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## Reining in the Purcell Principle

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# REINING IN THE *PURCELL* PRINCIPLE

RICHARD L. HASEN\*

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## I. INTRODUCTION

About a month before the 2014 election, the United States Supreme Court issued a series of four extraordinary orders in election law cases. Without any explanation, the Court: stayed a district court order which would have required Ohio to restore extra days of early voting;<sup>1</sup> stayed a Fourth Circuit order (partially reversing a district court) which would have restored same-day voter registration and the counting of certain provisional ballots in North Carolina;<sup>2</sup> vacated a Seventh Circuit stay of a district court order barring Wisconsin from implementing its new strict voter identification law;<sup>3</sup> and refused to vacate a Fifth Circuit stay of a district court order which would have barred Texas from continuing to use its new strict voter

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1. *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (mem.).  
2. *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (mem.).  
3. *Frank v. Walker*, 135 S. Ct. 7 (2014) (mem.).

identification law.<sup>4</sup> The district court, after a trial on the merits, had declared Texas' law unconstitutional and in violation of the Voting Rights Act.<sup>5</sup>

The orders appeared contradictory, for example by allowing strict voter identification requirements to be used on Election Day 2014 in Texas but not Wisconsin. But the apparent common thread, as suggested by Justice Alito's dissent from the order in the Wisconsin case<sup>6</sup> and by Justice Ginsburg's dissent from the order in the Texas case,<sup>7</sup> was the Supreme Court's application of "the *Purcell* principle:" the idea that courts should not issue orders which change election rules in the period just before the election. This idea has appeared in earlier Supreme Court cases, most prominently in *Purcell v. Gonzalez*,<sup>8</sup> a 2006 short *per curiam* case in which the Court vacated a Ninth Circuit injunction which had temporarily blocked use of Arizona's strict new voter identification law. The Court in *Purcell* criticized the Ninth Circuit both for not explaining its reasoning and for issuing an order just before an election which could cause voter confusion and problems for those administering elections.<sup>9</sup> In the 2014 election cases, the Court consistently voted against changing the electoral status quo just before the election. Ironically, given the Court's criticism of the Ninth Circuit for not giving reasons in *Purcell*, the Court did not explain its reasons in any of the 2014 election orders.

In this Article, I argue the Supreme Court should rein in the *Purcell* principle. Certainly the potential for voter confusion and electoral chaos raise a strong public interest argument against last minute changes in election rules. But under normal Supreme Court remedial standards for considering stays and injunctions, the effect of a court order on the public interest is only one factor to consider. Indeed, in *Purcell* itself the Court cautioned that "considerations specific to election cases" should be a factor "*in addition to* [weighing] the harms attendant upon issuance or nonissuance of an injunction."<sup>10</sup>

Although the precise test the Court uses in these emergency situations is somewhat fluid and uncertain, there is no doubt that ordinarily the Court considers the likelihood of success on the merits and

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4. *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.).

5. *Veasey v. Perry*, 71 F. Supp. 3d 627, 694 (S.D. Tex. 2014).

6. *Frank*, 135 S. Ct. at 7 (Alito, J., dissenting) ("There is a colorable basis for the Court's decision due to the proximity of the upcoming general election. It is particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted.").

7. *Veasey*, 135 S. Ct. at 10 (referencing and criticizing the application of the *Purcell* principle to this case).

8. 549 U.S. 1 (2006).

9. *Id.* at 4-5.

10. *Id.* at 4 (emphasis added).

relative hardship to the parties as two crucial factors in deciding whether to grant or vacate a stay or impose an injunction. By making the *Purcell* principle paramount, the Court runs the risk of issuing orders, which can disenfranchise voters or impose significant burdens on election administrators for no good reason. Had the Court applied all the ordinary appropriate factors for emergency relief to the four 2014 election cases, in addition to special concerns attendant in election cases, there is a strong argument it would have reached a different decision in at least the Texas case and potentially in the North Carolina case.

Part II of this Article explains the tests that the Court applies in considering emergency stays and related orders, arguing that the *Purcell* principle should properly be understood not as a stand-alone rule but instead as relevant to one of the factors (the public interest) the Court usually considers. Part III applies the proper standards to the four 2014 emergency election cases considered by the Supreme Court, arguing that the Court got it wrong in, at least, the Texas case and possibly in the North Carolina case. Part IV briefly argues that, regardless of whether the Supreme Court agrees with this call to rein in the *Purcell* principle, the Court should issue opinions, even weeks or months after the Court acts in an emergency elections case, explaining its reasoning. Such opinions would provide valuable guidance to lower courts considering election cases and help legitimize the Court's actions by making them more transparent. It also might discipline the Justices to decide controversial cases more consistently.

## II. SITUATING *PURCELL* IN THE USUAL PRACTICE FOR EMERGENCY STAYS AND INJUNCTIONS AT THE SUPREME COURT

### A. *The Supreme Court's Usual Practice for Granting Stays, Vacating Stays, and Issuing Injunctions*

Many Supreme Court practices and procedures are opaque and mysterious; the opacity recently got attention when the Court failed to explain its decision not to hear a large number of cases challenging the constitutionality of same-sex marriage bans and when it failed to explain its emergency orders in controversial voting and abortion cases.<sup>11</sup>

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11. Robert Barnes, *Supreme Court's Actions Are Monumental, but the Why of its Reasoning Often Missing*, WASH. POST (Oct. 12, 2014), [http://www.washingtonpost.com/politics/courts\\_law/supreme-court-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b\\_story.html](http://www.washingtonpost.com/politics/courts_law/supreme-court-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b_story.html); Adam Liptak, *Justices Drawing Dotted Lines with Terse Orders in Big Cases*, N.Y. TIMES (Oct. 27, 2014), <http://www.nytimes.com/2014/10/28/us/supreme-court-with-terse-orders-has-judges-and-lawyers-reading-tea-leaves.html>; Dahlia Lithwick, *Injunction Junction: What is the Supreme Court Thinking Behind Its Unfathomable Silence?*, SLATE (Oct. 16, 2014, 2:31 PM),

The Court's practices and procedures for reviewing emergency stay and injunction requests are among the most mysterious, in part because the Court often decides these cases without written explanation. The Court's formal rules describe only the mechanics of seeking stays and other emergency relief and not the substantive standards of review or any requirement of an explanation. A request for emergency relief ordinarily starts with an application directed to the Supreme Court Justice assigned as Circuit Justice to hear emergency matters from the Circuit. The Justice can decide the matter in chambers or refer it to the full Court for decision.<sup>12</sup>

Although the Justices have stated a variety of standards for deciding on emergency matters, they share factors typical for court review of preliminary relief requests: likelihood of success on the merits, the potential for irreparable injury to both parties, and the public interest. They all also give some measure of deference to the decision of the lower court.<sup>13</sup>

### 1. *Stays.*

Perhaps the most common articulation of the standard for reviewing a request to stay a lower court ruling is Justice Brennan's statement in the *Rostker v. Goldberg* case.<sup>14</sup> Individual Justices frequently

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[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/10/supreme\\_court\\_unsigned\\_orders\\_stays\\_and\\_injunctions\\_no\\_explanations\\_in\\_voter.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_unsigned_orders_stays_and_injunctions_no_explanations_in_voter.html).

12. See SUP. CT. R. 21 ("Motions to the Court"); SUP. CT. R. 22 ("Applications to Individual Justices"); SUP. CT. R. 23 ("Stays"); STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17, at 872-910 (10th ed. 2013).

13. See SHAPIRO, *supra* note 12, § 17.II.13, at 898 (listing the factors the Court considers for stays and temporary injunctions); *id.* at 907-08 ("How much weight is given the ruling of the lower court will depend in large measure upon whether other factors to be considered leave the Circuit Justice certain or uncertain as to whether a stay should be granted. While not bound by the orders of the lower courts, the Circuit Justice will be inclined to accept the prior ruling if the matter is deemed a close one, but not if the balance of equities or the likelihood of reversal clearly call for a different result.").

It does not appear that the Court has ever explained how the special standards for reviewing requests for emergency stays, vacating stays, and granting injunctions mesh with the usual "abuse of discretion" standard of review that an appellate court applies to a non-emergency review of a trial court's decision on a preliminary injunction.

14. 448 U.S. 1306 (1980) (Brennan, J., in chambers). As Justice Brennan put it:

The principles that control a Circuit Justice's consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve some-

have cited the *Rostker* standard in in-chambers opinions as Justices decided stay requests as a Circuit Justice.<sup>15</sup> Only recently, however, did the Supreme Court explicitly cite the *Rostker* test as the standard *the entire Court* applies in considering whether or not to stay a lower court order.

In the 2010 *Hollingsworth v. Perry* case,<sup>16</sup> the Court considered a motion to stay a trial court order to broadcast live proceedings from the Proposition 8 same-sex marriage trial in San Francisco. In considering the stay request of same-sex marriage opponents, the Court set forth the *Rostker* standard:

To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent. *Lucas v. Townsend* (1988) (Kennedy, J., in chambers); *Rostker* (Brennan, J., in chambers).<sup>17</sup>

Although the *Hollingsworth* decision staying the trial court's broadcast order split the Court 5-4, the dissenters articulated a substantially similar test for determining when the Court should grant a stay of a lower court order. The dissent's main concern instead was

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what different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

*Id.* at 1308 (citations omitted).

15. According to a Westlaw search conducted in January 2015, *Rostker* has been cited nineteen times in Court opinions, seventeen of which were in opinions from individual Justices whom were sitting as a Circuit Justice. The case was cited once by Justice Brennan (also joined by Justice Marshall) in a dissenting opinion from Justice Rehnquist's decision to grant a stay. *Heckler v. Lopez*, 464 U.S. 879, 885 (1983) (Brennan, J., dissenting). *Hollingsworth*, discussed below, is the most recent Supreme Court case citing *Rostker*. *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam). Justice Thomas, in a very recent statement joined by Justice Scalia, respected the denial of stay and also cited *Hollingsworth's* recitation of the *Rostker* standard, writing: "I join my colleagues in denying this application only because there appears to be no 'reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.' That is unfortunate." *Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428, 428 (2014) (citing *Hollingsworth*, 558 U.S. at 190). Justice Thomas's statement was noteworthy because it made reference to, and criticized, the Court's denial of certiorari in a number of same-sex marriage cases. See *id.* For more on stay standards, see SHAPIRO, *supra* note 12, § 17.II.3, at 877-78.

16. 558 U.S. 183 (2010).

