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## 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

Andrew Vazquez

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**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**

*Andrew Vazquez\**

Introduction .....	968
I. The <i>Purcell</i> Principle and State Emergency Powers .....	974
A. Judicial Analysis of Election Laws and the <i>Purcell</i> Principle .....	974
i. Jurisprudence Surrounding Election Laws and Requests for Preliminary Relief .....	975
ii. How <i>Purcell</i> Altered the Preliminary Injunctive Relief Analysis.....	977
iii. The Development of the <i>Purcell</i> Principle Through the “Shadow Docket” .....	978
B. The State Emergency Powers Doctrine and Its Relevance to Election Law .....	982
i. Emergency Powers in Constitutional Law.....	983
ii. When Emergencies Impact Elections .....	987
iii. State Responses to COVID-19 .....	990
II. Requests for Preliminary Relief from Election Laws During the COVID-19 Pandemic .....	992
A. The Application of the <i>Purcell</i> Principle During the COVID-19 Pandemic .....	992
i. <i>Republican National Committee v. Democratic             National Committee</i> .....	993

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ii. <i>Merrill v. People First of Alabama</i> .....	994
B. The Combination of the <i>Purcell</i> Principle and the State Emergency Powers Doctrine .....	996
i. <i>Andino v. Middleton</i> .....	997
ii. <i>Democratic National Committee v. Wisconsin         State Legislature</i> .....	998
iii. <i>Moore v. Circosta</i> .....	999
iv. Looking Back at <i>RNC</i> and <i>Merrill</i> .....	1000
C. Lower Court Usage of the <i>Purcell</i> Principle .....	1002
D. A Confusing, Gaping Hole in Voting Rights Protections .....	1004
III. The Combination of <i>Purcell</i> and State Emergency Powers Is Ripe for Abuse .....	1008
A. Fixing the <i>Purcell</i> Principle.....	1009
B. Courts Should Limit the <i>Purcell</i> Principle and State Emergency Powers.....	1011
C. Analyzing the Georgia 2022 Election Hypothetical Under the Egregious Abuse of State Emergency Power Framework.....	1014
Conclusion.....	1018
Appendix.....	1020

## INTRODUCTION

In 2020, the COVID-19 pandemic devastated communities across the United States.<sup>1</sup> The deadly disease infected approximately 20 million and killed more than 300,000 people as of December 31, 2020.<sup>2</sup> In the same year, Joe Biden and Donald Trump competed in the presidential election,<sup>3</sup> while down the ballot, hundreds of politicians competed in House, Senate, state, and local elections.<sup>4</sup> In the months leading up to Election Day, state officials struggled to implement safe

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1. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Feb. 10, 2021, 7:37 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [https://perma.cc/AY2R-XGQL].

2. See *Cumulative Cases*, JOHNS HOPKINS UNIV. & MED. (Mar. 18, 2021, 6:00 AM), <https://coronavirus.jhu.edu/data/cumulative-cases> [https://perma.cc/5DM8-7SS7].

3. See *Presidential Election, 2020*, BALLOTPEdia, [https://ballotpedia.org/Presidential\\_election,\\_2020](https://ballotpedia.org/Presidential_election,_2020) [https://perma.cc/5SE2-YSYL] (last visited Mar. 13, 2021).

4. See *Congressional, State, and Local Elections*, USA.GOV (July 21, 2021), <https://www.usa.gov/midterm-state-and-local-elections> [https://perma.cc/Q6E8-FDAV].

procedures to facilitate voting.<sup>5</sup> Although the majority of U.S. citizens have historically voted in person and on Election Day,<sup>6</sup> election officials sought to provide alternative access to the ballot box while also minimizing voters' exposure to COVID-19.<sup>7</sup> In many states, these changes included expanded access to absentee ballots and extended early voting, resulting in record-breaking voter turnout in the 2020 general election.<sup>8</sup>

As a result of the November election, Democrat Joe Biden won the presidency, and the Democrats maintained control of the House of Representatives.<sup>9</sup> Additionally, Democrats won 48 Senate seats, and Republicans won 50 Senate seats.<sup>10</sup> In Georgia, both Senate seats went to runoff elections, which occurred on January 5, 2021.<sup>11</sup> The runoff elections determined the control of the Senate.<sup>12</sup> If the Republican candidates won one or both of the seats, the Republicans would have control of the Senate;<sup>13</sup> if the Democrats won both seats, the Democrats would have control, with Vice President Kamala Harris

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5. See Molly Ball, *How COVID-19 Changed Everything About the 2020 Election*, TIME (Aug. 6, 2020, 6:45 AM), <https://time.com/5876599/election-2020-coronavirus/> [<https://perma.cc/9ZDC-77TF>].

6. See Drew DeSilver, *Amid Pandemic, the Long Decline of In-Person Voting on Election Day Is Likely to Accelerate This Year*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/amid-pandemic-the-long-decline-of-in-person-voting-on-election-day-is-likely-to-accelerate-this-year/> [<https://perma.cc/3Z8U-ZEDD>] (noting that in 1996, 89.5% of U.S. voters reported casting a ballot in person on Election Day).

7. See *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEdia [https://ballotpedia.org/Changes\\_to\\_election\\_dates\\_procedures\\_and\\_administration\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_2020](https://ballotpedia.org/Changes_to_election_dates_procedures_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020) [<https://perma.cc/N48T-T2GJ>] (last visited Mar. 13, 2021).

8. See Lazaro Gamio et al., *Record-Setting Turnout: Tracking Early Voting in the 2020 Election*, N.Y. TIMES (Nov. 12, 2020), <https://www.nytimes.com/interactive/2020/us/elections/early-voting-results.html> [<https://perma.cc/ZV72-WDDN>].

9. See *Presidential Election, 2020*, *supra* note 3; *United States Congress Elections, 2020*, BALLOTPEdia, [https://ballotpedia.org/United\\_States\\_Congress\\_elections\\_2020](https://ballotpedia.org/United_States_Congress_elections_2020) [<https://perma.cc/YVV8-3UGB>] (last visited Mar. 1, 2021).

10. See *United States Congress Elections, 2020*, *supra* note 9.

11. See Naaman Zhou, *Georgia Senate Runoff Elections: How They Work and Why They Matter*, GUARDIAN (Jan. 4, 2021, 6:04 AM), <https://www.theguardian.com/us-news/2020/dec/30/georgia-senate-runoff-elections-guide-how-they-work-why-they-matter> [<https://perma.cc/BA5K-DHH8>].

12. See *id.* (“When there is a 50–50 tie, the deciding vote is cast by the vice president. That will be Democrat Kamala Harris after the Biden administration is sworn in on 20 January.”).

13. See *id.*

casting the deciding vote.<sup>14</sup> Control of the Senate was momentarily important for both parties.<sup>15</sup> A Democratic majority in the Senate would enable then-President-elect Joe Biden to provide people much-needed relief from COVID-19.<sup>16</sup> Alternatively, a Republican-controlled Senate could block the Democratic agenda, just as it did under President Barack Obama.<sup>17</sup> Pollsters expected the elections to be particularly close and hypothesized that a few hundred voters could decide the fate of the Senate.<sup>18</sup> In the end, both Georgia Democratic Senators narrowly won, giving Democrats control over the Senate.<sup>19</sup>

For the November 2020 general election, Georgia's Secretary of State made significant efforts to facilitate early and absentee voting.<sup>20</sup> For example, the state mailed every voter no-excuse absentee ballots and placed absentee ballot drop-off boxes all across the state.<sup>21</sup> This resulted in unprecedented absentee voter turnout.<sup>22</sup> Additionally, election administrators opened numerous early in-person polling sites to reduce lines and crowding on Election Day,<sup>23</sup> producing record voter turnout and showing that early voting was one of the few safe and secure voting procedures for many voters.<sup>24</sup>

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See, e.g.,* Harry Enten, *Why Georgia's Senate Runoffs Are Too Close to Call*, CNN (Dec. 21, 2020, 7:21 AM), <https://www.cnn.com/2020/12/21/politics/georgia-runoffs-analysis/index.html> [<https://perma.cc/QW3W-V3ET>].

19. *See Georgia Senate Runoff Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/01/05/us/elections/results-georgia-runoffs.html> [<https://perma.cc/HPR6-EZRH>] (last visited Mar. 13, 2021).

20. *See Secretary of State Raffensperger Reopens Grants for Absentee Ballot Drop Boxes*, GA. SEC'Y STATE, [https://sos.ga.gov/index.php/elections/secretary\\_of\\_state\\_raffensperger\\_reopens\\_grants\\_for\\_absentee\\_ballot\\_drop\\_boxes](https://sos.ga.gov/index.php/elections/secretary_of_state_raffensperger_reopens_grants_for_absentee_ballot_drop_boxes) [<https://perma.cc/8PVU-CA87>] (last visited Mar. 13, 2021).

21. *See id.*

22. *See* Haley Garrett, *Georgia Secretary of State Reveals Record Breaking Early Voting, Absentee Ballot Turnout*, WGXA NEWS (Oct. 19, 2020), <https://wgxa.tv/news/local/georgia-secretary-of-state-reveals-record-breaking-early-voting-absentee-ballot-turnout> [<https://perma.cc/2UC4-B8LR>].

23. *See, e.g.,* Stephen Fowler, *Fulton County Launches Massive Early Voting Campaign*, GA. PUB. BROAD. (Oct. 1, 2020, 2:14 PM), <https://www.gpb.org/news/2020/10/01/fulton-county-launches-massive-early-voting-campaign> [<https://perma.cc/8DJU-JSVN>]; Olivia Morley, *Board of Elections Firms Up Locations for Early Voting and Weekend Voting*, ROME NEWS-TRIB. (Sept. 22, 2020), [https://www.northwestgeorgianews.com/rome/news/local/board-of-elections-firms-up-locations-for-early-voting-and-weekend-voting/article\\_1c2ab2c6-fd06-11ea-9616-b7ce91fe6cfa.html](https://www.northwestgeorgianews.com/rome/news/local/board-of-elections-firms-up-locations-for-early-voting-and-weekend-voting/article_1c2ab2c6-fd06-11ea-9616-b7ce91fe6cfa.html) [<https://perma.cc/TH8P-HZ4C>].

24. *See* Garrett, *supra* note 22.

Despite the pandemic worsening in the two months between the general election and the runoff elections, Georgia election officials attempted to eliminate no-excuse absentee voting<sup>25</sup> and restricted access to early voting for the runoff elections.<sup>26</sup> In Cobb County, for the runoff elections, election administrators eliminated 6 of the 11 early voting sites that serviced its 537,000 voters.<sup>27</sup> Yet, early voting was especially important in Cobb County, where voters experienced some of the longest early voting lines in Georgia during the general election.<sup>28</sup> Cobb County had initially planned to have nine early voting sites but increased it to 11 after record-breaking in-person voter turnout and extremely long lines at the start of early voting.<sup>29</sup> Even with 11 poll sites, voters waited as long as ten hours at early voting sites.<sup>30</sup>

To ensure that Cobb County's new poll closures for the runoff elections did not inhibit marginalized voters from accessing the franchise, the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF) and other civil rights groups sent an open letter on December 7 (December 7 Letter) to the county's election officials.<sup>31</sup> The letter asserted that the poll site closures "disproportionately impact[ed] Cobb County's Black and Latinx voters and expose[d] Cobb County to litigation."<sup>32</sup> Three of the closures were in South Cobb, where many Black and Latinx

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25. See Michael King, *Georgia Secretary of State Wants to Get Rid of No-Excuse Absentee Voting*, 11ALIVE (Dec. 28, 2020, 9:09 AM), <https://www.11alive.com/article/news/politics/elections/georgia-secretary-of-state-wants-to-get-rid-of-no-excuse-absentee-voting/85-ce5ace48-7b66-4fd5-b99e-c522e0e0bf1c> [<https://perma.cc/Q8BC-JFRP>].

26. See Vanessa Williams, *Voting Rights Groups Alarmed After Cobb County Cuts Half of its Early-Voting Sites for Ga. Senate Runoffs*, WASH. POST (Dec. 7, 2020, 7:04 PM), <https://www.washingtonpost.com/politics/2020/12/07/voting-rights-groups-alarmed-after-cobb-county-reduced-early-voting-sites-ga-senate-runoffs/> [<https://perma.cc/AF4U-67W6>].

27. See *id.*; *infra* appendix.

28. See Letter from NAACP Legal Def. & Educ. Fund, Inc. et al., to Cobb Cnty. Bd. of Comm'rs et al. 1, 2 (Dec. 7, 2020) [hereinafter Dec. 7 Letter], <https://www.naacpldf.org/wp-content/uploads/Letter-to-Cobb-Cnty-re-Reduction-in-Advance-Voting-Locations-1.pdf> [<https://perma.cc/VG4R-RRNN>].

29. See *id.*

30. See *id.* (citing Ken Tabous, *Voters Wait Up to 10 Hours in Line to Vote in Critical Georgia County*, NEWSWEEK (Oct. 21, 2020, 4:58 PM), <https://www.newsweek.com/voters-wait-10-hours-line-vote-critical-georgia-county-1541132> [<https://perma.cc/6SGQ-WJTP>]).

31. See *id.*

32. *Id.* at 7.

voters are concentrated.<sup>33</sup> These early voting changes would make it “difficult, if not impossible, for many Black and Latinx voters” to cast their ballots before Election Day.<sup>34</sup>

Cobb County officials contended that they closed the polling sites because they did not have enough poll workers due to COVID-19, the holiday season, and the amount of work required.<sup>35</sup> However, the December 7 Letter indicated that there were enough poll workers to staff the early poll sites and offered to help train and recruit additional poll workers.<sup>36</sup> As a result of mounting pressure, Cobb County officials announced that they would add two early voting sites during the final week of early voting and relocate another polling place to South Cobb.<sup>37</sup> Although the organizations welcomed the additional poll sites, they also stated the response was “insufficient,” as Cobb County continued to have near two-hour lines and some of the lowest voter turnout in the state.<sup>38</sup> Importantly, one of the attorneys who drafted the December 7 Letter observed that “[i]t wasn’t until there was an overt threat of litigation did the county agree to take steps to mitigate the situation.”<sup>39</sup>

Nationwide, voting rights advocates sent similar letters and threats of litigation to protect vulnerable voter populations that did not have the resources to litigate their own claims.<sup>40</sup> However, recent Supreme

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33. *See id.* at 4–7.

34. *Id.* at 5.

35. *See* Sanya Mansoor, *Georgia Polling Site Closures Reducing Access to Early Voting Among Working Class and Minority Voters, Civil Rights Groups Say*, TIME (Dec. 26, 2020, 6:29 PM), <https://time.com/5923898/georgia-early-voting-polling> [<https://perma.cc/QC9F-9FBR>] (“In Cobb, elections director Janine Eveler said in a statement ‘between COVID, the workload, and the holidays, we have simply run out of people.’”).

36. *See* December 7 Letter, *supra* note 28, at 7.

37. *See* Mansoor, *supra* note 35.

38. *Id.*

39. *Id.* (quoting Michael Pernick, an attorney for the NAACP Legal Defense Fund).

40. *See, e.g.*, December 7 Letter, *supra* note 28; *2020 Letters to Poll Workers and Police Regarding Voter Intimidation at the Polls*, ACLU CONN., <https://www.acluct.org/en/2020-letters-poll-workers-and-police-regarding-voter-intimidation-polls> [<https://perma.cc/R5DS-8CJX>] (last visited Mar. 13, 2021); *Advocacy: Letters to Election Officials*, BRENNAN CTR. FOR JUST. (Oct. 23, 2010), <https://www.brennancenter.org/our-work/research-reports/advocacy-letters-election-officials> [<https://perma.cc/KUC2-VELR>]; *Voting Rights*, LAWS.’ COMM. FOR C.R. UNDER L., <https://lawyerscommittee.org/project/voting-rights-project/> [<https://perma.cc/54RX-W7PU>] (last visited Mar. 13, 2021) (“Through coordinated and integrated programs of litigation, voter protection, advocacy, and education, the Voting Rights Project has had a tremendous positive impact on communities of color,

Court opinions indicate that the threat of litigation over election administration decisions made close to Election Day will soon be moot, even if the claims are meritorious.<sup>41</sup>

As a result of the copious changes to election laws made in response to the pandemic, there was an unprecedented amount of litigation during the 2020 election.<sup>42</sup> The Supreme Court, heavily relying on its 2006 ruling in *Purcell v. Gonzalez*,<sup>43</sup> gave great deference to state legislatures to administer the 2020 election.<sup>44</sup> This Note explores how the Supreme Court has taken the actual text of the *Purcell* opinion and morphed it into the *Purcell* principle, a bright-line rule against judicial intervention in elections close to Election Day.<sup>45</sup> This principle is based on a desire to prevent voter confusion or upset expectations regarding the rules of an election.<sup>46</sup> Reliance on the *Purcell* principle creates a gap in judicial protections on the right to vote and leaves the door open for abuses of state power.<sup>47</sup>

This Note examines the Court's application of the *Purcell* principle during the COVID-19 pandemic. Further, this Note identifies the implications the combination of *Purcell* and the state emergency powers doctrine pose to future elections.

