Article III — Equitable Relief — Election Administration —
Republican National Committee v. Democratic National Committee

The COVID-19 pandemic has created a variety of challenges in election administration,[1] resulting in numerous legal disputes.[2] One of these disputes arose in Wisconsin, as the state legislature's decision to proceed with a statewide election during the early stages of the outbreak sparked a national outcry and led to multiple lawsuits.[3] A group of plaintiffs succeeded in obtaining relief in federal district court, winning a preliminary injunction that, among other remedies, extended the deadline for voters to send in absentee ballots for several days after Election Day.[4] Last Term, in *Republican National Committee v. Democratic National Committee*,[5] the Supreme Court held that, as "lower federal courts should ordinarily not alter the election rules on the eve of an election," the district court erred in granting this extension.[6] The Court traced this disfavor for late judicial intervention to *Purcell v. Gonzalez*,[7] a decision that emphasized the need for courts faced with preelection challenges to consider the adverse effect that resulting "voter confusion" might have on electoral participation.[8] The outcome in *Republican National Committee*, which made participation more difficult for many Wisconsinites,[9] demonstrates that the *Purcell* doctrine's consideration of participation is one-sided: it accounts only for possible adverse effects of late judicial intervention on voter participation. In order to allow for a more complete assessment of the consequences of preelection court orders for voter participation — including consideration

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[1] *See, e.g.*, Kendall Karson, *"This Is Not Just a Georgia Problem": Primary Election Troubles Foreshadow Challenges for November*, ABC NEWS (June 10, 2020, 4:16 PM), https://abcn.ws/2Yr400C [https://perma.cc/T3Y5-SBDH].

[2] *See, e.g.*, *Four Pillars Cases: Where We Are Litigating*, DEMOCRACY DOCKET, https://www.democracydocket.com/4-pillars-cases [https://perma.cc/X22R-NBBG] (collecting current voting rights cases litigated by Perkins Coie, with most related to COVID-19). *See generally* Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos [https://perma.cc/UQ96-JT9H].

[3] *See* Alex Seitz-Wald & Shaquille Brewster, *Wisconsin, Facing Heavy Criticism, Plans Tuesday Primary Despite Coronavirus*, NBC NEWS (Apr. 1, 2020, 12:23 PM), https://www.nbcnews.com/politics/2020-election/wisconsin-facing-heavy-criticism-plans-tuesday-primary-despite-coronavirus-n1173361 [https://perma.cc/VEN4-LQSM].

[4] Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249, 2020 WL 1638374, at *17, *22 (W.D. Wis. Apr. 2, 2020).

[5] 140 S. Ct. 1205 (2020) (per curiam).

[6] *Id.* at 1207; *see id.* at 1206–07.

[7] 549 U.S. 1 (2006) (per curiam); *see Republican Nat'l Comm.*, 140 S. Ct. at 1207 (citing *Purcell*, 549 U.S. 1).

[8] *Purcell*, 549 U.S. at 4–5; *see* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 441 (2016).

[9] *See Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting); Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. TIMES (Apr. 20, 2020), https://nyti.ms/2XErzEJ [https://perma.cc/R7UD-WBTC].

of the benefits of orders that facilitate access to the franchise — the Court should stop treating *Purcell* as a bright-line rule against late judicial intervention and instead include an order's timing as just one element in its ordinary multifactor stay analysis.

In the spring of 2020, the COVID-19 pandemic caused a number of states to postpone their primary elections.[10] Wisconsin was not among them: although Governor Tony Evers, a Democrat, issued a "Safer-at-Home Order" on March 24, mandating that "all Wisconsinites . . . shelter in place . . . until April 24,"[11] the Republican-controlled state legislature nonetheless pressed forward with an April 7 election.[12] In response, Governor Evers and other state officials encouraged absentee voting.[13] This encouragement, combined with the health threats posed by in-person voting and the closure of many polling places, led to a "significant uptick in absentee ballot requests."[14] The "unprecedented number[]" of requests, in turn, left many clerks unable to issue absentee ballots on a schedule that would give voters enough time to actually use those ballots,[15] as state law required that absentee ballots be received by clerks' offices by 8 p.m. on Election Day.[16] A state election official ultimately estimated that some 27,500 timely requested ballots would not arrive until after that receipt deadline, precluding the affected voters — and others, whose ballots arrived before the deadline but too late to return by mail — from voting by mail.[17] In response, multiple plaintiffs, including the Democratic National Committee, the state Democratic Party, and individual voters, filed three separate lawsuits alleging that enforcement of various statutory requirements, including the 8 p.m. deadline, would unconstitutionally burden Wisconsinites' right to vote.[18] Several plaintiffs moved for a preliminary

