WRITTEN STATEMENT OF
SOPHIA LIN LAKIN
DEPUTY DIRECTOR, VOTING RIGHTS PROJECT
AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice.

Submitted to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary

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Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you.

The ACLU Voting Rights Project was established in 1965—the same year that the historic Voting Rights Act ("VRA") was enacted—and has litigated more than 300 cases since that time. Its mission is to build and defend an accessible, inclusive, and equitable democracy free from racial discrimination. The Voting Rights Project's recent docket has included more than 30 lawsuits last year alone to protect voters during the 2020 election; a pair of recent cases in the Supreme Court challenging the last administration's discriminatory census policies: *Department of Commerce v. New York*[1] (successfully challenging an attempt to add a citizenship question to the 2020 Census), and *Trump v. New York*[2] (challenging the exclusion of undocumented immigrants from the population count used to apportion the House of Representatives); challenges to voter purges and documentary proof of citizenship laws; and challenges to other new legislation restricting voting rights in states like Georgia.

In my capacity as Deputy Directory of the ACLU Voting Rights Project, I assist in the planning, strategy, and supervision of the ACLU's voting rights litigation nationwide, which focuses on ensuring that all Americans have access to the franchise, and that everyone is equally represented in our political processes. I am currently litigating or have litigated numerous cases challenging racially discriminatory laws under Section 2 of the Voting Rights Act, including *Sixth District of the African Methodist Episcopal Church v. Kemp*,[3] a challenge to Georgia's sweeping voter suppression law enacted in the wake of the 2020 elections; *Thomas v. Andino*,[4] a challenge to South Carolina's absentee ballot witness requirement and required "excuse" for absentee voting during the COVID-19 pandemic; *MOVE Texas v. Whitley*,[5] a challenge to a discriminatory purge program in Texas; *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*,[6] a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*,[7] a challenge to Wisconsin's voter ID law; and *North Carolina State Conference of the NAACP v. McCrory*,[8] a challenge to North Carolina's monster voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.[9] As Chief Justice John Roberts has explained, "[t]here is no right more basic in our democracy than the right to participate in electing our political

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[1] 139 S. Ct. 2551 (2019).

[2] 141 S. Ct. 530 (2020).

[3] No. 1:21-cv-01284-JPB (N.D. Ga. filed Mar. 29, 2021).

[4] No. 3:20-cv-01522-JMC (D.S.C. filed Apr. 22, 2020).

[5] No. 5:19-cv-00171 (W.D. Tex. filed Feb. 22, 2019).

[6] 894 F.3d 924 (8th Cir. 2018).

[7] 768 F.3d 744 (7th Cir. 2014).

[8] 831 F.3d 204 (4th Cir. 2016) ("*N.C. NAACP v. McCrory*").

[9] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

leaders."[10] We are not truly free without self-government, which requires a vibrant participatory democracy, in which everyone is treated fairly in the process and equally represented. Unfortunately, our nation has a long and well-documented record of fencing out certain voters—Black voters and other voters of color, in particular—and today that racial discrimination in voting remains a persistent and widespread problem.

My written statement will describe some of the reasons that post-enactment relief in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder*[11] is insufficient to protect voting rights and then turn to how the federal courts' growing use and the expanding scope of the so-called *Purcell* principle has worsened the problem. The *Shelby County* decision changed the landscape of voting rights in the United States.[12] Under the Voting Rights Act of 1965 ("VRA") prior to *Shelby County*, states and counties with the worst histories and recent records of voting discrimination had to obtain federal "preclearance"—that is, approval from the Department of Justice or a federal court—before implementing any changes to voting laws and practices, in order to ensure they did not curtail the right to vote. *Shelby County* struck down the formula used to identify which states were required to do so, gutting the heart of the Act. In her dissent in that case, the late Justice Ruth Bader Ginsburg warned that the Court's decision was "like throwing away your umbrella in a rainstorm."[13] And here we are today, drenched in the downpour. S*helby County* unleashed a wave of voter suppression and other discriminatory voting laws unlike anything the country had seen in a generation.[14]

After *Shelby County*, the main protection afforded by the VRA is Section 2. Section 2 bans the use of any "voting qualification or prerequisite to voting … which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color."[15] Section 2 applies nationwide, to all jurisdictions. Unfortunately, while Section 2 is an important and necessary tool to protect voting rights, it does not offer adequate protection on its own. Section 2 litigation is expensive, complex, and time-consuming, even compared to the baseline

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[10] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

[11] 570 U.S. 529 (2013).

[12] This written statement incorporates the written testimony of Dale Ho, Director, Voting Rights Project, American Civil Liberties Union, before the House Judiciary Committee, Constitution, Civil Rights, and Civil Liberties Subcommittee on September 10, 2019. I am also indebted to my ACLU Voting Rights Project colleagues who contributed to the preparation of this statement, in particular William Hughes, who provided invaluable support, as well as Brett Schratz, Madison Perez, and Alton Wang.

[13] 570 U.S. at 590 (Ginsberg, J., dissenting).

[14] *See* Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 Yale L.J. Forum 799 (2018); *Block the Vote: Voter Suppression in 2020*, ACLU (Feb. 3, 2020), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/; And this wave has not receded: According to the Brennan Center for Justice's analysis as of May 14, 2021, state lawmakers introduced at least 389 restrictive voting bills in 48 states—more than 4 times, the number of restrictive bills introduced two years ago—and at least 14 states enacted 22 new laws that restrict access to the vote—putting this legislative cycle on track to far exceed the current record. *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.work/research-reports/voting-laws-roundup-may-2021.

[15] 52 U.S.C. § 10301.

expenses and time of litigation. And because a Section 2 challenge can only be brought *after* a law has been passed or a policy implemented, multiple elections involving hundreds of elected officials can take place while the case is being litigated under regimes that are later found to be racially discriminatory—an irrevocable taint on our democracy that we have, unfortunately, seen play out in vivid terms in formerly covered states like North Carolina and Texas, thanks to the *Shelby County* decision.

The Supreme Court in *Shelby County* based its ruling in part on the assumption that voting rights plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases before an imminent election. But the theoretical availability of preliminary relief has also proven to be inadequate. The current standard for obtaining a preliminary injunction makes it difficult for plaintiffs to win preliminary relief in Section 2 cases. And the problem has only worsened due to the expansion of the so-called "*Purcell* principle," *i.e.*, the idea that courts should be cautious in issuing orders which change election rules in the period right before an election.[16] This so-called principle emerged out of *Purcell v. Gonzalez*, a short, unsigned 2006 decision, where the Court reversed the issuance of an injunction by an appeals court, due to its lack of deference to the district court it was reviewing. In passing, the Court gave a commonsense warning to consider the potential voter confusion and administrative burdens that may ensue if a court intervenes close to an election. Over time, this has morphed into the *Purcell* principle of today, effectively operating as bright-line rule against intervening in elections close to Election Day—even where the relief sought would neither confuse voters nor impose burdens on election officials and even where plaintiffs move as quickly as they can. And all too frequently, this rule is wielded inconsistently, in one direction only: to stymie voting rights advocates' efforts to ensure that voters are protected and discriminatory laws and practices are blocked *before* they can taint an election. In some instances, too, appeals courts acting to stay relief granted by a district court on the basis of *Purcell* (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid. Making matters worse, orders applying *Purcell* are increasingly issued without full opinions that explain the reasoning behind the order, making it harder for state officials and voters alike understand why the court has ruled in a particular way given the specific facts in the case before it, and fueling the perception that it is used more frequently against voting rights advocates.

The framers of the VRA understood that Section 2, a nationwide tool to bring cases one-by-one, could not bear the weight that is now placed on it following *Shelby County*. That is why the preclearance regime was enacted and remained in place (with bipartisan support) for decades—and that is why the stronger voting rights protections in the John Lewis Voting Rights Advancement Act ("VRAA"),[17] including a new preclearance regime, are absolutely critical. Congress has the power under the Fourteenth and Fifteenth Amendments to adopt strong enforcement legislation to prevent racial discrimination in the voting process at the federal, state, and local levels. Indeed, when Congress acts to address racial discrimination in voting—protecting both the fundamental right to vote and the right to be free from racial discrimination, two rights at the center of the Reconstruction Amendments—Congress acts at the height of its

[16] *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2017).

[17] John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. (2020).

power.[18] In light of current conditions, this body has not only the authority but the duty to ensure that all Americans are free to exercise the franchise in elections without the taint of racial discrimination.

I. Post-Enactment Relief is Inadequate to Protect Voting Rights

Following *Shelby County*, Section 2 of the Voting Rights Act ("VRA") is the heart of federal protections for the right to vote. It applies nationwide, to every state and local jurisdiction, and it has no expiration date. However, unlike the preclearance regime under Section 5, which applies *before* a law goes into effect, a Section 2 claim can only be brought *after* a law is already enacted or a policy announced. Plaintiffs must go to court and litigate their claims—a process that costs hundreds of thousands, if not millions, of dollars and often takes years—before a judge will strike down the law or order the practice stopped. In the interim, the law or practice remains in effect, which means that multiple elections involving hundreds of elected officials may be irrevocably tainted by taking place under a discriminatory regime. And unlike other civil rights, voters cannot be compensated once they have lost their right to vote in an election or voted under unlawful or discriminatory rules; instead, voters must simply wait for the next election.

A. Section 2 cases are expensive, resource intensive, and time-consuming

To begin, Section 2 cases are very costly to bring, both in terms of money and in terms of time. By its very nature, bringing a Section 2 case requires a significant investment at the outset, with no promise of eventual success or recouping any costs. This makes it harder for plaintiffs to bring Section 2 cases at all, and even for those cases that succeed, the burdens of litigation make Section 2 an insufficient tool to substitute fully for preclearance.

1. Section 2 cases are expensive and resource intensive.

Section 2 litigation is incredibly fact intensive. Plaintiffs must assemble local election data and hire quantitative experts to provide expensive and complex statistical testimony. Historians and other social scientists are often required to describe the past and ongoing discrimination in the jurisdiction, and candidates, elected officials, and community leaders are frequently needed to testify about their personal experiences with bloc voting, the responsiveness of elected officials, racial appeals in campaigns, and the like.[19] As a result, the cost of these

[18] *See Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) ("Broad interpretation [of Congress' power] [i]s particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, … ."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

[19] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143 (2015).

voting rights cases regularly falls in the six- and seven-figure range.[20]

A few examples from the ACLU's recent Section 2 litigation experience reflects the considerable monetary costs of these cases:

- In *North Carolina State Conference of NAACP v. North Carolina ("N.C. NAACP v. McCrory*"),[21] which successfully challenged North Carolina's omnibus bill limiting early voting and same-day registration, requiring certain forms of photo identification, and banning out-of-precinct voting, plaintiffs were awarded $5,922,165.28 for the costs and fees associated with the litigation, including multiple unsuccessful appeals.[22]

- In *National Association for the Advancement of Colored People v. East Ramapo Central School District* ("*NAACP v. East Ramapo*"),[23] a Section 2 case that successfully challenged the at-large method of election for the East Ramapo, New York school board, the plaintiffs were awarded $5,446,139.99 in costs and fees.[24]

- In *Montes v. City of Yakima*,[25] which successfully challenged the at-large voting system for the City Council of Yakima, Washington under Section 2*,* the plaintiffs were awarded $1,521,911.59 in costs and fees.[26]

- In *Wright v. Sumter County Board of Elections and Registration*,[27] a Section 2 case brought by the ACLU and partners that successfully challenged the at-large method of electing the Sumter County, Georgia school board members,[28] plaintiffs were awarded $786,929.98 for the costs and fees incurred to litigate the case.[29]

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[20] H.R. Rep No. 116-317, at 60 (2019) (noting testimony that "costs for a Section 2 case can range from hundreds of thousands of dollars to $10 million."); Br. of Joaquin Avila et al. as Amici Curiae in Support of Resp'ts at 24, *Shelby Cnty.*, 570 U.S., No. 12–96 ("Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs.") (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005)), *available at* https://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brief%20of%20Joaquin%20Avila%20et%20al.%20in%20Support%20of%20Respondents.pdf.

[21] 831 F. 3d. 204.

