'"[52] Here, the district court decision came 107 days before the North Carolina primary and 289 days before the 2018 midterm elections.

If the decision in *Benisek* was too close to the election but that in *Covington* was not, one might square the outcomes of these cases by theorizing that the former is justified by the representation the plaintiffs made regarding the timeline of when the court needed to act. Nevertheless, in these early cases, only cursory analysis is given to the *Purcell* Principle. While the number of days before the relevant election in each may provide a benchmark on the question of how close is too close for a court to intervene, these cases do not otherwise provide much insight into how and when *Purcell* should be applied more broadly.

### *2. Determining the Status Quo*

In the next several cases, the Justices began grappling with the voter confusion rationale from *Purcell*. In doing so, their opinions debate the relevant status quo against which to measure confusion.

First, *Brakebill v. Jaeger* concerned a North Dakota law requiring voters to present a valid form of identification containing their legal name, residential street address, and date of birth.[53] The district court enjoined the residential street address requirement on April 3, 2018.[54] However, the Eighth Circuit stayed that order, which the Supreme Court denied an application to vacate—allowing the law to go into effect for the 2018

[51] North Carolina v. Covington, 138 S. Ct. 974, 974 (2018) (mem.).

[52] *Covington*, 138 S. Ct. at 2554 (alterations in original) (first quoting White v. Weiser, 412 U.S. 783, 795 (1973); and then quoting *Covington*, 283 F. Supp. 3d at 448 n.10).

[53] Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (mem.); Brakebill v. Jaeger, 905 F.3d 553, 556 (8th Cir. 2018).

[54] Brakebill v. Jaeger, No. 16-cv-00008, 2018 WL 1612190, at *7 (D.N.D. Apr. 3, 2018).

midterms.[55] Justice Ginsburg, joined by Justice Kagan, challenged the Court's decision in dissent. She quoted from *Purcell* that "last minute '[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.'"[56] Here, the risk of voter confusion was "severe" because the injunction had been in force during the primary election; "[r]easonable voters may well assume that the IDs allowing them to vote in the primary election would remain valid in the general election."[57] Yet, the dissent argued, the confusion arising from the Court vacating the stay would "at most" lead to voters securing an unnecessary, extra form of ID.[58] That inconvenience "pales in comparison to the confusion caused by the Eighth Circuit's [stay], which may lead to voters finding out at the polling place that they cannot vote because their formerly valid ID is now insufficient."[59]

The dissent reveals several takeaways regarding one conception of the *Purcell* Principle. Justices Ginsburg and Kagan reason that the Principle should apply equally to lower appellate courts *staying* injunctions (*Brakebill*) as it does to lower appellate courts *issuing* injunctions (*Purcell*). Both have the power to create voter confusion when the order breaks from the legal status quo as settled by the *district court*. But the inquiry ought to be concerned not just with the existence of voter confusion, but the effect of that confusion. Where, as in *Brakebill*, the Supreme Court would be lifting burdens on the ability to vote, the dissent argues that the injunction should be permitted to stand.[60]

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[55] *Brakebill*, 905 F.3d at 561; *Brakebill*, 139 S. Ct. at 10 (mem.).

[56] *Brakebill*, 139 S. Ct. at 10 (Ginsburg, J., dissenting, joined by Kagan, J.) (alteration in original) (quoting *Purcell*, 549 U.S. at 4–5).

[57] Id.

[58] Id.

[59] Id. at 10–11.

[60] In this vein, one scholar has sorted election-related court orders into two categories, positive and negative:

> "Positive" orders add voting restrictions, while "negative" orders remove voting restrictions. Each category leads to different types of confusion. Positive orders produce underinclusive voter behavior—think bringing less identification to the polls than necessary—which risks disenfranchisement. Negative orders, on the other hand, lead to overinclusive voter behavior—think bringing more identification than necessary—which tends not to prevent people from voting.

Dodsworth, supra note 13, at 1081 (urging courts to adopt a presumption that "negative orders do not confuse voters in a way that disenfranchises those voters unless evidence suggests otherwise").

In *Republican National Committee v. Democratic National Committee* (*RNC v. DNC*), however, a majority of the Court rejected that approach. At issue was when absentee ballots must be mailed and postmarked in order to be counted.[61] Because of concerns related to the COVID-19 pandemic, the district court granted a preliminary injunction extending the deadline for receipt of absentee ballots from April 7, 2020 (election day) to April 13.[62] The district court entered its order five days before the election.[63] And the Seventh Circuit denied a motion to stay.[64] But just one day before the election, on April 6, the Supreme Court issued a stay; its reasoning turned largely on the *Purcell* Principle.[65]

In an unsigned opinion, the Court held that "[b]y changing the election rules so close to the election date," the district court "contravened" Supreme Court precedent, which "repeatedly emphasize[s] that lower federal courts should ordinarily not alter the election rules on the eve of an election."[66] The dissent—also citing *Purcell*—reasoned that the Supreme Court's order was sure to cause confusion.[67] "If proximity to the

[61] 140 S. Ct. 1205, 1206 (2020) (per curiam). "[T]he 2020 election cycle was characterized by an unusual volume of late changes to election rules in response to the perceived risks of in-person, Election Day voting." Vladeck, supra note 5, at 209. Litigated within the first few weeks of the COVID-19 pandemic, *RNC v. DNC* is just one of many cases grappling with how to safely run an election during this time—and the role of the judiciary in doing so. Other scholars have focused directly on the role that the *Purcell* Principle played in deciding election law disputes during the pandemic. See, e.g., Codrington, supra note 13, at 946 (arguing that the cases from the 2020 primaries and general election "laid bare" *Purcell*'s shortcomings and revealed the doctrine "consistently results in rulings that are detrimental to the nation's most vulnerable voters"); Andrew Vazquez, Note, Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the Covid-19 Pandemic and Opened the Door for Abuse of State Power, 48 Fordham Urb. L.J. 967, 1008–14 (2021) (arguing that the Court's reliance on the *Purcell* Principle posed unconstitutional burdens on the right to vote); Morley, supra note 13, at 428 (arguing that the Supreme Court "erred in extending the *Purcell* Principle to election emergency litigation"). While the pandemic provided more applications of the *Purcell* Principle to consider, the framework developed by this Note does not treat differently the COVID-era cases from those other cases discussed.

[62] Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 975–77, 983 (W.D. Wis. 2020).

[63] Id.

[64] Democratic Nat'l Comm. v. Bostelmann, Nos. 20-1538, 20-1539, 20-1546, 20-1545, 2020 WL 3619499, at *1 (7th Cir. Apr. 3, 2020).

[65] *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

[66] Id. at 1207 (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).

[67] Id. at 1210 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.) ("Election officials have spent the past few days establishing procedures and informing voters in accordance with the District Court's deadline. For this Court to upend the process—a day before the April 7 postmark deadline—is sure to confound election officials and voters.").

election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate."[68] But the majority denied that the proper course of action was to sit on its hands: "The Court would prefer not to [intervene at this late date], but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court . . . should correct that error."[69]

Both the majority and dissent agree that *Purcell* ought to dictate the resolution of the case, but each reaches a different outcome when the Principle is applied. How can that be? Using a framework developed by Harry Dodsworth, the divide might be understood as a disagreement on what is the relevant "status quo" against which to measure voter confusion.[70] In order to assess the likelihood of voter confusion, the Court must first identify the status quo—that is, the election rules it believes voters are familiar with.[71] When those rules are changed by a court order, confusion can be evaluated by looking to how the new rules differ from what voters previously expected. The rule originally adopted by a state legislature, a district court's order enjoining the rule's enforcement, a federal appellate court's decision on whether to stay the injunction, and the Supreme Court's review of that decision all might result in a change to the legal status of a given election rule. So what is the correct status quo? And how do we identify it?

The majority uses a first-in-time rule by looking to the content of state law as the status quo—before a federal court intervened. According to Dodsworth, this assumes voters derive knowledge about election rules from legislation and will "become confused if voting procedures [used on election day] differ from the procedures listed in the state code.[72] It is for this reason the majority speaks to "*lower* federal courts" altering election rules.[73] The Principle is meant to restrain lower federal courts from granting an injunction, but it need not hamstring the Supreme Court from staying an injunction improperly granted by a lower court. Even though the Supreme Court's review necessarily comes closer in time to election

[68] Id. at 1210–11.

[69] Id. at 1207 (majority opinion). The Court also expressed concerned that the district court's order in the case "fundamentally alter[ed] the nature of the election." Id.

[70] Dodsworth, supra note 13, at 1104–09.

[71] Id. at 1105.

[72] Id. at 1107 (referring to this as the "'state law' frame").

[73] *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

day, entering a stay does not cause any confusion because it merely returns to the status quo: state law.

In contrast, the dissent contends that an appellate court's stay *can* disrupt the status quo.[74] This view assumes what a voter will reasonably expect on election day is determined not simply by state law, but also takes into account how subsequent court orders may change the status of that law.[75] To the extent a court's injunction was in effect for some important period of time leading up to the election, it may be enough to establish that order as the relevant status quo.[76] If so, an appellate court should be wary of changing the rules by staying that injunction.

To see how these competing views play out, look no further than the previous two cases. In *Brakebill*, the state law required a valid ID in order to vote. So, to the majority, voters would expect to need a valid ID. The district court's order enjoining enforcement of that rule disrupted the status quo and thus *Purcell* counseled a stay. To the dissent, however, "the district court's order was the status quo because it was in place for the most recent primary [election]."[77] This meant that *not* needing an ID was what voters were familiar with and would expect for the general election.[78] As such, the appellate court's stay of the injunction—putting the ID requirement back into effect—disrupted the status quo.

Similarly, in *RNC v. DNC*, the majority viewed the deadline set by state law as the status quo. Because the district court's order extended that deadline, a stay was warranted under *Purcell*.[79] The dissent, however, considered that the Supreme Court's decision came just one day before the election. Voters might have relied on the district court's order extending the deadline and expected that complying with it would allow their ballots to be counted. If that was their expectation, the Court reimposing the original deadline might have caused confusion, resulting in disenfranchisement. This is why the dissent calls foul on the majority chastising the lower court for altering election rules on the eve of an

[74] Dodsworth, supra note 13, at 1108 (noting that this view "includes the reviewing court's *own* order as a large part of the voter confusion calculus").

[75] Id. at 1107 (referring to this as the "'recency' frame").

[76] Id.

[77] Id. at 1106.

[78] See id.

[79] See id.

election, while at the same time the Court itself changed the rules quite literally on the election's eve.[80]

The cases that followed demonstrate a similar clash over how voter confusion fits within the Principle. *Raysor v. DeSantis* concerned a Florida law under which residents who had been convicted of a felony could not have their right to vote restored until they paid off all court fees, fines, and restitution.[81] The district court issued a preliminary injunction in October 2019, which the Eleventh Circuit affirmed.[82] Consequently, felons who failed to pay off their fees were authorized to register to vote, and tens of thousands of them did so in advance of the primary election.[83] Following a bench trial, the district court entered a permanent injunction on May 24, 2020.[84] This time, however, the Eleventh Circuit stayed the injunction.[85] "[I]nvoking *Purcell*," the plaintiffs asked the Supreme Court to vacate that stay, "arguing that the Eleventh Circuit had changed the rules for an election on the eve of the relevant deadline, and had failed to either justify its ruling or explain why the district court ruling that it blocked was wrong."[86] The Supreme Court refused, drawing a dissent on *Purcell* grounds.[87]

The dissent again focused on the voter confusion rationale. Justice Sotomayor explained that the stay "created the very 'confusion' and voter chill that *Purcell* counsels courts to avoid."[88] Because the district court's

[80] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1210–11 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.); Dodsworth, supra note 13, at 1106 ("Is there not a hint of hypocrisy in the Supreme Court reprimanding a district court for 'alter[ing] the election rules on the eve of an election,' and then providing relief by *itself* altering the election rules on the actual eve of an election?" (alteration in original) (quoting *Republican Nat'l Comm.*, 140 S. Ct. at 1207)).

