

Election Eve Decisions – The Supreme Court Clarifies Reach of *Purcell*, Reversing Eleventh Circuit

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The United States Supreme Court late last month vacated the stay of an injunction entered by the U.S. Court of Appeals for the Eleventh Circuit. In a brief, one-paragraph order with no dissents, the Supreme Court held that the lower court had failed to properly analyze the motion under the Supreme Court’s traditional stay factors and had misapplied “the *Purcell* principle.” The immediate result is to revive a case alleging that Georgia’s system for electing public service commissioners violates Section 2 of the Voting Rights Act. Perhaps more importantly for other litigants, the decision may also shed additional light on an increasingly important principle of election law.

The *Purcell* Principle

The Supreme Court’s order arose from the Eleventh Circuit’s application of the *Purcell* principle. “[T]he *Purcell* principle,” the Supreme Court recently explained, teaches that “lower federal courts should ordinarily not alter the election rules on the eve of an election.” *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020); see *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

In the eponymous *Purcell* decision, the Supreme Court vacated a lower court decision staying a state voter identification requirement about a month before an election. There, the Court explained that the lower court “was required to weigh, in addition to the harms attendant upon issuance or non-issuance of an injunction, considerations specific to election cases.” In that case, the election-specific consideration highlighted by the Court was the recognition that “[c]ourt orders affecting elections, especially conflicting orders,

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can themselves result in voter confusion and consequent incentive to remain away from the polls.” In subsequent cases, several Justices have also emphasized concerns about smooth election administration and the potential for confusion among state election officials, who must adjust rapidly to changing court orders.

The *Purcell* principle was announced in 2006 and received renewed attention amidst the contentious 2020 presidential election. In at least eight cases reaching the Supreme Court’s “emergency” or “shadow” docket that cycle, the result turned on *Purcell*. And the pace has not abated. The decision last month marks the third *Purcell* case to reach the Court in 2022 already.

The Eleventh Circuit Decision

In *Rose v. Raffensperger*, 2022 WL 3572823 (11th Cir. Aug. 12, 2022) (No. 22-12593), the district court permanently enjoined the Georgia Secretary of State from conducting statewide elections for two public service commission districts on November 8, 2022. That order, issued approximately three months before the election, followed two years of litigation culminating in a five-day bench trial where the district court found that Georgia’s system for electing public service commissioners diluted the votes of black Georgians in violation of Section 2 of the Voting Rights Act.

The Eleventh Circuit held that the district court’s order violated *Purcell* on appeal. Chief among its reasons was the observation that the election was just three months away and that the Eleventh Circuit had previously applied *Purcell* to an election “less than four months away.” Although the majority acknowledged that the district court had met the deadline by which the Georgia Secretary of State had indicated he could remove the affected elections from the ballot without disruption to other races, the majority reasoned that “the permanent injunction was issued too close to [the election] date to allow for meaningful appellate review of the district court’s findings of facts and conclusions of law.” Judge Rosenbaum dissented.

Lessons

The Supreme Court’s one-paragraph order reversing the Eleventh Circuit provided the following explanation:

Respondent’s emergency motion for a stay pending appeal relied on the traditional stay factors and a likelihood of success on the merits, yet the Eleventh Circuit failed to analyze the motion under that framework. Instead, it applied a version of the *Purcell* principle that respondent could not fairly have advanced himself in light of his previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial. The Eleventh Circuit may reconsider whether a stay pending appeal is appropriate, subject to sound equitable discretion. (citations omitted)

Although sparse, several points can be drawn from the Court’s reasoning.

First, the decision suggests the Supreme Court agrees a *Purcell* defense is waivable. That result may seem obvious – after all, the Georgia Secretary of State had expressly told the district court that he would not “make an appeal based on *Purcell*, and the district court had entered its injunction before the date by which

the Secretary represented election changes would not be disruptive. But federal courts are sometimes reluctant to enforce waivers against government litigants, and the majority here applied *Purcell* notwithstanding the Secretary's clear attempts to waive. The Supreme Court's decision thus seems to indicate that state governments can lose the benefits of *Purcell* through an express waiver, at least where there are no countervailing considerations such as voter confusion.

Second, the Supreme Court declined to apply *Purcell* mechanically. The Eleventh Circuit majority applied *Purcell* because the election was three months away, and at least one precedent had applied *Purcell* to an election four months away. But, as Judge Rosenbaum explained, courts "can't just count days and see how far we are from election day." Rather, as Justice Kavanaugh has argued, "the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context." Under this approach, facts matter, and courts must consider how the scope of the requested relief affects the relevant considerations under *Purcell*. Changes that are easy to implement can be ordered later than disruptive changes. By holding that the Eleventh Circuit could reconsider whether a stay pending appeal is appropriate subject to its sound equitable discretion, the Supreme Court's decision suggests that these types of considerations, which are specific to election cases, are weighed as part of the ordinary equitable balance.

Third, the Supreme Court's focus on equitable considerations recenters the *Purcell* analysis. The Eleventh Circuit majority found a *Purcell* violation even though Georgia election officials had acknowledged that the district court's injunction would not disrupt their administration of the upcoming election, and even though the record contained no evidence that an injunction postponing the two public commissioner races would cause voter confusion. By vacating that ruling, the Supreme Court indicated the *Purcell* is not some quasi-judicial bar, but a rule of reason reflecting concerns about the potentially disruptive consequences of judicial tinkering with election rules.