COVID-19, ELECTION '20: SOME OF THE KEY LITIGATION*

Pamela S. Karlan

Stanford Law School

When the pandemic hit the United States with full force in March, many states were in the midst of conducting primary elections, including their presidential primary. Most of those states postponed their spring primaries until June or July. But the pandemic was still ongoing in the summer, and as policymakers and election administrators prepare for the November general election, they are forced to do so under the assumption that the virus will be a significant factor in shaping how voting will be conducted this fall.

1. The sudden explosion in absentee voting. The virus affects both the use of voting by mail and the ability to conduct in-person voting safely. Wisconsin was one of the few states that went ahead and conducted its elections as scheduled on April 7th. Absentee voting skyrocketed by more than 650 percent compared to normal times. In Pennsylvania's June primary, about 50 percent of voters voted absentee, compared to 5 to 7 percent normally. Election officials thus have to shift their election systems with very little time to prepare for a massive surge in absentee voting this fall. *See* Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), *available at* https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes/.

Doing so poses significant logistical challenges, particularly because many states will be experiencing this surge at the same time for a presidential election – which is always the highest turnout election. These problems include mundane supply-chain issues, such as the need to ramp up the capacity to print dramatically large quantities of absentee ballots; the stresses on the U.S Postal Service of delivering absentee ballots to voters and processing the return of those ballots to election officials throughout the country; and the need to purchase equipment for the handling of absentee ballots, in jurisdictions that do not have it, to avoid having to process this new volume of absentee ballots by hand. For a summary of these issues, see Nathaniel Persily, *It's Not Too Late to Save the 2020 Election*, WALL ST. J. (June 12, 2020), *available at* https://www.wsj.com/articles/its-not-too-late-to-save-the-2020-election-11591973979.

The rapid, widespread transition to absentee voting in the post-COVID primary elections presented a number of challenges to voters and jurisdictions alike. First, jurisdictions without much experience with mail ballots can be overwhelmed by the volume of requests, often coming at the last minute. In turn, some number of

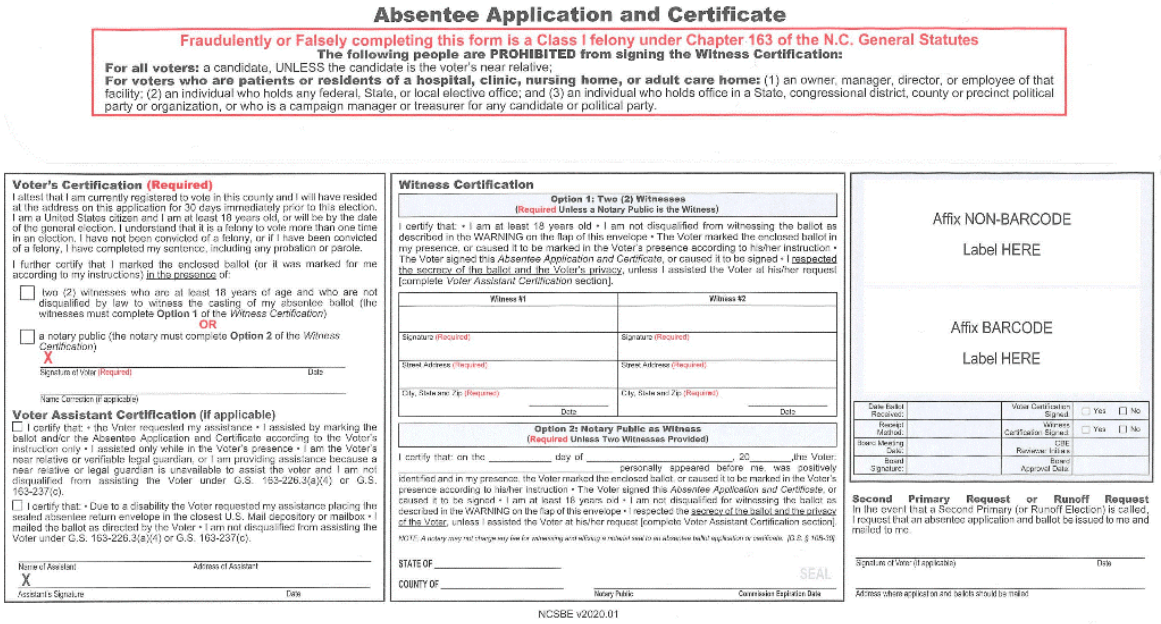
* These materials are drawn from the 2020 Supplement to Issacharoff, Karlan, Pildes, and Persily, The Law of Democracy: Legal Structure of the Political Process (5th ed. 2016).

voters who request absentee ballots do not receive them; others do not return them in time to be counted. *See* Michelle Ye Hee Lee, *Scattered problems with mail-in ballots this year signal potential November challenges for Postal Service*, WASH. POST (July 15, 2020), *available at* https://www.washingtonpost.com/politics/scattered-problems-with-mail-in-ballots-this-year-signal-potential-november-challenges-for-postal-service/2020/07/15/0dfb8b42-c216-11ea-b178-bb7b05b94af1_story.html; David Eggert, *Court denies Mich. absentee ballots that come after election*, DETROIT NEWS (July 15, 2020), *available at* https://www.detroitnews.com/story/news/local/michigan/2020/07/15/court-denies-mich-absentee-ballots-come-election/112261952/; Evan Nicole Brown, *What It's Been Like to Vote in 2020 So Far*, N.Y. TIMES (July 14, 2020), *available at* https://www.nytimes.com/2020/07/14/us/politics/voting-lines-2020-elections.html.