[81] 140 S. Ct. 2600, 2600 (2020) (mem.); see id. (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.) (describing the factual background of the case).

[82] Jones v. DeSantis, 410 F. Supp. 3d 1284, 1284, 1310 (N.D. Fla. 2019); Jones v. Governor of Fla., 950 F.3d 795, 800 (11th Cir. 2020) (per curiam).

[83] *Raysor*, 140 S. Ct. at 2603 (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.).

[84] Jones v. DeSantis, 462 F. Supp. 3d 1196, 1196, 1248 (N.D. Fla. 2020), *rev'd and vacated sub nom.* Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc).

[85] McCoy v. Governor of Fla., No. 20-12003, 2020 WL 4012843, at *1 (11th Cir. July 1, 2020).

[86] Vladeck, supra note 5, at 212.

[87] *Raysor*, 140 S. Ct. at 2600 (mem.); id. (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.).

[88] Id. at 2603 (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.).

decision tracked the Eleventh Circuit's affirmance of the preliminary injunction from months prior, "the stay upend[ed] the legal status quo nearly a year after the preliminary injunction took effect. . . . No doubt tens of thousands of Floridians with felony convictions ha[d] already registered to vote: That is precisely what [the Eleventh Circuit previously] said they could do."[89] The dissent reasoned that the preliminary injunction—rather than the state law it enjoined—had become the status quo. As a consequence:

> [Floridians] who registered in reliance on the preliminary and permanent injunctions will remain on the voter rolls despite the Eleventh Circuit's stay. Yet because of the Eleventh Circuit's decision, these voters will have no notice of their potential ineligibility or the resulting criminal prosecution they may face for failing to follow the abrupt change in law.[90]

This was the last *Purcell* Principle decision issued by the Court before Justice Ginsburg died on September 18, 2020.[91]

Next, *Andino v. Middleton* involved a South Carolina requirement that another individual must witness a voter's signature on their absentee ballot envelope for the vote to be counted.[92] In advance of the June 2020 primary, the district court enjoined the State from enforcing the witness requirement in the primary election.[93] The district court later entered a similar injunction for the general election.[94] A Fourth Circuit panel stayed this injunction,[95] but the en banc court vacated that stay.[96] Concurring in the en banc decision, one judge wrote that the court had "preserved the electoral status quo in South Carolina."[97] Due to the COVID-19 pandemic, the "June primary was . . . the first election for thousands of South Carolinians to vote by absentee ballot, and those citizens have only

[89] Id.

[90] Id. (citation omitted).

[91] Steve Vladeck, *Purcell* and the Partisan Valence of the Supreme Court's 2020 Election Cases, Election L. Blog: ELB Book Corner (May 16, 2023, 7:00 AM), https://electionlawblog.org/?p=136183 [https://perma.cc/C52U-CUTG].

[92] Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (mem.); Middleton v. Andino, 488 F. Supp. 3d 261, 267 (D.S.C. 2020).

[93] Thomas v. Andino, 613 F. Supp. 3d 926, 932 (D.S.C. 2020).

[94] *Middleton*, 488 F. Supp. 3d at 307.

[95] Middleton v. Andino, No. 20-2022, 2020 WL 5739010 (4th Cir. Sept. 24, 2020).

[96] Middleton v. Andino, 976 F.3d 403 (4th Cir. 2020); Middleton v. Andino, 990 F.3d 768 (4th Cir. 2020) (en banc).

[97] *Middleton*, 990 F.3d at 768 (King, J., concurring in the denial of a stay pending appeal).

voted absentee when no witness was necessary."[98] As such, the witness requirement "would likely . . . confuse and deter voters who, based on the rules of the June primary, reasonably expect the witness requirement to be suspended for the November general election, too."[99] But the Supreme Court disagreed, intervening to grant a stay.[100] In a short concurrence, Justice Kavanaugh explained that "[b]y enjoining South Carolina's witness requirement shortly before the election," the district court "defied" the *Purcell* Principle and the Court's precedents.[101]

In *Merrill v. People First of Alabama*,[102] the Supreme Court also intervened when the court of appeals refused to grant a stay. The case challenged Alabama election laws imposing a witness and photo identification requirement on absentee voting and a de facto ban on curbside voting.[103] Thirty-four days before the election, the district court entered an order "enjoining the enforcement of the witness requirement, photo ID requirement, and curbside voting ban for the November 2020 general election."[104] The court determined that each of these restrictions "violate[d] the right to vote in light of the COVID-19 pandemic."[105]

[98] Id. at 769.

[99] Id. (internal quotation marks omitted) (omission in original) (citation omitted).

[100] Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020) (mem.).

[101] Id. at 10 (Kavanaugh, J., concurring in grant of application for stay) (citation omitted). Later reflecting on the decision, the Fourth Circuit wrote:

> The Supreme Court's recent decision in *Andino* instructs that it is not federal court decisions, but state decisions, that establish the status quo. In *Andino*, there was a state law in place that was modified by a federal court injunction for the primaries; the state law continued to be in place for the November election; and the district court again enjoined it. [Our] view was that the injunction at the time of the primaries—establishing the rules when voters most recently voted—was the status quo. But our dissenting colleagues disagreed, viewing the state law as the status quo and federal court intervention as inappropriate under *Purcell*. The Supreme Court agreed with our colleagues. Apparently, then, it is the state's action—not any intervening federal court decision—that establishes the status quo.

Wise v. Circosta, 978 F.3d 93, 98 (4th Cir. 2020) (citations omitted).

[102] 141 S. Ct. 25 (2020) (mem.).

[103] The curbside voting ban was unique in that "[n]o provision of Alabama law expressly prohibits curbside or drive-thru voting" or "expressly provides for the practice." People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1129 (N.D. Ala. 2020). However, the Secretary of State determined that "curbside voting violate[d] state law" and intervened to stop the practice through court orders or calling law enforcement. Id. The district court held that "because curbside voting is a form of in-person voting at a polling site, counties may implement the practice without a grant of additional authority from the legislature." Id. at 1163.

[104] Id. at 1180.

[105] Id. at 1091.

Two weeks later, the Eleventh Circuit granted a stay of the injunction as to the witness and photo ID requirements but denied a stay as to the curbside voting ban.[106] The Supreme Court then stayed the order as to the curbside voting ban, assuring that all three impediments to voting were in effect for the 2020 election.[107]

A dissent written by Justice Sotomayor noted that "[t]o combat the spread of COVID-19, the Centers for Disease Control and Prevention recommend that States consider curbside voting."[108] The district court's order did not risk "creating voter confusion and consequent incentive to remain away from the polls" because "[t]he injunction lifts burdensome requirements rather than imposing them."[109] Dissenting Justices had raised a similar argument in both *Brakebill* and *RNC v. DNC*.[110] The dissent in *People First of Alabama* also explained that the order was a "reasonable accommodation" because it did not require any county to adopt curbside voting; "it simply g[ave] prepared counties the option to do so."[111]

*3. Exploring the Principle's Boundaries*

With a majority of the Court settling that state law establishes the status quo, the most recent set of cases reveal other dimensions of the *Purcell* Principle. In them, the Justices consider which courts the Principle binds, extend *Purcell*'s temporal scope as far as nine months before a general election, and suggest that the Principle's protections are waivable by the state. These cases explore the boundaries of the *Purcell* Principle, and several opinions employ rhetoric grounded in federalism to justify the Court's decision.

In *Democratic National Committee v. Wisconsin State Legislature* (*DNC v. Wisconsin State Legislature*), the Wisconsin absentee ballot deadline returned to the Court. In light of the COVID-19 pandemic, the

[106] People First of Ala. v. Sec'y of State for Ala., No. 20-13695, 2020 WL 6074333, at *1 (11th Cir. Oct. 13, 2020).

[107] *Merrill v. People First of Ala.*, 141 S. Ct. at 25 (mem.).

[108] Id. (Sotomayor, J., dissenting from grant of stay, joined by Breyer & Kagan, JJ.).

[109] Id. at 27 (internal quotation marks omitted) (citation omitted).

[110] Brakebill v. Jaeger, 139 S. Ct. 10, 10–11 (2018) (Ginsburg, J., dissenting from denial of the application to vacate stay, joined by Kagan, J.); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1209–10 (2020) (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.).

[111] *Merrill v. People First of Ala.*, 141 S. Ct. at 27 (Sotomayor, J., dissenting from grant of stay, joined by Breyer & Kagan, JJ.).

district court extended Wisconsin's deadline for receipt of absentee ballots by six days, so long as the ballots were postmarked on or before election day.[112] The Seventh Circuit stayed the injunction, and the Supreme Court declined to vacate that stay.[113] Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh each issued a concurring opinion.[114] All three opinions defended the stay with allusions to federalism,[115] but only Justice Kavanaugh invoked the *Purcell* Principle by name.[116]

He characterized the Principle as a "basic tenet of election law," writing that the "[Supreme] Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election."[117] Justice Kavanaugh also reaffirmed that the correct status quo to be protected is the state of the law *before* district court intervention.[118] He made clear that "[c]orrecting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule."[119] "[I]t would be preferable if federal district courts did not contravene the *Purcell* principle by rewriting state election laws close to an election. But when they do, appellate courts must step in."[120]

[112] Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 808 (W.D. Wis. 2020).

[113] Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 643 (7th Cir. 2020); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.).

[114] *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring in denial of application to vacate stay); id. (Gorsuch, J., concurring in denial of application to vacate stay, joined by Kavanaugh, J.); id. at 30 (Kavanaugh, J., concurring in denial of application to vacate stay).

[115] See infra Section III.B.

[116] *Democratic Nat'l Comm.*, 141 S. Ct. at 30 (Kavanaugh, J., concurring in denial of application to vacate stay).

[117] Id. at 30–31 (citing Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam)).

[118] See id. at 31 ("If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes."). Justice Kavanaugh appears to be adding a dimension to the *Purcell* Principle here by looking beyond just whether the court is providing clear guidance to the state and also taking into account the burdens placed on election officials. He recognizes that "judicial restraint not only prevents voter confusion but also prevents election administrator confusion." Id. This follows from his view that "running a statewide election is a complicated endeavor." Id.

[119] Id. at 31–32.

[120] Id. at 32.

On the very same day that the Court released its decision in *DNC v. Wisconsin State Legislature*, October 26, 2020, Justice Barrett was confirmed to succeed Justice Ginsburg.[121]

The last COVID-related case is *Republican Party of Pennsylvania v. Degraffenreid*.[122] About six weeks before the 2020 election, the Pennsylvania Supreme Court extended by three days the deadline for receiving mail-in ballots.[123] The U.S. Supreme Court denied applications to stay the Pennsylvania high court's decision.[124] Months after the election had passed, on February 22, 2021, the Court also denied petitions for writs of certiorari.[125]

Dissenting from the denial of certiorari, Justice Thomas suggested that the Pennsylvania high court's decision was made too "close" to election day.[126] Citing *Purcell*, he explained that unclear rules "sow confusion and ultimately dampen confidence in the integrity and fairness of elections. To prevent confusion, we have thus repeatedly—although not as consistently as we should—blocked rule changes made by courts close to an election."[127]

While this dissent arose in connection with the Court's decision to grant certiorari, one might infer that *Purcell* concerns were motivating Justice Thomas's dissent when the Court declined to grant a stay months before. But the 4-4 Court declined to intervene then without any mention of the Principle.[128]

Litigation surrounding the 2020 elections produced a host of cases invoking the *Purcell* Principle. The election cycles that followed have not matched that pace. The first *Purcell* case leading up to the 2022 elections

[121] Compare id. at 28 (mem.), with U.S. Senate, Roll Call Vote 116th Congress—2nd Session, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1162/vote_116_2_00224.htm [https://perma.cc/GU56-95R5] (last visited July 22, 2024).

