No. 20-3214

In the
United States Court of Appeals
for the Third Circuit

JIM BOGNET, *et al.*,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, *et al.*,

Defendants-Appellees,

DEMOCRATIC NATIONAL COMMITTEE

Intervenor-Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania
Case No. 3:20-CV-215
The Honorable Kim R. Gibson

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION[1]

This case is about the rules of the road for the federal election. Exercising its authority under the Elections Clause, the General Assembly set those rules; the Pennsylvania Supreme Court changed them on the eve of the election. Appellees and Intervenor Appellee say the Pennsylvania Supreme Court could lawfully make these changes; the text of the United States Constitution says otherwise.

Ignoring the clear mandate of the Constitution that provides that only the "Legislature[s]" of the several states may prescribe the time, place, and manner of federal elections for Representatives and Senators, or set the manner of choosing Presidential Electors, the Pennsylvania Supreme Court created by judicial fiat a deadline extension for the receipt of mail-in ballots. Further, contrary to the single, uniform, federal Election Day established by Congress, the Pennsylvania Supreme Court created a Presumption of Timeliness that allows voting *after* Election Day. These two policies are not only plainly unconstitutional violations of the structural delegation of power in the Constitution but also violate the Equal Protection Clause in two distinct ways: the new policies allow unlawfully cast votes to be counted,

[1] Based on the information available to us at this time, the impact of late-arriving ballots on the election of Pennsylvania's electors and on Bognet's race is not clear, in part because the time for those ballots to arrive under the Pennsylvania Supreme Court's ruling has not yet expired. We will continue monitoring events as they occur and of course will alert the Court if in our view those events render this appeal moot.

thereby diluting the vote of those who cast their ballots lawfully; and the new policy results in arbitrary and disparate treatment of voters.

These injuries and constitutional violations did not have to occur. The Pennsylvania Supreme Court could have abided by the allocation of power in the U.S. Constitution and left these decisions to the General Assembly. But instead the Pennsylvania Supreme Court made a policy judgment that the rules needed to change. Why did the Pennsylvania Supreme Court choose a 3-day extension? Or as Justice Gorsuch asked in a recent Supreme Court opinion, why would a court tack on "6 days onto the State's election deadline[?]" *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 2020 WL 6275871, at *2 (U.S. Oct. 26, 2020) (Gorsuch, J. concurring in denial of application to vacate stay). "[W]hat about . . . 7 or 10[?]" *Id.* The answers to these questions cannot be provided by the Pennsylvania Supreme Court because the Constitution does not allow the Pennsylvania Supreme Court to make these inherently legislative judgments about the procedures that are to be used in a federal election. *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 WL 6304626, at *2 (U.S. Oct. 28, 2020) (Statement of Alito, J.) ("The provisions of the Federal Constitution confer[] on state legislatures, not state courts, the authority to make rules governing federal elections."). Instead, the decision on "how-much-is enough" has been placed by the Constitution in the hands of the "state legislatures—not federal judges, not state

judges, not state governors, not other state officials." *Democratic Nat'l Comm.*, 2020 WL 6275871 at *2 (Gorsuch, J., concurring in denial of application to vacate stay). Nevertheless, the Pennsylvania Supreme Court did not abide by the Constitution's command.

For the reasons set forth below, Plaintiffs are entitled to a preliminary injunction to remedy these unconstitutional violations.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). This appeal is from the denial of Plaintiffs' motion for preliminary injunction. The District Court entered its order on October 28, 2020, Plaintiffs filed the notice of appeal on October 29, 2020, and this appeal is therefore timely.

STATEMENT OF ISSUES

1. Whether Appellants have standing to bring their Elections Clause, Presidential Electors Clause, Election Day, Equal Protection Clause claims. *See* App. 28–35; Plaintiffs' Reply Br., Doc. 69-1, at 3–9; Def. Resp. Br., Doc. 59, at 6–12; Intervenor Def. Resp. Br., Doc. 64, at 5–9.

2. Whether the Pennsylvania Supreme Court usurped the Pennsylvania General Assembly's plenary authority to "direct [the] Manner" for appointing electors for President and Vice President, U.S. CONST. art. II, § 1, cl. 2, and to

prescribe "[t]he Times, Places, and Manner" for congressional elections, *id.* art. I, § 4, cl. 1. *See* Plaintiffs' Br., Doc. 6, at 7–11; Def. Resp. Br., Doc. 59, at 23–25; Intervenor Def. Resp. Br., Doc. 64, at 9–13.

3. Whether the Pennsylvania Supreme Court's policy violates Appellants' right to have their votes counted without dilution and non-arbitrarily under the Equal Protection Clause, U.S. Const. am. XIV. *See* App. 35–37; Plaintiffs' Br., Doc. 6, at 18–22; Def. Resp. Br., Doc. 59, at 25–28; Intervenor Def. Resp. Br., Doc. 64, at 16–22.

4. Whether the Pennsylvania Supreme Court's Presumption of Timeliness is preempted by federal statutes that establish a single, uniform, federal Election Day. *See* Plaintiffs' Br., Doc. 6, at 11–18; Def. Resp. Br., Doc. 59, at 21–23; Intervenor Def. Resp. Br., Doc. 64, at 13–16.

5. Whether Appellants are entitled to an injunction notwithstanding the principle articulated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). *See* App. 37–38; Plaintiffs' Reply Br., Doc. 69-1, at 19–20; Def. Resp. Br., Doc. 59, at 17–19; Intervenor Def. Resp. Br., Doc. 64, at 23–24.

STATEMENT OF RELATED CASES

This case has not been before this Court previously. Plaintiffs are aware that a writ of certiorari is currently pending before the Supreme Court in *Republican Party of Pa. v. Kathy Boockvar, Secretary of Pennsylvania, et al.*, No. 20–542 (U.S.).

While that case presents similar issues, Petitioners in *Republican Party of Pennsylvania* do not raise the Equal Protection injuries of Appellants.

STATEMENT OF THE CASE AND FACTS

I. Pennsylvania General Assembly Establishes Multiple Ways to Vote and Clear Deadlines

In the fall of 2019, the Pennsylvania General Assembly enacted Act 77, a bipartisan reform of Pennsylvania's Election Code. *See* 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421); *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *10 (W.D. Pa. Oct. 10, 2020). Among other things, Act 77 established that all Pennsylvania voters could vote by mail with "no-excuse." Thus, following Act 77, Pennsylvanians could vote in person, vote by absentee ballot (if eligible), and vote by mail-in ballot.[2]

In addition to authorizing mail-in ballots, the Pennsylvania General Assembly set a clear receipt deadline for both mail-in ballots and civilian absentee ballots.[3] Act

[2] Civilian absentee ballots can only be cast if a voter meets "certain criteria . . . such as . . . the voter [will] be away from the election district on election day." *Donald J. Trump for President, Inc.*, 2020 WL 5997680 at *10. By contrast, mail-in ballots after Act 77 require "no excuse," any otherwise qualified voter can request and cast a mail-in ballot. *Id.* Unless otherwise noted, this Brief refers to civilian absentee and mail-in ballots collectively as "mail-in ballots."

