NO. 20-740

# In the Supreme Court of the United States

JIM BOGNET, *et al.*,

*Petitioners*,

v.

VERONICA DEGRAFFENREID,
ACTING SECRETARY OF PENNSYLVANIA, *et al.*,

*Respondents*.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

ARGUMENT .....1

I. The Court should grant certiorari on the first question presented and decide whether Petitioners have standing to press their claims..... 2

II. This case is not moot, but to the extent the Court disagrees it should vacate the Third Circuit's decision under *Munsingwear*.....9

CONCLUSION .....11

TABLE OF AUTHORITIES

Page

CASES

*Arizonans for Off. Eng. v. Arizona*,
520 U.S. 43, (1997) ..... 10, 11

*Azar v. Garza*,
138 S. Ct. 1790 (2018) ..... 10

*Bond v. United States*,
564 U.S. 211 (2011) ..... 6

*Camreta v. Greene*, 1
563 U.S. 692 (2011) ..... 10, 11

*Carson v. Simon*,
978 F.3d 1051 (8th Cir. 2020) ..... 3, 8

*Chiafalo v. Washington*,
140 S. Ct. 2316 (2020) ..... 8

*Colo. Gen. Assembly v. Salazar*,
541 U.S. 1093 (2004) ..... 5

*Davis v. Fed. Election Comm'n*,
554 U.S. 724 (2008) ..... 9

*Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*,
544 U.S. 280 (2005) ..... 3

*Friends of the Earth, Inc. v. Laidlaw Env't Servs.*,
528 U.S. 167 (2000) ..... 2

*Harper ex rel. Harper v. Poway Unified Sch. Dist.*,
549 U.S. 1262 (2007) ..... 10

*Lance v. Coffman*,
549 U.S. 437 (2007) ..... 2, 3

*Lance v. Dennis*,
546 U.S. 459 (2006) ..... 2

*Michel v. Anderson*,
14 F.3d 623 (D.C. Cir. 1994) ..... 6

*Quackenbush v. Allstate Ins. Co.*,
517 U.S. 706 (1996) ..... 2

*Republican Party of Pennsylvania v. Degraffenreid*,
No. 20-542, slip op. ..... 1, 7, 8, 9

*Ruhrgas AG v. Marathon Oil Co.*,
526 U.S. 574 (1999) ..... 2, 3

*Selig v. Pediatric Specialty Care, Inc.*,
551 U.S. 1142 (2007) ..... 10

*Trump v. Wis. Elections Comm'n*,
983 F.3d 919 (7th Cir. 2020) ..... 4

*U.S. Term Limits, Inc. v. Thornton*,
514 U.S. 779 (1995) ..... 5

*United States v. Munsingwear, Inc.*,
340 U.S. 36 (1950) ..... 1, 10

*Verlinden B.V. v. Cent. Bank of Nigeria*,
461 U.S. 480 (1983) ..... 2

RULES

Fed. R. Civ. P. 8(c) ..... 3

OTHER AUTHORITIES

2 DEBATES ON THE FEDERAL CONSTITUTION
(J. Elliot 2d ed. 1836) ..... 7

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787
(M. Farrand ed. 1911) ..... 7

## ARGUMENT

Federal courts may resolve jurisdictional issues in whatever order they deem appropriate, and the Court would not need to decide whether this case is moot in order to grant certiorari and rule that the Third Circuit was wrong to hold that Petitioners lack standing. Petitioners' position is that this case is *not* moot for the reasons explained by Justice Alito in his dissent from the denial of certiorari in *Republican Party of Pennsylvania v. Degraffenreid*, No. 20-542, slip op. at 3–4. But if the Court does not wish to decide that issue in the first instance, it could limit its review to the first question presented, reverse the Third Circuit's standing decision, and let the lower courts resolve the parties' dispute over mootness on remand. That course would allow the Court to decide an important and recurring threshold issue in election law cases on which the decision below created an acknowledged circuit split.