Second, voters unfamiliar with the process often make errors in absentee balloting that could lead to their votes not being counted. Most states require that the exterior return envelope for an absentee ballot include the voter's signature. Some also require signatures of a witness or notary or other information, such as the last four digits of a social security number or driver's license/state ID number. These measures are required to verify the identity of the person casting the ballot. Many voters fail to include that additional information or their signatures are deemed "mismatched" to those the election office has on file, drawn from DMV or voter registration records. If the information provided on the envelope is missing or inaccurate, roughly 20 states allow a voter to "cure" the inaccuracy if sufficient time remains. *See* NAT'L VOTE AT HOME INST., VOTE AT HOME POLICY ACTIONS: COVID-19 RESPONSE (May 2020), *available at* https://www.voteathome.org/wp-content/uploads/2020/05/NVAHI-50-State-Policy-Analysis.pdf. They do so by attesting to their signature or otherwise interacting with an election office to resolve the discrepancy. States, and even counties within states, vary considerably in the procedures they apply for verifying signatures and the voter's identity, employing combinations of automated and human review. *See* STANFORD LAW AND POLICY LAB, SIGNATURE VERIFICATION AND MAIL BALLOTS: GUARANTEEING ACCESS WHILE PRESERVING INTEGRITY (2020), *available at* https://law.stanford.edu/publications/signature-verification-and-mail-ballots-guaranteeing-access-while-preserving-integrity/.

Although we often categorize defects in mail ballots as "errors", in truth, the discrepancies that can lead to canceled votes come from many sources. First, verification of signatures only serves its purpose if the signature on file – most often derived from a small, but coarse, electronic sign-in pad at a DMV – accurately captures the voter's signature. Younger voters, who are less likely to have learned cursive writing, and older voters with certain disabilities, often do not have consistent signatures. Second, the instructions on an absentee ballot envelope are often not intuitive. Consider the absentee ballot envelope below from the 2020 primaries in North Carolina. Especially for first time absentee voters unfamiliar with the process,

they may find it strange that an anonymous ballot would require a signature on the envelope outside, let alone how important that signature is. Roughly five percent of absentee voters had their ballot rejected because of a missing signature.



Absentee Application and Certificate

Fraudulently or Falsely completing this form is a Class I felony under Chapter 163 of the N.C. General Statutes
The following people are PROHIBITED from signing the Witness Certification:
For all voters: a candidate, UNLESS the candidate is the voter's near relative;
For voters who are patients or residents of a hospital, clinic, nursing home, or adult care home: (1) an owner, manager, director, or employee of that facility; (2) an individual who holds any federal, State, or local elective office; and (3) an individual who holds office in a State, congressional district, county or precinct political party or organization, or who is a campaign manager or treasurer for any candidate or political party.

Voter's Certification (Required)
I attest that I am currently registered to vote in this county and I will have resided at the address on this application for 30 days immediately prior to this election. I am a United States citizen and I am at least 18 years old, or will be by the date of the general election. I understand that it is a felony to vote more than one time in an election, I have not been convicted of a felony, or if I have been convicted of a felony, I have completed my sentence, including any probation or parole.

I further certify that I marked the enclosed ballot (or it was marked for me according to my instructions) in the presence of:

☐ two (2) witnesses who are at least 18 years of age and who are not disqualified by law to witness the casting of my absentee ballot (the witnesses must complete **Option 1** of the *Witness Certification*)
OR
☐ a notary public (the notary must complete **Option 2** of the *Witness Certification*)

X _____
Signature of Voter (Required) Date

Name Correction (if applicable)

Voter Assistant Certification (if applicable)
☐ I certify that: • the Voter requested my assistance • I assisted by marking the ballot and/or the Absentee Application and Certificate according to the Voter's instruction only • I assisted only while in the Voter's presence • I am the Voter's near relative or verifiable legal guardian, or I am providing assistance because a near relative or legal guardian is unavailable to assist the voter and I am not disqualified from assisting the Voter under G.S. 163-226.3(a)(4) or G.S. 163-237(c).

☐ I certify that: • Due to a disability the Voter requested my assistance placing the sealed absentee return envelope in the closest U.S. Mail depository or mailbox • I mailed the ballot as directed by the Voter • I am not disqualified from assisting the Voter under G.S. 163-226.3(a)(4) or G.S. 163-237(c).

Name of Assistant Address of Assistant

X _____
Assistant's Signature Date

Witness Certification

Option 1: Two (2) Witnesses
(Required Unless a Notary Public is the Witness)

I certify that: • I am at least 18 years old • I am not disqualified from witnessing the ballot as described in the WARNING on the flap of this envelope • The Voter marked the enclosed ballot in my presence, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this *Absentee Application and Certificate*, or caused it to be signed • I respected the secrecy of the ballot and the Voter's privacy, unless I assisted the Voter at his/her request [complete *Voter Assistant Certification* section].

Witness #1	Witness #2
Signature (Required)	Signature (Required)
Street Address (Required)	Street Address (Required)
City, State and Zip (Required)	City, State and Zip (Required)
Date	Date

Option 2: Notary Public as Witness
(Required Unless Two Witnesses Provided)

I certify that: on the _____ day of _____, 20_____, the Voter, _____, personally appeared before me, was positively identified and in my presence, the Voter marked the enclosed ballot, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this *Absentee Application and Certificate*, or caused it to be signed • I am at least 18 years old • I am not disqualified for witnessing the ballot as described in the WARNING on the flap of this envelope • I respected the secrecy of the ballot and the privacy of the Voter, unless I assisted the Voter at his/her request [complete Voter Assistant Certification section].

NOTE: *A notary may not charge any fee for witnessing and affixing a notarial seal to an absentee ballot application or certificate.* (G.S. § 163-59)

STATE OF _____
COUNTY OF _____ SEAL
Notary Public Commission Expiration Date

Affix NON-BARCODE Label HERE

Affix BARCODE Label HERE

Date Ballot Received:		Voter Certification Signed:	☐ Yes ☐ No
Receipt Method:		Witness Certification Signed:	☐ Yes ☐ No
Board Meeting Date:		CBE Reviewer Initials:	
Board Signature:		Board Approval Date:	

Second Primary Request or Runoff Request
In the event that a Second Primary (or Runoff Election) is called, I request that an absentee application and ballot be issued to me and mailed to me.

