

# DOES ANYBODY REALLY KNOW WHAT TIME IT IS?: HOW THE US SUPREME COURT DEFINES “TIME” USING THE *PURCELL* PRINCIPLE

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## INTRODUCTION

When should federal judges avoid changing a state’s election laws in the run-up to an election? The US Supreme Court first provided federal courts with an answer to this question in *Purcell v. Gonzalez*.<sup>1</sup> In a six-page shadow docket per curiam opinion,<sup>2</sup> the Court established a legal doctrine now known as the “*Purcell* principle.”<sup>3</sup> Put simply, the *Purcell* principle provides that federal

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<sup>1</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam).

<sup>2</sup> Ira Robbins, *Scholarship Highlight: The Supreme Court’s Misuse of Per Curiam Opinions*, SCOTUSBLOG (Oct. 5, 2012, 11:13 AM), <https://www.scotusblog.com/2012/10/scholarship-highlight-the-supreme-courts-misuse-of-per-curiam-opinions/> [https://perma.cc/DD6W-VXQH] (“Traditionally, the per curiam opinion was used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion.”). Now, however, the per curiam opinion has become “a convenient tool for the Supreme Court in deciding controversial cases, because [w]ith no Justice signing the opinion, there [is] no individual to be blamed for evading the tough questions.” *Id.* (explaining that a per curiam opinion is an opinion that is issued in the name of the Court rather than in the name of a particular Justice or Justices).

<sup>3</sup> See Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. UNIV. L. REV. 427, 428, 441 (2016) (explaining that it is “now known” because, at the time of the opinion, the Supreme Court did not label it as the *Purcell* principle). Interestingly, the Court did not coin

judges should be cautious about altering state election rules in the period close to an election. The rationale for this principle is that such changes may confuse voters and create problems for officials who are administering the election.<sup>4</sup> “Court orders affecting elections, especially conflicting orders,” the Court explained, “can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”<sup>5</sup>

Since the Court decided *Purcell*, the Justices have relied on the *Purcell* principle numerous times to help them arrive at consequential decisions about elections decided on both their regular and shadow dockets.<sup>6</sup> The *Purcell* principle has been used to challenge thousands of Americans’ ability to vote, as well as the effectiveness of their votes.<sup>7</sup> Consider the Court’s shadow docket decision in *Republican National Committee v. Democratic National Committee*.<sup>8</sup> On March 24, 2020, Wisconsin Governor Tony Evers issued an executive order advising all Wisconsin residents to stay home until at least April 24 to slow the spread of the COVID-19 virus.<sup>9</sup> During that period, Wisconsin had a previously-scheduled April 7 election.<sup>10</sup> In light of the pandemic, on April 2, District

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the phrase “*Purcell* principle.” Rather, it was Richard Hasen, the Chancellor’s Professor of Law and Political Science at the University of California, Irvine, who coined the phrase. *Id.* Hasen defines this principle in his article as “the idea that courts should not issue orders which change election rules in the period just before the election.” *Id.*; see, e.g., Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (illustrating that the Justices have since adopted the phrase themselves).

<sup>4</sup> *Purcell*, 549 U.S. at 4–5.

<sup>5</sup> *Id.* at 4–5.

<sup>6</sup> *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (Westlaw Citing References). According to a search on Westlaw, the Supreme Court has cited *Purcell v. Gonzalez* in eighteen subsequent cases as of August 19, 2022. The analysis in this Article only includes seventeen of these eighteen cases. *Rose v. Raffensperger* 143 S. Ct. 58 (2022) was decided after this Article was written.

<sup>7</sup> See generally Josh Gerstein, *The Murky Legal Concept That Could Swing the Election*, POLITICO (Oct. 5, 2020, 7:58 PM), <https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604> [<https://perma.cc/8D7K-26CK>].

<sup>8</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

<sup>9</sup> See STATE WIS. DEP’T. HEALTH SERVS., EMERGENCY ORDER #12 SAFER AT HOME ORDER (2020); GOV. GRETCHEN WHITMER, EXECUTIVE ORDER 2020-42: TEMPORARY REQUIREMENT TO SUSPEND ACTIVITIES THAT ARE NOT NECESSARY TO SUSTAIN OR PROTECT LIFE-RESCINDED (Apr. 9, 2020), <https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/04/09/executive-order-2020-42> [<https://perma.cc/6Q7N-2BNJ>] (showing many other state governors enacted similar orders during the same time period); Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 22, 2020, 8:55 AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> [<https://perma.cc/2WWX-BY5A>] (showing a full timeline of how COVID-19 spread in the United States). The first case of suspected local transmission in the United States of COVID-19 was on February 26, 2020. *Id.* On March 13, 2020, former President Donald Trump declared a national emergency. *Id.* By March 17, 2020, COVID-19 was present in all fifty states. *Id.*

<sup>10</sup> Amy Gardner, *Federal Judge Declines to Postpone April 7 Presidential Primaries in Wisconsin*, WASH. POST (Apr. 2, 2020, 7:58 PM), <https://www.washingtonpost.com/politics/>

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Court Judge William Conley issued a preliminary injunction extending the deadline for election officials to receive absentee ballots from April 7 (Election Day) to April 13.<sup>11</sup> On April 6, just one day before the primary, the Supreme Court blocked the district court's ruling, thereby requiring each absentee voter's ballot to be postmarked by Election Day.<sup>12</sup> In support of its decision, the Court cited *Purcell*, stating that "lower federal courts should ordinarily not alter the election rules on the eve of an election."<sup>13</sup> Furthermore, the Supreme Court noted that the district court's order allowing voters to mail their ballots after Election Day was "extraordinary relief [that] would fundamentally alter the nature of the election by allowing voting for six additional days after the election."<sup>14</sup> The net effect of this decision was to force thousands of Wisconsin voters to choose between protecting their health in light of a global pandemic, or exercising their right to vote.<sup>15</sup>

Relatedly, in the shadow docket decision *Merrill v. Milligan*, the Court considered whether an Alabama congressional redistricting plan—which included only one majority-black district rather than the two that the state had prior to the new plan—violated Section 2 of the Voting Rights Act.<sup>16</sup> The District Court for the Northern District of Alabama found that the plan resulted in black and Democratic voters having less political power in Alabama's congressional delegation than they otherwise would or should.<sup>17</sup> The district court on January 24, 2022, required Alabama to redraw its congressional map.<sup>18</sup> However, on February 7, 2022, through a shadow docket decision, the Supreme Court in a 5-4 decision put the district court's ruling on hold,<sup>19</sup> which effectively allowed Alabama to proceed with its new redistricting map—with one majority-black district—for its primary elections and for the 2022 midterm elections.<sup>20</sup> In

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federal-judge-declines-to-postpone-april-7-presidential-primaries-in-wisconsin/2020/04/02/ff660b4-74dc-11ea-87da-77a8136c1a6d\_story.html [https://perma.cc/252B-FHCY].

<sup>11</sup> Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 983 (W.D. Wis. 2020).

<sup>12</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1208.

<sup>13</sup> *Id.* at 1207.

<sup>14</sup> *Id.* at 1208.

<sup>15</sup> As a result of this decision, many voters in Wisconsin were forced to vote in person, contributing to longer lines and increased health risks at polling stations. See *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> [https://perma.cc/SN94-GVEK].

<sup>16</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022).

<sup>17</sup> *Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819, at \*4 (N.D. Ala. Jan. 24, 2022); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022).

<sup>18</sup> *Singleton*, 582 F. Supp. 3d at 1033, 1035.

<sup>19</sup> *Merrill*, 142 S. Ct. at 879.

<sup>20</sup> There are various legal challenges to congressional and legislative maps for the 2022 midterms. As of February 2022, there are at least forty-six lawsuits alleging that seventeen states' maps are racially discriminatory or illicitly partisan. See *How Is the "Purcell Principle" Threatening Voting Rights in America?*, ECONOMIST (Feb. 17, 2022), <https://www.econ>

a concurring opinion, Justice Kavanaugh cited *Purcell* to indicate that federal court interference in the case was too close to the upcoming elections.<sup>21</sup> In the same way as *Republican National Committee*, this decision, using *Purcell* as precedent, comes with major consequences for elections and representation: the outcome of this case directly affected who was elected to the US House of Representatives in Alabama in 2022, and ultimately the political party that controlled US Congress following the 2022 midterms.<sup>22</sup>

In both cases, the Supreme Court applies the *Purcell* principle in a similar fashion—that is, it relies on *Purcell* to hold that federal courts cannot, or at least should not, intervene in election-related issues too close to the date the election is set to take place. However, what distinguishes *Merrill* from *Republican National Committee* is that *Merrill* was decided by the district court when Alabama’s primary was still four months away, and the general election was nearly nine months away. *Republican National Committee*, in contrast, was decided by the district court five days before Election Day.<sup>23</sup> Between the general election of interest in *Merrill* and the special election in *Republican National Committee*, there is a 283-day difference.<sup>24</sup>

This “time” distinction leads to the question posed by this Article: since the creation of the *Purcell* principle in *Purcell v. Gonzalez*, how has the Supreme Court defined “the period close to an election?” In other words, how close does an election have to be for the *Purcell* principle to apply to federal courts? The answer to this question has significant implications for predicting when the Supreme Court may disenfranchise voters or impose significant burdens on elec-

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omist.com/the-economist-explains/2022/02/17/how-is-the-purcell-principle-threatening-voting-rights-in-america [https://perma.cc/T9ZH-JMRJ].

<sup>21</sup> *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (“As the Court has often indicated, however, that traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state’s election law in the period close to an election.”). However, Justice Kagan, in her dissenting opinion, observed that, because the allegedly unconstitutional districts had been drawn in a week, new, constitutional districts could be fashioned quickly as well. *See id.* at 888 (Kagan, J., dissenting).

<sup>22</sup> Because Alabama did not have to create a second majority-black congressional district for the 2022 midterm elections, Democrats lost one seat in Alabama. Mark Joseph Stern, *How the Supreme Court Likely Handed Control of the House to Republicans*, SLATE (Nov. 9, 2022, 11:29 AM), <https://slate.com/news-and-politics/2022/11/supreme-court-republican-control-house-alito-mccarthy-gift.html> [https://perma.cc/XSM4-F2C5].

<sup>23</sup> Amy Howe, *Wisconsin Republicans Ask Justices to Intervene After Lower Court Extends Deadline for Primary Absentee Ballots*, SCOTUSBLOG (Apr. 4, 2020, 8:34 PM), <https://www.scotusblog.com/2020/04/wisconsin-republicans-ask-justices-to-intervene-after-lower-court-extends-deadline-for-primary-absentee-ballots/> [https://perma.cc/BGR3-K95Z].

<sup>24</sup> *Republican National Committee* was decided by the district court five days before Election Day. *Id.* *Merrill* was decided by the US Supreme Court 288 days before the General Election on November 8, 2022. *Court Case Tracker: Merrill v. Milligan*, BRENNAN CTR. FOR JUST. (July 18, 2022), <https://www.brennancenter.org/our-work/court-cases/merrill-v-milligan> [https://perma.cc/2K8V-SSG3].

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tion administrators in future election law cases that arrive at the Court's chambers.<sup>25</sup>

To answer this question, I collect opinions from the Supreme Court from 2006–2022 in which the Court uses, relies upon, or otherwise cites to *Purcell v. Gonzalez*. I include majority opinions, concurring opinions, and dissenting opinions from the Court's regular docket, as well as from its shadow docket. For each decision that cites *Purcell*, I collect data on how far out Election Day is from each decision by the lower court. This provides us with a better idea of the typical period the Supreme Court has used when defining the "period close to an election." Collectively, this Article will provide insight into how the Supreme Court has applied the *Purcell* principle since its creation and will discuss the implications of *Purcell* for the future of voting rights. I will argue that the *Purcell* shadow docket ruling has and will continue to have lasting implications on the outcomes of election lawsuits.

This Article will proceed as follows. Part I will review the history and application of the *Purcell* principle. Specifically, it will explore the exact language used in *Purcell v. Gonzalez* and provide an overview of how the Justices have applied *Purcell* since its inception, both in merits and shadow docket opinions. Part II will describe several limitations of the *Purcell* principle. In Part III, which contains the bulk of the quantitative analysis for this Article, I will explore how the Court has defined the period "close to an election" throughout their opinions and summarize key takeaways from these data. I will conclude with brief remarks about the role that *Purcell* has played in election law cases since its creation, and the potential consequences of the principle moving forward.

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

While the Supreme Court's ruling in *Purcell v. Gonzalez* deviated only slightly from the traditional procedure for analyzing preliminary injunctions or stay proceedings, subsequent cases using *Purcell* have morphed the case into the doctrine now known as the "*Purcell* principle," which arguably deviates considerably from traditional procedure.<sup>26</sup> To understand the principle fully,

<sup>25</sup> See generally Richard L. Hasen, Research Note, *Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J.: RULES, POLITICS, & POL'Y 150 (2022). There is reason to suspect that the *Purcell* principle will continue to be important in future election law cases, as the number of these cases continue to rise. As Hasen finds, there were record election litigation rates in regard to the 2020 Presidential Election: rates have nearly tripled from the period before the 2000 election compared to the post-2000 period. *Id.* at 151.

