Appeal No. 20-3214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Jim Bognet, et al.,
Plaintiffs-Appellants,

v.

Kathy Boockvar, Pennsylvania Secretary of State, et al.,
Defendants-Appellees,

Democratic National Committee,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
For the Western District of Pennsylvania (No. 3:20-cv-00215-KRG)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

In response to a state supreme court's interpretation of state election law, Appellants seek a federal court's rewrite. And in response to the district court's decree that a week before the election was too late to grant their requested injunction and to alter the deadline for the receipt of absentee and mail-in ballots ("receipt deadline"), Appellants now ask for that same relief a week *after* the election, demanding that this Court throw out validly-cast ballots in an attempt to reverse-engineer the relief that they waited far too long to seek in the first place. None of this should be permitted. The risk of voter confusion and potential disenfranchisement that foreclosed Appellants' last-minute motion for preliminary injunction did not simply disappear after the election; quite the opposite. A post hoc injunction, retroactively invalidating ballots cast in accordance with procedures implemented by election officials, would be even more destructive to the electoral process. It threatens the due process rights of thousands of voters whose ballots arrived during the three-day extension of the receipt deadline that Appellants seek to enjoin, and such relief is entirely unnecessary now that the Pennsylvania Department of State ("DOS") has directed county boards of elections to segregate and separately tally ballots delivered between 8:00 p.m. on November 3 (the original receipt deadline) and 5:00 p.m. on November 6 (the extended deadline).

Pennsylvania Department of State, *Canvassing Segregated Mail-in and Civilian Absentee Ballots Received by Mail After 8:00 p.m. on Tuesday, November 3, 2020 and Before 5:00 p.m. on Friday, November 6, 2020* (Nov. 1, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Canvassing-Segregated-Ballot-Guidance.pdf. Indeed, Appellant Bognet admits that he trails the frontrunner in the race for Pennsylvania's Eighth Congressional District by more than 11,000 votes, which does not include the segregated mail ballots that arrived after 8:00 p.m. on election day. There is simply no basis to grant injunctive relief.

While the equities clearly foreclose Appellants' requested relief, their failure to set forth any cognizable injuries to support their improbable legal claims confirm that their lawsuit was doomed from the outset. Their arguments alternatively assert (1) a right that belongs *only* to the Legislature (which Appellants lack authority to vindicate); (2) generalized and undifferentiated interests shared by the entire voting public; and (3) an implausible equal protection claim that infers a constitutional injury based solely on purported disparate treatment arising from their personal choice to vote in person. In each of these attempts to manufacture a cognizable injury, Appellants come up short, foreclosed by Supreme Court precedent and undone by modest inspection. Well-settled legal doctrine, fundamental due process, straightforward principles of fairness, and the equities demand that the Court reject

Appellants' attempt to inject chaos into the electoral system (and disenfranchise voters in the process). The district court's opinion should be affirmed.

STATEMENT OF JURISDICTION

The Court lacks subject matter jurisdiction because Appellants lack standing to bring their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

STATEMENT OF ISSUES

1. Whether the district court correctly held that *Purcell v. Gonzales* foreclosed changing Pennsylvania's voting rules just days before the election.

2. Whether the Due Process Clause forecloses the rejection well after the election of ballots lawfully cast in reliance on the Pennsylvania Supreme Court's interpretation of the Election Code and the Department of State's guidance.

3. Whether Appellants, a congressional candidate and individual voters, have standing to assert the rights of the Pennsylvania General Assembly and to raise generalized and undifferentiated interests that Appellants share with the entire citizenry.

4. Whether Appellants, who were entitled to vote by mail but chose to vote in person, can allege a cognizable equal protection injury for disparate treatment based on procedures applicable to all mail voters.

5. Whether the Electors and Elections Clauses prevent the Pennsylvania Supreme Court from holding that the Commonwealth Constitution's Free and Equal

Elections Clause required that elections officials accept ballots postmarked by election day but received within three days thereafter to protect voters from disenfranchisement due to pandemic-related mail delays entirely out of their control.

6. Whether the Pennsylvania Supreme Court's requirement that ballots postmarked on or before election day and received by 5 p.m. on November 6 unconstitutionally changed the date of the election.

7. Whether the Pennsylvania Supreme Court's modest, one-time, three day extension of the ballot receipt deadline in the context of a pandemic and significant mail processing delays was "arbitrary."

8. Whether the equities favor rejection of lawfully cast mail ballots after the election.

RELATED CASES AND PROCEEDINGS

This case seeks to enjoin relief ordered by the Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) ("*Boockvar*"), a decision issued by a state court on state law grounds. It relates significantly to a petition for certiorari currently pending before the United States Supreme Court, *Republican Party of Pennsylvania v. Kathy*

Boockvar, Secretary of Pennsylvania, et al., No. 20–542 (U.S.), which seeks review of the Pennsylvania Supreme Court's decision.

STATEMENT OF THE CASE

Shortly after the onset of the coronavirus pandemic, several groups of plaintiffs brought suit in Pennsylvania courts challenging aspects of the Commonwealth's election laws under the Pennsylvania Constitution's robust protections for voting rights. This litigation concerns the relief entered in one of those cases, *Boockvar*, 2020 WL 5554644, at *1.

In *Boockvar*, the plaintiffs challenged the strict application of the election day receipt deadline for mail-in and absentee ballots (together, "mail ballots"). *Id.* at *18. After careful consideration, the Pennsylvania Supreme Court held that the Commonwealth Constitution's Free and Equal Elections Clause required that elections officials accept ballots postmarked by election day but received within three days thereafter to protect voters from disenfranchisement due to mail delivery delays outside their control. *Id.* The vast majority of ballots received during this extension are expected to have a postmark—in fact, it is USPS's policy to postmark all mail ballots, and since this order was issued the Postal Service has committed in separate litigation to ensuring that ballots are postmarked when they enter the mail stream. *NAACP v. United States Postal Serv.*, No. 20-CV-2295 (EGS), 2020 WL 6469845, at *1 (D.D.C. Nov. 1, 2020). *Boockvar* futher held that a ballot that is

received before the November 6 deadline but lacks a legible postmark will be presumed to have been mailed by election day unless a preponderance of the evidence demonstrates that the ballot was mailed after election day. 2020 WL 5554644, at *31.

