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Essay

Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence

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Policymakers should not be distracted by the courts' near-universal rejection of legal challenges to President Joe Biden's clear electoral college and popular vote victory. Jurisprudential trends emerging from 2020's unprecedented wave of election-related litigation pose a threat to voting rights going forward. This essay examines three of those trends: The unjustified extension of the Purcell principle to block voting protections; the growing judicial embrace of the state legislative supremacy doctrine; and the apparent willingness of some judges to throw out lawfully-cast votes. Going forward, those trends will make it more difficult to protect voting rights through the court-imposed remedies and administrative interventions that helped to promote high voter turnout in 2020. This essay argues that state legislatures should respond quickly by enacting new statutory voting rights protections.

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Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence

JOSHUA PERRY * & WILLIAM TONG **

INTRODUCTION

Nobody should be fooled by the courts' near-universal rejection of Election Truthers' legal gambits in the aftermath of the 2020 presidential election. The real doctrinal story was the federal judiciary's growing embrace of both substantive law and remedial principles that may constrain efforts to protect voting rights going forward.¹ Consider just three points:

- The “*Purcell* principle” was first articulated by the Supreme Court in *Purcell v. Gonzalez* as a factor courts should consider in evaluating the propriety of injunctive relief in election cases.² But in 2020 it was applied by many courts as a near-total bar to judicial interventions protecting voting rights in the run-up to elections.
- The once-fringe notion of state legislative supremacy has metastasized into a frightening doctrine empowering federal judges to kneecap state efforts to protect voting rights.³ Before this year, the doctrine

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¹ The Supreme Court “has consistently held” that “the right of qualified voters to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution.” *United States v. Classic*, 313 U.S. 299, 315 (1941). We agree that voting rights should be explicitly encoded in the Constitution through amendment. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 *ELECTION L.J.* 263, 265 (2020) (proposing “a constitutional amendment protecting the right to vote, requiring national nonpartisan administration of federal elections, and setting certain minimal voter-protective standards for the conduct of state and local elections. Movement toward a constitutional amendment is a generational project aimed at entrenching strong voting rights protections against political backlash”). But, as Professor Hasen acknowledges, getting a constitutional right to vote amendment passed is a “generational project.” *Id.* States should not, and some states need not, wait for either slow-moving constitutional change or (sometimes retrograde) movement from the courts.

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

³ Some commentators call it the “independent state legislature doctrine.” See, e.g., Michael T. Morley, *The New Elections Clause*, 91 *NOTRE DAME L. REV. ONLINE* 79, 92 (2016). But the doctrine teaches that state legislation trumps even a state constitution as interpreted by the state's highest court.

was best known for a cameo appearance in a *Bush v. Gore* concurrence.⁴ But there is a very real risk that it will now be applied to block voting reforms promulgated by election administrators and state courts alike.

- Some judges appear willing not just to block voting rights reforms prospectively but even to throw out votes that were cast in good-faith reliance on those reforms. This troubling development raises the stakes for states to get voting rights right in the first instance.

Alongside those doctrinal developments, a political development emerged this year that should influence the shape of our election systems. Put bluntly: at the national level, at least, a significant number of officials in one of America's two major political parties cannot now be relied on to yield to the will of the people.

A handful of principled Republicans deservedly got a lot of good press in the fall of 2020. Gabriel Sterling and Brad Raffensperger in Georgia refused to be cowed.⁵ Aaron Van Langevelde in Michigan followed the law.⁶ Wisconsin Supreme Court Justice Hagedorn recoiled at throwing out 200,000 votes.⁷ But some of those conscientious public servants faced a backlash,⁸ and the numbers otherwise are sobering. In *Texas v. Pennsylvania*, 126 Republican U.S. representatives—a significant majority of the caucus—supported a request to judicially overturn the popular vote in

The important question, then, is not whether the legislatures are “independent”—of what?—but whether they are superior to all other actors and law.

⁴ 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring).

⁵ See, e.g., Tim Kephart, *Secy. of State Raffensperger Backs Aide as Trump Refuses to Back Down*, WGCL-TV (Dec. 2, 2020), https://www.cbs46.com/news/secy-of-state-raffensperger-backs-aide-as-trump-refuses-to-back-down/article_03a446bc-34a2-11eb-bf4f-e3771e83791c.html (“Secretary of State Brad Raffensperger said he backs aide Gabriel Sterling’s push for President Donald Trump to back off on his rhetoric on Georgia and his general election loss.”).

⁶ Tim Alberta, *The Michigan Republican Who Stopped Trump*, POLITICO (Nov. 24, 2020, 9:00 PM), <https://www.politico.com/newsletters/politico-nightly/2020/11/24/the-michigan-republican-who-stopped-trump-490984>.

⁷ Reid J. Epstein, *A Conservative Justice in Wisconsin Says He Followed the Law, Not the Politics*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/us/politics/wisconsin-justice-brian-hagedorn.html>; Joe Forward, *Wisconsin Supreme Court Majority Rules Against President Trump, Won't Invalidate Ballots*, STATE BAR OF WIS. (Dec. 16, 2020), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=12&Issue=22&ArticleID=28118>.

⁸ See, e.g., Marianne Levine & James Arkin, *Loeffler, Perdue Call on Georgia's Republican Secretary of State to Resign*, POLITICO (Nov. 9, 2020, 4:50 PM), <https://www.politico.com/news/2020/11/09/loeffler-perdue-georgia-secretary-state-resign-435484> (describing backlash against Georgia Secretary of State Raffensperger).

four U.S. states.⁹ The case was brought by a Republican Attorney General. Seventeen of his Attorney General (A.G.) peers supported him.¹⁰

Jeremiads to our democracy aside: a key takeaway here is that voting rights cannot depend on shared good-faith adherence to democratic norms. Instead, we need clear and detailed laws that will entrench the advances of 2020, expand voting rights even further, and constrain would-be bad actors where norms have failed or threaten to fail.¹¹

Our essay proceeds in three parts. Part I describes the voting rights environment in the immediate run-up to Election Day on November 3, 2020. It observes that record-high turnout stemmed, in part, from legislative, administrative, and judicial remedies protecting voting rights in the face of the COVID-19 pandemic.

But many of the remedies adopted this year by state courts and election administrators are vulnerable to the three judicial trends identified above. Part II examines those trends: the misapplication of the *Purcell* principle, the mainstreaming of the state legislative supremacy doctrine, and the apparent willingness of some judges to discard good-faith votes. It explains how those trends threaten future iterations of many of the kinds of reforms that we saw in 2020. It suggests that people who care about voting rights should not rely on those kinds of reforms going forward, but should instead focus on state legislative action wherever politically feasible.

Part III, the conclusion, offers the illustrative example of our home state, Connecticut. It describes some of the steps Connecticut took to protect voters in 2020, and explains how similar steps might be imperiled in future years by the judicial trends described in Part II. And it proposes statutory reforms that Connecticut's legislature, and legislatures in sister states, can consider to prevent backsliding and promote voting rights progress.¹²

⁹ Motion for Leave to File Brief Amicus Curiae & Brief Amicus Curiae of U.S. Representative Mike Johnson & 125 Other Members of the U.S. House of Representatives in Support of Plaintiff's Motion for Leave to File a Bill of Complaint & Motion for a Preliminary Injunction, *Texas v. Pennsylvania*, 208 L. Ed. 2d 487 (2020) (No. 155).

¹⁰ Brief of State of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint, *Texas*, 208 L. Ed. 2d 487 (No. 220155).

¹¹ Backsliding, in some states, is a real threat. Widespread claims of (fictional) fraud and (often unspecified and always unproven) irregularities are leading some states to legislatively constrict voting rights. See, e.g., Nick Corasiniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html> (describing Georgia legislature's adoption of a restrictive new voting measure).

¹² Congress can play an important role in imposing uniform nationwide election reforms. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). But congressionally-driven change is subject to national politics. States that care about voting rights, and whose political stars are aligned, should not wait on action from a Congress as narrowly divided as any in recent history.

