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

BRIEF OF RESPONDENT VERONICA DEGRAFFENREID, ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT A. WIYGUL
Counsel of Record
MICHELE D. HANGLEY
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
rwiygul@hangley.com

Counsel for Respondent Veronica Degraffenreid

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QUESTIONS PRESENTED

On September 17, 2020, responding to a combination of the COVID-19 pandemic and severe postal service delays that threatened to disenfranchise Pennsylvania voters, the Pennsylvania Supreme Court ordered a one-time, three-day extension of the statutory "received-by" deadline for mail-in ballots cast in the November 2020 election. On October 22, petitioners—a Republican congressional candidate and several Pennsylvania voters—filed a complaint and emergency motion for preliminary injunction in district court, seeking to enjoin the extension. The district court denied the emergency motion, and the Third Circuit affirmed.

The questions presented are:

1. Whether petitioners' emergency motion for a preliminary injunction, in which they sought only to enjoin the extension of the "received-by" deadline, is now moot.

2. Whether the relief petitioners sought in their preliminary injunction motion was prohibited because of the doctrine of laches and because it would have violated the constitutional rights of voters who relied on the challenged extension of the "received-by" deadline.

3. Whether any petitioner has Article III standing to challenge the Pennsylvania Supreme Court's decision.

4. Whether the claims of the former-candidate petitioner are precluded by the Pennsylvania Supreme Court's judgment.

5. Whether the Pennsylvania Supreme Court's decision violates the Constitution's Elections Clause or Electors Clause.

6. Whether the Pennsylvania Supreme Court's decision violates the rights of the voter petitioners under the Constitution's Equal Protection Clause.

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INTRODUCTION

The Court has already denied the petitions for writ of certiorari in Case Nos. 20-542 and 20-574 (collectively, the "RPP case"), which sought direct review of the same Pennsylvania Supreme Court order (the "Order") collaterally attacked by petitioners here. There are even more reasons to deny the present petition.

First, like the RPP case, this case is moot. Petitioners seek to contest an order that, because of the confluence of a once-in-a-century pandemic and severe postal delays, extended—by a modest three days—the statutory "received-by" deadline for mail-in ballots in a single election. But the election is over. Pennsylvania has officially certified all results; Congress, on January 6-7, 2021, officially certified the winner of the presidential election, *see* 3 U.S.C. § 15; and the prevailing candidates have taken office. Petitioners do not suggest that this Court could, at this late date, change the outcome of a single race.

Nor is there any conceivable basis to do so. It is undisputed that the total number of ballots challenged by petitioners is less than the margin of victory in each of Pennsylvania's federal races. Further, the vote totals certified by Pennsylvania do not include any of the ballots to which petitioners take exception. Put simply, this case is as moot as moot can be: petitioners sought only prospective equitable relief, that relief is no longer available, and no exception applies that would resuscitate their position.

Second, even if the case were not moot, petitioners' claims—including the motion for a preliminary injunction that is the subject of this petition—would be foreclosed by the doctrine of laches. Petitioners waited until October 22, 2020, fully 35 days after the Order issued, before filing suit. Even though the district court heard and disposed of petitioners' motion for preliminary injunctive relief with great celerity, there was not sufficient time, even under petitioners' own proposed briefing schedule, to submit their appeal to the Third Circuit before election day. At that point, granting the relief petitioners sought would have retroactively changed the election rules, disenfranchising voters who had cast their mail-in ballots in reliance on the Order and the instructions of public officials. As the Third Circuit recognized, that result would have been both grossly inequitable and an unlawful abridgement of the right to vote. These legal principles independently compelled denial of the motion for a preliminary injunction that petitioners ask this Court to address—and thus pose an insuperable vehicle issue.

Third, and similarly, the procedural posture of this case weighs heavily against certiorari. The RPP case at least involved a request for direct review of the Pennsylvania Supreme Court's merits ruling. Here, petitioners seek review of a denial of a preliminary injunction motion that the Third Circuit affirmed without addressing the merits of petitioners' constitutional and statutory claims. Thus, petitioners ask this Court to address questions that do not present a live case or controversy and were not considered by the court of appeals below. It is inconceivable

that petitioners can show irreparable injury—or can prove that the equities and the public interest support their request for an obsolete, nugatory preliminary injunction—and so they cannot actually present the questions that they purport to present for the Court's review.

Fourth, and independent of the aforementioned issues, the Third Circuit's standing rulings do not warrant an exercise of certiorari jurisdiction. The Third Circuit held, unsurprisingly, that (1) a losing candidate does not have standing to challenge, after election day, an order extending the time for county boards of elections to receive ballots returned by mail, where the candidate does not allege that the number of ballots in dispute is sufficient to affect the outcome of the election; and (2) the voter petitioners, who did not complain of any burden on their own ability to vote, suffered no cognizable injury as a result of ballots cast by other qualified voters in reliance on court-ordered procedures. Contrary to petitioners' assertions, these holdings do not implicate any circuit split or otherwise merit review by this Court. Rather, they are in complete accord with this Court's well-established standing jurisprudence. In addition, this case is a poor vehicle for reviewing the question of candidate standing because the final judgment in the RPP case bars petitioner Bognet's claims under the doctrine of res judicata.

For all of these reasons, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

I. The Pennsylvania Supreme Court rules that Pennsylvania's statutory mail-in voting deadlines, as applied to the unique circumstances of the November 2020 general election, violate voting rights guaranteed by the Pennsylvania Constitution.