<sup>26</sup> When district courts evaluate requests for preliminary injunctions or temporary restraining orders, they historically have weighed four factors: whether (1) the plaintiff has a substantial likelihood of success on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the plaintiff's favor, and (4) an injunction is in the public interest. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When examining a stay request, courts have typically considered the *Nken* fac-

however, a discussion of *Purcell* is required—along with an analysis of how the principle has taken shape over the course of sixteen years through the Court’s precedent. This section provides that discussion, beginning with the Court’s ruling in *Purcell v. Gonzalez*.

At issue in *Purcell* was Proposition 200, a 2004 Arizona voter identification law that sought to combat voter fraud by requiring voters to present proof of citizenship when registering to vote and identification when voting in person on Election Day.<sup>27</sup> Voters who did not have the requisite identification could still vote in person using a provisional ballot.<sup>28</sup> After the district court declined to block the law for the 2006 midterm elections,<sup>29</sup> the Ninth Circuit temporarily halted enforcement of the law while it decided the merits of the appeal.<sup>30</sup> However, the Supreme Court, in a shadow docket decision, reversed the decision of the Ninth Circuit, thereby reinstating Proposition 200 two and a half weeks before Election Day.<sup>31</sup>

The Supreme Court took issue with the Ninth Circuit’s decision for two reasons, totaling just six pages.<sup>32</sup> First, the Court emphasized the Ninth Circuit’s lack of an explanation for its decision, observing that the Ninth Circuit failed to give a reason for temporarily blocking the law, nor did it give a reason for denying the plaintiff’s motion for reconsideration.<sup>33</sup> Second, in just a single paragraph, the Court based its decision on the short amount of time between the Ninth Circuit’s order and the election and the need of Arizona election officials for clear guidance.<sup>34</sup> The Court stated that the Ninth Circuit “was required to

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tors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured [in the absence of] a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

<sup>27</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam); see also ARIZ. REV. STAT. ANN. § 16-166 (2022).

<sup>28</sup> *Purcell*, 549 U.S. at 2. A provisional ballot is used to record a vote when there are questions about a given voter’s eligibility that must be resolved before the vote can count. *Provisional Ballots*, NAT’L CONF. STATE LEGISLATURES (Nov. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx> [<https://perma.cc/LSQ2-GHNC>].

<sup>29</sup> *Gonzalez v. Arizona*, 435 F. Supp. 2d 997, 1004 (D. Ariz. 2006).

<sup>30</sup> *Purcell*, 549 U.S. at 2.

<sup>31</sup> *Id.* at 6. Professor Orin Kerr described the decision as “a lightning bolt from above.” Orin Kerr, *Supreme Court Allows Voter ID Law*, VOLOKH CONSPIRACY (Oct. 20, 2006, 5:05 PM), <http://volokh.com/posts/1161378321.shtml> [<https://perma.cc/PXP7-4STF>].

<sup>32</sup> The median majority opinion during the 2009 Term, for example, was 4,751 words. Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 18, 2010), [https://www.nytimes.com/2010/11/18/us/18rulings.html?pagewanted=1&\\_r=1&partner=rss&emc=rss#](https://www.nytimes.com/2010/11/18/us/18rulings.html?pagewanted=1&_r=1&partner=rss&emc=rss#) [<https://perma.cc/2NTL-FRC7>]. In contrast, the per curiam decision for *Purcell* is roughly 1,580 words.

<sup>33</sup> *Purcell*, 549 U.S. at 3.

<sup>34</sup> *Id.* at 4–5 (“Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, espe-

weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.”<sup>35</sup> And “[g]iven the imminence of the election and the inadequate time to resolve the factual disputes,” blocking the law weeks before Election Day could cause voter confusion and problems for election administrators.<sup>36</sup> As the Court stated, “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”<sup>37</sup> This section of the opinion adds a special consideration into the analysis for preliminary injunctions and stay considerations for election cases: the proximity of the election.

While proximity certainly was a part of the Court’s analysis in *Purcell*, it arguably was not the basis for its ruling. However, proximity has become all that *Purcell* is known for—and what the *Purcell* principle is based upon. Sections I.A and I.B explain how this came to be, by reviewing the evolution of the *Purcell* principle as cited and analyzed by the Supreme Court since 2006. I separate the cases that cite *Purcell* into two different waves. The first wave analyzes Supreme Court cases that incorporate *Purcell* into the reasoning but do so for reasons unrelated to proximity to an upcoming election (with the exception of a dissent in *Veasey v. Perry*). The second wave examines cases that directly cite *Purcell* to discuss proximity to an upcoming election, beginning with *Republican National Committee in 2020*.<sup>38</sup>

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cially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So, the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek en banc review. In the Ninth Circuit that procedure, involving voting by all active judges and an en banc hearing by a court of 15, can consume further valuable time. These considerations, however, cannot be controlling here. 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.”) This section is 187 words long and contains nine sentences.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.* at 5–6.

<sup>37</sup> *Id.* at 4–5. The Court relied on *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) to hold that a state has a compelling interest in preserving the integrity of its elections. *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Court also observed that “[n]o bright line separates permissible election-related regulation from unconstitutional infringements.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997).

<sup>38</sup> These cases are also discussed in chronological order.

A. *The First Wave of Purcell in the 2000s and 2010s*

Between 2006—when *Purcell* was decided—and 2013, the Supreme Court relied upon *Purcell* as precedent in four cases.<sup>39</sup> These cases were decided on the Court’s merits docket, which is interesting given that *Purcell* was a per curiam decision on the Court’s shadow docket. In all four of these cases, the proximity of upcoming elections as described in *Purcell* is not discussed; rather, *Purcell* is used to highlight issues such as preserving the integrity of elections and a fundamental right to vote.

*Purcell* was first cited in *Crawford v. Marion County Election Board*, that was decided two years after *Purcell*. In *Crawford*, *Purcell* was cited in Justice Souter’s dissenting opinion, and Souter did not use *Purcell* to make an argument about the timing of an election. Rather, he relied on *Purcell* to argue that there was a fundamental right to vote and that there was a compelling interest in preserving the integrity of the election process.<sup>40</sup> In the same Term, the Court decided *Riley v. Kennedy*,<sup>41</sup> where it did consider the timing of elections. In *Riley*, the Court answered the question of whether voting changes that resulted from an Alabama Supreme Court decision needed to receive preclearance under Section 5 of the Voting Rights Act.<sup>42</sup> Ultimately, the Court answered that question in the negative.<sup>43</sup> Citing *Purcell*, the Court observed that, even though “Alabama’s highest court . . . did not render its decision until after an election was held[,] . . . practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.”<sup>44</sup> *Riley* marked the first time that the Court incorporated the timing element of *Purcell* into one of its decisions; however, *Riley* involved a decision made by a federal court *after* the election of interest had passed.

Following *Riley*, the next time the Court cited *Purcell* was in *Doe v. Reed*.<sup>45</sup> Both Chief Justice Roberts in the majority opinion and Justice Thomas

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<sup>39</sup> This is according to a search on Westlaw on June 10, 2022. These cases are the following: *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 210, 225 (2008) (Souter, J., dissenting); *Riley v. Kennedy*, 553 U.S. 406, 426 (2008); *John Doe No. 1 v. Reed*, 561 U.S. 186, 197, 228 (2010); and *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 6, 40–41 (2013).

<sup>40</sup> *Crawford*, 553 U.S. at 210, 225 (Souter, J., dissenting).

<sup>41</sup> *Riley*, 553 U.S. at 410, 429. The 7-2 majority opinion was written by Justice Ginsburg with a dissenting opinion by Justice Stevens, which Justice Souter joined.

<sup>42</sup> 52 U.S.C.A. § 10301 (2022). The Voting Rights Act introduced nationwide protections of the right to vote. A key element of the law, Section 5, requires certain jurisdictions—states or political subdivisions of states—to obtain prior approval (“preclearance”) of any change to their electoral laws or procedures, generally by demonstrating to a federal court that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. *Id.* at § 10304.

<sup>43</sup> *Riley*, 553 U.S. at 411. Arguably, the technicalities of the fact-specific ruling limit the reach of the opinion.

<sup>44</sup> *Id.* at 426.

<sup>45</sup> *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010).



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in his dissenting opinion used *Purcell* to discuss the importance of preserving the integrity of the electoral process.<sup>46</sup> Three years later, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, Justice Scalia cited *Purcell* to discuss Proposition 200.<sup>47</sup> Similarly to Chief Justice Roberts and Justice Thomas in *Reed*, Justice Alito cited *Purcell* in his dissenting opinion to discuss the integrity of the election process.<sup>48</sup> Hence, from 2006 to 2013, the proximity component of *Purcell* was not advanced any further than what had been written in the original opinion.

In *Veasey v. Perry*, however, the Court changed course.<sup>49</sup> Unlike the previous cases, *Veasey* was the first case to cite *Purcell* (in a dissenting opinion) on the Court's shadow docket, in which the Court considered the proximity of *an upcoming election*.<sup>50</sup> At issue in *Veasey* was a new Texas voter identification law—SB 14—that required all voters to show one of six forms of photo identification in order to vote, placed strict limitations on who is exempt, and required voters to disclose personal information to obtain a free voter identification card.<sup>51</sup> On October 9, 2014, the district court found SB 14 unconstitutional, but the Fifth Circuit, relying in part on *Purcell* and citing logistical difficulties in retraining thousands of polling workers, blocked the district court's decision on October 14, 2014.<sup>52</sup> The Supreme Court allowed the Fifth Circuit's decision to stand, and thus, SB 14 remained in effect for the November 2014 midterm election.<sup>53</sup>

While the Supreme Court did not provide a fully written opinion for its decision, the dissenting opinion, written by Justice Ginsburg and joined by Justices Sotomayor and Kagan, argued that the Court should have vacated the Fifth Circuit's decision.<sup>54</sup> Invoking the proximity piece of *Purcell* for the first time in

<sup>46</sup> *Id.* at 197; *id.* at 228 (Thomas, J., dissenting).

<sup>47</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 6 (2013).

<sup>48</sup> *Id.* at 40–41 (Alito, J., dissenting).

<sup>49</sup> *Veasey v. Perry*, 574 U.S. 951, 951 (2014) (Ginsburg, J., dissenting).

<sup>50</sup> *Id.* at 951.

<sup>51</sup> S.B. 14, 2011 Leg., 82d Sess. (Tex. 2011). The bill was signed into law by Governor Rick Perry on May 27, 2011. Effective January 1, 2012, Texas registered voters were required to present a specified type of photo identification when voting at the polls in person. The Campaign Legal Center has called SB 14 “the nation’s strictest voter photo ID law” and claimed that it “[leaves] more than half a million [eligible] voters who do not have the requisite types of ID from fully participating in the democratic process.” *Veasey v. Abbott: A Challenge to Texas’ Harsh Voter ID Law*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/cases-actions/veasey-v-abbott> [<https://perma.cc/7E3W-W9N8>]. Additionally, according to the Legal Defense Fund, SB 14 would have a disproportionate effect on voters of color throughout the state. *Case: United States v. Texas, et. al.; Veasey v. Perry*, LEGAL DEF. FUND (Aug. 26, 2013), <https://www.naacpldf.org/case-issue/united-states-v-texas-et-al-veasey-v-perry/> [<https://perma.cc/KY2Y-6MP6>]. Nationally, only 8 percent of white voting age citizens lack a government-issued photo ID, in contrast to 25 percent of African American voting age citizens. *Id.*

<sup>52</sup> *Veasey v. Perry*, 769 F.3d 890, 892–93, 896 (5th Cir. 2014).

<sup>53</sup> *Veasey*, 574 U.S. at 951.

