NO. 20-740

IN THE
SUPREME COURT OF THE UNITED STATES

JIM BOGNET, *ET AL.*,
Petitioners,
v.
VERONICA DEGRAFFENREID, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court Of Appeals
for the Third Circuit

JOINT BRIEF OF RESPONDENT BOARDS OF ELECTIONS IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

ARGUMENT

Petitioners attempt to distract from the obvious mootness of their Petition by invoking weighty constitutional principles and dramatic conflicts between state and federal governments. Their efforts belie the numerous deficiencies in their case. They are seeking review of the denial of a temporary restraining order relating to an election that is long since settled. Even had the district court granted the order—aimed at preventing the boards of elections from counting certain ballots—no election result would have changed. The ballots in question ultimately were *not included in the state's certified count* and were, in any event, insufficient in number to affect the outcome of the vote.

And, by its terms, the Pennsylvania Supreme Court decision at issue applied only to the 2020 General Election. Petitioners may not obtain relief on the remote possibility that the Pennsylvania Supreme Court will, prior to some future election, again apply the state constitution to adapt a mail-in ballot deadline because unprecedented delays in U.S. Postal Service rendered unmanageable the statutory timeline, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*Boockvar*"). Moreover, their case seeking injunctive and declaratory relief remains pending in the district court and, indeed, is in its infancy, as the defendants (Respondents here) have not even answered the Complaint.

In this posture, on barely any record, and with no pending harm to redress, Petitioners would have this Court expound on the meaning of the Elections and Electors Clauses, advise on the limits of a state high court's authority to interpret its state's constitution, decide fact-laden questions of constitutional and prudential standing, and revise its settled doctrine about upsetting rules upon which voters relied in casting their votes. Such a request flies in the face of Article III.

Petitioners' claims fail on their merits for reasons explained by the Court of Appeals and argued in the oppositions filed by fellow respondents. Respondents refer to and adopt those positions and will not, for the sake of conciseness, restate them herein.

Regardless, it is unnecessary to consider the merits because the Petition fails at the threshold. Federal courts are not fora for dissertations on hypothetical questions of constitutional law; they may only rule on live disputes in which the parties have a concrete and particularized interest and where judicial action will be able to remedy the complained-of harms.

This dispute fails on all accounts. The case is moot because Petitioners seek to enjoin an action that never occurred in an election that concluded months

ago. The case also is not ripe because Petitioners have not and could not plead that the Pennsylvania Supreme Court is imminently going to make another, similar ruling regarding a future election. And, as the Court of Appeals thoroughly explained, Petitioners lack standing to sue.

The 2020 General Election has been contentiously and exhaustively litigated. Months after its conclusion, it need not be relitigated once more. The Court should deny the Petition.

I. The Petition is moot because it seeks review of an order declining to enjoin activity that never did, and never could, occur.

In order for a dispute to be justiciable in federal court, it must present a live case or controversy, not a grievance that no longer is occurring or causing harm (thus rendering it moot) or that might hypothetically occur in the future (thus rendering it unripe). *See Trump v. New York*, 141 S. Ct. 530, 534 (2020).

Federal jurisdiction requires that an actual controversy exist "at all stages of the review, not merely at the time the complaint is filed." *Arizonans for Off. Eng. v. Ariz.*, 520 U.S. 43, 67 (1997). "The parties must continue to have a personal stake in the outcome" for the duration of the suit. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (quotation

omitted). When the "issues presented" in a case "are no longer 'live,'" the case must be dismissed as moot. *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979).

This rule is particularly salient in controversies concerning the issuance of preliminary or emergency injunctive relief. "[I]n general, an appeal from the denial of a preliminary injunction is mooted by the occurrence of the action sought to be enjoined." *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 509 (2d Cir. 2005); *accord, e.g.*, *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994); *Thournir v. Buchanan*, 710 F.2d 1461, 1463 (10th Cir. 1983). Once the action the movant seeks to avert has occurred, the court has "no effective relief to offer." *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 621 (1st Cir. 1995); *accord Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." (quotation omitted)); *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981) ("[T]he question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out.").