Signature of Voter (if applicable) Date

Address where application and ballots should be mailed

NCSBE v2020.01

Given the potential for defects in the absentee voting process, it may come as little surprise that many absentee ballots are not counted. Most uncounted absentee ballots are rejected because they are received after the deadline. Rates of uncounted ballots range widely between jurisdictions, from 3% to 30% (in an extraordinary recent example from New York) and varied significantly even between counties in the same state. *See* Elise Viebeck & Michelle Ye Hee Lee, *Tens of thousands of mail ballots have been tossed out in this year's primaries. What will happen in November?*, WASH. POST (July 16, 2020), *available at* https://www.washingtonpost.com/politics/tens-of-thousands-of-mail-ballots-have-been-tossed-out-in-this-years-primaries-what-will-happen-in-november/2020/07/16/fa5d7e96-c527-11ea-b037-f9711f89ee46_story.html; Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands Of Mail-In Ballots Rejected For Tardiness*, NPR (July 13, 2020), *available at* https://www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness. A rate of 3% is less significant when only 5% of the overall vote is cast absentee than when 50% is by absentee ballot. Moreover, rates of uncounted ballots are not evenly distributed. One study of the rates of uncounted ballots in Florida's 2020 primary found the youngest voters were three times as likely to have their absentee vote go uncounted, and African Americans and Latinos were twice as likely to have their votes go uncounted as whites. DIANA CAO, FLORIDA ELECTION ANALYSIS (2020), *available at* https://healthyelections.org/sites/default/files/2020-06/Florida%20Election%20Memo.pdf.

Third, many voters prefer to vote in person, despite the virus. Some do not trust the postal service to deliver their ballot and others simply enjoy the civic spirit associated with voting in a polling place. *See* Carrie Levine & Pratheek Rebala, *'I wanted my vote to be counted': In South Carolina, a peek at COVID-19's impact on elections*, CENT. FOR PUB. INTEGRITY (June 22, 2020), *available at* https://publicintegrity.org/politics/elections/in-south-carolina-a-peek-at-covid-19s-impact-on-elections-polling-place/. A recent survey found that even with the virus, 30% of people in California still prefer to vote in-person. *See Republicans and Democrats in California prefer to get their ballot in the mail*, CALMATTERS (July 2, 2020), *available at* https://calmatters.org/commentary/my-turn/2020/07/republicans-and-democrats-in-california-prefer-a-mail-ballot-but-safe-accessible-options-are-important/.

Finally, a massive flood of absentee ballots means that many ballots will not be received and able to be counted until after Election Day. Most states permit these ballots to be postmarked as late as on Election Day and treat them as valid if received as late, in some states, as 14 days after Election Day. In Pennsylvania's June primary, only 50% of the vote had been counted the day after Election Day; it took five days after the primary before 75% of the vote was counted; and one month before the entire vote was counted. Chuck Todd et al., *Month-long vote count in Pennsylvania is another warning for November*, NBC NEWS (July 24, 2020), *available at* https://www.nbcnews.com/politics/meet-the-press/month-long-vote-count-pennsylvania-another-warning-november-n1234794. In New York, a winner in some congressional primaries was not declared until two weeks after Election Day, and in one congressional primary, a winner was still not declared more than a month after the election.

This leads to one of the greatest concerns about the fall election, if it turns out that hundreds of thousands of absentee ballots in swing states cannot be counted until well after Election Day. *See* Richard H. Pildes, *Reducing One Source of a Potential Election Meltdown*, LAWFARE BLOG (March 20, 2020) *available at* https://www.lawfareblog.com/reducing-one-source-potential-election-meltdown. In the current political climate, if one candidate is ahead in one or more critical states on Election Night, but that lead gradually evaporates over the next week or so -- making the other candidate the winner of the presidency -- explosive charges that the election is being stolen might well arise. To prepare the public for how much later than normal the winner of the election might be known, some media have begun talking about "Election Week" rather than Election Night. Even with some media doing so, how likely do you think it is that those warnings will diminish the risk that partisans will still charge that the election is illegitimate?

2. Political Controversies Over "Vote by Mail." "Voting by mail" also became politically controversial, with President Trump, in particular, arguing that voting by mail would increase the risk of election fraud. While there are a few, more significant examples of absentee-ballot fraud than in-person voter impersonation fraud, the

number of examples is small. Some of the political conflict over "vote by mail" was the product of widespread terminological confusion between "no-excuse absentee voting" and what might be called true "vote-by-mail," such as used in Washington, Oregon, Colorado, Utah and Hawaii. The functional difference is that the former requires the voter to request an absentee ballot while in the latter the state mails out absentee ballots to all eligible voters.

It is easy to find supporters and critics who sound as if they are defending or criticizing one of these options when they are actually addressing the other option. As an example of someone defending no-excuse absentee voting who *sounds* as if they are supporting true VBM. Michigan's Secretary of State, Jocelyn Benson (a former election law scholar), wrote an op-ed entitled "Vote By Mail Worked in Michigan." Jocelyn Benson, *Vote-by-mail worked in Michigan. Here's what we need to succeed in the fall*, BROOKINGS (June 19, 2020), *available at* https://www.brookings.edu/blog/fixgov/2020/06/19/vote-by-mail-worked-in-michigan-heres-what-we-need-to-succeed-in-the-fall/. That title makes it sound as if she is defending true VBM, but she is not; Michigan does not use true VBM (writers of op-eds typically have no say over the title a publication puts on a piece). Benson's piece was only defending and explaining no-excuse absentee voting.

Similarly, some critics of true VBM might sound as if they are attacking no-excuse absentee voting, or be taken to be doing that, when they are not. Professor Michael Morley, for example, has written strongly against true VBM, but supports no-excuse absentee voting. *See* Michael Morley, *Election Modifications to Avoid During the COVID-19 Pandemic*, LAWFARE BLOG (April 17, 2020), *available at* https://www.lawfareblog.com/election-modifications-avoid-during-covid-19-pandemic.

In addition, no-excuse absentee voting is not as controversial as some of these public debates might suggest. About 28 states now have no-excuse absentee voting (another 5 states use true VBM). Nor is no-excuse absentee voting as much of a partisan issue as some of the public debates might suggest. The list of these no-excuse absentee ballot states includes many that would be considered "red states," including such states as KS/ID/WY/SD/ND/NC/NV/NE/MT/GA/AK (a few of these states currently have divided government).