<sup>54</sup> *Id.* (Ginsburg, J., dissenting).

the Court's history, Justice Ginsburg argued that, since the district court made an expedited schedule in November 2013 for resolving the case, "Texas knew full well that the court would issue its ruling only weeks away from the election."<sup>55</sup> Moreover, according to Ginsburg, a proper application of *Purcell* would have dictated a different result: because the district court's decision would have merely reinstated election rules that were already familiar to Texas poll workers and voters, there was little risk that it would confuse voters or cause much disruption to Texas' electoral process.<sup>56</sup>

Justice Ginsburg also asserted that the Fifth Circuit placed too much emphasis on the potential for disruption to the election and neglected the broader standard for reviewing motions to block lower court opinions.<sup>57</sup> Essentially, Ginsburg was foreshadowing the Supreme Court's direct interpretation of the *Purcell* principle years later.<sup>58</sup> "*Purcell* held only that courts must take careful account of considerations specific to election cases," she wrote, "not that election cases are exempt from traditional stay standards."<sup>59</sup> Where the record showed that citizens were being deprived of their right to vote, she urged, courts must step in to vindicate the Constitution, even in the run-up to Election Day.<sup>60</sup> The closeness of an election, she argued, was a factor to be considered, but should not be an absolute rule barring courts from vindicating the Constitution.<sup>61</sup>

After *Veasey*, the Supreme Court did not cite *Purcell* again until 2018, in three cases: *Benisek v. Lamone*, *North Carolina v. Covington*, and *Brakebill v. Jaeger*—the latter two were decided again on the Court's shadow docket.<sup>62</sup> In *Benisek*, Republican voters alleged that Maryland's Sixth Congressional District was gerrymandered in 2011 in retaliation for their political beliefs.<sup>63</sup> In 2017, six years after the Maryland General Assembly redrew the district, plaintiffs sued to enjoin election officials from holding the 2018 congressional elections under the 2011 map.<sup>64</sup> In a per curiam decision, the Supreme Court argued that a preliminary injunction would have been against the public interest.<sup>65</sup> Citing *Purcell*, the Court observed that

<sup>55</sup> *Id.* at 952.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *infra* Section I.B.

<sup>59</sup> *Veasey*, 574 U.S. at 952 (Ginsburg, J., dissenting).

<sup>60</sup> *Id.* at 955 ("The greatest threat to public confidence in elections . . . is the prospect of enforcing a purposefully discriminatory law, one that . . . risks denying the right to vote to hundreds of thousands of eligible voters.").

<sup>61</sup> *Id.* at 952.

<sup>62</sup> *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018) (per curiam); *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam); *Brakebill v. Jaeger*, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting).

<sup>63</sup> *Benisek*, 138 S. Ct. at 1943.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1944.

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[p]laintiffs themselves represented to the District Court that any injunctive relief would have to be granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season. Despite the District Court’s undisputedly diligent efforts, however, that date had “already come and gone” by the time the court ruled on plaintiffs’ motion.<sup>66</sup>

Because of this, the deadline had “long since passed for purposes of entering a preliminary injunction on remand from this Court.”<sup>67</sup> Similar to *Riley*, this decision also used *Purcell* to discuss the proximity of an election *after* the election of interest had passed.

In the next case, *North Carolina v. Covington*, the district court appointed a special master to prepare a report and redraw two senate districts and seven house districts that the district court held violated the Equal Protection Clause of the Fourteenth Amendment.<sup>68</sup> On January 19, 2018, the district court approved North Carolina’s 2017 plan as modified by the special master’s recommended plans.<sup>69</sup> In a shadow docket per curiam opinion, the Supreme Court relied on *Purcell* to hold that the district court did not abuse its discretion by arranging for the special master to draw up a remedial map instead of giving the general assembly another chance or by adopting the special master’s recommended remedy: “the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections.”<sup>70</sup> The redrawing of the districts needed to be resolved for the 2017 special elections in North Carolina. By the time the Supreme Court made its decision, however, these elections had passed. Thus, *Purcell* was also used here to discuss proximity, but in the past tense just like *Benisek* and *Riley*.

The last case in 2018 was the shadow docket case *Brakebill v. Jaeger*.<sup>71</sup> In that case, six Native Americans filed suit to block a North Dakota voter identification law—HB 1369—that North Dakota Governor Doug Burgum signed into law on April 24, 2017, arguing that the law disenfranchised Native Americans by requiring residents to present an identification showing a residential address when voting.<sup>72</sup> After the district court found that the law had a disproportionate and discriminatory effect on Native American voters, the Eighth Circuit issued an opinion overturning the Court-ordered relief.<sup>73</sup> On October 9, 2018, the Supreme Court denied Native American Rights Fund’s emergency application to stop North Dakota from implementing HB 1369.<sup>74</sup>

<sup>66</sup> *Id.* at 1945.

<sup>67</sup> *Id.*

<sup>68</sup> *North Carolina v. Covington*, 138 S. Ct. 2548, 2550 (2018) (per curiam).

<sup>69</sup> *See id.* at 2551.

<sup>70</sup> *Id.* at 2553–54.

<sup>71</sup> *See generally*, *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

<sup>72</sup> *Id.* at 556; *see also* N.D. CENT. CODE § 16.1-01-04 (2022).

<sup>73</sup> *See Brakebill*, 905 F.3d at 557, 561.

<sup>74</sup> *Brakebill v. Jaeger*, 139 S. Ct. 10, 10 (2018) (mem.).

The majority of Supreme Court Justices decided to allow the Eighth Circuit decision to stand.<sup>75</sup> In her dissenting opinion, Justice Ginsburg—joined by Justice Kagan—argued that *Purcell* supported granting a preliminary injunction because the challenged law created a severe risk of voter confusion and disenfranchisement.<sup>76</sup> She feared that voters would come to the polling place only to find out they could not exercise their right to vote “because their formerly valid ID is now insufficient.”<sup>77</sup> While Justice Ginsburg hinted at the proximity of the law change to the upcoming election, she focused more on the risk of voter confusion, likely because the law was issued more than a year before the election.<sup>78</sup>

From these eight cases cited over the span of twelve years, it is clear that *Purcell* is cited in very important election law cases but not for reasons dealing with the proximity of upcoming elections—with the exception of *Veasey* in Justice Ginsburg’s dissenting opinion. Indeed, the opinions in *Riley*, *Benisek*, and *Covington* discuss the timing of elections, but this proximity is after the elections of interest in these cases had passed, such as discussing that district maps should have been drawn by a particular date (*Convinton* and *Benisek*) or a special election that should or should not have happened (*Riley*). Up until this point (2018) then, there was not a steadfast rule applied by the Supreme Court that federal courts should not intervene in state elections on the eve of an election. This changes very quickly, however, in 2020.

#### B. *The Second Wave of Purcell in the 2020s*

Because of the COVID-19 pandemic, “there was an unprecedented amount of litigation during the 2020 election.”<sup>79</sup> The Court, relying heavily on *Purcell*, gave great deference to state legislatures to administer the 2020 election in five cases: *Republican National Committee v. Democratic National Committee*, *Merrill v. People First of Alabama*, *Raysor v. DeSantis*, *Andino v. Middleton*, and *Democratic National Committee v. Wisconsin State Legislature*—which all

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<sup>75</sup> *See id.*

<sup>76</sup> *Id.* (Ginsburg, J., dissenting).

<sup>77</sup> *Id.* at 11 (Ginsburg, J., dissenting).

<sup>78</sup> *Id.* at 10 (Ginsburg, J., dissenting). *See generally* *North Dakota Voter ID Law* (Brakebill v. Jaeger), NAT’L AM. RTS. FUND, <https://narf.org/cases/nd-voter-id/> [<https://perma.cc/BFW9-BN4F>].

<sup>79</sup> Andrew Vazquez, *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, 973 (2021); *see also* Wilfred U. Codrington III, *Purcell in Pandemic*, 96 *N.Y.U. L. REV.* 941, 942 (2021). There was much legislative action taken at the state-level in 2020 to respond to the COVID-19 outbreak and its effect on elections. There were bills created for various reasons, including those relating to delaying elections, absentee and mail voting, and public health. *See generally* *COVID-19 and 2020 Primary Elections*, NAT’L CONF. ST. LEGISLATURES (July 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> [<https://perma.cc/HT46-4AZ3>].

were decided on the Court's shadow docket in the same year.<sup>80</sup> Arguably, it was not until 2020 that the proximity component of *Purcell*—and what is now known as the *Purcell* principle—came fully into fruition. These five cases established a hard-and-fast rule that lower courts should not enjoin voting changes close to Election Day, even when doing so is necessary to uphold the right to vote.<sup>81</sup> In the following paragraphs, these five cases and their implications are briefly discussed.

*Republican National Committee* is the first opinion to (1) expressly refer to the *Purcell* principle as the *Purcell* principle and (2) use the *Purcell* principle in a per curiam or majority opinion in a case where an election is upcoming. At issue in *Republican National Committee* was whether absentee ballots had to be mailed and postmarked by Election Day or could instead be mailed and postmarked after Election Day, provided they were received by local officials by Monday, April 13, 2020.<sup>82</sup> This deadline was considered due to the COVID-19 pandemic: it provided voters with additional time to plan to cast their ballots and gave the postal service more time to ensure that ballots were delivered to election offices in time. The Supreme Court stayed an April 2, 2020, preliminary injunction from the lower court that would have required Wisconsin to count the absentee ballots postmarked after the state's Election Day, extending the deadline from Tuesday, April 7, to Monday, April 13.<sup>83</sup> The Court's decision was released on Monday, April 6, 2020, just one day before Wisconsin's scheduled elections on Tuesday, April 7.<sup>84</sup>

As a part of its reasoning, the Court in a per curiam decision praised “the wisdom of the *Purcell* principle.”<sup>85</sup> Not only was this the first time that Court mentioned the *Purcell* principle in an opinion, but the majority's use of the word “wisdom” suggested very positive feelings toward the principle.<sup>86</sup> The majority stated that “when a lower court intervenes and alters the election rules

<sup>80</sup> See generally *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Sotomayor, J., dissenting); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (Roberts, J., concurring).

<sup>81</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 1–2 (2006). This case was cited in 2020 more than in any prior year.

<sup>82</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

<sup>83</sup> *Id.* at 1208; see also *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 977 (W.D. Wis. 2020). The Democratic National Committee, the Democratic Party of Wisconsin, and League of Women Voters, among others, requested the intervention of US District Court Judge William Conley to postpone Wisconsin's April 7 election. The District Court denied the petition to postpone the election. On April 2, however, Judge Conley issued a preliminary injunction extending the deadline for election officials to receive absentee ballots from April 7 (Election Day) to April 13, in order for voters to cast an absentee ballot. *Id.* at 952, 958–59.

<sup>84</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1205, 1208.

<sup>85</sup> *Id.* at 1207.

<sup>86</sup> *Id.*

so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.”<sup>87</sup> This reading of *Purcell* suggests that any lower court intervention close to an election needs to be corrected, which was Justice Ginsburg’s fear about the Court’s application of *Purcell* in her dissent in *Veasey*—a firm rule with few exceptions at the expense of “denying the right to vote to . . . eligible voters.”<sup>88</sup> To the majority, the “narrow, technical” issue at hand in this case was dispositive, even during a pandemic that had left many voters still waiting to receive their absentee ballot.<sup>89</sup>

As a result of the Court’s decision, thousands of voters in Wisconsin likely did not receive their requested absentee ballot by April 7, 2020, and therefore were not able to cast their votes in the election.<sup>90</sup> Ironically, the Supreme Court cited the *Purcell* principle here and said that lower courts should not intervene so close to the upcoming election, yet the Supreme Court intervened just one day before the election.<sup>91</sup> In a bitterly-worded dissenting opinion, Justice Ginsburg voiced many of the same concerns as she did in *Veasey*. She said the majority’s concerns about changing the rules close to Election Day “pale[d] in comparison to the risk that tens of thousands of voters w[ould] be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern.”<sup>92</sup>

A few months later, in *Merrill v. People First of Alabama*, the Supreme Court considered whether it should stay a ruling by the Eleventh Circuit leaving in place a federal district court’s order on June 15, 2020, lifting a ban on Alabama counties from offering curbside voting during the COVID-19 pandemic.<sup>93</sup>

<sup>87</sup> *Id.*

<sup>88</sup> *Veasey v. Perry*, 574 U.S. 951, 955 (2014) (Ginsburg, J., dissenting).

<sup>89</sup> *Republican Nat’l Comm.*, 140 S. Ct. at 1211.

<sup>90</sup> In part, the extension was in place because the system was overwhelmed with ballots due to the COVID-19 pandemic. Wisconsin usually receives around 250,000 requests for absentee ballots. For this election in 2020, they received at least 1.1 million requests. See Ian Millhiser, *A Judge May Have Saved Thousands of Wisconsin Voters from Being Disenfranchised by Coronavirus*, VOX (Apr. 3, 2020, 8:50 AM), <https://www.vox.com/2020/4/3/21206148/wisconsin-judge-order-coronavirus-election-voters-ballots> [<https://perma.cc/3KEV-D42F>]. There is also evidence that those who did not receive an absentee ballot resided disproportionately in counties likely to vote Democratic. See Richard L. Hasen, *Op-Ed: How Republicans Are Using the Pandemic to Suppress the Vote*, L.A. TIMES (Apr. 4, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-04-04/coronavirus-voting-republicans-safety-polls> [<https://perma.cc/H55T-RQWY>]; U.S. POSTAL SERV., OFF. OF INSPECTOR GEN., MANAGEMENT ALERT: TIMELINESS OF BALLOT MAIL IN THE MILWAUKEE PROCESSING & DISTRIBUTION CENTER SERVICE AREA 1, 7 (2020), <https://www.uspsog.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf> [<https://perma.cc/ZG2L-CJ8K>].

