

Playing the *Purcell* Game

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ABSTRACT

Decided by the Supreme Court in 2006, Purcell v. Gonzalez has given defendant jurisdictions a tool to delay court-ordered redistricting on the ground that they came too close to an election. This article catalogues the drastic expansion of Purcell over the last two decades, culminating in the Court's Allen v. Milligan order following the landmark decision altering the Voting Rights Act in Louisiana v. Callais. This article argues that the Milligan order, which limited the invocation of Purcell to government actors, conflicts with courts' practice of expanding Purcell's temporal reach through the rights of individual parties. Finally, the article proposes a strategy for voting rights litigants to blunt Purcell's remedy-delaying effect: litigate Purcell deadlines before the merits, rather than after a remedy has been ordered. Purcell remains a major part of the procedural landscape in which redistricting cases are litigated, and litigants must learn to use that landscape to their advantage.

I. INTRODUCTION

In *Purcell v. Gonzalez*,¹ the Supreme Court stayed an order from a federal court enjoining an Arizona voter identification law until after an upcoming election.² In the two decades since, *Purcell* has come to stand for the idea “that federal courts ordinarily should not alter state election laws in the period close to an election.”³ While the “*Purcell* principle” covers all voting- and election-related rules, its application to redistricting cases presents a special harm. Even when voting rights plaintiffs succeed in showing that an existing plan violates the Constitution or the Voting Rights Act (“VRA”), defendants use *Purcell* to claim that the decision has come too late to be implemented in time for the next election.⁴

* Clinical Fellow, Election Law Clinic at Harvard Law School. Many thanks to Professor Ruth Greenwood, Daniel Hessel, Sam Davis, and Rose Reilly for helpful thoughts and comments, and to the editorial team at the HARVARD CIVIL-RIGHTS CIVIL-LIBERTIES LAW REVIEW FORUM for their excellent edits. All errors are my own.

¹ 549 U.S. 1 (2006).

² *Id.* at 5.

³ Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring).

⁴ See, e.g., Merrill v. Milligan, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (applying *Purcell* to delay court-ordered redistricting in Alabama).

Federal judges seem especially worried about *Purcell* when the initial court order is not a decision on the merits, but a preliminary injunction before a full-scale trial.⁵ In redistricting cases, *Purcell* can significantly lengthen the amount of time before worthy plaintiffs can obtain relief.⁶ Due to the discrete nature of elections, and the limitations on when and how often elections can and should be run, *Purcell* can delay a new plan from going into place for years after a judge has ruled defendants have lost or are likely to lose on the merits—and if the decennial census comes at the wrong time, plaintiffs could *never* get relief, and district plans that are illegal and unconstitutional can be used without any recourse.⁷ The “redistricting wars” of the 2026 congressional election cycle underscore the worry: when Texas hastily redrew its congressional maps under pressure from President Donald Trump, a three-judge panel of the Western District of Texas preliminarily enjoined the mid-decade redistricted map as an unconstitutional gerrymander.⁸ On its non-merits docket,⁹ the Supreme Court stayed the district court’s injunction, in part because “lower federal courts should ordinarily not alter election rules on the eve of an election.”¹⁰ As a result, Texas will use its redrawn map for at least the 2026 congressional elections.

An astute observer will note that December 2025 is not exactly “on the eve” of an election that will take place in November 2026.¹¹ Why exactly *Purcell*’s reach expanded so far is the subject of another piece, though I certainly discuss how it happened below.¹² This piece does not argue for the abolition of *Purcell*, which has been persuasively done elsewhere.¹³ Instead, this piece accepts *Purcell* as an immovable part of election litigation, examining its implications instead of its merits. If *Purcell* is part of the rules of the game, voting rights litigants must play the game accordingly. This piece examines *Purcell* from two angles: first, I argue

⁵ *Id.* (Supreme Court order “stays the District Court’s injunction *pending a ruling on the merits*” (emphasis original)).

⁶ This piece focuses on redistricting cases, where the desired remedy is a new district map and an election under the new map (either special or regularly scheduled). Much of the analysis applies to application of a similar strategy in cases where the desired remedy is a different election system, or even a smaller-scale election rule change, such as changes regarding absentee ballot requirements.

⁷ See Tanner Lockhead, *Redistricting Immunity*, 112 CALIF. L. REV. 461, 481–84 (2024). Lockhead argues that the combined effect of *Purcell* and *Shelby County v. Holder*, 570 U.S. 529 (2013), is an effective immunization of governments for illegal district plans.

⁸ *League of United Latin Am. Citizens v. Abbott*, 809 F. Supp. 3d 502 (W.D. Tex. 2025).

⁹ I use the term “non-merits” docket to refer to the set of orders given without full briefing and argument. Colloquially, many use the term “shadow” docket or “emergency” docket.

¹⁰ *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 419 (2025) (quoting *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 423, 424 (2020)). *RNC v. DNC* in turn cites *Purcell* for that proposition. 589 U.S. at 424 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)).

¹¹ See *Abbott*, 146 S. Ct. at 428 (Kagan, J., dissenting from grant of stay) (“Here, Election Day is eleven months from now.”).

¹² See, e.g., Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 441 (2016).

¹³ See, e.g., Ruoyun Gao, *Why the Purcell Principle Should Be Abolished*, 71 DUKE L.J. 1139 (2022).

that a recent Supreme Court order explicitly limiting *Purcell* to invocation by states is misguided and ignores the way the principle has expanded; second, I identify a strategy for voting rights litigants to work within the confines of the amorphous doctrinal framework to ensure prompt remedial action. While litigants may prefer to overturn *Purcell* altogether, Supreme Court orders from the 2026 election cycle indicate that the *Purcell* game is here to stay, at least for the foreseeable future.

This piece proceeds as follows. Part II reviews the expansion of the *Purcell* limitation on voting remedies in the last decade. Part III argues that, contrary to a recent Supreme Court order in *Allen v. Milligan* (“*Milligan III*”),¹⁴ *Purcell* should expand beyond use solely by *governments*, and could be used by voters and candidates to protect systems against near-election anti-democratic changes. Such potential “defensive” use became a hot-button issue after the Supreme Court gutted Section 2 of the VRA in *Louisiana v. Callais*,¹⁵ and a multitude of Southern states moved to rapidly redistrict before the 2026 midterm elections. Part IV discusses pre-merits *Purcell* determination and explores the conditions in which a voting rights plaintiff could tie a defendant to a timeline, and schedule trial around a particular “*Purcell* date.” Parts III and IV focus on redistricting litigation under both the Fourteenth Amendment and the VRA, though the arguments in each are applicable to any election litigation where *Purcell* considerations may come into play.¹⁶ Finally, Part V summarizes the two arguments and concludes.

II. *PURCELL* AND ITS EXPANSION

The threat¹⁷ *Purcell* presents to pro-democracy litigants is less a function of its particular holding and more due to the way it has evolved. It is the animating worry behind *Purcell*, coined the “*Purcell* principle” by Professor Richard Hasen,¹⁸ that presents an ever-growing obstacle to merits relief, rather than the 2006 holding itself. This Part briefly describes the (itself brief) *Purcell* decision, and its growth and expansion in the two decades since.

A. *Purcell v. Gonzalez*

Purcell itself was a short, objectively reasonable per curiam decision to stay a Ninth Circuit injunction that engendered no significant debate on the Court at the time.¹⁹ The timeline of the case is just as important as the underlying dispute. In November 2004, Arizona voters passed a ballot measure that required voters to present proof of citizenship when registering to vote and identification when

¹⁴ 146 S. Ct. 1377 (2026).

¹⁵ 146 S. Ct. 1131 (2026).

¹⁶ As Part II describes, redistricting litigation has been at the forefront of *Purcell*’s expanded use due to both the administrative challenges of implementing a new district plan, and the length of redistricting litigation.

¹⁷ And, as I argue below, opportunity. See *infra* Part IV.

¹⁸ See Hasen, *supra* note 12.

¹⁹ The only additional opinion was a one-paragraph concurrence penned by Justice Stevens.

actually casting a ballot.²⁰ Under the now-defunct Section 5 of the VRA, Arizona had to preclear any changes to its election rules with the Department of Justice, which approved of the regulation in May 2005.²¹ About a year later, in May 2006, various groups challenged the regulation in federal district court.²² In September, the district court denied the plaintiffs' motion for a preliminary injunction, which they then appealed to the Ninth Circuit.²³ In an important twist, the appeal actually predated the full disposition from the district court, which had delayed issuing its findings of fact and conclusions.²⁴ On October 5, thirty-three days before the November election, the Ninth Circuit enjoined Arizona from enforcing the law until after full briefing, which would not be accomplished until two weeks after the election.²⁵ The district court then entered its findings on October 12.²⁶ The Supreme Court issued its per curiam grant of the state's application for stay on October 20, putting the identification and registration rule back in place for the 2006 election.

The Supreme Court found that, despite weighty interests on both sides, the Court of Appeals had not given sufficient deference to the district court's findings. The Ninth Circuit could not have done so because the district court had not issued its findings by the time the court of appeals enjoined the Arizona rules.²⁷ By the time the Supreme Court issued its order, the Ninth Circuit had not opined further on the district court's now-entered findings.²⁸ To the Court, the "impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order" meant the injunction needed to be vacated.²⁹

The *Purcell* decision was predicated on three factors: (1) the Ninth Circuit proceeded on an incomplete record ("the incomplete record factor"); (2) the Court of Appeals was issuing an injunction the district court had refused to issue ("the lower court denial factor"); and (3) the election in question was imminent ("the imminence factor"). Much recent scholarship has focused on the third factor, likely because, as described below, the case law has likewise centered on an election's imminence.³⁰ The incomplete record factor actually takes up most of the brief analysis in the per curiam opinion, including a somewhat-pointed rebuke of the

²⁰ *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006).

