

No. 20-740

IN THE
Supreme Court of the United States

JIM BOGNET, ET AL.,

Petitioners,

v.

KATHY BOOCKVAR, 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 OF RESPONDENT ADAMS COUNTY
BOARD OF ELECTIONS IN OPPOSITION**

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INTRODUCTION

The seat of government for Adams County sits in the heart of Gettysburg, Pennsylvania, the site of one of the bloodiest battles of the U.S. Civil War. Residents of Adams County are reminded daily of the deadly consequences of a deeply divided nation. As the world watched the horrific January 6th attack on our nation's Capitol, Gettysburgians were once again reminded of the terrible 3-day battle in 1863 which pitted brother against brother and made the creeks of our small, unassuming town run red with blood. Today, however, the impetus for civil war is far less just, fueled by misinformation campaigns and anti-democratic attempts to seize power by the leadership of this Court's two sister branches of government.

In Pennsylvania, each of the sixty-seven (67) counties are responsible for conducting local, state, and federal elections. County boards of election and

county election officials are comprised of members of both political parties. Contrary to the suggestions of partisan politicians, elections in Pennsylvania are not conducted by the particular political party which happens to be in power at the time of an election. The Adams County Board of Elections consists of two Republicans and one Democrat who set aside partisan differences to ensure that every eligible voter in Adams County who wishes to exercise their constitutional right to vote are able to do so. Certainly, the exigencies created by the deadly coronavirus pandemic presented an extraordinary challenge for county election officials in 2020, and preparations for those challenges were made doubly difficult by a bevy of frivolous election litigation and hyper-politicization of the election process, including the politicization of the numerous election cases filed with this Court. In spite of those challenges, county election officials

oversaw a secure and transparent election, during which the constitutional voting rights of all county constituents were respected.

The General Election of 2020 is long finished, and Pennsylvanians turned out in record numbers to make their voices heard. County election officials around the state certified the 2020 election results to the Secretary of the Commonwealth, and are now focused on preparing for the next election cycle. In that next election cycle, the PA Supreme Court has not extended the mail-in ballot deadline *sua sponte*, nor has there been any litigation seeking to extend the ballot deadline in response to failures of the post office.

As a result, it is plain and obvious that the Petitioners do not wish merely to resolve (now moot) questions of law, but rather they wish for this Court

to serve as a political instrument to overturn or cast doubt on the results of a democratic election.

The Adams County Board of Elections, as a bipartisan body, did not wish to wade into the turbulent political waters of this past election any more than this Court likely wants to, and it therefore did not intend to weigh in on this (or other) litigation. In response to the January 13th, 2021, Order of this Court requiring the Board to respond to the Petition the Adams County Board of Elections presents the following arguments in opposition.

SUMMARY OF ARGUMENT

The petition for certiorari ought to be denied by this Honorable Court because the election is now concluded, and the results thereof have since been

certified by the Commonwealth of Pennsylvania and by Congress. With the presidential inauguration less than a week away, Petitioners' claims now moot and non-justiciable. Even if Petitioners were granted their requested relief, the outcome of the election would not change. Moreover, there is no indication that the confluence of unique challenges facing voters in the 2020 General Election will present themselves again in the future or that similar claims arising out of future elections are capable of evading judicial review.

The Court should further deny review of the Pennsylvania Supreme Court's exercise of jurisdiction to protect state constitutional rights, as it did so with the full authority granted to the Court by the General

Assembly , and did not issue an order which disparately impacted voters or diluted votes.

This Court should deny review of Petitioners' claims, as they lack both Article III standing and other standing necessary to assert such claims, and Petitioners are unable to show any injury caused by the alleged violations.

Finally, the Court should deny review of any claims that the lower courts misapplied this Court's ruling in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as granting Petitioners' requested TRO or preliminary injunction on the eve of an election would have caused

severe confusion and disruption amongst voters and election officials.

