

No. 20-740

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

JIM BOGNET, ET AL.,

Petitioners

v.

VERONICA DEGRAFFENREID, ACTING
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Respondents.

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

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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INTRODUCTION

In response to this Honorable Court's request to file a response to the Petition for a Writ of Certiorari, the Allegheny County Board of Elections, Bucks County Board of Elections, and Philadelphia County Board of Elections respectfully submit the following arguments in opposition to the Petition and adopt the arguments as more fully set forth in the Brief filed by the Acting Secretary of the Commonwealth.

ARGUMENT

I. Petitioners Lack Standing.

The Third Circuit correctly addressed the threshold question of whether Petitioners had standing to bring this suit. Under Article III, § 2 of the Constitution, the federal courts have jurisdiction over this dispute only if it is a "case" or "controversy." *See* U.S. Const. Art. III, §2. This is a "bedrock requirement." *Raines v. Byrd*, 521 U.S. 811, 818 (citations omitted). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* For this fundamental reason, the Petition should be denied.

A. Petitioners Lack Standing Because Their Claims are Moot.

There is no question that Petitioners' claims are moot. Even if Petitioners were to succeed on their claims – and even if this Court were to invalidate all of the 9,428 ballots received between Tuesday November 6, 2020 at 8:00 p.m. and Friday November 9, 2020 at 5:00 p.m. – such a decision would have no impact on the outcome of any federal election. This Court must certainly acknowledge that Petitioners are only seeking an improper advisory opinion from this Court and for that reason, should deny their Petition. *See Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (“[A] dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words ‘Cases’ and ‘Controversies.’”). *See also Already, LLC v. Nike*, 133 S. Ct. 721, 727 (2013) (“We have repeatedly held that an ‘actual controversy’ must exist not only at ‘the time the complaint is filed,’ but through ‘all stages’ of the litigation.”)(citations omitted).

B. Petitioners Lack Standing to Sue For Alleged Violations of the Elections and Electors Clauses.

There can be no Article III case or controversy if the party seeking relief does not have standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

For the reasons set forth by this Court in *Lance v. Coffman*, 549 U.S. 437 (2007)(per curiam) private citizens lack standing to sue for alleged violations of the Elections and Electors clauses.

The Elections clause confers standing upon the Pennsylvania General Assembly, but not private parties. *Lance v. Coffman*, 549 U.S. 437 (438-42 (2007)(per curiam); *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018)(per curiam)(“Elections Clause claims . . . belong, if they belong to anyone, only to the Pennsylvania General Assembly.”). Because Petitioners are not the General Assembly they lack standing to advance their claims that the General Assembly’s rights were usurped under the Elections Clause.

Similarly, none of the Petitioners here were presidential “electors” as described in the Electors Clause of Article II of the U.S. Constitution, and therefore they lack standing to sue for the alleged violation of the Electors Clause.

Petitioners argue that this Court should resolve a conflict between the Third Circuit and the Eighth Circuit on the issue of whether private citizens have standing to allege violations of the Elections and Electors Clauses, citing *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), however, the Eighth Circuit’s decision is easily distinguishable. The Eighth Circuit granted Article III standing to the two

plaintiffs therein because they were presidential Electors - the “Electors” as described in the Electors Clause of Article II.¹ See U.S. Constit. Article II, § 1, cl. 2. Here, the Petitioners are a congressional candidate and private citizens, not presidential electors. Accordingly, there is no circuit split on this issue that warrants discretionary review.

Further, Petitioners have not asserted an injury specific and personal to them that justify relief from a federal court. The alleged injury – an inconsequentially inaccurate vote tally due to the Deadline Extension and/or application of the Presumption of Timeliness – is nothing more than a “generalized grievance” that cannot support a finding of standing. *United States v. Richardson*, 418 U.S. 166, 173-175 (1974).

This Court has taken up the issue of generalized grievances from private citizens within the context of the Elections Clause before. In *Lance v. Coffman*, four Colorado voters filed a complaint alleging that the Colorado Supreme Court had interpreted the

¹ Due to a particular feature unique to the Minnesota Election Law the court treated a candidate for the office of presidential elector synonymously with the actual elector, therefore conferring standing to the plaintiff candidates for presidential electors therein. See *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020)(interpreting the definitions section of the Minnesota Election Law).

Colorado Constitution in such a way to violate the Elections Clause of the U.S. Constitution by depriving the state legislature of its responsibility to draw congressional districts. *See Lance*, at 441. This Court held that the “problem with this allegation should be obvious: The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” *Id.* at 443. The Third Circuit’s decision here on standing is entirely in keeping with this Court’s precedent and this Court’s “refusal to serve as a forum for generalized grievances.” *Id.* at 339.

C. Petitioners Lack Standing to Allege Equal Protection Claims.

Voter Petitioners assert two equal protection claim injuries: a) the influence of their votes, cast in person on Election Day, was “diluted” by the Deadline Extension date and the Presumption of Timeliness; and b) that the Deadline Extension and Presumption of Timeliness created a preferred class of voters based on arbitrary and disparate treatment. For the reasons more thoroughly set forth by the Third Circuit, the Voter Petitioners lack Article III standing to assert either injury.

