

No. 20-740

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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JIM BOGNET, ET AL.,  
Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF THE  
COMMONWEALTH OF PENNSYLVANIA, ET AL.,  
Respondents.

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

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**BRIEF IN OPPOSITION OF  
RESPONDENT, UNION COUNTY BOARD OF ELECTIONS**

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## INTRODUCTION

The 2020 General Election presented unprecedented challenges for state election officials in the face of the COVID-19 pandemic. The Commonwealth of Pennsylvania was no exception. The logistics concerning absentee or mail-in ballots<sup>1</sup> was a particular concern in Pennsylvania.

In 2019, prior to the pandemic, the General Assembly passed Act 77, which, *inter alia*, allowed for “no-excuse” absentee voting in Pennsylvania whereby all eligible voters in Pennsylvania may vote by mail without first establishing their absence from their voting district. 25 Pa. Stat. §§ 3150.11-3150.17. Pursuant to Act 77, in order to be counted “a completed absentee [or mail-in] ballot must be received in the office of the county board of elections

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<sup>1</sup> Absentee ballots and mail-in ballots are hereinafter collectively referred to as “mail-in ballots.”

no later than eight o'clock P.M. on the day of the primary or election." *Id.* § 3146.6(c).

Given the multitude of disruptions in daily life caused by the COVID-19 pandemic, including mail-delivery delays, it became evident that the United States Postal Service ("USPS") would not be able to timely process and deliver mail-in ballots in the time frame proscribed by Act 77.<sup>2</sup> Thus, Pennsylvanians were faced with the very real possibility that lawfully cast mail-in ballots would not be counted through no fault of individual voters.

In light of this dilemma, the Pennsylvania Supreme Court was asked to fashion relief in order to protect individual voters and ensure that lawfully

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<sup>2</sup> The logistical challenges facing the USPS were confirmed in a letter from USPS General Counsel to Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, "which stated that Pennsylvania's ballot deadlines were 'incongruous with the Postal Service's delivery standards.'" *Bognet v. Sec'y Pennsylvania*, 980 F.3d 336, 344 (3d Cir. 2020).

cast mail-in ballots were counted.<sup>3</sup> On September 17, 2020, the Pennsylvania Supreme Court established a three-day extension of the ballot-receipt deadline for the November 2020 General Election. *See, Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020). Thus, “[a]ll ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted (“Deadline Extension”).” *Bognet*, 980 F.3d at 344-45. Additionally, “if the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless a preponderance of the evidence demonstrates that it was mailed after Election Day

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<sup>3</sup> As this Court is aware, numerous other lawsuits were filed in both state and federal courts as the issue of absentee or mail-in ballots became hyper-politicized.

(“Presumption of Timeliness”).” *Id.* at 345. This judicially created Deadline Extension and Presumption of Timeliness forms the basis of Petitioners’ underlying Complaint and Petition for Writ of Certiorari before this Court.

For the reasons that follow, Respondent Union County Board of Elections requests that this Honorable Court deny the Petition for Writ of Certiorari.

### ARGUMENT

#### **I. Petitioners’ Case Is Moot As The November 2020 General Election Has Concluded, The Results Have Been Certified, and There Are No Remaining Justiciable Issues Before This Court**

The Pennsylvania Supreme Court’s September 17<sup>th</sup> Order, which created the narrowly-tailored Deadline Extension and corresponding Presumption of Timeliness, was a one-time

emergency extension of the deadlines imposed by Act 77 in direct response to the delays and disruptions caused by the COVID-19 pandemic. *See, Pa. Democratic Party v. Boockvar*, 238 A.3d at 371 (noting that the statutory deadline for mail-in ballots “may be feasible under normal conditions, [but such deadlines] will unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters”).

The 2020 General Election has since concluded and both Congress and the Commonwealth of Pennsylvania have certified the election results. No relief sought by Petitioners will alter the election results. Moreover, the Deadline Extension and Presumption of Timeliness is no longer of any import to Pennsylvania voters and will



not be incorporated in, or have any effect on, future elections. Accordingly, the arguments and issues set forth in the Petition before this Court are moot.

Article III restricts the power of federal courts to “cases” or “controversies.” U.S. Const. art. III, sect. 2, cl.1. “Federal courts may not ‘decide questions that cannot affect the rights of litigants in the case before them’ or give ‘opinions advising what the law would be upon a hypothetical state of facts.’” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Thus, in order “to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Id.*

“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, 535 (2020); *see also*, *U.S. v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curium) (“It is a basic principle of Article III that a justiciable case or controversy must remain ‘extant at all stages of review’”). Therefore, “it is not enough that a dispute was very much alive when suit was filed; the parties must continue to have a personal stake in the ultimate disposition of the lawsuit.” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) (internal citations omitted).

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.” 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.”

*Trump v. New York*, 141 S. Ct. at 535 (internal citations omitted).

Here, Petitioners seek to overturn the Pennsylvania Supreme Court’s September 17, 2020 ruling regarding the Deadline Extension and corresponding Presumption of Timeliness. However, as mentioned above, the 2020 General Election has concluded and the winners have been determined by margins that far exceed the number of disputed ballots. Thus, the case is no longer ripe and Petitioners’ arguments are moot. “[W]hen the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” there is no “case” or “controversy” and the suit becomes moot. *Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

Moreover, the Pennsylvania Supreme Court specifically limited its September 17<sup>th</sup> Order to the extraordinary circumstances surrounding the 2020 General Election. *See, Pa. Democratic Party v. Boockvar*, 238 A.3d at 371 (PA Supreme Court stating: “we act now to allow the Secretary, the county election boards, and most importantly, the voters in Pennsylvania to have clarity as to the timeline for the 2020 General Election mail-in ballot process”). The Order did not apply to future elections and Petitioners have not alleged that a similar judicial remedy will be imposed on future elections.

Therefore, the issues presented in the Petition for Writ of Certiorari are no longer “live” and the Petitioners have no legally cognizable interest in this matter. Accordingly, there is no

justiciable issue pending before this Court and Petitioners' case is moot.<sup>4</sup>

## **II. Petitioners Do Not Have Standing**

For the sake of brevity, Respondent, Union County Board of Elections, joins and adopts the position and reasoning of the Third Circuit Court of Appeals with regard to Petitioners' standing claims. *See, Bognet v. Sec'y Pennsylvania*, 980 F.3d 336 (3d Cir. 2020).

## **III. The Third Circuit and District Court Correctly Interpreted Purcell**

For the sake of brevity, Respondent, Union County Board of Elections, joins and adopts the position and reasoning of the Third Circuit Court of

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<sup>4</sup> Petitioners' claims are further rendered moot by virtue of this Court's denials of Petitions for Writs of Certiorari filed pursuant to ancillary litigation which similarly challenged the Pennsylvania Supreme Court's September 17, 2020 Order. *See, Republican Party of Pa. v. Degraffenreid*, 2021 U.S. LEXIS 1197, *cert denied* (February 22, 2021).

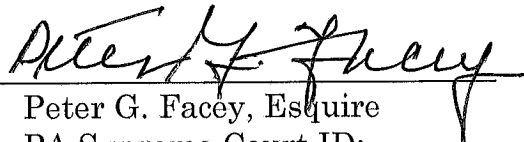
Appeals with respect to Petitioners' claims regarding the applicability and interpretation of *Purcell v. Gonzalez*, 549 U.S. 1 (2006). See, *Bognet v. Sec'y Pennsylvania*, 980 F.3d 336 (3d Cir. 2020).

**CONCLUSION**

For the foregoing reasons, Respondent, Union County Board of Elections, requests this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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