17. *Id.* at 190 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

with application of the test to the facts of the case. Justice Breyer for the dissenters stated the applicable test as follows:

The Court agrees that it can issue this extraordinary legal relief only if (1) there is a fair chance the District Court was wrong about the underlying legal question, (2) that legal question meets this Court's certiorari standards, (3) refusal of the relief would work "irreparable harm," (4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance, (5) the party's right to the relief is "clear and undisputable," and (6) the "question is of public importance" (or otherwise "peculiarly appropriate" for such action).<sup>18</sup>

## 2. *Vacating Stays.*

The Court's standard for *vacating* a lower court stay appears similar to the standard for granting stays. However, the in-chambers *Western Airline* opinion of Justice O'Connor<sup>19</sup> and the in-chambers *Coleman* opinion of then-Justice Rehnquist<sup>20</sup> state that a Justice should show great deference to a lower court (or at least a Court of Appeals)<sup>21</sup> which has granted a stay. Circuit Justices asked to vacate a lower court stay have cited this standard in in-chambers opinions, but these opinions have not yet been cited in a majority Supreme Court opinion.<sup>22</sup>

However, the Court has come close. In a 2013 case, *Planned Parenthood v. Abbott*,<sup>23</sup> the Court denied a request to vacate a stay of a trial court injunction limiting Texas' ability to implement some new Texas abortion restrictions that the Fifth Circuit had ordered. The Fifth Circuit's stay kept the restrictions in place pending further litigation in the lower courts.

Justice Scalia (in a concurring statement for himself, Justice Alito, and Justice Thomas) relied on *Western Airlines* and *Coleman* in explaining the standard the Court should apply when asked to vacate

18. *Id.* at 199 (Breyer, J., dissenting). Justice Breyer cited the majority's standard and *Rostker* as the appropriate standard. *Id.* The Justices also discussed the standards for the Court's mandamus power, an issue that is beyond the scope of this Article. *Id.* at 190.

19. *W. Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

20. *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

21. I was unable to find any cases discussing whether the same standard of deference should apply when a trial court stays its own order and an appellate court refuses to vacate the stay.

22. *See, e.g.*, *Blodgett v. Campbell*, 508 U.S. 1301 (1993) (O'Connor, J., in chambers) (citing *Coleman*); *Garcia-Mir v. Smith*, 469 U.S. 1311 (1985) (Rehnquist, J., in chambers) (citing *Coleman*); *see also* *Frank v. Walker*, 135 S. Ct. 7 (2014) (Alito, J., joined by Scalia, J., and Thomas, J., dissenting) (citing *W. Airlines, Inc.*, 480 U.S. at 1305).

23. 134 S. Ct. 506 (2013).

the Fifth Circuit stay: “We may not vacate a stay entered by a court of appeals unless that court clearly and “demonstrably” erred in its application of “accepted standards.””<sup>24</sup>

Justice Breyer in his dissent in *Planned Parenthood* also relied on *Western Airlines* and *Coleman* in setting forth the standard:

This Court may vacate a stay entered by a court of appeals where the case “‘could and very likely would be reviewed here upon final disposition in the court of appeals,’” “‘the rights of the parties . . . may be seriously and irreparably injured by the stay,’” and “‘the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.’”<sup>25</sup>

The Justices in *Planned Parenthood* emphasized different aspects of the *Western Airlines/Coleman* test. Justice Breyer mentioned consideration of the parties’ serious and irreparable injury, absent from Justice Scalia’s formulation, which focused on demonstrable error.<sup>26</sup>

Whether or not there are appreciable differences in how the Justices view the *Western Airlines/Coleman* standard<sup>27</sup> (and certainly there are differences in application of the standard), both Justice Scalia and Justice Breyer agreed<sup>28</sup> that in determining whether the Court of Appeals has made a “demonstrable error” in applying “accepted standards” for the granting of a stay, the Court will examine whether the Court of Appeals properly applied the stay standards the Court set out in its 2009 *Nken v. Holder* case:

(1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. There is substantial overlap between these and the factors governing preliminary injunctions; not because the two are one and the same,

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24. *Id.* at 506 (Scalia, J., concurring) (quoting *W. Airlines, Inc.*, 480 U.S. at 1305 (O’Connor, J., in chambers) (quoting *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers))).

25. *Id.* at 508-09 (Breyer, J., dissenting) (quoting *W. Airlines, Inc.*, 480 U.S. at 1305).

26. *Id.* at 506, 509.

27. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 13 & n.38 (2015) (noting the lack of clarity over whether Justice Breyer’s dissenting opinion disagreed with Justice Scalia’s opinion on whether a state necessarily suffers irreparable injury when the state cannot enforce its laws).

28. *Planned Parenthood*, 134 S. Ct. at 506 (Scalia J., concurring) (“When deciding whether to issue a stay, the Fifth Circuit had to consider [*Nken*’s] four factors . . . .”); *id.* at 509 (Breyer, J., dissenting) (“Given these considerations, in my view, the standard governing the Fifth Circuit’s decision whether to stay the District Court’s injunction was not satisfied, and the standard governing this Court’s decision whether to vacate the Fifth Circuit’s stay is satisfied.” (first citing *Nken v. Holder*, 556 U.S. 418, 426 (2009); then citing *W. Airlines, Inc.*, 480 U.S. at 1305)).

but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

The first two factors of the traditional standard are the most critical.<sup>29</sup>

### 3. *Issuing Interlocutory Injunctions.*

Finally, as noted in *Nken*,<sup>30</sup> the Supreme Court applies a similar standard to the stay standard in considering requests for an injunction before a final judgment. This point is worth considering because the Court at least once has enjoined a local election after lower courts have declined to do so.<sup>31</sup> The Court has held that a request for such an injunction “ ‘demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’ ”<sup>32</sup>

There are many in-chambers opinions from Justices (though apparently no majority opinion for the Court) stating that the right to an injunction from the Supreme Court must be “indisputably clear” before a Justice will grant it.<sup>33</sup>

As with the Court’s decisions on granting stays and vacating stays, a court decision to grant an injunction requires looking at the merits, the harm to the parties, and the public interest. As the Court stated in its 2008 *Winter* case, “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 equities tips in his favor, and that an injunction is in the public interest.”<sup>34</sup>

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29. 556 U.S. at 434 (2009) (citations omitted).

30. *See id.* (“There is substantial overlap between these [stay standards] and the factors governing preliminary injunctions . . .”).

31. *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining local election when date of election had not been precleared as required by section 5 of the Voting Rights Act and lower court made “most problematic” conclusion under Supreme Court precedent that changing the date of the local election need not be precleared under section 5).

32. *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312, 1313 (1986)); *see also SHAPIRO, supra* note 12, § 17.II.4, at 878-80 (noting that several Justices have explained that an injunction requires a greater justification than a stay).

33. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers); *Ohio Citizens*, 479 U.S. at 1313; *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers).

34. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

4. *The Common Standards and the Reality of Emergency Orders in Contentious Cases.*

Although the Supreme Court standards for (1) granting a stay, (2) vacating a stay, and (3) issuing an injunction differ somewhat in terms of the burden placed on the party seeking relief and the deference owed to the lower court, the standards all weigh the same issues of likelihood of success on the merits, irreparable injury to the parties, and the public interest.

How important is each of these factors relative to each other, and how does deference to lower courts play into the Court's decision? It is hard to say as a general matter, especially when many of these orders lack accompanying opinions. It appears, however, that the Justices' views as to the merits of the parties' claims loom heavily in many of the cases, as does a desire to avoid changing the status quo or making major legal pronouncements in some controversial cases in which the issue is before the Court on an expedited and emergency basis and perhaps likely to return soon on a fuller record.

Consider, for example, the Court's order issued a few days after the final opinion day of the October 2013 term involving religious exemptions to the Affordable Care Act's contraception mandate. In *Wheaton College v. Burwell*,<sup>35</sup> the Supreme Court issued an injunction allowing a religious college not to use a form prescribed by the U.S. Department of Health and Human Services to let the Department know of the College's religious objections to contraception coverage through its insurance plan so long as the College "informs the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services."<sup>36</sup> The Court noted that lower courts had divided on the question whether such an accommodation was required, and the Court cautioned that "this order should not be construed as an expression of the Court's views on the merits."<sup>37</sup> It was an odd statement given that the test for granting an injunction requires considering the likelihood of success on the merits and given some authority for the standard that petitioners' right to relief be "indisputably clear."<sup>38</sup>

Justice Sotomayor, dissenting for herself and Justices Ginsburg and Kagan, argued that the Court did not follow its usual skeptical standards for issuing an injunction:

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35. 134 S. Ct. 2806 (2014).

36. *Id.* at 2807.

37. *Id.*

38. See cases cited *supra* note 33.

Even if one accepts Wheaton's view that the self-certification procedure violates RFRA, that would not justify the Court's action today. The Court grants Wheaton a form of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act, 28 U.S.C. § 1651, blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims and in which those courts have declined requests for similar injunctive relief. Injunctions of this nature are proper only where "the legal rights at issue are indisputably clear." Yet the Court today orders this extraordinary relief even though no one could credibly claim Wheaton's right to relief is indisputably clear.<sup>39</sup>

The short but controversial order and dissent left Professor Richard Re scratching his head as to why the Court majority in *Wheaton College* did not even discuss the applicable standard of review<sup>40</sup> and whether the "indisputably clear" standard might apply only to in-chambers, and not full Court, injunctions.<sup>41</sup>

The Justices' concerns about the merits may have explained the result: all the conservative Justices apparently agreed with (or at least did not publicly dissent from) the Court's order granting the injunction; all of the liberal Justices (aside from Justice Breyer) expressly stated their disagreement with the order in Justice Sotomayor's dissent.<sup>42</sup> This tracked the division in the Court's recent *Burwell v. Hobby Lobby Stores, Inc.*<sup>43</sup> case raising similar issues and offering a similar split. Or perhaps, as Professor Will Baude suggests,

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39. 134 S. Ct. at 2808 (Sotomayor, J., dissenting) (citation omitted).

40. See Richard M. Re, *What Standard of Review Did the Court Apply in Wheaton College?*, RE'S JUDICATA (July 5, 2014, 6:42 PM), <http://richardresjudicata.wordpress.com/2014/07/05/what-standard-of-review-did-the-court-apply-in-wheaton-college/>.

