Nos. 20A64, 20A65, and 20A66

In the Supreme Court of the United States

JILL SWENSON, ET AL.,
APPLICANTS
v.
THE WISCONSIN STATE LEGISLATURE, ET AL.,
RESPONDENTS

(caption continued on inside cover)

ON EMERGENCY APPLICATION TO VACATE THE SEVENTH CIRCUIT STAY OF DISTRICT COURT ORDER ENTERING PRELIMINARY INJUNCTION

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF ELECTION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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October 16, 2020

SYLVIA GEAR, ET AL.,
APPLICANTS
v.
THE WISCONSIN STATE LEGISLATURE, ET AL.,
RESPONDENTS

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
APPLICANTS
v.
THE WISCONSIN STATE LEGISLATURE, ET. AL,
RESPONDENTS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY[*]

Amici Joshua A. Douglas, Rebecca Green, Pamela S. Karlan, Justin Levitt, Nicholas Stephanopoulos, and Stephen I. Vladeck, who are scholars of election law, respectfully move for leave to file the accompanying brief as *amici curiae* in support of neither party in the matter of these emergency petitions.

Amici are well-recognized legal scholars whose research focuses on the study of election law in the United States. As such, *amici* have a strong interest in ensuring courts considering challenges to voting rules properly understand the per curiam order in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), especially in this important period before the November 3, 2020 election.

Amici respectfully request that the Court consider the brief's analysis of the per curiam order in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The brief explains that, properly read, *Purcell* does not stand for the proposition that when an election is imminent, courts should not properly enjoin voting rules subject to legal challenge. *Purcell* notes that in considering whether to grant injunctive relief, courts must weigh "considerations specific to election cases," which include temporal proximity to an election. *Purcell* does not, however, create a presumption against or prohibit a court from enjoining a potentially illegal voting

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[*] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Applicants and respondents have consented to the filing of this brief.

rule based on timing. *Id.* at 4–5. Because some courts have treated *Purcell* as creating such a prohibition or presumption, *amici* respectfully urge this Court to provide further guidance on this issue. The brief suggests several factors that should guide courts' decisions on whether to enjoin unlawful voting rules, including but not limited to an election's temporal proximity. It is *amici*'s view that, taken together, these factors reflect both the importance of judicial restraint when it comes to electoral politics and the court's critical role in protecting the fundamental rights of voters and the integrity of the democratic process.

For the foregoing reasons, the Court should grant *amici curiae* leave to file the accompanying brief in support of neither party.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*[*]

Amici are well-recognized legal scholars whose research focuses on the study of election law in the United States. As such, *amici* have a strong interest in ensuring courts considering challenges to voting rules properly understand the per curiam order in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), especially in this important period before the November 3, 2020 election. *Amici* write in support of neither party. Instead, they submit this brief out of concern that some courts have treated *Purcell* as establishing a prohibition on or presumption against enjoining allegedly unlawful voting rules near in time to an election and as a result have dispensed with careful consideration of the multiple factors that properly bear on whether injunctive relief is appropriate. *Amici* respectfully urge the Court to provide further guidance to lower courts on this issue.

A summary of each *amicus*'s qualifications and affiliations is below. *Amici* file this brief solely as individuals and institutional affiliations are given for identification purposes only.

Joshua A. Douglas is the Ashland, Inc.-Spears Distinguished Research Professor of Law at the University of Kentucky's J. David Rosenberg College of Law. His research focuses on election law and voting rights. He is

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a co-author of *Election Law and Litigation: The Judicial Regulation of Politics* (2014).

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SUMMARY OF ARGUMENT

In *Purcell v. Gonzalez,* 549 U.S. 1 (2006) (per curiam), this Court observed that, in considering whether to enjoin allegedly unlawful voting rules, courts are required to weigh "considerations specific to election cases." *Id.* at 4. One consideration *Purcell* noted was the risk that an injunction affecting existing election law could "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Following *Purcell*, most courts asked to enjoin allegedly unlawful voting rules close in time to an election have continued to weigh the factors relevant to that decision. Some courts, however, have treated *Purcell* as a prohibition on or presumption against granting injunctive relief under that circumstance.