[22] Mem. Order, *McCrory*, 831 F.3d (No. 1:13-cv-00861-TDS-JEP), ECF No. 508.

[23] 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

[24] *NAACP v. E. Ramapo,* 462 F.Supp.3d (No. 7:17-CV-08943), ECF. No. 694.

[25] 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

[26] Order, *Montes*, 40 F.Supp.3d (No. 2:12-CV-03108-TOR), ECF No. 186.

[27] 979 F.3d 1282 (11th Cir. 2020) (affirming finding of a Section 2 violation).

[28] *See* Nicholas Casey, *A Voting Rights Battle in a School Board 'Coup'*, N.Y. Times (Nov. 3, 2020), https://www.nytimes.com/2020/10/25/us/politics/voting-rights-georgia.html.

[29] Order, *Wright*, 979 F.3d (No. 1:14-CV-00042-WLS), ECF No. 322.

Although in the cases above, the ACLU was successful and eventually recovered its costs, litigation requires that plaintiffs pay such expenses up front, without any promise of success. Given their cost and complexity, it should be no surprise that many plaintiffs and their lawyers (frequently nonprofit legal organizations and local civil rights attorneys with limited resources) simply decline to bring Section 2 cases in the first place.

2. Section 2 cases are time-consuming.

Even when cases are brought, it typically takes years to litigate a Section 2 claim to completion.[30] That may reflect the simple fact that voting rights litigation tends to be quite complex. As the former Director of the ACLU Voting Rights Project, Laughlin McDonald, explained in testimony before the Senate fifteen years ago:

> [Section 2 cases] are among the most difficult cases tried in federal court. According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case. Indeed, voting cases are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts.[31]

The ACLU's Section 2 litigation experience bears this out. The following table summarizes the ACLU's Section 2 litigation since *Shelby County*, including the length of time it has taken to litigate the case from filing to resolution[32]:

ACLU Section 2 Cases Litigated to Judgment/Settlement since *Shelby County*						
Case name	**Citation**	**Practice Challenged**	**Date Filed**	**Date Resolved**	**Days**	**Success?**
Bethea v. Deal	No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016)	Failure to extend voter registration deadline after hurricane	10/17/16	10/19/16	2	N
Frank v. Walker	768 F.3d 744 (7th Cir. 2014)	Voter ID	12/13/11	3/23/15	1197[33]	N

[30] *See Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

[31] *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

[32] "Date Resolved" reflects the date upon which a case was fully resolved on the merits either through a court decision and exhaustion of any appeals, through a consent decree, or through a settlement between the parties.

[33] Litigation on plaintiffs' as-applied constitutional claims is ongoing—and heading into its eleventh year—but the Seventh Circuit rejected our Section 2 claims in 2014, and the Supreme Court denied a petition for review of that decision in March 2015.

Florida Dem. Party v. Scott	No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)	Failure to extend voter registration deadline after hurricane	10/9/16	10/12/16	3	Y
Jackson v. Bd. of Trustees of Wolf Point	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), *R. & R. adopted as modified sub nom.* 2014 WL 1791229 (D. Mont. May 6, 2014)	School redistricting	8/7/13	4/14/14[34]	250	Y
Rangel-Lopez v. Cox	344 F. Supp. 3d 1285 (D. Kan. 2018)	County polling place closure	10/26/18	1/30/19	96	Y[35]
Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.	894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019)	School Board At-Large Elections	12/18/14	1/7/19	1482	Y
Montes v. City of Yakima	No. 12-CV-3108-TOR, 2015 WL 11120964 (E.D. Wash. Feb. 17, 2015)	City At-Large Elections	8/22/12	2/17/15[36]	910	Y
MOVE Texas Civic Fund v. Whitley	No. 5:19-cv-00171 (W.D. Tex. Feb 22, 2019)[37]	Statewide voter purge	2/4/19	4/29/19	85	Y
NAACP v. East Ramapo	462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd* 984 F.3d 213 (2d Cir. 2021)	School Board At-Large Elections	11/16/17	1/6/21	1147	Y
N.C. NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same-day registration; Out-of-Precinct Ballots; Pre-Registration	8/30/13	5/15/17	1355	Y
Navajo Nation Human Rts. Comm'n v. San Juan Cnty.	No. 2:16-cv-00154 (D. Utah 2016)	All-mail voting, elimination of polling places	2/26/16	2/21/18[38]	727	Y

[34] This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney's fees and costs.

[35] Although the court denied the plaintiffs' Motion for a Temporary Restraining Order, the plaintiffs voluntarily moved to dismiss the case after the defendants announced the opening of new polling locations. *See ACLU of Kansas Declares Victory; Files Voluntary Motion to Dismiss Dodge City Voting Access Suit*, ACLU of Kansas (Jan. 25, 2019), https://www.aclukansas.org/en/press-releases/aclu-kansas-declares-victory-files-voluntary-motion-dismiss-dodge-city-voting-access.

[36] This is the date the court adopted a remedial plan, later proceedings focused on attorney's fees and costs.

[37] Parties on both sides filed a joint motion to dismiss because of a reached settlement.

[38] This date reflects when the settlement from the parties was reached and announced. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county.

Ohio State Conf. of the NAACP v. Husted	No. 2:14-CV-00404 (S.D. Ohio 2014)	Early Voting	5/1/14	4/17/15[39]	352	Y
People First Alabama v. Merrill	491 F. Supp. 3d 1076 (N.D. Ala. 2020)	Absentee Ballot Excuse Requirement (COVID-19)	5/1/20	11/16/20	200	N[40]
Wright v. Sumter Cnty. Bd. of Elections & Registration	301 F. Supp. 3d 1297 (M.D. Ga. 2018), *aff'd* 979 F.3d 1282 (11th Cir. 2020)	County Redistricting	3/7/14	10/27/20	2427	Y

The average length of time that the ACLU's Section 2 cases have taken to litigate is 731 days or over two years. When emergency cases, such as those brought after natural disasters to extend an election-related deadline or those brought to accommodate voters in the COVID-19 pandemic, are excluded, this average jumps to 911 days or approximately thirty months, over two and a half years. In short, voting rights cases start with the baseline pace of litigation, which can be frustratingly slow for all parties, and add an additional layer of complexity, causing cases to drag on for years.

B. Elections can take place under discriminatory regimes while Section 2 litigation is pending.

Given the length of time it takes to litigate a Section 2 case, many elections can take place, hundreds of government officials elected, and millions of votes cast while the litigation is pending. Preliminary relief is in theory available to prevent elections from proceeding under the challenged regimes while a case is being litigated. But preliminary injunctions are difficult to win in Section 2 cases under the current standards. In fact, two leading civil rights lawyers estimated that preliminary injunctions were granted in fewer than 5% of Section 2 cases.[41] This means that even when the law is on the plaintiffs' side, multiple elections take place under practices later found to be discriminatory—and there is no way to adequately compensate the victims of voting discrimination after-the-fact.

Our experience litigating a vote dilution challenge to the at-large method of elections for the Ferguson-Florissant School Board in Missouri is illustrative. The Ferguson-Florissant school district was created pursuant to a 1975 desegregation order.[42] In 2014, the student body of the

[39] This date reflects when the parties reached a settlement and moved to dismiss the case.

[40] In this case, the trial court judge found a violation of Section 2 and entered an injunction barring the application of the excuse requirement to vote absentee; on appeal, the Eleventh Circuit granted a stay of the injunction without explaining its reasoning, *see* Op., *People First Alabama v. Merrill,* 491 F. Supp. 3d 1076 (No. 20-13695-B), 2020 WL 6074333 (likely relying on *Purcell v. Gonzalez*, see *infra*.)

[41] *See* Elmendorf & Spencer, *supra* note 19, at 2145 (citing Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama, and the Supreme Court*, Campaign Legal Ctr. (Mar. 1, 2013), http://www.campaign legalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court ("The actual number of preliminary injunctions that have been granted in the hundreds of Section 2 cases that have been filed over the years is quite small, likely putting the percentage at less than 5%, and possibly quite lower.").

[42] *Missouri State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018).

district was approximately 80% Black, but Black residents were a minority of the district's voting-age population. Due to racially polarized voting, as recently as 2014, there was not a single Black board member on the seven-member school board. Our lawsuit was ultimately successful, with the Eighth Circuit affirming in a unanimous opinion that the Board's at-large method of elections violated Section 2.[43] But the case took four years to litigate—and the 2015, 2016, 2017, and 2018 elections were held while proceedings were ongoing. In that time, nine members of the school board were elected.[44]

The following table summarizes Section 2 cases decided since *Shelby County* that have been reported in Westlaw[45] where plaintiffs sought a preliminary injunction, unsuccessfully, and later went on to win relief.[46]

Section 2 Cases – Preliminary Relief Denied, but Ultimately Successful					
Case Name	**Citation**	**Challenged Practice**	**Prelim. Inj. Sought**	**Relief Granted**[47]	**Days to Relief**
Wandering Medicine v. McCulloch	No. CV 12-135-BLG-DWM, 2014 WL 12588302 (D. Mont. 2014)	Polling Places; Registration Deadline	10/10/12[48]	6/13/14[49]	611

[43] *See id.*

[44] *See Election Results Archive,* Saint Louis County, Missouri, https://stlouiscountymo.gov/st-louis-county-government/board-of-elections/election-results-archive/ (last visited June 25, 2021) (collecting election results from April 7, 2015, April 5, 2016, April 4, 2017, and April 3, 2018 elections).

[45] While we have attempted to be systematic in this research, we do not purport to present a complete picture of all Section 2 litigation. Because this analysis is limited only to cases reported on Westlaw that specifically cite to Section 2's codification in the U.S. Code, it is likely under-inclusive. For example, if a Section 2 case settles without a judicial opinion, it may not appear in such a database.

[46] This includes cases where relief was obtained by winning a final decision on the merits or favorable settlement. This largely borrows from Professor Ellen Katz's definition of a "successful" Section 2 case. *See* Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 653-54 n.35 (2006) ("Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success," including decisions where a court "granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys' fees after a prior unpublished determination of a Section 2 violation.").

[47] The date in the "Relief Granted" column reflects the date of whatever court decision on the merits, consent decree, or settlement between the parties, first began to provide relief for the plaintiffs.

[48] 906 F. Supp. 2d 1083 (D. Mont. 2012) (preliminary injunction denied), *aff'd* 544 F. App'x 699 (9th Cir. 2013).

[49] Relief was granted through a settlement between the parties. *See Wandering Medicine v. Montana Secretary of State*, ACLU of Montana, https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state (last visited June 25, 2021).

Jackson v. Bd. of Trustees of Wolf Point	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), *R. & R. adopted as modified sub nom.* 2014 WL 1791229 (D. Mont. May 6, 2014)	School Redistricting	8/7/13	4/14/14[50]	250
Favors v. Cuomo	39 F. Supp. 3d 276 (E.D.N.Y. 2014)	State Legislative Redistricting	3/27/12	11/5/13	588
Benavidez v. Irving Indep. Sch. Dist.	No. 3:13-CV-0087-D, 2014 WL 4055366 (N.D. Tex. Aug. 15, 2014)	At-Large Elections	1/8/13	8/15/14	584
Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.	894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019)	At-Large Elections	12/2/15[51]	7/3/18	944
N.C. NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same Day Registration	5/19/14	7/29/16	1092
Pope v. Cnty. of Albany	94 F. Supp. 3d 302 (N.D.N.Y. 2015)	County Redistricting	7/15/11[52]	3/24/15	1348
Veasey v. Abbott	830 F.3d 216 (5th Cir. 2016)	Voter ID	9/1/13	8/10/16	1074
Navajo Nation v. San Juan Cnty.	162 F. Supp. 3d 1162 (D. Utah 2016), 266 F. Supp. 3d 1341 (D. Utah 2017), *aff'd*, 929 F.3d 1270 (10th Cir. 2019)	Districting	1/12/12	7/16/19	2742
Navajo Nation Human Rts. Comm. v. San Juan Cnty	No. 2:16-cv-00154 (D. Utah 2016)	Vote by Mail	2/25/16	2/22/18[53]	728
Ala. State Conf. of the NAACP v. City of Pleasant Grove	372 F. Supp. 3d 1333 (N.D. Ala. 2019) (denying MTD); No. 2:18-CV-02056-LSC, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019)	At-Large Elections	12/13/18	10/11/19	302
Flores v. Town of Islip	No. 18-CV-3549-GRB-ST, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020)	At-Large Districts	3/1/19	10/14/20	592

[50] This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney's fees and costs.