41. See *id.* Chief Justice Rehnquist succinctly stated the stringent standard he used in deciding whether to issue an injunction pending appeal in another election case:

An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction. The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue such an injunction. That authority is to be used "sparingly and only in the most critical and exigent circumstances." It is only appropriately exercised where (1) "Necessary or appropriate in aid of [our] jurisdiction[n]," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear."

Wis. Right to Life, Inc. v. FEC, 542 U.S. 1305, 1305-06 (2004) (Rehnquist, C.J., in chambers) (alterations in original) (citations omitted).

42. 134 S. Ct. at 2807-15.

43. 134 S. Ct. 2751 (2014).

the Court decided that preserving the status quo was more important than applying the usual test.<sup>44</sup> We do not know because the Court did not tell us.

*B. Fitting Purcell into the Supreme Court's Usual Practice*

As in *Wheaton College*, the Supreme Court in *Purcell v. Gonzalez*<sup>45</sup> declined to opine on the merits of the case involving Arizona's voter identification law. The Court noted that disputes over voter identification laws are "hotly contested," declaring: "We underscore that we express no opinion here on the correct disposition, after full briefing and argument."<sup>46</sup> This was not the only unusual thing about how the Supreme Court handled the *Purcell* case.

*Purcell* arose out of a ballot initiative, Proposition 200, which Arizona voters approved in 2004. The measure required proof of citizenship upon registering to vote and presentation of certain forms of identification to cast an in-person ballot on Election Day.<sup>47</sup> After the United States Department of Justice precleared the Arizona law under section 5 of the Voting Rights Act, a group of individuals and organizations opposed to the law filed a federal lawsuit in May 2006.

On September 11, 2006, the trial court denied the challengers' request for a preliminary injunction, without issuing findings of facts or conclusions of law. Plaintiffs appealed the denial of a preliminary injunction to the Ninth Circuit, which set a briefing schedule that would have concluded two weeks after the November 7, 2006 election. Plaintiffs then requested an injunction pending appeal from the Ninth Circuit preventing the State from enforcing the voter identification requirement at the November 7 election. On October 5,

[A]fter receiving lengthy written responses from the State and the county officials but without oral argument, the panel issued a four-

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44. Baude, *supra* note 27, at 11-12.

On one hand, they seem to have been motivated by a common-sense desire to preserve the status quo. But the Court has rules for these things, and it is not easy to tell how they permitted these orders. For instance, in her *Wheaton College* dissent, Justice Sotomayor pointed out that members of the majority had previously written that an injunction could issue only if the plaintiffs' entitlement to relief was "indisputably clear." The majority seemed to reject this standard by protesting that its "order should not be construed as an expression of the Court's views on the merits," but did not explain more. The Court issued a four-paragraph unsigned opinion that left the legal standard and its legal basis a mystery.

*Id.* (footnotes omitted).

45. 549 U.S. 1 (2006) (per curiam). The facts described in the next few paragraphs appear in similar form in *Purcell*. *Id.* at 2-4.

46. *Id.* at 5.

47. Under the law, a voter who voted early did not need to present identification. *Id.* at 2.

sentence order enjoining Arizona from enforcing Proposition 200's provisions pending disposition, after full briefing, of the appeals of the denial of a preliminary injunction. The Court of Appeals offered no explanation or justification for its order. Four days later, the court denied a motion for reconsideration. [Yet again the Court] gave no rationale for [its] decision.<sup>48</sup>

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. It then concluded that "plaintiffs have shown a possibility of success on the merits of some of their arguments but the Court cannot say that at this stage they have shown a strong likelihood." The District Court then found the balance of the harms and the public interest counseled in favor of denying the injunction.<sup>49</sup>

Arizona and county officials moved to stay the Ninth Circuit's grant of an injunction.<sup>50</sup> The Supreme Court construed the filings as a petition for certiorari, granted the petition, and vacated the order of the Court of Appeals,<sup>51</sup> a rare enough event that Professor Orin Kerr referred to it as equivalent to a judicial bolt of lightning.<sup>52</sup>

In analyzing whether the Ninth Circuit erred in granting a stay, the Supreme Court began with a paragraph that seemed deliberately drafted to present both sides of the contentious debate over voter identification laws.<sup>53</sup> (Elsewhere, I have criticized one statement in this paragraph, as unsupported by citation or empirical evidence,

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48. *Id.* at 3.

49. *Id.* at 3-4 (citations omitted).

50. *Id.* at 2.

51. *Id.*

52. Orin Kerr, *Supreme Court Allows Voter ID Law*, VOLOKH CONSPIRACY (Oct. 20, 2006, 5:05 PM), <http://volokh.com/posts/1161378321.shtml>.

53.

A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the fundamental political right to vote. Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.

*Purcell*, 549 U.S. at 4 (alteration in original) (citations omitted).

suggesting that voter identification laws promote voter confidence and that voters “who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”<sup>54</sup>

The Court then stated the basis for staying the Ninth Circuit’s order and vacating the injunction:

Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek en banc review. In the Ninth Circuit that procedure, involving voting by all active judges and an en banc hearing by a court of 15, can consume further valuable time. These considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.

Although at the time the Court of Appeals issued its order the District Court had not yet made factual findings to which the Court of Appeals owed deference, by failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals’ bare order in light of the District Court’s ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of 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 we vacate the order of the Court of Appeals.

We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court’s September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and “[n]o bright line separates permissible election-related regulation from unconstitutional infringements.” Giv-

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54. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 32, 35-36 (2007); see Stephen Ansolabehere & Nathaniel Persily, Essay, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008) (finding that voter confidence in the electoral process is not correlated with the presence or absence of voter identification laws in the state).

en the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.<sup>55</sup>

This was the entirety of the Supreme Court's substantive analysis. Justice Stevens issued a three-sentence concurrence noting the factual disputes over the extent of disenfranchisement and fraud and stating that the Court's order "will provide the courts with a better record on which to judge their constitutionality."<sup>56</sup>

The *Purcell* decision is both overdetermined and undertheorized. We do not know how much the case turned upon the failure of the Ninth Circuit to give reasons for its order (despite the trial court's failure to make timely factual findings and issue conclusions of law for the Ninth Circuit to review) and how much turned on the Ninth Circuit's failure to take into account "considerations specific to election cases and its own institutional procedures."<sup>57</sup> On considerations specific to election cases, the Court mentioned both the potential for voter confusion which could depress turnout and the State of Arizona's need for "clear guidance" to run its election.<sup>58</sup>

We also do not know how much the close timing of the election, combined with the possibility of en banc review, mattered. The Court wrote only that the Ninth Circuit "might" have taken the possibility of further review into account in drafting its order.<sup>59</sup> Arizona in its filing asked the Court to apply the *Coleman* "demonstrably wrong" test in the case,<sup>60</sup> but the Court in *Purcell* did not cite *Coleman* or apply it.

Even though the Court criticized the Ninth Circuit for its failure to give reasons or to defer to the district court (even in the absence of the district court's factual findings), the Court itself refused to weigh in on the merits of the parties' arguments.<sup>61</sup> This agnosticism, like in *Wheaton College*, appears to violate the Court's own standards for a stay. Under *Rostker*, the Court should have considered the likelihood that the challengers could have successfully challenged the law as well as the potential irreparable injury to all the parties and to the public interest.

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55. *Purcell*, 549 U.S. at 4-6 (alteration in original) (citations omitted).

56. *Id.* at 6 (Stevens, J., concurring).

57. *Id.* at 4.

58. *Id.* at 5.

59. *Id.*

60. Application for Stay of Injunction Pending Appeal at 10, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (Nos. 06-16702, 06-16706).

61. *Purcell*, 549 U.S. at 5.

The Court was right to note special considerations in election cases, what I call “the *Purcell* principle.” 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). Further, electoral chaos can ensue when election officials face conflicting court orders on how to run an election. Adding, removing, or changing election procedures just before the election can be difficult. Professional election administrators, especially in large jurisdictions, rely on cadres of poll worker volunteers who must be trained. It is tough to retrain these workers on new rules or procedures close to the election and to produce appropriate new written instructions the period just before the election—especially in jurisdictions using multiple languages.

These special concerns in election cases should have counted toward the public interest factor in the Court’s *Rostker* test. But these considerations should not have been considered while disregarding the other traditional factors for granting or denying preliminary relief: the likelihood of success on the merits and the relative hardship to the parties. The Court acknowledged that point by noting that it was raising special election-related considerations “in addition to the harms attendant upon the issuance or nonissuance of an injunction.”<sup>62</sup>

Two examples demonstrate why courts should consider all relevant factors (likelihood of success on the merits, relative irreparable harm to the parties, and the public interest) in deciding whether to grant a stay or other preliminary relief:

**Example 1:** A local city council passes an ordinance requiring voters to pay a poll tax in city elections one month before the election. A group of voters goes to court to have the poll tax declared unconstitutional. A week before the election, a court issues an injunction preventing the city from enforcing the poll tax. Before the court order, all poll workers had been sent instructions on how to implement the poll tax. The city seeks a stay from an appellate court.

**Example 2:** Plaintiffs bring a complex challenge arguing that parts of a state legislative redistricting plan violate section 2 of the Voting Rights Act. Two months before the election, when campaigns are underway and ballots have been printed, a federal court in a split decision determines that some of the districts violate the Act and must be redrawn. The court issues an order requiring that elections be run under new district lines, with a new candidate residency period and new ballots. Whether the court properly interpreted section 2 is uncertain. The State seeks a stay from the Supreme Court to run elections under the old lines.

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62. *Id.* at 4.

In both examples, the *Purcell* principle, applied to its fullest, would tell the courts to stay the lower court's order because we are in the period just before the election, when voters can be confused and election administrators burdened by election changes. However, these public interest concerns, while relevant, should not be the sole consideration.

In Example 1, the poll tax has been unconstitutional on the state and local level since the 1966 Supreme Court opinion in *Harper v. Virginia State Board of Elections*.<sup>63</sup> Therefore, the challengers' chances of success on the merits are 100 percent, and that should be a major factor in favor of the lower court injunction and against a stay. Further, a poll tax imposes a huge burden on poor voters who could be disenfranchised by the tax, making the irreparable injury on the challengers' side greater. Despite timing close to the election, and any hassle for election administrators to change instructions for running the election, the lower court should enjoin the poll tax and an appellate court should not stay such an order. Even a Supreme Court inclined to usually follow the *Purcell* principle would likely give way in a case like this one.