Neither *Purcell* nor any of this Court's other precedents creates such a prohibition or presumption. Rather, as illustrated by this Court's own orders, both before and after *Purcell*, timing is an important—but not dispositive—factor in determining whether the benefits of enjoining potentially unlawful voting rules outweigh the potential harm. *See* pp. 9–14, *infra*. Other factors bear critically on the analysis, including the nature of the injunction sought and how it would affect voting. For example, while an injunction that adds early voting days would not create an "incentive to remain away from the polls," *Purcell*, 549 U.S. at 5, an order requiring a last-minute change to voters' polling places very well might prevent voters from casting ballots.

Amici strongly believe that lower courts would benefit from further guidance on the import and application of *Purcell*. That guidance would clarify that timing alone should not drive the decision whether to grant an injunc-

tion in election cases. Rather, as in any equitable proceeding, context is vital. Thus, as further explained below, a court considering a request for an injunction should weigh, *inter alia*, whether the injunction sought would likely cause voter confusion that would chill voting, whether *failure* to issue the injunction would likely lead to a greater chilling effect, whether the injunction would likely lead election officials to err, and whether the party seeking the injunction acted diligently or could have sought relief earlier in time. Only by fully considering those factors—and others that may apply given the context—can a court properly determine whether injunctive relief is warranted.

ARGUMENT

I. *PURCELL* DID NOT RESTRICT COURTS' AUTHORITY TO ENJOIN VOTING RULES

Purcell's ruling is narrow. In it, this Court reviewed a four-sentence order by a Ninth Circuit motions panel that would have enjoined Arizona from enforcing its voter identification law shortly before an upcoming election. In doing so, the panel reversed the district court—which had denied the injunction sought—but "offered no explanation or justification" for its decision. 549 U.S. at 3. The order gave no indication that the panel had deferred to the discretion or factfinding of the district court. Based on that procedural error, the Court vacated the injunction, which allowed the challenged voter identification law to remain in effect for the upcoming election.

While it was the Ninth Circuit's failure to defer that plainly drove the result in *Purcell*, *id.* at 5, the Court's per curiam order also remarked on how timing may bear on a decision whether to enjoin voting rules close in time to

elections. It observed that court orders affecting elections can "result in voter confusion and consequent incentive to remain away from the polls," and that the risk may increase "[a]s an election draws closer." *Id.* at 4–5.

Purcell's observations concerning timing were not new. In *Williams v. Rhodes*, for example, the Court fashioned different injunctive relief for two different parties to account for the relative difficulty of administering the respective changes less than three weeks before a presidential election. 393 U.S. 23, 34–35 (1968). In *McCarthy v. Briscoe,* the Court likewise considered the feasibility of making the changes that would be required by the requested injunction with only 40 days left before the election. 429 U.S. 1317, 1321–24 (1976) (Powell, J., in chambers) (concluding that the benefits of an injunction outweighed timing concerns).

Purcell's commentary is similar. It confirmed that courts should consider proximity to an election in weighing whether and how to enjoin existing voting rules—but it gave no indication that timing alone should drive the decision. To the contrary, *Purcell* observed that "the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges," without ever suggesting that "careful consideration" no longer applies once an election is imminent. 549 U.S. at 4.

Post-*Purcell*, the Court has continued to recognize a district court's authority to enjoin election rules close in time to an election. In *Frank v. Walker*, the Court vacated—less than four weeks before Election Day—the Seventh Circuit's stay of a district court order that permanently enjoined a Wisconsin photo identification law. 574 U.S. 929 (2014); *see id.* (Alito, J., dissenting) (acknowledging that *Purcell* does not require appeals courts to

stay injunctions of voting rules ahead of elections). As another example, in *Republican National Committee v. Common Cause Rhode Island*, the Court declined to stay a district court consent judgment and decree invalidating a two-witness and notary requirement for mailed ballots, even though Rhode Island's 2020 primary election was less than a month away. No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). These orders confirm that *Purcell* did nothing to limit the power of district courts to order injunctive relief where they determine, in their discretion, that the circumstances so warrant.