²¹ *Id.*

²² *Id.* at 2–3.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 3–4.

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Gao, *supra* note 13, at 1147 (focusing on the time before an election); see Hasen, *supra* note 12, at 428 (same). But, as I show below, *Purcell* itself was not predicated solely on the imminence of the election. A full account of how *Purcell* grew into its current importance necessitates understanding how two of the three reasons underpinning the initial decision were dropped.

district court in question for not proceeding more expeditiously.³¹ And indeed, the worry that the Ninth Circuit would enjoin a perfectly legal voting regulation was well-founded: when the Ninth Circuit heard the case with full briefing and oral argument, it affirmed the district court's findings.³² The lower court denial factor could be read to apply *Purcell* to block an injunction only when a district court has declined to issue the injunction and a Court of Appeals has overruled that decision. To the Supreme Court, "[i]t was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court."³³ Subsequent development of *Purcell*, however, has focused on the imminence factor. If the incomplete record factor survives, it only does so as a general mistrust of district court preliminary injunction rulings, as opposed to decisions after a full trial.³⁴ And the lower court denial factor has all but disappeared; the Supreme Court routinely uses *Purcell* to stay *grants* of injunctions by district courts,³⁵ and the case is often invoked by district courts themselves.³⁶

The imminence factor has become the most important piece of *Purcell*. The *Purcell* Court emphasized the "imminence of the election and the inadequate time to resolve the factual disputes" before the election.³⁷ The Court's particular worry was voter confusion, with the imminence focus stemming from the risk that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls."³⁸ That risk increased as an election drew closer and closer.³⁹ This fear of voter confusion has, rightly or wrongly,⁴⁰ become the touchstone of *Purcell* jurisprudence in the years since 2006, animating the expanded use of *Purcell* against pro-democracy litigants.

³¹ *Purcell*, 549 U.S. at 3 ("Despite the time-sensitive nature of the proceedings and the pendency of a request for emergency relief in the Court of Appeals, the District Court did not issue its findings of fact and conclusions of law until October 12.").

³² See *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

³³ *Purcell*, 549 U.S. at 5.

³⁴ See *Merrill v. Milligan* ("Milligan I"), 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) ("The stay order is not a ruling on the merits, but instead simply stays the District Court's injunction *pending a ruling on the merits*.").

³⁵ See, e.g., *id.* (staying district court injunction); *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418 (2025) (same).

³⁶ See, e.g., *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1327 (N.D. Ga. 2022) (refusing to grant relief due to *Purcell*).

³⁷ *Purcell*, 549 U.S. at 5–6.

³⁸ *Id.* at 4–5. The Court noted the specific worry of conflicting court orders, hearkening back to the second factor discussed above.

³⁹ *Id.* at 5 ("As an election draws closer, that risk will increase."). That said, it is worth noting that the Court indicated the imminence worry may have cut *towards* the Ninth Circuit's rapid disposition, before the district court's full findings were entered. *Id.* ("So the Court of Appeals may have deemed this consideration to be grounds for prompt action.").

⁴⁰ For an argument that the voter confusion focus should actually have been a voter suppression focus, see Harry B. Dodsworth, *The Positive and Negative Purcell Principle*, 2022 UTAH L. REV. 1081, 1127–30 (2022).

B. The Time-Expanding Principle

Even dropping the first two factors in *Purcell*'s initial reasoning, the imminence-only holding remains narrow. The Ninth Circuit issued its injunction against the Arizona law a mere 33 days before the election at issue.⁴¹ To the extent that *Purcell* sets a minimum time horizon appropriate for relief, it sets it at roughly one month. This, on its face, seems reasonable; running elections is, after all, a massive administrative undertaking, made even harder if states, voters, and candidates do not know the rules.⁴² It would make little sense, to take an extreme example, to force a state to change its election districts the day before an election. Setting the rules of an election in stone at some point before the election, barring a showing of major prejudice or constitutional harm, seems eminently reasonable. And in *Purcell* itself, the district court—at the time of the Ninth Circuit's order, the only court with a full factual record—had determined no such harm existed.⁴³ Setting some minimum time horizon in which courts should be hesitant to alter election rules is not, in and of itself, an unreasonable evil for voting rights litigators to combat. That time horizon, however, has steadily expanded in the years since *Purcell*.⁴⁴

In tracking the expansion of *Purcell*'s time horizon, the key date on which to focus is not the date that the Supreme Court (or a Court of Appeals) invoked *Purcell* to stay an injunction, but rather the ordering of the injunction itself, whether preliminary or final. Rightly or wrongly, the Supreme Court has tended to view only the grant of an injunction as changing election rules, and not a subsequent decision to stay that injunction, though *Purcell* itself worried especially about “conflicting orders.”⁴⁵ As a result, modern *Purcell* applications often create the very conflicting orders the original decision sought to avoid.⁴⁶ When comparing the cases described below, recall that the injunction at issue in *Purcell* was granted roughly one month before the election.

Purcell lay relatively dormant for nearly a decade but began to come back to the legal zeitgeist in 2014. Spurred in part by the Supreme Court's merits opinion blessing an Indiana voter identification law⁴⁷ and dismantling the preclearance provisions of the VRA,⁴⁸ the 2014 cycle saw a glut of voting-restrictive laws, and

⁴¹ See *Purcell*, 549 U.S. at 3.

⁴² For further discussion of who needs to know the rules, see *infra* Section IV.B.

⁴³ See *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2006 WL 8431038 (D. Ariz. Oct. 12, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007) (preliminary injunction findings of fact and conclusions of law).

⁴⁴ Accord Samuel Davis, *The Griffin Principle: Defining and Deterring Election Contest Gamesmanship*, 21 DUKE J. CONST. L. & PUB. POL'Y. 193, 242–46 (2026) (describing interests underlying *Purcell*).

⁴⁵ *Purcell*, 549 U.S. at 4.

⁴⁶ Cf. Lockhead, *supra* note 7, at 475 (“*Purcell*'s position within stay jurisprudence creates needless confusion and results in inconsistent decisions.”)

⁴⁷ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

⁴⁸ *Shelby County v. Holder*, 570 U.S. 529 (2013).

legal challenges to those laws.⁴⁹ *Purcell*'s return to prominence brought only part of its original underpinnings. In *Husted v. Ohio State Conf. of the NAACP*,⁵⁰ the Supreme Court stayed an injunction entered by the District Court of the Southern District of Ohio on September 4, two months before the election.⁵¹ Already, the Court dropped the lower court denial factor from any test; where *Purcell* dealt with a trial court that had denied injunction, the *Husted* district court had done the opposite. Another 2014 case all but eliminated the first two factors of the original *Purcell* litigation: in *Veasey v. Perry*,⁵² the Court refused to overturn a Fifth Circuit stay of a Southern District of Texas *final* injunction.⁵³ As Justice Ginsburg pointed out in a dissent from the denial, the Fifth Circuit had committed the same sin as the Ninth in *Purcell*, and "accorded slim, if any, deference" to the trial court.⁵⁴ Since *Veasey* dealt with a final injunction issued by a district court, it ignored two of the original three *Purcell* factors: the incomplete record and lower court denial factors. Both were not present in *Veasey*'s procedural posture and the lack of both was ignored by the Fifth Circuit.⁵⁵ The 2014 cases thus turned injunction-stays in election litigation into a timing-only inquiry, and at the same time doubled the length of the appropriate time horizon imminence analysis. As the imminence factor's primacy increased, so too did its reach.

Since 2014, the imminence factor has continued to expand, as the Supreme Court has slowly marched the *Purcell* horizon ever backward. Often, this has occurred by tying the relevant election date to deadlines earlier than the actual election. In *Raysor v. DeSantis*,⁵⁶ the Supreme Court refused to vacate an Eleventh Circuit stay of a district court final injunction that occurred roughly two months before a *registration deadline* (itself 29 days before the election).⁵⁷ This new calculation of *Purcell* dates based on deadlines that themselves are well in advance of Election Day has continued apace. In a non-merits opinion in *Merrill v. Milligan* ("*Milligan I*"),⁵⁸ the Court stayed an injunction against Alabama's congressional district map because the *beginning* of absentee voting was roughly two-and-a-half months away.⁵⁹ The general election was nearly nine months away, and the primary election itself about four.⁶⁰ In other cases, the Court has simply invoked *Purcell* further and further before an election, even if the imminence factor was still

⁴⁹ For a discussion of these and other 2014 cases, and the conditions leading to them, see Hasen, *supra* note 12.

⁵⁰ 573 U.S. 988 (2014).

⁵¹ *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014). The Sixth Circuit had declined to stay the district court's injunction. *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014).

⁵² 135 S. Ct. 9 (2014) (mem.).

⁵³ *Id.*

⁵⁴ *Id.* at 10 (Ginsburg, J., dissenting).

⁵⁵ See *id.* at 11 (noting "the extensive factual record").

⁵⁶ 140 S. Ct. 2600 (2020) (mem.).

⁵⁷ See *id.* at 2602 (Sotomayor, J., dissenting from denial of application to vacate stay).

⁵⁸ 142 S. Ct. 879 (2022) (mem.).

⁵⁹ See *id.* at 879 (Kavanaugh, J., concurring).