Part I explains the *Purcell* principle by (1) exploring the Court's initial decision in *Purcell* and (2) examining how courts applied the *Purcell* principle in subsequent cases. Part I then discusses executive emergency powers in constitutional and state law, examines examples of recent emergencies affecting elections, and summarizes actions states and cities have taken to combat the COVID-19 pandemic.

Part II analyzes the Supreme Court's reliance on *Purcell* during the COVID-19 pandemic. Part II explains the intersection of state emergency powers and cases applying the *Purcell* principle that arose during the 2020 general election. Part II illustrates that the *Purcell*

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low-income communities, youth, people with disabilities, and other traditionally disenfranchised populations.”).

41. See *infra* Section II.D.

42. See *Election Litigation: COVID-19 and Emergency Election Litigation*, FED. JUD. CTR., <https://www.fjc.gov/content/350168/covid-19-and-emergency-election-litigation> [<https://perma.cc/FU7J-SCXP>] (last visited Mar. 16, 2021).

43. 549 U.S. 1 (2006) (per curiam); see also *infra* Part II.

44. See *infra* Part II.

45. See David Gans, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC'Y 19 (2020), <https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf> [<https://perma.cc/D3HK-RT2R>]; Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016); *supra* Section I.A.ii.

46. See Hasen, *supra* note 45, at 435.

47. See *infra* Part III.



principle is inconsistently applied by lower courts and leaves a gap in voting rights protections.

Part III then calls on the Supreme Court to clarify the bounds of the *Purcell* principle to allow for consistent lower-court application. Furthermore, Part III shows the imminent potential for abuse of state emergency powers through a hypothetical scenario. Finally, for challenges to election laws during an emergency, Part III proposes a new framework that would allow plaintiffs to make a showing of egregious abuse of state emergency powers through an unconstitutional manipulation of electoral processes. This Note concludes by applying this new framework to a hypothetical scenario, demonstrating why the Supreme Court must overcome the *Purcell* principle and state emergency powers.

### I. THE *PURCELL* PRINCIPLE AND STATE EMERGENCY POWERS

The development of the *Purcell* principle over the last two decades and its deviation from the process for evaluating preliminary requests for relief are crucial to understanding its application during the COVID-19 pandemic. This Part summarizes the scope of state emergency powers and gives examples of how the Supreme Court analyzed cases regarding emergency powers in the past. Additionally, this Part covers recent emergencies affecting elections and the use of state emergency powers to address risks associated with COVID-19. This Part also details both the *Purcell* principle and state emergency powers to provide essential context to understanding how combining these two concepts is problematic for future emergencies.

#### A. Judicial Analysis of Election Laws and the *Purcell* Principle

Election law jurisprudence developed over decades as the Supreme Court's understanding of the right to vote and freedom of association expanded.<sup>48</sup> As the Court's conceptualization of election law evolved, so did the administration of elections.<sup>49</sup> This Section summarizes the development of the *Purcell* principle and demonstrates its effect on judicial evaluation of election laws close to Election Day.

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48. See generally SAMUEL ISSACHAROFF, PAMELA S. KHAN & RICHARD H. PILES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (5th ed. 2016).

49. See *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/PZ8G-PAKC>].

*i. Jurisprudence Surrounding Election Laws and Requests for Preliminary Relief*

In *Yick Wo v. Hopkins*,<sup>50</sup> the Supreme Court stated, “the political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights.”<sup>51</sup> Generally, laws that infringe on fundamental rights receive strict scrutiny.<sup>52</sup> Between the 1960s and 1980s, the Court applied a strict scrutiny standard to laws that infringed on fundamental rights.<sup>53</sup> However, in *Anderson v. Celebrezze*<sup>54</sup> and *Burdick v. Takushi*,<sup>55</sup> the Court limited its use of strict scrutiny in election law cases. The Supreme Court devised the *Anderson-Burdick* test to balance the competing interests of the individual’s right to vote against the State’s justifications for burdening the right to vote with the challenged regulation.<sup>56</sup>

In *Burdick*, the Court held that, in considering election regulations, a court must first consider “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.”<sup>57</sup> If the court deems the burden “severe,”<sup>58</sup> then strict scrutiny — not the *Anderson-Burdick* standard — is applied.<sup>59</sup> If not, then the court must (1) “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule”; (2) “determine the legitimacy and strength of each of those interests”; and (3) “consider the extent to which those interests make it necessary to burden the plaintiff’s

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50. 118 U.S. 356 (1886).

51. *Id.* at 370.

52. *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

53. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper*, 383 U.S. at 670.

54. 460 U.S. 780 (1983).

55. 504 U.S. 428 (1992).

56. *Compare Harper*, 383 U.S. at 789, *with Burdick*, 504 U.S. at 434. For example, a photo identification law is a burden on the right to vote and a state may argue that a justification for this burden is to protect against voter fraud. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200–01 (2008).

57. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

58. *Compare Crawford*, 553 U.S. at 198–200 (characterizing a photo identification requirement to vote as not severe given that most voters already possess the requisite identification), *with Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000) (finding that a California statute severely burdened political parties’ right to associate when it forced them to allow voters to vote in their primaries who were not registered with the party).

59. *See Burdick*, 504 U.S. at 434.

rights.”<sup>60</sup> Modern courts use the *Anderson-Burdick* test to analyze election laws that plaintiffs claim burden their right to vote under the First and Fourteenth Amendments.<sup>61</sup>

Many election law cases concern requests for preliminary injunctions or temporary restraining orders (TROs) to prevent the enforcement of a challenged procedure before an upcoming election.<sup>62</sup> When district courts evaluate requests for preliminary injunction or TROs, they weigh four factors: whether (1) the plaintiff has a substantial likelihood of success on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the plaintiff’s favor, and (4) an injunction is in the public interest.<sup>63</sup> The most important factors in this analysis are the first and the second: the likelihood of success on the merits and the irreparable harm to the plaintiff absent preliminary relief.<sup>64</sup> When courts assess a plaintiff’s likelihood of success on the merits of an emergency relief request, they use the *Anderson-Burdick* test to weigh the burden on the individual’s First and Fourteenth Amendment rights against the state’s justifications for burdening those rights.<sup>65</sup> Then, based on these factors, the court may issue preliminary relief.<sup>66</sup>

If a district court grants the plaintiff’s requested preliminary injunction or TRO, the defendant may appeal for a stay pending appeal.<sup>67</sup> A stay pending appeal prevents the preliminary injunction from going into effect before a full appeal is heard.<sup>68</sup> A stay is part of the “traditional equipment for the administration of justice” and allows an appellate court the necessary time to review a lower court’s order.<sup>69</sup> The Supreme Court characterized a stay as an “‘intrusion into the ordinary processes of administration and judicial review,’ and

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60. *Anderson*, 460 U.S. at 789.

61. See Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC’Y (Sept. 24, 2019), <https://www.acslaw.org/expertforum/a-tale-of-two-election-law-standards/> [<https://perma.cc/K8TJ-Q8GA>].

62. See Gans, *supra* note 45, at 18.

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

64. See *id.* at 20–21.

65. See, e.g., *Kishore v. Whitmer*, 972 F.3d 745, 749–50 (6th Cir. 2020); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607–08 (8th Cir. 2020).

66. See *Winter*, 555 U.S. at 20.

67. See *Nken v. Holder*, 556 U.S. 418, 426 (2009).

68. See *id.* at 426–27.

69. See *id.* at 427.

accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’”<sup>70</sup>

Typically, the issuance of a stay is left to the court’s discretion and depends on the facts of each case.<sup>71</sup> When examining a stay, courts consider the *Nken* factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.<sup>72</sup>

The *Nken* factors are similar to those for issuing a preliminary injunction “because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.”<sup>73</sup> If the district court issues a stay, it is essentially dispositive for the outcome of an election law case because the appellate court usually renders a final judgment on the merits after Election Day.<sup>74</sup> The only chance for an appellant to overturn a stayed order is by appealing to the Supreme Court; however, the Court would only vacate the stay if the lower court “demonstrably” erred in its application of “accepted standards.”<sup>75</sup>

#### *ii. How Purcell Altered the Preliminary Injunctive Relief Analysis*

The *Purcell* opinion changed how courts evaluate requests for preliminary relief and stays pending appeal when an election date is approaching. In *Purcell*, the petitioners filed for a preliminary injunction of an Arizona referendum that required individuals to show photo identification as proof of citizenship for voter registration and to cast in-person ballots on Election Day.<sup>76</sup> The trial court denied the injunction and did not issue findings of fact or a legal conclusion.<sup>77</sup> The petitioners filed an appeal with the Ninth Circuit, which issued a four-

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70. *Id.* (citations omitted) (quoting *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); and then quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

71. *See id.* at 433.

72. *Id.* at 434.

73. *Id.*

74. *See Gans, supra* note 45, at 16 (“In voting rights and other election law cases, the decision to grant a stay may, for all intents and purposes, be outcome-determinative, at least for the current election cycle.”).

75. *See Hasen, supra* note 45, at 433 (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring)).

76. *See Purcell v. Gonzalez*, 549 U.S. 1, 1–2 (2006).

77. *See id.* at 3.

sentence opinion enjoining Arizona's law pending full hearings.<sup>78</sup> The district court then denied the request for a preliminary injunction.<sup>79</sup>

The petitioners appealed to the Supreme Court, which vacated the Ninth Circuit's order.<sup>80</sup> In its analysis, the Court underscored three essential elements that the Ninth Circuit should have considered.<sup>81</sup> First, the Court stressed that the Ninth Circuit "was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures."<sup>82</sup> Next, the Court emphasized that judicial orders close to Election Day might create voter confusion, especially when courts issue conflicting orders.<sup>83</sup> Lastly, although the Ninth Circuit issued its injunction before the district court's opinion, the Court asserted that the court of appeals should have given deference to the district court.<sup>84</sup> In its final sentence, the Court emphasized the importance of the election's timing and "the inadequate time to resolve factual disputes."<sup>85</sup>

The *Purcell* opinion added a special consideration into the analysis for preliminary injunctions and stay considerations for election law: the proximity of the election.<sup>86</sup> While the *Purcell* opinion initially deviated only slightly from the procedure for analyzing preliminary injunctions or stay proceedings,<sup>87</sup> subsequent cases morphed it into the doctrine known today as the "*Purcell* principle."<sup>88</sup>

### *iii. The Development of the Purcell Principle Through the "Shadow Docket"*

In *Purcell*, the Court instructed that special considerations be taken into account when a court considers judicial intervention before an election.<sup>89</sup> Nowhere in its opinion did the Court articulate a hard-and-fast rule mandating that courts never intervene when Election Day is

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78. *See id.*

79. *See id.* at 3–4.

80. *See id.* at 6.

81. *See id.* at 4–5.

82. *Id.* at 5.

83. *See id.* at 4–5.

84. *See id.* at 5.

85. *Id.* at 5–6.

86. *See id.*

87. *See* Hasen, *supra* note 45, at 440–44; *supra* Section I.A.i.

88. *See* Hasen, *supra* note 45, at 447–52.

89. *See Purcell*, 549 U.S. at 5–6.

close at hand.<sup>90</sup> Rather, the Court merely stated that the closer an election is, the greater the risk that court orders will increase voter confusion,<sup>91</sup> and cautioned courts that the proximity of the election should be a factor “in addition to the harms attendant upon issuance or nonissuance of an injunction.”<sup>92</sup> Between 2006 and 2014, the Supreme Court cited *Purcell* in four majority opinions,<sup>93</sup> only one of which stood for the proposition that “practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.”<sup>94</sup> Although the *Purcell* principle was not utilized extensively during this period, nonetheless, in 2014, the Supreme Court relied on the actual text of the *Purcell* opinion and morphed it into the *Purcell* principle: a bright-line rule against intervening in elections close to Election Day.<sup>95</sup>

The Court developed the *Purcell* principle exclusively through its summary orders process.<sup>96</sup> The summary orders process, otherwise known as the Supreme Court’s “shadow docket,” refers to emergency and summary decisions outside of the Court’s main docket of cases.<sup>97</sup> The summary orders process is characterized by expedited hearings and hastily decided cases without full briefing.<sup>98</sup> These cases are then decided with little to no explanation of their rulings.<sup>99</sup> Thus, the Court’s development of the *Purcell* principle through the summary orders process provides a weak jurisprudential foundation for the doctrine.<sup>100</sup>

In the 2014 election cycle, the Supreme Court applied the *Purcell* principle in four cases through the summary orders process. These

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90. *See id.* at 5.

91. *See id.* at 4–5.

92. *Id.* at 4; *see also* Hasen, *supra* note 45, at 439.

93. *See* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Riley v. Kennedy*, 553 U.S. 406 (2008).

94. *Riley*, 553 U.S. at 426.

95. *See* Gans, *supra* note 45, at 10–15.

96. *See id.* at 3, 10–15.

97. *See* Mark Walsh, *The Supreme Court’s ‘Shadow Docket’ Is Drawing Increasing Scrutiny*, AM. BAR ASS’N (Aug. 20, 2020, 9:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny> [<https://perma.cc/B6KZ-BPD5>].

98. *See* Gans, *supra* note 45, at 15.

99. *See id.* In contrast, the Court’s normal adjudication process is lengthy and meticulous with briefings from both sides and amici. *See id.*

100. *See id.* at 16.

cases come from four different states: Ohio,<sup>101</sup> North Carolina,<sup>102</sup> Wisconsin,<sup>103</sup> and Texas.<sup>104</sup> The Court decided these cases without issuing accompanying opinions. Despite the Court not providing reasoning and issuing these decisions close to Election Day,<sup>105</sup> lower courts have subsequently cited these cases as applying *Purcell*.<sup>106</sup> These cases are also cited by scholars as cementing the *Purcell* principle in election law jurisprudence.<sup>107</sup> Two of the four cases are especially illustrative of how the Supreme Court applied the *Purcell* principle in the 2014 election cycle.

In 2014, the Court relied on the *Purcell* principle in *Frank v. Walker* when it vacated the stay of a preliminary injunction of Wisconsin's voter ID law.<sup>108</sup> In *Frank*, the district court ruled that Wisconsin's voter ID law violated the U.S. Constitution.<sup>109</sup> It held that not only did approximately 300,000 Wisconsin voters not have the proper identification to meet the ID requirement but also that these voters had no easy way of obtaining such identification, putting the requirement in violation of the Equal Protection Clause of the Fourteenth Amendment<sup>110</sup> and Section 2 of the Voting Rights Act.<sup>111</sup> Thus, it issued an injunction of the ID requirement.<sup>112</sup> Wisconsin appealed for a stay of the order, which the Seventh Circuit granted.<sup>113</sup>

The Supreme Court then granted certiorari and vacated the stay, restoring the district court's injunction of Wisconsin's voter ID law.<sup>114</sup>

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101. See *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014) (mem.).

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

103. See *Frank v. Walker*, 574 U.S. 929 (2014) (mem.).

104. See *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.).

105. The 2014 general election took place on November 4, 2014. See *United States Congress Elections, 2014*, BALLOTPEDIA, [https://ballotpedia.org/United\\_States\\_Congress\\_elections,\\_2014](https://ballotpedia.org/United_States_Congress_elections,_2014) [<https://perma.cc/N2XW-XGZY>] (last visited Mar. 21, 2021).