In Example 2, the likelihood of success on the merits is uncertain. Further, there are great reliance interests in running elections under the already-declared lines. Voters, candidates, and others campaigned under the old district lines. It is not just a question of election administrators being inconvenienced but also of disrupting settled expectations throughout the jurisdiction. Minority voters may have less effective votes in these districts, but they are not literally disenfranchised. With an election looming, courts should make their changes effective for the next election cycle. This is precisely what the courts did in the 1960s redistricting cases when the Court declared elections from substantially unequal districts to be unconstitutional.<sup>64</sup> Timing matters much more here, as do reliance inter-

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63. 383 U.S. 663 (1966).

64. See *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature."); see also *Riley v. Kennedy*,

ests, as measured against uncertain success on the merits. The court likely should not make any changes close to the election.

It would be a much harder case, however, if the courts had determined that the State's section 2 liability was clearly established. In that case the merits would point strongly in one direction and the other factors strongly in the other. In such a case, the timing and disruption issues seem important, as does the judgment of the lower court as to what is feasible in terms of election administration changes in the period just before the election.

All of this complex balancing was missing in *Purcell*. The Court not only ignored the likelihood of success on the merits; it affirmatively refused to take a position on it.<sup>65</sup> It did not look at harms to the parties aside from the public interest in not changing the rules close to an election.<sup>66</sup>

It is certainly understandable that the Court in *Purcell* avoided saying anything on the merits, given how controversial voter identification laws were and are. The next time the Court considered a voter identification law, in the 2008 *Crawford v. Marion County Election Board* case,<sup>67</sup> the Court divided 3-3-3 in setting forth the constitutional standard and applying that standard to review Indiana's voter identification law. As we will see in the next Part, if and when the Court considers these issues on the merits, it is likely to divide along ideological lines once again.

But in eschewing discussion of the merits and of the relative irreparable harms to the challengers and to the State of Arizona (aside from its incorporation in the special election considerations), the Court in *Purcell* deviated from its normal (stated) practice for emergency relief, raising risks to both voters and those who run elections.

There is one benefit to strict application of the *Purcell* principle: it cabins some discretion of lower court judges through a per se rule to not allow last-minute judicial changes to election rules. That could be a benefit in highly charged political cases, but the price is too high, as it requires courts to ignore other important factors in deciding whether to grant extraordinary relief. Further, if we do not trust the courts to fairly decide cases on emergency measures for elections, why should we trust courts to fairly decide cases on other controversial issues, like abortion or religious exemptions to health care?

In sum, the Court correctly drew attention to special questions of timing before elections. But the *Purcell* principle needs to be domes-

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553 U.S. 406, 409 (2008) (“[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.”).

65. *Purcell*, 549 U.S. at 5.

66. *See id.*

67. 553 U.S. 181 (2008).

licated. Courts (including the Supreme Court) should consider the likelihood of success on the merits, potential irreparable harm to both sides, and other public interest factors in deciding whether or not to issue orders affecting elections in the period close to the election. When both the likelihood of success and irreparable harm point in the same direction, this is a strong argument for the Court to rule in that direction regardless of the direction pointed by the *Purcell* principle.

The parties' diligence is also relevant. In *Purcell*, the challengers waited months (and two elections) before seeking a preliminary injunction. Consideration of laches would be appropriate.<sup>68</sup> Further, courts should consider whether it might be possible to run elections using the rules already set by election officials but with the use of provisional ballots to resolve disputes after the election.<sup>69</sup> On the other hand, doing so would put even greater pressure on courts deciding issues post-election, when the decision is more likely to be outcome determinative.<sup>70</sup>

In sum, the Supreme Court should adjudicate its election disputes consistent with the general standards and levels of deference it has established for considering non-election requests to stay a lower court order, vacate a lower court stay, or issue an injunction in its own right. Special considerations related to elections should be one, but not a dominating, factor. Adherence to the usual rules makes it less likely the Court will be fully swayed by perceived differences in the merits in these highly political and ideologically-charged cases.

### III. PROPERLY APPLYING USUAL SUPREME COURT PRACTICE TO THE 2014 EMERGENCY ELECTION CASES

#### A. *The Reason for the Flurry of Election 2014 Emergency Cases*

The spate of emergency election cases reaching the Supreme Court in the fall of 2014 was unsurprising for those in the election law field. Since the disputed 2000 election, culminating in the Supreme Court's controversial decision in *Bush v. Gore*<sup>71</sup> ending the Florida recount and ensuring George W. Bush's ascendance to the

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68. For an argument on an increased use of laches in election cases, see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 998-99 (2005).

69. For more on the potential for increased use of provisional ballots, see Edward B. Foley & Joshua A. Douglas, Opinion, *Election 2014: The Vote You Save May Be Your Own*, N.Y. TIMES (Nov. 4, 2014), [http://www.nytimes.com/2014/11/04/opinion/elections-2014-the-vote-you-save-may-be-your-own.html?\\_r=0](http://www.nytimes.com/2014/11/04/opinion/elections-2014-the-vote-you-save-may-be-your-own.html?_r=0).

70. See Hasen, *supra* note 68, at 991-99 (arguing for courts, if possible, to resolve election disputes before, rather than after, an election to avoid just such a problem).

71. 531 U.S. 98 (2000).

presidency,<sup>72</sup> the amount of election legislation and litigation has increased markedly. Litigation has more than doubled in the post-2000 period compared to the pre-2000 period.<sup>73</sup> Among other things, this period of the Voting Wars has seen Republican state legislatures pass laws which have made it more difficult to register and vote and Democratic state legislatures pass laws which have made it easier to vote.<sup>74</sup> Cries (often unsubstantiated) of great problems with voter fraud and voter suppression fill not only the airwaves and internet but also courthouses across the country as laws have been challenged.

The latest wave of litigation follows the Supreme Court's 2008 decision in the *Crawford* case rejecting a facial challenge under the Equal Protection Clause to Indiana's voter identification law<sup>75</sup> and the Supreme Court's decision in the 2013 *Shelby County v. Holder* case<sup>76</sup> effectively removing a provision of the Voting Rights Act requiring jurisdictions with a history of racial discrimination in voting from getting preclearance from the federal government before making any changes in their voting rules.<sup>77</sup>

In the wake of these decisions, both jurisdictions which were subject to preclearance (Texas) and those not subject to preclearance but under Republican control (Wisconsin) passed stricter voter identification and other restrictive election laws.<sup>78</sup> When preclearance ended, Texas put its stalled voter identification law into immediate effect, a law which had been blocked first by the Department of Justice and then denied preclearance by a federal court in Washington, D.C.<sup>79</sup> North Carolina, which used to be partially covered by preclearance, passed the strictest set of voting rules since the passage of the 1965 Voting Rights Act.<sup>80</sup> Among other things, the law ended same-day

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72. For a chronology of the events, see RICHARD L. HASEN, *THE VOTING WARS* 11-40 (2012).

73. RICHARD L. HASEN, *EXAMPLES & EXPLANATIONS: LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW* 304 (2014).

74. See generally Hasen, *supra* note 68 (describing efforts to change election rules on a partisan basis in states across the United States).

75. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

76. 133 S. Ct. 2612 (2013).

77. See generally Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014) (describing and analyzing the *Shelby County* decision).

78. See Richard L. Hasen, *The Voting Wars Heat Up: Will the Supreme Court Allow States to Restrict Voting for Partisan Advantage?*, SLATE (Sept. 29, 2014, 10:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/voting\\_restrictions\\_may\\_reach\\_the\\_supreme\\_court\\_from\\_ohio\\_wisconsin\\_north.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/voting_restrictions_may_reach_the_supreme_court_from_ohio_wisconsin_north.html).

79. *Texas v. Holder*, 888 F. Supp. 2d 113, 117, 127 (D.D.C. 2012).

80. See generally Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV.

voter registration, cut back on early voting, stopped the counting of provisional ballots cast in the wrong precinct (even if the result of pollworker error), imposed a new voter identification requirement (but not to be put into effect until the 2016 elections), and made other changes making it harder to register and to vote.<sup>81</sup> In Ohio, the state legislature cut back on the amount of early voting, after an earlier attempt to do so was blocked by a federal court.<sup>82</sup>

Federal challenges to the new voting restrictions raised two main claims<sup>83</sup>: that these laws violated section 2 of the Voting Rights Act and that the laws violated the Fourteenth Amendment's Equal Protection Clause.<sup>84</sup> Both claims posed significant challenges for plaintiffs. Ever since the Supreme Court's 1986 decision in *Thornburg v. Gingles*,<sup>85</sup> section 2 had been widely used in the redistricting context to challenge a jurisdiction's failure to create enough majority-minority districts.<sup>86</sup> However, section 2 had not been used much (or at least with much success) to challenge election administration rules such as voter identification, in what Professor Dan Tokaji has aptly named the "new vote denial" cases.<sup>87</sup> Further, since *Crawford*, constitutional equal protection challenges to voter identification laws seemed difficult for plaintiffs to win under the sliding scale approach endorsed by the three Justices in the middle of the Supreme Court.<sup>88</sup>

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L. REV. F. 58 (2014), <http://harvardlawreview.org/2014/01/race-or-party-how-courts-should-think-about-republican-efforts-to-make-it-harder-to-vote-in-north-carolina-and-elsewhere/>.

81. *Id.*

82. *See* Ohio State Conference of NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014); Obama for Am. v. Husted, 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff'd*, 697 F.3d 423 (6th Cir. 2012).

83. Some of the challengers to these laws raised state law claims. For example, challengers to Pennsylvania's laws succeeded in having the law temporarily blocked on state law grounds upon demonstrating that Pennsylvania's Department of Transportation was not up to the task of getting identification cards into the hands of voters who wanted them in time for the 2012 elections. After a state trial court held that the law violated the state constitution, the State chose not to appeal. Martha T. Moore, *Pennsylvania Drops Court Effort to Save Voter ID Law*, USA TODAY (May 8, 2014, 5:34 PM), <http://onpolitics.usatoday.com/2014/05/08/pennsylvania-drops-effort-to-save-voter-id-law/>. I ignore these state claims here, as they generally do not end up before the U.S. Supreme Court. *Cf.* Bush v. Gore, 531 U.S. 98 (2000) (holding that Florida Supreme Court's decision to order statewide recount of undervotes pursuant to state law created a federal equal protection violation).

84. In Texas' case, challengers also argued that the law was an unconstitutional poll tax, a theory the trial court accepted. *See infra* note 100.

85. 478 U.S. 30 (1986).

86. *See* HASEN, *supra* note 73, at 280-88.