⁶⁰ See *id.* at 888 (Kagan, J., dissenting).

analyzed from Election Day; in *Robinson v. Callais*⁶¹ a non-merits docket order invoked *Purcell* without any further explanation nearly six months before a November election.⁶² Unlike *Milligan I*, the *Robinson* order contained neither an explanation attempting to justify the time horizon nor a reference to any earlier pre-election deadline. And in *Abbott*, the 2025 litigation over the Texas congressional map, the Court stayed an order enjoining a redistricting plan nearly a full year before Election Day 2026.⁶³ The expansion of the *Purcell* horizon at the Supreme Court has been twofold: both an expansion in the amount of time needed before a deadline and the anchoring of that deadline to dates themselves before Election Day.

The lack of guidance in non-merits opinions enables circuit courts to apply their own restrictive versions of *Purcell*, and to expand the time horizon further in their own right.⁶⁴ More and more often, the Circuits stake *Purcell* from deadlines before Election Day, rather than Election Day itself. The Sixth Circuit applied *Purcell* to stay an injunction issued a month before a registration deadline in *Tennessee Conference of the NAACP v. Lee*.⁶⁵ The Eleventh Circuit stayed an injunction of a Florida ballot drop-box rule nearly four months before voting was “to begin.”⁶⁶ The Fifth Circuit stayed an injunction against a county commission map two weeks before a candidate filing deadline.⁶⁷ And finally, in an unpublished opinion, the Eleventh Circuit anchored its *Purcell* horizon to a *candidate residency requirement*, meaning *Purcell* was applied to block an injunction of a redistricting plan *over a year* prior to the election at issue.⁶⁸

The point of this exercise is not to determine the correct set of deadlines and timelines, but to demonstrate that the foregoing cases lack consistency and are devoid of any reliability for litigants. Importantly, these cases also demonstrate that invocations of *Purcell* have become increasingly unmoored from *Purcell*’s original one-month timeframe.⁶⁹ Whether due to lack of Supreme Court guidance, judicial activism, or well-founded worry about protecting state election administrators, the *Purcell* horizon has marched inexorably further from elections, creating a larger and larger hurdle for even meritorious voting rights claimants to secure relief.

⁶¹ 144 S. Ct. 1171 (2024) (mem.).

⁶² *Id.*

⁶³ *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418 (2025).

⁶⁴ See Stephen I. Vladeck, *Putting the “Shadow Docket” in Perspective*, 17 HARV. L. & POL’Y REV. 289, 297 (2023) (describing problems with lack of precedential value in non-merits orders); see also Lockhead, *supra* note 7, at 479–81.

⁶⁵ 105 F.4th 888 (6th Cir. 2024).

⁶⁶ *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022).

⁶⁷ See *Petteway v. Galveston Cnty., Tex.*, 87 F.4th 721, 724 (5th Cir. 2023) (Oldham, J., concurring).

⁶⁸ See *McClure v. Jefferson Cnty. Comm’n*, No. 25-13253, 2025 WL 2977740 (11th Cir. Oct. 16, 2025). Though an unpublished order is not precedential, neither is a Supreme Court shadow/emergency docket order. See Vladeck, *supra* note 64.

⁶⁹ *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006).

C. The Milligan III Order

In early June 2026, the Supreme Court issued its most recent, and perhaps most important, *Purcell*-related opinion. Alabama's congressional redistricting following the 2020 Census had been the subject of a long and protracted court battle, resulting in two prior Supreme Court opinions, one itself *Purcell*-focused.⁷⁰ Important for this particular trip to the high court, Alabama had been planning to use a Court-ordered map for its 2026 Congressional elections following the Supreme Court's affirmance of an order to create a second majority-Black district in 2023 under the VRA.⁷¹ Then, in late April 2026, the Court drastically rewrote the contours of its vote dilution test under Section 2 of the VRA.⁷² The Supreme Court quickly vacated the injunction requiring Alabama to use the remedial map, and remanded the case to the three-judge District Court for reconsideration.⁷³ The District Court, however, enjoined Alabama's preferred map, which the state had drawn in an attempt to skirt the earlier injunction, including under a Fourteenth Amendment intentional discrimination theory, which *Callais* had purportedly left undisturbed.⁷⁴ The state appealed to the Supreme Court to stay the order.

The Supreme Court stayed the District Court's injunction in a non-merits docket order, *Milligan III*.⁷⁵ The key to *Milligan III*, for this piece's purposes, is its treatment of *Purcell*. *Milligan III* seemed to present a situation where the *Purcell* principle actually cut against a state, rather than for it: the voter confusion here was created by the state itself, not a court order.⁷⁶ The lower court order in question kept an existing map *in place* and *prevented* a late-breaking change.⁷⁷ Alabama had delayed some, but not all, of its primary elections in order to change the map.⁷⁸ The district court, unlike the Ninth Circuit in *Purcell*, had the full benefit of a broad evidentiary record.⁷⁹ This record was created at a full-scale trial over more than two

⁷⁰ For an overview of the pre-*Callais* history of the Milligan litigation, see *infra* Section IV.A.

⁷¹ See *Allen v. Milligan* ("Milligan I"), 146 S. Ct. 1377, 1381 (2026) (per curiam). *Milligan I* was the Court's order staying those initial orders until after the 2022 elections, on *Purcell* grounds. *Merrill v. Milligan* ("Milligan I"), 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

⁷² See *Louisiana v. Callais*, 146 S. Ct. 1131, 1159–60 (2026).

⁷³ See *Allen v. Caster*, 146 S. Ct. 1196 (2026) (mem.).

⁷⁴ See *Singleton v. Allen*, No. 21-cv-1291-AMM, 2026 WL 1469518, at *21 (N.D. Ala. May 26, 2026) (three-judge court).

⁷⁵ *Milligan III*, 146 S. Ct. at 1382 (per curiam).

⁷⁶ See *id.* at 1389 (Sotomayor, J., dissenting).

⁷⁷ *Id.* at 1384.

⁷⁸ See Anna Barrett, *Gov. Kay Ivey Sets Special Elections for Four Congressional Districts*, ALA. REFLECTOR (May 12, 2026), <https://alabamareflector.com/2026/05/12/gov-kay-ivey-sets-special-elections-for-four-congressional-districts/> [<https://perma.cc/3HWE-X3T3>] (last visited July 30, 2026).

⁷⁹ Compare *Singleton*, 2026 WL 1469518, at *1 ("We emphasize that because of the exceptional public importance of this matter, we carefully reviewed the extensive evidentiary record in these cases with fresh eyes in light of *Callais*."), with *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (noting that "at the time the Court of Appeals issued its order the District Court had not yet made factual findings").

weeks, with testimony from over twenty witnesses.⁸⁰ For just these reasons, Justice Sotomayor’s dissent attempted to martial *Purcell* on the side of the *plaintiffs*, rather than the defendant state.⁸¹ Still the Court stayed the district court’s injunction, and the per curiam opinion strictly shut off any suggestion that *Purcell* could be invoked *against* a state: “While federal courts should not impose changes close to an election, States are free to decide for themselves whether last-minute changes to an election are in their best interests.”⁸² Instead, the Court stated that the district court should not have “interposed itself into Alabama’s ongoing efforts to conduct its imminent 2026 congressional elections[.]”⁸³ In support, the per curiam opinion cited *Republican National Committee v. Democratic National Committee*, a *Purcell* non-merits docket order.⁸⁴ Far from helping avoid administrative difficulty, *Milligan III* transformed *Purcell* into a principle that itself sowed “chaos and confusion.”⁸⁵

III. DEFENSIVE *PURCELL*

Federal appellate courts have used *Purcell* as a tool to block pro-democracy lower court rulings. *Purcell* has allowed, for example, voting restrictions that a district court found to violate Section 2,⁸⁶ and districting plans found to violate the 14th Amendment as racial gerrymanders,⁸⁷ allowing them to be active for an additional electoral cycle. *Milligan III* indicates that the Supreme Court unequivocally does not see *Purcell* as a principle with which to block late-breaking *state-initiated* changes.

Potential “defensive *Purcell*,” in which *Purcell*-style arguments about voter confusion and proximity to an election are martialled against a state trying to change its own election rules, came to the legal forefront following the Supreme Court’s decision in *Louisiana v. Callais*. In *Callais*, the Court drastically narrowed the reach of Section 2 of the VRA.⁸⁸ In doing so, the Court immediately called into question a multitude of court-ordered district plans across the South, districts that had been

⁸⁰ *Singleton*, 2026 WL 1469518, at *8.

⁸¹ *Milligan III*, 146 S. Ct. at 1387–89 (Sotomayor, J., dissenting).

⁸² *Id.* at 1381 (per curiam).

⁸³ *Id.*

⁸⁴ *Id.*; see also *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) (“This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006))).

⁸⁵ *Milligan III*, 146 S. Ct. at 1383 (Sotomayor, J., dissenting) (quoting *Merrill v. Milligan* (“*Milligan I*”), 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of application for stays)).

⁸⁶ See, e.g., *Husted v. Ohio State Conf. of NAACP*, 135 S. Ct. 42 (2014) (mem.) (staying injunction against early voting restrictions).

⁸⁷ See, e.g., *McClure v. Jefferson Cnty. Comm’n*, No. 25-13253, 2025 WL 2977740, at *2 (11th Cir. Oct. 16, 2025) (staying injunction on *Purcell* grounds).

