

**In the
Supreme Court of the United States**

Jim Bognet, *et. al.*,
Petitioners,

v.

Kathy Boockvar, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari from the United
States Court of Appeals for the
Third Circuit

**BRIEF OF RESPONDENTS, BOARDS OF
ELECTION FOR CARBON, MONROE, PIKE,
SCHUYLKILL, SNYDER,
AND WAYNE COUNTIES**

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INTRODUCTION

The COVID-19 Pandemic created a once-in-a generation challenge for Pennsylvania that required swift action from the Pennsylvania Supreme Court to prevent disenfranchising thousands of voters. In the face of inaction from Pennsylvania's General Assembly, Pennsylvania's highest Court had no choice but to act. It acted not to "dilute" the vote of those who appeared at the polls but to preserve the rights of voters who feared their legitimate votes would not be counted. It was an emergency remedy, for a specific time, under unique circumstances, and has no force moving forward in the next election.

When the Pennsylvania Supreme Court was asked to act, it was faced with circumstances that

required immediate action the General Assembly was not able to provide.

Pennsylvania's Act 77, enacted on October 31, 2019 (pre-pandemic), allowed "no excuse" mail-in voting for the first time.

When the pandemic hit, Pennsylvania's governor shut down all non-essential businesses and counseled all Pennsylvanians to avoid public gatherings.

Pennsylvanians who wanted to exercise their right to vote, but feared the virus, were left with voting by mail. This was even more important given the historic turnout for the 2020 election, which created long lines and an atypical number of voters.

The problem was that, due to the pandemic, postal authorities notified the electorate that it could

not guarantee that their ballots would reach County Boards of election in time to have their ballots count.

Meanwhile, the 2020 Presidential election became hyper-politicized with numerous lawsuits being filed in federal court, none of which were successful. This politicization of the election guaranteed that Pennsylvania's General Assembly would not act to address the emergency.

The choice for the Pennsylvania Supreme Court was first, to do nothing, and allow thousands of voters to become disenfranchised because the Post Office could not guarantee the delivery of their ballots. Or, it could create a narrowly focused legal remedy in the form of an extension of just three days to receive ballots that would preserve the enfranchisement of Pennsylvania's voters.

The respondents never intended to wade into the competing claims of partisans who wished to undermine the results of the 2020 election. Their boards include members of both parties and their desire was only to have some level of certainty as to how to administer the 2020 election. Stated colloquially, we have “no dog in this fight.” However, Congress certified the election results in January. The President has been in office since then and state candidates have assumed office based on the results of that election. The segregated ballots received during the extension, will have no effect on the outcome, at least on the Presidential election. It is not clear what the effect would be on state candidates.

In the interest of healing the divide in this Country, we ask the Court to deny certiorari, refuse to continue the partisan bickering over the 2020 election, and look forward, realizing that the Pennsylvania Supreme Court's decision has no force moving forward and was an emergency, once-in-a-generation effort, to preserve the voting rights of Pennsylvania citizens.

SUMMARY OF ARGUMENT

The U.S. Supreme Court should deny certiorari.

The 2020 election is over. Congress and the Commonwealth of Pennsylvania certified the election months ago and Joseph Biden has been President since January. The votes received within the 3-day

extended deadline approved by the Pennsylvania Supreme Court would not have affected the outcome of the Presidential election. More importantly, the Pennsylvania Supreme Court's action was a decision to deal with an emergency in the face of such a partisan divide leading up to the election that the Pennsylvania General Assembly was unable to act. The court needed to take emergency action to prevent many voters from being disenfranchised. The decision was to protect citizens votes, not to impair others votes.

Petitioners' arguments are also moot. The Pennsylvania Supreme Court's decision related only to the 2020 presidential election. There is no decision authorizing any extensions in the 2021 election nor a reason to believe that the Court would issue such an

order as the Country begins to recover from the problems that existed in November 2020.

The Pennsylvania Supreme Court's modest extension diluted no one's vote. The Supreme Court should deny certiorari to protect state constitutional rights.

ARGUMENT

I. Petitioners' Case is moot.

Congress has already certified the federal election results. With respect to Pennsylvania, all parties agree that no relief sought by the petitioners will alter that result.

Article III limits the jurisdiction of the federal courts to actual "cases" or "controversies." U.S. Const. art. III, sect. 2, cl. 1. "An actual controversy

must exist not only at the time the complaint is filed, but through all stages of the litigation.” *Trump v. New York*, 141 S. Ct. 530, 534 (2020) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013)).

