No. 24-

IN THE

Supreme Court of the United States

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

Petitioners,

v.

AL SCHMIDT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Millions of Americans of every political stripe vote by mail in each federal election.

The Materiality Provision of the 1964 Civil Rights Act prohibits "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]" 52 U.S.C. § 10101(a)(2)(B). The statute expressly defines voting to include "all action necessary to make a vote effective including . . . casting a ballot, and having such ballot counted." *Id.* § 10101(a)(3)(A), (e).

The court of appeals held that this statute applies only to errors or omissions on voter registration forms and not to required forms that mail-ballot voters must complete for their mail ballot to be opened and counted.

The question presented is whether, under the Materiality Provision, voters who cast a mail ballot may have their ballots excluded and not counted because of an error or omission on a required paper form accompanying their mail ballot, where the error or omission is undisputedly irrelevant in determining the voter's identity or their qualifications or the timely receipt of their ballot.

PARTIES TO THE PROCEEDING

Petitioners Pennsylvania Conference of the NAACP, League of Women Voters of Pennsylvania, Philadelphians Organized to Witness Empower And Rebuild, Common Cause Pennsylvania, Black Political Empowerment Project, Make the Road Pennsylvania, Barry M. Seastead, Aynne Polinski, and Laurence Smith were plaintiffs in the district court and appellees in the court of appeals.

Respondent Secretary of the Commonwealth Al Schmidt and respondents the boards of elections for Allegheny County, Berks County, Bucks County, Lancaster County, Lehigh County, Montgomery County, Northampton County, Philadelphia County, Warren County, Washington County, Westmoreland County, and York County were defendants in the district court and appellees in the court of appeals.

The boards of elections of Adams County, Armstrong County, Beaver County, Bedford County, Blair County, Bradford County, Butler County, Cambria County, Cameron County, Carbon County, Centre County, Chester County, Clarion County, Clearfield County, Clinton County, Columbia County, Crawford County, Cumberland County, Dauphin County, Delaware County, Elk County, Erie County, Fayette County, Forest County, Franklin County, Fulton County, Greene County, Huntingdon County, Indiana County, Jefferson County, Juniata County, Lackawanna County, Lawrence County, Lebanon County, Luzerne County, Lycoming County, McKean County, Mercer County, Mifflin County, Monroe County, Montour County, Northumberland County, Perry County, Pike County, Perry County, Schuylkill County, Snyder County, Somerset County, Sullivan

County, Susquehanna County, Tioga County, Union County, Venango County, and Wyoming County were defendants in the district court.

Respondents Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania were intervenor-defendants in the district court and appellants in the court of appeals.

Respondent Richard Marino was an intervenor-appellant in the court of appeals.

Respondents Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee and Democratic National Committee were intervenors-appellees in the court of appeals.

Jean Terrizzi, Marjorie Boyle, and Deborah Diehl were plaintiffs in the district court but withdrew prior to the grant of summary judgment. Marlene Gutierrez and Joel Bencan were plaintiffs in the district court and appellees in the court of appeals but are not petitioners in this Court.

RELATED PROCEEDINGS

- *Pennsylvania State Conference of the NAACP et al v. Schmidt et al*, No. 22-cv-339, U.S. District Court for the Western District of Pennsylvania. Judgment entered November 21, 2023.
- *Pennsylvania State Conference of NAACP Branches, et al v. Northampton County Board of Elections, et al*, No. 23-3166, U.S. Court of Appeals for the Third Circuit. Judgment entered March 27, 2024.

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The order of the United States District Court for the Western District of Pennsylvania granting summary judgment for the Petitioners is reported at 703 F. Supp. 3d 632 and reprinted at App. 82a.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on March 27, 2024. App. 5a. The Third Circuit denied Petitioner's petition for rehearing *en banc* on April 30, 2024. App. 1a. On July 17, 2024, Justice Alito granted a request to extend the time for filing a petition for certiorari until August 28, 2024. On August 20, Justice Alito granted a further request to extend the time for filing a petition for certiorari until September 27, 2024.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Materiality Provision of the Civil Rights Act of 1964, which provides:

> (2) No person acting under color of law shall . . .
>
> > (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

INTRODUCTION

Decades ago, Congress specifically banned the practice of refusing to count a person's ballot because of an immaterial error on some required piece of paperwork. 52 U.S.C. § 10101(a)(2)(B). It did so as part of its Nation-shaping efforts in the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eradicate arbitrary and potentially discriminatory barriers to the franchise.

This case involves an undisputedly immaterial error on a piece of required, voting-related paperwork. In Pennsylvania, thousands of voters' mail ballots were set aside, left unopened and uncounted, because the voter failed to include a handwritten date when completing a required form printed on the outer mail ballot return envelope, or included a date that was deemed "incorrect." All agree these voters are qualified, that they filled out and returned their ballots on time, and that the handwritten date has

nothing to do with confirming voters' identities or qualifications, determining timeliness, or preventing fraud. In other words, all agree the error is immaterial.

Disenfranchising voters on this basis violates the plain terms of the Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), which prohibits refusing to count a person's vote based on an "error or omission" on a voting-related "record or paper," if the error or omission is "not material in determining" a person's qualifications to vote in the election.

The court of appeals nonetheless reversed the judgment for Petitioners in a split decision, reading the Materiality Provision as applying only to errors on registration forms. This interpretation is contrary to the statute's plain text and ignores or misapplies settled rules of statutory construction. The statute expressly covers not just errors on voter registration forms but errors on "*any* record or paper relating to *any* application, registration, *or other act requisite to voting*." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). The panel majority's reading effectively deletes the language that Congress chose to include. The panel majority's reading also ignores the expansive definition of "voting" provided by Congress in the statute's text. And while text alone dictates the right answer on the merits here, the decision below also misconstrues the statute's purpose and history and wrongly prioritizes the panel majority's own policy considerations over the statute's text.

The question presented is exceptionally important. Voters across the Nation increasingly use mail ballots to vote safely and securely. The rule

adopted here will result in the needless disenfranchisement of thousands of voters each election, especially seniors of all political stripes. And this case is an ideal vehicle for considering whether the Materiality Provision applies in the mail-ballot context, because here the immateriality of the voter-written envelope date—its total lack of relevance to a voter's identity or qualifications or to whether a ballot was timely completed or received by relevant the Election Day deadline—is undisputed. Certiorari should be granted.

Alternately, if the Pennsylvania state courts conclusively resolve this issue as a matter of state law—as they may via a case currently pending before the Pennsylvania Supreme Court—this Court should grant the petition, vacate, and remand pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That outcome would mirror the result in *Ritter v. Migliori*, where this Court vacated a prior Third Circuit decision reaching the opposite result on the same issue after the underlying case became moot. *See Migliori v. Cohen*, 36 F.4th 153, 162–66 (3d Cir. 2022) (unanimously concluding that the Materiality Provision *prohibited* excluding ballots based on failure to write date on mail-ballot envelope form), *judgment vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (Mem.) (2022).

If the controversy in this case is resolved on other grounds before this Court can take it up, the same result should obtain here, too.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Materiality Provision prohibits state actors from:

> deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B). The statute defines the word "vote" broadly, as "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast." *Id.* § 10101(a)(3)(A), (e).

The law was enacted as part of new voting protections in the Civil Rights Act of 1964, and initially applied only to federal elections. *See* Pub. L. No. 88-352, § 101, 78 Stat. 241, 241 (1964). The 1965 Voting Rights Act extended the provision to state elections as well. *See* Pub. L. No. 89-110, § 15(a), 79 Stat. 437, 444 (1965).

The Materiality Provision was designed to eradicate the use of irrelevant errors on paper forms as a barrier to the franchise. *E.g.*, *Fla. State Conf. of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1173 (11th Cir. 2008) (statute prohibits requiring "trivial

information" that merely serves "as a means of inducing voter-generated errors"); *Schwier v. Cox*, 340 F.3d 1284, 1294, 1297 (11th Cir. 2003) (statute prohibits state actors from "requiring unnecessary information" on voting-related paperwork as a condition to voting). Such paperwork requirements, such as making a voter write their age in months and days, were widely used in the Jim Crow South, often to prevent Black citizens from exercising the right to vote. *E.g.*, *id.*; *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995); *accord Schwier*, 340 F.3d at 1294, 1297; *see also* H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394, 2485-2487, 2491.

The Materiality Provision was necessary in no small part because narrower voting protections enacted in 1957 and 1960 had failed to protect the vote in the face of persistent, "ingenious" efforts by states to evade them. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *see, e.g.*, H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2489 (Rep. McCulloch); 110 Cong. Rec. 6714–15 (1964) (Sen. Keating) (explaining that immaterial paperwork errors had been used to "circumvent the 1957 and 1960 acts"). Congress sought to protect not merely people registering to vote, but "all persons *seeking to vote*"—and it did so "by prohibiting the disqualification of an individual because of immaterial errors or omissions in papers or acts relating *to such voting*." H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394, 2491 (emphasis added); *see also, e.g.*, 110 Cong. Rec. 6530 (1964) (Sen. Humphrey) (discussing "technique[s] for denying . . . *the right to vote*," such as "ask[ing]

questions that have nothing to do with the applicant's qualifications to vote." (emphasis added)).