I. 2020'S VOTING RIGHTS EXPANSION

Here is the good news, if you believe that every eligible American should exercise their constitutional right to participate in our democracy.¹³ The 2020 general election was a huge turnout success:

More than 159 million Americans voted in 2020: 159,633,396 to be exact. That's the largest total voter turnout in U.S. history and the first time more than 140 million people voted. Voter turnout in 2020 was the highest in 120 years when measured as a percentage of the voting-eligible population: 66.7 percent. You have to go back all the way to 1900 to find a higher percentage turnout (73.7 percent).¹⁴

There was positive change across the board: "Turnout increased in every state and in 98 percent of the nation's counties."¹⁵ Despite very real cause for concern,¹⁶ there were relatively few instances of voter intimidation at the polls—and no evidence of widespread intimidation campaigns prior to Election Day.¹⁷ The vote was secure, in the sense that it was protected against both foreign interference and any inappropriate meddling with the ballots here at home.¹⁸ And high turnout in 2020 benefitted both parties,

¹³ As noted above, this onetime democratic norm can no longer be taken for granted. *See, e.g.*, Inae Oh, *Rand Paul Is "Very, Very Concerned" with Eligible Voters Voting*, MOTHER JONES (Dec. 17, 2020), <https://www.motherjones.com/2020-elections/2020/12/rand-paul-is-very-very-concerned-with-eligible-voters-voting/> (quoting U.S. Senator Rand Paul) ("I'm very, very concerned that if you solicit votes from typically non-voters, that you will affect and change the outcome.").

¹⁴ James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020, 7:00 AM), <https://www.cfr.org/blog/2020-election-numbers>.

¹⁵ Allan Smith, Naitian Zhou & Jiachuan Wu, *Map: Turnout Surged in 2020*, NBC NEWS (Dec. 18, 2020, 2:19 PM), <https://www.nbcnews.com/politics/2020-election/turnout-map-2020-election-n1249620>.

¹⁶ *See, e.g.*, Rebecca Beitsch & Maggie Miller, *Trump's Call for Poll Watchers Sparks Fears of Voter Intimidation*, THE HILL (Sept. 30, 2020, 5:36 PM), <https://thehill.com/homenews/campaign/519028-trumps-call-for-poll-watchers-sparks-fears-of-voter-intimidation> (describing Trump camp's call for an "army" of poll watchers).

¹⁷ *See, e.g.*, Tim Alberta, *The Inside Story of Michigan's Fake Voter Fraud Scandal*, POLITICO (Nov. 24, 2020, 9:00 PM), <https://www.politico.com/news/magazine/2020/11/24/michigan-election-trump-voter-fraud-democracy-440475> ("There were no documented instances of voter intimidation" in Michigan). Of course, the absence of widespread voter intimidation on and before Election Day does not speak to the unacceptable and sometimes illegal campaign of intimidation and threats aimed at election officials and others by lost cause partisans in the aftermath of Donald Trump's loss. *See, e.g.*, Katie Shepherd, *Armed Protesters Alleging Voter Fraud Surrounded the Home of Michigan's Secretary of State*, WASH. POST (Dec. 7, 2020, 4:54 AM), <https://www.washingtonpost.com/nation/2020/12/07/michigan-sos-benson-armed-protest/>.

¹⁸ *See, e.g.*, *It's Official: The Election Was Secure*, BRENNAN CTR. FOR JUST. (Dec. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure> (aggregating bipartisan authority from across the country to show the security of the 2020 general election). There is a real argument that mass public acceptance of the results—the speed and grace with which the majority choice is accepted by the entire electorate, including supporters of the loser—is also part of an election's

albeit in different ways. A Democrat won the White House, but Republicans won significant victories down ballot in the high turnout environment. They gained ground in the U.S. House, held several hotly-contested U.S. Senate seats, and held or expanded their leads in many statehouses across the country.¹⁹

A lot of factors—including partisan enthusiasm for and against the presidential candidates—surely contributed to the high turnout.²⁰ But it is difficult to imagine that such a dramatic increase in participation and such a relatively smooth voting process were unrelated to a national wave of voting rights expansions in advance of the 2020 general election.²¹ Most significant among those were changes, responsive to the COVID-19 public health crisis, that reduced the risk of in-person virus transmission by easing restrictions on voter registration and expanding opportunities to cast ballots.

Early voting and mail voting in particular were unprecedentedly popular in the 2020 general election. More than 100 million people voted before Election Day, compared to 47 million in 2016.²² And despite Donald Trump’s efforts to delegitimize and discourage mail votes,²³ more than 65

“security,” because it goes to the stability of our entire democratic enterprise. In that sense, the election was not secure, because it was relentlessly undermined by the loser and his die-hard supporters.

¹⁹ Susan Davis, *How the GOP Defied Expectations Down the Ballot*, NPR (Nov. 17, 2020, 5:22 AM), <https://www.npr.org/2020/11/17/935455984/how-the-gop-defied-expectations-down-the-ballot>; Nathaniel Rakich & Elena Mejia, *Republicans Won Almost Every Election Where Redistricting Was at Stake*, FIVETHIRTYEIGHT (Nov. 18, 2020, 5:59 AM), <https://fivethirtyeight.com/features/republicans-won-almost-every-election-where-redistricting-was-at-stake/>.

²⁰ Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 814 (2018) (“[I]t is extremely difficult to ascribe causal connections between turnout shifts and any one particular factor. Voter turnout is an overdetermined phenomenon. Total turnout levels can rise or fall for many reasons, including: the competitiveness of elections, voter mobilization efforts and campaign tactics, the voting laws governing participation, and even the weather.”).

²¹ The relationship between voter turnout and election policies is complex. See *Voter Turnout*, MIT ELECTION DATA SCI. LAB, <https://electionlab.mit.edu/research/voter-turnout> (last visited Jan. 1, 2021) (summarizing the state of research into drivers of voter turnout). In 2020, though, a massive jump in turnout went hand-in-hand with widespread reforms in voting access, and voting experts’ initial analysis suggested that “[t]he method in which a record number of Americans voted also had a huge impact on turnout — with early voting and voting by mail seeing unprecedented use in 2020.” James Hill, *Why 2020 Broke Voter Turnout Records*, NONPROFIT VOTE (Nov. 23, 2020), <https://www.nonprofitvote.org/why-2020-broke-voter-turnout-records/>; Michael P. McDonald, *Trump and Polarization Drove Record Turnout. So Did Mail Voting, Which Should Be Universal*, USA TODAY (Nov. 6, 2020, 10:23 AM), <https://www.usatoday.com/story/opinion/2020/11/04/trump-polarization-mail-voting-drove-record-2020-turnout-column/6153959002/>.

²² Brittany Renee Mayes & Kate Rabinowitz, *The U.S. Hit 73% of 2016 Voting Before Election Day*, WASH. POST (Nov. 3, 2020, 1:15 PM), <https://www.washingtonpost.com/graphics/2020/elections/early-voting-numbers-so-far/>; Jay Willis, *Trump’s Voter Fraud Yarn is Unraveling. But It Can Still Help the GOP*, WASH. POST (Dec. 5, 2020, 5:30 AM), <https://www.washingtonpost.com/outlook/2020/12/05/trump-republicans-concede-fraud/>.

²³ See, e.g., Miles Parks, *Ignoring FBI and Fellow Republicans, Trump Continues Assault on Mail-In Voting*, NPR (Aug. 28, 2020, 12:46 PM), <https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting> (describing Trump’s attempts to delegitimize mail voting).

million people voted by mail in the 2020 general election, nearly double the 33 million who mailed their ballots in 2016.²⁴

The expansion of vote-by-mail was not an accident. The National Council of State Legislatures counted sixteen states that, prior to this election, required voters to provide a special excuse to obtain a mail-in ballot.²⁵ Of those, twelve liberalized their mail-in ballot access rules for the 2020 general election.²⁶ An additional four states sent mail-in ballots to every voter this year, without the need for a request.²⁷

Those changes were just the tip of iceberg. Along with changes to the basic structure of voting, states adopted many new policies to promote timely delivery, smooth processing, accurate counting, and prompt reporting. Sometimes those policies took the shape of laws enacted by state legislatures, but judges and election administrators also played an important role. That was not just because of politics. It was also because of both institutional competency and exigency. In other words, courts and agencies stepped in not only when legislatures would not act, but also when they could not act or should not have been the ones to act. Legislatures are ill-equipped to administer multi-faceted and technical election systems or resolve election disputes—which often implicate weighty constitutional interests and individual rights—in real time.

Pennsylvania offers a good example of legislatures, courts, and administrators acting each in their area of competency and constitutional authority to protect voting rights in 2020. The Commonwealth went into the election with a structural voting rights advantage, since its legislature adopted no-excuse mail voting in 2019.²⁸ That meant any eligible voter could vote by mail, but it did not mean the state automatically sent a ballot to each voter. Voters still had to request, complete, and submit their ballots timely and properly.²⁹

²⁴ Drew DeSilver, *Most Mail and Provisional Ballots Got Counted in Past U.S. Elections – But Many Did Not*, PEW RES. CTR. (Nov. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/>.

²⁵ *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L COUNCIL OF STATE LEGIS. (Nov. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Penn. Act of Oct. 31, 2019, Pub. L. 552, No. 77 (establishing universal mail-in voting in Pennsylvania).