The case-or-controversy requirement of Article III implicates two related justiciability doctrines: First, a plaintiff must demonstrate standing, including “an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical.” (internal citations omitted). Second, the case must be “ripe”—not dependent on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” (internal citations omitted). *Trump v. New York*, 141 S. Ct. 530, 535 (2020).

Petitioners seek to overturn a September 17, 2020, ruling by the Pennsylvania Supreme Court which extended the November 3, 2020 deadline for county election offices to receive mail-in ballots from the United States Post Office by three days or until November 6, 2020 at 5pm. See *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

In the face of announcements that the Post Office might not deliver voters' ballots by election day, Pennsylvania's voters relied on that ruling in mailing in their ballots. Any ruling from this court declaring that those voters' ballots would not be counted, disenfranchises them, regardless of whether their votes alter the election results. But, why act, if

a reversal of the Pennsylvania Supreme Court does not reverse the federal election results.

Secondly, and in terms of mootness, the PA Supreme Court's September 17 Order was specifically limited to the November 3rd General Election considering exigencies which threatened to disenfranchise voters who wished to mail their ballots in accordance with the PA Election. *Id.* at 371. The Order did not apply to future elections. The Order was, by its own terms, confined to the "unprecedented" circumstances of the 2020 General Election. *Id.* at 371¹.

¹ The court said: "...[W]e act now to allow the Secretary, the county election boards, and most importantly, the voters in Pennsylvania to have clarity as to the timeline for the 2020 General Election mail-in ballot process."

Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371, 2020 Pa. LEXIS 4872, *49, 2020 WL 5554644

As such, this case is now moot, and no actual controversy exists for purposes of Article III jurisdiction.

II. The Pennsylvania Supreme Court’s Order Was Not Arbitrary and Did Not Violate the Equal Protection Clause.

Petitioners contend that their votes were “diluted” because other voters were given a 3-day extension to have their votes counted—votes which they cast by election day, but which were in danger of not being considered because of the pandemic and delays in the U.S. Postal system.

Vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501, 204 L. Ed. 2d 931 (2019) (“[V]ote dilution’ in the one-person, one-vote cases refers to

the idea that each vote must carry *equal weight*.”
Bognet v. Sec’y Pennsylvania, 980 F.3d 336, 355,
2020 U.S. App. LEXIS 35639, *31, 2020 WL 6686120.
As the Third Circuit noted, the Voter Petitioners
take no issue with the content of the Deadline
Extension; they concede that the General Assembly,
as other state legislatures have done, could have
enacted exactly the same Deadline Extension as a
valid “time[], place[], and manner” regulation
consistent with the Elections Clause. *Bognet v. Sec’y
Pennsylvania*, 980 F.3d 336, 355, 2020 U.S. App.
LEXIS 35639, *32, 2020 WL 6686120 (3d Cir. 2020).

Their essential argument is that their votes
were diluted because federal law required a different
state organ to issue the Deadline Extension. The
Voter Plaintiffs have not alleged, for example, that

they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 (1915). As the Third Circuit noted, any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, is “quintessentially abstract in the election law context” and “divorced from any concrete harm.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)). *Bognet v. Sec’y Pennsylvania*, 980 F.3d 336, 356, 2020 U.S. App. LEXIS 35639, *33, 2020 WL 6686120 (3d Cir. 2020).

Given the pandemic and the stated inability of the U.S. Postal Service to assure voters that their votes would be delivered in a timely manner, the Pennsylvania Supreme Court's decision did not deny petitioners nor anyone else the equal protection of the law. To the contrary, the extension necessitated by a once-in-a-generation pandemic, assured that all voters who submitted their ballots by election day had their votes counted and were not disenfranchised through no fault of their own.

III. Petitioners Do Not Have Standing

For the sake of brevity, the Board joins and adopts the position and reasoning of the 3rd Circuit Court of Appeals regarding Petitioner's standing

claims. See *Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336 (3d. Cir. 2020).

IV. The Lower Courts did not Misinterpret *Purcell* when Denying Petitioners' Request for a TRO and Preliminary Injunction a Week before Election Day.

The Boards join and adopt the position and reasoning of the Adams County Board of Elections with respect to its arguments on the applicability of *Purcell v. Gonzales*, 549 U.S. 1 (2006).

CONCLUSION

For the foregoing reasons, the Respondent
Boards of Election ask the Court to deny the Petition.

Respectfully submitted,

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