

NOTES

FROM POLL TESTS TO THE *PURCELL* DOCTRINE: *MERRILL V. MILLIGAN* AND THE PRECARIOUS PRESERVATION OF VOTING RIGHTS

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The Voting Rights Act of 1965 (“the Voting Rights Act”) is one of the primary vehicles by which plaintiffs receive injunctive relief ahead of elections. More specifically, § 2 of the Voting Rights Act allows plaintiffs to challenge gerrymandered maps before they are used in contentious elections. However, Justice Kavanaugh’s reframing of the Purcell doctrine in Merrill v. Milligan weakened § 2’s ability to interrupt the use of these maps. This Note discusses how Justice Kavanaugh’s interpretation of the Purcell doctrine recenters the doctrine on bureaucratic inconvenience rather than voter enfranchisement, restricting voters’ access to relief prior to elections. Furthermore, this Note addresses how this restructuring is inconsistent with the intent of the Voting Rights Act and the Purcell doctrine. As a solution, this Note proposes a narrow interpretation of the Purcell doctrine focusing on voter enfranchisement through a strict application of the Gingles factors and a narrow timeline for redistricting.

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INTRODUCTION

“My dear friends, your vote is precious, almost sacred. It is the most powerful nonviolent tool we have to create a more perfect union. . . . Too many people have struggled, suffered and died to make it possible for every American to exercise their right to vote.”¹ Representative John Lewis urged listeners to vote at the 2012 Democratic National Convention, nearly forty-seven years after the passing of the Voting Rights Act of 1965² (the “Voting Rights Act”).³

On March 7, 1965, 600 protestors gathered at a church in downtown Selma, Alabama, planning to march approximately fifty miles to the state’s capital in Montgomery.⁴ John Lewis and other civil rights leaders, including Dr. Martin Luther King, Jr., led the march, only to be met with immediate violence from the local police force on the outskirts of the city.⁵ Soon after, March 7 became known as “Bloody Sunday.”⁶ In the months following Bloody Sunday, President Lyndon B. Johnson urged Congress to pass the Voting Rights Act, a targeted piece of legislation enshrining voting rights.⁷

Approximately fifty-seven years later, in February 2022, voting rights were again at stake in the heart of Alabama.⁸ Nine months before the 2022 congressional election, the U.S. Supreme Court reinstated Alabama’s highly contested voting district map, “HB1.”⁹ The narrow congressional election of 2022 followed, gluing voters across the country to their television screens as they waited for results.¹⁰

1. *Rep. John Lewis: ‘Your Vote Is Precious, Almost Sacred,’* PBS NEWS HOUR (Sept. 6, 2012, 6:02 PM), <https://www.pbs.org/newshour/show/rep-john-lewis-your-vote-is-precious-almost-sacred> [<https://perma.cc/S5CK-R4GR>].

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

3. *See Rep. John Lewis: ‘Your Vote Is Precious, Almost Sacred,’* *supra* note 1.

4. *Confrontations for Justice: John Lewis—March from Selma to Montgomery, ‘Bloody Sunday,’ 1965*, NAT’L ARCHIVES, <https://www.archives.gov/exhibits/eyewitness/html.php> [<https://perma.cc/CE24-YZKY>] (last visited Apr. 3, 2024).

5. *See id.*

6. *Id.*

7. *Id.*

8. *See* Adam Liptak, *Supreme Court Restores Voting Map that a Court Said Hurt Black Voters*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/us/politics/supreme-court-alabama-redistricting-congressional-map.html> [<https://perma.cc/DH33-ZYRV>].

9. *See id.*; *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

10. *See Balance of Power: Republican Majority in the House*, BLOOMBERG GOV’T (Dec. 14, 2023), <https://about.bgov.com/brief/balance-of-power-republican-majority-in-the-house/> [<https://perma.cc/K5PZ-37SQ>]; *see also* Janelle Bouie, *Opinion, A Shock to the System Is Coming. Which Party Will Be Ready for It?*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/opinion/midterms-republicans-democrats-history.html> [<https://perma.cc/DNH8-SQQ4>] (“There was no landslide, no decisive victory for one side over the other.”); German Lopez, *Still Undecided*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/09/briefing/midterm-election-results-2022.html> [<https://perma.cc/W6CK-ANDP>] (describing various elections the morning after the congressional 2022 election as “too close to call,” including elections in Arizona, Georgia, and Nevada).

Since the enactment of the Voting Rights Act, courts have sought to protect voters' rights under § 2.¹¹ Traditionally, when evaluating § 2 claims, the Supreme Court applies the factors established in *Thornburg v. Gingles*¹² and a totality of the circumstances standard, which will be explored in depth later in this Note.¹³ As courts tackled discriminatory voting practices, issuing injunctions and court orders, another development in election law jurisprudence arose: the *Purcell* doctrine established in *Purcell v. Gonzalez*.¹⁴ Generally, the *Purcell* doctrine does not allow courts to change election laws too close to an election, in the hopes of preventing voter confusion.¹⁵ Although § 2 traditionally provides injunctive relief for plaintiffs, under the *Purcell* doctrine courts hesitate to enact this relief close to an election.¹⁶ This hesitation featured prominently in a recent Supreme Court case: *Merrill v. Milligan*.¹⁷ In *Merrill*, the Court issued a decision without a majority opinion that upheld Alabama's HB1 map with only one majority-Black district; this decision allowed the map to be used in the highly contentious 2022 congressional election.¹⁸ Justice Kavanaugh concurred, expressing concern that blocking HB1's use would require too much substantial change too close to the election, despite the primary election being approximately four months away and the general election being nine months away.¹⁹ Hinging his analysis on this concern, Justice Kavanaugh placed bureaucratic inconvenience, rather than voter enfranchisement, at the center of the *Purcell* doctrine.²⁰ As a result, HB1, later found in violation of § 2 of the Voting Rights Act, remained in place for the 2022 congressional elections.²¹ This use of *Purcell* differed from the Supreme Court's and lower courts' prior uses of the doctrine, whereby voter enfranchisement took center

11. *See Merrill*, 142 S. Ct. at 879; *Andino v. Middleton* 141 S. Ct. 9, 10 (2020); *Moore v. Circosta*, 494 F. Supp. 3d 289, 322 (M.D.N.C. 2020) (holding that the changing of a ballot deadline under a month before Election Day would cause voter confusion at the hands of the court).

12. 478 U.S. 30 (1986).

13. *See id.* at 49–51 (requiring that plaintiffs establish (1) that the minority group was “sufficiently large and geographically compact” enough to have a majority-minority single member district; (2) that the minority group is “politically cohesive”; and (3) that the white majority, voting as a bloc, defeats “the minority’s preferred candidate[s]”).

14. 549 U.S. 1 (2006).

15. *See id.*; *see also* Rachael Houston, *Does Anybody Really Know What Time Is?: How the US Supreme Court Defines “Time” Using the Purcell Principle*, 23 *NEV. L.J.* 769, 769–70 (2023) (“[T]he *Purcell* principle provides that federal judges should be cautious about altering state election rules in the period close to an election.”).

16. *See Merrill*, 142 S. Ct. at 879; *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1240 (N.D. Ga. 2022) (holding that the *Purcell* doctrine applied because Georgia had “already begun the process of preparing for elections to take place”).

17. 142 S. Ct. 879 (2022) (mem.), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), *and Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

18. *See id.* at 879; *see also* Liptak, *supra* note 8.

19. *See Merrill*, 142 S. Ct. at 888–89 (Kagan, J., dissenting).

20. *See id.*

21. *See id.* at 888; *Allen v. Milligan*, 143 S. Ct. 1487, 1516 (2023); *see also* Hansi L. Wang, *Illegal Voting Maps Were Used in Some States in 2022. This Legal Idea Allowed Them*, NPR (July 19, 2023, 5:00 AM), <https://www.npr.org/2023/07/19/1186746963/alabama-redistricting-map-gerrymandering-purcell-principle> [<https://perma.cc/TP4Z-754F>].

stage and courts primarily applied the doctrine approximately one month before elections.²² Critics charge that some attempts to prevent voter confusion, like the Court’s decision in *Merrill*, “ha[ve] only further muddled litigation’s efficacy as a form of relief for voting discrimination” and further limited minority voters’ ability to exercise their voting rights, as these decisions have expanded the reach of the *Purcell* doctrine past its normative one-month boundary.²³

Through these limitations on § 2 claims, these decisions have undermined the protections and intentions of the Voting Rights Act and the *Purcell* doctrine.²⁴ Congress passed the Voting Rights Act to protect voting rights in the face of discriminatory laws and procedures such as poll tests, ID requirements, and racially gerrymandered maps.²⁵ Additionally, the *Purcell* doctrine seeks to preserve voting access by preventing voter confusion resulting from last-minute court orders.²⁶ Both of these goals have been missed and the opposite has occurred. In *Merrill*, Justice Kavanaugh, motivated largely by judicial caution, argued that the *Purcell* doctrine limited § 2’s applicability and that a map that diluted minority votes and endangered voting rights should be upheld.²⁷

In balancing the rights of individual voters and the state’s interest in preventing voter confusion, there are two opposing schools of thought—both are demonstrated in *Merrill*.²⁸ The first is a stance of judicial caution, articulated by Justice Kavanaugh, who concluded that changing the map nine months before the general election would create bureaucratic inconvenience inciting voter confusion.²⁹ Here, Justice Kavanaugh favored procedural caution over voting access.³⁰ The second stance is one of judicial intervention, expressed by Justice Kagan, who concluded that nine months did not fall within the narrow “weeks before an election” measure set forth in *Purcell*.³¹ Here, Justice Kagan reiterated *Purcell*’s original concerns as related to voter enfranchisement and ultimately favored voting access,

22. See *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020); *Moore v. Circosta*, 494 F. Supp. 3d 289, 322 (M.D.N.C. 2020); *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 361 (M.D. Pa. 2020) (holding that a purge of voter polls a mere two weeks before the election would be a “drastic, last minute” change that would endanger a “free and fair election”).

23. Shane Grannum, Note, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After Shelby County v. Holder*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 95, 112 (2018).

24. See *infra* Part II.C.

25. See KEVIN J. COLEMAN, CONG. RSCH. SERV., RL43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 8, 10 (2015).

26. See *id.* at 4–5.

27. See *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.); Wang, *supra* note 21.

28. Compare *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring), with *Merrill*, 142 S. Ct. at 888 (Kagan, J., dissenting).

29. See *id.* at 881–82 (Kavanaugh, J., concurring).

30. See *id.* at 880.

31. *Id.* at 888 (Kagan, J., dissenting) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

finding that the four months before the primary was substantial enough time for the legislature to redraw HB1.³²

To best preserve the policy goals of the Voting Rights Act and the *Purcell* doctrine, this Note proposes that courts adopt a narrow reading of the *Purcell* doctrine.³³ This narrow reading will be required when there is a clear violation of § 2, as determined by the *Gingles* test and the totality of the circumstances standard.³⁴ Part I of this Note provides the relevant background, amendments, applications, and interpretations of the Voting Rights Act and the *Purcell* doctrine. Part II of this Note details the U.S. District Court for the Northern District of Alabama's findings regarding HB1, the Supreme Court's decisions in *Merrill* and *Allen v. Milligan*,³⁵ and the ripple effects of these decisions in election law jurisprudence.³⁶ Part III of this Note proposes that courts adopt a narrow interpretation of the *Purcell* doctrine in circumstances in which there is a clear violation of § 2 under the *Gingles* test and the totality of the circumstances standard.³⁷

I. THE VOTING RIGHTS ACT AND THE *PURCELL* DOCTRINE

The Voting Rights Act and the *Purcell* doctrine changed over the years as Congress and the courts sought to protect the fundamental right to vote.³⁸ The developments in both areas reveal the intention behind these critical election law cornerstones and their shared goal of preserving voting rights.³⁹ Part I.A details the Voting Rights Act's history, provisions, and treatment in current election law jurisprudence. Part I.B discusses the *Purcell* doctrine, its history, and its interpretation since its inception.

A. *The Voting Rights Act: Protecting a Sacred Right*

Borne out of the civil rights movement, the Voting Rights Act continued evolving over the twentieth century and protected historically marginalized voters' sacred right to vote.⁴⁰ Since its passage, courts and Congress explored the various ways citizens can enforce their right to vote, reinforcing the Voting Rights Act's central concern of voter enfranchisement.⁴¹ Part I.A.1 outlines the legislative history and intent of the Voting Rights Act, explaining the elements of a successful § 2 claim. Part I.A.2 outlines the standard for successful § 2 claims. Finally, Part I.A.3 details how recent election law jurisprudence elevated § 2 claims' importance.

32. *See id.* at 889.

33. *See infra* Part III.A.

34. *See infra* Part III.A.

35. 143 S. Ct. 1487 (2023).

36. *See infra* Part II.

37. *See infra* Part III.

38. *See* COLEMAN, *supra* note 25, at 18–22; Harry B. Dodsworth, *The Positive and Negative Purcell Principle*, 2022 UTAH L. REV. 1081, 1084–85.

39. *See generally* COLEMAN, *supra* note 25, at 11–12. *See also* *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

40. *See* COLEMAN, *supra* note 25, at 10–11.

41. *See id.* at 12.