On October 31, 2019, Governor Tom Wolf signed into law Act 77 of 2019, P.L. 552, allowing, for the first time in Pennsylvania, no-excuse mail-in voting for all qualified voters. 25 P.S. § 3150.11. Under the statute, voters have until one week before election day to apply for a mail-in ballot. 25 P.S. § 3150.12a(a). The statutory deadline for completed mail-in ballots to be received by county boards of elections (the "received-by deadline") is 8:00 p.m. on election day. The Pennsylvania Election Code provides for a variety of safeguards to ensure the integrity of the mail-in voting process. *See* P.S. § 3146.8(g)(3); 25 P.S. § 3146.2c; 25 P.S. § 3146.8(g)(4); 25 P.S. § 3150.12b(a)(2).

The timing of Act 77 proved propitious. Following the onset of the COVID-19 pandemic in early 2020, Act 77 allowed millions of Pennsylvanians to vote safely from their homes.

In the spring of 2020, several Pennsylvania voters filed suit against the Secretary of the Commonwealth in the Commonwealth Court of Pennsylvania, contending that the statutory received-by deadline, as applied to the circumstances created by the pandemic, violated the Pennsylvania Constitution's Free and Equal Elections Clause. Pa. Const., art. I, § 5. The Pennsylvania Democratic Party and several Democratic candidates (collectively, the "Democratic Party") subsequently

raised a similar claim in a separate Commonwealth Court action filed against the Secretary and Pennsylvania's 67 county boards of elections. The Secretary initially opposed these claims because the prospect of mail delays affecting the November general election appeared, at that time, speculative. But as the summer progressed, compelling evidence emerged showing that the pandemic, combined with disruptive reforms implemented by the new Postmaster General, had created severe, sustained delays in postal delivery in Pennsylvania (and elsewhere), and indicating a significant likelihood that such delays would affect the mail-in voting process during the general election.

Moreover, on July 29, 2020, the General Counsel for the USPS sent a letter to the Secretary, stating that, based on the USPS's expected delivery times during the upcoming general election, "there is a significant risk that * * * ballots may be requested in a manner that is consistent with [Pennsylvania's] election rules and returned promptly, and yet not be [delivered] in time to be counted." The letter explained that Pennsylvania's statutory "deadlines for requesting and casting mail-in ballots are incongruous with the USPS's delivery standards," "creat[ing] a risk that ballots requested near the deadline under state law would not be returned by mail in time to be counted * * *." Att. 1 to Secretary's Opp. to Pet., No. 20-542 (Nov. 30, 2020).

After receiving this letter, the Secretary determined that a three-day extension of the received-by deadline (as opposed to the seven-day extension requested by the Democratic Party) was necessary to guarantee compliance with the Pennsylvania

Constitution. At the Secretary's request, the Pennsylvania Supreme Court accepted jurisdiction over the Democratic Party's lawsuit. That court permitted intervention by two state legislators and the Republican Party of Pennsylvania (collectively, "RPP"). The Republican Party explained that it was intervening to represent the interests of its candidates and voters.[1]

On September 17, 2020, the Pennsylvania Supreme Court issued its ruling. All seven justices agreed that, as applied to the unprecedented circumstances of the COVID-19 pandemic, enforcing Pennsylvania's statutory deadlines would violate the Free and Equal Elections Clause. The majority explained that although the "extremely condensed [statutory] deadline, providing only seven days between the last date to request a mail-in ballot and the last day to return a completed ballot," "may be feasible under normal conditions," it "will unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020). Noting that, under its precedents, the Pennsylvania Supreme Court had "broad authority to craft meaningful remedies" for constitutional violations impairing the right to vote, that court adopted the Secretary's recommendation that the received-by deadline be extended by three days. *Id.* Critically, the requirement that all ballots be cast by 8:00 p.m. on election day remained unchanged. Election officials

[1] RPP Appl. to Intervene 4-5 (July 27, 2021), *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa.).

were directed to disqualify any ballot that arrived at county boards of elections after the three-day period, was postmarked after election day, or was shown by a preponderance of the evidence to have been mailed after election day. *Id.* at 371-72 & n.26.

In an opinion dissenting in part, three justices agreed that relief was constitutionally required and that the court had "wide latitude to craft an appropriate remedy." *Id.* at 395 (Donohue, J., dissenting in part). But the dissenting justices would have exercised this discretion by moving the statutory deadline to *request* a ballot to an earlier date, rather than by extending the received-by deadline. *Id.* at 397.

II. This Court denies RPP's applications to stay and petitions for writ of certiorari.

RPP promptly asked this Court to stay the Order, asserting that the extension of the received-by deadline violated (1) the Electors and Elections Clauses of the U.S. Constitution and (2) federal statutes prescribing a uniform election day. On October 19, 2020, this Court denied the stay applications by a 4-4 vote. On October 23, RPP filed a petition for certiorari and sought expedited consideration, noting that, "[a]bsent quick action by this Court, * * * this Court's jurisdiction over the case[ ]could be lost." On October 28, the Court denied the motions to expedite. In an accompanying statement, Justice Alito noted "that there [was] simply not enough time at th[at] late date to decide the question before the election." Statement 3, No. 20-542 (Oct. 28, 2020).

On November 6, 2020, in response to a motion by RPP, Justice Alito ordered that, consistent with guidance issued by the Secretary on October 28, all Pennsylvania county boards of elections segregate all ballots received after 8:00 p.m. on election day, November 3, and that all such ballots, if counted, be counted separately.

The number of ballots received during the three-day extension period was less than the margin of victory in every federal race in Pennsylvania.[2] The certified election results—including the certified presidential election results sent to the President of the U.S. Senate and the Archivist of the United States pursuant to 3 U.S.C. § 11—do not include any ballots received after 8:00 p.m. on election day.[3]

On February 22, 2021, this Court denied RPP's petitions for writ of certiorari.

