

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' SUPPLEMENTAL BRIEF

David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
Telephone: (202) 220-9600
dthompson@cooperkirk.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. Appellants’ Claims Are Not Moot	1
CONCLUSION	3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anderson v. United States</i> , 417 U.S. 211 (1974)	1
<i>Carson v. Simon</i> , No. 20-3139, 2020 WL 6335967 (8th Cir. Oct. 29, 2020).....	2
<i>Constand v. Cosby</i> , 833 F.3d 405 (3d Cir. 2016).....	2
<i>County of Morris v. Nationalist Movement</i> , 273 F.3d 527 (3d Cir. 2001).....	2
<i>Isidor Paiewonsky Assoc., Inc. v. Sharp Props., Inc.</i> , 998 F.2d 145 (3d Cir. 1993).....	2
<i>United States v. Saylor</i> , 322 U.S. 385 (1944)	1
 <u>Constitutions and Statutes</u>	
U.S. CONST. art. III, § 2	1
25 PA. STAT. § 2642(k)	2
 <u>Other Authorities</u>	
2020 Election Calendar, Pa. Dep’t of State (Mar. 27, 2020), available at https://bit.ly/3n6IsBk	2

INTRODUCTION

Appellee Boockvar’s counsel has now provided the Court with up-to-date totals of all segregated absentee or mail-in ballots that were received by Pennsylvania’s county election boards after 8:00 p.m. on November 3 and before 5:01 p.m. on November 6. These totals confirm that thousands of ballots were received after the lawful deadlines established by the General Assembly. The totals prove a live “Case” or “Controversy” remains before this Court. U.S. CONST. art. III, § 2.

ARGUMENT

I. Appellants’ Claims Are Not Moot

Every voter, “whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by” unlawfully cast votes. *Anderson v. United States*, 417 U.S. 211, 227 (1974). Unconstitutional vote dilution occurs with the deposit of unlawful ballots, “no matter how small or great their number.” *Id.* at 226. Thus, the relevant analysis in determining whether a state is injuring an individual voter is not whether that voter’s preferred electoral outcome will come to pass, but instead whether his or her “expressions of choice” are being “given full value and effect.” *Id.* (citing *United States v. Saylor*, 322 U.S. 385, 386 (1944)). And here the lawful votes of Appellants Donald Miller, Debra Miller, Alan Clark, and

Jennifer Clark will not be given full value and effect—thousands of ballots that would be unlawful under the General Assembly’s deadlines have now arrived and will be included in the certified results, but for the relief sought by Appellants.

Appellant Bognet continues to have an interest in the outcome of this appeal as well. Regardless of the outcome of his race, Bognet “has a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete and particularized injury to candidates.” *Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *4 (8th Cir. Oct. 29, 2020). This inaccurate tally will be certified, but for the relief sought by Appellants.

Under Pennsylvania law, the county election boards have until the third Monday after the election to certify the results to the Secretary of the Commonwealth. *See* 25 PA. STAT. § 2642(k). This year that date is November 23. *See* 2020 Election Calendar, Pa. Dep’t of State at 23 (Mar. 27, 2020), available at <https://bit.ly/3n6IsBk>. Thus, the Court still can “grant effective relief,” and enjoin the Appellees from following the Pennsylvania Supreme Court’s policy in their certified results. *Constand v. Cosby*, 833 F.3d 405, 409 (3d Cir. 2016) (quoting *County of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001)). “[W]hen a court can fashion *some* form of meaningful relief, even if it only partially redresses the grievances” then “the appeal is not moot.” *Constand*, 833 F.3d at 409 (internal quotation marks omitted) (emphasis in original); *Isidor Paiewonsky Assoc.*,

Inc. v. Sharp Props., Inc., 998 F.2d 145, 152 (3d Cir. 1993) (“As long as we can impose at least one of [Appellant’s] remedies and that remedy would provide some effective relief to [Appellant], this appeal is not moot.”).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court find that this appeal is not moot.

Dated: November 12, 2020

Respectfully submitted,

/s/ David H. Thompson

David H. Thompson

Peter A. Patterson

Brian W. Barnes

Cooper & Kirk, PLLC

1523 New Hampshire Ave., N.W.

Washington, D.C. 20036

Telephone: (202) 220-9600

Fax: (202) 220-9601

dthompson@cooperkirk.com

ppatterson@cooperkirk.com

bbarnes@cooperkirk.com

Counsel for Plaintiffs-Appellants

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 539 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 12, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. Service on all counsel for all parties has been accomplished via ECF.

s/ David H. Thompson
David H. Thompson