The *Boockvar* decision rested on the Pennsylvania Supreme Court's interpretation and application of the Commonwealth's Constitution, and an extensive review of evidence presented by the parties. *See id.* at *10-17. That evidence included a letter from the USPS to Secretary of State Kathy Boockvar in which the USPS warned of a "mismatch" between present mail delivery standards and Pennsylvania's election deadlines that could disenfranchise voters, as mailed ballots may take up to a week to arrive at their destination. *Id.* at *13. The letter warned that Pennsylvania's elections laws—including the election day receipt deadline—created a substantial risk that ballots timely requested by voters and promptly mailed would still "not be returned by mail in time to be counted" in the November election. *Id.*[1]

In granting a modest and limited extension of the ballot receipt deadline to protect the Commonwealth's voters from disenfranchisement, the Pennsylvania

[1] Since election day, USPS has produced data pursuant to orders in separate litigation demonstrating that, in fact, ballots being returned by voters in the days surrounding election day were significantly delayed in Pennsylvania's USPS districts. *See* Notice, *Vote Forward v. DeJoy*, No. 1:20-cv-02405, ECF No. 103 (D.D.C. Nov. 8, 2020).

Supreme Court rested its decision only on state constitutional grounds. *See id.* at *15-18. The Court also emphasized that it was acting with sufficient time "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." *Id.* at *18. Following the Court's order, issued on September 17, Pennsylvania voters and election officials integrated this new deadline into their voting plans and election preparation activities under the assumption that the law would permit ballots mailed by election day to be counted if received by election officials on or before November 6. App'x at 82-103.

On September 28, the Republican Party of Pennsylvania, along with the President Pro Tempore and the Majority Leader of the Pennsylvania Senate filed an application before the U.S. Supreme Court to stay the Pennsylvania Supreme Court's ruling, asserting many of the same arguments Appellants advance here. The Court denied that application. *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020); *see also Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (Oct. 19, 2020). Four days later, the Republican Party of Pennsylvania again sought to obtain relief from the U.S. Supreme Court, this time through a petition for a writ of certiorari, and sought expedited consideration of the merits of the appeal before the election. While the Court denied the motion to expedite, *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 2020 WL 6304626

(U.S. Oct. 28, 2020), the petition for writ of certiorari is still pending. On October 28 and November 1, DOS issued guidance instructing county boards of elections to keep absentee and mail-in ballots arriving during the challenged extension period "separate" and "segregated" from all other voted ballots, and to separately tally the segregated ballots. Pennsylvania Department of State, *Canvassing Segregated Mail-in and Civilian Absentee Ballots Received by Mail After 8:00 p.m. on Tuesday, November 3, 2020 and Before 5:00 p.m. on Friday, November 6, 2020* (Nov. 1, 2020),https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Canvassing-Segregated-Ballot-Guidance.pdf.

Appellants (a congressional candidate and individual voters), in contrast, did nothing for five weeks after the Pennsylvania Supreme Court ruling which they now claim causes them irreparable harm. Instead, they waited until October 22, just 12 days before election day, to file their Complaint and motion for injunctive relief collaterally attacking the Pennsylvania Supreme Court's *September 17* ruling in *Boockvar*. After a hearing and full briefing on an expedited schedule, the district court denied Appellants' motion for preliminary injunction. App'x at 21-38. Appellants then sought emergency expedited review from this Court. ECF 37.

Election day has since passed. Nearly all of the ballots have been counted. Appellants concede that candidate Bognet trails by over 11,000 votes, and that does not include any ballots at issue here. Nevertheless, Appellants press on, seeking a

post-election reversal of the district court's denial of the preliminary injunction motion, which would retroactively nullify ballots in accordance with the law in place at the time of the election, and which the Pennsylvania Supreme Court determined must be counted in accordance with the Pennsylvania Constitution.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court is the ultimate arbiter of what Pennsylvania law requires. In *Pennsylvania Democratic Party v. Boockvar*, that Court found that a strict application of the election day ballot receipt deadline, as applied to this election, violated the Pennsylvania Constitution. 2020 WL 5554644. To protect voters from disenfranchisement in these unique circumstances, where an unprecedented number of voters are exercising their right to vote by mail to avoid risks to their own health and the public health, and USPS and elections administrators have both struggled under the strain, the Court found that ballots mailed by election day but received within 72 hours thereafter must be accepted and counted. In response, Appellants launched this improper collateral attack on the eve of the election, more than a month after the Pennsylvania Supreme Court issued the ruling that Appellants now challenge. The significant threat of voter confusion and disenfranchisement that would result from a last-minute reversal of the ballot receipt deadline extension, and the Supreme Court's repeated admonition against federal court intervention in state election laws close to an election, *Purcell v. Gonzalez*,

549 U.S. 1 (2006), all but foreclosed Appellants' eleventh-hour preliminary injunction motion. Now, post-election Appellants cannot obtain the relief they seek without violating the due process rights of the thousands of voters who relied on the law in place when they voted: that all ballots received through 5 p.m. on November 6 would be counted so long as they were postmarked by the close of polls on November 3.

But the Court need not wrestle with the significant constitutional issues that granting Appellants' relief would raise, because they lack standing to even invoke this Court's jurisdiction. Appellants alternatively assert (1) rights that belong only to the Legislature (not Appellants); (2) generalized and undifferentiated interests Appellants share with the entire citizenry; and (3) a fantastical equal protection theory that suggests voters have been subjected to disparate treatment and injured by *choosing* to vote in-person. None of these claims can satisfy Article III's requirement that a litigant's injury be individualized, concrete, imminent, and non-speculative.

Even assuming Appellants could identify a cognizable injury, they were (and still are) unlikely to succeed on the merits. Their claims under the Elections and Presidential Electors Clauses ignore the Pennsylvania Supreme Court's constitutionally and statutorily prescribed roles within the Commonwealth's ordinary lawmaking process. And the equal protection theories Appellants advance

have been rejected by courts around the country not only because they rely on generalized vote dilution grievances, but also because a voting accommodation *available to every voter* simply cannot logically be said to impose a burden or an unconstitutionally disparate treatment on those who choose not to take advantage of it.