87. *Id.* at 288-92; *see* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

88. On the uncertainty of the balancing test, *see* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507 (2008); Justin Levitt,

As Republican-dominated states enacted identification laws stricter than Indiana's, however, some plaintiffs had new hopes equal protection challenges could succeed.<sup>89</sup>

*B. The Ohio, North Carolina, Wisconsin,  
and Texas Emergency Cases*

The four cases that made it to the Supreme Court—Ohio, North Carolina, Wisconsin, and Texas—each raised both section 2 Voting Rights Act claims and equal protection claims. Below, I briefly describe the claims and their likelihood of success, leaving a fuller discussion of the merits of the claims to another time.

*1. Ohio.*

Ohio's case appeared to be the weakest on the merits, yet it succeeded in both the federal district court and the United States Court of Appeals for the Sixth Circuit before being reversed by the Supreme Court.<sup>90</sup> Plaintiffs challenged Ohio's cutback on early voting from thirty-five days to twenty-eight days, including the elimination of "Golden Week," a week's period in which voters could both register to vote and cast an early vote in the same transaction. The Republican legislature passed the measure after an earlier attempt to cut back on early voting failed in 2012. In that first cutback, the legislature (apparently inadvertently) cut back on the last weekend of early voting for all voters except certain military and overseas voters. A federal district court held that this disparate treatment violated equal protection.

In the new challenge, plaintiffs appeared before the same district court judge as in the 2012 case, and the judge held the new cutback violated both the Equal Protection Clause and section 2 of the Voting Rights Act. Minority voters were especially likely to use both early voting and Golden Week, and the judge found the cutbacks illegal. The district court, relying in part on Ohio's decision to cut back early voting (as opposed to analyzing the total amount of early voting Ohio offered under the new law), found both constitutional and voting rights violations. The trial judge ordered Ohio to restore the cut early voting period.

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Crawford—*More Rhetorical Bark Than Legal Bite?*, BRENNAN CTR. FOR JUST. (May 2, 2008), <http://www.brennancenter.org/blog/crawford-more-rhetorical-bark-legal-bite>.

89. On post-*Crawford* developments, see HASEN, *supra* note 73, at 308-10.

90. For the facts and procedural history described below, see *Ohio State Conference of NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (granting preliminary injunction), *stay denied pending appeal*, 769 F.3d 385 (6th Cir. 2014), *aff'd on merits*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014) (mem.).

Even with the cutbacks, Ohio offered more than the average amount of early voting, and many states (such as New York) offered no early voting at all. Further, Ohio offered no excuse absentee balloting across the state and sent every single voter an absentee ballot application. The judge found African-American voters mistrustful of absentee voting and held it not a sufficient substitute for the loss on in-person early voting.

The United States Court of Appeals for the Sixth Circuit first refused to stay the trial court's order and later issued an opinion affirming the district court. Ohio then sought a stay with the Supreme Court. The Court granted the stay, with the four more liberal Justices noting their dissent from the order. There was no written opinion or explanation offered by any Justice.<sup>91</sup>

## 2. *North Carolina.*

In North Carolina, plaintiffs filed voting rights and constitutional challenges to a number of provisions of the 2013 omnibus law making it harder to register and vote.<sup>92</sup> The federal government sued as well, seeking to also get North Carolina "bailed in" to preclearance under section 3 of the Voting Rights Act, a claim which remains pending.<sup>93</sup> The federal district court set a trial date of July 2015, and plaintiffs moved for a preliminary injunction to block some of the election

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91. The Court's order reads in full:

Application for stay presented to Justice Kagan and by her referred to the Court granted, and the district court's September 4, 2014, order granting a preliminary injunction stayed pending the timely filing and disposition of a petition for writ certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application for stay.

*Ohio State Conference*, 135 S. Ct. at 42. Months after the election, the case settled. Rick Hasen, *Ohio Early Voting Suit Settled, with Elimination of Significant "Golden Week"*, ELECTION L. BLOG (Apr. 17, 2015, 9:12 AM), <http://electionlawblog.org/?p=71807>.

92. For the facts and procedural history described below, see *N.C. State Conference v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (denying preliminary injunction), *aff'd in part, rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (ordering the trial court to grant a preliminary injunction in order to end same-day voter registration and counting of certain out-of-precinct ballots), *stayed sub nom. North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (mem.) (staying Fourth Circuit order and mandate).

93. Press Release, Dept of Justice, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), <http://www.justice.gov/opa/pr/justice-department-file-lawsuit-against-state-north-carolina-stop-discriminatory-changes> ("The complaint asks the court to prohibit North Carolina from enforcing these requirements, and also requests that the court order bail-in relief under section 3(c) of the Voting Rights Act. If granted, this would subject North Carolina to a new preclearance requirement.").

changes for the 2014 election season. The voter identification law was not yet in effect for 2014, but there was a “soft rollout” set for 2014 (in which poll workers would ask for identification but not turn people away who lacked it). One of the sets of plaintiffs sought to block that soft roll out.

The federal district court denied the preliminary injunction sought to enjoin a number of the new voting rules, primarily on grounds that based upon the evidence presented thus far, coupled with the judge’s views of how to decide section 2 vote denial claims, the plaintiffs were not likely to succeed on the merits and did not face irreparable injury.

Plaintiffs then appealed to the United States Court of Appeals for the Fourth Circuit. In a 2-1 vote, the court granted a preliminary injunction in part. The injunction was granted only as to two provisions of the law, which were the subject of the preliminary injunction motion: the rollback in early voting and the end of counting ballots cast in the wrong precinct. The Fourth Circuit held plaintiffs were likely to succeed on their section 2 claims as to these two provisions. The dissent, after running through the *Winter* factors for a preliminary injunction, cited *Purcell* as an additional reason to deny the request.<sup>94</sup>

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94. Judge Motz wrote in her dissent:

While securing reversal of a denial of preliminary relief is an uphill battle for any movant, Appellants face a particularly steep challenge here. For “considerations specific to election cases,” including the risk of voter confusion, counsel extreme caution when considering preliminary injunctive relief that will alter electoral procedures. Because those risks increase “[a]s an election draws closer,” so too must a court’s caution. Moreover, election cases like the one at hand, in which an appellate court is asked to *reverse* a district court’s denial of a preliminary injunction, risk creating “conflicting orders” which “can themselves result in voter confusion and consequent incentive to remain away from the polls.”

*League of Women Voters of N.C.*, 769 F.3d at 250-51 (Motz, J., dissenting) (alteration in original) (footnote omitted) (citations omitted). Judge Motz added in a footnote:

Although the majority steadfastly asserts that the requested injunction seeks only to maintain the status quo, the provisions challenged by Appellants were enacted more than a year ago and governed the statewide primary elections held on May 6, 2014. Appellants did not move for a preliminary injunction until May 19, 2014, almost two weeks after the new electoral procedures had been implemented in the primary. Moreover, regardless of how one conceives of the status quo, there is simply no way to characterize the relief requested by Appellants as anything but extraordinary. Appellants ask a federal court to order state election officials to abandon their electoral laws without first resolving the question of the legality of those laws.

*Id.* at 250 n.\*. The majority also distinguished *Purcell* noting that:

In *Purcell*, on which the dissenting opinion relies, the Supreme Court seemed troubled by the fact that a two-judge motions panel of the Ninth Circuit entered a factless, groundless “bare order” enjoining a new voter identification provision in an impending election. At the time of the “bare order,” the appellate court also lacked findings by the district court. By contrast, neither district

North Carolina then asked the Supreme Court to stay the Fourth Circuit's ruling. The Supreme Court stayed the Fourth Circuit's grant of a preliminary injunction, with Justices Ginsburg and Sotomayor noting their dissent. The majority again offered no reasoning to accompany its order. Justice Ginsburg wrote a four-paragraph dissent, stating in part that:

The Court of Appeals determined that at least two of the measures—elimination of same-day registration and termination of out-of-precinct voting—risked significantly reducing opportunities for black voters to exercise the franchise in violation of § 2 of the Voting Rights Act. I would not displace that record-based reasoned judgment.<sup>95</sup>

Justice Ginsburg did not explain why she would defer to the Court of Appeals' "record-based" judgment over the "record-based" judgment of the trial court.

### 3. *Wisconsin.*

In Wisconsin, a federal district court issued a lengthy opinion holding that Wisconsin's strict voter identification law violated both section 2 of the Voting Rights Act and the Equal Protection Clause.<sup>96</sup> The judge offered a very broad reading of section 2's application to vote denial cases and held that Wisconsin could not implement its law or any revised voter identification law without court approval. The trial judge concluded that over 300,000 Wisconsin voters lacked the proper identification and had no easy way of securing it.

The State of Wisconsin appealed to the United States Court of Appeals for the Seventh Circuit, and sought a stay of the district court's order so that it could use the identification requirement in its upcoming election. The Seventh Circuit put off the stay request until after oral argument in the case, which took place about eight weeks before the election. Later, the same day as the oral argument, the

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court nor appellate court reasoning, nor lengthy opinions explaining that reasoning, would be lacking in this case.

*Id.* at 248 n.6 (citation omitted).

95. *League of Women Voters of N.C.*, 135 S. Ct. at 6 (Ginsburg, J., dissenting).

96. For the facts and procedural history described below, see *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014) (holding that Wisconsin's voter identification law violated Voting Rights Act Section 2 and the U.S. Constitution's Equal Protection Clause and enjoining the law's use in elections), *stay granted*, 766 F.3d 755 (7th Cir. 2014), *reh'g en banc denied by equally divided court*, 769 F.3d 494 (7th Cir. 2014) (per curiam), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *vacating stay*, 135 S. Ct. 7 (2014) (mem.), *reh'g en banc denied by equally divided court*, 773 F.3d 783 (7th Cir. 2014) (mem.).

Seventh Circuit panel in a brief order stayed the trial court's order and allowed the State to move forward with implementing its voter identification law pending the outcome of the appeal.

Plaintiffs sought en banc review in the Seventh Circuit, arguing that there was no time to implement the law and get identification cards in the hands of all voters that wanted cards before the election. The State's original plan called for an eight-month rollout of the identification law in the event it was upheld by the courts. The State of Wisconsin conceded in its filings that up to ten percent of the state's voters would be unable to get identification in time for the upcoming election, and the problem would be especially acute for Wisconsin residents born in another state, who could have delays in securing a birth certificate from another state. Further, some voters had already received and voted with absentee ballots, but those ballots would not count unless voters supplied new identification information.

