

WHY THE *PURCELL* PRINCIPLE SHOULD BE ABOLISHED

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ABSTRACT

The Supreme Court seeks to promote orderly and effective voting through the Purcell principle, which prohibits district courts from altering election rules via injunctions on the eve of an election. Applying this principle, a court considers only the proximity of the upcoming election. The underlying rationale of the Purcell principle is to avoid possible voter confusion and election chaos caused by last-minute changes. While these are legitimate concerns, the rigid Purcell principle has led courts to blindly reject any changes proposed shortly before the election—even when the changes are necessary for an orderly, effective election.

This Note identifies the drawbacks of the Purcell principle and argues for its abolition. In other words, courts should cease applying the Purcell principle and return to the Winter preliminary injunction standard, which requires courts to weigh plaintiffs' likelihood of success on the merits, any irreparable harm to parties, the balance of equities, and the public interest. The Purcell principle is ambiguous in three key ways: whether it is a stand-alone rule or a subfactor; how close the election has to be for the principle to apply; and whether it applies to appellate decisions in addition to district courts' orders. The consistent failure of the judiciary to clarify the principle in the hundreds of Purcell cases generated by the COVID-19 pandemic demonstrates that revising Purcell is impracticable.

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INTRODUCTION

New voting restrictions, such as state voter identification laws, have been known to wreak chaos in the days prior to and during elections. When parties seek injunctive relief to suspend or alter these types of election requirements, courts sometimes reject their requests based on the “*Purcell* principle.”¹ The *Purcell* principle provides that courts should not alter election rules “on the eve of an election.”² While a last-minute change can certainly lead to more electoral confusion and chaos, the ambiguous *Purcell* principle causes even more political and social problems.³

Recently, the COVID-19 pandemic brought about a surge of election lawsuits that revealed these problems. In particular, the pandemic posed serious challenges to electoral systems and officials charged with managing the 2020 U.S. presidential election.⁴ These challenges included increased health risks caused by in-person voting, a national postal system overburdened by the surge in mail-in votes, and long lines at polling stations.⁵ Unsurprisingly, Wisconsin’s April 7 primary proved a mess. With only five of Milwaukee’s 180 polling stations open,⁶ voters were forced to wait for up to two and a half hours before casting their votes.⁷ Individuals who chose to mail in their votes

1. Professor Richard L. Hasen coined “the *Purcell* principle” in Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

2. Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

3. This Note sometimes uses “*Purcell*” to refer to “the *Purcell* principle.”

4. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How To Treat and Cure Them*, 19 ELECTION L.J. 263, 263–64 (2020) (explaining how the pandemic “has revealed the inadequacy of the American political infrastructure”).

5. See, e.g., Democratic Nat’l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 787–92 (W.D. Wis.) (discussing the COVID-19 pandemic’s impact on absentee and in-person voting), *denying stay* 976 F.3d 764 (7th Cir.) (per curiam), and *granting stay on reconsideration* 977 F.3d 639 (7th Cir.) (per curiam), *denying stay sub nom.* Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28 (2020) (mem.).

6. Milwaukee had only five stations open because the pandemic posed great health risks and few officials were willing to conduct the in-person election. Alison Dirr & Mary Spicuzza, *What We Know So Far About Why Milwaukee Only Had 5 Voting Sites for Tuesday’s Election While Madison Had 66*, MILWAUKEE J. SENTINEL (Apr. 9, 2020, 6:36 PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee-had-5-voting-sites-while-madison-had-66/2970587001> [<https://perma.cc/EG88-2SC4>].

7. Mary Spicuzza, ‘A Very Sad Situation for Voters’: Milwaukeeans Brave Wait Times as Long as 2 1/2 Hours, Top Election Official Says, MILWAUKEE J. SENTINEL (Apr. 7, 2020, 8:49

were not in a better position. Thousands of voters reported either never receiving their requested absentee ballots or receiving incorrect ballots.⁸ These voters faced a choice between risking their health by voting in person and suffering disenfranchisement.⁹ And even voters who successfully received their ballots had to follow strict absentee voting requirements, including providing a copy of the voter's photo identification and one or two witness signatures.¹⁰ Moreover, some states required voters' absentee ballot applications to be signed and witnessed by a notary.¹¹

The chaos and confusion of the Wisconsin primary were partly caused by the Seventh Circuit's and Supreme Court's decisions to uphold the state's strict absentee ballot requirements. Ironically, these decisions aimed to avoid "voter confusion and consequent incentive to remain away from the polls."¹² The saga began on April 2, 2021, when the U.S. District Court for the Western District of Wisconsin allowed the Democratic National Committee ("DNC") to challenge several of the state's voting requirements relating to the April 7 election.¹³ The

PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001> [<https://perma.cc/73FQ-58MC>].

8. Nick Corasaniti & Stephanie Saul, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html> [<https://perma.cc/C4E4-2VUR>] ("At least 9,000 absentee ballots requested by voters were never sent, and others recorded as sent were never received.").

9. Simon Lewis & Julia Harte, *Chaotic Wisconsin Election Signals Virus-Related Voting Battles Ahead*, REUTERS (Apr. 8, 2020, 8:20 PM), <https://reut.rs/3c3Q95C> [<https://perma.cc/9LTP-QZZD>] ("Having to make that decision between their life and their vote, it's heartbreaking.").

10. WIS. STAT. §§ 6.86, 6.87(2) (2021).

11. See, e.g., MISS. CODE ANN. § 23-15-627 (2020) ("An absentee ballot application must have the seal of the circuit or municipal clerk affixed to it and be initialed by the registrar or his deputy in order to be utilized to obtain an absentee ballot. . . . [Unless] you are temporarily or permanently disabled . . ."); OKLA. STAT. tit. 26, § 14-108 (2017) ("[Voters are] required to mark the ballot in ink or other manner as prescribed by the Secretary of the State Election Board; seal the ballots in the plain opaque envelope; fill out completely and sign the affidavit, such signature to be notarized at no charge by a notary public.").

12. Democratic Nat'l Comm. v. Bostelmann, Nos. 20-1538 & 20-1546, Nos. 20-1539 & 20-1545, 2020 U.S. App. LEXIS 25831, at *9 (7th Cir. Apr. 3, 2020) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam)), *granting stay in part sub nom.* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) ("The District Court's order . . . underscores the wisdom of the *Purcell* Principle, which seeks to avoid this kind of judicially created confusion.").

13. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 957 (W.D. Wis.), *granting stay in part* Nos. 20-1538 & 20-1546, Nos. 20-1539 & 20-1545, 2020 U.S. App. LEXIS 25831 (7th

district court granted preliminary relief to the DNC, loosening the absentee ballot witness signature requirement and extending the absentee ballot receipt deadline.¹⁴ Four days before the primary election, however, the Seventh Circuit vacated the adjustment to the witness requirement.¹⁵ Then, merely a day before the primary, the Supreme Court overturned the deadline extension, requiring each absentee voter's ballot be postmarked by election day.¹⁶

Voters who had legitimately relied on the district court's order found the subsequent decisions deplorable. Jill Swenson, for example, a sixty-one-year-old voter who mailed in her ballot without a witness signature—in compliance with the district court's order—found herself “completely disenfranchised” despite “follow[ing] all the rules,” after her vote was voided by the Seventh Circuit's decision.¹⁷ Others in similar situations were forced to vote in person, contributing to longer lines and increased health risks at polling stations.

The Seventh Circuit's and the Supreme Court's decisions were controlled by the *Purcell* principle, which originates from *Purcell v. Gonzalez*.¹⁸ In *Purcell*, the Supreme Court overruled a Ninth Circuit injunction that had temporarily blocked enforcement of Arizona's new voter identification law during the 2006 general election.¹⁹ The *Purcell* principle embodies the idea that a court should not alter election rules “in the period just before the election”²⁰ because “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls”²¹ and may disrupt the “clear guidance” to state election administrators that is provided by the existing election rules.²²

Cir. Apr. 3, 2020), *granting stay in part sub nom.* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam).

14. *See id.* at 959 (holding that absentee voters can replace the required witness certification with a written affirmation that they were unable to obtain such a certification despite reasonable efforts to do so).

15. *Bostelmann*, 2020 U.S. App. LEXIS 25831, at *8–9.

16. *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

17. Lewis & Harte, *supra* note 9.

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

19. *Id.* at 6.

20. Hasen, *supra* note 1, at 428.

21. *Purcell*, 549 U.S. at 4–5.

22. *See id.* at 5 (“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.”).

Since 2006, the *Purcell* principle has led to a good deal of confusion, creating more problems than it solves. It is most commonly applied by district courts when plaintiffs request either preliminary injunctions to enjoin a state from enforcing certain voting requirements or that the court modify such requirements.²³ But the Supreme Court has since failed to explain the *Purcell* principle's relationship with the preliminary injunction standard that is applied in all other contexts. This standard was articulated in *Winter v. Natural Resources Defense Council, Inc.*,²⁴ a 2008 Supreme Court decision: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."²⁵ How the bright-line *Purcell* principle can be reconciled with the *Winter* balancing test remains underdiscussed by courts.²⁶ As a result, it is unclear whether *Purcell* is a stand-alone rule or a factor that should be balanced with other considerations, such as avoiding voter disenfranchisement.²⁷

23. Courts may use preliminary injunctions either to preserve or to modify the status quo. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 957 (W.D. Wis. Apr. 2, 2020) (enjoining the state's deadline for receipt of absentee ballots receiving deadline and extending the deadline to a later date)); *see also* Libertarian Party of Ill. v. Cadigan, 824 F. App'x 415, 416 (7th Cir. 2020) ("[Plaintiffs] moved for a preliminary injunction, seeking to enjoin or modify Illinois's signature collection requirements for independent and third-party candidates . . ."); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *2-3 (D. Nev. May 27, 2020) (denying the plaintiffs' motion for a preliminary injunction to enjoin the implementation of an all-mail election for Nevada's June primary); *Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123, 1130 (D. Nev. 2020) ("Before the Court is Plaintiffs' motion for a preliminary injunction, asking the Court to compel the Secretary to extend the deadline and waive the in-person requirements . . .").

24. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Preliminary injunctive relief has been an equitable remedy since the early twentieth century. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 959-73 (2020) (discussing injunctions against state law in the early twentieth century). However, a uniform standard only emerged in *Winter*, in which the Supreme Court explicitly set the four factors and rejected the Ninth Circuit's sliding scale standard, which allowed a plaintiff who demonstrates a strong likelihood of success on the merits to obtain a preliminary injunction by showing only a possibility of irreparable harm. *See Winter*, 555 U.S. at 22 (rejecting the Ninth Circuit's "possibility" standard).

25. *Winter*, 555 U.S. at 20.

26. Several scholars have criticized the *Purcell* principle and argued that it be merged with the *Winter* standard, but courts have not explicitly discussed the relationship between *Purcell* and *Winter*. *See, e.g.,* Hasen, *supra* note 1, at 437-44 (recommending that *Purcell* be fit into the Supreme Court's usual practice of granting and vacating stays and issuing injunctions).

27. *Id.* In contrast, the *Winter* standard entails all of these considerations. *See infra* Part III.

Courts have also failed to specify the scope of *Purcell*'s application. The point in time at which courts should avoid adjusting election rules—days,²⁸ weeks,²⁹ or months³⁰ before an election—remains uncertain. Moreover, courts have not addressed whether *Purcell* applies when an appellate court vacates a lower court's order. This is problematic because the appellate decision changes the election rules again after the trial court's intervention—and thus at a point in time that is closer to the election. Take the Wisconsin case: although the district court may have violated the *Purcell* principle when it removed the witness signature requirement five days before the election, both the Seventh Circuit's and Supreme Court's interventions occurred “even closer to the election,” which seems to be a more serious breach of *Purcell*.³¹ After all, the district court's order had created a status quo upon which voters relied.³²

These ambiguities have led to both overuse and misuse of the *Purcell* principle,³³ causing election debacles and large-scale disenfranchisement.³⁴ Even though some courts acknowledge *Purcell* as problematic and caution against its application,³⁵ others treat *Purcell* as a paramount rule;³⁶ accordingly, various courts reach opposite

28. See, e.g., *Paher*, 2020 U.S. Dist. LEXIS 92665, at *16–18 (holding in its May 27 decision that *Purcell* prevents the court from altering election rules for the June 9 primary election).

29. See, e.g., *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 (M.D. Tenn.) (holding in its July 21 decision that *Purcell* prevents the court from altering election rules for the August 6 primary election), *aff'd*, 978 F.3d 378 (6th Cir. 2020).

30. See, e.g., *Libertarian Party of Pa. v. Wolf*, No. 20-2299, 2020 U.S. Dist. LEXIS 124200, at *33, *45 (E.D. Pa. July 14, 2020) (holding in its July 14 decision that *Purcell* prevents the court from altering election rules for the November general election), *aff'd sub nom.* *Libertarian Party of Pa. v. Governor of Pa.*, 813 F. App'x 834 (3d Cir. 2020) (mem.).

31. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1210–11 (2020) (per curiam); *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, Nos. 20-1539 & 20-1545, 2020 U.S. App. LEXIS 25831, at *9 (7th Cir. Apr. 3, 2020), *granting stay in part sub nom.* *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

32. See *Lewis & Harte*, *supra* note 9 (noting that some voters mailed in ballots without a witness “after a federal district court for Wisconsin ruled that the witness requirement would be relaxed”).

33. See *Hasen*, *supra* note 1, at 440 (“The *Purcell* decision is both overdetermined and undertheorized.”).

34. *Id.* at 429; see *infra* Part II (discussing this harm).

35. See, e.g., *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, J. & Pryor, J., concurring) (“*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists.”); see *infra* Part I.B.

36. See *infra* Part I.B.

results for cases with substantially similar facts. Still other courts denote *Purcell* as a subfactor of the *Winter* standard, under either “the plaintiff’s likelihood of success,” the “balance of equities,” or the “public interest” factor.³⁷ The vague *Purcell* principle thus leads to overbroad judicial discretion through standardless decision-making.³⁸

This Note argues that the *Purcell* principle should be abolished and replaced by the *Winter* standard. This is because *Purcell*’s specific concerns—avoiding voter confusion and election debacles—fit neatly into *Winter*’s balance of equities and public interest factors. Nonetheless, there exists minimal scholarship discussing the *Purcell* principle. Professors Richard Hasen and Samuel Gilleran argue that the Supreme Court should “rein in” the use of *Purcell*, based on decisions predating the COVID-19 pandemic.³⁹ However, the *Purcell* principle appeared more frequently in the 2020 presidential election litigation because COVID-19, a national emergency, necessarily caused significant last-minute changes to election rules. Based on the resulting decisions, which are largely contradictory and unsatisfactory, this Note builds upon scholars’ pre-COVID-19 arguments to advocate for the complete abolition of the *Purcell* principle.

This Note proceeds as follows. Part I surveys the history of the *Purcell* principle and summarizes the inconsistencies in *Purcell* case law, emphasizing those inconsistencies concerning the 2020 presidential election. Part II goes on to explore the reasons behind such inconsistent practice and reveals problems with *Purcell*, such as neglect of other *Winter* factors and unpredictability in cases. Next, Part III suggests the *Purcell* principle should be replaced by the *Winter* preliminary injunction standard. It argues district courts should assess the potential harm caused by modifying election rules shortly before an election, and they should balance such harm against other potential costs and benefits of the modifications, by using the *Winter* factors. Part IV surveys a COVID-19 election controversy, *Andino v. Middleton*,⁴⁰ arguing the Supreme Court improperly ignored other important considerations and reached the wrong decision.

37. See *infra* Part I.B; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

38. See *infra* Part II.D.

39. See Hasen, *supra* note 1 (arguing that courts should “rein in” the application of *Purcell*). See generally Samuel D. Gilleran, *Purcell v. Gonzalez, Principle and Problem—Native American Voting Rights in the 2018 North Dakota Elections*, 55 WAKE FOREST L. REV. 445 (2020) (calling for reexamination of *Purcell*).

40. *Andino v. Middleton*, 141 S. Ct. 9 (2020).

I. THE *PURCELL* JURISPRUDENCE

This Part begins by examining the origin of the *Purcell* principle—*Purcell v. Gonzalez*. It then summarizes the different approaches that courts have taken in applying the *Purcell* principle, revealing that *Purcell* rulings are largely inconsistent and contradictory.

A. *Origins: The Purcell Principle*

Purcell v. Gonzalez arose out of an Arizona voter identification law that requires proof of citizenship upon registering to vote.⁴¹ The Arizona law also requires, with limited exceptions, voters to present proper identification to cast in-person ballots on election day.⁴² Residents of Arizona challenged the identification law in federal court. On September 11, 2006, the U.S. District Court for the District of Arizona denied the plaintiffs' request for a preliminary injunction without issuing its finding of facts.⁴³ The plaintiffs subsequently appealed to the Ninth Circuit, which "set a briefing schedule that concluded on November 21, [2006,] two weeks after the upcoming November 7 election."⁴⁴ The plaintiffs accordingly requested an injunction pending appeal to prevent Arizona from enforcing its voter identification requirements during the November 7 election.⁴⁵ This request was granted.⁴⁶

In a per curiam decision, the Supreme Court vacated the Ninth Circuit's order,⁴⁷ a rare enough occurrence that Professor Orin Kerr describes it as "a judicial bolt of lightning."⁴⁸ The Court first stated that

41. See *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam) ("In 2004, Arizona voters approved Proposition 200. The measure sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.").

42. *Id.* at 2.

43. *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, No. CV 06-1362-PHX-ROS (cons) & No. CV 06-1575-PHX-ROS (cons), 2006 U.S. Dist. LEXIS 76638, at *5 (D. Ariz. Oct. 11, 2006), vacated, 549 U.S. 1 (2006). The district court issued its findings of fact and conclusions of law on October 11, 2006. *Id.*

44. *Purcell*, 549 U.S. at 3.

45. *Id.*

46. *Id.*

47. *Purcell*, 549 U.S. at 6.

48. Hasen, *supra* note 1, at 438 (citing Orin Kerr, *Supreme Court Allows Voter ID Law, VOLOKH CONSPIRACY* (Oct. 20, 2006, 5:05 PM), <http://volokh.com/posts/1161378321.shtml> [<https://perma.cc/N7Z6-D5JA>] ("Here the Supreme Court treated a request for a stay as a cert

voter identification laws concern both the state’s “compelling interest in preventing voter fraud [and] the plaintiffs’ strong interest in exercising the ‘fundamental political right’ to vote.”⁴⁹ Additionally, it required lower courts to weigh “considerations specific to election cases and its own institutional procedures.”⁵⁰ The Court explained the rationale behind its decision: “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.”⁵¹ The Court went on to hold the lower court erred in enjoining the voter identification requirement within two months of the election.⁵²

Purcell’s central takeaway is thus that courts should not alter election rules just before the election.⁵³ This *Purcell* principle, coined by Hasen,⁵⁴ was subsequently adopted by many courts.⁵⁵ The *Purcell* principle accounts for two election-specific considerations: “the potential for voter confusion which could depress turnout and [the state’s] need for ‘clear guidance’ to run its election.”⁵⁶

In *Purcell*, the Supreme Court also criticized the Ninth Circuit for its failure to explain its reasoning,⁵⁷ but the Court itself ironically refused to weigh the merits of the parties’ arguments.⁵⁸ Nor did it

petition, granted the petition, and reversed[,] . . . something rare enough to seem sort of like a lightning bolt from above.”).

49. *Purcell*, 549 U.S. at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

50. *Id.* at 4–5.

51. *Id.*

52. *See id.* at 5–6 (“Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.”).

53. Hasen, *supra* note 1 (stating that the idea from *Purcell* is that “courts should not issue orders which change election rules in the period just before the election”).

54. *Id.*

55. *See, e.g.,* *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 (M.D. Tenn.) (“‘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.’ Given the imminence of the August 6 primary, the Court will not do so here.” (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016))), *aff’d*, 978 F.3d 378 (6th Cir. 2020); *Crookston*, 841 F.3d at 399 (“[I]t is always possible for the [Michigan] Secretary [of State] to make election-protocol changes. If that reality sufficed to justify a delay of litigation, however, we would be encouraging sluggish election-procedure challenges rather than deterring them—just the opposite of the *Purcell* principle.”).