III. After this Court denies RPP's application to stay the Pennsylvania Supreme Court's Order, the present petitioners seek the same relief from a district court.

The present petitioners, former congressional candidate Jim Bognet and several Pennsylvania voters, commenced this federal action on October 22, 2020—35 days after issuance of the Order and 3 days after this Court denied RPP's motion to

[2] *See* Pa. Department of State, https://www.electionreturns.pa.gov/ (presidential race), https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=undefined&ElectionType=undefined&IsActive=undefined (congressional races) (last visited Mar. 14, 2021).

[3] *See* Pa. Department of State, https://www.electionreturns.pa.gov/; Certificate of Ascertainment of Presidential Electors, https://www.archives.gov/files/electoral-college/2020/ascertainment-pennsylvania.pdf (last visited Mar. 14, 2021).

stay. In their Complaint and Motion for an Immediate Temporary Restraining Order and a Preliminary Injunction, filed in the Western District of Pennsylvania, petitioners repeated RPP's claims that the Order exceeded the Pennsylvania Supreme Court's authority under the Electors and Elections Clauses. In addition, the voter petitioners, who allegedly intended to vote in person on election day, contended that the order violated their rights under the Equal Protection Clause by purportedly (1) diluting their votes, and (2) arbitrarily treating voters differently based on how they vote.

Petitioners urged that an immediate TRO and preliminary injunctive relief were necessary "given the exigent circumstances presented by the impending election in Pennsylvania" (Dist. Ct. Dkt. 6, at 1) and the inability to "turn back the clock" after administering the election under the terms of the Order (*id.* at 23).[4] The district court heard oral argument on petitioners' motion on October 27, and denied the motion the next day. The court concluded that, with the exception of one claim, petitioners lacked Article III standing. App. 67-74. The court further held that, regardless of the merits, it was "required to deny [petitioners'] motion for injunctive relief because [they filed it] on the eve of the election." App. 66.

[4] In successfully opposing a motion to transfer the case to a different division of the district court, petitioners contended that "even a one or two-day delay [in resolving their motion] will cause prejudice." Dist. Ct. Dkt. 30, at 4.

IV. The Third Circuit affirms the district court's denial of a preliminary injunction.

Petitioners appealed and moved for an expedited schedule in which briefing would conclude on November 3, election day. Noting that petitioners' timing "effectively foreclose[d] th[e] Court from ruling on their * * * appeal * * * on or before Election Day," the Third Circuit denied petitioners' motion but set a schedule whereby briefing was completed by November 9. 3d Cir. Dkt. 37.

In their opening brief filed on November 6, petitioners appeared to acknowledge that, because the appeal would not be decided until after the election, the vote margins relative to the number of challenged ballots could affect the justiciability of petitioners' claims. Petitioners explained that "the impact of late-arriving ballots on the election of Pennsylvania's electors and [petitioner] Bognet's race is not [yet] clear, in part because the time for those ballots to arrive * * * has not yet expired," and promised that they would "continue monitoring events * * * and of course will alert the Court if in [petitioners'] view those events render this appeal moot." 3d Cir. Dkt. 41, at 1 n.1. But in a proposed supplemental brief submitted on November 12, petitioners changed course. They argued, in substance, that the receipt of even a single ballot during the three-day extension period was sufficient to prevent the case from becoming moot, even if the number of challenged ballots did not affect the outcome of any race. 3d Cir. Dkt. 61.

On November 13, 2020, in a 55-page opinion written by Chief Judge D. Brooks Smith, the Third Circuit panel unanimously affirmed the district court's denial of

petitioners' emergency motion for a TRO or preliminary injunction. The court did not address the merits of petitioners' claims. It held that neither Bognet nor the individual voters had standing to press their challenge to the Order. The Third Circuit explained that private plaintiffs lack standing to assert an interest, common to all citizens, in protecting the purported prerogatives of state legislatures under the Electors or Elections Clause. And there was no basis to grant petitioners third-party standing to invoke the legislature's interest. App. 21-23.

Nor had petitioners pled a particularized, personal injury sufficient to confer standing. It was not adequate for candidate Bognet to assert an interest in running in an election subject to deadlines set exclusively by the Pennsylvania legislature: all candidates, including his opponent, were subject to the same rules, and Bognet offered no explanation of how the Order would affect "the competiveness" of his race. App. 26. Moreover, although Bognet was now seeking issuance of an order, *after* election day, enjoining the counting of ballots received during the three-day extension period, he did not allege (nor could he) that the number of ballots at issue was "sufficient … to change the outcome of the election to Bognet's detriment." App. 26.

The Third Circuit likewise rejected the voter petitioners' standing theories under the Equal Protection Clause. Petitioners first asserted they were injured because the counting of votes accepted pursuant to the Order, which petitioners alleged was unlawful, "diluted" their own votes. Agreeing with numerous other courts that had rejected similar "vote dilution" theories, the Third Circuit held that this

theory did not satisfy the jurisdictional requirement that an alleged injury be both concrete and particularized. App. 28-44. At bottom, petitioners had articulated only a generalized interest in adhering to procedural election rules. App. 44.

Nor could the voter petitioners predicate standing on a theory that the Order had subjected them to "arbitrary and disparate treatment." First, the Order had not created any cognizable "preferred class" of voters, as all Pennsylvanians were permitted to vote in person or by mail. Second, and independently, petitioners' alleged injury was fatally speculative. Petitioners argued that, in presuming that ballots received during the three-day period without a legible postmark were timely mailed, the Order created the theoretical possibility that votes cast after election day would be counted. But the Third Circuit noted that the Order did not *authorize* such late voting; it clearly prohibited it. The presumption

> could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee [or mail-in] 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.