²⁹ Press Release, Pa. Att'y Gen., VOTER ALERT: Receive a Mail-In Ballot without Requesting One? Check Your Status (Oct. 14, 2020), <https://www.attorneygeneral.gov/taking-action/press-releases/voter-alert-receive-a-mail-in-ballot-without-requesting-one-check-your-status/> (quoting Pennsylvania Secretary of State Kathy Boockvar) (“Pennsylvania is not a state that automatically sends mail ballots to voters. Voters must apply for the ballot for it to be sent to them . . .”).

But properly submitting the ballots was not simple. So, there was a significant risk of voter error, which in turn posed the threat that ballots cast in good faith by legal voters would be discounted for technical reasons. There was also the risk that, because of mail delays, ballots would arrive too late to be counted. 2020 was the first national election to be administered in Pennsylvania with the new 2019 voting rules in place, and it occurred in the middle of both a pandemic and widespread mail slowdown.

Pennsylvania's Secretary of State, Kathy Boockvar, responded to these concerns with a suite of administrative fixes. For example, to ensure that valid votes were not discarded unnecessarily, she issued guidance instructing county boards of elections—which are responsible in Pennsylvania for canvassing returns in the first instance—not to throw out votes based only on alleged signature mismatches.³⁰ To reduce the likelihood of disenfranchisement by poverty, she announced that the state would fund the postage on mail-in ballots.³¹ And to promote timely ballot returns, she empowered county boards to install secure drop-boxes.³²

Where the Secretary of State's administrative authority ended, state courts played a key role in making sure Pennsylvania was ready for the election. The Pennsylvania Supreme Court backed up Boockvar by ratifying counties' use of "as many secure and easily accessible" drop-box locations as the counties deemed appropriate.³³ It also held that county boards of elections were required to receive and count mailed ballots that were timely postmarked but delivered up until 5 p.m. on November 6, 2020.³⁴ As noted *infra* in Part II, the second issue proved especially controversial, since it ran up against a state law setting a hard deadline of 8 p.m. on November 3, 2020 for ballot receipt.³⁵ But the state court held that the statutory cutoff would violate the state constitution's voting rights guarantee under the unique circumstances of 2020: the pandemic, the unprecedented volume of mail voting, and nationwide postal service slowdowns that could have the effect of disenfranchising voters who followed all the rules.³⁶

³⁰ PA. DEP'T OF STATE, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (Sep. 11, 2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>. The Secretary's guidance was later upheld by the Pennsylvania Supreme Court as an accurate characterization of state law. *In re* November 3, 2020 Gen. Election, 240 A.3d 591, 611 (Pa. 2020).

³¹ Press Release, Pa. Dep't of State, Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots (July 31, 2020), <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>.

³² See *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 n.15 (Pa. 2020) (describing the PA Secretary of State's drop-box guidance).

³³ *Id.* at 357.

³⁴ *Id.* at 371–72.

³⁵ *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 733 (2021).

³⁶ *Boockvar*, 238 A.3d at 372 ("We conclude that this extension of the received-by deadline protects voters' rights while being least at variance with Pennsylvania's permanent election calendar, which we respect and do not alter lightly, even temporarily.").

The courts and the Secretary of State were careful not to overstep their bounds. So, for instance, the Pennsylvania Supreme Court refused to order election officials to offer voters with flawed ballots an opportunity to fix any problems (a so-called “notice and cure” process).³⁷ Nor, even in holding that the state constitution mandated an extension of the statutory ballot receipt deadline, did the Pennsylvania Supreme Court strike down the statutory deadline entirely. Absent legislative action, future elections will presumably continue to be conducted with the hard ballot receipt deadline of 5 p.m. on Election Day. Meanwhile, neither the courts nor the Secretary had the authority to fix the state’s ballot processing rules, which guaranteed a protracted count by forbidding counties from opening and processing mailed ballots until Election Day itself.³⁸

So, Pennsylvania’s election process, despite the heroic efforts of election administrators from Boockvar on down, was neither perfectly streamlined nor optimally calibrated to ensure the prompt and accurate counting of all valid votes. But it was still a massive step forward from the perspective of democratic participation. The sum of Pennsylvania’s election reforms—legislative, administrative, and judicial—contributed to record-breaking turnout. More than 6.9 million Pennsylvanians voted in the 2020 general election, up from 6.115 million in 2016.³⁹ That was a 10-percentage point jump in participation, from 61% of the voting age population in 2016 to 70.93% in 2020.⁴⁰

The question is whether this year’s improvements—in Pennsylvania and other states—will be sustained and carried forward. Unfortunately, trends in the federal judiciary’s response to 2020 election litigation suggest that future courts may well be hostile to many of the things that made 2020 a success.

³⁷ *Id.* at 374.

³⁸ Keya Vakil, *The Real Reason for PA Delay? The State’s GOP Put the Brakes on Early Counting*, COURIER NEWSROOM (Nov. 6, 2020, 10:55 AM), <https://couriernewsroom.com/2020/11/04/pa-ballot-delay/> (“Why the delay in counting these ballots? Due to state law, election officials in the state were legally unable to even begin *processing*—let alone count—ballots until Election Day. Democrats in the state, including Gov. Tom Wolf tried to pass legislation that would allow counties to begin pre-canvassing ballots to verify their validity before Election Day, but were obstructed by the Republican-led legislature.”). Protracted counting, and delayed results reporting, is only part of the problem with refusing to process ballots until Election Day. In an environment where one party encouraged its voters to use the mail, and the other demonized mail voting, reporting in-person votes before mailed votes contributed to the mistaken impression of post-Election Day shifts in the results. *See, e.g.*, D’Angelo Gore, *False Claim About Biden’s Win Probability*, FACTCHECK.ORG (Dec. 14, 2020), <https://www.factcheck.org/2020/12/false-claim-about-bidens-win-probability/> (explaining that misimpression, in turn, has been cynically deployed to fuel lies about massive election fraud).

³⁹ Press Release, Pa. Dep’t of State, Pennsylvania Announces Record Turnout for Nov. 3 Election (Nov. 17, 2020), <https://www.media.pa.gov/pages/state-details.aspx?newsid=434>.

⁴⁰ *Id.*

II. THE 2020 JUDICIAL TRENDS THAT THREATEN VOTING RIGHTS

Election challenges brought by Donald Trump and his supporters lost repeatedly and resoundingly in the post-Election Day period. But legislators and everyone else should resist any inclination to assume that the judiciary, state and federal, is committed to protecting voting rights and enforcing the will of the people.

It is true that Trump and his allies lost, over and over. The Democratic party's lead outside voting rights counsel, Marc Elias, calculated on January 12, 2021, that Trump and his supporters were 1-64 in post-Election Day litigation.⁴¹ Depending on how you count appeals, duplicative suits, and collateral attacks, Elias' number is at least in the ballpark. No court in the post-Election Day period substantiated any of Trump's claims of widespread fraud,⁴² and no court reversed the outcome of the presidential election in any state.⁴³

But, with few exceptions, Trump's post-Election Day losing streak was about his cases, which were doomed procedurally and substantively beyond the ability of even the most sympathetic courts to fix. Many of those cases presented precisely the kinds of justiciability problems that a conservative judiciary in particular could not easily ignore.⁴⁴ To cite just a few instances:

⁴¹ Marc E. Elias (@marcelias), TWITTER (Jan. 12, 2021, 11:39 PM), <https://twitter.com/marceelias/status/1349214546746093568>.

⁴² Before 2020, it was already apparent that voter fraud was a politically-motivated myth. That myth has now been conclusively dispelled. See *Texas Lieutenant Governor Dan Patrick Backs "Trump's Efforts," Offers \$1 million Reward for "Voter Fraud" Tips*, CBS NEWS (Nov. 11, 2020, 7:50 AM), <https://www.cbsnews.com/news/dan-patrick-texas-lt-governor-1-million-reward-voter-fraud-evidence/> (explaining that the partisan who came forward with actual proof of a single fraudulent act would have been a national hero for some, and rich to boot). But not a single person claimed the million-dollar reward. In just one extraordinary instance of the voter fraud mania backfiring, fringe voter fraud fanatics paid twenty private investigators to try to uncover fraud in Houston. The only person arrested was one of the investigators, who rammed an air conditioning repair truck thinking he was intercepting fraudulent ballots. Shawn Boburg, Dalton Bennett, Neena Satija & Ken Hoffman, *Ex-cop Hits Truck Thinking It Held 750,000 Fraudulent Ballots, Police Say It Held Air Conditioning Parts*, WASH. POST (Dec. 20, 2020, 3:32 PM), https://www.washingtonpost.com/investigations/texas-anti-voter-fraud-operation/2020/12/20/98969dbc-4157-11eb-a402-fba110db3b42_story.html.