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[10] *See* Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES (Aug. 10, 2020), https://nyti.ms/2XErzEJ [https://perma.cc/3RG9-FTKX].

[11] Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249, 2020 WL 1638374, at *3 (W.D. Wis. Apr. 2, 2020).

[12] *See id.* at *1; Amy Gardner, Elise Viebeck & Dan Simmons, *Wisconsin Supreme Court Blocks Order by Governor to Stop Tuesday's Elections in State's Latest Whipsaw*, WASH. POST (Apr. 7, 2020, 9:28 AM), https://www.washingtonpost.com/politics/wisconsin-governor-suspends-in-person-voting-in-tuesdays-elections-amid-escalating-coronavirus-fears/2020/04/06/9d658e2a-781c-11ea-b6ff-597f170df8f8_story.html [https://perma.cc/QSM4-MTK5].

[13] *Democratic Nat'l Comm.*, 2020 WL 1638374, at *4.

[14] *Id.*

[15] *Id.* at *5.

[16] *Id.* at *2 (citing WIS. STAT. ANN. § 6.87(6) (West 2020)).

[17] *See id.* at *5.

[18] *Id.* at *1–2; *see* Democratic Nat'l Comm. v. Bostelmann, No. 20-1538, 2020 WL 3619499, at *1 (7th Cir. Apr. 3, 2020) (per curiam); *see, e.g.*, Amended Complaint for Declaratory and Injunctive Relief ¶¶ 45–51, *Democratic Nat'l Comm.*, No. 20-cv-249 (W.D. Wis. Apr. 2, 2020) [hereinafter Amended Complaint]. Some plaintiffs also brought other claims. *See, e.g.*, Amended Complaint, *supra*, ¶¶ 52–63 (including procedural due process and equal protection claims).

injunction.[19] The motion did not specifically request that ballots postmarked after Election Day but before this new deadline be counted,[20] but the plaintiffs did orally request this relief during a hearing on April 1.[21]

Following an evidentiary hearing, on April 2 — five days before Election Day — the district court granted the plaintiffs' motion with respect to the 8 p.m. deadline, requiring that clerks instead accept absentee ballots received by 4 p.m. on April 13.[22] Critically, the State's elections commission did not oppose extending the deadline, and the court concluded that requiring voters to submit ballots by Election Day would impose a severe burden.[23] The State lacked a compelling interest in maintaining the deadline to justify this burden, and the balance of harms favored an extension.[24] The court declined to "add a postmarked-by date requirement," as there was no evidence that doing so would create "tangible benefits or harms," and giving voters more time to vote served the public interest by facilitating democratic participation.[25] The court later supplemented its order with a requirement that election officials not release any election results until after the new deadline for absentee ballot receipt.[26] The Wisconsin legislature — which had sought to intervene as a defendant but been denied on standing grounds — and the Republican National Committee (RNC), as well as the Republican Party of Wisconsin, appealed to the Seventh Circuit and moved for a stay of the district court's order pending appeal.[27]

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[19] *Democratic Nat'l Comm.*, 2020 WL 1638374, at *2. The plaintiffs first requested a temporary restraining order and preliminary injunction on March 18. *See* Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249 (W.D. Wis. Mar. 20, 2020). In response, the court granted the plaintiffs' request to extend the deadline for online voter registration from March 18 to March 30, but denied the remainder of the motion without prejudice. *See Democratic Nat'l Comm.*, 2020 WL 1320819, at *9. The plaintiffs then filed a renewed motion for a preliminary injunction, requesting both an extension of the absentee ballot receipt deadline and other relief. *See* Plaintiffs' Motion for Preliminary Injunction and Reconsideration of the Court's Ruling on the By-Mail Absentee Deadline and Documentation Requirements at 1, *Democratic Nat'l Comm.*, No. 20-cv-249 (W.D. Wis. Apr. 2, 2020) [hereinafter Plaintiffs' Motion].