App. 48-49 (footnotes omitted). Petitioners had not alleged any facts indicating that "[t]his parade of horribles" would come to pass. App. 48-50.

Finally, the Third Circuit explained that even if petitioners had had standing, it would have affirmed the denial of the preliminary injunction motion on equitable

grounds, including, in particular, "voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots." App. 50-51.

REASONS FOR DENYING THE WRIT

I. Petitioners' claims are moot.

"It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotation marks omitted). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). Accordingly, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, [a] case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted); *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 176-77 (2016) (Roberts, C.J., dissenting) ("Federal courts may exercise their authority 'only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.'" (quoting *Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892))).

If this case ever presented a live controversy—a doubtful proposition—it no longer does. Petitioners challenge an order issued because of the unprecedented, combined effect of a global pandemic and severe mail delays and limited, by its terms, to the 2020 general election. That election has concluded. The votes have been counted and certified. Early in the morning of January 7, 2021, Congress fulfilled its duty, under 3 U.S.C. § 15, to declare the persons elected President and Vice President.

It is also undisputed that adjudication of petitioners' claims is mathematically incapable of altering any election outcome.[5] What petitioners seek is an advisory opinion, divorced from any concrete legal consequence, regarding the validity of the Order. *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.'"). What is more, the certified vote totals *exclude* the ballots petitioners challenge. Thus, even if federal courts were in the business of resolving disputes in which the only stakes were the specific numbers appearing in a historical ledger—as they are not—petitioners' claims would still be moot.

This dispute does not fall into the exception to mootness for cases capable of repetition while evading review. "[T]he capable-of-repetition doctrine applies only in exceptional situations" where "the following two circumstances are simultaneously

[5] Excluding the ballots petitioners challenge, President Joseph Biden received 80,555 more Pennsylvania votes than former President Donald Trump, while approximately 10,000 ballots are at issue here.

present: (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." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks and alterations omitted). Neither requirement is met here.

First, the Court could have decided the RPP case before election day; while the Court declined to do so, it does not follow that the issues evade review in a manner justifying an exception to Article III mootness. To the extent *this* case evaded review, it was because of petitioners' delay in filing it. Moreover, unlike in some cases involving voting practices or ballot access, *see, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983), questions about the role of the state legislature (and other state actors) in regulating elections will often be resolvable well in advance of election day, *see, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC)*, 576 U.S. 787 (2015).

Second, there is no "reasonable expectation" or "demonstrated probability" that the same controversy will recur involving the same complaining parties. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). The Pennsylvania Supreme Court's decision arose from an extraordinary and unprecedented confluence of circumstances[6] and applied

[6] It was not until July that the new Postmaster General implemented delay-causing reforms to the USPS's operations. The letter from the USPS's General Counsel to the

only to the November 2020 election. This Court has deemed the capable-of-repetition test met in the election context where the challenged rule would remain in place and control future elections. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (finding exception to mootness based on likelihood that plaintiff would, in the future, run advertisements that were subject to the same challenged statutory provision); *cf. Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (finding capable-of-repetition exception inapplicable where, unlike in previous election decisions, the challenged action "was not a matter of statutory prescription"). That is plainly not the case here.

Indeed, there is no basis to conclude that the specific combination of extraordinary factors driving the Order will recur.[7] And even if they did, it requires yet more speculation to predict that Pennsylvania's statutory deadlines would still be what they are now, or, if they were, that the Legislature would not respond to the crisis by revising them. Even more so, there is no "demonstrated probability" of a repeat of the same controversy *involving these complaining petitioners*.[8]

Secretary, explaining that Pennsylvania's statutory deadlines were incompatible with the USPS's delivery standard, was sent at the end of the same month.

[7] Petitioners point to judicial modifications of statutory requirements in other jurisdictions, which were similarly based on the unique challenges caused by the pandemic and applied only to the November 2020 election. But the fact that extraordinary circumstances simultaneously affected multiple jurisdictions does not render the circumstances any less extraordinary.

[8] Petitioner Bognet has not alleged that he plans to run for federal office again. And the voter petitioners have provided no reason to conclude that, if the Pennsylvania

To the extent petitioners seek to avoid mootness by framing the dispute at an extremely high level of generality—in terms of, for example, whether the Electors Clause exempts election rules enacted by state legislatures from the requirements of state constitutions—their attempt is unavailing. If the potential repetition of claims involving the same provisions of federal law were sufficient, then "virtually any matter of short duration would be reviewable." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Such a rule would render Article III's prohibition on advisory opinions—and the concomitant requirement that, to be justiciable, a legal question must be embedded in *particular* facts involving *particular* parties with *particular* legal interests—a dead letter.

This case is moot, and the petition for certiorari should be denied on that basis.

II. This case is an unsuitable vehicle for resolving the questions presented.

This case is not a proper vehicle for resolving the questions presented for at least two additional reasons: (1) because of petitioners' delay in filing suit, bedrock principles of equity and constitutional law—what might aptly be described as a supercharged form of the doctrine of laches—would have precluded the (now moot) relief petitioners sought, and (2) there is no basis for concluding that petitioners could satisfy the requirements for a preliminary injunction.

Supreme Court were in the future to find that some statutory election rule imposes an unconstitutional burden on the right to vote, that decision would necessarily impair—rather than vindicate—petitioners' interests.

A. Petitioners' prejudicial delay in filing suit bars their claims.

As noted, the Order was based on circumstances that developed in the summer of 2020. The Pennsylvania Supreme Court took jurisdiction over the Pennsylvania Democratic Party's suit and ruled on an expedited basis on September 17, 2020. It acted when it did for the express purpose of "allow[ing] 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*, 238 A.3d at 371.