106. See, e.g., *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 470–71 (5th Cir. 2020); *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366 (9th Cir. 2016); *Tex. Voters All. v. Dall. Cnty.*, No. 4:20-CV-00775, 2020 WL 6146248 (E.D. Tex. Oct. 20, 2020); *Eason v. N.Y. State Bd. of Elections*, No. 16-CV-4292, 2016 WL 11706706 (S.D.N.Y. Oct. 7, 2016).

107. See, e.g., Gans, *supra* note 45, at 10–12. See generally Hasen, *supra* note 45, at 447–56.

108. See *Frank*, 574 U.S. 929.

109. See *Frank v. Walker*, 17 F. Supp. 3d 837, 879 (E.D. Wis. 2014).

110. See *id.* at 862–63.

111. See *id.* at 870.

112. See *id.* at 897–900.

113. See *Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014).

114. See *Frank v. Walker*, 574 U.S. 929, 929 (2014) (mem.).

The Court offered no justification for its order, which it issued slightly less than a month before Election Day.<sup>115</sup> Justice Alito dissented from the Court's decision to vacate the stay but conceded "the proximity of the upcoming general election" was a "colorable basis" for the Court's action.<sup>116</sup> Although the *Purcell* opinion is not a bright-line rule, it was the only Supreme Court precedent at the time that stood for the principle that the Court should not intervene close to an Election Day.<sup>117</sup> Here, Justice Alito clearly stated that the majority's decision was based on the proximity of the election.<sup>118</sup>

That same year, the Court again relied on the *Purcell* principle in *Veasey v. Perry*.<sup>119</sup> In *Veasey*, the petitioners alleged that Texas's voter ID requirement violated the Constitution because it unconstitutionally burdened minority and indigent voters.<sup>120</sup> In an 81-page opinion, the district court held that the state intentionally discriminated against minorities in violation of the Voting Rights Act<sup>121</sup> and the Equal Protection Clause.<sup>122</sup> The Fifth Circuit then stayed the order and allowed Texas to use the voter ID law in the 2014 election.<sup>123</sup> In its stay, the Fifth Circuit concluded that Texas was likely to succeed on the merits because the district court's stay was issued prior to the election.<sup>124</sup> Looking at the Supreme Court's prior orders from this cycle,<sup>125</sup> the Fifth Circuit deduced that the *Purcell* principle applied in cases brought so close to the election.<sup>126</sup>

The petitioners asked the Supreme Court to vacate the stay, but the Court refused without explanation.<sup>127</sup> Justice Ruth Bader Ginsburg

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115. *See id.*

116. *Id.* (Alito, J., dissenting); *see also Article III – Equitable Relief – Election Administration – Republican National Committee v. Democratic National Committee*, 134 HARV. L. REV. 450, 457 (2020) (citing *Frank*, 574 U.S. at 929).

117. *See Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006).

118. *See Frank*, 574 U.S. at 929.

119. 135 S. Ct. 9 (2014) (mem.); *see also* Hasen, *supra* note 45, at 428 (finding that the *Veasey* Court applied the *Purcell* principle).

120. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 633–34 (S.D. Tex. 2014).

121. *See id.* at 694 (citing the Voting Rights Act of 1965, 52 U.S.C. § 10301).

122. *See id.* at 657–58. A Texas Representative admitted that "it was 'common sense' . . . that minorities were going to be adversely affected by [the voter identification law]." *Id.* at 702.

123. *See Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).

124. *See id.* at 895.

125. *See id.* at 894–95 (first citing *Frank v. Walker*, 574 U.S. 929 (2014) (mem.); then citing *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.); and then citing *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014) (mem.)).

126. *See Veasey*, 769 F.3d at 894.

127. *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.).



wrote a dissent criticizing the Fifth Circuit's application of the *Purcell* principle.<sup>128</sup> She highlighted the extensive factual record the trial court based its decision upon, to which the Fifth Circuit gave almost no deference.<sup>129</sup> Justice Ginsburg noted that this was in direct contradiction of the *Purcell* opinion.<sup>130</sup> She declared that the majority and the Fifth Circuit had relied on the potential disruption to Texas's election processes, despite a showing that the state implemented the law with the intent to disenfranchise minority voters.<sup>131</sup>

Although the Court did not explain its reasoning, lower courts cite *Frank* and *Veasey* when ruling on election laws close to Election Day.<sup>132</sup> The Court used the summary orders process as the primary vehicle to develop the *Purcell* principle, deciding these cases without full briefing or consideration.<sup>133</sup> Nowhere in the *Purcell* opinion did the Court assert a hard-and-fast rule that courts should *never* intervene close to Election Day.<sup>134</sup> Nevertheless, through these rulings in its "shadow docket," the Court has transformed the *Purcell* principle into a bright-line rule.<sup>135</sup>

### B. The State Emergency Powers Doctrine and Its Relevance to Election Law

This Section explores federal and state emergency powers and discusses state emergency lawmaking in the context of election law. This Section then focuses on emergency situations impacting elections prior to 2020. Lastly, this Section summarizes state actions taken in response to COVID-19.

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128. *See id.* at 10–12 (Ginsburg, J., dissenting).

129. *See id.* at 10.

130. *See id.* (“*Purcell* held only that courts must take careful account of considerations specific to election cases, not that election cases are exempt from traditional stay standards.” (internal citation omitted)).

131. *See id.* “The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that . . . risks denying the right to vote to hundreds of thousands of eligible voters.” *Id.* at 12.

132. *See* *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 368 (9th Cir. 2016); *Taylor v. Milwaukee Election Comm’n*, 452 F. Supp. 3d 818, 828 (E.D. Wis. 2020); *Eason v. N.Y. State Bd. of Elections*, No. 16-CV-4292, 2016 WL 11706706, at \*1 (S.D.N.Y. Oct. 7, 2016).

133. *See* Gans, *supra* note 45, at 3.

134. *See id.* at 9.

135. *See id.* at 15–18.

*i. Emergency Powers in Constitutional Law*

Emergency powers refer to state and federal government's heightened authority to respond to specific threats to public safety and welfare.<sup>136</sup> For example, the Constitution delegates power to the federal government to deal with specific emergencies such as war, insurrection, and domestic violence.<sup>137</sup> Congress has the power to declare war, raise and support armies, provide and maintain a Navy, and call forth the militia to execute the laws of the union.<sup>138</sup> The President is the commander-in-chief of the military.<sup>139</sup> Furthermore, each state has its own powers and statutes that deal with emergencies.<sup>140</sup> The Supreme Court interprets federal emergency powers very broadly in times of emergency, such as during war.<sup>141</sup> This is known as the "state emergency powers doctrine," which holds that governments have increased power to address foreign and domestic emergencies.<sup>142</sup> However, after the emergency is over, the Court rolls back its extreme deference to the federal government and states.<sup>143</sup> On this point, acclaimed political scientist Clinton Rossiter once said, "[t]here do[es] indeed seem to be two Constitutions — one for war, one for peace."<sup>144</sup> The Court's actions during the Civil War and World War II exemplify this,<sup>145</sup> as these two wars encapsulate the most drastic use of emergency powers by the federal government.<sup>146</sup> The radical actions taken during these emergencies parallel those taken to combat the COVID-19 pandemic in their scope and impact on everyday life in the United States.

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136. See *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. 1 (2019), [https://www.brennancenter.org/sites/default/files/2019-10/2019\\_10\\_15\\_EmergencyPowersFULL.pdf](https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf) [<https://perma.cc/E82E-Q5S6>].

137. See William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMPAR. L. 389, 390 (1990).

138. See U.S. CONST. art. I, § 8.

139. See U.S. CONST. art. II, § 2.

140. See *Legislative Oversight of Emergency*, NAT'L CONF. ST. LEGISLATURES (Mar. 18, 2021), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> [<https://perma.cc/3BYF-LT56>].

141. See Fisch, *supra* note 137, at 394–96. See generally CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (expanded ed. 1976).

142. See Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 76–84 (1983).

143. See Fisch, *supra* note 137, at 394–96.

144. ROSSITER, *supra* note 141, at 129.

145. See Fisch, *supra* note 137, at 394–96; see also ROSSITER, *supra* note 141, at 11–130.

146. See L. ELAINE HALCHIN, CONG. RSCH. SERV., NATIONAL EMERGENCY POWERS 5 (2020), <https://fas.org/sgp/crs/natsec/98-505.pdf> [<https://perma.cc/9VK8-DEST>].

During the Civil War, President Lincoln unilaterally declared a general martial law, proclaiming that government military tribunals would try and punish all persons “guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States.”<sup>147</sup> Lincoln also suspended the writ of habeas corpus without congressional authorization, citing “public necessity.”<sup>148</sup> Lincoln waited three months after declaring martial law and suspending the writ of habeas corpus to request ratification of his actions, and it took Congress two years to ratify them.<sup>149</sup> During the war, the Supreme Court did not consider whether Lincoln exercised valid government power.<sup>150</sup> For example, in 1864, at the peak of the war, the Court refused to hear a case of a civilian who was convicted by a military tribunal, claiming it did not have appellate jurisdiction over military tribunals.<sup>151</sup>

Only after the Civil War did the Court review the federal government’s actions during the war. One year after the war ended, in *Ex parte Milligan*,<sup>152</sup> the Court reviewed a habeas corpus petition from a civilian convicted by a military tribunal in a non-rebellious area during wartime.<sup>153</sup> Then, it emphasized the inability of courts to adequately consider emergency powers during the war:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. . . . Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.<sup>154</sup>

The Court reversed the conviction and criticized the executive branch under Lincoln’s unfettered use of military tribunals and martial law during the Civil War.<sup>155</sup> As a result of the Court’s ruling, the jurisdiction of military tribunals is limited to members of enemy forces

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147. Fisch *supra* note 137, at 412 (quoting VI J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98 (1897)).

148. *Id.*

149. *See id.*

150. *See id.* at 394–95.

151. *See generally Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

152. 71 U.S. 2 (1866).

153. *See id.* at 107–08.

154. *Id.* at 109.

155. *See id.* at 121–27.

during wartime.<sup>156</sup> Military tribunals are unique in constitutional law in that they are exempt from certain amendments in the Bill of Rights.<sup>157</sup> The Court reasoned that when civilian courts were open and able to hear cases and the person tried is a civilian who is not involved in military service, Lincoln's executive war powers did not sanction the use of a military tribunal as a forum to try a civilian unconnected with the rebellion.<sup>158</sup> The Court thus determined that the government denied Milligan his constitutional right to a trial by jury, as he was not in military service.<sup>159</sup> The Court stressed the importance of safeguarding individual rights and liberties, even in times of war and emergency.<sup>160</sup>

Going further, the Court rebuked the executive branch's actions and vehemently opposed the idea that the government can declare general martial law.<sup>161</sup> Then, it emphasized the potential for abuse by subsequent administrations.<sup>162</sup> The Court stated that "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."<sup>163</sup> Although during the Civil War, the Court did not review the federal government's actions,<sup>164</sup> after the emergency ended, the Court vigorously rejected the power of the government to impose martial law and restricted the power of the executive branch during wartime.<sup>165</sup>

Similarly, during World War II, the Court deferred to the Executive during an emergency but then admonished the government

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156. See JENNIFER K. ELSEA, CONG. RSCH. SERV., COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 10 (2014), <https://fas.org/sgp/crs/natsec/R40932.pdf> [<https://perma.cc/3JM2-ZXCA>].

157. See U.S. CONST. amend. V (a grand jury indictment is not required "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). The Supreme Court also held that the Sixth Amendment's right to trial by jury and right to counsel do not apply to the military justice system. See *Middendorf v. Henry*, 425 U.S. 25, 42–48 (1976).

158. See *Ex parte Milligan*, 71 U.S. at 121–22. The Court was expressly referring to the military commissions set up by Lincoln during the Civil War and not the suspension of habeas corpus. See *id.*

159. See *id.* at 122–23.

160. See *id.* at 123–24.

161. See *id.* at 125–26. "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Id.* at 125.

162. See *id.* at 125.

163. *Id.*

164. See *id.* at 125–26.

165. See *id.* at 126–27.

afterward.<sup>166</sup> For example, the Court unanimously upheld the imposition of a curfew that solely applied to those of Japanese ancestry.<sup>167</sup> The Court ruled that “Congress and the Executive are [not] wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.”<sup>168</sup> Although the Court acknowledged the reprehensible nature of a race-based law, it ruled that the federal government was justified because of the wartime emergency.<sup>169</sup>

Then, in *Korematsu v. United States*,<sup>170</sup> the Supreme Court held that the decision to exclude Japanese Americans from military areas during the war was constitutional.<sup>171</sup> The Court concluded that the executive branch had the power to remove Japanese Americans from their homes, even without suspicion of sabotage or disloyalty.<sup>172</sup> Although there were clear sentiments of racial prejudice in the order and its administration,<sup>173</sup> the Court stated that the exclusion was justified by purely military objectives.<sup>174</sup>

However, just after World War II concluded, the Court retracted its deferential decisions in *Duncan v. Kahanamoku*.<sup>175</sup> Similar to *Milligan*, *Kahanamoku* questioned the constitutionality of the conviction of a civilian by a military tribunal established under martial law.<sup>176</sup> After the attack on Pearl Harbor, Hawaii declared martial law, which President Franklin D. Roosevelt approved shortly thereafter in compliance with the Hawaiian Organic Act.<sup>177</sup> Military police subsequently arrested Duncan and White for crimes that were not connected with military service.<sup>178</sup> At the time of their arrests, civilian courts were open.<sup>179</sup> The Court therefore reversed their convictions

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166. See Fisch, *supra* note 137, at 395.

167. See *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943).

168. *Id.* at 100.

169. See *id.* at 100–01.

170. 323 U.S. 214 (1944).

171. See *id.* at 215–19.

172. See *id.* at 217–19.

173. See *id.* at 216.

174. See *id.* at 223–24.

175. 327 U.S. 304 (1946).

176. See *id.* at 307.

177. See *id.* at 307–08.

178. Duncan was arrested for getting into a brawl with two military sentries and White was arrested for embezzling. See *id.* at 309–11.

179. See *id.* at 326–27.

and ruled that, under *Milligan*, the exercise of emergency powers to replace civilian courts, capable of hearing cases, with military tribunals for civilians not connected to military service is unconstitutional.<sup>180</sup> In its rebuke of emergency military powers, the Court declared that “[t]he established principle of every free people is, that the law shall alone govern; and to it the military must always yield.”<sup>181</sup>

During times of emergency, the Court is extraordinarily deferential to the federal government.<sup>182</sup> During wartime emergencies, the Court (1) declined to consider whether the calling of general martial law and the conviction of civilians by military tribunals were constitutional<sup>183</sup> and (2) upheld a race-based curfew as well as race-based exclusion orders.<sup>184</sup> After the emergencies ended, the Court held that such actions were unconstitutional. The Civil War and World War II are examples of how the Court used the emergency powers in the past.

### *ii. When Emergencies Impact Elections*

Prior to 2020, there were no modern precedents for nationwide emergencies affecting national elections.<sup>185</sup> However, there are recent examples of state emergencies that coincided with elections.<sup>186</sup> Furthermore, in times of emergency, state officials can use heightened authority to respond.<sup>187</sup> On September 11, 2001, two planes struck the Twin Towers as New Yorkers were heading to the polls for a primary

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180. *See id.* at 324.

181. *Id.* at 323 (quoting *Dow v. Johnson*, 100 U.S. 158, 169 (1879)).

182. *See* Fisch, *supra* note 137, at 394–96. An example of the use of emergency powers outside of wartime is the drastic measures taken by President Franklin D. Roosevelt to respond to the Great Depression. *See* Belknap, *supra* note 142, at 70–76.

183. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

184. *See* *Korematsu v. United States*, 323 U.S. 214, 219 (1944). It is unclear how much of the Court’s deference came from the allocation of constitutional authority over foreign affairs to Congress and the Executive, however this Note does not focus on this topic.

185. *See* R. SAM GARRETT, SARAH J. ECKMAN & KAREN L. SHANTON, CONG. RSCH. SERV., COVID-19 AND OTHER ELECTION EMERGENCIES: FREQUENTLY ASKED QUESTIONS AND RECENT POLICY DEVELOPMENTS 12–13 (2020), <https://crsreports.congress.gov/product/pdf/R/R46455/2> [<https://perma.cc/8NB5-MAC3>].

