



Supreme Court decision to hold off reviewing Pennsylvania election case could impact legal strategy

Republicans argued that changing rules before election could confuse voters

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The U.S. Supreme Court ruled that if it ends up reviewing a Pennsylvania Supreme Court decision to allow the receipt of ballots after Election Day, it will not be until after Nov. 3, effectively eliminating one factor of the Republicans' case.

In the Pennsylvania GOP's petition to the Supreme Court seeking review, the party stated that when the Pennsylvania Supreme Court ruled to change how the state would be handling its election, it presented a risk of confusing voters. That argument is known as the Purcell principle, as it comes from 2006's *Purcell v. Gonzalez*.

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase," the court said in *Purcell*.

In their petition, Republicans cited *Purcell*, saying that "it is the Pennsylvania Supreme Court majority's last-minute upsetting of the rules established by the General Assembly that threatens public '[c]onfidence in the integrity of our electoral processes' on the eve of a historic general election."

Incidentally, Democrats also cited *Purcell* by claiming that overturning the state court's ruling so close to the election would cause confusion.

Justice Brett Kavanaugh used *Purcell* in a concurring opinion when the Supreme Court decided to restore a South Carolina witness requirement for absentee ballots. Kavanaugh cited precedent that federal courts generally "should not alter state election rules in the period close to an election."

Since voters will have already cast their ballots by the time the court weighs in — if it opts to weigh in at all — Republicans may have to rely on other arguments. They do have options, as their petition showed.

One argument is that the Pennsylvania Supreme Court should not be allowed to change the state's election rules, regardless of timing. The state GOP claimed that because the Constitution says that it is up to state legislatures—not the courts—to determine the manner in which they

appoint their presidential electors, as well as the “Times, Places, and Manner of holding Elections for Senators and Representatives.”

Another argument is that federal statutes set out the time for “a single nationwide federal Election Day,” and that states “cannot create a process under which ballots cast or mailed after Election Day can be considered timely.”

While pushing the matter off until after the election may have made the Purcell argument moot, Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, speculated that Chief Justice John Roberts is hoping the whole case will be made moot if the election’s outcome does not rely on Pennsylvania.

“Chief Justice John Roberts, who always prefers to kick controversial cans down the road, is clearly hoping that Pennsylvania isn’t the deciding state in the presidential election,” Shapiro told Fox News.

Should Pennsylvania be the deciding factor, Shapiro noted, “all bets are off” because the court’s recent rulings against the Republicans would not necessarily be indicative of how they would ultimately decide the case.