[3] The only statutory exception to the General Assembly's deadline is that a valid "military-overseas ballot" will "be counted if it is delivered by 5 p.m. on the seventh day following the election." 25 P.S. § 3511(a) (articulating deadlines to comply with the congressionally-enacted Federal Uniformed and Overseas Citizens Absentee Voting Act); *see also* 52 U.S.C. §§ 20301–20311. If a military-overseas ballot lacks a postmark, a late postmark, or unreadable postmark, the ballot will only count if the

77 established that: a completed ballot "must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 2019 Pa. Legis. Serv. Act 2019-77; 25 P.S. §§ 3146.6(c), 3150.16(c). The General Assembly indicated how important this deadline was to the entire mail-in balloting regime with a clear non-severability clause. Section 11 of Act 77 provides that the deadline is "nonseverable. If any provision of th[e] act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." 2019 Pa. Legis. Serv. Act 2019-77. In the wake of the COVID-19 pandemic, the General Assembly once again revisited Pennsylvania's election laws. But it did not change the deadlines. *See* Pa. Leg. Serv. Act 2020–12.

II. Pennsylvania Supreme Court Creates Its Own New Deadlines

The Pennsylvania Supreme Court rewrote the election deadlines established by the Pennsylvania General Assembly in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020). The case originated after the "Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates, some in their official capacity and/or as private citizens" sought declaratory and injunctive relief in the Pennsylvania Commonwealth Court. *Id.* at *1. Secretary of the Commonwealth Kathy Boockvar

"voter has declared under penalty of perjury that the ballot was timely submitted." 25 P.S. § 3511(b).

petitioned for the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction and review the issues in the case immediately. After accepting jurisdiction, the Pennsylvania Supreme Court had two holdings relevant here.

First, the Pennsylvania Supreme Court extended the receipt deadline for mail-in ballots. *Id.* at *31. Although noting that "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots," the current pandemic required a new judicially set deadline. *Id.* at *16. Accordingly, instead of the deadline set by the General Assembly of 8:00 p.m. on Election Day, mail-in ballots would now be accepted if they were sent by Election Day and received by 5:00pm on Friday, November 6, 2020. *Compare Pa. Democratic Party*, 2020 WL 5554644, at *31, *with* 25 P.S. §§ 3150.16(c), 3146.6(c).

Second, the Pennsylvania Supreme Court created a Presumption of Timeliness for mail-in ballots that arrive during the three-day extension. When a mail-in ballot otherwise lacking a postmark or other proof of timely mailing arrives, it will be *presumed* to have been cast before Election Day "unless a preponderance of the evidence demonstrates" otherwise. *Id.* Although the plaintiffs who filed suit did not request this presumption, Secretary Boockvar "specifically recommend[ed]" its creation. *Id.* at *13 n. 20.

On appeal, the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's decision by an equally divided court. *Scarnati, et al., v. Boockvar,*

et al., No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020) (mem.); *Republican Party of Pa. v. Boockvar, et al.*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020) (mem). That decision is not "an authority for the determination of other cases either in [the Supreme Court] or in inferior courts." *Hertz v. Woodman*, 218 U.S. 205, 214 (1910); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008). Meanwhile, the petition for certiorari remains pending as the Supreme Court declined to expedite review. *See Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020) (mem.). Three Justices suggested that the Court may take up the issue on an expedited basis after the election. *See id.* at *2 (Statement of Alito, J.).

As of today at noon, the Pennsylvania Department of State's website (https://www.votespa.com/About-Elections/Pages/Election-Results.aspx) indicates that approximately 2,630,770 mail in ballets have been cast and received. From publicly available information, Pennsylvania does not appear to have begun counting those ballots received *after* the General Assembly's enacted deadline. As of today at noon, in the election for Pennsylvania's Eighth Congressional District, the Department of State's online data indicates that approximately 336,415 votes have been cast, including approximately 130,342 mail-in ballots. Currently, 174,032 votes have been cast for Matthew Cartwright, while Jim Bognet trails by approximately 11,649 votes.

III. District Court Proceedings

Appellants are Jim Bognet, a candidate for Congress in Pennsylvania's Eighth Congressional District, and four individual registered voters who planned to vote (and now have voted) in person on election day in Somerset County, Pennsylvania—Donald K. Miller, Debra Miller, Alan Clark, and Jennifer Clark. Appellants brought this suit in the Western District of Pennsylvania, seeking relief for the imminent injuries caused by the Pennsylvania Supreme Court's decision and Appellees' implementation of it. Specially, Appellants alleged that (1) the Pennsylvania Supreme Court's deadline extension violates the Elections Clause and Presidential Electors Clause; (2) the Pennsylvania Supreme Court's presumption of timeliness violates the single, uniform, federal Election Day established by Congress, and (3) the Pennsylvania Supreme Court's policy violates the Equal Protection rights of the Millers and Clarks by (a) diluting their votes unconstitutionally and (b) treating their votes in an arbitrary and disparate manner by creating a preferred class of voters. Appellants sought a preliminary injunction to halt Appellees' imminent unconstitutional actions. After hearing oral argument on October 27, 2020, the district court issued its decision on October 28, 2020 denying Appellants' request for a preliminary injunction.

In its decision, the District Court concluded that Appellants "established a likelihood of success on their claim that the counting of ballots received after

Election Day . . . without a postmark or with an illegible postmark creates a preferred class of voters and violates their rights under the Equal Protection Clause. The Court is of the opinion that this violation of the Equal Protection Clause should be enjoined." App. 27. But the District Court stayed its hand because of the Supreme Court's *Purcell* principle. App. 37–38. As for Appellants' other claims, the District Court found the Appellants lacked standing. App. 28–32. This appeal follows.

SUMMARY OF ARGUMENT

In addition to having standing to contest the arbitrary and disparate treatment of their votes, Appellants have standing to bring their claims regarding the Elections Clause, Presidential Electors Clause, and vote dilution. Appellant Bognet is a federal candidate, seeking election to the House of Representatives. His election is thus the very activity that the Elections Clause governs. He has an acute interest as a candidate to ensure the rules regulating his race are constitutionally established. Further, Appellants Donald K. Miller, Debra Miller, Alan Clark, and Jennifer Clark seek to vindicate their right to vote, which is "individual and personal in nature." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Far from a generalized grievance, the harm to their votes—both by dilution and arbitrary treatment—is concrete injury impacting them as individuals. As the Supreme Court discussed in *Federal Election Commission v. Akins*, 524 U.S. 11, 34–35 (1998), Appellants' injury, though widespread, is nevertheless sufficient for standing. Additionally, the Elections

Clause and the Presidential Electors Clause are structural provisions of the Constitution that "allocate[] power within government." *Bond v. United States*, 564 U.S. 211, 222 (2011). Thus, in addition to Bognet, the Millers and Clarks have "a direct interest" in challenging Appellees' implementation of the Pennsylvania Supreme Court's revisions to Pennsylvania election law.

The merits of Appellants' claims are controlled by the plain text of the Constitution. In the Elections Clause, the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1. In the Presidential Electors Clause, the Constitution mandates that "[e]ach state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2. These two provisions thus give primacy to the state legislatures to set the rules for federal elections.

