PURCELL PRINCIPLES FOR STATE COURTS

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In recent years, the U.S. Supreme Court has stressed that federal courts ordinarily should not issue remedies, such as preliminary injunctions, that would alter the rules for an impending election. This is known as the *Purcell* principle, and it frequently stymies litigants who seek to redress legal violations ahead of an election.

Existing commentary on *Purcell*, most of it critical, has focused on the federal level. A large and growing share of election litigation, however, occurs in state courts. This Essay surveys pre-election remedial practice and the status of the *Purcell* principle in state-level litigation. Based on a review of every reported state court decision to have cited *Purcell* through the November 2024 general election, our key descriptive takeaway is that state courts are not mirroring the U.S. Supreme Court's strong aversion to pre-election relief. Instead, they have taken a more nuanced and context-specific approach. Conceptually, we explain that there is good reason for state courts to chart their own course in this area—something they are free to do since the *Purcell* principle is an equitable doctrine by and for federal courts. The federalism concerns that partly undergird the *Purcell* principle do not apply to state courts, and state courts have distinctive powers and duties that make a blanket presumption against pre-election intervention inappropriate.

Prescriptively, building on existing state caselaw and academic commentary, we identify several considerations for state courts to weigh as they decide whether to grant pre-election remedies. These considerations, which we refer to as *Purcell* principles for state courts, aim to get at each case's underlying equities and help courts discern whether, on balance, intervention ahead of an election is warranted. This Essay concludes by discussing how the federal *Purcell* principle impacts pre-election U.S. Supreme Court review of state court remedial rulings, such as when litigants ask the Court for emergency relief on the ground that a state court violated the Federal Constitution's Elections Clause.

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INTRODUCTION

Election litigants are often racing against the clock. In many cases, their goal is to convince a court to cure an asserted legal violation before an upcoming election. That might mean seeking an order that imposes new district maps, requires ballots to include or exclude certain candidates, prohibits barriers to voting from being enforced, or directs election officials to manage the polls in particular ways. The list could go on. Cases like these may involve highly expedited proceedings that can strain both litigants and courts.

Beyond the practical challenges posed by compressed litigation timelines, parties pursuing pre-election judicial relief also face a doctrinal hurdle, at least when they are in federal court. The U.S. Supreme Court has held that "federal courts should ordinarily not alter the election rules on the eve of an election."[1] This admonition is known as the "*Purcell* principle," and it is both consequential and highly controversial.

Although the *Purcell* principle draws its name from the U.S. Supreme Court's 2006 decision in *Purcell v. Gonzalez*,[2] it did not become a mainstay of the Court's election-law jurisprudence until years later. Particularly since 2020, when it first used the term "*Purcell* principle" in an opinion,[3] the Court has repeatedly relied on the *Purcell* principle to reject remedies sought in the weeks and months before elections, and it has directed lower federal courts to do the same.[4] A core premise of these rulings is that last-minute judicial interventions have the potential to

1. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).
2. 549 U.S. 1 (2006) (per curiam).
3. *Republican Nat'l Comm.*, 140 S. Ct. at 1207.
4. *See infra*, Section I.B.

confuse voters and disrupt election administration, and thus are generally best avoided. Commentators—and dissenting Justices—have vociferously criticized the Court's assertive invocations of *Purcell*.[5] Among other things, they see the *Purcell* principle as overkill.[6] In their view, the potential for *some* pre-election court orders to cause chaos is no reason to disfavor *all* such orders.[7] Even when an election is imminent, judicial remedies may well remain net beneficial, and in such circumstances, courts should not allow illegality to go unredressed.[8]

To date, academic and public commentary on the *Purcell* principle has focused almost exclusively on federal litigation, and understandably so.[9] The *Purcell* principle is an equitable precept developed by the Supreme Court for the federal judiciary. But a large and growing share of the nation's election litigation—indeed, a majority of such litigation in recent years—occurs in state, not federal, courts.[10] The Supreme Court itself bears some responsibility for this: As the Court has made it more difficult to pursue many election-related claims in federal court, not just through the *Purcell* principle but also through various other procedural and substantive doctrines, litigants have increasingly shifted their attention to state courts.[11]

As the *Purcell* principle has become more prominent and potent at the federal level, and as election-related lawsuits at the state level have multiplied, it is perhaps unsurprising that state court defendants are increasingly citing *Purcell* and urging state courts to embrace the Supreme Court's deep skepticism of pre-election relief. This is therefore an opportune moment to consider the status of *Purcell* and pre-election

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5. *See infra* Section I.B; sources cited *infra* notes 72–79.

6. *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 205–216 (2023).

7. *See* Nicholas Stephanopoulos, *Freeing* Purcell *from the Shadows*, ELECTION L. BLOG (Sept. 27, 2020, 12:22 PM), https://electionlawblog.org/?p=115834 [https://perma.cc/J67P-YKEL].

8. *Id.*

9. For two of the rare discussions of *Purcell* and state courts, see Wilfred U. Codrington III, *Unprincipled All the Way Down*, 81 WASH. & LEE L. REV. 1087 (2024) [hereinafter Codrington III, *Unprincipled*], and Richard Pildes, *State Election Cases and the* "Purcell" *Doctrine*, ELECTION L. BLOG (Sept. 29, 2020, 7:24 AM), https://electionlawblog.org/?p=115927 [https://perma.cc/V9BK-ELQH].

10. *See, e.g.*, Miriam Seifter & Adam Sopko, *State Courts Are Fielding Sky-High Numbers of Lawsuits Ahead of the Midterms – Including Challenges to Voting Restrictions and to How Elections Are Run*, CONVERSATION (Oct. 26, 2022, 4:49 PM) [hereinafter Seifter & Sopko, *Sky-High Numbers*], https://theconversation.com/state-courts-are-fielding-sky-high-numbers-of-lawsuits-ahead-of-the-midterms-including-challenges-to-voting-restrictions-and-to-how-elections-are-run-192682 [https://perma.cc/FBX4-W6KW].

11. *See infra* Section II.A.

remedies in the states: Are the nation's state courts following the Supreme Court's lead and adopting strong presumptions against ordering relief in the lead up to an election? Or are they taking a different approach?

To get a sense of where the nation's state courts stand, we have examined every reported state court decision to have cited *Purcell v. Gonzalez* and its Supreme Court progeny through the November 2024 general election, as well as many state cases that addressed requests for pre-election relief without citing *Purcell*. Since 2020, citations to *Purcell* have soared in both federal and state courts, but state courts continue to reference the case far less often than their federal counterparts. In nearly two-thirds of states, *Purcell* has never been cited at all in connection with the timing of election litigation.[12]

Even when state courts do cite *Purcell*, they generally do not emulate the Supreme Court's recent practice of strongly disfavoring relief merely because an election is close at hand. Instead, our survey of the caselaw finds that state courts have taken a more nuanced and context-specific approach, one that accounts for electoral proximity as part of a conventional remedial analysis rather than treating it as a standalone basis for denying relief.[13] In some instances, state courts have concluded that intervening ahead of an impending election would indeed create unacceptable risks of disenfranchisement or administrative disaster, or otherwise be inequitable.[14] In other instances, state courts have pressed ahead even with an election close at hand, concluding that, on balance, it would be better to act than to leave a legal violation unredressed.[15]

The prevailing approach to pre-election remedies at the state level harkens back to an earlier era of federal practice. Decades ago, the guidance from the Supreme Court was for federal courts to be mindful of upcoming elections but to remedy legal violations when feasible.[16] Even in *Purcell* itself, the Supreme Court did not articulate a categorical aversion to pre-election relief. The Court there merely said that a federal appellate court asked to issue an injunction just before an election "was required to weigh . . . considerations specific to election cases."[17] State courts are essentially heeding *Purcell*'s original call to weigh the pros and cons of intervening ahead of an election, but they are doing so

12. *See infra* text following note 84.

13. *See infra* note 85 and accompanying text.

14. *See, e.g.*, *infra* notes 189–96 and accompanying text.

15. *See, e.g.*, *infra* notes 197–201 and accompanying text.

16. *See* DAVID GANS, AM. CONST. SOC'Y, THE ROBERTS COURT, THE SHADOW DOCKET, AND THE UNRAVELING OF VOTING RIGHTS REMEDIES 9–10 (2020), https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf [https://perma.cc/FU7G-FMGA].

17. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

without going further and reflexively putting a heavy thumb on the scale against pre-election intervention, as the U.S. Supreme Court has in recent years.

As a conceptual matter, whatever one's views of the federal *Purcell* principle, there are good reasons for state courts to chart their own distinctive path when it comes to pre-election remedies. Because the principle is an equitable precept for federal courts, state courts are not formally bound by it. And state courts are differently situated from their federal counterparts in ways that strongly counsel against moving in lockstep with current federal *Purcell* practice. As the Supreme Court itself has recognized, state institutions are the frontline actors on election matters in the nation's federal system.[18] Thus, the federalism concerns that contribute to the Court's wariness about late-stage federal judicial intervention in election cases do not carry over to state courts. State courts, moreover, have powers and duties within their state constitutional systems that differ from—and often go beyond—those of the federal judiciary at the national level. This is especially true with respect to election-related matters.[19] More so than the Federal Constitution, state constitutions are replete with foundational democratic commitments. State courts thus have a vital role to play in ensuring that elections are conducted in accordance with those commitments.

Because state courts will no doubt keep receiving requests for last-minute pre-election remedies, we offer some specific prescriptive recommendations drawn from existing state caselaw and academic commentary. Consistent with prevailing state-level practice, our initial advice is for state courts to continue to use their established frameworks for evaluating injunctions and other forms of relief even when an election is near. These frameworks generally call for courts to assess the relative hardships the parties would experience if relief were granted or denied, as well as the broader public interest. Considerations related to election timing can and should be weighed contextually as part of that analysis.

The following factors have been and should remain particularly important as state courts assess whether the balance of hardships and the public interest favor pre-election relief. First, courts should gauge the seriousness of the injury that the plaintiffs and others would experience if the asserted legal violation were left unremedied. On balance, the need for pre-election intervention is greater when the claims involve threats to foundational rights or grave democratic harms as opposed to more picayune technical matters. Second, courts should assess whether the plaintiffs have pursued their claims diligently. Litigants who expeditiously pursue claims that arise only as an election nears have a

18. *See infra* notes 148–51 and accompanying text.

19. *See infra* notes 154–57 and accompanying text.

stronger claim to relief than litigants who needlessly sit on their rights. Third, courts should weigh the actual likelihood that a requested remedy could create confusion that risks disenfranchising voters. The goal should be to identify whether, under the circumstances, the greater threat to voters would come from granting relief or denying it. Fourth, courts should similarly weigh the actual implications that a requested remedy would have for election administration. They should seek to distinguish interventions that could indeed wreak havoc for elections officials from those that would entail more manageable and justified administrative burdens, or perhaps even be burden-reducing. Finally, courts should consider whether declining to act ahead of an election would risk problematic post-election litigation. When leaving an issue unresolved creates the potential for post-election turmoil, that may be good reason for a court to step in and address it beforehand. Because these precepts accord with *Purcell*'s original premise that courts should "weigh . . . considerations specific to election cases,"[20] while also fulfilling state courts' own distinctive institutional responsibilities, we refer to them as *Purcell* principles for state courts.

This Essay proceeds as follows: Part I offers background on the federal *Purcell* principle's origins and the U.S. Supreme Court's increasingly categorical aversion to remedial interventions by federal courts in the run-up to an election. Drawing upon our survey of state caselaw, Part II first describes how state courts are and are not using *Purcell* in pre-election litigation and then explains why state divergence from federal practice in this area is justified. Part III offers more specific guidance to state courts and state court litigants about the factors that should matter most as state courts decide whether to grant requests for relief ahead of impending elections. Part III also briefly addresses the extent to which the pre-election remedial decisions of state courts are subject to U.S. Supreme Court review.

I. *PURCELL* IN THE U.S. SUPREME COURT

While this Essay's primary focus is on state courts, some background on the origins and development of the federal *Purcell* principle is necessary in order to compare and contrast the state experience. Section I.A describes the Supreme Court's 2006 decision in *Purcell v. Gonzalez* and the prior federal precedents that served as backdrop. Section I.B then discusses the development of the modern federal *Purcell* principle, which turns out to be only loosely connected to its namesake ruling.

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

A. Purcell v. Gonzalez *and its Precursors*

Purcell v. Gonzalez involved an Arizona law that required documentary proof of citizenship for voter registration, as well as certain forms of identification to vote.[21] In May 2006, a year after the U.S. Attorney General had precleared the law under section 5 of the Voting Rights Act, a group of plaintiffs challenged it in federal district court and sought a preliminary injunction against its enforcement.[22] The district court denied the requested injunction on September 11, 2006, but did not issue findings of fact or conclusions of law at that time.[23] The plaintiffs appealed to the Ninth Circuit and sought an injunction pending appeal.[24] On October 5, a motions panel granted that injunction in a short order that did not specify the panel's rationale.[25] The injunction was to remain in place until the plaintiffs' appeal was fully briefed and resolved after the midterm election on November 7, 2006.[26]

On October 13, the defendants asked the Supreme Court to intervene.[27] The Court considered their request as part of its emergency or "shadow" docket without full briefing or oral argument.[28] On October 20, the Court vacated the Ninth Circuit's injunction in a unanimous per curiam opinion.[29] The Court's spare analysis spanned just four paragraphs.[30] The Court explained that, when asked to enjoin election procedures in the run-up to an election, courts must be attentive to the election context:

> 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, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So

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21. *Id.* at 2.
22. *Id.* at 3.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Application for a Stay of the Order of the United States Court of Appeals for the Ninth Circuit, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (06A375).
28. VLADECK, *supra* note 6, at 209.
29. *See Purcell*, 549 U.S. at 1–2, 6.
30. *Id.* at 4–6.

> the Court of Appeals may have deemed this consideration to be grounds for prompt action.[31]

As this passage indicates, the Ninth Circuit had not ignored the upcoming election, and the Supreme Court did not criticize it on that basis. The Court instead went on to identify two problems with the Ninth Circuit's order: a lack of deference to the district court and a lack of reason-giving. According to the Court, even with the election just weeks away, "[i]t was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court," and there was "no indication that it did so."[32] The Court suggested that perhaps the Ninth Circuit had declined to defer since "the District Court had not yet made factual findings."[33] But the Court indicated that the Ninth Circuit only made matters worse "by failing to provide any factual findings or indeed any reasoning of its own":

> There has been no explanation by the Court of Appeals showing the rulings and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.[34]

Although the Court recognized that its intervention would "of necessity allow the election to proceed without an injunction suspending the voter identification rules," it stressed that it "express[ed] no opinion" on the merits of the plaintiffs' legal claims.[35]

Purcell's clearest lessons thus seemed to be that, even when an election is fast approaching, a federal appellate court asked to enjoin an election law should give proper deference to a district court's findings and discretionary judgments and should articulate the basis for its ruling. Indeed, this was the thrust of early academic commentary on the Court's decision.[36] The Court's mention of the need to

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31. *Id.* at 4–5.