<sup>91</sup> *Republican Nat’l Comm.*, 140 S. Ct. at 1207.

<sup>92</sup> *Id.* at 1211.

<sup>93</sup> *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1226–27 (N.D. Ala. 2020). The Alabama Secretary of State had banned curbside voting. Nina Totenberg, *Supreme Court Blocks Curbside Voting in Alabama, an Option During Pandemic*, NPR (Oct. 21, 2020, 10:03 PM), <https://www.npr.org/2020/10/21/926472968/supreme-court-blocks-curbside-voting-in-alabama-an-option-during-pandemic> [<https://perma.cc/4BDN-H25Y>].

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The Justices put the district court's order on hold in one paragraph, allowing Alabama election officials to ban curbside voting for the November general election.<sup>94</sup> Justice Sotomayor (with whom Justices Breyer and Kagan joined) dissented.<sup>95</sup> Citing *Purcell*, Sotomayor argued that, given the short time before the election, the district court's order was a "reasonable accommodation" because it did not require all counties to adopt curbside voting; it simply gave them the option to do so.<sup>96</sup> Again, these liberal justices are pointing to what they think is an error with the majority—interpreting *Purcell* as a steadfast rule at the expense of disenfranchising voters.

The following month, in *Raysor v. DeSantis*, the *Purcell* principle was used again in a dissenting opinion by the liberal Justices.<sup>97</sup> In this case, the Supreme Court rejected a request by Florida voters and civil rights groups to reinstate a ruling that would have cleared the way for thousands of Florida residents who had been convicted of a felony to vote in the state's upcoming elections even if they had not paid off their court costs, fees, and fines.<sup>98</sup> The Justices denied the request to lift the Eleventh Circuit's stay, issued on July 1, 2020, in a one-sentence order handed down on July 16, 2020, just a month before the primary election on August 18, 2020.<sup>99</sup> Justice Sotomayor, joined by Justices Ginsburg and Kagan this time, wrote in dissent that the Court's order "prevent[ed] thousands of otherwise eligible voters from participating in Florida's primary election simply because they [were] poor."<sup>100</sup> She also noted that the Eleventh Circuit's stay "created the very 'confusion' and voter chill that *Purcell* counsels courts to avoid."<sup>101</sup>

Additionally, Justice Sotomayor noted that the Supreme Court relied on the *Purcell* principle "as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day."<sup>102</sup> Similarly to the dissenting opinions in *Republican National Committee* and *Merrill*, several of the liberal Justices here (Sotomayor, Ginsburg, Kagan) note that such a strict interpretation of

<sup>94</sup> *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25–26 (2020) (mem.).

<sup>95</sup> *Id.* at 26.

<sup>96</sup> *Id.* at 27.

<sup>97</sup> *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600, 2603 (2020) (mem.).

<sup>98</sup> Amy Howe, *Justices Decline to Intervene in Florida Voting Dispute*, SCOTUSBLOG (July 16, 2020, 3:33 PM), <https://www.scotusblog.com/2020/07/justices-decline-to-intervene-in-florida-voting-dispute/> [<https://perma.cc/36W3-J8TB>]. "At the heart of the dispute [was] a 2018 amendment to Florida's constitution that permits people with prior felony convictions to vote once they complete 'all terms of their sentence including parole or probation.'" *Id.* In 2019, the Florida state legislature "passed a law that required residents who [had] been convicted of a felony to pay all court costs, fees, and fines before they [were] eligible to vote." *Id.*

<sup>99</sup> *Raysor*, 140 S. Ct. at 2602.

<sup>100</sup> *Id.* at 2600 (Sotomayor, J., dissenting).

<sup>101</sup> *Id.* at 2603.

<sup>102</sup> *Id.*

*Purcell* and the *Purcell* principle are affirming Justice Ginsburg's initial fears six years prior in *Veasey*.<sup>103</sup>

Two months later, in *Andino v. Middleton*, the Supreme Court dealt with whether they should stay an order by the US District Court for the District of South Carolina enjoining South Carolina's enforcement of a requirement that mail-in ballots for the 2020 election be verified by a signature in the presence of another individual, or "witness," in light of the COVID-19 pandemic.<sup>104</sup> On September 18, 2020, the lower courts had barred the state from imposing the witness requirement, concluding that doing so during the COVID-19 pandemic would likely infringe on the right to vote.<sup>105</sup> In a brief per curiam decision handed down on October 5, 2020, the Supreme Court allowed election officials in South Carolina to enforce the witness requirement.<sup>106</sup> In a concurring opinion, Justice Kavanaugh, citing *Purcell*, stated that "th[e] Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents."<sup>107</sup> Here, Justice Kavanaugh is using the *Purcell* principle as justification for the Supreme Court to act, and in this case, about a lower court decision issued forty-six days before Election Day. For the same reason in *Republican National Committee*, Justice Kavanaugh invoked the *Purcell* principle to say that, simply put, federal courts should not alter state election rules close to an election.

It is obvious from the four cases described in Section I.B that there clearly is tension between the conservative and liberal Justices about how to interpret *Purcell*. The conservative Justices—at least those who agreed with the majority in *Republican National Committee* and Justice Kavanaugh in his concurrence in *Andino*—use the *Purcell* principle to argue that there should be no federal interference in state elections before an election because of the proximity of the upcoming election of interest. As a result of less interference, there should be less voter confusion. The liberal Justices, on the other hand, interpret the principle in the reverse. They read *Purcell* as placing more of an emphasis on the goal of reducing voter confusion and preserving voting rights—and not citing proximity as a reason for the Court to take (or not take) action *unless* proximity can be used to reduce voter confusion and preserve voting rights. Proximity by its nature is not as important to the liberal Justices.

This tension continues to heighten and is best captured through the last 2020 Supreme Court case to cite *Purcell*. In *Democratic National Committee v. Wisconsin State Legislature*, the Supreme Court rejected requests in a 5-3 per

<sup>103</sup> *Id.*

<sup>104</sup> *Andino v. Middleton*, 141 S. Ct. 9, 9–10 (2020) (mem.); *Middleton v. Andino*, 488 F. Supp. 3d 261, 273–74 (D.S.C. 2020).

<sup>105</sup> *Middleton*, 488 F. Supp. 3d at 303.

<sup>106</sup> *Andino*, 141 S. Ct. at 9–10.

<sup>107</sup> *Id.* at 10 (Kavanaugh, J., concurring) (citations omitted).



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curiam opinion from two groups of Wisconsin voters and the Democratic National Committee to reinstate modifications to election rules that a federal judge had ordered on September 29, 2020, because of the COVID-19 pandemic.<sup>108</sup> One of these modifications was a six-day extension of Wisconsin’s absentee ballot receipt deadline, a similar extension to what was seen in *Republican National Committee* during the April special elections in Wisconsin the same year.<sup>109</sup>

Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh each wrote separate concurring opinions agreeing with the Court’s decision to deny relief.<sup>110</sup> However, Justice Kavanaugh’s concurrence was the only concurrence to cite *Purcell*.<sup>111</sup> In perhaps one of the most detailed opinions using *Purcell*, Kavanaugh provided the first formal definition of the *Purcell* principle itself, which deviates very little from the original language used in *Purcell v. Gonzalez*: “This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle.”<sup>112</sup> Using this definition, he observed that because the district court ordered several changes to Wisconsin’s election laws “just six weeks before the November election[,] . . . it nonetheless contravened [the] 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.”<sup>113</sup> By concluding that the district court’s injunction was unwarranted, Kavanaugh implied that six weeks was too close to an election for federal courts to alter election laws. Yet, he failed to explain why the six-week period was too close to the election.

Justice Kagan was joined by Justices Breyer and Sotomayor in dissent. Justice Kagan called Justice Kavanaugh’s interpretation of the *Purcell* principle a misunderstanding of *Purcell*’s message: “In fixating on timing alone, the court of appeals went astray. . . . A court, we counseled, must balance the ‘harms attendant upon issuance or nonissuance of an injunction,’ together with ‘considerations specific to election cases’ that may affect ‘the integrity of our electoral processes.’”<sup>114</sup> Here, Justice Kagan is reminding the Court of its original language in *Purcell*, suggesting that the purpose of *Purcell* is to uphold the integrity of elections by reducing voter confusion and preserving voting rights. By focusing on time alone, Justice Kagan argues that Justice Kavanaugh neglected

<sup>108</sup> *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020).

<sup>109</sup> The other modification made it easier for local election officials to work in areas where they do not live. *See Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 786–87 (W.D. Wis. 2020).

<sup>110</sup> *Democratic Nat’l Comm.*, 141 S. Ct. at 28 (2020) (Roberts, J., concurring); *id.* at 28–30 (Gorsuch, J., concurring); *id.* at 30–40 (Kavanaugh, J., concurring).

<sup>111</sup> *Id.* at 30–32 (Kavanaugh, J., concurring).

<sup>112</sup> *Id.* at 30.

<sup>113</sup> *Id.* at 31.

<sup>114</sup> *Id.* at 30, 40–41 (Kagan, J., dissenting).

that purpose.<sup>115</sup> Justice Kagan continues to argue that the extension of a deadline would not confuse voters because at worst “a voter not informed of the new deadline would (if she could) put her ballot in the mail a few days earlier than needed.”<sup>116</sup> The measure would also not discourage Wisconsinites from “exercising their right to the franchise.”<sup>117</sup> It also ensures that the state will not throw away votes. “And what will undermine the ‘integrity’ of that process is not the counting but instead the discarding of timely cast ballots that, because of pandemic conditions, arrive a bit after Election Day.”<sup>118</sup>

*Purcell* continued to be cited in 2021 by the Supreme Court and lower courts as states continued to modify their election rules due to the COVID-19 pandemic. For example, the Pennsylvania Supreme Court extended the deadline for absentee ballots until November 6, 2021—three days after Election Day, held on November 3.<sup>119</sup> The Pennsylvania Supreme Court ruled on September 17, 2020, that any ballots that were clearly postmarked after Election Day would not be counted while ballots that were postmarked by Election Day (as well as those without a postmark or with a postmark that was not clear) would be counted as long as they were received by November 6.<sup>120</sup> The US Supreme Court was deadlocked on the request, leaving the Pennsylvania Supreme Court’s decision in place on February 22, 2021, in their shadow docket decision *Republican Party of Pennsylvania v. Degraffenreid*.<sup>121</sup> Four Justices (Thomas, Alito, Gorsuch and Kavanaugh) indicated that they would have granted the Republicans’ application to dispose of ballots that were counted when the postmarks were not clear.<sup>122</sup>

In Justice Thomas’s dissenting opinion, he acknowledged that the extension of the deadline “seem[ed] to have affected too few ballots to change the outcome of any federal election.”<sup>123</sup> However, Justice Thomas continued, “that may not be the case in the future.”<sup>124</sup> In his view, because the cases were “an ideal opportunity to address just what authority nonlegislative officials have to set election rules, and to do so well before the next election cycle,” he deemed the Court’s “refusal to do so [as] inexplicable.”<sup>125</sup> Citing *Purcell*, he wrote that “[u]nclear rules threaten to undermine this system. They 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

<sup>115</sup> *Id.* at 42.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020).

<sup>120</sup> *Id.*

<sup>121</sup> Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (mem.).

<sup>122</sup> See *id.* at 737–38.

<sup>123</sup> *Id.* at 733.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

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should—blocked rule changes made by courts close to an election.”<sup>126</sup> Here, Justice Thomas suggested that the Pennsylvania Supreme Court’s decision on September 17, 2020, to extend the deadline three days to accommodate concerns about postal delays for the November 2021 election was perhaps too “close to an election.”<sup>127</sup> This dissent by Justice Thomas is the first time a conservative Justice other than Justice Kavanaugh is named as an author in an opinion reinforcing the proximity component of the *Purcell* principle.

Outside of the pandemic, *Purcell* continued to be cited. The second (and last) case to use *Purcell* as precedent in 2021 was on the Court’s merits docket: *Brnovich v. Democratic National Committee*.<sup>128</sup> *Brnovich* involved two electoral policies in Arizona that were enacted to promote election security. The first was a ban on third-party ballot collection that effectively prohibited third-party collection and delivery of voters’ absentee ballots, with limited exceptions.<sup>129</sup> The second policy invalidated ballots cast in the wrong precinct, even if those ballots included votes for statewide races where all Arizona citizens choose among the same candidates regardless of precinct location.<sup>130</sup> The Supreme Court ruled in a 6-3 decision that neither of Arizona’s election policies violated Section 2 of the Voting Rights Act or that they had a racially discriminatory purpose.<sup>131</sup> The majority used *Purcell* to discuss preserving the integrity of the election process, similar to the various dissenting opinions in *Crawford, Doe*, and *Arizona*: “Even if the plaintiffs had shown a disparate burden . . . [a] State indisputably has a compelling interest in preserving the integrity of its election process.”<sup>132</sup>

In 2022, the *Purcell* principle came back through two Supreme Court opinions, both on the shadow docket. Like *Brnovich*, the laws at issue in these two cases were not enacted in response to election changes caused by the COVID-19 pandemic. *Merrill v. Milligan* involved an Alabama law, HB 1, that was determined by the lower court on January 24, 2022, to violate Section 2 of the

<sup>126</sup> *Id.* at 734.