The full Seventh Circuit denied the request for an en banc hearing, evenly dividing 5-5 on the request. Judge Williams, for the five dissenters, called the order to allow the identification requirement to go into immediate effect with the admitted reality of disenfranchisement "shocking."<sup>97</sup> The challengers then sought a Supreme Court vacation of the Seventh Circuit stay. While the case was being briefed at the Supreme Court, the Seventh Circuit panel, in an opinion by Judge Easterbrook, issued an opinion on the merits, strongly rejecting the section 2 and constitutional claims. The full Seventh Circuit, upon the request of a judge on the court, then *sua sponte* considered rehearing the panel's final ruling en banc. That request failed again on a 5-5 even vote, with Judge Posner writing a scathing

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97. *Frank*, 769 F.3d at 498 (Williams, J., dissenting). Judge Williams, dissenting from denial of rehearing en banc, wrote:

The district court found that 300,000 registered voters—*registered voters*, not just persons eligible to vote—lack the most common form of identification needed to vote in the upcoming elections in Wisconsin. (To put this number in context, the 2010 governor's race in Wisconsin was decided by 124,638 votes and the election for United States Senator by 105,041 votes.) And how does the state reply to the fact that numerous *registered voters* do not have qualifying identification with elections so imminent? It brazenly responds that the district court found that "more than 90% of Wisconsin's registered voters already have a qualifying ID" and can vote and that "the voter ID law will have little impact on the vast majority of voters." But the right to vote is not the province of just the majority. It is not just held by those who have cars and so already have driver's licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age. It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state's registered voters; for the state to take this position is shocking.

dissent for the five dissenters. Among other things, Judge Posner remarked, “As there is no evidence that voter impersonation fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?”<sup>98</sup>

The Supreme Court vacated the Seventh Circuit’s stay, with the effect of blocking use of Wisconsin’s voter identification law in the November 2014 election. Once again, the Court offered no rationale for its order. Justice Alito, joined by Justice Scalia, issued a brief dissent which read in full:

There is a colorable basis for the Court’s decision due to the proximity of the upcoming general election. It is particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted. But this Court “may not vacate a stay entered by a court of appeals unless that court clearly and ‘demonstrably’ erred in its application of ‘accepted standards.’” Under that test, the application in this case should be denied.<sup>99</sup>

#### 4. *Texas.*

The Texas case also involved a state voter identification law.<sup>100</sup> The federal district court held a lengthy trial to consider section 2 and constitutional claims against the strict identification law. As in North Carolina, the Department of Justice got involved in the case and sought to get Texas bailed back into federal preclearance (an issue still pending in the case).<sup>101</sup> Less than weeks before the start of early voting, on October 20, the court issued a 147-page opinion holding Texas’ law a violation of the Voting Rights Act and the Constitution, both the Equal Protection Clause and the Twenty-fourth Amendment’s prohibition on poll taxes in federal elections. The trial court further found that Texas engaged in intentional discrimination in voting, a prerequisite to consideration for potential renewed preclearance.

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98. 773 F.3d at 795 (Posner, J., dissenting).

99. 135 S. Ct. at 7 (citations omitted). A few months later, the Supreme Court denied certiorari on the merits. *Frank v. Walker*, 135 S. Ct. 1551 (2015) (mem.).

100. For the facts and procedural history described below, see *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *stayed*, 769 F.3d 890 (5th Cir. 2014), *denying motion to vacate stay*, 135 S. Ct. 9 (2014), *aff’d in part and rev’d in part*, 796 F.3d 487 (5th Cir. 2015).

101. Press Release, Dep’t of Justice, Justice Department to File New LawsUIT Against State of Texas over Voter I.D. Law (Aug. 22, 2013), <http://www.justice.gov/opa/pr/justice-department-file-new-lawsuit-against-state-texas-over-voter-id-law> (“The complaint asks the court to prohibit Texas from enforcing the requirements of its law, and also requests that the court order bail-in relief under section 3 of the Voting Rights Act. If granted, this would subject Texas to a new preclearance requirement.”).

The trial court's opinion was not clear as to whether its injunction in using the identification law went into effect immediately, which would stop Texas from continuing to use its voter identification law as it had in the 2014 primaries and other elections. The trial court then clarified that the law was blocked for the 2014 general election.<sup>102</sup>

The State of Texas sought a stay of the trial court's order from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit granted the stay, with the effect of allowing Texas to use the identification law in the 2014 general election. The Court of Appeals refused to consider the merits of the arguments against Texas' identification law, stating that the issues were difficult. Although the court purported to apply the *Nken* factors for a stay, it found that Texas was likely to succeed on the merits only because the district court imposed a stay just before the election in violation of the *Purcell* principle.<sup>103</sup> The court looked at the Supreme Court's recent orders in the Ohio, North Carolina, and Texas cases and perceived that the *Purcell* principle was at work in the cases. Given the proximity to the election, the Fifth Circuit determined that it was too late for the trial court to block the use of Texas' identification law.

Plaintiffs asked the Supreme Court to vacate the Fifth Circuit's stay. The Court, once again without explaining its reasoning, refused to do so. The Court issued an order with a dissent at 5 a.m. on the Saturday morning before the first Monday of early voting in Texas, a highly unusual time of day (and unusual day) for the Court to issue a

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102. Final Judgment, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 13-CV-00193), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey689.pdf>.

103.

First, the State has made a strong showing that it is likely to succeed on the merits, at least as to its argument that the district court should not have changed the voting identification laws on the eve of the election. The court offered no reason for applying the injunction to an election that was just nine days away, even though the State repeatedly argued that an injunction this close to the election would substantially disrupt the election process. As discussed in Part III above, the Supreme Court has instructed that we should carefully guard against judicially altering the status quo on the eve of an election. And, just this term, the Court has stepped in to prevent such alterations several times. We find that the State has made a strong showing that the district court erred in applying the injunction to this fast-approaching election cycle.

The other questions on the merits are significantly harder to decide, given the voluminous record, the lengthy district court opinion, and our necessarily expedited review. But, given the special importance of preserving orderly elections, we find that this factor weighs in favor of issuing a stay.

ruling. The dissenters could well have been trying to call attention in a dramatic way to the injustice they saw in the Court's refusal to vacate a stay.<sup>104</sup>

Justice Ginsburg, joined by Justices Kagan and Sotomayor, issued a lengthy dissent. The dissent began by distinguishing the Ohio and North Carolina cases and then turned to *Purcell*:

Neither application involved, as this case does, a permanent injunction following a full trial and resting on an extensive record from which the District Court found ballot-access discrimination by the State. I would not upset the District Court's reasoned, record-based judgment, which the Fifth Circuit accorded slim, if any, deference. Cf. *Purcell v. Gonzalez* (Court of Appeals erred in failing

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104. Or so I have suggested. See Richard L. Hasen, *Dawn Patrol: Justice Ruth Bader Ginsburg's Critically Important 5 a.m. Wake-Up Call on Voting Rights*, SLATE (Oct. 19, 2014, 1:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/10/ginsburg\\_s\\_dissent\\_in\\_texas\\_voter\\_id\\_law\\_supreme\\_court\\_order.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/ginsburg_s_dissent_in_texas_voter_id_law_supreme_court_order.html).

Justice Ginsburg later gave a bit more insight on the timing in an interview with NPR's Nina Totenberg:

**Nina Totenberg:** Justice Ginsburg, you were up until . . . Friday night/Saturday morning, writing a passionate dissent in the Texas voter id case. Just to let people in the audience know, this was a procedural question in some measure. And you can note a dissent in those kinds of cases and not write and it is fairly common for that to happen. But you wrote; you were joined by Justices Kagan and Sotomayor. So why did you write and why did it take until 5 in the morning?

**Justice Ginsburg:** Why till 5 in the morning? We didn't get the last filing from Texas until Friday morning and then the Circuit Justice [Justice Scalia in this case] as you know has to write a memo. And that came around some time in the middle of the afternoon. So there wasn't much time to write the dissent. I had written a dissent in the North Carolina voting case, voting rights case. This one was . . . I would say it was very well-reasoned. You called it passionate.

**Nina Totenberg:** The point you were making . . . to explain a fact of law here is that in 2006 the Supreme Court issued a decision that basically said we try not to disturb what's going on in an election right before an election because people will get confused. And you said you did not think that applied here. Why?

**Justice Ginsburg:** First this case was unlike others because it had gone through a complete 9 day trial, reams of evidence, and an excellent decision written by the district court. This was a new system for Texas. From 2003-2013, they have a voter id that was reasonable. There were many things you could present. The new law cut back drastically on that. There had never been a federal election held under the new law. There had been local elections with very small turnout. So the poll watchers [workers?-Ed] were more familiar with old procedur[e]. So I didn't think this case fell into the mold of we can't disturb an election. There had been very little in the way of educational efforts, so that people knew what the new law required, so that the poll watchers would know. So I thought that the old system would involve less disruption than this never-done-in-a-federal-election-before [system].

Rick Hasen, *Justice Ginsburg Tells Nina Totenberg About 5 AM Texas Voter ID Decision*, ELECTION L. BLOG (Oct. 19, 2014, 5:11 PM), <http://electionlawblog.org/?p=67123>.

to accord deference to “the ruling and findings of the District Court”). The fact-intensive nature of this case does not justify the Court of Appeals’ stay order; to the contrary, the Fifth Circuit’s refusal to home in on the facts found by the District Court is precisely why this Court should vacate the stay.

Refusing to evaluate defendants’ likelihood of success on the merits and, instead, relying exclusively on the potential disruption of Texas’ electoral processes, the Fifth Circuit showed little respect for this Court’s established stay standards. See *Nken v. Holder* (“most critical” factors in evaluating request for a stay are applicant’s likelihood of success on the merits and whether applicant would suffer irreparable injury absent a stay). *Purcell* held only that courts must take careful account of considerations specific to election cases, not that election cases are exempt from traditional stay standards.<sup>105</sup>

The remainder of Justice Ginsburg’s dissent disputed the Fifth Circuit’s reasoning that a stay would disrupt Texas’ election processes.

True, in *Purcell* and in recent rulings on applications involving voting procedures, this Court declined to upset a State’s electoral apparatus close to an election. Since November 2013, however, when the District Court established an expedited schedule for resolution of this case, Texas knew full well that the court would issue its ruling only weeks away from the election. The State thus had time to prepare for the prospect of an order barring the enforcement of [the law]. Of greater significance, the District Court found “woefully lacking” and “grossly” underfunded the State’s efforts to familiarize the public and poll workers regarding the new identification requirements.<sup>106</sup>

The remainder of Justice Ginsburg’s dissent reviewed the trial court’s evidence that the law had a discriminatory purpose and would have a discriminatory impact on minority voters.<sup>107</sup>

The potential magnitude of racially discriminatory voter disenfranchisement counseled hesitation before disturbing the District Court’s findings and final judgment. Senate Bill 14 may prevent

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105. *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting) (partial citations omitted).