Against this backdrop, Congress crafted the Materiality Provision broadly to encompass all manner of trivial paperwork requirements that might be used as a barrier to voting. Its "over-inclusive" language was purposeful, meant "to capture well-disguised discrimination." *Vote.Org v. Callanen*, 89 F.4th 459, 482 (5th Cir. 2023); *see also Browning*, 522 F.3d at 1173 (explaining that, "in combating specific evils," Congress may "choose a broader remedy"). The statute thus protects qualified individuals' right not merely to register but "to vote in any election." 52 U.S.C. § 10101(a)(2)(B). And it applies to "all action necessary to make a vote effective," from "registration" all the way to "casting a ballot, and having such ballot counted," *id.* § 10101(a)(3)(A), (e).

Consistent with the statute's plain text and Congress's aims, the Materiality Provision has been applied in various contexts. It has been applied to immaterial errors on required paper forms at the polls. *See Ford v. Tenn. Senate*, No. 06-cv-2031, 2006 WL 8435145, at *7, *10–11 (W.D. Tenn. Feb. 1, 2006) ("technical requirement" to separately sign both application form and poll book could not be enforced to disenfranchise voters). It has also been applied to immaterial errors on voter-registration forms. *See, e.g.*, *Schwier*, 340 F.3d at 1294; *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1266, 1271 (W.D. Wash. 2006).

And more recently, with the expansion of mail-ballot voting, it has been applied to immaterial mistakes on mail-ballot-related paper forms, as

involved here. *See, e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (statute prohibited requirement to handwrite birth year on mail-ballot return envelope form); *see also Migliori*, 36 F.4th at 162-66 (unanimously concluding that statute prohibited requirement to write date on mail-ballot envelope form), *judgement vacated as moot sub nom. Ritter*, 143 S. Ct. 297.

II. FACTUAL BACKGROUND

A. Pennsylvania offers all voters the option to vote by mail

Pennsylvania has long offered mail voting to some categories of voters. In 2019, Pennsylvania expanded its availability to all registered, eligible voters. App. 20a–21a, 134a. In the 2022 general election, over one million Pennsylvanians voted by mail. *E.g.*, App. 48a, 140a.

A voter seeking to vote by mail must complete an application and submit it to the board of elections to verify their identity and qualifications. App. 20a, 134a–135a. They must provide their name, address, and proof of identification. *Id.*; *see* 25 Pa. Stat. §§ 3146.2, 3150.12. County boards of elections "ascertain" applicants' qualifications and verify proof of identification. 25 Pa. Stat. §§ 3146.2b, 3150.12b, 3146.8(g)(4). Then the county board sends them a package with a ballot, a secrecy envelope, and a pre-addressed outer return envelope, on which is printed a voter declaration form. 25 Pa. Stat. §§ 3146.6(a), 3150.16(a).

At "any time after receiving" the materials, the voter marks their ballot, puts it inside the secrecy

envelope, and places the secrecy envelope in the return envelope to deliver to the county board of elections. 25 Pa. Stat. §§ 3146.6(a), 3150.16(a). The voter then must "fill out, date and sign" the declaration form printed on the envelope affirming their qualifications. 25 Pa. Stat. §§ 3146.6(a), 3150.16(a); App. 21a.

To be timely, the board must receive ballots by 8 p.m. on Election Day. 25 Pa. Stat. §§ 3146.6(c), 3150.16(c); *see* App. 25a, 137a, 165a. Upon receipt, every county board marks the return envelope as received to confirm timeliness, and enters this information into Pennsylvania's electronic Statewide Uniform Registry of Electors database. App. 20a–21a, 58a, 137a, 164a–165a. The handwritten date that a voter writes on the declaration form thus has no bearing on whether a mail ballot is timely—it "is not used to confirm timely receipt of the ballot or to determine when the voter completed it." *E.g.*, App. 17a.

It is undisputed that the handwritten date on the envelope declaration form "is immaterial." App. 29a. It is not used "'for any purpose related to determining a voter's qualification' under Pennsylvania law," and it "plays no role in determining a ballot's timeliness." App. 21a, App. 25a; *see also* App. 137a, 156a–157a, 163a–166a. It is not used to detect or prevent fraud. App. 49a, 80a n.37; *see also* 164a n.39. As the panel majority below acknowledged, it serves "little apparent purpose." App. 17a.

B. Litigation ensues over the date requirement

Attempts to exclude mail ballots for failure to handwrite the date on the envelope declaration form have generated extensive litigation since 2019.

First, in 2020, the Supreme Court of Pennsylvania concluded on state-law grounds that mail ballots would be counted in that year's November election despite errors with respect to the handwritten date. *In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d 1058, 1062 (Pa. 2020), *cert. denied sub nom. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (Mem.) (2021). In reaching that result, a majority of the court suggested that invalidating votes on this basis "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons." *Id.* at 1074 n.5; *see also id.* at 1089 n.54 (Wecht, J., concurring and dissenting).

Next, in the November 2021 municipal elections, Lehigh County set aside 257 timely-received mail ballots from eligible voters because they had omitted the handwritten envelope date. *Migliori*, 36 F.4th at 157. Voters sued, and a unanimous panel ordered Lehigh County to count the votes to comply with the Materiality Provision. *See Migliori*, 36 F.4th at 162–164; *see also id.* at 164–66 (Matey, J., concurring). After this Court denied a stay application, every ballot was counted. *See Ritter v. Migliori*, 142 S. Ct. 1824 (Mem.) (2022). The election's certification ended the controversy and this Court subsequently vacated *Migliori* as moot in a non-merits order. *See Ritter*, 143 S. Ct. 297.

The issue re-emerged in the 2022 primary. The Commonwealth Court held that undated mail ballots must count because the date "does not relate to the timeliness of the ballot or the qualification of the elector." *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *28 (Pa. Commw. Ct. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9–15 (Pa. Commw. Ct. June 2, 2022).

Following this authority, for the 2022 general election, the Secretary of the Commonwealth advised counties to count valid, timely-received mail ballots from eligible voters notwithstanding any error or omission regarding the handwritten date. App. 137a–138a. But on October 16, 2022, immediately after the *Migliori* vacatur, and weeks after voting had begun, a group including the Republican Party respondents here brought an original action (termed a "Kings Bench" action) in the Supreme Court of Pennsylvania, seeking an election-eve order excluding mail ballots with no handwritten date or an "incorrect" handwritten date on the return envelope. App. 138a.

On November 1, 2022, the Pennsylvania Supreme Court issued an order directing that such mail ballots be segregated and not counted. The court did not rule on the federal statutory issue, instead holding only that the state statute requiring the date was mandatory, meaning that the handwritten date, though irrelevant, was required. *Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023); *id.* at 34-35 (Dougherty, J., concurring in part) ("federal law issue" left "unresolved"). *See* App. 22a–23a, 138a–139a. Nor did the Pennsylvania Supreme Court address whether enforcement of the statutory envelope-date

requirement to exclude qualified voters' ballots was consistent with the requirements of the Pennsylvania Constitution.

C. Thousands of Pennsylvanians are disenfranchised in 2022

In the 2022 general election, county boards of elections in Pennsylvania refused to count at least 10,500 timely-received mail ballots based solely on missing or purportedly "incorrect" handwritten dates on the outer return envelope. App. 140a. The affected voters were registered Democrats, Republicans, and Independents, ranging from ages 18 to 101 and hailing from across the State. Ct.App.Dkt.149 at 158–166, 174–180.

The envelope-date rule was enforced inconsistently and arbitrarily. Many counties refused to count ballots where the envelope date was correct but missing one term, such as "Oct. 25." App. 166a. Many rejected ballots with handwritten dates that appeared to use the international format (*i.e.*, day/month/year). App. 169a–170a. Counties also refused to count timely-received ballots with obviously unintentional mistakes, such as a voter writing their birthdate, or writing the wrong year, or mistakenly adding a digit to a term (*e.g.*, writing October 11 as "10/111"). *See* App. 168a–170a; *see also* Ct.App.Dkt.149 at 193–215 (detailing these and other inconsistent and arbitrary applications).

D. Voters and nonpartisan groups challenge the date requirement in federal court

Petitioners filed this lawsuit in the days leading up to the November 2022 election. Petitioners

named Pennsylvania's county boards and the Secretary of the Commonwealth as defendants. Republican-Party-affiliated entities intervened. App. 23a–24a.

Plaintiffs took written discovery from all 67 counties and the Secretary of the Commonwealth and deposed a number of county elections officials.[1] *See* Ct.App.Dkt.149 at 126–220 (Rule 56 stmt.), 604–618 (appendix listing record). That discovery formed a comprehensive and undisputed record regarding the use and purposes of the date on the mail-ballot envelope. *E.g.*, Ct.App.Dkt.149 at 221–512 (responses to Rule 56 stmt.). Based on the undisputed facts, the district court granted Petitioners' motion for summary judgment, concluding that the envelope date was "wholly irrelevant" to determining voter qualifications or timeliness and that excluding timely-submitted mail ballots based solely on the envelope-date requirement violates the Materiality Provision. App. 163a–170a.

