Timing is

Timing is everything in elections. Timing is just as important in electoral litigation. Given the stakes, litigation should be timed strategically to maximize relief while giving courts enough time to rule—all without disrupting the voting process. Statutes will often dictate when certain suits must be filed. There are also practical and prudential concerns to weigh. The U.S. Supreme Court has encapsulated some of these concerns in a doctrine known as the "*Purcell* principle."

The *Purcell* principle establishes that federal courts should generally refrain from interfering with state electoral processes or laws—typically through injunctions—close to an election. The principle arises from *Purcell v. Gonzalez*[1] where the plaintiffs sued to enjoin an Arizona voter ID law in May 2006. The district court denied the injunction, but a Ninth Circuit motions panel entered an injunction pending appeal in October—one month before the election. The Supreme Court vacated the injunction. It cautioned that, when "[f]aced with an application to enjoin operation of [election] procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." The court was concerned that last-minute changes could confuse voters or dissuade them from voting. It reasoned 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."

As the *Purcell* principle developed, justices have expressed unease about rushing state election officials to "understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes."[2] Practically speaking, time is always ticking to train poll workers or to print and mail ballots. Belated changes disrupt these processes.

The Supreme Court has applied the *Purcell* principle many times. For example, in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), the Supreme Court (5-4) stayed a three-judge district court's injunction finding Alabama's 2022 congressional map violated federal voting rights laws. The district court ordered the state to completely redraw the congressional districts just nine weeks before the primary's absentee voting. Justice Brett Kavanaugh, writing separately (with Justice Samuel Alito joining), emphasized that the *Purcell* principle "reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and

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voters, among others."[3]

In *Merrill*, the last-second map prevented candidates from knowing the district they might live in or who they might be running against, and stopped voters from knowing who their candidates might be.

Even so, Kavanaugh conceded the *Purcell* principle is not absolute. Rather, the *Purcell* principle simply raises the burden to justify eleventh-hour changes to election law and procedures. According to Kavanaugh, an injunction may overcome the *Purcell* principle if:

(1) the underlying merits are entirely clearcut in favor of the plaintiff;

(2) the plaintiff would suffer irreparable harm absent the injunction;

(3) the plaintiff has not unduly delayed bringing the complaint to court; and

(4) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Some courts have interpreted Kavanaugh's comments about *Purcell* as creating a presumption against injunctions leading up to an election.[4]

Two years after *Merrill*, the Supreme Court stayed another electoral map injunction. This time, a three-judge district court held unconstitutional Louisiana's 2024 electoral map and required a new remedial map no later than June 4.[5] Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson would have allowed the new map to take effect. Jackson explained, "[i]n [her] view, *Purcell* has no role to play here. There is little risk of voter confusion from a new map being imposed this far out from the November election. In fact, we have often denied stays of redistricting orders issued as close or closer to an election."[6]

The *Purcell* principle is not limited to the redistricting context. For instance, during the COVID pandemic, a federal district court in Wisconsin issued an injunction only five days before the election that allowed voters to mail absentee ballots after election day so long as the ballots were received by April 13—the already-extended deadline for ballots postmarked by election day. The Supreme Court stayed the injunction because it would have judicially created confusion and altered the nature of the election on short notice. The court reiterated "that lower federal courts should ordinarily not alter the election rules on the eve of an election."[7]

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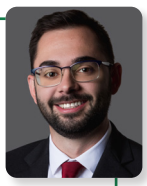
The *Purcell* principle does not set a brightline rule for how close is too close to an election. Along with the examples above, the Supreme Court has rejected judicial intervention in elections 21 days before the general election date, 34 days before the general election date, 46 days before the general election date, 48 days before the primary election date, 92 days before the primary election date, and 120 days before the primary election date.[8] Kavanaugh's *Merrill* opinion recognizes that "[h]ow close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects."[9] This murky area makes one thing clear: timing is everything. Without clearer guidance, litigants may want to err on the side of better late than never.

ENDNOTES:

1. 549 U.S. 1 (2006).
2. *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).
3. *Id.* at 880-81 (Kavanaugh, J., concurring).
4. *Tennessee Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Lee*, ___ F.4th ___, 2024 WL 3219054, at *6 (6th Cir. June 28, 2024) (citing *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370-72 (11th Cir. 2022)).
5. *Robinson v. Callais*, 144 S. Ct. 1171 (2024).
6. *Id.* at 1172 (Jackson, J., dissenting) (citing cases).
7. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020).
8. *Petteway v. Galveston Cnty., Texas*, 87 F.4th 721, 723 (5th Cir. 2023) (Oldham, J., concurring) (collecting cases).
9. *Merrill*, 142 S. Ct. at 881n.1 (Kavanaugh, J., concurring).



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