[51] In this case, we moved for summary judgment (which was denied) and then for interim relief in the event that liability was established at trial, rather than a preliminary injunction. In Section 2 cases challenging at-large elections, if liability is established, there frequently can be a substantial delay before relief is ordered, given the complexities of crafting a remedial election plan. *See* Mem. in Support of Pls.' Mot. for Interim Relief, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (No. 16-4511), 2015 WL 13249955 (Dec. 2, 2015) (describing requested relief).

[52] No. 1:11-CV-00736 LEK/DRH, 2011 WL 3651114 (N.D.N.Y. Aug. 18, 2011), *aff'd*, 687 F.3d 565 (2d Cir. 2012) (denying motion for preliminary injunction).

[53] This date reflects when the parties reached and announced a settlement. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county.

Blackfeet Nation v. Stapleton	No. 4:20-CV-00095-DLC (D. Mont. 2020)	Failure to open Satellite election office	10/9/20	10/12/20	3
NAACP v. East Ramapo	462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd* 984 F.3d 213 (2d Cir. 2021)	School Districting	12/8/17	5/26/20	900
Spirit Lake Tribe v. Jaeger	No. 1:18-CV-222, 2018 WL 5722665 (D.N.D. 2018)	Voter ID	10/30/18	4/24/20	542

The average length of time that it has taken to obtain relief in these Section 2 cases is 820 days (or approximately 27 months)—more than the two-year standard federal election cycle—during which hundreds of state and federal government officials have been elected under regimes that were later found to be discriminatory or were abandoned. For example, prior to eventual success in *NC NAACP v. McCrory*, voters in North Carolina chose 188 federal and state elected officials under election rules that would be subsequently struck down.[54] Thus, even where plaintiffs have moved quickly and sought preliminary relief, Section 2 litigation is an inadequate tool to prevent a discriminatory law from tainting elections.

C. Voting rights cases are different than other civil rights litigation.

The deficiencies of post-enactment litigation, such as the Section 2 cases described above, are particularly acute because voting is different than other civil rights litigation. Think of a case of employment or housing discrimination based on membership in a protected class. At least in theory, going through the legal process can restore that person's job or apartment, or make them whole through backpay or money damages.

Elections are different: once an election transpires under a discriminatory regime, it is impossible to compensate the victims of voting discrimination. Their voting rights have been compromised irrevocably, because the election has already happened and cannot be re-run. While those voters may be able to freely vote in future elections, winners of the elections run under unlawful practices gain the benefits of incumbency, making it harder to dislodge them from office. Those elected officials will make policy while in office, and courts cannot (and should not) dislodge those decisions, even if the mechanism under which they took office is later found to be unconstitutional or in violation of the VRA.

In short, voting rights are different. Litigating after the fact is an important tool, but reauthorizing a preclearance regime which stops these discriminatory changes from going into effect in the first place is necessary to ensure all citizens have the right to vote.

[54] *NC SBE Contest Results*, North Carolina State Board of Elections, https://er.ncsbe.gov (accessing 2014 election results through the filters on the dashboard).

II. The development of the so-called *Purcell* principle has further constrained the effectiveness of Section 2 and other voting rights protections.

As noted above, the availability of preliminary relief blocking a challenged practice while a case is being litigated was supposed to solve the problem of elections going forward under schemes later found to be unconstitutional or illegal. Indeed, the Supreme Court in *Shelby County* based its ruling that preclearance was no longer necessary in part on the assumption that voting rights plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases.[55]

But the theoretical availability of preliminary relief has too often proven to be inadequate. The current standard for obtaining a preliminary injunction makes it difficult enough for plaintiffs to win preliminary relief in Section 2 cases, given their complexity and fact-intensive nature. And the problem has only worsened due to the expansion of the so-called "*Purcell* principle," *i.e.*, the idea that courts should be cautious in issuing orders which change election rules in the period right before an election.[56] Since the brief, unsigned namesake decision, *Purcell v. Gonzalez*,[57] that spawned it, the *Purcell* principle has hijacked the case-specific analysis for obtaining preliminary relief. The instruction to consider the potential voter confusion and administrative burdens that may ensue if a court intervenes close to an election now operates as effectively a bright-line rule against intervening in elections close to Election Day—even where the relief sought would neither confuse voters nor impose burdens on election officials. At the same time, courts have applied the rule inconsistently, frequently with little explanation, making it harder for state officials and voters alike to understand why courts have blocked relief for voters in a specific case. This fuels the perception that the principle is being use in one direction only: to stymie voting rights advocates' efforts to ensure that voters are protected and discriminatory laws and practices are blocked *before* they can taint an election. In some instances, too, appeals courts acting to stay relief granted by a district court on the basis of *Purcell* (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid.

A. *Purcell v. Gonzalez*: A narrow, fact-specific decision.

The *Purcell* decision itself—which has now grown into a near-impossible hurdle for voting rights lawsuits to clear—is a narrow, fact-specific decision which bears little resemblance to the so-called "*Purcell* principle" that controls election cases today:

In 2006, residents of Arizona, Indian tribes, and community organizations brought a legal challenge to voter identification requirements adopted by ballot proposition in 2004. Plaintiffs moved for a preliminary injunction, barring the state from implementing the ID requirement, which the district court denied, but the Ninth Circuit granted in a short, three-line order entered

[55] 570 U.S. at 537 ("Both the Federal Government and individuals have sued to enforce § 2, … and injunctive relief is available in appropriate cases to block voting laws from going into effect[.]") (citations omitted); *see also* Oral Arg. Tr., *Shelby Cnty.*, No. 12-96, 2013 WL 6908203, at *25 (Justice Kennedy: "Is [a Section 2 suit] an effective remedy?" Pls. Counsel: "It is – number one, it is effective. There are preliminary injunctions.").

[56] *See* Hasen, *supra* note 16, at 428.

[57] 549 U.S. 1 (2006).

directly on the docket (as opposed to a published opinion).[58] The defendants—the State of Arizona and county election officials—appealed to the Supreme Court, which dissolved the Court of Appeals' injunction. In doing so, the Court warned that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," and that "[a]s an election draws closer, that risk will increase." [59] Ultimately, however, the Court concluded that "[t]hese considerations . . . cannot be controlling here," because the Court of Appeals erred "as a procedural matter" in failing "to give deference to the discretion of the District Court," and failing to provide any factual findings or reasoning of its own.[60] Considering itself the imminence of the November 6 and the need for clarity, together with this procedural error, the Supreme Court vacated the Ninth Circuit's injunction and allowed the election to proceed under the new voter ID rules.[61]

The crux of the decision was procedural error and the relationship between trial and appellate courts. Notably, nothing in the decision purports to assert a hard-and-fast rule that courts should never intervene in elections as they draw near. As discussed below, however, the Court's very brief discussion of "considerations specific to election cases"[62] in this unsigned opinion has become the foundation for an increasing number of court orders shutting the door to preliminary relief that would protect the right to vote during the course of multi-year voting rights litigation. Courts now cite *Purcell*—a narrow decision that described commonsense factors that a court should consider when an election is imminent—as an inviolable bar on granting any relief in the period before an election.

B. The *Purcell* principle has left unlawful and unconstitutional voting laws in place for years.

Of principal concern when it comes to the aggressive application of the *Purcell* principle is that voting laws ultimately found to be unlawful are permitted to remain in place for years—simply because the necessary court action that would have blocked that unlawful practice *before* it tainted an election would have occurred in the period close to that election. As a result, many elections take place, and candidates assume office, under discriminatory or otherwise unlawful regimes. This concern is magnified in the wake of *Shelby County* and the loss of the preclearance regime that would have prevented many of these laws from being enacted—or even proposed in the first instance.

The following cases illustrate this concern in vivid terms:

North Carolina State Conference of the NAACP v. McCrory[63] **(Statewide Voter Suppression Bill)**. In 2013, along with the Southern Coalition for Social Justice, we filed a lawsuit representing the League of Women Voters of North Carolina and individual North

[58] *See* Filed Order, *Gonzalez v. Arizona*, No. 06-16702 (9th Cir. Sept. 18, 2006), Dkt. 16.

[59] *Purcell,* 549 U.S. at 4-5.

[60] *Id.* at 5.

[61] *Id*.

[62] 549 U.S. at 4.

[63] *McCrory*, 831 F. 3d. 204.

Carolina voters, in consolidated litigation challenging a sweeping voter suppression bill in North Carolina. Among other things, the bill imposed a strict voter identification requirement, slashed a week of early voting, eliminated same-day registration and pre-registration, and required the invalidation of ballots cast out-of-precinct. The law was announced just hours after the Supreme Court's decision in *Shelby County*—which released North Carolina from the preclearance regime—and enacted a few short weeks later.[64]

These changes had a tremendous impact on voter access in the state. In the 2012 presidential election alone, approximately 900,000 voters had voted during the eliminated week of early voting; nearly 100,000 voters had registered using same day registration; approximately 50,000 had pre-registered; and 7,500 had cast ballots out of precinct.[65] Not only did the 2013 law eliminate these widely-used forms of participation, it also banned the use of many commonly-held forms of government-issued photo ID for voting purposes, including North Carolina student IDs, public assistance IDs, and even municipal employee ID cards. In all, every form of registration or voting curtailed or eliminated by the bill had been disproportionately used by Black voters; the only form of voting exempted from the ID requirement—absentee voting—was disproportionately used by white voters.[66]

Ultimately, the Fourth Circuit found in a unanimous opinion that the law had been enacted with racially discriminatory intent and struck down the challenged provisions of North Carolina's law as unconstitutional, finding that, in enacting these provisions, the North Carolina legislature "target[ed] African Americans with almost surgical precision."[67] But this case took 34 months to litigate—almost three years—from filing the complaint to the Fourth Circuit's ruling. In the interim, the 2014 general election took place under the provisions of the new law, with 188 federal and state offices elected—including a U.S. Senator, 13 congressional representatives, four state supreme court justices, and 170 state legislative seats.[68]

We did everything we could to prevent this from happening. We initially litigated this very complex matter on an expedited timeline, and sought a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted.[69] Unfortunately, the Supreme Court stayed that ruling,[70] likely on the basis of the *Purcell* principle[71]—effectively leaving the discriminatory

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[64] *See* William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, Wash. Post (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html ("[W]ithin hours of the court ruling, [a state representative] told local reporters, 'Now we can go with the full bill.' With the 'legal headache' of Section 5 out of the way, he said, a more extensive 'omnibus' bill would soon be introduced in the Senate.").

[65] *See* Appellants' Br. at 26, *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (Nos. 16-1468, 16-1469, 16-1474, 16-1529), 2016 WL 3355830, at *26.

[66] *N.C. NAACP v. McCrory*, 831 F.3d at 230.

[67] *Id.* at 214.

[68] *See 11/04/2014 Official General Election Results – Statewide*, N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0 (last visited June 24, 2021).

[69] *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

[70] *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.).

[71] Hasen, *supra* note 16, at 449.

regime in place for the 2014 election. The Supreme Court subsequently permitted that preliminary ruling to go into effect,[72] and we ultimately prevailed on the final merits of the case. But even though we did everything in our power to prevent this discriminatory law from tainting the 2014 election, thanks to the demise of preclearance and the expansion of the *Purcell* principle, we lacked adequate tools to do so. And while the law has since been struck down, there is no way to now compensate the Black voters of North Carolina—or our democracy itself—for that gross injustice.

Veasey v. Abbott[73] **(Statewide Voter ID Bill).** In 2013, civil rights groups filed a lawsuit challenging what was then the nation's harshest voter identification law, leaving more than 600,000 eligible voters without the required form of ID.[74] The law was originally signed into law in 2011. However, when Texas sought to have the law precleared, as was required under Section 5, it was blocked on the grounds that Texas was unable to prove that the law would not discriminate against Black and Latinx voters.[75] Within hours of the *Shelby County* decision, however, Texas, now no longer bound to the preclearance process, immediately implemented the requirement.

