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 a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT THE DEMOCRATIC NATIONAL COMMITTEE

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QUESTIONS PRESENTED

The Pennsylvania Supreme Court held that, in light of the COVID-19 public health emergency and severe delays of the U.S. Postal Service, applying Pennsylvania's statutory receipt deadline for mail-in ballots during the November 2020 general election would violate the Free and Equal Elections Clause of the Pennsylvania Constitution. The court remedied that state constitutional violation by permitting mail-in ballots to arrive in the three days following Election Day and adopting a rebuttable presumption that ballots arriving in that short window were timely cast unless a postmark or other evidence showed the contrary. Petitioners are individual voters and a candidate for the U.S. House who filed suit in federal court claiming that the Pennsylvania Supreme Court's decision violated the U.S. Constitution. The questions presented are:

1. Whether petitioners' challenge is moot.

2. Whether any petitioner has standing.

3. Whether, if this Court has Article III jurisdiction, the district court abused its discretion in refusing to enjoin the Pennsylvania Supreme Court's remedy less than a week before Election Day.

4. Whether, if this Court has Article III jurisdiction, this Court should address in the first instance the merits of petitioners' claims under the Elections and Electors Clauses and the Equal Protection Clause.

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INTRODUCTION

Petitioners brought this suit in federal court to collaterally attack a Pennsylvania Supreme Court decision that crafted a remedy specific to the 2020 general election. *Pennsylvania Democratic Party* v. *Boockvar*, 238 A.3d 345 (Pa. 2020). Because that election is now fully complete, and the remedy in question had no effect on any federal electoral result, petitioners' collateral challenge is moot. Although petitioners urge this Court to grant review to issue an entirely advisory opinion about the conduct of future elections, this Court has already declined to do just that, in the context of petitions that sought *direct* review of the Pennsylvania Supreme Court's decision and raised the Elections and Electors Clause challenge that is petitioners' primary claim in this case. See Nos. 20-542, 20-574 (cert. denied Feb. 22, 2021). Petitioners suggest no reason that, having declined to directly review the Pennsylvania Supreme Court's decision, this Court should review petitioners' now-moot collateral attack.

Even putting the mootness problem aside, the petition does not warrant review. The Third Circuit correctly held that petitioners lack standing to challenge the Pennsylvania Supreme Court's decision, and the court of appeals' conclusions do not conflict with the decision of any other court. Petitioners—a candidate for the U.S. House of Representatives and several individual voters—do not have standing to assert claims under the Elections and Electors Clauses because, among other things, their asserted interest in an accurate "final vote tally" is not a cognizable injury, and Pennsylvania has already provided that relief by excluding the challenged ballots from its final vote totals

for federal elections. Moreover, petitioners seek to assert the rights of the General Assembly and therefore lack prudential standing. Petitioners also lack standing to assert vote-dilution and disparate-treatment claims under the Equal Protection Clause, as petitioners fail to identify any concrete and particularized injury, and their claims boil down to a generalized interest in having state officials follow the law. The Third Circuit's standing rulings do not warrant review.

The Third Circuit's alternative holding—that the district court acted within its discretion in denying injunctive relief pursuant to *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006)—also does not merit review. For one thing, this Court would be able to reach the issue only if it concluded that at least one petitioner had standing. And the Third Circuit's decision rested on equities unique to this case: in particular, petitioners waited until less than two weeks before the election to challenge the Pennsylvania Supreme Court's decision, thereby guaranteeing that any federal injunction would cause exactly the "significant voter confusion" that *Purcell* "seeks to avoid." Pet. App. 15.

Finally, this Court should reject petitioners' invitation to consider the merits of their Elections and Electors Clause and Equal Protection Clause claims in the first instance. This Court is "a court of final review and not first view," and petitioners present no reason to depart from that principle here. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted).

STATEMENT OF CASE

1. In July 2020, the Pennsylvania Democratic Party, Democratic elected officials, and Democratic candidates (together, PDP) filed a petition in Pennsyl-

vania state court seeking to prevent disenfranchisement of Pennsylvania voters during the 2020 election. Asserting a violation of the Pennsylvania Constitution, PDP brought an as-applied challenge to Pennsylvania's statutory scheme governing the deadlines for mail-in ballots.

The relevant state statute provides that a voter may submit an application for a mail-in ballot until seven days before the election—here, October 27, 2020. See 25 Pa. Stat. § 3150.12a(a). If an application establishes that the voter meets the requirements for a mail-in ballot, the county board of elections must mail or deliver the ballot to the voter within two days. See 25 Pa. Stat. §§ 3146.2a(a.3)(3), 3150.15. The voter is to complete the ballot and place it in the mail, and if the mailing is received by the county board by 8 p.m. on Election Day then the board is to count the ballot. See 25 Pa. Stat. § 3150.16(c).

PDP argued that, in light of the COVID-19 public-health emergency, the ballot-receipt deadline threatened to result in voter disenfranchisement during the November 2020 general election in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution. PDP pointed to the difficulties experienced in connection with the June 2020 Pennsylvania primary election, in which a "crush of applications" for mail-in ballots caused "disparities in the distribution and return" of those ballots. *Pennsylvania Democratic Party* v. *Boockvar*, 238 A.3d 345, 362 (Pa. 2020) (citations omitted).

