No. 20-3214

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 Defendant-Appellee,

On Appeal from the United States District Court for the Western District of Pennsylvania in Case No. 3:20-cv-00215, Judge Kim R. Gibson

Secretary Boockvar's Opposition to Plaintiffs-Appellants' Emergency Motion for an Expedited Briefing Schedule

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Appellee Kathy Boockvar, in her capacity as Secretary of the Commonwealth, submits this response in opposition to Appellants' Emergency Motion for an Expedited Briefing Schedule.

This appeal has arrived at this Court on the eve of the election because of the Appellants' delay in bringing it. The Order Appellants challenge was issued by the Pennsylvania Supreme Court on September 17, 2020. Yet Appellants did not initiate this action until October 22, 2020—35 days later. On October 28, 2020, the Honorable Kim R. Gibson denied Plaintiffs-Appellants' Motion for Immediate Temporary Restraining Order and a Preliminary Injunction, which asked the District Court to enjoin Defendants from complying with the Pennsylvania Supreme Court's decision to extend certain mail-in and absentee ballot deadlines in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020). *Jim Bognet, et al., v. Kathy Boockvar, et al.*, No. 20-215, 2020 WL 6323121, at *7 (W.D. Pa. Oct. 28, 2020). Therefore, the rules established by the Pennsylvania Supreme Court remain in place: absentee and mail-in ballots may be voted by Election Day, November 3, and returned to county boards of elections by mail, so long as they arrive before 5:00 p.m. on November 6. Ballots received during this window, but which lack a legible postmark, are presumed to have been mailed on Election Day.

In their Motion for Entry of an Expedited Briefing Schedule ("Motion"), Appellants acknowledge that it would be unrealistic to decide this appeal in "the limited time that remains" before Election Day. Motion at 3. Secretary Boockvar agrees. As the District Court recognized, voters have relied on the deadlines set forth by the Pennsylvania Supreme Court—and have been informed of those deadlines in numerous communications and instructions from Commonwealth officials, county boards of elections officials, voter advocacy groups and others—in making their respective plans to vote, and it is far too late in the day to change those deadlines in advance of the election. *See Bognet*, 2020 WL 6323121, at *7 ("Granting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* [*v. Gonzalez*, 549 U.S. 1 (2006)] seeks to avoid").

Appellants nevertheless ask this Court to set a breakneck merits briefing schedule that, even at the pace they propose, will not be completed before the end of Election Day. Apparently, Appellants believe that the Court should consider changing the rules, and pulling the rug out from under Pennsylvania voters, *after*

they have all voted in reliance on the schedule established by the Pennsylvania Supreme Court.[1] This is incorrect for two reasons.

First, Appellants' requested after-the-election relief would have this Court punish voters who thought they were casting lawful ballots. Such *post-hoc* relief is plainly in conflict with the Supreme Court's recent action in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). In that case, a South Carolina District Court order, entered on September 18, 2020, enjoined that state's witness requirement for absentee ballots during the COVID-19 pandemic. On October 5, the High Court stayed the District Court's decision, thus reinstating the witness requirement. Recognizing that South Carolina voters submitted ballots without witnesses in the timeframe between the District Court's September 18 injunction and the Supreme Court's October 5 stay, however, that Court specified that "any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement." *Id.* The Supreme Court thus acknowledged that voters should not be punished for relying upon the rules.

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[1] In her capacity as a guardian of Pennsylvanians' access to the franchise, the Secretary strongly opposes the extraordinary, unprecedented relief Appellants seek.

Similar reliance interests here compel this Court to maintain the status quo for Pennsylvania voters at this late juncture. As the Supreme Court has long recognized, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, __U.S.__, 140 S. Ct. 1205, 1207 (2020).

Second, this proposed schedule disregards the possibility—indeed, probability—that this case will become moot after Election Day, and the significant burdens that the schedule would impose on the Commonwealth and county boards of elections personnel who are in charge of running the election. This Court should decline Appellants' invitation.

Despite these clear pronouncements by the United States Supreme Court, Appellants suggest this appeal is nonetheless urgent because of one issue—whether the Pennsylvania Supreme Court's determination that "a ballot received on or before 5:00 p.m. on November 6, 2020," that "lacks a [legible] postmark or other proof of mailing," should "be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day," *Pa. Democratic Party*, 2020 WL 5554644, at *18 n.26, violates the United States Constitution's Equal Protection Clause. *See* Motion at 3. According

to Appellants, this Court must address this issue quickly because, "[i]f the election in Pennsylvania is close," "there may be an overwhelming public interest in this Court resolving the appeal very quickly thereafter." *Id.* The "overwhelming interest" that Appellants describe is extremely unlikely to develop in the days after the election, and will likely never develop at all. Even if this Court were to rule in Appellants' favor (which it should not), the only ballots that will be affected are those that: 1) arrived at boards of elections in the three days after Election Day; and 2) lack a legible postmark. Given that the U.S. Postal Service is supposed to postmark all ballots, [2] the number of ballots that arrive after Election Day without postmarks is likely to be relatively small—perhaps a few thousand. Therefore, these votes are highly unlikely to provide the deciding factor in any federal race. If