To be sure, some states do strongly oppose no-excuse absentee voting; Texas is a current, prominent example, as discussed further below. But at least some of the political conflict over "Vote By Mail" was a product of commentators believing that defenders of no-excuse absentee were defending true VBM and critics of true VBM being thought of as hostile to no-excuse absentee voting. Indeed, President Trump and Vice President Pence suggested at points that they supported no-excuse absentee voting and were criticizing only true VBM.

3. In-person Voting. On top of preparing for dramatic increases in absentee voting, election officials face enormous problems in enabling in-person voting as well. Many traditional polling sites, such as schools and senior centers, are unlikely to be available, given concerns about the virus. In addition, many poll workers, who are often elderly, are declining to participate this year. This generates the need to consolidate numerous polling places into one location. That, in turn, has led to extremely long lines in some primaries, and to making voting less accessible.

Some solutions that have emerged thus far are to use large venues, such as sports arenas, as polling places that can accommodate, both for parking and on-site voting, exceptionally large numbers of voters. For an analysis of how this worked fairly effectively in Kentucky's primaries in June, see Robert Farley, *Kentucky: The Day After*, LAWYERS, GUNS & MONEY BLOG (June 24, 2020), *available at* https://www.lawyersgunsmoneyblog.com/2020/06/kentucky-the-day-after. Another possibility includes the use of curbside voting, in which voters can drive up and remain in their car to cast a ballot.

While ramping up the absentee-ballot process is critical, ensuring robust capacity for in-person voting will remain essential, particularly given the issues noted above about absentee voting. *See* Richard H. Pildes, *Absentee ballots will be critical this fall. But in-person voting is even more essential.*, WASH. POST (June 23, 2020), *available at* https://www.washingtonpost.com/opinions/2020/06/23/absentee-ballots-will-be-critical-this-fall-in-person-voting-is-even-more-essential/. For analysis of how to make the in-person process work as smoothly and safely as possible, see Nathaniel Persily & Charles Stewart III, *The Looming Threat to Voting in Person*, THE ATLANTIC (June 27, 2020), *available at* https://www.theatlantic.com/ideas/archive/2020/06/looming-threat-voting-person/613552/.

4. The Role of State Courts and the Lower Federal Courts. Policymakers in a number of states have acted to adapt their voting systems and rules to the circumstances of the pandemic. In some states, this has involved the passage of new legislation for elections this year. In other states, Governors or Secretaries of states have used their powers under public-health emergency statutes to restructure the voting process. Alabama law, for example, permits absentee voting only for certain specific reasons. But in light of the pandemic, Alabama's Secretary of State issued an order permitting no-excuse absentee voting.

But an enormous raft of litigation has already taken place, with more expected, over a broad array of voting-related issues. At the time this supplement went to press, more than 150 cases had already been filed in state or federal court. Some of this litigation would be taking place even without the pandemic. Both parties and their allied groups had raised vast sums to fund litigation before the virus emerged. That is a result of the increased recognition after first the 2000 election, then the 2016

election, of how small the margins might be that determine who becomes President; the small margins that determine partisan control of the Senate and House; and the intensity of our current political culture. With the virus then added on top of that, litigation took off even more dramatically.

Thus far, federal and state courts thus far have ordered changes to matters such as signature requirements for candidates and ballot initiatives; deadlines for voter registration; deadlines for absentee ballots; and witness requirements for absentee ballots. In some of these cases, the courts have merely prohibited the state from enforcing certain statutory prohibitions; in others, the courts have ordered the states to adopt new policies. For a summary of these decisions, see Richard Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, __ Election Law J. (forthcoming 2020). In the most dramatic of these cases, the federal courts decided that New York was constitutionally required to hold to its previously scheduled presidential primary election which the state, in the midst of the pandemic, had decided to cancel. Hemorrhaging money, the state sought to devote its scarce resources to the public health and economic crises the pandemic had unleashed and argued that the primary's main purpose no longer existed, given that Joe Biden had already wrapped up the nomination. But the court held that the state was required to hold the primary, because the elected delegates to the Democratic Convention, even if they would not change the fact that Biden would be nominated, still "could influence the party platform, vote on party governance issues, pressure the eventual nominee on matters of personnel or policy, and react to unexpected developments at the Convention."

These decisions are based on application of the *Anderson-Burdick* doctrine. Though state courts are not obligated to apply that doctrine as a matter of state constitutional law, many state courts have read their state constitutions to incorporate these same standards. One of the noteworthy features of these cases is that courts are concluding that laws completely constitutional under normal circumstances become unconstitutional under the conditions of the pandemic. Due to the virus, courts have concluded, states must not enforce otherwise valid provisions and must affirmatively adopt other measures. As one example, a Virginia district court concluded that "[i]n ordinary times," Virginia's requirement that an absentee ballot be signed by a witness may not be a significant burden on the right to vote." "But these are not ordinary times. In our current era of social distancing . . . the burden is substantial for a substantial and discrete class of Virginia's electorate." *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020). The court thus held the witness-signature requirement unconstitutional for the upcoming June primary, but expressed no view about that constitutionality of that requirement for future elections. *See also Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (concluding that long-standing Michigan provisions on the number of signatures required for candidates to appear on the ballot *now* imposed a "severe burden" on ballot access

because "the provisions are not narrowly tailored *to the present circumstances*").

One intriguing aspect to these early cases is the sudden emergence of *Anderson-Burdick* as *the* dominant font of authority for federal courts to order state-election code changes to enable effective political participation in the conditions of Covid-19. For most of the years since the *Anderson-Burdick* doctrine emerged, it had proven to be weak tea, particularly in the Supreme Court. Indeed, the doctrine was considered a retrenchment on the more robust right-to-vote doctrine that had first emerged in the 1960s, under which the Court subjected restrictions on the franchise to strict scrutiny. *Burdick* explicitly stated that "a more flexible standard" than strict scrutiny should apply going forward. Since the *Anderson-Burdick* test was formulated, the Supreme Court has never used it to strike down a regulation of, or restriction on, access to the ballot box – the most prominent example being the Court's decision invoking *Anderson-Burdick* to uphold a voter-identification law in *Crawford v. Marion County Election Bd.* But under the conditions of the pandemic, *Anderson-Burdick* has thus far become a much more robust doctrine in application.

