As *Johnson* v. *Stevenson* suggests, election disputes are a natural source of emergency applications, much like the death penalty cases we've already encountered. The two most common classes of election-related litigation—challenges to voting rules and redistricting *before* Election Day; and challenges to the results afterward—both tend to unfold under highly compressed timetables with a fixed expiration date, whether the election itself or the deadline for certifying the election's results. Just as in death penalty cases, the rule that applies while a dispute is pending is often more important than the ultimate resolution of the legal dispute. And as is also the case with death penalty cases, the disputes in election cases tend to be quite localized, turning on the rules that apply in a single city, county, or state.

But the last parallel to death penalty cases is perhaps the most important one: just as the Supreme Court became wary of emergency applications in capital cases in the early 1980s, it became wary of election-related applications in the mid-2000s. As they did in the capital context with their 1983 ruling in *Barefoot* v. *Estelle*, the justices in their 2006 ruling in *Purcell* v. *Gonzalez* attempted to articulate principles to govern all emergency applications in election cases. This time, though, they did so through a cryptic shadow docket ruling, one that has caused far more mischief than it has prevented.

In 2004, Arizona voters approved a ballot initiative, Proposition 200, that imposed strict new identification requirements for in-person voting on Election Day. Under the VRA, the initiative could not go into effect until it received "preclearance" from the Department of Justice, which DOJ granted in 2005. In May 2006, a group of Arizona voters, Native American tribes, and community organizations sued, claiming that the more stringent voter ID requirements were both a violation of the VRA and unconstitutional because they made it disproportionately more difficult for people of color and members of other minority groups (for whom obtaining the required IDs

has been, and generally remains, more difficult) to vote. On September 11, 2006, the district court denied the plaintiffs' request for an injunction, albeit with no accompanying explanation. The challengers quickly appealed that ruling, and also asked the Ninth Circuit to enjoin Proposition 200 pending that appeal. Recognizing that it wouldn't be possible to fully resolve Proposition 200's legality in time for the upcoming 2006 elections, the challengers wanted to prevent the initiative from being enforced at least in that voting cycle. On October 5, in a summary, four-sentence order, the Ninth Circuit agreed to block the new voter ID rule while it considered the merits.[13]

Arizona then asked the Supreme Court to stay the Ninth Circuit's injunction—to put Proposition 200 back into effect in time for Election Day 2006. Rather than just granting Arizona's request for a stay, though, the Supreme Court went further. It treated the state's emergency application as a petition for a writ of certiorari, granted it, and summarily vacated the Ninth Circuit's injunction. In an unsigned, five-and-a-half-page per curiam opinion, which conservative legal scholar Orin Kerr described as "a bolt of lightning," the Court in *Purcell* v. *Gonzalez* articulated what UCLA election law scholar Rick Hasen has dubbed "the *Purcell* principle" (Helen Purcell was the Maricopa County recorder and the nominal defendant in the case). At its simplest, the principle is that, to avoid confusion among voters and election administrators, courts should generally not change the rules governing elections as Election Day approaches, meaning that injunctions against even unlawful election rules are increasingly disfavored as Election Day draws near. *Purcell* is not an argument against the power of lower courts to provide remedies for unlawful election laws; rather, it's an argument against allowing injunctions of election laws to go into *effect* too close to elections. Although it's directed toward district courts, *Purcell* is as much a principle for appellate courts to apply, to justify stays of district court injunctions issued too closely to an election, or, as the Supreme Court held the Ninth Circuit

should have in *Purcell*, to justify staying their hand when district courts had, as well.[14]

At first blush, that principle seems reasonable enough: court orders—especially competing court orders—changing the rules in the run-up to Election Day can easily cause chaos, risking not just the potential disenfranchisement of confused voters, but potential headaches for election officials tasked with administering an election and tallying results under shifting legal foundations. Indeed, perhaps the best defense of *Purcell* is that it was an attempt by the Supreme Court to introduce rigidity into an area in which the justices believed there was too much discretion—to tightly circumscribe the power of courts as Election Day approaches. But in the seventeen years since *Purcell* was handed down, numerous problems have emerged with the principle it espoused.[15]

First, on its own terms, *Purcell* never explained when it's "too close" to an election for courts to intervene. In *Purcell* itself, the Ninth Circuit injunction came thirty-three days before the Arizona election—far enough out to seemingly abate any confusion or concern (the Supreme Court's decision, in contrast, came just eighteen days before the election). But if thirty-three days is too close, what about forty-three? Or sixty-three? Indeed, in a 2022 ruling we'll come back to shortly, the Court appeared to rely on *Purcell* to block a district court injunction handed down over nine *months* before the election—and twelve weeks before the primary (which, unlike the general election, could have been moved if necessary). Right off the bat, then, *Purcell*'s seeming nod toward a bright-line rule turns on the grayest of temporal considerations—inviting the very subjective decision-making from judges that the decision claimed it was trying to eliminate.[16]