ARGUMENT

I. The Pennsylvania Election Results Have Now Been Certified By Congress, Thus Making This Case Moot And Non-Justiciable

The 2020 General Election has been decided by the voters and certified by Congress, and no relief sought by the Petitioners will alter that result. Article III limits the jurisdiction of the federal courts to actual “cases” or “controversies.” U.S. Const. art. III, sect. 2, cl. 1. “An actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.” *Trump v. New York*, 141 S.Ct. 530, 534 (2020) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013)). The

case-or-controversy requirement of Article III implicates two related justiciability doctrines:

First, a plaintiff must demonstrate standing, including “an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical.” (internal citations omitted). Second, the case must be “ripe”—not dependent on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” (internal citations omitted).

Trump v. New York, 141 S.Ct. at 535.

Here, no pending controversy exists and the case no longer remains ripe for review. Petitioners seek to overturn a September 17th, 2020, ruling by the Pennsylvania Supreme Court which extended the November 3rd, 2020 deadline for county election offices to receive mail-in ballots from the United States Post Office by three days or until November 6th, 2020 at 5pm. See *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). The PA Supreme Court extended the deadline in response to well-documented concerns

that the United States Postal Service was facing substantial delays due to the pandemic and reports that the Postmaster General had ordered the dismantling of large mail sorting devices around the country. *Id.* at 362. Though the General Assembly was well aware of these concerns, it failed to reach any consensus to legislatively counteract the deleterious impact of the post office delays (likely as a result of the political climate surrounding mail-in ballots). The 3-day extension ordered by the PA Supreme Court did *not* extend the federal deadline for casting presidential ballots under 2 U.S. Code Section 7. For seven weeks leading up to Election Day, voters casting mail-in ballots relied on the PA Supreme Court extension.

That said, the PA Supreme Court's September 17th Order was specifically limited to the November 3rd General Election in light of exigencies which threatened to disenfranchise voters who wished to

mail their ballots in accordance with the PA Election Code’s statutory deadlines. The Order did *not* apply to future elections. The Order was, by its own terms, confined to the “unprecedented” circumstances of the 2020 General Election. *Id.* at 371.

In the three months since Petitioners’ first filing in the Western District on October 22nd, 2020 (more than a month after the PA Supreme Court ruling, and two days after this Court declined to issue a stay to the ruling), the 2020 General Election concluded and the presidential results were certified by the Commonwealth of Pennsylvania¹ and by the

¹<https://www.media.pa.gov/pages/state-details.aspx?newsid=435#:~:text=Harris-burg%2C%20PA%20%E2%80%93%20Following%20certifications%20of,president%20of%20the%20United%20States> (accessed January 14th, 2021)

United States Congress.² Joseph R. Biden is set to be sworn in as the 46th President of the United States in less than a week. Even if this Court were to invalidate the roughly 10,000 votes received by PA election officials in the three days after Election Day³, it would not change the results of the Pennsylvania presidential election, as Former Vice President Biden garnered roughly 80,000 votes more than President Trump did *without* those 10,000 mail-in ballots.⁴ As such, this

²https://www.washingtonpost.com/politics/congress-resumes-work-to-confirm-biden-win-on-historic-day-marred-by-riot/2021/01/06/4c3729dc-5039-11eb-b96e-0e54447b23a1_story.html (accessed January 14th, 2021)

³ As a brief aside, the Board believes that the suggested remedy of disenfranchising thousands of voters in response to a dispute between two branches of government over proper scope of authority is patently undemocratic and indefensible.

⁴ <https://www.electionreturns.pa.gov> (accessed January 14th, 2021). Strangely, the PA Department of State is only reporting the ballots not received after Election Day on its website, despite the certification of *all* lawful votes received in Adams County by the Board of Elections. It is believed that the Secretary has misconstrued an order by Justice Alito requiring segregation of certain ballots to mean that such ballots may not be publicly reported or counted.

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

There also exists no reasonable expectation that the circumstances underlying this litigation are “capable of repetition yet evading review.” See *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (recognizing exception to mootness doctrine). The exception to mootness 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 Technologies, Inc. v. U.S.*, 136 S.Ct. 1969, 1976 (2016) (quoting *Kemna*, at 17). Neither prong is satisfied here.