1. 832 Miles: From Selma, Alabama, to Capitol Hill

The Voting Rights Act, a milestone piece of legislation, marked a turning point in election law jurisprudence.⁴² The Voting Rights Act was one piece of a greater effort to register Black voters in the South.⁴³ Section 2(a) of the act stated the following:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.⁴⁴

Prior to the Voting Rights Act, in response to the Fifteenth Amendment⁴⁵ and Reconstruction-era legislation, many southern states enacted poll taxes, literacy tests, and other barriers to voting access.⁴⁶ Acts of violence and intimidation often enforced these barriers.⁴⁷ As a result of these measures, the prevention of minority voters from exercising their right to vote “remained entrenched and resistant to wholesale change” despite Congress passing several civil rights laws and the ratification of the Fifteenth Amendment.⁴⁸ Finally, after the violent interference of state troopers in Selma, President Lyndon B. Johnson presented the Voting Rights Act to Congress.⁴⁹ Around the same time, public sentiment toward Black voter enfranchisement shifted as the Court found “grandfather clauses” unconstitutional and Black veterans returned to the United States following World War II.⁵⁰ In light of changes in public opinion, the violence in Selma, and President Johnson’s urging, many members of Congress considered a bill protecting voting rights necessary for the preservation of American democracy and pushed the Voting Rights Act forward.⁵¹

42. *See id.* (“The impact of the VRA was immediate and dramatic . . . [as] [n]early 1 million black voters were registered within four years of passage . . . [and] the number of black elected officials in the South more than doubled.”).

43. *See id.* at 11.

44. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a)).

45. U.S. CONST. amend. XV, §§ 1–2 (guaranteeing “the right of citizens of the United States to vote” regardless of “race, color, or previous condition of servitude” and allowing Congress to “enforce” this amendment).

46. *See* COLEMAN, *supra* note 25, at 8–9 tbl.2.

47. *See id.*; *see also* NAT’L PARK SERV., CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 28 (2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf [<https://perma.cc/75J4-ATD6>] (describing instances of Klu Klux Klan attacks on Black voters less than twenty-four hours after they cast their votes).

48. *See* COLEMAN, *supra* note 25, at 1; U.S. CONST. amend. XV, §§ 1–2.

49. *See* COLEMAN, *supra* note 25, at 11.

50. *See id.* at 8–10 (noting that a “grandfather clause” in Louisiana stated that voter registration lists “include the names of all males whose fathers and grandfathers were registered on January 1, 1867, before blacks had been enfranchised”); *see also* *Guinn v. United States*, 238 U.S. 347, 367–68 (1915) (finding that an Oklahoma statute barring individuals who could not read or write or were not the descendant of registered voters from voting was unconstitutional under the “self-executing power of the Fifteenth Amendment”).

51. *See* 111 CONG. REC. 19200 (1965) (statement of Rep. Harold D. Donohue).

In contrast to previous civil rights statutes, the Voting Rights Act took a more proactive approach.⁵² For example, the act provided a “coverage formula” in § 4(b) in which the federal government could intervene in the electoral process of states with a history of voter disenfranchisement in the previous five years.⁵³ Section 5 enforced § 4(b) by requiring that states with this history receive federal approval of any new voting laws.⁵⁴ In addition to this preclearance formula, § 2 made any denial or abridgment of the right to vote “on account of race or color” unlawful.⁵⁵ Once passed, the Voting Rights Act continued evolving over the following years because some portions of the act remained unclear—despite the act being a piece of landmark legislation.⁵⁶

From the outset, one of the Voting Rights Act’s main concerns, beyond voter suppression, was gerrymandering. Equipopulous gerrymandering is “defined as districting that satisfies the one person-one vote principle yet is discriminatory toward an identifiable group of voters.”⁵⁷ Within the context of § 2, “an equipopulous racial gerrymander may thus be described as an apportionment of [the] legislature into districts of substantially equal population but with the district lines drawn to aid or hinder the voters of one race.”⁵⁸ More specifically, courts have found unconstitutional racial gerrymandering to have occurred if race was a “predominant factor in drawing the district” and there was no compelling state interest.⁵⁹ States engaged in the “specific act of re-drawing district lines to disenfranchise black voters” after the passing of the Voting Rights Act, and they continue to do so today.⁶⁰ In addition to state legislatures gerrymandering their

52. COLEMAN, *supra* note 25, at 11–12 (stating that the Voting Rights Act “abandoned that measured approach [of past legislation] and called for certain states and jurisdictions to demonstrate progress while submitting to federal oversight of voting changes”). Compare Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303), *invalidated by* *Shelby County v. Holder*, 570 U.S. 529 (2013), with Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, 71 Stat. 634, 634–35 (codified as amended at 42 U.S.C. §§ 1975–1975e) (establishing a special commission tasked with investigating claims of voting rights deprivation and general claims of equal protection under the law).

53. See § 4, 79 Stat. at 438; COLEMAN, *supra* note 25, at 15–16.

54. See § 5, 79 Stat. at 439; COLEMAN, *supra* note 25, at 15–16.

55. § 2, 79 Stat. at 437; COLEMAN, *supra* note 25, at 14.

56. See COLEMAN, *supra* note 25, at 18–22 (detailing the act’s amendment history and revealing its initial lack of clarity).

57. 25 AM. JUR. 2D *Elections* § 34, Westlaw (database updated Feb. 2024).

58. *Id.*

59. 6 ANTIEAU ON LOCAL GOVERNMENT LAW § 86.04 (Sandra M. Stevenson ed., 2d ed. 2023).

60. Patricia Okonta, Note, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 289 (2018); see also *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (holding that Alabama’s state legislature had racially gerrymandered its map due to the unnecessary combination of counties into single-house districts to prevent the election of Black house members); David P. Van Knapp, Annotation, *Diluting Effect of Minorities’ Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R. Fed. 29, 93 (2018).

election maps, unclear sections of the Voting Rights Act began to surface, making the path forward for voter enfranchisement more complicated.⁶¹

One of the act's most significant evolutions occurred in 1982, following the Supreme Court's ruling in *City of Mobile v. Bolden*.⁶² The Court's decision in this case drove Congress to further clarify the legislative intent of the act.⁶³ In *Mobile*, the Court considered whether a governing commission "elected at large" violated § 2 of the Voting Rights Act.⁶⁴ Prior to *Mobile*, dicta in earlier Court opinions "suggested that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution."⁶⁵ But in *Mobile*, despite finding that the "at-large" election process diluted minority votes, the Court held that plaintiffs must show an intent to discriminate in order to bring a successful § 2 claim.⁶⁶ Here, the Court found no such intent in the "at-large" voting scheme.⁶⁷ In reaching this conclusion, the Court reasoned that § 2 was not intended to expand beyond the bounds of the Fifteenth Amendment, based largely on the act's legislative history and the text of the amendment itself.⁶⁸ As a result of *Mobile*, petitioners' right to relief became dependent on their ability to show "purposeful discrimination," making the success of § 2 claims more unlikely.⁶⁹

In response to *Mobile*, in April 1982, Representative Peter W. Rodino, Jr. of the House Judiciary Committee presented an amendment to the Voting Rights Act clarifying its scope and protections.⁷⁰ The Senate and the House largely debated the language of § 2, as well as the repercussions of renewing the act for another ten years.⁷¹ Two camps emerged: those in favor of an effects test and those in favor of an intent test, as in *Mobile*.⁷² Amid this divide, Senator Robert J. Dole presented an amendment to the act, which

61. See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 52 U.S.C.).

62. 446 U.S. 55 (1979) (plurality opinion), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 52 U.S.C.).

63. See *id.* at 65; *Allen v. Milligan*, 143 S. Ct. 1487, 1500–01 (2023); see also Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355–56 (1983).

64. *Mobile*, 446 U.S. at 55 (explaining that Mobile's at-large voting scheme elected the city's commission, which "jointly exercised all legislative, executive, and administrative power," as compared to single-member districts electing a mayor and city council).

65. *Id.* at 67 n.13.

66. See *id.* at 78–79; see also Boyd & Markman, *supra* note 63, at 1354.

67. See *Mobile*, 446 U.S. at 74 (stating that "those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority" and are "far from proof that the at-large electoral scheme represents purposeful discrimination").

68. *Id.* at 61.

69. *Id.* at 63; Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 120 (2018).

70. See Boyd & Markman, *supra* note 63, at 1356.

71. See *id.* at 1415–18. See generally 111 CONG. REC. 19200 (1965).

72. 446 U.S. at 72 (articulating the requirements of an intent-based test); see also Boyd & Markman, *supra* note 63, at 1417 (presenting the results-based test as not allowing "a voting practice or procedure which is discriminatory in result" to stand).

attempted to balance the competing interests.⁷³ The amendment proposed by Senator Dole (the “Dole Amendment”), contained in the Voting Rights Act Amendments of 1982,⁷⁴ “strength[ened] [§ 2] with additional language delineating what legal standard should apply.”⁷⁵ The amendment required that a violation of § 2 be determined by a totality of the circumstances standard.⁷⁶ The Senate Judiciary Committee outlined several factors (the “Senate factors”) to guide this standard, including (1) “the extent of any history of official discrimination”; (2) “the extent to which voting in the elections of the state . . . is racially polarized”; (3) the presence of “unusually large election districts, majority vote requirements, anti-single shot provisions, or . . . procedures that may enhance the opportunity for discrimination”; (4) whether minority members have been “denied access” to a “candidate slating process”; (5) discrimination in other areas such as education or health; (6) “overt or subtle racial appeals” in political campaigns; and (7) “the extent to which members of the minority group have been elected to public office.”⁷⁷ This list is not exhaustive, and the committee considered other factors “indicative of the alleged dilution.”⁷⁸ This totality of the circumstances standard, reflected in the Senate factors, did not require plaintiffs to show the intentionality of “the deprivation of this fundamental right.”⁷⁹ When responding to questions from Senator Orrin G. Hatch regarding his amendment, Senator Dole stated that “‘access’ and ‘whether or not the system is open’ were at the heart of this change to section 2.”⁸⁰ Senator Dole’s answer and the flexibility in applying the Senate factors ultimately revealed the goal of the Voting Rights Act Amendments of 1982: the protection of voting rights.⁸¹

2. Section 2 Claims Generally

a. Defining the Dole Amendment: Gingles and the Totality of the Circumstances

Following the Dole Amendment, courts continued exploring what constituted a § 2 claim, soon establishing the *Gingles* test. In general, to establish a § 2 violation under the *Gingles* test, plaintiffs must establish three elements by a preponderance of the evidence:

73. See Boyd & Markman, *supra* note 63, at 1416–17.

74. Pub. L. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C.).

75. S. REP. NO. 97-417, at 28–29 (1982); see also Boyd & Markman, *supra* note 63, at 1416–17.

76. See Boyd & Markman, *supra* note 63, at 1416–17; see also *White v. Regester*, 412 U.S. 755, 766 (1973) (stating that “[t]he plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question”).

77. S. REP. NO. 97-417, at 28–29 (1982).

78. *Id.* at 29.

79. Boyd & Markman, *supra* note 63, at 1417.

80. *Id.* at 1418 (quoting S. REP. NO. 97-417, at 233).

81. See *id.*

- (1) that the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”;
- (2) that [the minority group] is “politically cohesive”; and
- (3) that the “white majority vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”⁸²

Additionally, the plaintiff must show that under the totality of the circumstances, it is clear that the “political processes leading to a nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a)” of the act.⁸³ Under the *Gingles* test, a successful § 2 claim targets gerrymandering if it “allege[s] . . . the manipulation of districting lines [to] fragment[] politically cohesive minority voters among several districts or [to] pack[] them into one district,” thereby diluting their votes.⁸⁴

Thornburg v. Gingles established the *Gingles* test.⁸⁵ In this case, the Supreme Court found that North Carolina’s state legislature violated § 2 by concentrating Black voters in single-member districts and fracturing the remaining Black voters across other districts.⁸⁶ The Court relied on the language of § 2 and the Senate factors, ultimately determining that although the factors were indicative of vote dilution, they were not wholly determinative, and a more substantial test was necessary for the finding that a “bloc voting majority . . . usually . . . defeat[s] candidates supported by a politically cohesive, geographically insular minority group.”⁸⁷ Thus, the *Gingles* test began to take shape.⁸⁸ In establishing the test’s first prong, the Court defined a “sufficiently large and geographically compact” minority group as a minority group that “possess[es] the potential to elect representatives.”⁸⁹ This means that if the minority group is spread across several districts, even if it is technically “geographically compact,” it would not satisfy the first *Gingles* factor because the lack of concentration would prevent the minority group from electing representatives of their own choice in each respective district.⁹⁰

In constructing the second and third prongs, the Court asked “whether [the] minority group members constitute[d] a politically cohesive unit” and “whether whites vote[d] sufficiently as a bloc usually to defeat the minority’s preferred candidates.”⁹¹ Applying these factors to the case at hand, the Court

82. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 371–72 (S.D.N.Y. 2004) (alterations in original) (quoting *Grove v. Emison*, 507 U.S. 25, 40 (1993)); *see also Thornburg v. Gingles*, 478 U.S. 30, 49 (1985).

83. 52 U.S.C. § 10301(b).

84. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 945 (N.D. Ala. 2022) (quoting *Shaw v. Hunt*, 517 U.S. 899, 914 (1996)), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

85. *See generally Gingles*, 478 U.S. at 31.