On September 17, 2020, the Pennsylvania Supreme Court accepted jurisdiction at the request of the Secretary of the Commonwealth (Secretary) and ruled that, under the unprecedented circumstances of the

2020 election, the statutory ballot-receipt deadline violated the Commonwealth's Free and Equal Elections Clause. 238 A.3d at 371. The court took into account the COVID-19 pandemic, the U.S. Postal Service's "current delivery standards," county election boards' struggles during the primary, and an increase in mail-in ballot requests for the general election. *Ibid.* The court concluded that the regular schedule for receiving and returning mail-in ballots was "unquestionably" insufficient under those circumstances and would therefore "result[] in the disenfranchisement of voters." *Ibid.*

Exercising its "broad authority to craft meaningful remedies" for the constitutional violation, the Pennsylvania Supreme Court granted a modest extension of the ballot-receipt deadline for the November 2020 election. 238 A.3d at 371. Under that extension, voters wishing to vote by mail had to place their ballots in the mail by no later than 8 p.m. on Election Day, and the ballots were then to be counted if received by county authorities by 5 p.m. on November 6. *Id*. at 371 & n.26. To ensure the disqualification of votes cast by voters after the Election Day deadline, however, any ballot postmarked after Election Day or shown by a preponderance of the evidence to have been cast too late was not to be counted. See *ibid.*; see also *id.* at 365 & n.20.

The Pennsylvania Supreme Court emphasized that it was acting sufficiently in advance of the election "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." 238 A.3d at 371. And in the weeks between the court's decision and November 3, Pennsylvania election officials relied on the decision

when advising voters about the rules governing the upcoming election.[1]

The Republican Party of Pennsylvania and two state legislators sought review in this Court of the Pennsylvania Supreme Court's decision. See Nos. 20-542, 20-574. PDP and the Secretary argued that the petitions should be denied because (*inter alia*) there were substantial questions regarding petitioners' standing and, even if petitioners had ever had cognizable injuries, the case had become moot. See, *e.g.*, Opp. 8-13, 19-22, No. 20-542. On February 22, 2021, this Court denied both petitions.

2. On October 22, 2020, five weeks after the Pennsylvania Supreme Court issued its decision, four Pennsylvania voters who planned to vote in person on Election Day (individual petitioners) and House candidate Jim Bognet (collectively, petitioners) filed the instant suit in federal district court, alleging that the Pennsylvania Supreme Court's remedy violated the U.S. Constitution. Pet. App. 13. Petitioners claimed that the remedy violated the federal Elections and Electors Clauses on the ground that it "usurped the General Assembly's prerogative" to set election rules. Pet. App.

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[1] See, *e.g.*, https://web.archive.org/web/20200928010711/https://www.votespa.com/about-elections/pages/upcoming-elections.aspx (Sept. 28, 2020 website capture); General election mail-in ballot guide for Philadelphia voters (Sept. 25, 2020), https://www.phila.gov/media/20201005102659/Mail-in-ballot-guide-printer-spread-English-20200925.pdf; see also The Philadelphia Inquirer, *How to Vote in 2020*, https://www.inquirer.com/politics/election/inq/2020-election-pennsylvania-mail-in-person-voting-guide-20200918.html; Katie Meyer, *All the deadlines you need to know to vote in Pa., N.J. and Del.*, WHYY NPR (Sept. 29, 2020), https://whyy.org/articles/all-the-deadlines-you-need-to-know-to-vote-in-pa-n-j-and-del/.

22. Individual petitioners also claimed that the remedy violated the Equal Protection Clause by "dilut[ing]" their voting power and "creat[ing] a preferred class of voters." Pet. App. 28. Petitioners named state elections boards and the Secretary as defendants, and respondent Democratic National Committee intervened as a defendant in the district court. See Dkt. 3:20-cv-00215, Nos. 23, 36 (W.D. Pa. Oct. 26, 2020).

Petitioners requested that the district court grant them injunctive relief. After expedited briefing and a hearing, the district court denied that request. Pet. App. 66-67. The court concluded that petitioners did not have standing to assert the bulk of their claims. See Pet. App. 67-72. The only claim as to which the court found standing was individual petitioners' claim that the state court's order directing the counting of certain ballots without a legible postmark created a "preferred class of voters" who could "cast their ballots after" Election Day. Pet. App. 74-76. But the court denied relief on that claim, relying on this Court's "repeated[] emphas[is] that lower federal courts should ordinarily not alter the election rules on the eve of an election." Pet. App. 77 (quoting *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam)). Noting that petitioners waited until "less than two weeks before the election" to file suit, the court reasoned that "significant voter confusion" would follow from disrupting the "rapidly approaching" election, which was "precisely" what this Court's decision in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), "seeks to avoid." Pet. App. 78. On that basis, the court ruled that the balance of equities and the public interest did not favor granting relief. See Pet. App. 77-78.

The Third Circuit affirmed. First, the court ruled that petitioners did not have standing to assert any of their claims. As to the claims under the Elections and Electors Clauses, the Third Circuit explained that neither petitioners' asserted interest in "proper application" of the federal Constitution nor any of Bognet's alleged injuries—for example, his purported inability to "run in an election where Congress has paramount authority"—constituted cognizable injuries under Article III. Pet. App. 21, 26 (citation omitted). Moreover, the court concluded that even if petitioners had suffered any cognizable injury, they nevertheless lacked prudential standing because they were attempting to assert the rights of the General Assembly rather than any interests of their own. See Pet. App. 23-26.