⁴³ Rosalind S. Helderman & Elise Viebeck, *"The Last Wall": How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html.

⁴⁴ Typical here were the four so-called "Kraken" lawsuits brought by Trump-adjacent lawyer Sidney Powell in Arizona, Georgia, Michigan, and Wisconsin. *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093 (D. Ariz. Dec. 9, 2020); *Pearson v. Kemp*, No. 1:20-cv-4809-TCB, 2020 U.S. Dist. LEXIS 226348 (N.D. Ga. Nov. 29, 2020); *King v. Whitmer*, No. 20-13134, 2020 U.S. Dist. LEXIS 228621 (E.D. Mich. Dec. 7, 2020); *Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 226870 (E.D. Wis. Dec. 3, 2020). After repeatedly threatening to "release the kraken," Powell filed her first suit in Georgia on 11/25/2020. *Pearson*, 2020 U.S. Dist. LEXIS 226348 at *1-2. The last suit was dismissed in Wisconsin on 12/9/2020. *Feehan*, 2020 U.S. Dist. LEXIS 226870 at *5. All four alleged, bizarrely, that a Hugo Chavez-designed software system, manipulated by Iran and China, somehow corrupted votes in U.S. swing states against President Trump.

although any reasonable Supreme Court Justice would have rejected Texas' fantastical original jurisdiction suit seeking to overturn the results in Pennsylvania and three other swing states, conservative justices in particular surely recoiled at the prospect of opening the courthouse doors for any state to sue any other state over its internal election procedures.⁴⁵ Similarly, any reasonable judge would have rejected the Trump campaign's deeply defective case that sought to throw out Pennsylvania's entire popular vote on the pretext that the state allowed counties to choose whether to provide notice-and-cure opportunities for defective ballots. But the conservative district court judge⁴⁶ assigned to the case was particularly unlikely to embrace the campaign's broad theory of associational standing.⁴⁷

To better understand the future of voting rights in the courts, then, it is important to look past the (comforting) final judgments in the terrible cases, terribly lawyered, that Trump and his allies brought. The lasting jurisprudential story here is much more likely to be about the judicial obstacles to voting rights that became deeply entrenched in 2020.⁴⁸

A. *Better Never Than Late: The Purcell Principle*

In 2004, Arizona voters approved a proposition “requiring voters to present proof of citizenship when they register to vote and to present

Pearson, 2020 U.S. Dist. LEXIS 226348 at *2; *Bower*, 2020 U.S. Dist. LEXIS 231093 at *43; *King*, 2020 U.S. Dist. LEXIS 228621 at *4; *Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 231603, at *51 (E.D. Wis., Dec. 9, 2020). And in all four cases, federal district court judges found (among other substantive and procedural problems) that Powell's plaintiffs lacked standing to challenge the election because (again, among other problems) their injuries were not distinct from those suffered by any other voter who preferred the losing candidate. *Bower*, 2020 U.S. Dist. LEXIS 231093 at *45–47; *King*, 2020 U.S. Dist. LEXIS 228621 at *35; *Feehan*, 2020 U.S. Dist. LEXIS 231603, at *41; Transcript of Motions Hearing at 42, *Pearson*, No. 1:20-cv-4809-TCB.

⁴⁵ See *Texas v. Pennsylvania*, 208 L. Ed. 2d 487, 487 (2020) (“The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”).

⁴⁶ See Press Release, Pat Toomey, U.S. Senator for Pennsylvania, Toomey Statement on PA Fed. Court Decision, Congratulates President-elect Biden (Nov. 21, 2020), <https://www.toomey.senate.gov/newsroom/press-releases/release-toomey-statement-on-pa-federal-court-decision-congratulates-president-elect-biden> (describing Judge Matthew Brann as “a longtime conservative Republican”).

⁴⁷ See *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 U.S. Dist. LEXIS 218351, at *27 (M.D. Pa. Nov. 21, 2020) (“Even if the Individual Plaintiffs attempted to vote for President Trump, their constitutional interests are different, precluding a finding of associational standing. In any event, because the Individual Plaintiffs lack standing in this case, the Trump Campaign cannot satisfy the first prong of associational standing either.”).

⁴⁸ An eloquent commentary on the major thrust of this election cycle’s jurisprudence can be found in Federal Sixth Circuit Judge Moore’s heartfelt dissent in *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 392 (6th Cir. 2020) (“Make no mistake: today’s majority opinion is yet another chapter in the concentrated effort to restrict the vote. . . . I will not be a party to this passive sanctioning of disenfranchisement. I dissent.”).

identification when they vote on election day.”⁴⁹ A coalition of plaintiffs, including Native American voters, sued.⁵⁰ They observed that many people of color in Arizona, including many eligible voters, lacked government-issued identification, and argued that the restrictive new measures burdened those residents’ right to vote⁵¹ in service of a fictional voter fraud narrative. A federal district court refused to enjoin the law in the run-up to that fall’s election, but the Ninth Circuit summarily issued an appellate injunction.⁵²

In a brief per curiam order, the Supreme Court granted certiorari and vacated the injunction.⁵³ The problem, the Court said, was not necessarily that the appellate court was substantively wrong, but that it showed no sign of having given proper deference to the trial court.⁵⁴ In dicta, the Court offered a few sentences of guidance about how lower courts should balance the equities and consider the public interest in similar suits going forward⁵⁵: “Court orders affecting elections,” it explained, “especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”⁵⁶ Changing the rules on the eve of an election risks confusing voters. And so, the Supreme Court instructed lower courts to weigh that potential for confusion—“in addition to [weighing] the harms attendant upon issuance or non[-]issuance of an injunction”—in deciding whether and when to act.⁵⁷

That context-specific preliminary injunction consideration, mentioned as dicta in a per curiam opinion, has now morphed into a principle whose contemporary incarnation is perhaps best embodied in a Justice Kavanaugh concurrence from October of 2020: “This Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the

⁴⁹ *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam).

⁵⁰ *Id.* at 3.

⁵¹ See Complaint for Declaratory and Injunctive Relief at 16, *Gonzalez v. Arizona*, No. 2:06-cv-01268-ROS (D. Ariz. May 9, 2006) (arguing that “[L]atinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to register to vote and cast a ballot. As a result, significant numbers of Latinos attempting to register and turn out to vote are denied the right to vote”).

⁵² *Purcell*, 549 U.S. at 3.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 5.

⁵⁵ Balancing the equities and considering public interest are routine and mandatory parts of every preliminary injunction equation. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

⁵⁶ *Purcell*, 549 U.S. at 4–5.

⁵⁷ *Id.* at 4. For a thoughtful analysis of how the *Purcell* doctrine started and how it has evolved, see Brief of Election Law Scholars as Amici Curiae in Support of Neither Party, *Swenson v. Wis. State Legis.*, 141 S. Ct. 644 (2020) (No. 20A64), 2020 WL 6204644, at *7.

period close to an election.”⁵⁸ Justice Kavanaugh cited *Purcell* to support this principle of nonintervention.

The case in which Justice Kavanaugh broadly reinterpreted *Purcell* was *Andino v. Middleton*.⁵⁹ *Andino* is a perfect example of a key problem with an application of *Purcell* that preserves the pre-litigation status quo at all costs. By the time a case reaches the Court, the status quo has often changed, sometimes repeatedly.

Andino was about a South Carolina statute mandating a witness signature on each absentee ballot envelope.⁶⁰ As the COVID-19 pandemic swept the state in the summer of 2020, South Carolina enacted a law allowing no-fault absentee voting for the entire electorate in the presidential primary.⁶¹ A federal judge also suspended the witness requirement—which was particularly problematic given social distancing mandates—for the primary.⁶² Many voters took advantage of the expanded absentee voting opportunity.⁶³ As a result, by the fall of 2020, a significant number of South Carolina voters’ only experience with mail-in voting did not include witness signatures.⁶⁴ As the federal Fourth Circuit explained: “[t]he June primary was thus the first election for thousands of South Carolinians to vote by absentee ballot, and those citizens have only voted absentee when no witness was necessary.”⁶⁵

With November 3, 2020 approaching and COVID-19 still a major health concern, the district court again suspended the witness requirement, now for the general election.⁶⁶ The state had not appealed the ruling in the primary, but now it did. The Fourth Circuit refused to block the injunction, but the state had better luck with the Supreme Court.⁶⁷ Only Justice Kavanaugh, concurring, explained his reasoning—citing, as we have seen, to *Purcell*.⁶⁸

⁵⁸ *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring).

⁵⁹ *Id.*

⁶⁰ S.C. CODE ANN. § 7-15-380 (2020).