86. *See id.* at 38.

87. *See id.* at 49.

88. *See id.*

89. *Id.* at 50 n.17.

90. *See id.*

91. *Id.* at 56.

relied largely on the U.S. District Court for the Eastern District of North Carolina's findings, which established that in "the general elections, black support for black Democratic candidates ranged between 87% and 96%."⁹² Additionally, the lower court found that white voters supported Black-preferred candidates "between 28% and 49%" of the time.⁹³ These statistics satisfied the second and third prongs of the *Gingles* test, showing bloc voting and the defeat of minority-preferred candidates.⁹⁴ After finding that the plaintiffs satisfied the *Gingles* test's three prongs, the Court looked to the totality of the circumstances, relying on the Senate factors.⁹⁵ Here, the Court considered historical discrimination in North Carolina; the state's continued attempts to keep Black voters in geographically insular and politically cohesive districts; and the "too recent, too limited, and . . . too aberrational" success of a few, Black-preferred candidates.⁹⁶ These factors, among others, led to the Court's conclusion that the scheme "impair[ed] the ability of . . . black voters to participate equally in the political process and to elect candidates of their choice" in violation of § 2.⁹⁷ Thus, *Gingles* established the standard by which plaintiffs could challenge racially gerrymandered maps under § 2 and the Dole Amendment.⁹⁸ This test sets a high bar; plaintiffs must produce evidence satisfying each of the three prongs, as well as the totality of the circumstances standard.⁹⁹

*b. The Gingles Standard in Current
Election Law Jurisprudence*

More recent § 2 claims also applied the *Gingles* test.¹⁰⁰ Most notably, in *Allen*, the Court found all three *Gingles* factors were met, granting the plaintiffs relief under § 2.¹⁰¹ In evaluating the first prong, the Court found that the plaintiffs' submission of eleven possible maps showed that Black voters could be a majority in more than one district.¹⁰² Under the second prong, the Court found that because Black voters largely supported the same candidates with a 92.3 percent vote, they constituted a voting bloc.¹⁰³ As to

92. *Id.* at 59.

93. *Id.*

94. *See id.*

95. *See id.* at 79–80.

96. *Id.* at 80.

97. *Id.*

98. *See id.*

99. *Id.* at 79–80. Justice Kagan noted this high evidentiary standard in her dissent in *Merrill*, citing the "extensive evidentiary record" necessary for the lower court to find the *Gingles* test satisfied. *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

100. *See generally* *Singleton v. Merrill*, 582 F. Supp. 3d. 924 (N.D. Ala. 2022), *aff'd*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger* 587 F. Supp. 3d 1222, 1240 (N.D. Ga. 2022).

101. *See* *Allen v. Milligan*, 143 S. Ct. 1487, 1517 (2023).

102. *See id.* at 1504–05.

103. *Id.* at 1505.

the third prong, the Court found that white voters also voted as a bloc, regularly defeating Black-preferred candidates.¹⁰⁴ Finally, the Court stated that the totality of the circumstances standard was also met based on an “undeniable and well documented” history of voter discrimination in Alabama.¹⁰⁵ As a result, Alabama’s HB1 map violated § 2.¹⁰⁶ Here, the Court reaffirmed its own precedent of using the *Gingles* test and the totality of the circumstances standard to evaluate § 2 claims.¹⁰⁷

But not every § 2 claim is successful under the *Gingles* test.¹⁰⁸ In *Duncan v. Louisiana*,¹⁰⁹ the U.S. District Court for the Eastern District of Louisiana found that the plaintiff did not have a valid § 2 claim.¹¹⁰ In this case, the plaintiff claimed that a Louisiana state law requiring particular forms of identification or a signed affidavit denied him his right to vote and violated § 2.¹¹¹ However, the court found that one incident did not “demonstrate the discriminatory effect” necessary for a § 2 claim.¹¹² Because a singular incident cannot fulfill any of the three *Gingles* prongs, the plaintiff could not have a successful § 2 claim.¹¹³ Here, the plaintiff failed to produce any evidence of minority voters facing a discriminatory effect because of the identification requirement.¹¹⁴ As a result, under *Gingles*, the court could not merely rule on the plaintiff’s “conclusory allegations of racial discrimination with no factual foundation.”¹¹⁵ *Duncan* reveals that not every § 2 claim succeeds due to the extensive evidence that courts require. The Supreme Court and district courts rigorously apply the *Gingles* test, along with the totality of the circumstances standard, in accordance with the amended language of § 2.¹¹⁶

104. *See id.* (finding that white voters “support Black-preferred candidates with only 15.4% of the vote”).

105. *Id.* at 1506 (quoting *Singleton v. Merrill* 582 F. Supp. 3d 924, 1020, 1023 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023)) (describing Alabama’s history of racial discrimination).

106. *See id.* at 1517.

107. *See id.*

108. *See Duncan v. Louisiana*, No. 15-5486, 2016 U.S. Dist. LEXIS 49705, at *14–15 (E.D. La. Apr. 13, 2016); *see also DeBaca v. County of San Diego*, 794 F. Supp. 990, 1000–01 (S.D. Cal. 1992) (holding that the plaintiffs’ anecdotal evidence was insufficient and did not satisfy the *Gingles* test, specifically the second and third prongs).

109. No. 15-5486, 2016 U.S. Dist. LEXIS 49705, at *14–15 (E.D. La. Apr. 13, 2016).

110. *See id.* at *13–15.

111. *See id.* at *13–14.

112. *Id.* at *14–16.

113. *Id.* at *14.

114. *See id.* at *14–15.

115. *Id.* at *15.

116. *See id.* at *15–16; *see also Allen v. Milligan*, 143 S. Ct. 1487, 1506 (2023); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301).

3. A Post-*Shelby* Reality: Section 2 Is the Last Man Standing

Decades after *Gingles*, subsequent developments further heightened the importance of § 2 claims. After *Shelby County v. Holder*¹¹⁷ rendered § 4 and § 5 toothless, § 2 and § 3 provided an avenue for plaintiffs to receive injunctive relief before elections.¹¹⁸ In *Shelby County*, the Court addressed the § 5 preclearance requirement.¹¹⁹ In this case, Shelby County (a district subject to § 4 and § 5) asserted that § 4(b) and § 5 were unconstitutional.¹²⁰ Section 4(b) required that state and local jurisdictions “meet certain criteria” before making any changes to their voting laws.¹²¹ This restriction applied mainly to states with a history of literacy tests or other devices acting as a barriers to voting access.¹²² In *Shelby County*, Chief Justice Roberts found the pressure that § 4(b) and § 5 imposed on the precarious balance of federalism too high.¹²³ Furthermore, he raised equity concerns, as one state would have to wait for preclearance to change election laws whereas another state could make changes immediately.¹²⁴ In light of § 4(b) and § 5’s conflict with state sovereignty, the Court held that Congress could not rely solely on a “formula based on 40-year-old facts having no logical relation to the present day” and found § 4(b) unconstitutional.¹²⁵ The Court declined to rule explicitly on § 5, but because § 5 was dependent on § 4(b), § 5 became unenforceable following *Shelby County*.¹²⁶ *Shelby County* removed litigants’ ability to preempt discriminatory voting laws through preclearance, and, as a result, § 2 quickly became the primary vehicle for litigants to do so.¹²⁷ Section 2 litigation remains a method for addressing voting

117. 570 U.S. 529 (2013).

118. See Paul M. Wiley, Note, *Shelby and Section 3: Pulling the Voting Rights Act’s Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2127–29 (2014). Some, like Wiley, assert that § 3 is an option for plaintiffs to receive relief under the Voting Rights Act. *Id.* However, exploring that option is not within the scope of this Note.

119. See *id.* See generally *Shelby County*, 570 U.S. at 540.

120. See *Shelby County*, 570 U.S. at 556–57.

121. Wiley, *supra* note 118, at 2120.

122. See 52 U.S.C. § 10303(b) (establishing that “a state [in] which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and . . . less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964” would be subject to preclearance for any voting law changes), *invalidated by Shelby County v. Holder*, 570 U.S. 529 (2013).

123. See *Shelby County*, 570 U.S. at 540.

124. See *id.* at 544–45.

125. *Id.* at 554. The preclearance formula “assumed that low registration and voting statistics in jurisdictions that required literacy tests and devices resulted from [the test’s] discriminatory application” in § 4 and then, through § 5, required any voting procedure changes be submitted to the U.S. Department of Justice for review. COLEMAN, *supra* note 25, at 15.

126. See *Shelby County*, 570 U.S. at 557; Grannum, *supra* note 23, at 104.

127. See *Shelby County*, 570 U.S. at 537 (“Section 2 is permanent, applies nationwide, and is not at issue in this case.”).

discrimination, but it is complicated by the Court's reframing of the *Purcell* doctrine.¹²⁸

Beyond *Shelby* and the Court's recent application of *Purcell*, the assumption that § 2 provides a private right of action has recently come under scrutiny from the U.S. Court of Appeals for the Eighth Circuit.¹²⁹ In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*,¹³⁰ the Eighth Circuit held that private plaintiffs did not have a right to sue under § 2 of the Voting Rights Act.¹³¹ Here, the court dismissed the legislative history surrounding the Dole Amendment and the Court's dicta in *Mobile*, alluding to private plaintiffs' right of action under § 2.¹³² Chief Judge Lavenski R. Smith dissented, quoting the Blackstonian principle that "where there is a legal right, there is also a legal remedy" and citing numerous instances in which courts across the country had provided private plaintiffs remedies under § 2.¹³³ This recent decision shows the increasing importance of preserving § 2 and the full scope of its protections.¹³⁴

B. The Purcell Doctrine: Preventing Confusion at the Polls

Generally, the *Purcell* doctrine posits "the idea that courts should think twice before changing election rules close to an election."¹³⁵ The *Purcell* doctrine seeks to prevent voter confusion and preserve state administration of elections.¹³⁶ Under this doctrine, courts hesitate to interfere too close to elections and abstain from issuing orders around one month before an election when a change would cause voter confusion resulting in voter disenfranchisement.¹³⁷ Part I.B gives a general outline of the doctrine, describes its development, and defines voter confusion. Additionally, Part

128. See Grannum, *supra* note 23, at 111–12.

129. See generally *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). It is important to acknowledge this recent development. A full discussion of the argument's potential success before the Supreme Court is not within the scope of this Note.

130. 86 F.4th 1204 (8th Cir. 2023).

131. Compare *id.* at 1216–17, with *Turtle Mt. Band of Chippewa Indians v. Howe*, No. 22-CV-22, 2023 U.S. Dist. LEXIS 206894 at *53–54 (D.N.D. Nov. 17, 2023) (holding that the plaintiffs, including the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Tribe, showed under § 2 that North Dakota's redistricting map violated the Voting Rights Act), and *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1032 (N.D. Ala. 2022) ("Holding that Section Two does not provide a private right of action would work a major upheaval in the law, and we are not prepared to step down that road today."), *aff'd*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

132. See *Ark. State Conf. NAACP*, 86 F.4th at 1211–17; see also Jacqueline Thomsen & Suzanne Monyak, *Voting Rights Ruling Follows US Supreme Court 'Bat Signal'*, BLOOMBERG L. (Nov. 21, 2023, 12:47 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/us-law-week/BNA%200000018b-f2cb-dd29-adff-fadfa0ff0001> [https://perma.cc/NY7S-EZM7].

133. See *Ark. State Conf. NAACP*, 86 F.4th at 1220 (Smith, C.J., dissenting) (quoting Daniel P. Tokaji, *The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 126 (2010)).

134. *Id.* at 1218–19.

135. See Dodsworth, *supra* note 38, at 1082.

136. See *id.*

137. See *id.* at 1083.

I.B outlines the doctrine's evolution through the COVID-19 pandemic election litigation.

1. The Doctrine and the Case that Started It All

The *Purcell* doctrine aims to protect states' "compelling interest" in maintaining voter enfranchisement and the "integrity" of their electoral processes.¹³⁸ The doctrine states that courts cannot hand down orders impacting election laws too close to the time of an election.¹³⁹ Here, the doctrine's concern is that court orders issued at the last minute cause voter confusion.¹⁴⁰ This confusion, in turn, harms the valid state interest of election integrity and voter enfranchisement.¹⁴¹ Furthermore, the risk of confusion happening increases the closer an election is to occurring.¹⁴² As a result, in applying *Purcell*, courts balance the state's interests with voters' access, keeping the concern of voter enfranchisement front and center.¹⁴³

The Supreme Court established the *Purcell* doctrine in *Purcell v. Gonzalez*, a § 2 case originating in Arizona.¹⁴⁴ In this case, the Court found that an order from the U.S. Court of Appeals for the Ninth Circuit enjoining Arizona from requiring proof of citizenship for voter registration occurred too close to the general election.¹⁴⁵ Two years prior to *Purcell*, Arizona placed Proposition 200 before its voters.¹⁴⁶ Proposition 200 was a law that "sought to combat voter fraud" by mandating that voters provide proof of citizenship when they register and provide identification on election day.¹⁴⁷ Voters approved the measure, and Arizona implemented the procedures.¹⁴⁸ The district court denied the plaintiff's initial request for injunctive relief on September 11, 2006, but the Ninth Circuit overturned this decision, issuing an order enjoining the enforcement of the law.¹⁴⁹ The court handed down the order on October 5th, and the general election was set for November 7th.¹⁵⁰ In reviewing this timeline, the Supreme Court focused primarily on the critical balance between Arizona's interest in preserving its elections' integrity and the voter's interest in exercising their right to vote.¹⁵¹ The Court emphasized that changes in election procedures close to the time of an

138. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

139. *See id.*

140. *See id.*

141. *See id.*; *see also* *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) ("Unclear rules threaten to undermine [the election] system. They sow confusion and ultimately dampen confidence in the integrity and fairness of elections. To prevent confusion, we have thus repeatedly . . . blocked rule changes made by courts close to an election.").