On October 9, 2014, after a full nine-day trial, the district court issued a 143-page opinion that concluded that the voter ID law was passed with discriminatory intent and had discriminatory results, and permanently enjoined the state from enforcing the ID requirement. The full complement of judges on the Fifth Circuit eventually affirmed the district court's finding that the voter ID law violated the Voting Rights Act in July 2016.[76] But as in North Carolina, the case took over three years to litigate from the filing of the complaint to the Fifth Circuit's ruling. In the interim the 2014 general elections went forward with the voter ID requirement in place. In those elections, Texas voters filled an open governor's seat, as well as voted for six other statewide officeholders, all 36 members of the state's congressional delegation, all 150 members of the state house, and half of the state senate.[77] Moreover, the voter ID requirement was still in place for primary elections in 2016, including a contested presidential primary in both major parties,[78] as well a 2015 election to approve seven proposed constitutional

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[72] That is, despite temporarily staying that preliminary ruling, the Supreme Court declined to hear the case on appeal, leaving the preliminary injunction in place for subsequent local elections. *See North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015) (mem.). This suggests that the Supreme Court's stay of the preliminary injunction was issued due primarily to the proximity of the Fourth Circuit's ruling to the 2014 general election. *See* Hasen, *supra* note 16.

[73] 830 F.3d 216 (5th Cir. 2016) (en banc).

[74] *The Effects of Shelby County v. Holder*, Brennan Ctr. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder ("Experts estimated that over 600,000 registered Texas voters did not have an acceptable ID under the new law.").

[75] Letter from Assistant Att'y Gen. Thomas E. Perez to Tex. Dir. of Elections Keith Ingram (Mar. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120312.pdf.

[76] *Veasey*, 830 F.3d. Texas would subsequently pass a new law to ameliorate the defects found in the voter ID bill, rendering the case moot (and sparking a new set of legal challenges).

[77] *Race Summary Report: 2014 General Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist175_state.htm (last visited June 24, 2021).

[78] *See Race Summary Report: 2016 Democratic Party Primary Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist233_state.htm (last visited June 24, 2021); *see also Race Summary Report:*

amendments.[79] All in all, more than eleven million ballots were cast under a discriminatory election regime.[80]

As in North Carolina, the plaintiffs did everything they could. They filed suit the day after the Governor announced that the law would be implemented and moved expeditiously to fully resolve the complex matter on the merits. In contrast to many of the applications for preliminary relief discussed here, this case featured the opportunity for a full hearing of the claims and the submission of evidence, with dozens of witnesses testifying—and, because trial dates are set well in advance, more than adequate notice to state officials that a ruling would come down close in time to the election. Nevertheless, the Fifth Circuit stayed the injunction, "based primarily on the extremely fast-approaching election date," *i.e.*, because of *Purcell*.[81] When the plaintiffs asked the Supreme Court to vacate the stay, it declined to do so—presumably also on the basis of *Purcell*.[82]

Notably, nothing in the Fifth Circuit's stay order in any way contradicted the district court's finding that the law was passed with discriminatory intent and had discriminatory results. In other words, the appeals court concluded that proper application of the *Purcell* doctrine required it to allow a law found to be "motivated, at the very least in part, *because of* and not merely *in spite of* ... detrimental effects on the African-American and Hispanic electorate"[83] to govern the conduct of federal elections. The Texas plaintiffs did everything they could to prevent this discriminatory law from tainting the 2014 election, but thanks once again to the demise of preclearance and the expansion of the *Purcell* principle, over 200 federal and state officials in Texas were elected under a regime the full Fifth Circuit would affirm as "impos[ing] significant and disparate burdens on the right to vote" and as "ha[ving] a discriminatory effect on minorities' voting rights in violation of Section 2 of the [VRA]."[84]

***Husted v. Ohio State Conference of the NAACP*[85] (Cuts to Early Voting).** In May 2014, we filed a lawsuit representing the Ohio chapters of the NAACP, the League of Women Voters, the A. Philip Randolph Institute, and various churches and other organizations, challenging an Ohio law that sharply cut the availability of early voting passed in the wake of the surge in turnout in the 2012 presidential election. The cuts disproportionately impacted Black

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2016 Republican Party Primary Election, Off. of the Sec'y of State, https://elections.sos.state.tx.us/elchist273_state.htm (last visited June 24, 2021).

[79] *Race Summary Report: 2015 Constitutional Amendment Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist190_state.htm (last visited Jun 24, 2021).

[80] *Turnout and Voter Registration Figures (1970–Current)*, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/historical/70-92.shtml (last visited June 24, 2021).

[81] *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014).

[82] *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.); *id.* at 9 (Ginsburg, J., dissenting) (noting that while, "in *Purcell* and in recent rulings on applications involving voting procedures, this Court declined to upset a State's electoral apparatus close to an election," it should not do so in the instant case).

[83] *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014).

[84] *Veasey*, 830 F.3d at 256, 265.

[85] 573 U.S. 988 (2014).

Ohio voters, who not only relied more heavily on early voting than white voters but also relied more heavily on Sunday voting, which was eliminated by the law.[86]

As discussed, proving a Section 2 claim is difficult and resource intensive. Nevertheless, in June, just one month after we filed suit and three and a half months after the law was enacted, we moved for a preliminary injunction, submitting voluminous documents to support our claims, including several expert reports, extensive briefing, and hundreds of pages of exhibits. In a thorough opinion, weighing the competing evidence proffered by the state to defend the practice, the district court found that we had shown that the law was substantially likely to violate the Constitution and Section 2, and on September 4, 2014 (weeks in advance of the early voting period) issued a preliminary injunction mandating that early voting go forward without the state's cuts. The state appealed, and after emergency briefing, on September 24, the Sixth Circuit affirmed the injunction, finding, in a similarly thorough opinion, that the plaintiffs were likely to succeed on their VRA and constitutional arguments.[87]

Despite these findings on the merits, the Supreme Court stayed the injunction in a five to four vote—presumably on the basis of *Purcell*—just sixteen hours before early voting was to begin.[88] In contrast to the opinions of the lower courts, setting out detailed findings of fact and conclusions of law, the Supreme Court's stay was three sentences long, giving no clarity on what, precisely, it disagreed with or how the courts below had erred. The case ultimately settled, with the state agreeing to restore some of the reduced early voting opportunities.[89]

In the meantime, however, the 2014 general election went forward with the early voting cuts in place, with religious and community organizations scrambling to communicate the changes and to arrange transportation for their members. As Reverend Todd Davidson, of the Antioch Baptist Church in Cleveland noted, "[b]ecause of the last minute decision by the [Supreme C]ourt, [his church] was forced to hold off on their advertising because they did not want to give incorrect information."[90] The settlement, moreover, did not take effect until after primary elections in 2015. All told, over one hundred federal and state officials, including the state's governor, lieutenant governor, and secretary of state, were elected and over three million ballots were cast under a regime that two levels of the federal court system had concluded would

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[86] *Ohio State Conf. of NAACP v. Husted*, 43 F. Supp. 3d 808, 828–29 (S.D. Ohio 2014).

[87] *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated as moot* 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

[88] *Husted*, 573 U.S. 988. Although the Court provided no explanation for its reasons for staying the order, its order in *Husted* was one of four emergency orders issued relating to the 2014 elections, and opinions of individual Justices in two of those cases indicate that the Court was relying on *Purcell*. *See Frank v. Walker*, 574 U.S. 929, 929 (2014) (mem.) (Alito, J., dissenting) (discussing the "proximity of the upcoming general election"); *Veasey v. Perry*, 135 S. Ct. 9, 10–11 (2014) (mem.) (Ginsburg, J., dissenting) (arguing against application of *Purcell* to stay district court order); *see also* Hasen, *supra* note 16, at 428 ("[T]he apparent common thread [in the 2014 election cases] … was the Supreme Court's application of 'the *Purcell* principle.'").

[89] Settlement Agreement Among Pls. and Defs. Sec'y of State Jon Husted, *Ohio State Conf. of NAACP v. Husted*, (S.D. Ohio 2014) (No. 2:14-cv-00404-PCE-NMK), ECF No. 111-1, *available at* https://www.aclu.org/legal-document/naacp-v-husted-settlement-agreement-among-plaintiffs-and-defendant-secretary-state.

[90] DeNora Getachew, *Voting 2014: Stories from Ohio*, Brennan Ctr. (Dec. 5, 2014), https://www.brennancenter.org/our-work/research-reports/voting-2014-stories-ohio.

likely violate the U.S. Constitution and the Voting Rights Act—based solely on the *Purcell* principle.[91]

C. The *Purcell* principle has grown dramatically as a doctrine.

Since the Supreme Court's decision in *Purcell*, federal courts have increasingly cited the decision to preclude or stay court action on election rules where the impending election is imminent.[92] The following tables show the number of times courts denied or stayed injunctive relief on the basis of *Purcell*.[93]

Applications of *Purcell* – Presidential Elections		Applications of *Purcell* – Midterm Elections	
2008	2	2006	2
2012	6	2010	0
2016	11	2014	5
2020	58	2018	10

As the tables show, the number of times courts used *Purcell* to deny or stay injunctive relief almost doubled from just six in the 2012 elections to eleven cases in 2016. In 2020, this figure skyrocketed to fifty-eight—more than five times as many voting rights cases stopped due to *Purcell* in 2016. This trend is not limited to presidential elections; in the 2014 midterms, courts applied *Purcell* to deny or stay injunctive relief only five times, while in the 2018 midterms, this grew to ten instances.

But the explosion in *Purcell*-based denials or stays of injunction does not simply reflect courts relying on *Purcell* in an increasing number of cases. A closer look at these cases reveals an even more concerning trend: courts are now applying the *Purcell* principle almost

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[91] *2014 Elections Results*, Ohio Sec'y of State, https://www.ohiosos.gov/elections/election-results-and-data/2014-elections-results/ (last visited June 24, 2021); *2015 Elections Results*, Ohio Sec'y of State, https://www.ohiosos.gov/elections/election-results-and-data/2015-official-elections-results/ (last visited June 24, 2021)..

[92] *See* Hasen, *supra* note 16 at 429 (describing how the Supreme Court has "ma[de] the *Purcell* principle paramount" in election-related litigation); Adam Liptak, *Missing From Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. Times (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html?searchResultPosition=2 (characterizing *Purcell*'s development into "a near-categorical bar on late-breaking adjustments to state election procedures"); Andrew Vasquez, Note, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 Fordham Urb. L.J. 967, 996 (2021) (describing how the Supreme Court in April 2020 "significantly strengthened the *Purcell* principle, allowing lower courts to cite it as doctrine throughout the 2020 election.").

[93] Appendix A lists cases where relief was denied or a stay was granted by an appeals court, presumably on the basis of *Purcell*. As discussed further *infra*, these cases often arise without full briefing or argument, and courts frequently issue orders denying relief or staying a lower court's grant of relief without clarifying their reasoning. Therefore, courts may be applying *Purcell*, even if they do not make that explicit, meaning the list is likely underinclusive.

automatically to block preliminary relief in the period before an election. The Supreme Court has encouraged this development, articulating the *Purcell* principle as a rule that "lower federal courts should ordinarily not alter the election rules on the eve of an election."[94]

This trend is concerning because courts have a duty to litigants to conduct an individualized analysis, especially in the context of an application for preliminary relief. The current standard for whether or not a court should issue an injunction instructs courts to consider, among other things, whether the plaintiffs will suffer irreparable harm, whether "the balance of equities" counsel in favor of relief and whether the "injunction is in the public interest."[95] These factors are by definition specific to each case and each requested injunction. If anything, *Purcell* itself is a reminder to conduct this case-specific analysis: there, the lower court "was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases."[96] *Purcell* (the case) reminds courts to take a closer look at the issue before them, while *Purcell* (the principle) in its current form gives courts an excuse not to. Too often, courts have relied on the *Purcell* principle to avoid their responsibility to make the fact-specific inquiries and to weigh the relevant equities that are particular in each case. Instead, they apply a bright-line rule that too frequently works against voters.