Second, although *Purcell* justified an election-specific rule for limiting the effects of injunctions by alluding to "considerations specific to election cases," it never explained why such a rule was needed. Why wouldn't the traditional standards for

injunctions, and for stays of injunctions pending appeal, suffice? As we've repeatedly seen, when a district court enters an injunction, whether that injunction should be stayed pending appeal depends upon a number of factors, including the harm that the parties might suffer from a ruling in either direction and how the public interest is impacted either way. Those traditional factors are supposed to be "balanced," an invitation to courts to assess which harm is worse: the harm to plaintiffs, for example, of having to comply with potentially unlawful voting rules, or the harm to everyone else of blocking those rules on the eve of the election. Thus, even before *Purcell*, the argument for staying an eleventh-hour injunction that would have wreaked havoc on a state's election procedures would have been powerful, even if the plaintiffs' challenge to those procedures was strong. Likewise, a pre-*Purcell* analysis would have focused on the actual likelihood that a specific law or court order blocking it would cause voter confusion, rather than the more general presumption the Supreme Court articulated in *Purcell*—that all late changes to election rules will confuse voters.[17]

But the flip side of this coin is even more troubling: by departing from the traditional standard, *Purcell* removes from the equation the possibility that, as disruptive as an injunction might be, freezing (or not issuing) it would be worse. For example, say a new state election rule would unlawfully prevent 20 percent of registered voters from actually voting, but that barring the new rule from taking effect would entail the risk that some minority of the remaining voters might be confused on Election Day. The chance of some voters being confused hardly justifies allowing widespread disenfranchisement. Under *Purcell*, though, that analysis becomes irrelevant, even if the plaintiffs' challenge to the new election rule is very likely to succeed.[18]

As such, *Purcell* seemingly invites bad behavior by local and state election officials, who might themselves change the rules on the eve of an election because they know they can do so

without worrying about interference from the courts. At the time *Purcell* was decided, such last-minute changes wouldn't have been possible in many jurisdictions, due to the Voting Rights Act's preclearance requirement. But in 2013, the Supreme Court effectively gutted that requirement when it held, in *Shelby County* v. *Holder*, that the formula that Congress had used to identify those jurisdictions to which it applied was itself unconstitutional. Since then, no jurisdiction has had to obtain preclearance from the Justice Department for any changes to its election rules, even eleventh-hour ones. And the rise of election denialism in response to—and since—the 2020 election only increases the risk that relevant local or state officials in some parts of the country might be inclined to attempt such shenanigans.

Even though *Shelby County* vitiated the preclearance regime, nothing in the Court's 2013 ruling prevented the justices from providing clearer criteria for last-minute interventions in election cases, a task that became only that much more urgent in a world without preclearance. *Purcell* could have identified a window (say, sixty days) before the election, and instructed courts to view changes to the rules by *any* relevant actor, whether a local or state politician or a state or federal judge, with presumptive skepticism. By instead treating the election law at the moment it reaches the district court as the operative baseline, even if that law was deliberately changed weeks (or even days) beforehand, *Purcell* makes it even easier for election administrators to get away with unlawful rule changes so long as they're adopted late in the game. And even if a court ultimately strikes down the rule on the far side of the election, *Purcell* would support allowing the rule to remain in effect on Election Day itself, presumably accomplishing the goal of those officials who adopted it. Even in states whose officials don't behave quite so badly, *Purcell* at the very least incentivizes delay. When Georgia governor Brian Kemp waited a full month in late 2021 before signing the state legislature's new

congressional district maps into law, it was broadly assumed that, with an eye on *Purcell*, he was simply trying to run out the clock. And it worked: although a Georgia district court concluded in early 2022 that the maps violated the Voting Rights Act, it also held that it wouldn't enjoin them because of the proximity to Georgia's primaries.[19]

Finally, and exacerbating all of these concerns, *Purcell* was itself a shadow docket decision—decided on a compressed schedule, with no argument, and with no advance indication to the parties or anyone else that the Court was going to treat Arizona's emergency application as an opportunity to fundamentally rewrite judicial procedure in election cases. Its thinly reasoned analysis spans just over two pages. One would think, if the justices wanted to dramatically change the nature of judicial review in election cases, that they would have done so a bit more publicly, and in a more comprehensive opinion.[20]

For all of these reasons (and others), *Purcell* has been roundly and repeatedly criticized by election law scholars. Hasen has written that it was both "overdetermined and undertheorized." University of Wisconsin professor Dan Tokaji suggested that the Court's analysis could "charitably be described as careless." And Brooklyn Law School's Wilfred Codrington III has been perhaps the most unsparing in his analysis, describing the decision as a "charade," and dismissing the Court's reasoning as "vacuous, self-contradictory, amorphous, and *more* prone to aggrandizing election-related concerns—including those that the Supreme Court suggested it should mitigate."[21]

Perhaps no set of cases better illustrates these concerns than those the Supreme Court decided in the run-up to the 2020 election. Because of the COVID pandemic, the 2020 election cycle was characterized by an unusual volume of late changes to election rules in response to the perceived risks of in-person, Election Day voting. We also saw an unprecedented number of lawsuits challenging the validity of those changes, and still other lawsuits challenging the refusal of some jurisdictions to