Nonetheless, following *Purcell*, some courts have treated the per curiam order as a "warning threshold" or "command" that prevents courts from "intefer[ing] with state election laws in the weeks before an election." *See, e.g.*, *Tully v. Okeson*, __ F.3d __, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) (citing "*Purcell*'s warning threshold" as a basis for denying relief); *Middleton v. Andino*, __ F.3d __, 2020 WL 5752607, at *1 (4th Cir. Sept. 25, 2020) (Wilkinson, J., and Agee, J., dissenting from the grant of rehearing en banc) ("The Supreme Court has repeatedly cautioned us not to interfere with state election laws in the 'weeks before an election.' The district court failed to give this command proper weight." (quoting *Purcell*, 549 U.S. at 4)); *Common Cause Indiana v. Lawson*, No. 20-2911, 2020 WL 6042121 at *2 (7th Cir. Oct. 13, 2020) ("The Supreme Court insists that federal judges not change electoral rules close to an election."). Recent statements from Members of this Court could be construed as reinforcing that reading of *Purcell*. *See Andino v. Middleton*, No.20A55, 2020 WL 5887393 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By

enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents." (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)).

Amici respectfully submit that the foregoing statements reflects an incorrect reading of *Purcell*, which contains no "command" or even presumption against enjoining voting rules close in time to an election. To the contrary, what *Purcell* emphasizes is that courts must weigh the "harms attendant upon issuance or nonissuance of an injunction" together with "considerations specific to election cases," one of which is the possibility that an injunction could cause confusion and keep voters away from the polls. 549 U.S. at 4. Those principles in no way constrain courts from enjoining an allegedly unlawful voting rule that, left in place, would cause the obvious and irreparable harm of illegally restricting individual voting rights, or ordering a change that protects the right to vote while posing no serious threat of voter confusion.

Because there is risk that lower courts are inconsistently or incorrectly determining what *Purcell* stands for, *amici* respectfully submit that Court should give further guidance on the import and application of *Purcell*—clarifying that the order "did not set forth a *per se* prohibition against enjoining voting laws on the eve of an election," *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016) (en banc) and setting forth the range of equitable factors that should be considered in deciding

whether to grant such relief.[1] Such an approach would be in line with the Court's prior mandates: "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

II. COURTS SHOULD CONSIDER MULTIPLE FACTORS IN DECIDING WHETHER TO ENJOIN VOTING RULES

Reading *Purcell* as a categorical ban on or a presumption against enjoining election rules close in time to an election will not always mitigate—and could even exacerbate—the concerns cited in *Purcell*. Drawing from precedent, including *Purcell*, courts should instead consider, at minimum, five factors in keeping with its holding. These factors are as follows:

First, is the court's intervention likely to cause "voter confusion and consequent incentive to remain away from the polls"? *Purcell*, 549 U.S. at 4–5. *Purcell* instructs that the operative outcome whose likelihood must be weighed is whether eligible voters will not vote as a result of the court's intervention. The Court noted this is more likely if there are "conflicting orders" issued and "[a]s an election draws closer." *Id.* But the Court did not say that

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[1] Because *Purcell* and subsequent cases like *Frank*, *Republican National Committee*, and *Andino* were decided on emergency petitions to the Court, their lack of detailed guidance may "create[] at least a possibility of arbitrariness in implementation; and leaves a fog of uncertainty as to exactly what the standards are" for lower courts. Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 157 (2019).

every judicial intervention will have this result. That depends on the specific circumstances of the election rule challenged.

Imagine that a jurisdiction announced after early voting had already begun that it was cutting the hours available at several polling locations. If a court entered an injunction requiring the jurisdiction to keep the polling locations open, it is extremely unlikely that this remedy would result in a chilling effect on eligible voters. Voters who erroneously believe that the reduction in hours has gone into effect may not vote, but that is no different from how they would behave if the injunction did not issue. Other examples of changes to election rules that do not alter voters' behavior include the manner in which ballots, after they have been cast, are counted or collected. *See, e.g.*, *Feldman*, 843 F.3d at 370 (holding that *Purcell* principles support an injunction against newly-instituted criminal penalties for third-party ballot collectors because the injunction does not change voter behavior "regardless of the outcome of this litigation"). The outcome can also turn on the remedy fashioned by the court, which in some cases can be tailored to minimize or eliminate voter confusion.