⁸⁸ See 146 S. Ct. 1131, 1159–60 (2026) (“updat[ing] the *Gingles* framework”).

ordered under the old Section 2 test, but might not be required under the new one.⁸⁹ As southern states moved almost immediately to redistrict, questions abounded about whether or not they would have time: the *Callais* decision was released on April 29, well within the time horizon in which courts have halted pro-democracy rulings before a November election in the same year. Louisiana, the subject of the case, had already begun early voting, but promptly suspended its primary in order to redraw its districts.⁹⁰ Other states followed suit, and litigators sued to enjoin the actions, trying to turn the governments' own argument against them: *Purcell* counsels against redraws this close to an election.⁹¹ *Milligan III* presented the Supreme Court with a near-perfect opportunity to extend *Purcell* to cover identical confusion-causing concerns caused by a state government, yet the Court declined.⁹² This Part argues that the expansion of *Purcell*'s time horizon should be matched with an expanded breadth, and the Court erred by not applying such breadth in cases like *Milligan III*.

A. Who holds a *Purcell* "right"?

Even prior to *Milligan III*, *Purcell* use had been reserved for invocation by the government. *Purcell* itself was a government request for a stay.⁹³ So too was the *Milligan I* order;⁹⁴ the *Husted* order;⁹⁵ the *Abbott* order;⁹⁶ and so on. When private parties attempt to challenge late-breaking election changes in similar settings to those in which governments receive favorable *Purcell* consideration, they are rebuffed without opinion far more often, as was the case in *Tangipa v. Newsom*,⁹⁷ a California case mirroring the Texas litigation. In *Tangipa*, unlike the Texas case, the district court refused to enjoin the California map,⁹⁸ and when the plaintiffs appealed to the Supreme Court for an emergency injunction pending appeal, they

⁸⁹ See Nate Cohn, *What Peak Gerrymandering Could Look Like Now*, N.Y. TIMES (Apr. 30, 2026), <https://www.nytimes.com/2026/04/30/upshot/gerrymanders-redistricting-democrats-republicans.html> [https://perma.cc/L439-FDLL] (last visited July 30, 2026).

⁹⁰ See *Governor Landry Suspends Only U.S. House Primary Elections Following Supreme Court Ruling*, LA. OFFICE OF THE GOVERNOR (Apr. 30, 2026), <https://gov.louisiana.gov/news/5093> [https://perma.cc/TR5X-KTRN] (last visited July 30, 2026).

⁹¹ See Piper Hutchinson, *Follow the Legal Challenges to Louisiana Suspending its US House Primaries*, LA. ILLUMINATOR (May 5, 2026), <https://lailluminator.com/2026/05/05/follow-the-legal-challenges-to-louisiana-suspending-its-us-house-primaries/> [https://perma.cc/RCY3-UVDS] (last visited July 30, 2026) (interviewing Michael Li at the Brennan Center).

⁹² *Allen v. Milligan* ("Milligan III"), 146 S. Ct. 1377, 1382 (2026).

⁹³ *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) ("The State of Arizona and county officials from four of its counties seek relief...").

⁹⁴ *Merrill v. Milligan* ("Milligan I"), 142 S. Ct. 879 (2022) (Kagan, J., dissenting) ("Alabama now seeks a stay of that ruling").

⁹⁵ 135 S. Ct. 42 (2014) (mem.).

⁹⁶ *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 419 (2025) ("[T]he State of Texas and several of its official applied to this Court for a stay.").

⁹⁷ 816 F. Supp. 3d 1081 (C.D. Cal. 2026).

⁹⁸ *Id.* at 1138.

were rebuffed in a single sentence.⁹⁹ The right to election rule continuity that *Purcell* and its progeny have created rests in the government, not in private parties.

Where the government-as-invoker norm actually stems from, however, is less clear. It does not stem from *Purcell* itself, which discusses a state's interest only in the sense that Arizona had an interest in defending the challenged rule as a method of preventing voter fraud.¹⁰⁰ *Purcell* instead focused on the interests of voters: the Court worried that dueling court orders could "result in voter confusion consequent incentive to remain away from the polls."¹⁰¹ That risk was the one the *Purcell* Court worried would increase "[a]s an election draws closer,"¹⁰² not any additional burden on the state itself. But in *Milligan I*, Justice Kavanaugh described the problem in a very different way:

On top of that, state and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges. The District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.¹⁰³

In *Abbott*, Justice Alito described Texas's interest as "need[ing] certainty on which map will govern the 2026 midterm elections."¹⁰⁴ That does not sound like a need to avoid voter confusion. Why does *Purcell* seem to create a right for voters, but then vest it in the state?

The best answer comes in the way the *Purcell* principle is typically defined: "courts should not issue orders which change election rules in the period just before the election."¹⁰⁵ Rules are, of course, set by the state, and so if a court issues an order changing a rule, it has harmed the state. The appeal right rests, therefore, in the state (or local) government. If *Purcell* is simply a principle of federalism, then the state's status as the sole holder of the *Purcell* right is sensible, even if it does not fit with the Court's original conception of *Purcell*.¹⁰⁶ Evaluating whether *Purcell* originally protected a state's voters from confusion or its progeny evolved to give states a freestanding interest in continuity is academically interesting, but less important here than the result: states get to invoke *Purcell* against court orders changing their election rules. Typically, private parties do not.

⁹⁹ *Tangipa v. Newsom*, No. 25A839, 2026 WL 291659, at *1 (Feb. 4, 2026) (mem.).

¹⁰⁰ *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

¹⁰¹ *Id.* at 4–5 (emphasis added).

¹⁰² *Id.* at 5.

¹⁰³ *Merrill v. Milligan* ("Milligan I"), 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

¹⁰⁴ *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 420 (2025) (Alito, J., concurring).

¹⁰⁵ Hasen, *supra* note 12, at 428 (emphasis added).

¹⁰⁶ See *supra*, Section II.A.

B. Expanded Timelines, Expanded “Rights”

What happens, though, when a *government itself* changes election rules with an imminent election, instead of a court? Do the policy considerations underlying *Purcell* and its progeny disappear? No, of course not. As Justice Sotomayor’s dissent pointed out, the concerns animating *Purcell* itself were present in *Milligan III*.¹⁰⁷ I argue that the Court’s limitation of the *Purcell* right to invocation solely by governments is inconsistent with the manner in which courts, including the Supreme Court, have expanded *Purcell*’s reach in the last decade.

As the time horizon of *Purcell* has been pushed further away from the actual election date,¹⁰⁸ courts applying *Purcell* have focused less and less on the harms to a *government*, and more on rights held by private parties. Especially in redistricting cases, where the time horizon tends to be pushed out furthest,¹⁰⁹ courts have spoken of *Purcell* protecting candidates, campaigns, and voters instead of government election administrators and state legislatures. In *Milligan I*, just before the passage quoted above, Justice Kavanaugh described the State as arguing “that the District Court’s injunction is a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others.”¹¹⁰ Candidates, campaigns, voters, and parties are not the state, but private parties, upon whom the stay-seeking state asserted its *Purcell* right. Going beyond Alabama’s argument, Justice Kavanaugh continued: “Indeed, at this point, some potential candidates do not even know which district they live in. Nor do incumbents know if they now might be running against other incumbents in the upcoming primaries.”¹¹¹ Before he defined the *Purcell* interests of the states, Justice Kavanaugh first listed the admittedly strong interests of private parties.

Other cases go even further than *Milligan I*. In the recent Texas litigation, the per curiam opinion criticized the district court for “improperly insert[ing] itself into an active primary campaign, causing much confusion and upsetting the delicate federal-state balance in elections.”¹¹² Note the use of the term “primary campaign.” The state has no interest qua state in the primary *campaign* itself, rather than the mechanics of the actual election, only the candidates and campaigns do.¹¹³ The

¹⁰⁷ *Allen v. Milligan* (“*Milligan III*”), 146 S. Ct. 1377, 1387–89 (2026) (Sotomayor, J., dissenting).

¹⁰⁸ See *supra* Section II.B.

¹⁰⁹ See, e.g., *Abbott*, 146 S. Ct. at 419 (applying *Purcell* principle nearly a full year before election). Though *Abbott* does not cite *Purcell* itself, it cites cases that themselves cite *Purcell* to apply the principle. *Id.* (citing *Republican Nat’l Comm. v. Democratic Nat’l Comm.* 589 U.S. 423, 424 (2020) (per curiam)).

¹¹⁰ *Merrill v. Milligan* (“*Milligan I*”), 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

¹¹¹ *Id.*

¹¹² *Abbott*, 146 S. Ct. at 419 (2025).

¹¹³ One can ask if the state has an interest in the primary *campaign* rather than just the administration of the primary election, when exactly the campaign starts, and how a court is to tell.

Eleventh Circuit has described “the primary reason” to apply “*Purcell*’s heightened standard” to be “the risk of voter confusion,” before finding that reason lacking.¹¹⁴ When extending the *Purcell* horizon to beyond the residency requirement period, a panel of the Eleventh Circuit located the confusion and hardship primarily in candidates, with election administrators listed later.¹¹⁵ So too has the Fifth Circuit focused on protecting candidates when attaching *Purcell* to a filing deadline instead of an election date.¹¹⁶ Again and again, circuits that apply *Purcell* describe the principle as more about protecting the participants in democracy than the interests of states.¹¹⁷

Returning the focus of *Purcell* protections to private parties would not require altering how courts weigh the merits, typically brought under the Due Process or Equal Protection Clauses. Indeed, *Purcell* does not change the merits considerations of injunctions against states, it should simply change the stay calculus by recognizing that private parties have interests in election rule stability, just as state governments do. Private (voter) interest in stability, of course, was the impetus for *Purcell* itself.¹¹⁸ The Court has in fact already allowed private parties to intervene and claim *Purcell* protections for a late-breaking rule: in *Republican National Committee v. Democratic National Committee*,¹¹⁹ a district court allowed the Republican National Committee and Republican Party of Wisconsin to intervene before it extended a ballot-receipt deadline for the 2020 primaries during the COVID-19 pandemic.¹²⁰ The Supreme Court stayed the district court injunction on behalf of those private intervenors.¹²¹ Though the 2020 litigation occurred *very* close to the election, inside even the original *Purcell* horizon, the case provides precedent¹²² for pro-democracy litigants, likely as both intervenors and plaintiffs,

Cf. Kenichi Serino, *Why U.S. Election Campaigns Feel So Long*, PBS (May 2, 2024), <https://www.pbs.org/newshour/politics/why-u-s-election-campaigns-feel-so-long> [<https://perma.cc/ZC7E-HPZC>] (last visited July 30, 2026) (noting that modern American campaigns have started earlier than in the past).