In the decision at issue here, a divided panel of the court of appeals reversed. While acknowledging that the handwritten date on the declaration form was irrelevant, the panel majority concluded that the Materiality Provision "is concerned only with the process of determining a voter's *eligibility* to cast a ballot" and therefore allows voters to be disenfranchised for irrelevant paperwork errors on any required, voting-related forms other than their initial registration form. App. 37a. The panel majority

[1] At least sixty counties executed a stipulation agreeing not to contest the requested relief. *See* D.Ct.Dkt.156, 189, 243, 423 (stipulations).

conceded that this reading creates textual "redundancies." App. 44a. It characterized its reading of the statutory text as one in which "the tail . . . wags the dog." App. 40a.

Judge Shwartz dissented, concluding based on the text of the statute that it "applies to mistakes on paperwork including, but not limited to, voter registration forms." App. 70a.

The court of appeals subsequently denied review *en banc*. App. 3a–4a. Four of the court's active judges voted to grant *en banc* review. App. 4a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS WRONG

A. The Third Circuit's Decision Is Irreconcilable with Statutory Text

Statutory interpretation "begins with the statutory text, and ends there as well if the text is unambiguous." *E.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (cleaned up) (citations omitted).

On a plain-text reading of the statute, every element is met as to the envelope-date error.

- Pennsylvania voters were "den[ied] the right . . . to vote" as the statute defines it because their ballots were not "counted and included in the appropriate totals of votes cast[.]" 52 U.S.C. §§ 10101(a)(2)(B), (a)(3)(A), (e).

- That denial was "because of an error or omission," *i.e.,* omitting or incorrectly inputting the handwritten date on the envelope form. *Id.* § 10101(a)(2)(B).

- The error was on a "record or paper relating to any application, registration, or other act requisite to voting," *i.e.*, the paper declaration form printed on the return envelope, which voters were required to complete in order to vote, *i.e.*, to "cast[] a ballot, and hav[e] such ballot counted," *id.* § 10101(a)(3)(A), (e). *See also, e.g.*, Pocket Oxford American Dictionary 664 (3d ed. 2010) (defining "requisite" as "necessary because of circumstances or regulations").

- This error is undisputedly immaterial to whether a voter "is qualified under State law to vote in [the] election[,]" or to their mail ballot's timely receipt. *Id.* § 10101(a)(2)(B).

Under this straightforward reading of the statute, no words are rendered superfluous or meaningless. The rules of grammar and syntax are observed. Statutory definitions are respected. The Materiality Provision reaches instances where (as here, and as Congress intended) a voter's right to vote is nullified due to a meaningless paperwork mistake on some required, voting-related paper form that has no bearing on whether they are qualified to vote in the election. And it extends no further than that.

The panel majority's registration-forms-only

interpretation does violence to the text and countermands numerous principles of statutory interpretation.

The panel majority's reading renders key portions of statutory text entirely superfluous, contravening a "cardinal rule" of statutory interpretation. *E.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The Materiality Provision applies to errors or omissions to "*any* record or paper relating to *any* application, registration, *or other act requisite to voting*," 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Limiting the statute's scope to records or papers relating to "registration" only effectively deletes the above-emphasized text that Congress chose to include.

The panel majority's reading also requires ignoring statutorily defined terms, which are equally part of the statutory text. *E.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 n.10 (1995). Congress expressly defined voting for purposes of the statute as including not just registration but "all action necessary to make a vote effective including . . . casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(a)(3)(A), (e). Under that definition, completing the declaration form is an "act requisite to voting" because if a voter does not satisfactorily complete the form (by including the meaningless handwritten date) they will not "hav[e] [their] ballot counted."

The panel's reading also violates basic rules of syntax and usage—"ordinary principles of English prose"—which always apply in interpreting statutory

text. *E.g.*, *Flora v. United States*, 362 U.S. 145, 150 (1960).

The Materiality Provision comprises two parts or clauses. The statute's main clause sets forth the general prohibition on vote-denial based on paperwork errors and specifies the paper forms "on" which such errors might be made, namely "any record or paper relating to any application, registration, or other act requisite to voting[.]" 52 U.S.C. § 10101(a)(2)(B). A subordinate "if" clause then specifies *which* errors or omissions on such forms cannot serve as a basis for disenfranchisement: those that are "not material in determining whether such individual is qualified under State law to vote in such election[.]" *Id.* The two clauses are illustrated below:

> [1] No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting,
>
> [2] if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election

52 U.S.C. § 10101(a)(2)(B).

The statute expressly identifies which records or papers it covers in the main clause, where the term "record or paper" appears. And the main clause contains no limitation to records or papers related to registration—indeed, its express language is to the contrary. So the panel majority looked elsewhere. It focused on language in the statute's subordinate

clause ("material in determining whether such individual is qualified under State law to vote"), even though the subordinate clause identifies not types of *forms* (*i.e.*, "record[s] or paper[s]") at issue, but the types of *errors* that may serve as a proper basis for vote denial. App. 29a–31a.

The panel then incorrectly assumed that "determining whether such individual is qualified under State law to vote" implies some limitation to only the voter registration process, App. 29a–30a, 37a, even though a voter's qualifications may also be assessed or confirmed when voters apply for a mail ballot, or when they fill out mail ballot paperwork like the declaration form at issue here, or when they are presented with paperwork at the polls, *see infra* 20. The panel majority then used this presumed registration-only limitation to override the main clause's express language to the contrary directly specifying what forms are covered. App. 30a–31a.

This is not a natural or permissible way to read text. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) (discussing the "nearest reasonable referent" rule). The "not material in determining" qualifications language refers directly to the term "error or omission," the adjacent referent within the subordinate clause. 52 U.S.C. § 10101(a)(2)(B) (paperwork error may not be the basis for vote denial "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election"). It does not refer to (and thus does not limit) the scope of the term "record or paper" in the more distant main clause. *Compare Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.

569, 584 (1994) (specification in dependent clause of statute could not "swallow" the broader meaning of the main clause).

The panel majority's own description of what it was doing underscores how unnatural its construction is. The court explained that its interpretation of the Materiality Provision turns "the 'in determining' phrase" from the subordinate clause into "the tail that wags the dog." App. 40a. The tail wagging the dog is, to put it mildly, not a natural occurrence—much less a permissible rationale for reading a statute's words against their plain meaning.[2]

Moreover, even if the panel majority's "wag-the-dog" approach to statutory construction was permissible, the mail-ballot envelope form at issue here is still covered by the text as Congress wrote it.

The panel majority assumed that "determining whether [a voter] is qualified under State law to vote" (*i.e.*, the language it relied on from the statute's subordinate clause) only occurs when a voter first registers to vote. *See, e.g.*, App. 30a, 37a. But the Materiality Provision applies to forms or paperwork that a voter may be required to complete again and again in each discrete election (like the form at issue here), as evidenced by the repeated references to the right "to vote in any election" and qualifications "to vote in any election." 52 U.S.C. § 10101(a)(2)(B). This "in any election" language would be superfluous if the

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[2] Indeed, the joke in the play from which the idiom originates is that the tail wagging the dog is *physically impossible*. *See* Tom Taylor, *Our American Cousin* 8 (1858) ("Why does a dog waggle his tail[?] . . . Because the tail can't waggle the dog! Ha ha!"), https://tinyurl.com/4kumh94y.

statute only covered a person's initial voter registration. *E.g.*, *RadLAX*, 566 U.S. at 645.

And even if the panel majority were right that only forms that have to do with "determining whether [a voter] is qualified under State law to vote" are covered, the form at issue here would still fit the bill. While the *date* on the envelope form is immaterial in determining if a voter is qualified, the paper form on which voters are asked to write the date—a declaration including "a statement of the electors qualifications"—necessarily *is* used to confirm a voter's qualifications. *See* 25 Pa. Stat. §§ 3146.4, 3146.6(a), 3150.12, 3150.16(a); *see also* D.Ct.Dkt.281 at 1172 (envelope form asks voters to declare, among other things, "I am qualified to vote in this election").

Even under the panel majority's reading, then, the "act requisite to voting" at issue here—completing the envelope form, including the declaration that the voter is qualified—is fundamentally "similar in nature" to completing an "application" or "registration." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16 (2001) (describing the *ejusdem generis* canon, under which, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific word."). Like a voter application or registration, the envelope declaration is a voting-related paper form that voters are required to fill out to indicate their qualifications as part of the voting process.

Refusing to count a person's vote because of immaterial mistakes on such required paper forms is

unlawful. Simply put, there is no viable reading of the text that supports the panel majority's contrary conclusion.