<sup>127</sup> *Id.*

<sup>128</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2328, 2347 (2021). This case has been described in the media as the Supreme Court’s “chance to diminish the Voting Rights Act.” See, e.g., Joan Biskupic, *John Roberts Has Another Chance to Diminish the Voting Rights Act*, CNN (Mar. 2, 2021, 9:38 PM), <https://www.cnn.com/2021/03/02/politics/supreme-court-brnovich-v-dnc-case-analysis-john-roberts/index.html> [<https://perma.cc/PZ4Q-4KAB>].

<sup>129</sup> *Brnovich*, 141 S. Ct. at 2334; see also H.R. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016). This practice has been referred to as “ballot ‘harvesting’” by its critics. Amber Phillips, *What Is Ballot ‘Harvesting,’ and Why Is Trump So Against It?*, WASH. POST (May 26, 2020, 3:55 PM), <https://www.washingtonpost.com/politics/2020/05/26/what-is-ballot-harvesting-why-is-trump-so-against-it/> [<https://perma.cc/5VPU-U6VU>].

<sup>130</sup> *Brnovich*, 141 S. Ct. at 2334; see also ARIZ. REV. STAT. ANN. §§ 16–122, 16–135 (2022).

<sup>131</sup> *Brnovich*, 141 S. Ct. at 2329, 2350.

<sup>132</sup> *Id.* at 2347.

Voting Rights Act by diluting the vote of black voters.<sup>133</sup> The Supreme Court in a 5-4 per curiam vote stayed the decisions of the lower courts to strike down Alabama’s enacted congressional plan, thereby allowing it to be used for the 2022 primary and general elections.<sup>134</sup> In concurrence, Justice Kavanaugh, joined by Justice Alito, again invoked the *Purcell* principle, explaining that freezing the district court’s order was consistent with the principle—and he also lent even more credibility to the principle by calling it a “bedrock tenet” of election law:

That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It 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 in the period close to an election.<sup>135</sup>

According to Justice Kavanaugh, changing the state’s maps in Alabama “would require heroic efforts by” election officials “in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.”<sup>136</sup> He concluded from there that “the plaintiffs ha[d] not established that the changes [were] feasible without significant cost, confusion, or hardship.”<sup>137</sup>

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<sup>133</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879, 883 (2022) (mem.); see *Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819 at \*1 (N.D. Ala. Jan. 24, 2022); *Singleton v. Merrill*, No. 2:21-cv-1291-AMM, 2022 WL 272636 at \*1 (N.D. Ala. Jan. 27, 2022). The *Pennsylvania Capital-Star* criticized the Court, saying that “[i]n allowing the state to use a voting map adopted in late 2021 that a court has ruled unlawful soon after passage, the Supreme Court is sending a signal to other states regarding the lack of review available regarding problematic maps they may draw.” Henry L. Chambers, Jr., *The U.S. Supreme Court’s Ruling on Alabama’s Voting Map Could Reverberate Nationwide*, PENN. CAP.-STAR (Feb. 15, 2022, 6:30 AM), <https://www.penncapital-star.com/commentary/the-u-s-supreme-courts-ruling-on-alabamas-voting-map-could-reverberate-nationwide-analysis/> [<https://perma.cc/X2PF-TC3W>]. Indeed, Alabama is far from the only state facing a contested map. For example, Georgia’s new maps were signed into law on December 31, 2021, and are effective for the 2022 upcoming election. However, five lawsuits have been filed by various civil liberties and voting rights advocacy groups, arguing that the maps were drawn unfairly. See, e.g., Rachel Garbus, *Here’s How Redistricting Changed Georgia’s 2022 Maps for the House, State Senate, and U.S. House*, ATL. MAG. (Jan. 27, 2022), <https://www.atlantamagazine.com/news-culture-articles/heres-how-redistricting-changed-georgias-2022-maps-for-the-house-state-senate-and-u-s-house/> [<https://perma.cc/U7XR-ZW8J>].

<sup>134</sup> *Milligan*, 142 S. Ct. at 879–80. The Supreme Court’s order was not a ruling on the merits of the case and thus does not hold that the map does not discriminate against black voters. Instead, the Court’s order puts the lower court’s decision to overturn the map on hold until the matter can be fully argued before the Court. *Id.* at 880. However, given the passage of time before those arguments can begin, the legislature’s map will be in effect during the 2022 midterms.

<sup>135</sup> *Id.* at 880–81 (Kavanaugh, J., concurring).

<sup>136</sup> *Id.* at 880.

<sup>137</sup> *Id.* at 881–82.

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Justice Kagan (with whom Justices Sotomayor and Breyer joined) flatly rejected Justice Kavanaugh's application of the principle to the case facts, disputing the contention that it was too late to require Alabama to redraw its maps.<sup>138</sup> Kagan noted that the Alabama legislature created and approved the current map in less than a week and could move quickly again if it wanted.<sup>139</sup> Unlike in *Purcell*, which was decided fifteen days before Election Day, Kagan noted that *Merrill* was decided more than nine months before Election Day in November 2022, four months before primaries in June 2022, and two months before absentee early voting.<sup>140</sup>

Most recently in *Moore v. Harper*, the North Carolina General Assembly adopted a new congressional voting map based on 2020 Census data.<sup>141</sup> The legislature at the time was controlled by the Republican Party.<sup>142</sup> A group of Democratic-Party-affiliated voters and nonprofit organizations challenged the map in state court, alleging that it was a partisan gerrymander that violated the state constitution.<sup>143</sup> On February 14, 2022, the North Carolina Supreme Court ruled that the state could not use the map in the 2022 elections and remanded the case to the trial court for further proceedings.<sup>144</sup> The trial court adopted a new congressional map drawn by three court-appointed experts.<sup>145</sup> On February 25, 2022, prior to the state's primary election on May 17, 2022, Republican state legislators filed an emergency appeal with the Supreme Court, asking to halt the state court's order until the Supreme Court could review the case.<sup>146</sup>

<sup>138</sup> *Id.* at 888 (Kagan, J., dissenting).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Harper v. Hall*, 868 S.E.2d 499, 512 (N.C. 2022).

<sup>142</sup> For a timeline of party control in the North Carolina state legislature, see *Party Control of North Carolina State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_North\\_Carolina\\_state\\_government](https://ballotpedia.org/Party_control_of_North_Carolina_state_government) [<https://perma.cc/A8HY-TDV6>].

<sup>143</sup> *Harper*, 868 S.E.2d at 513.

<sup>144</sup> *Id.* at 559–60.

<sup>145</sup> Amy Howe, *Justices Will Hear Case That Tests Power of State Legislatures to Set Rules for Federal Elections*, SCOTUSBLOG (June 30, 2022, 12:47 PM), <https://www.scotusblog.com/2022/06/justices-will-hear-case-that-tests-power-of-state-legislatures-to-set-rules-for-federal-elections/> [<https://perma.cc/8ETY-DZTH>].

<sup>146</sup> Emergency Application for Stay Pending Petition for Writ of Certiorari, *Moore v. Harper* (Feb. 25, 2022), [https://www.supremecourt.gov/DocketPDF/21/21-1271/215064/20220225161437927\\_2022-02-25%20Moore%20Emergency%20Application.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1271/215064/20220225161437927_2022-02-25%20Moore%20Emergency%20Application.pdf) [<https://perma.cc/F2FA-GCNV>]. Joshua Douglas, a law professor at the University of Kentucky, describes the independent state legislature theory as follows in *Washington Monthly*:

[T]hese lawmakers are arguing that state courts cannot constrain them when it comes to the political maps they draw. And they are asking the US Supreme Court to say that the state supreme court had no authority to render a ruling under the state constitution. . . .

. . . .

The idea is known as the 'independent state legislature' theory. It suggests that state courts overstep their bounds when they strike down election laws under the state constitution. In invalidating a voting rule that applies to federal elections, the argument goes, the state court is taking away authority from the state legislature, contrary to what is dictated by the US Constitution.

On March 7, 2022, the Supreme Court denied the emergency application in a 5-4 per curiam opinion,<sup>147</sup> meaning that it did not require North Carolina to change its existing congressional election districts for the upcoming 2022 primary and general elections. Justice Kavanaugh, concurring in the denial of application for stay, observed that the Republican state legislators were asking for “extraordinary interim relief—namely, an order from this Court requiring North Carolina to change its existing congressional election districts.”<sup>148</sup> Citing the *Purcell* principle, Justice Kavanaugh wrote that the “Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election.”<sup>149</sup> He went on to state that

[i]n light of the *Purcell* principle and the particular circumstances and timing of the impending primary elections in North Carolina, 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.<sup>150</sup>

Here, Kavanaugh is suggesting that the time period between February 25, 2022, and May 17, 2022, is also too close for federal courts to tinker with election rules.<sup>151</sup>

Based on the Supreme Court precedent that has cited *Purcell*, it is evident that the *Purcell* principle has guided the Court to make very consequential decisions that have affected areas of how voters have been able to cast their votes, which includes areas like ballot deadlines, curbside voting, and mail-in ballots.<sup>152</sup> While the majority opinion in *Purcell* relied on the proximity to the upcoming election of interest to justify their reasoning for reversing the decision of the Ninth Circuit, proximity was just one of many reasons the Court relied upon. Since this decision, the Supreme Court has relied more heavily on the proximity component of *Purcell*, and has since created and advanced the *Purcell* principle through opinions both on its shadow and merits dockets. There is also a stark divide between how the conservative and liberal Justices interpret the *Purcell* principle, with the conservative Justices interpreting it much more strictly than the liberals. That is, the conservatives seem to be committed to not allow any federal court interference with state elections, whereas liberals are

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Joshua A. Douglas, *The Dangerous Election Theory the Supreme Court May be Poised to Endorse*, CNN (July 7, 2022, 8:34 PM), <https://www.cnn.com/2022/07/07/opinions/supreme-court-2024-elections-north-carolina-douglas/index.html> [https://perma.cc/GW6M-VPFU].

<sup>147</sup> Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (mem.).

<sup>148</sup> *Id.* (Kavanaugh, J., concurring).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> After the Court decided to take the case, commentators began to sound the alarm. See generally Colby Itkowitz & Isaac Stanley-Becker, *Democracy Advocates Raise Alarm After Supreme Court Takes Election Case*, WASH. POST (July 1, 2022, 7:05 PM), <https://www.washingtonpost.com/politics/2022/07/01/democracy-advocates-raise-alarm-after-supreme-court-takes-election-case/> [https://perma.cc/HXB5-P95T].

<sup>152</sup> See *supra* Section I.B.

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open to interference so long as the interference protects voters. But, even with conservatives—particularly Justice Kavanaugh—pushing the principle forward, there has not been considerable growth of the doctrine since the original text of *Purcell*. Indeed, Justice Kavanaugh spent considerable time in *Democratic National Committee* and *Merrill v. Milligan* discussing the principle.<sup>153</sup> Yet, there are still many gaps in its application. Part II of this Article will now investigate the limitations of applying the principle as it is currently understood to election law cases.

## II. LIMITATIONS OF APPLYING THE *PURCELL* PRINCIPLE

This Part addresses several major limitations of applying the *Purcell* principle to election law cases that the Supreme Court places on its docket.<sup>154</sup> Perhaps the first critique should begin with the origins of the principle. As discussed above, the Court handed down its decision in *Purcell* through its shadow docket. Shadow docket decisions are emergency and summary decisions that are made outside of the Court’s regular docket, are quickly decided without full briefing or oral arguments, and often provide little to no explanation of the justices’ decision-making process.<sup>155</sup> Additionally, the votes of these

<sup>153</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring); *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30–32 (2020) (Kavanaugh, J., concurring).

<sup>154</sup> See Codrington, *supra* note 79, at 961 (“[T]he absence of clear instruction [from *Purcell*] is problematic as it can result in inconsistency among lower courts, unfairness to the parties, and a waste of judicial resources. Indeed, *Purcell*’s failure to clarify this point of ambiguity only exacerbates the confusion that stems from this anti-confusion principle.”).