Acting under its exclusive authority, the Pennsylvania General Assembly established a clear deadline for the receipt of mail-in ballots: 8:00 p.m. on Election Day. The Pennsylvania Supreme Court—which is not the Legislature or endowed with legislative authority by the Pennsylvania Constitution—extended that deadline

by 3 days and created a presumption that non-postmarked ballots are timely (the Presumption of Timeliness). The Pennsylvania Supreme Court's announced policies, in particular the 3-day deadline extension, violate the Elections Clause and the Presidential Electors Clause because the General Assembly did not enact those changes. The Constitution does not countenance changing federal election regulations by judicial fiat. Appellees should be enjoined from implementing these changes that violate the Elections Clause and Presidential Electors Clause.

The Pennsylvania Supreme Court's revisions to the Commonwealth's election law further violate the Equal Protection Clause in two distinct ways. First, by mandating the counting of votes that would otherwise be unlawful under the deadline enacted by the General Assembly, the new policies allow unlawfully cast votes to be counted, thus diluting the votes of those who cast their ballots lawfully as Appellants intend to do. *See Reynolds v. Sims*, 377 U.S. 533, 561 (1964). "[T]he number of" unlawful ballots cast "whether in greater or less degree is immaterial." *Anderson v. United States*, 417 U.S. 211, 226 (1974). "[N]o matter how small or great" the number of unlawful votes, the counting of those votes "dilutes the influence of honest votes in an election." *Id.*

Second, the Pennsylvania Supreme Court's policies result in arbitrary and disparate treatment of voters like Appellants by creating a "preferred class of voters," *Gray v. Sanders*, 372 U.S. 368, 379 (1963), because those who cast mail-in

ballots did not need to abide by the General Assembly's Election Day deadline and potentially could even vote after Election Day. Thus, Appellees should be enjoined from implementing these changes that violate the Equal Protection Clause.

What is more, the Pennsylvania Supreme Court's Presumption of Timeliness will allow votes that are cast *after* Election Day to count. But Congress established a single, uniform, federal Election Day on November 3, 2020. Since Congress has "mandate[d] holding all elections for Congress and the Presidency on a single day throughout the Union," the Pennsylvania Supreme Court's presumption—allowing voting *after* Election Day—is contrary to federal law. *Foster v. Love*, 522 U.S. 67, 70 (1997). Appellees should be enjoined from implementing this presumption.

But for a misapplication of *Purcell*, the District Court would have granted Appellants' preliminary injunction in part. But the principle articulated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), should not stay the hand of this Court. First, this Court would not be upsetting the status quo by issuing relief, but rather ensuring the status quo ante—the General Assembly's enactments—would be applied in this election. *See, e.g.*, *Carson v. Simon*, No. 20-3139, 2020 WL 6335967, *8 (8th Cir. Oct. 29, 2020). Further, given the highly publicized treatment of this case and Appellee Boockvar's own public statements urging voters to return their ballots by the General Assembly's deadline, an injunction in this case would not add to voter confusion but eliminate it. Finally, now that the election has taken place,

Purcell no longer applies as it is not possible to disrupt an election that has already happened.

STANDARD OF REVIEW

This Court reviews the denial of a motion for a preliminary injunction for an abuse of discretion but reviews the District Court's underlying legal conclusions de novo. *See, e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263, 268 (3d Cir. 2009). To obtain a preliminary injunction, a party must show:

> (1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.

Miller v. Mitchell, 598 F.3d 139, 147 (3d Cir. 2010).

ARGUMENT

I. Appellants Have a Substantial Likelihood of Prevailing on the Merits In This Appeal

A. Plaintiffs Have Standing

Contrary to the District Court's determination, Appellants have standing to bring their Elections Clause, Presidential Electors Clause, and *both* Equal Protection Clause claims, *see* App. 28–35.

1. The Millers and Clarks Have Standing

In assessing standing, this Court "separate[s]" the "standing inquiry from any assessment of the merits of the plaintiff's claim." *Cottrell v. Alcon Labs.*, 874 F.3d

154, 162 (3d Cir. 2017). For standing purposes this Court must thus assume that "plaintiffs ha[ve] stated valid legal claims." *Id*. In this context, application of this precedent means that the Court must assume that counting late ballots is unlawful.

The District Court held that the Millers and Clarks merely had alleged "generalized grievances" of vote dilution so that their injury was not sufficient for standing. *See* App. 31–32 (citing *Moore v. Circosta*, No. 1:20-CV-911, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020); *Martel v. Condos*, No. 5:20-CV-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020)). But decades of Supreme Court precedent hold otherwise; Appellants have adequately alleged an "invasion of a legally protected interest" that is both "concrete and particularized." *Gill v. Whitford*, 138 S. Ct. at 1929. "[A] person's right to vote is 'individual and personal in nature.'" *Id.* (quoting *Reynolds* 377 U.S. at 561). Accordingly, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Id.* (quoting *Baker v. Carr*, 369 U.S. 206 (1962)). Thus, the Supreme Court has found that plaintiffs have adequately "pleaded a particularized burden" when the allegation is that a state policy has "dilute[ed] the influence of their votes." *Id.* at 1931. Similarly, the Supreme Court has found such an injury when the right to vote has been "diluted by ballot-box stuffing." *Reynolds*, 377 U.S. at 555; see *also United States. v. Saylor*, 322 U.S. 385, 387 (1944); *Ex parte Siebold*, 100 U.S. 371,

388–89 (1879). "[N]o matter how small or great" the number of unlawful votes, "it dilutes the influence of honest votes in an election." *Anderson*, 417 U.S. at 226. That is a concrete injury. *See Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 581 (11th Cir. 1995) (per curiam) ("[C]ounting ballots that were not previously counted would dilute the votes of those voters who met the requirements of section 17–10–7 as well as those voters who actually went to the polls on election day."). Here, it is undisputed that Appellees will accept ballots that are late and therefore unlawful under the General Assembly's enactments. Since the acceptance of unlawful votes unconstitutionally dilutes Appellants' individual lawful votes, *Reynolds*, 377 U.S. at 555, Appellants have adequately alleged a particularized "injury in fact." *Gill*, 138 S. Ct. at 1929; *Roe*, 43 F.3d at 581; *cf. Anderson*, 417 U.S. at 226.