¹¹⁴ *Jacksonville Branch of the NAACP v. Jacksonville* (“*Jacksonville II*”), No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. 2022).

¹¹⁵ See *McClure v. Jefferson Cnty. Comm’n*, No. 25-13253, 2025 WL 2977740, at *3 (11th Cir. Oct. 16, 2025) (“The district court’s injunction, given its timing, will create confusion and hardship for candidates . . .”).

¹¹⁶ See *Petteway v. Galveston Cnty., Tex.*, 87 F.4th 721 (5th Cir. 2023) (Richman, J., concurring) (“There would be little time for those candidates to campaign, and the time and resources expended by campaigns that commenced in December, or earlier, would be for naught.”).

¹¹⁷ For an alternative view that *Purcell* is better understood as a federalism-protecting doctrine, and thus states do indeed hold the *Purcell* right, see Casey P. Schmidt, Note, *Disrupting Election Day: Reconsidering the Purcell Principle as a Federalism Doctrine*, 110 VA. L. REV. 1493, 1528–44 (2024).

¹¹⁸ See *supra* Section II.A.

¹¹⁹ 589 U.S. 423, 424 (2020) (per curiam).

¹²⁰ See *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1505640, at *1 (W.D. Wis. Mar. 28, 2020). Not to be confused with the similarly named November litigation over a similar issue.

¹²¹ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 423, 423 (2020).

¹²² In the colloquial, not legal, sense. See Vladeck, *supra* note 64.

to claim the same interests and protections. This is especially true in light of the Supreme Court's and other courts' recent rhetoric seeming to vest *Purcell* rights in the people, not the government.¹²³

As states redistrict after the *Callais* decision, they are doing so inside the *Purcell* time horizon set by courts. The Texas primaries have already happened.¹²⁴ The Alabama required residency period has long since passed.¹²⁵ Filing deadlines in all states are long gone.¹²⁶ Redistricting injunctions *against* state governments would almost certainly be stayed under *Purcell* given the timelines laid out by appellate courts. And yet, at least five states have redistricted since the *Callais* decision,¹²⁷ with some suspending active primary elections in order to redistrict.¹²⁸ Given the way that the courts laying out those timelines have focused their *Purcell* discussions on private parties and not the government, those same private parties should be able to call on that protection when they need it. The expansion in time has vested the *Purcell* right in more than just the government; to be internally valid, the right should be invocable by more than just the government as well. The Court's limitation of the *Purcell* right to governments only flies in the face of judicial expansion of *Purcell*, which occurred by anchoring *Purcell* to the interests of non-governmental actors. *Milligan III*'s strict limitation of *Purcell* use to state-aligned parties is fundamentally inconsistent with the steady extension of those parties' use. The order is based on a fundamental contradiction: federal courts have expanded *Purcell* in order to protect the interests of non-governmental groups, but *Milligan III* refuses to protect those groups from the state itself.

¹²³ Private *Purcell* invocation is consistent with other scholarly views of the role the principle plays. Dodsworth differentiates between "positive" invocations of *Purcell*, where an appellate court applies *Purcell* to add voting restrictions, and "negative" invocations, where *Purcell* removes voting restrictions. See Dodsworth, *supra* note 40, at 1112–13. He argues that appellate courts should be more wary of positive invocations, which will result in voter confusion and, as a byproduct, voter suppression. See *id.* at 1121–23. This argument is broadly consistent with the idea that a *Purcell* analysis can be centered on voters who might be unable to cast their ballots, rather than solely government actors.

¹²⁴ See *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 419 (2025) ("The District Court improperly inserted itself into an active primary campaign, causing much confusion and upsetting the delicate federal-state balance in elections.").

¹²⁵ See *McClure v. Jefferson Cnty. Comm'n*, No. 25-13253, 2025 WL 2977740, at *8 (11th Cir. Oct. 16, 2025) (setting *Purcell* deadline based on residency period).

¹²⁶ See *Petteway v. Galveston Cnty., Tex.*, 87 F.4th 721, 724 (5th Cir. 2023) (Oldham, J., concurring) (setting *Purcell* deadline based on filing deadline).

¹²⁷ See *Changing the Maps: Tracking Mid-Decade Redistricting*, NAT'L CONF. OF STATE LEGISLATURES (updated July 14, 2026), <https://www.ncsl.org/redistricting-and-census/changing-the-maps-tracking-mid-decade-redistricting> [https://perma.cc/8545-C277]. The current count, as of this writing, is: Louisiana, Alabama, Florida, Tennessee, and South Carolina.

¹²⁸ See Barrett, *supra* note 78; *Governor Ivey Celebrates Major Court Victory in State's Redistricting Battle, Calls Special Election for Alabama-Drawn Congressional Map*, OFFICE OF THE GOVERNOR OF ALA. (May 12, 2026), <https://governor.alabama.gov/newsroom/2026/05/governor-ivey-celebrates-major-court-victory-in-states-redistricting-battle-calls-special-election-for-alabama-drawn-congressional-map/> [https://perma.cc/QDH5-KUJ7] (last visited July 30, 2026).

C. Potential Further Contraction of the “Right”

After *Milligan III*, the Court has made clear that the *Purcell* “right” belongs only to state governments. Previous cases indicate the Court could be willing to contract the right even further, limiting *Purcell*’s invocation to specific arms of state government. *Milligan III* implies that the Court views *Purcell* as a federalism enforcing principle, rather than a principle protecting voters from confusion.¹²⁹ Some conservative jurists have looked to push the limit even further, and anchor *Purcell* in the independent state legislature theory.¹³⁰ Under this view, *Purcell* should be expanded to block not just federal court interference with an election but any non-legislative interference.

In *Democratic National Committee v. Wisconsin State Legislature*,¹³¹ the Court declined to vacate a Seventh Circuit stay of a district court order enjoining a Wisconsin ballot collection rule during the COVID-19 pandemic.¹³² Concurring, Justice Kavanaugh indicated that any actor other than the state legislature should be unable to intervene in election administration close to an election.¹³³ Though the case applied that principle to federal court intervention, the Kavanaugh concurrence could be applied to other, non-Article III actors. Conservative Fourth Circuit judges made this argument pointedly, though in dissent, in *Wise v. Circosta*.¹³⁴ There the en banc Fourth Circuit declined to enjoin a North Carolina State Board of Elections rule change with similar effect as the district court injunction at issue in *Wisconsin State Legislature*.¹³⁵ Though the majority actually relied on *Purcell* in declining to enjoin the rule,¹³⁶ three conservative judges dissented on the grounds that *Purcell* should block any non-legislative late rule change, including one by the state election agency.¹³⁷ The Supreme Court denied emergency relief over a dissent by

¹²⁹ See generally Schmidt, *supra* note 117.

¹³⁰ The independent state legislature theory holds that only the state legislature, and no other state government actors (including state courts), can alter the rules of federal elections. See Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring).

¹³¹ 141 S. Ct. 28 (2020) (mem.).

¹³² See *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 643 (7th Cir. 2020).

¹³³ *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurring) (“It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.”).

¹³⁴ 978 F.3d 93, 111 (4th Cir. 2020) (Wilkinson & Agee, JJ., dissenting). Such a view would take *Purcell* beyond the bounds of federalism, and vest it instead in the independent state legislature theory.

¹³⁵ See *id.* at 96 (majority opinion).

¹³⁶ See *id.* at 98 (arguing that NCSBE set status quo, and federal court should not upset it).

¹³⁷ See *id.* at 116 (Wilkinson & Agee, JJ., dissenting) (“As the district court observed, *Purcell* has traditionally been applied against federal courts changing the rules shortly before elections. But there is no principled reason why this rule should not apply against interferences by state courts and agencies.”). Judges Wilkinson and Agee constituted the majority on the panel that the en banc Fourth Circuit overturned.

Justice Gorsuch that echoed similar themes as the dissenting judges below.¹³⁸ The independent state legislature theory was dealt a blow in *Moore v. Harper*,¹³⁹ but if the *Milligan III*-style limitation on the parties that can use *Purcell* is to continue, *Wise* likely presents the next move.

IV. PRE-MERITS *PURCELL* DETERMINATION AS A LITIGATION STRATEGY

Where Part III discussed and argued against the Court’s recent limitations on the use of *Purcell*, this Part offers a strategy, grounded in successful practice, to take *Purcell* as it exists and use it to plaintiffs’ advantage. *Purcell* threatens to delay meritorious claims, including those that were determined meritorious after full trial proceedings in a district court,¹⁴⁰ a full election cycle. For obvious reasons, voting rights litigators should hope to avoid such an outcome.¹⁴¹ This Part outlines the strategy of litigating *Purcell* issues *before* any merits decision, the importance of doing so, and the contexts in which litigants might succeed with such a strategy. Litigating *Purcell* prior to the merits could lock defendants out of using it later, and ensure plaintiffs promptly get the relief that a court has already decided they deserve. Though this section focuses on redistricting cases, where *Purcell* deadlines have been moved furthest from the actual election date,¹⁴² the strategy could conceivably be applied to all manner of voter suppression cases.