The equities also weigh decidedly against Appellants. Their purported injuries rely on meritless fears of "illegal" voting if counties remain permitted to count ballots that were mailed by election day but delivered up to three days later. But these ballots have already been segregated from ballots that arrived by the election day deadline, and are separately tallied pursuant to DOS's guidance; thus Appellants face no imminent injury requiring injunctive relief. When these generalized and legally-flawed theories of harm are weighed against the potential disenfranchisement of thousands of eligible voters who did nothing more than follow the instructions of elections officials, it is clear that the only parties at risk of irreparable harm are Pennsylvanians who voted by mail after being told for over six weeks that their ballots would be counted if postmarked by election day and delivered within three days thereafter. Appellants' requested relief was inappropriate in the days before the election when they initially sought it, and is all the more inappropriate now, after the election has concluded and voters have cast their ballots

in compliance with the rules in place during that election. The district court's ruling should be affirmed.

ARGUMENT

To succeed on appeal, Appellants must show that the "ultimate decision to grant or deny the injunction" was an "abuse of discretion." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). Findings of fact are reviewed for "clear error"; legal conclusions are reviewed de novo. *Id.* Because the district court did not abuse its discretion in denying the Appellants' motion for a preliminary injunction, its decision should be affirmed.

I. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL

Appellants cannot invoke this Court's jurisdiction because their purported injuries are inadequate to meet the threshold requirements of Article III of the U.S. Constitution. *First*, Appellants claim that the Pennsylvania Supreme Court in *Boockvar* usurped the General Assembly's authority. But the General Assembly is not before this Court and Appellants have no authority to act on its behalf. *Second*, Appellants attempt to create a contrived equal protection injury, contending they are somehow disadvantaged by the fact that mail ballots in Pennsylvania may be counted if postmarked by election day and delivered to election officials by November 6, but ignore that the remedy issued in *Boockvar* protected all Pennsylvania voters equally

(including them, if they had chosen to vote by mail). Courts have repeatedly found similar theories insufficient for standing, and this Court should, too.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). A plaintiff has the burden of establishing three factors: (1) an injury-in-fact that is actually imminent, concrete, and particularized, (2) that is caused by and traceable to the actions of the defendant, and (3) is redressable by a decision in the plaintiff's favor on the merits. *See Lujan*, 504 U.S. at 560–61; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at * 32 (W.D. Pa. 2020). Prudential limitations further require that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 129 (quotations omitted).

Appellants have no claim to any injury suffered by the General Assembly based on the purported usurpation of their authority. The jurisprudence is clear: if such a separation of powers injury belongs to anyone, it is the General Assembly as an institution, not Appellants. *E.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015); *Va. House of Delegates v.*

Bethune-Hill, 139 S. Ct. 1945, 1953 (2019); *Raines v. Byrd*, 521 U.S. 811, 821 (1997). The U.S. Supreme Court has consistently held that individual citizens—even individual legislators—do not have standing to assert the institutional interests of legislatures.

Appellants' efforts to obtain a different result here are foreclosed by *Lance v. Coffman*, 549 U.S. 437, 442 (2007), in which the Supreme Court rejected an almost identical argument. In *Lance*, individual voters sued to challenge a state supreme court decision interpreting the state constitution, alleging that the state court ruling usurped the legislature's authority under the Elections Clause. 549 U.S. at 442. After describing the Court's "lengthy" jurisprudence holding that federal courts should not serve as a forum for generalized grievances," the Court stated that the problem with the plaintiffs' standing "should be obvious:"

> The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.

Id. Consistent with *Lance*, federal courts have repeatedly declined to adjudicate Elections Clause claims for want of jurisdiction. *See, e.g.*, *Wise v. Circosta*, No. 20-2104, 2020 WL 6156302 at *14 (4th Cir. 2020), *application for stay denied*, Nos. 20A71, 20A72 (U.S. Oct. 28, 2020).

In fact, a federal court in Pennsylvania previously rejected similar attempts to invoke the Elections Clause by litigants unhappy with prior decisions of the Pennsylvania Supreme Court. When state legislators and members of congress brought suit in *Corman v. Torres*, 287 F. Supp. 3d 558, 568 (M.D. Pa. 2018), collaterally attacking a Pennsylvania Supreme Court decision that struck down an existing congressional districting map and replaced it with a court-ordered plan, the federal three-judge panel held that the plaintiffs lacked standing because "the claims in the complaint rest[ed] solely on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause of the United States Constitution," which individual legislators had no legal right or authority to assert. *Id.* at 567.

The cases Appellants rely upon to invite this Court to find differently are inapposite. *Bond v. United States*, 564 U.S. 211, 222 (2011), was an appeal by a criminal defendant of a guilty plea on the grounds that the federal statute serving as the basis for her conviction violated the 10th Amendment. 564 U.S. at 215-16. The only holding on Article III standing was that Bond's "challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidating the conviction." *Id.* at 217. To be sure, *Bond* concludes that individuals can in *some* circumstances seek a remedy for injuries stemming from

a separation of powers violation, but only *after* they have independently demonstrated Article III standing. *Id.* at 225. If Bond's injury was not concrete and personal, she could not have raised the 10th Amendment challenge. *Id.* at 217.

While the constitutional injury in *Bond*—incarceration—was clearly concrete and personal to the appellant in that case, Appellants here demonstrate no such individualized injury. Their projected concerns about "vote dilution" and "arbitrary and disparate" treatment due to the *Boockvar* decision—even if plausible (and they are not, *see infra* at Argument, III.A, B)—are not unique to them. Rather, they are injuries that would be shared by nearly all voters in the Commonwealth. *See, e.g.*, *Donald J. Trump for President, Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *59; *Donald J. Trump for President, Inc. v. Cegavske*, No. 20-cv-1445, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 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, 926–27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015). To the extent that Appellants are concerned that more of the allegedly "preferred class" of voters' ballots will be counted in favor of their political opponents, that preference is simply an interest "'in their collective representation in [government],' and in influencing the [government's] overall 'composition and policymaking,'" which likewise cannot

serve as the basis of an Article III injury. *Minn. Voters All. v. Minneapolis*, No. 20-2049, 2020 WL 6119937, at *7 (D. Minn. Oct. 16, 2020) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

Clinton v. New York, 524 U.S. 417 (1998), and *I.N.S. v. Chadha*, 462 U.S. 919 (1983), are also no help to Appellants. Appellants cite to *Chadha* to support standing because the Supreme Court permitted Mr. Chadha to assert a separation of powers argument on appeal even though, in addition to his own private interests, his claim advanced institutional government interests. Br. at 19. But this just begs the question of whether Appellants have themselves established a cognizable injury resulting from the purported usurpation of the General Assembly's power. Unlike Appellants, Mr. Chadha established a deeply personalized injury (imminent deportation) within an existing immigration proceeding on appeal. 462 U.S. at 936. Appellants' purported vote dilution injury does not compare. *See* Br. at 19.