Yet petitioners did not bring this action until 35 days after that decision. The district court acted as quickly as possible, but it was not able to rule on petitioners' emergency motion until October 28, less than a week before election day. At that point, the deadline for applying for a mail-in ballot had already passed. And if the district court had granted the injunction petitioners sought, there can be little doubt that a significant number of voters would not have learned of the changed deadline for days to come. Even more importantly for present purposes, petitioners' delay prevented the Third Circuit from deciding their appeal before election day. As that court recognized, petitioners were thus asking the court to retroactively invalidate votes that qualified voters had cast in accordance with the rules in place at the time of the election. App. 50-51 (discussing "voters' reliance on the rules in place").

These facts squarely implicate the doctrine of laches, "a defense developed by courts of equity to protect defendants against unreasonable, prejudicial delay in

commencing suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (internal quotation marks omitted). "The delay which will defeat [an equitable claim] * * * depend[s] on the peculiar equitable circumstances of [each] case." *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956) (internal quotation marks omitted). Courts have recognized that "[d]iligence in the compressed timeline applicable to elections is measured differently from how it might be determined in other contexts." *Voters Organized for the Integrity of Elections v. Baltimore City Elections Bd.*, 214 F. Supp. 3d 448, 454 (D. Md. 2016). "Extreme diligence and promptness are required in election-related matters" because of the risk that last-minute changes to election procedures will impair election administration and infringe the voting rights of electors. *State ex rel. Ascani v. Stark Cnty. Bd. of Elections*, 700 N.E.2d 1234, 1236 (Ohio 1998); *accord, e.g.*, *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (noting that "any claim against a state electoral procedure must be expressed expeditiously").

Petitioners' delay in filing suit plainly failed to meet the diligence standard. For five weeks following the Pennsylvania Supreme Court's Order, petitioners sat on the alleged rights they now assert. By the time they brought suit, it was too late to enjoin that Order without prejudicing the rights of voters.

The prejudice caused by petitioners' delay is as severe as it is manifest. Petitioners do not merely ask this Court to suspend the principle that "lower federal courts should ordinarily not alter the election rules on the eve of an election."

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam opinion) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). Petitioners urge this Court to pull the rug out from under voters *who have already voted* in reliance on the court-ordered deadlines in place at the time of the election, retroactively invalidating their votes. That would not only be an egregious violation of the doctrine of laches; it would violate voters' fundamental constitutional rights.

This Court has long held that citizens' right to vote, which is "vital to the maintenance" of our "democratic institutions," *Carrington v. Rash*, 380 U.S. 89, 94 (1965), includes the right to "have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Under the Due Process Clause, citizens cannot be deprived of such fundamental rights without "an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 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"). Consistent with these principles, when, approximately a month *before* the 2020 general election, this Court held that a federal district court had improperly enjoined South Carolina's witness requirement for absentee ballots, it nonetheless ordered that "any ballots cast before" the issuance of this Court's stay "and received within two days" of the stay 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). The Court's remedy recognized the need to protect the rights of voters who had reasonably relied

on the rules in place at the time they cast their ballots, notwithstanding the later determination that those rules should not have been issued. These reliance interests are even more compelling here, where the election has already taken place and there is no possibility for voters to cast new ballots.

For these reasons, petitioners are mistaken in suggesting that this case presents an opportunity to determine whether the *Purcell* principle "stand[s] in the way" of enjoining state courts' alteration of statutory election rules (Petition at 29), or whether, going even further, *Purcell* somehow prohibits state courts from protecting voting rights against threats that emerge in the months prior to an election (*id.* at 31). Regardless of whether *Purcell* counseled against granting the stay timely sought by RPP, petitioners' prejudicial delay in filing suit bars relief under well-settled equitable principles. Moreover, nothing in *Purcell* suggests that voters can be subjected to a bait-and-switch in which they vote in reasonable reliance on then-governing procedural rules and then are told, after the election is over, that those rules were actually invalid and their votes will therefore not count.

B. The procedural posture of this case militates against certiorari review.

The lower-court decision at issue here is a denial of an emergency motion for TRO and preliminary injunction. This Court has explained that, "except in extraordinary circumstances, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916). That general rule applies with special force here.

To the extent the circumstances of this case are "extraordinary," it is in a way that weighs against interlocutory review, not in favor of it. As petitioners effectively concede, the alleged basis for preliminary relief—the urgency posed by an imminent election—no longer exists. Put differently, petitioners cannot dispute that *the motion at issue* is moot, even if they incorrectly assert that their underlying claims somehow are not. Thus, regardless of their arguments about the applicability of the "capable of repetition, yet evading review" exception to mootness, there can be no doubt whatsoever that petitioners' preliminary injunction motion—the only motion at issue here—seeks relief that is neither available nor effectual. What is more, both the district court and the Third Circuit denied the motion based both on standing *and* the balance of the equities, and the Third Circuit did not reach or address the merits of any of Petitioners' claims. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (noting that "[o]urs is a court of final review and not first view"); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 462 (2006) (declining to consider a claim "without the benefit of the Court of Appeals' analysis").

III. The Third Circuit's standing holdings do not warrant certiorari.

To the extent petitioners contend that the Third Circuit's standing rulings are independently worthy of this Court's discretionary review, petitioners are wrong. This is true not only because their claims are foreclosed regardless of standing, but also because the Third Circuit's rulings are firmly rooted in this Court's well-developed standing jurisprudence. As the court of appeals recognized, neither Bognet

nor the voter petitioners have standing to press their claims. Contrary to petitioners' arguments, the Third Circuit's holdings do not implicate any true circuit split or otherwise merit review.