186. *See id.* at 4–9.

187. *See* *Election Emergencies*, NAT’L CONF. ST. LEGISLATURES (Sept. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx> [<https://perma.cc/JKK6-H27W>]. State officials’ heightened emergency powers in regard to elections include suspending or amending statutes, postponing the election, and relocating polling places among other things. *See id.*

election.<sup>188</sup> Within hours of the attack, then-Governor George Pataki issued an executive order delaying the primary.<sup>189</sup> Two days later, the New York State Legislature passed the Emergency Primary Election Rescheduling Act, which postponed the primary until September 25.<sup>190</sup> September 11 may be the most traumatic emergency affecting an election in recent U.S. history, but it is not the only one.<sup>191</sup>

The most common triggers for state emergency powers near an election are hurricane related.<sup>192</sup> Hurricane season runs from June through November<sup>193</sup> and has substantially impacted elections for decades.<sup>194</sup> For example, the 2012 and 2016 presidential elections were affected by hurricanes. On October 29, 2012, Hurricane Sandy ravaged the eastern seaboard of the United States just seven days before the presidential election on November 6.<sup>195</sup> Twenty four states were hit, and the Federal Emergency Management Agency issued disaster declarations for 225 counties in ten states.<sup>196</sup> The majority of states that were severely affected by Hurricane Sandy did not provide substantial opportunities to vote by mail or vote early before Election Day.<sup>197</sup> A

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188. See Adam Nagourney, *After the Attacks: The Election; Primary Rescheduled for Sept. 25, with Runoff, If Necessary, Set for Oct. 11*, N.Y. TIMES (Sept. 14, 2001), <https://www.nytimes.com/2001/09/14/us/after-attacks-election-primary-rescheduled-for-sept-25-with-runoff-if-necessary.html> [<https://perma.cc/M8N6-34H2>].

189. See Adam Nagourney, *A Day of Terror: The Elections; Pataki Orders Postponement of Primaries Across State*, N.Y. TIMES (Sept. 12, 2001), <https://www.nytimes.com/2001/09/12/us/day-terror-elections-pataki-orders-postponement-primaries-across-state.html> [<https://perma.cc/MPD8-BR9U>].

190. See GARRETT ET AL., *supra* note 185, at 8; see also 2001–12: *Effect of New York State Legislature Decision to Reschedule New York State Primary and Runoff Elections*, N.Y.C. CAMPAIGN FIN. BD. (Sept. 20, 2001), <https://www.nycfb.info/law/advisory-opinions/2001-12-effect-new-york-state-legislature-decision-reschedule-new-york-state/> [<https://perma.cc/3TFE-MGE2>].

191. See GARRETT ET AL., *supra* note 185, at 4–9.

192. See *id.*

193. See *Tropical Cyclone Climatology*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.nhc.noaa.gov/climo/> [<https://perma.cc/X9N6-DAM9>] (last visited Mar. 6, 2021).

194. See Adam Howard, *How Hurricanes Have Disrupted and Defined Past Elections*, NBC NEWS (Oct. 6, 2016, 2:26 PM), <https://www.nbcnews.com/storyline/hurricane-matthew/how-hurricanes-have-disrupted-defined-past-elections-n660796> [<https://perma.cc/6HJM-TZKZ>]; Meredith McGraw, *A Look Back at How Hurricanes Affect Presidential Elections*, ABC NEWS (Oct. 7, 2016, 11:41 AM), <https://abcnews.go.com/Politics/back-hurricanes-affect-presidential-elections/story?id=42643749> [<https://perma.cc/N3G5-AGVC>].

195. See Robert M. Stein, *Election Administration During Natural Disasters and Emergencies: Hurricane Sandy and the 2012 Election*, 14 ELECTION L.J. 66, 66 (2015).

196. See *id.*

197. See *id.* at 67–68. Maryland was the only state affected by Hurricane Sandy to implement early in-person voting in 2020. See *id.*

significant number of polling places were damaged by the hurricane and remained closed due to flooding.<sup>198</sup> In response, many state legislatures failed to provide voters with flexible solutions to vote, such as absentee voting or the option to vote early.<sup>199</sup> As a result, in the 225 impacted counties, voter turnout declined by 2.8% on average between 2008 and 2012.<sup>200</sup> Ultimately, Hurricane Sandy was one of the most disruptive hurricanes in terms of impact on an election.<sup>201</sup>

Hurricane Matthew created a similar problem in early October 2016.<sup>202</sup> Several states declared emergencies in preparation for Hurricane Matthew and ordered widespread evacuations of the coastlines.<sup>203</sup> Hurricane Matthew hit on October 7, four days before the end of voter registration in Florida on October 11.<sup>204</sup> Then-Governor Rick Scott refused to extend the voter registration deadline in Florida despite calls from voting rights groups to accommodate voters displaced by the hurricane.<sup>205</sup> The Florida Democratic Party and other groups filed suit, alleging that refusing to extend the voter registration had a “decidedly partisan effect.”<sup>206</sup> The district court

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198. See, e.g., Michael Cooper, *Disruption from Storm May Be Felt at the Polls*, N.Y. TIMES (Nov. 2, 2012), <https://www.nytimes.com/2012/11/03/us/politics/hurricane-sandy-threatens-to-disrupt-voting-on-election-day.html> [<https://perma.cc/99QG-KNT9>].

199. See Stein, *supra* note 195, at 68–69.

200. See *id.* at 69.

201. See GARRETT ET AL., *supra* note 185, at 5–6.

202. See Tai Kopan, *Hurricane Matthew Hits Campaign Trail with Voter Registration Deadline Fight*, CNN (Oct. 7, 2016, 1:43 PM), <https://www.cnn.com/2016/10/07/politics/hurricane-matthew-politics-voting/index.html> [<https://perma.cc/GAX5-TER8>].

203. See Reuters, *4 States Declare Emergency as Hurricane Matthew Closes in on Florida*, FORTUNE (Oct. 7, 2016, 4:10 AM), <https://fortune.com/2016/10/07/hurricane-matthew-florida-emergency-evacuate/> [<https://perma.cc/GFQ7-TPU7>] (noting that Florida, Georgia, South Carolina, and North Carolina declared states of emergency ahead of Hurricane Matthew).

204. See Hannah Hartig & John Lapinski, *Will Hurricane Matthew Impact Voter Registration in Florida?*, (Oct. 7, 2016, 1:54 PM), <https://www.nbcnews.com/politics/2016-election/will-hurricane-matthew-impact-voter-registration-florida-n661976> [<https://perma.cc/U98V-XME6>].

205. See *id.* During the 2016 presidential election, Rick Scott also served as the National Chairman of Rebuilding America Now, which supported Donald Trump in the election. See Sally Bronston, *Gov. Scott on Trump's Tax Returns: 'Every Candidate's Different'*, NBC (Aug. 7, 2016, 12:25 PM), <https://www.nbcnews.com/meet-the-press/gov-scott-trump-s-tax-returns-every-candidate-s-different-n624851> [<https://perma.cc/GGQ2-SVMZ>].

206. Joseph Ax, *Judge Gives Florida Voters More Time to Register After Hurricane*, REUTERS (Oct. 12, 2016, 11:33 AM), <https://www.reuters.com/article/us-usa-election-florida-registration/judge-gives-florida-voters-more-time-to-register->



ordered the Governor to extend the voter registration deadline by six days.<sup>207</sup> Hurricane Matthew was the last hurricane to interrupt an election prior to 2020.<sup>208</sup>

*iii. State Responses to COVID-19*

Emergency situations, like the hurricanes discussed above, grant state and federal officials greater power to address the emergency. In response to the COVID-19 pandemic, many state officials utilized emergency powers.<sup>209</sup> On January 31, 2020, then-Secretary of Health and Human Services Alex M. Azar II declared a public health emergency for the entire country.<sup>210</sup> Then on March 13, President Donald Trump invoked his emergency presidential powers under the National Emergencies Act.<sup>211</sup> Additionally, all 50 states declared their own states of emergency.<sup>212</sup> State responses to COVID-19 varied widely, but the vast majority took extraordinary steps to combat the deadly virus.<sup>213</sup> They implemented various emergency procedures such as stay-at-home orders, criminal and civil sanctions for large gatherings, and mandates to wear facial masks.<sup>214</sup> These emergency actions impacted nearly every aspect of life in the United States, from

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after-hurricane-idUSKCN12C1Y2 [<https://perma.cc/Z9SQ-G4EA>] (quoting a complaint filed by the Florida Democratic Party against the State of Florida).

207. *See id.*

208. Other examples of hurricanes affecting elections include Hurricane Andrew in 1992, Hurricane Charley in 2004, and Hurricane Matthew in 2018. *See generally* GARRETT ET AL., *supra* note 185.

209. For an in-depth analysis on each state's response to COVID-19, see *State Action on Coronavirus (COVID-19)*, NAT'L CONF. ST. LEGISLATURES (Feb. 12, 2021), <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx#dataViz> [<https://perma.cc/AS25-T2BC>].

210. *See* Press Release, U.S. Dept. of Health and Hum. Servs., Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html> [<https://perma.cc/6Z6T-E6BB>].

211. *See* Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020). Section 319 of the Public Health Service Act grants the President emergency power, among other things, to release funds to state and local governments to combat the health emergency as well as suspend incoming international travel to the United States. *See* Public Health Service Act § 319, 42 U.S.C. § 247d.

212. *See* Oren Gross, *Emergency Power in the Time of Coronavirus . . . and Beyond*, JUST SEC. (May 8, 2020), <https://www.justsecurity.org/70029/emergency-powers-in-the-time-of-coronaand-beyond/> [<https://perma.cc/ZX2R-NQNE>].

213. *See State Action on Coronavirus (COVID-19)*, *supra* note 209.

214. *See id.*

simple activities like hanging out with friends to complex matters like the economy.<sup>215</sup>

There are four general categories of gubernatorial emergency power.<sup>216</sup> In many states, the governor has power over state election laws during an emergency.<sup>217</sup> Specifically, 45 states have statutes and contingencies for dealing with emergencies on Election Day.<sup>218</sup> These statutes vary greatly from state to state, but most constitute three categories of powers.<sup>219</sup> These three categories grant (1) the power to delay or reschedule an election,<sup>220</sup> (2) the power to relocate polling places,<sup>221</sup> and (3) the power to delay or reschedule an election.<sup>222</sup> In addition, many states allocate emergency authority to governors to suspend or amend statutes.<sup>223</sup> A federal statute sets out the date for all federal elections, and governors do not generally have the power to postpone such elections in an emergency.<sup>224</sup> The only instance of this occurred in 2018 when Super Typhoon Yutu hit the Northern Mariana Islands, and the Governor postponed the election for House Delegate from November 6 to November 13.<sup>225</sup>

In response to COVID-19, many states implemented or expanded voting procedures during the 2020 election cycle.<sup>226</sup> The vast majority of states allowed voters to cast a ballot by mail, many without needing to cite a reason such as disability, physical incapacity, or others.<sup>227</sup> States also expanded access to early in-person voting to reduce the crowding on Election Day, and thus the potential to spread COVID-

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215. *See Most Americans Say Coronavirus Outbreak Has Impacted Their Lives*, PEW RSCH. CTR. (Mar. 30, 2020), <https://www.pewsocialtrends.org/2020/03/30/most-americans-say-coronavirus-outbreak-has-impacted-their-lives/> [<https://perma.cc/9GB9-U82R>].

216. *See Election Emergencies*, *supra* note 187 (providing a breakdown of each gubernatorial power by state in table 2).

217. *See id.*

218. *See id.*

219. *See id.*

220. Six states — Idaho, Kentucky, New York, Oregon, South Dakota, and Utah — provide for a delay or rescheduling of the election. *See id.*

221. Eighteen states allow for the relocation of polling places. *See id.*

222. Six states — Florida, Louisiana, Hawaii, Maryland, South Carolina, and Virginia — allow for delaying the election and relocating polling places. *See id.*

223. *See id.*

224. *See* 2 U.S.C. § 7; GARRETT ET AL., *supra* note 185, at 5.

225. *See* GARRETT ET AL., *supra* note 185, at 5.

226. *See Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx> [<https://perma.cc/4LBW-88LR>] (last visited Dec. 17, 2020).

227. *See id.*

19.<sup>228</sup> Early and absentee voting saw record numbers of voters,<sup>229</sup> and these expansions facilitated historic voter turnout in the 2020 presidential election.<sup>230</sup> Additionally, 19 states postponed their primaries.<sup>231</sup> In times of emergency, government officials have expanded authority to protect U.S. residents, even during an election. Many state government officials used such authority during the 2020 election in response to COVID-19.

## II. REQUESTS FOR PRELIMINARY RELIEF FROM ELECTION LAWS DURING THE COVID-19 PANDEMIC

Part II discusses the ways the Supreme Court examined challenges to election procedures during 2020. Section II.A demonstrates the Court's willingness to defer to states early in the pandemic. This Section further explains how members of the Court incorporated the state emergency powers doctrine in their analyses along with the *Purcell* principle. Section II.B examines how lower courts utilized the *Purcell* principle throughout the 2020 election. Section II.C then covers how the usage of the *Purcell* principle leaves a gap in voting rights protections by analyzing an example from the 2021 Georgia Senate runoff elections.

### A. The Application of the *Purcell* Principle During the COVID-19 Pandemic

The following cases demonstrate how the Supreme Court applied the *Purcell* principle early in the COVID-19 pandemic. In *Republican National Committee v. Democratic National Committee* (*RNC*), the Court established the initial framework for applying the *Purcell* principle during the pandemic.<sup>232</sup> *Merrill v. People First of Alabama* shows how the Court applied the principle after *RNC*.<sup>233</sup> Both of these cases set the stage for future cases, which ultimately combined the

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228. See Richard H. Pildes, *Early and Mail-In Voting for 2020 Election Expands Dramatically Despite Legal Fights*, WALL ST. J. (Oct. 30, 2020, 6:00 AM), <https://www.wsj.com/articles/early-and-mail-in-voting-for-2020-election-expands-dramatically-despite-legal-fights-11604052000> [<https://perma.cc/2HJJ-DZBK>].

229. See Gamio et al., *supra* note 8.

230. See Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout Is the Highest in Over a Century*, WASH. POST (Dec. 28, 2020, 4:29 PM), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/BLK6-574D>].

231. See GARRETT ET AL., *supra* note 185, at 11.

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

233. See *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.).

reasoning initially set forth in *RNC* with the state emergency powers doctrine.

*i. Republican National Committee v. Democratic National Committee*

On March 24, 2020, Wisconsin Governor Tony Evers issued a stay-at-home order to stem the spread of COVID-19.<sup>234</sup> Wisconsin's primary was scheduled for April 7, only 14 days later.<sup>235</sup> The Democratic National Committee (DNC) and other parties sued the Wisconsin Elections Commission in federal court to postpone the primary election.<sup>236</sup> The DNC asserted that Wisconsin residents would face "the extreme burden of literally risking their health and lives in order to cast a vote."<sup>237</sup> Wisconsin citizens overwhelmed election officials with requests for absentee ballots, which thousands of voters would not receive until after Election Day because the election offices could not process them in time.<sup>238</sup> Yet, the district court denied the DNC's petition to postpone the election.<sup>239</sup> Instead, the court issued a preliminary injunction extending the deadline by which absentee ballots could be received by up to six days past Election Day, even if the ballot was not postmarked by Election Day.<sup>240</sup>

On April 6, in *RNC*,<sup>241</sup> the Supreme Court relied on the *Purcell* principle to stay the district court's order.<sup>242</sup> The Court, referring to the issue as a "narrow, technical" one, stated that extending the deadline for when absentee ballots may be cast was an extraordinary departure from the plaintiff's requested relief and "fundamentally alter[ed] the nature of the election."<sup>243</sup> The Court criticized the district court for crafting its own relief when it granted the extension of the

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234. See Wisc. Exec. Order No. 12 (Mar. 24, 2020).

235. See *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> [<https://perma.cc/P6WK-WWQ4>].

236. See Democratic Nat'l Comm. v. Bostelmann (*Bostelmann I*), 451 F. Supp. 3d 952, 958 (W.D. Wis. 2020).

237. *Id.* at 970–71 (quoting the plaintiff's brief).