56. Hasen, *supra* note 1, at 440.

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

58. *Id.*

consider the other factors traditionally associated with preliminary injunction requests, including the public interest, irreparable harm to parties, and balance of equities.⁵⁹ The language in *Purcell* suggests both that the decision is not a categorical bar on judicial intervention and that the possibility of court-created confusion should be weighed against other considerations. That “court orders . . . *can* themselves result in voter confusion” suggests court orders do not always cause confusion, and those that are harmless need not be prohibited.⁶⁰ Further, that “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” suggests the *Purcell* considerations should be balanced against other factors.⁶¹ However, the Supreme Court never explicitly discussed what these considerations are nor how they should be weighed.⁶² In opinions since, the Court has consistently failed to clarify the relationship between *Purcell* and the normal preliminary injunction standard, leading to the subsequent entrenchment of *Purcell* across the country.

B. Subsequent Application of Purcell: Inconsistent Judicial Practice

Later *Purcell* cases are largely inconsistent and contradict one another. In short, courts generally take one of three approaches to this principle: (1) treat it as a stand-alone rule by interpreting it as a categorical bar on judicial intervention at a time close to an election; (2) apply it as a subfactor under one of the four *Winter* factors; or (3) neglect to apply it. This Section discusses each of these approaches.

59. *See id.* (“[W]e express no opinion here on the correct disposition . . . of the appeals from the District Court’s September 11 order [denying a preliminary injunction] . . .”). Although the *Winter* standard did not emerge in its current form until 2008, courts have long considered these equitable factors when making preliminary injunction decisions. *See, e.g.,* *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 540 (1987) (“[A]pplying the traditional test for a preliminary injunction, the court concluded that the balance of irreparable harm did not favor the movants; in addition, the public interest favored continued oil exploration . . .”).

60. *Purcell*, 549 U.S. at 4–5 (emphasis added).

61. *Id.* (emphasis added); *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 41–42 (2020) (Kagan, J., dissenting) (“A court, we counseled, must balance the ‘harms . . . of an injunction,’ together with ‘considerations specific to election cases’ . . . [T]hose election-specific factors . . . [include] the potential for a court order, especially close to Election Day, to ‘result in voter confusion . . .’ *Purcell* tells courts to apply . . . the usual rules of equity.” (quoting *Purcell*, 549 U.S. at 4–5)).

62. *See infra* Part II.A.

1. *Applying Purcell as a Stand-Alone Rule that Substitutes Winter.* Some courts, including the Supreme Court,⁶³ treat *Purcell* as paramount in the context of preelection disputes. Despite a plaintiff's request for a preliminary injunction, these courts refuse to apply the four *Winter* factors. Instead, they only consider whether the request is made "on the eve of an election."⁶⁴ In other words, a plaintiff's request to eliminate a witness signature requirement, for example, six months before an election might be allowed if the court believes six months is sufficient to avoid any voter confusion. However, another plaintiff who

63. The *Purcell* principle has generally appeared in Supreme Court cases in which the Court considered whether to stay an order of a district court or whether to vacate a stay granted by an appellate court. *See, e.g.,* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207–08 (2020) (per curiam) (staying the district court's preliminary injunction that enjoined the absentee ballot requirements on the basis of the *Purcell* principle). The standards for granting and vacating stays are not the same as the *Winter* standard. In *Hollingsworth v. Perry*, the Court held,

To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

558 U.S. 183, 190 (2010) (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988)). Similarly, the Court has held that when deciding whether to vacate a stay, it must consider

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1986)). However, "the standards all weigh the same issues of likelihood of success on the merits, irreparable injury to the parties, and the public interest"—these are essentially the same considerations as in the *Winter* standard. *Hasen, supra* note 1, at 435. This Note thus does not discuss the *Hollingsworth* and the *Nken* standards separately.

64. *See, e.g.,* *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (emphasizing the "unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day," which risked "gravely affect[ing] the integrity of the election process" and "further underscore[d] the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion"); *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 (M.D. Tenn.) (refusing to allow the plaintiffs' motion for preliminary injunction to enjoin several of Tennessee's mail-in ballot requirements three weeks before the state's August primary election because "[w]hen an election is 'imminen[t]' and when there is 'inadequate time to resolve . . . factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures" (second alteration in original) (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016))), *aff'd*, 978 F.3d 378 (6th Cir. 2020); *Crookston*, 841 F.3d at 399 ("[E]lections officials should not have to disseminate a new, difficult-to-implement policy to 30,000 poll workers in the week before a presidential election. On this record, the tardiness of Crookston's motion for a preliminary injunction alone requires us to reject it.").

makes the same request two weeks before the election will be unsuccessful, solely due to the timing.

In applying the *Purcell* principle as a stand-alone rule, courts either briefly mention the *Winter* factors but dispose of them as unimportant,⁶⁵ or they simply ignore them. For example, in *Common Cause v. Thomsen*,⁶⁶ the plaintiffs challenged Wisconsin's rigorous student voter identification requirements, arguing such requirements disenfranchised students.⁶⁷ However, the district court refused to consider whether "voter rights would be vindicated" by a change of law—in other words, the plaintiffs' likelihood of success on the merits—because "[t]he important question under *Purcell* isn't whether a decision would favor plaintiffs or defendants; it is whether a decision could lead to confusion before an election."⁶⁸

2. *Treating Purcell as a Subfactor Under the Winter Standard.* Other courts take a middle ground: they neither regard *Purcell* as a paramount rule nor abandon it completely. Instead, they combine *Purcell* with the *Winter* standard by making *Purcell* a subfactor under one of three *Winter* factors: the likelihood of success on the merits, the balance of equities, or the public interest.⁶⁹

The *Anderson-Burdick* test represents the typical framework for analyzing the likelihood of success on the merits in an election case.⁷⁰ Under this framework, the court first determines whether the challenged restriction imposes a severe burden on the plaintiff's voting rights.⁷¹ If so, the court applies strict scrutiny review to the restriction.⁷² However, if only a limited burden is imposed, the court will embrace

65. See *Crookston*, 841 F.3d at 399–401 (stating that the plaintiff had a low likelihood of success on the merits and that the existing rule furthered the public interest, but that these do not affect *Purcell*'s status as a stand-alone rule).

66. *Common Cause v. Thomsen*, No. 19-cv-323-jdp, 2020 U.S. Dist. LEXIS 175468 (W.D. Wis. Sept. 23, 2020).

67. *Id.* at *1–2.

68. *Id.* at *4–5.

69. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

70. See *Esshaki v. Whitmer*, 455 F. Supp. 3d 367, 373 (E.D. Mich. 2020) (applying the *Anderson-Burdick* test to a ballot-access law to determine the plaintiffs' likelihood of success on the merits), *modified in part*, 813 F. App'x 170 (6th Cir. 2020). The test is named after two Supreme Court cases that required courts to weigh burdens imposed by election rules on voting rights against the rules' potential benefits. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

71. *Esshaki*, 455 F. Supp. 3d at 373.

72. *Id.* at 373–74.

flexibility, balancing the interests of the plaintiff against those of the state.⁷³ Whether the burden is severe largely depends on the surrounding circumstances—for example, a limited burden in normal times, such as obtaining a witness’s signature, became a significant burden during the height of the COVID-19 pandemic.⁷⁴

Courts have taken two different approaches when considering *Purcell* under the likelihood of success on the merits factor. Some courts mention *Purcell*, usually briefly, simply to undermine the plaintiff’s likelihood of success, without explaining how *Purcell* fits with the *Anderson-Burdick* test.⁷⁵ Other courts treat *Purcell* as a synonym for “laches,” which provides that a plaintiff’s claim can be time barred if they cause unreasonable delay in pursuing it.⁷⁶

Still other courts consider the *Purcell* principle a subfactor of the balance of equities factor.⁷⁷ Modifications of voting requirements by

73. *See id.* at 374. (“[R]egulations that impose a more-than-minimal but less-than-severe burden[] require a flexible analysis, weighing the burden on the plaintiffs against the [s]tate’s asserted interest and the chosen means of pursuing it.” (third alteration in original) (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016))).

74. *See id.* at 376. (“[I]n the context of the COVID-19 pandemic, the efficacy of a mail-based campaign is unproven and questionable at best.”).

75. *See, e.g., Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123, 1148–49 (D. Nev. 2020) (applying *Purcell* to determine whether the plaintiff was likely to succeed on his challenge to in-person voting requirements).

76. *See, e.g., Detroit Unity Fund v. Whitmer*, No. 20-12016, 2020 U.S. Dist. LEXIS 164633, at *13 (E.D. Mich. Aug. 17, 2020) (“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.” (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016))), *aff’d*, 819 F. App’x 421 (6th Cir. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 (M.D. Tenn.) (treating the *Purcell* Principle and the theory of laches as the same), *aff’d*, 978 F.3d 378 (6th Cir. 2020). Actually, the theory of laches should be a subfactor under the balance of equities, instead of the likelihood of success on the merits. This is because the more delay caused by the plaintiff, the heavier burden on the defendant to adjust to the proposed new rules. However, courts that consider laches under likelihood of success on the merits have failed to explain this approach. For an analysis of why treating *Purcell* as the synonym of laches is problematic, see *infra* Part II.A.

77. *See, e.g., Wise v. Circosta*, 978 F.3d 93, 103 (4th Cir.) (“[T]he balance of equities is influenced heavily by *Purcell* and tilts against federal court intervention at this late stage.”), *denying stay* 141 S. Ct. 46 (2020); *League of Women Voters of Ohio v. Larose*, 489 F. Supp. 3d 719, 740–41 (S.D. Ohio 2020) (suggesting the *Purcell* principle tilts the “balance of equities” against enjoining Ohio’s signature matching requirements one month before an election). The meaning of “balance of equities” is undetermined: “This factor is sometimes described . . . as measuring any harm to any person besides the moving party. Other courts instead focused only on harm to the defendant. Still other courts restricted this factor to considerations of *irreparable* harm only.” M. Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 943 n.33 (2019) (citations omitted).

courts “on the eve of the election” can be disturbing to state election officials. These officials have relied on the preexisting rules as the status quo,⁷⁸ and adjusting to new rules can cause substantial administrative inconvenience.⁷⁹ The *Purcell* principle recognizes state officials need “clear guidance” to conduct elections,⁸⁰ and abrupt judicial intervention may interfere with such guidance. Such interference constitutes a “harm” under the balance of the equities factor.