This is not a generalized grievance. The Supreme Court has carefully explained that an impermissible "generalized grievance" should not be confused with a widespread injury-in-fact that affects many people, such as the vote dilution suffered by Appellants. In *Federal Election Commission v. Akins*, 524 U.S. 11, 34–35 (1998), the Supreme Court explained that sometimes the term "generalized grievance" had been invoked imprecisely because the term "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the common concern for obedience to law." *Id.* at 23 (internal quotation marks omitted). It was this latter lack of concreteness

that most often led to widespread injuries being considered insufficient for standing. *Id*.; *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

In *Akins*, the Court explained that an injury does not become an impermissible "generalized grievance" merely because a plaintiff's injury is widespread. Instead, "generalized grievance" is most often a shorthand for a widespread injury that was too "abstract," *i.e.*, an injury with no concrete effects on particular plaintiffs. *Akins*, 524 U.S. at 23–24. To clear this up, the Supreme Court explained that widely shared injuries, when the harm is concrete, will give rise to an injury in fact, for instance in a mass tort. *Id*.; *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury."). The Supreme Court added that one "particularly obvious . . . hypothetical example" was "where large numbers of voters suffer interference with voting rights conferred by law." *Akins*, 524 U.S. at 24. Such an injury would not be a "generalized grievance" at all. *Id.* at 23; *see also Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994) ("That all voters in the states suffer this injury, along with the appellants, does not make it an 'abstract' one."). In any event, not all voters have standing; only those voters whose ballots arrive by 8pm on Election Day have standing. Those voters whose late ballots would be counted obviously do not have standing. Moreover, the Millers and Clarks are registered to vote in Somerset County, a rural county with a much lower rate of

requesting mail-in ballots than the majority of the state's more densely populated areas. *See* App. 45–51. For instance, Somerset County only had a mail-in ballot request rate of 20.1%. *See* Pa. Early Voting Statistics, U.S. Elections Project (Nov. 3, 2020), https://electproject.github.io/Early-Vote-2020G/PA.html. By contrast densely populated Montgomery County has a 46.3% request rate, Chester County has a 45.3% request rate, Allegheny County has a 45% request rate Bucks County has a 40.7% request rate, and Philadelphia County has a 39.7% request rate. *Id.* As a consequence, as rural voters the Millers' and Clarks' votes are being more diluted in favor of urban voters. *Cf. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (noting Democratic voters as a group were more likely to lack a photo ID and thus, even though the ID law applied generally, the Democratic Party had standing to represent its members who were affected), aff'd, 553 U.S. 181, 189 n.7 (2008).

While the District Court did not discuss it in its opinion, Appellees and Intervenor Appellee argued below that the Millers and Clarks lacked prudential standing to bring Elections Clause and Presidential Electors Clause claims because they are not agents of the Pennsylvania General Assembly.[4] *But see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (calling into

[4] It is worth noting that the concept of prudential standing is completely irrelevant with respect to the Millers' and Clarks' equal protection claims, which assert that their individual right to equal protection of the laws is being violated.

question the continued vitality of prudential standing doctrines). Yet Appellees and Intervenor Appellee began from the wrong premise. The Millers and Clarks do not seek to vindicate the rights of the General Assembly, instead they are seeking to vindicate the rights of themselves as individual voters. The Elections Clause and the Presidential Electors Clause are structural provisions of the Constitution that "allocate[] power within government," and the Millers and Clarks have "a direct interest" in challenging the Appellees' implementation in court. *See Bond* 564 U.S. at 222. Unlike the plaintiffs in *Lance v. Coffman*, 549 U.S. 437 (2007), the Millers and Clarks do not "only . . . allege" an abstract injury that "the Elections Clause . . . has not been followed," *id*. at 441–42; *see also Clinton v. City of New York*, 524 U.S. 417, 430 (1998) (finding standing to challenge line-item veto because the parties "alleged a 'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed'"); *I.N.S. v. Chadha*, 462 U.S. 919, 935 (1983) (rejecting argument that Chadha "lack[ed] standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests"). The additional votes that must be counted under these new rules dilute the votes of the Millers and Clarks as individuals, thus they have standing. See *Bond*, 564 U.S. at 222; *Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555; *Roe*, 43 F.3d at 581.

2. Appellant Bognet Has Standing.

The District Court similarly erred in finding that Bognet did not have standing to bring his Elections Clause claims. Assuming the validity of Appellants' claims—that unlawful votes will be counted in his election—Bognet has standing. First, Bognet ran his campaign on the understanding that all ballots would have to be delivered by 8:00pm on November 3, 2020. He and his campaign devoted resources to educating voters and staff on the rules related to mail-in ballots and the lawful deadlines. *See* App. 22–23. Now, as a consequence of the unlawful policy that Appellees will be implementing, he had to divert resources to educate voters and staff on the new rules. He has thus been directly injured. *Cf. Const. Party of Pa. v. Aichele*, 757 F.3d 347, 364 (3d Cir. 2014) ("[Plaintiffs] have produced sworn and uncontested declarations that their plans for seeking public office are directly impeded by the relevant provisions of the election code."). Moreover, as a candidate, Bognet has a "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *4 (8th Cir. Oct. 29, 2020). This injury is "certainly impending" because the Pennsylvania Supreme Court's policy "departs from the Legislature's mandates," *Id.* Thus, he has alleged an injury in fact. *Id.*

Further, Bognet, as a candidate for Congress, falls squarely within the ambit of the Elections Clause's protections. After all, the Elections Clause expressly

addresses the election of Representatives to the House of Representatives. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–805 (1995); *id.*, at 862 (Thomas, J., dissenting). And the violation of the Elections Clause alleged here directly injures Bognet in his campaign for office. Even the "threatened" reduction of competitiveness in an election is sufficient for standing purposes. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 & n.4 (5th Cir. 2006) (political party has standing because "threatened loss of [political] power is still a concrete and particularized injury sufficient for standing purposes"); *see also Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). Finally, the unlawful regulation of the election in which Bognet is a candidate stands as an impediment to his election. *Cf. Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (noting that "private" individuals have standing to assert a claim that their right to a public office has been impeded by unlawful means (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *Powell v. McCormack*, 395 U.S. 486 (1969)). Accordingly, Bognet has standing.[5]

[5] The District Court did not address Appellees' argument below that claim or issue preclusion barred Appellants' claims. And that was for good reason: it was meritless. Appellees argued that the Republican Party of Pennsylvania's lawsuits somehow precluded Appellants' claims here. But Alan Clark is not registered to vote as a Republican (he is unaffiliated), App. 53, so the preclusion argument fails on its own

B. The Pennsylvania Supreme Court's Policy Violates the Elections Clause and the Presidential Electors Clause

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." (emphasis added). U.S. CONST. art. I, § 4, cl. 1. The Constitution thus grants the state "Legislature" primacy in setting the rules for federal elections, subject to check only by Congress. *See, e.g.*, *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1884).

The Presidential Electors Clause similarly grants exclusive authority to the state legislature. It provides that "[e]ach state shall appoint, in such manner as the *Legislature* thereof may direct, a number of electors . . . ." U.S. CONST. art. II, § 1, cl. 2 (emphasis added). Thus, the Constitution establishes a state's "legislature" as the only state entity that may constitutionally regulate federal elections. *See, e.g.*,

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terms, which depended on the Republican Party's purported representation of its members' interests. Moreover, membership in a political party is not akin to one of the "limited circumstances" in which the Supreme Court has recognized preclusion based on prior litigation by a representative, such as "properly conducted class actions . . . and suits brought by trustees, guardians, and other fiduciaries," to be consistent with due process. *Taylor v. Sturgell*, 553 U.S. 880, 894–95 (2008). Consistent with the general rule in American law to disfavor nonparty preclusion, *id.* at 898, this Court should not take up Appellees' argument to dramatically expand preclusion law here.