First, the challenged action is not too short to be fully litigated prior to cessation or expiration. See *Kingdomware Technologies*, 136 S.Ct. at 1976. The

PA Supreme Court issued the Order on September 17th, a month and a half prior to the November 3rd Election Day. Prior to Petitioner's filing in the Western District Court on October 22nd, this Court had *already* considered and denied a petition to stay that PA Supreme Court's order just two days before on October 19th. Though Petitioners could have initiated litigation a month earlier, they instead chose to wait *more than a month* after the PA Supreme Court ruling (assumedly to see what happened with the other various pending litigation matters challenging the PA Supreme Court decision). Petitioners have not cited new circumstances or forged novel legal theories that might justify the month-long wait before filing, as sister litigation pending before this Court largely mirror the claims and facts found here.

Second, it is extremely unlikely that Petitioners (or anyone) will be subject to the same action by the

PA Supreme Court again. See *id.* The 2020 General Election presented a confluence of unique challenges that were unprecedented, including a once-in-a-century deadly pandemic, the dismantling of the postal service on the eve of an election, historic voter turnout, the failure (or refusal) of the General Assembly to act, and active disinformation campaigns waged against the mail-in voting system in Pennsylvania. It should be noted that the June 2nd, 2020 Primary Election, though conducted in the midst of the pandemic with the same mail-in voting scheme, did not suffer from the same issues. Simply put, the General Election presented a perfect storm that is unlikely to arise again. Moreover, as noted above, the PA Supreme Court ruling is no longer in effect, and there is no indication by Petitioners that a similar judicial remedy will be imposed in the future in response to an undeniably unique situation.

Therefore, no exception to mootness should be applied and the Petition should be denied.

II. The Pennsylvania Supreme Court Had Both Legislative and Constitutional Authority to Protect State Constitutional Voting Rights

The Elections and Electors Clauses do not prevent the Pennsylvania Supreme Court from reviewing state elections laws which implicate constitutional concerns, and the PA Supreme Court acted according to legislative authority. The Elections Clause provides simply that state legislatures will “prescribe” the “Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, sect. 4, cl. 1. The Electors Clause provides that “[e]ach State shall appoint, in such Manner as the Legislature

thereof may direct, a Number of Electors” for President.

U.S. Const. art. II, sect. 1, cl. 2.

In *Arizona State Legislature v. Arizona Independent Redistricting Com’n*, this Court held that “[n]othing in [the 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. 787, 817-818 (2015). This Court also held 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 v. Common Cause*, 139 S.Ct. 2484, 2507 (2019).

The Pennsylvania Constitution, adopted prior to its federal counterpart, provides explicit constitutional voting protections for its citizens. Pa. Const. Art. VII, sect. 1. It guarantees that all eligible citizens “shall

be entitled to vote at all elections subject, however, to such laws requiring and regulating registration of electors as the General Assembly may enact.” *Id.* Additionally, “elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” *Id.*, Art. I, sect. 5. Of course, the statute Petitioners complain has been usurped by the PA Supreme Court does *not* implicate laws “requiring and regulating registration of electors.” Rather, it directs Counties to only count votes which are received by the County Election Office by a certain date and time. The Pennsylvania Supreme Court “shall be reposed with the supreme judicial power of the Commonwealth” and possesses jurisdiction “as provided by law.” Pa. Const. Art. V, Sect. 2.

Indeed, despite the protests of certain vocal members of the General Assembly, it was the General Assembly itself that gave the PA Supreme Court the

jurisdiction to review its election laws and act to protect the constitutional voting rights of Pennsylvanians. Specifically, the General Assembly imbued the PA Supreme Court with the “extraordinary jurisdiction” to assume plenary review over matters of public importance at any stage of litigation and “enter a final order or otherwise cause right and justice to be done.” 42 Pa.C.S. sect. 726. The Election Code does not provide any guidance for counties to deal with natural disasters. However, the Code specifically grants the authority of lower courts to “decide such other matters pertaining to the election as may be necessary to carry out the intent of this act.” 25 P.S. sect. 3046. This provision, as noted by the PA Supreme Court, has historically been interpreted to grant jurisdiction to the state courts in matters in which emergency situations threaten to disenfranchise voters. *Pennsylvania Democratic Party v.*

Boockvar, at 370 (citing *In re General Election-1985*, 531 A.2d 83 (Pa. Cmwlth. 1987)).