A. *Milligan I* and *Jacksonville*: *A Tale of Two Cases*

Two redistricting cases from the 2020 redistricting cycle demonstrate the significance of litigating *Purcell* before the merits. First, consider *Milligan I*.¹⁴³ The *Milligan* litigation concerned the Alabama congressional redistricting plan, and saw relief delayed so long via *Purcell* that the Alabama Secretary of State changed and the merits decision for the plaintiffs was eventually affirmed under a different case name, *Allen v. Milligan* (“*Milligan II*”).¹⁴⁴ In January 2022, more than nine months before the 2022 midterm elections but only seven weeks before voting began in the primaries, a three-judge district court granted the plaintiffs a preliminary injunction against the Alabama plan, finding that the plaintiffs were likely to succeed on their

¹³⁸ See *Moore v. Circosta*, 141 S. Ct. 46, 46–47 (2020) (Gorsuch, J., dissenting) (“Despite the General Assembly’s considered judgment about the appropriate response to COVID, other state actors—including the State Board of Elections—recently chose to issue their own additional and supplemental set of amendments to state election laws.”).

¹³⁹ 600 U.S. 1, 22 (2023) (“The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.”).

¹⁴⁰ See, e.g., *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418 (2025).

¹⁴¹ Cf. *Robinson v. Ardoin*, 86 F.4th 574, 600 (5th Cir. 2023) (“Once an ‘election occurs, there can be no do-overs and no redress’ for voters whose votes were diluted.” (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014))).

¹⁴² See *supra* Section II.B.

¹⁴³ 142 S. Ct. 879 (2022) (mem.).

¹⁴⁴ 599 U.S. 1 (2023).

claim that the plan violated Section 2 of the VRA.¹⁴⁵ Two weeks later, the Supreme Court granted Alabama's application for an emergency stay, with Justice Kavanaugh writing a concurrence indicating that he had been heavily influenced by *Purcell* concerns.¹⁴⁶ Following the stay, the 2022 congressional elections occurred under Alabama's original map, which a three-judge district court had already determined likely violated the VRA. After the 2022 elections, the Supreme Court eventually heard the merits of the case in review of the preliminary injunction granted in *Singleton* and stayed in *Milligan I*. They affirmed the panel's ruling.¹⁴⁷ Alabama did not hold special elections, instead waiting until the 2024 congressional elections to implement their new VRA-compliant map. *Purcell* thus resulted in, or at the very least contributed to the result of, Alabamans living under a map that violated the VRA for two additional years. Before the election, a federal court held that the Alabama map violated the VRA, and the Supreme Court held the same afterwards, and yet *Purcell* created the irreparable harm of two more years under a vote-dilutive map.¹⁴⁸

The *Milligan* litigation, and the harm that *Purcell* brought to the plaintiffs and Alabamans, stands in sharp contrast to the harm an attempt at *Purcell* litigation did *not* cause in *Jacksonville Branch of the NAACP v. Jacksonville*.¹⁴⁹ In *Jacksonville*, minority plaintiffs claimed that the City of Jacksonville's City Council districts were racially gerrymandered, in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁰ Shortly after filing their complaint, the plaintiffs moved for a preliminary injunction against use of the map for future city council elections, the next of which were scheduled for March 2023. A district judge granted the injunction on October 12, 2022, finding that the plaintiffs were likely to succeed on their equal protection claim, and thus that the map violated the Constitution.¹⁵¹ The order gave the defendants until November 8 to pass a new, constitutionally firm map.¹⁵² As the *Milligan* defendants did, the *Jacksonville* defendants ran to the court of appeals, crying *Purcell*. Only this time, there was a critical difference: during the litigation, and before the district court did the bulk of the trial scheduling, the defendants "represented to the district court that they needed to know the map boundaries by December 16, 2022, in order to proceed with the March 21, 2023,

¹⁴⁵ See *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (three-judge court).

¹⁴⁶ *Merrill v. Milligan* ("Milligan I"), 142 S. Ct. 879, 879–80 (2022) (Kavanaugh, J., concurring). On the Court's emergency docket, applications are typically granted without opinion, though recently it has become more common for justices to file opinions concurring in or dissenting from the decision. The lack of explained reasoning, and thus lack of clear precedential reach, is a major criticism of the emergency docket. See, e.g., Vladeck, *supra* note 64.

¹⁴⁷ See *Milligan II*, 599 U.S. at 42.

¹⁴⁸ See, e.g., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable . . .").

¹⁴⁹ 635 F. Supp. 3d 1229 (M.D. Fla. 2022).

¹⁵⁰ See *id.* at 1239.

¹⁵¹ See *id.* at 1296.

¹⁵² *Id.* at 1303.

elections.”¹⁵³

This difference proved incredibly important. *Purcell* serves, among other aims, to ensure that election administrators can make court-required changes to election rules only where “the changes are feasible without significant cost, confusion, or hardship.”¹⁵⁴ By representing to the district court the exact date by which they needed a district plan to avoid those concerns—a “*Purcell* date,” if you will—the defendants ceded *Purcell* arguments when the injunction was entered before that date. And in the *Jacksonville* litigation, “the entire schedule on which the district court proceeded was developed with [the defendants], working backwards from the date they provided, and the final schedule was accepted ‘without caveat.’”¹⁵⁵ Where the *Milligan* plaintiffs had to wait over a full election cycle for their relief due to *Purcell*, the pre-merits *Purcell* determination neutered the *Jacksonville* defendants’ argument for an emergency stay, and the March 2023 Jacksonville city council elections took place under a constitutional map instead of one that a federal judge had determined likely violated the Fourteenth Amendment.

B. Pre-merits *Purcell* in context

In *Jacksonville*, the defendants offered the *Purcell* date themselves without an adversarial determination. The same happened in *Rose v. Raffensperger*,¹⁵⁶ a case in which the Supreme Court vacated a *Purcell* stay. During the proceedings, the *Rose* defendant “expressly disclaimed any *Purcell* argument that was based on the notion that Georgia would have administrative problems or that voters would suffer confusion as a result of the district court’s injunction.”¹⁵⁷ In a situation where the *Purcell* date was determined via a more adversarial process and decided explicitly by a district judge, the argument for holding the defendants to the *Purcell* date only gets stronger. Depending on how adversarial the process actually is, defendants could even be estopped from claiming *Purcell* should stay a preliminary injunction or merits decision.

Justice Kavanaugh’s *Milligan I* concurrence portends a potentially more formalized *Purcell* doctrine.¹⁵⁸ Pre-merits *Purcell* date determinations would

¹⁵³ *Jacksonville Branch of NAACP v. Jacksonville* (“*Jacksonville II*”), No. 22-13544, 2022 WL 16754389, at *1 (11th Cir. Nov. 7, 2022). When the *Milligan* litigation returned to the district court after *Callais*, the district court deeply considered the *Purcell* implications of its decision, though it did not anchor its decision to a particular date. See *Singleton v. Allen*, No. 21-cv-1291-AMM, 2026 WL 1469518, at *2–*5 (N.D. Ala. May 26, 2026). The Supreme Court ignored that consideration in *Milligan III*.

¹⁵⁴ *Merrill v. Milligan* (“*Milligan I*”), 142 S. Ct. 879, 881–82 (2022) (Kavanaugh, J., concurring).

¹⁵⁵ *Jacksonville II*, 2022 WL 16754389, at *2.

¹⁵⁶ 143 S. Ct. 58 (2022) (mem.).

¹⁵⁷ *Rose v. Sec’y, State of Georgia*, No. 22-12593, 2022 WL 3572823, at *3 (11th Cir. Aug. 12, 2022) (Rosenbaum, J., dissenting from grant of emergency stay), *vacated sub nom.* *Rose v. Raffensperger*, 143 S. Ct. 58 (2022).

¹⁵⁸ Even though Justice Kavanaugh’s opinion is a “concurrence,” the emergency docket posture

greatly impact the *Purcell* analysis under Justice Kavanaugh’s formalized framework. To Justice Kavanaugh, *Purcell* should be a test that replaces the typical *Nken/Winter* preliminary injunction factors.¹⁵⁹ Under his *Purcell* formulation, a close-to-an-election injunction changing the election rules should be granted only when: “(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.”¹⁶⁰

Justice Kavanaugh would seemingly replace *Nken* with this test in the election context, regardless of when the injunction was sought, so the timing question—*Purcell*’s original worry—folds entirely into the fourth prong. If the defendants have already stated, either voluntarily or in an adversarial setting, that implementing a districting plan by their proposed *Purcell* date would not cause “significant cost, confusion, or hardship,” then the fourth prong would be resolved in the plaintiffs’ favor. What then would be left? In redistricting cases, *Purcell* stays arise in two circumstances: when the plaintiffs have moved for a preliminary injunction prior to a full trial¹⁶¹ or the plaintiffs have won at a full trial and have won a permanent injunction or similar relief.¹⁶² In either context, the resolution of the fourth factor vastly aids plaintiffs under Justice Kavanaugh’s test. In the preliminary injunction context, factors (i) and (ii) are already part of the preliminary injunction analysis (even if (i) represents a higher standard than typical *Nken* analysis). In the post-full-trial setting, the plaintiffs have *already* won, so the underlying merits could not be more clear-cut and the irreparable harm is the same. In both cases, if factor (iv) disappears, all that remains is factor (iii). Assuming the plaintiffs have not overly delayed in bringing their claim, Justice Kavanaugh’s formalized *Purcell* doctrine underscores that it could be crucial to get a *Purcell* date out of defendants before the merits.

