Maryland Law Review

Volume 80 | Issue 4 Article 6

Republican National Committee v. Democratic National Committee: Reinterpreting the Court's Role in Election Law Challenges

Carly L. Brody

NOTE

REPUBLICAN NATIONAL COMMITTEE V. DEMOCRATIC NATIONAL COMMITTEE: REINTERPRETING THE COURT'S ROLE IN ELECTION LAW CHALLENGES

CARLY L. BRODY*

In *Republican National Committee v. Democratic National Committee*,[1] the Supreme Court of the United States addressed whether the date prescribed by Wisconsin law to receive absentee ballots in the State's April 2020 primary election could be extended in the midst of the coronavirus pandemic ("COVID-19").[2] Many voters who timely requested their ballots did not receive their ballots in time to return them before the statutory deadline.[3] COVID-19 created an unprecedented late surge in absentee ballot requests that overwhelmed election officials and resulted in a backlog of sending ballots to voters.[4] The lower federal courts granted a six-day extension for receiving absentee ballots, considering when the ballots would be "received by" as the only relevant inquiry.[5] On appeal, the Supreme Court focused on when the ballots would be "received by" *and* "postmarked by," and weakened the lower courts' remedy by requiring that ballots received up to six days after the election also be postmarked by election day.[6]

The Court decided the case by narrowly focusing on the notion that lower federal courts should not change election rules close to an election, while failing to properly weigh other election-specific considerations.[7] The Court's reasoning in *Republican National Committee* laid the groundwork

*J.D. Candidate, 2022, University of Maryland Francis King Carey School of Law. The author first thanks the *Maryland Law Review* editorial staff for their insightful comments and diligent edits throughout the writing process. She also thanks Professors Mark Graber, Max Stearns, and Stephen Mortellaro for their generous time and invaluable feedback. Finally, the author thanks her family and friends for their endless support and encouragement, especially her father Richard and her brother-in-law Brad for their thoughtful discussions about this Note.

1. 140 S. Ct. 1205 (2020) (per curiam) [hereinafter *Republican Nat'l Comm.*].
2. *Id.* at 1206.
3. *See infra* text accompanying notes 21–22; *see also infra* notes 217–221 and accompanying text.
4. *Republican Nat'l Comm.*, 140 S. Ct. at 1210 (Ginsburg, J., dissenting).
5. *See infra* text accompanying notes 35–38.
6. *Republican Nat'l Comm.*, 140 S. Ct. at 1206.
7. *See infra* Section IV.A.

for more emergency judicial decisions by lower courts as the 2020 General Election approached, which relied on the same reasoning and unfortunately precipitated further confusion and disenfranchisement in the midst of a public health emergency.[8] In light of these repercussions, this Note argues that (1) the Court should not have intervened in the Wisconsin dispute, and that by doing so, the Court threatened its legitimacy;[9] (2) the Court improperly considered the timing of the election by relying on the *Purcell* principle as a rigid rule[10] and by applying it in a way that contradicted the principle's purpose;[11] (3) the Court emphasized the timing of the election while neglecting to fully account for the election law's burden on voters;[12] and (4) the dissent's reasoning insufficiently assessed the constitutional analyses required in deciding election-related challenges.[13]

I. THE CASE

Wisconsin planned to hold its spring election in person on Tuesday, April 7, 2020, but this plan was complicated by the emerging COVID-19 pandemic.[14] The ballots included the presidential primaries; a Wisconsin Supreme Court seat; three Wisconsin Court of Appeals seats; over 100 other judgeships; over 500 school board seats; and thousands of other local positions.[15] In the weeks leading up to the election, Wisconsin reported more than 1,0000 confirmed cases of COVID-19 and approximately twenty-four deaths attributable to the disease,[16] but experts estimated that the actual number of Wisconsin citizens infected was ten times higher and projected that cases would continue rising.[17] The surge in cases prompted Wisconsin's governor to issue a shelter-in-place order on March 24, 2020, to slow the virus's spread.[18] ID. Meanwhile, options for voting in-person before or on election day became severely limited as a number of polling places closed when poll workers and municipal clerks canceled their shifts and the Wisconsin Elections Commission ("WEC") expressed public health concerns about those sites that remained open.[19] FN. Because voting in person during

8. *See infra* Section IV.B.
9. *See infra* Section IV.A.
10. *See infra* Section IV.B.1.
11. *See infra* Section IV.B.2.
12. *See infra* Section IV.C.
13. *See infra* Section IV.D.
14. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206, 1208 (2020) (per curiam).
15. *Id.* at 1209 (Ginsburg, J., dissenting).
16. *Id.* at 1208 (Ginsburg, J., dissenting).
17. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 960–61 (W.D. Wis. 2020).
18. *Id.*
19. *Id.* at 961, 965.

the pandemic is a public health risk and state public officials encouraged voters to vote absentee, Wisconsin's absentee ballot requests rose to unprecedented levels.[20] For the April 2020 primary election, at least 1,119,439 voters requested absentee ballots—nearly one million more than in 2016, which had the most requests of the four previous spring elections.[21] Processing these demands overwhelmed election officials and resulted in backlogs that threatened thousands of ballots from arriving in time to be counted.[22] COVID-19 also resulted in United States Postal Service ("USPS") slow-downs and, combined, these delays made the deadline for receiving absentee ballots at 8:00 P.M. on election day "completely unworkable."[23]

In the two weeks leading up to the election, Plaintiffs—including individual Wisconsin voters, community organizations, the Democratic National Committee, and the Democratic Party of Wisconsin—filed three suits against the WEC in the United States District Court for the Western District of Wisconsin.[24] The suits challenged multiple statutory requirements for the April 7, 2020, election.[25] Relevant to the Supreme Court's opinion and this Note is Wisconsin's statutory deadline for receiving absentee ballots, which was 8:00 P.M. on election day.[26] On March 28, the district court consolidated the three cases.[27] Additionally, the district court granted the Republican National Committee's and the Republican Party of Wisconsin's motion to intervene on behalf of the WEC.[28]

On March 27, 2020, Plaintiffs sought a preliminary injunction from the district court to extend the deadline for clerks to receive absentee ballots mailed in by voters.[29] The district court held an evidentiary hearing and oral argument on April 1, 2020.[30] The following day, the court granted the Plaintiffs' request for a preliminary injunction, finding that the statutory

20. *Id.* at 957–58, 960; *Republican Nat'l Comm.*, 140 S. Ct. at 1208–09 (Ginsburg, J., dissenting).

21. *Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting); *Bostelmann*, 451 F. Supp. 3d at 961.

22. *Bostelmann*, 451 F. Supp. 3d at 961–62.

23. *Id.* at 962.

24. *Id.* at 957; *Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting).

25. *Bostelmann*, 451 F. Supp. 3d at 957.

26. *Id.* at 958–59.

27. *Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting).

28. Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249-wmc, at *12 (W.D. Wis. Mar. 28, 2020).

29. *Bostelmann*, 451 F. Supp. 3d at 958. Plaintiffs also sought an extension of the deadline for absentee ballots; suspension of the witness signature requirement on absentee ballots; and reconsideration of the court's ruling on the by-mail absentee deadline and documentation requirements. *Id.* However, the issue on appeal in the Supreme Court involved the extension of the deadline to receive absentee ballots. *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

30. *Bostelmann*, 451 F. Supp. 3d at 958.

voting deadlines "impose an unconstitutional burden on the right to vote."[31] In assessing whether to grant a preliminary injunction, the court conducted a two-step inquiry.[32] The court first evaluated whether the Plaintiffs met a preliminary threshold by demonstrating: "(1) that [they] will suffer irreparable harm absent preliminary injunctive relief during the pendency of [their] action; (2) inadequate remedies at law exist; and (3) [they have] a reasonable likelihood of success on the merits."[33] After determining that the Plaintiffs had satisfied this threshold, the court conducted a balancing analysis "to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests."[34]

The district court granted an injunction to extend the statutory deadline to receive absentee ballots from 8:00 P.M. on election day, April 7, 2020, to 4:00 P.M. on April 13, 2020.[35] However, the court did "*not* add a post-marked-by date requirement" and relied on WEC's statement that it did not oppose extending the deadline.[36] The court reasoned that "even the most diligent voter may be unable to return his or her ballot in time to be counted."[37]

In an emergency appeal on April 3, 2020, the United States Court of Appeals for the Seventh Circuit upheld the district court's six-day extension for receiving absentee ballots.[38] The Supreme Court of the United States granted the application for stay on April 6, 2020 to decide "whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13."[39]

II. THE COURT'S REASONING

In *Republican National Committee*, the issue before the Supreme Court was whether to stay the lower courts' grant of preliminary injunction.[40] The

31. *Id.* at 959, 969.

32. *Id.* at 968.

33. *Id.* (quoting Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1044 (7th Cir. 2017)).

34. *Id.*

35. *Id.* at 959.

36. *Id.* at 976–77.

37. *Id.* at 976.