A. The holding regarding former candidate Bognet does not merit review.

1. Regardless of standing, Bognet's claims are precluded by the judgment in the RPP case.

As an initial matter, even if former congressional candidate Bognet had standing, the final judgment in the RPP case would preclude his claims under the Pennsylvania law of res judicata.[9] *See Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985) (whether a state-court judgment precludes a federal suit is a question of state law); *see also Stevenson v. Silverman*, 208 A.2d 786, 787-88 (Pa. 1965) (enumerating elements of res judicata). That is hardly surprising, as this action is an undisguised attempt to collaterally attack the Pennsylvania Supreme Court's decision.

Petitioners dispute only one element of res judicata, contending the doctrine is inapplicable because Bognet was not a party to the previous case. But "[t]he doctrine of res judicata * * * is binding[] not only on actual parties to the [earlier] litigation, but also to those who are in privity." *Stevenson*, 208 A.2d at 788; *see also Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310 (3d Cir. 2009)

[9] The Secretary raised this issue before both the district court and the Third Circuit, though neither court reached it.

(Pennsylvania privity rules are "not inconsistent with federal law" on the same issues). This law recognizes that res judicata may apply to a nonparty to the first proceeding where "the nonparty was 'adequately represented by someone with the same interests who [wa]s a party.'" *Nationwide*, 571 F.3d at 312 (quoting *Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (2008)). "Adequate" representation exists where "(1) [t]he interests of the nonparty and her representative [*i.e.*, the party] are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor*, 128 S. Ct. at 2176 (citation omitted).

That test is plainly met here. The interests of the Republican Party of Pennsylvania and of Bognet, a Republican candidate, are aligned with respect to the subject matter of this lawsuit, and the Party indisputably understood itself to be acting in a representative capacity on behalf of its candidates. Indeed, in successfully moving to intervene, the Party told the Pennsylvania Supreme Court that its purpose was "to assert and protect the rights of [its] members in upcoming elections" and "to uphold the Election Code under which [it], [its] voters, [its] members, and [its] candidates exercise their constitutional rights to vote and to participate in elections in Pennsylvania."[10] The Party pointed to these intervention papers when, before this Court, it asserted "associational standing" to proceed "on behalf of itself and its

[10] RPP Appl. to Intervene 4-5 (July 27, 2021), *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa.).

members." RPP Stay Reply 3, No. 20A54 (Oct. 6, 2020). Accordingly, the judgment in the RPP case precludes Bognet's claims.[11] *See Int'l Union v. Brock*, 477 U.S. 274, 289-90 (1986) (implying that where entity asserted associational standing, "a judgment won against it" will, absent proof of inadequate representation, "preclude subsequent claims by the association's members"); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 588 (5th Cir. 2006) ("after the primary election, a candidate steps into the shoes of his party, and their interests are identical").

If res judicata did not apply here, a political party's candidates could sit on the sidelines, content to let the party expressly represent their interests in challenging a particular election rule—and then, if the party suffers an adverse judgment, each could take another bite at the apple, in a different forum, by raising the same claims. That cannot be—and is not—the law.

2. Bognet lacks standing.

Further, the Third Circuit's holding that Bognet lacked standing accorded with well-settled principles of justiciability. "To establish Article III standing," a plaintiff must, *inter alia*, have sustained an injury that stems from "invasion of a legally protected interest," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), and is "concrete, particularized, and actual or imminent," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Particularization and concreteness are distinct requirements.

[11] Because petitioners have stated that one of the voter petitioners is not a member of the Republican Party, the Secretary addresses res judicata only with respect to former candidate Bognet.

"For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (2016). To be "concrete," an injury must be "real, and not abstract." *Id.* Bognet cannot claim an injury that satisfies this test.

Petitioners do not dispute the Third Circuit's conclusion that Bognet's assertion of a "right to run in an election where Congress has paramount authority," *i.e.*, where the rules are set in accordance with petitioners' interpretation of the law, is insufficient to plead a cognizable injury. *See* App. 26. That is tantamount to an interest in "hav[ing] the Government act in accordance with law," which is plainly inadequate. *Allen v. Wright*, 468 U.S. 737, 754 (1984); *see Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (2020) ("applicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws"); *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (bare allegation that "the law—specifically the Elections Clause—has not been followed" does not confer standing). Additionally, as the Third Circuit observed and petitioners do not dispute, petitioners lack third-party standing to assert any interests the Pennsylvania Legislature may have in challenging the Order. *See* App. 22-23.

Instead, petitioners insist that Bognet, as a candidate, has a personal, concrete interest in invalidating the Order. Petitioners note that in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), an Eighth Circuit panel held that presidential electors had standing, under the Electors Clause, to seek to enjoin a similar deadline-extension order issued by a Minnesota court. But *Carson* is distinguishable, and the circuit split

suggested by petitioners is thus illusory. *First*, the claims in *Carson* were asserted by presidential electors, who might well have unique interests in the application of the Electors Clause and the elector-selection process. None of petitioners here can claim such interests; they are not presidential electors or even candidates for presidential office.

Second, the Eighth Circuit directed issuance of an injunction *prior* to election day, and it was conceivable that the relief plaintiffs sought would determine whether they were elected. Even assuming *arguendo* that a candidate may have standing, before an election, to challenge a generally applicable procedural rule by showing that it will hurt the competitiveness of his campaign: (1) Bognet did not plead—let alone establish—any facts showing a non-speculative prospect that the Order would inflict any such campaign-related injury; and (2) any such campaign-related interest cannot support Bognet's claim for injunctive relief *after* the election is over and it is undisputed that the relief sought could not affect the outcome of the race.