[20] *Republican Nat'l Comm.*, 140 S. Ct. at 1206; *see* Plaintiffs' Motion, *supra* note 19, at 1, 3.

[21] *See Republican Nat'l Comm.*, 140 S. Ct. at 1210 (Ginsburg, J., dissenting) (citing Stenographic Transcript of Videoconference Evidentiary Hearing Held Before U.S. District Judge William M. Conley at 102–03, *Democratic Nat'l Comm.*, No. 20-cv-249 (W.D. Wis. Apr. 2, 2020)).

[22] *Democratic Nat'l Comm.*, 2020 WL 1638374, at *2, *22. The court also enjoined or modified several other statutory requirements but concluded that circumstances did not warrant postponing the election wholesale. *See id.* at *16, *22.

[23] *Id.* at *16–17.

[24] *Id.* at *17.

[25] *Id.*

[26] Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-00249, slip op. at 2 (W.D. Wis. Apr. 3, 2020).

[27] Democratic Nat'l Comm. v. Bostelmann, No. 20-1538, 2020 WL 3619499, at *1 (7th Cir. Apr. 3, 2020) (per curiam).

On April 3, the Seventh Circuit granted in part and denied in part the motion for a stay.[28] In a per curiam opinion, a three-judge panel declined to stay the portions of the injunction extending the deadlines for receipt of absentee ballots and ballot requests.[29] The following day, the RNC, the Republican Party of Wisconsin, and the Wisconsin legislature applied to the Supreme Court for "a stay of the district court's injunction to the extent it require[d] the State to count absentee ballots postmarked after April 7."[30]

The Supreme Court granted the stay on April 6, one day before Election Day.[31] In a brief per curiam opinion, the Court emphasized that it viewed the case as presenting a "narrow, technical question about the absentee ballot process."[32] As the applicants had "not challenged" the portion of the injunction that extended the deadline for clerks to receive ballots to April 13, that extension remained in effect: "The sole question" was "whether absentee ballots . . . must be mailed and postmarked by election day."[33] By granting the stay, the Court answered in the affirmative.[34]

The Court first observed the "critical point" that "in their preliminary injunction motions, the plaintiffs did not ask that . . . ballots mailed and postmarked after election day . . . be counted."[35] The district court had thus "unilaterally ordered" this extension less than a week before Election Day.[36] In so doing, the lower court "fundamentally alter[ed] the nature of the election" by allowing voters to cast ballots after in-person voting had concluded.[37] Citing three precedents, including 2006's *Purcell v. Gonzalez*, the majority argued that the "Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."[38] The district court's preliminary injunction ran afoul of this principle.[39]

As an illustration of "[t]he unusual nature" of the preliminary injunction, the majority highlighted the district court's later supplementary order

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[28] *Id.* at *1–2.

[29] *Id.* at *1. The court stayed a portion of the injunction allowing absentee voters to waive a requirement that their ballots be accompanied by witness certification by instead submitting a personal affirmation, and concluded that the Wisconsin legislature did have standing to intervene and pursue an appeal. *Id.* at *2.

[30] Emergency Application for Stay at 1–2, *Republican Nat'l Comm.*, 140 S. Ct. 1205 (2020) (No. 19A1016) (emphasis omitted). The applicants originally submitted their request to Justice Kavanaugh, the Circuit Justice for the Seventh Circuit, *id.* at 1, who referred the application to the full Court, *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

[31] *Republican Nat'l Comm.*, 140 S. Ct. at 1206, 1208.

[32] *Id.* at 1206.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 1207.

[37] *Id.*

[38] *Id.* at 1207 (first citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam); then citing Frank v. Walker, 135 S. Ct. 7 (2014) (mem.); and then citing Veasey v. Perry, 135 S. Ct. 9 (2014) (mem.)).