Democratic Nat'l Comm., 2020 WL 6275871 at *2 (Gorsuch, J. concurring in denial of application to vacate stay).

The word "Legislature" in both the Elections Clause and the Presidential Electors Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, FEDERALIST NO. 27, at 174–175 (C. Rossiter ed. 1961) (Alexander Hamilton) (defining "the State legislatures" as "select bodies of men"); *Legislature*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (Noah Webster) ("[T]he body of men in a state or kingdom, invested with power to make and repeal laws."); *Legislature*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Samuel Johnson) ("The power that makes laws."). By specifying "Legislature" rather than State generally, the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch—or at most to the State's legislative *process*. *See Ariz. State Legislature v. Ariz. Indep. Redist. Comm'n*, 576 U.S. 787, 814 (2015); *id.* at 839 (Roberts, C.J., dissenting).[6]

[6] Appellants' claims in this case are entirely consistent with *Arizona Independent Redistricting Commission*. But to the extent this Court or the Supreme Court disagrees, Appellants preserve the argument that *Arizona Independent Redistricting Commission* was wrongly decided and should be overturned.

The Pennsylvania Constitution provides that the "legislative power of th[e] Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, § 1. "The legislative power is the power to make, alter and repeal laws." *Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008) (internal quotation marks omitted). This grant of power to the Pennsylvania General Assembly is exclusive—"the principle of separation of powers forbids any branch from exercising the functions exclusively committed to another branch." *Id.* Accordingly, Pennsylvania's "non-delegation doctrine forbids entities other than the legislative branch from exercising the 'legislative power,' as those entities do not have 'the power to make law.'" *Wolf v. Scarnati*, 233 A.3d 679, 704 (Pa. 2020); *see also Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them."). The exclusive grant of legislative power to the Pennsylvania General Assembly means that the U.S. Constitution authorizes *only* the General Assembly to regulate federal elections in Pennsylvania, at least in the absence of further regulation by Congress.

Appellees and Intervenor Appellee made two arguments below to refute the Constitution's clear command. Neither is availing. First, they argued that the General Assembly statutorily delegated its legislative authority to the Pennsylvania Supreme Court to rewrite the election laws in 25 P.S. § 3046. This statute gives power to the "court of common pleas" on "*the day* of each primary and election from 7 o'clock

A.M. until 10 o'clock P.M. and so long thereafter as it may appear that the process of said court will be necessary to secure a free, fair and correct computation and canvass of the votes cast at said election." (emphasis added). The statute further provides that "[d]uring *such* period," the court:

> shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise . . . ; shall issue process . . . ; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act.

Id. (emphasis added). Even assuming Appellees and Intervenor Appellee were right that a statute assigning authority to local Pennsylvania courts also applies to the Pennsylvania Supreme Court, their interpretation fails to account for the other clear textual limits in this 25 P.S. § 3046: namely, the statute limits that authority to "*the day*" and "*such period*" of the relevant election. *Id.* (emphasis added). That narrow interstitial grant of authority is a far cry from a global authority to rewrite election statutes.

The Pennsylvania Supreme Court claimed a "natural disaster" situation enlarged the scope of the remedies provided by the text—for instance, this authority had been previously found when "extreme weather" on Election Day caused massive "flooding along the Monongahela River," "loss of electricity, heat and water." *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987). But the current pandemic is different in kind from a natural disaster that unexpectedly disrupts the actual mechanics of voting, so that example is inapposite. *Cf. Moore v. Circosta*, No.

20A72, 2020 WL 6305036, at *2 (U.S. Oct. 28, 2020) (slip op. at 2) (Gorsuch, J., dissenting from denial of application for injunctive relief) ("Nor is COVID like the "natural disasters" the Board has pointed to in the past (e.g., hurricanes or power outages) that can disrupt the mechanics of running an election, especially given that the General Assembly has long known about the pandemic's challenges and expressly prepared for them").

In all events, it is of no moment that the Pennsylvania Supreme Court itself relied on a reading contrary to the plain text of the statute. The ordinary deference "to the decision of state courts on issues of state law" is not applicable in the extraordinary cases "in which the Constitution imposes a duty or confers a power on a particular branch of a State's government." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). In those situations—like the Elections Clause and Presidential Electors Clause—"the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id.* Accordingly, "'the clearly expressed intent of the legislature must prevail' and . . . a state court may not depart from the state election code enacted by the legislature." *See Democratic Nat'l Comm.*, 2020 WL 6275871 at *6 (Kavanaugh, J. concurring in denial of application to vacate stay) (quoting *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring)). Thus, since the plain text of 25 P.S. § 3046 does not show a

delegation of authority, this Court should not credit the Pennsylvania Supreme Court's contrary view.

Appellees and Intervenor Appellee also argued below that the Pennsylvania Constitution overrides the General Assembly's authority in its Free and Equal Elections Clause. *See* PA. CONST. art. I, § 5. To be sure, the Supreme Court has said that nothing 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." *Ariz. Ind. Redist. Comm'n*, 576 U.S. at 817–818. But Appellees and Intervenor Appellee misunderstand that dictum.

The general rule is that the power to regulate elections "conferred upon the legislatures of the states by the constitution of the United States . . . cannot be taken from them or modified by their state constitutions." *McPherson v. Blacker*, 146 U.S. 1, 35, (1892). In *Arizona Independent Redistricting Commission*, four justices agreed that this remained the rule and there could be no substantive limits set by state constitutions on state legislative authority when the legislature was regulating federal elections. As Chief Justice Roberts explained, "[i]n a conflict between [a State] Constitution and the Elections Clause, the State Constitution must give way." *Ariz. Indep. Redist. Comm'n*, 576 U.S. at 827 (Roberts, C.J., dissenting).

The *Arizona Independent Redistricting Commission* majority only disagreed to the extent that the majority recognized an exception for the people of the states to create alternative *procedures* for lawmaking by popular initiative in their state constitutions. While states have wide latitude in their state constitutions to specify which body is the "legislature" for purposes of exercising the power conferred by the Elections Clause, it does not follow that a state constitution may place substantive limits on *how* the power is exercised by whatever sort of "legislature" or legislative process the state constitution creates. The Arizona State Constitution vested legislative authority in the people through the citizen-led initiative power. 576 U.S. at 796 (noting Arizona Constitution's provision that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative."). The Court in *Arizona Independent Redistricting Commission* upheld that arrangement, but it did not have before it any question about whether Arizona's constitution could restrict the scope of authority and discretion conferred by the Elections Clause upon the state's "legislature," however defined.

Other Supreme Court precedent does not support Appellees' position either. In *State of Ohio ex rel. Davis v. Hildebrant*, 36 U.S. 708 (1916), the Ohio Constitution gave the people of Ohio a legislative veto "to approve or disapprove by popular vote any law enacted by the State's legislature." *Ariz. Indep. Redist. Comm'n*, 576 U.S. at 805. Since the referendum veto was in the state constitution as

"part of the legislative power," the Elections Clause did not "def[y]" it either. *Id.* The *procedure* for enacting statutes was allowed. And the Supreme Court also upheld the exercise of a Governor's veto in *Smiley v. Holm*, 285 U.S. 355, 367 (1932). Once again the challenged procedure was upheld because it was consistent with "the method which the State has prescribed for legislative enactments." *Id.* These procedural cases thus provide no support for the proposition that state courts can exercise freewheeling power under a state constitution to rewrite the substance of state statutes regulating the manner for holding federal elections.