32. *Id.* at 5.

33. *Id.*

34. *Id.*

35. *Id.* at 5–6.

36. *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1090 (2007) ("Viewed in the most favorable light, the Supreme Court's opinion [in *Purcell*] might be read to mean that: (1) district courts should promptly provide an explanation for their intervention in election disputes at the time that they make those decisions; and (2) courts of appeals should generally defer to district courts' findings regarding the balance of hardships on a preliminary injunction motion." (footnote omitted)).

"weigh . . . considerations specific to election cases"[37] was more ambiguous. While the Court identified the risk that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," it did not suggest that federal judicial interventions close to an election were categorically disfavored.[38]

More broadly, the Court in *Purcell* gave no indication that it meant to alter its own past guidance and practice with respect to injunctive relief in election cases. Caselaw in the decades prior to *Purcell* counseled courts to be sensitive to impending elections but to provide relief where reasonably possible. In its landmark decision in *Reynolds v. Sims*,[39] for example, the Court wrote that, where legislative districts are found to be unconstitutionally malapportioned, courts should normally act "to insure that no further elections are conducted under the invalid plan" and should consider "withholding the granting of immediately effective relief" only in "an unusual case," including "where an impending election is imminent and a State's election machinery is already in progress."[40] According to the *Reynolds* Court, "the proximity of a forthcoming election" was a factor to be considered in conjunction with "general equitable principles."[41] A similar approach is evident in other rulings.[42] *Purcell* did not purport to part ways with these precedents, and the Court

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

38. *Id.* at 4–5.

39. 377 U.S. 533 (1964).

40. *Id.* at 585; *see also* GANS, *supra* note 16, at 4–6 (discussing *Reynolds*' relation to *Purcell*).

41. *Reynolds*, 377 U.S. at 585.

42. In *Clark v. Roemer*, a federal district court declined to enjoin Louisiana from holding elections for judicial seats not precleared under section 5 of the Voting Rights Act, "cit[ing] the short time between election day and the most recent request for injunction, the fact that qualifying and absentee voting had begun, and the time and expense of the candidates." *See* 500 U.S. 646, 653 (1991), *rev'g* 750 F. Supp. 200 (1990). The Supreme Court held that the district court erred and should have issued the pre-election injunction. *Id.* at 652–55; *see also McCarthy v. Briscoe*, 429 U.S. 1317, 1323 n.4 (1976) (Powell, J., in chambers) (ordering on September 27 that Texas add a presidential candidate to the November ballot after noting that "there appear[ed] to be ample time" to do so); *Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers) (issuing a temporary order on September 10, 1968, requiring Ohio to add a presidential candidate to the ballot for the November election after finding no "insurmountable practical problems" to granting relief); *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (concluding on October 15 that Justice Stewart's September 10 temporary order was proper, but that it was now too late to add a different party to the ballot because "it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots" and "such a last-minute change [would] pose[] a risk of interference with the rights of other Ohio citizens, for example, absentee voters").

presumably did not mean to chart a new doctrinal course in a short, unanimous per curiam decision issued on a highly expedited timeline.

B. The Purcell *Principle's Controversial Evolution*

For years, *Purcell* remained a relatively obscure and seemingly minor opinion. Then, in the weeks before the 2014 midterm elections, a divided Supreme Court issued four emergency orders that suggested a new gloss on *Purcell*. These orders involved federal court challenges to restrictive voting laws from North Carolina, Ohio, Texas, and Wisconsin. In three of the orders, the Court either stayed injunctions issued by lower courts or affirmed appellate stays of district court injunctions, allowing the North Carolina, Ohio, and Texas restrictions to take effect for the 2014 election.[43] In the fourth, the Court vacated a stay of an injunction, thereby effectively blocking a Wisconsin voter identification law for the election.[44]

Although the Court's 2014 orders were summarily issued without majority opinions, there were indications that *Purcell* played a role.[45] In the Texas case, for instance, the Fifth Circuit had stayed the district court's injunction, citing *Purcell* and the fact that the injunction was issued shortly before an election.[46] Dissenting from the Court's decision to affirm the Fifth Circuit, Justice Ruth Bader Ginsburg argued, among other things, that the Fifth Circuit had misapplied *Purcell* by "[r]efusing to evaluate defendants' likelihood of success on the merits and, instead, relying exclusively on the potential disruption of Texas' electoral processes."[47] In other words, Justice Ginsburg criticized the appellate court—and apparently her Supreme Court colleagues—for treating *Purcell* as a standalone rule disfavoring injunctive relief ahead of an election.

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43. *See North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.) (vacating an injunction of two North Carolina laws that rolled back early voting and ended the counting of ballots cast in the wrong precinct); *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (mem.) (vacating an injunction of an Ohio law that reduced the number of early voting days, including the elimination of a "golden week" in which voters could register to vote and cast a ballot at the same time), *stay'g* 43 F. Supp. 3d 811 (S.D. Ohio 2014); *Veasey v. Perry*, 574 U.S. 951 (2014) (mem.) (preserving a stay of a district court's injunction of a Texas voter identification law). For more on the four 2014 decisions highlighted in this Essay, see Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 447–56 (2017).

44. *See Frank v. Walker*, 574 U.S. 929 (mem.), *vacating stay*, 766 F.3d 755 (7th Cir. 2014).

45. *See* Hasen, *supra* note 43, at 456.

46. *Veasey v. Perry*, 769 F.3d 890, 891–93 (5th Cir. 2014).

47. *Veasey*, 574 U.S. at 951–52 (Ginsburg, J., dissenting).

It was these 2014 rulings that prompted Professor Rick Hasen to coin the term "*Purcell* principle" as shorthand for "the idea that courts should not issue orders which change election rules in the period just before an election."[48] Notably, the Court's 2014 interventions marked a shift from *Purcell* itself. A majority of the Justices in 2014 appeared driven primarily by a desire to avoid last-minute judicial changes to election rules, rather than by the appellate deference and reason-giving concerns that featured prominently in the *Purcell* opinion. As Justice Ginsburg observed in the Texas case, the Supreme Court affirmed the Fifth Circuit even though that court had "accorded slim, if any, deference" to "the District Court's reasoned, record-based judgment."[49] Meanwhile, despite criticizing the Ninth Circuit in *Purcell* for failing to explain itself, the Court's majority declined to explain any of its four 2014 pre-election rulings.

These rulings proved to be the tip of the iceberg. Amid an unprecedented surge of pandemic-related emergency election litigation in 2020, the Court doubled down on the *Purcell* principle, treating it as something approaching a categorical rule barring federal courts from enjoining state election laws in the run-up to an election. The Court's first ruling along these lines was *Republican National Committee v. Democratic National Committee*.[50] In that case, the Court voted 5–4 to vacate in part a district court order that had given Wisconsin voters extra time to receive and return their absentee ballots for the state's April 6 primary.[51] In a per curiam decision issued the day before the election, the Court cited *Purcell* and two of the unexplained 2014 orders for the proposition that "[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."[52] According to the majority, the district court had "contravened th[e] Court's precedents" by "changing the election rules so close to the election date."[53] Dissenting, Justice Ginsburg contended that the majority's *Purcell* analysis had it backward. As she saw it, the district court had reasonably responded "to a grave, rapidly developing public health crisis," and the Court's nondeferential intervention "at this

48. *See* Hasen, *supra* note 43, at 428.

49. *Veasey*, 574 U.S. at 951 (Ginsburg, J., dissenting).

50. 140 S. Ct. 1205 (2020) (per curiam).

51. *Id.* at 1206–07.

52. *Id.* at 1207 (first citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); then citing *Frank v. Walker*, 574 U.S. 929 (2014) (mem.); and then citing *Veasey*, 574 U.S. 951).

53. *Id.*

late hour" would "confound election officials and voters" and "result in massive disenfranchisement."[54]

A series of similar orders followed as 2020 went on. None had an accompanying majority opinion, but several featured concurrences and dissents that disputed *Purcell*'s application. The most substantial of these writings came in another case from Wisconsin, *Democratic National Committee v. Wisconsin State Legislature*.[55] The district court there issued a preliminary injunction in late September that essentially repeated, for the November general election, an accommodation made for the April primary which the Supreme Court's prior ruling had not blocked.[56] Specifically, the district court directed the State to count absentee ballots postmarked by Election Day but received up to six days later.[57] The Seventh Circuit stayed the injunction, and on October 26, the Supreme Court denied an application to vacate that stay.[58] The Supreme Court's ruling meant that absentee ballots received after Election Day would not be counted in Wisconsin. Chief Justice John Roberts, Justice Neil Gorsuch, and Justice Brett Kavanaugh each separately concurred in the Court's decision, with Justice Kavanaugh's concurrence placing *Purcell* front and center: "[T]he District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents. 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."[59] He described it as "a basic tenet of election law" that "[w]hen an election is close at hand, the rules of the road should be clear and settled."[60]

In dissent, Justice Elena Kagan responded that "fixating on timing alone" reflected "a misunderstanding of *Purcell*'s message."[61] She accepted that "[l]ast-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand."[62] She observed, however, that "not every such change poses that danger," and "court[s] must also take account of other

54. *Id.* at 1209–10 (Ginsburg, J., dissenting); *see also id.* at 1210–11 (Ginsburg, J., dissenting) ("If proximity to the election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate.").

55. 141 S. Ct. 28 (2020) (mem.).

56. *See Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir.) (per curiam), *application to vacate stay denied*, 141 S. Ct. 28 (2020) (mem.).

57. 977 F.3d at 641.

58. 141 S. Ct at 28.

59. *Id.* at 30 (Kavanaugh, J., concurring).

60. *Id.* at 31 (Kavanaugh, J., concurring).

61. *Id.* at 41 (Kagan, J., dissenting).

62. *Id.* at 42 (Kagan, J., dissenting).

matters—among them, the presence of extraordinary circumstances (like a pandemic), the clarity of a constitutional injury, and the extent of voter disenfranchisement threatened."[63] In her words, "[a]t its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity," which means "consider[ing] all relevant factors, not just the calendar."[64]

The Supreme Court has continued since 2020 to articulate and apply its strong-form *Purcell* principle, most prominently in *Merrill v. Milligan*.[65] There, the district court enjoined Alabama's congressional districting plan in January 2022 after concluding that it unlawfully diluted the votes of Black voters, in violation of section 2 of the Voting Rights Act.[66] The Supreme Court voted 5–4 to stay that injunction pending full review of the case, thus allowing Alabama to use the disputed districts for the 2022 election cycle.[67] There was no opinion for the majority, but a concurrence from Justice Kavanaugh leaned heavily on *Purcell*: "The stay order follows this Court's election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle."[68] According to Justice Kavanaugh, the *Purcell* principle is not an "absolute" bar on pre-election injunctions, "but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures."[69] He suggested that a pre-election injunction might be justified notwithstanding *Purcell* when:

> (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at

63. *Id.* (Kagan, J., dissenting).

64. *Id.* (Kagan, J., dissenting).

65. 142 S. Ct. 879 (2022) (mem.).

66. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (per curiam).

67. 142 S. Ct. at 879 (2022) (mem.).

68. *Id.* at 879 (Kavanaugh, J., concurring); *see also id.* at 880 (Kavanaugh, J., concurring) ("This Court has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle.").

69. *Id.* at 881 (Kavanaugh, J., concurring).

> least feasible before the election without significant cost, confusion, or hardship.[70]

In dissent, Justice Kagan viewed *Purcell* as inapplicable since Alabama's 2022 primary election was still months away. Alabama, she wrote, "is not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year."[71]

Legal scholars have been highly critical of the Supreme Court's use of the *Purcell* principle.[72] One line of criticism maintains that the Court's approach to *Purcell* has underprotected fundamental voting rights.[73] When voters are unable to obtain pre-election injunctions, unconstitutional rules and practices remain in effect. The Court's strong anti-injunction presumption may even encourage unscrupulous actors to roll out last-minute election changes and then insist that it is too late for the courts to stop them.[74] The presumption also incentivizes defendants to adopt litigation-delay tactics.[75] Another line of criticism centers on process. This critique stresses that the Court's invocations of *Purcell*

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70. *Id.* (Kavanaugh, J., concurring).

71. *Id.* at 888–89 (Kagan, J., dissenting). In May 2024, the Supreme Court similarly invoked *Purcell* in a case involving an equal protection challenge to Louisiana's congressional map. *Robinson v. Callais*, 144 S. Ct. 1171 (2024) (mem.). The district court had enjoined the map, and the Court stayed that injunction, allowing the map to be used. In dissent, Justice Ketanji Brown Jackson saw "little risk of voter confusion" since the relevant election was not until November, and thus "*Purcell* has no role to play here." *Id.* at 1172 (Jackson, J., dissenting).

72. *See, e.g.*, VLADECK, *supra* note 6, at 209 (summarizing the scholarly reaction to *Purcell*). For a particularly scathing assessment of the Court's *Purcell* practice, see Wilfred U. Codrington III, Purcell *in Pandemic,* 96 N.Y.U. L. REV. 941 (2021) [hereinafter Codrington III, *Pandemic*].

73. *See, e.g.*, Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST. L.J. ONLINE 111, 119–20 (2022) (explaining that the Court's stay in *Merrill* "all but guarantees that minority voters will be subject to at least one election under an illegal map"); GANS, *supra* note 16, at 3 ("Before *Purcell*, courts did not close the doors to individuals victimized by restrictive election rules simply because an election was approaching."); Anthony J. Gaughan, *Redistricting in the Political Thicket: The Ghosts of* Colegrove v. Green, 111 KY. L.J. 589, 634 (2022–23) ("The *Purcell* principle . . . directs courts to put a finger on the scale in favor of government defendants.").

74. Gaughan, *supra* note 73, at 634 (arguing that *Purcell* as applied by the Supreme Court "incentivizes legislatures to adopt partisan election rules late in a legislative term" because they can "escape timely judicial review").

75. Shapiro, *supra* note 73, at 120 (explaining that the Supreme Court's "lesson" for defendants in voting rights cases is that they should "delay and then demand that the courts presume confusion and chaos will ensue regardless of evidence to the contrary").

have come primarily on its emergency or "shadow" docket.[76] The Court receives limited briefing, hears no oral argument, rushes its review, and provides little or no account of its reasoning.[77] Relatedly, critics have faulted the Court for failing to offer clearer guidance about when and how *Purcell* should apply.[78] And they have pointed to apparent inconsistencies in the Court's invocations of *Purcell*, sometimes casting this as evidence of partisan bias.[79]

II. *PURCELL* IN STATE COURT

Has the *Purcell* principle's rise to prominence in federal election litigation carried over to the state level? Should it carry over? To answer the first question, Section II.A surveys state caselaw. It finds that the strong-form federal *Purcell* principle that now prevails in the U.S. Supreme Court has gained little traction in the nation's state courts. As for the second question, Section II.B explains that, for multiple reasons, it is appropriate for state courts to adopt a more nuanced approach to requests for pre-election relief than the prevailing federal approach.

