

No. 23-3166

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

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PENNSYLVANIA STATE CONFERENCE OF THE NAACP BRANCHES,  
*et al.*,

*Plaintiffs-Appellees,*

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA, *et al.*,  
*Defendants-Appellees,*

REPUBLICAN NATIONAL COMMITTEE, *et al.*,  
*Intervenor-Defendants-Appellants.*

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Appeal from the United States District Court for the  
Western District of Pennsylvania, No. 1:22-cv-339

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**Brief of Amici Curiae SeniorLAW Center and the Center for Advocacy for  
the Rights and Interests of Elders in Support of Petitions for Rehearing or  
Rehearing En Banc**

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Dated: April 17, 2024

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 3d Cir. L.A.R. 26.1.1, Amici Curiae SeniorLAW Center and the Center for Advocacy for the Rights and Interests of Elders disclose that they have no parent corporations and that no publicly held corporations hold 10% or more of their stock.

Dated: April 17, 2024

/s/ Benjamin D. Geffen  
Benjamin D. Geffen

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF IDENTITY AND INTEREST OF AMICI ..... 1

STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE  
PROCEDURE 29(a)(4)(E).....2

ARGUMENT .....3

    A. Older voters have more to lose than most if the panel majority’s decision  
    stands .....4

    B. The right to vote has long included consideration for the needs of citizens  
    with disabilities and older voters in general .....8

CONCLUSION .....11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Applewhite v. Commonwealth</i> , 54 A.3d 1 (Pa. 2012) .....	5
<i>Applewhite v. Commonwealth</i> , No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) .....	6
<i>Brown v. Grzeskowiak</i> , 101 N.E.2d 639 (Ind. 1951) .....	9
<i>McDonald v. Bd. of Election Comm’rs</i> , 394 U.S. 802 (1969) .....	10
<i>McLinko v. Dep’t of State</i> , 279 A.3d 539 (Pa. 2022) .....	9, 10
<i>Moore v. Pullem</i> , 142 S.E. 415 (Va. 1928) .....	9
<i>N.A.A.C.P. v. Phila. Bd. of Elections</i> , No. 97-cv-7085, 1998 WL 321253 (E.D. Pa. June 16, 1998) .....	10
<i>Perles v. Cnty. Return Bd. of Northumberland Cnty.</i> , 202 A.2d 538 (Pa. 1964) .....	9
<i>Queenan v. Russell</i> , 339 S.W.2d 475 (Ky. 1960) .....	9
<i>Tully v. Okeson</i> , 977 F.3d 608 (7th Cir. 2020) .....	11
<i>United States v. Classic</i> , 313 U.S. 299 (1941) .....	9
<b>Statutes</b>	
52 U.S.C. § 20101 .....	10
Ind. Code § 3-11-10-24(a)(5) .....	11
La. Rev. Stat. § 18:1303(J) .....	11
Miss. Code Ann. § 23-15-715(b) .....	11

S.C. Code Ann. § 7-15-320(B)(2)..... 11  
 Tenn. Code Ann. § 2-6-201(5)(A) ..... 11  
 Tex. Elec. Code Ann. § 82.003 ..... 11