[122] 141 S. Ct. 732 (2021) (mem.).

[123] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020).

[124] Scarnati v. Boockvar, 141 S. Ct. 644, 644 (2020) (mem.) (noting that "Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would grant the application," but with no reference to *Purcell*); Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.) (same). Note that there were only eight Justices on the Court at this time, as October 19, 2020, is one week before Justice Barrett was confirmed. See supra note 121 and accompanying text.

[125] *Degraffenreid*, 141 S. Ct. at 732 (mem.).

[126] Id. at 734 (Thomas, J., dissenting from denial of certiorari) (footnote omitted) (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam)).

[127] Id.

[128] *Scarnati*, 141 S. Ct. at 644 (mem.); Republican Party of Pa. v. Boockvar, 141 S. Ct. at 643 (mem.).

was *Merrill v. Milligan*, which I discussed in the Introduction. With Justice Barrett siding with the majority, the Supreme Court decided 5-4 to stay the district court's order and allow Alabama to use its map in the 2022 elections.[129]

Building off his views from previous cases, Justice Kavanaugh's concurrence provides the most thorough explication of the doctrine to date. Now referring to it as a "bedrock tenet of election law,"[130] he began by outlining the two dimensions of the *Purcell* Principle: (1) "federal district courts ordinarily should not enjoin state election laws in the period close to an election," and (2) "federal appellate courts should stay injunctions when . . . lower federal courts contravene that principle."[131] Justice Kavanaugh acknowledged that the Court's opinions "including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election."[132] Further, speaking to the question of how close is too close to an election to trigger *Purcell*, he explained that it "may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects."[133] "Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement."[134] In this case, he looked to the burden on election administrators, noting that the "District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion."[135]

[129] Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.). Recall that the Supreme Court later affirmed the district court's finding that the Alabama districting map "likely violated Section 2 of the Voting Rights Act." Allen v. Milligan, 143 S. Ct. 1487, 1498 (2023).

[130] *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.). Query whether a principle born in the year 2006 can fairly be characterized as a *bedrock tenet* of election law.

[131] Id. at 879 (citing *Purcell*, 549 U.S. 1).

[132] Id. at 881. His own view, however, is that the *Purcell* Principle "simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." Id. The Principle might be overcome if the plaintiff can establish: "(i) the underlying merits are entirely clearcut"; "(ii) the plaintiff would suffer irreparable harm absent the injunction"; "(iii) the plaintiff has not unduly delayed bringing the complaint to court"; and "(iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." Id.

[133] Id. at 881 n.1.

[134] Id.

[135] Id. at 880.

All four dissenters disagreed that *Purcell* was applicable here. Justice Kagan—writing for herself, Justice Breyer, and Justice Sotomayor—explained that "this case is not like *Purcell* because we are not 'just weeks before an election.'"[136] Rather, the general election was approximately *nine months* away and the primary about four.[137] The Court had extended the temporal scope of *Purcell* far beyond what had triggered the Principle in prior cases. Doing so, the dissent argued, set a dangerous precedent for the protection of voting rights. The State was "not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year."[138] Writing for himself, the Chief Justice also thought that the 2022 election should "take place in accord with the judgment of the District Court," with subsequent elections governed by the Supreme Court's decision on merits review.[139] As such, he too believed that the election was not sufficiently close to warrant abstention; however, he did not cite *Purcell*.[140]

*Merrill v. Milligan* suggests that the *Purcell* Principle may be triggered in redistricting cases even earlier in time than it is in those cases involving injunctions related to the nuts and bolts of elections—such as voter identification requirements or absentee ballot deadlines. Where electoral maps are at issue, more time leading up to election day is perhaps necessary because of the additional steps in the process following adoption of a map. For example, candidates need to know what the district lines are to register their candidacy, and primary elections may need to be held.

Exactly one month later, however, the Court rejected a request to stay in another redistricting case: *Moore v. Harper*.[141] Following the 2020 census, North Carolina adopted new congressional and state legislative

[136] Id. at 888 (Kagan, J., dissenting from grant of applications for stays, joined by Breyer & Sotomayor, JJ.) (citations omitted).

[137] Id.

[138] Id. at 888–89. Note that the plaintiffs challenging the map "had filed suit on the very day that the map had been adopted—the earliest possible moment for such legal action." Vladeck, supra note 5, at 220. As such, "[Justice] Kavanaugh's *Purcell* analysis effectively suggested that there was nothing the district court could have done to stop Alabama from using an unlawful map for at least one election cycle." Id.

[139] *Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting from grant of applications for stays).

[140] Id. at 882–83.

[141] 142 S. Ct. 1089 (2022) (mem.). On the merits, *Moore v. Harper* was the case in which the Supreme Court rejected the independent state legislature theory, holding that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." 143 S. Ct. 2065, 2081 (2023).

maps.[142] After enactment, plaintiffs challenged the redistricting scheme in state court, alleging it violated the state constitution by "establishing severe partisan gerrymanders."[143] The Supreme Court of North Carolina struck down the maps and remanded for the lower court to oversee the redrawing.[144] On remand, the trial court rejected a new map proposed by the legislature and, instead, required the State to use a map created by court-appointed experts.[145] The Supreme Court of North Carolina declined to stop the use of the expert-drawn map for the 2022 election,[146] so the legislative defendants submitted an emergency application for stay pending the filing and disposition of a petition for a writ of certiorari.[147] The U.S. Supreme Court denied that application.[148]

Justice Kavanaugh penned another concurrence justifying the decision on *Purcell* grounds. He explained that "an order from this Court requiring North Carolina to change its existing congressional election districts for the upcoming 2022 primary and general elections" would be "extraordinary interim relief."[149] "In light of the *Purcell* principle . . . it is too late for the *federal* courts to order that the district lines be changed for the 2022 primary and general elections, just as it was too late for the federal courts to do so in the Alabama redistricting case last month."[150]

That Justice Kavanaugh analogized the decision to *Merrill v. Milligan* is notable for two reasons. First, the *Purcell* Principle compelled a stay in *Merrill* but required the Court to deny the stay here.[151] Second, he is the only Justice we know was in the majority in both cases.[152] Justices

[142] Harper v. Hall, 868 S.E.2d 499, 511–13 (N.C. 2022), *aff'd sub nom.* Moore v. Harper, 143 S. Ct. 2065.

[143] Id. at 513.

[144] Id. at 559.

[145] Amy Howe, Justices Decline to Reinstate GOP-Backed Congressional Voting Maps in North Carolina, Pennsylvania, SCOTUSblog (Mar. 7, 2022, 9:42 PM), https://www.scotusblog.com/2022/03/justices-decline-to-reinstate-gop-backed-congressional-voting-maps-in-north-carolina-pennsylvania/ [https://perma.cc/23WL-LR69].

[146] Id.

[147] Id.

[148] Moore v. Harper, 142 S. Ct. 1089 (2022) (mem.).

[149] Id. at 1089 (Kavanaugh, J., concurring in denial of application for stay).

[150] Id. (emphasis added) (citing Merrill v. Milligan, 142 S. Ct. 879 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.)).

[151] Compare *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.), with *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay).

[152] *Merrill* had four noted dissenters. 142 S. Ct. at 882 (Roberts, C.J., dissenting from grant of applications for stays); id. at 883 (Kagan, J., dissenting from grant of applications for stays,

Thomas, Alito, and Gorsuch—all three of whom voted to grant the stay in *Merrill*—dissented because they would have granted a stay here too.[153] Deciphering what makes these two cases different is critical to harmonizing their outcomes. Section III.E takes up this task under my proposed framework that explains how the *Purcell* Principle should be understood and applied.

The final *Purcell* case leading up to the 2022 elections was *Rose v. Raffensperger*.[154] On August 5, 2022, the district court enjoined the Georgia Secretary of State from conducting elections for two districts of the Public Service Commission.[155] Applying the *Purcell* Principle, the Eleventh Circuit stayed that injunction.[156] But one week later, the Supreme Court vacated the stay—the only time it has done so.[157] The decision turned on the fact that the Eleventh Circuit applied *Purcell* even though the Secretary made "previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial."[158] Thus, the Secretary "could not fairly have advanced" an argument under the *Purcell* Principle, which is why his motion instead relied on the traditional stay factors.[159] During the preliminary injunction hearing, counsel for the Secretary asserted that, should the district court rule against him, "we won't make an appeal based on *Purcell*."[160]

joined by Breyer & Sotomayor, JJ.). *Moore* had only three. 142 S. Ct. at 1089 (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.). While Justice Barrett must have voted with the majority to grant a stay in *Merrill*, her vote in *Moore* was not revealed.

[153] *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from the denial of application for stay, joined by Thomas & Gorsuch, JJ.). The dissent did not cite *Purcell*; however, the opinion seemed to propose an alternative test: whether granting a stay in the circumstances would be "minimally disruptive." Id. at 1091. In this case, candidates filing their paperwork could have registered to run in a district under the "first plan adopted by the legislature." Id. at 1091–92. Ensuring the relevant form specified they were running under that map "would not have been greatly disruptive." Id. Therefore, according to the dissent, a stay was appropriate.

[154] 143 S. Ct. 58 (2022) (mem.).

[155] Rose v. Raffensperger, 619 F. Supp. 3d 1241, 1247 (N.D. Ga. 2022), *rev'd sub nom.* Rose v. Sec'y, 87 F.4th 469 (11th Cir. 2023).

[156] Rose v. Sec'y, No. 22-12593, 2022 WL 3572823, at *1 (11th Cir. Aug. 12, 2022), *vacated sub nom.* Rose v. Raffensperger, 143 S. Ct. 58, 59 (2022).

[157] *Rose*, 143 S. Ct. at 59 (mem.).

[158] Id.

[159] Id. For a discussion of how the *Purcell* Principle interacts with the traditional stay factors, see Hasen, supra note 13, at 429–44.

[160] Transcript of Preliminary Injunction Hearing at 126, Rose v. Raffensperger, No. 20-cv-02921, 2022 WL 670080 (N.D. Ga. Mar. 7, 2022), ECF No. 108.

The outcome in *Rose* adds yet another dimension to the *Purcell* doctrine. The Principle is apparently waivable if a state concedes that the district court's schedule provides enough time in advance of the election to allow effectual relief should the plaintiff succeed.

