Case No. 20-50867

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LEAGUE OF WOMEN VOTERS OF TEXAS; RALPH EDELBACH; BARBARA MASON; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; TEXAS LEGISLATIVE BLACK CAUCUS,
Plaintiffs-Appellees,
v.
RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,
Defendant-Appellant

LAURIE-JO STRATY; TEXAS ALLIANCE FOR RETIRED AMERICANS; BIGTENT CREATIVE,
Plaintiffs-Appellees,
v.
RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
NOS. 20-CV-1006; 20-CV-1015

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amici curiae* certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the amicus brief. *See* Fifth Cir. Rule 29.2. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICI CURIAE*[1]

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. In particular, *amici* are concerned that some courts have treated *Purcell* as establishing a prohibition on enjoining existing voting rules near in time to an election, rather than carefully evaluating the multiple considerations that should properly bear on whether injunctive relief is appropriate. *Amici* write in support of neither party. They instead file this brief to raise their concerns about the misapplication of *Purcell*.

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.

- **Rebecca Green** is Professor of the Practice of Law and the Kelly Professor for Excellence in Teaching at William and Mary Law School. She is the Co-Director of the Election Law Program, a joint project of the William and Mary Law School and the National Center for State Courts.

[1] 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.

- **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).

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 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 voting rules subject to legal challenge 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 granting injunctive relief under that circumstance.

Neither *Purcell* nor any of the Supreme Court's other precedents creates such a prohibition. Rather, as illustrated by the Court's own orders, both

before and after *Purcell*, timing is an important—but not dispositive—factor in determining whether issuing an injunction is likely to do more harm than good. *See infra* at 7-12. Also important is the nature of the injunction sought and how it would affect voting. For example, a court order restoring early voting days would not create an "incentive to remain away from the polls." *Purcell*, 549 U.S. at 5. An order requiring states to change voters' polling places at the last minute 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 and thus 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.

ARGUMENT

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

In *Purcell*, the Supreme Court reviewed a four-sentence order by a two-judge motions panel of the Ninth Circuit 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. 1, 3 (2006) (per curiam). Because the panel's order gave no indication of any deference to the discretion of the district court, the Court vacated the injunction, allowing the challenged voter identification law to stand.

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 noted, among other things, 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. These observations 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. The Court ultimately determined that the benefits of an injunction outweighed that factor. 429 U.S. 1317, 1321–24 (1976) (Powell, J., in chambers).

Purcell is fully consistent with decisions like these. It confirmed that courts should consider proximity to an election in weighing whether 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).

Republican National Committee v. Common Cause Rhode Island is similar. There, the Court declined to stay a district court consent judgment and decree invalidating a two-witness and notary requirement for mailed ballots, confirming that *Purcell* does not forbid district courts from ordering such relief even when an election is near. No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020).

Nonetheless, some have treated *Purcell* as a "warning threshold" or "command" that prevents the judiciary 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) (explaining that with "voting . . . already underway," injunctive relief from absentee voting limitations was not appropriate because the court had "crossed *Purcell*'s warning threshold"); *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)).

Amici respectfully submit that the foregoing 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.

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). Such reading is 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. *AMICI* URGE COURTS TO CLARIFY THE CONSIDERATIONS THAT SHOULD BE WEIGHED UNDER *PURCELL*

Reading *Purcell* as a categorical ban on enjoining election rules near to an election will not always mitigate—and could even exacerbate—concerns cited in *Purcell*. *Amici* believe that instead, courts should consider, at minimum, five factors in keeping with *Purcell*. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, __ F.3d __, 2020 WL 5951359, at *5 (7th Cir. Oct. 8, 2020) (Rovner, J., dissenting). 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 imposed a poll tax one week before an election. If a court entered an injunction against the tax, it is extremely unlikely that this remedy would result in a chilling effect on eligible voters. Voters who erroneously believe that the poll tax is still in place 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 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.

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). If 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 lifting a poll tax, are not likely to lead to administrator error resulting in a distorted vote count, as "voters don't have to pay" 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://takecareblog.com/blog/freeing-purcell-from-the-shadows (Sept. 27, 2020).

Third, can judicial inaction lead to a greater injury, such as a greater quantity 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," there are extraordinary pandemic circumstances, and "[i]nstructions omitting the two-witness or notary requirement have been on the state's website" for weeks,

judicial abstention 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). Voters are more likely to be "surprised when they receive ballots" requiring two witness signatures and notarization, "and far fewer will vote." *Id.* at 17.

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 sought injunctive relief approximately one month before an upcoming election challenging a 125-year old law).

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 impossible or 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.*, *Fla. 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 that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree . . . '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. at 780, 789 (1983) (noting "court must resolve" constitutional challenges to state elections rules, and such work follows "an analytical process that parallels its work in ordinary litigation"); *Bush v. Gore*, 532 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 read *Purcell* as issuing no command preventing courts from enjoining 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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DATED: OCTOBER 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth 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).

DATED: OCTOBER 12, 2020

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