The court of appeals similarly rejected individual petitioners' theories of standing as to their claim under the Equal Protection Clause. The court explained that individual petitioners' claim of vote dilution was neither concrete nor particularized given that they failed to allege that the challenged decision would lead to their votes receiving less weight than others' votes or that the decision caused them any particular disadvantage. See Pet. App. 28-44. And individual petitioners' contention that they were injured by alleged creation of a preferred class of voters stumbled out of the gate, the court concluded, because the Pennsylvania Supreme Court's remedy did not create *any* classes of voters. Pet. App. 44-45. In any event, the Third Circuit stated, individual petitioners had not alleged "invasion of a *legally protected* interest" by claiming that the decision allowed one group of voters to break the law by voting after Election Day more readily. Pet. App. 45 (emphasis added) (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The court also deemed any injury under that theory to be speculative

because individual petitioners had provided no basis to believe that the state court's remedy would actually result in the counting of any ballots cast after Election Day. See Pet. App. 47-50.

Second, the Third Circuit ruled that even assuming petitioners had standing, the district court had not abused its discretion in denying injunctive relief based on *Purcell*. The court of appeals explained that the district court had appropriately weighed the "[u]nique and important equitable considerations" at issue in this case, including petitioners' decision to wait until less than two weeks before the election to file their suit and the near certainty of voter confusion if the rules were altered just days before the election. Pet. App. 50-51 (quoting *Republican Nat'l Comm.*, 140 S. Ct. at 1207).

3. Ultimately, neither the Pennsylvania Supreme Court's decision nor the Third Circuit's decision had any effect on the outcome of any federal election. Pennsylvania counties collectively reported that 9,428 ballots were received statewide between 8 p.m. on Election Day and 5 p.m. on November 6, only 669 of which lacked a legible postmark. Brief in Opposition of Kathy Boockvar 7, No. 20-542. In the presidential race, President Biden received 80,555 more votes in Pennsylvania than did his main opponent. And no Pennsylvania House race (in each of which only a fraction of the 9,428 ballots would have been cast) could have been altered by changing 9,428 votes. See https://www.electionreturns.pa.gov/ (President); https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=undefined&ElectionType=undefined&IsActive=undefined (House).

ARGUMENT

I. This Case Does Not Warrant This Court's Review Because Any Opinion Would Be Advisory.

The Pennsylvania Supreme Court decision that petitioners challenge crafted a remedy specific to the 2020 general election—an election that is now complete. The remedy in question had no effect on any federal electoral result. Thus, even if petitioners were to prevail in this Court, nothing in the real world would change. And petitioners are not entitled to any relief in this Court in any event, because judicial invalidation of votes cast in reasonable reliance on clear state guidance would offend fundamental principles of due process and equity.

Accordingly, all that petitioners actually seek in this Court is an entirely advisory opinion about the conduct of future elections. Puzzlingly, petitioners affirmatively *urge* this Court to decide the questions presented outside the confines of a live dispute regarding an ongoing election. But, this Court, like other federal courts, has no power to settle abstract legal questions that do not implicate any actual case or controversy. This Court's review is therefore not warranted.

1. "It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review.'" *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (citation omitted). At all times, a litigant "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (citation omitted). Thus, there is "no case or controversy, and a suit becomes moot, 'when the issues presented are no longer 'live' or the parties lack a legally

cognizable interest in the outcome.'" *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). Put differently, mootness exists if "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ibid.* (citation omitted).

That description precisely fits this case: the conclusion of the 2020 election has made clear that no petitioner retains a legally cognizable interest in the outcome of the asserted claims.

a. Petitioners filed their lawsuit before Election Day, when it was possible that ballots received between 8 p.m. on November 3 and 5 p.m. on November 6 might make a difference in the results of a federal election in Pennsylvania. By the time petitioners filed this petition, however, that possibility no longer existed. Pennsylvania counties received only 9,428 ballots during that window of time, and the margin of victory in every federal election in Pennsylvania was larger than that number. See p. 8, *supra.* This Court's resolution of this case therefore could not affect the electoral result, or petitioners' interests, in any way. Nor could it affect any future election, because the dispute in this case concerns a Pennsylvania Supreme Court ruling that by its terms was applicable only to the now-concluded 2020 election. Although petitioners never had standing in the first place, see pp. 15-25, *infra*, they certainly cannot claim any "legally cognizable interest in the outcome" at this stage, *Chafin*, 568 U.S. at 172 (citation omitted), because absolutely nothing would change even if they succeeded on all of their claims.

b. Petitioners may argue that they have an interest beyond actual electoral outcomes on the ground that they want a "final vote tally [that] accurately reflects the legally valid votes cast." Pet. 14 (citation

omitted). That argument is meritless. See p. 16, *infra*. But, even if it were correct, it would not cure petitioners' mootness problem.

As an initial matter, petitioners already have the "final vote tally" in hand. Pet. 14. The "Official Returns" page of the Pennsylvania Department of State website states that the "vote totals for President and Representative in Congress do not include any votes from mail ballots received between 8 p.m. on election day and 5 p.m. the following Friday."[2] In other words, the Pennsylvania Department of State has *not* included in the final vote tally any of the ballots that petitioners challenge in this case. It is hard to know what more petitioners want—or could receive.

Moreover, even if the final vote tally were not to petitioners' liking, this Court can no longer "grant any effectual relief" to remedy that alleged injury. *Chafin*, 568 U.S. at 172 (citation omitted). Pennsylvanians whose timely cast mail-in ballots arrived from November 4 to November 6 voted in conformity with then-existing election rules and in reasonable reliance on official guidance. Under those circumstances, a court may not invalidate those ballots, because individuals must "have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994); see also *Lemon* v. *Kurtzman*, 411 U.S. 192, 203 (1973) ("reliance interests weigh heavily in the shaping of an appropriate equitable remedy").