38. Democratic Nat'l Comm. v. Bostelmann, No. 20–1538, 2020 WL 3619499, at *8 (7th Cir. Apr. 3, 2020).

39. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

40. *Id.*

preliminary injunction permitted absentee ballots to be mailed in and received for up to six days after the 2020 Wisconsin primary election in the midst of the COVID-19 pandemic.[41] In a per curium opinion, the Court ruled that the district court erred by (1) granting relief that the Plaintiffs did not request in their preliminary injunction motions, and (2) altering election laws only five days before the election.[42] The Court reasoned that precedent prohibited lower federal courts from changing "the election rules on the eve of an election."[43] The Court categorized the district court's eleventh-hour order as "judicially created confusion" and observed that *Purcell v. Gonzalez*,[44] which cautioned against issuing conflicting court orders close to an election,[45] demanded it be rebuked.[46]

The Court emphasized that the Plaintiffs themselves did not ask for the six-day grace period in their preliminary injunction motions.[47] Then, the Court justified its intervention by explaining that it has a responsibility to correct a lower court's error in changing the election rules so close to the election.[48] The Court also equated the timing to that of absentee voters who requested their ballots late in previous Wisconsin elections.[49] Finally, the Court claimed the dissent disregarded that the State already extended the receipt deadline for absentee ballots from April 7 to April 13 "to accommodate Wisconsin voters."[50] The Court maintained that the Plaintiffs actually requested an extension to expand the opportunity to vote absentee, not an extension by which ballots may be cast and counted.[51] In granting a partial stay pending final disposition of the appeal by the Seventh Circuit, the Court concluded that absentee ballots could only be counted if they were (1) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 P.M.; or (2) hand-delivered by April 7, 2020, at 8:00 P.M.[52]

In dissent, Justice Ginsburg rejected the Court's characterization that the case merely presented "a narrow, technical question"; she instead argued that the issue was "whether tens of thousands of Wisconsin citizens [could] vote

41. *Id.*

42. *Id.* at 1206–07.

43. *Id.* at 1207 (citing Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam)).

44. 549 U.S. 1 (2006) (per curiam).

45. *Id.* at 4–5.

46. *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

47. *Id.*

48. *Id.*

49. *Id.* (reasoning that the plaintiffs failed to provide evidence "that these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots").

50. *Id.* at 1207–08.

51. *Id.* at 1208.

52. *Id.*

safely in the midst of a pandemic."[53] Justice Ginsburg contended that the district court's order allowed Wisconsin citizens to do so and expressed her fear that the Court's outcome would result in "massive disenfranchisement."[54] She reasoned that many voters who timely requested their ballots would not receive them prior to the postmarked-by deadline.[55]

In rejoinder to the majority's concerns, Justice Ginsburg first explained that although the Plaintiffs did not request that ballots postmarked after April 7, 2020 be counted in their preliminary injunction motions, they requested that relief at the preliminary injunction hearing.[56] Next, she argued that the majority's hesitation regarding the timing of the district court's response so close to the election made its decision, which was "even closer to the election," even "more inappropriate."[57] In response to the Court's concern that the district court's order permitted voters to vote after election day, Justice Ginsburg maintained that the district court's decision to enjoin publication of the election results before April 13, 2020, safeguarded an accurate depiction of the results.[58] She reasoned that these concerns "pale in comparison to the risk that tens of thousands of voters will be disenfranchised" and advocated for "[e]nsuring an opportunity for the people of Wisconsin to exercise their votes."[59]

III. LEGAL BACKGROUND

The United States Constitution does not grant an affirmative right to vote in national and state elections, but courts have long recognized an implicit fundamental political right to vote.[60] The Constitution prohibits states from denying the right to vote on the bases of race,[61] sex,[62] age,[63] and

53. *Id.* at 1211 (Ginsburg, J., dissenting).

54. *Id.* at 1209, 1211.

55. *Id.* at 1209.

56. *Id.* at 1210.

57. *Id.* at 1210–11.

58. *Id.* at 1211.

59. *Id.*

60. Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights."); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted . . . . [because] [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("[T]he right to vote in state elections is implicit . . . .").

61. U.S. CONST. amend. XV.

62. U.S. CONST. amend. XIX.

63. U.S. CONST. amend. XXVI, § 1.

failure to pay a poll tax.[64] However, the Constitution grants states the authority to create election codes for primary and general elections—including elections at the federal level—and reserves powers for states to oversee elections of the state legislature.[65] Constitutional challenges to state election codes often invoke the First and Fourteenth Amendments, and courts evaluate the challenged law's burdens on voters in determining the appropriate level of scrutiny to apply.[66] Section A describes state voting laws.[67] Section B discusses constitutional challenges to state election laws.[68] Section C examines the *Purcell* principle, which courts frequently reference in emergency decisions.[69] Section D explores the framework of the *Anderson-Burdick* balancing test, which courts frequently apply when assessing the likelihood of success on the merits in preliminary injunction analyses of constitutional challenges to election laws.[70]

A. State Voting Laws

The Constitution confers broad power on the states to establish rules regulating federal elections, and states also have a reserved power to create laws for their state legislature elections.[71] To ensure order in the election process, states have created election codes for holding elections at the state and federal levels.[72] In addition to prescribing the time, place, and manner of holding primary and general elections, states also specify the qualifications for voters and procedures for voter registration.[73] They also establish the qualifications and selection criteria for candidates.[74]

64. U.S. CONST. amend. XXIV, § 1.

65. U.S. CONST. art. I, § 4, cl. 1.

66. *See infra* Section III.B.

67. *See infra* Section III.A.

68. *See infra* Section III.B.

69. *See infra* Section III.C.

70. *See infra* Section III.D. The "*Anderson-Burdick* balancing test" was established by two cases, *Anderson v. Celebrezze*, 469 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

71. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .").

72. Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) ("The Constitution . . . . confers on the states broad authority to regulate the conduct of elections, including federal ones.").

73. *See Storer*, 415 U.S. at 730 (explaining that states have developed "comprehensive, and in many respects complex, election codes" for state and federal elections).

74. *Id.*

Unlike the federal constitution, most state constitutions grant an affirmative right to vote.[75] State constitutions also authorize their legislatures to regulate absentee voting procedures.[76] State absentee voting laws prescribe varying levels of voter protections, such as universal vote-by-mail whereby voters automatically receive a ballot;[77] providing all registered voters an application for absentee voting; and not requiring an excuse for applying to vote absentee.[78]

B. Constitutional Challenges to State Election Codes

While the United States Constitution leaves states broad authority to create election codes, states may not impose burdens on the right to vote that conflict with other constitutional provisions.[79] But any restrictions that states impose on voting will always exclude someone.[80] Thus, courts consider "whether the restriction and resulting exclusion are reasonable given the interest the restriction serves."[81] Challenges to state voting laws frequently invoke the First Amendment rights of expression and association and the Fourteenth Amendment's due process and equal protection clauses.[82]

To determine which level of scrutiny to apply and which constitutional test to use, courts first assess the burden that a state law has on a political party, a voter, or a class of voters.[83] No litmus test exists for measuring the severity of the burden, but a state must prove its interest outweighs the

75. *See, e.g.*, MD. CONST. art. I, § 1 ("[E]very citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State."); WIS. CONST. art. III ("Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."). *But see generally* ARIZ. CONST. art. VII (omitting a constitutional right to vote).

76. *See, e.g.*, MD. CONST. art. I, § 3a ("The General Assembly shall have the power to provide by suitable enactment for voting by qualified voters of the State of Maryland who are absent at the time of any election in which they are entitled to vote, for voting by other qualified voters who are unable to vote personally, or for voting by qualified voters who might otherwise choose to vote by absentee ballot, and for the manner in which and the time and place at which such absent voters may vote, and for the canvass and return of their votes."); WIS. CONST. art. III, § 2 ("Laws may be enacted . . . [p]roviding for absentee voting.").

77. *See, e.g.*, OR. REV. STAT. § 254.470(3) (2020).

78. *See, e.g.*, 2018 Md. H.B. 829 (2018).

79. *See* Williams v. Rhodes, 393 U.S. 23, 29, 34 (1968); Doe v. Walker, 746 F. Supp. 2d 667, 669 (D. Md. 2010) (internal citations omitted) ("It is axiomatic that a state may not erect obstacles which deprive a group of citizens of the fundamental right to vote absent sufficient justification.").

80. Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) ("[S]tate legislatures may without transgressing the Constitution impose extensive restrictions on voting. Any such restriction is going to exclude, either de jure or de facto, some people from voting . . . .").

81. *Id.*

82. *See e.g.*, Burdick v. Takushi, 504 U.S. 428, 430 (1992).

83. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008).

restriction on voting rights.[84] Where a law severely burdens the right to vote, courts apply a standard of strict scrutiny.[85] For lesser burdens, courts use a more deferential standard: the *Anderson-Burdick* balancing test.[86] Meanwhile, in time-sensitive matters where courts assess injunctions and do not issue findings of fact and conclusions of law, courts frequently invoke the *Purcell* principle.[87]

C. The Purcell *Principle*

In *Purcell v. Gonzalez*,[88] the Supreme Court acknowledged the importance of timing when a lower court issues an order concerning an election.[89] In that case, the State of Arizona—and officials from four of its counties—sought relief from an interlocutory injunction issued by a Ninth Circuit motions panel.[90] The Ninth Circuit had issued an injunction of an Arizona statute that required voters to present proof of citizenship when they registered to vote and to provide identification when they voted in person.[91] Voters who did not have the requisite identification could still vote in person using a provisional ballot.[92]

The Court noted that the federal appellate court was asked to enjoin the implementation of the voter identification procedures "just weeks before an election," and determined that it should have balanced the potential harms of issuing or not issuing an injunction with "considerations specific to election cases and its own institutional procedures."[93] The Court explained that court

84. *Id.* at 190–91. *But see id.* at 205 (Scalia, J., concurring in the judgment) (defining the criteria for determining the severity of burdens as follows: Those that are "[o]rdinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe," whereas those that "go beyond the merely inconvenient" are severe).

85. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (establishing that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); *see also* Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (internal quotations and citations omitted) (explaining where legislation burdens the right to vote, a state must show "that the burden imposed is necessary to protect a compelling and substantial governmental interest").

86. *See Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (discussing how courts apply the approach set out in *Burdick* to state statutes governing voter qualifications, candidate selection, and the voting process); Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 970, n.13 (W.D. Wis. 2020) (explaining that the *Anderson-Burdick* balancing framework evaluates "the constitutional rules that apply to state election regulations" (quoting Harlan v. Scholz, 866 F.3d 754, 759 (7th Cir. 2017)); *infra* Section III.D.

87. Purcell v. Gonzalez, 549 U.S. 1, 3–5 (2006) (per curiam); *see also infra* Section III.C.

88. 549 U.S. 1 (2006) (per curiam).

89. *Id.* at 3–5.

90. *Id.* at 2.

91. *Id.* at 2–3.

92. *Id.* at 2.

93. *Id.* at 4.

orders close to an election increase the risks of voter confusion and voter deterrence, although those issues alone do not control.[94] The Court held that the appellate court erred by failing to provide an explanation for its own findings and by not giving deference to the district court's conclusions.[95] Ultimately, the Court vacated the Ninth Circuit's injunction and allowed the election to proceed with those requirements in effect because the imminence of the election did not provide enough time to resolve factual disputes.[96]

In multiple challenges to voter identification laws decided on emergency motions where the Court has not issued a majority opinion, the Court's dissenters have applied *Purcell* to stand for the notion that decisions too close to an election threaten voter confusion and disenfranchisement.[97] For example, in *Veasey v. Perry*,[98] the Court did not provide an opinion for its decision to vacate a stay of a federal district court's injunction of a Texas voter identification law, which the district court found imposed an unconstitutional burden on voters and violated the Voting Rights Act.[99] In dissent, Justice Ginsburg invoked *Purcell* to argue that since the district court made an expedited schedule in November 2013 for resolving the case, "Texas knew full well that the court would issue its ruling only weeks away from the election."[100] Thus, the State had time to prepare for the possibility of an order preventing enforcement of the voter identification law.[101] In *Frank v. Walker*,[102] the Court vacated a stay of a permanent injunction that invalidated a Wisconsin voting law that required voters to provide photo identification before they could cast a vote.[103] In dissent, Justice Alito noted the "proximity of the upcoming general election" as support for the Court's decision, before rejecting the Court's decision on other grounds.[104] Later, dissenting in *Brakebill v. Jaeger*,[105] Justice Ginsburg argued that the *Purcell* principle supported granting a preliminary injunction because the challenged North

94. *Id.* at 5.

95. *Id.*

96. *Id.* at 5–6.

97. *See* Veasey v. Perry, 135 S. Ct. 9, 10 (2014) (Ginsburg, J., dissenting); Frank v. Walker, 574 U.S. 929, 929 (2014) (Alito, J., dissenting); Brakebill v. Jaeger, 139 S. Ct. 10, 10–11 (2018) (Ginsburg, J., dissenting).

98. 135 U.S. 9 (2014).

99. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *stayed*, 769 F.3d 890, 892 (5th Cir. 2014), *denying motion to vacate stay*, 135 U.S. 9 (2014).

100. *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

101. *Id.*

102. 135 S. Ct. 7 (2014).

103. *See* Frank v. Walker, 17 F. Supp. 3d 837, 837, 842 (E.D. Wis. 2014), *stayed*, 766 F.3d 755, 756 (7th Cir. 2014), *vacating stay*, 135 S. Ct. 7, 7 (2014).

104. *Frank*, 134 S. Ct. at 7–8 (Alito, J., dissenting).

105. 139 S. Ct. 10 (2018).

Dakota voter identification law created a severe risk of voter confusion and disenfranchisement.[106] She focused on the risk of voter confusion over the proximity of the election, likely because the law was issued more than a year before the election.[107]

D. The Anderson-Burdick *Balancing Test*

In *Anderson v. Celebrezze*,[108] the Supreme Court considered whether Ohio's early filing deadline for a candidate to qualify for a position on the state ballot placed an unconstitutional burden on a candidate's supporters' voting and associational rights.[109] The Court determined that constitutional challenges to state election laws cannot be resolved by any litmus test that separately considers valid and invalid restrictions.[110] Although state election codes burden, to some degree, the individual's right to vote or the right to associate with others for political ends, the Court reasoned that states' regulatory interests frequently substantiate "reasonable, nondiscriminatory restrictions."[111] Therefore, the Court prescribed an analytical process to assess whether a state's challenged provision of its election law places an unconstitutional burden on voters' First Amendment rights.[112] Under this framework, courts first weigh the asserted injury according to the rights protected by the First Amendment and, second, consider the state's interests that support the burden imposed.[113] After weighing these factors, courts determine the constitutionality of the challenged provision.[114]

Nine years later, the Court applied the *Anderson* balancing test in *Burdick v. Takushi*[115] to uphold a Hawaii election law requiring a political candidate to participate in a primary election prior to obtaining a position on the general election ballot.[116] In a challenge alleging violations of the First and Fourteenth Amendments, the Court recognized that state election law provisions imposing "'severe' restrictions" on voters' rights must be

106. *See* Brakebill v. Jaeger, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016), *terminating injunction*, 2018 WL 1612190, at *8 (D.N.D. Apr. 3, 2018), *denying stay pending appeal*, 2018 WL 4714914, at *3 (D.N.D. Apr. 30, 2018), *granting stay*, 905 F.3d 553, 554 (8th Cir. 2018), *denying motion to vacate stay*, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting).

107. *Brakebill*, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting); *Brakebill*, 905 F.3d 553, 556 (8th Cir. 2018).

108. 460 U.S. 780 (1983).

109. *Id.* at 782.

110. *Id.* at 789.

111. *Id.* at 788.

112. *Id.*

113. *Id.* at 789.

114. *Id.*

115. Burdick v. Takushi, 504 U.S. 428 (1992).

116. *Id.* at 430.

"narrowly drawn to advance a state interest of compelling importance."[117] Accordingly, the Court noted the necessity of applying a strict scrutiny standard.[118] Meanwhile, the Court explained that where an election law creates a lesser burden, a state does not need to establish a compelling interest; "reasonable, nondiscriminatory restrictions" invoke only a rational basis inquiry.[119] In reaffirming *Anderson*'s requirement to weigh the asserted injury to the right to vote against the State's justifications for the burden imposed by its statute, "*Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule."[120] Although both *Anderson* and *Burdick* involved ballot-access cases, the Supreme Court has applied the balancing standard in other types of challenges to state voting laws.[121] Where courts evaluate whether to grant preliminary injunctions of state election laws facing constitutional challenges, they apply the *Anderson-Burdick* test to assess the likelihood of success on the merits.[122]

IV. ANALYSIS

In *Republican National Committee*, the Supreme Court stayed a grant of a preliminary injunction that would have allowed ballots mailed and postmarked after election day—but received within six days of the 2020 Wisconsin primary election—to be counted.[123] The dispute over when ballots needed to be received or postmarked emerged because of the challenges presented by the COVID-19 pandemic.[124] Because the Court

117. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

118. *See id.*; Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2009).

119. *Burdick*, 504 U.S. at 433–34 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)); *Obama for Am.*, 697 F.3d at 429.

120. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204–05 (2008) (Scalia, J., concurring) (citing *Burdick*, 504 U.S. at 434).

121. *See Obama for Am.*, 697 F.3d at 425, 429, 431 (upholding a district court's application of the *Anderson-Burdick* balancing test in a request for a preliminary injunction against an Ohio election law that ended in-person early voting for non-military voters three days before the election because it imposed an excessive burden on Plaintiffs by precluding a significant number of voters from casting their ballots, of which their constituents constituted a large proportion); *Crawford*, 553 U.S. at 204 (describing the Supreme Court's expansive application of the *Anderson-Burdick* balancing test "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process").

122. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also Obama for Am.*, 697 F.3d at 429 (applying the *Anderson-Burdick* "flexible standard" where "a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters" (quoting Burdick v. Takushi, 504 U.S. at 434)).

123. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

124. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 957 (W.D. Wis. 2020).

decided this case only one day before the election, the Court's opinion effectively served as a final judgment without a proper assessment of the success on the merits or the harms to the parties and the public.[125] The Court's decision narrowed the scope of assessing absentee voting challenges from one that involved a balancing of voters' and states' respective burdens to one dependent upon the proximity of the election.[126] For future challenges to states' absentee voting laws, this decision has the unfortunate effect of marking a new era of reliance upon the *Purcell* principle that has perpetuated voter disenfranchisement, while simultaneously reframing the Court's role in the judicial process and creating skepticism that partisanship influenced its decision-making.[127]

Section IV.A criticizes the Court's intervention in *Republican National Committee* and the subsequent cases in the 2020 election cycle, and explores how the Court jeopardized its legitimacy by giving the impression that it based these decisions on partisan preferences.[128] Section IV.B analyzes the Court's over-reliance on the *Purcell* principle, which is not a clear-cut rule,[129] and examines how the Court's application of the principle actually contradicted the principle's purpose.[130] Section IV.C argues that the Court

125. The Court issued its opinion on April 6, 2020, and Wisconsin proceeded with its election on April 7, 2020. *See Republican Nat'l Comm.*, 140 S. Ct. at 1206. As the Court only considered the timing of the election and the relief the plaintiffs requested in their preliminary injunction motions, it did not assess the merits of the case. *Id.* at 1206–07; *see also* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428–29 (2016) (explaining that the Court's focus on the *Purcell* Principle can deter it from evaluating "the likelihood of success on the merits and relative hardship to the parties," which it typically considers "in deciding whether to grant or vacate a stay or impose an injunction").

126. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1861 (2013) ("The goal of balancing is to condemn disproportionate burdens on the exercise of voting rights.").

127. *See* Nicholas Stephanopoulos, *The Supreme Court Shouldn't Decide Voting Cases. It Keeps Getting Them Wrong.*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/outlook/supreme-court-election-rulings/2020/10/29/6a7b65d6-1991-11eb-aeec-b93bcc29a01b_story.html ("[The Court's] function is to resolve 'important question[s] of federal law.' . . . By nevertheless granting review, over and over, the [C]ourt has become exactly what it professes not to be: a tribunal that fixes the lower courts' supposed mistakes, even when they implicate no larger legal principle.") (internal quotation and citation omitted); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) ("[T]he 'shadow docket' deprives affected parties . . . of the opportunity to fully brief and argue the issue; creates at least a possibility of arbitrariness in implementation; and leaves a fog of uncertainty as to exactly what the standards are in different categories of cases — a muddle that is unhelpful to lower courts as it is to the parties." (citing William Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), https://reason.com/2019/04/12/death-and-the-shadow-docket/)); *see also infra* Section IV.A.

128. *See infra* Section IV.A.

129. *See infra* Section IV.B.1.

130. *See infra* Section IV.B.2.

has relied on the *Purcell* principle at the expense of conducting the requisite balancing analysis for election-related cases, where courts weigh the burdens voters face against the state's interests in the law.[131] Finally, Section IV.D critiques Justice Ginsburg's dissent, which properly framed the issue but provided insufficient reasoning.[132]

A. The Court Jeopardized its Legitimacy by Allowing Partisanship to Drive Its Decision-making

Republican National Committee and its progeny of 2020 general election cases suggests that political interests motivated the outcomes at the expense of thorough reasoning or deciding cases because of their legal, rather than societal, implications.[133] The Court did not have to intervene at all—and should not have done so—because its opinions included sparse explanations that disregarded legal precedents.[134]

1. The Court Erred in Relying on Its Shadow Docket Instead of Its Standard "Merits" Docket

The Court relied on its shadow docket to decide *Republican National Committee* and the subsequent 2020 general election voting cases.[135] Consequently, these cases are marked by rushed opinions with little basis in constitutional doctrine and which threaten the Court's role and legitimacy.[136] Typically, the Court assesses the merits of a case based on an appeal from a lower court's final decision; this standard docket is called the "merits" docket.[137] The process takes months and involves written briefing, oral

131. *See infra* Section IV.C.

132. *See infra* Section IV.D.

133. *See* Stephanopoulos, *supra* note 127.

134. *Id.*

135. *See, e.g.*, Andino v. Middleton, 141 S. Ct. 9 (2020) (Mem.), *granting stay in part to* Middleton v. Andino, 488 F. Supp. 3d 261 (D.S.C. 2020) (upholding the witness requirement for absentee ballots, except for ballots cast before the issuance of the stay and received within two days of the order); Dem. Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (Mem.), *denying stay to* Dem. Nat'l Comm. v. Bostelmann, 977 F.3d 639 (7th Cir. 2020) (rejecting the district court's six-day extension to accept absentee ballots as ordered in *Republican National Committee*); Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (Mem.), *denying cert. and stay to* Pa. Dem. Party v. Boockvar, 238 A.3d 345 (Pa. 2020) (upholding the district court's three-day extension for receiving absentee ballots as long as they are postmarked by 8:00 PM on election day); Moore v. Circosta, 141 S. Ct. 46 (2020) (Mem.), *denying stay to* Wise v. Circosta, 978 F.3d 93 (4th Cir. 2020) (upholding nine-day extension for receiving absentee ballots after election day); Merrill v. People First of Ala. (Mem.), 141 S. Ct. 190 (2020) (Mem.), *granting stay to* People First of Ala. v. Secretary of State for Ala., 467 F. Supp. 3d 1179 (N.D. Ala. 2020) (upholding Alabama's decision to ban curbside voting).

136. *See* Stephanopoulos, *supra* note 127.

137. *Id.*

argument, and a signed decision by the Court that provides thorough reasoning.[138] In contrast, parties in *Republican National Committee* and in the 2020 general election emergency decisions that followed filed emergency applications with the Supreme Court even before completion of the lower court proceedings.[139] After only a few days of briefing and no oral argument, the Court issued unsigned opinions without explaining why it approved or denied the relief sought.[140]

The Court's approach has effectively altered its role from one that decides important questions of federal law to one that corrects lower court errors.[141] In challenges to election laws, the Court has typically applied the *Anderson-Burdick* balancing test to determine whether state election laws unconstitutionally burden the right to vote.[142] Although scholars criticize the *Anderson-Burdick* test as "indeterminate" such that its implementation may be "arbitrary,"[143] it is important to follow this test as a matter of stare decisis.[144] The Court's reasoning, which it provides in a formal, written opinion that explains its careful evaluation of the parties' arguments and that considers precedent, has an important role in demonstrating to litigants and the public that the result is not an arbitrary exercise of political power.[145] Without reasoning, these decisions appear as political exercises of power that support states restricting citizens' abilities to vote.[146]

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See, e.g.*, Foley, *supra* note 126, at 1859; *see also infra* notes 237–241 and accompanying text.

144. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (describing the importance of stare decisis, which "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

145. *See* Stephanopoulos, *supra* note 127.

146. *Id.* ("When the court's rulings are unreasoned . . . they don't command the same respect. They don't demonstrate to litigants that their concerns have been heard. And to the public, they seem more like exercises of political power than of judicial deliberation."); Wendy R. Weiser, *Talking Election Law with the Brennan Center*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/talking-election-law-brennan-center ("If the Supreme Court helps decide the presidency or control of the Senate by issuing a ruling that's sharply split on ideological lines, it would dramatically undermine confidence in both the court and the election.").

2. Republican and Democratic Parties Have Competing Interests in Administering Elections, and the Justices' Opinions Reflect This Divide

That most of the majority opinions in *Republican National Committee* and the subsequent general election cases did not provide reasoning for granting or denying requests for stays suggests that partisanship had an important role.[147] In election-related challenges, states have a compelling interest to enforce state election laws that maintain order, prevent ambiguity, and reduce confusion.[148] Republicans have thus sought to protect pre-pandemic voting laws to increase voter confidence in the credibility of the elections and to ease the administration of the elections.[149] Republican efforts have included restricting mail-in voting and early voting, prohibiting sending ballot request forms to all registered voters, limiting placement of ballot drop boxes, and tightening voter identification requirements.[150] In contrast, Democrats have aimed to suspend pre-COVID-19 election rules in order to respond to the "surge in mail-in ballots due to the pandemic" and USPS delays in order to ensure that ballots could arrive in time to be counted.[151] Accordingly, Democrats have supported measures such as extending the deadlines for receiving absentee ballots.[152]

The Justices' opinions of election-related cases in the 2020 election cycle reflected this partisan divide. Justices Thomas, Alito, and Gorsuch[153]

147. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisan Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020) ("The United States Supreme Court's conservative majority has taken the Court's election jurisprudence on a pro-partisanship turn that gives political actors freer range to pass laws and enact policies that can help entrench politicians—particularly Republicans—in power and insulate them from political competition.").

148. *See* Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 971 (W.D. Wis. 2020).

149. Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS FRONTLINE (Oct. 28, 2020) https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/.

150. Christina A. Cassidy and Ryan J. Foley, *Some Republicans Worry Voting Limits Will Hurt the GOP, Too*, AP NEWS (May 7, 2021), https://apnews.com/article/tx-state-wire-donald-trump-election-2020-business-voting-rights-bea2903cf9119ca427327acd2f307364.

151. *See* Jim Rutenberg & Nick Corasaniti, *Kavanaugh's Opinion in Wisconsin Voting Case Raises Alarms Among Democrats*, N.Y. TIMES, https://www.nytimes.com/2020/10/27/us/kavanaugh-voting-rights.html (last updated Nov. 3, 2020).

152. *See* Hassan & Glaun, *supra* note 149.

153. President Donald Trump, a Republican who did not win the popular vote, appointed Justices Kavanaugh and Gorsuch, while Republican President George W. Bush, who also did not win a plurality of the popular vote, appointed Justice Alito and Chief Justice Roberts. *See* Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 243 (2020). Republican President George H.W. Bush, who also did not receive the popular vote, appointed Justice Thomas to the Court. United States Senate, *Supreme Court Nominations (1789-*

consistently voted against the extensions and aligned with Republicans, whereas Justices Breyer, Kagan, and Sotomayor[154] consistently voted for the extensions and aligned with Democrats.[155] However, Justice Kavanaugh and Chief Justice Roberts sometimes interpreted *Purcell* more liberally than the other Republican-appointed justices.[156] For example, in the Pennsylvania[157] and Wisconsin[158] cases regarding the general election, Chief Justice Roberts joined the liberal justices on the bench to deny injunctive relief to the Republicans and uphold ballot extension deadlines.[159] In the South Carolina case regarding the general election, Chief Justice Roberts joined the majority opinion and Justice Kavanaugh concurred in the decision to permit counting completed ballots that lacked a witness signature.[160]

3. Republican National Committee *Facilitated Partisanship in Lower Courts' Decisions*

The *Republican National Committee* holding, which was based on a "narrow, technical question," suggested to lower courts that the *Purcell* principle was a hard-and-fast rule that did not require traditional balancing analyses of the burdens to voters against the interests of the state.[161] As a result, subsequent decisions at federal district and appellate levels regarding the 2020 general election similarly relied on the *Purcell* principle and could conduct constitutional balancing analyses according to partisan

Present), https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Nov. 15, 2020).