Finally, the most recent case invoking the *Purcell* Principle is *Robinson v. Callais*.[161] At issue was the Louisiana congressional map for the 2024 elections (and beyond). In January 2024, Louisiana adopted a new redistricting scheme that included a second, newly created majority-minority district.[162] Plaintiffs challenged that map on the grounds that the new district was an impermissible racial gerrymander.[163] A three-judge district court agreed, holding on April 30, 2024, that the district "violate[d] the Equal Protection Clause" and enjoining the State from using the map in the upcoming elections.[164] In setting a schedule for the remedial phase of the case, Louisiana asserted that May 15 was "the deadline by which they must receive a congressional map in order to prepare for the November elections."[165] But the district court rebuffed that timeline, giving the State until June 3 to enact a new map or the court would order use of an interim one.[166]

Louisiana then sought an emergency application for stay pending appeal in the Supreme Court, arguing that "[t]his case screams for a *Purcell* stay" and reiterating its May 15 deadline.[167] The Court obliged. On May 15—right on schedule—the Court granted the applications and stayed the district court's order pending appeal.[168] Its reasoning rested on a single but familiar citation: "See *Purcell v. Gonzalez*."[169] As the order made clear, a majority of the Court explicitly agreed that *Purcell* necessitated a stay here.

The Court's order also noted that Justices Sotomayor and Kagan voted against the stay, but only Justice Jackson penned a dissenting opinion—

[161] 144 S. Ct. 1171 (2024) (mem.).

[162] Callais v. Landry, No. 24-cv-00012, 2024 WL 1903930, at *3, *5–6 (W.D. La. Apr. 30, 2024).

[163] Id. at *1.

[164] Id.

[165] Scheduling Order at 2, Callais v. Landry, No. 24-cv-00122 (W.D. La. May 7, 2024), ECF No. 219.

[166] Id. at 3.

[167] Emergency Application for Stay Pending Appeal at 1, 34, Landry v. Callais, 144 S. Ct. 1171 (2024), 2023 WL 11645741.

[168] Robinson v. Callais, 144 S. Ct. 1171 (2024) (mem.).

[169] Id. (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).

her first words on *Purcell*.[170] In Justice Jackson's "view, *Purcell* ha[d] no role to play" because "[t]here [wa]s little risk of voter confusion from a new map being imposed this far out from the November election."[171] The district court's injunction was handed down 189 days before the election—farther in advance of the relevant election than any case to date.

* * *

This concludes the journey through each case in which the *Purcell* Principle has been discussed by the Supreme Court—from its 2006 decision in *Purcell* through the 2023 Term. Amidst sharp disagreements among the Justices, it is not immediately clear what conditions are necessary to trigger application of the Principle. The next Part will try to make sense of the doctrine, beginning by circling back to the three rationales announced in *Purcell*.

## II. DO *PURCELL*'S RATIONALES HOLD UP?

In determining what triggers the *Purcell* Principle, an obvious place to start is the three rationales that the Court provided in the *Purcell* case itself. If the Court's subsequent applications of the Principle are consistent with them, then these rationales might indeed constitute the relevant inquiry into whether the Principle ought to be invoked.

### *A. Voter Confusion*

Voter confusion has been understood as the driving force behind the *Purcell* Principle. Much of the literature refers to *Purcell* as an anti-confusion principle,[172] and it is this aspect of the case that has gotten the most discussion by the Justices in subsequent decisions. But, in practice, the Court's applications of the Principle do not seem to be driven by concerns of actual on-the-ground voter confusion. Two points demonstrate how this rationale cannot adequately explain the Court's decisions over the run of cases.

First, consider how a majority of the Court has interpreted the status quo against which to measure voter confusion. In looking solely to the

[170] Id.; id. at 1171–72 (Jackson, J., dissenting from grant of applications for stay).

[171] Id. at 1172 (Jackson, J., dissenting from grant of applications for stay).

[172] See, e.g., Codrington, supra note 13, at 961, 970 (referring to *Purcell* as an "anti-confusion principle"); Vladeck, supra note 5, at 205 ("At its simplest, the principle is that, to avoid confusion among voters and election administrators, courts should generally not change the rules governing elections as Election Day approaches . . . .").

content of state law, the majority fails to account for how subsequent court orders can affect what a voter will reasonably expect on election day. This is perhaps most apparent in *Brakebill*, where the district court's injunction had been in effect during the primary election just months prior.[173] It was the procedures under the district court order—and not the state law—that voters were most recently familiar with and, accordingly, would reasonably expect again for the general election. Therefore, staying that order seems like it was more likely to cause confusion than remedy it.[174]

Similarly, in *Raysor v. DeSantis*, the district court's preliminary injunction had been in effect for almost a year—and was affirmed by the Eleventh Circuit—before that court later stayed the permanent injunction.[175] During that year, tens of thousands of Floridians with felony convictions had registered and remained on the voter rolls.[176] But the effect of the stay made it a crime for them to actually cast a ballot.[177] Surely it would have been less confusing to keep the district court's order in place and let the individuals vote who had registered in reliance thereon.

The Supreme Court refused to vacate both stays. But there are also cases in which it was the high court that changed the rules on the eve of an election by overruling the lower courts. The Court has done so despite the fact *Purcell* cautioned against "[c]ourt orders affecting elections, *especially conflicting* orders."[178] For example, in *Andino v. Middleton*, the district court had entered its injunction almost seven weeks before election day. It was initially stayed by the court of appeals and then vacated by the court en banc before the Supreme Court (re-)stayed the

[173] Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting from denial of the application to vacate stay).

[174] Recall that this precise sequence of events also occurred in *Andino*. See Middleton v. Andino, 990 F.3d 768, 768–69 (4th Cir. 2020) (en banc) (King, J., concurring in the denial of a stay pending appeal).

[175] 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.).

[176] Id.

[177] Some individuals apparently were in fact prosecuted. See Gabriella Sanchez, In Florida, the Right to Vote Can Cost You, Brennan Ctr. for Just. (Sept. 7, 2022), https://www.brennancenter.org/our-work/analysis-opinion/florida-right-vote-can-cost-you [https://perma.cc/6N9R-3U3A] (describing the story of a formerly incarcerated man who was arrested for "[v]oting with unpaid fines or court fees," despite being told by an election official that he "regained his voting rights").

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

order less than a month before the election.[179] This back and forth represents *five* changes to whether the rule was in effect during the two months leading up to election day. It is difficult to imagine a more confusing set of conflicting orders than that. And, perhaps more shockingly, in *RNC v. DNC*, the Supreme Court changed the absentee ballot deadline the very *day* before the election after the Court of Appeals had refused to intervene.[180]

It is sensible that, for the doctrine to have any teeth, appellate courts need to be able to reverse a lower court when it violates the *Purcell* Principle's restraints. But, if voter confusion really was the Court's primary concern, one could imagine designing the system of appellate review in these cases to reduce the impact of conflicting orders. For example, what if the requisite standard to invoke *Purcell* increased with each appeal to account for the fact that the election gets closer with every level of review? If the injunction seemed appropriate to the district court, the court of appeals, and perhaps even the court of appeals sitting en banc, by the time the application to stay got to the Supreme Court, the violation of *Purcell* would have to be particularly egregious for the Court to not give deference to the lower courts. Alternatively, the Supreme Court could give closer analysis to the individual facts and circumstances to assess what is actually more likely to confuse voters. Instead of conducting a case-by-case assessment, however, the Court has presumed voter confusion *whenever* an injunction deviates from the state law on the books.

Second, the *Purcell* Principle only applies to injunctions issued by *federal* courts.[181] But is the name of the court listed at the top of the opinion really likely to influence the average American's voting behavior? Presumably voters would be no less confused if a late-breaking change to election procedures came from a state court rather than a federal one. There is nothing inherently less confusing about state action than federal action. Yet *Purcell* has nothing to say about the former.

In this vein, several judges on the Fourth Circuit—albeit in dissent—have concluded that the Principle ought to cover both. They argue that "there is no principled reason why this rule should not apply against

[179] Middleton v. Andino, No. 20-2022, 2020 WL 5739010, at *1 (4th Cir. Sept. 24, 2020); Middleton v. Andino, 990 F.3d 768, 768 (4th Cir. 2020) (en banc); Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020) (mem.).

[180] 140 S. Ct. 1205, 1207–08 (2020) (per curiam).

[181] See infra Section III.B.

interferences by state courts and agencies. The victim of a last-minute interference, whatever its source, is the same: a federal election."[182] Their view is not only that the Principle logically applies to both federal and state court intervention, but that it would be rendered meaningless unless extended.[183]

If preventing confusion could truly rationalize the Supreme Court's decisions in these cases, why wouldn't the Principle be extended to restrict state courts from changing election rules at the eleventh hour? The Court's failure to do so—limiting *Purcell*'s scope to the federal courts—suggests that voter confusion does not adequately explain its application of the *Purcell* Principle.

### *B. Clear Guidance*

The second rationale offered in *Purcell*, providing "clear guidance to the State," is more difficult to trace.[184] After *Purcell*, the Court never again speaks of "clear guidance" in these cases. However, one might reconceptualize it as "election administrator confusion." In that sense, this rationale and voter confusion are essentially two sides of the same coin. Justice Kavanaugh has implied as much, writing that the *Purcell* Principle "not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens . . . confidence in the fairness of the election."[185]

Indeed, avoiding confusion of election officials may actually be a more pertinent consideration than voter confusion. These officials are more

[182] Wise v. Circosta, 978 F.3d 93, 116 (4th Cir. 2020) (Wilkinson, J., dissenting, joined by Agee & Niemeyer, JJ.).

[183] Id. at 116–17 ("If *Purcell* did not apply in state courts, federal election rules would continue to be at the mercy of litigation and rushed, last-minute decisions by state judges . . . .").

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

[185] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); see also Hasen, supra note 13, at 441 (explaining that "electoral chaos can ensue when election officials face conflicting court orders on how to run an election," especially if it requires retraining "cadres of poll worker volunteers"); Nicholas Stephanopoulos, Freeing *Purcell* from the Shadows, Take Care (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows [https://perma.cc/A64X-ZGUP] ("Beyond the possibility of voter confusion, then, courts contemplating action close to election day should evaluate the risk of administrator error."); Codrington, supra note 13, at 953 n.63 ("While the potential for judicial decisions to result in election administrator confusion is a reasonable consideration, the *Purcell* decision itself never raised it.").

inclined to be paying attention to rule changes than the average American voter. And the negative consequences of poll workers being confused are likely to be more pervasive. But if we conceive of this rationale as confusion of election officials, it suffers the same flaws as the voter confusion justification because of how the Court has interpreted the status quo. Consider cases like *Brakebill* and *Andino*, where the district court's order had been in effect for the primary but then was stayed for the general election.[186] Election administrators, just like the voters, would have been familiar with the procedures governed by the injunction. So once that injunction was stayed, the officials needed to be retrained and acclimate to a different set of procedures. It surely would have been less confusing to the individuals working the polls had the Supreme Court maintained the rules from the recent primary. The Court's decision to ignore these concerns suggests that this confusion rationale also cannot explain when the *Purcell* Principle ought to be applied.

### *C. Deference to the District Court*

Finally, the Court in *Purcell* held that it was necessary "for the Court of Appeals to give deference to the discretion of the District Court."[187] This rationale seemed especially sensible in *Purcell* where three unique conditions were present: (1) the court of appeals issued an injunction where the district court declined to; (2) the district court had not issued findings of fact at the time the court of appeals entered its order; and (3) the court of appeals provided no reasoning for its decision.[188] But *none* of the subsequent cases have had a similar procedural history. The Supreme Court's applications of *Purcell* have typically involved an injunction entered by the district court, which the court of appeals then either stayed or let stand. It is unclear whether the deference rationale has force in these circumstances at all.

But if this rationale was intended to guide application of the *Purcell* Principle *generally*, it has been consistently flouted. In the cases outlined in Section I.B, an argument frequently made in dissent is that the Court is committing the same error made by the Ninth Circuit in *Purcell*: failing to defer to the judgment of the district court. This critique is particularly

[186] Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting from denial of the application to vacate stay, joined by Kagan, J.); Middleton v. Andino, 990 F.3d 768, 769 (4th Cir. 2020) (King, J., concurring in the denial of a stay pending appeal).