B. The Third Circuit's Decision Is Irreconcilable with Congress's Aims

The panel majority came to its interpretation based not on text or purpose, but on legislative history and policy concerns that it thought justified "cabin[ing] the Materiality Provision's reach." App. 36a. Those tools, however, do not even come off the shelf without first determining that the text is insolubly ambiguous. *E.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–254 (1992). Otherwise, "courts must presume that [Congress] says in a statute what it means and means in a statute what it says there." *Id.*[3]

[3] In addition to being no match for plain text, the panel majority's policy concerns are overblown. Properly read, the statute is limited to forms that voters must complete to have their vote counted. It does not cover the ballot itself because a ballot is not "similar in nature," *Circuit City*, 532 U.S. at 115, to the examples Congress provided, namely an "application" or "registration," both of which are paper forms that voters are required to fill out with specific information. Rather the ballot *is the vote itself*. Moreover, an election official attempting to count a ballot but being unable to do so because it cannot be counted due to an overvote would not "deny the right of [the voter] to vote" in the first place. 52 U.S.C. § 10101(a)(2)(B). Nor does the statute preclude any requirement to use a secrecy envelope with a mail ballot, because the secrecy envelope also is not a "record or paper" (like an application or registration) that voters must fill out. Indeed, failing to use a secrecy envelope would not be an error or omission "on" a required form at all. 52 U.S.C. § 10101(a)(2)(B).

And in any case, the panel majority's reading of the Materiality Provision's history and purpose (App. 29a–38a) was wrong.

To be sure, Congress repeatedly referred to "registrars" and voter registration in enacting the Materiality Provision. But that is because, in 1964, many voters were being arbitrarily denied the ability even to register. But Congress's aims (consistent with the express terms of the statute) were broader—to succeed where narrower legislative efforts had failed and to secure and protect the franchise itself, not merely registration. *E.g.*, *supra* 5–7. If Congress had limited its protection to registration and omitted forms involved in the receipt and casting of ballots from the Materiality Provision's protections, the statute would have fallen far short of its goals. Jim Crow jurisdictions could have simply allowed Black citizens to register, and then presented them at the polls with other "ballot application" or "voter declaration" paperwork containing immaterial paperwork requirements. *Cf. Ford*, 2006 WL 8435145, at *11.

The broad language Congress chose, explicitly extending beyond registration to "any act requisite to voting," underscores its broad purpose. And the fact that the language Congress chose has led in turn to new applications over the decades is entirely unsurprising. With the Civil Rights Act and the Voting Rights Act, Congress enacted "major piece[s] of federal civil rights legislation," *Bostock v. Clayton Cnty.*, 590 U.S. 644, 680 (2020), designed to stymie even not-yet-invented forms of vote denial. *See Katzenbach*, 383 U.S. at 309. In service of that goal, Congress defined voting in broad terms, as including

"all action necessary to make a vote effective," 52 U.S.C. § 10101(a)(3)(A), (e), and it placed within the ambit of the Materiality Provision all manner of paper forms "requisite to voting," *id.* § 10101(a)(2)(B); *see also supra* 14–16.

Congress's decision to broadly define the right to vote and to use expansive language in describing the forms of paperwork that were covered—reasonable responses to the policy problem it faced—"virtually guaranteed that unexpected applications would emerge over time." *Bostock*, 590 U.S. at 680. And so here we are. "'[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command." *Id.* at 674 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). The statute's application even in situations that might not have been initially foreseen thus reflects the "presumed point . . . to produce general coverage," not any intent "to leave room for courts to recognize ad hoc exceptions." Scalia & Garner, *Reading Law* at 101.

II. THE CASE PRESENTS A UNIQUELY GOOD VEHICLE TO ADDRESS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

The panel majority's interpretation of the Materiality Provision does not just threaten to disenfranchise thousands of Pennsylvania voters each and every election. If adopted more broadly, it could deny the protection of federal law to literally millions, and greenlight new immaterial paperwork requirements for mail-ballot *and in-person voters alike*, both of whom the panel majority's rule excludes from the statute's protection.

The panel majority opinion's novel and countertextual reading is contrary to recent federal court decisions in Texas, Georgia, and Arkansas holding that the Materiality Provision's protections apply to paper forms associated with the mail ballot process. Those courts so concluded by following the plain text of the statute, which applies to mail-ballot-related paperwork when completing that paperwork is an "act requisite to voting." *See In re Ga. Senate Bill 202*, No. 1:21-CV-01259, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) ("[C]ompleting the outer envelope is an 'act requisite to voting' because without it, the vote will not count."), *on appeal* Nos. 23-13085 and 23-13095 (11th Cir.); *La Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 742, 757 (W.D. 2023) (application for a mail ballot and completion of carrier envelope were "act[s] requisite to voting"), *on appeal* No. 23-50885 (5th Cir.); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023) (holding the Materiality Provision applied to absentee ballot

applications, but finding that the challenged requirement was material).

Since the Third Circuit's decision, though, one district court has chosen to follow the panel majority. *See Liebert v. Millis*, No. 23-CV-672, 2024 WL 2078216, at *14–*17 (W.D. Wis. May 9, 2024) (discussing the decision below and concluding that the errors on forms printed on absentee ballot envelope "fall outside the scope of the Materiality Provision").[4] The Third Circuit's decision is thus already sowing confusion and disagreement among the lower courts regarding the scope of the Materiality Provision.

And the consequences of the current confusion in the lower courts are profound. Use of mail-in voting has grown dramatically in recent years, whether because voters require the option due to sickness, disability, travel, work or family obligations, or because voters choose it out of its comparative ease and flexibility. Many states, like Pennsylvania, now make absentee voting available to all registered voters, rather than a smaller subset.[5] The COVID-19 pandemic further enlarged the growing role of voting by mail, with voters voting by mail in 2020 to protect

[4] *Liebert* relied mainly on the Third Circuit's decision and also pointed out that older decisions "concluded with little discussion that the Materiality Provision applies only to voter registration." *Liebert,* 2024 WL 2078216 at *10. *See, e.g.*, *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996) (so concluding in dicta).

[5] *E.g.*, Nat'l Conf. of State Legislatures, *States with No-Excuse Absentee Voting* (Dec. 20, 2023), https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting.

themselves, their families, and the public.[6] Millions of Americans now vote by mail in every federal election.

The rule adopted below would leave those millions of voters—including many seniors, voters with disabilities, and rural voters who rely on mail ballots as their *only* way to vote—facing new risks of having their ballot discarded because of a meaningless paperwork mistake. It would reopen them to the type of arbitrary disenfranchisement that Congress sought to eradicate. And because the rule adopted below limits the statute's application to voter registration forms only, it would be useless in preventing new forms of in-person vote denial based on polling place paperwork—some of the very types of barriers that Congress meant to sweep away when it passed the Materiality Provision in the first place.

This Court has recognized the importance of promoting trust in elections, improving voter confidence, and avoiding voter confusion. *E.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 664 (2021); *see also Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Clarifying the application of federal law in the context of mail-ballot voting in particular—and the extent to which voters may have their ballots excluded due to trivial paperwork mistakes—is especially important, and becoming more so with each election.

This case is an ideal vehicle for resolving the statutory interpretation issue presented. It was

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[6] Drew Desilver, *Mail-in voting became much more common in 2020 primaries as COVID-19 spread*, Pew Rsch. Ctr. (Oct. 13, 2020), https://www.pewresearch.org/short-reads/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread//

decided not on emergency motions, but on a fully developed factual record on summary judgment. The thoroughness of that record and the nature of the date requirement in particular means that it is undisputed that the error or omission at issue here is not "material" as the statute defines it—it does not go to a voter's identity or qualifications, or to whether their ballot was timely received. *E.g.*, App. 163a–170a.

Accordingly, a grant of certiorari here would allow the Court to interpret the scope of the statute, and resolve the question whether it applies in the mail-ballot context, without wading into the more fact-dependent issues that might arise with other paperwork requirements where the "materiality" of the error at issue is actually contested.

III. IF THIS CASE BECOMES MOOT, THE COURT SHOULD GRANT THE PETITION, VACATE THE THIRD CIRCUIT'S DECISION, AND REMAND

Mere weeks before the filing of this petition, the Pennsylvania Commonwealth Court held that the practice of excluding voters' mail ballots due to an error in handwriting the date on the envelope form violates the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5. *See Black Pol. Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321 (Pa. Commw. Ct. Aug. 30, 2024), *vacated,* No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 13, 2024). That decision was vacated on procedural grounds, after which a King's Bench action asserting the same state constitutional claim was filed in the Pennsylvania Supreme Court. *See* Application for Extraordinary Relief, *New PA Project Education Fund v. Schmidt*, No. 112 MM 2024

(Pa. filed Sept. 25, 2024); *see also* Order, *Baxter v. Philadelphia Bd. of Elections*, C.P. No. 240902481 (Phila. Cty. Ct. Sept. 26, 2024) (holding Free and Equal Elections Clause bars exclusion of ballots cast in local special election).