142. *See Purcell*, 549 U.S. at 4–5.

143. *See id.*

144. *See id.*

145. *See id.* at 2–3.

146. *See id.* at 2.

147. *See id.*

148. *See id.*

149. *See id.* at 3.

150. *See id.*

151. *Id.* at 4.

election impact confidence in the electoral process.¹⁵² There, the concern was that “voters who fear[ed] their legitimate votes [would] be outweighed by fraudulent ones [would] feel disenfranchised.”¹⁵³ In establishing this doctrine, the Court placed its concerns about voter confusion and enfranchisement at the forefront of its decision.¹⁵⁴

Specifically in *Purcell*, with the election approximately one month away, the Court asserted that “the imminence of the election” warranted the “election . . . proceed[ing] without an injunction suspending the voter identification rules” at the last minute.¹⁵⁵ Although it was difficult to perfectly predict the exact effects of the voter identification requirement, it was not difficult to draw the conclusion that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”¹⁵⁶ Ultimately, the time frame of barely a month was too narrow to avoid voter confusion, and the Court reversed the Ninth Circuit’s injunction.¹⁵⁷

In *Purcell*, the Court reached its conclusion by considering not only the timeline of the change but also its predicted impact on voter behavior.¹⁵⁸ Although the Court did not outline a specific timeline for applying *Purcell*, it did outline the main concern of conflicting court orders confusing voters.¹⁵⁹ Similar to the Voting Rights Act, the *Purcell* doctrine seeks to ensure that voters do not face discrimination or disenfranchisement at the polls.¹⁶⁰

2. Voter Confusion: Defined in the Early Years of *Purcell*

In the years following *Purcell* and prior to *Merrill*, the Court centered its analysis of *Purcell* on reasonable voter behavior and confusion. Although *Purcell* itself vaguely defined the doctrine, the Court began clarifying the doctrine further, focusing on the timeline for upcoming elections and the potential for voter confusion and disenfranchisement.¹⁶¹

The references to voter confusion and voter enfranchisement in *Purcell* are largely abstract concepts, so the Court later outlined the contours of voter

152. *See id.*

153. *Id.* at 2.

154. *See id.* at 4.

155. *See id.* at 6.

156. *See id.* at 4–5.

157. *See id.*

158. *See id.*

159. *See id.* In his concurring opinion, Justice John Paul Stevens revealed the difficulty in pinpointing a specific timeline, related primarily to the Court’s ability to conduct the factfinding necessary to a claim made under the Voting Rights Act. *See id.* at 6 (Stevens, J., concurring).

160. *See id.* at 1; *see also* Dodsworth, *supra* note 38, at 1083 (“The *Purcell* Principle tells courts to be careful when considering whether to grant these injunctions because late rule changes might confuse voters and keep them from voting.”).

161. *See* Houston, *supra* note 15, at 777.

confusion based on reasonable voter behavior.¹⁶² For example, in their dissent in *Brakebill v. Jaeger*,¹⁶³ Justice Ruth Bader Ginsburg and Justice Kagan advocated for the use of the *Purcell* doctrine.¹⁶⁴ In this case, the U.S. District Court of North Dakota issued an injunction preventing North Dakota from enforcing a law that required voters to have identification listing their current residential address.¹⁶⁵ On appeal, the Eighth Circuit issued a stay, citing concerns that not requiring voters to have identification confirming their current residential address would result in vote dilution and “wrong-precinct” voting.¹⁶⁶ Ultimately, the Supreme Court denied the plaintiff’s application to vacate the stay, but, in their dissent, Justices Ginsburg and Kagan asserted that the differing court orders from the lower courts would lead to confusion with “reasonable voters . . . assum[ing] that the IDs allowing them to vote in the primary election would remain valid in the general election.”¹⁶⁷ Applying the *Purcell* doctrine, they considered the impact that a last-minute change in voting procedure would have on the reasonable voter’s understanding of voting requirements.¹⁶⁸ *Brakebill* demonstrates that prior to *Merrill*, the Court applied the *Purcell* doctrine based on reasonable voter behavior, not bureaucratic inconvenience.¹⁶⁹ This consideration would change in less than ten years.

Defining voter confusion within the context of reasonable voter behavior is essential to the *Purcell* doctrine. Last-minute changes to voting procedures, such as to voter ID requirements or polling places, can confuse voters and lead to voter disenfranchisement.¹⁷⁰ One example of this effect comes from Boise, Idaho, where the Ada County Elections office changed five precinct locations approximately a week before the election.¹⁷¹ One resident stated that “the problem [was] not the change in location . . . but the short notice of the change.”¹⁷² A state senatorial candidate running in the election also raised concerns about the last-minute changes and the “fear this

162. See generally *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018) (mem.).

163. 139 S. Ct. 10 (2018) (mem.).

164. See *id.* at 10 (Ginsburg, J., dissenting).

165. See *id.*

166. *Brakebill v. Jaeger*, 905 F.3d 553, 559–60 (8th Cir. 2018).

167. See *Brakebill*, 139 S. Ct. at 10 (Ginsburg, J., dissenting).

168. See *id.*

169. See *id.*; Dodsworth, *supra* note 38, at 1099 (describing Justice Kavanaugh’s diversion from the standard *Purcell* doctrine interpretation, explaining that “he interprets the principle as a bright-line bar to judicial interference”). Furthermore, the U.S. District Court for the Southern District of New York distinguished changes in procedure “impact[ing] only the conduct of election officials” as different from the voter confusion that *Purcell* is concerned with because it would have “no effect on a voter’s state of mind” and “[did] not alter any ‘voter-facing’ aspects of the upcoming elections.” Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 61 (S.D.N.Y. 2022).

170. See Dodsworth, *supra* note 38, at 1083 (“[L]ate changes could of course confuse voters and election officials, leading to people not knowing how, when, or where to vote.”).

171. See Morgan Boydston, *Many Voters Frustrated over Last-Minute Change in Polling Place*, KTVB7 (Nov. 5, 2016, 10:18 PM), <https://www.ktvb.com/article/news/politics/voter-guide/many-voters-frustrated-over-last-minute-change-in-polling-place/277-348702087> [https://perma.cc/T9Q3-9BYA].

172. *Id.*

change-up [would] discourage or prevent some people from exercising their right to vote.”¹⁷³ Although these practical concerns mentioned various bureaucratic inconveniences, such as relocating polling places and notifying voters of changes, the concerns still centered on the reasonable voter and their understanding of where and when they could vote.¹⁷⁴

These concerns remained prevalent during the height of the COVID-19 pandemic.¹⁷⁵ In the midst of conflicting court orders, many election administrators “scrambl[ed] to keep up with a crush of ongoing litigation winding its way through the courts, with some saying they feel like ‘yo-yos’ caught in the middle of politically fraught legal battles over ballot deadlines and other voting rules.”¹⁷⁶ An election official in Michigan described the 2020 election jurisprudence as confusing because “[w]e get a directive, then a judge says ‘no.’ We get another directive, and the appeals court says ‘no.’”¹⁷⁷ Finally, yet another Michigan election official elaborated on the dangerous effects of this confusion: a “higher than normal” number of questions coming from voters, resulting in election clerks having to “play the additional role [of] ‘correct[ing] misinterpretations and misconceptions voters have.’”¹⁷⁸ As demonstrated by these anecdotes, even with the mention of bureaucratic inconvenience, election officials remained focused on the effects any last-minute changes would have on the reasonable voter.¹⁷⁹ This level of voter confusion leads to voter disenfranchisement, precisely what the *Purcell* doctrine seeks to avoid.¹⁸⁰

3. The *Purcell* Doctrine and the Pandemic: An Evolution

The *Purcell* doctrine continued evolving over the course of the COVID-19 pandemic.¹⁸¹ Throughout this evolution, the Court remained concerned with voter enfranchisement and continued applying *Purcell* mostly in instances of changes occurring approximately one month from an election.¹⁸² One of the most prominent instances of these changes was in *Republican National Committee v. Democratic National Committee*.¹⁸³ In *Republican National Committee*, the Court found that, under the *Purcell* doctrine, the U.S. District Court for the Western District of Wisconsin improperly ordered an extension

173. *Id.*

174. *See id.*

175. *See* Lucien Bruggeman, ‘Like a Yo-Yo’: Election Officials Grapple with Flood of Confusing Last-Minute Rule Changes, ABCNEWS (Oct. 29, 2020, 7:56 AM), <https://abcnews.go.com/Politics/yo-yo-election-officials-grapple-flood-confusing-minute/story> [https://perma.cc/2476-ATHH].

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.*

180. *See* Dodsworth, *supra* note 38, at 1083. *See generally* *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

181. *See* Houston, *supra* note 15, at 780–81; Dodsworth, *supra* note 38, at 1096–97.

182. *See* Houston, *supra* note 15, at 801 tbl.4.

183. 140 S. Ct. 1205 (2020).

for Wisconsin voters using mail-in ballots.¹⁸⁴ This order allowed Wisconsin to count ballots submitted after the deadline as long as the board received the ballots by election day.¹⁸⁵ At trial, the district court ruled that because COVID-19 made in-person voting unsafe and the demand for mail-in ballots increased, an extension for mail-in ballots was necessary to ensure that each voter received an opportunity to vote.¹⁸⁶ The U.S. Court of Appeals for the Seventh Circuit allowed this order to stand.¹⁸⁷ But, on appeal, the Supreme Court found that this change occurred too close to the election, as the order came down five days before the scheduled election.¹⁸⁸ Furthermore, the Court raised concerns about voter confusion, citing the “unusual nature” of the order.¹⁸⁹ Here, the Court found the risk of voters being unable to vote virtually nonexistent, as absentee ballots are usually received by the date of the election.¹⁹⁰ Because the Court was not concerned with voter access and found the window of five days too narrow to “avoid this kind of judicially created confusion,” the Court applied the *Purcell* doctrine narrowly and struck down the extension.¹⁹¹

Even in this recent case, Justice Ginsburg raised concerns about the use of the *Purcell* doctrine preventing voter access more than it prevented confusion.¹⁹² She cited specific issues with “heavily burdened election officials [having] . . . a severe backlog of ballots requested but not promptly mailed to voters.”¹⁹³ Here, Justice Ginsburg, although concerned with a degree of bureaucratic inconvenience, was more concerned with voter access. Additionally, she cautioned the Court to be wary of intervening even later than the lower court, asserting that “[i]f proximity to the election counseled hesitation when the District Court acted several days ago, this Court’s intervention today—even closer to the election—is all the more inappropriate.”¹⁹⁴ Justice Ginsburg’s dissent demonstrates that when the Court applies the *Purcell* doctrine narrowly, there should still be concern about preserving the goal of the *Purcell* doctrine: voter enfranchisement.¹⁹⁵

This trend of applying the *Purcell* doctrine narrowly continued throughout the COVID-19 pandemic.¹⁹⁶ A few months later, in *Andino v. Middleton*,¹⁹⁷

184. *See id.* at 1206.

185. *See id.* at 1208.

186. *See id.* at 1209 (Ginsburg, J., dissenting).

187. *See id.* at 1209.

188. *See id.* at 1206–07 (majority opinion).

189. *Id.* at 1207.

190. *Id.* The Court additionally raised that the mail-in deadline for sending ballots had already been moved from April 4th to April 7th, which had further guaranteed voting access. *Id.* at 1208.

191. *Id.* at 1207.

192. *See id.* at 1208–11 (Ginsburg, J., dissenting).

193. *Id.* at 1209.

194. *Id.* at 1210–11.

195. *See id.*

196. *See generally* *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Moore v. Circosta*, 494 F. Supp. 3d 289 (M.D.N.C. 2020); *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354 (M.D. Pa. 2020).

197. 141 S. Ct. 9 (2020).

the Supreme Court held that the U.S. District Court of South Carolina's injunction, granted approximately a month and a half before the election, could not be upheld, as it occurred too close to the election.¹⁹⁸ In this case, the district court issued an injunction on September 18, which the U.S. Court of Appeals for the Fourth Circuit affirmed on September 30.¹⁹⁹ The injunction prevented South Carolina's legislature from enforcing a witness requirement on absentee ballots in the November election.²⁰⁰ On appeal, the Supreme Court found the time frame of a little over a month too close to the election for "'second guessing' by an 'unelected federal judiciary'" to occur.²⁰¹ In *Andino*, the Court continued its trend of applying *Purcell* narrowly, even in unprecedented times.²⁰²

This narrow interpretation of *Purcell* appeared in lower court rulings as well.²⁰³ In *Moore v. Circosta*,²⁰⁴ the U.S. District Court for the Middle District of North Carolina held that the changing of a ballot deadline less than a month before election day would cause "judicially created confusion."²⁰⁵ In this case, two weeks after North Carolina sent out ballots, it sent out a revised memorandum including changes related to ballot deficiencies and deadlines for absentee ballots.²⁰⁶ Here, the district court found that because the changes occurred less than a month before the election, they would incite precisely the type of confusion among voters that the *Purcell* doctrine seeks to avoid.²⁰⁷ Following the Supreme Court's lead on interpreting the *Purcell* doctrine narrowly, not every appeal under *Purcell*'s jurisprudence was successful.