This Court's decisions in election cases have consistently reflected that principle. For instance, this

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[2] https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=1.

Court has, in the face of reliance interests and considering other pertinent facts and circumstances, refused to invalidate an election after it has occurred, notwithstanding constitutional or other legal infirmities in the election. See, *e.g.*, *Connor* v. *Williams*, 404 U.S. 549, 550-551 (1972) (per curiam); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 571-572 (1969). More recently, in staying a district court's injunction against South Carolina's witness requirement for absentee ballots, this Court protected voters' reliance interests by providing that "any ballots cast before" the issuance of the Court's stay "and received within two days" of the Court's order "may not be rejected for failing to comply with the witness requirement." *Andino* v. *Middleton,* No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). And this Court's steadfast adherence to the *Purcell* principle is of a piece with that approach. See *Democratic Nat'l Comm.* v. *Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring).

Accordingly, even if petitioners could claim some interest in an order declaring the legality of votes cast in the 2020 election, this Court could not grant that relief. That renders petitioners' claims moot.

2. Any argument that the issues here are capable of repetition yet evading review would be meritless. That doctrine "applies 'only in exceptional situations,' 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.'" *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

Petitioners can satisfy neither prong of that test. First, the challenged action could have been litigated prior to the election. The Pennsylvania Supreme Court issued its decision on September 17, 2020—about a month and a half before Election Day. Instead of challenging that decision immediately, petitioners inexplicably waited five weeks to bring suit. Petitioners' delay—not any aspect of this suit—prevented full litigation prior to mootness.

There is no reason to think that election-law cases generally will evade review—or even require expedited review—simply because they sometimes arise in anticipation of a coming election. This Court has had no trouble in the past adjudicating such cases on a standard timeline. See, *e.g.*, *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) (argued March 2, 2015, and decided on June 29, 2015).

Second, there cannot possibly be a "reasonable expectation" that the "same action" will occur again. *Kingdomware*, 136 S. Ct. at 1976 (citation omitted). The Court has deemed that standard satisfied in the election context when a disputed rule would necessarily control future elections. See *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979). Here, however, the Pennsylvania Supreme Court's decision was confined to the "unprecedented" circumstances of the 2020 election, including a once-in-a-century pandemic, a massive influx of mail-in ballots, and severe postal delays. *Pennsylvania Democratic Party*, 238 A.3d at 369, 371; see pp. 3-4, *supra*.

3. Remarkably, petitioners ignore the glaring jurisdictional flaw in their petition—except at times to treat mootness as a *feature* of this case. For example,

they urge this Court not to wait until the relevant issues arise "during an ongoing election," and contend that review would allow the Court "to affirm * * * important principle[s] well in advance of the next nationwide election day." Pet. 7, 13.

But this Court, like all federal courts, does not exist to "provide guidance and prevent uncertainty." Pet. 34. To the contrary, this Court "has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). That rule serves the critical purpose of limiting the judiciary to "those disputes" that are "traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968); see *ibid.* (requiring actual controversy ensures a "clash of adversary argument exploring every aspect" of an issue (quoting *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961))). And this case does not involve any such dispute. With the 2020 election long over, this case merely seeks this Court's guidance on "abstract, intellectual problems." *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

Just last month, in adjudicating petitions seeking direct review of the Pennsylvania Supreme Court decision that underlies this case, this Court confronted the same situation. See, *e.g.*, Pet. Reply at 1, *Republican Party of Pennsylvania* v. *Boockvar*, No. 20-542 (argument by petitioners that "this case is an ideal vehicle, in part precisely *because* it will not affect the outcome of this election"); see also *Scarnati* v. *Pennsylvania Democratic Party*, No. 20-574. The Court denied those petitions. There is no reason to take a different approach here—especially given that the petition in

this case seeks only *collateral* review of the same decision that was the direct subject of those earlier petitions.

II. The Questions The Third Circuit Addressed Do Not Warrant Review.

A. The Third Circuit's standing analysis does not warrant review.

1. The Third Circuit's conclusion that petitioners do not have standing to pursue their claims under the Elections and Electors Clauses does not conflict with other authorities and is correct under this Court's precedent.

The Third Circuit concluded that petitioners did not have standing to assert claims under the Elections and Electors Clauses because petitioners could not show any cognizable injury to themselves and because they were seeking to assert the rights of the General Assembly and accordingly lacked prudential standing. Petitioners argue that this analysis created or deepened three separate circuit splits. It did not. In fact, none of those purported conflicts exists. Moreover, the Third Circuit's analysis was entirely correct and consistent with this Court's precedent.

First, petitioners contend that the decision below conflicts with a decision of the Eighth Circuit about whether "candidates have an independent interest in 'ensuring that the final vote tally accurately reflects the legally valid votes cast.'" Pet. 14 (quoting *Carson* v. *Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)). But the Third Circuit did not address any such alleged injury. Instead, the court understood Bognet to be claiming injury based on his allegations of a violation

of an alleged "'right to run in an election where Congress has paramount authority,'" a "'threatened' reduction in the competitiveness of his election," and expenditures to reduce those perceived harms. Pet. App. 26-27 (quoting Complaint ¶ 69 and Pet. C.A. Br. 21). The Third Circuit concluded that *those* supposed harms did not constitute cognizable injuries, see *ibid.*—and (for good reason) petitioners do not even attempt to challenge that conclusion. But, in so concluding, the Third Circuit said nothing about whether the injury the Eighth Circuit considered in *Carson* would be sufficient to give rise to standing. Petitioners' claim of a split thus finds no grounding in the Third Circuit's decision.