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

[188] Id. at 5.

compelling where the district court has issued extensive findings of facts and entered a permanent injunction following a full trial and resting on an extensive record, only to be set aside by the court of appeals or Supreme Court. To give just a few examples:

In *Veasey v. Perry*, Justice Ginsburg noted that the district court's permanent injunction was based on an "extensive factual record developed in the course of a nine-day trial."[189] In *Raysor v. DeSantis*, Justice Sotomayor pointed to the 125-page district court opinion with factual findings and legal conclusions following an eight-day trial that "included thousands of records and testimony from the plaintiffs, state and county officials, public defenders, and experts."[190] She similarly highlighted that the permanent injunction in *Merrill v. People First of Alabama* followed a nine-day trial and rested on "an extensive record."[191] According to Justice Kagan, the district court in *DNC v. Wisconsin State Legislature* supported its order with "specific facts and figures about how COVID would affect the electoral process in Wisconsin," based on testimony from experts and the chair of the Wisconsin Elections Commission.[192] And in *Merrill v. Milligan*, she emphasized that the three-judge district court held a "seven-day preliminary injunction hearing with live testimony from 17 witnesses."[193] It entered its order after "considering a massive factual record" and "reviewing more than 1,000 pages of briefing."[194] There, even the Chief Justice—his only dissent in a *Purcell* case—noted that the "District Court reviewed the submissions of the plaintiffs' experts and explained at length the fact-bound bases for its conclusion that the plaintiffs had made that showing."[195]

[189] 574 U.S. 951, 953 (2014) (Ginsburg, J., dissenting, joined by Sotomayor & Kagan, JJ.); id. at 951 ("I would not upset the District Court's reasoned, record-based judgment, which the Fifth Circuit accorded slim, if any, deference.").

[190] 140 S. Ct. 2600, 2601 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.). The dissent explained that the "Eleventh Circuit's 'bare order' staying the District Court's decision does not 'provide any factual findings or indeed any reasoning of its own,' and '[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect.'" Id. at 2602 (alteration in original) (quoting *Purcell*, 549 U.S. at 5).

[191] 141 S. Ct. 25, 26 (2020) (Sotomayor, J., dissenting from grant of stay, joined by Breyer & Kagan, JJ.).

[192] 141 S. Ct. 28, 40, 44 (2020) (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.).

[193] 142 S. Ct. 879, 883, 885 (2022) (Kagan, J., dissenting from grant of applications for stays, joined by Breyer & Sotomayor, JJ.).

[194] Id. at 883.

[195] Id. at 882 (Roberts, C.J., dissenting from grant of applications for stays).

Yet, in each of these cases, the court of appeals or Supreme Court overrode the district court's injunction. In doing so, each appellate court failed to defer to the lower court's judgment, even though the "district court has the greatest familiarity with the facts in a case, because it oversees the development and presentation of evidence."[196]

Under the *Purcell* Principle, the deference rationale seemingly operates as a one-way ratchet: where the district court declines to enter an injunction (as in *Purcell*), appellate courts are required to defer to that ruling. Yet, where the district court determines that an injunction is appropriate—even when it backs it up with factual findings based on an extensive record—deference is apparently not required. That the dice are loaded against injunctive relief undercuts any overall coherence to "deference" as a justification for the Principle. And whether the court of appeals deferred to the district court appears to generally carry little, if any weight, in determining whether *Purcell* should be applied.

* * *

Reducing voter confusion, providing clear guidance to states, and deferring to district courts all seemed like sensible grounds supporting the Supreme Court's decision in *Purcell*. And these considerations could have steered the Court in future applications of the Principle. However, as outlined in this Part, the doctrine does not operate in practice by looking to these three rationales and weighing whether an injunction is appropriate. The Court chose to invoke the Principle in an overwhelming number of these cases, and it did so even where concerns of voter confusion, clear guidance, and deference to the district court suggested a different outcome was appropriate. So, then, what can explain the Court's application of the *Purcell* Principle?

## III. *PURCELL* AS AN ANTI-DISRUPTION FEDERALISM PRINCIPLE

In this Part, I propose a new framework under which to analyze the Supreme Court's *Purcell* doctrine. I suggest that *Purcell* is better understood not as an anti-confusion principle—as the case law and scholarship have suggested—but instead an anti-disruption principle grounded in federalism. While the original opinion in *Purcell* suggested alternate rationales for the Principle, subsequent applications by the

[196] *Democratic Nat'l Comm.*, 141 S. Ct. at 43–44 (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.) (first citing Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam); and then citing Fed. R. Civ. P. 52(a)).

Supreme Court have elucidated that the doctrine is more coherent if explained as being born out of federalism. In that vein, to determine whether *Purcell* should be triggered, courts would reach sounder results by asking if judicial intervention would *disrupt* the state's administration of its elections. Where the court decides that intervention would be disruptive, the Principle is applied and operates as a near-total bar on injunctive relief. But where intervention would not be disruptive, the court will not invoke *Purcell* and a lower court's decision to enjoin the election procedure is permitted.

### *A. Disruption Is Distinct from Confusion*

At first blush, one might think that "disruption" and "confusion" are not materially different. But recharacterizing *Purcell* as an anti-disruption principle is not a mere exercise in relabeling concepts. The two are, in fact, distinct.

Confusion occurs when voters—and perhaps also election administrators—do not correctly understand the election rules or procedures. For voters, this can result in disenfranchisement, either in choosing to stay home[197] (self-disenfranchisement) or being prohibited from having their vote cast or counted for failing to comply with the rules[198] (e.g., not bringing the correct form of identification or failing to properly fill out a ballot). For election officials, it can result in errors concerning the determination of which ballots can be counted.[199]

On the other hand, disruption occurs when the election process is changed or derailed by the judiciary. The Justices have spoken about disruption on its own terms, separate from concerns about confusion. In one *Purcell* case, a majority of the Court expressed concern that the lower court's injunction "fundamentally alter[ed] the nature of the election."[200] In another case, Justices Thomas, Gorsuch, and Alito considered whether

[197] *Purcell*, 549 U.S. at 4–5 (discussing "voter confusion and consequent incentive to remain away from the polls").

[198] See, e.g., Brakebill v. Jaeger, 139 S. Ct. 10, 11 (2018) (Ginsburg, J., dissenting from denial of the application to vacate stay, joined by Kagan, J.) (noting that the "confusion caused by the Eighth Circuit's order" "may lead to voters finding out at the polling place that they cannot vote because their formerly valid ID is now insufficient").

[199] See Stephanopoulos, supra note 185.

[200] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam).

granting a stay would be "minimally disruptive."[201] In yet another, Justices Ginsburg, Sotomayor, and Kagan discussed whether there was a "risk that the District Court's injunction will in fact disrupt [the state's] electoral processes."[202] And Justice Kavanaugh has consistently emphasized the burdens that intervention imposes on state election administrators.[203] Where disruption occurs, the very *fact* of court intervention is the problem; whether it produces on-the-ground confusion is a separate, subsequent question. This Note argues that using disruption—rather than confusion—as the touchstone makes more sense both to explain these past applications and to guide future applications of the *Purcell* Principle.

There are undoubtedly circumstances where confusion and disruption go hand in hand. But there can be confusion without disruption, and vice versa. Consider a scenario where the state election board does a poor job of advertising a new rule adopted by the legislature or circulates voter materials that include incorrect information. Voters may very well be confused and consequently fail to meet the requirements on election day, but this confusion had nothing to do with a court's intervention. On the other hand, consider a situation where a federal court strikes down a state's campaign finance law. The effect of the decision may be disruptive (subject to the conditions discussed *infra*) in that enjoining enforcement

[201] Moore v. Harper, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from the denial of application for stay, joined by Thomas & Gorsuch, JJ.).

[202] Veasey v. Perry, 574 U.S. 951, 952 (Ginsburg, J., dissenting, joined by Sotomayor & Kagan, JJ.).

[203] See, e.g., Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes."); id. ("Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards."); Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.) ("The District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.").

Note, however, that "[a]dministrator *error* . . . isn't equivalent to administrator *inconvenience*. Almost any judicial revision of election regulations—near or far from an election—will lead to more work for election officials." Stephanopoulos, supra note 185. But "extra work is no reason for courts not to remedy legal violations unless it genuinely threatens to delay or distort the vote count." Id.

of the law infringes on the state's ability to conduct the election with, for example, a disclosure requirement or contribution limit that its elected representatives thought necessary to protect against corruption. And it may require a change in the state's enforcement practices in the middle of an election cycle. But is the change likely to confuse voters? Even assuming the average voter is aware of the rules regarding campaign finance, the court's intervention in this type of case seems unlikely to confuse individuals in a way that would implicate their ability to vote on election day or their expectations once in the voting booth.[204]

### *B. Disruption Alone Is Insufficient to Trigger* Purcell

Disruption alone, however, is not enough to trigger application of the *Purcell* Principle—there is more to the doctrine than that. Specifically, it incorporates a federalism dimension.

Parsing the opinions of those Justices who have consistently been in the majority in *Purcell* cases, there are strong indications that federalism concerns are implicated in the Court's application of the Principle. Using both constitutional and structural arguments, these Justices have suggested that federal courts should not interfere in the unique circumstances presented by these cases *because* they are federal courts—even though jurisdiction is proper.

Justice Gorsuch outlined the constitutional argument in *DNC v. Wisconsin State Legislature*:

> The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them. Nothing in our founding document

[204] In a similar vein, consider how the "clear guidance" rationale from *Purcell* is also distinct from disruption. A court entering an injunction could provide extremely clear instructions to the state regarding how the election ought to proceed. In the case of redistricting, for example, the court may even redraw the map itself and send it back the state legislature to implement outright. But just because the court's order is *clear* does not mean that the judiciary taking over the process—voiding the state legislature's chosen map and drawing the lines under which it will be forced to conduct the election—is not disruptive to the state apparatus for administering elections and burdensome to the officials therein.

> contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions.[205]

The structural argument follows closely behind the constitutional one. Justice Gorsuch went on:

> Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot. Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful.[206]

So, as Justice Kavanaugh articulated in the same case, even if a district court's injunction is "well intentioned and thorough, it nonetheless contravene[s] this Court's longstanding precedents by usurping the proper role of the state legislature and rewriting state election laws in the period close to an election."[207]

Under this view, federalism requires insulating to some degree the ability of the state—and its legislature in particular—to dictate the rules that will govern its elections. And this comes at the cost of limiting the power of federal courts with regards to election-related litigation. Quoting Justice Kavanaugh again, this time joined by Justice Alito, "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws."[208] In a similar vein—also in in *DNC v.*

[205] *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay, joined by Kavanaugh, J.) (citations omitted). Note that the Court in *Moore v. Harper* decided not to embrace the outer boundaries of this view—at least for election law disputes that do not fall within the scope of *Purcell*. 143 S. Ct. 2065, 2081–83 (2023) (holding that the Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections, and such rules remain subject to the ordinary exercise of state judicial review); id. at 2090 (noting that "federal courts must not abandon their own duty to exercise judicial review").

[206] *Democratic Nat'l Comm.*, 141 S. Ct. at 29 (Gorsuch, J., concurring in denial of application to vacate stay, joined by Kavanaugh, J.); see also id. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay) ("It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.").

[207] Id. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay); id. at 33 ("[S]tate legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic.").

[208] *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.).