A. Purcell*'s Limited Uptake*

To get a sense of whether and how state courts have been applying the *Purcell* principle, we identified and reviewed all reported state supreme court and intermediate appellate court decisions that have cited *Purcell* or its U.S. Supreme Court progeny (such as *Republican National Committee v. Democratic National Committee*). There are at least some additional instances in which state courts at all levels have invoked *Purcell* in unpublished "shadow" docket orders, which are generally nonprecedential.[80] We have identified and reviewed some such rulings,

76. *See, e.g.*, VLADECK, *supra* note 6, at 226–27; Caroline Fredrickson, *Will American Democracy Last in Light of the Shadow Docket?*, 23 NEV. L.J. 727, 740–45 (2023).

77. *See, e.g.*, GANS, *supra* note 17, at 15–16; *see also* Hasen, *supra* note 43, at 462.

78. *See, e.g.*, Hasen, *supra* note 43, at 461–62.

79. *See, e.g.*, VLADECK, *supra* note 6, at 216–27; Codrington III, *Pandemic*, *supra* note 72, at 981–84.

80. The Wisconsin Supreme Court, for example, has not made any timing-related references to *Purcell* in published decisions, but it recently cited *Purcell* in an unpublished order staying in part a trial court's ruling that had created uncertainty about where local officials were allowed to place in-person absentee ballot sites ahead of the state's August 2024 primary and November 2024 general elections. *See Brown v. WEC*, No. 2024AP232, at 5 (Wis. May 3, 2024), https://www.wicourts.gov/sc/order/DisplayDocImage.pdf?docId=814067 [https://perma.cc/MH7Z-9SAE] (order granting partial stay of a circuit court's decision); *see also Richer v. Fontes*, No. CV-24-0221-

but as a practical matter, it is nearly impossible to survey them systematically because many state courts do not make them publicly available online, at least in a readily searchable form.[81] Because reported rulings are most consistently available and most directly convey the state of the law, they have been our focus.

One initial finding is that state courts have cited *Purcell* far less often than federal courts, even though state and federal courts handle comparable volumes of election litigation.[82] As of November 8, 2024, Westlaw tallied 406 citations to *Purcell* by federal courts compared to only eighty-four by the nation's state courts.[83] These counts include many instances in which courts have cited *Purcell* in ways unrelated to the *Purcell* principle, such as for the proposition that states have an interest in preventing voter fraud.[84] Courts in only eighteen states appear to have cited *Purcell* in connection with the timing of election litigation. In thirty-two states, we have found no such references to *Purcell* at all.

As in federal court, citations to *Purcell* in state courts have surged in recent years. Litigants and judges at all levels have taken note of the U.S. Supreme Court's high-profile invocations of the *Purcell* principle during the 2020 and 2022 election cycles. Although *Purcell* was decided in 2006, nearly two-thirds of all federal court citations to *Purcell* (266 of 406), and three-quarters of all state court citations (63 of 84) have come since January 2020. It is notable not only that state courts are increasingly referencing *Purcell* but also that they continue to do so at just a fraction of the rate of their federal counterparts.

Examining the small but growing set of state cases that cite *Purcell* reveals that state and federal courts differ in their *Purcell* usage not just quantitatively but also qualitatively. By and large, even when state courts expressly reference *Purcell*, they have not echoed the Supreme Court's intense skepticism of pre-election injunctions. This is not to say that state courts have been inattentive to election timing and to the potential

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SA, 2024 WL 4299099, at *3 (Ariz. Sept. 20, 2024) (citing *Purcell* while holding that it would be inappropriate "to disenfranchise voters en masse from participating in state contests" due to an error in state-run databases that came to light with "so little time remaining before the beginning of the 2024 General Election").

81. *See* Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449, 1489–93 (2024).

82. *See, e.g.*, Miriam Seifter & Adam B. Sopko, *Standing for Elections in State Courts*, 2024 U. ILL. L. REV. (forthcoming 2024) (manuscript at 104) [hereinafter Seifter & Sopko, *Standing*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4803103 ("[T]he majority of recent election litigation has taken place in state court."); Seifter & Sopko, *Sky-High Numbers*, *supra* note 10.

83. As of November 8, 2024, Lexis similarly tallied 412 citations to *Purcell* by federal courts compared to eighty-one by state courts.

84. *E.g.*, *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013).

downsides of late-stage judicial interventions. To the contrary, state courts routinely take account of such considerations. But they generally do so in more measured ways than the Supreme Court, analyzing electoral proximity within established doctrinal frameworks rather than elevating it above almost all else.[85]

Three state high court redistricting rulings from 2022 nicely illustrate the contrast between the prevailing state and federal approaches. These rulings—from New York, New Hampshire, and Tennessee—came on the heels of the Supreme Court's decision in *Merrill v. Milligan* staying a district court injunction that would have required new congressional maps for Alabama's 2022 primary, which was then about four months away.[86] In the state cases, the defenders of the challenged maps urged the courts to follow the Supreme Court's lead and hold, based on the federal *Purcell* principle, that it was likewise too late to order new 2022 maps.[87] In two of these cases, the courts rejected those *Purcell* arguments and imposed new maps. In the third case, the court held that it was indeed too late to require a new map, but it grounded that conclusion in the specific factual record before it.

In the New York case, *Harkenrider v. Hochul*,[88] the New York Court of Appeals (the state's highest court) issued its ruling on April 27, 2022, just two months before the state's scheduled June 28 primary.[89] And the April 27 ruling did not itself adopt a remedial map but instead required further lower court proceedings to develop one.[90] To ensure adequate time to create and implement the new maps, the court indicated that the trial court would likely need to reschedule the state's primary

85. *See* Codrington III, *Unprincipled*, *supra* note 9, at 1106–07 (similarly concluding that state courts "have tended to reject the absolutist manner in which the Supreme Court has implemented *Purcell*"). Of course, the relevant state caselaw does vary to some extent in its particulars. *See id.* at 1106, 1109 (finding "unevenness in how [state] courts think about *Purcell*," including differences in precisely "*how much* weight" they give to electoral proximity (internal quotation marks omitted)).

86. *See* 142 S. Ct. 879, 888 (Kavanaugh, J., concurring).

87. *See Harkenrider v. Hochul*, 197 N.E.3d 437, 454 (N.Y. 2022) ("The parties dispute the proper remedy for these constitutional violations, with the State respondents arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway."); *Norelli v. Sec'y of State*, 292 A.3d 458, 468 (N.H. 2022) ("[T]he State argues that the principle that federal courts should not ordinarily enjoin a state's election laws in the days preceding an election 'warns against judicial intervention in the present case.'").

88. 197 N.E.3d 437 (N.Y. 2022).

89. *Id.* at 437; *Month by Month Political Calendar*, N.Y. ST. BD. ELECTIONS, https://elections.ny.gov/system/files/documents/2023/10/2022-month-by-month-political-calendar.pdf [https://perma.cc/5V97-6QAD].

90. *Harkenrider*, 197 N.E.3d at 456.

from June to August (which that court ultimately did).[91] The New York Court of Appeals acknowledged that imposing a new map and delaying the primary would produce some "logistical difficulties," but it expressed confidence that elections officials could handle them.[92] It thus saw no need to "defer[] any remedy for a future election" and subject New Yorkers "to an election conducted pursuant to an unconstitutional reapportionment."[93] "Prompt judicial intervention," the court explained, "is both necessary and appropriate to guarantee the People's right to a free and fair election."[94] In a footnote, the court added that "respondents' reliance on the federal *Purcell* principle [was] misplaced," as that "doctrine cautions *federal* courts against interfering with state election laws when an election is imminent" but does not limit a state court's authority "to remedy violations of the State Constitution."[95]

In the New Hampshire case, *Norelli v. Secretary of State*,[96] the state supreme court ordered new maps in May 2022, about four months before the state's September 2022 primary.[97] As in New York, the court "reject[ed] the State's position that, despite the unconstitutionality of the current congressional districting statute, judicial non-intervention in this case is more important than protecting the voters' fundamental rights."[98] According to the court, "[i]t is the duty of the judiciary to protect constitutional rights and, in doing so, to support the fundamentals on which the Constitution itself rests."[99] Addressing *Purcell* and its progeny, the court explained those cases did not, as the state maintained, "deliver[] a clear directive" against intervention; instead, they merely "advise[d] in favor of resolving this case in a timely and efficient manner so as not to disrupt the upcoming election process."[100]

Meanwhile, in the Tennessee case, *Moore v. Lee*,[101] a trial court preliminary enjoined the state's senate map, which had been challenged

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91. *Id.* at 455; *Harkenrider v. Hochul*, No. E2022-0116CV, 2022 WL 2961374, slip op. at 3 (N.Y. Sup. Ct. May 11, 2022).

92. *Harkenrider*, 197 N.E.3d at 454–55.

93. *Id.* at 454.

94. *Id.*

95. *Id.* at 454 n.16. For criticism of the New York Court of Appeals' decision to press ahead with a 2022 remedy, see Jerry H. Goldfeder & Andrew Vazquez, *New York Election Chaos and the 'Purcell' Principle*, N.Y.L.J. (May 10, 2022, 2:00 PM), https://www.law.com/newyorklawjournal/2022/05/10/new-york-election-chaos-and-the-purcell-principle/.

96. 292 A.3d 458 (N.H. 2022).

97. *Id.* at 461, 471.

98. *Id.* at 468.

99. *Id.* at 469 (internal quotation marks omitted).

100. *Id.* at 468.

101. 644 S.W.3d 59 (Tenn. 2022).

on state constitutional grounds.[102] The trial court stated that it would impose a remedial map if the Legislature did not adopt a new map within fifteen days.[103] That order came four months before the state's August 2022 primary but just one day before the state's candidate filing deadline, so the trial court also extended that deadline by four weeks.[104] In an expedited appeal to the Tennessee Supreme Court, the defendants argued that the trial court had "not adequately consider[ed] the harm to the State and the public interest in enjoining the Senate plan and extending the candidate filing deadline."[105] The Tennessee Supreme Court agreed, relying heavily on "detail[ed]" affidavits from four election administrators.[106] Based on these affidavits, the court found it "clear . . . that a delay in the Senatorial candidate filing deadline . . . will have a significant detrimental impact on the work of our state and county election officials, risks voter confusion, and potentially compromises the integrity of our state's elections."[107] Following this evidentiary discussion, the court proceeded to cite *Purcell* and a number of federal cases that had "applied the *Purcell* principle in declining to preliminarily enjoin redistricting plans."[108] But as the Tennessee Supreme Court framed it, the trial court's injunction was not problematic simply because an election was approaching but instead because that court had failed to "address the robust defense evidence of the harm that will result from delaying the Senatorial candidate filing deadline."[109]

These redistricting rulings are fairly typical of how state courts have treated *Purcell* across the range of election-related cases they hear: State courts have been attentive to electoral proximity and its practical implications, but they have eschewed categorical or near-categorical rules against intervention in favor of more context-specific analysis.

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102. *Id.* at 62.

103. *Id.*

104. *Id.*

105. *Id.* at 62, 64.

106. *Id.* at 64.

107. *Id.* at 65. Among other things, the affidavits discussed the fact that many counties had already adjusted precinct lines pursuant to the new map and notified voters of the adjustments, that some nominating petitions had already been filed based on the challenged map's districts, and that extending the candidate filing deadline would impact the ability of administrators to comply with certain federal law obligations and accurately prepare for early voting. *Id.* at 64–65.

108. *Id.* at 65–66.

109. *Id.* at 67. The Tennessee Supreme Court also observed that the plaintiff's alleged irreparable harm was "not to her ability to vote, but rather to her alleged right to vote in a county with consecutively numbered Senate districts"—a harm "outweighed by the significant harm the injunction will inflict on the Defendants and the public interest." *Id.*

Sometimes, as in the New York and New Hampshire redistricting cases, courts have pressed ahead even with an election looming; sometimes, as in Tennessee, they have concluded that an impending election counseled against relief.

A closer look at this body of state caselaw reveals that *Purcell* has appeared mainly in one of two doctrinal contexts. First, as in the redistricting cases discussed above, some state courts have cited *Purcell* when considering whether an impending election counsels against an injunction or similar remedy. Second, some state courts have invoked *Purcell* when deciding whether to apply the doctrine of laches, which serves to bar claims that have not been diligently pursued.

With respect to the injunctive relief inquiry, state courts have generally used *Purcell* in more limited and discrete ways than the U.S. Supreme Court. Rather than embracing the federal *Purcell* principle's strong anti-injunction presumption, state courts continue to recite and apply their usual multipart injunction (or stay) standards. The precise phrasing varies by state, but as at the federal level, the key factors are: (1) the movant's likelihood of success on the merits; (2) the prospect of irreparable harm to the movant absent an injunction (or stay); (3) the prospect of countervailing hardships to the opposing party if an injunction (or stay) is granted; and (4) the public interest.[110] State courts primarily discuss electoral proximity and invoke *Purcell* while analyzing the public interest, or sometimes as part of balancing the equities between the parties.

Consider two illustrative examples from Maine and Ohio. In both cases, the state courts concluded that an impending election weighed against injunctive relief. But each decision followed from the court's assessment of the discrete circumstances it confronted, rather than from a categorical aversion to pre-election injunctions. *Purcell* has made similar cameos in several more state cases, but its role was even smaller than in these Maine and Ohio cases because the courts denied relief primarily for reasons unrelated to electoral proximity.[111]

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110. *See, e.g.*, Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 886–92 (2018); *cf.* Michael T. Morley, *Beyond the Elements:* Erie *and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 459 (2018) ("State standards for injunctive relief often involve somewhat different elements or are expressed in subtly different terms than federal standards.").