238. See *id.* at 962 ("[T]he City Clerks for Madison and Milwaukee represent that '[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have the time to receive, vote and return their ballot by Election Day.'" (alteration in original) (quoting the defendant's brief)).

239. See *id.* at 975.

240. See *id.* at 975–83.

241. 140 S. Ct. 1205, 1207 (2020) (per curiam).

242. See *id.*

243. *Id.* at 1206–07.

receipt of absentee ballots and elimination of the postmark requirement.<sup>244</sup>

The majority applied the *Purcell* principle and relegated its discussion of the COVID-19 pandemic to just one line in the opinion.<sup>245</sup> The Court stated that it “ha[d] repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”<sup>246</sup> However, this was not an ordinary situation. Hundreds of polling places were closed to prevent COVID-19 from spreading.<sup>247</sup> For example, Milwaukee closed 175 out of 180 polling places.<sup>248</sup> With only five locations, Wisconsin voters who voted in person waited in long lines and increased their chances of catching the airborne virus.<sup>249</sup> Additionally, thousands of Wisconsin voters did not receive their absentee ballots on time.<sup>250</sup> Thus, the Court’s decision forced thousands of voters to choose between not voting and risking exposure to the deadly COVID-19 virus to vote in person.<sup>251</sup> Justice Kagan dissented, emphasizing that the “suggestion that the current situation is not ‘substantially different’ from ‘an ordinary election’ boggles the mind.”<sup>252</sup> The dissent also noted that “[e]nsuring an opportunity for the people of Wisconsin to exercise their votes should be [the Court’s] paramount concern.”<sup>253</sup>

#### ii. Merrill v. People First of Alabama

After *RNC*, the Supreme Court applied the *Purcell* principle to other cases challenging ballot access and voting requirements. On July

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244. *See id.* at 1207.

245. *See id.* at 1208 (“The Court’s decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID-19 are appropriate.”).

246. *Id.* at 1207.

247. *See* Henry Redman, *Wisconsin’s Closed Polls*, WIS. EXAMINER (Apr. 6, 2020), <https://wisconsinexaminer.com/2020/04/06/wisconsins-closed-polls/> [<https://perma.cc/5ASB-VFK4>].

248. *Id.*

249. Elise Viebeck et al., *Long Lines, Anger and Fear of Infection: Wisconsin Proceeds with Elections Under Court Order*, WASH. POST (Apr. 7, 2020, 6:40 PM), [https://www.washingtonpost.com/politics/long-lines-form-in-milwaukee-as-wisconsin-proceeds-with-elections-under-court-order/2020/04/07/93727b34-78c7-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/politics/long-lines-form-in-milwaukee-as-wisconsin-proceeds-with-elections-under-court-order/2020/04/07/93727b34-78c7-11ea-b6ff-597f170df8f8_story.html) [<https://perma.cc/LT4H-KV54>].

250. *See* Democratic Nat’l Comm. v. Bostelmann (*Bostelmann I*), 451 F. Supp. 3d 952, 962 (W.D. Wis. 2020).

251. *See* Viebeck et al., *supra* note 249.

252. Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1210 (Kagan, J., dissenting).

253. *Id.* at 1211.

2, 2020, in *Merrill v. People First of Alabama*, the Court stayed an injunction of Alabama's witness requirement for absentee ballots.<sup>254</sup> In *Merrill*, the petitioners challenged Alabama's requirement that absentee ballots include a photocopy of valid photo ID and be signed by a notary or two witnesses, claiming it would potentially force voters to be exposed to COVID-19.<sup>255</sup> The district court held that the challenge was warranted, and the plaintiffs were right to be concerned about COVID-19 exposure.<sup>256</sup> Thus, it enjoined the enforcement of the absentee ballot requirements.<sup>257</sup> On appeal, the Eleventh Circuit unanimously refused to stay the order and agreed that the photo ID and witness requirements were unconstitutional due to concerns over COVID-19.<sup>258</sup> The concurring opinion addressed, but refused to apply, the *Purcell* principle, stating the burden of implementation was slight because it only forced the state to accept absentee ballots under "relatively minor expanded circumstances."<sup>259</sup> In her concurrence, Judge Britt Grant expressed her concerns, stating that "[t]he Supreme Court has emphasized time and time again that federal courts should not jump in to change the rules on the eve of an election."<sup>260</sup>

On review, the Supreme Court voted 5–4 to grant a stay of the injunction, but it offered no opinion explaining its reasoning,<sup>261</sup> making it hard to determine why it ruled this way. However, Alabama's Republican primary runoff election was 12 days after the ruling,<sup>262</sup> which, coupled with the lower courts' reliance on *Purcell*, indicates that the Court likely relied on the *Purcell* principle. This is characteristic of the Supreme Court's other requests for emergency relief that applied the *Purcell* principle.<sup>263</sup> *Merrill* is exemplary of how the Supreme

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254. See *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.).

255. See *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1195–96 (N.D. Ala. 2020).

256. See *id.* at 1209.

257. See *id.* at 1225–27.

258. See *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505 (11th Cir. 2020).

259. *Id.* at 514 (Rosenbaum, J., concurring).

260. *Id.* at 516 (Grant, J., concurring) (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)).

261. See *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.).

262. The Alabama primary runoff election took place on July 14, 2020. See *United States Senate Election in Alabama, 2020 (July 14 Republican Primary Runoff)*, BALLOTPEdia, [https://ballotpedia.org/United\\_States\\_Senate\\_election\\_in\\_Alabama,\\_2020\\_\(July\\_14\\_Republican\\_primary\\_runoff\)](https://ballotpedia.org/United_States_Senate_election_in_Alabama,_2020_(July_14_Republican_primary_runoff)) [<https://perma.cc/V8QS-KE5R>] (last visited Mar. 6, 2021).

263. See *supra* Section I.A.

Court addressed election law cases related to COVID-19 throughout the 2020 election cycle.

*RNC* and *Merrill* are two of the Supreme Court's COVID-19-related election law cases during the 2020 election and illustrate how the Court considered these cases early in the pandemic.<sup>264</sup> *RNC* significantly strengthened the *Purcell* principle, allowing lower courts to cite it as doctrine throughout the 2020 election.<sup>265</sup> The Court stated that it has "repeatedly emphasized" that courts not alter election rules close to Election Day.<sup>266</sup> The Court implicated *Purcell* through opinion-less orders in cases like those in 2014,<sup>267</sup> but it never explicitly directed lower courts not to intervene in elections close to Election Day until *RNC*.<sup>268</sup>

### B. The Combination of the *Purcell* Principle and the State Emergency Powers Doctrine

As more cases made their way through the judicial system in 2020, the Supreme Court not only relied on the *Purcell* principle but also deferred to state power over election law and state emergency powers more generally, which include, for example, the power to protect public health and wellness by limiting First Amendment rights.<sup>269</sup> Members of the Court applied the state emergency powers doctrine in *Andino v. Middleton*<sup>270</sup> and *Democratic National Committee v. Wisconsin State Legislature*<sup>271</sup> to justify deferring to the state legislatures' decisions regarding election administration during the COVID-19 pandemic.

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264. See generally *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (mem.) (staying an injunction of Oregon's requirement to gather signatures to place initiatives on the general election ballot); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.) (staying an injunction of Florida's law forcing reconstituted felons to pay their fines in order to regain voting rights under the *Purcell* principle); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.) (denying a request to vacate a stay of an injunction of Texas's law automatically granting absentee ballots to citizens 65 or older).

265. One hundred and sixteen cases cited *RNC* during the 2020 election. See, e.g., *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 568–69 (6th Cir. 2020); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 470–71 (5th Cir. 2020); *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020).

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

267. See *supra* Section I.A.

268. See *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

269. See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (mem.).

270. 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring).

271. 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring); see also *id.* at 32 (Kavanaugh, J., concurring).

*Andino* and *Wisconsin State Legislature* thus couple these two doctrines to strengthen the Court's position on COVID-19 election law cases.<sup>272</sup>

*i. Andino v. Middleton*

*Andino*, similar to *Merrill*, concerned a witness requirement for absentee ballots.<sup>273</sup> South Carolina's absentee ballots mandated another individual witness a voter's signature on the absentee ballot envelope.<sup>274</sup> After plaintiffs cited "the unique risks presented by the COVID-19 pandemic," the district court found that the witness requirement violated the plaintiffs' First and Fourteenth Amendment rights.<sup>275</sup> The Fourth Circuit initially stayed the district court's order,<sup>276</sup> but upon rehearing en banc, vacated that order.<sup>277</sup> On review, the Supreme Court stayed the district court's opinion and, like *Frank* and *Veasey*,<sup>278</sup> issued no majority opinion.<sup>279</sup> Justice Kavanaugh's concurring opinion laid out two reasons for granting the stay.<sup>280</sup>

First, Justice Kavanaugh reiterated a point Chief Justice Roberts made in a different COVID-19 case, *South Bay United Pentecostal Church v. Newsom*.<sup>281</sup> "[T]he Constitution 'principally entrusts the safety and the health of the people to the politically accountable officials of the States.'"<sup>282</sup> Justice Kavanaugh asserted that this logic extended to election laws, which "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."<sup>283</sup> Second, Justice Kavanaugh emphasized the Court's precedent, explicitly citing *Purcell* and stating that federal courts should not alter state election rules close to the

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272. See *Andino*, 141 S. Ct. at 10; *Wis. State Legislature*, 141 S. Ct. at 28–30 (Gorsuch, J., concurring); *Wis. State Legislature*, 141 S. Ct. at 30–33 (Kavanaugh, J., concurring).

273. See *Middleton v. Andino*, 488 F. Supp. 3d 261, 267 (D.S.C. 2020).

274. See *id.*; see also S.C. CODE ANN. § 7-15-420 (2006).

275. *Andino*, 488 F. Supp. 3d at 294.

276. See *Middleton v. Andino*, No. 3:20-cv-20-2022, 2020 WL 5739010 (4th Cir. Sept. 24, 2020).

277. See *Middleton v. Andino*, 976 F.3d 403 (4th Cir. 2020) (en banc).

278. See *supra* Section I.A.iii.

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

280. See *id.* at 10 (Kavanaugh, J., concurring).

281. 140 S. Ct. 1613 (2020) (mem.).

282. *Andino*, 141 S. Ct. at 10 (quoting *South Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring)).

283. *Id.* (quoting *South Bay United Pentecostal Church*, 140 S. Ct. at 1614).



election.<sup>284</sup> This was the first time a Supreme Court Justice conjunctively used the *Purcell* principle and the state emergency powers doctrine in a holding.<sup>285</sup>

*ii. Democratic National Committee v. Wisconsin State Legislature*

Justice Kavanaugh applied this same line of reasoning 21 days later in his concurring opinion in *Democratic National Committee v. Wisconsin State Legislature*,<sup>286</sup> which involved a challenge to Wisconsin's deadline for receiving valid absentee ballots.<sup>287</sup> The district court granted the petitioners relief in the form of a six-day extension of the deadline for receipt of ballots, so long as the ballots had postmarks dated by Election Day.<sup>288</sup> The Seventh Circuit stayed the district court's injunction on two grounds: (1) the district court changed the election's rules too close to the election, and (2) its ruling usurped the legislature's authority to administer elections.<sup>289</sup> The Seventh Circuit cited Justice Kavanaugh's concurrence in *Andino* to support its decision.<sup>290</sup>

The Court affirmed the Seventh Circuit's stay on October 26, 2020, eight days before the presidential election on November 3.<sup>291</sup> Justice Kavanaugh emphasized the importance of the *Purcell* principle and went so far as to refer to it as "a basic tenet of election law."<sup>292</sup> He reiterated that judicial restraint prevents voter confusion, as well as confusion in election administration.<sup>293</sup> Justice Kavanaugh added that "[i]t is one thing for state legislatures to alter their own election rules in the late innings . . . . It is quite another thing for a *federal district court* to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent."<sup>294</sup>

Justice Kavanaugh then emphasized federal courts' limited role in COVID-19-related election cases.<sup>295</sup> He argued that the Constitution

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284. *See id.*

285. *See id.*

286. 141 S. Ct. 28 (2020) (mem.) (Kavanaugh, J., concurring).

287. *See Democratic Nat'l Comm. v. Bostelmann (Bostelmann II)*, 488 F. Supp. 3d 776, 783–84 (W.D. Wis. 2020).

288. *See id.* at 817.

289. *See Democratic Nat'l Comm. v. Bostelmann (Bostelmann III)*, 977 F.3d 639, 641–43 (7th Cir. 2020).

290. *See id.* at 642.

291. *See Wis. State Legislature*, 141 S. Ct. 28.

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

293. *See id.*

294. *Id.* (emphasis added).

295. *See id.* at 32.

provides “politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID-19 pandemic.”<sup>296</sup> Again, Justice Kavanaugh stressed that the federal judiciary should not second-guess a state legislature’s decision.<sup>297</sup> He noted the difference in state responses to the challenges posed by holding an election during COVID-19 and that it was the responsibility of each state’s legislature to address such challenges.<sup>298</sup>

Justice Gorsuch argued that the district court in *Wisconsin State Legislature* used COVID-19 to circumvent the state’s expressly delegated power to run elections.<sup>299</sup> In his opinion, he faulted the district court for substituting the state legislature’s judgment with its own, violating the legislature’s expressly delegated constitutional powers.<sup>300</sup> Justice Gorsuch underscored the legislature’s political accountability and expertise in dealing with science and safety matters, which he felt were better mechanisms for dealing with COVID-19-related problems.<sup>301</sup> He claimed that courts damage the people’s faith in the Constitution by acting to usurp the legislature’s role in elections.<sup>302</sup> While not relying on the nearness of the election, Justice Gorsuch still underscored the power of state legislatures to write election laws, as opposed to the courts, as his reason for affirming the stay.<sup>303</sup>

### iii. Moore v. Circosta

Justice Gorsuch, joined by Justice Alito, relied on the same reasoning in his dissenting opinion in *Moore v. Circosta*,<sup>304</sup> decided two days after *Wisconsin State Legislature*. He stated that, “[e]veryone agrees . . . that the North Carolina Constitution expressly vests all

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296. *Id.*

297. *See id.*

298. *See id.* at 32–33. To emphasize how hastily written this opinion was, it is worth pointing out that it contained several errors. *See* Mark Joseph Stern, *Let’s Count All the Errors and Lies in Brett Kavanaugh’s Defense of Voter Suppression*, SLATE (Oct. 27, 2020, 4:17 PM), <https://slate.com/news-and-politics/2020/10/brett-kavanaugh-voter-suppression-wisconsin-mistakes.html> [<https://perma.cc/Q5N7-489G>].

299. *See Wis. State Legislature*, 141 S. Ct. at 28–29 (Gorsuch, J., concurring).

300. *See id.* at 29 (“The Constitution provides that State legislatures — not federal judges, not state judges, not state governors, not other state officials — bear primary responsibility for setting election rules.”).

301. *See id.*

302. *See id.* at 30.

303. *See id.* at 29.

304. 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting).

legislative power in the General Assembly, not the Board or anyone else.”<sup>305</sup> Justice Gorsuch then cited his concurrence in *Wisconsin State Legislature* to reiterate the legislature’s preeminence in administering elections during COVID-19.<sup>306</sup>

Lastly, it is important to note that neither Justice Kavanaugh nor Justice Gorsuch went through the traditional framework for staying orders or vacating a stay of lower courts in these cases.<sup>307</sup> Justice Kavanaugh’s concurrence in *Andino* ignored the *Nken* factors<sup>308</sup> and relied solely on the *Purcell* principle and state emergency powers.<sup>309</sup> In *Wisconsin State Legislature*, he did not consider any of the factors required for evaluating whether to vacate the Seventh Circuit’s stay.<sup>310</sup> Similarly, in his *Wisconsin State Legislature* concurrence, Justice Gorsuch relied solely on the accountability of the legislature and the Constitution’s explicit delegation to states to administer elections.<sup>311</sup>

#### iv. Looking Back at RNC and Merrill

The Court’s first COVID-19 election law case, *RNC*, lacked the state emergency powers justification and relied solely on the election’s proximity.<sup>312</sup> The majority characterized the case as a “narrow, technical question.”<sup>313</sup> The dissent argued, “[w]ith the majority’s stay in place, . . . [voters] will have to brave the polls, endangering their own and others’ safety. Or they will lose their right to vote, through no fault of their own.”<sup>314</sup> At least 52 people were infected with COVID-19 as a result of voting in person in the Wisconsin primary election.<sup>315</sup> The

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305. *Id.* at 47.