⁶¹ Haley Walters & Kirk Brown, *No-Excuse Absentee Voting Approved in South Carolina as Coronavirus Concerns Continue*, GREENVILLE NEWS (May 12, 2020, 8:17 PM), <https://www.greenvilleonline.com/story/news/2020/05/12/no-excuse-absentee-voting-in-sc-approved-coronavirus-concerns/3119655001/>.

⁶² *Middleton v. Adino*, No. 20-2022, 2020 U.S. App. LEXIS 31093, at *5 (4th Cir. Sept. 30, 2020) (King, J., concurring).

⁶³ Walters & Brown, *supra* note 61.

⁶⁴ Seanna Adcox, *2,500 SC Ballots Won't Count Due to Lack of a Signature*, POST & COURIER (Nov. 2, 2020), https://www.postandcourier.com/columbia/politics/2-500-sc-ballots-wont-count-due-to-lack-of-a-signature/article_f267a344-1d22-11eb-9a9b-8b2546e97d01.html.

⁶⁵ *Middleton*, 2020 U.S. App. LEXIS 31093, at *5 (King, J., concurring).

⁶⁶ *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 U.S. Dist. LEXIS 171431, at *97–98 (D.S.C. Sept. 18, 2020).

⁶⁷ *Andino v. Middleton*, 141 S. Ct. 9, 9–10 (2020).

⁶⁸ *Id.* at 10 (Kavanaugh, J. concurring).

But mail-in voting without a witness signature *was* the status quo for many South Carolina voters in the fall of 2020.⁶⁹ It was certainly the status quo after the district court acted and the Fourth Circuit refused to intervene. The Supreme Court itself created the confusion that *Purcell* had instructed courts to avoid.

Throughout the fall of 2020, many lower courts followed Justice Kavanaugh’s lead in applying *Purcell* as a virtual bar to judicial involvement in voting rights issues anywhere near the time of the election,⁷⁰ even when the risk of voter confusion was low or nonexistent.⁷¹

Given the trend in applying *Purcell*, it is unwise to rely on courts to step in and protect voting rights, even—perhaps *especially*—in emergencies. Legislatures need to proactively legislate for contingencies. That is doubly true in light of the second major trend identified here: the mainstreaming of the state legislative supremacy doctrine.

B. *The Doctrine of State Legislative Supremacy*

The Elections Clause of the Constitution says that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”⁷² The Electors Clause says that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”⁷³ Before 2020, no court had applied those clauses to strike down voting rights rules approved by state elections administrators or state courts.

But last year, the doctrine of state legislative supremacy came into its own, maturing frighteningly quickly to its most extreme incarnation. At that extreme, the doctrine empowers federal courts to strike down state election rules fashioned by anyone other than the state’s legislature. That includes election rules pronounced by a state supreme court based on its authoritative interpretation of the state constitution. It also apparently includes election rules promulgated by a state administrator acting with power delegated by the legislature.

On this front, one of the most troubling decisions of the 2020 election litigation cycle—in terms of forecasting where the courts are headed—was not handed down by the Supreme Court but by the federal Eighth Circuit. In

⁶⁹ *Middleton*, 2020 U.S. Dist. LEXIS 171431, at *55.

⁷⁰ See Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 444–61 (2016) (exploring applications of the principle in the 2014 election cycle).

⁷¹ See, e.g., *Mi Familia Vota v. Abbott*, No. 20-50907, 2020 U.S. App. LEXIS 34347, at *5 (5th Cir. Oct. 30, 2020) (applying *Purcell* to block a court order requiring masks at polling places); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 142 (5th Cir. 2020) (applying *Purcell* to block an order allowing counties to institute more than one absentee ballot drop-off location).

⁷² U.S. CONST. art. I, § 4, cl. 1.

⁷³ *Id.* art. II, § 1, cl. 2.

defiance of the *Purcell* principle, the per curiam decision was filed on October 29, 2020, just five days before Election Day.⁷⁴

Under Minnesota statute, mailed ballots can only be counted if they are received by 8 p.m. on Election Day.⁷⁵ In the runup to the 2020 general election, that hard deadline endangered voting rights. Like so many other states, Minnesota expected a surge in mail voting at the same time as poorly considered—and perhaps poorly intentioned—new USPS policies were creating significant mail delivery delays.⁷⁶

So voting rights advocates sued Minnesota’s Secretary of State, who is in charge of the state’s elections, in state court.⁷⁷ Citing First and Fourteenth Amendment violations, they asked the court to enjoin application of the deadline so that voters would not be disenfranchised by mail slowdowns.⁷⁸ The Secretary and the plaintiffs negotiated a resolution, memorialized and approved by the court in an August 3, 2020 consent decree: “[T]he Secretary agreed he would issue guidance to local election officials to count all mail-in ballots with a postmark of Election Day or before, if those election officials received the ballots within five business days (seven calendar days) of Election Day”⁷⁹ Local and national Republican parties and the Trump campaign were intervenors in that state court case.⁸⁰ They announced, but then abandoned, an appeal to the state supreme court.⁸¹

Instead, with mail voting already ongoing in Minnesota, two Republican presidential electors collaterally attacked the consent decree in federal court. Invoking the legislative supremacy doctrine, they argued that the consent decree violated the Electors Clause. In *Carson v. Simon*, the federal district court refused their request for an injunction.⁸²

What was most shocking was not just that the Eighth Circuit panel reversed the district court, nor even that it acted so late in the day—ironically or not, depending on your level of cynicism, in defiance of the *Purcell* principle. Instead, it was how casually and summarily the court upended a state court decision, potentially disenfranchising thousands of voters in about a page-and-a-half of double-spaced discussion that was more assertion

⁷⁴ *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020) (per curiam).

⁷⁵ MINN. STAT. § 203B.08 (2020).

⁷⁶ Minnesota was one of fourteen states that joined in a voting rights lawsuit against USPS aimed at forcing policy changes to accelerate ballot delivery. *Washington v. Trump*, No. 20-CV-03127, 2020 U.S. Dist. LEXIS 171873, at *5–7 (E.D. Wash. Sept. 17, 2020).

⁷⁷ Complaint for Declaratory and Injunctive Relief at 39–40, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. 2020).

⁷⁸ *Id.*

⁷⁹ *Carson v. Simon*, 978 F.3d 1051, 1056 (8th Cir. 2020).

⁸⁰ Order of Aug. 3, 2020, at 1, *LaRose*, No. 62-CV-20-3149.

⁸¹ Notice of Appeal, at 1, *LaRose*, No. 62-CV-20-3149; Order of Aug. 18, 2020, at 1–2, *LaRose v. Simon*, No. A20-1040 (Minn. 2020), *dismissed*.

⁸² *Carson v. Simon*, No. 20-CV-2030, 2020 U.S. Dist. LEXIS 192120, at *2 (D. Minn. Oct. 16, 2020).

than legal analysis. The court acted as though its conclusion were mandated by the “plain terms” of the Electors Clause: Since the Clause “vests the power to determine the manner of selecting electors exclusively in the ‘Legislature’ of each state,” it must necessarily be true that “only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.”⁸³ The court cited no precedent on the dispositive questions of what the Constitution means by “manner,” or whether Minnesota’s change was significant enough to rise to a constitutional violation.⁸⁴

No controlling precedent dictated the *Carson* decision. In the absence of such precedent, one of *Carson*’s deep oddities is that it did not cite to the most obvious authority available—which, while not binding, certainly must have told the panel something about the direction in which the law was headed. This was the ruling of the U.S. Supreme Court just three days earlier.

The Supreme Court decision, too, was about mailed ballots. A federal district court in Wisconsin had extended the state’s statutory deadline for receiving and counting ballots by six days in light of the pandemic.⁸⁵ A panel of the Seventh Circuit stayed that injunction, mechanically applying *Purcell* as an absolute bar to judicial intervention.⁸⁶

On October 26, 2020, the shorthanded Supreme Court, by a 5-3 vote, declined to vacate the stay.⁸⁷ There was no opinion for the Court, but Justices Gorsuch and Kavanaugh, separately concurring, both explicitly embraced the state legislative supremacy doctrine.⁸⁸ Gorsuch: “The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.”⁸⁹ Kavanaugh: “In a Presidential election, in other words, a

⁸³ *Carson*, 978 F.3d at 1059–60.