As for *Clinton*, the Line Item Veto Act at issue in that case provided a "special" and "express" provision allowing for constitutional challenges to be brought by any "individual" adversely affected by the Act. 524 U.S. at 428; *see* Pub. L. 104-130, April 9, 1996, 110 Stat. 1200 (previously codified at 2 U.S.C. 692). There is no similar provision of federal law here. In addition, the *Clinton* Court, after rigorous inquiry, found that two of the plaintiffs had also demonstrated a concrete, personal stake in the outcome: they lost a unique "statutory bargaining chip" that

had been provided by the statute itself. *Clinton*, 524 U.S. at 432. Notably, the Court did *not* find that the *individual Plaintiff* in the case demonstrated an injury under Article III; rather, it determined that it need not address the issue because other parties had standing. *Id. Clinton* therefore does nothing for Appellants' claim of injury here.

Even if Appellants in this case suffered an injury sufficient for Article III purposes, they are still barred under the doctrine of prudential standing from raising the rights of the General Assembly. To assert the General Assembly's institutional rights, Appellants bear the burden of proving (1) a close relationship between them and the General Assembly; and (2) a hinderance to the General Assembly's ability to protect its own rights. *Kowalski*, 543 U.S. at 130; *see also Amato v. Wilentz*, 952 F.2d 742, 750 (3d Cir. 1991).[2] They cannot satisfy either requirement, nor do they

[2] Contrary to Appellants' suggestion, the Third Circuit continues to recognize the prudential doctrine of third-party standing after the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). *See Holland v. Rosen*, 895 F.3d 272, 287 (3d Cir. 2018) (applying prudential doctrine of third-party standing to determine plaintiff lacked standing); *see also Lexmark*, 572 U.S. at 127 n.3 ("This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day."); *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017) (internal quotations omitted) ("The question [relevant to prudential standing] is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.").

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make any attempt to do so. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573 (holding individual legislators do not have prudential standing to bring Elections Clause claim). Because Appellants seek to "assert[] the legal rights of others" who are capable of protecting themselves, prudential limitations bar Appellants' claims. *Phila. Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund v. C.I.R.*, 523 F.3d 140, 145 (3d Cir. 2008).

II. IT IS TOO LATE TO GRANT APPELLANTS THE RELIEF THEY SEEK.

A. The district court correctly found that *Purcell* foreclosed Appellants' requested relief.

The district court correctly held that Appellants' request for a temporary restraining order—just days before the election—was barred by the Supreme Court's decision in *Purcell v. Gonzales*, 549 U.S. 1 (2006). In *Purcell*, the Supreme Court advised federal courts not to disrupt state election regimes on the eve of an election without carefully considering whether the change is likely to confuse voters, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *See id.* at 4. That principle forecloses Appellants' requested eleventh-hour injunction which would have decreased the amount of time available for voters to return their mail ballots. Had the district court granted Appellants' motion—which came *within* the timeframe that USPS warned may be too late for ballots to be delivered in time to be counted—the consequences would

have been profound and disenfranchising for the thousands of voters who relied on the extended deadline in voting by mail, only to learn that their mail ballots would have to arrive three days earlier than advertised in order to be counted.[3] *Boockvar*, 2020 WL 5554644, at *13.

Appellants attempt to avoid *Purcell*'s clear instruction by mischaracterizing the "status quo ante" as the November 3 ballot receipt deadline. Br. at 42 (citing 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2948 (3d ed.) (explaining courts have defined the status quo as "the last peaceable uncontested status" existing between the parties before the dispute developed)). They argue that a party should not be able to "wait until shortly before an election to act, then plead that it is too late for those actions to be challenged in federal court." Br. at 41-42.

But Appellants are the only ones who waited until the last minute to act. The petitioners in *Boockvar* initiated their legal challenge on July 10, nearly four months before the election. *Boockvar*, 2020 WL 5554644, at *1. Appellants waited to initiate their own legal challenge less than *two weeks* before the election. *Purcell* does not "countenance such gamesmanship," Br. at 42; it forecloses it. The status quo is the Pennsylvania Supreme Court's ruling which extended the deadline for the return of

[3] *Purcell* not only directs district courts to consider certain election-specific equitable factors before disrupting a state's election scheme within weeks of an election, it also bars courts of appeals from disrupting the district court's conclusions on those equitable considerations without the benefit of factual development. *See* 549 U.S. at 4.

mail ballots. *See Growe v. Emison*, 507 U.S. 25, 35-36 (1993) ("The state court's plan became the law of Minnesota. At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligated the federal court to give that judgment *legal effect* . . .").

Finally, Appellants cannot mitigate the catastrophe that could have resulted had the district court granted their requested injunction by pointing to a press release—issued after Appellants initiated this litigation and just four mail-delivery days before the election—encouraging voters to hand-deliver their mail ballots. Br. at 44-45. Even if every Pennsylvania voter became instantly aware of the Secretary's press release when it was published—which surely they did not, as there was insufficient time for a full voter re-education program—such warnings would have had no impact on voters who had already mailed their ballots without sufficient time for those ballots to be delivered by November 3, but with the expectation that they would be counted if delivered by November 6. What is more, even if voters who had not yet mailed their ballots learned of the Secretary's press release immediately and put their ballots in the mail that instant, four days *still* would not have provided enough time for them to return their ballots by mail. *Boockvar*, 2020 WL 5554644, at *13.