In fact, as Justice Alito recently observed, "[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa.*, 2020 WL 6304626 at *2 (Statement of Alito, J.).

In sum, the Elections Clause and Presidential Electors Clause mean what they say and only authorize entities vested with legislative authority under state law to regulate federal elections. "This . . . does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis in original). Of course,

"[t]he framers of the Constitution might have adopted a different method" of prescribing the rules for Federal Elections, even one that included the courts or other state entities. *Hawke v. Smith*, 253 U.S. at 227 (1920). But it "is not the function of courts"—state or federal—"to alter the method which the Constitution has fixed." *Id*.

C. The Pennsylvania Supreme Court's Policy Violates the Equal Protection Clause

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). And counted means "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted). For instance, the Supreme Court has held that ballot-box stuffing is unconstitutionally dilutive of citizens' votes. *See id.* at 555; *United States. v. Saylor*, 322 U.S. at 387; *Ex parte Siebold*, 100 U.S. at 388–89. The number of unlawful ballots cast "whether in greater or less degree is immaterial." *Anderson*, 417 U.S. at 226. As the Court has explained, "[t]he deposit of forged ballots in the ballot boxes,

no matter how small or great their number, dilutes the influence of honest votes in an election." *Id.*

The Pennsylvania Supreme Court's policy that Appellees must follow ensures that votes that are invalid under the duly enacted laws of Congress and the General Assembly *will* be counted in two ways: (1) ballots that are received as late as 5:00 P.M. on November 6, 2020 are timely and (2) ballots cast *after* Election Day are treated presumptively as timely ballots. *See Pa. Democratic Party*, 2020 WL 5554644, at *40 (Mundy, J. dissenting) (noting the "substantial case" that the "presumption opens the door to illegally and untimely cast or mailed ballots being counted in, and tainting the results of, the imminent general election"). Since these ballots would have been late, and therefore would not have counted, Appellants' votes will be unconstitutionally diluted.

When the Appellees, acting consistent with the Pennsylvania Supreme Court's policy, purposely accept even a single ballot cast after Election Day or accept otherwise late ballots beyond the deadline set by the General Assembly, the Appellees have accepted votes that unconstitutionally dilute the weight of lawful voters like the Millers and Clarks.

Second, as the District Court correctly found, to ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*,

531 U.S. 98, 105 (2000); App. 32–36. "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros v. Bd. of Elections,* 249 F.3d 941, 954 (9th Cir. 2001). Judicial fiat cannot be used to create a "preferred class of voters." *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

Appellees will be administering Pennsylvania's election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. The General Assembly previously established clear rules for mail-in ballots. Ballots needed to be filled out on or before Election Day. And those ballots needed to be delivered to the County Election Boards by 8:00 P.M. The Pennsylvania Supreme Court arbitrarily changed these rules. In fact, the presumption created by the Pennsylvania Supreme Court—that allows for the casting of votes *after* Election Day—was not even relief requested by the plaintiffs initially seeking changes to Pennsylvania's voting laws. *See* Emergency Appl. for a Stay Pending the Filing and Disposition of a Pet. for a Writ of Cert., No. 20A53, at 7 (U.S. Sept. 28, 2020). Instead, Appellee Boockvar recommended it. *Pa. Democratic Party*, 2020 WL 5554644, at *13 n.20. The Pennsylvania Supreme Court created this presumption "[w]ithout further explanation." *Id*. at *40 (Mundy, J. dissenting). This arbitrary alteration of Pennsylvania's voting rules, when it does not appear that voting plaintiffs sought the specific relief granted, is exactly the type of "unusual" change

that the Supreme Court has held should not be made "on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206–07 (2020).

This arbitrary change disparately impacts a distinct set of voters. It impacts those voters like the Millers and Clarks, who lawfully vote in person and submit their ballots *on time*. It is easy to see this disparate effect. For one, it disparately impacts voters in rural areas such as Somerset that are not requesting mail-in ballots at as high a rate as other higher-density urban areas are. For another, Appellants will not be able to show up to their local voting place and vote in-person on November 5, 2020. Yet, as a consequence of the Pennsylvania Supreme Court's presumption, ballots that are cast *after* Election Day on November 5, 2020 will count. The Equal Protection Clause does not countenance this type of arbitrary and disparate treatment of voters by how they vote, especially since this relief was not even requested by plaintiffs seeking judicial relief, *Republican Nat'l Comm.*, 140 S. Ct. at 1207, and "[w]ithout further explanation." *Pa. Democratic Party*, 2020 WL 5554644, at *40 (Mundy, J. dissenting).

D. The Pennsylvania Supreme Courts Presumption Violates the Single, Uniform, Federal Election Day

By operation of both 2 U.S.C. § 7 and 3 U.S.C. § 1, Congress has "mandate[d] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997). The "designated federal elections"

of Representative, Senator, and President "were to take place on that day and no other days." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1172 (9th Cir. 2001). After all, the word "the" precedes "day" in 2 U.S.C. § 7 and "Tuesday" in 3 U.S.C. § 1. This use of the definite article "the" implies "that the[se] statute[s] refer[] to a single day." *Id*.; *cf. Rapanos v. United States*, 547 U.S. 715, 732 (2006) (plurality opinion of Scalia, J.) (holding that "[t]he use of the definite article ('the')" limited statutory definition to only include specific "waters"). "[T]here is no dispute . . . that voting must end, on federal election day." *Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006); *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 114 (Mont. 1944).

To be sure, Congress and the several states have provided numerous means by which voters can cast votes *before* Election Day. Many states provide for some form of early voting. *See, e.g.*, *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775–76 (5th Cir. 2000). And absentee balloting has been around since at least the War of 1812 in Pennsylvania and the Civil War in other states. *See Chase v. Miller*, 41 Pa. 403, 416 (1862); *Voting Integrity*, 259 F.3d at 1175. But what none of these forms of voting allow for is the casting of ballots *after* Election Day.

The reason is simple: despite the long history of voting *before* Election Day, Congress established a single, uniform, federal Election Day in 1872 which prevents voting *after*. As the Supreme Court held in *Foster*, at a minimum the term "election" "plainly refer[s] to the combined actions of voters and officials meant to make a final

selection of an officeholder." *Id.* at 71 (citing N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "[t]he act of choosing a person to fill an office")). This is "the day" on which these combined actions must be "consummated." *Id*. at 72 n.4. If the state establishes any other day for these *combined actions* to occur, then the state has violated 2 U.S.C. § 7. *Id.*

Accordingly, in *Foster* the Supreme Court held that Louisiana's primary system violated 2 U.S.C. § 7 because the "combined actions" of state officials and voters were not limited to Election Day. Louisiana provided that a candidate who received 50% of the vote in the primary before Election Day was considered elected by state officials. Since the election "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress," Louisiana clearly violated 2 U.S.C. § 7. Both voters and state election officials finished their respective actions before the date set by Congress.