306. *See id.*

307. *See generally* *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Kavanaugh, J., concurring); *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring); *Wis. State Legislature*, 141 S. Ct. at 30–40 (Kavanaugh, J., concurring).

308. *See supra* Section I.A.i.

309. *See Andino*, 141 S. Ct. at 9.

310. *See Wis. State Legislature*, 141 S. Ct. at 30–40. For discussion of the factors for evaluating whether to vacate a stay, see *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring).

311. *See Wis. State Legislature*, 141 S. Ct. at 28–30.

312. *See* *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020).

313. *Id.* at 1206.

314. *Id.* at 1211 (Ginsburg, J., dissenting).

315. *See* Scott Bauer, *52 Who Worked or Voted in Wisconsin Election Have COVID-19*, ABC NEWS (Apr. 29, 2020, 7:03 PM), <https://abcnews.go.com/Health/wireStory/52-worked-voted-wisconsin-election-covid-19-70406317> [https://perma.cc/5MW7-ZPQ3].

voter confusion and difficulty in implementing court orders close to the date of the election triumphed, in the Court's eyes, over the confusion and fear of voters the pandemic caused.<sup>316</sup>

The concurring opinions in *Andino* and *Wisconsin State Legislature* may be reactions to *RNC*.<sup>317</sup> Justice Kavanaugh weighed the tension between the power expressly delegated to the states to run elections and the states' power to address public health crises against the courts' power to remedy harms to voters' rights.<sup>318</sup> Meanwhile, Justice Gorsuch was primarily concerned with lower courts supplanting the constitutionally prescribed role of state legislatures' power over election administration and deferred to state legislatures' decisions regarding the COVID-19 pandemic.<sup>319</sup>

Looking at *Merrill* through this lens changes the context of the Supreme Court's order.<sup>320</sup> The Court potentially took the view — although it is hard to be certain without a written opinion — that the Alabama legislature considered the risks associated with COVID-19 and weighed it against the integrity of the election. The legislature then affirmatively decided not to change the witness requirement for absentee ballots and, according to the Court, this must be given deference under the state emergency powers doctrine in addition to the *Purcell* principle.<sup>321</sup> This deference comes despite the burden on the right to vote that the witness requirement poses in light of the COVID-19 pandemic.<sup>322</sup> Thousands of Alabamans voted by mail and requiring a witness to sign the ballots potentially exposed them to COVID-19.<sup>323</sup> Justice Kavanaugh did not write an opinion in *Merrill*, but he may have

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316. See *Republican Nat'l Comm.*, 140 S. Ct. at 1205–08 (majority opinion).

317. See generally *Andino v. Middleton*, 141 S. Ct. 9, 9 (2020) (Kavanaugh, J., concurring); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring); *Wis. State Legislature*, 141 S. Ct. at 30–40 (Kavanaugh, J., concurring).

318. See *Andino*, 141 S. Ct. at 9 (2020); *Wis. State Legislature*, 141 S. Ct. at 30–40.

319. See *Wis. State Legislature*, 141 S. Ct. at 28–30 (2020) (Gorsuch, J., concurring).

320. See *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.).

321. See *supra* Section II.B.

322. See, e.g., Yelena Dzhanova, *Some Voters Are Scared the Coronavirus Will Stop Them from Casting a Ballot*, CNBC (June 1, 2020, 4:01 PM), <https://www.cnbc.com/2020/06/01/some-voters-are-scared-coronavirus-will-stop-them-from-casting-ballot.html> [<https://perma.cc/M5P6-7FTN>].

323. See Madeleine Carlisle & Abigail Abrams, *The Supreme Court's Alabama Ruling Could Disenfranchise Thousands of High Risk Voters*, TIME (Oct. 23, 2020, 3:45 PM), <https://time.com/5903449/supreme-court-restricts-voting-alabama/> [<https://perma.cc/XSH7-WAXM>].

evaluated *Andino* similarly.<sup>324</sup> Without an opinion to accompany the order in *Merrill*, it is impossible to tell exactly how the Court considered it. Nevertheless, the addition of the state emergency powers doctrine and legislature's power over election administration to the *Purcell* principle adds a stronger justification to the Court's reasoning in these cases.

### C. Lower Court Usage of the *Purcell* Principle

During the 2020 election cycle, over 70 district courts cited either the *Purcell* opinion or the *Purcell* principle's explication in *RNC*.<sup>325</sup> Circuit courts stayed a preliminary injunction or refused to grant one and sided with the state in nearly every one of the 30 appealed decisions.<sup>326</sup> The majority of circuit courts relied on the *Purcell* principle in their ultimate conclusions.<sup>327</sup> Only four appellate courts sided with the plaintiffs because the state either settled,<sup>328</sup> offered no legal resistance,<sup>329</sup> or filed its appeal too late for relief.<sup>330</sup> One appellate court sided with the plaintiffs only to be reversed by the

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324. Compare *People First of Ala.*, 467 F. Supp. 3d at 1191–97, with *Middleton v. Andino*, 488 F. Supp. 3d 261, 271–76 (D.S.C. 2020).

325. For a search of cases citing *Purcell v. Gonzalez* during the 2020 election, see WESTLAW, <https://1.next.westlaw.com> (search “549 U.S. 1”; follow the “Citing References” hyperlink; filter cases by date from Jan. 1, 2020 to Dec. 31, 2020 and non-Supreme Court Cases). For a search of cases citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.* during the 2020 election, see WESTLAW, <https://1.next.westlaw.com> (search “140 S. Ct. 1205”; follow the “Citing References” hyperlink; filter cases by non-Supreme Court Cases).

326. See, e.g., *Esshaki v. Whitmer*, 813 F. App'x 170, 171–73 (6th Cir. 2020) (ruling that a political candidate's ballot access was unconstitutionally burdened because he would have to gather signatures in violation of a stay-at-home order, but staying the preliminary injunction in part because it overrode the state's power to administer elections); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020) (refusing to grant a temporary restraining order on Tennessee's absentee ballot procedures, which plaintiff alleged were treated differently than mail-in ballots in violation of the Fourteenth Amendment).

327. See, e.g., *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411–12 (5th Cir. 2020); *Tully v. Okeson*, 977 F.3d 608, 618 (7th Cir. 2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020).

328. See *Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020) (rejecting an intervening motion by Republican Party organizations for stay because defendants settled with plaintiffs).

329. See *Libertarian Party of Ill. v. Cadigan*, 824 F. App'x 415 (7th Cir. 2020) (allowing the preliminary relief to stand because the defendants originally consented to the court order but then later filed appeal to stay the injunction).

330. See *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566 (6th Cir. 2020) (refusing to stay a preliminary injunction of absentee ballot procedures because the appeal was filed after absentee voting began).

Supreme Court.<sup>331</sup> Two of these cases arose after Election Day on November 3, 2020,<sup>332</sup> which is patently different than when an election is imminent. The courts applied a bright-line rule to these cases and failed to consider them on the merits.<sup>333</sup> Many of these cases were highly politicized, with both the Republican and Democratic parties initiating or intervening in the majority of cases.<sup>334</sup>

The circuit courts showed enormous deference to the state justifications when applying the *Nken* factors.<sup>335</sup> As noted above, almost none of the cases sided with plaintiffs when considering a stay pending appeal absent other unique considerations.<sup>336</sup> The circuit courts weighed the interests of the state in administering the election during COVID-19 extraordinarily heavily when balancing the stay factors.<sup>337</sup> Although these cases applied the *Purcell* principle, it was not consistently applied in the same manner among the circuit courts.<sup>338</sup> Some cases applied the *Purcell* principle under the “likelihood of success on the merits” factors.<sup>339</sup> Other cases applied the *Purcell* principle when considering whether the state would be irreparably harmed absent a stay of the preliminary injunction.<sup>340</sup> Still, others applied it when considering the balance of equities or public

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331. See *People First of Ala. v. Sec’y of State for Ala.*, 815 F. App’x 505 (11th Cir. 2020), *vacated*, *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020).

332. See *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020); *Trump v. Wis. Elections Comm’n*, 983 F.3d 919 (7th Cir. 2020).

333. Compare *Common Cause R.I.*, 970 F.3d at 16–17 (1st Cir. 2020), with *Mi Familia Vota v. Abbott*, 834 F. App’x 860, 862 (5th Cir. 2020), and *Tully v. Okeson*, 977 F.3d 608, 612–13 (7th Cir. 2020).

334. See *generally* *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Common Cause R.I.*, 970 F.3d at 16–17 (noting the decision only appealed by intervening Republican Party, which sought to overrule settlement between plaintiffs and election officials).

335. See, e.g., *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 393–94 (5th Cir. 2020) (deferring specifically to the state legislature’s emergency powers to run elections); *Tully*, 977 F.3d at 615–16 (applying rational basis review instead of the *Anderson-Burdick* test when assessing the appellants likelihood of success on the merits).

336. See, e.g., *Kishore v. Whitmer*, 972 F.3d 745 (6th Cir. 2020) (staying a preliminary injunction of ballot-access requirements for third-party candidates would require plaintiffs to violate stay-at-home orders); *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020) (staying a preliminary injunction of the elimination of straight-ticket voting).

337. See, e.g., *Thompson v. Dewine*, 959 F.3d 804, 811–12 (6th Cir. 2020); *Tully*, 977 F.3d at 615–16.

338. Compare *Tex. All. for Retired Ams.*, 976 F.3d at 568, with *A. Philip Randolph Inst. of Ohio v. Larose*, 831 F. App’x 188, 192 (6th Cir. 2020), and *Common Cause R.I.*, 970 F.3d at 17.

339. See *Mi Familia Vota v. Abbott*, 834 F. App’x 860, 863 (5th Cir. 2020); *Tex. All. for Retired Ams.*, 976 F.3d at 568.

340. See *Tex. Democratic Party*, 961 F.3d at 411–12.

interest factors.<sup>341</sup> There is confusion as to the *Purcell* principle's application, and the Supreme Court's lack of guidance contributed to the variation in the circuit courts' reasoning. This line is particularly blurred when court orders will actually lessen voter confusion.<sup>342</sup> Some circuit court decisions helped to prevent voter confusion, which was the primary consideration in the *Purcell* opinion.<sup>343</sup> The circuit courts did not uniformly apply the *Purcell* principle, which can confuse plaintiffs bringing claims against election laws close to the date of an election.<sup>344</sup>

#### D. A Confusing, Gaping Hole in Voting Rights Protections

The current application of the *Purcell* principle and state emergency powers doctrine relinquishes the Supreme Court's role in adjudicating requests for preliminary relief from election laws.<sup>345</sup> By refusing to rule on the merits in emergency relief cases, the Court has retracted judicial protections of the right to vote. This reasoning moves away from a balancing test and towards a strict rule that, close to elections, grants state legislatures full control over election laws, subject to little to no substantive judicial review.<sup>346</sup> Lower courts are following the Supreme Court's lead and using a bright-line rule based on the proximity of the elections.<sup>347</sup> This Note does not argue that all of these cases are incorrectly decided, but rather that the bright-line rule against intervening in election procedures close to Election Day prevents courts from deciding these claims on the merits and permits constitutional abuses.

An example from Georgia's 2021 Senate runoff elections underscores the importance of this. In Hall County, officials opened several early voting locations for the 2020 general election to

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341. See *Larose*, 831 F. App'x at 192; *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *Thompson*, 959 F.3d at 813.

342. See *Common Cause R.I.*, 970 F.3d at 17 (“[I]n the absence of the consent decree, it is likely that many voters will be surprised when they receive ballots, and far fewer will vote.”).

343. See *id.* (“Because of the unusual — indeed in several instances unique — characteristics of this case, the *Purcell* concerns that would normally support a stay are largely inapplicable, and arguably militate against it.”).

344. See *infra* Section III.A.

345. See Joshua A. Douglas, *Courts Are Supposed to Protect the Right to Vote. Why Aren't They?*, CNN (Oct. 14, 2020, 7:51 PM), <https://www.cnn.com/2020/10/14/opinions/courts-not-protecting-voting-rights-douglas/index.html> [<https://perma.cc/U9RL-CERP>].

346. Compare Section I.A.i (explaining the *Anderson-Burdick* balancing test), with Part II (exploring the use of the *Purcell* principle's bright-line rule against judicial intervention).

347. See *supra* Section II.B.

accommodate COVID-19 concerns.<sup>348</sup> Murrayville Library was one of eight early voting sites opened to prevent the spread of COVID-19 and ensure compliance with social distancing guidelines.<sup>349</sup> In Gainesville, Black and Latinx workers at the Fieldale Farms poultry plant relied on the Murrayville Library, which was just a four-minute drive away, to vote in the 2020 general election.<sup>350</sup> However, with the COVID-19 pandemic growing exponentially worse in December 2020, the Murrayville Library and the three other sites were closed ahead of the 2021 Georgia Senate runoff elections.<sup>351</sup>

Georgia law, which mandates that citizens have two hours to vote on their lunch breaks,<sup>352</sup> and limited public transportation caused Fieldale Farms workers to rely on nearby polling places to vote.<sup>353</sup> These four poll site closures disproportionately affected working-class Black and Latinx voters like those at the Fieldale Farms plant, potentially forcing them to vote on Election Day and expose themselves to COVID-19.<sup>354</sup> In response, LatinoJustice and other public interest organizations wrote a letter to Hall County election officials warning them that its early voting site closures would make it “difficult, if not impossible, for many Latino and Black voters” in Hall County to cast their ballots before Election Day.<sup>355</sup> The letter went on to say that the “elimination of half of Hall County’s advance voting locations disproportionately impact[ed] Hall County’s Latino and Black voters and expose[d] Hall County to litigation.”<sup>356</sup>

The letter supported this assertion with direct evidence of decreased voter turnout in Hall County for the runoff elections.<sup>357</sup> Over the first two days of early voting in the 2020 general election, Hall County was among Georgia’s counties with the highest voter turnout.<sup>358</sup> In

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348. *See* Mansoor, *supra* note 35.

349. *See id.*

350. *See id.*

351. *See id.*

352. *See* GA. CODE ANN. § 21-2-404 (West 2021).

353. *See* Mansoor, *supra* note 35.

354. *See id.*

355. Letter from Kira Romero-Craft, Managing Att’y, LatinoJustice PRLDEF et al., to Richard Higgins, Chairman, Cnty. Bd. of Comm’rs et al. 4 (Dec. 16, 2020) [hereinafter Dec. 16 Letter], <https://www.naacpldf.org/wp-content/uploads/December-16-2020-Letter-Re-Closure-of-Early-Vote-Sites-in-Hall-County.pdf> [<https://perma.cc/Q8F3-TJCD>].

356. *Id.*

357. *See id.* at 2.

358. *See id.* (citing *Voter Absentee Files*, GA. SEC’Y STATE, <https://elections.sos.ga.gov/Elections/voterabsenteefile.do> [<https://perma.cc/G65K-D2LL>] (last visited Feb. 26, 2021)).



contrast, for the runoff elections, Hall County dropped to among the counties with the lowest voter turnout over the first two days of early voting.<sup>359</sup> The poll closures may have created confusion among voters in Hall County, many of whom likely anticipated voting at the same location they voted in the general election less than two months earlier.<sup>360</sup> Not only is this a ballot access issue, but it is also an issue regarding the health of marginalized communities.<sup>361</sup> Marginalized communities are disproportionately more likely to get COVID-19,<sup>362</sup> and forcing them to wait in long lines to vote on Election Day further increased this risk.<sup>363</sup>

The letter urged Hall County to maintain at least eight early voting locations so that the county would not violate Section 2 of the Voting Rights Act<sup>364</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>365</sup> Hall County election officials stated that they reduced the number of early voting sites because they did not have enough poll workers to operate more early voting sites.<sup>366</sup> The organizations that sent the letter retorted by offering to help provide and train poll workers if the county had a shortage.<sup>367</sup> Hall County did not end up taking any action in response to this letter.<sup>368</sup> The number of early votes as a percentage of all votes cast in Hall County decreased from 61.3% in the general election to just 38.5% in the runoff elections.<sup>369</sup>

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359. *See id.*

360. *See* Mansoor, *supra* note 35.