154. Democratic President Barack Obama appointed Justices Kagan and Sotomayor to the Court. *See* United States Senate, Supreme Court Nominations (1789-Present), https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Nov. 15, 2020).

155. Richard L. Hasen, *The Supreme Court May No Longer Have the Legitimacy to Resolve a Disputed Election*, ATLANTIC (Feb. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/02/supreme-court-elections/605899/ (last visited Feb. 13, 2021) ("People have begun thinking and talking about 'Republican justices' and 'Democratic justices,' and public opinion about the Court now seems to diverge along party lines.").

156. *See* Josh Gerstein, *The Murky Legal Concept That Could Swing the Election*, POLITICO (Oct. 5, 2020, 7:58 PM), https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604.

157. Scarnati v. Boockvar, 141 S. Ct. 724 (2020).

158. Moore v. Circosta, 141 S. Ct. 46 (2020); Wise v. Circosta, 141 S. Ct. 658 (2020).

159. *See* Scarnati v. Boockvar, 141 S. Ct. 724 (2020); Moore v. Circosta, 141 S. Ct. 46 (2020); Wise v. Circosta, 141 S. Ct. 658 (2020).

160. Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020).

161. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam); *see also* Gerstein, *supra* note 156 (describing the prevalence of the *Purcell* principle in the 2020 general election cases).

preferences.[162] Just as the Court's majority has taken a textualist approach that is "unsolicitous toward protecting voting rights" when ruling in favor of the Republican party,[163] lower-court judges appointed by President Trump frequently relied on the *Purcell* principle to favor maintaining restrictions on mail-in voting, ballot deadlines, and signature requirements as compared to judges nominated by President Obama.[164] Trump-appointed judges have largely supported the reasoning that state legislatures, not federal courts, should set the rules for voting, even during a state of emergency.[165] In addition to invoking the *Purcell* principle more frequently to restrict voting rights, confusion over how to balance burdens faced by voters and state's interests in administering the elections under *Anderson-Burdick* has permitted conservative judges and justices to weigh concerns of voting fraud more heavily.[166]

B. The Court's Reliance on the Purcell *Principle Resulted in Severe Disenfranchisement and Election Chaos*

In her dissenting opinion in *Republican National Committee*, Justice Ginsburg properly reframed the issue from the majority's assertion of a "narrow, technical question about the absentee ballot process"[167] to one about whether voters can vote safely during the pandemic.[168] But *Republican National Committee*'s "narrow" holding was not narrow in its impact.[169]

162. *See Ann* E. Marimow & Matt Kiefer, *Judges Nominated by President Trump Play Key Role in Upholding Voting Limits Ahead of Election Day*, WASH. POST (Oct. 31, 2020, 8:00 AM) https://www.washingtonpost.com/politics/2020/10/31/trump-judges-voting-rights/?arc404=true; Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1838 (2013) (explaining that judges "should not rule for Democrats and against Republicans because the judges themselves are Democrats or prefer the Democratic Party, and vice versa," but that exceedingly narrow judicial rulings increase this risk).

163. *See* Edward B. Foley, *The Supreme Court Ruling on Ballot Deadlines May be More of a Reprieve for Democrats Than a Win*, WASH. POST (Oct. 20, 2020, 7:56 PM), https://www.washingtonpost.com/opinions/2020/10/20/supreme-court-ruling-ballot-deadlines-may-be-more-reprieve-democrats-than-win/.

164. *See* Marimow & Kiefer, *supra* note 162.

165. *Id.*

166. *Id.*; *see also infra* Section IV.C; Hassan & Glaun, *supra* note 149 (describing an increase among conservatives' "spurious and unsubstantiated allegations of fraud" in litigation "against the expansion of mail-in voting"). However, studies show that absentee-voter fraud is rare. Brent Kendall & Alexa Corse, *Coronavirus Intensifies Legal Tussle over Voting Rights; Pandemic Adds Twist to Some Long-Simmering Controversies Playing Out During 2020 Election Cycle*, WALL ST. J. (Apr. 19, 2020, 2:42 PM), https://www.wsj.com/articles/coronavirus-intensifies-legal-tussle-over-voting-rights-11587315601.

167. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

168. *Id.* at 1211 (Ginsburg, J., dissenting).

169. *Contra* Foley, *supra* note 126, at 1837–38 (explaining that narrow judicial rulings make it harder for people to "determine whether a future court is being unprincipled in refusing to apply the

Rather, it served as a prelude to the voting cases leading up to the November 2020 general election, which have deterred minor changes to the election process that would mitigate disenfranchisement resulting from COVID-19.[170] While the pandemic forced polling locations to close and created serious public health risks for those voting in person, it also posed significant obstacles to those voting absentee.[171] The surge in absentee ballot requests overwhelmed state election commissions and the resulting backlogs in processing these requests, coupled with pandemic-caused mail delays, exacerbated the likelihood that voters would not receive and be able to return their ballots in time to be counted.[172]

The 2020 General Election involved "a record-breaking amount of litigation"[173] and "[a] record number of votes" cast absentee[174] that reflected a strong partisan divide regarding absentee ballots.[175] While more Democrats wanted to vote by mail for the 2020 election, more Republicans wanted to vote in person, in accordance with the Republican Party's reassurance that voters could do so safely.[176] The Court did not provide explanations for many

precedent in new circumstances" because they "do[] not tell future judges enough about what is factually important in the precedent case to assess whether future cases are relevantly similar or dissimilar").

170. *See* Nicholas Stephanopoulos, *Failing to Respect the Passive Virtues: A Critique of RNC v. DNC*, ELECTION L. BLOG (Apr. 27, 2020, 6:59 AM), https://electionlawblog.org/?p=110999#_ftn2 ("My deepest concern about the opinion that was issued is that it has very likely foreclosed modest adjustments in election adjustments when future courts are faced with elections where circumstances like the pandemic are impacting the ability to vote.").

171. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 961 (W.D. Wis. 2020); *see also infra* note 204 and accompanying text.

172. *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d at 957–58, 961.

173. Hassan & Glaun, *supra* note 149; *see also* Stanford-MIT, *COVID-Related Election Litigation Tracker*, HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ (last visited Jan. 16, 2021) (showing that prior to the election more than 400 lawsuits had been filed in 44 states, and following the election, that number surpassed 500 in 46 states plus Washington, D.C.).

174. *See* Drew Desilver, *Most Mail and Provisional Ballots Got Counted in Past U.S. Elections – But Many Did Not*, PEW RSCH. CTR. (Nov. 10, 2020), https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/ (last visited Feb. 13, 2021) (estimating 65 million voters cast absentee ballots).

175. Erwin Chemerinsky, *Chemerinsky: Will SCOTUS Rulings Help Decide the 2020 Presidential Election?*, ABA J. (Sept. 2, 2020, 10:18 AM CDT), https://www.abajournal.com/news/article/chemerinsky-will-supreme-court-rulings-help-decide-the-2020-election. ("This is an election where Republicans, led by President Donald Trump, are seeking to limit absentee ballots, and Democrats expand them. It is one where Democrats are likely to bring lawsuits to enlarge the ability of people to vote and Republicans are likely to oppose them.").

176. Russell Berman, *If You Can Grocery Shop in Person, You Can Vote in Person*, THE ATLANTIC (Sept. 8, 2020), https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/ (last visited Feb. 13, 2021); *see also* Brent Kendall & Alexa Corse, *supra* note 166 (explaining that Democrats support vote-by-mail expansion, and while some Republican-led states are also advancing vote-by-mail options, "[President] Trump and the RNC

of its emergency decisions, but the parties' briefs, lower courts' analyses, and Justices' concurrences and dissents suggest that the Court's application of *Purcell* in *Republican National Committee* was a deciding factor in many of its decisions.[177] Rather than preventing confusion and disenfranchisement, however, reliance on the *Purcell* principle in this context generated further restrictions so that fewer votes counted.[178]

1. The Court Gave Too Much Weight to an Ambiguous Principle

In *Republican National Committee*, the Court primarily relied on the *Purcell* principle,[179] which is a "shadow doctrine" that lacks a clearly defined analytical framework and frequently arises in the Supreme Court's "shadow docket."[180] The *Purcell* principle suggests that courts should not issue orders affecting elections, especially conflicting orders, close to an election because as the election approaches, the likelihood that those orders cause voter confusion and disenfranchisement increases.[181] These "considerations specific to election cases and [their] own institutional procedures"[182] attempt to prevent electoral chaos among voters and election officials that result from changing or conflicting orders close to the election.[183]

Yet, the Court has not clearly defined the contours of the *Purcell* principle, including what the cutoff time of an election is or how flexibly the

oppose nationwide mail-in voting" because "not all states could have the logistics in place by November and . . . it could open the door to ballot tampering and other fraud"); Pew Research Center, *4. Voter Engagement and Interest, Voting By Mail and In Person*, In: Amid Campaign Turmoil, Biden Holds Wide Leads on Coronavirus, Unifying the Country (Oct. 9, 2020), https://www.pewresearch.org/politics/2020/10/09/voter-engagement-and-interest-voting-by-mail-and-in-person/ (last visited Feb. 13, 2021) (reporting findings from an August poll conducted before states began general election voting, where 60% of Trump supporters preferred to vote in person on Election Day and 17% preferred to vote by mail, but 23% of Biden supporters preferred to vote in person on Election Day and 58% preferred to vote by mail).