In any event, petitioners' unexplained assertion (at 14) that Bognet's interest in an "accurate[]" "final vote tally" is cognizable under Article III is meritless. Petitioners admit that they are not seeking such a tally in order to attempt to alter the outcome of Bognet's race. See Pet. 14 (arguing that standing does not turn on "outcome-determinative" harm). And an interest in accuracy for accuracy's sake is simply a request "that the government be administered according to law"—an interest that does not give rise to standing. *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922); see *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (holding that plaintiffs' allegation that "the law—specifically the Elections Clause—has not been followed * * * is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past").

Second, petitioners allege that the Third Circuit split from the D.C. Circuit in concluding that the individual petitioners did not have standing to bring their

claims under the Elections and Electors Clauses because "dilution of their validly cast votes * * * was a nonjusticiable generalized grievance." Pet. 16. But, again, that simply misstates the decision below. The Third Circuit viewed vote dilution as the basis for petitioners' separate Equal Protection claims, but not as an alleged harm giving rise to their claims under the Elections and Electors Clauses. Compare Pet. App. 21-22, with Pet. App. 28-44; see also pp. 30-31, *infra* (Third Circuit's vote-dilution analysis was correct).

Even if the Third Circuit had concluded that petitioners' alleged vote-dilution injury did not provide standing to pursue their claims under the Elections and Electors Clauses, there would be no conflict. *Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994)—the source of the supposed split—simply bears no relation to this case. *Michel* involved a challenge to a House rule allowing delegates from territories and the District of Columbia to vote in the Committee of the Whole, see *id.* at 624, not an argument that a state-court remedy violated the Elections or Electors Clause. And the D.C. Circuit held in that case that individual voters had standing because their representatives lost relative voting power. See *id.* at 626. Such an ongoing reduction in the weight of each representative's vote created a risk of actually influencing voting outcomes that is entirely absent here, where petitioners do not so much as allege that the claimed reduction in their voting power has or ever will change any election outcome. Cf. *Raines* v. *Byrd*, 521 U.S. 811, 824 (1997) (holding plaintiffs lacked injury where "[t]hey have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated," and plaintiffs could not "allege that the Act will nullify their votes in the future").

Third, petitioners claim that the Third Circuit's holding that they lacked prudential standing is in conflict with the Eighth Circuit's decision in *Carson*. Pet. 14. But the Third Circuit's prudential standing holding was only one reason it gave for rejecting petitioners' claims under the Elections and Electors Clauses; the court independently concluded that petitioners lacked standing because they had not shown a cognizable injury. See Pet. App. 26 (prudential standing "still presumes that the plaintiff otherwise meets the requirements of Article III; * * * Plaintiffs do not"). Thus, no ruling by this Court on the prudential-standing issue could change the result below absent consideration of the Third Circuit's separate holdings regarding cognizability—as to which, as explained above, review is not warranted.

Moreover, the decision below does not clash with the Eighth Circuit's decision as to prudential standing. The two courts were considering different asserted injuries (and therefore different characterizations of the rights at issue): the Eighth Circuit held that the Electors "rais[ed] their own rights" in ensuring "an []accurate vote tally," *Carson*, 978 F.3d at 1058, while the Third Circuit concluded that Bognet was asserting "the General Assembly's rights" when he argued that he had a "right to run in an election where Congress has paramount authority," Pet. App. 23, 26 (citation omitted). It is far from obvious that the two courts would reach conflicting results if they actually confronted comparable injuries.

Finally, petitioners' expansive view of prudential standing has no grounding in precedent. Petitioners point to *Bond* v. *United States*, 564 U.S. 211 (2011), but that was a Tenth Amendment case, and "[t]here is

no precedent for expanding *Bond* beyond th[at] context." Pet. App. 26 n.6. Petitioners' string citation (at 15) to this Court's separation-of-powers cases is equally unavailing: many of those cases did not address standing, and each of them is relevant only to the allocation of powers to organs of the *federal* government. The Framers created a federal government of divided and limited powers to protect individual liberty, and so individuals may assert their own rights when they challenge a breakdown in the federal separation of powers. See *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020); *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986). Petitioners do not argue that the Framers' delegation of the creation of election codes to state legislatures was intended to protect individuals from abusive power wielded by other branches of state government. There was thus no error in the Third Circuit's conclusion that petitioners identified no interest of their own under the Elections and Electors Clauses.

2. The Third Circuit correctly held that petitioners lacked standing to pursue their Equal Protection claims.

Petitioners do not contend that the Third Circuit's rejection of their standing to assert their Equal Protection claims conflicts with the decision of any other court. Instead, petitioners seek only error correction of the Third Circuit's straightforward application of established standing principles. But the Third Circuit correctly identified numerous independent defects in petitioners' standing theories, some of which petitioners do not challenge here. Further review is not warranted.

1. As the Third Circuit explained, petitioners' claimed vote-dilution injury—that their votes were diluted by the casting of "invalid" ballots received after November 3, Pet. C.A. Br. 31—is neither concrete nor particularized. Petitioners fail to show that the court should have permitted their claim to proceed.

a. The Third Circuit correctly held that petitioners' claimed injury is not concrete.