The logic of *Foster* compels the same result when the combined actions of voters and state officials occur *after* the date set by Congress. After the Pennsylvania Supreme Court's decision, Pennsylvania voters can cast their mail-in ballots on November 4, 2020 and state officials will also accept those ballots for tabulation on November 4, 2020. But Election Day was November 3, 2020—the state cannot allow these combined actions to occur *after* that date. Thus, Pennsylvania is allowing

something meaningfully different from lawful absentee or early voting, which does not allow for both casting and acceptance of ballots *after* Election Day. *See Voting Integrity*, 259 F.3d at 1175 (upholding early voting because the "'final selection' cannot be made until the federal election day."). In those instances, there is no "combined action" on a day different than Election Day. *Foster*, 522 U.S. at 71; *Voting Integrity*, 259 F.3d at 1175.[7]

In fact, Congress explicitly rejected an amendment to the text of 2 U.S.C. § 7 that would have allowed states to continue voting *after* Election Day. *Voting Integrity*, 259 F.3d at 1173 (quoting Cong. Globe, 42 Cong., 2d Sess. 676 (1872)). Prior to the enactment of 2 U.S.C. § 7, Texas held open its polls for four days and Congress considered an amendment that would let that happen. Under the proposed amendment, the national election day would be the "first day of the polls being open in those states." *Id*. (citing Cong. Globe, 42 Cong., 2d Sess. 610 (1872)). Thus, Congress considered explicit statutory language that would have allowed states to have additional election days after the one set by Congress—in fact three more, just like Pennsylvania is now imminently countenancing. Congress rejected that Amendment to allow additional any election days after the one set by Congress. One Senator on the floor stated, "there will be time enough for these states to conform

[7] Congress has provided a few exceptions, none of which apply to Pennsylvania's policy. *See Foster*, 522 U.S. at 71 n.3 (citing 2 U.S.C. § 8(a) for run-off election exception); 2 U.S.C. § 8(b) (special elections for vacancies).

their legislation" to "the election of members of Congress [on] a single day." Cong. Globe, 42 Cong., 2d Sess. 676 (emphasis added).

Appellees and Intervenor Appellee portrayed Appellants' claims as though they were somehow reliant on speculative and widespread fraud. But Appellants' claims do not rely in anyway on fraud or any scienter on the part of Pennsylvanians. The fact that there will be late-cast votes does not necessarily mean that there will be thousands of bad actors in Pennsylvania. For example, there may be voters who signed their ballots on or before Election Day but did not send in their ballot until later. These voters could have stayed up and seen national election night returns and then decided to send their ballots in the next day or even after 8:00 P.M. that night. If their ballots arrive with a illegible postmark or no postmark at all, then they will be counted—despite the fact that the ballots are late, and despite the fact that casting ballots *after seeing returns* is exactly one of the types of actions that Congress aimed to prevent by establishing a single, uniform, federal Election Day. *See* Cong. Globe, 42 Cong., 2d Sess. 141 (1872) (arguing the need for a single Election Day because multiple days give "some States" and "some parties undue advantage" by allowing the early "news" from some states to have "great influence upon" the returns in other states).

II. The Remaining Preliminary Injunction Factors Counsel in Favor of Granting Injunctive Relief.

The three remaining factors this Court must assess in considering Appellants' preliminary injunction appeal—irreparable harm, balance of harms, and the public interest—counsel in favor of reversing the District Court.

A. Irreparable Harm

This Court "cannot turn back the clock and create a world in which Pennsylvania does not have to administer the [2020] elections under the strictures of the [Pennsylvania Supreme Court's ruling]." *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). Yet the "principal issue[]" remains "whether the votes that have been ordered to be counted are . . . legally cast votes." *Bush v. Gore*, 531 U.S. 1046, 1047 (Scalia, J., concurring in order issuing stay pending appeal). As such, the "counting of votes that are of questionable legality…threaten[s] irreparable harm." *Id.* The irreparability of harm to Bognet's campaign is thus plainly apparent. *Cf. id.* What is more is that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes that will be cast by the Millers and Clarks, and treat those votes arbitrarily and disparately. This is irreparable harm. *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) ("Having concluded that requiring plaintiffs to file their petitions by April 10 likely violates their constitutional rights, it clearly follows that denying them preliminary injunctive relief will cause them to be irreparably injured . . . this infringement on their rights cannot be alleviated after the election."); *see also*

League of Women Voters of N. Carolina v. N. Carolina, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury."); *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 228 (E.D.N.Y. 2019) ("An abridgement or dilution of the right to vote constitutes irreparable harm." (citing *Elrod v. Burns*, 472 U.S. 347, 373 (1976)); *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017) (similar).

B. The Balance of Equities and the Public Interest

Despite the district court's ruling to the contrary, the balance of equities and public interest weigh strongly in favor of granting Appellants' motion. Appellants stand to suffer immediate, irreparable harm. "[P]ublic confidence in the integrity of the electoral process has independent significance," and the public interest would be further served here by an order that immediately clarifies that Appellees will abide by the deadlines established by the Pennsylvania General Assembly. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). To that end, "late-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result." *see also Democratic Nat'l Comm.,* 2020 WL 6275871 at *6 (Kavanaugh, J., concurring in

denial of application to vacate stay). (internal quotation marks omitted)). Accordingly, enforcing the deadlines set by the General Assembly is in the public interest. By contrast, the Appellees can in no way be harmed by the granting of this motion "because the enforcement of an unconstitutional [practice] vindicates no public interest." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citing *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir.2003) ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.")).

Moreover, the Pennsylvania Department of State's Twitter (including retweets by Appellee Boockvar) emphatically told Pennsylvanian voters to "[r]eturn your ballot NOW. Mail ballots must be returned by 8 p.m., Nov 3." PA Department of State (@PAStateDept), TWITTER, (Oct. 24, 2020, 1:00 PM),https://tinyurl.com/yyc5wlmr. "Don't wait until the last minute to return your voted mail ballot. Mail ballots must be returned by 8 p.m. on November 3." PA Department of State (@PAStateDept), TWITTER, (Oct. 25, 2020, 1:00 PM),https://tinyurl.com/y62baf2a. Further, "PA voters can hand-deliver their mail ballot to a drop box, their county election office, or satellite location until 8 pm Nov 3, but DON'T WAIT! Find a return location at: votesPA.com/ReturnBallot." PA Department of State (@PAStateDept), TWITTER, (Oct. 27, 2020, 11:00 AM),https://tinyurl.com/y4zxqrwd. And on Election Day itself the Department of