Petitioners continue to believe that all the questions presented are worthy of this Court's review. But to the extent that the denial of certiorari in *Degraffenreid* signals that the Court is not inclined to take up the Petition's merits questions, the Court should still review the Third Circuit's standing decision and begin the process of lifting the "shroud of doubt" that hangs over this area of the law. *Degraffenreid*, slip op. at 11 (Thomas, J., dissenting from denial of certiorari). In the alternative, to the extent that the Court is persuaded that this case is moot, it should vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

## I. The Court should grant certiorari on the first question presented and decide whether Petitioners have standing to press their claims.

A. The principal briefs in opposition make much of this case's supposed mootness, but they do not even attempt to explain how that issue poses an obstacle to review of the Third Circuit's standing decision. There is no mandatory "sequencing of jurisdictional issues," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), and this Court has often reversed erroneous jurisdictional dismissals while leaving it open to defendants to argue on remand for dismissal on alternative threshold grounds. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 193–94 (2000); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 498 (1983).

In *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (*per curiam*), for example, this Court held that an Elections Clause challenge to a congressional redistricting plan adopted by the Colorado Supreme Court should not have been dismissed under the *Rooker-Feldman* doctrine. Following remand, the case returned to this Court for a second time, and the Court ruled that the plaintiffs did not have standing to press their claims. *Lance v. Coffman*, 549 U.S. 437 (2007) (*per curiam*). Despite the plaintiffs' lack of standing, the Court explained that there was nothing improper about reversing the lower court the first time around. Like standing, *Rooker-Feldman* is a jurisdictional doctrine, and "'there is no unyielding jurisdictional hierarchy.'"

*Coffman*, 549 U.S. at 439 n.* (quoting *Ruhrgas AG*, 526 U.S. at 578).

Whatever the merits of Respondents' mootness arguments, it would be entirely consistent with this Court's established practice to grant certiorari and start by reviewing the jurisdictional basis on which the decision below rested. If the Court prefers not to decide whether this case is moot, it could grant only the Petition's first question presented, leaving it to the lower courts to sort through mootness and the merits issues the Petition presents. Respondents' mootness arguments are thus, at most, a reason to limit review to the Third Circuit's standing decision, not to deny the Petition altogether.[1]

B. Respondents make several strained attempts to reconcile the decision below with the Eighth Circuit's ruling in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), but they cannot escape the Third Circuit's express acknowledgement that it was creating a circuit split: "Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots." App. 25 n.6 (citing *Carson*). Indeed, although Respondents

[1] The Secretary's laches and claim preclusion arguments are affirmative defenses that were not the basis for the decision below. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005); Fed. R. Civ. P. 8(c). The Court could leave those issues for resolution by the lower courts on remand even if it granted the Petition in its entirety, and they are irrelevant to the threshold issue of whether Petitioners have standing.

do not acknowledge it, the split has deepened since the Petition was filed, with the Seventh Circuit recently holding that a candidate for the presidency had standing to object to an alleged violation of the Electors Clause. *See Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) (quoting *Carson* for the proposition that "[a]n inaccurate vote tally is a concrete and particularized injury to candidates").

The DNC argues that *Carson* is distinguishable because the Third Circuit "understood" Petitioner Bognet not to assert the interest that provided the basis for standing in *Carson*—a candidate's "independent interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." DNC BIO 15. Thus, the DNC claims, "the Third Circuit said nothing about whether the injury the Eighth Circuit considered in *Carson* would be sufficient to give rise to standing." *Id.* at 16. The DNC adopted a decidedly broader reading of the decision below in a recent brief to the Seventh Circuit, praising the Third Circuit for "declining to follow *Carson*," and (unsuccessfully) urging the Seventh Circuit to do the same. Br. of Intervening Def.-Appellee Democratic Nat'l Comm., *Trump v. Wis. Elections Comm'n*, No. 20-3414, 2020 WL 7701233, at *11 n.7 (7th Cir. Dec. 18, 2020).

