

Appeal No. 20-3214

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Jim Bognet, et al.,

Plaintiffs-Appellants,

v.

*Kathy Boockvar, in her capacity has Secretary of the Commonwealth
of Pennsylvania, et al.,*

Defendants-Appellees,

Democratic National Committee,

Intervenor-Appellee.

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

**OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION
FOR AN EXPEDITED BRIEFING SCHEDULE**

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**Applications for admission pending*

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INTRODUCTION

At issue in this case is the Pennsylvania Supreme Court's September 17 ruling, which applied and found that, to protect voters from disenfranchisement, the Pennsylvania Constitution requires the extension of the ballot receipt deadline by three days in the present election. In the six weeks that have elapsed since the Pennsylvania Supreme Court entered its order, the parties to that lawsuit sought review at the United States Supreme Court twice: first, with an emergency application to stay the decision, and second, with a petition for a writ of certiorari accompanied by a motion to expedite consideration. The Supreme Court denied the stay application on October 19, and the motion to expedite consideration was denied on October 28. The certiorari petition remains pending. *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020).

The Plaintiffs-Appellants ("Plaintiffs") in this case, on the other hand, did nothing. They sat on their hands and waited until just last week to act, at which point they filed an eleventh-hour request for a temporary restraining order demanding that the courts, the Secretary, and election officials from all sixty-seven counties act at breakneck speed to accommodate Plaintiffs' ill-timed collateral attack of the Pennsylvania Supreme Court ruling that has been in place for well over a month. This self-imposed emergency is not the type of extenuating circumstance that warrants the extraordinarily compressed briefing schedule that Plaintiffs now

request—nor the consequent burden on election officials that it would impose—just days before election day, especially after the U.S. Supreme Court just denied the Republican Party’s motion to expedite consideration of their own petition for a writ of certiorari raising the same issues.

Plaintiffs who slept on their claims for over a month are ill-positioned to expedite anything on the eve of an election, much less the appeal of an Order altering the deadlines for mail ballots, at a time when it is much too late for voters to comply with new restrictions and adapt to the requested relief. The last-minute nature of their request is one of the reasons the district court denied their motion for preliminary injunction in the first place, and Plaintiffs themselves recognize, just as the Supreme Court did, that it is too late to grant their requested relief before election day. It is difficult to see how Plaintiffs here are any more entitled to an expedited briefing schedule on their appeal than the parties who challenged the Pennsylvania Supreme Court ruling over a month ago and have since sought (unsuccessfully) to expedite their appeals.

Perhaps the most troubling aspect of Plaintiffs’ extraordinary request is their implicit acknowledgment that not only are they too late to obtain pre-election day relief, but the expedited review they seek may not even be necessary at all. They surmise that there may be “overwhelming public interest” in a resolution of their appeal “[i]f the election is close”; but what if it isn’t? And they further suggest that

“factual developments” may “necessitate this Court to move immediately,” but point to no supporting facts, whatever they may be, that *currently* warrant expedited consideration. Thus, all the Court has before it is a request to expedite briefing as a contingency plan, not to resolve any pressing controversy, but to be ready in case a close election or other future events create the emergency that is currently non-existent. Simply put, Plaintiffs’ hypotheticals are not the kinds of “exceptional reason[s] that warrant[] expedition,” Local Appellate Rule 4.1, and certainly do not entitle them to force the federal judiciary, the Secretary of the Commonwealth, all sixty seven county boards of election, and the DNC into a last-minute rush that could have been easily avoided by a timely challenge.

ARGUMENT

I. Plaintiffs inexcusably delayed in bringing this action.

To expedite an appeal, litigants must show an “extraordinary reason” warranting expedited review. L.A.R. 4.1. Plaintiffs have made no such showing, and this Court should not countenance their inexcusable delay in bringing this action by awarding an expedited schedule that prejudices the parties and harms the public. *E.g., Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 404 (E.D. Pa. 2016) (“Plaintiffs unreasonably delayed filing their Complaint and Motion, something which weighs decidedly against granting the extraordinary relief they seek. The delay is particularly relevant where, as here, an election is looming.”).