[39] *Id.*

prohibiting "the public release of any election results for six days after election day."[40] The Court argued that this gag order "in essence enjoined nonparties" and, in any event, would most likely be unworkable.[41] Moreover, should any results leak, it "would gravely affect the integrity of the election process."[42] These oddities "underscore[d] the wisdom of the *Purcell* principle" in trying to "avoid this kind of judicially created confusion."[43]

The Court next addressed the dissent's arguments. First, the majority again emphasized "the critical point that the plaintiffs themselves did not ask for this additional relief."[44] Second, the Court argued that, despite the "late date," precedent required that, "when a lower court intervenes and alters the election rules so close to the election date," the Court "correct that error."[45] Third, the majority observed that "even in an ordinary election," individuals who submitted absentee ballot requests close to the deadline would receive their ballots with little time to spare and that many Wisconsinites had already received theirs.[46] Finally, the Court emphasized that the district court had extended the deadline for ballot receipt by clerks from April 7 to April 13, an extension that remained in effect.[47]

In closing, the majority emphasized that its holding on this "narrow question . . . should not be viewed as expressing an opinion" on whether the election should be held or whether COVID-19 called for "other reforms or modifications in election procedures."[48]

Justice Ginsburg dissented, emphasizing the practical consequences of the Court's order.[49] She first described the unusual circumstances surrounding Wisconsin's election, including the "dire health risk[]" posed by in-person voting and an "unprecedented"[50] "surge" in absentee ballot requests, which created a corresponding "severe backlog of ballots requested but not promptly mailed to voters."[51] In these circumstances, an Election Day postmark requirement would, she "fear[ed], . . . result in massive disenfranchisement."[52] "Tens of thousands of voters who

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *See id.* at 1207–08.
[48] *Id.* at 1208.
[49] *See id.* at 1208–11 (Ginsburg, J., dissenting). Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan.
[50] *Id.* at 1208.
[51] *Id.* at 1209. Justice Ginsburg also noted the stakes of the election, which featured "presidential primaries" and contests for "a seat on the Wisconsin Supreme Court" and other state offices. *Id.* at 1208.
[52] *Id.* at 1209. Justice Ginsburg also noted that this requirement was "novel," as neither the statute nor the district court's extension of the deadline to April 13 included any "postmark-by requirement." *Id.*

timely requested ballots"[53] would "be left quite literally without a vote."[54] These conditions belied the majority's "suggestion that the current situation [was] not 'substantially different' from 'an ordinary election'" and made the "Court's intervention . . . ill advised."[55] Moreover, Justice Ginsburg argued that *Purcell* actually militated against the Court "upend[ing]" matters one day before the new postmark deadline.[56]

The dissent next rejected the majority's justifications for granting the stay. Justice Ginsburg first countered the argument that the plaintiffs had not sought the portion of the injunction stayed by the majority, observing that the plaintiffs had "specifically requested [this] remedy at the preliminary-injunction hearing."[57] Next, she again suggested that *Purcell* required the Court to stay its hand, rather than the district court's order: whatever reasons "proximity to the election"[58] might have given for "hesitation" when the lower court issued its order applied even more strongly on the eve of the election.[59] Third, Justice Ginsburg downplayed the fact that the preliminary injunction would have "allowed absentee voters to cast ballots after election day."[60] This measure was analogous to Wisconsin's allowing "voter[s] . . . already in line by the poll's closing time" to vote, and the district court's bar on "publication of election results" would minimize any harm.[61] The dissent concluded by rejecting the majority's framing of the case as "present[ing] a 'narrow, technical question,'" emphasizing that "[e]nsuring an opportunity for the people of Wisconsin to exercise their votes should be [the Court's] paramount concern" and arguing that, while the district court's injunction facilitated voter participation, the Court's stay forced voters to choose between "their right to vote" and "their own and others' safety."[62]