111. In *Fay v. Merrill*, the Connecticut Supreme Court rejected challenges to COVID-19-related changes to the state's absentee voting procedures partly on the merits and partly on mootness grounds, but the court also mentioned in a footnote that judicial intervention before the state's primary election "would have raised significant practical issues" and cited *Purcell* and other federal cases for support. 256 A.3d 622, 631–33, 638 n.21 (Conn. 2021). In *League of United Latin Am. Citizens of Iowa v. Pate*, the Iowa Supreme Court declined two weeks before the November 2020 election to enjoin a law limiting the ability of county auditors to correct deficient absentee ballot request forms

The Maine case, *Jones v. Secretary of State*,[112] involved a challenge to the state's ranked-choice voting system.[113] The Secretary of State had determined that opponents of the system failed to obtain enough signatures to place a "people's veto" of the system on the ballot.[114] After the Maine Supreme Judicial Court affirmed the Secretary's determination (and vacated a contrary trial court ruling), the challengers asked the court to stay its mandate. In an opinion issued on October 1, 2020, the court explained that this stay request was subject to "the same standards [as those] for obtaining injunctive relief."[115] In a section of its opinion entitled "Irreparable Injury, Harm to Other Parties, and the Public Interest," the court noted that the state "ha[d] already finalized templates and printed more than a million [ranked-choice] ballots," some of which had already been delivered to—and returned by—military and overseas voters.[116] The court added that, if the opponents of ranked-choice voting had indeed fallen short of the people's veto threshold (as the court had already held), then the public "ha[d] a strong interest in using ranked-choice voting" and "not changing the rules for voting at this late time," when "[v]oting ha[d] [already] begun with voters using this method."[117] It was here that the court, without further elaboration, included a cite to *Purcell*.[118] The court separately concluded that the challengers were not likely to prevail on the merits if they sought further review in the U.S.

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after concluding that the plaintiffs' legal claims were unlikely to succeed on the merits. 950 N.W.2d 204, 208, 216 (Iowa 2020) (per curiam). In its conclusion, the court's opinion briefly added that "[t]he United States Supreme Court has repeatedly warned that courts 'should ordinarily not alter election rules on the eve of an election.'" *Id.* at 215–16 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam)). In *Singh v. Murphy*, a New Jersey appellate court issued an unpublished ruling rejecting on the merits a challenge to mail-in voting procedures implemented by the state during the pandemic. No. A-0323-20T4, 2020 WL 6154223, at *1, *13 (N.J. Sup. Ct. App. Div. Oct. 21, 2020). The court added that the public interest "manifestly tip[ped] against granting" injunctive relief given that "[t]he general election utilizing the mail-in voting procedures has been underway for many weeks" and "over a million New Jersey voters have already marked and mailed in their ballots." *Id.* at *14. As part of that discussion, the court cited *Purcell* and two pre-*Purcell* federal appellate rulings for the proposition that "a wealth of federal precedent . . . weighs heavily against entertaining on-the-brink challenges to the voting procedures of upcoming elections." *Id.* at *15.

112. 2020 ME 117, 239 A.3d 628 (per curiam).

113. *Id.* ¶ 3, 239 A.3d at 630.

114. *Id.*

115. *Id.* ¶ 2, 239 A.3d at 630 (quoting *Me. Equal Just. Partners v. Comm'r*, 2018 ME 127, ¶ 31, 193 A.3d 796, 804).

116. *Id.* ¶ 3, 239 A.3d at 630.

117. *Id.* ¶ 4, 239 A.3d at 630–31.

118. *Id.*

Supreme Court, which was itself a sufficient alternative reason for rejecting the stay motion.[119]

In the Ohio case, *Ohio Democratic Party v. LaRose*,[120] a state appellate court reversed the trial court's preliminary injunction that would have required election officials to accept electronically submitted absentee ballot applications.[121] The appellate court's decision, issued September 29, 2020, articulated and applied the state's usual injunction standard.[122] The court first determined that, while one of the plaintiffs' multiple claims was likely to succeed on the merits, the plaintiffs had not shown that they would suffer irreparable harm without an injunction.[123] That was presumably reason enough to deny the injunction, but for the sake of completeness, the court also jointly examined the potential for an injunction to cause "[u]njustifiable harm to third parties" and "the public interest."[124] Near the end of that discussion, the court noted the U.S. Supreme Court's admonition "that, ordinarily, courts should not alter the election rules close to an election."[125] The court's analysis, however, centered on the factual record as opposed to a general anti-injunction presumption. According to the court, "unrebutted evidence in this case

119. *Id.* ¶¶ 6–10, 239 A.3d at 631–33. A few weeks later, in *Alliance for Retired Americans v. Secretary of State*, the Maine Supreme Judicial Court used *Purcell* somewhat differently. 2020 ME 123, 240 A.3d 45. The plaintiffs sought a preliminary injunction barring enforcement of the state's usual election-day deadline for receiving absentee ballots as well as its usual absentee ballot verification and rejection processes, contending that applying those requirements during the pandemic would violate their voting and due process rights under the U.S. and Maine Constitutions. *Id.* ¶¶ 1–2, 240 A.3d at 48. A state trial court denied relief in August 2020, and the Maine Supreme Judicial Court affirmed in a ruling issued just two weeks before the November 2020 election. *Id.* ¶ 2, 240 A.3d at 48. The court focused primarily on the substance of the claims, concluding that the plaintiffs lacked a likelihood of success on the merits. *Id.* ¶¶ 11, 21, 240 A.3d at 50, 54. As it discussed the deadline challenge, the court cited *Purcell* and *Republican National Committee* (along with other federal and state cases) as support for applying a more deferential constitutional standard than strict scrutiny. *See id.* ¶ 16, 240 A.3d at 52 (describing *Purcell* as a "principle of judicial restraint"). This merits-oriented invocation of *Purcell* is unusual and probably misplaced. In *Purcell* and later decisions, the Supreme Court has principally treated an impending election as a reason to withhold a remedy, not as grounds for rejecting a legal claim on the merits. Regardless, electoral timing was not nearly as central to the Maine Supreme Judicial Court's analysis as it was to the analysis in *Republican National Committee*. The court may well have declined to apply strict scrutiny regardless, and it separately rejected the plaintiffs' challenge to the state's verification and processes on the merits without referencing *Purcell* at all. *Id.* ¶¶ 26–31, 240 A.3d at 55–57.

120. 2020-Ohio-4664, 159 N.E.3d 852 (Ct. App.).

121. *Id.* ¶ 1, 159 N.E.3d at 858–59.

122. *Id.* ¶¶ 32–33, 159 N.E.3d at 867.

123. *Id.* ¶¶ 34, 60–66, 159 N.E.3d at 867, 874–75.

124. *Id.* ¶¶ 67–84, 159 N.E.3d at 875–80.

125. *Id.* ¶ 82, 159 N.E.3d at 879.

clearly demonstrated" how a late-stage injunction would "plac[e] the security and administration of the election at risk."[126]

Beyond cases in which state courts have referenced *Purcell* while applying injunction-related standards, the other major place where *Purcell* has made timing-related appearances in state courts is in discussions of laches. These two inquiries—whether an injunction is warranted and whether laches bars a claim—can overlap, but the doctrine of laches focuses first and foremost on the timing choices of the plaintiffs: Did they unreasonably delay bringing claims that could have, and in fairness should have, been brought sooner?[127] Multiple state courts have invoked *Purcell* while explaining their decisions to reject tardy election claims based on laches.[128] For example, in one of the earliest state court citations to *Purcell*, the Maryland Supreme Court held that laches barred

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126. *Id.*

127. *See Trump v. Wis. Elections Comm'n,* 983 F.3d 919, 925–26 (7th Cir. 2020) ("At its core, laches is about timing. 'Laches cuts off the right to sue when the plaintiff has delayed 'too long' in suing. 'Too long' for this purpose means that the plaintiff delayed inexcusably and the defendant was harmed by the delay.'" (quoting *Teamsters & Emps. Welfare Tr. of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002))); *see also* Codrington III, *Unprincipled*, *supra* note 9, at 1109–15 (discussing the similarities and differences between the *Purcell* principle and laches).

128. In a few instances, state courts have referenced both *Purcell* and laches when rejecting requests to intervene ahead of an election without clarifying what considerations drove the court's analysis. For example, a month before the November 2024 election, the Pennsylvania Supreme Court issued a short per curiam order declining to exercise King's Bench or extraordinary jurisdiction over a case involving the status of improperly dated absentee ballots. It read, in full:

> This Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will — laches, the *Purcell* principle, or common sense — the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").

New PA Project Educ. Fund v. Schmidt, Case No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) (footnote omitted). At a glance, this per curiam might be seen as an endorsement by the Pennsylvania Supreme Court of the strong-form federal *Purcell* principle, but that likely reads too much into the court's ruling. For one thing, the court clarified in a footnote that, while it was declining to accept the case in an extraordinary posture shortly before the election, it would—even with the election looming—"continue to exercise our appellate role with respect to lower court decisions that have already come before this Court in the ordinary course." *Id.* at *1 n.2; *see also id.* at *2 (Donohue, J., statement in support of denial) (explaining that, while "it is inappropriate to grant King's Bench jurisdiction in this matter," "a future challenge" might arise "in the ordinary course"). For another, a concurring opinion pointed to the challengers' "inexplicabl[e]" failure to raise their claims sooner—and not merely the election's proximity—as a key reason for denying their petition. *Id.* at *1 (Brobson, J., concurring); *see also Baxter v. Phila. Bd. of Elections*, No. 76 EM 2024, 2024 WL 4650792 (Pa. Nov. 1, 2024) (per curiam) (staying lower court decision in a separate last-minute case involving the counting of undated absentee ballots).

a challenge to a candidate's eligibility brought just eighteen days before the November 2006 midterm election, when the plaintiff could have sued months earlier.[129] The court explained that the plaintiff's "dilatory" failure to proceed expeditiously ahead of the election was especially problematic given that ballots had already been printed, voting machines had been programmed, and many absentee votes had been returned.[130] More recently, a Michigan appellate court cited *Purcell* (as well as pre-*Purcell* state caselaw) to support the proposition that "laches [is] especially appropriate to apply" to legal challenges brought close in time to an election.[131] Shortly before the November 2024 election, the Ohio Supreme Court likewise held that a claim was barred by laches, invoking *Purcell* and the disruptive potential of last-minute judicial orders to explain why the plaintiffs' failure to act sooner was prejudicial.[132] Along similar lines, the Texas Supreme Court has cited *Purcell* while using a

129. *Liddy v. Lamone*, 919 A.2d 1276, 1287–91 (Md. 2007).

130. *Id.* at 1289–90; *see also id.* at 1291 ("Such delayed challenges go to the core of our democratic system and cannot be tolerated.").

131. *Davis v. Sec'y of State*, No. 362841, 2023 WL 3027517, at *6 (Mich. Ct. App. Apr. 20, 2023). Other Michigan cases have similarly referenced *Purcell* when addressing laches. *See DeVisser v. Sec'y of Stat*e, 981 N.W.2d 30, 35 (Mich. 2022) (Welch, J., concurring) (explaining that concerns about last-minute election litigation expressed in cases such as *Purcell* have particular bite "where a plaintiff has unreasonably delayed bringing a claim before the court"); *Genetski v. Benson*, No. 20-000216, 2020 WL 7033539, at *2 (Mich. Ct. Cl. Nov. 2, 2020) ("Quite simply, the request for injunctive relief—made the day before the general election on a policy issued weeks—if not months ago—is simply too late."); *Election Integrity Fund v. Benson*, No. 20-000169, 2020 WL 7033535, at *3 (Mich. Ct. Cl. Oct. 26, 2020) ("Plaintiffs have not given the Court a compelling reason why it should exercise its discretion to grant preliminary injunctive relief on the eve of an election, given the delay occasioned in bringing this matter. Thus, the Court concludes that the doctrine of laches weighs heavily in favor of denying the requested relief."); *Cavanagh v. Benson*, No. 22-000077, 2022 WL 20611788, at *1 (Mich. Ct. Cl. June 3, 2022) ("Plaintiff's lack of diligence in pursuing this action in and of itself gives the Court sufficient reason to deny the complaint and emergency motion.").

132. *State ex rel. Ohio Democratic Party v. LaRose*, No. 2024-Ohio-4953, ¶ 30, 2024 WL 4488054, at *6 (Ohio Oct. 15, 2024) ("[T]he rationale set forth in *Purcell* necessarily informs our consideration of the prejudice requirement of laches."). The Ohio Supreme Court's ruling arguably went a step too far toward endorsing the federal *Purcell* principle. Despite appropriately recognizing that *Purcell* "is not binding on this court" and is "primarily built on principles of federalism," the court wrote that it found *Purcell*'s "logic persuasive." *Id.* ¶¶ 28–29. The court, however, did not identify electoral proximity alone as a sufficient basis for rejecting the plaintiffs' claim had it been timely raised. Instead, it was the plaintiffs' needless delay that doomed them. *Id.* ¶ 32; *see also State ex rel. City of Maumee v. Lucas Cnty. Bd. of Elections*, 2024-Ohio-5304, No. L-24-1238, 2024 WL 4691072 (Ct. App. Oct. 30, 2024) (holding that laches barred a challenge to a local ballot measure in part because the party's delay left election officials unable to change the ballot before early and absentee voting began).

laches-like standard to reject mandamus petitions that election litigants failed to bring expeditiously.[133]

* * *

The core takeaway from this survey is that *Purcell* has not had nearly the same bite at the state level as it has had at the federal level. There can be little doubt that the Supreme Court is using the *Purcell* principle to deny relief that federal courts likely would have granted in the past. State courts, in contrast, do not appear to be wielding *Purcell* in outcome-altering ways. Instead, when they invoke it, they are doing so mainly to support longstanding and uncontroversial propositions about the need for courts to be sensitive to the consequences of their pre-election rulings and the need for election litigants to proceed diligently when seeking relief. Indeed, the state cases that have cited *Purcell* do not appear meaningfully different in reasoning or result from the myriad state election cases, new and old, that have considered whether to grant a pre-election injunction or apply laches without making any mention of *Purcell*.[134]

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133. *See In re Khanoyan*, 637 S.W.3d 762, 764–65 (Tex. 2022) (explaining that "invoking judicial authority in the election context requires unusual dispatch," that "[a]ll parties must move with maximum expedition" as an election approaches, and that "[a]voidable delays, in particular, may be fatal to the courts' ability to proceed at all"); *In re Hotze*, 627 S.W.3d 642, 644–46 (Tex. 2020) (concluding that litigants had not "acted diligently to protect their rights" when they waited needlessly ten weeks to challenge a gubernatorial directive that expanded early voting and that this "lengthy delay" precluded consideration of their claims).

134. *See, e.g.*, *Off. of the Lieutenant Governor v. Corbisier ex rel. B.L.*, 522 P.3d 174, 179–80 (Alaska 2022) (rejecting an injunction that would have undermined the public's interest in "an orderly and timely election"); *Kruidenier v. McCulloch*, 158 N.W.2d 170, 174 (Iowa 1968) (concluding that, although an election was approaching, the court could "still remedy [an unlawful apportionment] without a 'disruption of the election process'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964))); *Schade v. Md. State Bd. of Elections*, 930 A.2d 304, 327 (Md. 2007) (declining shortly before an election to enjoin the use of certain voting machines and observing "that a change in voting systems at the late date that this case involved[] would have done more harm than good"); *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 460 S.W.2d 1, 2 (Mo. 1970) (concluding "that it would be wholly inequitable and impracticable to attempt" to impose a new map just a month before a scheduled election); *Cutler v. Chapman*, 289 A.3d 139, 153–54 (Pa. Commw. Ct. 2023) (declining to enjoin an upcoming special election based in part on "the election preparations that have already occurred" and the likelihood of "voter confusion"); *In re Senate Bill 177*, 294 A.2d 657, 660 (Vt. 1972) (declining to enjoin an unconstitutionally apportioned map where "the impending primary election is imminent and the senate's election machinery is already in progress"); *Trump v. Biden*, 2020 WI 91, ¶ 12, 951 N.W.2d 568, 574 (holding that laches barred challenges to election administration procedures where the "delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the elections officials, other candidates, [and] voters . . . is obvious and immense").