106. *Id.* Justice Ginsburg added:

Furthermore, after the District Court’s injunction issued and despite the State’s application to the Court of Appeals for a stay, Texas stopped issuing alternative “election identification certificates” and completely removed mention of [the law’s] requirements from government Web sites. In short, any voter confusion or lack of public confidence in Texas’ electoral processes is in this case largely attributable to the State itself.

*Id.* at 10-11 (citation omitted).

107. *Id.* at 11-12. Justice Ginsburg also noted that the district court held the law was an unconstitutional poll tax, an issue not presented in the other 2014 election cases. *Id.* at 12.

more than 600,000 registered Texas voters (about 4.5% of all registered voters) from voting in person for lack of compliant identification. A sharply disproportionate percentage of those voters are African-American or Hispanic.<sup>108</sup>

### C. *Freeing the 2014 Election Cases of the Purcell Principle*

I cannot say for certain that rigid application of the *Purcell* principle is responsible for the Supreme Court orders in the 2014 election cases. The Court majority in each case did not give a word of reasons for its orders. We do not even know if additional Justices dissented but chose not to note their dissents in the North Carolina, Wisconsin, or Texas cases.<sup>109</sup> But Justice Alito's<sup>110</sup> and Justice Ginsburg's<sup>111</sup> dissents certainly make it appear that *Purcell* was behind the Court's orders. This is also how the Fifth Circuit understood the cases when it considered a stay of the Texas order<sup>112</sup> and how I understood the cases<sup>113</sup> while they were in progress.

Properly applying the standards from the Court's general rules for considering emergency relief, there is a strong argument that the Court reached the right result in the Ohio and Wisconsin cases. North Carolina is a closer case. The Court's decision in the Texas case appears incorrect.

#### 1. *Ohio.*

The Court was correct to stay the trial court's order in the Ohio case. Challengers seemed unlikely to succeed on the merits in the Supreme Court, despite winning in the courts below. While the pre-

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108. *Id.* (citation omitted).

109. In Ohio, there were four noted dissents, so no other Justices could have dissented. *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014) (mem.).

110. *Frank v. Walker*, 135 S. Ct. 7 (2014) (Alito, J., dissenting).

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

112. *Veasey v. Perry*, 769 F.3d 890, 897 (5th Cir. 2014) (Costa, J., concurring) ("I agree with Judge Clement that the only constant principle that can be discerned from the Supreme Court's recent decisions in this area is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis. The injunction in this case issued even closer in time to the upcoming election than did the two out of the Fourth and Sixth Circuits that the Supreme Court recently stayed. On that limited basis, I agree a stay should issue.").

113. Richard L. Hasen, *How to Predict a Voting Rights Decision: The Supreme Court Just Made It Harder to Vote in Some States and Easier in Others*, SLATE (Oct. 10, 2014, 10:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/10/supreme\\_court\\_voting\\_rights\\_decisions\\_contradictions\\_in\\_wisconsin\\_ohio\\_north.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_voting_rights_decisions_contradictions_in_wisconsin_ohio_north.html) ("But there is a consistent theme in the court's actions, which we can call the 'Purcell principle' after the 2006 Supreme Court case *Purcell v. Gonzalez*: Lower courts should be very reluctant to change the rules just before an election, because of the risk of voter confusion and chaos for election officials. The Texas case may raise the hardest issue under the Purcell principle, and how it gets resolved will matter a lot for these types of election challenges going forward.").

cise application of section 2 of the Voting Rights Act to vote denial cases remains up in the air,<sup>114</sup> it is doubtful that the conservative Supreme Court—the same court which recently hobbled section 5 of the Voting Rights Act in the *Shelby County* case and has displayed routine skepticism and hostility toward race-based claims—would read the Voting Rights Act so expansively as to cover a jurisdiction’s cutback of early voting from five weeks to four weeks, especially when the jurisdiction sent every voter in the state an application for a no-excuse absentee ballot to be voted during the early voting period. Even with proof that African-American voters in Ohio used early voting, and especially “Golden Week,” more than white voters, the current Supreme Court is quite unlikely to hold that the Ohio legislature’s cutback in early voting, which makes it marginally more difficult to cast a vote and has a disparate impact on minority voters, deprives minority voters of an opportunity to participate in the political process and to elect representatives of their choice.

This lack of a major burden on voters also factors into the balance of hardships to the parties, another key part of the *Rostker* test for stays and related tests. Ohio voters deprived of the extra week to vote have other ample ways to cast a vote. The State’s burden of adding an extra week is small as well, requiring additional personnel and administration.

Finally, the public interest does not cut strongly in one direction. On the one hand, expanding opportunities to vote can serve the public interest. On the other hand, the public has an interest in efficient administration of elections, and adding back the week would impose additional costs. Of course, the timing close to the election (the *Purcell* principle) cuts against a late court order to change election timing.

Given the weakness of the merits on the plaintiffs’ side, the Court seemed correct in staying the lower court. The *Purcell* factor reinforces this decision.

## 2. *Wisconsin*.

The Supreme Court also seemed correct in its decision in the *Wisconsin* case, vacating the Seventh Circuit stay which would have had the effect of allowing the State of Wisconsin to immediately implement its voter identification law.<sup>115</sup> This case was a no-brainer for reversal. The State admitted that such a precipitous implementation of its law would disenfranchise up to ten percent of the state’s population, especially residents born out of state who would have

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114. See *HASEN*, *supra* note 73, at 288-92.

115. *Frank v. Walker*, 135 S. Ct. 7 (2014).

difficulty getting the right documentation in time, and put burdens on those voters who had already received their absentee ballots which, if the law were implemented, would not be counted unless the voters produced identification—something not required by the original instructions.<sup>116</sup>

Putting aside whether Wisconsin's voter identification law as a whole was likely to be found by the Supreme Court to violate either section 2 of the Voting Rights Act or the Constitution's Equal Protection Clause, there was no real question that the immediate implementation of the law would violate both, by disenfranchising voters for no compelling reason, and with that burden falling disproportionately on minority voters. Aside from the likelihood of convincing the Supreme Court that the precipitous disenfranchisement was likely illegal, the relative burdens faced by the parties tilted heavily in favor of the challengers. On the one side were the many voters who would be disenfranchised when a rollout planned for eight months was compressed into a few weeks. On the other hand, the State posited an interest in preventing voter fraud, which was totally hypothetical and unproven.<sup>117</sup> As in other states, Wisconsin could not point to significant instances of voter impersonation fraud which would justify imposing such a law at all,<sup>118</sup> much less imposing such a law on a truncated schedule. Many members of the public who were not plaintiffs stood the risk of being disenfranchised, tilting the public interest in Wisconsin's favor. Finally, the *Purcell* principle seemed to have strong application here, with a change just before the election likely to both confuse voters and put new burdens on election administrators.

Even accepting Justice Alito and Justice Scalia's statement in the Wisconsin case dissent that the Court should apply the "demonstrable error" standard in determining whether to vacate a stay imposed by a Court of Appeals,<sup>119</sup> the Wisconsin case—with its certainty of disenfranchisement, lack of strong government interest in immediate implementation of its law, and timing so close to the election as to risk both voter confusion and election administrator chaos—meets the standard. It is troubling that these dissenting Justices would tolerate certain disenfranchisement out of deference to the Court of Appeals, an appellate court which, considering the issue en banc twice, split evenly on the question.

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116. *Frank v. Walker*, 17 F. Supp. 3d 837, 853-62 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015) (mem.).

117. *Id.* at 847.

118. *Id.* at 847-48.

119. 135 S. Ct. at 7 (Alito, J., dissenting).

### 3. *North Carolina.*

North Carolina presents a closer case on the Supreme Court's decision to stay the Fourth Circuit's order putting North Carolina's end of same-day voter registration and out-of-precinct voting on hold.<sup>120</sup> Compared to Ohio, North Carolina's case presented both more evidence of a disparate effect of legislative rollbacks of voting rights as well as a more nuanced understanding of the scope of section 2 of the Voting Rights Act. It is not at all clear that the Supreme Court will agree with the Fourth Circuit's views on the facts and the law, but the Fourth Circuit's analysis was nuanced and careful, with the potential to be affirmed on the merits. Further, the burdens on voters in North Carolina appeared more significant than the modest cut-back in early voting days in Ohio.

On the other hand, North Carolina voters still had many other opportunities to vote.<sup>121</sup> Further, as noted by the Fourth Circuit dissent,<sup>122</sup> making these changes close to the election burdened election administrators: the State had already set out its procedures for voting, and this change would mean new instructions in the period just before the election.<sup>123</sup>

In such a close case, arguably, the Supreme Court should have deferred to the Fourth Circuit's decision to grant the narrow preliminary injunction in North Carolina. Deference seems to make the most sense in close cases. Or perhaps the Court should have deferred to the district court, which actually considered the evidence first. Recall that in *Purcell*, the Supreme Court criticized the Ninth Circuit for lack of deference to the decision of the district court not to grant a preliminary injunction.<sup>124</sup> The Court's rules on which court deserves deference remain uncertain and underdeveloped.

### 4. *Texas.*

The Court erred in failing to vacate the Fifth Circuit's stay, even applying the "demonstrable error" standard of review.<sup>125</sup> As Justice

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120. *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014).

121. Despite the loss of same-day voter registration and cutbacks in early voting, the amount of early voting actually increased in 2014 compared to the 2010 midterm election, especially among Democrats. Nate Cohn, *For Democrats, Turnout Efforts Look Successful (Though Not Elections)*, N.Y. TIMES (Nov. 14, 2014), [http://www.nytimes.com/2014/11/15/upshot/evaluating-the-success-of-democratic-get-out-the-vote-efforts.html?\\_r=0](http://www.nytimes.com/2014/11/15/upshot/evaluating-the-success-of-democratic-get-out-the-vote-efforts.html?_r=0) ("Since 2010, turnout increased by 14 percent in North Carolina counties that voted for President Obama, but just 4 percent in counties that voted for Mitt Romney.").

122. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 249 (4th Cir. 2014) (Motz, J., dissenting).