Carson's statement that candidates "have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," 978 F.3d at 1058, is not reflective of a developed circuit split warranting certiorari review. *First*, as noted above, the factual circumstances underlying the *Carson* and *Bognet* holdings are starkly different. *Second*, the statement in *Carson* is unsupported by any citation to authority or reasoning. The Eighth Circuit panel offered no explanation of how a losing candidate could have a "concrete," "legally protected interest" in the resolution

of an Electors or Elections Clause challenge where, as here, the election is over, and the number of ballots at stake cannot affect the election's outcome. At a minimum, then, before taking up the standing questions presented here, the Court should wait to see whether courts apply *Carson*'s statement as broadly as petitioners urge, and whether courts develop reasoned arguments in its support.

In any event, *this* case is not a vehicle for determining the accuracy of the *Carson* statement. As discussed above, Pennsylvania's certified vote totals do not include the ballots petitioners challenge, so petitioners have no quarrel (justiciable or otherwise) with the "final vote tally."

B. The holding regarding the voter petitioners does not merit review.

The Third Circuit's rejection of the voter petitioners' two standing arguments is likewise unworthy of this Court's review. First, federal courts across the country have repeatedly rejected petitioners' "vote dilution" theory of Equal Protection injury. And rightly so. As the Third Circuit recognized, that theory does not plead an injury that is concrete and particularized. Where the Court has recognized a form of "vote dilution"-based standing, it has been in contexts such as malapportionment and racial gerrymandering, where government officials have taken actions that directly diminish the weight of *specific groups*' votes relative to other parts of the electorate. *See* App. 38 (discussing *Baker v. Carr*, 369 U.S. 186, 206 (1962)); App. 40 (discussing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015)).

Petitioners' vote dilution theory is quite different. Petitioners assert that they are cognizably injured by any vote that another qualified voter cast in a way that is allegedly procedurally invalid—as well as by any procedure that *leaves open the possibility* that a procedurally invalid vote could be counted. Thus, petitioners contend that every Pennsylvania voter has standing to challenge the Pennsylvania Supreme Court's extension of the received-by deadline. And they claim every voter has standing to challenge the rebuttable presumption that a ballot received during the extension period without a legible postmark was timely mailed, because of the speculative possibility that such a rule could result in a late-cast ballot going undetected and being counted.

Petitioners pay no heed to the fact that they obviously have no legal right to exclude ballots from other qualified voters—at least some of whom would, if the Pennsylvania Supreme Court had not issued its Order, have inevitably mailed the same ballot earlier, dropped it in a dropbox, or voted in person. In addition, unlike in the gerrymandering or malapportionment context, the disputed Order does not burden the rights of specific groups. Rather, every voter can take advantage of the remedy the court provided. If the votes counted pursuant to that decision are procedurally invalid, as petitioners allege, each such vote "dilutes" the vote of every voter in the same way and measure. As the Third Circuit recognized, petitioners' "dilution" theory would grant every voter standing to assert a federal equal protection challenge whenever any ballot was allegedly cast in an incorrect manner—or

whenever any procedure allowed for that *possibility*. It is impossible to square that result with Article III's requirement that a cognizable injury must be concrete, particularized, and non-speculative. "[A]llowing standing for [petitioners' alleged voter dilution] injury [would be] indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the 'proper application of the Constitution and law'—a proposition that the Supreme Court has firmly rejected." App. 44.[12]

There is no circuit split with respect to the validity of petitioners' vote dilution theory. It has been rejected by district courts in multiple circuits. *See* App. 36-37. No court of appeals has endorsed it. To the contrary, the Eleventh Circuit has also directly rejected this theory, expressly agreeing with the Third Circuit in this case—and this Court denied that plaintiff's petition for certiorari. *Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) ("Vote dilution in this context is a 'paradigmatic generalized grievance that cannot support standing.'"), *cert. denied*, No. 20-799, 2021 WL 666431 (U.S. Feb. 22, 2021). There is no reason to treat this petition any differently.

[12] Contrary to petitioners' suggestion, their purported "vote dilution" injury bears no resemblance to a mass tort, in which each plaintiff indisputably has sustained a personal, particularized, concrete injury. Nor is this case analogous to *Federal Election Commission v. Akins*, where a particular statute vested large numbers of persons with the specific right "to receive particular information about campaign-related activities"—and sought to protect those persons from the specific harm alleged by plaintiffs. 524 U.S. 11, 21-25 (1998).

Petitioners' argument for a circuit split rests entirely on a single, 27-year-old decision, *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994). But *Michel* is not on point. That case did not involve a challenge to a procedural rule regarding when and how a qualified voter could return her ballot. At issue in *Michel* was whether certain persons were qualified members of the electorate at all. *Michel* held that congressmen and private voters had standing to challenge a rule allowing territorial representatives to vote in the House of Representatives. *Id.* at 625-68. In other words, the issue in *Michel* was whether each qualified voter has a concrete interest—as part of the right of democratic self-determination—in excluding individuals who are not proper members of the relevant electorate and therefore ostensibly should not have any say in the polity's decision-making process. But regardless of whether *that* injury would suffice to confer standing, it is simply not implicated by this case. Petitioners' claims are not about *who* may vote. Rather, Petitioners challenge the validity of certain rules prescribing *when and how* the votes of qualified electors may be received, rules that apply to every voter in the same way.[13] Whatever the merits of *Michel*'s standing holding, it does not contradict the numerous decisions—by the Third Circuit, Eleventh Circuit, and multiple district courts—holding that *petitioners'* asserted interest is insufficient to confer standing.

[13] For this reason, petitioners are wrong to assert that the Third Circuit's holding controls whether they would have standing to challenge a "unilateral" decision by "elected State bureaucrats" to "extend voting rights to 16-year-olds or non-citizens." Petition at 7.