In staying the district court's order — and thereby making it more difficult for many Wisconsinites to vote — the Court demonstrated that its current conception of the effects of late-breaking judicial intervention in elections is incomplete. The Court rooted its decision in the "*Purcell* principle" — a doctrine ostensibly aimed in part at facilitating voter participation.[63] But, as the dissent pointed out, *Republican National Committee* ultimately made it more difficult for many Wisconsinites to vote.[64] The

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[53] *Id.*
[54] *Id.* at 1210.
[55] *Id.* (quoting *id.* at 1207 (majority opinion)).
[56] *Id.* (citing Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam)).
[57] *Id.*
[58] *Id.* at 1210–11.
[59] *Id.* at 1211; *see id.* at 1210–11.
[60] *Id.* at 1211.
[61] *Id.*
[62] *Id.* (quoting *id.* at 1206 (majority opinion)).
[63] *See id.* at 1207 (majority opinion); Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam) (describing need to account for adverse effects of confusion on participation); Hasen, *supra* note 8, at 441.
[64] *See Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

Court's rigid application of *Purcell* to produce this problematic result highlights two related flaws in the Court's *Purcell* analysis. First, in applying the *Purcell* doctrine, the Court considered only the negative participatory effects of possible voter confusion and ignored the potential salutary effects of orders that make it easier for voters to cast their ballots. Second, the Court failed to anchor the *Purcell* principle within its traditional analysis of stay requests, which considers the risk of irreparable harm and, in close cases, the balance of the equities. The harmful consequences of *Republican National Committee* demonstrate that the Court should integrate *Purcell* into its usual stay analysis, allowing for consideration of the full spectrum of effects that judicial intervention can produce on voter participation, rather than maintaining its current crabbed view.

Purcell relied on participation grounds to justify its call for courts to act with special "consideration[]" in challenges to election procedures close to Election Day.[65] The case dealt with a challenge to an Arizona voter ID statute.[66] The district court denied the plaintiffs' request for a preliminary injunction, but the Ninth Circuit stayed enforcement of the law in a brief order issued roughly a month before the 2006 midterm elections.[67] The Court vacated the stay in a short per curiam opinion, the reasoning of which was not entirely clear.[68] In the opinion's most influential passage,[69] the Court expressed concern that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."[70] The Court thus emphasized concern for voter participation.[71] Notably, this concern was one-sided: the Court noted the risk of voter confusion that would depress turnout, but did not encourage lower appellate courts to exercise equal caution before staying trial court orders that facilitated participation.[72] However, *Purcell* itself was not clear on precisely how much of a role this concern played in the outcome. The Court vacated the Ninth Circuit's stay at least partly because the circuit had shown insufficient deference to the trial court,[73] and hinted at concern about

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[65] *Purcell*, 549 U.S. at 4; *see id.* at 4–5.

[66] *See id.* at 2.

[67] *Id.* at 3.

[68] *Id.* at 6; *see* Hasen, *supra* note 8, at 440 ("*Purcell* . . . is both overdetermined and undertheorized.").

[69] *See, e.g.*, Veasey v. Perry, 769 F.3d 890, 893–95 (5th Cir. 2014) (emphasizing that concern over late-arriving judicial orders best explains Court's jurisprudence); Stephanopoulos, *supra* note 2.

[70] *Purcell*, 549 U.S. at 4–5.

[71] *See id.* at 5.

[72] *See id.* at 4–5 (discussing only risks of judicial intervention). The Court did acknowledge elsewhere in the opinion the potential for judicial intervention to facilitate voter participation. *See id.* at 4 ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.").

[73] *See id.* at 5. By contrast, *Republican National Committee* gave no hint of deference to the trial court's findings. *See* 140 S. Ct. at 1206–08 (making no mention of trial court's role as factfinder).

difficulty in election administration.[74] Thus, *Purcell* indicated that participation should factor in the analysis when considering late judicial intervention in an election, but did not offer clear guidance on how to apply that principle.