The court of appeals first explained that "state actors counting ballots in violation of state election law" is not a "concrete harm under the Equal Protection Clause." Pet. App. 33. Petitioners contend that the Third Circuit "mischaracterize[d] the source of Petitioners' injury" because, they assert, their injury actually arises from a violation of the federal Elections and Electors Clauses. See Pet. 19. But before the court of appeals, petitioners themselves characterized their vote-dilution injury as arising from a violation of *state* law. See Pet. C.A. Br. 31 (asserting that petitioners' "votes will be unconstitutionally diluted" because ballots received after November 3 were "invalid," and arguing that the ballots were invalid because, under laws enacted by "the General Assembly," "these ballots would have been late, and therefore would not have counted"); *id*. at 38.[3] Petitioners cannot now complain that the Third Circuit mischaracterized their vote-dilution theory. And, notably, petitioners do not challenge the Third Circuit's conclusion that an alleged vi-

[3] Petitioners also asserted in passing that ballots received after November 3 were invalid under "the duly enacted laws of Congress." Pet. C.A. Br. 31. But as the court of appeals explained (Pet. App. 31-32), no federal law prohibits ballots from being counted if they are cast by, but received after, Election Day.

olation of state law does not give rise to a concrete injury for purposes of an Equal Protection vote-dilution claim.

In any event, the Third Circuit gave other reasons for its conclusion that petitioners' vote-dilution injury was not concrete—and petitioners do not challenge those reasons here. The Third Circuit correctly explained that "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." Pet. App. 33; see *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2501 (2019). But petitioners do not allege that their votes were unequally weighted compared to other defined classes of votes. The court therefore correctly concluded that petitioners' claimed injury boils down to an abstract interest in having the State not allow other voters to cast ballots that petitioners view as invalid. See Pet. App. 34, 41. If such claimed "dilution" were "a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." Pet. App. 34 (citation omitted). For that reason, the Third Circuit observed, "[e]ven if we were to * * * view[] the *federal* Elections Clause as the source of [the] 'unlawfulness' of Defendants' vote counting," petitioners' claimed injury was "quintessentially abstract." Pet. App. 34-35.

b. The Third Circuit also correctly concluded that petitioners' alleged vote-dilution injury is not particularized. Pet. App. 36-44. Because petitioners had not contended "that their votes are less influential than any other vote," the court explained, their claimed injury was merely a "generalized grievance." Pet. App. 41 n.13.

Although petitioners protest (Pet. 16-18) that even a widely shared injury can be sufficient for standing, the Third Circuit expressly acknowledged as much. Pet. App. 41 n.13. Petitioners' injury lacks particularity not because there are a large number of people who can assert it, but because there is nothing about the injury that is *personal* to them. Because petitioners have not alleged that their votes are treated less favorably than other votes, their theory is necessarily that they, equally with all Pennsylvania voters, are injured by any official action that may have the effect of permitting more ballots to be cast. Petitioners therefore cannot "allege facts showing disadvantage to themselves as individuals." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1929-1930 (2018). Petitioners' only response—that any "widely shared injur[y]" suffices for an injury in fact so long as "the harm is concrete," Pet. 17—would collapse concreteness and particularization. But the two are "independent requirement[s]." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). The Third Circuit did not err in holding that petitioners lacked standing to pursue their vote-dilution claim.

2. The Third Circuit also correctly held that petitioners lack standing to assert a claim that the Pennsylvania Supreme Court's decision treated them in an arbitrary and disparate way by creating a preferred class of voters. Pet. App. 44-50. Again, the Third Circuit provided two reasons for rejecting petitioners' claim and, again, petitioners fail to show that either was error.

First, the Third Circuit held that petitioners failed to identify a legally cognizable injury because they did not explain how the Pennsylvania Supreme Court's decision created any "legally protected 'preferred

class.'" Pet. App. 44, 45. The court of appeals explained that the Pennsylvania Supreme Court's decision did not create different classes of voters, but instead established a remedy applicable to *all* voters. Pet. App. 45. As a result, it is "an individual voter's *choice* whether to vote by mail or in person," not any membership in a defined class, that determines whether the mail-in or in-person balloting rules apply. *Ibid*. Petitioners respond (Pet. 20) that the court of appeals' reasoning suggests that standing to assert gerrymandering claims could be defeated by the charge that the plaintiffs have chosen to continue "living in unconstitutionally gerrymandered districts." But in a gerrymandering case, the districting decision affects a defined category of individuals living in the gerrymandered district, and moving away from the district would constitute an injury in itself. Here, by contrast, there are not "in person" voters and "mail in" voters in Pennsylvania; every voter has the option to vote by either method. If petitioners thought they would be better off voting by mail, they had the same opportunity to do so as every other voter in the Commonwealth.

In addition, the Third Circuit offered a second rationale for its preferred-class holding—a rationale that petitioners ignore. The court explained that petitioners had failed to identify any preferred *treatment* enjoyed by mail-in voters. Pet. App. 46-47. Ballots cast by mail-in voters are entitled to no more weight than ballots cast by in-person voters. And to the extent that petitioners contend that the Pennsylvania Supreme Court's decision might allow mail-in voters to vote after Election Day, the Third Circuit correctly observed that under that decision, "no voter—whether in person or by mail—is *permitted* to vote after Election Day." Pet. App. 46. Petitioners cannot argue that

having less of an opportunity to break the law than other voters is a legally protected interest sufficient for standing.