The remaining courts consider *Purcell* a public interest subfactor.⁸¹ This approach highlights that “the potential for voter confusion and electoral chaos raise a strong public interest argument against last minute changes in election rules.”⁸²

3. *Neglecting or Cautioning Against Purcell*. Not all courts apply the *Purcell* principle.⁸³ Some keep applying the *Winter* standard, considering the merits of the plaintiff’s claim, balancing potential harms to the plaintiff and the defendant, and weighing the public

78. See *Wise*, 978 F.3d at 103 (“[T]he appropriate status-quo framework is the status quo created by the state’s actions, not by later federal court interventions.”).

79. See *League of Women Voters of Ohio*, 489 F. Supp. 3d at 741 (“[I]ssuing an injunction now would create a major rule change for both [the Ohio Secretary of State] and local boards of elections to adjust to while pre-election activities are ramping up.”).

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

81. See, e.g., *Paher v. Cegavske*, 457 F. Supp. 3d 919, 935 (D. Nev. 2020) (“[A]n injunction precluding Defendants’ use of mail ballots in the June 9, 2020 Primary would put Nevadans at risk and may result in the very type of confusion that *Purcell* cautions against.”).

82. Hasen, *supra* note 1.

83. Lower courts do not always follow Supreme Court precedents; they occasionally narrow or even overrule the precedents. See, e.g., Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 511 (1974) (listing categories of lower courts’ disavowals of Supreme Court precedents, including “[d]isavowal of [p]recedent on [s]ubstantive [g]rounds”); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924 (2016) (“Yet narrowing from below happens all the time, sometimes with the Supreme Court’s blessing.” (citation omitted)).

interest.⁸⁴ These courts generally neither mention *Purcell* in their reasoning nor explain *Purcell*'s absence.⁸⁵

Other courts go a step further and criticize the *Purcell* principle. These courts have identified potential problems with *Purcell*: First, intervention by an appellate court to correct an improper intervention by a lower court may itself constitute a *Purcell* violation and can create even more confusion and chaos.⁸⁶ Second, overreliance on *Purcell* leads to unfettered judicial discretion, since it may cause the court to overlook other important considerations.⁸⁷ Finally, in struggling to avoid potential *Purcell* challenges, courts are forced to make predictions on future elections very early without complete understanding of the electoral process.⁸⁸

It is apparent that post-*Purcell* cases are largely inconsistent: cases with substantially similar facts may have contrary results in different

84. See, e.g., *Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020) (upholding the core of the injunction issued by the district court, “which enjoins the State from enforcing the statute’s two ballot-access provisions at issue unless the State provides some reasonable accommodation to aggrieved candidates,” because the district court correctly found that the state’s ballot-access provisions severely burdened the plaintiffs’ voting rights and were not narrowly tailored such that plaintiffs had a strong likelihood of success on the merits); *Thompson v. DeWine*, 461 F. Supp. 3d 712, 734, 736–37 (S.D. Ohio) (partially granting the plaintiffs’ request for a preliminary injunction based on discussion of “likelihood of success,” “irreparable injury,” and “[s]ubstantial [h]arm to [o]thers and [p]ublic [i]nterest”), *granting stay* 959 F.3d 804 (6th Cir. 2020).

85. See *Esshaki*, 813 F. App'x at 172 (holding that the district court correctly applied the *Anderson-Burdick* test to Michigan’s ballot-access measures, which severely burdened voters’ ballot access); *Thompson*, 461 F. Supp. 3d at 724 (holding the court should balance the plaintiffs’ “likelihood of success on the merits,” the chance for “irreparable harm,” whether “substantial harm [will occur] to others,” and “whether the public interest would be served by issuing the injunction” to determine whether it should preliminarily enjoin Ohio’s signature requirements for local initiatives and constitutional amendments).

86. See *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1210–11 (2020) (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.”).

87. See *People First of Ala. v. Sec’y of State for Ala.*, 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, J. & Pryor, J., concurring) (“*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists.”).

88. See *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 800 (W.D. Wis.) (seeking to “ameliorate [this] risk” of a potential violation of *Purcell* by “issu[ing] a decision far enough in advance” to allow officials to implement modifications and communicate them to voters, but acknowledging the court must make predictions relevant to the November election without a complete understanding of voter behavior at that time), *denying stay* 976 F.3d 764, 766 (7th Cir.) (per curiam), and *granting stay on reconsideration* 977 F.3d 639 (7th Cir.) (per curiam), *denying stay sub nom.* *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (mem.).

jurisdictions. For example, consider two plaintiffs who each challenge their state's absentee ballot witness signature requirement four weeks before the election. Plaintiff A seeks to enjoin the requirement in a stand-alone *Purcell* court, while Plaintiff B seeks the same relief in a *Purcell*-as-a-subfactor court. Suppose that both courts agree the witness signature requirement severely burdens voting rights, and both plaintiffs face a strong risk of disenfranchisement without the injunction. Still, Plaintiff B is much more likely to get the preliminary injunction relative to Plaintiff A.⁸⁹ This comparison illustrates how inconsistent application of the *Purcell* principle leads to inconsistent results.

II. "NOT A MAGIC WAND"⁹⁰: WHY *PURCELL* SHOULD BE ABOLISHED

The *Purcell* principle should be abolished because it causes more harm than good, and any good it does cause is easily reached through the well-developed *Winter* standard. On one hand, *Purcell* is dangerous in three important ways: (1) it is unclear whether it is a stand-alone rule or a subfactor;⁹¹ (2) in terms of timing, it is unclear how close the election has to be for the principle to apply;⁹² and (3) it is unclear whether it applies to appellate decisions.⁹³ These ambiguities necessarily lead to arbitrary judicial practices in which judges "exercise will instead of judgment."⁹⁴ On the other hand, *Purcell's* two purposes—to avoid voter confusion and to provide clear guidance to state election administrators—are fully covered by the balance of equities and the public interest *Winter* factors.⁹⁵ As a result, the *Purcell* principle is unnecessary and should be abolished.

This Part first examines the problems caused by the three ambiguities inherent in the *Purcell* principle's status, timing, and scope. It does so by first focusing on how the *Purcell* principle affects district courts' decisions; then, it turns to the controversy over the *Purcell*

89. For a full analysis of the harm of such inconsistent practices, see *infra* Part II.D.

90. *Supra* note 87.

91. See *infra* Part II.A.

92. See *infra* Part II.B.

93. See *infra* Part II.C.

94. THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Terence Ball ed., 2003) (emphasis omitted); see *infra* Part II.D.

95. See *infra* Part III.

principle's application in appellate decisions. Taken together, these issues lead to standardless judicial decision-making and inconsistent rulings on similar facts. This Part then argues that Supreme Court clarification of these ambiguities is not a feasible solution. Rather, courts should directly apply the *Winter* standard where they would have used the *Purcell* principle.⁹⁶

A. *Treating Purcell as a Stand-Alone Rule Risks Neglecting Other Important Considerations*

The *Purcell* principle typically appears in cases in which a plaintiff requests injunctive relief,⁹⁷ which is an equitable remedy that “emphasize[s] both flexibility and fact specificity.”⁹⁸ By treating *Purcell* as a paramount rule, a court simply assesses how close the election is from the date of the decision, neglecting other equitable factors.⁹⁹ This approach diminishes the flexibility and specificity required by preliminary injunction questions. As articulated in *Winter*, the factors considered in granting a preliminary injunction are the likelihood of success on the merits, any irreparable harm to the plaintiff, the balance of equities, and the public interest.¹⁰⁰ Analysis of each factor on its own reveals how the *Purcell* principle causes problems by substituting a bright-line rule for a nuanced balancing test.¹⁰¹

1. *The Likelihood of Success on the Merits.* After coining the *Purcell* principle, Hasen provides two examples to show why the likelihood of success factor plays an important role in election cases. In Example 1, a city council passes an ordinance requiring voters to pay a poll tax in city elections,¹⁰² a practice held to be illegal by the Supreme

96. See *infra* Part III.

97. See *supra* note 23 and accompanying text.

98. Moore, *supra* note 77, at 942; see also *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987))).

99. See *supra* notes 63–64 and accompanying text (listing cases in which courts applied *Purcell* but not *Winter* balancing factors).

100. See *supra* notes 24–25 and accompanying text.

101. Cf. *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 42 (2020) (Kagan, J., dissenting) (“And a court must also take account of other matters—among them, the presence of extraordinary circumstances (like a pandemic), the clarity of a constitutional injury, and the extent of voter disenfranchisement threatened.”).

102. Hasen, *supra* note 1, at 441.

Court in 1966.¹⁰³ A court enjoins the poll tax one week before the election.¹⁰⁴ In Example 2, a plaintiff raises “a complex challenge arguing that parts of a state legislative redistricting plan violate section 2 of the Voting Rights Act.”¹⁰⁵ In this example, it is uncertain whether the old district lines are unconstitutional. Still, the court issues an injunction that redraws the district lines two months before the election.¹⁰⁶

In Example 1, the plaintiff has a 100 percent likelihood of success on the merits—leaving the poll tax intact will surely violate voters’ constitutional rights.¹⁰⁷ In contrast, in Example 2, the plaintiff’s likelihood of success on the merits is less certain because the plan is not per se unconstitutional, and voters and administrators have relied on the already-decided lines.¹⁰⁸ In other words, the court will struggle to decide the district lines’ constitutionality at the preliminary injunction stage. Therefore, Hasen concludes that immediate judicial intervention is appropriate in Example 1, but not in Example 2.¹⁰⁹ Nevertheless, in both examples, a stand-alone *Purcell* principle prevents the courts from granting the injunction at a time close to the election.¹¹⁰

Reaching the same result in the two examples is problematic because the likelihood of success on the merits is closely tied to the issue of disenfranchisement. If a plaintiff is likely to win the case, then denying the injunction is likely to disenfranchise them. Courts accept that there are circumstances in which small-scale disenfranchisement is justified by other benefits, such as reliance interests (as in Example 2), but judges cannot determine which interest should be prioritized without conducting a balancing test. In contrast, the *Purcell* principle acts as a one-size-fits-all solution, always requiring “judicial abstention” rather than judicial intervention.¹¹¹

103. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that a poll tax is unconstitutional).