Nor does Appellants' suggestion that *Purcell* does not apply in the post-election context alleviate the equitable concerns that animated the district court's

denial of their motion for preliminary injunction. Waiting until *after* an election to change voting rules would simply compound, rather than alleviate, confusion and uncertainty. In *every subsequent election*, the possibility of ex post facto rule changes that threaten to cancel voters' ballots are just as likely to create the "consequent incentive to remain away from the polls" that *Purcell* sought to avoid. 549 U.S. at 5; *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (noting a judge could "justifiably conclude that the voters . . . would be offended by the cancelling of ballots notwithstanding their established acceptability"). Simply put, litigants may not wait until the eleventh hour to spring an election law challenge; yet that is precisely what Appellants attempted to do with their untimely request to enjoin a deadline extension that had been in place for over a month. On this equitable consideration alone, the district court correctly denied Appellants' motion for preliminary injunction.

B. The Due Process Clause forecloses Appellants' requested relief.

The relief Appellants now seek—post hoc rejection of lawfully cast ballots—deeply offends the due process rights of thousands of voters who cast their ballots in compliance with the existing law, *see Growe*, 507 U.S. at 35, and is entirely unnecessary in light of the fact that DOS has instructed county boards to separate and segregate ballots during the three-day receipt deadline extension window, *see* Pennsylvania Department of State, *Canvassing Segregated Mail-in and Civilian*

Absentee Ballots Received by Mail After 8:00 p.m. on Tuesday, November 3, 2020 and Before 5:00 p.m. on Friday, November 6, 2020 (Nov. 1, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Canvassing-Segregated-Ballot-Guidance.pdf. When state or local officials affirmatively invite voters to follow a procedure that is later deemed invalid, due process prohibits those voters' ballots from being invalidated on that ground. *See Griffin*, 570 F.2d at 1075 (finding due process violation when voters' ballots were rejected after voters "follow[ed] the instructions of the officials charged with running the election"); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2006) (affirming injunction prohibiting Board from certifying elections without tallying certain absentee ballots when election officials "at least arguably [] misled the voters into not filing new absentee-ballot applications"); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597-98 (6th Cir. 2012) (holding rejecting ballots invalidly cast due to poll worker error likely violates due process).

In *Griffin v. Burns*, the First Circuit rejected the argument that discarding ballots cast in reliance on guidance provided by state election officials, *even if* that guidance was later overturned, was "the sort of hardship that must be borne as the consequence of the state court's ruling on a disputed legal issue." The voters, the court found, "were doing no more than following the instructions of the officials charged with running the election," and should not have been disenfranchised. 570

F.2d at 1075; *see also Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (finding board of elections violated voters' substantive due process rights by adopting new interpretation of election code without notice and refusing to count votes).

The reliance interests and due process concerns that informed these decisions apply with equal force here. For more than six weeks before the election, Pennsylvania assured its voters that, to have their mail-in ballots count, the ballots must be postmarked by election day and delivered within three days after. Pennsylvania's voters and election officials integrated that deadline into their voting plans and election preparation activities. And thousands of Pennsylvanians cast their ballots in a manner consistent with, and in reliance on, that guidance. At all times following the Pennsylvania Supreme Court's decision in *Boockvar*, ballots postmarked on or before election day and received by 5 p.m. on November 6 were lawfully cast. The Court cannot, consistent with due process, disqualify those ballots and disenfranchise voters for acting in accordance with the very procedures implemented by state officials.

III. APPELLANTS' CHALLENGE ALSO FAILS ON THE MERITS.

A. The ballot receipt deadline extension does not violate the Equal Protection Clause.

Appellants' claim that the ballot receipt deadline extension violates the Equal Protection Clause fails on the merits for all the same reasons that it fails the standing analysis: they cannot identify any plausible constitutional injury.

The Fourteenth Amendment's Equal Protection Clause prohibits state actors from "deny[ing] to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. This Clause "has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Accordingly, equal protection is violated only in certain situations where: (1) the government has created classifications of similarly situated persons, and (2) the government's treatment of individuals in one classification is less favorable than its treatment of individuals in the other. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *James v. City of Chester*, 852 F. Supp. 1288, 1297 (D.S.C. 1994) ("The equal protection guarantee of the Fourteenth Amendment only applies to governmental actions which classify individuals for different benefits or burdens under the law; it does not govern actions which do not classify individuals."); *see also Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("[T]he gravamen of an equal protection

claim is differential governmental treatment."). Where these threshold elements are absent—as here—there is no equal protection claim to adjudicate.

Common sense dictates that an accommodation available to *all* Pennsylvania voters—i.e., the ballot receipt deadline extension—does not divide voters into different classes. In 2019, the General Assembly enacted election reforms that permit *every Pennsylvania voter* to cast a ballot by mail. Act 77 of 2019, P.L. 552 ("Act 77"); *see also* 25 P.S. § 2602(z.6) ("The words 'qualified mail-in elector' shall mean a qualified elector"); 25 P.S. § 3150.11(a) ("A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth[.]"). The extension of the ballot receipt deadline did not divide Pennsylvanians between a class of in-person voters and a class of mail-in electors. Rather, every voter self-determines which method of casting a ballot is preferable by personally weighing each method's relative advantages and acting accordingly. Appellants here alleged they were inclined to vote in person, and argue that they did so. Compl. ¶¶ 11-14; Br. at 9. That was their prerogative. But they cannot survey the menu of voting options the Commonwealth has provided, choose the option that suits their taste, and then cry discrimination when other voters choose differently.

No matter which method voters choose, ballots must be cast by 8:00 p.m. on November 3rd. *Compare* 25 P.S. § 3045 (polls for in-person voting "shall remain open continuously until 8 P.M., Eastern Standard Time, at which time they shall be

closed"), *with Boockvar*, 2020 WL 5554644, at *31 (ordering valid mail-in ballots shall be counted if "postmarked by 8:00 p.m. on election day, November 3, 2020"). *Boockvar* did not extend any voting deadlines that apply to Pennsylvania electors. On the contrary, by extending the *receipt* deadline for mail ballots, the Pennsylvania Supreme Court mitigated the disadvantages faced by individuals who choose to vote by mail—and risk the invalidation of a timely cast ballot due to mail processing delays—relative to individuals who choose to vote in person, and face no such risk. This is not forbidden state action. The Equal Protection Clause is a constitutional shield to protect against discriminatory mistreatment. Fashioning it into a sword to strike at government efforts to *equalize* application of the law would be a bizarre doctrinal turn, and—with no precedent or logic to support it—one this Court should not indulge.