⁸⁴ The court cited generally to two Supreme Court decisions for the proposition that the constitution empowers state legislatures to set the manner of elections. But it did not explain how it knew that “manner,” in the Constitution, extended not just to the form of the election but also to the details of its implementation. At least one other federal judge thought that was a pretty important question. See *Trump v. Wis. Elections Comm’n*, No. 20-cv-1785-BHL, 2020 U.S. Dist. LEXIS 233765, at *5, *36–39 (E.D. Wis. Dec. 12, 2020) (dismissing Electors Clause challenge on a finding, *inter alia*, that the “manner” of the election simply means whether the election is determined by popular vote). And it did not explain how it knew that Minnesota’s change was “significant” enough to rise to a constitutional violation. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (“A *significant* departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”) (emphasis added).

⁸⁵ *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

⁸⁶ *Id.* at 641–42 (“Here the district court entered its injunction on September 21, only six weeks before the election and less than four weeks before October 14, the first of the deadlines that the district court altered. If the orders of last April, and in *Frank*, were too late, so is the district court’s September order in this case.”).

⁸⁷ *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct 28, 28 (2020).

⁸⁸ *Id.* at 28–30, 34 n.1.

⁸⁹ *Id.* at 29 (Gorsuch, J., concurring).

state court’s ‘significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.’”⁹⁰ Justice Kavanaugh’s opinion was remarkable, among other things, for tracing the doctrine back to Chief Justice Rehnquist’s concurrence in *Bush v. Gore*—which, by its own terms, was not to be cited as precedent.⁹¹

It seems clear that, at a minimum, Justices Thomas and Alito join their peers Gorsuch and Kavanaugh in embracing a maximalist reading of the state legislative supremacy doctrine. On October 19, 2020 those four justices dissented from the Court’s split decision denying relief in perhaps the most extreme possible application of the doctrine.⁹² The case, *Republican Party of Pennsylvania v. Degraffenreid*, asked whether the Pennsylvania Supreme Court somehow violated the federal constitution when it extended the state ballot receipt deadline by three days in the face of the COVID-19 crisis.⁹³

We have already seen the *Degraffenreid* case at the state supreme court level.⁹⁴ To recap: Pennsylvania law forbids counting mailed ballots unless they are received by close of polls on Election Day.⁹⁵ But, faced with COVID-19 and mail slowdowns, the Pennsylvania Supreme Court held that the strict ballot receipt deadline offended the state constitution’s right to vote.⁹⁶ Its order extended the deadline by three days to protect that right.⁹⁷

⁹⁰ *Id.* at 34 n.1 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U. S. 98, 113 (Rehnquist, C.J., concurring) (2000)).

⁹¹ See Chad Flanders, *Please Don’t Cite This Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 141–42 (2006), <https://www.yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-gore> (“*Bush v. Gore* notoriously announced that ‘our consideration is limited to the [*142] present circumstances,’ a line which some legal academics likened to a ticket good for one day only, or a self-destruct mechanism: after the President was chosen, the case blew up. Was the Supreme Court really trying to signal that *Bush v. Gore* should have no precedential value?”).

⁹² *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (Mem.) (2020).

⁹³ Petition for Writ of Certiorari, *Republican Party of Pa. v. Boockvar*, 2020 WL 6273543 (U.S. 2020) (No. 20-542); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). Kathy Boockvar, the Pennsylvania Secretary of State during the 2020 election season, resigned on February 5, 2021, after the 2020 presidential election was decided and with the case still pending certiorari. Angela Couloumbis, *A Pa. Dept. of State Error Means Some Sex-Abuse Victims Will Again Have to Wait for Justice*, SPOTLIGHT PA (Feb. 1, 2021), <https://www.inquirer.com/politics/pennsylvania/spl/kathy-boockvar-resign-pennsylvania-election-official-constitutional-amendment-20210201.html>. The case was then re-designated *Pennsylvania Republican Party v. Degraffenreid*, after Veronica Degraffenreid became acting Secretary of State in Boockvar’s place.

⁹⁴ *Degraffenreid*, 141 S. Ct. at 732. A similar case came out of North Carolina, too. There, a state court signed off on a consent decree extending the mailed ballot receipt deadline. See *Wise v. Circosta*, 978 F.3d 93, 98 (4th Cir. 2020). The district court refused to enjoin the extension, and the Fourth Circuit, *en banc*, voted 12-3 to deny an injunction pending appeal. The Supreme Court too denied an injunction, with three justices noting a dissent and Justice Barrett not participating.

⁹⁵ *Degraffenreid*, 141 S. Ct. at 733.

⁹⁶ *Id.*

⁹⁷ *Id.*

The state Republican Party asked the Supreme Court to intervene, invoking the legislative supremacy doctrine.⁹⁸ With only eight justices on the bench following Ruth Bader Ginsburg's death, the Court split on whether to grant immediate relief. The Chief Justice, without explanation, joined Justices Breyer, Kagan, and Sotomayor.⁹⁹ On a 4-4 tie, the Pennsylvania Supreme Court decision stood.

Let's do some quick back-of-the-envelope math. The Pennsylvania Republican Party injunction vote suggests there are at least four Supreme Court justices ready to apply the state legislative supremacy doctrine and reverse even a state supreme court's extension of voting rights based on the state's own constitution.¹⁰⁰ That is before Justice Barrett's vote is counted. The Wisconsin vote shows that there are at least five justices—again, without Justice Barrett—who will apply it to reverse a federal court. And, to end where this section started: At least one federal appellate court thinks the doctrine is so self-evidently correct that it can apply it days before a presidential election—with almost no analysis, without even a reference to days-old Supreme Court guidance, and certainly without waiting for the Supreme Court to go there first—to reverse a state court consent decree and terminate receipt of mailed votes days.

The rise of state legislative supremacy bodes poorly for future judicial interventions aimed at protecting and expanding voting rights. State legislative supremacy looks like a sword to strike down administrative voting rights reforms, too. And, as some commentators and even one Trump-appointed federal judge have predicted, the rise of the state legislative supremacy doctrine is likely to bring on a massive and destabilizing new crush of litigation.¹⁰¹ Now, every state election

⁹⁸ *Id.*

⁹⁹ *Id.* at 732. The Chief Justice, in a brief statement in the Wisconsin case, explained that he distinguishes between federal court interventions to extend voting deadlines—which he would enjoin—and state courts taking the same action based on state constitutions. The latter, he implied, are entitled to some level of deference. *Democratic Nat'l Comm. v. Wis. State Legislature* 141 S. Ct. 28, 28 (2020) (Robert, C.J., concurring) (“While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.”).

¹⁰⁰ It is true that, on February 22, 2021, more than a month after Joe Biden was sworn in as president, the Supreme Court denied certiorari in *Degraffenreid*, with three dissenters (Alito, Gorsuch, and Thomas). *Degraffenreid*, 141 S. Ct. at 732, 738. As we have seen, that was not the breakdown when it was unclear whether the case would have made a difference in the election outcome. Voting rights advocates will have to decide whether they want to bet on similar results going forward.

¹⁰¹ *See Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 U.S. Dist. LEXIS 233765, at *40 (E.D. Wis. Dec. 12, 2020) (“If plaintiff's reading . . . was correct, any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results. This would risk turning every Presidential election into a federal court lawsuit over the Electors Clause.”).

procedure—except procedures that the legislature explicitly blessed, in excruciating detail—will be exposed to challenge in federal court.¹⁰²

Here, too, the takeaway is clear. In future emergencies, state legislatures that care about voting rights may well not be able to rely on administrative guidance or on judicial interventions. Instead, they would do well to legislate proactively, comprehensively, and in detail.

C. *Throwing Out Votes*

From legal rules invoked to frustrate voting rights expansion, we now turn to the problem of remedies. 2020 showed us that at least some judges on some of our highest courts are willing to throw out votes retroactively when they do not like the rules under which the votes were cast. That is a radical and troubling break from our constitutional tradition.

Recall *Andino v. Middleton*, where the Supreme Court blocked a lower court injunction that waived South Carolina’s absentee ballot witness requirement.¹⁰³ When the Court acted on October 5, 2020, some voters had already submitted their absentee ballots without witness signatures.¹⁰⁴ In staying the injunction, the Court’s per curiam went at least some distance to protect those voters: “The order is stayed except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement.”¹⁰⁵ The per curiam was consistent with a longstanding appreciation that good-faith voters have a Due Process right to have their votes counted, even if the rules under which the votes were cast are later invalidated.¹⁰⁶

But three of the eight sitting justices were willing to buck that trend. Justices Alito, Gorsuch, and Thomas noted that they would have granted the stay application in full—in other words, they would not have allowed a grace

¹⁰² The irony of conservative justices calling for federal court intrusion into state law issues—even overruling state supreme courts about how to apply state constitutions—was not lost on dissenters. See *Democratic Nat’l Comm.*, 141 S. Ct. at 46 n.7 (Kagan, J., dissenting) (“At the same time that Justice Kavanaugh defends this stance by decrying a ‘federal-judges-know-best vision of election administration,’ he calls for *more* federal court involvement in ‘reviewing state-court decisions about state [election] law.’”) (internal citations omitted).