*Wisconsin State Legislature*—Chief Justice Roberts distinguished the Court's decision to stay the injunction entered by the *federal* district court there with its refusal to do so in cases where the applications came following a *state* court's injunction. He explained that the former "involves federal intrusion on state lawmaking processes," but "modification of election rules" is permitted in the latter because it instead "implicate[s] the authority of state courts to apply their own constitutions to election regulations."[209]

Based on this rhetoric—and separate from any concern about voter confusion—the *Purcell* Principle may be understood as reflecting a core constitutional premise: decisions about election procedures are principally the province of the states. And this makes even more sense when placed into proper context.

Arguing that the Roberts Court is keen on federalism is unoriginal.[210] Consider for a moment its holdings in major cases related to abortion,[211] federal habeas corpus,[212] and Congress's spending powers.[213] And this observation rings particularly true in connection with its election law jurisprudence.[214] Think here about two of the Roberts Court's most notable election law decisions. The opinion in *Shelby County v. Holder*, which found unconstitutional the VRA provision setting out the preclearance coverage formula, began by noting that preclearance

[209] 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay).

[210] See, e.g., Ilya Somin, Federalism and the Roberts Court, 46 Publius 441, 441 (2016) (noting that Federalism has been a "central focus" of the Court's "most important and controversial decision since John Roberts became Chief Justice"); Kiel Brennan-Marquez, The Philosophy and Jurisprudence of Chief Justice Roberts, 2014 Utah L. Rev. 137, 179–82 (discussing the Chief Justice's commitment to federalism).

[211] See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

[212] See Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021) (eliminating the exception allowing for "watershed" rules of criminal procedure to apply retroactively on federal collateral review).

[213] NFIB v. Sebelius, 567 U.S. 519, 579–85 (2012) (plurality opinion) (invalidating part of the Affordable Care Act because it was unconstitutionally "coercive," acting as a "gun to the head" of the states).

[214] See, e.g., Joshua A. Douglas, (Mis)trusting States to Run Elections, 92 Wash. U. L. Rev. 553, 553–54 (2015) (arguing the Roberts Court defers to states in election law matters on both substantive and procedural issues); Katherine Danaher, Note, The Price Tag on Voting Equality: How to Amend the Voting Rights Act Using the Spending Power, 100 Tex. L. Rev. 1197, 1211 (2022) (explaining that, "in the field of election law, federalism is a dominant concern").

constituted "a drastic departure from basic principles of federalism."[215] The Court noted the "substantial federalism costs"[216] in a system where "States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."[217] Similarly, in *Rucho v. Common Cause*, the Court held that partisan gerrymandering was not justiciable in federal court—turning these disputes over to the states.[218] The *Purcell* Principle, viewed as a federalism doctrine, fits comfortably alongside these two cases. Each forces the federal judiciary to get out of the business of adjudicating a certain subset of election law cases.

For this reason, it is no coincidence that the opinions discussing *Purcell* speak directly to federal courts;[219] it exclusively applies to them. The

[215] 570 U.S. 529, 535 (2013).

[216] Id. at 540 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

[217] Id. at 544. Preclearance required federal court authorization for a state to make *any* change to its election rules—that is, if the U.S. Attorney General did not approve the change. Id. at 537 ("Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges."). Professor Vladeck has discussed the implications of the *Shelby County* decision in light of *Purcell*:

> *Purcell* seemingly invites bad behavior by local and state election officials, who might themselves change the rules on the eve of an election because they know they can do so without worrying about inference from the courts. At the time *Purcell* was decided, such last-minute changes wouldn't have been possible in many jurisdictions, due to the Voting Rights Act's preclearance requirement. . . . Since [*Shelby County*], no jurisdiction has had to obtain preclearance from the Justice Department for any changes to election rules, even eleventh-hour ones.

Vladeck, supra note 5, at 207–08.

[218] 139 S. Ct. 2484 (2019); see also Travis Crum, Deregulated Redistricting, 107 Cornell L. Rev. 359, 401 (2022) (arguing that *Rucho* "alluded to federalism concerns" in that "the Framers' solution to the foreseeable gerrymandering of congressional districts was to 'assign[] the issue to the state legislatures, expressly checked and balanced by the Federal Congress" (quoting *Rucho*, 139 S. Ct. at 2496)); Mark Ercolano, Note, Self-Restraint or Judicial Disregard: Reviewing the Supreme Court's Answer to the Political Question of Partisan Gerrymandering, 64 Ariz. L. Rev. 239, 270 (2022) (arguing that "respect towards federalism rested at the heart of *Rucho*"). But see Chad M. Oldfather & Sydney Star, Roberts, Rules, and *Rucho*, 53 Conn. L. Rev. 705, 737 (2022) (arguing that the Chief Justice was "blocked from basing the *Rucho* decision on [federalism] grounds simply because federalism forms no part of the political question doctrine").

[219] See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower *federal* courts should ordinarily not alter the election rules on the eve of an election." (emphasis added)); Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of application for stay) ("[T]his Court has repeatedly emphasized that *federal* courts ordinarily should not alter state election rules in the period close to an election." (emphasis added)); Democratic Nat'l Comm.

Supreme Court has only invoked the Principle when *federal* courts are interfering with state election laws. Nowhere has the Court suggested that *Purcell* applies to late-breaking injunctions entered by state courts.[220] And federal courts of appeals have recognized this as well.[221]

v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("This Court has repeatedly emphasized that *federal* courts ordinarily should not alter state election laws in the period close to an election . . . ." (emphasis added)); Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.) ("[*F*]*ederal* district courts ordinarily should not enjoin state election laws in the period close to an election . . . ." (emphasis added)); id. at 880 ("This Court has repeatedly stated that *federal* courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle." (emphasis added)); Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay) ("But this Court has repeatedly ruled that *federal* courts ordinarily should not alter state election laws in the period close to an election." (emphasis added)).

[220] In *Republican Party of Pennsylvania v. Degraffenreid*, Justice Thomas suggested that the Pennsylvania Supreme Court's decision came too close to election day and cited *Purcell*. 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from the denial of certiorari). However, he wrote only for himself in dissent and an application to stay the Pennsylvania high court's decision was not pending at that time. When the Court had previously denied the request to stay, no Justice—either in support or dissent—authored an opinion or cited *Purcell*. See Scarnati v. Boockvar, 141 S. Ct. 644, 644 (2020) (mem.); Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.).

The three dissenters in *Moore v. Harper*, 142 S. Ct. 1089 (2022), sought a stay even though the application came following a state court decision, but that opinion does not cite *Purcell* at all, let alone imply that the Principle should apply to state courts, id. at 1089–92 (Alito, J., dissenting from the denial of application for stay, joined by Thomas & Gorsuch, JJ.).

[221] See, e.g., Wise v. Circosta, 978 F.3d 93, 99 (4th Cir. 2020) (en banc) ("*Purcell* is about *federal court* intervention. . . . Our dissenting colleagues' attempt to stretch *Purcell* beyond its clear limits to cover not just federal court action, but also action by state courts and state executive agencies acting pursuant to a legislative delegation of authority, proves too much. They cite no authority for this expansion, and there is none."); Carson v. Simon, 978 F.3d 1051, 1062 (8th Cir. 2020) ("The *Purcell* principle—that *federal* courts should usually refrain from interfering with state election laws in the lead up to an election—is well established." (emphasis added)); Libertarian Party of Ill. v. Cadigan, 824 Fed. App'x 415, 419 (7th Cir. 2020) ("The Supreme Court has instructed that *federal* courts should refrain from changing state election rules as an election approaches." (emphasis added)).

Some state courts have also concluded—rightly, in my view—that the *Purcell* Principle does not apply to them. See, e.g., Harkenrider v. Hochul, 197 N.E.3d 437, 454 n.16 (N.Y. 2022) ("The State respondents' reliance on the federal *Purcell* principle is misplaced. The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent and does not *limit* state judicial authority where, as here, a state court must intervene to remedy violations of the State Constitution." (citations omitted)); Democratic Senatorial Campaign Comm. v. Pate, 950 N.W.2d 1, 15 (Iowa 2020) (Appel, J., specially concurring) ("*Purcell*, of course, is infused with federalism concerns, arising from the notion that federal courts should show a degree of caution before they intervene in state-created election procedures that could bollix up the management of an election by state

If the *Purcell* Principle could truly be justified by preventing voter confusion, then the Supreme Court would also be expected to stay late-breaking injunctions that were entered by a state court. But that is not how it has been applied.[222] Coupled with the fact that the holdings in several cases appeared *more* likely to confuse voters in practice, confusion does not adequately account for the Court's applications of the Principle because state action can be just as confusing as federal action. These decisions cannot be reconciled except on federalism grounds.

On the other hand, that the *Purcell* Principle does not extend to state courts makes sense under a federalism anti-disruption model. State courts entering injunctions—no matter how close they come to election day—cannot cause disruption to the state's administration of elections because they are *part* of the state government and its electoral system when exercising judicial review.[223] While federalism can explain and harmonize these cases, voter confusion does not.

### *C. Federalism Alone Is Insufficient to Trigger* Purcell

Federalism concerns, however, are insufficient to trigger application of the *Purcell* Principle; both federalism *and* disruption are required. The reason for this is straightforward: if federalism alone was a sufficient barrier to inhibit federal courts from interfering in state elections, then federal courts would *never* be able to afford relief when, for example, a state redistricting scheme violated the U.S. Constitution or voter suppression law violated the VRA. The Supreme Court has recognized, however, that the "[Reconstruction] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[224] Indeed, they "significantly broadened the scope of federal power over elections."[225]

officials. There is, of course, no federalism consideration in this case."). But see, e.g., Liddy v. Lamone, 919 A.2d 1276, 1288 (Md. 2007); Fay v. Merrill, 256 A.3d 622, 638 n.21 (Conn. 2021).

[222] See supra Section II.A.

[223] Cf. Moore v. Harper, 143 S. Ct. 2065, 2081–83 (2023) (holding that the Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections, and such rules remain subject to the ordinary exercise of state judicial review).

[224] City of Rome v. United States, 446 U.S. 156, 179 (1980).

[225] Franita Tolson, Enforcing the Political Constitution, 74 Stan. L. Rev. Online 88, 99 (2022).

Any federal court order telling the states how to conduct their elections infringes on their sovereignty. But the default rule is that federal courts *do* have the jurisdiction and authority to police the states where their election procedures run afoul of federal law.[226] As the Court noted in *Reynolds v. Sims*, "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."[227] *Purcell* is thus the unusual case.

Undoubtedly, the starting point of the Court's *Purcell* Principle doctrine is that the constraint on federal judicial relief is merely temporary and temporal, federalism notwithstanding. It is only when federal intervention would be *disruptive* that federal courts must wait until after election day. In that sense, *Purcell* is a remedial principle; under certain conditions, it limits the scope of the remedy that federal courts can afford litigants in a dispute regarding election laws. The Principle does not bar a federal court from exercising jurisdiction or reaching a decision on the merits; if it did, one would expect the Supreme Court to have said as much. Rather, where a federal court's decision includes injunctive relief that would be disruptive to the state's administration of its elections, that injunction simply must be stayed—at least as applied to the upcoming election cycle. So, when is federal court intervention disruptive?