104. Hasen, *supra* note 1, at 441.

105. *Id.*

106. *Id.*

107. *Id.* at 442.

108. *Id.*

109. *Id.* at 442–43.

110. *Id.*

111. Notably, both can lead to voter disenfranchisement. As Nicholas Stephanopoulos explains,

Crucially, however, judicial *intervention* isn’t the only step that can lead to disenfranchisement. Judicial *abstention* can, too, when it allows an unconstitutional

2. *Irreparable Harm*. The above examples also indicate that blind adherence to the *Purcell* principle may cause irreparable harm. In Example 1, the poll tax will cause complete disenfranchisement for voters who cannot afford the tax; this constitutes irreparable harm.¹¹² In contrast, in Example 2, it is uncertain whether the original lines will result in infringements upon minority voters' rights. According to Hasen, even if these voters had fewer effective votes under the original lines, they are not “literally” disenfranchised and will not suffer “irreparable harm” if the court postpones its decision to redraw the lines.¹¹³ Yet, in both cases, a court guided solely by the *Purcell* principle will deny the motion for preliminary injunction.

3. *Balance of Equities*. The third *Winter* factor typically requires a court to weigh the hardships suffered by the plaintiff if the injunction is denied against the burden on the defendant if the injunction is granted.¹¹⁴ Because identifying the plaintiff's hardships draws heavily on the second *Winter* factor—irreparable harm—the balance of equities factor is generally measured by potential harm to the defendant—which, in election cases, is often the state.¹¹⁵ However, when courts blindly apply *Purcell*, they miss the opportunity to assess the varying burdens on defendant states that would be caused by injunctive relief.¹¹⁶

policy that unjustifiably burdens voting to stay in effect. Courts thinking about action near an election should therefore balance the disenfranchisement if they do interfere (from voter confusion and/or administrator error) against the disenfranchisement if they don't (from the unlawful status quo).

Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, ELECTION L. BLOG (Sept. 27, 2020, 12:22 PM), <https://electionlawblog.org/?p=115834> [<https://perma.cc/7K8R-GDTK>].

112. Hasen, *supra* note 1, at 442.

113. *See id.* at 442–43 (concluding that “[t]he court likely should not make any changes close to the election”).

114. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (requiring the plaintiff to demonstrate “that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted”).

115. *See, e.g., Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (describing the balance of equities factor as measuring “the likelihood of harm to the defendant if the requested relief is granted”).

116. Importantly, *Purcell* cases do not always consist of plaintiff voters seeking loosened voting requirements and a defendant state defending the existing requirements. When a state executive has acted in advance and waived certain onerous requirements, plaintiffs—often state election officials—sometimes allege the new election rules are unconstitutional—often because they increase the likelihood of voter fraud—and seek preliminary injunctions against the new rules. *See, e.g., Wise v. Circosta*, 978 F.3d 93, 96–97 (4th Cir.) (denying legislative officials' motion to enjoin the North Carolina State Board of Elections' extension of its deadline for the receipt of

During the COVID-19 pandemic, for example, plaintiffs sought all kinds of remedies—extensions of deadlines to submit signatures in support of their initiative, waivers of signature and notary requirements for absentee ballots, the establishment of an electronic signature system, and more polling stations.¹¹⁷ Although these measures arguably all increase access to voting and function against disenfranchisement, they placed varying burdens on states.¹¹⁸ Extending a signature deadline by several days may not seriously burden administrators, but establishing a new electronic signature system or increasing polling stations can be both costly and time-consuming.¹¹⁹ A stand-alone *Purcell* principle, however, directs a court to reject both a request to postpone the deadline and a request to develop an electronic signature system if the two requests are made simultaneously, even though one might have a significantly lower burden on the state administering the election.

Another factor that courts typically consider when balancing the equities is whether the plaintiff unreasonably delayed in pursuing their claim, which is known as the theory of laches.¹²⁰ However, courts are

absentee ballot), *denying stay* 141 S. Ct. 46 (2020). However, in these cases, courts still must balance potential benefits and harm to the state, election officials, voters, and the general public, either under the balance of equities factor or the public interest factor. Therefore, this Note does not apply a separate analysis to the use of *Purcell* in the context of these types of cases.

117. See, e.g., *Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123, 1130 (D. Nev. 2020) (requesting an extension of the deadline to submit the required signatures for the plaintiffs' initiative); *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 790–91 (M.D. Tenn.) (requesting a waiver of the signature verification requirements), *aff'd*, 978 F.3d 378 (6th Cir. 2020); *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 521 (W.D. Ky. 2020) (requesting more polling stations).

118. As Stephanopoulos notes,

When courts step in at the last minute, they can (though they need not) make it still harder to run an election. Court orders can disrupt administrators' familiar routines, compel them to make determinations for which they lack training or experience, and extend how long each step in the process takes. . . . When this risk is severe, discretion may be the better part of valor.

Stephanopoulos, *supra* note 111.

119. *Fair Maps Nev.*, 463 F. Supp. 3d at 1130 (finding the “[p]laintiffs have shown they are likely to prevail on the merits of their as applied challenge as to the statutory provision setting the deadline, but not the in-person requirements”).

120. See, e.g., *Detroit Unity Fund v. Whitmer*, No. 20-12016, 2020 U.S. Dist. LEXIS 164633, at *11–12 (E.D. Mich. Aug. 17, 2020) (rejecting the plaintiff's request to postpone the deadline of placing a ballot initiative because the motion for preliminary injunction was filed two hours before the election without explanation for such delay), *aff'd*, 819 F. App'x 421 (6th Cir. 2020); *Mich. Chamber of Com. v. Land*, 725 F. Supp. 2d 665, 681 (W.D. Mich. 2010) (“[I]t is well established that in election-related matters, extreme diligence and promptness are required.” (quoting *McClafferty v. Portage Count Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009)));

not able to fully assess whether the plaintiffs diligently developed their claims by solely applying the *Purcell* principle. This is because laches concerns whether the *plaintiff* delayed in bringing his suit, but the *Purcell* principle concerns only the time span between the case and the *election*.

Suppose the state in Example 1 passes its poll tax ordinance one month before an election. A plaintiff with the utmost diligence can only litigate close to the day of the election because the event that gives rise to their claims did not occur any earlier.¹²¹ Even though this plaintiff's claim should not be barred under the traditional theory of laches, they will face great difficulties in a court that confuses the *Purcell* principle with the theory of laches. *Purcell* thus risks shutting the courthouse door to diligent plaintiffs who genuinely seek to prevent voter disenfranchisement. Applying *Purcell* illustrates an inherent deficiency in the principle: this “hard-and-fast rule against modifying election regulations close to an election . . . seem[s] inherently incompatible with emergencies, which by definition arise unexpectedly and may jeopardize fundamental voting processes.”¹²²

4. *Public Interest.* The *Purcell* principle aims to avoid “voter confusion and consequent incentive to remain away from the polls.”¹²³ This is clearly a public interest consideration, and thus within the scope of the final *Winter* factor. But public interest may be influenced by multiple subfactors, and the potential voter confusion caused by a lower court's intervention is merely one of them. For example, in-person voting during the pandemic poses serious health risks to voters,

Memphis A. Phillip Randolph Inst., 473 F. Supp. 3d at 801 (“It is to say that plaintiffs seeking the very extraordinary remedy of enjoining state procedures governing an approaching primary election needed to move more quickly than they did, and the Court has not been satisfied by the various explanations for the delay.”); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *13 (D. Nev. May 27, 2020) (denying the plaintiffs' second motion for a preliminary injunction when they “waited 14 days after the PI Order was issued and only 26 days before the June Primary to file the AC and bring the Second PI Motion”). These courts generally treat the *Purcell* principle and the theory of laches as one and the same, but this Note argues that the considerations behind these two principles are different. These courts improperly substitute the assessment of plaintiffs' diligence with the closeness of the upcoming election. See *supra* notes 75–76 and accompanying text.

121. See Stephanopoulos, *supra* note 111 (discussing this difficulty).

122. *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1323 n.30 (N.D. Ga. 2020), *aff'd sub nom.* *Black Voters Matter Fund v. Sec'y of State for Ga.*, 11 F.4th 1227 (11th Cir. 2021).

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

and gathering witness signatures is burdensome.¹²⁴ Moreover, sticking to the original ballot-receiving deadlines may substantially burden the postal system and election administrators.¹²⁵ In addition, “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.”¹²⁶ Thus, avoiding disenfranchisement is another important concern. To better protect the public interest, all these different considerations, including *Purcell*’s voter confusion, should be balanced against each other; the *Purcell* principle improperly reduces the complicated public interest factor to limited considerations.

B. The Ambiguous Timing Element Causes Unpredictability in Purcell Cases

Although *Purcell* is a bright-line rule that courts simply should not alter election rules at a time close to the election, the undefined time limit diminishes its predictability and certainty.¹²⁷ Bright-line rules, as compared to balancing tests, typically give clearer guidance to courts and lead to more consistent results.¹²⁸ This advantage of *Purcell* is illusory, however, because the principle’s timing element is completely undefined. In other words, courts receive insufficient guidance on how close an election needs to be to render judicial intervention inappropriate—at present, the standard could be several days,¹²⁹ two to three weeks,¹³⁰ or even several months,¹³¹ depending on rules in

124. See *supra* note 5 and accompanying text (discussing the burdens imposed by in-person voting).

125. *Id.*

126. *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012).

127. See Hasen, *supra* note 1, at 443 (“There is one benefit to strict application of the *Purcell* principle: it cabins some discretion of lower court judges through a per se rule to not allow last-minute judicial changes to election rules.”).

128. James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 785 (1995) (“*Chadha* also demonstrates how [bright-line] rules can simultaneously reduce future judicial discretion and expand judicial power, depending upon the party being constrained by the particular rule.”).