¹⁰³ *Andino v. Middleton*, 141 S. Ct. 9, 9–10 (2020).

¹⁰⁴ Zak Koeske, *SC Won’t Accept Absentee Ballots That Lack Witness Signature. What You Need to Know*, THE STATE (Oct. 8, 2020), <https://www.thestate.com/news/politics-government/article246299550.html>.

¹⁰⁵ *Andino*, 141 S. Ct. at 10.

¹⁰⁶ See, e.g., *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (“The State would disqualify thousands of right-place/wrong-precinct provisional ballots, where the voter’s only mistake was relying on the poll-worker’s precinct guidance. That path unjustifiably burdens these voters’ fundamental right to vote.”); *Bennett v. Yoshina*, 140 F.3d 1218, 1226–27 (9th Cir. 1998) (stating the general principle that voters are entitled to rely in good faith on existing rules at the time they vote, but cannot be disenfranchised by surprise *ex post* rule changes).

period for ballots cast in good faith reliance on the lower court injunction.¹⁰⁷ They were prepared to throw out those votes.

A similarly grim portent emerged from the Wisconsin Supreme Court in the aftermath of the election. Here, the Trump campaign appealed from a recount in Dane and Milwaukee counties, the state's two most populous Democratic strongholds.¹⁰⁸ Trump claimed that the counties had administered the election in contravention of state statutes—for instance, that county officials had collected absentee ballots at a “Democracy in the Park” event and had distributed the wrong form for absentee ballot applications.¹⁰⁹ On that basis, Trump sought to throw out about 200,000 ballots in an election decided by only about 20,000 votes.¹¹⁰

The trial court did not consider the question of remedy because it ruled that the election was indeed administered in accordance with state law. And on appeal, four of the seven state supreme court justices denied relief. But three dissented. That is: the Wisconsin Supreme Court was one vote away from opening the door to a remedy that would have disenfranchised 200,000 good-faith voters and swung the election to the popular vote loser.

These are near misses—but still misses. The courts did not throw out those votes. If these cases were all there were, the attempts to throw out votes would be cause for concern, but not full-blown alarm. But it gets worse—because in every meaningful sense of the term, the Supreme Court has already thrown out more than 10,000 votes for president.

The case, again, is *Republican Party of Pennsylvania v. Degraffenreid*.¹¹¹ The issue, as before, was whether the state supreme court somehow violated the federal constitution by extending the state's statutory mailed ballot receipt deadline to protect the state constitutional right to vote.¹¹²

The Supreme Court left the *Degraffenreid* cert petition pending until February 22, 2021.¹¹³ And while cert was pending, 10,097 ballots were kept “in limbo,” waiting on the Court.¹¹⁴ Those were the ballots received after the close of polls on Election Day, November 3, 2020—the statutory deadline for receiving mailed ballots—but before 5 p.m. on November 6, 2020, the deadline imposed by the Pennsylvania Supreme Court.

The ballots were in limbo because a justice of the Supreme Court put them there. On November 6, 2020 Justice Alito, acting alone, ordered that

¹⁰⁷ *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 732–33 (2021).

¹⁰⁸ *Trump v. Biden*, 951 N.W.2d 568, 570 (Wis. 2020).

¹⁰⁹ *Id.* at 571–75.

¹¹⁰ *Id.* at 571, 578.

¹¹¹ *Degraffenreid*, 141 S. Ct. at 732.

¹¹² *See supra* note 93 and accompanying text.

¹¹³ *Degraffenreid*, 141 S. Ct. at 732.

¹¹⁴ Jonathan Lai, *10,000 Pennsylvania Votes Are in Limbo. They Won't Change the Outcome. They Could Still Have a Huge Impact*, PHILA. INQUIRER (Dec. 20, 2020), <https://www.inquirer.com/politics/election/pennsylvania-late-mail-ballots-supreme-court-20201220.html>.

“ballots received by mail after 8:00 p.m. on November 3 be segregated and kept ‘in a secure, safe and sealed container separate from other voted ballots,’ and [] that all such ballots, if counted, be counted separately.”¹¹⁵

“Separate,” in this context too, is not equal. The ballots were still segregated on November 24, 2020 when Pennsylvania counties were bound by law to complete their official canvass, and so they could not be included when the Secretary of State certified an 81,000-vote victory for Joe Biden. In other words: 10,097 voters, who followed in good faith the law handed down by the state’s highest court, had no say in the state’s determination of the presidential election. The ballots may not physically have been thrown out, but they did not matter. It is true but irrelevant that those 10,097 votes could not change the statewide outcome. The right to vote is not the right to determine the outcome. It is the right to have your voice heard and included. And those 10,097 voters were not heard.

III. STATE LEGISLATURES SHOULD ACT TO PROTECT VOTING RIGHTS

These are the stakes: If states do not get voting rights right, the first time, the Supreme Court may well be ready to punish voters with disenfranchisement. And, in light of *Purcell* and the legislative supremacy doctrine, part of getting it right should include legislative action. To show why, and what that legislative action might look like, we turn in conclusion to a brief case study of our home state, Connecticut.

Without early voting or an established system of widespread mail voting, Connecticut was caught in a difficult situation as the 2020 election season approached with the COVID-19 crisis still ongoing. To its credit, the state took significant steps to meet the challenge. The governor issued an executive order for the August primary election, extending the receipt deadline for timely-mailed ballots by two days.¹¹⁶ The legislature convened in a special session and passed a law—limited to the 2020 election—allowing any voter to claim “the sickness of COVID-19” as an excuse to vote by absentee ballot.¹¹⁷ And the Secretary of State—among other thoughtful moves—announced that she would send an absentee ballot application form to each active and registered voter, with return postage paid.¹¹⁸

But even with all that, mail-in voting was complicated. In the absence of legislative authorization, Connecticut was only able to send a ballot

¹¹⁵ Order of Justice Alito, *Republican Party of Pa. v. Degraffenreid*, No. 20-542 (U.S. Nov. 6, 2020).

¹¹⁶ CONN. EXEC. ORDER No. 7MMM (Aug. 10, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7MMM.pdf>.

¹¹⁷ Mark Pazniokas, *Socially Distanced Senate Passes No-Excuse Absentee Ballot Bill*, CT MIRROR (July 28, 2020), <https://ctmirror.org/2020/07/28/socially-distanced-ct-senate-passes-no-excuse-absentee-ballot-bill/>.

¹¹⁸ Press Release, Denise W. Merrill, Secretary of the State of Connecticut, Secretary Merrill Outlines Process and Timelines for November General Election (Aug. 25, 2020), <https://portal.ct.gov/SOTS/Press-Releases/2020-Press-Releases/Secretary-Merrill-Outlines-Process-and-Timelines-for-November-General-Election>.

application—not a ballot—to each voter. The voter then had to mail in the application; the application was processed; a ballot was mailed out; and the voter then had to return the ballot by mail. The result: At a time of widespread mail slowdowns, a successful mail-in vote for a truly homebound person in Connecticut required four separate trips through the unreliable U.S. mail.

By and large, though, the state's extraordinary steps to protect voting rights worked. In 2020, despite COVID-19, Connecticut had record voter turnout: 71.5% of the voting-eligible population, as compared to 64.9% in the 2016 presidential election.¹¹⁹ The turnout rate put Connecticut sixteenth in the country, just behind swing-state Florida and just ahead of swing-state North Carolina.¹²⁰ That is grounds for celebration, but not complacency.¹²¹ If Connecticut had matched Minnesota's nation-leading 80% turnout rate, an additional 220,455 state residents would have vindicated their voting rights. That leaves plenty of room for improvement.¹²²

And, in Connecticut as elsewhere, there are also reasons to be concerned about backsliding. In future elections, it is easy to imagine partisans of the misguided legislative supremacy doctrine challenging the use of executive orders to bolster the election system. It is also easy to imagine similar challenges to administrative actions by the Secretary of the State. And litigation similar to that which voting rights advocates brought this year, in Connecticut and elsewhere, to force fixes may well be less effective vehicles for change in the face of both the *Purcell* principle and the state legislative supremacy doctrine.¹²³

¹¹⁹ *Compare 2020 General Election Turnout Rates*, U.S. ELECTIONS PROJECT (Dec. 7, 2020), <http://www.electproject.org/2020g>, with *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT (Sept. 5, 2018), <http://www.electproject.org/2016g>.

¹²⁰ *2020 General Election Turnout Rates*, U.S. ELECTIONS PROJECT (Dec. 7, 2020), <http://www.electproject.org/2020g>.