In *Common Cause Rhode Island v. Gorbea*,²⁰⁸ the U.S. Court of Appeals for the First Circuit distinguished the U.S. District Court of Rhode Island's order enjoining the enforcement of a witness requirement for absentee ballots two months before the election from the voter identification procedures

198. *See id.* at 10.

199. *See id.*; Middleton v. Andino, 990 F.3d 768, 768 (4th Cir. 2020).

200. *See Andino*, 141 S. Ct. at 10.

201. *See id.* (quoting *S. Bay United Pentecostal Church v. Newsome*, 140 S. Ct. 1613, 1614 (2020)).

202. *See id.*

203. *See* Am. Council of the Blind of Ind. v. Ind. Election Comm'n., No. 20-CV-03118, 2022 U.S. Dist. LEXIS 41558, at *20–21 (S.D. Ind. Mar. 9, 2022) (holding that a change in election procedure allowing voters with print disabilities to use absentee ballots is a "feasible change to implement . . . and is unlikely to cause voter confusion that would cause voters to be discouraged from voting"); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020) (holding that changing the rules significantly after an election is in violation of the *Purcell* doctrine), *aff'd*, 981 F.3d 1307 (11th Cir. 2020); *see also* *Republican Party of Pa. v. Cort*, 218 F. Supp. 3d 396, 405 (E.D. Pa. 2016) (holding that a plaintiff's request for an injunction five days prior to the election was improper due to the potential to disrupt "an impending election").

204. 494 F. Supp. 3d 289 (M.D.N.C. 2020).

205. *See id.* at 322 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)).

206. *See id.* at 300.

207. *See id.* at 322.

208. 970 F.3d 11 (1st Cir. 2020).

struck down in *Purcell*.²⁰⁹ In this case, the circuit court held that because of the “unusual . . . characteristics of [the] case, the *Purcell* concerns that would normally support a stay [were] largely inapplicable.”²¹⁰ The court found the seemingly nonexistent risk of voter confusion persuasive enough to not invoke the *Purcell* doctrine.²¹¹ As demonstrated in these cases, when applying the *Purcell* doctrine or declining to do so, lower courts, following the Supreme Court, remained concerned with the risk of voter enfranchisement and confusion.²¹²

Demonstrated by the above cases, recent enforcement of the *Purcell* doctrine focused on instances in which courts have issued orders approximately a month prior to election day or the start of an election.²¹³ Furthermore, even in such narrow instances, Justice Ginsburg raised concerns about overly broad enforcement of the *Purcell* doctrine, leading to widespread voter disenfranchisement and a distortion of the doctrine itself.²¹⁴ This difficult balance becomes even more trying when courts apply the *Purcell* doctrine in conjunction with § 2 claims.

II. ALABAMA’S SEVEN DISTRICTS AND ONE MAP

The COVID-19 pandemic was not the last time that the *Purcell* doctrine raised its head, particularly in relation to § 2 claims. In September of 2023, the U.S. District Court for the Northern District of Alabama found that the state’s newly drawn congressional map, HB1, violated § 2.²¹⁵ HB1 had already been used in the 2022 congressional election and was at the center of two years of contentious election litigation.²¹⁶ Part II.A details the contested map and the lower court’s decision in early 2022. Part II.B explains the Court’s ruling in *Merrill* and its effect on the 2022 congressional election. Part II.C explains how *Allen* revealed the long-term implications of the decision in *Merrill*. Finally, Part II.D explains the immediate effect that the Court’s findings in *Merrill* had on lower court rulings.

209. *See id.* at 13.

210. *Id.* at 17.

211. *See id.*

212. *See id.*; *Moore v. Circosta*, 494 F. Supp. 3d 289, 322 (M.D.N.C. 2020).

213. *See generally* *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020); *Andino v. Middleton* 141 S. Ct. 9 (2020); *Moore*, 494 F. Supp. 3d at 289; *see also* *Covington v. North Carolina*, No. 15-CV-399, 2018 U.S. Dist. LEXIS 12945, at *21–22 (M.D.N.C. Jan. 26, 2018) (holding that “unlike *Purcell*, where the election was ‘weeks’ away, this is not a ‘voting case decided on the eve of an election’ where the balance of the equities favors maintaining the status quo” (citation omitted) (first quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); and then quoting *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014)).

214. *See Republican Nat’l Comm.*, 140 S. Ct. at 1210–11 (Ginsburg, J., dissenting).

215. *See generally* *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023); Summer Concepcion, *Court Strikes Down Alabama Congressional Map for Diluting the Power of Black Voters*, NBC News (Sept. 5, 2023, 10:38 PM), <https://www.nbcnews.com/politics/elections/judges-strike-alabama-congressional-map-diluting-power-black-voters-rcna103393> [<https://perma.cc/5J2N-4VFN>].

216. *See generally* *Singleton*, 582 F. Supp. 3d 924.

A. HB1: District 7 and the Contested Map

Prior to the 2022 congressional election, Alabama’s majority-Republican legislature implemented HB1—a decision that resulted in months of litigation.²¹⁷ Only one of the seven districts (“District 7”) had a majority of Black voters, despite 27 percent of Alabama residents being Black.²¹⁸ Additionally, the percentage of Black voters in District 7 decreased by 4 percent, from 55 percent to 51 percent, despite the general population of Alabama growing by 5.1 percent.²¹⁹ In part due to these discrepancies, ten months prior to the general election in *Singleton v. Merrill*,²²⁰ a three-judge panel for the U.S. District Court for the Northern District of Alabama issued an injunction preventing the use of HB1 under § 2.²²¹ The district court applied the *Gingles* test and the totality of the circumstances standard.²²² In evaluating the first *Gingles* factor, “numerosity and reasonable compactness,” the court considered expert testimony, including Professor Moon Duchin’s²²³ explanation that HB1 “packs [the] Black population into District 7 at an elevated level of over 55% BVAP [Black voting-age population], then cracks [the remaining] Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of [the remaining districts] has more than about 30% BVAP.”²²⁴ Here, Professor Duchin’s analysis showed that, on its own, the minority voter population was sufficiently large and compact enough to create its own majority-minority district, in addition to District 7.²²⁵ The court also considered the four alternative plans that Professor Duchin presented, all of which had two majority-minority districts, without disrupting the compactness of HB1.²²⁶ These maps revealed the possibility of creating more than one majority-minority district under Alabama’s redistricting requirements, thus satisfying the first *Gingles* factor.²²⁷

In evaluating the second and third *Gingles* factors, which require a showing that Black and white voters create politically cohesive voting blocs and that the white majority defeats the minority’s candidates, the court

217. See Wang, *supra* note 21.

218. See *Merrill v. Milligan*, 142 S. Ct. 879, 884 (2022) (Kagan, J., dissenting), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

219. See Emily Cochrane, *Alabama Lawmakers Decline to Create New Majority-Black Congressional District*, N.Y. TIMES (July 21, 2023), <https://www.nytimes.com/2023/07/21/us/politics/alabama-congress-district-map.html> [<https://perma.cc/7ZDR-UK38>].

220. 582 F. Supp. 3d 924 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

221. See *id.* at 1034.

222. See *id.* at 1034; *Merrill*, 142 S. Ct. at 879–80.

223. Professor Duchin has a “mathematics degree from Harvard . . . and two graduate mathematics degrees from the University of Chicago” and “runs a redistricting research lab . . . [that] uses her mathematical specialty, metric geometry, to understand redistricting” at Tufts University, where she is a professor of mathematics. *Singleton*, 582 F. Supp. 3d at 960.

224. *Id.* at 960–61 (quoting Professor Moon Duchin’s expert testimony).

225. See *id.*

226. *Id.* at 965–66.

227. See *id.*

evaluated Professor Baodong Liu's²²⁸ testimony.²²⁹ Professor Liu "opined that 'in 13 out of . . . 13 elections (100 %) . . . Black voters expressed a preference for Black candidates.'"²³⁰ Additionally, Professor Liu testified that white voters (the majority) did not share this preference.²³¹ As a result of these statistics, bloc voting, and Professor Liu's conclusion that other plans provided more majority-minority districts in comparison with HB1, the court found that the state of racially polarized voting in Alabama satisfied the final two *Gingles* factors.²³² Thus, in *Singleton*, the court held that the plaintiffs had met all three prongs of the *Gingles* test.²³³

Finally, the totality of the circumstances standard required the court to consider the Senate factors, including Alabama's history with redistricting, discrimination at-large, and the proportion of districts in which Black voters were the majority.²³⁴ Here, the court cited instances of the United States Attorney General denying Alabama preclearance due to the "discriminatory effect" of proposed voting procedures and other instances of violence against Black voters, including Bloody Sunday.²³⁵ After considering these factors and the above expert testimony, the court found that the map violated § 2 under the *Gingles* factors and the totality of the circumstances standard.²³⁶ The court issued an order requiring Alabama to redraw the map and enjoined the state from using HB1 because the "irreparable harm to the . . . plaintiffs' voting rights" outweighed "the administrative burden of drawing and implementing a new map."²³⁷ This statement echoed the core sentiment of the Voting Rights Act and *Purcell*: placing voter enfranchisement above all else.

B. *Nine Months and One Critical Election: How Merrill Impacted the Narrow 2022 Congressional Elections*

Shortly after the court's ruling in *Singleton*, the plaintiffs' victory was cut short. In *Merrill*, the Supreme Court granted Alabama a stay of the injunction, providing no opinion and no further analysis as to the motivation behind its decision.²³⁸ However, Justice Kavanaugh, in concurrence, raised concerns related to the *Purcell* doctrine.²³⁹ He posited that the injunction

228. "Dr. Liu is a tenured professor of political science at the University of Utah" and studies the impact of election systems on minority voters' participation in the electoral process. *Id.* at 966.

229. *Id.* at 967–69.

230. *Id.* at 967 (quoting Professor Baodong Liu's expert testimony).

231. *Id.*

232. *See id.* at 969.

233. *See id.* at 969–70.

234. *See id.*

235. *Id.* at 971–72.

236. *See id.* at 1026.

237. *Id.* at 1027.

238. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

239. *See id.* at 880 (Kavanaugh, J., concurring); *see also* Amy Howe, *In 5-4 Vote, Justices Reinstate Alabama Voting Map Despite Lower Court's Ruling that It Dilutes Black Votes*, SCOTUSBLOG (Feb. 7, 2022, 8:43 PM), <https://www.scotusblog.com/2022/02/in-5-4-vote->

would occur too close to the time of the election and would likely confuse voters.²⁴⁰ Justice Kavanaugh expressed doubt that the nine months between the date of the lower court’s decision in *Singleton* and the general election was sufficient time to communicate with election officials and voters about the changes resulting from redistricting.²⁴¹ He discussed the time and preparation that it takes for local officials to execute an election.²⁴² He further emphasized that any judicial order mandating redistricting seven weeks before the primary election and nine months before the general election was asking for “heroic efforts” from local officials, unlikely to prevent confusion.²⁴³ To resolve this issue, he proposed a new test under *Purcell* requiring that a plaintiff establish the following factors to merit relief under § 2:

- (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes . . . are at least feasible before the election without significant cost, confusion, or hardship.²⁴⁴

In *Merrill*, Justice Kavanaugh asserted that even under this new test, the plaintiffs failed to show “clearcut” favor and feasibility of the changes and that the map should therefore be allowed to stand.²⁴⁵

Justice Kavanaugh’s concerns of bureaucratic inconvenience echoed those he previously raised in *Democratic National Committee v. Wisconsin State Legislature*.²⁴⁶ There, Justice Kavanaugh’s concern about voter confusion centered on an understanding that in conducting an election, “thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers’ policy choices . . . [a]nd at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots.”²⁴⁷ In both *Merrill* and *Democratic*

justices-reinstate-alabama-voting-map-despite-lower-courts-ruling-that-it-dilutes-black-votes/ [https://perma.cc/77FY-ENVH].

240. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

241. *See id.*

242. *Id.*

243. *Id.* It is important to note here that Justice Kavanaugh’s reference to the seven-week time period is taking into account the beginning of absentee voting. *See* ELEC. DIV., OFF. OF THE SEC’Y OF STATE, VOTER GUIDE 2022, at 13 (2022), [https://www.sos.alabama.gov/sites/default/files/election-2022/2022%20Voter%20Guide%20\(1\).pdf](https://www.sos.alabama.gov/sites/default/files/election-2022/2022%20Voter%20Guide%20(1).pdf) [https://perma.cc/3T84-BXBX]. The primary opened for absentee ballot voting on March 30, 2022 but the primary date for in-person voting was May 24, 2022. *See id.*; *see also* Dodsworth, *supra* note 38, at 1102–03 (discussing how Justice Kavanaugh’s concurrence “expressed the novel view that *Purcell* modifies the preliminary injunction factors in a way that makes it harder for plaintiffs to obtain injunctions” and “emphasized that *Purcell* kicks in sooner in gerrymandering cases”).

244. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

245. *Id.*

246. 141 S. Ct. 28 (2020).

247. *Id.* at 31. Justice Kavanaugh also cited these concerns about voter confusion in *Republican National Committee*, highlighting not only the “unusual nature” of the initial order to extend the deadline for mail-in ballot acceptance but also further emphasizing the risk of

National Committee, Justice Kavanaugh attempted to strike *Purcell*'s balance between preventing voter confusion and ensuring voter enfranchisement.²⁴⁸ But the result disfavored federal courts interfering with state election procedures in most instances.²⁴⁹ Furthermore, by presenting a new test in *Merrill*, Justice Kavanaugh reframed the focus of *Purcell* and undermined the "exacting requirements" of the *Gingles* test under § 2 as long as the state could present some form of bureaucratic inconvenience.²⁵⁰

On the other hand, in *Merrill*, Justice Kagan dissented, stating that because the plaintiffs filed their complaint immediately following HB1's enactment and nine months before the general election, the *Purcell* doctrine did not apply.²⁵¹ Here, she stated that the Court ought to step in to prevent Black voters from having their "electoral power diminished."²⁵² Recounting the history of slavery and discrimination, she emphasized the importance of preserving voting rights in the state of Alabama.²⁵³ Additionally, Justice Kagan explained how Alabama's legislature "pack[ed]" Black voters into one district [District 7] and "crack[ed]" the rest across three other districts.²⁵⁴ She asserted that this "clear vote dilution" met the high bar of the *Gingles* test and followed "a massive factual record developed over seven days of testimony, and [a review of] more than 1,000 pages of briefing."²⁵⁵ Disregarding Justice Kagan's concerns, the Court scheduled oral arguments for the following fall after the 2022 election.²⁵⁶

Justice Kagan's concerns paralleled her own and Justice Ginsburg's concerns in *Republican National Committee*.²⁵⁷ Unlike Justice Kavanaugh, who described slow-moving bureaucratic systems, Justice Ginsburg, with whom Justice Kagan joined in dissent, emphasized the speed with which election officials responded to the lower court's order, quickly informing

voter confusion likely to ensue from delaying election results for six days. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

248. See *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring); *Democratic Nat'l Comm.*, 141 S. Ct. at 31; see also Houston, *supra* note 15, at 790–91 (detailing Justice Kavanaugh's invocation of the *Purcell* doctrine to enjoin a lower court's stay on a partisan, gerrymandered map in North Carolina).

249. See Houston, *supra* note 15, at 790–91.

250. *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023); see also *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring); Henry L. Chambers Jr., *The U.S. Supreme Court's Ruling on Alabama's Voting Map Could Reverberate Nationwide*, PA. CAPITAL-STAR (Feb. 15, 2022, 6:30 AM), <https://www.penncapital-star.com/commentary/the-u-s-supreme-courts-ruling-on-alabamas-voting-map-could-reverberate-nationwide-analysis/> [https://perma.cc/JN75-FR6R].

251. See *Merrill*, 142 S. Ct. at 883 n.1 (Kagan, J., dissenting).

252. *Id.* at 889.

253. *Id.* at 886.

254. *Id.* at 884.

255. *Id.* at 883. See generally *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022), *aff'd*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

256. See Wang, *supra* note 21; Howe, *supra* note 239.

257. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208–11 (2020).

voters of the change in the absentee ballot deadline.²⁵⁸ Additionally, the Justices raised the concern that the “extraordinary” circumstances COVID-19 presented—in which voters either had to “brave the polls, endangering their own and others’ safety” or “lose their right to vote, through no fault of their own”—tipped the *Purcell* balancing test in favor of not applying the doctrine.²⁵⁹ In *Merrill* and *Republican National Committee*, Justice Kagan made the case for an interpretation of *Purcell* concerned with voter enfranchisement, emphasizing the doctrine’s roots and the high bar of the *Gingles* test.²⁶⁰

Justice Kavanaugh advocated for a reframing of the *Purcell* doctrine around bureaucratic inconvenience, whereas Justice Kagan echoed reminders about the doctrine’s original concerns, remaining closer to the heart of the *Purcell* doctrine and the Voting Rights Act. *Merrill*’s ruling and shift in the Court’s focus sent a signal to states that they may be able to avoid redrawing maps if they could prove that doing so would present any form of inconvenience.²⁶¹

C. How the Court’s Findings in *Allen* Revealed the Misuse of the *Purcell* Doctrine in *Merrill*

Over a year later, in *Allen*, the Court found that HB1, which Alabama used in the 2022 congressional election, violated § 2.²⁶² The Court’s analysis in *Allen* mirrored that of the court in *Singleton* merely a year and a half prior.²⁶³ In *Allen*, the Court reaffirmed its precedent of evaluating § 2 claims under the *Gingles* factors and the totality of the circumstances standard.²⁶⁴ The Court held that the *Gingles* test and its “exacting requirements . . . limit judicial intervention to ‘those instances of intensive racial politics’ where the ‘excessive role [of race] in the electoral process den[ies] minority voters equal opportunity to participate.’”²⁶⁵ Here, the Court reemphasized the Voting Rights Act’s commitment to securing voting rights and voter access and “promoting the purposes of the Fifteenth Amendment” before evaluating the plaintiffs’ § 2 claims under *Gingles*.²⁶⁶

258. *See id.* at 1210 (describing how “[e]lection officials have spent the past few days establishing procedures and informing voters in accordance with the [lower court’s] deadline”).

259. *Id.* at 1211.

260. *See id.*; *Merrill*, 142 S. Ct. at 884 (Kagan, J., dissenting).

261. *See supra* Part II.D.

262. *See Allen v. Milligan*, 143 S. Ct. 1487, 1516–17 (2023). *See generally* Wang, *supra* note 21.

263. *See Allen*, 143 S. Ct. at 1503.

264. *See id.*; *see also* Emma Shoucair, *The Outcome of Allen v. Milligan: A Tentative Victory for Voting Rights in Alabama*, JURIST (Oct. 8, 2023, 5:45 PM), <https://www.jurist.org/commentary/2023/10/https-www-jurist-org-commentary-2023-10-emma-shoucair-allen-milligan-voting-rights/> [<https://perma.cc/A6QA-K5Z8>].

265. *Allen*, 143 S. Ct. at 1510 (quoting S. REP. NO. 97-417, at 33–34 (1982)).

266. *Id.* at 1516 (quoting *City of Rome v. United States* 446 U.S. 156, 177 (1980)); *see also supra* Part I.A.1.

In evaluating the first prong of the *Gingles* test, the Court established that “black voters could constitute a majority” of voters in a second, “reasonably configured” district, based on Professor Duchin’s testimony and eleven maps provided by the plaintiffs.²⁶⁷ The Court then proceeded to the second prong of the *Gingles* test, finding that because “Black voters supported their candidates of choice with 92.3% of the vote,” they were a politically cohesive voting bloc.²⁶⁸ Finally, the Court found that white voters acted as a voting bloc, regularly defeating Black voters’ preferred candidates.²⁶⁹ In this analysis, the Court emphasized that the district court correctly applied the *Gingles* test, finding that HB1 violated § 2.²⁷⁰

This emphasis on voting rights was a far cry from the Court’s ruling in *Merrill*, in which the majority decision, issued without an opinion, consisted of four sentences granting a stay of the injunction.²⁷¹ Some considered *Allen* a victory for voting rights activists, but others raised concerns about the long-lasting and precedential effect of *Merrill* on the 2022 congressional election and beyond.²⁷² Under Alabama’s HB1 map, the only Democratic candidate elected was Terri Sewell in District 7 (the only majority-minority district).²⁷³ In the first six districts, only Republican candidates were successful, with their margins of victory ranging from 27.5 percent to 62.4 percent.²⁷⁴ It is hard to ignore the effects of *Merrill*, given that the only district to elect a Black Democrat in the 2022 congressional election²⁷⁵ was the same district that has been “represented by a Black Democrat since its inception as a majority-Black district in 1992.”²⁷⁶

By delaying its finding that HB1 violated § 2 for nearly two years, the Court provided Alabama with an incentive to create and use one free bad map, resulting in continued litigation into 2023.²⁷⁷ Even after the Court’s

267. *Allen*, 143 S. Ct. at 1504; *see also* *Thornburg v. Gingles*, 478 U.S. 30, 49 (1985).

268. *Id.* at 1505 (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1017 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023)); *see also supra* Part II.A.

269. *See Allen*, 143 S. Ct. at 1505.

270. *See id.* at 1506.

271. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

272. Compare Kimberly Strawbridge Robinson & Lydia Wheeler, *Roberts, Kavanaugh Shock with Liberal Voting Rights Victory*, BLOOMBERG L. (June 8, 2023, 1:40 PM), <https://news.bloomberglaw.com/us-law-week/roberts-kavanaugh-shock-with-liberal-victory-on-voting-rights> [<https://perma.cc/7RD6-52UW>], with Michael Wines, *In Three Southern States, a Legal Battle over Political Maps*, N.Y. TIMES (Sept. 21, 2023), <https://www.nytimes.com/2023/09/21/us/redistricting-alabama-georgia-louisiana.html> [<https://perma.cc/C2QP-XJ2P>].

273. *2022 Alabama House Election Interactive Map*, 270TOWIN, <https://www.270towin.com/2022-house-election/states/alabama> [<https://perma.cc/7JKJ-8TFU>] (last visited Apr. 3, 2024).

274. *See id.*

275. *See id.*

276. *Singleton v. Merrill*, 582 F. Supp. 3d. 924, 935 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

277. *See Allen v. Milligan*, 143 S. Ct. 1487, 1542 (2023); *Singleton v. Allen*, No. 21-CV-1530, 2023 U.S. Dist. LEXIS 163008, at *35–37 (N.D. Ala. Sept. 11, 2023); *see also* Nina Totenberg, *Supreme Court Rejects Alabama’s Defiance in Voting Case*, NPR (Sept. 26, 2023, 10:14 AM), <https://www.npr.org/2023/09/26/1200906844/supreme-court-alabama-voting->

ruling in *Allen*, Alabama delayed the redistricting process, submitting a nearly identical map.²⁷⁸ In response, the Court denied Alabama's second appeal for a stay against the lower court's injunction,²⁷⁹ and the U.S. District Court for the Northern District of Alabama repeated its prior sentiments:

We repeat that we are deeply troubled that the State enacted a map that the Secretary readily admits does not provide the remedy we said federal law requires The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice without further delay.²⁸⁰

Here, the Alabama legislature's reaction to the Supreme Court's findings in *Allen* shows the dangers of the Court's delay in *Merrill*. Because of this delay, Alabama used a map diluting Black voters' votes for the 2022 congressional election and attempted to do so a second time.²⁸¹ This one free bad map led to further attempts by Alabama to use an identical map even after both the Supreme Court and U.S. District Court for the Northern District of Alabama gave explicit instructions otherwise.²⁸²

D. The Expansion of the Purcell Doctrine Has Further Constrained Voter Access in Historically Difficult Areas, Giving Them One Bad Map

November 2022 marked an important election across the nation as every seat in the House of Representatives, over one-third of the Senate seats, and more than half of the nation's governorships were at stake.²⁸³ Leading up to this critical election, judges in Alabama, Georgia, and Louisiana found the states' respective redistricting maps to be in violation of § 2 but declined to issue injunctions prior to the election, citing concerns related to Justice Kavanaugh's recent articulation of the *Purcell* doctrine in *Merrill*.²⁸⁴

Justice Kavanaugh's reframing of the *Purcell* doctrine and lower courts' deference to his interpretation have restricted plaintiffs' ability to seek relief

case [<https://perma.cc/TF6V-H5FT>]; Caroline Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST. L.J. ONLINE 111, 120 (2022) ("The lesson from the Supreme Court: Defendants in voting rights cases should delay and then demand that the courts presume confusion and chaos will ensue regardless of evidence to the contrary.").

278. See Cochrane, *supra* note 219; Singleton, 2023 U.S. Dist. LEXIS 163008, at *37.

279. See Singleton v. Allen, No. 2:21-CV-1291, 2023 WL 5691156, at *71 (N.D. Ala. Sept. 5, 2023), *cert denied*, Allen v. Milligan, 144 S. Ct. 476 (2023) (mem.); Totenberg, *supra* note 277.

280. Singleton, 2023 U.S. Dist. LEXIS 163008, at *36–37.

281. See Wang, *supra* note 21.

282. See Cochrane, *supra* note 219; Singleton, 2023 U.S. Dist. LEXIS 163008, at *36–37.

283. See Ed O'Keefe, Aaron Navarro & Rebecca Kaplan, *What's at Stake in the 2022 Midterm Elections?*, CBSNEWS (Nov. 8, 2022, 12:23 PM), <https://www.cbsnews.com/news/whats-at-stake-2022-midterm-elections/> [<https://perma.cc/6UQX-J454>].