Such are the circumstances here. What would Petitioners have this Court do? The injunctive relief they seek—to "restrain the Secretary of the

Commonwealth . . . and the 67 County Boards of Elections . . . from following" the Pennsylvania Supreme Court's decision to extend the mail-in ballot deadline, *Bognet v. Boockvar*, No. 20-cv-215, 2020 U.S. Dist. LEXIS 200923, at *8 (W.D. Pa. Oct. 28, 2020)—is no longer available to them. So they ask the Court to pronounce rules of constitutional interpretation and application for future election disputes. But those rules would affect neither Petitioners nor their claims. A decision here would constitute exactly the sort of advisory decree that Article III disallows.[1] *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

The Court "cannot turn back the clock and create a world in which the 2020 election results are not certified." *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (quotation omitted). What's more, the ballots at issue in this case are not included in the certified election results. Whatever the issues or hypothetical worries at the commencement of the case, those presented now are "no longer live," *Davis*, 440 U.S. at 631, and only "an abstract dispute about

[1] Notably, this Court has denied multiple prior petitions requesting review of the 2020 General Election. *See, e.g.*, *Donald J. Trump for President, Inc. v. Degraffenreid*, No. 20-845, 2021 U.S. LEXIS 1065, at *1 (U.S. Feb. 22, 2021); *Kelly v. Pennsylvania*, No. 20-810, 2021 U.S. LEXIS 1063, at *1 (U.S. Feb. 22, 2021); *Republican Party of Pa. v. Degraffenreid*, Nos. 20-542, 20-574, 2021 U.S. LEXIS 1197, at *1 (U.S. Feb. 22, 2021).

the law" remains. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). The case is moot.

Federal courts do still have jurisdiction if the harmful conduct has abated but nonetheless is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This doctrine is reserved for "exceptional situations," *L.A. v. Lyons*, 461 U.S. 95, 109 (1983), and "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (quotation marks omitted). Since elections typically are condensed and recurring events, the Court "routinely invokes" this exception "in election cases." *Republican Party of Pa. v. Degraffenreid*, Nos. 20-542, 20-574, 2021 U.S. LEXIS 1197, at *14 (U.S. Feb. 22, 2021) (Thomas, J., dissenting from denial of cert.).

But this Petition does not fit the mold of election-related disputes that the Court has found to be justiciable after an election had concluded.

First, there is no "reasonable expectation" that "the same complaining party will be subject to the same action again" because there is no *ongoing* rule *presently* in force that threatens continuing or future harm on Petitioners.

In *Meyer v. Grant*, for instance, the Court struck down Colorado's ban on paid petition circulators in a suit brought by plaintiffs who were unable to gather enough signatures to support a ballot initiative that election but planned to try again in the next. 486 U.S. 414, 417 n.2, 428 (1988). And *Wisconsin Right to Life* featured an organization that intended to run similar ads in a subsequent election that would again be prohibited by the challenged federal statute. *See* 551 U.S. at 463. *See also, e.g.*, *Davis*, 554 U.S. at 736 (a congressional candidate publicly stated he would likely run again in challenge to a particular campaign finance law); *Anderson v. Celebrezze*, 460 U.S. 780, 782–84 & n.3 (1983) (challenge by presidential candidate to Ohio's early filing deadline).

By contrast, the Pennsylvania Supreme Court's three-day extension of the Pennsylvania Election Code's deadline for receiving mail-in ballots in the 2020 General Election is not an ongoing rule. It was a temporary remedy employed in an as-applied state constitutional challenge to a state statute. The possibility of recurrence is, at best, "no more than conjecture." *Lyons*, 461 U.S. at 108–09.