C. Approaches to pre-merits *Purcell* date determination

How might litigating *Purcell* prior to the merits actually work? Multiple

of *Milligan I* means his reasoning could (or could not) have large reach in the coming years. See Vladeck, *supra* note 64, at 297.

¹⁵⁹ *Milligan I*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (viewing *Purcell* as a “sensible refinement of ordinary stay principles in the election context”). A stay could apply to a preliminary injunction or permanent injunction won at trial. The standard test requires courts to examine whether a plaintiff can 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 equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

¹⁶⁰ *Milligan I*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

¹⁶¹ See, e.g., *Jacksonville Branch of NAACP v. City of Jacksonville* (“*Jacksonville I*”), 635 F. Supp. 3d 1229 (M.D. Fla. 2022).

¹⁶² See, e.g., *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (three-judge court), *aff’d sub nom.* *Cooper v. Harris*, 581 U.S. 285 (2017).

avenues exist within the pretrial phase of redistricting litigation that could reverse the typical merits-focused *Purcell* order. This section briefly discusses three: motions, discovery requests, and a scheduling conference with the court.¹⁶³ Each differs in terms of how adversarial it is, how binding it might be, and how willing to engage in the process a district court would have to be for the method to succeed. The choice of a particular method should be made based on the context of the defendants, the facts on the ground, the jurisdiction, and even the specific district judge sitting on the case. All three methods come with the goal of providing an expedited remedy while maintaining efficient judicial administration.

Importantly, pre-merits *Purcell* determination should not be an attempt to change *what* the *Purcell* date actually is to a government, but rather *when* plaintiffs and courts learn of the date. If a county needs three months before an election to implement a new district plan, then litigating *Purcell* prior to the merits will not change how much time they need. The strategy's goal is to inform the plaintiff and the court of the date before it has passed, helping to conclude litigation before the date in question, and thereby blocking any *Purcell* grounds for a court-ordered stay and ensuring that plaintiffs do not suffer irreparable harm from waiting until after an election cycle for relief. Pre-merits *Purcell* determination is a way to play the *Purcell* game according to its current rules, not change them.

1. Motion practice

First, plaintiffs could bring a “Motion to Determine *Purcell* Date,” or “Motion to Determine a Date Before Which Special Elections Would Be Possible.” This motion would come after the motion to dismiss stage of the litigation: after any motion to dismiss is rejected, the court will know the case will go to summary judgment or trial, barring settlement, and will be more likely to want to protect its eventual merits ruling, should it be for the plaintiffs. In their motion, plaintiffs should include a proposed *Purcell* date—likely something towards the outer edge of what the Supreme Court has indicated is reasonable for similarly sized jurisdictions, but also something that would be achievable as a date by which to finish a trial and receive a merits ruling. Plaintiffs' goal would not be to push *Purcell* closer to the election, but to tie the defendants to a reasonable date, so they cannot go running to the court of appeals seeking a stay—and thereby securing one more election cycle under dilutive maps—after a defeat. Plaintiffs can demonstrate why such a date is appropriate based on past cases, with a focus on similarly-sized jurisdictions where possible. Information regarding previous redistricting timelines within the relevant jurisdiction could help determine whether a date offered by defendants is or is not reasonable, all with the goal of reaching a stipulated target date.

Asking a court to essentially set a deadline for its own decision—by noting a

¹⁶³ In most scenarios, a defendant will want to avoid committing to a date prior to trial in order to preserve the *Purcell* argument for a potential appeal. These strategies therefore focus on using trial processes to actively tie defendants to a date, rather than hoping they simply volunteer one.

Purcell date before which relief would be available—is unorthodox, but plaintiffs would not be asking a district court to do anything theoretically beyond its powers. In asking for a pre-merits *Purcell* determination, plaintiffs would be asking the court to take an action in order to ensure the availability of a specific remedy at the end of the trial. In other contexts, similar remedy-protecting actions are required: Federal Rule of Appellate Procedure 7 explicitly authorizes a district court to require a bond from a losing defendant upon appeal,¹⁶⁴ and courts routinely place property in escrow while parties’ rights are determined.¹⁶⁵ And since district courts have well-established control over their dockets,¹⁶⁶ they would be able to expedite proceedings as needed to ensure relief.¹⁶⁷ Viewed this way, requiring defendants to commit to a *Purcell* date is not as unorthodox as it initially seems.

2. Discovery requests

Instead of engaging in motion practice to actually litigate a *Purcell* date, plaintiffs could utilize the discovery process to tie defendants to a *Purcell* date. An interrogatory in a redistricting case could be framed:

Please identify and state the basis of your knowledge of support for the latest date by which you could implement and put in place, either via settlement or court order, a remedial districting plan for the [November 20XX] elections.

Questions remain of what to do if defendants either refuse to answer, or answer with a date that is exceedingly long before the relevant election.¹⁶⁸ In either case, plaintiffs could resort to motions to settle the date, moving to settle a discovery dispute if the defendant refuses to answer or moving for an order to show cause in the event of an excessively early deadline. Even if the date is not definitively settled, or an appellate court does not take a settled date as evidence that *Purcell* is not active, the discovery process has the added benefit of building out a *Purcell* record for analysis after merits determination. In both situations, defendants would be forced to claim *Purcell* on appeal having already been asked via the normal

¹⁶⁴ Fed. R. App. P. 7 (“[T]he district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.”).

¹⁶⁵ See, e.g., *Powell v. Alleghany Corp.*, 188 F.3d 514 (9th Cir. 1999) (approving district court-ordered escrow procedures).

¹⁶⁶ See, e.g., *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (discussing “power inherent in every court to control the disposition of the causes on its docket”).

¹⁶⁷ This is something the original *Purcell* opinion chided the district court for *not* doing. See 549 U.S. at 3.

¹⁶⁸ Note that, under the current regime, defendants can and do claim *Purcell* protections—and get them—from appellate courts exceedingly long before an election. See *infra* Section II.B. That reality undercuts the risk of potentially adverse consequences from defendants setting their *Purcell* date very far from an election during discovery; they were likely going to try to do so afterwards, in any event.

litigation process to settle the question. This certainly makes the optics of running to a court of appeals for *Purcell* relief after a merits decision worse.¹⁶⁹

A disadvantage of this strategy compared to motion practice is that the *Purcell* date determination is unlikely to occur until after the case schedule is set, meaning that the schedule cannot be built working backwards from the *Purcell* date, as it was in *Jacksonville*. Plaintiffs could attempt to move the trial start date in response to the *Purcell* date determination, but a court may not want to upset the entire trial schedule after the scheduling meeting required by Rule 16.¹⁷⁰

3. Discussion during scheduling

With a sympathetic district court judge, and perhaps relatively cooperative defendants, plaintiffs may be able to discuss *Purcell* concerns at or in advance of the Rule 26(f) conference and subsequent scheduling conferences.¹⁷¹ Even if not formally moving to settle a *Purcell* date prior to scheduling or planning to determine a *Purcell* date through the discovery process, engaging with the court and the defendants on prospective *Purcell* concerns would allow the court to schedule backwards from the discussed date, or even a general timeframe, as in *Jacksonville*. Such discussion is less binding than a date determined via motions but would again change the optics of claiming *Purcell* on the emergency docket. Asking to discuss a *Purcell* date during scheduling proceedings could also make a district judge more amenable to deciding in the plaintiffs' favor on any *Purcell*-related discovery disputes or disputes regarding an excessively early *Purcell* date. Finally, discussing *Purcell* before the bitterness of discovery sets in could make defendants more willing to actually discuss the issue than they would be later in the process.

D. Settings in which to litigate Purcell before trial

Once litigators have decided on a method, or methods, with which to attempt a pre-merits *Purcell* date determination, they should carefully consider the context in which to attempt such litigation. Winning the first few pre-merits *Purcell* date determinations could create a body of law approving the practice, making cases on more difficult facts and in more difficult jurisdictions easier to win. Trial judges may *want* to tie defendants to predetermined *Purcell* dates: doing so could protect relief and improve judicial administration by making emergency stay proceedings that came prior to the predetermined *Purcell* date easily dismissible.¹⁷² Still,

¹⁶⁹ Cf. *Jacksonville Branch of NAACP v. Jacksonville* (“*Jacksonville II*”), No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. Nov. 7, 2022).

¹⁷⁰ Fed. R. Civ. P. 16.

¹⁷¹ Rule 26(f) conference timing is often determined by a district court's local rules. See, e.g., N.D. Miss. & S.D. Miss. L.U. Civ. R. 16(a) (setting conference within 60 days of first responsive pleading).

¹⁷² See, e.g., *Jacksonville II*, 2022 WL 16754389.

successfully determining *Purcell* dates early in cases under this theory will be key to demonstrating that these potential gains are real and worth the effort. This section provides guidelines for selecting successful cases.