<sup>155</sup> Paul LeBlanc, *Here’s What the ‘Shadow Docket’ Is and How the Supreme Court Uses It*, CNN (Apr. 7, 2022, 9:24 AM), <https://www.cnn.com/2022/04/07/politics/shadow-docket-supreme-court/index.html> [<https://perma.cc/QG32-6D5V>]. Even some of those within the Court have shown concern about shadow docket decision making. In a dissenting opinion, Justice Sotomayor warned that “the Court . . . has been all too quick to grant the Government’s ‘reflexiv[e]’ requests. But make no mistake: Such a shift in the Court’s own behavior comes at a cost.” *Wolf v. Cook County*, 140 S. Ct. 681, 683 (2020) (mem.) (Sotomayor, J. dissenting). Continuing, she stated that “[s]tay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument.” *Id.* at 683–84. Lawmakers have also shown concern. For example, US Representative Hank Johnson of Georgia argued that “[k]nowing why the Justices select[] certain cases, how each of them vote[], and their reasoning is indispensable to the public’s trust in the court’s integrity.” Samantha O’Connell, *Supreme Court ‘Shadow Docket’ Under Review by U.S. House of Representatives*, AM. BAR ASS’N (Apr. 14, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/project\\_blog/scotus-shadow-docket-under-review-by-house-reps/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/) [<https://perma.cc/U79Z-NWBV>]; US Representative Louie Gohmert of Texas stated, “I am a fan of judges and justices making clear who is making decisions.” *Id.*; Representative Darrell Issa of California “suggested that members of Congress select the most significant recent shadow-docket rulings and write bipartisan letters to the Court, requesting that their votes and rationale behind the decisions be made public.” *Id.*

decisions can be withheld.<sup>156</sup> In *Purcell*, while the Court did provide an opinion, it is unclear which justice(s) wrote the opinion. For these reasons, there is a weak jurisprudential foundation for the doctrine.

Furthermore, because *Purcell* was hastily decided, it is no surprise that the Court did not give any attention to the ways in that it diverges from the prior jurisprudential landscape and how, if at all, it should be applied alongside these prior cases. Because of the Court's vagueness, many federal court cases that apply the *Purcell* principle largely contradict one another and are inconsistent.<sup>157</sup> In short, federal courts generally take one of three approaches to the *Purcell* principle: they either treat it as a stand-alone rule by interpreting it as a reason on its own not to intervene in state elections at a time close to an election, as one factor in a multifactor analysis, or neglect to apply it all.<sup>158</sup> Collectively, the ultimate result of these contradictory conclusions is an increasingly partisan view of the judiciary, diminishing the perceived legitimacy of courts generally and the Supreme Court specifically.<sup>159</sup>

Relatedly, the Court also did not provide any clarity in *Purcell* and have yet to provide any clarity through additional opinions about the extent that voter confusion and election integrity should be weighed against other factors influencing the need for emergency relief. This became apparent in 2020 when states altered voting rules to address safety concerns posed by the COVID-19

<sup>156</sup> “While the justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree.” DAVID GANS, *THE ROBERTS COURT, THE SHADOW DOCKET, AND THE UNRAVELING OF VOTING RIGHTS REMEDIES* 15 (Am. Const. Soc’y, 2020).

<sup>157</sup> See Ruoyun Gao, *Why the Purcell Principle Should Be Abolished*, 71 DUKE L.J. 1139, 1148–54 (2022).

<sup>158</sup> See *id.* As a stand-alone rule, federal courts may refuse to apply the four *Winter* factors. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”). Instead, they may only consider whether the request is made “on the eve of an election.” Gao, *supra* note 157, at 1139. Other courts may neither regard *Purcell* as a paramount rule nor abandon it completely. They may combine *Purcell* with the *Winter* standard by making *Purcell* a subfactor under one of three *Winter* factors: the likelihood of success on the merits, the balance of equities, or the public interest. Then, there are courts that do not apply the *Purcell* principle at all, relying instead on the *Winter* standard.

<sup>159</sup> See, e.g., Charlie Savage, *GOP-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html> [<https://perma.cc/FRQ2-JD22>]. As Richard Hasen puts it,

[i]n the end, we may find that when it comes to efforts to shore up the legitimacy of our election system and provide voters with the information they need to make informed election decisions, the Supreme Court may become as much of an impediment to reform efforts as it has on voting rights, partisan gerrymandering, and campaign finance reform. More and more the court is looking like no friend of democracy and just another partisan actor.

Richard L. Hasen, *How Supreme Court Radicalism Could Threaten Democracy Itself*, SLATE (Mar. 8, 2022, 5:45 AM), <https://slate.com/news-and-politics/2022/03/supreme-court-radicalism-threatens-democracy.html> [<https://perma.cc/38YZ-3FW2>].



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pandemic.<sup>160</sup> Even though rules were changed close to elections, they were designed to aid voters in safely casting a ballot during a global pandemic. In spite of this reality, the Supreme Court largely blocked last minute changes while citing *Purcell* and the risk of potential voter confusion.<sup>161</sup> In their shadow docket orders, the Justices often did not focus on any other election-related concerns, such as potential widespread disenfranchisement without the expanded COVID-19 rules.

Next, the Supreme Court agrees that the *Purcell* principle applies to lower federal courts but disagrees that it applies to them. Put another way, according to the doctrine, federal courts cannot intervene in state elections, but the Supreme Court is able to intervene right before an election if it wants, which is revealed in its precedent. For example, in *Republican National Committee v. Democratic National Committee*, the Supreme Court decided on the day before the Wisconsin primary to overrule the district court's order to extend the mail-in voting deadline, even though state officials and voters had already relied on that order for days.<sup>162</sup> Similarly, two years earlier in *Brakebill v. Jaeger*, the Supreme Court stayed the district court's injunction of a North Dakota voter identification requirement.<sup>163</sup> The Court issued the stay fewer than two months before the election, even though "[t]he risk of voter confusion [was] severe . . . because the [district court's] injunction against requiring residential-address identification was in force during the primary election."<sup>164</sup> By not applying the *Purcell* principle to its own decisions, the Supreme Court has acted hypocritically and, ironically, may have caused even more voter confusion.

Finally, and most pertinent for this Article, the *Purcell* principle does not draw a line in the sand for what it defines as too close to an election to alter voting rules, which in turn diminishes its predictability and certainty.<sup>165</sup> Is "too close" defined as a week, a month, or even a year? This unclarity means that "time" or "proximity" is left up to interpretation by the Supreme Court, and lower courts as well.<sup>166</sup>

<sup>160</sup> Some states consolidated the number of in-person polling locations, some conducted primarily all-mail elections, some proactively sent applications to vote by mail to registered voters, and some loosened restrictions around who qualified to cast an absentee mail ballot and what voters needed to provide in order to do so. See Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic*, ABC NEWS (Sep. 22, 2020, 3:57 PM), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> [<https://perma.cc/4PX2-R863>].

<sup>161</sup> See, e.g., *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30–40 (2020) (mem.) (Kavanaugh, J., concurring).

<sup>162</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1205–09.

<sup>163</sup> *Brakebill v. Jaeger*, 139 S. Ct. 10, 10 (2018) (mem.).

<sup>164</sup> *Id.* (Ginsburg, J., dissenting).

<sup>165</sup> Gao, *supra* note 157, at 1160 (observing that bright-line rules, "as compared to balancing tests, typically give clearer guidance to courts and lead to more consistent results").

<sup>166</sup> For example, in *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, the Court of Appeals for the Eleventh Circuit relied on the *Purcell* principle to stay a district

Because of this lack of clarity, the Supreme Court runs the risk of issuing orders that can disenfranchise voters or impose significant burdens on election administrators for no good reason other than the order being *too close* to an election. The purpose of the *Purcell* principle is for federal courts to not intervene in state elections so long as to avoid voter confusion and keep clear guidance in place for state election administrators. However, if this purpose is lost, and if the Court blocks any kind of intervention from federal courts in elections, then the Court could issue orders that cause even more voter confusion. As Justice Kagan stated in her dissent in *Democratic National Committee v. Wisconsin State Legislature*, “[a] court, we counseled, must balance the ‘harms . . . of an injunction,’ together with ‘considerations specific to election cases’ . . . . [T]hose election-specific factors . . . [include] the potential for a court order, especially close to Election Day, to ‘result in voter confusion’ . . . . *Purcell* tells courts to apply . . . the usual rules of equity.”<sup>167</sup>

This major judicial inconsistency also creates a legal environment where the result of a case may no longer be decided by precedent, but rather by what federal courts happen to subjectively interpret as being *too close to an election*. One lower court could think three days is too close to an election, while another court may think three months is too close to an election to interfere. Ultimately lower courts are left with no real guidance in the present and for the future.

This judicial inconsistency comes with its consequences. Without real guidance, lower court judges seeking to limit voting access can point to *Purcell* as a reason why voter suppression laws should remain in place. Bad actors can push for restrictive voting measures or unfair maps to remain in place simply because an election is on the horizon, even if the election is months away. Without a clear rule to follow, judges must weigh potential voter confusion against the risk that voters will be harmed by potentially illegal laws—a decision that can be vulnerable to the political whims of judges, especially for judges who are elected down party lines.

To this end, not defining a time also produces a chilling effect. It sends a message to federal courts to not intervene in state elections, even if there is clear voter disenfranchisement. For instance, consider the 2022 midterm elections. The Court’s order in *Merrill* suggests that the window for deciding the legality of redistricting measures before the 2022 election closed months before the election took place. This likely sent a message to all states—those that had

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court’s ruling on the ground that the district court acted too close to the primary election, even though the election was still five months away. 32 F.4th 1363, 1369, 1371, 1374–75 (11th Cir. 2022) (per curiam). In *League of Women Voters*, the Eleventh Circuit asked itself the following question: “When is an election sufficiently ‘close at hand’ that the *Purcell* principle applies?” *Id.* at 1371. Since the Supreme Court has not provided a clear answer, the lower court provided an answer of its own: “Whatever *Purcell*’s outer bounds, we think that this case fits within them.” *Id.* This is a clear example of how lower courts have had to make their own interpretations about the closeness of an election for the principle to apply. *Id.*

<sup>167</sup> *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 41–42 (2020) (mem.) (Kagan, J., dissenting).

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not finished redistricting and those that may have wished to revise their redistricted maps—that they could pass whatever maps they wanted, possibly to tilt the 2022 congressional election in the controlling party’s favor, without fear of being overruled in federal court. The consequences of not defining time also extend to legislatures. State lawmakers are left unable to change electoral regulations—including deadlines, procedures, and even redistricting maps—without an unending cloud of uncertainty as to their legality.

In Part III, I seek to provide some clarity to this judicial inconsistency by exploring how the Supreme Court has exactly defined the period close to an election through its use of the *Purcell* principle.

### III. DEFINING THE PERIOD CLOSE TO AN ELECTION

To define the period close to an election, I first collected the opinions issued by the Supreme Court that used *Purcell* as precedent. To do so, I accessed the Westlaw Edge database and searched for the case *Purcell v. Gonzales* (2006) in their search engine. I then filtered the citing references to include cases only in which the Supreme Court has cited *Purcell* in their opinions. Based on this search, there are seventeen opinions since 2006 that have cited *Purcell*. This includes majority opinions, per curiam opinions, concurring opinions, and dissenting opinions. The seventeen opinions are displayed in Table 1, with information also detailing whether the cases were decided on the Court’s shadow docket.

Interestingly, the first four opinions that cite *Purcell* after its inception from 2008 to 2013 were not on the Court’s shadow docket. From 2018 to 2022, however, all but two cases that cite *Purcell* are on the Court’s shadow docket, which contributes to the current media narrative about the Court’s abuse of the shadow docket.<sup>168</sup> Therefore, while the *Purcell* decision originated on the Court’s shadow docket, it has been incorporated in decisions both on the shadow docket and the Court’s merits docket. It seems that *Purcell* initially moved into the Court’s regular opinions but has now reverted back to the Court’s shadow docket, with the decision being cited most frequently—and especially most recently—through the Court’s shadow docket. This means that *Purcell* is now being used more in cases that lack public deliberation and transparency.

<sup>168</sup> See Steve Vladeck, *Brett Kavanaugh’s Defense of the Shadow Docket Is Alarming*, SLATE (Feb. 8, 2022, 4:32 PM), <https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadowdocket-rulings-keep-getting-worse.html> [<https://perma.cc/868F-M9RN>].