Reaching for another way to identify the requisite classification, Appellants suggest a population-density theory of discrimination. *See* Br. at 17 (arguing the Appellant voters "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"); Compl. ¶ 71. But voters in rural Somerset County and urban Philadelphia County alike could choose whether to vote in person or by mail, and whatever their choice, they had to cast their ballot by 8:00 p.m. on election day. If they voted by mail, rural and urban voters alike would have their ballots counted

provided they were postmarked by election day and received within 72 hours thereafter.

But even supposing for the moment that counting mail ballots that are postmarked by November 3 and received by November 6 somehow discriminates against Appellants, such a claim would fail under the appropriate standard laid out by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *Short v. Brown*, 893 F.3d 671, 676–77 (9th Cir. 2018) (applying *Anderson-Burdick* to vote dilution challenge to vote by mail law); *see also Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 538 (6th Cir. 2014), *vacated as moot*, 2014 WL 10384647 (Oct. 1, 2014) (applying *Anderson-Burdick* to equal protection challenge to Secretary of State directive). Under this framework, courts weigh the burden on the right to vote against the precise interests put forth by the state. *See Rogers v. Corbett*, 468 F.3d 188, 193-94 (3rd Cir. 2006) (stating that "the *Anderson* test is the proper method for analyzing [voting] equal protection claims due to their relationship to the associational rights found in the First Amendment"). It is a "flexible" sliding scale, where "the rigorousness of [the court's] inquiry depends upon the extent to which [the challenged law] burdens [voting rights]." *Anderson*, 460 U.S. at 789. Here, Plaintiffs have not alleged that their right to vote, or anyone else's has been burdened at all, and therefore their claim would merit at most minimal scrutiny. *See Rogers*, 468 F.3d at 194.

The ballot receipt deadline clearly surpasses this minimal threshold. As the Secretary argued before the Pennsylvania Supreme Court—and as that Court agreed—a modest, one-time, three-day extension of the ballot receipt deadline is necessary to ensure voters are not disenfranchised due to mail delivery delays. *Boockvar*, 2020 WL 5554644, at *18. The Court recognized that "Pennsylvania's election laws currently accommodate the receipt of certain ballots after Election Day, as it [*sic*] allows the tabulation of military and overseas ballots received up to seven days after Election Day. 25 Pa.C.S. § 3511." *Id.* And the Court emphasized that the three-day safeguard found necessary in *Boockvar* "provides more time for the delivery of ballots while also not requiring alteration of the subsequent canvassing and reporting dates necessary for the Secretary's final reporting of the election results." *Id.* The Commonwealth's interest in preventing the disenfranchisement of its citizens for reasons outside their control far outweighs the vague, loosely-defined burdens Appellants attempt to assert. *See Short*, 893 F.3d at 676 (finding state's interest in mailing ballots to voters to facilitate voting outweighed any conceivable burden placed on those who chose not to vote by mail).

Similar—and uncontested—accommodations provided to voters who cast their ballot in-person further illustrate the well-established state interests at issue here. To ensure in-person voters who are prepared to submit their ballot before the deadline are not disenfranchised due to processing delays beyond their control,

Pennsylvania law provides that when polls close at 8:00 p.m., "all those who are in line either inside or outside of the polling place waiting to vote, shall be permitted by the election officers to do so." 25 P.S. § 3066(a). In much the same way, voters who have placed their ballots into the custody of the federal postal system prior to the close of polling places have effectively "joined the line," and it is of no moment that their ballot is received by elections officials after polls are closed. The ballot receipt deadline extension clearly advances the Commonwealth's interest in protecting the constitutional right to vote.

B. Appellants are not likely to succeed on the merits of their Elections and Electors Clause Claims.

Appellants are also unlikely to succeed on their claim that the Pennsylvania Supreme Court usurped the General Assembly's authority under the Elections and Presidential Electors Clauses of the U.S. Constitution. First, the Supreme Court has repeatedly affirmed that the grant of legislative authority in the Elections and Presidential Electors Clauses must be exercised consistent with the state's lawmaking process. *Ariz. State Legislature*, 576 U.S. at 807; *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

In *Ohio ex rel. Davis v. Hildebrant*, the Supreme Court upheld a state law that allowed Ohio voters, through a referendum process, to approve or disapprove of election laws passed by the state legislature. 241 U.S. at 566. Because this process was a part of the "legislative power" under the state constitution and statutes, the

Court held that it was "valid" under the federal Elections Clause. *See id.* at 567–69. The Court reached the same conclusion in *Smiley v. Holm*, where it held that the Minnesota governor's veto of an election bill, so long as the veto was part of the state's "legislative process" under state law, could not "be regarded as repugnant to the grant of legislative authority" in the Elections Clause. 285 U.S. at 368–69. As the Court reasoned, since the Constitution confers on state legislatures the responsibility to "mak[e] laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id*. at 367. *Hildebrant* and *Smiley* therefore stand for the simple but important proposition that election regulations enacted by the Legislature are not immune from State constitutional constraints.[4]

[4] Although these cases interpret the Elections Clause, the Supreme Court has explained that the state Legislature's "duty" under Elections Clause "parallels the duty under" the Presidential Electors Clause. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Courts have accordingly treated them as identical for purposes of interpretation. *Moore v. Circosta*, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *23 (M.D.N.C. Oct. 14, 2020) ("The meaning of 'Legislature' within the Electors Clause can be analyzed in the same way as 'Legislature' within the Elections Clause."), *request for injunctive relief denied in Wise v. Circosta*, No. 20-2104, 2020 WL 6156302 (4th Cir. Oct. 20, 2020) (en banc); *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020) ("As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause."); *see also Ariz. State Legislature*, 576 U.S. at 839 (Roberts, C.J., dissenting) (noting the Presidential Electors Clause's "considerable similarity to the Elections Clause").

Appellants' attempt to write off *Smiley* and *Hildebrant* as "procedural cases" is not well founded. They contend that the referendum and gubernatorial vetoes at issue were merely procedures in the lawmaking process and that allowing state courts to interpret the "substance" of election laws would give state courts "freewheeling power" to "rewrite" election codes. Br. at 29. That is simply not what those cases hold; in fact, the Court recognized that the Elections Clause does not grant freewheeling power to *state legislatures* to enact such laws. *See Smiley*, 285 U.S. at 367-68 ("We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."); *Hildebrant*, 241 U.S. at 568 ("[T]he referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim that the law which was disapproved . . . was yet valid and operative is conclusively established to be wanting in merit.").

