

## **No Relief from a State Supreme Court’s Extension of the Deadline for Receipt of Cast Ballots Because the Action Was Brought Too Close to the Election**

*Bognet v. Boockvar (Kim R. Gibson, W.D. Pa. 3:20-cv-215)*

A federal complaint challenged a decision by a state supreme court regarding a deadline accommodation for mailed ballots at a time of degraded mail service and a global infectious pandemic. The district judge decided that the case had merit, but immediate relief could not be granted only days before the election. The court of appeals affirmed her decision, and the Supreme Court ultimately ordered the case dismissed as moot.

*Subject:* Absentee and early voting. *Topics:* Absentee ballots; enjoining certification; laches; matters for state courts; Covid-19; intervention; interlocutory appeal; case assignment.

On October 22, 2020, a congressional candidate and four voters filed a federal complaint in the Western District of Pennsylvania against the secretary of the commonwealth and all sixty-seven county boards of elections challenging a September 17 decision by Pennsylvania’s supreme court.<sup>1</sup> The Pennsylvania court, among other things, established

a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the [United States Postal Service (USPS)] and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement resulting from the conflict between the Election Code and the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the [global infectious Covid-19] pandemic.<sup>2</sup>

The U.S. Supreme Court declined to stay the Pennsylvania decision on October 19.<sup>3</sup>

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1. Complaint, *Bognet v. Boockvar*, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2020), D.E. 1; *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 345 (3d Cir. 2020); see Angela Coulombis & Marie Albiges, *Barrett Could Be the Key if Pa. Battle Back in Court*, Phila. Inquirer, Oct. 23, 2020, at A3.

2. *Pa. Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345, 371 (2020), *cert. denied*, 593 U.S. \_\_\_, 141 S. Ct. 732 (2021); see *Bognet*, 980 F.3d at 344–45 (“the Pennsylvania Supreme Court concluded that [the postal service’s] existing delivery standards could not meet the timeline built into the Election Code and the circumstances beyond voters’ control should not lead to their disenfranchisement”).

3. *Scarnati v. Boockvar*, 592 U.S. \_\_\_, 141 S. Ct. 644 (2020) (stay application by the president pro tempore and the majority leader of Pennsylvania’s senate); *Republican Party of Pa. v. Boockvar*, 592 U.S. \_\_\_, 141 S. Ct. 643 (2020) (stay application by the Republican Party of Pennsylvania, an intervenor in the state case); see *Bognet*, 980 F.3d at 345; see also Stephen Vladeck, *The Shadow Docket* 215–16.

With their complaint, the plaintiffs in the Western District case filed a motion for a temporary restraining order and a preliminary injunction.<sup>4</sup>

Judge Kim R. Gibson set the case for a videoconference hearing on October 27.<sup>5</sup> On the day before the hearing, she granted the Democratic National Committee's motion to intervene as a defendant.<sup>6</sup> She denied the secretary's October 24 motion to transfer the case to Judge J. Nicholas Ranjan,<sup>7</sup> who on October 10 denied relief regarding ballot drop boxes, mail-in ballot signatures, and restrictions on poll watchers,<sup>8</sup> and who on October 23 denied a temporary restraining order regarding the exclusion of poll watchers from some election locations.<sup>9</sup>

Although Judge Gibson determined that the complaint had merit, she denied immediate relief on October 28, "less than one week prior to the [November 3] election date."<sup>10</sup>

The Court finds that Plaintiffs have established a likelihood of success on their claim that the counting of ballots received after Election Day but before 5:00 p.m. on November 6, 2020, without a postmark or with an illegible postmark creates a preferred class of voters and violates their rights under the Equal Protection Clause. . . . [However,] the Court determines that it is required to deny Plaintiffs' motion for injunctive relief because Plaintiffs raised their claim on the eve of the election, despite the likelihood of success on the merits of their Equal Protection Claim.<sup>11</sup>

The court of appeals affirmed her decision on November 13,<sup>12</sup> but the Supreme Court vacated the affirmance on April 19, 2021, finding the case to be moot.<sup>13</sup> Judge Gibson dismissed the case on July 19.<sup>14</sup>

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4. Motion, *Bognet*, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2020), D.E. 5.

5. Docket Sheet, *id.* (Oct. 22, 2020); *see* Minutes, *id.* (Oct. 28, 2020), D.E. 76.

6. Order, *id.* (Oct. 26, 2020), D.E. 36; *see* Motion, *id.* (Oct. 24, 2020), D.E. 23.

7. Order, *id.* (Oct. 26, 2020), D.E. 51; *see* Motion, *id.* (Oct. 24, 2020), D.E. 256.

8. Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

9. Transcript at 8, Parnell v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1570 (W.D. Pa. Oct. 23, 2020, filed Oct. 26, 2020), D.E. 55.

10. Opinion at 8, *Bognet*, No. 3:20-cv-215 (W.D. Pa. Oct. 28, 2020), D.E. 77 [hereinafter W.D. Pa. Opinion], 2020 WL 6323121; *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 346 (3d Cir. 2020) ("The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28 . . .").

11. W.D. Pa. Opinion, *supra* note 10, at 7–8.

12. *Bognet*, 980 F.3d 336.

13. *Bognet v. Degraffenreid*, 593 U.S. \_\_\_, 141 S. Ct. 2508 (2021); *see* Jonathan Lai, *Last Pa. Election Challenge Is Tossed*, Phila. Inquirer, Apr. 20, 2021, at B1.

14. Order, *Bognet*, No. 3:20-cv-215 (W.D. Pa. July 19, 2021), D.E. 116.