B. Purcell*'s Limited Conceptual Relevance*

As a conceptual matter, it makes sense that the Supreme Court's strong-form *Purcell* principle has not taken hold in state courts. This Section explains that state courts have good reasons to chart a distinctive path when it comes to pre-election litigation. In short, whatever one's view of the Supreme Court's current approach to *Purcell* (and, as described in Part I, there is much to criticize), state and federal courts are differently situated in our nation's decentralized electoral system and have different institutional roles to play.

It bears noting up front that *Purcell* and its progeny do not formally bind state courts. As both the Supreme Court and state courts have recognized, the *Purcell* principle is a federal equitable doctrine designed to constrain federal judicial intervention ahead of an election.[135] The Supreme Court has invoked the principle only in federal court cases, and the Court has rejected at least four requests to apply *Purcell* to state court rulings that provided pre-election relief. In October 2020, the Court denied without comment two emergency applications to stay a Pennsylvania Supreme Court ruling that had extended the state's deadline for receiving absentee ballots.[136] A week later, when the Court stayed a federal district court ruling that provided a similar deadline extension in Wisconsin, Chief Justice Roberts explained in a short concurrence that

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135. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that *lower federal courts* should ordinarily not alter election rules on the eve of an election."(emphasis added)); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) ("[T]his Court has repeatedly emphasized that *federal courts* ordinarily should not alter state election rules in the period close to an election."(emphasis added)); *Harkenrider v. Hochul*, 197 N.E.3d 437, 454 n.16 (N.Y. 2022) ("The *Purcell* doctrine cautions *federal* courts . . . and does not limit state judicial authority . . . ."); *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 15 (Iowa 2020) (Appel, J., specially concurring) ("*Purcell* . . . is infused with federalism concerns, arising from the notion that federal courts should show a degree of caution before they intervene in state-created election procedures that could bollix up the management of an election by state officials."); *see also* Pildes, *supra* note 9 ("[The *Purcell* principle] is a doctrine about the equitable powers of *federal* courts. It is not a principle of substantive, federal constitutional law. That means it does not apply to state courts addressing election-law claims . . . .").

136. *Scarnati v. Boockvar*, 141 S. Ct. 644 (mem.), *denying stay of Pa. Democratic Party v. Boockvar*, 283 A.3d 345 (Pa. 2020); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (mem.). The stay applications were presented to the Court shortly after Justice Ginsburg's death; the Court denied them by an evenly divided 4–4 vote. *See* Emergency Application for Stay Pending Disposition of a Petition for a Writ of Certiorari, *id.* (No. 20A53); Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/KW25-VRKP].

the Wisconsin and Pennsylvania situations were governed by "[d]ifferent bodies of law and different precedents," namely: "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes."[137]

In 2022, the Court in *Moore v. Harper*[138] denied an application to stay a North Carolina Supreme Court ruling that had enjoined the state's gerrymandered congressional map pursuant to the North Carolina Constitution.[139] The stay applicants in *Moore* asserted that, with an election approaching, *Purcell* counseled in favor of a stay until the Supreme Court took up and resolved their federal claim.[140] (Specifically, they urged the Supreme Court to embrace the independent state legislature theory and hold that the state supreme court had usurped the state legislature's power to regulate federal elections in violation of the Federal Constitution's Election Clause.[141]) While the Court acted on the application without an opinion, Justice Kavanaugh, who is perhaps the median Justice on these questions, explained in a concurrence that the *Purcell* principle counseled against a stay, not in favor of it. The Supreme Court, he wrote, "has repeatedly ruled that *federal courts* ordinarily should not alter state election laws in the period close to an election."[142] Given North Carolina's "impending primary elections," it was "too late for the federal courts"—including the Supreme Court—to issue a stay that would serve to undo the district lines imposed by the state supreme court.[143] A month earlier, in *Merrill v. Milligan*, Justice Kavanaugh similarly described *Purcell* as a doctrine by and for federal courts: "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."[144]

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137. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (Roberts, C.J., concurring).

138. 142 S. Ct. 1089 (2022) (mem.)

139. *Id.* at 1089.

140. Emergency Application for Stay Pending Petition for Writ of Certiorari at 26, *id.* (No. 21A455).

141. *Id.* at 12–17.

142. *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring) (emphasis added).

143. *Id.* (Kavanaugh, J., concurring). Justice Samuel Alito dissented, joined by Justices Clarence Thomas and Neil Gorsuch. His view was not that the North Carolina Supreme Court had run afoul of the *Purcell* principle, but rather that North Carolina's primary was still far enough off that granting a stay under the Court's usual standard would be "only minimally disruptive." *Id.* at 1091 (Alito, J., dissenting).

144. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Justice Kavanaugh's approach to *Purcell* in *Moore* and *Merrill* is particularly notable because he was among the Justices who would have granted the applications to stay the Pennsylvania Supreme Court's voting ruling in October 2020. *See Scarnati v.*

Most recently, just before the November 2024 election, the Court issued a one-line order denying an application to stay a Pennsylvania Supreme Court ruling that directed election officials to count certain provisional ballots.[145] The stay applicants argued, in part, that the state courts had violated the *Purcell* principle by providing this relief so close to the election.[146] No Justice dissented from the stay denial or otherwise expressed support for the applicants' *Purcell* argument.[147]

Going further, the Supreme Court's election-law jurisprudence does not just allow state courts to reject the rigid constraints of the federal *Purcell* principle, it seemingly encourages them to do so. In a number of recent rulings, the Supreme Court has stressed that federal courts should tread lightly when it comes to voting and elections, as these are areas in which states "retain broad autonomy."[148] Whatever one may think about how these rulings characterize the federal judiciary's role, the key point for present purposes is that they call for state-level actors, including state courts, to oversee elections and safeguard the democratic process in ways that federal courts will not. In *Rucho v. Common Cause*,[149] for example, the Court held that federal constitutional challenges to partisan gerrymanders are nonjusticiable in federal court, but it also invited opponents of gerrymandering to continue to seek recourse through state laws and state courts.[150] To date, a strong majority of the state high courts

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Boockvar, 141 S. Ct. 644 (2020) (mem.). He offered no explanation for his position on those 2020 applications, but his statements in 2022 suggest that he now more firmly subscribes to the view that the Supreme Court ordinarily should not step in shortly before an election to stay state court rulings.

145. *Republican Nat'l Comm. v. Genser*, ___ S. Ct. ___, No. 24A408, 2024 WL 4647792 (Nov. 1, 2024) (mem.).

146. Emergency Application for Stay Pending Disposition of a Petition for a Writ of Certiorari at 17–21, *Genser*, ___ S. Ct. ___ 2024 WL 4647792 (Nov. 1, 2024).

147. In a statement respecting the denial of the application, Justice Alito (joined by Justices Thomas and Gorsuch) explained that a procedural wrinkle led him to "agree with the order denying the application" despite the "considerable importance" of the Pennsylvania Supreme Court's decision. *Genser*, ___ S. Ct. ___, 2024 WL 4647792, at *1. He made no mention of *Purcell*.

148. *Shelby County v. Holder*, 570 U.S. 529, 543 (2013); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2341 (2021) (expressing concern that an expansive construction of the Voting Rights Act would "transfer much of the authority to regulate election procedures from the States to the federal courts"). *But see Trump v. Anderson*, 144 S. Ct. 662, 670–71 (2024) (holding that Congress, not the states, is responsible for enforcing Section 3 of the Fourteenth Amendment against federal officeholders and candidates and noting the "uniquely important national interest[s]" at stake in presidential elections (internal quotation marks omitted)).

149. 139 S. Ct. 2484 (2019).

150. *Id.* at 2506–08. Decades before *Rucho*, the Court described states as having "primary responsibility for apportionment of their federal congressional and state legislative districts" and wrote that federal judges should "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has

to have considered the issue have rejected calls to incorporate *Rucho*'s nonjusticiability holding into their own jurisprudence and have instead allowed litigants to pursue state constitutional challenges to partisan gerrymandering.[151] Cases like *Rucho* illustrate that recourse may be had in state court even when it is unavailable in federal court. Indeed, the very fact that the doors to federal court are closed can make it all the more important for state courts to keep their doors open.

Looking beyond the U.S. Supreme Court's jurisprudence, several significant features of state courts and state constitutions underscore why state courts have been right not to move in lockstep with federal *Purcell* precedent. First, central to the federal *Purcell* principle is the Supreme Court's concern about federal judges swooping in as unelected outsiders and disrupting state-led efforts to conduct elections. These countermajoritarianism and federalism concerns do not hold when it comes to state courts. Most state judges are elected, and even the rest can claim more democratic legitimacy within their states than federal judges appointed and confirmed at the national level, particularly since state judicial accountability mechanisms generally go beyond those that exist for federal judges.[152] State courts, moreover, are a constituent part of their state's governmental apparatus and thus cannot be cast as interlopers meddling in the affairs of a separate sovereign.[153]

Second, state courts have different constitutional and statutory powers than federal courts and different relationships with the other branches of government. State constitutions do not parrot the jurisdictional limitations of Article III of the Federal Constitution. Instead, as scholars have detailed, state courts commonly "undertake a wider range of functions than do federal courts in terms of advice-giving,

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begun to address that highly political task itself." *Growe v. Emison*, 507 U.S. 25, 33–34 (1993).

151. *See* Harry Isaiah Black, *Explainer: Status of Partisan Gerrymandering Claims Across the Country*, ST. DEMOCRACY RSCH. INITIATIVE, https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2024/06/Explainer-Status-of-Partisan-Gerrymandering-Claims-Across-the-Country-Harry-Isaiah-Black.pdf [https://perma.cc/V6G4-C4BR] (July 26, 2024).

152. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1357–58 [hereinafter Bulman-Pozen & Seifter, *Countering the New Election Subversion*]; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1917–18 (2001); Seifter & Sopko, *Standing*, *supra* note 82 (manuscript at 126).

153. *See* Hershkoff, *supra* note 152, at 1900–02; *see also* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1908 (2023) [hereinafter Bulman-Pozen & Seifter, *Democratic Proportionality*] ("State judges do not stand outside of democracy but are always active participants in it.").

administration, and policy-making."[154] Most state constitutions also go further than the Federal Constitution in expressly guaranteeing access to the courts and the right to a judicial remedy.[155] At the same time, state constitutions typically place more constraints on state legislatures than the Federal Constitution places on Congress, meaning that state courts are often asked to weigh in on lawmaking matters and to resolve politically charged disputes.[156] The upshot of all this is that state courts are better positioned than their federal counterparts to weigh the competing interests at stake in last-minute election litigation and make context-specific remedial determinations.[157] Neither their authority nor their capacity is so limited as to require them to use the strong-form federal *Purcell* principle as a shortcut to truncate and flatten their analysis.

Third, state courts are situated within state constitutional systems that are deeply committed to inclusive democratic self-government. Across the board, state constitutions guarantee the fundamental right to vote more explicitly and forcefully than the Federal Constitution, and they contain an array of additional features to enable the people to govern themselves as political equals through majoritarian institutions that respect minority rights.[158] A core duty of state courts is to provide a

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154. Hershkoff, *supra* note 152, at 1841; *see also* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 322 (2d ed. 2023) ("The range of powers allocated to the judicial branch under state constitutions differs both quantitatively and qualitatively from the 'judicial power' enumerated in Article III of the U.S. Constitution.").

155. Seifter & Sopko, *Standing*, *supra* note 82, (manuscript at 124) (citing Marcus Alexander Gadson, *Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur*, 98 WASH. L. REV. 1, 3 (2023)); Pildes, *supra* note 9 ("State courts often operate under different jurisdictional and equitable doctrines than federal courts.").

156. Hershkoff, *supra* note 152, at 1891–93; *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1156 (1999) ("[S]tate courts are frequently counted on to resolve constitutional questions that implicate the courts 'directly in day-to-day political issues' and that encourage them to act as interdependent members of state government." (quoting G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 43 (1988))); WILLIAMS & FRIEDMAN, *supra* note 154, at 335, 337 (explaining that "the relationship between state supreme courts and state legislatures . . . is different from the Supreme Court's relationship to Congress" and that state courts are "more regular[ly] involve[d] in the workings of other branches" and "often deeply involved in the state's ongoing policymaking processes").

157. *See* Hershkoff, *supra* note 152, at 1902 (explaining that, compared to federal courts, state courts are "accorded a greater judicial space in which to experiment and design innovative remedies").

158. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 879–81 (2021) (discussing state constitutions' strong commitments to popular sovereignty, majority rule, and political equality); *see*

forum for the people to vindicate their democratic rights and to protect the system's democratic nature. As Jessica Bulman-Pozen and Miriam Seifter have put it, state courts play a "markedly broader" role in democracy-related matters than the federal courts, and state courts have recognized, "[b]oth recently and in the more distant past, . . . their role in fostering democracy."[159] A rule that categorically disfavors pre-election remedies stands at odds with the democratic responsibilities of state courts.

Finally, state constitutions and statutes sometimes establish special procedures and deadlines for judicial review of specific democracy-related matters. These include provisions that apply to redistricting disputes,[160] to challenges to grants or denials of ballot access,[161] and to other categories of voting and election litigation.[162] A few recently enacted state-level voting rights acts even include express anti-*Purcell* provisions that instruct courts not to deny relief simply because an election is close at hand.[163] Courts have recognized that when state law

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also Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 153, at 1926 ("All state constitutions include not only the right to vote but also additional protections to safeguard popular participation in and control over elections."); Joshua A. Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014).

159. Bulman-Pozen & Seifter, *Countering the New Election Subversion*, *supra* note 152, at 1357. Exemplifying this broader role, most state courts have at one time or another "applied a relaxed version of standing" to allow election-law litigants to proceed with claims that they likely could not have pursued under federal standing doctrine. Seifter & Sopko, *Standing*, *supra* note 82 (manuscript at 143).

160. *See, e.g.*, COLO. CONST. art. V, § 44.5 (requiring state supreme court review of plans created by the state's redistricting commission); N.Y. CONST. art. III, § 5 (authorizing judicial review of redistricting plans and requiring courts to resolve challenges within sixty days); OR. REV. STAT. § 255.411(8)(b) (2023) (specifying when a court-ordered remedial districting plan imposed under the Oregon Voting Rights Act can go into effect).