Here, the Pennsylvania Constitution and laws passed by the General Assembly itself not only contemplates a role for the courts as part of the Commonwealth's lawmaking process generally, but also *specifically* assigns authority to state courts in the regulation of elections in certain circumstances. For example, as the Pennsylvania Supreme Court noted in *Boockvar*, a provision of the election code provides the courts of common pleas with the power "to decide

'matters pertaining to the election as may be necessary to carry out the intent' of the Election Code," which includes "providing 'an equal opportunity for all eligible electors to participate in the election process.'" *Boockvar*, 2020 WL 5554644, at *17 (quoting 25 P.S. § 3046 and *In re General Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987)). The Pennsylvania Supreme Court, because it holds the "supreme judicial power," has jurisdiction under the same provision to respond to emergencies in the same manner as the courts of common pleas. Pa. Const. Art. V, § 2(a); 42 Pa.C.S. § 501; *In re Bruno*, 101 A.3d 635, 676 (Pa. 2014). The Pennsylvania Supreme Court may also exercise "extraordinary jurisdiction" and assume plenary power over any matter of immediate public importance that is pending before another court of the Commonwealth. *See* 42 Pa.C.S § 726.[5] These provisions give the Pennsylvania Supreme Court unmistakable authority to ensure

[5] Several other laws confer broad judicial authority to the Pennsylvania Supreme Court authority. *E.g.*, 42 Pa.C.S.A. § 501 ("The Supreme Court of Pennsylvania . . . shall be the highest court of this Commonwealth and in it shall be reposed the supreme judicial power of the Commonwealth."); 42 Pa.C.S.A. § 502. ("The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court . . . . The Supreme Court shall also have and exercise the following powers: (1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law. (2) The powers vested in it by statute . . . ."); 42 Pa.C.S.A. § 722 ("The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases . . . Matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth . . . any statute of, this Commonwealth.").

that election procedures comport with the requirements of the Pennsylvania Constitution. That is what the Pennsylvania Supreme Court did in *Boockvar*. 2020 WL 5554644, at *1. It would undermine this scheme for federal courts to displace a State Supreme Court judgment on state law with its own view.

When confronted in the past with circumstances that threaten to disenfranchise voters, Pennsylvania courts have exercised similar authority under 25 P.S. § 3046. For example, after "flooding along the Monongahela River" caused a state of emergency in 1985, a court of common pleas delayed voting for two weeks. *In re General Election-1985,* 531 A.2d at 838, 839 (allowing "members of the electorate . . . [to] be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws"). Pennsylvania courts have even exercised that authority to extend the ballot receipt deadline, just as the Pennsylvania Supreme Court's Order in *Boockvar* did. In advance of the 2016 presidential election, when thousands of voters in Montgomery County had not received their absentee ballots within days of the election because election officials faced "unprecedented demand," a Pennsylvania court extended the absentee ballot receipt deadline by four days and instructed the Montgomery County Board of Elections to accept all absentee ballots that were received by the new deadline. App'x at 75-80. Additionally, earlier this year, the Courts of Common Pleas of Bucks and Delaware Counties extended the

deadline for the return of mail-in ballots during the June Primary for seven days, as long as the ballot was postmarked by the date of the primary. *In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (C.P. Bucks June 2, 2020) (McMaster, J.); *In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No.-CV 2020-003416 (C.P. Delaware June 2, 2020) (Rashing, J.).

In short, Appellants' Elections and Presidential Electors Clause claims fail under the Supreme Court's well-established precedents recognizing that the Legislature's authority is subject to the state's lawmaking process.

C. The postmark presumption does not subject Appellants to arbitrary treatment.

Even if Appellants' theory of disparate treatment were cognizable under the Equal Protection Clause—it is not—the district court erred as a matter of law by concluding that the postmark presumption is arbitrary. While the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications."). Instead, equal protection "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (citation omitted). What's more, "unless a classification

warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citations omitted).

There is no argument that the postmark presumption makes voting more difficult, or that voters who choose to vote in-person are a protected class. Instead, the district court determined that Appellants were likely to succeed on this claim because the postmark presumption failed rational basis review. According to the district court, allowing a rebuttable presumption that mail ballots with a missing or illegible postmark received by November 6th were cast by November 3rd is "arbitrary." App'x at 36. This was mistaken; the postmark presumption is not only rational, it is essential to ensure voters who cast a mail ballot by election day are not disenfranchised by postal service errors—a risk not encountered by in-person voters.

Thus, Appellants' (and the district court's) theory violates a core principle of equal protection: "The Constitution does not require things which are different . . . to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Because, by definition, only voters who cast their ballot by mail risk their ballot being invalidated by USPS error, the postmark presumption does not treat similarly situated citizens differently. In-person voters face no risk that a ballot cast by the close of polls on election day will not be counted due to tardiness. As

explained above, Pennsylvania law even allows in-person voters to cast a ballot *after the statutory deadline* if they are in line to vote at the time polls close. 25 P.S. § 3066. But voters who submit their ballot by mail face exactly this risk due to third-party errors—USPS's inadvertent failure to stamp some ballot envelopes with a legible postmark—outside their control, resulting in the rejection of their timely cast ballots. In this regard, the differences between in-person and mail voters are readily apparent and warrant the tailored remedy ordered in *Boockvar* to ensure Pennsylvania's elections are free and equal.

D. The federal statutes setting the date of the election do not preempt the postmark presumption.

The *Boockvar* decision does not conflict with federal laws setting the date of the election. 2 U.S.C. § 7; 3 U.S.C. § 1. The Pennsylvania Supreme Court's decision requires election officials to count only ballots postmarked by election day; ballots postmarked after election day are not counted. *See* 2020 WL 5554644, at *15 n.20. What Appellants take issue with is the standard that *Boockvar* sets for assessing the timeliness of ballots, but they have not pointed to any federal law that dictates exactly how a state must determine the postmark date of a mail ballot or whether that ballot was timely-cast. *Donald J. Trump for President, Inc. v. Way*, No. 3:20-cv-10753, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) (*Trump for President III*) ("[T]he Federal Election Day Statutes are silent on methods of determining the timeliness of ballots.").