129. *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 92665, at *3 (D. Nev. May 27, 2020) (holding in its May 27 decision that *Purcell* prevents the court from altering election rules for the June 9 election).

130. *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 802 (M.D. Tenn.) (holding in its July 21 decision that *Purcell* prevents the court from altering election rules for the August 6 election), *aff’d*, 978 F.3d 378 (6th Cir. 2020).

131. *Libertarian Party of Pa. v. Wolf*, No. 20-2299, 2020 U.S. Dist. LEXIS 124200, at *49–50 (E.D. Pa. July 14, 2020) (holding in its July 14 decision that *Purcell* prevents the court from altering election rules for the November general election), *aff’d sub nom.* *Libertarian Party of Pa. v. Governor of Pa.*, 813 F. App’x 834 (3d Cir. 2020) (mem.).

different jurisdictions. Moreover, even if the Court was willing to specify a temporal cutoff, its attempt would be infeasible because the time limit depends on each state and each election.¹³²

The Supreme Court has determined that both five days before the Wisconsin primary election¹³³ and forty-five days before the South Carolina general election¹³⁴ were sufficiently close to an election to trigger *Purcell*. However, the Supreme Court has never held that judicial intervention—in the form of an injunction—forty-five days before an election is precluded in all circumstances. Similarly, the Court has never suggested a court can always alter election rules more than a month and a half before an election. In fact, the U.S. District Court for the District of Nevada has held that *Purcell* barred it from waiving Nevada’s in-person requirements regarding collection of signatures, although the plaintiff requested the injunctive relief five months before the election.¹³⁵

The 2020 battle between the district court and the Supreme Court over Wisconsin’s election rules further illustrates the ambiguity of *Purcell*’s timing element. The district court’s April 2 decision to extend the mailing and postmarking deadline of absentee ballots was overturned by the Supreme Court because that order was issued only five days before the April primary election.¹³⁶ Approaching the general election in November, having learned its lesson, the district court again extended the statutory deadlines for mail-in registration and voting to avoid “disenfranchising tens of thousands of voters”¹³⁷—this time six

132. *Infra* Part II.D.

133. See *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020) (per curiam) (rejecting a change to election rules made five days before the Wisconsin primary).

134. See *Andino v. Middleton*, 141 S. Ct. 9, 9–10 (2020) (overruling the district court’s September 18 decision enjoining South Carolina’s witness requirement for absentee ballots); *South Carolina Elections, 2020*, BALLOTPEdia, https://ballotpedia.org/South_Carolina_elections,_2020 [https://perma.cc/LJ88-UDH5] (showing that South Carolina’s general election date is November 3).

135. The Nevada District Court held that,

[e]ven though there are some five months until the election, rolling out and testing a new electronic system for signature collection and verification between now and then will take some time. Thus, the Court finds the *Purcell* principle applies to the In-Person Requirements despite Plaintiffs’ argument there is still plenty of time before the election.

Fair Maps Nev. v. Cegavske, 463 F. Supp. 3d 1123, 1148 (D. Nev. 2020).

136. See *Republican Nat’l Comm.*, 140 S. Ct. at 1207 (applying the *Purcell* principle to overrule the district court’s order).

137. *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 783 (W.D. Wis.), *denying stay* 976 F.3d 764 (7th Cir.) (per curiam), *and granting stay on reconsideration* 977 F.3d 639 (7th

weeks before the election took place.¹³⁸ The district court even noted the earliness of the injunction relative to the election, determining this decision “d[id] not come without its tradeoffs.”¹³⁹ The court admitted it could not have a complete understanding of voter behavior six weeks before the election, and its assessment of relative hardships on voters and the state might not be accurate.¹⁴⁰ Still, it determined, the benefits of the injunction outweighed those drawbacks.¹⁴¹

As in *Purcell* itself, the Supreme Court overruled the district court without providing a written opinion.¹⁴² Justice Brett Kavanaugh concurred, explaining that “the District Court changed Wisconsin’s election rules too close to the election, in contravention of this Court’s precedents.”¹⁴³ The Supreme Court failed to explain why the six-week period was “too close to the election.”¹⁴⁴ As a result, the unavoidability of the unpredictable timing element diminishes the *Purcell* principle’s benefits as a bright-line rule.

C. *Purcell’s Undefined Scope Results in Controversial Decisions*

Courts have not reached consensus regarding whether the *Purcell* principle also requires appellate courts to refrain from altering election rules close to election dates. Although the functions of district courts and appellate courts differ, limiting the application of the principle to district court decisions contradicts both the language of *Purcell* itself and public policy.

Cir.) (per curiam), *denying stay sub nom.* Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28 (2020) (mem.).

138. *Id.* at 800 (“To ameliorate that risk, the court has generally attempted to issue a decision far enough in advance to allow an appeal of the court’s decision, provide sufficient time for the WEC and local election officials to implement any modifications to existing election laws, and to communicate those changes.”).

139. *Id.*

140. *Id.*

141. *Id.* at 808.

142. Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28, 28 (2020) (mem.).

143. *Id.* at 30 (Kavanaugh, J., concurring). In Kavanaugh’s concurrence, he noted,

In this case, however, just six weeks before the November election and after absentee voting had already begun, the District Court ordered several changes to Wisconsin’s election laws, including a change to Wisconsin’s deadline for receipt of absentee ballots. Although the District Court’s order was well intentioned and thorough, it nonetheless contravened this Court’s longstanding precedents by usurping the proper role of the state legislature and rewriting state election laws in the period close to an election.

Id.

144. *Id.* at 28. The majority did not provide a written opinion.

The Supreme Court seems to believe *Purcell* applies to district court decisions that are under review, but it does not apply to the Supreme Court's own vacatur of those decisions. In *Republican National Committee v. Democratic National Committee*,¹⁴⁵ the Supreme Court decided on the day before the Wisconsin primary to overrule the district court's order to extend the mail-in voting deadline, despite the fact that state officials and voters had already relied on that order for days.¹⁴⁶ Similarly, two years earlier in *Brakebill v. Jaeger*,¹⁴⁷ the Supreme Court stayed the district court's injunction of a North Dakota voter identification requirement.¹⁴⁸ The Court issued the stay fewer than two months before the election, although "[t]he risk of voter confusion [was] severe . . . because the [district court's] injunction against requiring residential-address identification was in force during the primary election."¹⁴⁹ By not applying the *Purcell* principle to its own decisions, the Supreme Court ironically caused more voter confusion.

However, the First, Fourth, and Seventh Circuits have applied the *Purcell* principle to restrain themselves from overruling election-related injunctions at times even closer to the election than were the respective lower courts' decisions. These circuits generally hold appellate intervention so close to the election is inappropriate because the district court's order has created a status quo upon which voters and officials have relied, and further intervention would lead to more confusion among them.¹⁵⁰

145. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).

146. *See id.* at 1206–08 (rejecting a district court order that changed election rules five days before the Wisconsin primary).

147. *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018).

148. *See id.* at 10 (Ginsburg, J., dissenting) (vacating the district court's order in *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016)).

149. *Id.* at 10 (Ginsburg, J., dissenting).

150. *See, e.g., Common Cause R.I. v. Gorbea*, 970 F.3d 11, 16, 17 (1st Cir. 2020) ("Rhode Island just conducted an election without any attestation requirement So the status quo (indeed the only experience) for most recent voters is that no witnesses are required. . . . [T]he *Purcell* concerns that would normally support a stay are largely inapplicable, and arguably militate against it."); *Libertarian Party of Ill. v. Cadigan*, 824 F. App'x 415, 419 (7th Cir. 2020) (applying the *Purcell* principle to affirm the district court's preliminary injunction where appellants sought "to challenge injunctive relief that [they] initially agreed was necessary and proper" and only later "did they change course and put at risk the reliance the plaintiffs have placed in the orders entered by the district court"); *Middleton v. Andino*, 990 F.3d 768, 768 (4th Cir.) (King, J., concurring) ("[O]ur en banc Court is wholly justified in denying the emergency motion to stay the district court's preliminary injunction pending appeal. Indeed, to stay the

Both the wording and rationale of *Purcell* support the interpretation that the *Purcell* principle binds all levels of courts. *Purcell* states that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”¹⁵¹ As a result, *Purcell* fails to limit application to district court orders and instead cautions against *all* levels of judicial intervention. The rationale behind *Purcell*—to avoid voter confusion and maintain orderly elections—does not call for distinguishing between levels of courts.¹⁵² As noted by the First and Seventh Circuits, where voters have already relied upon a district court’s injunction, an appellate court’s intervention can more seriously disrupt the electoral process.¹⁵³

However, the Supreme Court’s approach is not without merits to plaintiffs. When a district court errs in violating the *Purcell* principle, an appellate court certainly has both the power and the duty to correct this wrong. Chief Justice John Roberts’s concurrence in *Democratic National Committee v. Wisconsin*¹⁵⁴ states, “Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule.”¹⁵⁵ However, this correction itself arguably violates the *Purcell* principle.

injunction so close to the election would engender mass voter confusion and other problems that the Supreme Court warned against in *Purcell v. Gonzalez*.”), *granting stay in part* 141 S. Ct. 9, *dismissing appeal as moot* No. 20-2022, 2020 WL 8922913 (4th Cir. Dec. 17, 2020).

151. *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam) (emphasis added).

152. *See id.* (holding that altering election rules shortly before an election causes voter confusion).

153. *See Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 790–91 (W.D. Wis.) (“This court’s injunction extending the absentee ballot physical receipt deadline from April 7 to April 13 appears to have resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely.”), *denying stay* 976 F.3d 764 (7th Cir.) (per curiam), and *granting stay on reconsideration* 977 F.3d 639 (7th Cir.) (per curiam), *denying stay sub nom. Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (mem.). The court recounted:

Relying on this court’s preliminary injunction modifying the witness signature requirement in light of such issues, Swenson eventually mailed her ballot without a witness signature, only to find out later that this court’s order was stayed on appeal. Other voters also testified that they did not cast their absentee ballot, or they cast their ballot without the proper certification, due to COVID-19-related safety concerns regarding the witness requirement.

Id. at 789 (citation omitted); Lewis & Harte, *supra* note 9 (discussing Swenson’s story).