161. *See, e.g.*, OHIO CONST. art. II, § 1g (establishing pre-election deadlines for legal challenges to statewide ballot measures); MINN. STAT. § 204B.44 (2023) (requiring expedited judicial consideration of ballot access challenges).

162. *See, e.g.*, CONN. GEN. STAT. § 9-368j(g)(2)(F)(ii) (2023) (describing process for seeking preliminary relief under state's voting rights act in the run-up to an election); COLO. REV. STAT. § 1-1-107(2)(d) (2024) (requiring expedited review of election-related actions brought by the Colorado Attorney General); WASH. REV. CODE §§ 29A.92.090–.92.110 (2024) (creating a private cause of action to enforce the Washington Voting Rights Act, requiring a trial to be held within a year of filing the complaint, and specifying when a remedial district plan can go into effect).

163. *See* MINN. STAT. ANN. § 200.57(2) (West 2024) (instructing courts to apply their usual temporary injunction factors to requests for pre-election relief under the state's voting rights act and instructing that "if the court determines that it is possible to implement appropriate relief that would address an alleged violation before an election, such relief shall not be denied on the basis that the election is close in time or that the relief could result in voter confusion"); N.Y. ELEC. LAW § 17-216 (McKinney 2024) (instructing courts to grant preliminary relief ahead of an election whenever the "plaintiffs

directly addresses the process for adjudicating a particular election dispute, the inapplicability of the federal *Purcell* principle is especially clear.[164]

III. ADAPTING *PURCELL* FOR STATE ELECTION LITIGATION

As election-related lawsuits continue to pour into state courts, those courts are sure to face many more questions about whether to provide pre-election remedies, such as preliminary injunctions. As Part II detailed, state courts thus far have not embraced the federal *Purcell* principle's categorical aversion to relief when an election looms. They have instead conducted more nuanced inquiries that better align with their distinctive legal and institutional contexts. But how, exactly, should state courts proceed when asked to intervene ahead of an election, and what sort of oversight should the Supreme Court provide? This Part takes on those questions. Section III.A catalogs the factors that should guide state courts as they weigh requests for pre-election relief. Section III.B then considers the role of the Supreme Court in reviewing state court decisions to grant or deny such relief.

A. Guidance for State Courts Considering Pre-Election Remedies

As discussed in Section II.A, state courts around the country have already addressed requests for pre-election relief in a variety of election-related cases. Synthesizing key lessons from these rulings, as well as from academic commentary on the *Purcell* principle, this Section sets out a list of the factors that matter most when considering the propriety of judicial action ahead of an election.

We focus specifically on the recurring situation in which plaintiffs ask courts to order defendants to take or refrain from taking certain actions in relation to an upcoming election. The requested order in these cases may take one of several procedural forms. Probably most commonly, plaintiffs seek preliminary injunctions (known in some states

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are more likely than not to succeed on the merits" and "it is possible to implement an appropriate remedy that would resolve the alleged violation in the upcoming election").

164. *See, e.g.*, *Martin v. Simon*, 6 N.W.3d 443, 452 (Minn. 2024) ("[A] principle that *federal* courts should not enjoin a *state's* election laws in the immediate lead-up to an election is inapplicable in the context of a section 204B.44 petition [regarding ballot access], which expressly permits a petition to be filed in *state* court to correct election-related errors that 'have occurred or are about to occur.'" (quoting MINN. STAT. § 204B.44(a) (2023))); *Harkenrider v. Hochul*, 197 N.E.3d 437, 454 (N.Y. 2022) ("Indeed, our State Constitution both requires expedited judicial review of redistricting challenges — as occurred here — and authorizes the judiciary to 'order the adoption of, or changes to, a redistricting plan' in the absence of a constitutionally-viable legislative plan." (citation omitted) (quoting N.Y. CONST. art. III, § 4(e))).

as temporary injunctions). These provide interim relief while cases proceed to final resolution, which may not be until after the election. Plaintiffs sometimes also seek pre-election permanent injunctions (if time permits), as well as temporary restraining orders (if the need for interim relief is truly immediate). Additionally, election litigants sometimes seek writs of mandamus to compel an official to carry out a nondiscretionary duty. If a lower court grants one of these remedies, a defendant may seek to have it stayed on appeal.

Different forms of relief—preliminary injunctions, permanent injunctions, temporary restraining orders, mandamus, and stays—come with their own distinct standards, which can vary somewhat by state. Parties seeking preliminary injunctions, for example, typically must show a likelihood that their claim will succeed on the merits, while those seeking permanent injunctions need a final merits ruling in their favor.[165] But across remedial categories and across states, there is substantial analytical overlap. In addition to considering the merits of the claim, courts generally assess the harm the plaintiffs may suffer if relief is denied, the countervailing hardships the defendants may experience if relief is granted, and the broader public interest in granting or denying relief.[166]

Consistent with existing state-level practice, our initial recommendation is for state courts in election cases to apply their usual doctrinal framework for the requested relief, rather than fixating first and foremost on electoral proximity, as the federal *Purcell* principle seems to counsel. Courts should take account of an impending election *within* their existing frameworks, rather than as a separate and superseding inquiry. More specifically, courts should assess whether and how an upcoming election affects the hardships parties may experience if relief is granted or denied, as well as the broader public interest. In practice, the hardship and public interest prongs of the analysis frequently shade into each other in election cases. Plaintiffs in such cases commonly assert that their requested relief will benefit not just themselves but the public

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165. *See, e.g.*, *Dallman v. Ritter*, 225 P.3d 610, 621 (Colo. 2010) ("[W]hile we review preliminary injunctions for likelihood of success on the merits and permanent injunctions for actual success on the merits, the legal criteria and analytical process are essentially the same."); *PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718, 723 (Iowa 2003) (explaining that "[t]he standards a court considers in granting a temporary injunction are similar to those for permanent injunctions," but "temporary injunctions require a showing of the *likelihood* of success on the merits whereas permanent injunctions require *actual* success"); *see also* Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 UC IRVINE L. REV. 1331, 1336–38, 1375 n.300 (2020).

166. *See* KIRSTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 5–6 (2009); *see also supra* note 110 and accompanying text.

at large, while defendants similarly maintain that their interest in opposing relief aligns with the public interest.[167]

To put it another way, although the current federal *Purcell* principle is unsuitable for state courts, it is entirely appropriate for state courts to weigh "considerations specific to election cases," as the Supreme Court originally advised in *Purcell* itself.[168] But what, exactly, are the relevant considerations for state courts to incorporate into their hardship and public interest analyses when resolving requests for pre-election relief? We offer the following list of *Purcell* principles for state courts.

1. The Nature of the Plaintiff's Claim and Injury

The claims that plaintiffs raise in election cases run the gamut from momentous to trivial. On one end of the spectrum, plaintiffs may assert that their fundamental right to vote is being denied or abridged, that they cannot meaningfully participate in the political process due to starkly biased electoral maps, that they have been unfairly barred from appearing on the ballot, and so on. At the other end of the spectrum, parties in many cases wrangle over technical minutiae, such as precisely how close an election observer may stand to poll workers or just what parts of their mailing address an absentee ballot witness must provide.

Simply put, the need for a pre-election remedy is greater when plaintiffs show a real threat to their basic democratic rights than it is when plaintiffs show only picayune imperfections that create no participatory barriers or bona fide risks to electoral integrity. State courts should make it a high priority to redress the former sorts of injuries, even when an election is looming. In other words, in contrast to the current federal *Purcell* principle, which categorically disfavors pre-election relief, state courts should apply a presumption in favor of taking pre-election action to curb serious rights violations and democratic defects, and they should demand strong countervailing reasons before denying relief. This approach follows naturally from the bedrock democratic precepts that suffuse state constitutional systems. In the words of Bulman-Pozen and Seifter, "state courts have not only the authority but also the duty to invalidate election-subverting measures and to serve as a bulwark for the basic functioning of American democracy."[169]

State courts already appear to be incorporating the nature of the plaintiff's claim into their analysis. For example, in *Moore v. Lee*, the

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167. *See, e.g.*, *Jones v. Sec'y of State*, 2020 ME 117, ¶¶ 3–5, 239 A.3d 628, 630–31 (per curiam).

168. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

169. Bulman-Pozen & Seifter, *Countering the New Election Subversion*, *supra* note 152, at 1365.

Tennessee redistricting case discussed in Section II.A in which the court declined to enjoin the state's senate map, the Tennessee Supreme Court observed that the plaintiff had not claimed an injury "to her ability to vote," but rather challenged what the court regarded as a relatively minor defect in the map—namely, that the state senate districts in one county had been non-consecutively numbered.[170] In contrast, the New York and New Hampshire courts that granted pre-election relief in their states' contemporaneous redistricting cases observed that the plaintiffs' claims implicated the basic fairness of the challenged maps.[171]

The Ohio Supreme Court's 2022 decision in *State ex rel. DeMora v. LaRose*[172] is also instructive. In that case, prospective candidates who had been excluded from the state's primary ballot pursuant to a directive from the Secretary of State sought a writ of mandamus compelling the Secretary to rescind the directive and give them an opportunity to be included.[173] After concluding that the Secretary had breached clear legal duties set forth in Ohio law, the court rejected the Secretary's invocation of the federal *Purcell* principle and granted relief even though the primary was just weeks away—and the deadline for preparing ballots for military and overseas voters had already passed.[174] According to the court, the application of *Purcell* to mandamus actions was "questionable, at best," given that mandamus "requires a showing of a clear legal right, a clear legal duty, and the absence of an adequate remedy in the ordinary course of the law."[175] It was inappropriate, the court suggested, for officials who violate clear legal rights and duties to invoke timing concerns as a reason to leave their violations uncorrected.[176] The court added that, even if the impending election required some degree of judicial caution, the right of the prospective candidates to be included "outweigh[ed] the burden" that might be placed on county boards of election to reprint ballots.[177]

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170. *Moore v. Lee*, 644 S.W.3d 59, 67 (Tenn. 2022).

171. *See Harkenrider v. Hochul*, 197 N.E.3d 437, 452–53 (N.Y. 2022) (discussing the seriousness of partisan gerrymandering); *Norelli v. Sec'y of State*, 292 A.3d 458, 468 (N.H. 2022) (explaining that the state's malapportioned congressional districts violated the plaintiffs' fundamental rights).

172. 2022-Ohio-2173, 217 N.E.3d 715.

173. *Id.* ¶¶ 1–2, 217 N.E.3d at 717–18.

174. *Id.* ¶¶ 38–47, 217 N.E.3d at 724–26.

175. *Id.* ¶ 43, 217 N.E.3d at 725. *But see State ex rel. Ohio Democratic Party v. LaRose*, No. 2024-Ohio-4953, ¶ 29, 2024 WL 4488054, at *5 (Ohio Oct. 15, 2024) (suggesting, in apparent tension with its earlier analysis in *DeMora*, that "the rationale set forth in *Purcell* applies to relief in mandamus actions").

176. *See DeMora*, ¶¶ 44–45, 217 N.E.3d at 725–26.

177. *Id.* ¶ 46, 217 N.E.3d at 726; *see also id.* ¶ 44, 217 N.E.3d at 725–26 ("In this circumstance, the *Purcell* principle should not bar a court from requiring the subject of the law here—the secretary of state—to do his duty and follow the law.").

2. The Plaintiff's Diligence, or Lack Thereof

It is entirely reasonable for state courts to consider whether litigants who seek pre-election relief have acted diligently and expeditiously.[178] When plaintiffs have proceeded as quickly as could reasonably be expected, courts should hesitate to use an election's proximity as a basis for inaction. The reality is that election-related claims often arise or become judicially cognizable only when an election is near.[179] An across-the-board reluctance to intervene in such situations may leave important rights or requirements functionally unenforceable.[180] If elections officials, for example, decide to exclude candidates from the ballot just before the legal deadline for printing ballots, candidates who expeditiously object should not be faulted, and courts should not deny relief, simply because ballots are now being printed.[181]

Moreover, as commentators have observed when critiquing the federal *Purcell* principle, closing the door on litigants as an election

178. *See, e.g.*, *All. for Retired Ams. v. Sec'y of State*, 2020 ME 123, ¶ 8, 240 A.3d 45, 50 ("[W]hen challenges to election laws are lodged on the eve of an election it is imperative that plaintiffs act as expeditiously as possible in their pursuit of relief."); Hasen, *supra* note 43, at 444 (discussing the relevance of the parties' diligence in bringing late challenges to election rules); Stephanopoulos, *supra* note 7 ("[I]t matters whether plaintiffs diligently developed their claim or, conversely, dallied when they should have hurried.").

179. As they assess whether plaintiffs have acted with sufficient diligence, courts should be sensitive to the particular circumstances. Alaska courts, for example, rejected an argument that laches barred a suit seeking pandemic-related voting accommodations that was brought in early September 2020. *Alaska v. Arctic Vill. Council*, 495 P.3d 313, 319 (Alaska 2021). Although the suit could potentially have been filed somewhat sooner, the Alaska Supreme Court affirmed the trial court's conclusion that the plaintiffs "did not unreasonably delay," given that "the pandemic is a shifty beast" and "the science of the pandemic's reach and effects, and the government's response to it, were ever-changing." *Id.* (quoting *Arctic Vill. Council v. Meyer*, No. 3AN-20-07858 CI, 2020 WL 6120133, at *3 (Alaska Super. Ct. Oct. 5, 2020)).

180. *See, e.g.*, Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 38 (2007) (warning that while *Purcell* may "moderately reduc[e] the total amount of [election] litigation," it "achieves that result only by eliminating cases for which the only viable remedy may come through pre-election judicial review").

181. *See, e.g.*, *State ex rel. DeMora v. LaRose*, 2022-Ohio-2173, ¶¶ 45–47, 217 N.E.3d 715, 726 (providing relief in such a situation). The same logic applies to late-breaking disputes over ballot initiatives and referenda. *See, e.g.*, *League of Women Voters of Utah v. Utah State Legislature*, No. 20240965, ___ P.3d ___, 2024 WL 4294102 (Utah Sept. 25, 2024) (affirming a lower court injunction that voided a legislatively referred statewide ballot measure after ballots had been printed and ordered that votes cast on the measure would not count); *id.*, ___ P.3d ___, 2024 WL 4562458 (Utah Oct. 24, 2024) (full opinion); *see also* Robert Gehrke, *"Amendment D Is Void': GOP Lawmakers' Constitutional Amendment Won't Be Counted in 2024 Election*, SALT LAKE TRIB., https://www.sltrib.com/news/politics/2024/09/12/amendment-d-utah-judge-strikes/ [https://perma.cc/UN6A-UH9J] (Sept. 12, 2024, 3:34 PM).

nears, even when those litigants could not have acted sooner, can incentivize gamesmanship and delay on the part of lawmakers, election administrators, and others.[182] Officials might wait to roll out new laws or regulations, or to issue new district maps, until an election is sufficiently close that they believe the window for litigation has closed. While the Supreme Court has cast the *Purcell* principle as a way to avoid subjecting voters and election officials to last-minute changes ahead of an election, the absence of pre-election judicial oversight could well generate more last-minute changes, not fewer. Meanwhile, those facing pre-election lawsuits might adopt strategies designed to run out the clock. By making clear that their doors remain open, state courts can discourage such actions.[183]

On the flip side, when litigants have not pursued their claims diligently, that may well be a reason to deny pre-election relief, at least when the tardy action upsets the reliance interests of voters or election officials.[184] As discussed in Section II.A, one way this commonly plays out is through the doctrine of laches. When a court holds that a party is barred by laches from pursuing a claim, the court typically dismisses the claim entirely, meaning that the party loses out not just on the possibility

182. *See, e.g.*, Gaughan, *supra* note 73, at 634; Shapiro, *supra* note 73, at 119–20.