Those cases raise the prospect that, if the Supreme Court of Pennsylvania grants the petition and rules for the petitioners, the underlying controversy in this case over the envelope-date requirement will be conclusively resolved on state law grounds through separate state court litigation. If that were to happen—if, in other words, this case were to "become 'moot while on its way here'"—this Court should follow its "'established practice,'" by "'vacat[ing] the judgment below and remand[ing] with a direction to dismiss.'" *Azar v. Garza*, 584 U.S. 726, 729 (2018) (quoting *Munsingwear*, 340 U.S. at 39).

Vacatur under such circumstances would be proper and fitting. Indeed, when the shoe was on the other foot in *Ritter*, and it was the voter plaintiffs who had obtained a favorable decision from a unanimous panel of the Third Circuit on the application of the Materiality Provision to the envelope-date error, the Court granted *Munsingwear* vacatur once the petitioners conceded that the controversy had been conclusively resolved. *See* 143 S. Ct. 297; Pet.'s Br. at 15, *Ritter v. Migliori*, No. 22-30 (July 7, 2022), 2022 WL 2704768 (stating that "[t]he controversy underlying this case has ended").

In *Ritter*, vacatur was granted even though the parties who sought vacatur had acted directly to snuff out the controversy—the county by counting the contested ballots and then certifying the election, and

the losing candidate by conceding the election prior to certification and forswearing further state court litigation or other action to contest the result. Br. in Opp'n. at 1-3, *Ritter v. Migliori*, No. 22-30 (2022), 2022 WL 4110508.

If the underlying issue regarding the envelope date is conclusively resolved by the state courts as a matter of state law, the controversy over the envelope-date issue in Pennsylvania will be over. Vacatur of the decision below in those circumstances will have no effect (and certainly no prejudicial effect) on any party. The decision by the panel majority below is incorrect, incompatible with statutory text, and would otherwise be worthy of review. There accordingly would be ample reason for this Court to "clea[r] the path for future relitigation of the issues" and "eliminat[e] a judgment, review of which was prevented through happenstance," that was inconsistent with plain text and very likely incorrect. *Munsingwear*, 340 U.S. at 40.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. If the underlying issue is resolved by the state courts, the Court should grant, vacate, and remand with instructions to dismiss.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3166

PENNSYLVANIA STATE CONFERENCE OF NAACP BRANCHES; LEAGUE OF WOMAN VOTERS OF PENNSYLVANIA; PHILADELPHIANS ORGANIZED TO WITNESS EMPOWER AND REBUILD; COMMON CAUSE PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; MAKE THE ROAD PENNSYLVANIA; BARRY M. SEASTEAD; MARLENE G. GUTIERREZ; AYNNE MARGARET PLEBAN POLINSKI; JOEL BENCAN; LAURENCE M. SMITH

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; ADAMS COUNTY BOARD OF ELECTIONS; ALLEGHENY COUNTY BOARD OF ELECTIONS; ARMSTRONG COUNTY BOARD OF ELECTIONS; BEAVER COUNTY BOARD OF ELECTIONS; BEDFORD COUNTY BOARD OF ELECTIONS; BERKS COUNTY BOARD OF ELECTIONS; BLAIR COUNTY BOARD OF ELECTIONS; BRADFORD COUNTY BOARD OF ELECTIONS; BUCKS COUNTY BOARD OF ELECTIONS; BUTLER COUNTY BOARD OF ELECTIONS; CAMBRIA COUNTY BOARD OF ELECTIONS; CAMERON COUNTY BOARD OF ELECTIONS; CARBON COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; CLARION COUNTY BOARD OF ELECTIONS; CLEARFIELD COUNTY BOARD OF ELECTIONS; CLINTON COUNTY BOARD OF

ELECTIONS; COLUMBIA COUNTY BOARD OF ELECTIONS; CRAWFORD COUNTY BOARD OF ELECTIONS; CUMBERLAND COUNTY BOARD OF ELECTIONS; DAUPHIN COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; ELK COUNTY BOARD OF ELECTIONS; ERIE COUNTY BOARD OF ELECTIONS; FAYETTE COUNTY BOARD OF ELECTIONS; FOREST COUNTY BOARD OF ELECTIONS; FRANKLIN COUNTY BOARD OF ELECTIONS; FULTON COUNTY BOARD OF ELECTIONS; GREENE COUNTY BOARD OF ELECTIONS; HUNTINGDON COUNTY BOARD OF ELECTIONS; INDIANA COUNTY BOARD OF ELECTIONS; JEFFERSON COUNTY BOARD OF ELECTIONS; JUNIATA COUNTY BOARD OF ELECTIONS; LACKAWANNA COUNTY BOARD OF ELECTIONS; LANCASTER COUNTY BOARD OF ELECTIONS; LAWRENCE COUNTY BOARD OF ELECTIONS; LEBANON COUNTY BOARD OF ELECTIONS; LEHIGH COUNTY BOARD OF ELECTIONS; LUZERNE COUNTY BOARD OF ELECTIONS; LYCOMING COUNTY BOARD OF ELECTIONS; MCKEAN COUNTY BOARD OF ELECTIONS; MERCER COUNTY BOARD OF ELECTIONS; MIFFLIN COUNTY BOARD OF ELECTIONS; MONROE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; MONTOUR COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; NORTHUMBERLAND COUNTY BOARD OF ELECTIONS; PERRY COUNTY BOARD OF ELECTIONS; PHILADELPHIA COUNTY BOARD OF ELECTIONS; PIKE COUNTY BOARD OF ELECTIONS; POTTER COUNTY BOARD OF ELECTIONS; SCHUYLKILL COUNTY BOARD OF ELECTIONS; SNYDER COUNTY BOARD OF ELECTIONS; SOMERSET COUNTY BOARD OF ELECTIONS; SULLIVAN COUNTY BOARD OF ELECTIONS; SUSQUEHANNA COUNTY BOARD OF ELECTIONS; TIOGA COUNTY BOARD OF ELECTIONS; UNION COUNTY BOARD OF ELECTIONS;

VENANGO COUNTY BOARD OF ELECTIONS; WARREN COUNTY BOARD OF ELECTIONS; WASHINGTON COUNTY BOARD OF ELECTIONS; WAYNE COUNTY BOARD OF ELECTIONS; WESTMORELAND COUNTY BOARD OF ELECTIONS; WYOMING COUNTY BOARD OF ELECTIONS; YORK COUNTY BOARD OF ELECTIONS

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; THE REPUBLICAN PARTY OF PENNSYLVANIA,
Appellants
(Intervenors in D.C.)

(W.D. Pa. No. 1-22-cv 00339)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and AMBRO*, Circuit Judges

The petitions for rehearing filed by Appellees Pennsylvania State Conference of the NAACP, League of Women Voters of Pennsylvania, Philadelphians Organized to Witness, Empower and Rebuild, Common Cause Pennsylvania, Black Political Empowerment Project, Make the Road Pennsylvania, Barry M. Seastead, Marlene G. Gutierrez, Aynne Margaret Pleban Polinski, Joel Bencan, and Lau-

* Judge Ambro's vote is limited to panel rehearing.

rence M. Smith, and Appellees Secretary of the Commonwealth and Philadelphia, Allegheny, Bucks, Delaware, and Montgomery County Board of Elections, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are **denied**.

Judges Shwartz, Krause, Restrepo and Freeman voted for rehearing en banc.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Date: April 30, 2024
Lmr/cc: All Counsel of Record

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3166

PENNSYLVANIA STATE CONFERENCE OF NAACP BRANCHES; LEAGUE OF WOMAN VOTERS OF PENNSYLVANIA; PHILADELPHIANS ORGANIZED TO WITNESS EMPOWER AND REBUILD; COMMON CAUSE PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; MAKE THE ROAD PENNSYLVANIA; BARRY M. SEASTEAD; MARLENE G. GUTIERREZ; AYNNE MARGARET PLEBAN POLINSKI; JOEL BENCAN; LAURENCE M. SMITH

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; ADAMS COUNTY BOARD OF ELECTIONS; ALLEGHENY COUNTY BOARD OF ELECTIONS; ARMSTRONG COUNTY BOARD OF ELECTIONS; BEAVER COUNTY BOARD OF ELECTIONS; BEDFORD COUNTY BOARD OF ELECTIONS; BERKS COUNTY BOARD OF ELECTIONS; BLAIR COUNTY BOARD OF ELECTIONS; BRADFORD COUNTY BOARD OF ELECTIONS; BUCKS COUNTY BOARD OF ELECTIONS; BUTLER COUNTY BOARD OF ELECTIONS; CAMBRIA COUNTY BOARD OF ELECTIONS; CAMERON COUNTY BOARD OF ELECTIONS; CARBON COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS;

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SOMERSET COUNTY BOARD OF ELECTIONS; SULLIVAN COUNTY BOARD OF ELECTIONS; SUSQUEHANNA COUNTY BOARD OF ELECTIONS; TIOGA COUNTY BOARD OF ELECTIONS; UNION COUNTY BOARD OF ELECTIONS; VENANGO COUNTY BOARD OF ELECTIONS; WARREN COUNTY BOARD OF ELECTIONS; WASHINGTON COUNTY BOARD OF ELECTIONS; WAYNE COUNTY BOARD OF ELECTIONS; WESTMORELAND COUNTY BOARD OF ELECTIONS; WYOMING COUNTY BOARD OF ELECTIONS; YORK COUNTY BOARD OF ELECTIONS

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; THE REPUBLICAN PARTY OF PENNSYLVANIA,
Appellants
(Intervenors in D.C.)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court No. 1-22-cv-00339)
District Judge: Honorable Susan Paradise Baxter

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Before: SHWARTZ, CHUNG, and AMBRO, Circuit Judges

(Opinion filed March 27, 2024)

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OPINION OF THE COURT

AMBRO, Circuit Judge,

Pennsylvania, like all other States, has devised a web of rules that qualified voters must follow to cast a ballot that will be counted. Mail-in and absentee voters, for their part, must sign and date the declaration printed on the return envelope containing their

mail ballot. The date requirement, it turns out, serves little apparent purpose. It is not used to confirm timely receipt of the ballot or to determine when the voter completed it. But the Supreme Court of Pennsylvania ruled that dating the envelope is mandatory, and undated or misdated ballots are invalid under its state law and must be set aside.