A second intriguing aspect of these cases is that the federal courts can be seen as exercising the kind of emergency powers normally thought to be the province of only executives and legislatures. Courts have become first-movers and front-line actors in adopting new policies that the emergency circumstances are thought to require. In addition, the conception of constitutional rights has shifted in the emergency. As against the ordinary state of affairs, in which American constitutional rights are viewed as negative rights, during the pandemic, these rights become the kind of positive constitutional rights thought to exist only in other constitutional systems. *See* Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356:

> In the domain of elections, federal courts are themselves becoming affirmative institutions of the state taking the initiative to create new policies that the pandemic crisis is thought to warrant. The courts are not engaging in an *ex post* checking function against new emergency measures the government has taken; instead, the courts are responding to the *failure* of governments to adopt new policies tailored to the extreme new circumstances of the pandemic. Courts in this arena are not negatively checking and vetoing government action, they are *affirmatively* requiring government to adopt certain policies. Courts are not issuing injunctions blocking coercive new emergency measures governments have adopted; instead, courts are mandating that governments *exercise* extraordinary powers that would not be required in normal times. In a fragmented way thus far, across district courts scattered around the country, the federal courts are moving bit by bit toward building a new election code for pandemic-time elections. While we are not accustomed to viewing the Constitution as granting federal

> courts emergency powers, that is an apt overarching framework for synthesizing the various election-related decisions rapidly emerging -- with several new decisions weekly -- from the federal courts.

All this is in flux, however, and two federal courts of appeals have rejected the notion that federal courts have such powers. In Texas, which permits absentee voting only for those who are disabled, away, or over 65, a federal district court had held that the Constitution required Texas to make absentee voting available to all eligible voters. But in staying the district court's injunction, a motions panel of the Fifth Circuit stated that the "Virus's emergence has not suddenly obligated Texas to do what the Constitution has never been permitted to command, which is to give everyone the right to vote by mail." *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *14 (5th Cir. June 4, 2020). Judge Ho's concurring opinion elaborated this view: the Constitution can be implicated in response to state action, but "expanding access to mail-in voting to redress personal hardship . . . is a policy matter for the Legislature." The case will be argued to the Fifth Circuit later this year.

The Sixth Circuit has taken a similar position, but in a more nuanced form. That court held that a district court had properly applied *Anderson-Burdick* in enjoining Michigan from applying its usual deadlines and signature requirements to state and federal candidates seeking access to the primary ballot, given the circumstances of Covid-19. But exercising the kind of emergency powers discussed above, the district court had gone on to order the state to (1) reduce the number of signatures required by 50%; (2) extend the deadline for filing the signatures; and (3) permit the collection of signatures through the use of electronic mail. The Sixth Circuit held that the district court did not have the power to order Michigan to take these affirmative steps; it was up to the state, in the first instance, to decide how to re-design its election process in light of the holding that its current rules had become unconstitutional, due to the virus. In the words of the Sixth Circuit, the district court had impermissibly crossed the line into engaging in "a plenary re-writing of the State's ballot-access provisions." *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *2 (6th Cir. May 5, 2020). Despite the virus, "federal courts have no authority to dictate to the States precisely how they should conduct their elections." In a later, unanimous decision, the Sixth Circuit elaborated by saying that "[f]ederal courts can enter positive injunctions that require parties to comply with existing law. But they cannot 'usurp a State's legislative authority by re-writing its statutes' to create new law." *Thompson v. DeWine*, No. 20-3526, 2020 WL 2702483, at *6 (6th Cir. May 26, 2020).

5. The Supreme Court. Thus far, the Supreme Court has decided only one of these voting cases on the merits, from Wisconsin. The Court has also ruled on requests for procedural relief in cases from three other states.

a. In Texas, a federal district court in a preliminary injunction context held that plaintiffs were likely to succeed on their claim that Texas' policy of permitting only those over the age of 65 to cast an absentee ballot without a further justification unconstitutionally discriminated against younger voters, in the context of the pandemic, in violation of the 26th Amendment (few cases address the 26th amendment at all). The Fifth Circuit stayed that decision. Plaintiffs then asked the Supreme Court to vacate that stay and for expedited consideration of their cert. petition before the Fifth Circuit had resolved the appeal pending before it. The Supreme Court declined to do so. The cert. petition remains pending and the Fifth Circuit has scheduled argument on the state's appeal from the district court's preliminary injunction.

In Alabama, the state was holding runoff elections for its primaries on July 14, 2020. Because of the virus, the Secretary of State (SOS) issued an emergency regulation permitting all voters to vote absentee. But the SOS did not modify other requirements related to absentee voting, including requirements that the voter submit with the ballot a copy of a photo ID and an affidavit signed either by a notary public or two witnesses (the Governor issued an order permitting notarization to be done by videoconference rather than in person). Invoking *Anderson-Burdick,* plaintiffs challenged these requirements and also argued that they should have a right to engage in in-person curbside voting, which the SOS was allegedly preventing counties from using.

The district court accepted these claims and granted a preliminary injunction. Specifically, the court's order enjoined (1) state officials from enforcing the witness requirement against any qualified voter who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the CDC has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19; (2) the election officials from enforcing the photo ID requirement for any qualified voter age 65 or older or with a disability who determines it is impossible or unreasonable to safely satisfy that requirement, and who provides a written statement signed by the voter under penalty of perjury that he or she is 65 or older or has a disability; and (3) the Secretary from prohibiting counties from establishing curbside voting procedures that otherwise comply with state election law.

The Eleventh Circuit denied Alabama's emergency motion to stay the preliminary injunction. The Supreme Court, in a 5-4 order, then stayed the district court's order pending resolution of the issues on the merits in the Eleventh Circuit. In the runoff primaries, 5.2% of the total vote was cast absentee, a record for Alabama.