183. For example, fewer than ninety days before the November 2024 general election, the Georgia State Election Board adopted a series of controversial rules involving the election certification process and other matters. The rules were quickly challenged in multiple state court actions. After a state trial court enjoined the rules on October 16, the rules' defenders filed an emergency motion asking the Georgia Supreme Court to put the injunction on hold based in part on *Purcell*. *See* Emergency Motion for Supersedeas, *Republican Nat'l Comm. v. Eternal Vigilance Action, Inc.*, No. S25M0259 (Ga. Oct. 22, 2024). On October 22, the Georgia Supreme Court unanimously denied the motion, thus keeping the trial court's last-minute injunction in place. The court's short order did not mention *Purcell*. *Eternal Vigilance Action*, No. S25M0259. In a separate case, a state trial court similarly enjoined one of the new rules (requiring a hand count of ballots) after concluding that an "11th-and-one-half hour implementation" of the rule would produce "administrative chaos." *Cobb Cnty. Bd. of Elections & Registration v. State Election Bd.*, No. 24CV012491, at 6 (Ga. Super. Ct. Oct. 15, 2024). And during a hearing in yet another case, the trial court directly pushed back against an argument that the *Purcell* principle barred pre-election relief, pointing out that this "would mean that there is a window where unreviewable rules can be issued" even if the rules are defective or unconstitutional. *See* Devan Cole, *Georgia Judge Signals a Need To Clarify 'Vague' New Election Certification Rule*, CNN (Oct. 1, 2024, 3:21 PM), https://www.cnn.com/2024/10/01/politics/georgia-judge-signals-a-need-to-clarify-vague-new-election-certification-rule/index.html [https://perma.cc/VH3K-QJNG].

184. There is even greater reason to deny relief when litigants belatedly decide to complain about problems that they or their allies caused. *See* Lisa Marshall Manheim, *Electoral Sandbagging*, 13 UC IRVINE L. REV. 1187 (2023).

of pre-election relief, but post-election relief as well.[185] This is sometimes a sensible result, as in 2020 when litigants belatedly sought to undo states' COVID-19–related absentee voting accommodations.[186] In other instances, however, dismissing a claim based on laches may be needlessly strong medicine. Instead, courts might simply consider whether a plaintiff's failure to proceed more expeditiously tilts the balance of hardships and the public interest against granting a preliminary pre-election remedy. For example, suppose a state adopts a redistricting plan many months before an election, and a plaintiff waits to challenge it until just before the election. It may well be appropriate for a court to conclude that the plaintiff's delay counsels against pre-election relief while still allowing the plaintiff to move forward with the case and perhaps obtain a remedy for future elections.

3. The Actual Risks of Voter Confusion and Disenfranchisement

A frequent criticism of the federal *Purcell* principle is that it purports to guard against confusion and disenfranchisement but swears off any practical inquiry into whether the requested pre-election judicial intervention is indeed likely to cause—rather than alleviate—confusion or disenfranchisement.[187] State courts, in contrast, have been right to recognize that context matters and that decisions to grant or withhold pre-election relief should rest on realistic appraisals of the expected consequences.[188]

On one hand, litigants sometimes request pre-election relief that truly could confuse and disenfranchise voters. State courts should be alert to that possibility and take care to avoid intervening in ways that leave

185. *E.g.*, *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925–26 (7th Cir.), *aff'g dismissal in* 506 F. Supp. 3d 620 (E.D. Wis. 2020).

186. *See Trump v. Biden*, 2020 WI 91, ¶¶ 9–10, 951 N.W.2d 568, 572 (holding that laches barred post-election challenges to election procedures). Laches may similarly be warranted when a plaintiff brings a tardy challenge involving ballot access or candidate eligibility. *See, e.g.*, *Liddy v. Lamone*, 919 A.2d 1276, 1287–91 (Md. 2007).

187. *See, e.g.*, Codrington III, *Pandemic*, *supra* note 72, at 971 (arguing that "the [Supreme] Court made no attempt to go beyond paying mere lip service to voter confusion" in its 2020 decisions that invoked the *Purcell* principle).

188. *See, e.g.*, *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 15 (Iowa 2020) (Appel, J., specially concurring) ("*Purcell* plainly should not be regarded as a per se bar or even a deterrent to necessary litigation, but only a reminder that a reviewing court should be attentive to the potential of voter confusion and the burdens that may be imposed on election administrators in considering equitable relief in voting rights cases."); *see also* Stephanopoulos, *supra* note 7 (urging courts to use "the best available evidence" to assess the probability that judicial changes to election rules close to election day will confuse voters, rather than "*assume* that this probability is high").

voters worse off. In a variety of cases, this appears to be exactly what state courts have done.

Shortly before the November 2024 election, for example, the Nevada Supreme Court rejected a request to enjoin the state from counting non-postmarked mail ballots that arrive after election day.[189] The court's main rationale was that Nevada law authorizes the counting of such ballots if received within three days of the election, and thus the challengers had not shown a likelihood of success on the merits.[190] But the court also explained that a last-minute injunction would have been inequitable in light of its potential impact on voters: "Rejecting timely mailed ballots because of postal service omissions cuts against the strong public interest in exercising the right to vote."[191] The court cited *Purcell* as support for the proposition "that the public has a 'strong interest in exercising the fundamental political right to vote.'"[192]

Along similar lines, when a New Jersey appellate court declined to enjoin the state's mail-in voting procedures two weeks before the November 2020 election, the court observed that "over a million New Jersey voters ha[d] already marked and mailed in their ballots," and that "[d]isrupting that process now would inevitably cause widespread upheaval and potential voter disenfranchisement."[193] (The court also noted that the plaintiff could have brought his challenge months earlier.[194]) Applying analogous reasoning, though in a distinct procedural posture, the Tennessee Supreme Court ruled one day before the state's August 2020 primary that a trial court had erred in enjoining certain state absentee ballot requirements.[195] But "[r]ecognizing that absentee ballots had already been cast for the [primary] election consistent with the trial court's temporary injunction," the court declined to stay the injunction and made clear that the votes of those who relied on the trial court's order would "be duly counted."[196]

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189. *Republican Nat'l Comm. v. Aguilar*, No. 89149, 2024 WL 4601602 (Nev. Oct. 28, 2024).

190. *Id.* at *2–4. Under Nevada law, ballots postmarked by election day are counted if received within four days of the election. NEV. REV. STAT. § 293.269921(1)(b) (2023).

191. *Aguilar*, 2024 WL 4601602, at *5. The court added that the plaintiffs had offered "no evidence or allegations that counting [the disputed] mail ballots" posed any risk of "voter fraud." *Id.*

192. *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

193. *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *14 (N.J. Super. Ct. App. Div. Oct. 21, 2020).

194. *See id.*

195. *Fisher v. Hargett*, 604 S.W.3d 381, 405 (Tenn. 2020).

196. *Id.*; *see also Richer v. Fontes*, No. CV-24-0221-SA, 2024 WL 4299099, at *3 (Ariz. Sept. 20, 2024) (declining to issue an order shortly before the November

In other circumstances, however, the more serious threat of confusion or disenfranchisement would come from denying pre-election relief rather than granting it. In such cases, it is appropriate for state courts to be more amenable to intervening. Two 2020 voting cases from Alaska and New Mexico are illustrative. In the Alaska case, a trial court concluded that applying the state's absentee witness requirements during the pandemic would likely violate the state constitutional right to vote, and it enjoined the requirements a month before the November election.[197] The Alaska Supreme Court affirmed, rejecting a *Purcell*-based argument that last-minute changes to election rules should be disfavored because of their potential to "create confusion and distrust."[198] As the Alaska courts explained, that argument, which rested on conjecture rather than evidence, may well have had things backward under the circumstances. It was at least as likely that a pre-election order safeguarding "individuals' rights to protect their health and to vote" would "increase voter confidence in Alaska's elections system, showing that even during a pandemic, the [S]tate will maximize our citizens' opportunities to vote safely."[199] Similarly, less than two months before New Mexico's June 2020 primary, the state supreme court ordered the Secretary of State to mail an absentee ballot application to every voter.[200] The court wrote that its duty to "zealously guard both the right to vote and the legitimacy of the processes through which those votes are cast and counted" called for "just and speedy" action ahead of the election to promote the health of voters and elections workers and to "mak[e] it easier for voters to cast their ballots from the safety of their own homes."[201]

Two further points bear noting: First, while courts commonly discuss confusion and disenfranchisement together, confusion is largely subsidiary to disenfranchisement in this inquiry. The real question is whether voters will be confused in ways that hinder their electoral participation. A pre-election order that offers voters more ways to cast ballots (while retaining existing voting options) might initially confuse at

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2024 election that could have prevented nearly 100,000 Arizonans from voting in state election contests).

197. *See State v. Arctic Vill. Council*, 495 P.3d 313, 315 (Alaska 2021).

198. *Id.* at 324. The Alaska Supreme Court affirmed the trial court's injunction on October 12, 2020, and followed up with a full opinion in September 2021. *Id.* at 319.

199. *Id.* at 325 (alteration in original) (quoting *Arctic Vill. Council v. Meyer*, No. 3AN-20-07858 CI, 2020 WL 6120133, at *6 (Alaska Super. Ct. Oct. 5, 2020)).

200. *See* Order at 5–6, *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, 487 P.3d 815 (No. S-1-SC-38228).

201. *Oliver*, 2021-NMSC-018, ¶¶ 27, 30, 44, 487 P.3d at 826–27, 830. The court issued its pre-election order on April 16, 2020, and followed up with the full opinion in May 2021.

least some voters, but that is not a serious strike against it if everyone remains able to participate at least as easily as before.

Second, as courts assess whether pre-election intervention—or non-intervention—risks confusion and disenfranchisement, the recency of the challenged law, regulation, or policy may be a relevant consideration. Enjoining a newly adopted regulation that has not previously been in effect—or perhaps not yet used in a general election—will often be less disruptive than enjoining a longstanding one. Indeed, the rollout of a new regulation ahead of an election might itself cause participation-hindering confusion that courts can help alleviate. Courts sometimes discuss this in terms of whether a requested pre-election remedy would alter or maintain the status quo.[202] While that framing is understandable, it can needlessly sidetrack and muddy the inquiry by generating peripheral disputes about what counts as the status quo ante.[203] Courts are probably better off directly focusing on the real question: whether pre-election relief is likely to confuse and disenfranchise voters or, instead, to promote their electoral participation.

4. Implications for Election Administration

It is also entirely appropriate for state courts to consider how granting or denying relief could impact the ability of election officials to run a successful election.[204] The approach of state courts has been and should remain a calibrated one that scrupulously identifies and weighs the administrative burdens and benefits of a pre-election remedy. This inquiry will often overlap with the assessment of voter confusion and disenfranchisement described above. After all, judicial action that throws a major wrench into the administrative machinery on the eve of an election might well create problems for voters that courts should seek to avoid. Sometimes, however, lawmakers or election officials are the ones making late-stage changes, and in such cases judicial intervention may serve to alleviate administrative burdens and difficulties.[205]

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202. *See, e.g.*, *State ex rel. DeMora v. LaRose*, 2022-Ohio-2173, ¶ 44, 217 N.E.3d 715, 725–26.

203. *See* Harry B. Dodsworth, *The Positive and Negative* Purcell *Principle*, 2022 UTAH L. REV. 1081, 1104–12 (urging courts to not fixate on identifying the status quo as part of their *Purcell* analyses).

204. *See, e.g.*, Stephanopoulos, *supra* note 7 ("Courts should avoid changing election regulations near an election when, by doing so, they would likely cause election officials to make serious mistakes.").

205. Decisions by multiple Georgia courts in the weeks before the November 2024 general election to put on hold several new rules enacted by the State Election Board offer an apt example. *See supra* note 183.

When plaintiffs seek relief that cannot realistically be implemented before an impending election, their request is almost certainly doomed to fail. Courts should not order the impossible or truly infeasible.[206] In redistricting cases, for example, both the Supreme Court and state courts have recognized for decades that litigation may unfold so close to an election that there is simply no practical way to replace the challenged maps.[207]

Perhaps more often, a pre-election remedy is possible, but it would entail real burdens or costs for election administrators. Such cases require state courts to make equitable judgments about what they reasonably can ask of officials under the circumstances. The mere fact that a remedy would mean more work or expense for election administrators cannot be enough for a court to deny relief. This is especially so when the administrators themselves, through their actions or inactions, caused the problem that precipitated the last-minute litigation. If anything, as an election nears, it becomes even more important for state courts to ensure that elections officials do not flout their legal responsibilities, particularly in ways that could harm voters or produce outcome-altering errors. That said, courts may have no choice but to withhold pre-election relief if they conclude that granting it would be so disruptive that it would only make matters worse.[208]

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206. *See, e.g.*, *Liddy v. Lamone*, 919 A.2d 1276, 1288 (Md. 2007) ("[I]njunctive relief may be inappropriate in an elections case if the election is too close for the State, realistically, to be able to implement the necessary changes before the election."); *DeVisser v. Sec'y of State*, 981 N.W.2d 30, 36 (Mich. 2022) (Welch, J., concurring) (stating that, with the 2020 general election "now less than one week away," "[i]t would be impossible to retrain thousands of workers across our state" on new polling place procedures).

207. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

208. The Arizona courts concluded that they faced such a situation as the November 2024 election approached. Arizona's Secretary of State filed suit about five weeks before the election seeking to require officials in one of the state's counties to abide by provisions of the state's Elections Procedures Manual that permit voters to cast out-of-precinct ballots. A state trial court concluded that the officials were indeed obligated to follow the Manual, but also observed that the Secretary of State knew or should have known of the county's noncompliance months earlier and thus should have sued sooner. *Fontes v. Cavanaugh*, No. S1100CV202402541, at 5–7 (Ariz. Super. Ct. Oct. 4, 2024). The court explained that, with the election so close at hand, the balance of hardships and the public interest counseled against relief. The county would have needed to reprogram more than 100 voting machines, and the court found "compelling" the county recorder's "explanation of the multitude of other logistical complications involved in a wholesale modification of the impacted devices." *Id.* at 7. All polling place staff also would have "require[d] additional training in an excessively compressed period." *Id.* "At this late date," the court wrote, "the requested remedy . . . is impracticable, if not imprudent, since it creates unacceptable risk of chaos, uncertainty, and confusion in this election." *Id.* The Arizona Supreme Court affirmed in a short order, explaining that the trial court did not "abuse its discretion in finding" that the balance of

When the harm to be redressed ahead of an election is a serious one, such as potential disenfranchisement or a genuine likelihood of election fraud, state courts can justifiably order relief that is more administratively burdensome than would be warranted in other circumstances. Consider two situations involving misprinted ballots. In one case, the state has erroneously excluded the candidates of one major party. In the other, the error is a technical formatting issue that does not meaningfully affect the ballot's usability. A court could appropriately require the state to take extraordinary measures to cure the first error but appropriately decline to require such measures to cure the second error, instead allowing the election to proceed with the noncompliant ballots. State courts have regularly made such context-specific judgments in pre-election ballot litigation.[209]

As litigants wrangle over pre-election relief, they sometimes offer affidavits or other evidence directly from elections officials. When those tasked with running elections believe that a requested remedy would create problems and describe those anticipated problems in detail, state courts should take that evidence very seriously.[210] But they should also subject it to real scrutiny. After all, elections administrators will often prefer to avoid new obligations in the run-up to an election, and that understandable desire may lead them to overstate the burdens and difficulties of implementing a requested remedy. On the flip side, precisely because administrators are often predisposed to be skeptical of late-stage court-ordered changes, it is notable when they express confidence in their ability to comply.[211] Such assurances, or even the absence of objections from administrators, can strongly buttress the case for granting relief.

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hardships tipped in the county's favor, particularly given that "early voting has already begun." *Fontes v. Lewis*, No. CV-24-0251-T/AP, 2024 WL 4625950, at *2 (Ariz. Oct. 25, 2024).

209. *Compare, e.g.*, *DeMora*, 2022-Ohio-2173, ¶ 45, 217 N.E.3d at 726 (requiring new ballots to be prepared where candidates had been wrongly excluded), *with Marcy v. Matanuska-Susitna Borough*, 433 P.3d 1056, 1060–61 (Alaska 2018) (affirming a trial court's decision not to replace a ballot that included an initiative question that the plaintiff claimed could not lawfully go to the voters).

210. *See, e.g.*, *Moore v. Lee*, 644 S.W.3d 59, 65 (Tenn. 2022) (finding based on the detailed affidavits of multiple officials that a pre-election remedy would "have a significant detrimental impact"); *In re Khanoyan*, 637 S.W.3d 762, 766 (Tex. 2022) (crediting affidavits indicating "that disruptions to the election at this point would be 'catastrophic'").

211. *See, e.g.*, *Mich. All. for Retired Ams. v. Benson*, No. 20-000108-MM, 2020 WL 7094961, at *9 (Mich. Ct. Cl. Sept. 18, 2020) (relying on the Secretary of State's assurance "that there is sufficient time to draft guidance to local election officials" to conclude that the requested remedy "will not affect the smooth operation of the November 3, 2020 general election"), *rev'd on other grounds sub nom.*, *Mich. All. for Retired Ams.v. Sec'y of State*, 964 N.W.2d 816 (Mich. Ct. App. 2020).

State courts also should bear in mind the possibility of tailoring remedies to provide at least some pre-election relief to deserving plaintiffs while limiting administrative costs and risks. It is common for state courts to seek out and adopt such compromise options. In one of the earliest state cases to cite *Purcell*, an Illinois appellate court considered what to do after concluding that certain referendum language on the November 2008 ballot was inaccurate and misleading.[212] The trial court rejected the plaintiffs' requests that the ballots be reprinted or that a separate ballot be created just for the referendum, but it also rejected the option of doing nothing. Instead, the trial court ordered that election workers distribute a "corrective notice" to voters along with the existing ballot.[213] The appellate court affirmed, concluding that, under the circumstances, this was a proper exercise of the trial court's discretion.[214]

5. The Prospect of Post-Election Litigation

A final factor for state courts to consider when weighing requests for pre-election relief is whether the parties' dispute might, if left unredressed, flare up again post-election in an even more vexing form.[215] Suppose, for example, that local election officials have taken different positions as to whether state law allows certain types of absentee ballots to be counted, and the controversy reaches a state court shortly before an election. If the court leaves the issue unresolved and the election is close, the courts could face divisive, frenetic, high-stakes post-election litigation over the outcome of specific races. Intervening pre-election, before votes are tallied and results are known, and ordering that the disputed ballots be counted or not would likely better serve the public interest by helping to avoid this potentially explosive source of uncertainty.

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212. *Chi. Bar Ass'n v. White*, 898 N.E.2d 1101, 1104 (Ill. App. Ct. 2008).

213. *Id.* at 1104–05.

214. *Id.* at 1107–08.

215. *See, e.g.*, *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 15 (Iowa 2020) (Appel, J., specially concurring) ("*Purcell* should not overshadow the fact that pre-election litigation is better than postelection litigation."); Seifter & Sopko, *Standing*, *supra* note 82 (manuscript at 125–26) ("[C]ertainty—and therefore trust—in elections is often unavailable if conflicts linger without resolution. . . . Contra the federal *Purcell* principle, some state courts have realized the importance of settling matters prior to an election so that people can retain confidence in elections and results will be stable after.").

B. U.S. Supreme Court Oversight

Although the Supreme Court has regularly stepped in and set aside the pre-election orders of lower federal courts in recent years, it has not similarly enmeshed itself in the pre-election remedial rulings of state courts. There is often a clear jurisdictional reason for the Court's non-involvement: Many state election cases involve purely state-law claims and state-law defenses and thus present no reviewable federal questions.[216] Federal issues, however, regularly do appear in state election litigation, and even in such cases, the Supreme Court has most often let state courts have the last word on whether to grant pre-election relief.

The Court's forbearance is at least partly a function of the federal *Purcell* principle. As discussed in Section II.B, the prevailing view of the principle among the Justices has been that federal courts—including the Supreme Court—ordinarily should not alter state election rules on the eve of an election, whether those rules derive from laws, regulations, or state court orders. Logically, if the *Purcell* principle applies when federal courts are asked to review state election administration, it makes sense that the Court would likewise apply it when reviewing state election adjudication. The usual justifications for the principle—that federal courts should avoid intruding on state prerogatives and disrupting the election process—apply to both situations. And there is no obvious reason to think that state courts pose a greater threat to federal rights than other state actors as to require closer federal judicial supervision.

Because litigants dissatisfied with state court decisions to grant or deny pre-election relief will presumably continue to ask the Supreme Court to intervene on their behalf, it is worth unpacking the applicable standard. Most often, the party coming to the Court will be complaining about a state court's handling of a federal defense raised in response to a state-law claim. (State election cases raising federal claims are less common, since such cases are removable to federal court, but we briefly discuss such cases below.) If the state court has rejected the federal defense and *granted* relief, the state court defendant may ask the Supreme Court for an emergency stay of that ruling.[217] If the state court has *denied* relief based on the federal defense, the state court plaintiff may ask the Supreme Court for an emergency injunction (or perhaps an expedited merits ruling).[218] In either situation, the party opposing the Court's

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216. *See* 28 U.S.C. § 1257.

217. *See* § 2101(f).

218. *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 5-4, 14-13 to 14-14, 17-7 to 17-12 (11th ed. 2019).

intervention will, in addition to defending the state court's decision on the merits, likely argue that the *Purcell* principle counsels against disturbing the state court's ruling.

What would it take in such circumstances for the Supreme Court to issue a stay or some other form of emergency relief? One possibility is that the Court could decide that the election remains far enough off that the *Purcell* principle is not implicated. The Court could then choose to act so long as it concludes that its usual standards for emergency intervention are satisfied.[219] As noted above, critics of existing *Purcell* practice have faulted the Court for not clearly delineating the point at which the *Purcell* principle kicks in.[220]

A second possibility is that the Court could conclude that, although *Purcell* applies, the presumption against intervention has been overcome. Justice Kavanaugh has most fully articulated what this would require, explaining that the merits would need to be "entirely clearcut" in favor of the party seeking relief, that the party "would suffer irreparable harm absent" relief, that there has been no "undu[e] delay[]" in seeking relief, and that "the changes in question are at least feasible before the election without significant cost, confusion, or hardship."[221] This language suggests that the bar for overcoming *Purcell* is high and requires, at the outset, that a state court glaringly botched its analysis of federal law.

To get more concrete, consider a specific federal defense that parties in state pre-election litigation have brought to the Supreme Court before and will presumably continue to bring—namely, that a state court ruling violates the Federal Constitution's Elections Clause by improperly interfering with state legislative authority to regulate federal elections. The Supreme Court rejected a strong-form version of this argument—known as the independent state legislature theory ("ISLT")—in *Moore v. Harper*.[222] It held there that the Elections Clause does not grant state legislatures exclusive authority to regulate federal elections independent of state courts and other state institutional actors.[223] Instead, state legislatures remain bound by their own constitutions, and their work remains subject to state judicial review.[224] The Court, however, endorsed a weaker form of ISLT, explaining that state courts can run afoul of the

219. *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (summarily reversing a Wisconsin Supreme Court redistricting decision after concluding in March 2022 that there remained "sufficient time to adopt [new] maps" for its August 2022 primary).

220. *See supra* notes 77–78 and accompanying text.

221. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

222. 143 S. Ct. 2065, 2088 (2023).

223. *Id.* at 2086–88.

224. *Id.* at 2081, 2084.

Elections Clause if they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[225] The Court declined to offer guidance as to when, exactly, a state court's actions become so out of the ordinary that they create an ISLT problem.[226]

After *Moore v. Harper*, the door thus remains open for litigants to bring ISLT arguments to the Supreme Court after properly pursuing them through the state system. But it is difficult to see how an ISLT argument could provide the basis for pre-election emergency action, such as a stay. As is true of other litigants seeking Supreme Court intervention ahead of an election, litigants who raise ISLT arguments must contend with the federal *Purcell* principle. Recall that in *Moore v. Harper* itself, the Court declined to stay the challenged North Carolina Supreme Court ruling for the upcoming election before it conducted its full merits review.[227] Per Justice Kavanaugh, parties who seek to overcome the presumption against pre-election federal court intervention must first establish that "the underlying merits are entirely clearcut in [their] favor."[228] The Court in *Moore v. Harper*, however, consciously chose not to adopt a specific test for determining when a state court transgresses the ordinary bounds of judicial review.[229] The existence of an agreed-upon legal standard would seem to be a prerequisite for finding a clear-cut ISLT violation. In other words, while *Moore* allows litigants to argue that state courts have violated the Elections Clause, *Purcell* appears to preclude those litigants from obtaining pre-election federal court relief on that basis, at least until the Supreme Court further develops the ISLT standard in future cases.[230]

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225. *Id.* at 2089.

226. *Id.*

227. *Moore v. Harper*, 142 S. Ct. 1089 (2022) (mem.); *see also supra* notes 138–43 and accompanying text.

228. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

229. *Moore*, 143 S. Ct. at 2089 ("We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific.").

230. *See* Rob Yablon, Moore v. Harper *and the* Purcell *Principle*, ELECTION L. BLOG (June 29, 2023, 3:35 PM), https://electionlawblog.org/?p=137194 [https://perma.cc/E6QX-U2AQ]. Notably, days before the November 2024 election, the Supreme Court rejected an emergency stay application in which the applicants contended that the Pennsylvania Supreme Court had transgressed the ordinary bounds of judicial review when it directed election officials to count certain provisional ballots. *Republican Nat'l Comm. v. Genser*, ___ S. Ct. ___, 2024 WL 4647792 (Nov. 1, 2024) (mem.); *see also supra* notes 145–47 and accompanying text.

The discussion thus far has focused on state pre-election litigation featuring state-law claims and federal defenses. What about the less common situation in which a state court plaintiff seeks and obtains pre-election relief based on a federal claim?[231] If asked to stay the state court's ruling, should the Supreme Court hold itself to the federal *Purcell* principle and presumptively allow the state court ruling to remain in effect? Or should the Court be more willing to step in? There is limited on-point precedent, and we merely raise the question here without attempting to provide a definitive answer. On one hand, one might argue that closer Supreme Court oversight in such cases is warranted to avoid giving state courts more leeway than their federal counterparts to grant pre-election relief on federal claims. Relatedly, one could conceivably argue that, even though *Purcell* generally does not bind state courts, those courts should apply it as a matter of comity when deciding federal claims. On the other hand, the federalism and anti-confusion rationales that underlie the Supreme Court's *Purcell* practice still seem applicable. And we accept in other contexts that state courts can adjudicate federal claims that litigants are unable to pursue in federal court for jurisdictional or procedural reasons. State courts, for example, sometimes apply permissive standing rules that open their doors to claims that federal courts could not hear.[232] It is not apparent why symmetry between state and federal practice would be any more necessary with respect to pre-election relief, especially because the defendants in state court suits that raise federal claims will usually have the option to remove the cases to federal court and invoke the *Purcell* principle there if they wish.[233]

CONCLUSION

Electoral proximity has long been a relevant consideration for courts in election litigation. In recent years, the Supreme Court has fixated on this factor, holding that federal courts ordinarily should not intervene when an election nears. State courts have thus far not embraced this federal *Purcell* principle. Instead, state courts have tended to conduct more nuanced, context-specific inquiries, often keeping the courthouse doors open to litigants much later in an election cycle than their federal counterparts.

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231. One recent example is *Norelli v. Sec'y of State*, 292 A.3d 458, 460 (N.H. 2022) (per curiam), which addressed a federal malapportionment claim. *See also supra* notes 96–100 and accompanying text.

232. *See, e.g.*, Calvin Massey, *Standing in State Courts, State Law, and Federal Review*, 53 DUQ. L. REV. 401 (2015); Peter N. Salib & David K. Suska, *The Federal–State Standing Gap: How To Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155 (2018).

233. *See* 28 U.S.C. § 1441.

The treatment of *Purcell* by state courts underscores the distinctive and important role for state courts on democracy-related issues. State courts have different constitutional and statutory powers than their federal counterparts, and they are situated within state constitutional systems that are committed to democratic self-governance. State courts can thus provide a forum for protecting democratic rights even when the doors to federal court are closed—a common theme in the state court decisions addressing *Purcell*. Although state courts are not entirely uniform in how they approach pre-election litigation, the state caselaw shows that courts are capable of conducting context-specific equitable analyses without the need for a hard-edged rule against late-stage intervention. Optimistically, perhaps the state court experience will one day spur the Supreme Court itself to return to a more nuanced and more voter-protective approach to pre-election relief.

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