The litigation surrounding the Commonwealth's deadline for receiving mail ballots began several months ago, involving several parties and multiple actions. The Pennsylvania Supreme Court resolved the litigation through an Order issued on September 17—six weeks ago. Throughout these proceedings, Plaintiffs chose to remain on the sidelines, but now seek parallel appellate review of nearly identical legal arguments from this Court presumably to preserve yet another opportunity to attack the Pennsylvania Supreme Court's decision in the event the election is close.

To the extent Plaintiffs suggest that this action is in fact *timely* because of the U.S. Supreme Court's rejection of the application to stay the *Boockvar* decision, this Court should flatly reject such a notion. *See, e.g., Dobson v. Dunlap*, 576 F. Supp. 2d 181, 187-88 (D. Me. 2008) (rejecting pendency of another lawsuit as excuse for delay in filing). Plaintiffs cannot "have it both ways" by disassociating with the pending federal actions where it is convenient for their legal arguments while relying on it to excuse their delay in vindicating their own rights, which they claim are imminently at risk. *Id.* Plaintiffs' delay in prosecuting their claims alone is enough reason to deny expedition of this matter.

II. Plaintiffs will not be prejudiced in the absence of an expedited briefing schedule and cannot identify any extraordinary reason for such relief.

Plaintiffs cannot (and indeed do not) say they will suffer prejudice absent an expedited briefing schedule, and for good reason. It is Plaintiffs' own failure to ask for emergency relief when it was appropriate that now has them scrambling in the

eleventh hour to adjudicate their claims. Furthermore, the Secretary of the Commonwealth has already directed counties to segregate all ballots which Plaintiffs contend are at issue—those received between 8 p.m. on November 3 and 5 p.m. on November 6.¹ The segregation of these ballots all but eliminates any contention that somehow Plaintiffs could be prejudiced under an alternative briefing schedule.

As for the Appellees, the prejudice that would follow from granting Plaintiffs' proposed briefing schedule is both certain and significant. Plaintiffs seek to require the Secretary and every single county in Pennsylvania to turn their attention away from administering an exceptionally challenging election—mere *days* before that election—and toward immediate briefing before this court. The likelihood that “circumstances warrant” this Court’s review of this appeal after the election, moreover, is slim and entirely speculative. It is far from clear how many ballots postmarked by election day will arrive between 8:00 p.m. on November 3 and 5:00 p.m. on November 6, let alone how many ballots will arrive during that window without a legible postmark. There is certainly no reason to assume that the number will be decisive in the races for President and House of Representatives. In other

¹ Pennsylvania Department of State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020 (Oct. 28, 2020) available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-10-28-Segregation-Guidance.pdf>. (directing that all such ballots “shall be kept separate and segregated from all other voted ballots” and “shall not [be] pre-canvass[ed] or canvass[ed] . . . until further direction is received.”).

words, the extraordinary relief Plaintiffs seek is not only plainly unnecessary on an expedited basis, there is no reason to believe it will be necessary at all.

CONCLUSION

The Democratic National Committee respectfully requests the Court deny Plaintiffs' motion for expedited appeal.

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By: /s/ Marc E. Elias

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Local Appellate Rule 31.1(c).

1. This brief complies with the type-word limit of Rule 32 because, excluding the parts of the document exempted by that rule, this document contains 1,289 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font. The word count was generated using Microsoft Word's processing software.

3. The text in the electronic version of this brief is identical to the text in the paper copies.

4. A virus detection program has been run on the file and no viruses were detected.

/s/ Marc E. Elias
Marc E. Elias

CERTIFICATE OF SERVICE

Marc E. Elias certifies that on the 30th day of October 2020, I served a copy of the above document in this matter on all counsel of record and parties via ECF filing.

/s/ Marc E. Elias _____

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