Nor did the Third Circuit err in rejecting the voter-petitioners' second standing theory, which alleges an equal protection injury in the form of "arbitrary and disparate treatment." Specifically, petitioners assert that the Order created a preferred class of voters because the presumption of timely mailing allegedly allowed for the *possibility* that mail-in ballots cast after election day *could* be counted. Notably, petitioners fail to identify any decision recognizing the validity of such a standing theory. Indeed, the Eleventh Circuit's *Wood* decision, which this Court recently declined to review, rejected the same theory, once again agreeing with the Third Circuit. *See* 981 F.3d at 1315-16.

As the Third Circuit recognized, the presumption of timely mailing did not prefer or disfavor any class of persons. The presumption applied only to mail-in voting because it addressed a threat of disenfranchisement that is unique to mail-in voting—the risk that the USPS will not legibly postmark a particular ballot. Anyone may choose to vote by mail, in which case they enjoy the presumption of timeliness.[14] And as noted above, the harm petitioners allege—that untimely cast mail-in votes might nonetheless be counted—does not affect petitioners, or in-person voters more

[14] Petitioners' strained attempt to analogize the Order to gerrymandering districts is unavailing. *See* Petition at 20. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), this Court recognized that voters living in gerrymandered districts have standing to assert an equal protection injury because state actors have intentionally attempted to dilute the voting influence of a specific group to which the voters belong. Here, by contrast, there is no allegation of intentional discrimination against a particular group. Further, petitioners have not alleged any burden on their ability to vote by mail. By contrast, there are many reasons why it may be severely burdensome, if not impossible, for a voter to change his residence.

generally, "differently than any other person." *Wood*, 981 F.3d at 1316. Further, the Order did not *authorize* mail-in voters to cast ballots later than in-person voters; all had to cast them by the close of the polls on election day.

At bottom, petitioners' complaint is that one of multiple voting methods equally available to everyone is allegedly more susceptible to the erroneous tabulation of late votes than another. Whatever the merits of that critique as a matter of election-administration policy, it does not state a cognizable equal protection injury. For one thing, petitioners' assertion that the presumption of timeliness will *actually* allow mail voters to cast untimely ballots and have them counted is fatally speculative—it rests on a chain of causal assumptions unsupported by any well-pled factual allegations, let alone evidence. App. 47-50. Merely pointing out that some ballots were, in fact, received during the extension period without legible postmarks, *see* Petition at 21-22, does nothing to show that any such ballots were cast after election day. And perhaps most fundamentally, petitioners' challenge to the presumption does not allege "discrimination or other intentionally unlawful conduct, or [any] burden on petitioners' own voting rights." App. 47.

IV. The petition does not present any substantial merits question.

Finally, the merits questions presented by the petition—which the Third Circuit did not reach—are also unworthy of this Court's review. Contrary to petitioners' arguments, neither the Elections Clause nor Electors Clause prevents state courts from reviewing election laws governing federal elections to ensure they

conform to the substantive requirements of state constitutions. As the Court has explained, "[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 elections in defiance of provisions of the State's constitution." *AIRC*, 576 U.S. at 817; *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("state constitutions can provide standards and guidance for state courts to apply" in reviewing congressional redistricting statutes enacted by state legislatures under Elections Clause); *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932) (finding "no suggestion" that the Elections Clause was intended to exempt state legislatures from complying with "conditions which attach to the making of state laws" under state constitutions).

This precedent makes clear that state legislatures are bound by both procedural *and* substantive provisions of their states' constitutions. This is so for at least two reasons. First, it is elemental that a state statute cannot trump the state constitution. *See AIRC*, 576 U.S. at 81; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803); *see also* The Federalist No. 78 (Alexander Hamilton). Second, although the Electors and Elections Clauses supply state legislatures with the power to regulate federal elections, those clauses by themselves do not create state legislatures; rather, state legislatures are creations of their own state constitutions. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("What is forbidden or required to be done by a state is forbidden or required of the legislative power under state

constitutions as they exist."); *see also* Pa. Const. art II, § 1 (vesting legislative power in the General Assembly). In other words, in authorizing state legislatures to regulate federal elections, the Elections and Electors Clauses take those legislatures as they find them—as constituted and bound by the state constitutions to which they owe their existence.

Here, the Pennsylvania Supreme Court unanimously held that the unique circumstances surrounding the 2020 general election required relief under the Free and Equal Elections Clause of the Pennsylvania Constitution. Under that court's precedent, that Clause requires that "elections [be] conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). The extension Order was fully consistent with that pre-existing body of state law. It in no way violated the Elections or Electors Clause.

Petitioners' claims under the Equal Protection Clause also fail as a matter of law. Unless a legal classification either burdens a fundamental right or targets a suspect class—as shown, the Order did neither—it need only bear a "'rational relation to some legitimate end'" to satisfy equal protection. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *accord Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). Here, petitioners contend that the Order violated equal protection because its provision for a three-day extension of the received-by deadline, as well as its presumption of timely

mailing for ballots lacking a legible postmark, applied only to mail-in ballots and not in-person voting.

But there was obviously a rational basis for that distinction. The issues the Order was designed to address—namely, the threat that, in the circumstances of the November 2020 election, the USPS's mail delivery standards would be incompatible with the statutory deadlines for mail-in voting, and that timely cast ballots would not receive a postmark—arose *only* in the context of mail-in voting. There is nothing arbitrary or irrational in the fact that different voting methods are subject to different procedures, so long as the different procedures are rationally related to the different nature of the methods. That was plainly the case here. *See, e.g.*, *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (requiring voters to present identification if they voted at polling places, but not if they voted by absentee ballot, did not violate Equal Protection Clause, as "[a]bsentee] voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. WIYGUL
Counsel of Record
MICHELE D. HANGLEY
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
rwiygul@hangley.com

Counsel for Respondent Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania

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