Second, is the court's intervention reasonably likely to lead to errors in administration by election officials? This factor is also circumstance-dependent and should be part of the court's "due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). For example, in evaluating whether it should stay in late September an injunction that issued five months prior, the Eighth Circuit examined, among other factors, the consequences of such a decision on election administration. It determined that despite the late-in-time change to election rules effected by a stay, in this

case, "[t]he Secretary . . . should have sufficient time to educate and train election officials about that single change." *Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018), *app. to vacate stay denied*, 139 S. Ct. 10, 11 (2018).

In considering this factor, if courts determine that it is likely that a vote count would be slowed or inaccurate because of election officials' missteps under the new court-imposed injunction, that would weigh in favor of abstention. For example, difficult-to-implement injunctions, such as those requiring reprinting ballots, could very well lead to error or be impossible to implement in the time required. Conversely, some remedies, such as telling officials they should count mail-in ballots sealed by tape instead of glue, are not likely to lead to administrator error resulting in a distorted vote count, as it is a simple rule that can be announced to officials and executed easily. In all circumstances, however, "[a]dministrator *error* . . . isn't equivalent to administrator *inconvenience*," and extra work for election officials alone is "no reason for courts not to remedy legal violations unless it genuinely threatens to delay or distort the vote count." Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, Election Law Blog, https://perma.cc/KGV8-GNMH (Sept. 27, 2020).

Third, can judicial inaction lead to a greater injury, such as a greater number of eligible voters being deterred from voting by an unlawful status quo? While judicial intervention can sometimes lead to disenfranchisement, as discussed in the two factors above, so too can judicial *abstention* in cases where the unlawful application of the challenged election rule will confuse or disenfranchise voters, leading eligible voters to "remain away from the polls." *Purcell*, 549 U.S. at 5. For example, if "the status quo (indeed the only experience) for most recent voters is

that no witnesses are required," the election is taking place during a pandemic, and "[i]nstructions omitting the two-witness or notary requirement have been on the state's website" for weeks, judicial abstention from enjoining the witness and notary rule is more likely to lead to a chilling effect than would injunctive relief. *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 16–17 (1st Cir. 2020); *see Republican Nat'l. Comm.*, 2020 WL 4680151, at *1 (denying stay of injunction). In that scenario, voters are more likely to be "surprised" if injunctive relief were not issued, "and far fewer will vote." *Id.* at 17. In weighing injunctive relief, courts therefore should consider whether judicial inaction will lead to greater harm to the electoral process.

Fourth, did the party seeking the injunction act diligently in seeking relief from the time when the relevant set of circumstances requiring intervention arose? In *Purcell*, the Court noted that plaintiffs waited more than a year to challenge an election rule such that appellate courts had mere weeks before the election to consider the issue. 549 U.S. at 2. Courts examining the appropriateness of injunctive relief should thus evaluate the diligence of the party pursuing the injunction. *See Crookston v. Johnson*, 841 F.3d 396, 397–98 (6th Cir. 2016) (holding injunction was unwarranted where a plaintiff first sought injunctive relief challenging a 125-year old law just five weeks before an upcoming election).

Conversely, for timely challenges to newly instituted voting rules, the nearness of an election should weigh less heavily against judicial intervention. *Feldman*, 843 F.3d at 370 (holding *Purcell* does not require abstention because plaintiffs filed suit "less than six weeks after the passage of legislation," and have "pursued expedited consideration of their claims at every stage of the litigation").

Moreover, changes in circumstances that make ordinary election rules unduly burdensome for voters should likewise be weighed appropriately. For example, extending election deadlines in the normal course may be untenable. But if a natural disaster strikes on the eve of an election deadline, that merits a different set of considerations entirely. *See, e.g.*, *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (granting TRO to extend voter registration deadline in wake of Hurricane Matthew).