We must decide whether federal law nonetheless requires those non-compliant ballots be counted. Section 10101(a)(2)(B) of the Civil Rights Act of 1964, called the Materiality Provision, prohibits denial of the right to vote because of an "error or omission" on paperwork "related to any application, registration, or other act requisite to voting," if the mistake is "not material in determining whether [an] individual is qualified" to vote. Because the date requirement is irrelevant to whether a vote is received timely, the blink response is to believe a voter's failure to date a return envelope should not cause his ballot to be disqualified. But our role restricts to interpreting a statute, and there we hold that the Materiality Provision only applies when the State is determining who may vote. In other words, its role stops at the door of the voting place. The Provision does not apply to rules, like the date requirement, that govern *how* a qualified voter must cast his ballot for it to be counted. We reach this conclusion because a contrary approach cannot be reconciled with the text and historic backdrop of the statute, nor cabined to the date requirement while leaving intact other vote-casting rules that serve valid state interests. Accordingly, we reverse the District Court's decision and remand for further consideration of the pending equal protection claim.

I. BACKGROUND

A

The federal law at the heart of this case—the Materiality Provision of the Civil Rights Act of 1964—today reads as follows:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B). It was part of Congress' effort to "outlaw[] some of the tactics" used by States "to disqualify [African Americans] from voting in federal elections." *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). Despite the promises of the Fifteenth Amendment that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, § 1, discriminatory laws like poll taxes, literacy tests, property qualifications, and "good morals" requirements abounded after its ratification, Katzenbach, 383 U.S. at 313. African American voter registration in many Southern States thus languished at "appallingly low" levels for decades. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. __, 141 S. Ct. 2321, 2330 (2021).

One of the many techniques used to keep Black

is not used to confirm timely receipt of the ballot or to determine when the voter completed it.voters from the polls was to reject would-be registrants for insignificant, hyper-technical errors in filling out application forms. Report of U.S. Comm'n on Civil Rights ("CRC Report") 1963, at 22. For instance, registrars rejected applicants for failing "to calculate [their] age to the day," misspelling "Louisiana," underlining "Mr." when it should have been circled, or the Catch 22 of identifying their skin color as "Negro" instead of "brown," or "brown" instead of "Negro."[1] Voter registration thus was the principal means to suppress Black voter participation.

Congress, in 1957 and 1960, passed two civil rights acts to rein in some of these practices, but "[e]fforts to deny the right to vote" continued to "take many forms," most often through "arbitrary registration procedures" individuals had to follow to qualify to vote. CRC Report of 1961, at 133, 137. A few years later, Congress again took aim at these entrenched problems. In Title I of the Civil Rights Act of 1964, it prohibited the arbitrary application of voter qualification standards and procedures and barred literacy tests as a qualification for voting in federal elections. Pub. L. No. 88-352, § 101(a)(2)(A), (C). Surrounded by these provisions, the Materiality Provision of the

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[1] CRC Report of 1961, at 137; Hearings on S. 1731 and S. 1750 Before the S. Comm. on the Judiciary, 88th Cong. 101 (1963) (statement of Robert F. Kennedy, U.S. Att'y Gen.); *see also* 110 Cong. Rec. 6715-16 (1964) (statement of Sen. Kenneth B. Keating) (recounting similar rejections); 110 Cong. Rec. 6733 (1964) (statement of Sen. Philip A. Hart); *id.* at 6530 (statement of Sen. Hubert Humphrey); *id.* at 1693-94 (statement of Rep. Emanuel Celler).

1964 Act applied only to federal elections, *id.* § 101(a)(2)(B), but the Voting Rights Act of 1965 expanded its reach to state elections as well. Pub. L. 89-11, § 15(a), 79 Stat. 437, 444 (1965).

Fast forward to today. Voter registration now is a streamlined process often requiring little more than a few clicks on a website or a trip to a driver's license center. In Pennsylvania, an individual is qualified to vote if that person (1) is at least eighteen years old on the day of the election, (2) has been a U.S. citizen for at least one month before that day, (3) has resided in Pennsylvania and the election district for at least thirty days, and (4) has not been imprisoned for a felony conviction within the last five years. Pa. Const. art. VII, § 1; 25 P.S. § 2811, 25 Pa.C.S. § 1301(a). Each county board of elections assesses compliance with these requirements when the individual *see*ks to register to vote. 25 Pa.C.S. § 1328. Approved applicants receive a unique identification number in the Statewide Uniform Registry of Electors ("SURE") system—Pennsylvania's database of all registered voters—and an identification card. *Id.* §§ 1328.1, 1222.

In 2019, Pennsylvania also made voting more convenient by adopting universal mail-in voting. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8; *see* 25 P.S. § 3150.11(a). Registered voters now can cast their vote by submitting a mail-in ballot without having to show cause why they cannot make it to the polls on Election Day. To do so, a registered voter must apply to his county election board and provide, among other things, his name, address, date of birth, proof of identification, and length of residency in the voting district. *Id.* § 3150.12. The county board reviews the

application, verifies the proof of identification, and compares the information with that on the applicant's registration card housed in county-specific voter rolls within the SURE system. *Id.* § 3150.12b(a). Once approved, the voter receives a package containing the ballot, a secrecy envelope, and a pre-addressed return envelope. *Id.* § 3150.14; App. 57. The return envelope is specific to each voter and features a declaration as well as a unique barcode that allows the county board to track each ballot. 25 P.S. § 3150.14; *see also* App. 58, 80. After completing the ballot, the voter places it into the secrecy envelope, and places that envelope into the return envelope. 25 P.S. § 3150.16(a).

Among the rules a mail-in voter must follow for his mail ballot to be valid—central to the dispute here—is Pennsylvania's requirement to "fill out, date and sign the declaration printed on [the] envelope" before returning the completed ballot. *Id.* § 3150.16(a). But, it may surprise, the date on the declaration plays no role in determining a ballot's timeliness. That is established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope. App. 58, 80; *see* 25 P.S. §§ 3150.17(b)(5), 3146.9(b)(5).

B

Until recently, the Materiality Provision received little attention from federal appellate courts. When it did, the challenged state law prescribed rules governing voter registration. *See Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) (affirming District

Court determination that Georgia statute requiring applicants to disclose Social Security Number on registration form violated Materiality Provision); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (reversing grant of preliminary injunction and holding Florida voter registration statute imposing a new verification process as a precondition of registration for first-time registrants did not violate Materiality Provision); *Vote.Org v. Callanen*, 89 F.4th 459, 485-91 (5th Cir. 2023) (holding Texas law requiring an original signature on a voter registration form did not violate Materiality Provision).

But in the November 2020 and November 2022 elections, thousands of Pennsylvania mail-in voters did not comply with the date requirement. Some voters omitted the date altogether, others put shortened or obviously incorrect dates. As county boards took different approaches to enforcing the date requirement, litigation began, and the Materiality Provision took center stage. A panel of this Court ruled this federal law does apply outside the voter registration context and was violated by the date requirement now (again) before us. *See Migliori v. Cohen*, 36 F.4th 153, 157 (3d Cir. 2022). But that decision has since been vacated as moot by the Supreme Court. *Ritter v. Migliori*, 143 S. Ct. 297 (2022).

The validity of enforcing the date requirement thus remained uncertain as a matter of federal law. But the Supreme Court of Pennsylvania soon settled the issue for state law purposes. *See Ball v. Chapman*, 289 A.3d 1, 20-23 (Pa. 2023). It unanimously agreed the command in Pennsylvania's Election Code that mail-in voters "shall . . . date" the declaration

was "unambiguous and mandatory" as a matter of statutory interpretation; so omitting the date, or incorrectly dating the return envelope, "render[s] a ballot invalid" under Pennsylvania law. *Id.* at 20-22. The Court also rejected the argument that a declaration with an incorrect date was "sufficient," reasoning that "[i]mplicit in the Election Code's textual command . . . is the understanding that 'date' refers to the day upon which an elector signs the declaration." *Id.* at 22. So, under Pennsylvania law, noncompliant ballots are invalid. The Court evenly divided, however, on whether failing to count noncompliant ballots violated the Materiality Provision. *Id.* at 9. That question thus was bound to return to us.