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[2] Under USPS regulations, post offices are required to postmark election mail. *See* 39 C.F.R.§ 211.2(a)(2); Postal Operations Manual at 442.2; Your 2020 Official Election Mail Kit 600, United States Postal Service, https://about.usps.com/kits/kit600.pdf at page 25 (last visited 10/30/2020). First-Class and Priority mail are postmarked showing the "full name of [the] Post Office, two-letter state abbreviation, ZIP Code, date of mail, and a.m. or p.m." *See* 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3. But because "the Postal Service recognizes elections as the bedrock of our system of government[,]" beginning in March 2014, the USPS "began applying a cancellation mark to all letter pieces processed on USPS Letter Automation Compatible Postage Cancellation Systems." Your 2020 Official Election Mail Kit 600, United States Postal Service, https://about.usps.com/kits/kit600.pdf at page 25 (last visited 10/30/2020). This improvement in USPS automation prints a cancellation mark on ballot envelopes with pre-paid postage "including identifying the date the Postal Service accepted custody of balloting materials." *Id.*

these votes have no bearing on the electoral outcome, Appellants' claim will be moot, Appellants may withdraw it, and in any event, expedited procedures will be unnecessary. In other words, the extraordinary relief Appellants seek is plainly unnecessary now—and it may never be necessary.

The hurried briefing schedule Appellants seek is not only contrary to Supreme Court practice and precedent and makes little practical sense given that this case might be mooted, it also carries a much larger threat—destabilizing confidence in the election while vote-counting is underway. The importance and gravity of the questions presented in this case weigh powerfully against the extraordinarily hurried adjudication that Appellants demand. Were they to prevail, it would cast doubt on myriad election rules contained in other state election codes and enforced by other state courts while vote-counting was ongoing elsewhere.[3]

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[3] For example, under Nevada law, "[i]f an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the absent ballot shall be deemed to have been postmarked on or before the day of the election." Nev. Rev. Stat. Ann. § 293.317(2). In Illinois, any mail-in ballot received without a postmark "after the polls close on election day and before the close of the period for counting provisional ballots cast at that election, shall be . . . opened to inspect the date inserted on the certification, and, if the certification date is election day or earlier" it will be counted. 10 ILCS 5/19-8(c); *see also*, 10 ILCS 5/18A-15. And New Jersey likewise accepts any "ballot without a postmark, . . . that is received by the county boards of elections from the United States Postal Service within 48 hours of the closing of polls on November 3, 2020[.]" N.J. Stat. Ann. § 19:63 31(m). See also, N.Y. Elec. Law § 8-412; Cal. Elec. Code § 3020(b); W. Va. Code, § 3 3-5(g)(1).

Finally, and most fundamentally, this Court need look no further than the United States Supreme Court's recent decision to refuse to expedite consideration of the petition for writ of certiorari in *Republican Party of Pennsylvania v. Boockvar*. In that case, the same decision of the Pennsylvania Supreme Court is at issue and the Court decided that these issues could not be resolved quickly. *See* Order dated October 28, 2020, *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (U.S.). The Supreme Court's decision not to expedite consideration of the petition for certiorari may well have been based on the recognition that there is no need for expedited consideration before it is even clear that the number of disputed ballots at issue will sustain a live case or controversy.[4]

For all these reasons, Appellants' Motion for Entry of an Expedited Briefing Schedule should be denied.

In order to keep the Court apprised of the status of this case, in lieu of Appellants' unnecessarily rushed proposed briefing schedule, Secretary Boockvar suggests the following:

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[4] Appellants seek to escape the United States Supreme Court's determination not to expedite because one issue—whether the Pennsylvania Supreme Court's mailing date presumption violates the United States Constitution's Equal Protection Clause—is not presented in that case. *See* Motion at 3. Even if that is correct—petitioner in *Republican Party of Pennsylvania v. Boockvar* reference the presumption in its questions presented—it has no impact on the Supreme Court's analysis that, given the election calendar, expedited consideration is unwarranted.

- Secretary Boockvar will contact the Court by 5:00 p.m. Saturday, November 7 with information about the status of the count, including, where information is available, what the approximate margins are in federal races, the number of mail-in and absentee ballots that arrived between 8:00 p.m. November 3, and 5:00 p.m. on November 6, and any approximation of how many of these ballots lacked legible postmarks.
- Should there still be a live controversy based on these numbers, Secretary Boockvar, other Appellees, or Appellants may contend that this Court should move quickly to decide it.

Respectfully submitted

October 30, 2020

/s/ Michele D. Hangley

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CERTIFICATE OF BAR MEMBERSHIP (LAR 46.1)

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Michele D. Hangley, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Michele D. Hangley
MICHELE D. HANGLEY

Dated: October 30, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 1,827 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

3. In addition, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that the electronic version of the brief has been scanned for viruses by Trend Micro OfficeScan 10.6.5372 (updated continuously) and is, according to that program, free of viruses.

/s/ Michele D. Hangley
MICHELE D. HANGLEY

October 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Michele D. Hangley
MICHELE D. HANGLEY