154. *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020).

155. *Id.* at 31–32 (Kavanaugh, J., concurring).

An appellate court, accordingly, faces a dilemma because it must choose between leaving a district court's wrong unresolved or correcting it through another wrong. Though the former approach is supported by both the language of *Purcell* and public interest in avoiding voter confusion, the latter approach was explicitly adopted by the Supreme Court in *Democratic National Committee*.¹⁵⁶ This paradox suggests the rigid *Purcell* principle is problematic by itself. In contrast, the *Winter* standard allows all courts to flexibly balance hardships on different parties, thereby avoiding this problem.

D. Revising the Purcell Principle Is Impracticable and Unlikely

The *Purcell* principle is too ambiguous to provide courts with clear guidance. As illustrated in Part I.B, courts are left to guess the standards and choose their preferred versions of *Purcell* without significant limitations, rendering inconsistent rulings in similar cases “only natural.”¹⁵⁷ Lack of judicial reasoning and apparent inconsistent rulings also risk diminishing public confidence in the judiciary.¹⁵⁸

Moreover, the ambiguities inherent in *Purcell* cannot be resolved simply through clarification of the Supreme Court's reasoning. The Court itself has committed the very error of treating *Purcell* as a stand-alone rule and neglecting other relevant equitable factors.¹⁵⁹ The COVID-19 election cases illustrate the systemic implications of the Court's failure to address the *Purcell* ambiguities and to rein in its application. Faced with the pandemic, the Supreme Court has had

156. *Id.*

157. See Gilleran, *supra* note 39, at 468 (“So when trial courts are faced with these hypercharged election cases, in an atmosphere in which partisan rancor is at its highest, and equipped with the fuzziest of guidance, inconsistent rulings are only natural.”).

158. See *supra* Part I.A; see also William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 10 (2015) (“A sense that [the Court's] processes are consistent and transparent makes it easier to accept the results of those processes, win or lose.”).

159. See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020) (per curiam) (stating that “[t]he question before the Court is a narrow, technical question about the absentee ballot process” and failing to discuss, for example, the risk of voter disenfranchisement in Wisconsin); see also Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (applying the *Purcell* principle to stay the district court's order without considering the *Winter* balancing factors). *But see* Hasen, *supra* note 1, at 461–63 (recommending the Supreme Court explain its reasoning in *Purcell* cases even weeks or months after the Court issues an emergency order and concluding that “reason-giving will lead the Court to make more consistent decisions and bolster the Court's legitimacy”). At the time of Hasen's 2016 article, the Supreme Court had not shown its approval of the stand-alone *Purcell* position, as it did in the COVID-19 election cases.

ample opportunity to tighten *Purcell*. For example, in the Wisconsin primary context, Kavanaugh simply noted the district court's action was "too close to the election" and again failed to either clarify *Purcell* or explain its reasoning.¹⁶⁰ It is therefore unrealistic to expect a clearer *Purcell* interpretation from the Supreme Court.

Further, tightening *Purcell* is impracticable. Take the timing element: states need different amounts of time to implement different election rule modifications—establishing a new electronic signature system is much more complicated than postponing the ballot deadline.¹⁶¹ It is not realistic to expect the *Purcell* principle to specify the required time for every different change in advance. In contrast, courts can avoid this roadblock by flexibly balancing both parties' hardships and deciding whether making an adjustment at a given point in time confers benefits that outweigh the disadvantage—just like courts already do under *Winter*.¹⁶²

III. REPLACING *PURCELL* WITH *WINTER*: AVOIDING VOTER CONFUSION AS A SUBFACTOR UNDER THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST

Given that the ambiguous *Purcell* principle causes more harm than good, this Part argues the principle is unnecessary because the *Winter* standard provides for all of *Purcell*'s benefits. The *Purcell* principle cautions against judicial intervention at a time close to the election and seeks to both ensure administrators can conduct elections under "clear guidance" and avoid voter confusion by maintaining orderly elections.¹⁶³ These two purposes, which implicate the interests of state governments and voters, fit into the balance of equities and the public interest factors of the *Winter* standard. Moreover, it is not sufficient to relegate *Purcell* to a subfactor under the first *Winter* factor—the plaintiff's likelihood of success on the merits—because this inquiry is not related to whether the voting requirement imposes a severe burden on the plaintiff and whether the burden outweighs the rule's benefits. As a result, the *Winter* test should replace *Purcell*.

160. See *Wis. State Legis.*, 141 S. Ct. at 30–31 (Kavanaugh, J., concurring) (relying upon the *Purcell* principle in his concurring opinion; the majority failed to provide a written opinion).

161. See *supra* notes 116–118 and accompanying text (comparing state officials' burdens in making different adjustments to voting procedures).

162. For a full analysis of the *Winter* balancing test, see *infra* Part III.

163. *Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006) (per curiam).

A. *The Balance of Equities and the Public Interest Cover Purcell Considerations*

Because *Winter*'s balance of equities and the public interest factors “merge when the [g]overnment is the opposing party” in all preliminary injunction cases, this Section does not examine the two factors separately.¹⁶⁴ Given that a typical *Purcell* case has a plaintiff who challenges existing election rules and a government defendant who defends those rules,¹⁶⁵ this Section considers the balance of equities and the public interest factors together.

Under *Winter*, *Purcell*'s objectives—election administrability and avoiding voter confusion—should be balanced against other harms caused by the issuance or nonissuance of the injunction.¹⁶⁶ Issuing the injunction may, for example, confuse voters who have relied upon the old rules, result in election chaos, and increase administrative costs.¹⁶⁷ Failure to issue the injunction may cause, for example, large scale voter disenfranchisement if the challenged rule substantially burdens voters, heavy burdens on defendants to stick to the old rules in emergency situations, and chaotic election conditions like long lines or broken voting machines.¹⁶⁸ Further, when an appellate court overrules an injunction granted by a district court, the harms are amplified.¹⁶⁹

With these harms in mind, courts should holistically balance the *Purcell* considerations together with other benefits and harms surrounding the injunction by applying the *Winter* standard. For

164. *Nken v. Holder*, 556 U.S. 418, 435 (2009). This is because the government is supposed to speak for the public interest: for example, heavy burdens on election officials can make it difficult to conduct an orderly election, thereby harming the public's voting rights. *But see Moore, supra* note 77, at 955 (“First, the government does not always speak for the public interest, particularly where minority rights are concerned. Second, administrative or litigation costs associated with granting injunctive relief should be considered under the balance-of-equities factor, creating a separate (albeit minor) set of considerations for these two factors.” (footnote omitted)). This Note does not discuss this controversial issue in depth and simply follows the Supreme Court's approach to merge the two factors. However, Part III of this Note *does* consider the administrative costs emphasized by Moore.

165. *See supra* note 23 and accompanying text (discussing typical cases that apply the *Purcell* principle).

166. *See Univ. of Haw. Pro. Assembly v. Cayetano*, 183 F.3d 1096, 1107–08 (9th Cir. 1999) (defining the “balance of hardships” factor).

167. *See, e.g., Purcell*, 549 U.S. at 7 (discussing the consequences of issuing the injunction).

168. *See, e.g., Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123, 1149–50 (D. Nev. 2020) (discussing the consequences of the nonissuance of the injunction).

169. *See supra* note 150 and accompanying text (discussing the harm caused by appellate courts changing the status quo created by district courts).

example, in *Democratic National Committee v. Bostelmann*,¹⁷⁰ the district court, applying the *Winter* factors, thoroughly analyzed the impact of the COVID-19 pandemic on Wisconsin's April and August elections, the possible effects of each proposed change of election rules, and potential benefits and harm caused by issuing or not issuing the injunction to the plaintiffs, the defendants, and the general public.¹⁷¹ As to the *Purcell* principle, the court did consider "the risk that any of its actions may create confusion on the part of voters," but it ultimately sided with the plaintiffs because the "balance of interests weighs heavily in favor of plaintiffs as to this narrow relief" of postponing the deadline for mail-in ballots.¹⁷²

B. The Likelihood of Success on the Merits Cannot Accommodate Purcell Considerations

Some courts recognize *Winter* as the correct preliminary injunction standard but improperly consider *Purcell* as a subfactor of the likelihood of success on the merits factor.¹⁷³ This approach is problematic because *Purcell* does not fit in with the *Anderson-Burdick* test, which is typically used as the analytical framework of the likelihood of success on the merits inquiry.¹⁷⁴ *Anderson-Burdick* requires the court to engage in a two-pronged analysis: The court should first ask whether the challenged rule imposes a severe burden on the plaintiff.¹⁷⁵ If not, the court should ask whether the burden on the plaintiff outweighs the benefit of the rule.¹⁷⁶ On the contrary, *Purcell* concerns solely the time period between the decision and the upcoming election, which is unrelated to the burden imposed on the plaintiff's voting rights by the substantive rules.¹⁷⁷ For example, *Purcell* does not distinguish between an unconstitutional poll tax and a valid

170. *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis.), *denying stay* 976 F.3d 764 (7th Cir.) (per curiam), and *granting stay on reconsideration* 977 F.3d 639 (7th Cir.) (per curiam), *denying stay sub nom.* *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (mem.).

171. *Id.* at 787–95.

172. *Id.* at 800, 803.

173. *See supra* notes 75, 77 and accompanying text (discussing the two approaches that courts took when they treated *Purcell* as a subfactor under the likelihood of success on the merits).

174. *See supra* notes 70–74 and accompanying text (discussing the *Anderson-Burdick* test).

175. *See supra* notes 70–74 and accompanying text (discussing the *Anderson-Burdick* test).

176. *See supra* notes 70–74 and accompanying text (discussing the *Anderson-Burdick* test).

177. *See, e.g., Goldstein v. Sec'y of the Commonwealth*, 484 Mass. 516, 576 (2020) (“[I]t is the in-person aspect of the signature requirement that renders it unduly burdensome in light of the current pandemic and quarantine . . .”).

voter identification requirement; so long as the plaintiff chooses to litigate close to the election, both rules will be upheld. Therefore, the *Purcell* considerations are covered by the balance of equities and public interest factors, but not by the likelihood of success on the merits factor.