Nominally, the *Purcell* principle addresses several concerns: it counsels against granting an injunction when there is a risk of voter confusion or administrative burden on elections officials in complying. It also encourages plaintiffs to move quickly, rather than asserting their rights at the last minute. And finally, it sets clear rules in advance of an election, so all parties will know what will and will not be subject to its instructions. This is not, however, how the *Purcell* principle has operated in practice.

1. The Purcell *principle has been applied even where there is no risk of voter confusion.*

Perhaps the principal reason animating the Supreme Court's concern about court intervention close to an election is the risk that changing election rules will create "voter confusion," a risk which increases "[a]s an election draws closer."[97] But individualized analysis as to whether the relief requested or ordered would in fact cause voter confusion has over time seemingly become optional. In fact, courts have stayed relief in cases where a court found that a practice or procedure was likely unconstitutional or a VRA violation and ordered relief *with no voter-facing implications*, *i.e.*, where there was no plausible risk that voters could have been confused, let alone disenfranchised, by the court-ordered relief.

An illustrative example is *Republican National Committee v. Democratic National Committee*.[98] In March 2020, as the deadly COVID-19 pandemic spread across the country and

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

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

[96] 549 U.S. at 4 (per curiam).

[97] *Id.* at 4–5.

[98] 140 S. Ct. 1205 (2020).

the world, the Democratic Party challenged various provisions of Wisconsin's election administration rules and procedures, arguing that existing rules would, in the unique context of the pandemic, unconstitutionally burden Wisconsin voters' fundamental right to vote in the April 7 Democratic presidential primary. Describing "the severe burdens that voters are sure to face in the upcoming election" and finding that the plaintiffs had shown that the absentee ballot receipt deadline was likely unconstitutional, the court granted a preliminary injunction.[99] Among other things, the injunction extended the deadline for the receipt of absentee ballots by six days, requiring the state to count ballots so long as they were received by April 13th (even if postmarked after Election Day).[100] Under the court's order, voters did not have to know anything new or do anything different to have their ballots counted—the order impacted only what elections officials would do with certain ballots on the back-end *after* voters had already mailed in their ballots, and reflected the novel public health threat and changed circumstances. Moreover, state elections officials specifically did not oppose extending the deadline, and represented to the court that the April 13th receipt deadline "would not impact the ability to complete the canvass in a timely manner."[101]

After a flurry of emergency appeals, the case reached the Supreme Court, which stayed the injunction the day before the election.[102] The Court's opinion relied on *Purcell*, not for the idea that there are considerations specific to election-related cases that weighed (in combination with the other equities) in favor of a stay in the case before it, but for the much broader idea that "lower federal courts should ordinarily not alter the election rules on the eve of an election." Missing from any of its discussion was the fact that last-minute changes were unavoidable, due to the spread of COVID-19. Also absent was the surge in absentee ballot requests made by Wisconsin voters as COVID-19 spread which elections officials were struggling to process in time. The preliminary relief made the best of a bad situation, by giving voters a few extra days for elections officials to deal with the last-minute surge of absentee ballot applications. There was no risk of voter confusion—absentee voters were merely waiting to *receive their ballot*, and the preliminary injunction would have allowed them to cast their ballot and have it counted. Instead, due to the Supreme Court's action, voters were forced to choose: risk exposure to a deadly virus which scientists were very early in understanding, or lose their right to vote. Wisconsin election officials would later acknowledge that 71 voters or poll-workers contracted COVID-19 as a result of the April 7 primary.[103]

An additional example is *Middleton v. Andino*,[104] another COVID-19-related challenge. There, plaintiffs challenged two aspects of South Carolina's absentee ballot process, the requirement that people who vote absentee must have a third-party witness sign their ballot and the requirement that voters have a qualifying "excuse" to vote absentee. The district court denied

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[99] *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 972, 976 (W.D. Wis. 2020).

[100] *Id.* at 976.

[101] *Id.* (quotations omitted).

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

[103] Common Dreams, *Study Shows Wisconsin's April 7 In-Person Election Resulted in Explosion of New COVID-19 Infections*, Milwaukee Indep. (May 23, 2020), http://www.milwaukeeindependent.com/syndicated/study-shows-wisconsins-april-7-person-election-resulted-explosion-new-covid-19-infections/.

[104] 488 F. Supp. 3d 261 (D.S.C. 2020).

preliminary relief as to the excuse requirement, citing *Purcell*, though it did enjoin the operation of the witness requirement.[105] As with the absentee ballot receipt deadline, this injunction did not require voters to do anything differently in order to have their ballots counted. Instead, it *removed* a step that would have otherwise caused a voter's ballot to be rejected on the back end—a step that had already been suspended for the prior election.[106] Because of this prior suspension, *Purcell*'s concerns about courts changing the status quo were not present, as "a new status quo [was] set in South Carolina for voting requirements," meaning that *failing* to issue the injunction would have created the change in voting practices and any subsequent confusion.[107] Insofar as any confusion might have existed, moreover, it would have been resolved in favor of *enfranchisement*—either the voter obtained a witness signature or they didn't; their ballot would count either way.

However, the state appealed—and when the case came before it, the Supreme Court stayed the injunction, in a short, unsigned order.[108] Although the Court as a whole did not explain its action, Justice Brett Kavanaugh wrote a short concurring opinion (speaking only for himself) explaining that *Purcell* compelled the result.[109]

2. *The* Purcell *principle has applied even where there is no administrative burden for election officials.*

Another factor animating the *Purcell* logic of disfavoring court-ordered election changes too close to an election is that late-breaking changes can impose significant administrative burdens on elections officials. But as with voter confusion, individualized analysis as to administrative burden has likewise seemingly become optional over time.

The *Middleton* case described above is a case in point. In addition to demonstrating that the injunction suspending the witness requirement would not cause any voter confusion (and certainly not any that would result in disenfranchisement), the evidence presented made clear that there would be little to no administrative burden to implement it. Particularly relevant was Marci Andino, the director of the state election commission, representing to the court "her support for suspending the Witness Requirement and [her] belie[f] it will not be difficult or costly."[110] Elections workers would have to open and process the absentee ballots whether or not the witness signature was being enforced—if anything, not having to confirm that the witness requirement had been satisfied removed a processing step.[111] In fact, Andino wrote to the state legislature in July 2020 recommending many voter changes, including "[r]emov[ing] the witness

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[105] *Id.* at 294 n.29 ("[T]he court decline[s] to enjoin the Election Day Cutoff due to concerns raised in *Purcell ...*").

[106] *Id.* at 289.

[107] *Id.* at 288.

[108] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.).

[109] *See id.* at 10 (Kavanaugh, J., concurring in grant of application for stay).

[110] *Middleton*, 488 F. Supp. 3d at 289, *stayed pending appeal*, 141 S. Ct. 9 (2020).

[111] In fact, Dir. Andino stated regarding the witness requirement, "[w]hile election officials check the voter's signature, the witness signature offers no benefit to election officials as they have no ability to verify the witness signature." *Id.* at 301 n.36.

requirement for absentee return envelopes"— the exact relief plaintiffs requested.[112] As discussed above, however, the injunction was stayed prospectively, likely on the basis of *Purcell.*

In fact, far from avoiding an administrative burden, applying *Purcell* can impose one. In the *Republican National Committee* case described above, Wisconsin elections officials attempted to react quickly to the enormous influx of absentee ballot requests in the early days of the COVID-19 pandemic. Although the district court's injunction directed them to accept ballots received after the statutory deadline, they notably did not appeal the decision. Instead, political actors who intervened in the lawsuit pursued the appeal, winning stays of portions of the injunction at the Seventh Circuit (requiring enforcement of the witness signature on absentee ballots) and the Supreme Court (requiring ballots to be postmarked by election day, rather than received six days later). Both courts cited *Purcell* in doing so,[113] without mentioning that their orders imposed additional, time-consuming tasks on elections officials, to verify witness signatures and review postmarks on absentee ballots, at a time when elections officials were already "heavily burdened."[114] Absent from these decisions was any acknowledgement of this administrative effort, though those same courts will cite such burdens to deny relief in other cases.[115]

3. The Purcell *principle has been applied even when plaintiffs move quickly.*

The problems that the aggressive and overly broad version of the *Purcell* principle have created are exacerbated by the fact that courts are applying the principle to bar relief even where plaintiffs are moving as quickly as they can and litigate the case expeditiously. In the sprawling North Carolina litigation discussed above, for example, we filed our lawsuit the day the bill was signed into law by then-Governor McCrory. There was simply no way to bring our challenge earlier. The Supreme Court still stayed preliminary relief for the 2014 election, presumably on the basis of *Purcell*.

The same was true in *Rangel-Lopez v. Cox*,[116] another ACLU case. Ford County, Kansas, offered only one voting site for nearly twenty years, at the Dodge City civic center.[117] On

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[112] Letter from Marci Andino (July 17, 2020), *Middleton*, 488 Supp. 3d (No. 3:20-cv-01730), ECF No. 78-1 at 3.

[113] *See Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 20-1539 & 20-1545, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205, 1207 (2020).

[114] *See Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting) ("Accommodating the surge of absentee ballot requests has heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters.").

[115] *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (mem.) (Roberts, C.J., concurring) (joined by three other Justices) (citing "the present strain imposed by this structural injunction on the time and resources of state and local officials, and the costs to the State will continue to add up over the coming weeks" as a reason to issue a stay); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (arguing against assuming decision-making over "tasks that belong to politically responsible officials").

[116] 344 F. Supp. 3d 1285 (D. Kan. 2018).

[117] Elections officials claimed that the Americans with Disabilities Act compelled it to close all other polling sites, as they were not accessible. For more on the factual background of this case, *see* ACLU of Kan., *KS LULAC and Rangel-Lopez v. Cox*, https://www.aclukansas.org/en/cases/ks-lulac-and-rangel-lopez-v-cox (last updated Jan. 25, 2019).

September 11, 2018, fewer than two months before the 2018 elections, the county clerk unilaterally decided to move the polling location—again, the sole voting site in the county—to another location four miles away. The new location was outside Dodge City limits (and more than 80% of the county's residents live in Dodge City), and 1.2 miles away from the nearest public transportation stop. Even worse, after making this decision, the county only began publicizing the change on September 28, 39 days before the election.

The ACLU of Kansas acted promptly, attempting to meet with the county clerk to coordinate non-partisan voter assistance, but the clerk cancelled the scheduled meeting and subsequently stopped responding to ACLU communications. After being stonewalled, the ACLU finally sued on October 26, less than one month after the change was made public. The application for preliminary relief was denied, due to *Purcell*; in the court's eyes, *Purcell* meant that the public interest would not be served by ordering the opening of an additional election site, due to the risk of confusion from competing notices.[118] In doing so, this case provides just one of many examples of how the principles that purportedly animate the *Purcell* doctrine have largely worked only in one direction: against voting rights plaintiffs. The clerk's decision to move a long-standing polling site shortly before an election meant that confusion was inevitable, but the court's rigid understanding of *Purcell* (*i.e.*, that *Purcell* warns only against the confusion that may arise if a *court* "insert[s] itself into this process"[119]) meant that it did not consider whether court action here was in fact necessary to mitigate voter confusion created by the government's last-minute changes. Such an approach is divorced from reality and has allowed courts to avoid their responsibility to make the fact-specific inquires and to weigh the relevant equities that are particular in each case in favor of a bright-line rule that too frequently works against voters.

4. The Purcell *principle is frequently described as a bright-line rule against courts intervening in upcoming elections – but it is not applied consistently or with real clarity on what it requires.*

Academic and legal commentors frequently describe the *Purcell* principle as a bright-line rule.[120] However, whether courts will actually apply *Purcell*——even in situations that seem to present the paradigm circumstances that counsel against intervention—remains deeply unpredictable.

For example, in the *Brakebill v. Jaeger*[121] litigation concerning North Dakota's Voter ID law, the district court issued an injunction prior to the 2018 primary elections. Months later, and one week before absentee voting began, the Eighth Circuit granted a stay of the injunction, allowing the state to require ID with a residential (rather than mailing) address, with severe

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[118] *Rangel-Lopez*, 344 F. Supp. 3d at 1290.