In any event, the DNC's attempt to distinguish *Carson* based upon differing alleged interests in the two cases is utterly without merit. Petitioners' opening brief to the Third Circuit said that "Bognet has a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," Pls.-Appellants' Opening Br., Doc. 41 at 20 (3d Cir. Nov. 6, 2020), and the complaint alleges that Bognet

was injured by the Pennsylvania Supreme Court's decision to override a state statute because it "allows County Boards of Elections to accept votes for Representative that would otherwise be unlawful in his election." Compl., Doc. 1 ¶ 69 (W.D. Pa. Oct. 22, 2020). Rather than overlooking a key argument in Petitioners' opening brief and ignoring the allegations in the complaint, the Third Circuit was quite clear that it simply disagreed with the Eighth Circuit's decision in *Carson*. *See* App. 25 n.6.

The Secretary fares no better when she argues that *Carson* is distinguishable because it was a suit brought by candidates for the Electoral College, "who might well have unique interests in the application of the Electors Clause" that differ from the interests of a congressional candidate under the Elections Clause. Penn. BIO 27. The Secretary cites no authority and points to nothing in the text, structure, or history of the Constitution to support this supposed distinction, and this Court has previously observed that the States' duties under the Elections and Electors Clauses are "parallel[ ]." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari). Moreover, neither *Carson* nor the decision below even hints at the possibility that either court would accept the textually untenable distinction between the Electors and Elections Clauses that the Secretary posits.

Equally unpersuasive is the Secretary's attempt to repackage her mootness argument as a basis for distinguishing *Carson*. Like the plaintiffs in that case, Petitioners moved for a preliminary injunction "*prior*

to election day." Penn. BIO 27. Whatever the passage of time might mean for whether this case is moot, it had no bearing upon the Third Circuit's standing analysis, which directly conflicts with both the Eighth Circuit's decision in *Carson* and the Seventh Circuit's subsequent ruling in *Wisconsin Elections Commission*.

Respondents also miss the mark when they argue that the decision below does not conflict with Judge Silberman's opinion for the D.C. Circuit in *Michel v. Anderson*, 14 F.3d 623, 625–26 (D.C. Cir. 1994). True, *Michel* concerned an alleged violation of Article I, Section 2—not the Elections, Electors, and Equal Protection Clauses. But the vote dilution injury the voter Petitioners allege is in all material respects the same as the injury that provided a basis for standing in *Michel*, and Respondents never explain why the different substantive theory of liability in *Michel* ought to change the standing analysis.

C. This is not the place for an extended discussion of the merits of the Third Circuit's standing decision; even if the decision below were correct in every particular, the first question presented would be cert-worthy given the contrary and highly consequential precedents of the Seventh, Eighth, and D.C. Circuits. But the DNC errs when it follows the Third Circuit in dismissing *Bond v. United States*, 564 U.S. 211 (2011), as "a Tenth Amendment case" that is irrelevant to Petitioners' standing. DNC BIO 18. The teaching of *Bond* is that because the Constitution's structural provisions are designed to protect individual liberty, individuals who are injured by violations of those provisions may seek redress in federal court. Just so here.

At bottom, the DNC's attempt to distinguish *Bond* rests on the premise that the Elections Clause is no part of the Framers' plan for "a federal government of divided and limited powers" designed "to protect individual liberty." DNC BIO 19. But the historical record is manifestly to the contrary. As John Jay explained to the New York ratification convention, the reason the Elections Clause charges the state and federal *legislatures* with regulating federal elections is to ensure that the rules governing such elections are determined by "the will of the people." 2 DEBATES ON THE FEDERAL CONSTITUTION 327 (J. Elliot 2d ed. 1836). The Framers well understood that those with power to regulate federal elections might abuse their authority and "mould their regulations as to favor the candidates they wished to succeed." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 241 (M. Farrand ed. 1911) (statement of Madison). But as with so many other problems the Framers confronted, their solution was structural and democratic: to entrust this responsibility to the branch of state government that is closest to the People, subject to a further democratic check in the form of oversight by Congress. This structural feature of the Constitution—no less than other provisions that preserve federalism and establish a national government of limited and divided powers—is designed to keep the government accountable to the People and safeguard individual liberty.

D. Thankfully, the state judicial power grab that Petitioners challenge "affected too few ballots to change the outcome of any federal election" in Pennsylvania in 2020. *Degraffenreid*, slip op. at 2 (Thomas, J., dissenting). But good fortune may not hold in the

next election cycle, when the lower courts are all but certain to again confront the standing question presented here. Most election law cases require courts to make decisions that give a perceived advantage to the partisans of one party or another, must be litigated on highly truncated timelines, and implicate vexing remedial questions. As it comes to the Court, this case has none of those disadvantages and therefore is an unusually good vehicle "to provide clear rules for future elections." *Degraffenreid*, slip op. at 11.