Second, the Third Circuit correctly held that even if the possibility that mail-in votes cast after Election Day would be mistakenly counted gave rise to a legally cognizable injury, that injury was speculative. See Pet. App. 47-50. As the court explained, petitioners would be injured 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." Pet. App. 48-49 (footnotes omitted). Making petitioners' theory of injury even more improbable, Pennsylvania has its "own mechanisms for deterring and prosecuting voter fraud." Pet. App. 49 (citation omitted).

Rather than attempting to justify this "highly attenuated chain of possibilities," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), petitioners argue (Pet. 21) only that there is evidence that some number of ballots in previous primaries arrived without clear postmarking or after the deadline. But such "evidence"—which petitioners did not mention below—pertains only to one link in the speculative chain of possibilities described above. Petitioners have given no reason to think that even a single ballot was *cast* after Election Day, much less that such ballots were received by November 6—and USPS's projected mail timelines and Pennsylvania's voter-fraud laws provide

strong reason to doubt that any such contingency occurred.[4] Petitioners have failed to show any cognizable, non-speculative injury supporting their arbitrary-and-disparate treatment claim.

B. The Third Circuit's *Purcell* holding does not warrant review.

The Third Circuit further concluded that, even if petitioners had standing, the district court acted within its discretion in denying injunctive relief in reliance on *Purcell*, which holds that federal courts should not issue injunctions altering state voting rules in the weeks leading up to an election. Pet. App. 50-53 (citing *Purcell*, 549 U.S. at 4-5). That ruling also does not warrant review.

First, this Court would not be able to reach the *Purcell* issue unless it reviewed and reversed all of the multiple, alternative grounds on which the Third Circuit concluded that petitioners lack standing. For the reasons stated above, those conclusions do not warrant review and are correct.

Second, this case is an extremely poor vehicle for considering the application of the *Purcell* principle. Petitioners would benefit from reversal of the Third Circuit's *Purcell* holding only if they would otherwise have been entitled to preliminary injunctive relief on their claims. But that is highly unlikely. For one thing, the Third Circuit's reasoning strongly suggests that the court believed that the balance of equities did

[4] Although petitioners also complain (Pet. 21-22) about the ballots received between November 3 and November 6 that had a legible postmark showing they were mailed on or before Election Day, those ballots obviously cannot support any claim that those voters received preferred treatment allowing them to vote later than petitioners.

not favor injunctive relief even in the absence of *Purcell*, as petitioners waited until two weeks before the election to challenge a Pennsylvania Supreme Court decision that had issued in September. Pet. App. 51, 53. In addition, petitioners cannot demonstrate irreparable harm: the ballots in question were segregated and did not affect the outcome, and petitioners have not been able to identify any other concrete injury. And if that were not enough, petitioners' claims lack merit for the reasons stated below. See Part III, *infra*.

Third, petitioners are incorrect in arguing that the Third Circuit's treatment of the Pennsylvania Supreme Court's decision as the "status quo" for *Purcell* purposes conflicts with *Carson*. There, the Eighth Circuit held that when a state executive official has deviated from the State's statutory election rules, the latter should be treated as the status quo. *Carson*, 978 F.3d at 1062. But the Third Circuit did not announce any categorical rule that would conflict with *Carson*. Instead, the Third Circuit relied on the specific and unique circumstances of this case in deciding to treat the Pennsylvania Supreme Court's decision as the status quo. In particular, the Pennsylvania Supreme Court had issued its decision on September 17, leading state election officials to embark on a massive campaign to inform voters about the extended ballot-receipt deadline, while petitioners had inexplicably waited until less than two weeks before the election to seek an injunction moving the ballot-receipt deadline back up to November 3. Pet. App. 51. From the standpoint of the voters whose confusion *Purcell* seeks to avoid, the extended ballot-receipt deadline was undoubtedly the status quo. That case-specific characterization does not conflict with *Carson*.

Finally, and for the same reasons, the Third Circuit did not err in refusing to overturn the district court's discretionary judgment that—as a result of petitioners' own delay—any intervention would lead to "judicially created confusion" that "the *Purcell* principle * * * seeks to avoid." *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (per curiam). An order moving up the ballot-receipt deadline so close to the election inevitably would have resulted in voter confusion. *Purcell*, 549 U.S. at 4-5. The only "gamesmanship" this case involved was an attempt by petitioners, not the federal courts, to "simply wait until shortly before an election to act." Pet. 30. The Third Circuit appropriately rejected that effort.

III. This Court Should Not Address The Merits Of Petitioners' Claims In The First Instance.

A. The merits questions are not properly presented here.

Petitioners ask this Court to consider in the first instance whether they have demonstrated a likelihood of success on the merits of their claims. The Third Circuit did not reach that question. As "a court of final review and not first view," this Court does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky*, 566 U.S. at 201 (citations omitted).

Petitioners offer no justification for departing from that practice here. Indeed, doing so would be particularly unjustified in light of this Court's denial of certiorari in cases that presented an opportunity to engage in direct review of the Pennsylvania Supreme Court's decision on the merits of the Elections and Electors Clause issue that is petitioners' primary claim in this case. See pp. 14-15, *supra*. And while petitioners assert (Pet. 31-34) that the merits issues are important and recurring, that is all the more reason to await a

case in which the issues are properly presented after being fully vetted by the lower courts.