[119] *Id.*

[120] *Article III - Equitable Relief - Election Administration - Republican National Committee v. Democratic National Committee*, 134 Harv. L. Rev. 450, 457 (2020) ("Despite *Purcell*'s opaqueness, however, some courts, including the Supreme Court, have since treated it as establishing a bright-line rule against judicial intervention close to Election Day."), *see also* Erwin Chemerinsky, *Keynote Address Alaskan Election Law in 2020*, 37 Alaska L. Rev. 139, 141 (2020) ("But as... lower court judges have interpreted *Purcell*, it has become a bright-line rule.").

[121] *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

consequences on Native Americans living on reservations, who commonly use P.O. boxes. Here, the concerns that putatively counsel in favor of *Purcell* existed: voters had been told for months they could use IDs that were now unacceptable, so the stay would be deeply confusing and impose a substantial risk that some voters would show up at the polls to vote without a qualifying ID (or, as explicitly warned against in the *Purcell* decision itself, be "incentiv[ized] to remain away from the polls" altogether); the stay would also require North Dakota to revisit training for elections officials, despite the Secretary of State representing that revising materials would take several months; and voting would begin less than a week after the Eighth Circuit issued the stay. Unperturbed, the panel refused to apply *Purcell* and refrain from intervening and changing the rules already in place. Of course, when the plaintiffs brought subsequent litigation shortly afterward, taking at face value the Eighth Circuit's statement "the courthouse doors remain open" for residents without formal addresses affected by the stay,[122] their efforts were blocked by *Purcell*.[123] Eventually—eighteen months later—the plaintiffs settled with the state defendants, and now those without a street address may cast a ballot and voters with tribal IDs may use those as a permissible form of identification.[124]

Nor is the time period where the *Purcell* principle applies to bar relief clearly defined. Some courts take an expansive view: In *Richardson v. Texas Secretary of State*,[125] for example, the court denied preliminary relief that would have blocked enforcement of signature matching for absentee ballots and established a cure process on the basis of *Purcell* 56 days before the next election. In *Thompson v. DeWine*, the Sixth Circuit stayed a preliminary injunction preventing enforcement of certain requirements for ballot initiative signatures 161 days before the election, warning that while "the November election itself may be months away but important, interim deadlines … are imminent."[126] Given the context of qualifying ballot initiatives, this may be fair enough, but the court continued: "[M]oving or changing a deadline or procedure now will have inevitable, other consequences."[127] This logic—that the existence of any consequences of changing election procedures counsels against relief—expands the relevant *Purcell* window months in advance of elections, and given the frequency of primary and general elections, leaves little (if any) time for plaintiffs to challenge unlawful voting practices and obtain relief before those practices taint elections.

At the same time, however, courts have ignored or declined to apply the *Purcell* principle within much smaller windows. In *Carson v. Simon*, for example, the Eighth Circuit declined to apply *Purcell* in a decision issued *five days* before the 2020 general election.[128] There, voting

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[122] *Id.* at 561.

[123] *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018) (denying preliminary relief).

[124] *See* Campaign Legal Ctr., *Secretary of State and North Dakota Tribes Agree to Settle Voter ID Lawsuit*, https://campaignlegal.org/press-releases/secretary-state-and-north-dakota-tribes-agree-settle-voter-id-lawsuit (last visited June 25, 2021).

[125] No. SA-19-cv-00963-OLG, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020).

[126] 959 F.3d 804, 813 (6th Cir. 2020) (granting stay of preliminary injunction), *mot. to vacate stay denied*, No. 19A1054, 2020 WL 3456705 (U.S. June 25, 2020) (mem.).

[127] *Thompson*, 959 F.3d at 813.

[128] 978 F.3d 1051, 1061-61 (8th Cir. 2020).

rights plaintiffs and state officials entered into a consent decree, approved by a state court, extending the deadline for the receipt of absentee ballots to August 3, 2020, and state officials promptly began working with local elections officials to prepare. Then, a second set of plaintiffs brought a new lawsuit challenging the consent decree, moving for a preliminary injunction on September 24, which was denied on October 12. On appeal the Eighth Circuit enjoined the state court order, which had the effect of *moving up* the absentee ballot deadline, again just days before the election. It is hard to imagine a situation where *Purcell* is more applicable: here, the requested order came at the eleventh hour, risked a great deal of voter confusion, and imposed serious administrative burdens as state officials subsequently struggled to comply with the new ballot receipt deadline.[129]

D. When courts apply the *Purcell* principle on appeal, they exacerbate all of the problems of *Purcell*— and introduce new ones.

In theory, *Purcell* applies equally to district courts and courts of appeals, instructing them both to consider the risk of voter confusion and administrative burden in complying with a court order. However, in practice, the growing number of stays (where an appeals court prevents a lower court's order from taking effect) by courts of appeals and the Supreme Court, and the expansion of the doctrine into a bright-line rule creates the exact whipsaw effect that the *Purcell* principle theoretically aims to avoid.[130] The ways in which appeals courts have applied the *Purcell* principle, moreover, has introduced new problems.

***First,* voters may be disenfranchised if they act in reliance on a lower court order that is subsequently stayed by an appellate court on the basis of *Purcell*.** If, say, a district court enjoins enforcement of a witness requirement, a voter may mail in an absentee ballot without such a witness signature. If an appeals court then applies the bright-line version of *Purcell* that exists today to stay the injunction, that voter's ballot will be thrown out, merely because the voter relied in good faith on the court order. Appeals courts increasingly apply *Purcell* in this way: without consideration of whether the stay itself would cause the very confusion and attendant disenfranchisement that the Supreme Court was concerned with in the original decision.

In Wisconsin in 2014, for example, the district court in *Frank v. Walker* preliminarily blocked enforcement of the state's voter ID requirement,[131] the Seventh Circuit subsequently stayed that injunction.[132] But before the stay was issued, nearly 12,000 absentee voters' ballots were mailed *without* the ID instructions, and hundreds of absentee ballots had already been cast

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[129] Amy Forliti, *Court: Late Minnesota Absentee Ballots Must Be Separated*, MPR News (Oct. 29, 2020), https://www.mprnews.org/story/2020/10/29/court-late-minnesota-absentee-ballots-must-be-separated ("The court's decision is a tremendous and unnecessary disruption to Minnesota's election, just days before Election Day. This last-minute change could disenfranchise Minnesotans who were relying on settled rules for the 2020 election … ." (quoting the Secretary of State)).

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

[131] 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

[132] *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014) (mem.).

without a photocopy of accepted ID. In our petition for rehearing en banc on the stay, we pointed this out, and argued that by staying the injunction and bringing the ID requirement back, the court would effectively disenfranchise voters who did nothing more than follow the instructions that they were given by the state, in conformity with the law as it then stood.[133] But the en banc court deadlocked.[134] Fortunately, the Supreme Court lifted the stay.[135]

Although the Seventh Circuit did not rely on *Purcell* in issuing the stay in *Frank v. Walker*, the expansion of the *Purcell* doctrine into a hard-and-fast rule coupled with appeals courts' willingness to use *Purcell* to stay injunctions point to a world in which voters' reliance interests are disregarded solely because the injunction was ordered during some undefined period of time before an election.

This is not a far-fetched concern. In the 2020 *Middleton* case out of South Carolina discussed above, for example, the Fourth Circuit affirmed an injunction against the enforcement of the state's requirement that absentee ballots contain a signature of a witness. Absentee voters in South Carolina were then told as a result that they did not need a witness signature on their ballots, and some voted.[136] The Supreme Court then stayed the injunction prospectively—*i.e.*, permitting the counting of ballots without witness signatures that were cast while the injunction was in effect.[137] But Justices Gorsuch, Alito, and Thomas would have stayed the injunction altogether[138]—disenfranchising voters who did nothing more than rely on an injunction while it was in effect.

If appeals courts think of the *Purcell* doctrine as a bright-line rule—despite all of the inconsistencies in its application as discussed—they are more likely to stay an injunction. As this whipsaw litigation has become more and more common, reaching new heights in 2020, the effects spread beyond those voters covered by specific rulings. The fact that whipsaw orders and Supreme Court intervention has become so common itself casts doubt and creates uncertainty about (and ultimately limits the effectiveness of) any relief granted near an election. This in turn feeds the exact voter confusion that the *Purcell* principle is in theory used to avoid.

***Second*, the application of *Purcell* by appeals courts and the Supreme Court has been plagued by a lack of transparency, to the point where the emergency orders, including election-related orders, are referred to as "the shadow docket."[139]** Generally, a case in a federal court of appeals is decided after full briefing, oral argument (as need be), and judicial

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[133] *See* Emergency Mot. for Reh'g En Banc at 8–9, *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014) (No. 14-02058), ECF No. 66-1 at 13–14.

[134] *Frank v. Walker*, 769 F.3d 494 (7th Cir. 2014) (per curiam).

[135] *Frank v. Walker*, 574 U.S. 929 (2014) (mem.).

[136] Zak Koeske, *SC Absentee Voters Need a Witness. What Happens When Election Mailers Say Otherwise?*, The State (Oct. 14, 2020), https://www.thestate.com/news/politics-government/election/article246398885.html.

[137] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.).

[138] *Id.* at 10.

[139] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of L. & Liberty 1, 1 (2015) (coining the term); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019).

research and drafting, a process that can often take months. The product of this effort is a reasoned opinion that the parties can read and understand, one that assures the parties that their arguments got a fair hearing and provides guidance as to the rules of the road for litigants going forward.

Purcell and its applications depart sharply from this practice. In fact, the Supreme Court's development of the *Purcell* principle has occurred almost exclusively as a series of unsigned orders that lack such an explanation. In 2014, the first federal election cycle following *Shelby County*, the Supreme Court issued four rulings in election cases, all of which were unsigned and lacking in any explanation of the reasoning underlying the decisions.[140] In *Ohio NAACP v. Husted* , discussed above, the district court and Sixth Circuit both issued extremely thorough opinions discussing the merits of the case and explanation of why, despite the impending election, those courts were issuing or affirming preliminary relief.[141] In contrast, the Supreme Court's opinion staying the injunction was three sentences.[142] By 2020, the Court would issue more than a dozen emergency orders regarding applications for injunctive relief, and only one featured an opinion from the Court.[143] In these cases and others with silent orders, it falls upon practicing lawyers and academics to infer what was happening, based on the facts of the cases as well as individual statements by Justices concurring or dissenting from the order.[144] In turn, lower courts tasked with making sense of these brief, hastily-decided orders have begun citing them for the idea that *Purcell* is in fact the bright-line rule that it has turned into.[145] In other words, the Supreme Court has changed the law of emergency election through these orders, without acknowledging that is what it is doing.

Of course, elections impose external deadlines, so election-related litigation frequently comes before the higher courts as emergency applications for stays or relief as a matter of practical necessity. While there are limits to what courts can reasonably be expected to produce in the time frame that elections allow for, there are still ways to lessen the costs of the shadow docket. For example, courts regularly issue orders disposing of a case (such as an order granting

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[140] *North Carolina.*, 574 U.S. 926; *Husted*, 573 U.S. 988; *Veasey*, 135 S. Ct. 9; *Frank*, 574 U.S. 929.

[141] *Ohio State Conf. of NAACP*, 43 F. Supp., *aff'd*, 768 F.3d 524 (6th Cir. 2014).

[142] *Husted*, 573 U.S. 988.

[143] *Compare Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020) (mem.); *Republican Nat'l Comm. v. Common Cause RI*, 141 S. Ct. 206 (mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Raysor v. DeSanti*s, 140 S. Ct. 2600 (2020) (mem.); *Tex. Democratic Party v. Abbott,* 140 S. Ct. 2015 (2020) (mem.); *Thompson v. DeWine*, 207 L. Ed. 2d 1094 (June 25, 2020) (mem.); *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.); *Democratic Nat'l Comm. v. Wis. State Legisl.,* 141 S. Ct. 28 (2020) (mem.)*, with Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

[144] Of course, that applications of *Purcell* frequently draw concurrences or dissents explaining how the (unenumerated) majority is erring in one way or the other implies that there is in fact sufficient time for the Justices to draft something explaining what their reasoning is.