### *D.* Purcell*'s Conditions*

Having refashioned *Purcell* as an anti-disruption federalism principle, this Section offers a test to better explain the Court's applications of the Principle in the case law. This framework may also aid litigants and courts in future cases where *Purcell* issues arise. The presence of four conditions is necessary for a showing that judicial intervention is disruptive to the state's administration of its elections:

*1. The Injunction Must Be Entered by a Federal Court.* First, as discussed previously, *Purcell* does not apply to state courts. The Principle

[226] See, e.g., Allen v. Milligan 143 S. Ct. 1487, 1502–06 (2023) (using the framework from *Thornburg v. Gingles*, 478 U.S. 30 (1986), to analyze a vote-dilution claim under Section 2 of the VRA); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–67 (1966) (striking down a poll tax as violative of the Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.").

[227] 377 U.S. at 585.

is solely triggered when a federal court issues an order changing a state's election laws.

For this reason, future litigants who are wary that *Purcell* will thwart their challenge to a state's election laws—even if they are successful on the merits—can circumvent the Principle altogether by simply filing in state court. In the November 2023 elections, for example, a Mississippi state court issued an injunction *on* election day, keeping the polls open after precincts in the state's most populous county ran out of ballots.[228]

*2. The Federal Injunction Must Alter a State's Election Rules.* Second, because of the doctrine's grounding in federalism, the injunction must pertain to a state's election laws. The Court has only applied the *Purcell* Principle when a *federal* court altered *state* election rules or procedures; to date, the Principle has not been applied to courts making changes to federal law. And Justice Kavanaugh's opinions expressly speak about state election rules.[229] It is for this reason that the Supreme Court has looked to state law on the books in determining whether a federal court order resulted in a change to the status quo. But where the federal court's interpretation does not modify the content of state election law, *Purcell* need not be a barrier.

*3. The Election Must Be "Close."* Third, the federal court's interference is disruptive only if its injunction is ordered sufficiently *close*

[228] Order Extending Voting Hours, Miss. Democratic Party v. Hinds Cnty. Election Comm'n, No. 25CH1:23-cv-01247 (Miss. Chan. Ct. Nov. 7, 2023), https://mscenterforjustice.org/wp-content/uploads/2023/11/002_MS-Dems-v-Hinds-Cnty_order.pdf [https://perma.cc/2Q84-CTBD]; Taylor Vance, Judge Extends Hinds County Precinct Hours After Numerous Ballot Problems, Miss. Today (Nov. 7, 2023), https://mississippitoday.org/2023/11/07/hinds-county-election-problems-voting-extended/ [https://perma.cc/BZL3-BKED].

[229] See, e.g., Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of application for stay) ("[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter *state* election rules in the period close to an election." (emphasis added)); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("This Court has repeatedly emphasized that federal courts ordinarily should not alter *state* election laws in the period close to an election . . . ." (emphasis added)); Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.) ("[F]ederal district courts ordinarily should not enjoin *state* election laws in the period close to an election . . . ." (emphasis added)); id. at 880 ("This Court has repeatedly stated that federal courts ordinarily should not enjoin a *state's* election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle." (emphasis added)); Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay) ("But this Court has repeatedly ruled that federal courts ordinarily should not alter *state* election laws in the period close to an election." (emphasis added)).

to an election. The Supreme Court has emphasized that the Principle only applies where injunctions are entered by a federal court "on the eve of an election," and Justice Kavanaugh has consistently referred to its scope as "the period close to an election."[230] Indeed, the entire doctrine is premised on the notion that the pause is temporary; otherwise federal courts would never be able to enforce federal election law in connection with state election rules. In that respect, *Purcell* restricts *when* injunctive relief is the appropriate remedy to be provided by a federal court.

This fits neatly into the conception of *Purcell* as an anti-disruption principle. The Court has determined that there is a period of time in which allowing an injunction that changes those rules would be disruptive to the state's administration of its elections and is thus improper, even if the state has run afoul of federal law and a federal court would otherwise be able to intervene. But it is far easier to say that *Purcell* has a limited temporal scope than to quantify the days, weeks, or months leading up to the election in which it applies.

How close to an election is too close? The Court has never really provided an answer.[231] The opinions discussing *Purcell* do not generally discuss the timing element beyond the facts of the individual case. And the only discussion of how it more broadly fits into the Principle's framework—articulated by Justice Kavanaugh in *Merrill v. Milligan*—amounted to little more than an "it depends." He explained in a footnote that "[h]ow close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects."[232] This sounds in disruption concerns but is not particularly administrable.

I have tried to provide clarity where the Court has not. Table 2 outlines the instances in the *Purcell* canon where the Court's decision—paired

[230] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); e.g., Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of application for stay) ("[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election.").

[231] Pierce v. N.C. State Bd. of Elections, 97 F.4th 194, 247 (4th Cir. 2024) (Gregory, J., dissenting) ("[N]o precedential Supreme Court opinion has ever addressed *Purcell*'s proper scope.").

[232] 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurring in grant of application for stays, joined by Alito, J.).

with, in some cases, the concurring and dissenting opinions[233]—suggests that the relevant election was too close for a federal court to enter an injunction.[234] For each case, I listed the election law issue litigated and calculated how close was too close. I did this by taking the date of the lower court order and counting the number of days until election day—for *both* the next primary and general election, where applicable.[235] Table 3 then sorts these cases by the number of days until the next election.

[233] Cf. *Pierce*, 97 F.4th at 247 (Gregory, J., dissenting) ("[M]embers of the Supreme Court writing separately began to cite *Purcell* in support of blocking district and appellate court rulings that the authoring justice believed came too close to an election. However, no precedential Supreme Court opinion has ever addressed *Purcell*'s proper scope. Left to decipher conflicting separate writings by individual justices, inconsistent lower court applications of the doctrine come as no surprise. But in the absence of a Supreme Court majority opinion sufficient to clarify *Purcell*'s proper application, we must make the most of these separate writings." (citations omitted)).

[234] I have omitted from Tables 2 and 3 *Benisek v. Lamone* because the federal district court there did not grant injunctive relief. 266 F. Supp. 3d 799, 801 (D. Md. 2017). Additionally, I have omitted *North Carolina v. Covington* because the Supreme Court affirmed the district court's decision to have a special master—rather than the state legislature—draw the remedial districting map, suggesting federal court intervention was *not* too close to election day. 138 S. Ct. 2548, 2553–54 (2018). Further, the Court there had already denied in part a stay pending appeal with no mention of *Purcell*. See North Carolina v. Covington, 138 S. Ct. 974, 974 (2018) (mem.). I have also omitted *Republican Party of Pennsylvania v. Degraffenreid* because Justice Thomas's suggestion that the decision of the state court below came too close to election day was presented in a dissent from a denial of certiorari, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from the denial of certiorari), and here too the Supreme Court previously voted 4-4 to deny an application to stay with no invocation of *Purcell* on either side. See Scarnati v. Boockvar, 141 S. Ct. 644, 644 (2020) (mem.); Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.). Finally, I have omitted *Rose v. Raffensperger* because there the Supreme Court vacated the lower federal court's stay. 143 S. Ct. 58, 58–59 (2022).

[235] For a more detailed description of how the relevant days are calculated, see supra note 41. One caveat, however, is necessary regarding *Moore v. Harper*. Recall that the application there requested a stay of a *state* court's order. As such, the U.S. Supreme Court would have been the first *federal* court to intervene with the state's administration of its elections. Because these Tables are concerned with how close is too close for a federal court to interfere, the date in the third column of Table 2 for *Moore v. Harper* is the date the U.S. Supreme Court decided to deny the stay, rather than the date the Supreme Court of North Carolina issued its decision.

**Table 2.** Too Close for Federal Court Intervention

| Case Name | Issue | Order Entered by Lower Court | Primary / Election Day | Days Before Election |
|---|---|---|---|---|
| *Purcell v. Gonzalez* | Voter ID | 10/5/2006 | 11/7/2006 | **33** |
| *Veasey v. Perry* | Voter ID | 10/9/2014 | 11/4/2014 | **26** |
| *Brakebill v. Jaeger* | Voter ID | 4/3/2018 | 6/12/2018<br>11/6/2018 | **70**<br>**217** |
| *RNC v. DNC* | Ballot deadline | 4/2/2020 | 4/7/2020 | **5** |
| *Raysor v. DeSantis* | Felon voter eligibility | 5/24/2020 | 8/18/2020<br>11/3/2020 | **86**<br>**163** |
| *Andino v. Middleton* | Absentee requirement | 9/18/2020 | 11/3/2020 | **46** |
| *Merrill v. People First of Alabama* | Curbside voting | 9/30/2020 | 11/3/2020 | **34** |
| *DNC v. Wisconsin State Legislature* | Ballot deadline | 9/21/2020 | 11/3/2020 | **43** |
| *Merrill v. Milligan* | Redistricting | 1/24/2022 | 5/24/2022<br>11/8/2022 | **120**<br>**288** |
| *Moore v. Harper* | Redistricting | 3/7/2022 | 5/17/2022<br>11/8/2022 | **71**<br>**246** |
| *Robinson v. Callais* | Redistricting | 4/30/2024 | 11/5/2024 | **189** |

**Table 3.** Too Close for Federal Court Intervention, Sorted

| Case Name | Days Before Election |
|---|---|
| *RNC v. DNC* | **5** |
| *Veasey v. Perry* | **26** |
| *Purcell v. Gonzalez* | **33** |
| *Merrill v. People First of Alabama* | **34** |
| *DNC v. Wisconsin State Legislature* | **43** |
| *Andino v. Middleton* | **46** |
| *Brakebill v. Jaeger* | **70**<br>**217** |
| *Raysor v. DeSantis* | **86**<br>**163** |
| *Moore v. Harper* | **71**<br>**246** |
| *Merrill v. Milligan* | **120**<br>**288** |
| *Robinson v. Callais* | **189** |

In some ways, Tables 2 and 3 are under-determinate. They exclusively report cases where the Supreme Court's decision suggested that judicial intervention was too close to the election, and not where the Court held the inverse: that the federal court's injunction was *not* too close. The only *Purcell* case in which the Supreme Court has blessed the district court's intervention is *North Carolina v. Covington*. The Court affirmed where the district court's decision came 107 days before the primary and 289 days before the general election. However, one might hesitate to rely on *Covington* as being precedential on this issue for three reasons. First, the Court there had previously denied a stay pending appeal with no mention of *Purcell*.[236] Second, this was one of the first cases to cite *Purcell*, and it did so with only a passing reference to the then-fledgling Principle. And third, the Court has since twice extended the temporal scope of *Purcell* in *Merrill v. Milligan*, accompanied by a far more explicit analysis of the Principle in a separate opinion by Justice Kavanaugh, and *Robinson v. Callais*.[237]

Relatedly, the only time that the Court, on *Purcell* grounds, has vacated a stay order entered by a lower court was in *Rose v. Raffensperger*. However, it did so because of representations made by the State that the district court's schedule would allow the election to be conducted effectively, *not* because the election was *in fact* sufficiently far away.[238]

In deciding whether to invoke *Purcell*, courts clearly have to open up their calendars and ask: "How far away is the next election day?" As indicated in Table 3, until this year, the farthest out that the Supreme Court had applied the *Purcell* Principle was 120 days before the next election. Among the federal courts of appeals, the Eleventh Circuit had expressly adopted a four-months test.[239] And the Fifth Circuit read the Court's cases to say the same.[240] These numbers suggested that an

[236] North Carolina v. Covington, 138 S. Ct. 974, 974 (2018) (mem.).

[237] 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.); Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024) (mem.).

[238] See Rose v. Raffensperger, 143 S. Ct. 58, 59 (2022) (mem.).