**Rules**

Fed. R. App. P. 29(a)(4)(E)..... 2  
 Fed. R. App. P. 35(b)(1)(B) ..... 3

**Other Authorities**

Joshua A. Douglas, *State Judges and the Right to Vote*,  
 77 Ohio St. L.J. 1 (2016)..... 8  
 Vicki A. Freedman & Brenda C. Spillman, *Disability and Care Needs Among  
 Older Americans*, 92 Milbank Q. 509 (2014) ..... 4  
 Daniel Hopkins, *Expert Declaration*,  
*Eakin et al. v. Adams County Board of Elections et al.*,  
 W.D. Pa. Case No. 1:22-cv-340-SPB, ECF No. 314-11..... 6, 7  
 George F. Miller, *Absentee Voters and Suffrage Law* (1948) ..... 9  
 Pa. Department of State,  
*Voting by Alternative Ballot*,  
<https://www.vote.pa.gov/Voting-in-PA/Pages/Alternative-Ballot.aspx>..... 10  
 U.S. Census Bureau, *Disability Characteristics*,  
<https://data.census.gov/table?q=disability> ..... 4, 5  
 U.S. Census Bureau, *QuickFacts Pennsylvania*,  
<https://www.census.gov/quickfacts/fact/table/PA#> ..... 5  
 U.S. Dep’t of Transp., Bureau of Transp. Statistics,  
*Travel Patterns of American Adults with Disabilities* (Jan. 3, 2022),  
<https://www.bts.gov/travel-patterns-with-disabilities>..... 5  
 Carter Walker & Laura Benschoff, *Philadelphia’s Communities of Color  
 Disproportionately Affected When Mail Ballots Are Rejected Over Small Errors*,  
 SpotlightPA, June 27, 2023,  
[https://www.spotlightpa.org/news/2023/06/pa-philadelphia-mail-ballot-rejection-  
 black-latino/](https://www.spotlightpa.org/news/2023/06/pa-philadelphia-mail-ballot-rejection-black-latino/)..... 8

## **I. STATEMENT OF IDENTITY AND INTEREST OF AMICI**

SeniorLAW Center and the Center for Advocacy for the Rights and Interests of Elders (CARIE) are both nonprofit, nonpartisan organizations focused on protecting the rights and autonomy of older adults in Pennsylvania.

SeniorLAW Center seeks justice for older people using the power of the law, educating the community, and advocating at local, state, and national levels. Founded in 1978, SeniorLAW Center has served more than 450,000 older Pennsylvanians through its many diverse programs, including its statewide SeniorLAW HelpLine, which serves older adults in all 67 Pennsylvania counties. SeniorLAW Center addresses critical legal issues affecting the lives of older people, including elder abuse, family violence and financial exploitation, housing and shelter, grandparents raising grandchildren, guardianship, consumer protection, health care, advance planning, and civil and voting rights.

SeniorLAW Center works to protect the right to vote of older Pennsylvanians, regardless of party, race, culture, or orientation, as a fundamental right and one that older people particularly value. SeniorLAW Center has provided education, outreach, and legal assistance to older Pennsylvanians throughout the Commonwealth to help protect their right of suffrage. It has organized and held pro bono clinics to help older voters and has authored numerous articles and media

pieces on the challenges facing older Pennsylvanians in voting and the need to remove obstacles.

CARIE is a leader in providing direct assistance to elders, their families, and professionals in the aging field. Through telephone contacts and site visits to Philadelphia-area long-term care facilities, CARIE assists older adults and their caregivers in assessing needs, identifying service resources, and making the necessary connections to resolve elder care issues. CARIE's team works each election cycle to help long-term care residents get to the polls or mail in a ballot with hands-on assistance in facilities and even arranging for transportation when needed. Last year CARIE helped over 200 people vote.

Older Pennsylvanians are especially reliant on the mail-in ballot option to exercise their right to vote. Rejecting ballots with undated or misdated outer envelopes where that date plays no role whatsoever in determining a voter's eligibility or a ballot's validity injures SeniorLAW Center and CARIE's constituents by needlessly burdening their right to vote.

## **II. STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)**

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

### **III. ARGUMENT**

The panel majority incorrectly reversed the decision of the District Court. By granting the Petitions for Rehearing or Rehearing En Banc and affirming the decision of the District Court, this Court will ensure that thousands of ballots will be counted at every major election that would otherwise be discarded. Whether to count thousands of ballots mailed disproportionately by older voters, and whether the Civil Rights Act of 1964 permits rejection of mail ballots for immaterial paperwork errors, are questions of “exceptional importance” that warrant rehearing en banc. Fed. R. App. P. 35(b)(1)(B).

This case is of particular significance to older voters, as a large share of the impacted ballots are cast by older Pennsylvanians. Older adults are significantly more likely than younger adults to have disabilities or travel limitations that make in-person voting difficult or impossible. Data from recent Pennsylvania elections show that older voters are not only more likely to vote by mail, but are also more likely to not date or to misdate their ballot envelopes. State and federal laws have long recognized these special difficulties older voters face. Affirmance of the District Court decision is crucial for ensuring that older Pennsylvanians will not experience disproportionately high voiding of their ballots.