Nor does it present a live case or controversy to allege simply that the Pennsylvania Supreme Court may one day again violate the federal Constitution, or even a specific clause thereof. If it did, the exception to constitutional limits on federal jurisdiction would

swallow the rule. After all, the Court does not engage in presumptions that law enforcement officers may in the future "act unconstitutionally" by subjecting a plaintiff to illegal conduct, *see id.*, or that a legislature will reenact a challenged statute after its amendment or expiration, *see Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam) (challenge to state's voter residency requirement moot after the statute's subsequent amendment). The same solicitude should be afforded to a state's judiciary.

Second, denying the Petition need not deprive the issues in the case of review. This case, and these claims, still are pending before the district court, which has yet to rule—let alone develop a record—on Petitioners' request for declaratory relief. Their "claim that [the mail-in ballot deadline] was illegally [extended] remains to be litigated in [their] suit . . . ; in no sense does that claim 'evade' review." *Lyons*, 461 U.S. at 109. The Court should not wade into the fray when the lower court has not had the opportunity to resolve it in the first instance. *See Camenisch*, 451 U.S. at 398 ("Until such a trial [on the merits] has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit."); *Reclaim Idaho v. Little*, 826 F. App'x 592, 595 (9th Cir. Sept. 1, 2020) (remanding an election-related dispute to "allow the parties to develop the record . . . on whether this controversy is [moot] . . . because the district court is better positioned to evaluate factual

nuances and disputes," and so "the district court can decide this issue in the first instance").

And, in fact, should the Pennsylvania Supreme Court's decision spawn future challenges to the Pennsylvania Election Code, *see Degraffenreid*, 2021 U.S. LEXIS 1197, at *18–19 (Alito, J., dissenting from denial of cert.), there will be other opportunities to adjudicate the limits of the state court's power that present concrete disputes involving litigants with actual rights and interests at stake. The Petition should be denied.

II. Petitioners' challenge to hypothetical future state court decisions is not justiciable because it is not ripe.

Relatedly, and alternatively, if Petitioners' claims are not moot, they are unripe.

To be ripe, an issue must "not [be] dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump*, 141 S. Ct. at 535 (*quoting Texas v. United States*, 523 U.S. 296, 300 (1998)). In particular, where a petitioner only cites a *possibility* that her rights may be violated, but fails to demonstrate that it is "foreseen or even likely," the claim is unripe and cannot be heard in federal court. *See Texas*, 523 U.S. at 300 (dismissing as unripe a claim that enforcement of a Texas law would violate the petitioner's rights

where enforcement was not ongoing, foreseen, or likely).

Petitioners lodge grandiose objections to the Pennsylvania Supreme Court's purported interference with the role of the state legislature in fashioning rules for federal elections. But, as discussed, the court's decision was limited to the 2020 General Election. *See Boockvar*, 238 A.3d at 372. Petitioners do not—and could not—plead that similar future events leading to a similar future action by the state court are foreseeable or likely. *See id.* at 370–73 (citing the U.S. Postal Service's statement that it "could be unable to meet Pennsylvania's statutory election calendar" and the increased prevalence of mail-in voting in light of the risks presented by the coronavirus pandemic as reasons for its decision).

III. Petitioners lack standing to press their claims.

Numerous challenges to the 2020 General Election failed for lack of standing.[2] So too should this challenge. None of the Petitioners—a former

[2] *See, e.g.*, *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *Pa. Voters Alliance v. Centre Cty.*, No. 20-cv-01761, 2020 U.S. Dist. LEXIS 195176, at *2 (M.D. Pa. Oct. 21, 2020); *Donald J. Trump for President v. Cegavske*, No. 20-cv-1445, 2020 U.S. Dist. LEXIS 172052, at *1 (D. Nev. Sept. 18, 2020); *Martel v. Condos*, No. 20-cv-131, 2020 U.S. Dist. LEXIS 182693, at *1 (D. Vt. Sept. 16, 2020).