B. Even if this case properly presented petitioners' merits questions, those questions do not warrant review.

1. This Court's precedents foreclose petitioners' extreme position that the Elections and Electors Clauses completely disable state courts from any role in reviewing election laws governing federal elections. In *Arizona State Legislature*, the Court held that "[n]othing in th[e] [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817-818.[5] And just two Terms ago, the Court stated that "state constitutions can provide standards and guidance for state courts to apply" when reviewing state congressional districting laws enacted under the Elections Clause. *Rucho*, 139 S. Ct. at 2507. Petitioners all but ignore that binding precedent.

Nor are petitioners correct in arguing (Pet. 23) that the Clauses' use of the term "Legislature" forecloses any role for the State's judicial branch. This Court long ago unanimously held that the Elections Clause's reference to the "Legislature" "neither requires nor excludes * * * participation" in the lawmaking process by other organs of state government. See *Smiley* v.

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[5] This Court has interpreted the Elections and Electors Clauses in "parallel[]," *U.S. Term Limits, Inc*. v. *Thornton*, 514 U.S. 779, 805 (1995), and petitioners rely on precedent regarding both Clauses without contending that any meaningful distinction between the two exists for purposes of this case.

Holm, 285 U.S. 355, 368 (1932). Moreover, substantive limitations on lawmaking arising from state constitutions were well known at the time of the Framing. Several state constitutions included provisions that were analogous to Pennsylvania's Free and Equal Elections Clause, and state courts engaged in judicial review of state enactments.[6]

Petitioners identify (Pet. 24-25) a handful of decisions from other courts that allegedly conflict with the Pennsylvania Supreme Court's decision. Those alleged conflicts, of course, provide no basis for reviewing *this* decision, which issued no ruling on the question. In any event, the allegedly conflicting decisions predated *Arizona State Legislature*, *Rucho*, and (in some cases) *Smiley*. Contrary to petitioners' argument (Pet. 24), *Carson* does not conflict with the Pennsylvania Supreme Court's decision, as there the Eighth Circuit found a violation of the Clauses where a state executive official had exceeded his authority under state law to administer the election laws. 978 F.3d at 1060. Here, by contrast, the Pennsylvania Supreme Court acted well within its state-law authority in engaging in ordinary constitutional review of election legislation.

2. Petitioners' argument that this Court should decide the merits of their Equal Protection claims fares no better.

Petitioners' vote-dilution claim asserts (Pet. 26-27) that their votes are "diluted" by the counting of votes

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[6] Maryland Constitution of 1776, Declaration of Rights, art. V; Massachusetts Constitution of 1780, art. IX; New Hampshire Constitution of 1784, art. XI; Pennsylvania Constitution of 1776, art. VII; Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933-935 (2003).

that are "invalid"—that is, ballots arriving after the legislative deadline of November 3. That claim therefore rises and falls with petitioners' claim under the Elections and Electors Clauses, which lacks merit for the reasons explained above. Moreover, the Equal Protection Clause prohibits *unequally weighing* votes; it does not create a federal constitutional claim any time a vote is cast in violation of some separate legal requirement. See *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964) ("an individual's right to vote * * * is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens").

Petitioners' claim of arbitrary-and-disparate treatment (Pet. 27-28) rests on the false premise that the Pennsylvania Supreme Court's decision permits mail-in voters (but not in-person voters) to vote after Election Day. As the Pennsylvania court explained, however, "voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters." *Pennsylvania Democratic Party*, 238 A.3d at 371 n.26. The decision's adoption of a rebuttable presumption for determining whether a mail-in vote without a legible postmark is timely cast simply addresses a factual question specific to mail-in votes; it does not somehow create a preferred class of mail-in voters. States have long had leeway to set ballot-receipt deadlines after Election Day to account for postal delivery time, and to determine how to resolve any factual questions as to whether such ballots were timely cast by Election Day.[7] Such laws do not, as petitioners would have it,

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[7] For instance, petitioners' novel theory would invalidate the many state laws that count ballots of overseas military voters cast by Election Day but received by a date certain after Election

treat voters arbitrarily in violation of the Equal Protection Clause.

CONCLUSION

The petition should be denied.

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Day *even when those ballots lack a timely postmark*—laws that are premised on the entirely reasonable assumption that mailed ballots will take some time to arrive from overseas. See Ark. Code Ann. § 7-5-411(a)(1)(B)(ii); Cal. Elec. Code §§ 3117, 3020; Colo. Rev. Stat. Ann. § 31-10-102.8(3), (4); D.C. Code § 1-1061.10; Fla. Stat. Ann. § 101.6952(4); 10 Ill. Comp. Stat. 5/20-8(c); Mo. Ann. Stat. § 115.920(2); Nev. Rev. Stat. § 293.317(2); N.Y. Elec. Law § 10-114(1); Ohio Rev. Code Ann. § 3511.11(C); 25 Pa. Cons. Stat. § 3511(b); R.I. Gen. Laws § 17-20-16; S.C. Code Ann. § 7-15-700(B); Tex. Elec. Code Ann. §§ 86.007, 101.057; Utah Code Ann. § 20A-16-408(2). In addition, other States use a presumption similar to Pennsylvania's, and some rely on other sources of evidence such as voter certification. See, *e.g.*, Nev. Rev. Stat. AB 4, § 20(2); N.J. Stat. Ann. § 19:63-31(m); Cal. Elec. Code §§ 3011, 3020(b)(2); 10 Ill. Comp. Stat. 5/19-8(c).