361. *See id.*

362. *See, e.g.,* Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist — and in Some Cases Worsen*, NPR (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [https://perma.cc/T9CK-WDHE]; *Ethnic Minorities Disproportionately Affected by Coronavirus: Study*, REUTERS (Nov. 12, 2020, 7:57 PM) <https://www.reuters.com/article/us-health-coronavirus-minorities/ethnic-minorities-disproportionately-affected-by-coronavirus-study-idUSKBN27T03G> [https://perma.cc/YZ7J-K6MZ].

363. *See* Mansoor, *supra* note 35.

364. Section 2 of the Voting Rights Act prohibits voting practices or procedures that, based on the “totality of the circumstance of the local electoral process,” have the result of denying or diluting a racial or language minority an equal opportunity to participate in an election. *See Section 2 of the Voting Rights Act*, U.S. DEP’T JUST. (Sept. 11, 2020), <https://www.justice.gov/crt/section-2-voting-rights-act> [https://perma.cc/UD6X-M5B9] (citing S. REP. NO. 97-417, at 28–29 (1982)).

365. *See* Dec. 16 Letter, *supra* note 355, at 4.

366. *See* Mansoor, *supra* note 35.

367. *See id.*

368. *See* Telephone Interview with Michael Pernick, Att’y, NAACP Legal Def. Fund (Dec. 30, 2020).

369. *Compare Georgia Early Voting Statistics*, U.S. ELECTIONS PROJECT (Nov. 5, 2020), <https://electproject.github.io/Early-Vote-2020G/GA.html>

Hall County's citizens should be able to seek judicial review to determine whether county policies result in unconstitutional disenfranchisement. If a court determines that the plaintiffs have a meritorious claim, the court should be able to intervene and prevent such unconstitutional actions. However, because Hall County officials made such decisions within two months of Election Day, a court may rely on the *Purcell* principle and merely defer to state officials' decisions. If state officials know the court will give absolute deference to the state's decision, officials can act without oversight and the threat of litigation will be moot.<sup>370</sup> Stressing the proximity of the election so heavily takes away the greatest weapon in the voting rights advocate's arsenal: litigation.<sup>371</sup> There is a hole in voting rights protections because, under the *Purcell* principle, courts could refuse to grant judicial relief for claims regarding unconstitutional election administration decisions within two months of Election Day, even if such claims have merit.

Moreover, the Supreme Court has not clearly articulated the bounds of the *Purcell* principle and merged it with deference to state power over elections and emergency powers.<sup>372</sup> The *Purcell* opinion warned lower courts about the potential voter confusion caused by court orders decided close to Election Day.<sup>373</sup> The Court then applied the *Purcell* principle as a bright-line rule against intervening in elections close to Election Day.<sup>374</sup> Additionally, the Court has not articulated any exceptions to the *Purcell* principle.<sup>375</sup> Without much guidance on applying the *Purcell* principle, lower courts, unsurprisingly, do not apply it uniformly.<sup>376</sup> The fact that neither Justice Kavanaugh nor Justice Gorsuch went through the traditional factors for staying an order in *Andino* or vacating a stay in *Wisconsin State Legislature* lends credence to the deduction that the factors are irrelevant when applying the *Purcell* principle.<sup>377</sup> Lastly, the Court has never defined how close to an election is too close. For example, the Court has applied the

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[<https://perma.cc/NJV3-SPMZ>], with *Georgia Early Voting Statistics — 2021 Senate Run-Off Election*, U.S. ELECTIONS PROJECT (Jan. 6, 2020), [https://electproject.github.io/Early-Vote-2020G/GA\\_RO.html](https://electproject.github.io/Early-Vote-2020G/GA_RO.html) [<https://perma.cc/JP9P-PZJW>].

370. See *infra* Section III.C.

371. See *supra* note 40 and accompanying text.

372. See *supra* Section II.B.

373. See *supra* Section I.A.

374. See *supra* Section II.A.

375. See *supra* Sections II.A–B.

376. See *supra* Section II.C.

377. See *supra* Section II.B.

*Purcell* principle to lower court rulings that arose 61 days before an election,<sup>378</sup> as well as five days before an election.<sup>379</sup> This veritable mess of a doctrine leaves a gap in the judicial protection of voting rights close to elections.

### III. THE COMBINATION OF *PURCELL* AND STATE EMERGENCY POWERS IS RIPE FOR ABUSE

By strongly relying on the *Purcell* principle, the Supreme Court is tying lower courts' hands and preventing them from providing judicial relief from unconstitutional burdens on the right to vote. While the *Purcell* principle is harmful in the context of ordinary elections, the additional reliance on the state emergency powers doctrine opens the door to potential abuse in future elections. The Court should articulate more explicit boundaries for the *Purcell* principle and state emergency powers.

Section III.A points out that reliance on the *Purcell* principle and state emergency powers grants considerable power to state legislatures. It then analyzes the potential for emergency powers to be abused by state legislators or governors for illegitimate reasons and asserts that the Supreme Court needs to prevent state governments from improperly intervening in elections. Section III.B argues that the Court should clearly articulate the *Purcell* principle to allow for consistent application by lower courts. This Section then proposes that the Court allow plaintiffs to prove that changes to election laws are an egregious abuse of state emergency powers and create burdens on the right to vote without valid justification. Section III.C concludes by analyzing a hypothetical example under both the existing framework and the proposed framework to demonstrate how it protects against egregious abuses of state emergency powers.

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378. See *Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014). The district court decided *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014), on September 4, 2014, and election day in 2014 was on November 4, see *Election Results, 2014*, BALLOTPEDIA, [https://ballotpedia.org/Election\\_results,\\_2014](https://ballotpedia.org/Election_results,_2014) [https://perma.cc/JG25-AHNV] (last visited Mar. 23, 2021).

379. See *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020). The district court decided *Democratic National Committee v. Republican National Committee*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), on April 2, 2020, and primary election day in Wisconsin was on April 7, 2020, see *Wisconsin Elections, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Wisconsin\\_elections,\\_2020](https://ballotpedia.org/Wisconsin_elections,_2020) [https://perma.cc/GR4Y-SWE8] (last visited Apr. 8, 2021).

### A. Fixing the *Purcell* Principle

James Madison wrote in *Federalist No. 43* that “[t]he only restriction imposed on [the States is] that they shall not exchange republican for antirepublican Constitutions.”<sup>380</sup> To ensure the integrity of elections, the Court must carve out an exception to the *Purcell* principle regarding the potential for egregious abuse of state emergency powers for undemocratic purposes. In an emergency, courts should protect against practices and procedures that unconstitutionally burden the right to vote. State legislatures and executives are more capable of responding to emergencies like a pandemic, but courts must guarantee that the responses do not violate the Constitution.

The *Purcell* principle is incredibly problematic and prevents consideration of cases on the merits close to elections, leaving plaintiffs without judicial relief from potential constitutional violations. This issue is heightened in emergencies when the state has greater justifications for burdening the right to vote.<sup>381</sup> Combining the *Purcell* principle with the state emergency powers doctrine allocates tremendous power to state legislatures to administer elections during emergencies and ties the courts’ hands in voting rights litigation.<sup>382</sup> State legislatures have the power to create election laws<sup>383</sup> and address emergencies,<sup>384</sup> but that power should be subject to judicial review. A bright-line rule prohibiting judicial review close to Election Day and complete deference to state emergency powers opens the door to abuse of state powers. Without a possibility for recourse close to elections, voters are vulnerable to egregious abuses of state emergency powers.

The Supreme Court views legislative branches as better equipped to handle public health crises because they are politically accountable to the people.<sup>385</sup> Nevertheless, legislatures may not be fully accountable if they can rewrite the rules of their own elections without substantive judicial review close to the election’s date. If a natural disaster, like a hurricane,<sup>386</sup> or a terrorist attack<sup>387</sup> hits close to Election Day, then courts may be powerless to prevent voting rights abuses.

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380. THE FEDERALIST No. 43 (James Madison).

381. See *supra* Section I.C.i.

382. See *supra* Part II.

383. See U.S. CONST art. I, § 4.

384. See *Election Emergencies*, *supra* note 187 and accompanying text.

385. See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

386. See *supra* Section I.C.ii.

387. See *supra* Section I.C.ii; see also Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 525 (2005).

As demonstrated previously, every case close to an election and a state emergency completely defers to state decisions.<sup>388</sup> The Constitution grants state legislatures authority to administer elections, subject to Congressional oversight and judicial review for constitutional rights violations.<sup>389</sup> Ensuring the political accountability of the decisions made in an emergency is essential to the function of democracy.<sup>390</sup> Allowing an exception to the *Purcell* principle and state emergency powers doctrine balances the deference to state legislatures in making emergency decisions while maintaining fair election practices.

Historically, the Court has been very deferential to the states *during* emergencies, but the Court has stepped in *after* emergencies to prevent future egregious abuses of emergency powers.<sup>391</sup> Egregious abuses of emergency powers have consisted of prosecuting civilians in military tribunals when they were not involved with military service and civilian courts were operational, thereby depriving them of their constitutional rights to a trial by jury and due process of law.<sup>392</sup> An egregious abuse of emergency powers in election law, as defined in this Note, involves using emergency powers to unconstitutionally inject government into the debate over who *should* govern through decisions that affect the right to vote.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>393</sup> the Court struck down a provision of Arizona's public campaign financing system that allowed candidates for state office who accepted public funding to receive additional public funding when independent expenditure groups spent money for a privately funded opponent.<sup>394</sup> In its opinion, the Court stated that "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election' . . . . And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values."<sup>395</sup>

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388. *See supra* Parts II.

389. *See* U.S. CONST. art. I, § 4; *id.* amends. XIV, XV, XVII, XIX, XXVI.

390. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

391. *See supra* Section I.B.i.

392. *See supra* Section I.B.i.

393. 564 U.S. 721 (2011).

394. *See id.* at 750–55.

395. *Id.* at 750 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 742 (2008)).

In *McCutcheon v. Federal Election Commission*,<sup>396</sup> the Court addressed a campaign finance law that restricted how much money a donor could contribute in total to all political candidates or committees.<sup>397</sup> When it struck down this restriction, the Court said, “those who govern should be the *last* people to help decide who *should* govern.”<sup>398</sup> Concerns over governmental intrusion into the decision as to who should govern are the same concerns that the Court should have when states make emergency changes to election laws.

### B. Courts Should Limit the *Purcell* Principle and State Emergency Powers

The Supreme Court should look back at the framework it created with the *Purcell* principle and state emergency powers doctrine to protect democracy in future emergencies. Currently, the Supreme Court has not outlined circumstances that could overcome the *Purcell* principle.<sup>399</sup> Not even a showing of intentional racial discrimination was enough to overcome the *Purcell* principle in one case.<sup>400</sup> The marriage of the *Purcell* principle and the state emergency powers doctrine makes judicial relief even more unlikely.<sup>401</sup> On the one hand, the Court is correct: emergencies warrant deference to state legislatures.<sup>402</sup> However, courts must have the power to review such actions. Suppose that, in response to COVID-19, a state passed an emergency order stating that only men could vote because there are fears COVID-19 kills more women than men. This regulation clearly would violate the Nineteenth Amendment, which states that “the right . . . to vote shall not be denied or abridged . . . by any State on account of sex.”<sup>403</sup> However, it appears that in this absurd scenario, the Court would defer to the state emergency powers and the *Purcell* principle and refuse to grant judicial relief. This is unacceptable.

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396. 572 U.S. 185 (2014) (plurality opinion).

397. *See id.* at 193–96.

398. *See id.* at 192.

399. *See supra* Sections I.A–B; *supra* Part II.

400. *See* *Veasey v. Perry*, 71 F. Supp. 3d 627, 698–99 (S.D. Tex. 2014) (enjoining implementation of voter identification law based on finding of intentional discrimination), *motion to vacate stay denied*, 769 F.3d 890, 892 (5th Cir. 2014), *motion to vacate stay denied*, 135 S. Ct. 9, 9 (2014) (mem.); *see also supra* Section I.A.iii.

401. *See supra* Section II.B.

402. *See* *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29–30 (2020) (Gorsuch, J., concurring).

403. U.S. CONST. amend. XIX.

The first thing the Court should do is establish clear boundaries for the *Purcell* principle and remedy the confusion among lower courts.<sup>404</sup> When determining if the *Purcell* principle applies, the Court should provide direction on specific considerations regarding the election's proximity. The lack of explanation about timing prevents clear communication to plaintiffs when the *Purcell* principle applies.<sup>405</sup> Additionally, the importance of the proximity of the election may differ between cases.<sup>406</sup> For instance, if the deadline for printing ballots is one month before the election, then any litigation regarding ballot access for a candidate must take place an adequate amount of time before printing the ballots. However, if the challenged procedure is, for example, the deadline for casting or receiving absentee ballots, then a month out from the election may be ample time to change the necessary procedures. The Court needs to explain these considerations to ensure consistent application of the *Purcell* principle across the circuits.

Furthermore, the Court must make clear how the *Purcell* principle applies in the procedure for analyzing requests for preliminary relief or stays pending appeal. Currently, lower courts are applying the principle inconsistently, making it confusing for plaintiffs to litigate.<sup>407</sup> If plaintiffs do not know which of the preliminary injunction factors or *Nken* factors the principle applies to, then any litigation becomes more difficult.<sup>408</sup> Additional explanation is needed in order to uniformly apply the *Purcell* principle across the circuit courts.

Moreover, the Court must clarify a distinction between courts' power to overrule election laws and the constraints on that power close to Election Day. Throughout the pandemic, the Court merged the *Purcell* principle with state legislatures' constitutionally delegated power to administer elections under Articles I and II of the Constitution<sup>409</sup> without clearly distinguishing between the two

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404. *See supra* Section II.C.

405. *See, e.g.,* *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020) (ruling that plaintiffs misconstrued when the *Purcell* principle applies because 18 days before early voting begins is too close to the election).

406. *See* *Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020) (applying the *Purcell* principle even though election officials gave the court a deadline more than a week later than when the ruling came down).

407. *See supra* Section II.C.

408. *Compare* *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) (applying the *Purcell* principle under the "irreparable harm" factor in the analysis of stay pending appeal), *with* *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 865 (5th Cir. 2020) (applying the *Purcell* principle under the "likelihood of success on the merits" factor in the stay analysis).

409. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

doctrines.<sup>410</sup> This is particularly evident in Justice Gorsuch's *Wisconsin State Legislature* concurrence and *Moore* dissent when he used the state election power and the *Purcell* principle interchangeably.<sup>411</sup> As a result, lower courts are citing the *Purcell* principle as standing for different propositions.<sup>412</sup> Thus, the Court needs to clarify if the *Purcell* principle merely prevents orders that create voter confusion or any orders close to elections.<sup>413</sup>

Additionally, the Court needs to create an exception to the *Purcell* principle to allow courts to analyze whether it will intervene regarding election decisions close to Election Day, especially in cases of emergencies. A bright-line rule against interference prevents the Court from granting judicial relief, even if there are constitutional violations. Utilizing the traditional frameworks for considering requests for preliminary relief or granting a stay pending appeal, courts should add into their analysis specific considerations regarding abuses of state emergency powers.

If the plaintiff can establish that the challenged procedure constitutes a burden on the right to vote, then the courts should allow plaintiffs to argue that the state's proffered justifications for that burden are not warranted or are invalid, even in times of an emergency. In the context of elections, the responses must be done in good faith and must preserve access to the franchise. The substitution of free and fair elections with those in which the government injects itself towards one party is analogous to the substitution of civilian courts with military tribunals.<sup>414</sup> The manipulation of election procedures to help decide who should govern should be considered an egregious abuse of state emergency power, and courts must intervene to prevent this.

If plaintiffs can prove either of the following, then courts should grant the plaintiffs' requested relief over the justifications of the state. First, suppose the plaintiff can prove there is direct intent to burden

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410. *See* *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring) (reasoning that the district court's relief was so extraordinary that "there [is no] precedent for it in 230 years of this Court's decisions").