Despite *Purcell*'s opaqueness, however, some courts, including the Supreme Court, have since treated it as establishing a bright-line rule against judicial intervention close to Election Day. When asked in recent election law cases either to stay a lower court's order or to vacate a circuit court's stay of a district court's order, the Court has generally acted in a way that prevented the lower courts from altering the status quo close to Election Day.[75] Though the Court has declined to explain its reasoning in these cases,[76] separate opinions suggest that *Purcell* was at work. For instance, although Justice Alito dissented from the Court's decision in *Frank v. Walker*[77] to vacate a stay issued by the Seventh Circuit shortly before an election, he nonetheless acknowledged "the proximity of the upcoming general election" as a "colorable basis" for the Court's action.[78] At least some lower courts and scholars have taken the Court's actions to indicate a bright-line rule against late judicial intervention.[79] The Fifth Circuit, for example, has found avoiding late judicial involvement to be "clearly" the "common thread" in the Supreme Court's actions.[80] In this way, *Purcell* has evolved from a decision based on multiple considerations — both general concern for participation and case-specific problems with the Ninth Circuit's lack of deference on factual issues — into a rigid test for assessing (or, perhaps more accurately, disposing of) preelection challenges.

Republican National Committee reflects this rigidity. The Court did not consider how factors unique to the instant case might justify late intervention, nor did it give any deference to the lower court's factfinding.[81] Rather, the Court relied uncritically on the general rule "that lower federal courts should ordinarily not alter the election rules on the eve of an election."[82] This dedication to a bright-line rule amid extraordinary circumstances rightfully drew criticism both from the dissent and from

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[74] *See Purcell*, 549 U.S. at 5 (observing Arizona's need for "clear guidance" in administering its election); *see also* Hasen, *supra* note 8, at 440 (noting this consideration).

[75] *See, e.g.*, Veasey v. Perry, 135 S. Ct. 9 (2014) (mem.); Frank v. Walker, 135 S. Ct. 7 (2014) (mem.). *See generally* Hasen, *supra* note 8 (discussing the Court's approach).

[76] *See* Hasen, *supra* note 8, at 428.

[77] 135 S. Ct. 7 (mem.).

[78] *Id.* at 7 (Alito, J., dissenting).

[79] *See, e.g.*, Thompson v. DeWine, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam) ("[W]e must heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach."); Veasey v. Perry, 769 F.3d 890, 893–95 (5th Cir. 2014); Hasen, *supra* note 8, at 428; Stephanopoulos, *supra* note 2.

[80] *Veasey*, 769 F.3d at 895.

[81] *See Republican Nat'l Comm.*, 140 S. Ct. at 1206–08; *cf.* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (criticizing appellate court for not showing deference to district court factfinding).

[82] *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

commentators, with the former observing that the majority's decision to ignore context in this way "boggle[d] the mind."[83] But, however normatively undesirable the Court's conclusion might be, it fit the recent trend in the Court's approach to litigation shortly before elections.[84]

The problematic outcome in *Republican National Committee*, which left many Wisconsinites unable to vote safely, demonstrates the harm that this bright-line approach can inflict on the very value — voter participation — that *Purcell* sought in part to protect. Turning *Purcell* into a bright-line rule against judicial intervention might limit voter confusion, but it ignores the fact that lower court orders might directly facilitate voter participation.[85] In other words, the danger of voter confusion considered in the *Purcell* analysis reflects only one aspect of judicial intervention's effects on voter participation.[86] While confusion might limit participation, enjoining restrictions on citizens' ability to cast their ballots could enhance it. Which effect predominates is essentially an empirical question, and the answer might vary by case, making a bright-line rule inappropriate.

The Court could facilitate a fuller inquiry into the participatory effects of late judicial intervention in a given case by subjecting election challenges to its usual analysis for granting stays, rather than treating the *Purcell* principle as a bright-line, outcome-determinative rule. In considering a request for a stay, the Court typically engages in a multistep inquiry, requiring "(1) 'a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari . . .'; (2) 'a fair prospect that a majority of the Court will conclude that the decision below was erroneous'; and (3) a likelihood that 'irreparable harm [will] result from the denial of a stay.'"[87] The Court might also

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[83] *Id.* at 1210 (Ginsburg, J., dissenting); *see, e.g.*, Stephanopoulos, *supra* note 2.