177. *See* Gerstein, *supra* note 156; Connor Clerkin et al., *Mail Voting Litigation During the Coronavirus Pandemic*, Stanford-MIT Healthy Elections Project (Oct. 26, 2020), https://healthyelections.org/sites/default/files/2020-10/Mail_Voting_Litigation_0.pdf (anticipating that courts would increasingly consider the *Purcell* principle as the election approached).

178. *See* Hassan & Glaun, *supra* note 149.

179. *See supra* Part II.

180. Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, TAKE CARE BLOG (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows (describing "shadow doctrines" as "rules the Court applies only in its non-merits cases" and the Court's "shadow docket" as "disputes . . . resolve[d] summarily, without the usual briefing, argument, explanations, or even indications how each Justice voted"); *see also* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY, 5 (2015) (describing the Court's "shadow docket" as its "non-merits work"); *supra* text accompanying notes 135–140.

181. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam).

182. *Id.* at 4.

183. Hasen, *supra* 125, at 441.

principle can be interpreted.[184] This uncertainty traces back to the *Purcell* opinion, where the Court held that the Ninth Circuit failed to consider election-specific considerations and potential harms resulting from issuing or not issuing an injunction, while not providing the necessary deference to the district court's findings.[185] The uncertainty arises from the Court's failure to specify which factor drove its decision to vacate the Ninth Circuit's injunction of Arizona voter identification procedures: the failure of the Ninth Circuit to give reasons for its order; the Ninth Circuit's failure to make "considerations specific to election cases and its own institutional procedures;" or the close timing of the election and the possibility of en banc review.[186]

Importantly, the *Purcell* principle is only one factor of many that courts consider when issuing emergency stays.[187] Courts also consider the likelihood of success on the merits, the potential for irreparable injury to both parties, and the public interest.[188] However, these considerations "cannot be controlling."[189] Courts must give some level of deference to the lower court's decision.[190] Additionally, courts typically apply the *Anderson-Burdick* balancing test's lower level of scrutiny to challenges of infringement on voting rights to assess the likelihood of success on the merits.[191] In *Purcell*, the Court did not apply this balancing analysis—it did not evaluate the harms to the parties beyond considering the public's interest in not changing the rules close to an election.[192]

In *Republican National Committee*, the Court narrowly applied the *Purcell* principle to stand for the notion that lower federal courts should not change "the election rules on the eve of an election," so as to avoid the "judicially created confusion" that might result from ballots being mailed and postmarked after election day.[193] The district court subsequently enjoined the public release of any election results until six days after election day, but

184. Gerstein, *supra* note 156.

185. *Purcell*, 549 U.S. at 4–5.

186. Hasen, *supra* 125, at 440 (quoting *Purcell*, 549 U.S. at 4.).

187. *Id.* at 428.

188. *Id.* at 441, 444; *see also* Nken v. Holder, 556 U.S. 418, 426 (2009) (internal citations omitted) (establishing the standards for granting or vacating a stay as likelihood of success on the merits, irreparable harm to the movant, harm to other parties, and the public interest). Professor Richard L. Hasen advocates for the *Purcell* principle to fall into the public interest prong but argues that these concerns should not be the sole consideration. Hasen, *supra* note 125, at 441.

189. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).

190. *Id.*

191. *See supra* 122 and accompanying text.

192. Hasen, *supra* note 125, at 443.

193. *Republican Nat'l Comm.*, 140 S. Ct. 1205, 1206–1207 (2020) (per curiam).

the Court doubted that order's effectiveness.[194] The Court surmised that, despite the order, information would be released that would affect the integrity of the election process,[195] likely by informing voters of which candidate led in the precinct and thereby motivating the behavior of voters who had not yet cast their ballots.

The Court's analysis gave too much weight to the *Purcell* principle without accounting for considerations specific to granting stays and other election-specific concerns.[196] Like the appellate court in *Purcell*, the Court in *Republican National Committee* failed to consider the likelihood of success on the merits, the relative irreparable harm to the parties, and the public interest factors.[197] By not considering these factors, the Court also erred by not providing deference to the lower court's factual findings of irreparable harm, inadequate remedies at law, and the likelihood of success on the merits.[198] In particular, the Court disregarded the district court's application of the *Anderson-Burdick* balancing test and conclusion "that the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizens' right to vote."[199]

By not providing deference to the district court's factual findings and by failing to adequately show why these findings were incorrect, the Court did not follow the holding in *Purcell*.[200] A significant issue involved the Court's failure to consider COVID-19;[201] instead, it treated this case as it would "an ordinary election."[202] The Court did not acknowledge the district court's findings of fact regarding the current state of the COVID-19 health crisis, the increased reliance on absentee ballots, and the dangers of voting in person.[203] For example, the Court did not consider the district court's findings that the number of absentee ballots requested dwarfed those in the previous four spring elections by tenfold; the state election board could not process the surge in requests, resulting in severe backlogs; voters could not easily vote in person; the public health risk of voting in person, especially for senior poll workers; or most importantly, the estimated 27,500 absentee

194. *Id.*

195. *Id.*

196. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam); *Republican Nat'l Comm.*, 140 S. Ct. at 1206–1208.

197. *See supra* text accompanying note 192; *Republican Nat'l Comm.*, 140 S. Ct. at 1206–1208.

198. *Republican Nat'l Comm.*, 140 S. Ct. at 1206–1208.

199. *Id.* at 1209 (Ginsburg, J., dissenting).

200. *See* Purcell v. Gonzalez, 549 U.S. at 4–5.

201. *See Republican Nat'l Comm.*, 140 S. Ct. at 1210 (Ginsburg, J., dissenting) ("The Court's suggestion that the current situation is not 'substantially different' from 'an ordinary election' boggles the mind.").

202. *See id.* at 1207.

203. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 960 (W.D. Wis. 2020).

ballots projected to be received after 8:00 P.M. on the day of the election that would not be counted.[204]

The Court's minimal analysis and its reliance on the *Purcell* principle as its primary justification—which itself is neither a "hard-and-fast rule" nor "well developed"[205]—demonstrates the decision's improper application of the doctrines historically applied to voting challenges. Additionally, the vagueness of the *Purcell* principle has resulted in its unpredictable application that threatens a partisan result.[206]

2. The Court's Application of the Purcell *Principle Contradicted the Principle's Purpose by Causing Further Election Chaos and Disenfranchisement*

The Court relied on the *Purcell* principle to argue that the lower federal courts cannot change election rules immediately before the election because doing so will result in judicially created confusion.[207] The Court, however, misapplied the *Purcell* principle by only discussing a portion of the principle and not weighing other critical election-specific considerations.[208] This resulted an outcome that contravened the principle's purpose. The principle provides that as an election draws closer, the risk will increase that a court's orders will "result in voter confusion" and, consequently, push voters "away from the polls."[209] Additionally, "electoral chaos" may result from "conflicting court orders" telling election officials "how to run an election."[210]

The application of *Purcell* depends on the kind of policy being challenged.[211] Policies establishing the basic building blocks of the election, such as at-large voting, should almost never be changed close to an election.[212] However, policies incapable of causing voter confusion because they apply only to administrators, such as implementing a signature match

204. *Id.* at 961–62.

205. Gerstein, *supra* note 156.

206. *Id.*; *see also supra* Section IV.A.2 (discussing partisan trends in the Court's election-related decisions).

207. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207.

208. *Id.*

209. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam); *see also* Hasen, *supra* note 125, at 441 ("When the rules for elections change, voters may not only be confused; they can be disenfranchised (for example, by not having the right documentation or showing up at the wrong polling place).").

210. Hasen, *supra* note 125, at 441.

211. *See* Stephanopoulos, *supra* note 180 ("[C]ourts shouldn't *assume* that this probability is high; they should *assess* it based on the best available evidence.").

212. *Id.*

requirement, do not invoke the *Purcell* principle.[213] Extending the deadline for absentee voting during the pandemic falls in between the two ends of the spectrum, and, therefore, the Court should have considered the remedy's impacts on voter confusion and disenfranchisement.[214]

Although a direct application of the *Purcell* principle requires a reviewing court to stay a lower court's order issued in the days leading up to the election, the Court in *Republican National Committee* misapplied the principle by overlooking important election-specific concerns.[215] First, by looking only at the public's interest in not changing the election rules close to an election, the Court omitted *Purcell*'s concern for disenfranchisement and did not account for the inevitable confusion that would result in the midst of a global pandemic.[216] The Court ignored the "certainty that thousands of ballots [would] arrive after the April 7, 2020 deadline."[217] Consequently, tens of thousands of absentee voters, who timely requested their absentee ballots, did not receive their ballots in time for their votes to be counted.[218] Voters who did not receive their ballots in time were forced to choose between sacrificing their fundamental political right to vote[219] and risking their health and safety to vote in person.[220] And in the City of Madison,

213. *Id.*

214. *Id.*

215. *See* Hasen, *supra* note 125, at 441–42.