Fifth and finally, temporal proximity to the election does matter as one factor among several, but it is not dispositive. This principle is illustrated in *Purcell* itself. While the Ninth Circuit "may have deemed this consideration" of the risk of voter chilling as "grounds for prompt action" in an effort to save "valuable time," that consideration "cannot be controlling." *Purcell*, 549 U.S. at 5. Instead, the appeals court must give due deference to "the discretion of the District Court," "weigh . . . considerations specific to election cases and its own institutional procedures," and provide "reasoning of its own." *Id.* at 4–5. Moreover, courts can tailor relief based on timing constraints instead of abstaining entirely. "[A] court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes. . . 'any relief accorded can be fashioned in the light of well-known principles of equity.'" *Reynolds*, 377 U.S. at 585 (quoting *Baker v. Carr*, 369 U.S. 186, 250 (1962) (Douglas, J., concurring)).

These weighing factors are not new to courts. They fit into an existing framework for determining the appropriateness of injunctive relief. *See generally* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fla. St. U. L. Rev. 427, 430–34, 437–44 (2016). The *Purcell* principle

and the factors it requires weighing are part and parcel with giving "a due regard for the public interest in orderly elections." *Benisek*, 138 S. Ct. at 1944–45. The same applies for a court of appeals reviewing the issuance of a stay, which requires an assessment of "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting "substantial overlap" between the standard for appeals courts "and the factors governing preliminary injunctions"). And when this Court evaluates whether to vacate a court of appeals' stay of an injunction, it should evaluate whether the court of appeals erred in its application of that standard with respect to the above factors. *Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). In evaluating whether to stay a lower court decision pending filing and petition for certiorari, the Court should consider these factors in its evaluation of "the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

Indeed, failure to hew to the standard of review is a significant motivating factor in *Purcell*'s reasoning, which specifically admonished the Ninth Circuit's lack of deference to the discretion of the District Court that denied injunctive relief, and noted the Ninth Circuit may have relied too heavily on concerns about the election's timing. *Purcell*, 549 U.S. at 4–5.

III. FURTHER GUIDANCE IS NECESSARY TO RECONFIRM THE JUDICIARY'S PROPER ROLE IN ELECTION CASES

Allowing courts to continue to read *Purcell* as a categorical ban or even strong presumption against enjoining voting rules close in time to an election risks diminishing the judiciary's vital role in safeguarding voting rights. As

Purcell emphasized, voters have a "strong interest in exercising the 'fundamental political right to vote.'" 549 U.S. at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). And while the management of elections no doubt falls primarily within the political sphere, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds*, 377 U.S. at 566; *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll tax and noting, "where fundamental rights and liberties are asserted . . . classifications which might invade or restrain them must be closely scrutinized and carefully confined"); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (noting "court must resolve" constitutional challenges to state elections rules by weighing rights violations against "precise interests" asserted by the state, and that such work follows "an analytical process that parallels its work in ordinary litigation"); *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) (stating that federal courts have a responsibility to "resolve the federal and constitutional issues the judicial system has been forced to confront").

Purcell does not relieve courts of that duty. Nor is it "a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists." *People First of Alabama v. Sec'y of State for Alabama*, 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, J. and Pryor, J., concurring in denial of stay). No doubt courts should consider the potential risks of enjoining voting rules close in time to an election. But allowing courts to persist in treating *Purcell* as a prohibition or even strong presumption against such injunctions is equally dangerous. Allowing allegedly unlawful rules to remain in place as an election proceeds could result in unlawful abridgment of individual voters' rights.

It could cause potentially affected voters to stay away from the polls. It could even incentivize promulgation of dubious election rules in the immediate lead-up to election deadlines in hopes that courts will refrain from intervening.

These dangers can be avoided, without expanding the judiciary's proper role in election cases, by confirming that *Purcell* means what it says: Timing is an important but not dispositive consideration in the injunction analysis. Courts must continue to weigh *all* of the "harms attendant upon issuance or nonissuance" of the injunction sought. *Purcell*, 549 U.S. at 4.

CONCLUSION

For the reasons stated above, *amici* respectfully urge the Court to clarify that *Purcell* issues no command and creates no presumption against courts' injunction of potentially unlawful voting rules in the period before an election. Instead, *Purcell* confirms that courts should consider all relevant factors, given the context presented, in deciding whether an injunction is warranted.

Respectfully submitted.

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