

U.S. Supreme Court Rules on Wisconsin Absentee Ballots

In a 5-3 [decision](#) the U.S. Supreme Court disallowed a [lower court decision](#) to go into effect which would have allowed absentee ballots to be counted if they were received as late as November 9, as long as they were postmarked on or before election day. As a result, Wisconsin absentee ballots must be received by election day to be counted.

This decision is at odds with a recent ruling from [Pennsylvania](#) raising the same question. In the Pennsylvania case, the Supreme Court ruled 4-4, meaning that the lower court decision would stay in effect. That decision held that absentee ballots received up to three days after the election could be counted.

Chief Justice Roberts voted with the more liberal Justices in the Pennsylvania case to allow late ballots to be counted. It wasn't clear why because none of the Justices issued an opinion, which is typical in emergency cases. In the Wisconsin case the Chief Justice explained how he saw the cases as different. The Pennsylvania case involved applying the Pennsylvania constitution, which is very pro-voting, to Pennsylvania elections law. The Wisconsin case, according to the Chief Justice, "involves federal intrusion on state lawmaking processes."

The Justices wrote a number of lengthier opinions in *Democratic National Committee v. Wisconsin State Legislature*, which was issued minutes before Judge Barrett because Justice Barrett.

Wisconsin statutes require absentee ballots to be received by election day. On September 21, a federal district judge extended the deadline due to COVID-19. The Seventh Circuit disallowed the district court decision from going into effect pending appeal. The Supreme Court agreed with the Seventh Circuit.

Justices Gorsuch and Kavanaugh wrote a brief concurring opinion which stated, “state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.” It is up to state legislatures to answer the “how-much-is-enough questions” related to changing election requirements to respond to COVID-19, according to these Justices.

Justice Kavanaugh wrote a lengthy solo concurrence as well. He offered three reasons for why he disagreed with the district court decision. First, he pointed out that the Supreme Court “has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle.” Second, he opined that state legislatures and not federal judges “have the responsibility to address the health and safety of the people during the COVID-19 pandemic.” Finally, elections must have deadlines. In early September, Wisconsin mailed every registered voter an absentee ballot application. “A deadline is not unconstitutional merely because of voters’ ‘own failure to take timely steps’ to ensure their franchise.”

Justice Kagan, joined by Justices Breyer and Sotomayor, also wrote a longer opinion. According to Justice Kagan, *Purcell* is a “not a rule but a caution” that should be applied to election changes that might “baffle and discourage voters.” Allowing more time for absentee ballots to be received wouldn’t likely do either. Justice Kagan also expressed skepticism that courts should defer to state

legislatures regarding election law: “For in that field politicians’ incentives often conflict with voters’ interests—that is, whenever suppressing votes benefits the lawmakers who make the rules.” Justice Kagan also pointed out that given the surge in requests for absentee ballots up until Wisconsin’s October 29 ballot-application deadline and unusual mail delays, as many as 100,000 votes won’t be counted without the six-day extension. Only 284 Wisconsin mail ballots weren’t counted in the 2016.

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