(“[A]lthough the court has always had a shadow docket, in the last five years [there has been a] dramatic change[] in exactly what the court uses it for.”); O’Connell, *supra* note 155. Additionally, “[a]s the shadow docket has risen in prominence, it seems the merits docket has also shrunk, with the Court handing down only 53 merit decisions in its October 2019 term, the fewest since the Civil War.” *Id.*

TABLE 1: US SUPREME COURT CASES CITING *PURCELL*

| Case Name  | Year | Shadow Docket |
|--|------|---------------|
| 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 | No            |
| North Carolina v. Covington                                    | 2018 | Yes           |
| Brakebill v. Jaeger  | 2018 | Yes           |
| Republican National Committee v. Democratic National Committee | 2020 | Yes           |
| Raysor v. DeSantis   | 2020 | Yes           |
| Andino v. Middleton  | 2020 | Yes           |
| Merrill v. People First of Alabama                             | 2020 | Yes           |
| Democratic National Committee v. Wisconsin State Legislature   | 2020 | Yes           |
| Republican Party of Pennsylvania v. Degraffenreid              | 2021 | Yes           |
| Brnovich v. Democratic National Committee                      | 2021 | No            |
| Merrill v. Milligan (Initial Application)                      | 2022 | Yes           |
| Moore v. Harper (Initial Application)                          | 2022 | Yes           |

However, Part I describes that not all the cases in Table 1 apply the *Purcell* principle. In fact, many of the opinions in Table 1 cite *Purcell* for other reasons, such as upholding election integrity and avoiding voter confusion. There are also opinions that cite *Purcell* and discuss the proximity component of the *Purcell* principle, but after the election of interest has passed. For these reasons, Table 2 lists the cases where the Court invokes the *Purcell* principle, and specifically the time leading up to an election, along with the type of opinion that uses the principle and the justice(s) who invoke it. The total cases from Table 1 dwindle from seventeen to nine.<sup>169</sup>

<sup>169</sup> *Republican National Committee v. Democratic National Committee* is listed twice in Table 2 because it is the only time *Purcell* is used in two opinions—both a per curiam and dissent.

TABLE 2: US SUPREME COURT CASES CITING THE *PURCELL* PRINCIPLE

| Case Name   | Type of Opinion(s) | Justice(s)                                      | Too Close? |
|---|--------------------|---|------------|
| Veasey v. Perry (2014)  | Dissent            | Ginsburg<br>(Joined by Sotomayor and Kagan)     | No         |
| Republican National Committee v. Democratic National Committee (2020) | Per Curiam         | N/A   | Yes        |
| Republican National Committee v. Democratic National Committee (2020) | Dissent            | Ginsburg joined by Breyer, Sotomayor, and Kagan | No         |
| Raysor v. DeSantis (2020)   | Dissent            | Sotomayor<br>(Joined by Ginsburg and Kagan)     | No         |
| Andino v. Middleton (2020)  | Concurrence        | Kavanaugh                                       | Yes        |
| Merrill v. People First of Alabama (2020)                             | Dissent            | Sotomayor<br>(Joined by Breyer and Kagan)       | No         |
| Democratic National Committee v. Wisconsin State Legislature (2020)   | Concurrence        | Kavanaugh                                       | Yes        |
| Republican Party of Pennsylvania v. Degraffenreid (2021)              | Dissent            | Thomas  | Yes        |
| Merrill v. Milligan (Initial Application) (2022)                      | Concurrence        | Kavanaugh<br>(Joined by Alito)                  | Yes        |
| Moore v. Harper (Initial Application) (2022)                          | Concurrence        | Kavanaugh                                       | Yes        |

Table 2 shows that the *Purcell* principle has been cited in four concurring opinions, five dissenting opinions, and one per curiam opinion. The principle has not been invoked in a majority opinion other than the one in *Republican National Committee*, where the application for stay was presented to Justice Kavanaugh. In recent years, Justice Kavanaugh has been the most likely to cite the *Purcell* principle in opinions, specifically in concurring opinions: he has cited the principle four times from 2020–2022.<sup>170</sup> He is also the only justice to advance the *Purcell* principle through concurring opinions, and he has stood

<sup>170</sup> See *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring); *Merrill v. Milligan*, 142 S. Ct. 879, 879–882 (2022) (Kavanaugh, J., concurring); *Democratic Nat'l Comm.*, 141 S. Ct. at 30–31 (Kavanaugh, J., concurring); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring).

alone in these opinions, except for *Merrill*, where he was joined by Justice Alito.<sup>171</sup> Justice Thomas has cited the *Purcell* principle once, in his dissenting opinion in *Degraffenreid*.<sup>172</sup>

Justice Sotomayor has used the *Purcell* principle in dissent twice but joined Justice Ginsburg's dissenting opinion as well in *Veasey*.<sup>173</sup> What is interesting is that the Court's liberal Justices—in these cases, Ginsburg, Sotomayor, and Kagan—are the only justices to use the *Purcell* principle to claim that the Court's action (or inaction) is *not* too close to the upcoming election of interest. The conservative Justices—Kavanaugh, Alito, and Thomas—have only used the *Purcell* principle to advance the claim that federal courts have acted too close to upcoming elections.

Figure 1 takes the cases listed in Table 2 and visually displays the number of times the *Purcell* principle is cited from the first time it is used in *Veasey* in 2014 through 2022. This figure highlights that the principle has mostly been used by the Justices in just the past couple of years. There is a five-year gap from 2015 to 2019 where the principle was not incorporated into any opinions. The first opinion to cite *Purcell* again after this gap is *Republican National Committee*—both in the per curiam opinion of the Court and in dissent.

What is fascinating about this gap is that the Court decides to invoke the *Purcell* principle again after this five-year hiatus, at least in large part, due to the COVID-19 pandemic. All the cases in Table 2 that the Court took in 2020 and 2021 involved the pandemic and are generally about altering the date of an election or changing accessibility to the polls for voters. From these cases alone, one could infer that the *Purcell* principle may—or should—only be invoked in unprecedented election times like a pandemic. However, this is not what the current makeup of the Court thinks, as the two concurrences in *Merrill* and *Moore* deviate from this inference. *Merrill* and *Moore* are both about redistricting in the period close to an election, notwithstanding any sort of unprecedented event that may interfere with this process like a pandemic. *Merrill* and *Moore* have opened the door for the Court to continue to keep the *Purcell* principle alive and apply it to election cases more broadly—and not just those cases that have unprecedented circumstances surrounding them.<sup>174</sup>

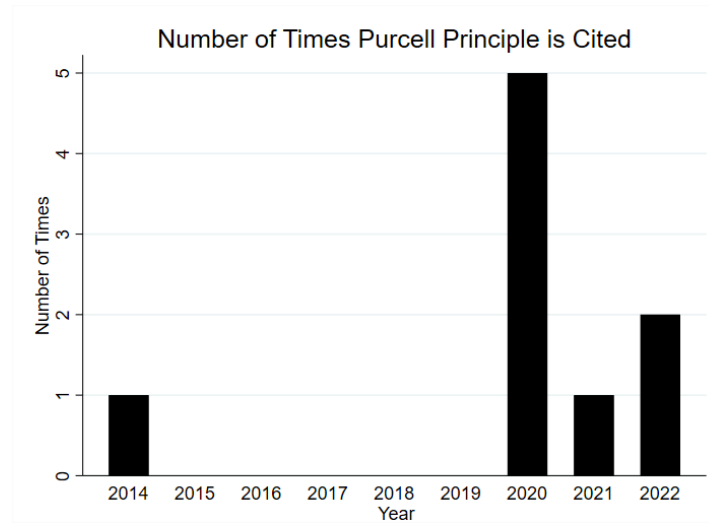
<sup>171</sup> *Merrill*, 142 S. Ct. at 879–82 (2022) (Kavanaugh, J., concurring).

<sup>172</sup> *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting).

<sup>173</sup> See *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600, 2602–03 (2020) (Sotomayor, J., dissenting); *Merrill v. People First of Ala.*, 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting); *Veasey v. Perry*, 574 U.S. 951, 951 (2014) (Ginsburg, J., dissenting).

<sup>174</sup> It is worth noting that although the Court took *Merrill* and *Moore* on their shadow docket, both cases will be decided on their regular docket during the October 2022 Term. Because of this, these cases have received a lot of attention in the media. See, e.g., Alex Swoyer, *Supreme Court to Hear Election Cases Next Term, Progressives Warn It Could 'Upend' Democracy*, WASH. TIMES (July 22, 2022), <https://www.washingtontimes.com/news/2022/jul/22/supreme-court-hear-two-election-cases-next-term-pr/> [<https://perma.cc/AK9S-Y>]

FIGURE 1



In addition to the recent increase in the use of the *Purcell* principle, the principle has also been applied more broadly to various areas of election law, ranging from voter identification requirements, ballot deadlines, voter accessibility, mail-in ballot requirements, curbside voting, and, most recently, redistricting cases, as seen in Table 3. Outside of *Veasey*, the Supreme Court has not used the principle in cases about voter identification requirements. The Supreme Court has most frequently used the principle in cases that are about changing the ballot deadlines, which all happened during the COVID-19 pandemic. In fact, during the pandemic, the Court used the *Purcell* principle to make very important decisions in cases about voter access, mail-in ballot requirements, curbside voting, and ballot deadlines. In 2022, however, the Supreme Court has moved away from using the *Purcell* principle in election cases about voting logistics, and instead has applied the principle in two redistricting cases. Because the *Purcell* principle has been applied to so many areas of election law, perhaps it can be applied to any case so long as a federal court is deciding a state action that involves an upcoming election.

TYG]; Patrick J. Kiger, *Could the Moore v. Harper SCOTUS Case Radically Alter U.S. Democracy?*, HOW STUFF WORKS (Sep. 15, 2022), <https://people.howstuffworks.com/moore-v-harper-news.htm> [<https://perma.cc/5JC7-QGDE>].

TABLE 3: CASE AND ISSUE TYPE

| Case Name  | Year | Issue Type                 |
|--|------|----------------------------|
| Veasey v. Perry  | 2014 | Voter ID                   |
| Republican National Committee v. Democratic National Committee | 2020 | Ballot Deadline            |
| Raysor v. DeSantis   | 2020 | Voter Access               |
| Andino v. Middleton  | 2020 | Mail-in Ballot Requirement |
| Merrill v. People First of Alabama                             | 2020 | Curbside Voting            |
| Democratic National Committee v. Wisconsin State Legislature   | 2020 | Ballot Deadline            |
| Republican Party of Pennsylvania v. Degraffenreid              | 2021 | Ballot Deadline            |
| Merrill v. Milligan (Initial Application)                      | 2022 | Redistricting              |
| Moore v. Harper (Initial Application)                          | 2022 | Redistricting              |

Collectively, these tables and figures describe the cases of interest but do not investigate just how close the lower courts' decisions are to the upcoming election(s) of interest. For this reason, Table 4 breaks down each case in Table 3 by the lower court and the date that they handed down their decision and the election dates.<sup>175</sup>

From an initial glance, the Supreme Court chose to intervene in cases that are about federal court decisions made close to general elections *and* primary elections. *Raysor*, *Merrill*, and *Moore* all involved both primary and general elections. Moving forward, this could suggest that the court is willing to apply the *Purcell* principle to federal court decisions made about all sorts of elections, not just general elections. This could include runoff elections and special elections, in addition to primary elections. It is also clear that the days between the federal courts' decision dates and the election dates vary greatly. However, it is difficult to make inferences about the timing between the dates from this table alone.

<sup>175</sup> The lower court dates in Table 3 are the dates that the lower courts made their decisions, not when the opinions were released. However, sometimes opinions were released the same day as decisions.

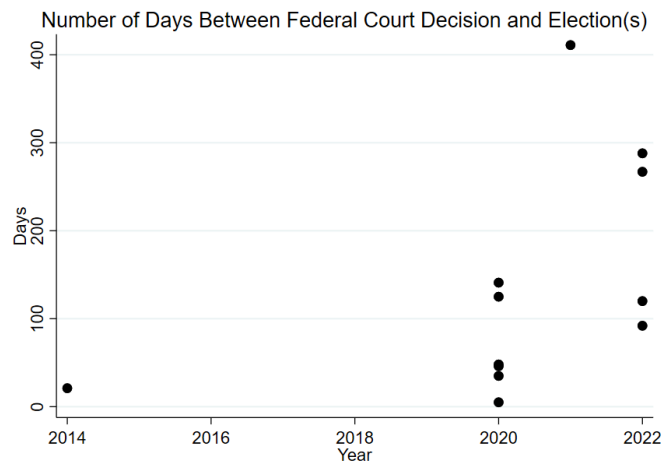


TABLE 4: DAYS BETWEEN DECISION DATE AND ELECTION DATE

| Case Name   | Lower Court  | Decision Date      | Election Date(s)   | Days Between |
|---|--|--------------------|--|--------------|
| Veasey v. Perry (2014)  | The United States Court of Appeals for the Fifth Circuit                 | October 14, 2014   | November 4, 2014   | 21           |
| Republican National Committee v. Democratic National Committee (2020) | The United States District Court for the Western District of Wisconsin   | April 2, 2020      | April 7, 2020  | 5            |
| Merrill v. People First of Alabama (2020)                             | US Court of Appeals for the 11th Circuit                                 | June 15, 2020      | November 3, 2020   | 141          |
| Raysor v. DeSantis (2020)   | US Court of Appeals for the 11th Circuit                                 | July 1, 2020       | Florida Primary (August 18, 2020), General Election (November 3, 2020)     | 48, 125      |
| Andino v. Middleton (2020)  | US District Court for the District of South Carolina                     | September 18, 2020 | November 3, 2020   | 46           |
| Democratic National Committee v. Wisconsin State Legislature (2020)   | US Court of Appeals for the 7th Circuit                                  | September 29, 2020 | November 3, 2020   | 35           |
| Republican Party of Pennsylvania v. Degraffenreid (2021)              | Pennsylvania Supreme Court   | September 17, 2020 | November 2, 2021   | 411          |
| Merrill v. Milligan (Initial Application) (2022)                      | US District Court for the Northern District of Alabama Southern Division | January 24, 2022   | Alabama Primary (May 24, 2022), General Election (November 8, 2022)        | 120, 288     |
| Moore v. Harper (Initial Application) (2022)                          | North Carolina Supreme Court   | February 14, 2022  | North Carolina Primary (May 17, 2022), General Election (November 8, 2022) | 92, 267      |

For this reason, Figure 2 visually displays the number of days between a federal court decision and the upcoming elections for all the cases listed in Table 3. With these nine cases taken together, the average number of days between a decision and an election in 2020 was 66; in 2021, the outlier was 411 days; and in 2022, the average number of days was 191.<sup>176</sup> While we only have four years of point estimates in this figure, it does seem that the average number of days between a federal court decision and the upcoming election of interest is increasing—and it has, on average, in the last three years. From the first use of the *Purcell* principle in Justice Ginsburg’s dissent in *Veasey*, to Justice Thomas’s dissent in *Degraffenreid*, there is a 390-day difference between what they both define as being *too close* or *not too close* to an election.