123. *Id.* at 252-53.

124. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

125. *Veasey v. Perry*, 135 S. Ct. 9 (2014).

Ginsburg pointed out in dissent, the court failed to properly apply the *Nken* standard to consider whether or not to stay the district court order enjoining Texas' continued use of its voter identification law.<sup>126</sup> Instead, the Fifth Circuit decided the question of a stay solely as a matter of timing under the *Purcell* principle.<sup>127</sup>

By failing to properly apply the *Nken* standard, the Court of Appeals never examined the likelihood of success on the merits or the relative hardship of the parties.<sup>128</sup> With the Court of Appeals failing to examine the merits, it (and the Supreme Court) should have deferred on the facts to the trial court, which held a full trial. The trial court determined not only that the law was likely to have a disparate impact on minority voters but also that the Texas legislature passed the law with racially discriminatory intent.<sup>129</sup> Further, the trial court determined the law was an unconstitutional poll tax because of the costs associated with getting needed documentation.<sup>130</sup>

Whether or not the Supreme Court would likely agree with the district court's more expansive reading of section 2 of the Voting Rights Act, the Constitution's Equal Protection Clause, or the Twenty-Fourth Amendment, it should have deferred to the district court given the finding of intentional racial intent. There is no question that voting laws passed with a racially discriminatory purpose can violate both the Fourteenth and Fifteenth Amendments. Further, factual findings of trial courts, such as the district court's finding of racially discriminatory purpose, are entitled to considerable deference unless they are clearly erroneous. The Fifth Circuit not only failed to reject the trial court's factual finding on this point as clearly erroneous—it refused to examine the record on the question when deciding to stay the trial court's injunction.

The Fifth Circuit also failed to meaningfully consider the irreparable harm to the parties or the public interest aside from application of the *Purcell* principle. The trial court's factual finding that up to 600,000 Texans lacked the right kind of identification and could not easily receive it would be a factual finding entitled to deference unless clearly erroneous. This large risk of disenfranchisement would

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

127. *See* *Veasey v. Perry*, 769 F.3d 890, 892-95 (5th Cir. 2014).

128. The Fifth Circuit held that the state would be irreparably harmed if it could not enforce its laws. *Id.* at 895. It then said that the individual voter plaintiffs "may be harmed" by the stay, but then in a footnote backpedaled: "The State contends that no individual voter plaintiffs would actually be harmed by a stay. But, at this time, we decline to decide the fact-intensive question of which individual voter plaintiffs would be harmed." *Id.* at 896 & n.4. The failure to engage with the facts makes the balancing the court purported to engage in meaningless.

129. *Veasey v. Perry*, 71 F. Supp. 3d 627, 695-703 (S.D. Tex. 2014).

130. *Id.* at 703-07.

have to be balanced against the State's interest in preventing voter fraud. And here, once again, the Court of Appeals did not address, much less find clearly erroneous, the district court's factual finding that there was no significant evidence of impersonation fraud to support Texas' voter identification law and that claims of fraud were a pretext for unconstitutional discrimination.

Faced with such a record, the Supreme Court in the Texas case should have sided with Justice Ginsburg's dissent and put Texas' voter identification law on hold until the Fifth Circuit (and potentially the Supreme Court) could fully review the factual findings and legal conclusions the district court made after a full trial on the merits. Leaving the decision to hang solely on the *Purcell* principle risked the disenfranchisement of voters without good reason and violated the Court's own stated standards for determining whether to vacate a stay imposed by a court of appeals.

#### IV. GIVING REASONS (AFTER THE FACT) IN EMERGENCY (ELECTION) CASES

Whether or not the Supreme Court in reviewing emergency election cases is going to rein in the *Purcell* principle in order to apply the Court's more general standards for granting or denying emergency relief, the Court should give lower courts and the public a fuller explanation for its actions. An explanation could come weeks or months after the Court issues an emergency order in the form of a separate opinion or set of opinions, much like the practice of some state supreme courts in dealing with emergency election litigation. State supreme courts,<sup>131</sup> federal district courts,<sup>132</sup> and federal courts of appeal<sup>133</sup> have followed this practice.

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131. See, e.g., *Malnar v. Joice*, 337 P.3d 43, 44 (Ariz. 2014) ("We previously issued an order affirming the superior court's removal of Elizabeth Joice's name from the 2014 general election ballot for a vacant term on the Peoria Unified School District Governing Board. This opinion explains our reasoning.")

132. For example, Judge O'Malley of the Northern District of Ohio wrote:

After careful consideration, while, for reasons that will be explained in detail in the Court's forthcoming memorandum opinion in this matter, the Court ultimately rejects both parties' legal theories, it orders implementation of one of the Board's alternative remedies: limited voting. The Court issues this summary order now to accommodate the concerns expressed by the Board of Elections and to provide the parties with guidance as to how to prepare for this fall's upcoming Board elections. The Court will explain the full rationale for reaching this result in the opinion that will issue shortly.

Order at 3, *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (No. 08-CV-2832), <http://electionlawblog.org/archives/euclid-order.pdf>.

133. See, e.g., *Citizens United v. Gessler*, 773 F.3d 200, 202 n.1 (10th Cir. 2014) ("We held oral argument on October 7 and issued an interim order on October 14. This opinion explains the basis of that order and does not consider events occurring after October 14."); *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 891 (5th Cir. 2012) ("On September 6,

There is even Supreme Court precedent for doing so. In 1942, the Supreme Court considered habeas corpus petitions involving the detention of German citizens during World War II. In *Ex Parte Quirin*,<sup>134</sup> the Court issued an order in the case, following it up a few months later with an explanatory opinion.<sup>135</sup> But the Court has not followed that practice, either in *Bush v. Gore* or in the 2014 election cases, when the press of time made an immediate decision, but not full opinion, necessary.

It is possible that many of the criticisms of the logic and argument of *Bush v. Gore* could have been avoided if the Court had more time to work on the opinion. Justice Sandra Day O'Connor, in the *Bush v. Gore* majority, later told journalist Jan Crawford Greenburg: "I don't think what emerged in the last opinion was the Court's best effort. It was operating under a very short time frame, to say the least. Given more time, I think we probably would've done better."<sup>136</sup> Similarly, Justice Kennedy, also in the majority, told Greenburg, "The problem with *Bush v. Gore* was that it came so fast, it had to be decided so fast."<sup>137</sup>

The benefits of giving reasons are many.<sup>138</sup> Reasons will help lower courts use the right standards in election cases, rather than having to try to read tea leaves from unexplained Court orders. Following the Court's normal procedural regularity in election cases will bolster the legitimacy of the Court in the eyes of the public, something especially important in controversial cases, such as election cases.<sup>139</sup> Following usual and articulated rules may also discipline Justices into deciding similar cases alike, regardless of the identity of the parties.

Giving reasons imposes three significant costs as well. First, it imposes time costs on the Justices, who often have to put aside their work on the Court's normal caseload to deal with these emergency

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2012, we entered an order granting Appellant Texas Secretary of State Hope Andrade's Emergency Motion to Stay the district court's Order (as modified) granting in part a preliminary injunction against the enforcement of certain Texas statutes and stating that reasons would be assigned later. Those reasons follow.".)

134. 317 U.S. 1 (1942) (per curiam).

135. *Id.* at 20 ("On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.") (citation omitted).

136. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 175 (2007).

137. *Id.*

138. See generally Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633 (1995) (exploring the logic of giving reasons).

139. See Baude, *supra* note 27, at 9-15 (noting the benefits of procedural regularity and legitimacy in Court decision-making).

motions in the first place. However, if the Court could work on these cases when not up against pressing deadlines, it could issue an opinion with reasons even months after a decision.

Second, giving reasons could cause the Court to decide issues it would rather avoid or would prefer to resolve in another case with a better-developed factual record. This is a genuine concern. Having the Court decide the full scope of section 2 of the Voting Rights Act in vote denial cases based on the relatively spare record in some of these cases could lead the Court to make poor decisions which it could avoid in reviewing a more fully formed case. The Court can deal with this problem in a few ways: asking for supplemental briefing, remanding for additional fact-finding, or issuing an opinion that limits the Court's precedential holding, explaining that the Court may view the legal issue differently when presented more fully in a subsequent case.

Finally, forcing the Court to give reasons may make it more difficult for the Court to reach prudential decisions of compromise in these cases. As noted, both *Purcell* and *Wheaton* might be viewed as cases in which the Court wanted to preserve the status quo and put issues off for another time. Further, Justices Breyer and Kagan might not have (publicly) dissented in the North Carolina case in hopes that such restraint could induce the Chief Justice and Justice Kennedy not to dissent (or publicly dissent) in the Wisconsin case. This kind of tacit compromise or horse trading is, of course, speculation.<sup>140</sup> But if such prudential/political considerations are going into how the Court decides some of these controversial, high profile cases, reason-giving could act as a deterrent. If Justices Breyer and Kagan have to explain their votes in the North Carolina case, they may change how they vote.

While these are real costs, they are ultimately outweighed by the duty of the Court to explain its actions in a democracy and the potential that reason-giving will lead the Court to make more consistent decisions and bolster the Court's legitimacy. We vest the Court with great power over everything from elections to abortion, gay marriage and health care. Every important issue comes before the Court, and it is often the last word in how these cases are decided. The Court owes us, and itself, explanations when it takes important actions that broadly affect U.S. life and liberty and the strength of American democracy.

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140. On normative issues related to such vote trading, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2333-79 (1999).

## V. CONCLUSION

The *Purcell* principle is an important one which should be considered any time a court is asked to intervene close to an election: courts should weigh the risk of voter confusion and the burdens on election administrators when courts make changes to election rules close to an election.

*Purcell* should not be a stand-alone principle, but the Supreme Court's silence in the 2014 election cases threatens to make it one. Instead, the Court should clarify that the *Purcell* principle is part of the public interest factor which courts should consider along with likelihood of success on the merits, relative hardship to the parties, and appropriate deference to lower courts in deciding whether to grant a stay or other emergency relief in an election case. Had the Court properly applied its usual test in the 2014 election cases, it would have blocked Texas' voter identification law from being used in the 2014 election, as Justice Ginsburg urged in her dissent. The Court perhaps would have reached a different conclusion in the North Carolina voting case as well.

Finally, the Court should issue opinions, even months after the fact, explaining its reasoning in the election cases. Such opinions will increase the Court's legitimacy in deciding controversial election issues and could discipline the Court to apply consistent legal standards to requests for emergency relief.