Respondents cannot deny that the standing issue is important, and recent experience underscores as much. If in *Carson* the Eighth Circuit had analyzed standing in the same manner as the decision below, Minnesota election officials would have continued to count mail-in ballots that arrived up to a week after the deadline they ultimately used during the 2020 general election. *See Carson*, 978 F.3d at 1054. And although not enough to change the result of any federal race in Pennsylvania during the most recent cycle, the roughly 10,000 ballots implicated by this suit could easily be outcome-determinative in a close race. The Court ought to diffuse this bomb while it can do so at a safe distance from the next election, much as it did when it granted certiorari in the faithless electors case—*Chiafalo v. Washington*, 140 S. Ct. 2316 (2020). Respondents' laches and *Purcell* arguments also show why the Court should at least review the Third Circuit's standing decision: by the time the next case that presents this issue grinds its way through the lower courts and the losing party seeks certiorari, it may be too late to award meaningful relief to whichever side was right.

The Secretary emphasizes that Petitioners seek review of a preliminary injunction ruling—a procedural posture that this Court typically disfavors. Penn. BIO 21–22. But the Third Circuit definitively held that Petitioners do not have standing, leaving nothing more for the district court to do but dismiss the case. Under these circumstances, requiring Petitioners to seek certiorari from an appeal of the inevitable dismissal would be pointless. The Court should grant certiorari now rather than leaving the lower courts to struggle through the next election cycle with an unresolved circuit split over who has standing in election law cases.

## II. This case is not moot, but to the extent the Court disagrees it should vacate the Third Circuit's decision under *Munsingwear*.

This case is not moot because Petitioners' claims concern conduct that is capable of repetition but evading review. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735–36 (2008). Respondents' arguments to the contrary fail to acknowledge "the breadth of the Pennsylvania Supreme Court's decision," "misunderstand[] the applicable legal standard" by wrongly implying that it is necessary for Petitioners to show "that history will repeat itself at a very high level of specificity," and depend on the "highly speculative" assumption that the pandemic will no longer be a problem during the next federal election in Pennsylvania. *Degraffenreid*, slip op. at 3–4 (Alito, J., dissenting from denial of certiorari). Petitioner Bognet is taking steps to put himself in position to run for Congress again in 2022, the individual voter Petitioners intend

to continue voting in federal elections in Pennsylvania, and this case therefore continues to present a live controversy.

But to the extent the Court disagrees, it should at a minimum vacate the decision below. When "a civil case from a court in the federal system . . . has become moot while on its way here," this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Doing so would prevent the Third Circuit's decision from "spawning any legal consequences," *id.* at 40–41—a result that would be particularly appropriate because the decision below is both wrong and otherwise cert-worthy. When called upon to do so in cases that have become moot, the Court has frequently vacated lower court decisions on preliminary injunctions and other interlocutory matters. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018); *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, No. 06-595, 549 U.S. 1262 (2007); *Selig v. Pediatric Specialty Care, Inc.*, No. 06-415, 551 U.S. 1142 (2007). Vacatur is likewise the proper course here if the Court is convinced that this case is moot.

To be sure, vacatur under *Munsingwear* is an equitable remedy, and this Court has on occasion insisted that a petitioner demonstrate standing to appeal before vacating a lower court's decision. *See Camreta v. Greene*, 563 U.S. 692, 712 & n.10 (2011). *But see Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 66, 70, 74–75 (1997) (vacating lower court decision while declining to "resolve" "grave doubts" about peti-

tioners' standing to appeal). But to the extent that Petitioners must show that they have standing and therefore were deprived through mootness of "review to which [they are] entitled," *Camreta*, 563 U.S. at 712 n.10, that is only another reason to grant the Petition's first question presented.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the Court concludes that this case is moot, it should vacate the decision below under *Munsingwear*.

Respectfully submitted,

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