FIGURE 2



Once we combine Tables 2 and 3, it is easy to draw conclusions about how individual Justices interpret time. Justices Ginsburg, Sotomayor, and Kagan did not think that twenty-one days between the decision date in *Veasey* and the election of interest was too close for a federal court to intervene, nor did they (including Justice Breyer) think five days was too close in *Republican National Committee*. In *Raysor*, Justices Sotomayor, Kagan, and Breyer did not think that 48 days for Florida’s primary or 125 days for the general election was too close either. Perhaps these liberal Justices read *Purcell* in a similar way that Justice Kagan describes it in her dissent in *Democratic National Committee*, claiming that *Purcell* is not about time alone, but rather it is about ensuring that electoral processes retain their integrity. If this is the case, then for the liberal Justices on the bench, the timing principle may not be of strong interest. That is, there may not be a particular cutoff point for the liberal Justices in deciding

<sup>176</sup> These numbers are not rounded.

whether the *Purcell* principle applies, but rather time is only relevant if it interferes with election integrity. These data seem to provide support for this claim.

When we look at the remaining cases, however, there is a wider range of days that the conservative Justices felt it was too close for lower courts to act in upcoming elections—rather than the liberals’ approach of arguing that there is not a time that it is too close to intervene.<sup>177</sup> In the conservative-leaning opinions, the dates range from five days in the per curiam decision in *Republican National Committee* up to 411 days in Justice Thomas’ dissenting opinion in *Degraffenreid*. In *Degraffenreid*, Justice Thomas cited *Purcell* to state that the federal court decision happened too close to an election, and that federal courts should not intervene “[t]o prevent confusion.”<sup>178</sup> Similarly, in *Republican National Committee*, the per curiam uses very similar language, “the *Purcell* principle . . . seeks to avoid . . . judicially created confusion.”<sup>179</sup>

For the conservative Justices, then, there seems to be a stricter standard for when federal courts should not intervene. They rely more heavily on the actual time between the federal court decision and the upcoming election of interest. Through their opinions, they have argued that federal courts should not intervene 5 days before an election or 411 days before an election. Given that the conservative majority has also not used *Purcell* to argue that an election is *not* too close, perhaps the current conservative makeup on the bench will continue to use *Purcell* to argue that federal courts should not intervene *at all*, or at least as close as five days before. This finding alone can be used to predict how the *Purcell* principle might be used by the Supreme Court moving forward.

Once the liberal decisions are removed from Table 3, the average number of days between a federal court decision and an upcoming election is 156 days. Figure 3 breaks this down further and shows the average number of days between a federal court decision and an upcoming election from 2020–2022 in the decisions in which one or more of the conservatives on the bench thought that federal courts were intervening too close to the upcoming election(s). The average period that is too close to an election in 2020 is 59 days; in 2021, it is 411 days; and in 2022, it is 179 days.<sup>180</sup>

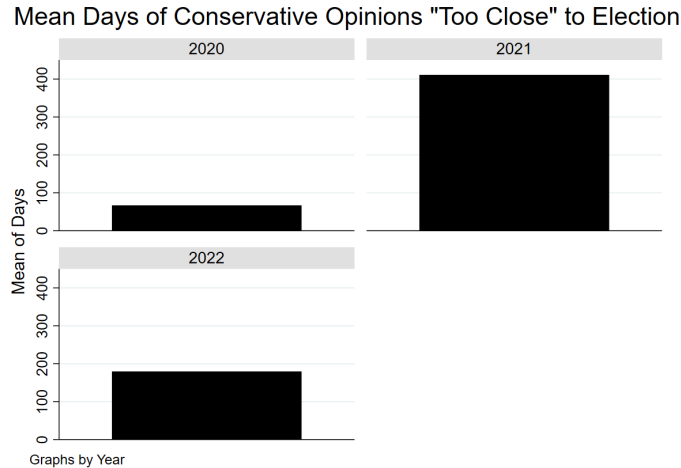
<sup>177</sup> Several cases (*Raysor*, *Merrill*, and *Moore*) involve more than one election. For this reason, in Table 3, there are several numbers listed under the “Days Between” column and, in Figure 3, there are more datapoints than number of cases.

<sup>178</sup> *Republican Party v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting).

<sup>179</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

<sup>180</sup> These numbers are not rounded.

FIGURE 3

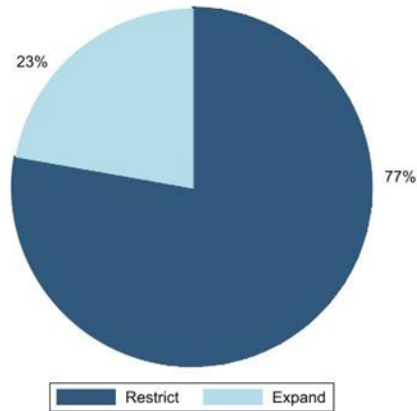


Choosing to intervene or not intervene by relying on the *Purcell* principle, at least in part, comes with its consequences—and, in these cases, this is especially true for voting accessibility and representation at the polls. Of the cases that use the *Purcell* principle (n=9), 77 percent of them restrict voting access and representation as seen in Figure 4. For example, *Andino* kept in place the requirement of having South Carolinians vote absentee in the presence of a witness, *Raysor* did not allow Florida residents who had been convicted of a felony to vote if they had not paid off their court fees, and *Merrill* allowed Alabama election officials to ban curbside voting.<sup>181</sup> There are only two decisions that expand voting accessibility and representation: *Republican Party of Pennsylvania* and *Moore*. To the former, Justices Thomas, Alito, Gorsuch, and Kavanaugh all indicated that they would have granted the Republicans' application to dispose of ballots that were counted when the postmarks were not clear. Still, without a majority, the ballot extension remained in place. Similarly, in *Moore*, the Justices denied the petitioners' application to stay the lower court's order but still accepted their petition for writ for certiorari. This denial meant that North Carolina kept in place a new congressional map created by three experts, disposing of an older map that the lower court found unconstitutional on partisan gerrymandering grounds.

<sup>181</sup> *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.); *Merrill v. People First*, 141 S. Ct. 190 (2020) (mem.).

FIGURE 4

Proportion of Cases that Expand or Restrict Voting Access and Representation



Collectively, there are several conclusions that can be drawn from these data. First, *Purcell* has been cited in seventeen cases, but the actual *Purcell* principle has only been cited ten times in nine cases. However, eight of these cases have been in the past two years. While one could assume that this was due exclusively to the COVID-19 pandemic, the Justices have proved otherwise. Two cases in 2022, *Merrill* and *Moore*, have applied the principle—both focusing on the timing of elections notwithstanding the pandemic. This could suggest that while the COVID-19 pandemic may have caused the Court to bring back *Purcell*, it may be here to stay and could impact various aspects of elections moving forward. Second, conservative Justices on the bench use the *Purcell* principle as a reason to say that the federal court(s) acted too close to an election, whereas the liberal Justices have used it to say that the federal court(s) did not act too close to an election.

This has incredible implications moving forward, as it could suggest that with a current conservative majority and with Justice Kavanaugh's continued use of the *Purcell* principle, the Supreme Court could invoke the *Purcell* principle more often as a reason for the Supreme Court to intervene—whether the case is about a federal court decision made 5 days away or 411 days away from an election.<sup>182</sup> This may especially hold true, as Justice Kavanaugh has even provided a definition of the principle, calling it a “bedrock tenet of election law.”<sup>183</sup> We may see him push the principle forward and provide even more le-

<sup>182</sup> See Chambers, *supra* note 133 (“The *Merrill* ruling does not appear to track *Purcell*. The district court’s injunction in *Merrill* was the result of a full review of Alabama’s congressional redistricting plan. The district court heard seven days of testimony and read a substantial volume of briefings before reaching its decision. At the conclusion of the case—handled at warp speed for a federal court—the district court wrote an opinion of more than 200 pages explaining in detail the law and facts underlying its decision.”).

<sup>183</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (Kavanaugh, J., concurring).

gitimacy to it, especially since he has received the support of both Justices Alito and Thomas in *Degraffenreid* and *Merrill*.<sup>184</sup>

Through various concurrences and dissents, it also seems like Justices Kavanaugh, Thomas, and Alito have interpreted the *Purcell* principle as a hard-and-fast rule that federal courts should not interfere with state elections at all if the interference is close to an election—which the liberal Justices have argued is a misunderstanding of *Purcell*'s message.<sup>185</sup> As this Article has pointed out, interpreting the principle in such a constricting way can be very detrimental for voting access and representation. For example, in *Republican National Committee*, just one day before the election the Supreme Court blocked the district court's ruling that prevented Wisconsinites from submitting their absentee ballots in an extended period after Election Day—from April 7 to April 13.<sup>186</sup> The Supreme Court made their decision on April 6, which meant that any Wisconsinites' plans to submit ballots for the remainder of the week came to a halt.<sup>187</sup> Thousands of Wisconsinites were denied access to the electoral process, and the consideration that the election was happening during a global pandemic was tossed to the side.<sup>188</sup>

The data portion of this Article finds that the *Purcell* principle is invoked in cases where federal courts have made decisions about elections ranging from 5 days to 411 days prior to an election. What this tells us is that while the Supreme Court has not defined a time window for when federal court intervention is *too close* to an election, the current time window they are operating from seems to be generous. Based on the analysis, as the most conservative estimate, federal courts should stay clear of interfering with state elections for at least 411 days leading up to the next election. While Justice Thomas wrote that 411 days was too close, he could very well persuade other members on the bench to agree with him given that there is now a 5-4 conservative majority on the bench, and these election law cases have often been split down ideological lines. If Justice Thomas's dissenting opinion is not considered, however, and we only focus on concurrences, federal courts should not intervene more than 288 days before an election as the safest bet.

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<sup>184</sup> Importantly, too, even if the Court defined a specific time period, it would need to specify different time periods as they relate to each state and each election.

<sup>185</sup> *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 41, 42 (2020) (Kagan, J., dissenting).

<sup>186</sup> *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (per curiam).

<sup>187</sup> *Id.* at 1205.

<sup>188</sup> Eric Lach, *Why is Wisconsin Holding an Election During the Coronavirus Pandemic?*, NEW YORKER (Apr. 7, 2020), <https://www.newyorker.com/news/campaign-chronicles/why-is-wisconsin-holding-an-election-during-the-coronavirus-pandemic> [<https://perma.cc/RAT3-3MF3>].

## CONCLUSION

The *Purcell* principle's increasing prominence in deciding election cases has only grown since it was formulated in 2006 and appears poised to influence future election cycles. This is especially the case since its use has recently been spearheaded by Justice Kavanaugh, and there is no reason to suspect that Justice Kavanaugh will stop using the principle, given that he believes it is a "bed-rock tenant of election law."<sup>189</sup> Critics of the principle have pointed to the overall vagueness at the outer bounds of the *Purcell* principle and when and how it should be applied.<sup>190</sup> This Article brings clarity to this point by analyzing exactly what the Court has defined as the period close to an election since *Purcell*'s inception in 2006. Based on this Article's findings, federal courts should be wary about changing state election laws, as the current conservative makeup on the bench has produced opinions claiming that even 411 days is too close to an upcoming election for federal courts to intervene. This has severe consequences for the future of elections, because, as Justice Sotomayor pointed out in *Republican National Committee*, the Court's current use of the principle is prone to condone disenfranchisement of voters across the country.

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<sup>189</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 880 (Kavanaugh, J., concurring).

<sup>190</sup> *See, e.g.*, Gao, *supra* note 157, at 1160; Hasen, *supra* note 3, at 440.

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