The Court also took action in a felon-disenfranchisement case (discussed in

detail in the Chapter 2 materials of this Supplement) out of Florida not connected to the unique circumstances of the virus. After the district court issued an injunction, holding that the Florida law at issue was unconstitutional, the en banc Eleventh Circuit issued a stay, pending appeal, of that injunction. The Supreme Court then declined to vacate that stay.

b. The Court's one decision on the merits emerged out of an intense political struggle in Wisconsin between the Governor, a Democrat, and the Republican-controlled state legislature. Wisconsin was scheduled to hold elections in April 2020, during the first peak of the pandemic, that involved both the presidential primary and a general election for the state supreme court. After acknowledging he did not have the unilateral power to postpone the election, the Governor sought to get the legislature to do so. When the legislature refused, the Governor then did so unilaterally, but the state supreme court held he lacked the power to do so.

Plaintiffs then turned to the federal courts, invoking *Anderson-Burdick* to request several changes to the rules governing the election. The district court acknowledged it had no power to postpone the election. The court then ordered two changes for the April election: (1) that the state treat as valid all absentee ballots received on or before April 13th, six days after Election Day; (2) that absentee ballot postmarked *after* Election Day also be treated as valid votes as long as they too were received by April 13th.

The state then took the case to the Supreme Court. The state did not challenge the first part of the district's court's order. The District Court issued its preliminary injunction on Thursday, April 2; on Friday, the Seventh Circuit declined to vacate that stay; on Monday, the day before the election, the Supreme Court in a 5-4 per curiam decision (without plenary briefing or oral argument) then overturned the second part of the district's court and held that the court could not order state officials to treat absentee ballots as valid votes if those ballots were postmarked after Election Day:

REPUBLICAN NATIONAL COMMITTEE, et al. *v.* DEMOCRATIC NATIONAL COMMITTEE, et al.

140 S. Ct. 1205 (2020)

PER CURIAM:

The application for stay presented to Justice Kavanaugh and by him referred to the Court is granted. The District Court's order granting a preliminary injunction is stayed to the extent it requires the State to count absentee ballots postmarked after April 7, 2020.

Wisconsin has decided to proceed with the elections scheduled for Tuesday, April 7. The wisdom of that decision is not the question before the Court. The question before the Court is a narrow, technical question about the absentee ballot process. In this Court, all agree that the deadline for the municipal clerks to receive absentee ballots has been extended from Tuesday, April 7, to Monday, April 13. That extension, which is not challenged in this Court, has afforded Wisconsin voters several extra days in which to mail their absentee ballots. The sole question before the Court is whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13. Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots mailed and postmarked after election day, April 7, to be counted. That is a critical point in the case. Nonetheless, five days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited, but is that the plaintiffs themselves did not see the need to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell* v. *Gonzalez*, 549 U. S. 1 (2006) (*per curiam*) [other citations omitted].

The unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day is perhaps best demonstrated by the fact that the District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day. In doing so, the District Court in essence enjoined non-parties to this lawsuit. It is highly questionable, moreover, that this attempt to suppress disclosure of the election results for six days after election day would work. And if any information were released during that time, that would gravely affect the integrity of the election process. The District Court's order suppressing disclosure of election results showcases the unusual nature of the District Court's order allowing absentee ballots mailed and postmarked after election day to be counted. And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.

The dissent is quite wrong on several points. First, the dissent entirely disregards the critical point that the plaintiffs themselves did not ask for this additional relief in their preliminary injunction motions. Second, the dissent contends that this Court

should not intervene at this late date. The Court would prefer not to do so, but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error. Third, the dissent refers to voters who have not yet received their absentee ballots. But even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots (which was this past Friday in this case) will usually receive their ballots on the day before or day of the election, which in this case would be today or tomorrow. The plaintiffs put forward no probative evidence in the District Court that these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots. In that regard, it bears mention that absentee voting has been underway for many weeks, and 1.2 million Wisconsin voters have requested and have been sent their absentee ballots, which is about five times the number of absentee ballots requested in the 2016 spring election. Fourth, the dissent's rhetoric is entirely misplaced and completely overlooks the fact that the deadline for receiving ballots was already extended to accommodate Wisconsin voters, from April 7 to April 13. Again, that extension has the effect of extending the date for a voter to mail the ballot from, in effect, Saturday, April 4, to Tuesday, April 7. That extension was designed to ensure that the voters of Wisconsin can cast their ballots and have their votes count. That is the relief that the plaintiffs actually requested in their preliminary injunction motions. The District Court on its own ordered yet an additional extension, which would allow voters to mail their ballots after election day, which is extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election.

Therefore, subject to any further alterations that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m.

The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.

The stay is granted pending final disposition of the appeal by the United States Court of Appeals for the Seventh Circuit and the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE GINSBURG, with whom JUSTICES BREYER, SOTOMAYOR, AND KAGAN join, dissenting.

* * *

II

A

The Court's order requires absentee voters to postmark their ballots by election day, April 7—*i.e.*, tomorrow—even if they did not receive their ballots by that date. That is a novel requirement. Recall that absentee ballots were originally due back to election officials on April 7, which the District Court extended to April 13. Neither of those deadlines carried a postmark-by requirement.

While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received. Yet tens of thousands of voters who timely requested ballots are unlikely to receive them by April 7, the Court's postmark deadline. Rising concern about the COVID–19 pandemic has caused a late surge in absentee- ballot requests. The Court's suggestion that the current situation is not "substantially different" from "an ordinary election" boggles the mind. Some 150,000 requests for absentee ballots have been processed since Thursday, state records indicate. The surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots. As of Sunday morning, 12,000 ballots reportedly had not yet been mailed out. It takes days for a mailed ballot to reach its recipient—the postal service recommends budgeting a week—even without accounting for pandemic-induced mail delays. It is therefore likely that ballots mailed in recent days will not reach voters by tomorrow; for ballots not yet mailed, late arrival is all but certain. Under the District Court's order, an absentee voter who receives a ballot after tomorrow could still have voted, as long as she delivered it to election officials by April 13. Now, under this Court's order, tens of thousands of absentee voters, unlikely to receive their ballots in time to cast them, will be left quite literally without a vote.