Contrary to the suggestion of Petitioners, the PA Supreme Court did not “usurp” the power of the state legislature, see Petition, pg. 24, instead, it acted in full accordance with the power delegated to it by the General Assembly through the Pennsylvania Constitution, the statutes related to the jurisdiction of the state judiciary, and the Election Code itself.

A. The Pennsylvania Supreme Court’s Order Was Not Arbitrary And Did Not Violate The Equal Protection Clause.

For the sake of brevity, the Board joins and adopts the position and reasoning of the 3rd Circuit Court of Appeals with regard to Petitioner’s Equal Protection Clause claims. See *Bognet v. Secretary*

Commonwealth of Pennsylvania, 980 F.3d 336 (3d. Cir. 2020).

The Board would additionally note, however, that the PA Supreme Court order was not “arbitrary” in any sense, as Petitioners claim. See Petition, pg. 28. The PA Supreme Court established a 3-day extension as the result of a number of specifically-stated considerations. See *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d at 362-269. The Secretary had received a letter from the General Counsel of the U.S. Postal Service that voters should mail completed ballots at least a week before Election Day due to the slow-downs faced by USPS. *Id.* at 364. However, due to the statutory deadline for applying for mail-in ballots (October 27th, 2020), many voters who timely applied for mail-in ballots could not possibly receive a ballot in time to send it back a week before Election Day. *Id.* at 365. In the June Primary alone, Delaware County mailed

thousands of ballots *on the night of* the primary election, thus making receipt and return impossible. *Id.* at 364. It was estimated that the number of mail-in applicants would double for the General Election. *Id.* at 364, 370. Thus, though Petitioners stress that they voted in-person and “*on time*” (as if to suggest that voters who chose the mail-in voting option were irresponsible by comparison), see Petition, pg. 28, the fact is that mail-in voters who in good faith fully complied with the Election Code’s mandates were wholly at the mercy of an unpredictable postal service for both receipt and submission of their ballots during a global crisis. See generally, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d at 362-269. Recognizing this, the PA Supreme Court accepted the recommendation of the Secretary to extend the deadline for ballots sent by Election Day (i.e., “*on time*”), but nevertheless received late due to delays in the postal service. This equitable relief

crafted by the PA Supreme Court ensured the equal treatment of mail-in voters as in-person voters; namely, that their votes would be counted if properly cast by the federal Election Day. As the state’s highest court noted, “this extension of the received-by deadline protects voters’ rights while being least at variance with Pennsylvania’s permanent election calendar, which we respect and do not alter lightly, even temporarily.” *Id.* at 372.

It is wholly disingenuous for Petitioners to argue that other votes are somehow “diluted” by the counting of votes cast by Election Day but received within the 3-day extension period, but in the same breath argue that this Court should disenfranchise thousands of good-faith voters whose only sin was to rely on the wisdom of the highest state court and the efficiency of the federal postal service. The Board therefore asks the Court to deny review of the Equal Protection claims.

III. Petitioners Do Not Have Standing

For the sake of brevity, the Board joins and adopts the position and reasoning of the 3rd Circuit Court of Appeals with regard to Petitioner's standing claims. See *Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336 (3d. Cir. 2020).

IV. Lower Courts Did Not Misinterpret *Purcell* When Denying Petitioner's Request For A TRO And Preliminary Injunction A Week Before Election Day

For the sake of brevity, the Board joins and adopts the position and reasoning of the 3rd Circuit Court of Appeals with regard to Petitioner's claims

relating to *Purcell v. Gonzalez*, 549 U.S. 1 (2006). See *Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336 (3d. Cir. 2020).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition be denied.

Respectfully submitted,



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