284. See Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [<https://perma.cc/V62P-BNXL>]; see also Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1240, 1327 (N.D. Ga. 2022); Ardoyn v. Robinson, 142 S. Ct. 2892, 2892–93 (2022).

under § 2.²⁸⁵ Prior to the Court’s decision in *Merrill*, many courts looked to the facts of *Purcell* and centered the doctrine’s application on voter enfranchisement, considering the impact the change would have on voters.²⁸⁶ For example, in *Common Cause Rhode Island v. Gorbea*,²⁸⁷ the First Circuit found that concerns that would normally invoke the *Purcell* doctrine were inapplicable given the “unique” characteristics surrounding the election.²⁸⁸ In this case, the U.S. District Court of Rhode Island issued an injunction suspending the witness requirement for absentee ballots.²⁸⁹ Subsequently, the First Circuit upheld the district court’s injunction, declining to apply *Purcell*.²⁹⁰ In rejecting the application of *Purcell*, the First Circuit found that although the injunction came only two months before the election, the burden of requiring voters to potentially risk exposure to COVID-19 was too high.²⁹¹ Ultimately, the court argued that the danger this burden posed to voting access overcame any concerns related to *Purcell* and bureaucratic inconvenience.²⁹² Prior to *Merrill*, this is how courts applied *Purcell*: a balancing test centered largely on voter enfranchisement.²⁹³ Following *Merrill*, the landscape changed.²⁹⁴

Common Cause Rhode Island is distinct from the U.S. District Court for the Northern District of Georgia’s recent findings—less than two years later—in *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*.²⁹⁵ After the 2020 census, the Georgia legislature, in accordance with the Georgia State Constitution, set out to reapportion districts for the U.S. House of Representatives, the Georgia Senate, and the Georgia House of Representatives for the first time since the Supreme Court’s *Shelby County* ruling.²⁹⁶ Plaintiffs immediately took action, filing suit “[w]ithin hours of Governor Kemp signing [the map] into law.”²⁹⁷ In doing so, the plaintiffs asserted that the Georgia legislature did not provide enough majority-minority districts for Black voters “to elect their preferred

285. See *Alpha Phi Alpha Fraternity Inc.*, 587 F. Supp. 3d at 1326–27 (holding that, considering Justice Kavanaugh’s new standard and Georgia’s current preparations for the election, there was “insufficient time to effectuate remedial relief for the purposes of the 2022 election cycle”). But see *Common Cause v. Rucho*, 284 F. Supp. 3d 780, 791 (M.D.N.C. 2018) (holding that a general election “more than *ten months* away” and an election cycle was substantially far enough to allow for the court to enjoin an “unconstitutional” districting plan (emphasis in original)).

286. See generally *Covington v. North Carolina*, No. 15-CV-399, 2018 U.S. Dist. LEXIS 12945, at *21–22 (M.D.N.C. Jan. 26, 2018); *Andino v. Middleton*, 141 S. Ct. 9 (2020).

287. 970 F.3d 11 (1st Cir. 2020).

288. See *id.* at 17.

289. See *id.* at 13.

290. See *id.* at 14.

291. See *id.* at 14–15.

292. See *id.*

293. See *supra* Part I.B.3.

294. See *infra* Part II.D.

295. 587 F. Supp. 3d 1222 (N.D. Ga. 2022).

296. See *id.* at 1237 (noting that it was “the first time in over fifty years in which Georgia . . . redistricted following the Decennial Census without having to seek preclearance” as a result of *Shelby County*).

297. *Id.* at 1235.

candidates.”²⁹⁸ Before launching into its analysis of the *Gingles* factors and the totality of the circumstances standard, the district court made it clear that it held Justice Kavanaugh’s concurrence from *Merrill* in high regard.²⁹⁹ The court emphasized that “Justice Kavanaugh’s opinion carries even more weight than typical Supreme Court dicta” because five of the other Justices also concluded that an injunction would not be appropriate.³⁰⁰ Following this aside, the court began its analysis, going through each individual *Gingles* factor.³⁰¹

In evaluating the first *Gingles* factor, the court found that because an additional majority-minority district could be drawn through experts’ illustrative maps, the plaintiffs “satisfied the numerosity component of the first *Gingles* precondition.”³⁰² Moving on to the second factor of the *Gingles* test, the court found that the plaintiffs showed “political cohesion among Black voters,” relying on expert analysis explaining precinct-level election results and voter preference data.³⁰³ In evaluating the third *Gingles* factor, the court concluded that expert testimony provided evidence that the white voting bloc would defeat Black-preferred candidates, amounting to “legally significant . . . bloc voting.”³⁰⁴ Finally, the court evaluated the map under the totality of the circumstances standard, using each of the nine Senate factors, ultimately finding that the factors weighed in the plaintiff’s favor.³⁰⁵

The court found that the plaintiffs’ claims satisfied the *Gingles* factors and the Senate factors, concluding that the plans violated § 2.³⁰⁶ Furthermore, the court emphasized, “the resulting threatened injury . . . [could not] be undone through any form of . . . post-election relief.”³⁰⁷ Despite these findings, the court ultimately held that it would be “unwise, irresponsible, and against common sense for this Court to not take note of [*Merrill*].”³⁰⁸ The court found that it could not disregard Justice Kavanaugh’s new iteration of the *Purcell* principle and, as a result, could not offer injunctive relief despite the plaintiff’s fulfillment of the “exacting requirements” of *Gingles*.³⁰⁹

298. *Id.*

299. *See id.* at 1239–40.

300. *See id.* at 1240.

301. *See id.* at 1240–41.

302. *Id.* at 1257.

303. *Id.* at 1304–07.

304. *Id.* at 1312 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986)). Here, the Court relied on expert testimony, which showed that when the existing majority-Black district was excluded, “Black-preferred candidates were defeated by white-bloc voting in all 31 elections.” *Id.* at 1312.

305. The court referred to racial appeals in Georgia elections, underrepresentation of Black candidates, and the effects of discrimination in other areas such as employment, but it also noted that factor four, the use of a “slating process” for elections, was not relevant in Georgia. *See id.* at 1315–21.

306. *See id.* at 1321.

307. *Id.* at 1320.

308. *Id.* at 1326.

309. *See id.*; *see also* *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023).

The sequence of these two lower court cases is demonstrative of the ripple effect of Justice Kavanaugh's concurrence and reframing of the *Purcell* doctrine in *Merrill. Common Cause Rhode Island* declined to apply the *Purcell* doctrine due to the effects that its application would have on voter enfranchisement, regardless of the bureaucratic inconvenience and the absence of a race element in the plaintiff's claim.³¹⁰ In contrast, a couple of years later, the court in *Alpha Phi Alpha Fraternity Inc.* considered how a challenged map would dilute minority votes, offering no path for plaintiffs to properly recover after the election, and yet still found the deprivation of voting rights not substantial enough to overcome the *Purcell* doctrine and its bureaucratic concerns.³¹¹ Although a mere two years separate these two cases, Justice Kavanaugh's concurrence pushes them to two opposing ends of the spectrum.³¹² One court chose to protect voters' rights in unique circumstances,³¹³ and the other allowed a redistricting map in clear violation of § 2 to stand.³¹⁴

III. BACK TO THE BASICS: A NARROW INTERPRETATION OF *PURCELL* IS IN ALIGNMENT WITH THE PURPOSE OF *PURCELL* AND THE VOTING RIGHTS ACT

Justice Kavanaugh's reframing of the *Purcell* doctrine gives states one free bad map, in conflict with the legislative intent of the Voting Rights Act and the judicial intent of the *Purcell* doctrine.³¹⁵ As a solution, courts should apply the *Purcell* doctrine more narrowly in cases in which there is a clear violation of § 2 under the *Gingles* test and the totality of the circumstances standard. By adopting this narrow interpretation of the *Purcell* doctrine, courts can better protect voting rights where they are most at risk.³¹⁶ Part III.A proposes adopting a narrow conception of the *Purcell* doctrine to ensure injunctive relief for plaintiffs who raise successful claims of vote dilution under § 2. Part III.B outlines how this narrow conception aligns with the legislative intent of the Voting Rights Act and the judicial intent of the *Purcell* doctrine.

310. See *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020).

311. See *Alpha Phi Alpha Fraternity Inc.*, 587 F. Supp. 3d at 1320, 1324–26.

312. See Houston, *supra* note 15, at 798; see also Chambers, *supra* note 250 (raising concerns that the expansion of the *Purcell* principle could have a “tangible effect” on voting rights in Alabama and that it “sen[t] a message to all states . . . that they can pass whatever maps they want, possibly tilting the 2022 congressional election, without fear of being overruled in federal court”).

313. See *Common Cause R.I.*, 970 F.3d at 17.

314. See *Alpha Phi Alpha Fraternity Inc.*, 587 F. Supp. 3d at 1326.

315. See *supra* Parts I.A–B.

316. Justice Roberts outlined in *Allen* that the risk of minority votes being diluted is “greatest [when] . . . minority voters are submerged in a majority voting population that ‘regularly defeat[s]’ their choices.” *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (third alteration in original) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986)).

A. *The Court Should Adopt a Narrow Conception
of the Purcell Doctrine to Address Clear
Violations of § 2 of the Voting Rights Act*

Courts' use of the *Purcell* doctrine when elections are months away has led to the use of maps that dilute minority votes and contravene the legislative intent of the Voting Rights Act.³¹⁷ In these instances, the difficulty lies in balancing the intent of both the *Purcell* doctrine and the Voting Rights Act, along with defining what precisely is a “clear” violation of § 2. Therefore, this Note proposes a narrow conception of the *Purcell* doctrine as applied in § 2 claims. This narrow interpretation provides plaintiffs with injunctive relief if they can show, through a clear establishment of the *Gingles* factors and the totality of the circumstances, that the voting procedure or law is in violation of § 2. First, this section defines what a clear violation of § 2 is under the *Gingles* test and the totality of the circumstances standard. Second, this section defines what constitutes a narrow application of the *Purcell* doctrine, specifically as it applies to § 2 claims and redistricting.

1. Defining a Clear Violation of § 2 of the Voting Rights Act

The first step to applying this narrow interpretation is defining what amounts to a clear violation of § 2. There are cases that demonstrate instances in which, based on the overwhelming evidence presented by plaintiffs, courts found clear attempts to dilute minority votes.³¹⁸ Due to the fact-intensive nature of the *Gingles* test, one of the first considerations in establishing this clear violation is the amount of evidence a court evaluates. In the opening lines of Justice Kagan's dissent in *Merrill*, she stated that the ruling left “Black Alabamians to suffer . . . clear vote dilution.”³¹⁹ Here, Justice Kagan articulated precisely how clear the vote dilution was based on the lower court's decision and the amount of evidence it considered.³²⁰ She began by explaining the “strict” nature of the *Gingles* factors and underscored the “extremely robust body of evidence,” “massive factual record, . . . seven days of testimony, and review[] [of] more than 1,000 pages of briefing” used in the lower court's findings.³²¹

This fact-intensive inquiry in *Singleton* pushed the district court to consider expert testimony, along with a statistical analysis of illustrative maps, census data, and election results from years prior, ultimately dedicating nearly 100 pages to the court's legal analysis of this evidence

317. See Houston, *supra* note 15, at 772 (referring to the use of *Purcell* in these instances as “com[ing] with major consequences for elections and representation”).

318. See generally *Alpha Phi Alpha Fraternity Inc.*, 587 F. Supp. 3d 1222; *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022), *aff'd*, Allen v. Milligan, 143 S. Ct. 1487 (2023).

319. *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting), *vacated*, Allen v. Milligan, 143 S. Ct. 2607 (2023) (mem.), and Allen v. Caster, 143 S. Ct. 2607 (2023) (mem.).

320. See *id.* at 883–84.

321. See *id.* at 884 (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1028 (N.D. Ala. 2022), *aff'd*, Allen v. Milligan, 143 S. Ct. 1487 (2023)).

under the *Gingles* test.³²² In addition to going through mountains of evidence, the court dedicated individual analysis to each *Gingles* factor, as well as to each Senate factor, in evaluating the totality of the circumstances standard.³²³

Extensive evidence and robust analysis on its own may not amount to a showing of clear vote dilution, but the numbers present in the evidence may also be considered indicative of clear vote dilution. In *Alpha Phi Alpha Fraternity Inc.*, the court concluded that “Georgia’s electoral system is not equally open to Black voters.”³²⁴ More specifically, the court referred to several instances in which the numbers indicating the dilution of minority votes surpassed those in *Allen*.³²⁵ For example, when evaluating the third *Gingles* factor in *Alpha Phi Alpha Fraternity Inc.*, the court found that in Georgia, “only 12.4% of white voters” voted for Black-preferred candidates, as compared to “15.4% of white voters” in Alabama voting for Black-preferred candidates.³²⁶ As a result, the court held that the evidence of racially polarized voting was “very clear,” satisfying the *Gingles* test.³²⁷ Although the court in *Alpha Phi Alpha Fraternity Inc.* did not treat *Allen*’s statistics as a bright-line rule for when plaintiffs have satisfied the *Gingles* test, it did find that when numbers of this stark nature are considered with other substantial evidence, there is clear vote dilution.³²⁸

Although there is no standard for what percentages show clear vote dilution under the *Gingles* test, courts should consider not only the volume of evidence presented but also the precise requirements of and the margins by which plaintiffs satisfy the *Gingles* test. Once it finds clear vote dilution, the court would then need to determine if the narrow application of *Purcell* allows for an injunction within the available time period.³²⁹

2. Defining a Narrow Conception

The second part of this narrow application of *Purcell* requires that courts balance the time available with the intensive task of redistricting and the potential irreparable damage of diluted minority votes. In *Merrill*, Justice Kavanaugh raised concerns about pushing the legislature to quickly change a map within a narrow time span, creating chaos and voter confusion.³³⁰ This

322. See generally *Singleton*, 582 F. Supp. 3d 924.

323. See *id.*

324. *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337, 2023 U.S. Dist. LEXIS 192080, at *224 (N.D. Ga. Oct. 26, 2023).