State reminded voters that they should "[h]and-deliver [their] mail ballot by 8 p.m., TODAY." PA Department of State (@PAStateDept), TWITTER, (Nov. 3, 2020, 5:30 PM), https://tinyurl.com/yypjvuex. Later on at 7:00 p.m., the Department of State said "Polls close in 1 hour. Make sure you're in line by 8 p.m. If you did not return your mail ballot, you may bring your ballot & envelopes to your polling place to be voided and then vote on your county's voting system." PA Department of State (@PAStateDept), TWITTER, (Nov. 3, 2020, 7:00 PM), https://tinyurl.com/y2dat7sv. Thus, enforcing the General Assembly's deadline would be *consistent with* what Appellee Boockvar and the Pennsylvania Department of State told voters.[8]

Finally, contrary to the District court's determination, *see* App. 37–38, *Purcell* does not apply to stay the hand of this Court's equitable power. The District Court, however, fundamentally misapplied the *Purcell* principle and distorted the proper status quo ante by which this Court must assess the Pennsylvania Supreme Court's unconstitutional alterations to Pennsylvania's receipt deadline and the creation of a presumption of timeliness. In fact, the District Court's understanding of *Purcell* would provide a clear roadmap for displacing validly enacted voting laws that regulate federal elections—simply wait until shortly before an election to act, and

[8] To that end, Appellee Boockvar informed the Supreme Court that the Department of State "direct[ed] county boards of elections to segregate ballots it received between 8:00 p.m. on November 3, 2020, and 5:00 p.m. on November 6, 2020." Letter of October 28, 2020, No. 20-542 (U.S. Oct. 28, 2020).

then plead that it is too late for those actions to be challenged in federal court. *Purcell* should not countenance such gamesmanship.

It is true that *Purcell* has traditionally applied against federal courts changing the rules shortly before elections. But there is no principled reason for why *Purcell* should not apply against interference by state courts and administrative bodies acting in violation of the federal Constitution. After all, attempts to change election rules, whether facilitated in federal or state court, cause the uncertainty, confusion, and chaos that the *Purcell* principle is designed to guard against. Indeed, the Pennsylvania Supreme Court ignored the Supreme Court's animating concern regarding a "fundamental[] alter[ation]" of a State's election-administration regime at the eleventh hour. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

Moreover, an injunction would reinstate, not change, the status quo in Pennsylvania. Appellees argue that, due to the Pennsylvania Supreme Court's order and the Appellees' subsequent implementation of it, the status quo is the unlawful Receipt Deadline. Appellees misapprehend the correct status quo ante, which, properly understood, are the election rules established by the General Assembly's duly enacted statutes. *See* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2948 (3d ed.) (explaining that courts have defined the status quo as "the last peaceable uncontested status" existing between the parties before

the dispute developed); *see also Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 378 (4th Cir. 2012); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (noting that "it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions," but "[s]uch an injunction restores, rather than disturbs, the status quo ante").

As the Eighth Circuit recently explained in a case involving the Presidential Electors Clause and changes adopted by the Minnesota Secretary of State:

> The *Purcell* principle is a presumption against disturbing the status quo. The question here is who sets the status quo? The Constitution's answer is generally the state legislature. And in the case of presidential elections, the Electors Clause vests power exclusively in the legislature. In our case, the Minnesota Legislature set the status quo, the Secretary upset it, and it is our duty, consistent with *Purcell*, to at least preserve the possibility of restoring it.

Carson v. Simon, No. 20-3139, 2020 WL 6335967, *8 (8th Cir. Oct. 29, 2020). So too here. The General Assembly established clear deadlines and these have been usurped by the Pennsylvania Supreme Court. "When the constitutionally mandated locus for election decisions is disregarded, whether by a federal court, a state court, a state agency or a state official, the same rationale that works to prevent election interference by federal courts also works to prevent interference by other entities as well." *Id.*

Finally, there are "several unusual—indeed in several instances unique—characteristics of this case," that make "*Purcell* concerns . . . largely inapplicable."

Common Cause Rhode Island v. Gorbea, 970 F.3d 11, 17 (1st Cir. 2020). This has been "much publicized" litigation, *id.*, including most prominently the Supreme Court's decision, split 4-4, to not stay the Pennsylvania Supreme Court's policy. *Scarnati, et al., v. Boockvar, et al*., No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020) (mem.). Just a week later, three Justices additionally called into question the legality of the votes cast under it and raised the possibility of future review. *See Republican Party of Pa.*, 2020 WL 6304626 at *2 (Statement of Alito, J.) ("Although the Court denies the motion to expedite, the petition for certiorari remains before us, and if it is granted, the case can then be decided under a shortened schedule."). As it stands now, Pennsylvania election officials are separating ballots received after the General Assembly's enacted deadline—a strong indicator to any voter that the General Assembly's deadline is the lawful one to rely on.

In light of these highly-publicized decisions, Boockvar in a number of public statements has counseled that Pennsylvanians get their ballots in by 8:00 P.M. on Election Day—consistent with the General Assembly's enactments. For instance, in a Press Release on October 29, 2020, Boockvar told Pennsylvanians that "[v]oters who have received but not returned their mail ballots should drop them off immediately." Press Release, Pennsylvania Department of State, Pennsylvania Urges Voters to Hand-Deliver Ballots Immediately (October 29, 2020) (available at https://bit.ly/3kIp8tb). She added that if Pennsylvanians "[h]and-deliver [their] mail

ballot as soon as possible to your county election office or authorized drop-off location no later than Election Day, and you can be certain that your vote will be counted." *Id.* Appellants agree that that is exactly what Pennsylvanians should do because that is what the General Assembly lawfully allows. Accordingly, an injunction establishing that these public statements by Appellee Boockvar are what is required by law would not add to voter confusion but eliminate it. *Cf. Republican Party of Pa.*, 2020 WL 6304626 at *1 (Statement of Alito, J.) (noting that failure to correct Pennsylvania Supreme Court's decision may lead to "the election in Pennsylvania . . . being conducted under a cloud").

In all events, Election Day has come and gone.[9] "Because th[e] election has already occurred," *Purcell*'s concerns about "conflicting court orders" or "voter confusion and consequent incentive[s] to remain away from the polls" are simply not implicated. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011) (quoting *Purcell*, 549 U.S. at 4–5). Rather, deciding this case and providing injunctive relief to Appellants would "enhance 'confidence in the integrity of our electoral processes[, which] is essential to the functioning of our participatory democracy.'" *Id.* (quoting *Purcell*, 549 U.S. at 4).

[9] To the extent Appellees and Intervenor-Appellee argue that the district court should be given the first opportunity to consider the implications of the election occurring, that argument should be rejected given the time constraints imposed by the fact that actual counting of ballots is ongoing; any remand to the district court would create unnecessary delay.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's denial of a preliminary injunction.

Dated: November 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Federal Rules of Appellate Procedure and this Court's Rules, I certify the following:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 11,273 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. This brief complies with Local Rule 31.1(c). The text of the electronic brief is identical to the text in the paper copies supplied to the Court. Further, Windows Defender was run on the electronic brief and no viruses were detected.

4. David H. Thompson, Peter A. Patterson, and Brian W. Barnes, are all admitted to practice in the Third Circuit Court of Appeals and are members in good standing.

/s/ David H. Thompson
David H. Thompson

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Local Rule 25.1(b), I hereby certify that on November 6, 2020, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

/s/ David H. Thompson
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