This Court's intervention is thus ill advised, especially so at this late hour. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Election officials have spent the past few days establishing procedures and informing voters in accordance with the District Court's deadline. For this Court to upend the process—a day before the April 7 postmark deadline—is sure to confound election officials and voters.

B

What concerns could justify consequences so grave? The Court's order first suggests a problem of forfeiture, noting that the plaintiffs' written preliminary-injunction motions did not ask that ballots postmarked after April 7 be counted. But unheeded by the Court, although initially silent, the plaintiffs specifically requested that remedy at the preliminary-injunction hearing in view of the ever-increasing demand for absentee ballots.

Second, the Court's order cites *Purcell*, apparently skeptical of the District Court's intervention shortly before an election. Never mind that the District Court was reacting to a grave, rapidly developing public health crisis. If 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.

Third, the Court notes that the District Court's order allowed absentee voters to cast ballots after election day. If a voter already in line by the poll's closing time can still vote, why should Wisconsin's absentee voters, already in line to receive ballots, be denied the franchise? According to the stay applicants, election-distorting gamesmanship might occur if ballots could be cast after initial results are published. But obviating that harm, the District Court enjoined the publication of election results before April 13, the deadline for returning absentee ballots, and the Wisconsin Elections Commission directed election officials not to publish results before that date.

The concerns advanced by the Court and the applicants pale in comparison to the risk that tens of thousands of voters will be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern.

* * *

The majority of this Court declares that this case presents a "narrow, technical question." That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. Under the District Court's order, they would be able to do so. Even if they receive their absentee ballot in the days immediately following election day, they could return it. With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation.

NOTES AND QUESTIONS

1. There were a number of problems administering the election, including a dramatic reduction of the number of polling sites in Milwaukee and Green Bay, due to the lack of poll workers able to staff those sites. Even with these problems, the enormous volume of absentee votes led turnout to be surprisingly high; at 34 percent, turnout was higher than the 31 percent average for all of Wisconsin's presidential primaries since 1984.

2. At this stage, it is not clear what the precedent of *RNC v. DNC* will mean for future issues. The case was limited to a discrete issue that has not arisen in any other case: whether a federal court can order absentee ballots cast after Election Day to be

treated as valid votes. Many states permit absentee ballots to be *received* by election officials after Election Day; but neither those states, nor any others, permit absentee ballots postmarked after Election Day to be treated as valid votes. In a perhaps broader sense, the Court's decision might mean that, whatever power federal courts have to modify more discretionary policies concerning elections, in light of the virus, they do not have the power to change the formal qualities that give an election finality; just as federal courts do not have the power to change the date of the election, they do not have the power to change the date by which votes must be cast. What other aspects of elections, if any, might fall into that category awaits future developments.

* * * * *

Not all the key litigation surrounding the 2020 election is a direct product of COVID-19, of course. Consider the situation in Florida.

In recent years, many states have relaxed their offender disenfranchisement provisions. Between 1997 and 2018, roughly two dozen states made it easier for at least some offenders to vote, by repealing lifetime disenfranchisement laws, allowing some or all persons under community supervision (e.g., people on probation or parole) to vote, or easing the restoration process for citizens seeking to have their right to vote restored after completing their sentence. These reforms made roughly 1.4 million individuals potentially eligible to vote. *See* Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reforms*, The Sentencing Project (Oct. 17, 2018), available at https://perma.cc/M9GK-2JRV.

In 2018, Florida voters, by a wide margin (with two-thirds of voters supporting the initiative), amended the state constitution to automatically restore most individuals' right to vote "upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4. (Individuals convicted of murder or a felony sex offense were not included.) Roughly 1.4 million individuals could potentially benefit from Amendment 4.

In June 2019, the legislature enacted SB 7066, which defined "completion" of the terms of a sentence to include payment of all financial obligations ordered within the four corners of the sentencing document. These obligations might consist, in a particular case, of fines, restitution, costs, or fees. The amounts were potentially quite substantial, involving thousands of dollars. Among the costs and fees are a flat $225 assessment in every felony case, $200 of which is used to fund clerks' offices, and $25 of which is deposited in the state's general fund, and a $3 assessment in every case that goes into an account that funds domestic-violence programs and law-enforcement training.

After litigation began in federal court challenging SB 7066, the Governor sought an advisory opinion from the state supreme court. That court held, as a matter

of state law, that the language of Amendment 4 itself, without regard to the subsequent legislative enactment, required the payment of all legal financial obligations (LFOs) as a condition precedent to renewed eligibility to vote. *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1072 (Fla. 2020).

In the federal litigation, various voters and civil rights and voting rights groups challenged Florida's "pay-to-vote" requirement advancing theories under the First, Eighth, Fourteenth and Twenty-Fourth Amendments.

In the fall of 2019, the district court granted a preliminary injunction premised on the principle that requiring payment of financial obligations as a condition of restoring an offender's right to vote violates the Equal Protection Clause when the offender is unable to pay. *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1289 (N.D. Fla. 2019). The court enjoined the Florida Secretary of State and the Supervisors of Elections in the counties where the individual plaintiffs lived from preventing those seventeen individuals from registering or from voting "based only on failure to pay a financial obligation that the plaintiff asserts the plaintiff is genuinely unable to pay." The court did not address the plaintiffs' procedural due process claim (which challenged the method by which aspiring voters could show their inability to pay) or their Twenty-Fourth Amendment claim, which challenged some of the LFOs as a forbidden poll tax.

In February 2020, the Eleventh Circuit affirmed the district court's grant of a preliminary injunction. It held that "heightened scrutiny applies in this case because we are faced with a narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box." *Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020). The Eleventh Circuit explained that disenfranchisement inflicted "a continuing form of punishment" on indigent former offenders to which non-indigent former offenders were not subjected. And it suggested that the Florida requirement might not pass even rational basis scrutiny.