[239] See Rose v. Sec'y, No. 22-12593, 2022 WL 3572823, at *1 (11th Cir. Aug. 12, 2022) ("[T]he '*Purcell* principle,' as articulated in [*RNC v. DNC*], applies when an election is less than four months away." (citing League of Women Voters of Fla. v. Fla. Sec'y of State, 32 F.4th 1363, 1371 (11th Cir. 2022))); Jacksonville Branch of NAACP v. City of Jacksonville, No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. Nov. 7, 2022) (noting that applying *Purcell* "five months prior to the elections" would "extend the 'eve of an election' farther than we have before").

[240] See Robinson v. Ardoin, 86 F.4th 574, 599 (5th Cir. 2023) ("*Purcell* stayed an election 29 days prior to an election, and the Supreme Court has stayed injunctions five days, 33 days,

injunction would not be considered disruptive to a state's administration of its elections if the federal court's order was entered approximately four months before election day. But *Robinson v. Callais* extended *Purcell*'s temporal scope even further, with a majority of the Court explicitly relying on the Principle to grant a stay more than *six months* before the relevant election.[241] Accordingly, six months is perhaps the new benchmark for courts and practitioners to bear in mind.

*Robinson* may further stand for the proposition that, in determining "how close is too close," courts should defer to the state. There, the Supreme Court credited the State's representation of the deadline by which it needed to receive the finalized redistricting map, even though the court below had explicitly rejected that timeline.[242]

*4. The State Must Not Have Waived Reliance on the Principle.* Finally, the Principle cannot be applied where a state has waived the protections of *Purcell*. In *Rose v. Raffensperger*, the Supreme Court held that where a state concedes the district court's schedule provides enough time in advance of the election to allow effectual relief (should the plaintiff succeed), then *Purcell* can no longer justify grounds for a stay—even if an appellate court thinks otherwise.[243] As such, the protections provided by the *Purcell* Principle are waivable by the state. This too makes sense if *Purcell* is viewed as an anti-disruption principle grounded in federalism.

The state is best positioned to assess the adverse effects of a court order on its ability to effectively conduct the upcoming election. If the state is not concerned that injunctive relief would be disruptive, then a federal court should take that at face value. Should a state decide to waive any reliance on *Purcell*, and should a court enter an injunction, the consequence may very well be that voters are confused by the change in election rules. But voter confusion cannot explain the applications of the Principle. That the Court puts waiver in the hands of the state makes more sense if *Purcell* is understood as protecting against disruption to the state's electoral process. Since it is the state's interest in federalism being served, it is for the state to waive.

60 days, and less than four months before an election. Here, the injunction was implemented more than five months prior to the election and more than four months prior to early voting registration." (citing Robinson v. Ardoin, 37 F.4th 208, 229 (5th Cir. 2022))).

[241] *Robinson*, 144 S. Ct. at 1171.

[242] See supra notes 165–69 and accompanying text.

[243] 143 S. Ct. at 59.

In assessing whether an injunction would unduly interfere with a state's administration of its elections, a Court can look to whether the state itself has renounced any claim of disruption. If so, the *Purcell* Principle should not be applied. Future litigants can leverage this feature of the doctrine to try to exact a waiver from the state by working out an agreed upon schedule in advance of any preliminary injunction hearing or trial.[244] If there is the opportunity for discovery, one might attempt to gather evidence about the timeline under which past election procedures were implemented and get the chief election official on the record in a deposition. In *Rose*, a statement made by the State's counsel in court was sufficient.[245]

### *E. Testing the Framework*

Viewing *Purcell* as a federalism and anti-disruption principle, and using the conditions laid out above, let's briefly revisit three of the *Purcell* cases discussed in Part I. I will examine two cases in which the Supreme Court's application of the *Purcell* Principle made sense under my proposed framework and one case that should be reconsidered.

In *Moore v. Harper*, the Court applied the *Purcell* Principle—refusing to intervene in the redistricting process—and was right to do so. There, the Supreme Court of North Carolina struck down the State's maps 92 days before the primary election.[246] Asking whether this action disrupted North Carolina's administration of its elections, the answer is clearly no. Under Condition 1, changes to election procedures by state courts are not disruptive, so the U.S. Supreme Court did not apply the *Purcell* Principle to the state supreme court order and denied the request stay the injunction.

[244] See, e.g., *Jacksonville Branch of NAACP*, 2022 WL 16754389, at *2 ("[T]he entire schedule on which the district court proceeded was developed with [the city], working backwards from the date they provided, and the final schedule was accepted 'without caveat.' Given [the city's] position that the election can be conducted on the schedule they made collaboratively with the district court and [plaintiffs], we do not believe *Purcell* applies here.").

[245] Transcript of Preliminary Injunction Hearing at 126, Rose v. Raffensperger, No. 20-cv-02921 (N.D. Ga. Mar. 2, 2022), ECF No. 108 ("I just would want to note for the record for [plaintiffs' counsel] that we may appeal based on the merits, but we won't make an appeal based on *Purcell* so we can at least get that put down. If we get to that point. I wanted to make that clear.").

[246] Harper v. Hall, 868 S.E.2d 499, 508–10 (N.C. 2022). The Supreme Court of North Carolina entered its decision on February 14, 2022, which was 92 days before the primary election on May 17, 2022.

But had the Court granted a stay, that decision—a *federal* court changing the maps just 71 days before the primary—would have been disruptive.[247]

The holding in *Moore* makes even more sense when compared to the Court's decision to grant a stay in *Merrill v. Milligan*. Both were redistricting cases, both were granted certiorari on the merits, and the preliminary decision in *Moore* came more than two weeks closer to the election. But the order in *Merrill* was entered by a federal district court.[248] A *federal* court ordering Alabama to draw new maps was disruptive to the State's administration of its elections. Therefore, under the conditions this Note proposes, the Supreme Court in *Merrill* was correct in determining that *Purcell* applied and a stay was necessary to correct the violation of the Principle. On the other hand, in *Moore*, because the Supreme Court was not correcting a lower *federal* court order that contravened the Principle, the Court applied *Purcell* to itself and properly abstained from federal court intervention.

By contrast, the Court applied the Principle in *Merrill v. People First of Alabama* where it should not have. Recall that no provision of Alabama law expressly addressed curbside voting.[249] While the Secretary of State took the position that curbside voting violated the law, the district court determined that it was a form of in-person voting that counties could implement without additional authority from the legislature.[250] As such, under Condition 2, the federal court's decision did not block a state election law or invalidate a regulation issued by the Secretary; it merely enjoined the Secretary from outlawing the practice de facto by obtaining court orders or calling the police. And in doing so, the district court's injunction did not *force* the State to adopt curbside voting; it didn't force Alabama to do anything at all.[251] The order simply gave counties that were prepared to implement curbside voting the *option* to do so.

Asking whether federal court intervention would disrupt Alabama's administration of its elections, the case should come out differently. Allowing counties the option to implement the curbside voting procedure was not disruptive because it did not change the content of the State's

[247] Moore v. Harper, 142 S. Ct. 1089 (2022) (mem.).

[248] Singleton v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (per curiam).

[249] People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1162 (N.D. Ala. 2020).

[250] Id. at 1162–63.

[251] Merrill v. People First of Ala., 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting from grant of stay); *People First of Ala.*, 491 F. Supp. 3d at 1093 ("To be clear, lifting the ban on curbside voting permits counties willing to implement the practice, if any, to do so, but this order does not mandate that counties must provide curbside voting in Alabama.").

election law and the injunction allowed county election officials to opt out. Thus, the federal court should have been permitted to grant that relief, and a stay was inappropriate under *Purcell*.

## CONCLUSION

With the 2024 elections just around the corner, much is on the ballot: the White House, 34 seats in the Senate, all 435 seats in the House of Representatives, 13 state and territorial governorships, and a growing list of state ballot measures concerning everything from establishing a constitutional right to an abortion[252] and changing the state flag[253] to increasing the minimum wage[254] and implementing ranked choice voting.[255] Decisions on each of these issues will be made in the voting booth. But in the days, weeks, and months leading up to election day, decisions that will nevertheless *impact* the results of the 2024 elections are being made in the courtroom. Litigation has and will continue to influence the rules, maps, and procedures governing the upcoming election cycle. With its power to prevent federal courts from enforcing the protections of federal law, we can expect the *Purcell* Principle to play a role in these cases. Indeed, it already has.[256]

This Note proposes a new framework for understanding *Purcell*. I have suggested that the Principle cannot be explained by voter confusion—as the case law and scholarship have long contended—but can be explained

[252] Michelle Larkin, Maryland Voters to See Reproductive Rights on 2024 Ballot, Md. Matters (Mar. 30, 2023, 11:15 PM), https://www.marylandmatters.org/2023/03/30/maryland-voters-to-see-reproductive-rights-on-2024-ballot/ [https://perma.cc/B57L-672J].

[253] Meaghan Bellavance, Voters to Decide Next Year Whether to Adopt 1901 Maine State Flag, NEWS CENTER Me. (July 27, 2023, 10:53 AM), https://www.newscentermaine.com/article/news/politics/maine-politics/voters-to-decide-whether-to-adopt-1901-maine-state-flag-next-year-november-2024/97-641a5ccd-38ec-47e5-a94b-47d9dc444663 [https://perma.cc/8X7M-Z733].

[254] Danielle Dawson, $18 Minimum Wage in California? What to Know About Next Year's Ballot Measure, Fox 5 San Diego (Mar. 13, 2023, 11:25 AM), https://fox5sandiego.com/news/california-news/californians-will-get-to-vote-on-an-18-minimum-wage-next-year-what-to-know/ [https://perma.cc/MP7Y-4HES].

[255] Adam Edelman, Oregon Becomes the Latest State to Put Ranked Choice Voting on the Ballot, NBC News (June 27, 2023, 2:43 PM), https://www.nbcnews.com/politics/2024-election/oregon-becomes-latest-state-put-ranked-choice-voting-ballot-rcna91289 [https://perma.cc/A824-TRTQ].

[256] Petteway v. Galveston County, 87 F.4th 721, 723, 724 (5th Cir. 2023) (holding that the *Purcell* Principle required staying the district court's order finding a districting map for the 2024 elections violated federal law and adopting a judicially created remedial map); Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024) (mem.).

by federalism. Although this federalism rationale has been unarticulated by the Supreme Court expressly, the applications of *Purcell* make more sense if the Principle is viewed as an instrument to advance the constitutional theory that decisions about election procedures are primarily the province of the states.

Viewing the doctrine this way, when a court hears an election law dispute when election day is near, it should ask whether judicial relief would disrupt a state's administration of its elections. This question is answered by looking to four conditions necessary to trigger application of the Principle. Where the court decides that intervention would be disruptive to the state, the Supreme Court's precedents instruct that the Principle ought to be applied and operate as a near-total bar on injunctive relief. Under this conception, the Court's historic applications of *Purcell* make more sense. But this framework—and those conditions—should also provide guidance to future litigants. For example, if, looking at the calendar, one anticipates that a decision is unlikely to be rendered by a federal district court six months before election day, counsel should consider taking their claim to state court where the Principle doesn't apply. Alternatively, one might work with opposing counsel to agree on a briefing schedule that will allow relief to be effective should the plaintiff succeed or get an admission on the record—forcing a potential waiver from the state. Both are apparently fair game under *Purcell*.

Much guidance from the Supreme Court is still needed regarding the contours of the *Purcell* Principle. The Principle's scope is constantly evolving, and its coherence hindered by the fact that *Purcell* is, by nature, a doctrine of the shadow docket. Hopefully a majority of the Court will soon answer the questions scholars have asked over the last almost-two decades. In the meantime, however, this Note has tried to make sense of the cases with the clues we have thus far been given.