¹²¹ *Id.* Happily, Denise Merrill, Secretary of the State in Connecticut, has been a consistent and powerful voice for legislation protecting, expanding, and facilitating the right of all eligible Connecticut residents to vote. *See, e.g.*, Press Release, Denise W. Merrill, Secretary of the State of Connecticut, Secretary Merrill Statement on Passage of Absentee Ballot Bill (July 28, 2020), <https://portal.ct.gov/SOTS/Press-Releases/2020-Press-Releases/Secretary-Merrill-Statement-on-Passage-of-Absentee-Ballot-Bill> (“Connecticut voters want to be able to vote more conveniently, through Early Voting and No-Excuse Absentee Ballots, every year, not just in 2020, just like the voters in 43 other states.”).

¹²² The opportunities for statutory improvement are perhaps best conveyed through a few illustrative comparisons. Unlike Louisiana, Connecticut does not have early voting. LA. REV. STAT. ANN. § 18:1309 (2020). Unlike Georgia, it does not routinely offer no-excuse mail voting. GA. CODE ANN. § 21-2-380 (2020). Unlike Utah, it does not mail ballots to all voters. UTAH CODE ANN. § 20A-3a-202 (2020). Unlike Florida, it does not count or even process mail-in ballots early. FLA. STAT. § 101.68 (2020). Unlike Mississippi, it does not allow any grace period for timely-mailed ballots that are delayed in the mail until after Election Day. MISS. CODE ANN. § 23-15-637 (2020) (allowing five-day grace period). Unlike Indiana, it disenfranchises people on parole after felony convictions. IND. CODE § 3-7-13-6 (2020).

¹²³ *See Conn. State Conf. of NAACP Branches v. Merrill*, No. 3:20-cv-00909 (D. Conn. July 2, 2020) (seeking to force Connecticut to allow no-excuse absentee voting in the 2020 General Election; the litigation was voluntarily dismissed in light of legislative action); H.B. No. 6002, Spec. Sess. (Conn.

So Connecticut, like many other states, should take up legislative reforms quickly—at a minimum, before the next election cycle. Before examining the substance of those reforms, it is worth articulating a couple of context-specific factors that are exemplative of the sorts of considerations that reformers in each state should take into account.

First: One quirk of Connecticut’s posture is that the state constitution can be read to constrain early voting and voting by mail:

The general assembly may provide by law for voting . . . by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity.¹²⁴

This provision may be read to bar mail voting by anyone who does not fall within those constitutionally-delimited categories. The legislative workaround to expand the availability of absentee voting in 2020 was imminently reasonable. The legislature—backed by the courts—interpreted “sickness” as comprehending a society-wide pandemic that provided a valid constitutional excuse for any voter to cast a mail ballot.¹²⁵

Second: Connecticut has a highly decentralized government with a strong tradition of local control. The state has 169 municipalities and no county governments. While the Secretary of the State has significant oversight and planning responsibilities, responsibility for administering elections at the local level is split in each municipality between town clerks and registrars of voters, each of which is elected separately and have separate roles and authority in the election process.¹²⁶

Both of these Connecticut-specific phenomena pose challenges—but, as in other states, neither is an insurmountable barrier to reform. Connecticut is hardly the only state with decentralized election authority. Georgia, for instance, which has both early voting and universal mail-in voting, places primary election administration authority in the hands of 159 separate county units, spread over a far larger area than Connecticut.¹²⁷ And even if

2020), https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB06002&which_year=2020 (expanding absentee voting for 2020 election, signed into law on July 31, 2020).

¹²⁴ CONN. CONST. art. VI, §7.

¹²⁵ On this basis, Connecticut courts dismissed state constitutional challenges against the legislature’s 2020-specific reform. *Fay v. Merrill*, No. HDDCV206130532S, 2020 WL 4815881 *1, *3 (Conn. Super. Ct. July 22, 2020), *aff’d*, No. SC 20486, 2021 WL 560780 *1, *20 (Conn. 2021).

¹²⁶ Compare CONN. GEN. STAT. § 9-17 *et seq.* (2020) (enumerating responsibilities of registrars of voters) with CONN. GEN. STAT. § 9-6 *et seq.* (2020) (enumerating responsibilities of town clerks). Thus, for instance, town clerks prepare absentee ballots, CONN. GEN. STAT. §9-135b (2020), while registrars are responsible for voting machines, CONN. GEN. STAT. § 9-238 (2020).

¹²⁷ See, e.g., GA. CODE ANN. § 21-2-267 (2020) (listing some of the responsibilities of county election officials).

the state constitution, until amended, is a short-term barrier to action on some aspects of early and absentee voting, it is not an impediment to so many other legislative changes that can expand the franchise; armor the state against the need for pre-Election Day tinkering that triggers *Purcell* arguments; and moot any legislative supremacy doctrine arguments before they take hold.

Here goes, then. If there cannot be early voting until the state constitution is amended, Election Day could be made a holiday.¹²⁸ If there cannot be universal no-excuse mail voting yet, the state can at a minimum enact legislation triggering the fixes used (largely successfully) this year in any future year affected by a pandemic or other significant disruption. Right now, the state can enact legislation explicitly endorsing and funding drop-boxes where appropriate in future elections. Right now, it can expand automatic voter registration to every scenario in which a voter comes in contact with the state—including bookings in jails.¹²⁹ It can allow early mail ballot processing; ensure maximum ballot simplicity and standardization; guarantee notice and cure opportunities for flawed mail ballots; and carve out a grace period for ballots timely mailed but received after Election Day. It can set clear standards for provisional ballots and require audits and data collection statewide to ensure compliance. It can extend the franchise to people convicted of all crimes, or at a minimum to parolees. It can guarantee a right to vote within thirty minutes of getting in line at a polling place. It can prevent a local repeat of the national scandal following Election Day in 2020 by limiting opportunities and incentives for frivolous post-election challenges, including providing sanctions for frivolous claims; heightening standards of proof on claims of fraud; requiring that all recounts and challenges be concluded by the federal safe harbor deadline; and articulating a legislative policy in favor of counting ballots whenever possible and in the absence of proven fraud. It can mitigate risk in advance of future crises by explicitly empowering and delegating authority to the Secretary of State to take appropriate emergency action in the future when necessary to protect the right to vote.

Each state will have its own priority list and will be constrained by its own political realities. But, at least in some states, there is reason to hope that both major political parties are incentivized to act. Republicans in down ballot races across the country did very well in 2020's high-turnout

¹²⁸ See VA. CODE ANN. §2.2-3300 (2020) (declaring Election Day a legal holiday).

¹²⁹ See Press Release, Denise W. Merrill, Secretary of the State of Connecticut, Secretary of the State Denise Merrill Announces Legislative Proposal (Feb. 20, 2020), <https://portal.ct.gov/SOTS/Press-Releases/2020-Press-Releases/Secretary-of-the-State-Denise-Merrill-Announces-Legislative-Proposal> (proposing to legislatively encode automatic voter registration).

election.¹³⁰ And Democrats, even in “safe” blue states, should not be complacent with the status quo. Without further prophylaxis against regressive court interference, challenges to the constitutionality of election procedures are possible in any state. It is notable that Donald Trump and his supporters brought formal challenges to election results this year in Michigan, Minnesota, and New Mexico, states that Joe Biden won by massive margins.¹³¹ And it should not matter to Democrats that court challenges from this past election did not change the outcome, even when—as in Pennsylvania—they succeeded in excluding valid votes.

Voting rights are not about which party wins. They are about how our citizens participate in their own government and exercise one of their most precious rights. Every eligible voter who cannot or does not participate is a loss for democracy. And every new lawful participant is a win. Through their actions and inactions—even and especially the concerning ones—the federal courts have given us guidance. It is time to go out there and get some more wins for the rights of citizens to vote and have their votes counted.

¹³⁰ Trip Gabriel, *How Democrats Suffered Crushing Down-Ballot Losses Across America*, N.Y. TIMES (Nov. 28, 2020), <https://www.nytimes.com/2020/11/28/us/politics/democrats-republicans-state-legislatures.html>

¹³¹ See *Donald J. Trump for President, Inc., v. Oliver*, No. 1:20-cv-01289 (D. N.M. Dec. 14, 2020) (challenging election results in a state that Joe Biden won by almost 11 percentage points and 100,000 votes); *Kistner v. Simon*, No. A20-1486 (Minn. Nov. 24, 2020) (challenging election results in a state that Biden won by more than 7 percentage points and 233,000 votes); *Donald J. Trump for President, Inc., v. Benson*, No. 1:20-cv-01083-JTN-PJG (W.D. Mich. Nov. 11, 2020) (challenging election results in a state that Biden won by more than 154,000 votes).