1. A clear winner

First and foremost, pre-merits *Purcell* determination should be sought in a case that is a clear and obvious winner. If brought under the VRA, the *Gingles* preconditions of the possibility to draw a minority-majority district and racially polarized voting should be clearly met.¹⁷³ If a redistricting case is brought under a constitutional theory, either intentional discrimination theory or racial predominance violating the Fourteenth Amendment,¹⁷⁴ the plaintiffs should have smoking gun evidence of intent or predominance. Litigating *Purcell* prior to the merits asks a court to do additional work earlier in the process and to impose a burden on the defendants in order to protect the plaintiffs later. The first cases in which a court is asked to do this must be cases in which it can be *sure* that the “later” will be reached barring settlement.

Bringing a surefire winner to court also implicates Justice Kavanaugh’s formalized *Purcell* test from *Milligan I*.¹⁷⁵ The first of Justice Kavanaugh’s four prongs requires that “the underlying merits are *entirely* clearcut in favor of the plaintiff.”¹⁷⁶ If Justice Kavanaugh’s test governs any *post*-merits *Purcell* litigation, it will require meeting prong (i) to reject an emergency stay. To turn their pre-merits *Purcell* determination into a post-merits blockade, litigants should be positive they meet prong (i), regardless of the strategy they use to determine the *Purcell* date. If plaintiffs *do* meet the standard Justice Kavanaugh suggested, an early *Purcell* determination arguably becomes even more necessary.

2. A case brought quickly

For similar reasons, plaintiffs must be sure to meet Justice Kavanaugh’s third requirement, that “the plaintiff has not unduly delayed bringing the complaint to court.”¹⁷⁷ Even if a predetermined *Purcell* date should eliminate this requirement, and there is an argument that it should, there is no reason to run such a risk in the early cases attempting pre-merits *Purcell* determination. Directly attacking prong (iii) of Justice Kavanaugh’s *Milligan I* concurrence test will be easier once there is a body of case law regarding pre-merits *Purcell* date determinations to which plaintiffs can anchor their arguments. Similarly, plaintiffs in early cases should not try to debate whether the anchoring date for “undue delay” is the filing of the complaint or some other time at which evidence was accrued; their case should

¹⁷³ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

¹⁷⁴ See, e.g., *Cooper v. Harris*, 581 U.S. 285, 291 (2017).

¹⁷⁵ *Merrill v. Milligan* (“*Milligan I*”), 142 S. Ct. 879, 879 (2022).

¹⁷⁶ *Id.* at 881 (emphasis added).

¹⁷⁷ *Id.*

have been brought quickly by any standard a reviewing court may use. For the first cases, plaintiffs should pay close attention to the requirements surrounding *Purcell*, and that means using a case brought promptly and quickly.¹⁷⁸

3. A case in the Eleventh Circuit, maybe

A change in approach between two recent Eleventh Circuit cases indicates that the court, which covers Georgia, Florida, and Alabama, may be the best forum in which to attempt formal pre-merits *Purcell* determination. First, in *Rose v. Raffensperger*, the Supreme Court reversed an emergency stay granted by the Eleventh Circuit to a VRA vote dilution claim in Georgia.¹⁷⁹ The *Rose* defendants had intimated to the district court that they would be able to implement remedies if ordered by August 12, 2022. The district court obliged, stating that it “specifically conducted the trial in this action sufficiently in advance of the November election so that Plaintiffs could be afforded relief in the event they prevailed in the Court’s ruling on a complete record.”¹⁸⁰ But the Eleventh Circuit still struck the remedies on *Purcell* grounds.¹⁸¹ The Supreme Court chastised the Eleventh Circuit for applying *Purcell* instead of the typical *Nken* injunction analysis because the defendant “could not fairly have advanced himself in light of his previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief.”¹⁸² Additionally, as discussed above, the Eleventh Circuit denied emergency relief from the preliminary injunction of a district plan in *Jacksonville* when the defendants had similarly represented to the district court that they could make the required changes on the schedule on which the case was decided.¹⁸³ The Eleventh Circuit was particularly mindful of the *Rose* vacatur, which came only three months prior to the *Jacksonville* emergency stay proceedings.¹⁸⁴ Cowed by the Supreme Court’s disapproval of its overapplication of *Purcell* when defendants had “previously represent[ed]” that a date presented no *Purcell* problems, the Eleventh Circuit seemed loath in *Jacksonville* to risk another contrary decision on appeal.

Jacksonville and *Rose* indicate pre-merits *Purcell* date determinations have

¹⁷⁸ Given the timing of this piece, more than halfway through a ten-year census period, this requirement indicates that this strategy may be more effective after the 2030 Census than at the current moment, barring any more mid-cycle redistricting. Waiting to bring suits through multiple election cycles could easily be seen as “undue delay” by a reviewing court.

¹⁷⁹ See *Rose v. Raffensperger*, 143 S. Ct. 58, 58–59 (2022) (mem.); see also *Rose v. Raffensperger*, 619 F. Supp. 3d 1241 (N.D. Ga. 2022).

¹⁸⁰ *Rose*, 629 F. Supp. 3d at 1271.

¹⁸¹ See *Rose v. Sec’y, State of Georgia*, No. 22-12593, 2022 WL 3572823, at *1 (11th Cir. Aug. 12, 2022) (discussing *Purcell*).

¹⁸² *Rose*, 143 S. Ct. at 59.

¹⁸³ See *Jacksonville Branch of NAACP v. Jacksonville* (“*Jacksonville II*”), No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. 2022).

¹⁸⁴ See *id.* (“Our decision not to further those outer bounds—at least, not in this case—is bolstered by *Rose v. Raffensperger* . . . [where] the Supreme Court rejected our application of *Purcell* . . .”).

additional weight within the Eleventh Circuit. Still, even the Eleventh Circuit is a far from perfect jurisdiction: a panel of the court staked the *Purcell* horizon in *McClure v. Jefferson County Commission* from a residency deadline a year before an election in 2025.¹⁸⁵ Though the *McClure* order represents perhaps the single most aggressive *Purcell* opinion to come from any court, the order was unpublished, giving it significantly less precedential weight than the Supreme Court's *Rose* order.¹⁸⁶ An also-unpublished concurrence in *Jacksonville*, written by a Trump appointee, implied defendants should *affirmatively* raise *Purcell* concerns early in the trial process.¹⁸⁷ Plaintiffs in redistricting cases should be more than willing to give defendants that opportunity, and tie them to a date from which trial courts can work backwards to guarantee relief if merited.

CONCLUSION

Purcell presents a higher and higher hurdle for meritorious plaintiffs to clear in order to obtain speedy relief. In one recent case, a district judge determined that plaintiffs were likely to win their VRA suit but decided *sua sponte* not to grant relief under *Purcell*.¹⁸⁸ Pro-democracy litigants need to learn to play the *Purcell* game, as the 2026 redistricting wars indicate the case will not soon fade from appellate courts' fancies.

This piece has examined *Purcell* from two angles. First, this piece explained how litigants may have thought they could use *Purcell* as a defensive tool to block late-breaking government-initiated rule changes and how *Milligan III* dashed any such hope. After *Louisiana v. Callais* altered the jurisprudence surrounding Section 2 of the VRA, many states rushed to alter their congressional districts prior to the November 2026 elections, and the Supreme Court was willing to let them. Such willingness is inconsistent with recent decisions just prior to *Milligan III* from the Supreme Court, as well as the Fifth and Eleventh Circuits,¹⁸⁹ where those courts applied *Purcell* to protect the rights of private parties, not just government interests. The original *Purcell* opinion itself, as well as subsequent developments, support a view that the rule is grounded more in voter confusion than in federalism concerns,

¹⁸⁵ See *McClure v. Jefferson Cnty. Comm'n*, No. 25-13253, 2025 WL 2977740 (11th Cir. Oct. 16, 2025).

¹⁸⁶ See 11th Cir. R. 36-7 ("The court generally does not cite to its 'unpublished' opinions because they are not binding precedent."). Though by the same token, the unpublished *Jacksonville* order also lacks binding weight, it still represents hope that *Rose* will be followed within the Eleventh Circuit.

¹⁸⁷ See *Jacksonville II*, 2022 WL 16754389, at *6 n.1 (Lagoa, J., concurring). At the time of writing, the Eleventh Circuit has five Democratic appointees among its twelve judges (42%), while the Fifth Circuit, which also sees a significant number of redistricting cases, has five Democratic appointees among its seventeen judges, only 29%. See *Biographical Directory of Article III Judges, 1789-Present*, FED. JUDICIAL CTR. (last visited Aug. 19, 2026) <https://www.fjc.gov/history/judges> (containing searchable directory of Article III judges).

¹⁸⁸ See *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1327 (N.D. Ga. 2022).

¹⁸⁹ These two circuits cover many of the southern hotbeds for VRA litigation.

contra *Milligan III*.

Second, this piece offered voting rights litigants a strategy with which to play the *Purcell* game: litigating *Purcell* dates prior to the merits. Such a strategy prevents defendants from delaying relief if a trial court is able to meet the relevant time frame. Pre-merits *Purcell* litigation will be a delicate process and does not guarantee success. Defendants could refuse to play ball, and courts could refuse to enforce any agreed-upon date. Still, the rewards outweigh any risks. By litigating *Purcell* dates before the merits, worthy plaintiffs may be able to get their remedies earlier and can prevent defendants from eking out another election cycle using maps or rules that violate the Constitution or the VRA. Importantly, this strategy is viable even in the post-*Milligan III* world where defensive *Purcell* use has failed. Under this strategy, the state is still the party asserting *Purcell*; plaintiffs only attempt to force the state to assert *Purcell* earlier than the final moment. *Purcell* is the game that pro-voting rights litigants must navigate. They should make sure to play all of their cards.

* * *