A state's regulation of elections has an important limitation: it "cannot *directly* conflict with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (emphasis added); *Trump for President III*, 2020 WL 5912561, at *12. While "Congress has the authority to compel states to hold [federal] elections on the dates it specifies," *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001); *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7—nothing in *Boockvar* altered the timing of the November election. *Trump for President III*, 2020 WL 5912561, at *12 (denying preliminary relief because "no federal law regulat[es] methods of determining the timeliness of mail-in ballots or requir[es] that mail-in ballots be postmarked."). Because there is no "actual conflict" between the postmark presumption in *Boockvar* and federal law, Appellants' preemption argument is without merit. *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (no preemption where "compliance with both [the challenged law] and the federal election day statutes does not present 'a physical impossibility'" (citation omitted) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963))); *Trump for President III*, 2020 WL 5912561, at *12 (no preemption where no "direct conflict" between New Jersey's postmark presumption and federal laws setting date of elections); *cf. Keisling*, 259 F.3d at 1175

(emphasizing that *Foster* did not "present the question whether a State must always employ the conventional mechanics of an election").[6]

This case is therefore readily distinguishable from the authorities upon which Appellants rely. In *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944), the Montana legislature passed a law during World War II permitting overseas ballots that arrived in December to be counted in the presidential election. The Montana Supreme Court found the act unconstitutional because permitting voting to extend into late December would not allow Montana's presidential electors to be appointed or elected in accordance with federal law: "[t]he chief objection made to the postponement of the final determination of election results to late in December is that under both the federal and state Acts . . . the presidential electors must meet on the first Monday after the second Wednesday in December following their election, and that the delay would deprive Montana of representation in the electoral college." *Id.* at 114. Given that ballots must be received by November 6th, *Boockvar* presents no such risk.

In *Foster v. Love*, 522 U.S. 67 (1997), the U.S. Supreme Court overturned Louisiana's open primary statute, which provided an opportunity for U.S. House and Senate elections to take place entirely in the month before election day, "without any

[6] *See also Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 629 (3d Cir. 1994), *aff'd*, 516 U.S. 199 (1996); *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 649–50 (9th Cir. 2004) (quoting *Gadda v. Ashcroft*, 363 F.3d 861, 871 (9th Cir. 2004)).

action to be taken on federal election day." *Id.* at 68–69. The Court concluded that this system "runs afoul of the federal statute" because it permitted federal elections to take place entirely before the statutorily-mandated election day. *Id.* at 69, 72. Once again, this is not the case before the Court. The *Boockvar* decision does not set a competing election day, and does not permit absentee votes cast after election day to be counted. Rather, the decision *requires* election officials to reject mailed ballots that are postmarked after election day or, in the exceedingly rare case where a ballot received after election day is missing a postmark or other clear means of determining when it was mailed, where a preponderance of the evidence shows that it was not mailed by election day. *Boockvar*, 2020 WL 5554644, at *18 n.26.

Maddox and *Foster* stand for the unremarkable proposition that voting must be available on election day and that ballots must be counted in time for presidential electors to be appointed or elected. But, as post-*Foster* appellate court decisions conclude, "we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote." *Bomer*, 199 F.3d at 777; *Millsaps*, 259 F.3d 535 ("[A]ll courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes."). *Boockvar* "further[s] the important federal objective of reducing the burden on citizens to exercise their right to vote . . . without thwarting other federal concerns," *Bomer*, 199 F.3d at 777, by ensuring that

voters who cast their ballots by mail are not arbitrarily disenfranchised simply because of USPS delays. The November 6 deadline to receive ballots prescribed in the *Boockvar* decision is therefore not in conflict with federal law, and Appellants' preemption claim lacks merit.

IV. THE EQUITIES FORECLOSE APPELLANTS' REQUESTED RELIEF.

It would be administratively confusing and illogical—and disenfranchising for an untold number of mail-in and absentee voters—should Appellants' request for an injunction be granted now, *after* the election has already come and gone. Injunctive relief "is an equitable remedy" and one that does not "issue[] as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). This is especially so when there are substantial public consequences of this "extraordinary remedy" at stake. *Id.* at 312. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*

Appellants' request for injunctive relief came after Pennsylvanians had already reached—and far surpassed—the window in which USPS warned it would be too late to mail ballots to meet the original receipt deadline, App'x at 44; *Boockvar*, 2020 WL 5554644, at *13, and thousands of voters reasonably relied on the current receipt deadline (November 6) in exercising their right to vote. Absent a bend in the space time continuum, these voters cannot turn the clock back and send

their mail ballots in time to comply with the original deadline, or vote in person. Votes have been cast. The election is over.

Weighed against these steep public consequences is Appellants' paltry claim to irreparable harm. Appellants have not suffered any injury, much less one that is irreparable. They acknowledge, for instance, that Appellant Jim Bognet, a candidate for the U.S. House of Representatives, trails his opponent by over 11,000 votes, even without counting any ballots received during the three-day extension of the ballot receipt deadline—the very ballots, it should be noted, that Bognet claims will injure him if they are counted. And while Appellants regard all ballots counted after election day under Pennsylvania's ballot receipt deadline as "illegal votes," federal courts have repeatedly rejected this theory as a basis to bring a lawsuit, much less obtaining extraordinary injunctive relief. *See supra* at Argument, I.

The public consequences of the post hoc invalidation of ballots received during the three-day extension of the receipt deadline are substantial: it would disenfranchise thousands of voters who voted in reliance of the deadline and would inject chaos at a time when the electoral system can least afford it. The upheaval that would result from granting Appellants' requested relief at this stage of the electoral process, is a price this Court should deem too steep to pay, particularly when confronted with the contrived notions of injury and improbable legal claims advanced by Appellants in this case.

CONCLUSION

For the foregoing reasons, the district court's decision denying Appellants' motion for preliminary injunction should be affirmed.

DATED: November 9, 2020

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Dated:11/09/20

CERTIFICATE OF SERVICE

I hereby certify that on Monday, November 9, 2020, on I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Marc E. Elias*
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