216. *Id.*; *see also* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam).

217. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 975 (W.D. Wis. 2020).

218. *See Republican Nat'l Comm.*, 140 S. Ct. 1205, 1210 (2020) (per curiam) (Ginsburg, J., dissenting). However, during the "extended period, nearly 80,000 additional votes arrived and were counted, according to the Wisconsin Elections Commission." Brent Kendall and Jess Bravin, *Supreme Court Rejects Pandemic-Spurred Voting Changes in Wisconsin*, WALL ST. J. (Oct. 26, 2020), https://www.wsj.com/articles/supreme-court-denies-extended-mail-ballot-deadline-in-wisconsin-11603758108. *See also* The New York Times, *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html (reporting on election day that "[o]fficial state figures showed that of 1,282,762 ballots requested, 1,273,374 had been sent, a shortfall of about 9,000").

219. *Contra* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (voters could cast provisional ballots); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 186 (2008) (same).

220. To Members of the United States Senate and House of Representatives (May 5, 2020), https://cdn.americanprogress.org/content/uploads/2020/05/05061221/21DemocracyTeam_finalmailvotingandcovid19.pdf?_ga=2.104965632.2029394591.1603550377-683790534.1603550377; *see also* Nick Corasaniti & Reid J. Epstein, *At Least 7 in Wisconsin Got Coronavirus During Voting, Officials Say*, N.Y. TIMES (May 13, 2020), https://www.nytimes.com/2020/04/21/us/politics/wisconsin-election-coronavirus-cases.html (documenting that at least seven people contracted COVID-19 from voting in-person based on only 30% of the data); CDC Coronavirus Disease 2019 (COVID-19), Polling Locations and Voters, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last updated Jan. 4, 2021) (warning against in-person voting because of crowds and longer wait times); *see also* The New York Times, *Wisconsin Primary Recap: Voters Forced to Choose Between Their*

"[h]undreds of absentee ballots" that voters mailed back—likely before election day—did not have a postmark and risked invalidation.[221]

The Court also failed to consider that its stay created further confusion. Election officials had already spent the previous few days establishing procedures and informing voters in accordance with the district court's deadline.[222] Requiring election officials to change instructions even closer to the deadline only increases the state's burdens, as states then have to supply additional resources to train poll worker volunteers on new rules and procedures and develop new written instructions just before the election.[223]

These changes could also make voters more confused, as they relied on other guidance (i.e., the guidance prepared in accordance with the district court's order) issued only days before.[224] Although, even if the district court's extension of the deadline for receiving absentee ballots caused confusion, that confusion did not leave voters in a worse position than before—rather, a better one. Sending in a ballot according to the statutory deadline, which was earlier than the district court's change required, still meant that those ballots counted.[225] But the confusion caused by the Court's postmarked-by requirement left voters in a worse position because voters had to act immediately for their votes to count, and voters who timely requested their absentee ballots could not vote if they had not yet received their ballots.[226]

Additionally, the Court did not acknowledge the district court's finding that the plaintiffs showed a likelihood of success on the merits, which it determined by primarily relying on the evidence indicating inevitable

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Health and Their Civic Duty, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html (explaining that in Milwaukee, where the predominately black northern part of the city experienced the highest rates of COVID-19, voters—overwhelmingly black and Hispanic—who had not cast absentee ballots waited in line for hours to vote in person).

221. Laura Schulte and Patrick Marley, *Many Wisconsin Absentee Ballots Returned Without Postmarks and May Not Be Counted Because of It*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/2020/04/10/wisconsin-election-votes-may-not-count-ballots-without-postmark/5123238002/ (Apr. 12, 2020, 9:29 AM CT).

222. *See Republican Nat'l Comm.*, 140 S. Ct. 1205, 1210 (2020) (per curiam) (Ginsburg, J., dissenting).

223. *See* Hasen, *supra* note 125, at 441.

224. *See e.g.*, Linda Schmidt, *Confused About Voting? Your Options for Election Day 2020*, FOX5 N.Y. (Oct. 14, 2020), https://www.fox5ny.com/news/confused-about-voting-your-options-for-election-day-2020; Reid J. Epstein, *Confused About Voting? Here are Some Easy Tips*, N.Y. TIMES (Nov. 3, 2020), https://www.nytimes.com/article/voting-tips.html.

225. *See infra* note 258 and accompanying text.

226. *See Republican Nat'l Comm.*, 140 S. Ct. 1205, 1209 (2020) (per curiam) (Ginsburg, J., dissenting).

disenfranchisement.[227] The district court extended the absentee ballot deadline after careful analysis of the respective harms with the aim to minimize the 2020 election chaos—particularly voters' confusion about how to vote—that resulted from the rapidly evolving COVID-19 pandemic.[228] Even if the likelihood of success demonstrated greater certainty, invoking a "complex balancing" analysis that accurately accounts for the severity of voter confusion and disenfranchisement should have led the Court to deny the stay.[229] By narrowly considering that lower courts' changes to election rules close to the election result in confusion, the Court's decision to change the election rules even closer to the election did not *prevent* judicially-related confusion and disenfranchisement; it *facilitated* confusion and disenfranchisement.[230]

The Court's reliance on the *Republican National Committee* framework, which itself narrowly applied the *Purcell* principle at the expense of weighing election-related considerations along with the harms of issuing or not issuing an injunction, has prevented flexibility in a time of crisis.[231] As a consequence, the Court has implicitly undermined the long-established fundamental political right to vote.[232] This result calls into question the applicability of the *Purcell* principle, particularly during times of crisis, where it has been used as an excuse to restrict voting rights.[233]

C. The Court's Emphasis on the Purcell *Principle Masked Its Failure to Apply the Requisite Balancing Test for Deciding Election Cases*

Election law's federalist approach requires some system of regulation. Accordingly, the *Anderson-Burdick* "flexible balancing test" provides a

227. *See* Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 976 (W.D. Wis. 2020).

228. *See supra* notes 203–204 and accompanying text.

229. *See* Hasen, *supra* note 125, at 443.

230. *See Republican Nat'l Comm.*, 140 S. Ct. at 1210 (Ginsburg, J., dissenting).

231. *See supra* Section IV.A.3.

232. Wendy Weiser & Daniel Weiner, *The Supreme Court's "Breathtakingly Radical" New Approach to Election Law*, POLITICO MAG. (Nov. 22, 2020, 7:00 AM), https://www.politico.com/news/magazine/2020/11/22/supreme-court-election-law-voting-rights-438844 (explaining that the Court's decisions ultimately limited voting access responses to the pandemic that the federal courts had generally permitted and disenfranchised tens of thousands of Americans, particularly people of color).

233. *See* Rick Hasen, *The Biggest Problem with the Supreme Court's Opinion in the Wisconsin Voting Case Was Not the Result (Which Was Still Wrong), But the Court's Sloppiness and Nonchalance About Voting Rights and What That Means for November*, ELECTION L. BLOG (Apr. 10, 2020, 12:39 PM), https://electionlawblog.org/?p=110647 (advocating for courts to abandon the *Purcell* principle when an emergency outside the parties' control causes a court to issue an emergency election order); Hassan & Glaun, *supra* note 149 (explaining that abiding by the *Purcell* principle can prevent necessary changes to voting laws that prevent voters from having their votes counted).

mechanism for the Court to employ to determine whether "a state's rules and procedures . . . violate the Fourteenth Amendment."[234]

Yet, in *Republican National Committee*, the Court rigidly applied the *Purcell* principle, without mentioning the *Anderson-Burdick* balancing test, to avoid making much-needed changes to old election rules that would consider voters' health and safety during a global pandemic.[235] While it is possible that the Court conducted an implicit balancing analysis,[236] the majority's failure to acknowledge *Anderson* or *Burdick* likely suggests that the Court is continuing to grapple with its implementation, rather than outright rejecting it.[237] The Court has not yet articulated a uniform approach for weighing burdens on the right to vote with the state's interests.[238] Despite the Court's failure to provide clear guidance on how to apply *Anderson-Burdick*, lower courts continue to rely on it.[239] As with the ambiguous *Purcell* principle, this lack of guidance can provide judges with too much

234. *See* Edward B. Foley, *supra* note 126, at 1847.

235. *See supra* text accompanying note 193.

236. *See* Foley, *supra* note 126, at 1852 (suggesting that *Bush v. Gore* had "an implicit element of balancing").

237. *Id.* at 1847. The Court has not yet agreed on the method for balancing the burdens under the *Anderson-Burdick* balancing test. *See* Brief of Erwin Chemerinsky as *amicus curiae* in support of neither party [Applicable Legal Standard], at 12, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008), https://www.brennancenter.org/sites/default/files/legal-work/e91c0b5e230c0db479_2jm6b17yw.pdf (citing Dunn v. Blumstein, 405 U.S. 330, 337, 305 (1972)) (arguing that in *Crawford*, the Court should clarify confusion faced in the lower courts about which level of constitutional scrutiny to apply by reaffirming the validity of the *Dunn* line of cases, which apply strict scrutiny to lawsuits alleging the complete denial of the right to vote); Foley, *supra* note 126, at 1853–54 (arguing that the Court's "imprecise . . . reasoning" in *Bush v. Gore*, *Anderson*, *Burdick*, and *Crawford* makes them impossible to square with each other and creates confusion and uncertainty for lower courts in their voting law jurisprudence).

238. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. at 200; *id.* at 204–05 (Scalia, J., concurring); *id.* at 218 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). While the plurality in *Crawford* considered the burdens on a "*voter-specific* basis," the Scalia concurrence rejected this approach and engaged in "*wholesale* balancing: weighing the law's burden on all voters collectively, as compared to the state's across-the-board interests in adopting the law." Foley, *supra* note 126, at 1848–49 (emphasis added).

239. Foley, *supra* note 126, at 1854, 1859; *see also* Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC'Y (Sept. 24, 2019), https://www.acslaw.org/expertforum/a-tale-of-two-election-law-standards/ (surmising that "*Anderson-Burdick* balancing is itself flawed, and the courts must recognize the centrality of the right to vote to our democratic system and impose stringent rules on governments that try to infringe on that right"); Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, EXCESS OF DEMOCRACY (Apr. 20, 2020), https://excessofdemocracy.com/blog/2020/4/the-fundamental-weakness-of-flabby-balancing-tests-in-federal-election-law-litigation (explaining that the *Anderson-Burdick* balancing test "is unusually weak as a vehicle for protecting 'voting rights' under the Constitution").

discretion to decide cases according to their own political beliefs,[240] which can be problematic in policy-related cases.[241]

Meanwhile, too flexible of an application of *Purcell*—one that disregards the importance of timing altogether and relies solely on the also indeterminate *Anderson-Burdick* inquiry—would allow Courts to more easily change election rules just before an election. In addition to creating confusion among voters, changing election rules can also cause confusion among election officials, which may lead to mistakes in administering the elections.[242]

The Court has not yet clarified the contours of either the *Purcell* principle[243] or the *Anderson-Burdick* balancing test[244] and did not apply them in conjunction with each other in *Republican National Committee*.[245] Thus, it was insufficient for the Court to rely on the *Purcell* principle alone as a "hard-edged rule."[246] *Purcell* itself emphasizes the importance of deference to a lower court's findings of fact, consideration of the harms to the parties, and evaluation of factors specific to election cases.[247] Accordingly, the Court should rely on it as a standard that, in addition to considering the factors that *Purcell* articulates—the proximity of the election and the likelihood of new rules creating confusion and disenfranchisement—also considers other election-specific concerns, such as the probability of election officials making errors when administering the elections and the timing of the

240. Muller, *supra* note 239 (citing Daunt v. Benson, 956 F.3d 396, 423 (6th Cir. 2020) (Readler, J., concurring in the judgment)) ("The temptation to overindulge in the *Anderson-Burdick* test has not gone unnoticed."). The *Anderson-Burdick* test "allow[s] a judge 'easily [to] tinker[ ] with levels of scrutiny to achieve [his or her] desired result.'" Daunt v. Benson, 956 F.3d 396, 423 (6th Cir. 2020) (Readler, J., concurring in the judgment) (second, third, and fourth alternations in original) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting)); *see also* Foley, *supra* note 126, at 1859 (expressing concern that judges can abuse the *Anderson-Burdick* balancing's vague standard to decide cases to achieve their own desired result, without considering the law, and that this may become binding "if a majority of the Supreme Court chooses to be willfully disobedient to the Court's own precedent").

241. Muller, *supra* note 239 (citing *Daunt*, 956 F.3d at 424 (Readler, J., concurring in the judgment)) ("In sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them.").

242. Stephanopoulos, *supra* note 180 ("Court orders can disrupt administrators' familiar routines, compel them to make determinations for which they lack training or experience, and extend how long each step in the process takes. As a result, the vote count can be slowed or even rendered inaccurate thanks to election officials' missteps under the new court-imposed rules."); *see also supra* notes 222–223 and accompanying text.

243. *Id.* ("[T]he *Purcell* principle remains remarkably opaque.").

244. *See supra* notes 237 and 238 and accompanying text.

245. *See Republican Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

246. Stephanopoulos, *supra* note 180.

247. *See supra* text accompanying notes 93 and 95.

litigation compared to when the law was enacted.[248] As the *Purcell* principle invokes a multi-factor test, the Court would help future applications of the test by clearly articulating how it weighed each of the relevant factors in its decisions.

D. Though It Accurately Defined the Issue, the Dissent Also Did Not Properly Apply the Requisite Constitutional Analyses

In her dissenting opinion in *Republican National Committee*, Justice Ginsburg properly articulated the issue as assessing the burden on voters but offered limited support.[249] Her dissent cited the district court's *Anderson-Burdick* balancing analysis, which concluded that the pre-COVID-19 statutory deadlines for receiving absentee votes "would unconstitutionally burden Wisconsin citizens' right to vote."[250] However, she never mentioned the importance of employing that balancing test, she did not apply the test herself, and finally, she did not discuss the Court's failure to cite to *Anderson* or *Burdick*.[251] Similarly, she referenced the Court's reliance on the *Purcell* principle, but did not properly apply it.[252]

Justice Kagan's analysis in *Democratic National Committee v. Wisconsin State Legislature*[253] highlights the aspects of Justice Ginsburg's dissent that could have been more robust.[254] In that case, Justice Kagan averred that the Court's decision would disenfranchise large numbers of voters who timely requested and mailed their ballots but whose ballots did not arrive in time to be counted due to mail delays.[255] There, Justice Kagan applied the *Anderson-Burdick* balancing test to determine whether the disenfranchisement resulting from backlogs and mail delays imposed a severe burden on the right to vote.[256] She criticized the appellate court's "fixati[on] on timing alone" and explained why it had misapplied the *Purcell*

248. Stephanopoulos, *supra* note 180.

249. *See Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

250. *Id.* at 1209.

251. *Id.*

252. *Id.* at 1210.

253. 141 S. Ct. 28 (2020).

254. *See supra* notes 53–59 and accompanying text.

255. *See* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 40 (2020) (Kagan, J., dissenting). The Supreme Court refused to extend the deadline on October 26, 2020, and as of October 27, 2020, 320,000 outstanding absentee ballots needed to be submitted by election day on November 3. Scott Bauer, *Supreme Court Ruling Spurs Wisconsin to Get Early Votes In*, AP NEWS https://apnews.com/article/election-2020-virus-outbreak-madison-wisconsin-elections-76c789b1fdda33aa71f73fc86ef44dcd.

256. *Wisconsin State Legislature*, 141 S. Ct. 28, 41 (2020) (Kagan, J., dissenting) (criticizing the Supreme Court for "never even address[ing] [that] constitutional issue").

principle.[257] She reasoned extending the absentee ballot-receipt deadline would not confuse voters because the worst outcome would be that voters mail their ballots a few days early.[258] Moreover, counting votes does not "undermine the 'integrity' of [the democratic] process," whereas discarding "timely cast ballots that, because of pandemic conditions, arrive a bit after Election Day," does.[259]

Justice Ginsburg's dissent did not highlight the Court's complete disregard of the *Anderson-Burdick* balancing test.[260] Though the test is imperfect,[261] it is important for the Court to apply longstanding procedures for determining the constitutionality of state election laws.[262] Additionally, Justice Ginsburg's dissent suggested that the Court improperly relied on the *Purcell* principle, but did not explain how it misapplied it, beyond its hypocrisy of changing the election laws closer to the election than the district court, and its failure to consider that the district court was responding to a "rapidly developing public health crisis."[263] A more substantive analysis would have shed more light on how the Court erred and could have influenced subsequent decisions in cases leading up to the election.

V. CONCLUSION

In *Republican National Committee*, the United States Supreme Court effectively modified the district court's six-day extension for receiving absentee ballots by requiring that absentee voters postmark their ballots by Election Day.[264] Ultimately, the Court's reliance on and interpretation of the *Purcell* principle, along with its failure to explicitly assess the burdens on voters during the pandemic, jeopardized the ability of tens of thousands of voters who timely requested ballots to exercise their right to vote.[265] The Court's inadequate analysis in *Republican National Committee* laid the foundation for the Court's subsequent emergency decisions as the 2020 general election approached and created the impression that its decisions were made according to partisan preferences.[266] It also raises important

257. *Id.* at 41–42 (Kagan, J., dissenting).

258. *Id.* at 42.

259. *Id.*

260. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1209 (2020) (per curiam) (Ginsburg, J., dissenting).

261. *See supra* note 239 and accompanying text.

262. *See supra* note 144 and accompanying text.

263. Republican Nat'l Comm., 140 S. Ct. at 1210–11 (Ginsburg, J., dissenting).

264. *Id.* at 1206.

265. *Id.* at 1211; *see also supra* note 218 and accompanying text.

266. *Id.*; *see supra* Section IV.A.

concerns for the future of the Court's role in voting cases[267] and its continued reliance on the *Purcell* principle in emergency situations as an inflexible rule.[268] In failing to engage in a constitutional balancing analysis, the Court signaled that courts could rely on the *Purcell* principle in lieu of following the *Anderson-Burdick* precedent.[269] Finally, Justice Ginsburg's dissent did not go far enough in exposing the Court's insufficient reasoning, which was marked by its avoidance in following established constitutional procedures.[270] Importantly, the Court's decisions in *Republican National Committee* and its progeny, all marked by little to no reasoning, leave open critical questions about the Court's legitimacy and its future prioritization of the fundamental political right to vote.[271]

267. *See* Stephanopolous, *supra* note 127.
268. *See* Hasen, *supra*, note 233 and accompanying text; *supra* Section IV.B.
269. *See supra* Section IV.C.
270. *See supra* Section IV.D.
271. *See supra* Section IV.A.