The district court then certified a class and conducted a full-scale bench trial, issuing its opinion in May 2020. *Jones v. DeSantis*, 2020 WL 2618062 (N.D. Fla., May 24, 2020). The court found that "the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount." Withholding the right to vote on that basis was irrational and because it created a wealth barrier to rights restoration without sufficient justification, it failed both rationality review and heightened scrutiny under the Equal Protection Clause.

Moreover, the district court also held that while restitution orders did not impose a "tax," many of the fees and costs Florida mechanically assessed against all

convicted felons *were* taxes because they were used to fund government operations. "The Twenty-Fourth Amendment precludes Florida from conditioning voting in federal elections on payment of these fees and costs. And because the Supreme Court has held, in effect, that what the Twenty-Fourth Amendment prescribes for federal elections, the Equal Protection Clause requires for state elections, Florida also cannot condition voting in state elections on payment of these fees and costs."

Finally, the district court held that Florida's system for enabling all former offenders to determine their LFOs was so plagued by intractable administrative problems that it violated procedural due process and was unconstitutionally vague. The court found that many offenders had "no way to find out" their LFOs. It pointed to testimony regarding the efforts of "a professor specializing in this field with a team of doctoral candidates from a major research university" who unsuccessfully spent weeks trying to obtain the LFOs for "153 randomly selected felons." And a group of staff with "combined experience of over 100 years" in one county clerk's office spent 12-15 hours "bulldog[ing]" the circumstances of one of the individual plaintiffs at the end of which "[t]hey came up with what they believed to be the amount owed. But even with all that work, they were unable to explain discrepancies in the records" they had used.

The court emphasized that based on the State's own estimates, the projected completion date for reviewing the LFOs of only the 85,000 *currently* pending registrations for individuals with felony convictions would be completed only "early in 2026. With a flood of additional registrations expected in this presidential election year, the anticipated completion date might well be pushed into the 2030s."

And the court found that the inability to determine LFOs accurately would deter even eligible offenders from registering or voting because the state's voter registration form warns a false affirmation of eligibility is a felony and they might reasonably fear prosecution.

The district court then declared that the "Florida pay-to-vote system" is "unconstitutional as applied to individuals who are otherwise eligible to vote but are genuinely unable to pay the required amount," that conditioning the right to vote on "amounts that are unknown and cannot be determined with diligence is unconstitutional," and that "[t]he requirement to pay fees and costs as a condition of voting is unconstitutional because they are, in substance, taxes." It enjoined the state and its officials from enforcing those requirements.

The district court also required the state to set up a process by which individuals could request an advisory opinion from the Division of Elections regarding their LFOs. If the Division of Elections fails to provide an answer within 21 days, the government was enjoined from taking any steps to impede the individual's registration or voting, including acting "to cause or assist a prosecution of the requesting person for registering to vote and voting" unless and until the person

voted after "the Division of Elections provides an advisory opinion that shows the person is ineligible to vote."

The state appealed. In July 2020, the court of appeals voted to hear the case en banc (rather than initially before a three-judge panel) and in a one sentence order granted the state's motion to stay the permanent injunction pending appeal. *Jones v. Governor of Florida*, 2020 WL 4012843 (11th Cir. July 1, 2020).

The plaintiffs then asked the Supreme Court to vacate the court of appeals' stay of the district court's permanent injunction. In a per curiam order, the Court denied that motion. *Raysor v. DeSantis*, 2020 WL 4006868 (U.S. July 16, 2020).

Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented from the denial of the application to vacate the Eleventh Circuit's stay. She emphasized that "'nearly a million' persons are barred from voting because of Florida's alleged wealth discrimination, inscrutable processes, and tax." Thus, it was quite likely that the question whether Florida could condition automatic re-enfranchisement on paying LFOs was "exceptionally important and likely to warrant review."

She then confronted the Court's *Purcell* jurisprudence. In Purcell v. Gonzales, 549 U.S. 1 (2006) (per curiam), the plaintiffs had brought suit in May 2006 to challenge Arizona's newly implemented Proposition 200, which required voters to present proof of citizenship when they registered to vote and to present identification when they voted on election day. They sought a preliminary injunction to enjoin its use in the upcoming November election. In early September, the district court denied their request for a preliminary injunction without then issuing findings of fact or conclusions of law. (Only in mid-October did the district court explain that while the plaintiffs had "shown a possibility of success on the merits of some of their arguments," the court could not say "at this stage they have shown a strong likelihood" and finding that the balance of the harms and the public interest counseled in favor of denying the injunction.) In the interim, a two-judge court of appeals motions panel issued a four-sentence order enjoining Arizona from enforcing Proposition 200 pending disposition, after full briefing, of the plaintiffs' appeal of the denial of a preliminary injunction. That briefing would not be completed until after the 2006 election.

In a per curiam opinion, the Supreme Court treated the state's application to vacate the court of appeals injunction as a petition for certiorari, granted the petition, and vacated the court of appeals' order. The Court emphasized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Thus, the Court stated that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the [challenged] rules." This proposition—that courts should not change

election rules shortly before an election—came to be known as the "*Purcell* principle." *See* Richard L. Hasen, *Reining in the Purcell Principle,* 43 Fla. St. U. L. Rev. 427 (2016); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 456 (2015).

Quoting *Purcell v. Gonzales*, Justice Sotomayor observed that, like the Ninth Circuit in *Purcell*, the Eleventh Circuit's "bare order" granting en banc review and staying the district court's injunction had not "'provide any factual findings or indeed any reasoning of its own,' and '[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect." She emphasized that "[t]he law required the Eleventh Circuit to 'give deference to the discretion of the District Court,' but there is 'no indication that it did so.' That is the precise error this Court corrected in *Purcell*." In light of the fact that the preliminary injunction had already been in place for nearly a year, she argued that "the Eleventh Circuit has created the very 'confusion' and voter chill that *Purcell* counsels courts to avoid." And she ended by charging that "[t]his Court's inaction continues a trend of condoning disfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. *See Republican National Committee v. Democratic National Committee*, 589 U. S. ——, (2020) (per curiam). Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disfranchisement—a situation that *Purcell* sought to avoid—the Court balks."