With regard to their claim of vote dilution, the alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it a sufficiently particularized injury that specifically disadvantages these voters. No Pennsylvania voter's vote has counted for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.

Their claim that a preferred class of voters was created by the Pennsylvania Supreme Court decision fails because they cannot show what preference was given to mail-in voters. Without this, there cannot be a valid equal protection claim. All voters had the option and choice to either cast their vote in person or by mail. While there may have been separate options for voters that in of itself does not create a cognizable equal protection claim. Further, Petitioners fail to account for the reality that *no* voters in Pennsylvania had the *right* to vote after Tuesday, November 6 at 8:00 p.m. Petitioners stoke the fire by seemingly arguing that unlawfully submitted ballots are being granted a preferred status over their lawfully submitted ballots. One cannot claim an equal protection violation based upon a right be a so-called preferred class to violate the law. *See Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014).

In sum, Petitioners have not met their threshold burden of demonstrating standing, thus, the inquiry should end there.

II. The Lower Courts Appropriately Applied the Purcell Principle.

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam). The *Purcell* principle – that federal courts should refrain from interfering with state elections laws in the lead up to an election – is well established. Let us remember the foundational purpose of this principle in light of the facts of this case. Pennsylvania law, as set forth and enacted by its legislature before the onset of COVID-19, permitted voters who properly applied to vote via mail. An overwhelming number of mail-in ballot applications were requested due to the pandemic, resulting in significant struggles for populous counties in particular. The resulting issue which came before the Pennsylvania Supreme Court was whether these unanticipated circumstances created a violation of the Free and Equal Elections Clause of the Pennsylvania Constitution.

The Pennsylvania Supreme Court found that an as-applied constitutional violation existed, and acted on September 17, more than six weeks before

Election Day.² Pennsylvania voters relied upon the rules in place, relying on the assurances that their lawfully submitted mail-in ballots, if indeed hampered by the untimeliness of the mail delivery system, would be afforded a cushion of three days for their arrival at the County Board of Elections. Then, Petitioners filed their Motion seeking an injunction less than two weeks before Election Day – a Motion the District Court promptly addressed on October 28th, a mere 6 days prior to Election Day. Ballots from voters were already mailed and were en route back to the counties’ Boards.

It is in this light that the District Court was faced with the request to grant an injunction that would have changed the rules that Pennsylvania voters had relied upon by placing their ballots in the mail, with hopes that it would arrive by Friday, November 6th. The District Court was confronted, too, by the guiding principle of *Purcell* and a litany of election decisions from this Court in 2020, admonishing lower federal courts that failure to adhere to the

² The Pennsylvania Supreme Court was also informed by the legislative delegation of authority to Pennsylvania courts, albeit courts of common pleas, thereby enabling our courts to equitably decide matters pertaining to the election as may be necessary to carry out the intent of the Pennsylvania Election Code. Such delegation of authority ensures an equal opportunity for all eligible voters to participate in the election process. See *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369 (Pa. 2020) (citing 25 P.S. § 3046 and *In re General Election 1985*, 531 A.2d at 839 (Pa. Cmwlth. 1985)).

Purcell principle violates this Court's precedents. See, e.g., *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (“[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents.” (citations omitted)); *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (“[T]he District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”); see also *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (“[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute.” (citing *Purcell*, 549 U.S. at 4–5)).

Granting Plaintiffs' requested injunction on the eve of the election would have caused significant confusion and disruption amongst voters and election officials, and would have sown distrust in

our electoral process. It is clear that the District Court decision to deny the injunction was in concert with this Court's precedent. Realizing this, Petitioners now request this Court to exercise discretionary review to take up the question and issue an advisory opinion addressing not whether a federal court should intervene, but whether *Purcell* should apply to state courts and prohibit their intervention in such circumstances. Petitioners over-simplify the inquiry.

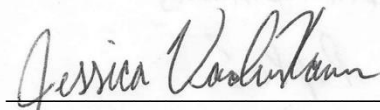
As noted above, in granting the Deadline Extension the Pennsylvania Supreme Court made clear that it was not asked to interpret the statutory deadline for mail-in ballots. Instead, the Pennsylvania Supreme Court determined that the application of the statutory language to a unique set of circumstances, not contemplated by the General Assembly, created an as-applied violation of the Pennsylvania Constitution. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369-371 (Pa. 2020) (“[T]he Free and Equal Elections Clause of the Pennsylvania Constitution requires that ‘all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.’” (citations omitted)). To reverse the

Pennsylvania Supreme Court in its interpretation of its own state constitution would require this Court to substitute its own interpretation of Pennsylvania's state constitution, and consequently enable any federal court to do the same. Should this Court accept that invitation, the resulting chaos in election-related litigation is all too foreseeable.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted:



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