**A. Older voters have more to lose than most if the panel majority's decision stands**

Older adults are more likely than others to vote by mail, for reasons including their increased need for assistance with activities of daily life, higher incidence of disabilities, and greater transportation challenges. As of 2011, 10.9 million Americans aged 65 or older relied on help for self-care, mobility, and household activities, and another 7.5 million had difficulty with these activities but received no help. Vicki A. Freedman & Brenda C. Spillman, *Disability and Care Needs Among Older Americans*, 92 *Milbank Q.* 509, 518 (2014). These activities include “paying bills/banking,” “getting around inside’s one home or building,” and “leaving one’s home or building.” *Id.* Together, these two groups represented 48.3% of older Americans.

Older Americans are significantly more likely than younger adults to have a disability, increasing their likelihood of voting by mail. According to the Census Bureau’s 2022 American Community Survey, 46% of Americans aged 75 and older and 24% of those aged 65 to 74 report having a disability, while only 13% of adults ages 35 to 64 and 8% of adults under 35 report having a disability. U.S. Census Bureau, *Disability Characteristics*, <https://data.census.gov/table?q=disability> (last visited Apr. 5, 2024). Older adults are nearly five times more likely to suffer from an ambulatory difficulty: 20.8% of adults aged 65 and older have an ambulatory difficulty, compared with 4.4% of adults aged 18-64. *Id.* They are also significantly

more likely to experience a vision difficulty: 5.9% of adults aged 65 and older have a vision difficulty, contrasted with 2.1% of adults aged 18-64. *Id.* The numbers are even higher for people aged 75 and higher, with 29.7% experiencing an ambulatory difficulty and 8.3% experiencing a vision difficulty. *Id.*

Many older adults also experience transportation challenges, including mobility disabilities or lack of access to a current driver's license or car, making them more likely to vote by mail. An estimated 11.2 million Americans aged 65 and older report having travel-limiting disabilities. U.S. Dep't of Transp., Bureau of Transp. Statistics, *Travel Patterns of American Adults with Disabilities* (Jan. 3, 2022), <https://www.bts.gov/travel-patterns-with-disabilities>. The percentage of people reporting travel-limiting disabilities increases with age. *Id.* Before age 50, the number is less than 10%. *Id.* It increases to over 18% by age 70 and to nearly 32% by age 80. *Id.*

Pennsylvania's older adults are scarcely immune from the difficulties that older Americans face nationwide. Nearly 20% of the Commonwealth's population is 65 or older. U.S. Census Bureau, *QuickFacts Pennsylvania*, <https://www.census.gov/quickfacts/fact/table/PA#> (last visited Apr. 5, 2024). As the Pennsylvania Supreme Court noted in a voting-rights case, "the elderly" are among "the most vulnerable segments of our society." *Applewhite v. Commonwealth*, 54 A.3d 1, 4 (Pa. 2012). Older voters tend to have a "declining need or ability to drive."

*Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at \*54 (Pa. Commw. Ct. Jan. 17, 2014). And the right to vote under the state constitution extends to “every qualified Pennsylvanian elector, regardless of age.” *Id.* at \*24.

Empirical analyses show that the envelope date requirement ensnares a disproportionately high number of older Pennsylvania voters. An expert declaration offered in the related litigation of *Eakin et al. v. Adams County Board of Elections et al.*, W.D. Pa. Case No. 1:22-cv-340-SPB, quantifies these impacts. Hopkins Decl., *Eakins* ECF No. 314-11. The author of the expert declaration is Daniel Hopkins, Ph.D., “a tenured Professor of Political Science at the University of Pennsylvania.” Hopkins Decl. ¶ 3. Dr. Hopkins reports two related phenomena of significance to older voters’ use of mail ballots.

First, he marshals research showing that “subtle changes in the costs and frictions involved in undertaking certain activities can influence their completion.” *Id.* ¶ 11. “[P]rocedural frictions” such as “confusion over how to properly mark or complete the ballot” can prevent voters “from successfully casting a vote for the candidate or measure of their choice and having that vote counted.” *Id.* ¶ 13. “Voters with the fewest resources available to them are often the least equipped to overcome increases in the costs of voting.” *Id.* ¶ 14. Older voters are more likely to vote by mail, because in-person voting has even higher costs and friction than mail voting. *Id.* ¶¶ 15, 17-18. Dr. Hopkins concludes this part of his discussion by noting that

“the date requirement increases the cost of voting and imposes the heaviest burdens on individuals who are already highly vulnerable to cost increases and are less likely to overcome them,” including “older voters.” *Id.* ¶ 20.