candidate for Congress and voters who pledged to vote in person in the 2020 General Election—had standing to start with, a defect only made worse after the election, when their suspicions of harm did not come to pass. *See Arizonans for Official English*, 520 U.S. at 48–49 (a case must be justiciable at its inception and throughout its pendency). Because this deficiency presents yet another reason why the Court lacks jurisdiction in this matter, the Petition should be denied.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complaint of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014). The injury "must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (*quoting Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Here, each Petitioner lacks standing because none of the challenged ballots were included in Pennsylvania's official certified count. Pa. Dep't of State, 2020 Presidential Election Returns, https://bit.ly/3vpLHbS (last visited March 13, 2021). The conduct Petitioners warned would cause them injury never happened and, now, could never happen. Their dispute is strictly academic.

For Bognet, the congressional candidate, to have experienced an injury-in-fact as a result of the Pennsylvania Supreme Court's decision, even if the late arriving ballots were counted, "the number of [challenged] ballots cast in favor of his opponent would have to be sufficient to change the results of the election." *See Bognet*, 2020 U.S. Dist. LEXIS 200923, at *12; *see also Bognet v. Sec'y Pa.*, 980 F.3d 336, 351–52 (3d Cir. 2020). Bognet lost the election by over twelve thousand votes, none of which arrived after Election Day. Pa. Dep't of State, 2020 Presidential Election Returns, https://bit.ly/3vpLHbS. Because he suffered no harm from the mail-in ballot deadline extension, Bognet cannot show injury-in-fact, much less that the nonexistent injury was caused by Respondent boards of elections or is redressable here or in any court.

The voter Petitioners also do not have standing. They allege they were harmed by the decision in *Boockvar* because (1) it resulted in mail-in voters receiving preferential treatment over in-person voters and (2) ballots Petitioners deemed improperly cast were more likely to be counted, thereby diluting Petitioners' votes. Federal courts have almost unanimously rejected the dilution theory as presenting only a generalized grievance. Here, of course, the Court need not even consider vote dilution because none of the late arriving votes were included in the certified count and therefore could not have diluted anyone's vote, including Petitioners'.

And Petitioners' claim that *Boockvar* transformed mail-in voters into a preferred class is similarly insufficient to confer standing. The only "preference" Petitioners allege the Pennsylvania Supreme Court bestowed on mail-in voters was making it somewhat more likely that a mail-in voter—as compared to an in-person voter—could cast a ballot after 8 p.m. on Election Day (a crime regardless of whether one votes by mail or in person) and have that ballot counted. Prior to the election, that alleged injury was too conjectural because it could only result from a long series of unlikely events. *Bognet*, 980 F.3d at 362 ("[T]he Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy; (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur; (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted."). Now that the election has occurred, it is apparent that the Pennsylvania Supreme Court's decision did not cause Petitioners any harm because no late-arriving votes were counted (and would not have changed the results in any case).

While Petitioners may believe the Pennsylvania Supreme Court improperly intruded upon the state legislature's role in federal elections,

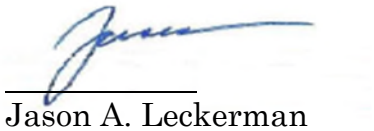
that belief does not confer standing. Prudential standing to assert claims on behalf of others may exist in certain limited circumstances but those circumstances are not present here for the reasons explained by the Third Circuit and adopted by this brief. *Bognet*, 980 F.3d at 350 ("Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests.").

At base, Petitioners were left entirely unscathed by the decision in *Boockvar*. The injuries they allege were speculative when the Complaint was filed and are non-existent now, in a world where none of the challenged ballots were included in the certified count and the order which they sought to enjoin has expired. The issues presented are neither live nor ripe; nor do Petitioners have a concrete and particularized interest in the claims they press. Entertaining jurisdiction here would not require an expansive reading of Article III, but a boundless one. Respondents respectfully request that this Court deny the Petition.

CONCLUSION

For the foregoing reasons, Respondents Chester, Delaware, and Montgomery Boards of Elections respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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