Shortly after the *Ball* order, five individuals whose ballots were not counted during the November 2022 election, along with the Pennsylvania State Conference of the NAACP ("NAACP") and other voting organizations,[2] brought this suit under 42 U.S.C. § 1983 against all 67 Pennsylvania county boards of elections and the Secretary of the Commonwealth of Pennsylvania ("Secretary"), claiming enforcement of the date requirement violated the Materiality Provision and the equal protection clause of the Fourteenth Amendment. The Republican National Committee and other entities affiliated with it ("RNC") intervened as Defendants.

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[2] The NAACP joined efforts with the League of Women Voters of Pennsylvania, Philadelphians Organized to Witness, Empower and Rebuild, Common Cause Pennsylvania, Black Political Empowerment Project, and Make the Road Pennsylvania. For convenience, they are collectively referred to as "NAACP," and with the individual plaintiffs as "Plaintiffs."

On cross-motions for summary judgment,[3] the District Court determined the Plaintiffs lacked standing to bring their equal protection claim against all county boards of election and their Materiality Provision claim against 55 of them. It thus dismissed those counties on standing grounds. But the Court ruled the Plaintiffs had standing to sue the remaining 12 county boards and the Secretary, and granted summary judgment for the Plaintiffs on their Materiality Provision claim. It declared that rejecting timely received mail ballots because of missing or incorrect dates violated the Materiality Provision and permanently enjoined the Secretary from directing counties to exclude ballots on that basis. The Court also dismissed the equal protection claim against the Secretary on constitutional avoidance grounds, explaining "there [wa]s no need to reach" that issue given the Court's resolution of the statutory question. App. 7, 88. (The NAACP did not appeal the District Court's rulings on that claim or on standing.).

The District Court framed the Materiality Provision issue as "whether Pennsylvania's Date Requirement is material to the act of voting": "[I]f the error is not material to voting, the requirement of placing a date on the Return Envelope violates the Materiality Provision." App. 74. The date requirement, it reasoned, is immaterial by any measure. No party disputed that election officials "did not use the handwritten date . . . for any purpose related to determining" a voter's qualification under Pennsylva-

[3] The Secretary did not move for summary judgment, instead filing a brief stating he did not oppose the Plaintiffs' motion as to the Materiality Provision but opposed it as to the equal protection claim.

nia law. App. 74-75, 81. Moreover, it is "irrelevant in determining when the voter signed their declaration" or filled out the ballot. App. 79. Nor is it used to determine the ballot's timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties' timestamping and scanning procedures serve to verify that. Indeed, not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.

The District Court also disagreed with the RNC's argument that enforcement of the date requirement "does not impinge on the right to vote" because the Materiality Provision "only prohibits immaterial requirements affecting the qualification and registration of a voter," not additional requirements for casting a ballot. App. 76. That interpretation, in the Court's view, was incompatible with the statute's expansive definition of "vote" to include "casting a ballot and having [it] counted." App. 77.

The RNC timely appealed. Richard Marino, who lost his 2023 bid for reelection to the Towamencin Township Board of Supervisors after the District Court ordered the counting of non-compliant ballots, intervened.[4] The RNC and Marino obtained a stay of

[4] Appellees argue Mr. Marino's challenge regarding the application of the District Court's order to his 2023 race is moot because the results have been certified and his opponent sworn into office. E.g., DNC Br. 50-53. Thus, they say, we cannot "grant any effectual relief" if he prevailed here. *Id.* at 50 (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Under Pennsylvania law, however, the results of an election may be changed even after certification based on a "timely filed election contest petition." *In re Contest of 2003 Gen. Election for the Off. of Pro-*

that order, and we expedited the appeal. The Democratic National Committee and other entities affiliated with it ("DNC") intervened in support of the Plaintiffs-Appellees. The Secretary, though a Defendant below, joins Plaintiffs and the DNC in defending the District Court's decision on the Materiality Provision claim ("Appellees").

With that important background in mind, we turn to the merits.

II. DISCUSSION[5]

States have separate bodies of rules for separate stages of the voting process. One stage, voter qualification, deals with who votes. To register and thus be authorized to vote, applicants must follow prescribed

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thonotary, 849 A.2d 230, 235 (Pa. 2004); RNC Br. 66. Mr. Marino filed such a petition, but the Court of Common Pleas rejected his challenge as untimely (and thus moot) and noted the ballots were counted consistent with the District Court's order. *In re: Contest of Nov. 7, 2023 Election of Towamencin Twp.*, No. 1482 C.D. 2023, slip op. at *8-9 (Pa. Commw. Ct. Dec. 29, 2023). Mr. Marino appealed, and the Commonwealth Court scheduled a hearing on both mootness and the merits of his certification challenge for April 3, 2024. *See* ECF No. 219. It thus is not "impossible" that he could prevail, *Chafin*, 568 U.S. at 172, so his claim before us is not moot.

[5] The District Court had jurisdiction under 28 U.S.C. § 1331. 28 U.S.C. § 1291 gives us appellate jurisdiction. We review the District Court's order granting summary judgment and questions of statutory interpretation *de novo*. *Ingram v. Experian Info. Sols., Inc.*, 83 F.4th 231, 236 (3d Cir. 2023).

While Appellants provide several grounds for reversal, we need consider only one: that Pennsylvania's date requirement does not violate the Materiality Provision. We assume private plaintiffs can sue to enforce that federal law. *Migliori*, 36 F.4th at 159-62; *Vote.Org*, 89 F.4th at 475-478.

steps and meet certain requirements. It's like obtaining a license to drive. Another stage deals with how ballots are cast by those previously authorized to vote, which is governed by a different set of rules. To cast a ballot that is valid and will be counted, all qualified voters must abide by certain requirements, just like those authorized to drive must obey the State's traffic laws like everyone else.

The Materiality Provision is an important federal overlay on state election requirements during the "who" stage: voter qualification. It prohibits States from denying an applicant the right to vote based on an error or omission in paperwork involving his application if that mistake is immaterial in determining whether he is qualified to vote. That is, it is triggered when conduct or laws restrict *who* may vote. But it leaves it to the States to decide *how* qualified voters must cast a valid ballot. Pennsylvania has made one such rule—the date requirement—mandatory. The federal Materiality Provision, in our view, does not interfere.

It has five elements: (1) the proscribed conduct must be engaged in by a person "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right . . . to vote"; (3) that denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to an[] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B); *see also Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from denial of application for stay).

The first and third elements are not disputed here. Pennsylvania's county boards of elections are state actors, and neither party argues that a missing or incorrectly dated mail-in envelope is not an "error or omission on [a] record or paper."[6] But does the declaration on the envelope in which the ballot travels "relat[e] to an[] application, registration, or other act requisite to voting"? And what of the requirement that "such error or omission" must not be "material in determining whether such individual is qualified under State law to vote"? Also, is a voter "den[ied]

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[6] Judge Chung notes the possibility that the phrase "because of an error or omission" does more work than the parties argue. 52 U.S.C. § 10101(a)(2)(B). For instance, facially non-compliant mistakes that render a ballot defective under state law might be "defects." Accordingly, one might say these facially non-compliant ballots are not counted "because of" a defect rather than "because of an error or omission." Undated envelopes may fall into this category since the statute imposes a duty on the voter to date the declaration, 25 P.S. § 3146.6(a), and the Supreme Court of Pennsylvania has concluded the requirement is mandatory, *Ball*, 289 A.3d at 20-21. In comparison, improperly dated envelopes might be considered imperfectly compliant ballots where electors have facially met statutory requirements but have done so imperfectly, either by error (e.g., using the previous year) or by omission (e.g., providing no year). Although the Court found that these misdated envelopes were not "sufficient," it analyzed the effect of these mistakes separately from its consideration of undated envelopes and pursuant to a different statute, 25 P.S. § 3146.8(g)(3) (providing election officials discretion to determine sufficiency). *See Ball*, 289 A.3d at 20-23, Section III(B)(1) (undated envelopes) and III(B)(2) (incorrectly dated envelopes). Thus, not counting imperfectly compliant ballots might be considered "because of an error or omission" rather than a defect. This interpretation would not affect the discounting of undated ballots, but it might result in requiring incorrectly dated ballots to be counted if the dissent's view of paperwork were adopted. 52 U.S.C. § 10101(a)(2)(B).

the right . . . to vote" if his ballot is not counted for failing to abide by state ballot-casting rules?

Read as a whole and in context, the text tells us the Materiality Provision targets laws that restrict who may vote. It does not preempt state requirements on how qualified voters may cast a valid ballot, regardless what (if any) purpose those rules serve.