325. See *id.* at *168.

326. *Id.*

327. See *id.*

328. See *id.*

329. There is a possibility that states could continue gerrymandering in a manner that is less clear than the above cases, but addressing this is beyond the scope of this Note, as the process of redrawing state maps can be subject to different state laws.

330. See *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.); see also *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020).

is a concern because redrawn districts can result in polling-location changes and other changes, leaving voters at a loss as to how to exercise their right to vote.³³¹ Furthermore, there must also be consideration of the various restrictions that face legislatures when they are redistricting.³³² As the U.S. Court of Appeals for the Fifth Circuit stated in *In re Landry*,³³³ “a court must afford the legislative body . . . the first opportunity to accomplish the difficult and politically fraught task of redistricting.”³³⁴ Therefore, to define what precisely a “narrow conception” of *Purcell* would look like under § 2 claims, there is some guidance in the recent jurisprudence surrounding Alabama’s, Georgia’s, and Louisiana’s redistricting cases.³³⁵

In outlining this narrow conception, it is important to distinguish cases such as *Singleton* and *Alpha Phi Alpha Fraternity Inc.* from cases such as *In re Landry*.³³⁶ In both *Singleton* and *Alpha Phi Alpha Fraternity Inc.*, the general elections were set to begin in approximately November and the injunctions were handed down in February, placing the general elections nearly nine months away from each court’s decision.³³⁷ This is a wider margin of time for redistricting than was contested in a recent case in Louisiana.

In *Ardoin v. Robinson*,³³⁸ the Court stayed a preliminary injunction issued by the U.S. District Court for the Middle District of Louisiana.³³⁹ Here, the Court held the injunction in “abeyance pending [the] Court’s decision in *Merrill*.”³⁴⁰ Once, the stay was rejected by the Court following its findings in *Merrill*,³⁴¹ the Fifth Circuit evaluated the lower court’s findings in *In re Landry*, emphasizing that “[r]edistricting based on section 2 of the Voting Rights Act is complex, historically evolving, and sometimes undertaken with looming electoral deadlines[, b]ut [that] it is not a game of ambush.”³⁴² Here, the Fifth Circuit found that the lower court’s order, mandating the legislature

331. See *supra* Part I.B.1.

332. See SARAH J. ECKMAN, CONG. RSCH. SERV., IN11618, CONGRESSIONAL REDISTRICTING CRITERIA AND CONSIDERATIONS 1 (2021) (“Redistricting criteria commonly reflect a combination of state and federal statutes, judicial interpretations, and historical practices.”).

333. 83 F.4th 300 (5th Cir. 2023), *stay denied sub nom.* *Robinson v. Ardoin*, 144 S. Ct. 6.

334. *Id.* at 306–07.

335. See *Wines*, *supra* note 272.

336. See generally *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337, 2023 U.S. Dist. LEXIS 192080, at *224 (N.D. Ga. Oct. 26, 2023); *In re Landry*, 83 F.4th 300.

337. See generally *Singleton*, 582 F. Supp. 3d 924; *Alpha Phi Alpha Fraternity Inc.*, 2023 U.S. Dist. LEXIS 192080. The injunction in *Singleton* was handed down on February 7, and the injunction in *Alpha Phi Alpha Fraternity Inc.* was handed down on February 28. See *Singleton*, 582 F. Supp. 3d. at 936–37; *Alpha Phi Alpha Fraternity Inc.*, 2023 U.S. Dist. LEXIS 192080, at *17.

338. 142 S. Ct. 2892, 2892–93 (2022).

339. See *id.*

340. *Id.*

341. See generally *Robinson v. Ardoin*, 144 S. Ct. 6 (2023).

342. *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023) (citation omitted), *stay denied sub nom.* *Robinson v. Ardoin*, 144 S. Ct. 6.

to redistrict in five legislative days, was unreasonable.³⁴³ Holding that the state was entitled to a stay, the court distinguished the Alabama litigation on the grounds that in *Singleton*, the court gave the state legislature six weeks to present a new districting plan.³⁴⁴ This was a far cry from the five days Louisiana's state legislature had been given.³⁴⁵

In evaluating the second step of this narrow application, consideration of the burden facing legislatures when redistricting in the face of a looming election is critical.³⁴⁶ Here, the difference between five days and six weeks is stark. A narrow application of *Purcell* would find that a five-legislative-day window, as given in *In re Landry*, is too short a time period for the legislature to redistrict and communicate to voters any changes that affect their voting process.³⁴⁷ But the same application would find that the six weeks given in *Singleton* is substantial time to redraw a legislative map and communicate any changes to voters.³⁴⁸ Within this window is the narrow application of the *Purcell* doctrine.

*B. Narrowing the Purcell Doctrine in This Way
Is in Alignment with the Legislative Intent
Underlying the Voting Rights Act and Judicial
Intent Underlying the Purcell Doctrine*

“Substantial questions merit substantial thought.”³⁴⁹ Justice Kagan, in her dissent, reminded the Court of the weight of its decision in *Merrill*, emphasizing the dangers of “adopt[ing] [the] novel legal rule” of Justice Kavanaugh’s reframing of *Purcell* based on bureaucratic inconvenience.³⁵⁰ By shifting the focus of the *Purcell* doctrine in *Merrill*, Justice Kavanaugh avoided engaging in the often long, fact-intensive inquiries related to § 2 claims.³⁵¹ This avoidance is misaligned with the legislative intent underlying the Voting Rights Act and the judicial intent underlying the *Purcell* doctrine.³⁵² In light of this, it is critical that the Court take an affirmative step toward preserving the protections of both the *Purcell* doctrine and § 2 of the Voting Rights Act by adopting a narrow interpretation of *Purcell* when addressing § 2 claims. First, this section addresses how this narrow interpretation is consistent with the legislative intent of the Voting Rights

343. *Id.* at 307–08.

344. *Id.* at 306.

345. *Id.*

346. *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (raising bureaucratic concerns such as filing deadlines, candidates having insufficient information on any changes to their district, and general communication to voters in time), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

347. *See In re Landry*, 83 F.4th at 304.

348. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1033–34 (N.D. Ala. 2022), *aff’d*, *Allen v. Milligan*, 143 S. Ct. 1487 (2023).

349. *Merrill*, 142 S. Ct. at 887–88 (Kagan, J., dissenting).

350. *See id.* at 887.

351. *See id.*

352. *See supra* Parts I.A–B.

Act. Second, this section addresses how this interpretation is also consistent with the judicial intent of the *Purcell* doctrine.

1. A Narrow Interpretation Aligns with the
Legislative Intent of the Voting Rights Act

The Voting Rights Act was a direct, intentional effort to preserve the voting rights of minority voters in states that historically restricted their voting rights.³⁵³ Borne out of the civil rights movement of the 1960s, the Voting Rights Act took a more direct approach to combatting voter disenfranchisement as compared to previous civil rights statutes.³⁵⁴

As the Voting Rights Act evolved, Congress made its legislative intent clearer: “The voting rights act . . . [has] reflected the overwhelming consensus . . . that the most fundamental civil right of all citizens—the right to vote—must be preserved at whatever cost and through whatever commitment required of the federal government.”³⁵⁵ The Voting Rights Act Amendments of 1982 emphasized the importance of “eliminating the requirement of proof of intentional discrimination and simply requir[ing] proof of discriminatory ‘results.’”³⁵⁶ There, Congress made it clear that § 2 relief must not impose an unreasonable burden on plaintiffs and must be accessible to them.³⁵⁷ The Court echoed this sentiment in *Shelby County*, in which it stated that its “decision in no way affect[ed] the permanent, nationwide ban on racial discrimination found in § 2.”³⁵⁸ Both of these statements reveal not only an intent to not overwhelm plaintiffs with a burden of proof, but also an intent to reaffirm plaintiffs’ ability to seek relief under § 2.³⁵⁹

The roadmap is clear: under the *Gingles* test and the totality of the circumstances standard, plaintiffs are able to secure injunctive relief ahead of elections when bad maps are drawn by state legislatures.³⁶⁰ This preserves their right to vote under § 2 of the Voting Rights Act, in alignment with Congress’s intent. But, as Justice Kagan states in dissent, the *Merrill* Court “skips that step . . . based on the untested and unexplained view that the law needs to change.”³⁶¹ As a result, the Court undermined a law that the “Court once knew to buttress all of American democracy.”³⁶² By requiring plaintiffs

353. See COLEMAN, *supra* note 25, at 8; see also *supra* Part I.A.1.

354. See COLEMAN, *supra* note 25, at 11–12.

355. *Alpha Phi Alpha Fraternity Inc. v. Raffenberger*, No. 21-CV-05337, 2023 U.S. Dist. LEXIS 192080, at *11 (N.D. Ga. Oct. 26, 2023) (quoting S. REP. NO. 97-417, at 28–29 (1982)).

356. S. REP. NO. 97-417, at 124; see also *Boyd & Markman*, *supra* note 63, at 1417.

357. See *supra* Part I.A.1.

358. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

359. This interpretation has come under criticism in the Eighth Circuit’s recent decision not to provide private plaintiffs a right of action under § 2. See *supra* Part I.A.3.

360. See *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting), *vacated*, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (mem.), and *Allen v. Caster*, 143 S. Ct. 2607 (2023) (mem.).

361. *Id.*

362. *Id.*

to satisfy the “exacting requirements” of the *Gingles* test and the totality of the circumstances standard, this narrow interpretation avoids opening the door to frivolous claims.³⁶³ But by not skipping this critical step,³⁶⁴ this narrow interpretation emphasizes the heart of the Voting Rights Act: voting access “preserved at whatever cost.”³⁶⁵

2. A Narrow Interpretation Aligns With the Judicial Intent of the *Purcell* Doctrine

The *Purcell* doctrine ensures that voters do not become disenfranchised due to changes made too close to an election, causing confusion.³⁶⁶ The *Purcell* doctrine did not state that any electoral changes “too close” to an election should be struck down, but rather created a general balancing test that weighs the “possibility that qualified voters might be turned away from the polls” against administrative concerns.³⁶⁷ As discussed earlier in this Note, the Court’s analysis of *Purcell* prior to *Merrill* centered on voter enfranchisement.³⁶⁸ Therefore, Justice Kavanaugh’s prioritization of bureaucratic inconvenience over voter enfranchisement diverted the original focus of the *Purcell* doctrine.³⁶⁹ Furthermore, his focus on bureaucratic inconvenience resulted in drawn-out litigation following the 2022 congressional election and Alabama’s continued resubmission of a map in violation of § 2. By shifting its focus, the Court sent a signal to states that they may be able to avoid redrawing maps if they could prove that doing so would present any form of inconvenience.³⁷⁰

Comparatively, this narrow test would recenter the focus of *Purcell*. By first requiring plaintiffs to satisfy the high bar of the *Gingles* test and the totality of the circumstances standard and then considering whether the timeline of changes would fall within the narrow conception outlined in Part III.A.2, the test would balance *Purcell*’s “considerations specific to election cases and . . . institutional procedures” with its central concern of voter enfranchisement.³⁷¹

363. *Allen v. Milligan*, 143 S. Ct. 1487, 1510 (2023); *see also supra* Part II.A.2.

364. *Merrill*, 142 S. Ct. at 889 (Kagan, J., dissenting).

365. *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337, 2023 U.S. Dist. LEXIS 192080, at *11 (N.D. Ga. Oct. 26, 2023) (quoting S. REP. NO. 97-417, at 28–29 (1982)).

366. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006).

367. *Id.* at 4–5; *see also* Brittany Carter, *The Purcell Principle and the Antiblackness of Constitutional Fundamentalism*, 72 AM. U. L. REV. 1601, 1606 (2023) (stating that the *Purcell* doctrine requires a “clear understanding of the balance of harms and the public interest” and that Justice Kavanaugh’s concurrence is a “misreading” of *Purcell* and its “central principle”).

368. *See supra* Part I.B.2.

369. *See supra* Part II.B.

370. *See supra* Part II.D.

371. *Purcell*, 127 S. Ct. at 4–5.

CONCLUSION

The restructuring of the *Purcell* doctrine has limited plaintiffs' ability to receive relief under § 2 of the Voting Rights Act. Justice Kavanaugh's interpretation of the *Purcell* doctrine in *Merrill* has produced a focus on bureaucratic inconvenience, rather than on voter enfranchisement. This distortion of the *Purcell* doctrine is misaligned with the intent of the Voting Rights Act and the *Purcell* doctrine. Additionally, this distortion has given states the opportunity to have one free bad map by claiming any change would occur too close to the election.

There is a way to balance the goals of both the Voting Rights Act and the *Purcell* doctrine: a narrow interpretation of the *Purcell* doctrine, implemented by a stringent use of the *Gingles* test. This narrow reading of *Purcell* would allow courts to address concerns of voter enfranchisement and provide ample time for legislatures to redraw maps. Above all else, this interpretation would allow courts to remain true to the intent of both the *Purcell* doctrine and the Voting Rights Act.