C. *Why the Winter Standard Is Preferrable*

In addition to ensuring more equitable balancing of the interests, the *Winter* standard also avoids other *Purcell* defects. Courts need not decide whether the date of decision is too close to the election day as a stand-alone issue; instead, they must only examine whether issuing an injunction at a given time causes more harm than good to election administrators and voters.¹⁷⁸ Similarly, when applying *Winter*, whether the challenged action is a state election official's intervention or a judicial intervention is unimportant.

Courts will also find applying *Winter* easier than applying *Purcell*. Originating in the 1920s, the preliminary injunction standard has been developed through significant case law, ultimately becoming the four-factor modern test that is *Winter*.¹⁷⁹ Courts thus have sufficient jurisprudence upon which to rely in understanding the meaning of each of the four factors, their relationships, and the scope of the test.¹⁸⁰ In other words, unlike *Purcell*, *Winter* provides clear guidance to courts, avoiding the chronic *Purcell* problem of inconsistent rulings.

To be sure, the *Winter* standard allows courts to flexibly balance the interests of different parties based on the specific facts of each case, so courts are not expected to reach the same result in every similar case.¹⁸¹ However, in contrast to *Purcell*, this kind of flexibility will not lead to arbitrary judicial decision-making because *Winter* requires

178. See *supra* notes 170–172 and accompanying text (discussing how the court balanced the harm and good of postponing the deadline for mail-in ballots in *Democratic National Committee v. Bostelmann*).

179. See Moore, *supra* note 77, at 941–44 (discussing the history of the preliminary injunction standard).

180. See, e.g., *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–45 (2018) (per curiam) (recognizing the four *Winter* factors and also requiring that the plaintiff show reasonable diligence); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087–89 (2017) (per curiam) (applying the *Winter* equitable factors to grant the government's application to stay the injunction entered by the lower courts); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–64 (2010) (applying the *Winter* equitable factors to overrule the district court's decision granting the preliminary injunction).

181. See *supra* note 98 and accompanying text (discussing the flexibility of *Winter*).

courts to consider and weigh *each* equitable factor, including the temporal proximity of the election.

Most importantly, moving from the purportedly bright-line *Purcell* to the flexible *Winter* standard will not bury *Purcell* considerations. If the Supreme Court believes avoiding voter confusion and maintaining orderly elections are indispensable and more important than other equity factors, it can simply say so, and direct lower courts to give them more weight. For example, the *Bostelmann* district court considered both *Winter* and *Purcell* factors before deciding that the balance of interests tipped in favor of plaintiffs.¹⁸² Courts will be able to consider the weight of avoiding voter confusion along with other costs and benefits under the balance of equities factor if *Purcell* is replaced by *Winter*.

IV. APPLYING THE BALANCING TEST TO THE SUPREME COURT'S *PURCELL* CASES

This Part surveys another COVID-19-era example, *Andino v. Middleton*, to further illustrate the ambiguities of the *Purcell* principle and the advantages of the *Winter* standard. In *Andino*, the U.S. District Court for the District of South Carolina reached the correct result of enjoining several voting requirements by thoroughly considering the *Winter* factors. Subsequently, the Supreme Court improperly overruled the district court because it treated *Purcell* as a stand-alone rule and neglected to consider the plaintiffs' likelihood of success on the merits, the balance of equities, and the public interest.

A. *The Lower Courts' Decisions*

In *Andino*, a group of plaintiffs sought a preliminary injunction against several state voting requirements, including a witness requirement for absentee ballots for South Carolina's November 2020 general election, claiming that these requirements unduly burdened their voting rights. Notably, South Carolina had held its June primary without such requirements pursuant to the district court's order.¹⁸³ When assessing the later challenge, the court reflected on the effects of the earlier decision, highlighting the state's failure to challenge what

182. See *supra* notes 170–172 and accompanying text (discussing the *Bostelmann* decision).

183. *Middleton v. Andino*, 488 F. Supp. 3d 261, 288 (D.S.C.), *granting stay in part* 141 S. Ct. 9, *dismissing appeal as moot* No. 20-2022, 2020 WL 8922913 (4th Cir. Dec. 17, 2020).

became the “new status quo”—the nonrequirement of a witness for absentee ballots.¹⁸⁴ Therefore, it reasoned, granting the injunction for the general election would preserve the status quo and would mitigate voter confusion.¹⁸⁵

The district court allowed the plaintiffs’ request and intended the injunction to apply “during the current coronavirus crisis,” particularly to the November 2020 general election.¹⁸⁶ As for the timing, the district court issued its decision on September 18, forty-five days before the general election.¹⁸⁷ The court carefully examined the impact of the COVID-19 pandemic, the international, national, and state public health responses, and previous changes made by the legislature and the court to South Carolina’s voting procedures.¹⁸⁸ It then applied the four *Winter* factors to decide whether to grant the plaintiffs’ request for a preliminary injunction.¹⁸⁹

In determining the plaintiffs’ likelihood of success on the merits, the court found the witness requirement “concerns a privilege that implicates a purportedly unconstitutional burden on the fundamental right to vote” and applied the *Anderson-Burdick* test.¹⁹⁰ Based on COVID-19 data, findings of fact by courts in other jurisdictions, and expert witness testimony,¹⁹¹ the court concluded, “Plaintiffs have shown they will suffer a significant burden if forced to comply with the Witness Requirement.”¹⁹² In contrast, the court found the state’s interest in combating voter fraud using the witness requirement to be “minimal.”¹⁹³ Specifically, the court stated that this interest was diluted “by scant underlying evidence of any absentee ballot fraud.”¹⁹⁴ Balancing the burden and the interest, the court held “[p]laintiffs have shown a strong likelihood that the Witness Requirement’s imposed

184. *Id.*

185. *See id.* (“Just as in the last election, voters will likely expect the same restrictions to be suspended for the November 2020 General Election, including the Witness Requirement.”).

186. *Id.* at 296.

187. *Supra* note 134.

188. *Andino*, 488 F. Supp. 3d at 266–73.

189. *Id.* at 293.

190. *Id.* at 296.

191. *Id.* at 296–99.

192. *Id.* at 299.

193. *Id.* at 302.

194. *Id.* at 300.

burdens on Plaintiffs outweigh an investigatory law enforcement interest.”¹⁹⁵

The court then went on to find the plaintiffs had demonstrated irreparable harm because the “infringement of a citizen’s constitutional right to vote cannot be redressed by money damages.”¹⁹⁶ The court also held the balance of the equities and the public interest factors tipped in the plaintiffs’ favor: even though the plaintiffs would likely suffer irreparable harm absent an injunction, the state failed to prove any harm that would result from the issuance of the injunction.¹⁹⁷ Also, the court concluded that loosening the witness requirement would protect public health and would permit more voters to vote.¹⁹⁸

Finding all four *Winter* factors weighed in favor of the plaintiffs, the court enjoined the witness requirement for the November general election.¹⁹⁹

B. *The Supreme Court’s Decision*

The Supreme Court granted the defendant’s application for a stay and vacated the district court’s preliminary injunction, but it also failed to provide a written opinion.²⁰⁰ However, Kavanaugh’s concurrence suggests the *Purcell* principle played an important role in the Court’s decision.²⁰¹ Although the Court typically balances the equitable *Winter* factors in considering whether to grant a stay,²⁰² Kavanaugh did not discuss any of these factors. He emphasized that a state legislature’s decision on election rules “should not be subject to second-guessing by an ‘unelected federal judiciary.’”²⁰³ In addition, he claimed that the district court “defied [the *Purcell*] principle and this Court’s

195. *Id.* at 302.

196. *Id.* at 303.

197. *Id.*

198. *Id.* at 303–04.

199. *Id.* at 307.

200. *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020).

201. *See id.* (Kavanaugh, J., concurring) (“[F]or many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election.”).

202. *See supra* note 63 and accompanying text (discussing the *Winter* balancing factors).

203. *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020)).

precedents” by enjoining South Carolina’s witness requirement shortly before the election.²⁰⁴

In sum, the concurring opinion highlights a number of the problems with *Purcell* that were identified in Part III. First, Kavanaugh neglected other important considerations, such as the plaintiff’s likelihood of success on the merits, the balance of equities, and the public interest. Although the Supreme Court is required to consider these factors in stay cases,²⁰⁵ at least the concurring justices appeared to depart from this practice, instead relying on the *Purcell* principle alone to overrule the district court.²⁰⁶ The *Purcell* principle thus enabled the Court to evade other important considerations.

Regarding the timing element, the Supreme Court failed to explain why forty-five days prior is too close to the election.²⁰⁷ Moreover, it stayed the district court’s September 18 injunction of the witness signature requirement at a time even closer to the election, when the injunction had already created a status quo.²⁰⁸ In contrast, the district court applied the *Winter* standard and thoroughly considered benefits and hardships for each party, including the risk of voter confusion.²⁰⁹ *Andino* thus shows that *Purcell* can and should be replaced by the *Winter* standard.

CONCLUSION

After fourteen years, it is time for the *Purcell* principle’s tenure to come to an end. Applying *Purcell* is like using a flashlight in the sun: the flashlight may help, but the sun already provides enough light. The *Purcell* principle seeks to avoid voter confusion and to maintain orderly elections. These concerns are necessarily implicated when courts apply the *Winter* factors, rendering *Purcell* meaningless. The *Winter* standard is superior because it considers plaintiffs’ constitutional rights and the public interest, but *Purcell* considers only the proximity of the election date. The COVID-19 election cases reveal how such an oversimplified rule can lead to inconsistent decisions on

204. *Id.*

205. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

206. *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring).

207. *Id.*

208. *See Middleton v. Andino*, 990 F.3d 768, 768 (4th Cir.) (King, J., concurring) (applying *Purcell* to support rather than overrule the district court’s injunction), *granting stay in part* 141 S. Ct. 9, *dismissing appeal as moot* No. 20-2022, 2020 WL 8922913 (4th Cir. Dec. 17, 2020).

209. *See supra* Part IV.A (discussing the lower court’s reasoning).

similar facts and, consequently, large-scale voter disenfranchisement. Causing more harm than good, the *Purcell* principle should be abolished and replaced by the *Winter* balancing test in future election cases.