[145] *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (reasoning that two months is presumptively inside the window where *Purcell* applies to block relief because while, "*Frank* [*v. Walker*] did not give reasons, but *Republican National Committee* [*v. Democratic National Committee*] treated *Frank* as an example of a change made too late."); *see also* Vasquez, *supra* note 92, at 980 ("Despite the Court not providing reasoning and issuing [its four 2014 election orders] close to Election Day, lower courts have subsequently cited these cases as applying *Purcell*.") (citations omitted).

or denying an application for a stay) and then afterwards, release opinions explaining how the court arrived at that conclusion. However, the Supreme Court has declined to do this in its election cases applying *Purcell*, leaving the actual contours of the principle unclear.

The use of the shadow docket imposes real costs. As discussed, voting rights is one of the most complex areas of law that federal judges deal with, and cases are time-consuming and expensive to litigate. One reason a court may deny or stay relief is they view those claiming it as unlikely to succeed on the merits; another might be that though they feel plaintiffs have a strong likelihood of success, they are compelled by *Purcell* to deny relief. It would be better for all involved, including state defendants, if courts explained their reasoning so litigation could proceed more efficiently through the system.

Moreover, without written opinions, there's no guidance for litigants as to how they are supposed to seek relief without running into a *Purcell* problem. The lack of written opinions also means that there is no way to ensure that courts are applying the *Purcell* principle consistently. This detracts from the core persuasive force of judicial opinions, namely the idea that they are reasoned, neutral applications of legal principles. Instead, unsigned emergency orders with no stated reasons lend credence to criticism that judges are playing politics, rather than applying the law.

Conclusion

The inadequacies of post-enforcement relief indicate the need for a revival of preclearance. While Section 2 is an important tool, cases brought under it by definition are reacting to changes that have already been implemented. Such cases are time and resource-intensive to litigate, often requiring experts and extensive briefing. In contrast, the preclearance regime under the Voting Rights Act—which operated for decades—allowed the federal government to be nimbler in protecting the right to vote, blocking discriminatory changes to election rules before they went into effect and became much more difficult to undo. Importantly, state actors subject to preclearance also benefit from the process: case-by-case, after-the-fact voting rights litigation is expensive for defendants, just as it is for civil rights plaintiffs.

For states not subject to preclearance, lowering the standard to win a preliminary injunction would strengthen the protections of Section 2. The John Lewis Voting Rights Act that was introduced in July 2020, following Rep. Lewis' death, would lower the standard that plaintiffs need to meet to win a preliminary injunction, requiring them to "raise[] a serious question" as to the merits of their claim, as opposed to proving they are "likely to succeed on the merits."[146] One way to think of this is as a precaution: because voting rights are so crucial and violations cannot be remedied after the fact, making it easier to win preliminary relief merely errs on the side of caution in protecting these civil rights. Nor would this standard encourage frivolous litigation: Section 2 claims remain resource-intensive to litigate and prove, meaning that this would only allow courts to block changes that are legally questionable while the case is fully litigated.

[146] John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. § 8(b)(4) (2020); *Winter*, 555 U.S. at 20.

The *Purcell* principle represents a concerning development in the federal courts' treatment of voting issues. The original decision, a narrow order dealing with the relationship between district and appeals courts, has metastasized into a per-se ban on federal courts issuing any injunction in the weeks before an election. While there are situations where forbearing is appropriate due to the potential for confusion, this represents an abdication of responsibility that courts have to protect our most sacred rights. Moreover, the development of this so-called principle in a series of unsigned and unexplained orders, resolving some of the most closely-watched and politically-charged cases that come before the federal court system, damages the stature of the courts in the eyes of the parties and citizens. When law is made in this fashion, there is no way to know whether courts are applying the principle consistently and no guidance for litigants on how to successfully seek relief.

One final note, although much of what is discussed here concerns the workings of the federal courts and the manner in which they issue injunctions, Congress has the power to act and the responsibility, under the Constitution, to ensure that the right to vote is not abridged. It is clear, settled law that Congress has the power to set standards for the issuance of injunctions,[147] which the Supreme Court reaffirmed as recently as 2000.[148] In the context of voting rights, and the long struggle to expand access to the ballot, Congress has an even clearer role. The Fourteenth and Fifteenth Amendments to the U.S. Constitution guarantee citizens the right to due process and equal protection under law, and the right to vote free from disenfranchisement on the basis of race, respectively.[149] Both of these amendments also state, unambiguously, that Congress shall have the power to enforce their guarantees.[150] If other institutions tasked with protecting constitutional rights, such as the court system and state governments, are failing to live up to their duties, this body has the responsibility to intervene.

I thank you again for the opportunity to testify in front of this subcommittee on these important issues.

[147] *Yakus v. United States*, 321 U.S. 414, 441 (1944).

[148] *Miller v. French*, 530 U.S. 327, 350 (2000) ("Congress clearly intended to … preclud[e] courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles.").

[149] U.S. Const. amends. XIV, XV.

[150] U.S. Const. amends. XIV § 5, XV § 2.

Appendix A

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NEOCH v. Blackwell	Ohio	6th Cir.	2006	Y	10/26/06	2006 WL 8424056	Y	Granting Stay	10/31/06	467 F.3d 999	N				11/7/06
US v. Philadelphia	Philadelphia	E.D. Pa.	2006	N	11/3/06	2006 WL 3922115	N								11/7/06
State ex rel. Applegate	County	S.D. Oh.	2008	N	2/6/08	2008 WL 341300	N								3/4/08
Kelly v. Johnson	Montana	D. Mont.	2008	N	10/9/08	2008 WL 11394337	N								11/4/08
Boustani v. Husted	Ohio	N.D. Oh.	2012	N	11/6/12	2012 WL 5414454	N								11/6/12
SEIU v. Husted	Ohio	6th Cir.	2012	Y	10/26/12	906 F.Supp.2d 745	Y	Granting Stay	10/31/12	698 F.3d 341	N				11/6/12
Lair v. Bullock	Montana	9th Cir.	2012	Y	10/3/12	903 F.Supp.2d 1077	Y	Granting Stay	10/16/12	697 F.3d 1200	N				11/6/12
NJ Press Ass'n v. Guadagno	NJ	D. N.J.	2012	N	10/23/12	2012 WL 5498019	N								11/6/12
Dem-Repub. Org'n of NJ v. Guadagno	NJ	D. N.J.	2012	N	10/11/12	900 F.Supp.2d 447	N								11/6/12
Colon-Marrero v. Conty-Perez	Puerto Rico	1st Cir.	2012	N	9/18/12	2012 W1 8134091	Y	Affirming	10/18/12	703 F.3d 134	N				11/6/12
Veasey v. Perry (2014)	Texas	U.S.	2014	Y	10/11/14	71 F.Supp.3d 627	Y	Granting Stay	10/14/14	769 F.3d 890	Y	Denying Vacatur	10/18/14	135 S. Ct. 9	11/4/14
Husted v. Ohio State Confernce of the NAACP	US	U.S.	2014	Y	9/4/14	43 F.Supp.3d 808	Y	Affirming	9/24/14	768 F.3d 524	Y	Granting Stay	9/29/14	135 S.Ct. 42	11/4/14
Frank v. Walker (2014)	Wisconsin	U.S.	2014	Y	4/29/14	17 F.Supp.3d 837	Y	Granting Stay	9/12/14	766 F.3d 755	Y	Vacating Stay	10/9/14	574 U.S. 929	11/4/14
Davis v. Commonwealth Elec. Comm'n	NMI	D. N.M.I.	2014	N	10/27/14	2014 WL 12767673	N								11/4/14
League of Women Voters of N. Carolina v. North Carolina (2014)	North Carolina	U.S.	2014	N	8/8/14	997 F.Supp.2d 322	Y	Reversing, Issue Injunction	10/1/14	769 F.3d 224	Y	Granting Stay	10/8/14	574 U.S. 927	11/4/14
Stop Hillary PAC v. FEC	US	E.D. Va.	2015	N	12/21/15	166 F.Supp.3d 643	N								11/8/16
Greater Birmingham Ministries v. Alabama	Alabama	N.D. Ala.	2016	N	2/17/16	161 F.Supp.3d 1104	N								3/1/16
Crookston v. Johnson	Michigan	6th Cir.	2016	Y	10/24/16	2016 WL 9281943	Y	Granting Stay	10/28/16	841 F.3d 396	N				11/8/16
Pa. Democratic Party v. Republican Party of Pa.	Pennsylvania	E.D. Pa.	2016	N	11/7/16	2016 WL 6582659	N								11/8/16
Frank v. Walker (2016)	Wisconsin	7th Cir.	2016	Y	7/19/16	196 F.Supp.3d 893	Y	Granting Stay	8/10/16	2016 WL 4224616	N				11/8/16
Ariz. Democratic Party v. Reagan	Arizona	D. Ariz.	2016	N	11/3/16	2016 WL 6523427	N								11/8/16

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Repubulican Party of Pa. v. Cortes	Pennsylvania	E.D. Pa.	2016	N	11/3/16	218 F.Supp.3d 396	N								11/8/16
Silberberg v. Bd. of Elections of NY	New York	S.D.N.Y.	2016	N	11/3/16	216 F.Supp.3d 411	N								11/8/16
Manship v. Va. Bd. of Elections	Virginia	E.D. Va.	2016	N	11/3/16	2016 WL 6542842	N								11/8/16
Feldman v. Ariz. Secretary of State Office	Arizona	U.S.	2016	N	10/11/16	2016 WL 5900127	Y	Reversing, Issue Injunction	11/4/16	843 F.3d 366	Y	Granting Stay	11/5/16	137 S.Ct. 446	11/8/16
League of Women Voters of US v. Newby	KS, GA, AL	D.C. Cir.	2016	N	6/29/16	195 F.Supp.3d 80	Y	Issue stay	9/9/16	671 F. App'x 820	N				11/8/16
N. Carolina State Conference of the NAACP v. McCrory (2016)	North Carolina	U.S.	2016	N	4/25/16	182 F.Supp.3d 320	Y	Reversing, Issue Injunction	7/29/16	831 F.3d 204	Y	Denying Stay	8/31/16	137 S.Ct. 27	11/8/16
Patino v. Pasadena	Pasadena, Texas	5th Cir.	2017	Y	1/6/17	230 F.Supp.3d 667	Y	Denying stay	2/3/17	677 F.App'x 950	N				4/24/17
Thompson v. Alabama	Alabama	M.D. Ala.	2017	N	7/28/17	2017 WL 3223915	N								7/31/17
Brakebill v. Jaeger	North Dakota	U.S.	2018	Y	4/3/18	2018 WL 1612190	Y	Granting Stay	9/10/18	905 F.3d 553	Y	Denying Vacatur	10/9/18	139 S. Ct. 10	11/6/18
Michigan A. Philip Randolph Institute v. Johnson	Michigan	U.S.	2018	Y	8/1/18	326 F.Supp.3d 532	Y	Granting Stay	9/5/18	749 F.App'x 342	Y	Denying Vacatur	9/7/18	139 S. Ct. 50	11/6/18
Spirit Lake Tribe v. Jaeger	North Dakota	D.N.D.	2018	N	11/1/18	2018 WL 5722665	N								11/6/18
Rangel-Lopez v. Cox	Ford Cty, KS	D. Kan.	2018	N	11/1/18	344 F.Supp.3d 1285	N								11/6/18
Higginson v. Becerra	Poway, CA	S.D. Cal.	2018	N	10/2/18	2018 WL 4759204	N								11/6/18
League of Women Voters of Ariz. v. Reagan	Arizona	D. Ariz.	2018	N	9/18/18	2018 WL 4467891	N								11/6/18
Curling v. Kemp	Georgia	N.D. Ga.	2018	N	9/17/18	334 F.Supp.3d 1303	N								11/6/18
Short v. Brown	California	9th Cir.	2018	N	4/25/18	2018 WL 1941762	Y	Denying Stay	6/22/18	893 F.3d 671	N				11/6/18
Benisek v. Lamone	Maryland	U.S.	2018	N	8/24/17	266 F.Supp.3d 799	*Three judge panel*				Y	Affirming Denial	6/18/17	138 S.Ct. 1942	11/6/18
League of United Latin American Citizens of Ariz. v. Reagan	Arizona	D. Ariz.	2018	N	11/14/18	2018 WL 5983009	N								11/16/18
Miracle v. Hobbs	Arizona	9th Cir.	2019	N	12/16/19	427 F.Supp.3d 1150	Y	Affirming Denial	5/1/20	808 F.App'x 470	N				11/3/20

