Case No. 20-1931

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRIORITIES USA; RISE, INC.; DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,
Plaintiffs-Appellees,
v.
DANA NESSEL,
Defendant,
and
REPUBLICAN NATIONAL COMMITTEE; MICHIGAN REPUBLICAN PARTY,
Intervenors,
and
THE MICHIGAN SENATE; THE MICHIGAN HOUSE OF REPRESENTATIVES,
Intervenors-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (FLINT)
NO. 19-CV-13341

BRIEF OF ELECTION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1931 Case Name: Priorities USA, et al., v. Nessel

Name of counsel: Alexandra M. Walsh, Wilkinson Walsh LLP

Pursuant to 6th Cir. R. 26.1, Joshua Douglas, Rebecca Green, Justin Levitt, et al.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on October 15, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alexandra M. Walsh

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. *PURCELL* DID NOT RESTRICT COURTS' AUTHORITY TO ENJOIN VOTING RULES 4

II. COURTS SHOULD CONSIDER MULTIPLE FACTORS IN DECIDING WHETHER TO ENJOIN VOTING RULES 8

III. FURTHER GUIDANCE IS NECESSARY TO RECONFIRM THE JUDICIARY'S PROPER ROLE IN ELECTION CASES 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 15

Baker v. Carr, 369 U.S. 186 (1962)..13

Benisek v. Lamone, 138 S. Ct. 1942 (2018) 10, 13, 14

Brakebill v. Jager, 905 F.3d 553 (8th Cir. 2018)...10

Brakebill v. Jager, 139 S. Ct. 10 (2018) 10

Bush v. Gore, 531 U.S. 98 (2000) 15

Common Cause Indiana v. Lawson, No. 20-2911, 2020 WL 6042121
(7th Cir. Oct. 13, 2020) 7

Common Cause Rhode Island v. Gorbea, 970 F.3d 11(1st Cir. 2020) 11

Crookston v. Johnson, 841 F.3d 396 (6th Cir. 2016) 12

Dunn v. Blumstein, 405 U.S. 330 (1972)..14

Feldman v. Arizona Sec'y of State's Office,
843 F.3d 366 (9th Cir. 2016) 8, 9, 12

Florida Democratic Party v. Scott,
215 F. Supp. 3d 1250 (N.D. Fla. 2016) 12, 13

Frank v. Walker, 574 U.S. 929 (2014)..6

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)................14, 15

McCarthy v. Briscoe, 429 U.S. 1317 (1976)..5

Middleton v. Andino, __ F.3d __, 2020 WL 5752607
(4th Cir. Sept. 25, 2020)...7

Nken v. Holder, 556 U.S. 418 (2009) 14

People First of Alabama v. Sec'y of State for Alabama,
815 F. App'x 505 (11th Cir. 2020) 15

Purcell v. Gonzalez, 549 U.S. 1 (2006) ....*passim*

Republican Nat'l Comm. v. Common Cause Rhode Island,
No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020) 6, 11

Reynolds v. Sims, 377 U.S. 533 (1964) 8, 13, 14

Tully v. Okeson, __ F.3d __, 2020 WL 5905325 (7th Cir. Oct. 6, 2020) 7

Williams v. Rhodes, 393 U.S. 23 (1968) 5

OTHER AUTHORITIES

Richard L. Hasen, *Reining in the Purcell Principle*,
42 Fla. St. U. L. Rev. 427 (2016) 13

Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*,
Election Law Blog, https://perma.cc/KGV8-GNMH (Sept. 27, 2020) ...10, 11

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.

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.

[*] No counsel for any party authored the *amici* brief in whole or in part and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. Plaintiff-Appellees consented to the filing of this brief. Intervenor-Appellants, the Michigan Senate and Michigan House of Representatives, took no position on the filing of this brief.

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- **Justin Levitt** is a Professor of Law and the Gerald T. McLaughlin Fellow at LMU Loyola Law School, Los Angeles. He previously served as Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice.
- **Nicholas Stephanopoulos** is a Professor of Law at Harvard Law School, where he teaches and writes on election Law and constitutional Law. He is a co-author of *Election Law: Cases and Materials* (6th ed. 2017).
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SUMMARY OF ARGUMENT

In *Purcell v. Gonzalez,* 549 U.S. 1 (2006) (per curiam), the Supreme 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 the Supreme Court's other precedents creates such a prohibition or presumption. Rather, as illustrated by the Court's 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 infra* at 9-15. 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.

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, the Supreme 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 did also remark 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 Supreme 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.").

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.

Purcell "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). Instead, courts should examine the range of equitable factors that should be considered in deciding whether to grant such relief. Such an approach would be in line with the Supreme 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 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").

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 this court to read *Purcell* as issuing no command and creating 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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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. As all parties in the case are registered with the Court's electronic filing system, electronic filing constitutes service on the participants. See Fed. R. App. P. 25(c)(2)(A).

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/s/ Alexandra M. Walsh
Alexandra M. Walsh

Counsel for *Amici Curiae*

Dated: October 15, 2020