411. *See id.*; *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting) ("Such last-minute changes by largely unaccountable bodies, too, invite confusion, risk altering election outcomes, and in the process threaten voter confidence in the results.").

412. *Compare Tex. Democratic Party*, 961 F.3d at 411 (citing the *Purcell* principle to say that forcing Texas to implement a procedure against its will constituted irreparable harm), *with Tully v. Okeson*, 977 F.3d 608, 618 (7th Cir. 2020) (citing the *Purcell* principle to say that the court is "ill-equipped" to override the state legislature's decision). *See generally supra* Section II.C.

413. *See supra* Section II.D.

414. *See supra* Section I.B.i.



the right to vote for voters to favor one candidate, party, or class of voters and improperly attempt to decide who should govern. In that case, the court should not immediately defer to the state's decision. Rather, the court should consider the egregious abuses of state emergency power in its decision to intervene in the election. Statements by government officials or party members regarding the reasons for implementing changes, or refusing to implement changes, can be proof of manipulation and abuse of state emergency powers. Additionally, the plaintiff may demonstrate that the policies or lack thereof intend to benefit one class of voters to the detriment of another.

Second, if the plaintiff can prove that the implemented policies, or the refusal to implement policies, burden the right to vote while serving no rational purpose or do not further the state's proffered interest, then equitable relief should be granted to the plaintiff. While a high bar to meet, this burden of proof provides a way for plaintiffs to surmount the combination of the *Purcell* principle and state emergency powers doctrine. When the use of state emergency power injects government into the debate as to who should govern,<sup>415</sup> then courts should strike it down. Allowing an exception to the *Purcell* principle and state emergency powers doctrine, although intended to be rarely granted, allows courts to protect against egregious abuses of state power.

### C. Analyzing the Georgia 2022 Election Hypothetical Under the Egregious Abuse of State Emergency Power Framework

Consider the following example of a hypothetical 2022 gubernatorial election in Georgia to demonstrate the implications of the *Purcell* principle and the state emergency powers doctrine. Joe Biden won Georgia by a razor-thin margin in the 2020 presidential election,<sup>416</sup> which results in a hotly contested 2022 gubernatorial election. In 2020, President Biden had narrowly beat out President Trump's lead in Georgia due primarily to absentee ballots,<sup>417</sup> and Democratic voters

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415. *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (holding that campaign finance regulations that pursue objectives other than the preventing quid pro quo corruption or its appearance impermissibly inject government "into the debate over who should govern" (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011))).

416. *See Georgia Presidential Election Results 2020*, NBC NEWS (Feb. 3, 2021, 1:15 PM), <https://www.nbcnews.com/politics/2020-elections/georgia-president-results> [<https://perma.cc/VC8M-TBK3>].

417. *See* Stephanie Saul, *Biden Is Closing the Gap on Trump in Georgia*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/04/us/politics/biden-is-closing-the-gap-on-trump-in-georgia.html> [<https://perma.cc/3V96-YFXE>].

were much more likely to vote absentee than Republican voters.<sup>418</sup> In the 2022 election, incumbent Republican Governor Brian Kemp is running for reelection.<sup>419</sup>

Imagine that a month and a half before the 2022 election, a massive hurricane strikes the east coast, devastating Georgia and destroying many of the planned polling places for the upcoming elections. In response to the emergency, Georgia's emergency statute grants Governor Kemp power to suspend regulatory statutes, including election laws.<sup>420</sup> Governor Kemp publicly states Georgia will not have enough poll workers and resources to open new polling sites in every county and thus will not open new sites in selected counties. Although the Governor leaves this out of the public statement, the only counties with new poll sites are ones in which President Trump won at least 60% of the vote in 2020.<sup>421</sup> Not only that, but the Governor says that Georgia will only give out and count absentee ballots from these counties and does not have the resources to administer and count all the absentee ballots. Therefore, it will not disseminate no-excuse absentee ballots or allow displacement from the hurricane to be used as an excuse.<sup>422</sup> As a result, Georgia voters in densely populated, heavily Democratic counties — such as Fulton, Gwinnett, Cobb, Chatham, and Dekalb — and competitive counties like Houston and Lowndes have very few polling places and no other viable alternative to vote in the wake of the hurricane.

These decisions inflame voting rights groups across Georgia, who sue in federal court for a preliminary injunction and writ of mandamus, forcing the Governor to open new polling locations in these counties and allow all voters to cast absentee ballots. A federal district court in Georgia grants the preliminary injunction on the grounds that these restrictions violate voters' First and Fourteenth Amendment rights under the *Anderson-Burdick* test.<sup>423</sup> Its injunction forces the state to

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418. Almost 850,000 Georgia absentee voters voted for President Biden compared to about 450,000 for President Trump. See Christopher Alston, *Georgia's Absentee Voting Policies That Benefited Democrats Were Created by Republicans*, WABE (Nov. 9, 2020), <https://www.wabe.org/absentee-voting-policies-in-georgia-that-benefited-democrats-were-originally-created-by-republicans/> [<https://perma.cc/8CUA-43U4>].

419. See *Brian Kemp*, BALLOTPEDIA, [https://ballotpedia.org/Brian\\_Kemp](https://ballotpedia.org/Brian_Kemp) [<https://perma.cc/G9QS-YNW5>] (last visited Mar. 1, 2021).

420. See GA. CODE ANN. § 38-3-51 (West 2014); see also *Election Emergencies*, *supra* note 187.

421. See *Georgia Presidential Election Results 2020*, *supra* note 416.

422. Cf. King, *supra* note 25 (discussing an attempt by Georgia's Governor to restrict access to absentee ballots during the COVID-19 pandemic due to a lack of resources).

423. See *supra* Section I.A.

accept absentee ballots for all voters and open one new polling place per 10,000 residents in each county that did not have reopened poll sites. The Eleventh Circuit, relying on the Supreme Court's reasoning in *Wisconsin State Legislature*,<sup>424</sup> stays the district court's injunction. The plaintiffs then appeal to the Supreme Court, which refuses to vacate the stay and reiterates its framework, combining the *Purcell* principle and the state emergency powers doctrine. Since the legislature acted with emergency power due to the hurricane and the election is now less than a month away, the Court refuses to intervene. The Court cites its previous emergency election law cases<sup>425</sup> and says it is not the place of the Court to second-guess decisions of the politically accountable branches of state governments.

Consequently, on the day of the election, hundreds of thousands of voters displaced by the hurricane have to wait all day to vote on Election Day. Many are unable to vote due to excessively long lines. Moreover, election officials reject hundreds of thousands of absentee ballots for not falling within the valid excuses. The limitation of polling places is particularly burdensome in Atlanta, where several counties have more than half a million residents but only one poll site.<sup>426</sup> Georgia's most populous counties are heavily made up of Black Americans and vote overwhelmingly Democratic.<sup>427</sup> As a result, these restrictions disenfranchise thousands of voters, particularly Democrats. The election results in a landslide victory for the incumbent Republican Governor Kemp, who first enacted such restrictive policies.

This hypothetical demonstrates the extent to which reliance on the *Purcell* principle and the state emergency powers doctrine allow for abuse of state emergency powers close to elections. During emergencies, voters may receive no relief from blatant attempts to restrict access to the ballot, even when there are clear partisan motivations behind them. The Court should maintain limitations on that power to ensure free and fair elections. By foregoing any judicial review close to elections, the Supreme Court is abdicating its primary

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424. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020); *see also supra* Section II.B.ii.

425. *See supra* Part II.

426. *See Georgia Counties by Population*, GA. DEMOGRAPHICS, [https://www.georgia-demographics.com/counties\\_by\\_population](https://www.georgia-demographics.com/counties_by_population) [<https://perma.cc/MY8G-9VMZ>] (last visited Mar. 1, 2021).

427. *See* David Weigel, *How Votes Shifted in the Six Political States of Georgia*, WASH. POST (Dec. 8, 2020), <https://www.washingtonpost.com/graphics/2020/politics/georgia-senate-political-geography/> [<https://perma.cc/BY8K-6H6R>].

responsibility: protecting U.S. citizens against violations of their constitutional rights.

When analyzing this hypothetical within the new framework outlined in Section III.B, the judicial analysis changes. After a hurricane, state emergency powers take effect and increase the state's power to implement changes to election laws.<sup>428</sup> In the suit challenging the relocation and reopening of polling places in predominantly white, Republican-dominated counties and the refusal to accept absentee ballots from those displaced by the hurricane, the plaintiffs can prove an egregious abuse of state power.<sup>429</sup>

First, the plaintiffs must prove that the changes — or lack thereof — to election laws burden their right to vote.<sup>430</sup> Then, the plaintiffs must show that the use of state power was egregious by injecting the government into the debate as to who should govern. If the plaintiffs can show that the state has enough poll workers, in contrast to the Governor's claim, to open new polling locations in the affected counties, then the state's justification for burdening the right to vote is suspect. The state may argue that it did not have the resources to open them due to the hurricane. However, the plaintiffs may prove that the state did not allocate its resources proportionately, concentrating them in certain counties, and that it has access to more resources than it is employing. Proving this demonstrates that the state is improperly abusing its emergency powers and inequitably facilitating the right to vote in the gubernatorial election.

Moreover, the plaintiffs could argue that opening new polling places only in counties that voted for President Trump by 60% demonstrates an improper abuse of state emergency power. The plaintiffs may argue that the primary reason to open new polling places in only those counties is to promote the Governor's electoral prospects.<sup>431</sup> Had the government spread them out in proportion to the population in each county, this would have facilitated voting across the state. As a result, the inequitable distribution of polling places and refusal to employ enough poll workers to service the other counties serves no rational purpose and are not explained by the Governor's justification.

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428. *See supra* Section I.B.

429. *See supra* Section III.B.

430. *See supra* Section III.B.

431. *Cf. Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (“[T]he Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.”).

Furthermore, the State's argument that it cannot administer no-excuse absentee ballots because it lacks the resources to do so leaves thousands of voters without a viable alternative for voting. If the plaintiff shows that the state has the resources to implement this procedure, this lends credence to their argument. Additionally, if the plaintiff can demonstrate that they, along with many other voters, will have no other viable alternative to vote in the election due to the refusal to open new polling places in several counties, this furthers their argument. Moreover, if the plaintiffs can prove that not only does the state have enough resources to implement no-excuse absentee voting, but also that not doing so would serve to inject the government into the debate over who should govern, then the court should provide the plaintiffs relief.

In this hypothetical, the changes to election law through emergency powers prevented the free exercise of the franchise and a fair election. The Governor's actions were not justified by his proffered justifications and improperly injected government into the debate as to who should govern. The inhibition of a democratic election constitutes an egregious abuse of state emergency powers over election law, which overcomes the application of *Purcell* and the state emergency powers doctrine in an emergency proceeding.

If the Court does not formulate a method for a new framework for evaluating *Purcell* and state emergency powers, then this scenario could happen in the near future, and courts would have no way to prevent impermissible, undemocratic actions. The exception for egregious abuses of state emergency powers is the only way to balance both the states' compelling interests in managing election emergencies against access to the franchise and fairness of elections. The Court should ensure political accountability through the maintenance of free and fair elections.

### CONCLUSION

The fear of potentially catching a deadly virus while voting engendered a profound change in election processes and procedures throughout the United States. Numerous lawsuits arose trying to ensure voters' safety while enabling access to the ballot in the face of COVID-19.<sup>432</sup> The Court tried to leave decisions about voter safety up to state legislatures because they are politically accountable and have

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<sup>432</sup>. See *Election Litigation: COVID-19 and Emergency Election Litigation*, *supra* note 42.

the expertise to deal with emergencies.<sup>433</sup> However, the Court's reliance on the *Purcell* principle and deference to state emergency powers allow unconstitutional burdens on the right to vote to continue without consideration of cases on the merits.<sup>434</sup> Without a way to overcome the potential for bad actors to abuse the state legislatures' power over emergency election administration, voters may have no way to hold elected officials accountable in an emergency.<sup>435</sup> This framework aims not to subject every state legislature and executive decision regarding elections during an emergency to judicial review. It is merely to provide a backstop against those "[w]icked men, ambitious of power, with hatred of liberty and contempt of law"<sup>436</sup> from abusing their emergency powers.

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433. *See* Part II.

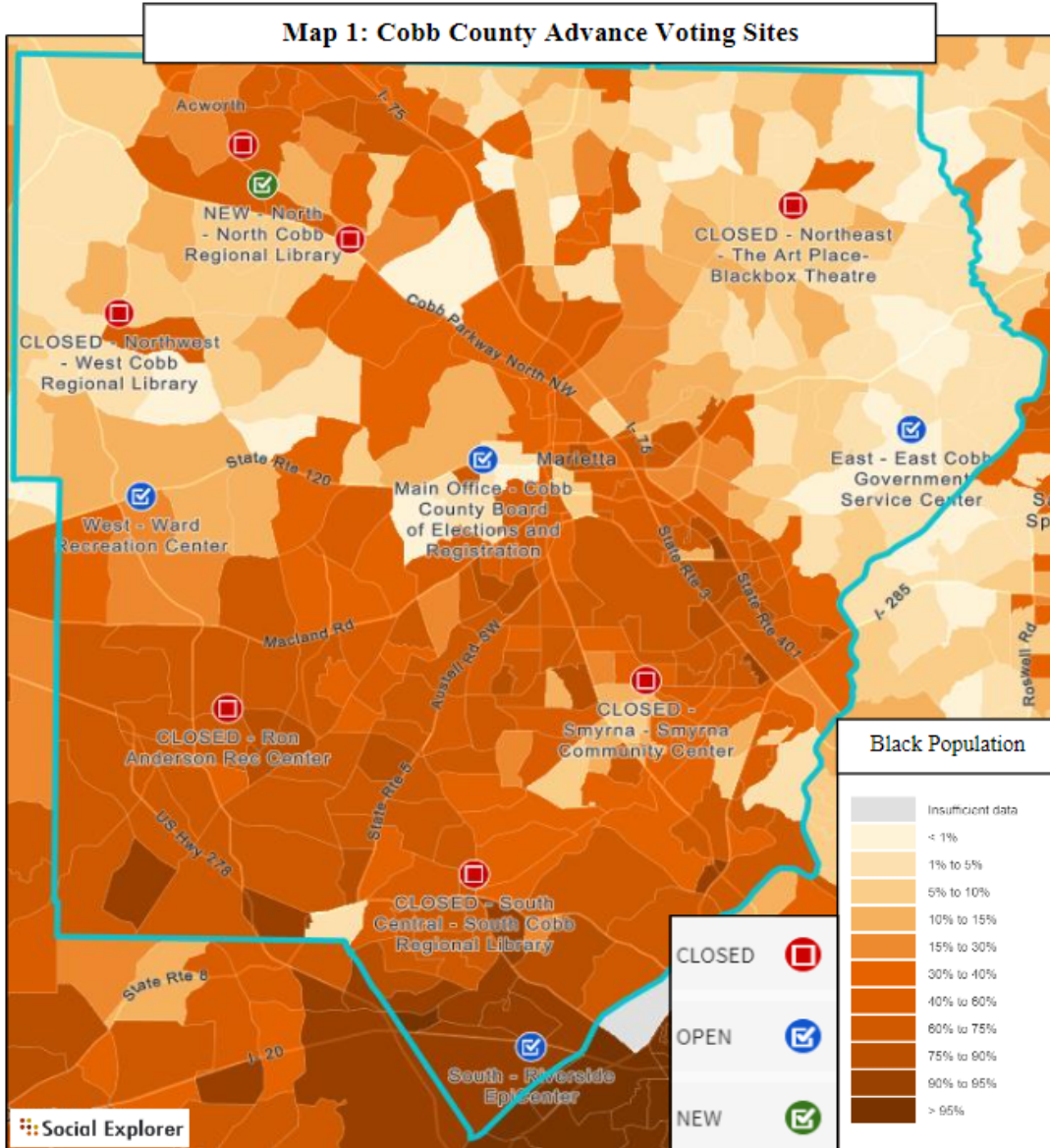
434. *See supra* Parts II, III.

435. *See supra* Part III.

436. *Ex parte* Milligan, 71 U.S. 2, 125 (1866).

APPENDIX

Cobb County Advance Voting Sites<sup>437</sup>



437. Dec. 7 Letter, *supra* note 28, at 4.