[84] The Court apparently continued this trend with cases decided after *Republican National Committee*, although again the majorities in each case did not spell out their reasoning. *See* Raysor v. DeSantis, No. 19A1071, 2020 WL 4006868 (U.S. July 2, 2020) (mem.) (declining to vacate Eleventh Circuit's stay of district court injunction that struck down certain limits on voter registration for individuals with felony convictions); Merrill v. People First of Ala., No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020) (mem.) (staying preliminary injunction of certain Alabama statutes that restricted absentee voting); *see also Raysor*, 2020 WL 4006868, at *4 (Sotomayor, J., dissenting) (arguing that the Court's recent application of *Purcell* has "condon[ed] disfranchisement").

[85] *See Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting) (arguing that the district court's order would have enabled "tens of thousands of Wisconsin citizens" to "vote safely"). The Court's bright-line approach might make more sense if the aim of *Purcell* had been to avoid confusion itself, regardless of its effect on participation. However, there is no obvious normative reason why voter confusion about election administration would be problematic independent of its effect on participation, and *Purcell* itself seemed to view confusion as a danger because of the "consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5; *see also Raysor*, 2020 WL 4006868, at *4 (Sotomayor, J., dissenting) (observing that *Purcell* "sought to avoid" "disfranchisement").

[86] *See Purcell*, 549 U.S. at 4–5 (limiting participation considerations to confusion risk).

[87] Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 131 (2019) (quoting Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

"balance the equities" and "explore the relative harms to [the] applicant[,] . . . [the] respondent," and the public if the case is "close."[88] Scholars have already argued that the Court should return to this framework in election challenges, rather than relying on *Purcell* as a sole guiding rule.[89] *Republican National Committee* demonstrates that one benefit of such a return to normal practice would be to allow for a fuller consideration of the effect the challenged judicial intervention would have on voter participation. Voters' ability to participate in elections speaks to several of the factors in the Court's traditional analysis: First, any wrongly disenfranchised voter suffers an irreparable harm — once an election has passed, that individual cannot vote retroactively — affecting the third factor ordinarily considered by the Court.[90] Second, *Purcell* itself suggests that facilitating broad participation serves the public interest,[91] and voters clearly have an interest in their own ability to participate,[92] making full consideration of the effects — both positive and negative — that judicial intervention might have on participation relevant to the balance of the equities. Integrating *Purcell* into the Court's ordinary analysis, then, would not only promote doctrinal uniformity but also allow for more thorough consideration of the participation concerns that partly motivated *Purcell* itself.

At bottom, there is no plausible way in which application of the *Purcell* principle in *Republican National Committee* furthered the doctrine's participatory justification.[93] By applying *Purcell* as a bright-line rule, the Court failed to recognize that the extraordinary circumstances called for a fuller evaluation of the effects of the lower court's order before issuing a stay.[94] The case's antidemocratic outcome, depriving many Wisconsinites of the opportunity to vote safely,[95] demonstrates that in future cases the Court should engage in such a broader analysis, applying its usual framework for considering stay requests and taking a more complete view of how judicial intervention might affect voter participation. Litigation shortly in advance of elections will continue to be a fact of life,[96] and a more circumspect approach would help ensure that future plaintiffs are not deprived of their fundamental right to vote.

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[88] *Conkright*, 556 U.S. at 1402 (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

[89] *See* Hasen, *supra* note 8, at 441; Stephanopoulos, *supra* note 2.

[90] *E.g.*, *Raysor*, 2020 WL 4006868, at *2 (Sotomayor, J., dissenting); Jones v. Governor of Fla., 950 F.3d 795, 828–29 (11th Cir. 2020) (per curiam).

[91] *See Purcell*, 549 U.S. at 4–5.

[92] *E.g.*, *Jones*, 950 F.3d at 829.

[93] *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

[94] *See id.* at 1207 (majority opinion) (applying *Purcell* as a bright-line rule).

[95] *See, e.g.*, *id.* at 1211 (Ginsburg, J., dissenting); Rutenberg & Corasaniti, *supra* note 9.

[96] *See* Stephanopoulos, *supra* note 2.