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Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Reg'n & Elecs.	Gwinnett Cty.	N.D. Ga.	2020	N	3/2/20	446 F.Supp.3d 1111	N								3/2/20
Republican Nat'l Comm. v. Democratic Nat'l Comm.	Wisconsin	U.S.	2020	Y	4/2/20	451 F.Supp.3d 952	Y	Granting Stay	4/3/20	2020 WL 3619499	Y	Granting Stay	4/6/20	140 S.Ct. 1205	4/7/20
Taylor v. Milwaukee Elec'n Comm'n	Milwaukee, WI	E.D. Wis.	2020	N	4/6/20	452 F.Supp.3d 818	N								4/7/20
League of Women Voters of Ohio v. LaRose (2020 Primary)	Ohio	S.D. Oh.	2020	N	4/3/20	2020 WL 6115006	N								4/28/20
Garcia v. Griswold	Colorado	D. Colo.	2020	N	5/7/20	2020 WL 4003648	N								5/7/20
Paher v. Cegavske	Nevada	D. Nev.	2020	N	5/27/20	2020 WL 2748301	N								6/9/20
Libertarian Party of Ill. v. Cadigan	Illinois	7th Cir.	2020	Y	4/23/20	455 F.Supp.3d 738	Y	Denying Stay	8/20/20	824 F.App'x 415	N				6/22/20
Curtin v. Va. State Bd. of Elecs.	Virginia	E.D. Va.	2020	N	5/29/20	463 F.Supp.3d 653	N								6/23/20
Merrill v. People First of Ala. (pre-trial)	Alabama	U.S.	2020	Y	6/15/20	467 F.Supp.3d 1179	Y	Denying Stay	6/25/20	815 F.App'x 505	Y	Granting Stay	7/2/20	141 S.Ct. 190	7/14/20
Detroit Unity Fund v. Whitmer	Michigan	6th Cir.	2020	N	8/17/20	2020 WL 6580458	Y	Affirming	9/2/20	819 F.App'x 421	N				7/28/20
Memphis A. Philip Randolph Institute v. Hargett (2020 Primary)	Tennessee	M.D. Tenn.	2020	N	7/21/20	473 F.Supp.3d 789	N								8/6/20
Common Cause Rhode Island v. Gorbea	Rhode Island	U.S.	2020	Y	7/30/20	2020 WL 4365608	Y	Denying Stay	8/7/20	970 F.3d 11	Y	Denying Vacatur	8/13/20	141 S.Ct. 206	9/8/20
S. Carolina Progressive Network Educ. Fund v. Andino	South Carolina	D. S.C.	2020	N	10/9/20	2020 WL 5995325	N								10/4/20
Namphy v. Desantis	Florida	N.D. Fla.	2020	N	10/9/20	2020 WL 5994268	N								10/6/20
Trump v. Wisc. Elec. Comm'n	Wisconsin	7th Cir.	2020	N	12/12/20	2020 WL 7318940	Y	Affirming	12/24/20	983 F.3d 919	Y				11/3/20
Wood v. Raffensperger	Georgia	11th Cir.	2020	N	11/20/20	2020 WL 6817513	Y	Affirming	12/5/20	981 F.3d 1307	Y				11/3/20
Mi Familia Vota v. Abbott	Texas	5th Cir.	2020	Y	10/27/20	2020 WL 6304991	Y	Granting Stay	10/30/20	2020 WL 6498958	N				11/3/20
Org'n for Black Struggle v. Ashcroft	Missouri	8th Cir.	2020	Y	10/9/20	2020 WL 6325722	Y	Granting Stay	10/23/20	978 F.3d 603	N				11/3/20
Common Cause Ind. v. Lawson (poll hours)	Indiana	7th Cir.	2020	Y	9/22/20	2020 WL 5671506	Y	Granting Stay	10/23/20	978 F.3d 1036	N				11/3/20

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Memphis A. Philip Randolph Institute v. Hargett (2020 General)	Tennessee	6th Cir.	2020	Y	9/9/20	2020 WL 5412126	Y	Denying Stay	10/19/20	977 F.3d 566	N				11/3/20
Richardson v. Texas Sec'y of State	Texas	5th Cir.	2020	Y	9/8/20	2020 WL 5367216	Y	Granting Stay	10/19/20	978 F.3d 220	N				11/3/20
Arkansas United v. Thurston	Arkansas	W.D. Ark.	2020	N	11/3/20	2020 WL 6472651	N								11/3/20
Mi Familia Vota v. Hobbs	Arizona	9th Cir.	2020	Y	10/5/20	2020 WL 5904952	Y	Granting Stay	10/13/20	977 F.3d 948					11/3/20
People First of Ala. v. Merrill (post-trial)	Alabama	U.S.	2020	Y	9/30/20	2020 WL 5814455	Y	Granting Stay	10/13/20	2020 WL 6074333	Y	Granting Stay	10/21/20	141 S.Ct. 25	11/3/20
Common Cause Ind. v. Lawson (ballot receipt)	Indiana	7th Cir.	2020	Y	9/29/20	2020 WL 5798148	Y	Granting Stay	10/13/20	977 F.3d 663	N				11/3/20
Tex. League of United Latin American Citizens v. Hughs	Texas	5th Cir.	2020	Y	10/9/20	2020 WL 5995969	Y	Granting Stay	10/12/20	978 F.3d 136	N				11/3/20
A. Philip Randolph Institute of Ohio v. LaRose	Ohio	6th Cir.	2020	Y	10/6/20	2020 WL 5909804	Y	Granting Stay	10/9/20	831 F. App'x 188	N				11/3/20
Democratic Nat'l Comm. v. Bostelmann	Wisconsin	U.S.	2020	Y	9/21/20	2020 WL 5627186	Y	Granting Stay	10/8/20	977 F.3d 639	Y	Denying Vacatur	10/26/20	141 S. Ct. 28	11/3/20
Ariz. Democratic Party v. Hobbs	Arizona	9th Cir.	2020	Y	9/10/20	2020 WL 5423898	Y	Granting Stay	10/6/20	976 F.3d 1081	N				11/3/20
New Ga. Proj. v. Raffensperger	Georgia	11th Cir.	2020	Y	8/31/20	2020 WL 5200930	Y	Granting Stay	10/2/20	976 F.3d 1278	N				11/3/20
TARA v. Hughs	Texas	5th Cir.	2020	Y	9/25/20	2020 WL 5747088	Y	Granting Stay	9/30/20	976 F.3d 564					11/3/20
Andino v. Middleton	South Carolina	U.S.	2020	Y	9/18/20	2020 WL 5591590	Y	Denying Stay	9/25/20	976 F.3d 403	Y	Granting Stay	10/5/20	141 S. Ct. 9	11/3/20
Jones v. Desantis	Florida	U.S.	2020	Y	5/24/20	462 F.Supp.3d 1196	Y	Granting Stay	7/1/20	2020 WL 4012843	Y	Denying Vacatur	7/16/20	140 S.Ct. 2600	11/3/20
Thompson v. Dewine	Ohio	U.S.	2020	Y	5/19/20	461 F.Supp.3d 712	Y	Granting Stay	5/26/20	959 F.3d 804	Y	Denying Vacatur	6/25/20	2020 WL 3456705	11/3/20
Bognet v. Sec'y Commonwealth of Pa.	Pennsylvania	3rd Cir.	2020	N	10/28/20	2020 WL 6323121	Y	Affirming	11/13/20	980 F.3d 336	Y				11/3/20
Wince v. Thurston	Arkansas	E.D. Ark.	2020	N	10/28/20	2020 WL 6324743	N								11/3/20
League of Women Voters of Ark. v. Thurston	Arkansas	W.D. Ark.	2020	N	10/26/20	2020 WL 6269598	N								11/3/20
Hoffard v. Cnty. of Cochise	Cochise Cty., AZ	D. Ariz.	2020	N	10/22/20	2020 WL 6555235	N								11/3/20
Pascua Yaqui Tribe v. Rodriguez	Arizona	D. Ariz.	2020	N	10/22/20	2020 WL 6203523	N								11/3/20

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Public Interst Law Found. v. Boockvar	Pennsylvania	M.D. Pa.	2020	N	10/20/20	2020 WL 6144618	N								11/3/20
Texas Voters Alliance v. Dallas Cnty.	Texas	E.D. Tex.	2020	N	10/20/20	2020 WL 6146248	N								11/3/20
Moore v. Circosta	North Carolina	U.S.	2020	N	10/14/20	2020 WL 6063332	Y	Affirming Denial	10/20/20	978 F.3d 93	Y	Denying Stay	10/28/20	141 S.Ct. 46	11/3/20
Carson v. Simon	Minnesota	8th Cir.	2020	N	10/12/20	2020 WL 6018957	Y	Reversing and	10/29/20	978 F.3d 1051	N				11/3/20
Donald Trump for President v. Way	New Jersey	D. N.J.	2020	N	10/6/20	2020 W1 5912561	N								11/3/20
Democracy N. Carolina v. N. Carolina Bd. of Elections	North Carolina	M.D. N.C.	2020	N	10/2/20	2020 WL 6589362	N								11/3/20
League of Women Voters of Ohio v. LaRose (2020 General)	Ohio	S.D. Oh.	2020	N	9/27/20	2020 WL 5757453	N								11/3/20
Yazzie v. Hobbs	Arizona	9th Cir.	2020	N	9/25/20	2020 W1 5834757	Y	Affirming Denial	10/15/20	977 F.3d 964	N				11/3/20
Common Cause v. Thomsen	Wisconsin	W.D. Wis.	2020	N	9/23/20	2020 WL 5665475	N								11/3/20
Minn. RFL Caucus v. Freeman	Minnesota	D. Minn.	2020	N	9/14/20	2020 WL 5512509	Y	*Pending Appeal*							11/3/20
Eason v. Whitmer	Michigan	E.D. Mich.	2020	N	9/9/20	2020 WL 5405878	N								11/3/20
Tully v. Okeson	Indiana	7th Cir.	2020	N	8/21/20	2020 WL 4926439	Y	Affirming Denial	10/6/20	977 F.3d 608	N				11/3/20
Kishore v. Whitmer	Michigan	6th Cir.	2020	N	7/8/20	2020 WL 3819125	Y	Affirming	8/24/20	972 F.3d 745	N				11/3/20
McCarter v. Brown	Oregon	D. Ore.	2020	N	6/20/20	2020 WL 4059698	N								11/3/20
Fair Maps Nevada v. Cegavske	Nevada	D. Nev.	2020	N	5/29/20	463 F.Supp.3d 1123	N								11/3/20
Arizonans for Fair Elecs v. Hobbs	Arizona	9th Cir.	2020	N	4/17/20	454 F.Supp.3d 910	Y	Denying Stay	5/5/20	CoA Dkt. 37	N				11/3/20
Little v. Reclaim Idaho	Idaho	U.S.	2020	Y	6/26/20	469 F.Supp.3d 988	Y	Denying Stay	7/9/20	CoA Dkt. 14-1	Y	Granting Stay	7/30/20	140 S.Ct. 2616	9/7/20
Clarno v. People Not Politicians	Oregon	U.S.	2020	Y	7/13/20	472 F.Supp.3d 890	*Appeal directly to S.Ct.*				Y	Granting Stay	8/11/20	141 S.Ct. 206	7/2/20
Tex. Democratic Party v. Abbott	Texas	U.S.	2020	Y	5/19/20	461 F.Supp.3d 406	Y	Granting Stay	6/4/20	961 F.3d 389	Y	Denying Vacatur	6/26/20	140 S. Ct. 2015	7/14/20
Black Voters Matter Fund v. Raffensperger	Georgia	N.D. Ga.	2021	N	12/16/20	2020 WL 7394457	N								1/5/21