Second, Dr. Hopkins analyzes data from the 2022 general election to quantify these effects. In addition to identifying racial and ethnic disparities, he finds that an “older voter is 0.37 percentage points more likely to cast a mail ballot with a date issue” than a younger voter. *Id.* ¶ 45. Similarly, he finds that a 60-year-old voter is “0.2 percentage points more likely to cast a mail ballot lacking a date” than a 20-year-old voter, and is “0.13 percentage points more likely to cast a mail ballot with an incorrect date.” *Id.* ¶¶ 52, 56.

Two additional sources of data from Philadelphia bolster Dr. Hopkins’s findings. First, an evaluation of mail ballot outer envelopes with date problems by the Philadelphia County Board of Elections from the November 8, 2022 general election found that “[e]lderly voters were disproportionately overrepresented.” Pa.App. 893, ECF No. 146. The oldest voters were particularly impacted, with 14% of envelopes with date problems coming from voters aged 80-89, and a total of 70 such envelopes coming from voters at least 90 years old. Pa.App. 893-94. Philadelphia segregated and did not count any of these voters’ ballots. Pa.App. 893. Second, a review of undated and incorrectly dated mail ballot envelopes in Philadelphia from the May 16, 2023 primary noted that “mail voters already skew

older than voters as a whole,” and found that “voters whose ballots were subject to rejection for dating errors had a median age approximately five years older than the median age of all voters requesting mail ballots.” Carter Walker & Laura Benshoff, *Philadelphia’s Communities of Color Disproportionately Affected When Mail Ballots Are Rejected Over Small Errors*, SpotlightPA, June 27, 2023, <https://www.spotlightpa.org/news/2023/06/pa-philadelphia-mail-ballot-rejection-black-latino/>.<sup>1</sup>

Together, these data sources show that a policy of rejecting ballots with undated and misdated outer envelopes will hit older Pennsylvanians harder than younger voters. Rehearing or rehearing en banc is appropriate for this reason and the many other reasons set forth in the District Court’s well-reasoned opinion, in Judge Shwartz’s dissent, and in the two petitions for rehearing or rehearing en banc.

**B. The right to vote has long included consideration for the needs of citizens with disabilities and older voters in general**

Courts in 1964 and earlier routinely recognized that the right to vote includes the right of an eligible absentee voter to cast such a ballot and to have it counted.<sup>2</sup>

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<sup>1</sup> As Judge Shwartz noted in her dissenting opinion, this analysis also found “that the types of errors and omissions that occurred in this case disproportionately disenfranchised minority voters.” Dissent at 28 n.20.

<sup>2</sup> The right to vote is grounded principally in state constitutions, and state court decisions were thus the main source of caselaw that informed Congress in 1964 about the right to vote. *See generally* Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L.J. 1, 1-2 (2016).

*E.g., Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (stating, in case concerning absentee ballots, that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter”); *Queenan v. Russell*, 339 S.W.2d 475, 478 (Ky. 1960); *Brown v. Grzeskowiak*, 101 N.E.2d 639, 647 (Ind. 1951); *Moore v. Pullem*, 142 S.E. 415, 423 (Va. 1928). See generally *United States v. Classic*, 313 U.S. 299, 315 (1941) (“Obviously included within the right to choose . . . is the right of qualified voters within a state to cast their ballots and have them counted. . . .”).

For decades preceding the enactment of the Materiality Provision, most states guaranteed that the right to vote included a right to cast an absentee ballot for broad categories of people who could not vote in person. This was especially significant for senior citizens and people with disabilities. As early as 1948, 27 states permitted absentee voting for citizens whose health prevented them from voting in person. George F. Miller, *Absentee Voters and Suffrage Law* 20 (1948). Pennsylvania joined these states in 1957 by expanding access to absentee ballots to “qualified voters unable to vote in their district due to their ‘unavoidable’ absence because of their duties, occupation or business or because of illness or physical disability.” *McLinko v. Dep’t of State*, 279 A.3d 539, 581 (Pa. 2022) (quoting Pa. Const. art. VIII, § 19 (1874) (amended in 1957)).

Post-1964 developments have reinforced the principle that the right to vote includes the right for older voters to have a meaningful opportunity to cast a ballot and to have it counted. For one example, by 1969 “all but five States ha[d] extended the [absentee] ballot to the physically disabled.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 810 n.9 (1969).

For a second example, in 1984 President Reagan signed the Voting Accessibility for the Elderly and Handicapped Act “to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.” 52 U.S.C. § 20101. To satisfy this law, Pennsylvania introduced a means of voting called the “alternative ballot,” which is the functional equivalent of an absentee ballot, and which is available to any elector who has a disability or who is over 65 years old, and who is assigned to an inaccessible polling place. *See* Pa. Department of State, *Voting by Alternative Ballot*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Alternative-Ballot.aspx> (last visited Apr. 5, 2024); *see also* *N.A.A.C.P. v. Phila. Bd. of Elections*, No. 97-cv-7085, 1998 WL 321253, at \*1 (E.D. Pa. June 16, 1998).<sup>3</sup>

For a third example, many states that do not offer a universal mail-voting option have for decades statutorily permitted senior citizens to vote by absentee

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<sup>3</sup> Under Act 77 of 2019, Pennsylvania now allows every voter to choose between voting in person or by mail. *See generally* *McLinko v. Dep’t of State*, 279 A.3d 539, 544 (Pa. 2022).

ballot. *E.g.*, Ind. Code § 3-11-10-24(a)(5); La. Rev. Stat. § 18:1303(J); Miss. Code Ann. § 23-15-715(b); S.C. Code Ann. § 7-15-320(B)(2); Tenn. Code Ann. § 2-6-201(5)(A); Tex. Elec. Code Ann. § 82.003. As one judge has explained, such laws recognize “the physical and social conditions that invariably afflict senior citizens. A November day in Indiana, at least in the northern regions of the State, can pose a significant obstacle to leaving one’s home.” *Tully v. Okeson*, 977 F.3d 608, 619 (7th Cir. 2020) (Ripple, J., concurring); *see also id.* (noting “the legislature’s solicitude that everyone who experiences the barriers associated with old age can vote”).

This long history of solicitude for the needs of older voters informed Congress in 1964 and should inform this Court now. Unless reversed, the panel majority’s decision will lead to the voiding of thousands of older voters’ ballots for a technical mistake that the majority acknowledged “plays no role in determining a ballot’s timeliness,” Opinion at 18. This is an issue of exceptional importance that the Court needs to correct through rehearing or rehearing en banc.

#### **IV. CONCLUSION**

Granting the petitions and affirming the District Court’s decision will protect thousands of Pennsylvania voters, especially older voters, from having their ballots discarded on the basis of immaterial paperwork mistakes. This is exactly what the Civil Rights Act of 1964 requires, and this Court should grant the petitions for rehearing or rehearing en banc and affirm the District Court.



Respectfully submitted,

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Dated: April 17, 2024

## V. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. Fed. R. App. P. 29(b)(4) and 32(a)(7)(B) because this brief contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 365 word-processing software.

3. This brief complies with 3d Cir. L.A.R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies, and a virus detection program, SentinelOne - Agent version 23.4.2.216, has been run on the electronic file and no virus or risk was detected.

*/s/ Benjamin D. Geffen*

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Benjamin D. Geffen

Dated: April 17, 2024

**VI. CERTIFICATE OF BAR MEMBERSHIP**

The undersigned hereby certifies that he is a member in good standing of the bar of this Court.

/s/ Benjamin D. Geffen  
Benjamin D. Geffen

Dated: April 17, 2024

## **VII. CERTIFICATE OF SERVICE**

On this date, I caused a true and correct copy of the foregoing Brief of Amici Curiae in Support of Petitions for Rehearing or Rehearing En Banc to be served upon all counsel of record via the Court's ECF system, in accordance with 3d Cir. L.A.R. Misc. 113.4.

/s/ Benjamin D. Geffen  
Benjamin D. Geffen

Dated: April 17, 2024