A

To make sense of the Materiality Provision, we begin with the part we think drives the interpretation of the rest of the statute. For the statute to apply, the "error or omission" must not be "material in *determining* whether such individual is qualified under State law to vote . . . ." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). At first glance, one might think the date requirement fits neatly because the date on the declaration bears no relation—it is immaterial—to whether a voter is qualified under Pennsylvania law to vote, *i.e.*, age, citizenship, duration of residence, and so forth. And that is what Appellees argue to us. *See* NAACP Br. 28-29; DNC Br. 24; Sec'y Br. 25-26.

But the text does not say the error must be immaterial "to" whether an individual is qualified to vote. It uses the words "in determining," and that choice must mean something. *See Polselli v. IRS*, 598 U.S. 432, 441 (2023) ("We ordinarily aim to 'give effect to every clause and word of a statute.'" (quoting Microsoft Corp. v. i4i L.P., 564 U.S. 91, 106 (2011)). Read naturally, we believe they describe a process—namely, determining whether an individual is quali-

fied to vote. So the information containing an error or omission, material or not, must itself relate to ascertaining a person's qualification to vote (like paperwork submitted during voter registration), and it is only in that context that "officials are prohibited from using" a mistake to deny ballot access unless it is "material 'in determining' whether" the applicant indeed is qualified to vote. *See Ball*, 289 A.3d at 38 (Brobson, J., concurring in part, dissenting in part).

Words also take color from context. Other provisions in subsection 10101(a)(2) that sandwich the Materiality Provision give it meaning. The first—(a)(2)(A)—targets the application of discriminatory standards, practices, or procedures "in determining whether any individual is qualified. . . to vote." The second—(a)(2)(C)—bars literacy tests "as a qualification for voting," subject to some exceptions not relevant here. The thrust of subsection (a)(2) in which the Materiality Provision lives thus appears clear: it governs voter qualification determinations.

And once that much is settled, we can readily make sense of the phrase "record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Everyone agrees dating the return envelope does not relate to applying or registering to vote. Indeed, it is far afield. But is it an "act requisite to voting"?

If those words take meaning from the words that precede it—application or registration—the answer is no. But Appellees claim the statutory definition of "vote" supplies an unequivocal answer to the contrary. *See* NAACP Br. 35; DNC Br. 19; Sec'y Br. 35. It includes "all action necessary to make a vote effec-

tive[,] including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast[.]" 52 U.S.C. § 10101(e). So, the argument goes, because "requisite" means "necessary," and the statutory definition of "vote" includes "having [a] ballot counted," the Materiality Provision unambiguously applies here: dating the declaration on the return envelope is "necessary" to having one's ballot counted, and the envelope is a paper related to that act.

But the words of a statute are not read in isolation; statutory construction is a "holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The phrase "act requisite to voting" also draws its import from the context in which it appears. Because the "in determining" phrase, as explained, makes clear the Materiality Provision applies to determinations that affect a voter's eligibility to cast a ballot, its application necessarily is limited to "record[s] or paper[s]" used in that process. And Congress further signaled its focus on qualification determinations by referring to acts like "application" and "registration." Those specific words limit the scope of the relevant paperwork in a way that coheres with the statute's voter qualification focus. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (internal quotation marks omitted)).

Although we need not rely on legislative history,

it too supports confining the statute's scope to paperwork used for voter qualification determinations. Title I of the Civil Rights Act of 1964, as we have detailed above, was one in a series of federal efforts *see*king to put an end to Southern States' diverse techniques "used to disqualify" African Americans from voting. *Katzenbach*, 383 U.S. at 811; *see also Browning*, 522 F.3d at 1173 (describing enactment as a means to "sweep away such tactics as disqualifying an *applicant*" by "inducing voter generated errors that could be used to justify rejecting *applicants*" (emphases added)).

Several statements in the Report issued by the House Judiciary Committee that considered the legislation buttress the Materiality Provision's focus on "address[ing] the practice of requiring unnecessary information for voter *registration* with the intent that such requirements would increase the number of errors or omissions on the *application* forms, thus providing an excuse to *disqualify* potential voters." *Schwier*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphases added); *see* Robert A. Katzmann, JUDGING STATUTES 75 (2014) ("Committee reports are among 'the most authoritative and reliable materials of legislative history.'" (citation omitted)); Anita S. Kirshnakumar, *Dueling Canons*, 65 Duke L.J. 909, 991-92 (2016). In the Report, the Committee declares that "discriminatory use of literacy tests and other *devices by registration officials* is dealt with … by the *prohibition against their disqualifying an applicant* for immaterial errors or omissions in papers requisite to voting in Federal elections." H.R. Rep. 88-914, title I (1963), *reprinted* in 1964 U.S.C.C.A.N. 2391, 2394 (emphases added).

And references to "registration" and its many permutations abound. *See id.* ("[Section 10101(a) is designed to [e]nsure nondiscriminatory practices in the *registration* of voters …. (emphasis added)); *id.* at 2445-46 (noting Title I would "provide for Federal determinations as to whether errors or omissions in an *application to register* are material" (emphasis added)); *id.* at 2490 (reporting the "disproportionately low [African American] registration in some counties" (emphasis added)). Supporters praised Section 10101(a) for countering "the intricate methods employed by some … officials to defeat [African American] *registration*," like the "dilatory handling of [their] *applications* and failure to notify *applicants* of results," and "applying more rigid standards of accuracy to [them] than white[s], thereby rejecting [African Americans'] *applications* for minor errors or omissions." *Id.* at 2491 (emphases added). They noted "*registrars* will overlook minor misspelling errors or mistakes… by white *applicants*, while rejecting an [African American's] *application* for the same," and explained the amendment would require "*registration officials*," among other things, to "disregard minor errors or omissions if they are not material in *determining whether an individual is qualified* to vote." *Id.* (emphases added). And testimony at the House and Senate Judiciary Committee hearings detailed the myriad discriminatory techniques local registrars used to reject applications like, as noted, misspelling "Louisiana." *See* n.1, *supra*.

The legislative history shows the enacting Congress was concerned with discriminatory practices during voter registration, thus in line with what the text reflects. So, in our view, the phrase "record or

paper relating to application, registration, or other act requisite to voting" is best read to refer to paperwork used in the voter qualification process. It does not cover records or papers provided during the vote-casting stage.

Yet a separate reason leads us to conclude that a vote-casting rule cannot violate the Materiality Provision: a voter who fails to abide by state rules prescribing how to make a vote effective is not "den[ied] the right . . . to vote" when his ballot is not counted. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich*, 141 S. Ct. at 2338. States have legitimate interests in regulating the voting process and in imposing restrictions on voters to preserve "the integrity and reliability of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008). If state law provides that ballots completed in different colored inks, or secrecy envelopes containing improper markings, or envelopes missing a date, must be discounted, that is a legislative choice that federal courts might review if there is unequal application, but they have no power to review under the Materiality Provision. And we know no authority that the "right to vote" encompasses the right to have a ballot counted that is defective under state law.

One may argue, as Appellees do, that the statutory definition of "vote" as "having [a] ballot counted" means that not counting a timely received mail ballot denies "the right to vote." Sec'y Br. 47; NAACP Br. 43. But the definition does not get us far. Is that right "denied" when a ballot is not counted because the voter failed to follow the rules, neutrally applied,

for casting a valid ballot? We doubt it is.

Consider that the enacting Congress in 1964 merely cross-referenced the definition of "vote" from Title VI of the Civil Rights Act of 1960, where Congress sought to protect minorities' access to the polls in States with "a pattern or practice" of denying the right to vote on racial grounds. *See* Pub. L. 86-449, 74 Stat. 86, 91-92, Title VI, § 601(a), codified at 52 U.S.C. § 10101(e). It "authorized courts to *register voters* in areas of systematic discrimination," *Katzenbach*, 383 U.S. at 313 (emphasis added), upon proof they were "denied" that "opportunity," 52 U.S.C. § 10101(e). That focus on denying (and remedying denials of) the opportunity to register strengthens our view that the phrase "deny the right . . . to vote" in the Materiality Provision must be understood as denying an individual the opportunity to access the ballot in the first instance—not as denying the right to cast a defective ballot. *See Schwier*, 340 F.3d at 1294 ("[The Materiality Provision] forbids the practice of *disqualifying potential voters* for their failure to provide information irrelevant to determining their eligibility to vote." (emphasis added)).

Returning to the 1960s, we think, illustrates that is what Congress had in mind. It targeted States' systematic campaigns to subvert minorities' access to the polls. Rejecting applications to register for irrelevant mistakes was one of many devices, like poll taxes or literacy tests, that resulted in outright *vote denial*—many Black citizens never had a chance to cast their ballot. *See Shelby County v. Holder*, 570 U.S. 529, 547 (2013). In enacting the Materiality Provision and other prohibitions, Congress put an end to that. No longer could States block ballot box access to

an applicant who misspelled a State's name or failed to calculate correctly his birthday to the day. But the Materiality Provision's prohibitions end there. States must still control the mechanics of the vote-casting process. Once inside the voting place (where, in the 1960s, nearly all voting took place), all voters must follow the same rules for casting a valid ballot.

In our view, it makes no sense to read the Materiality Provision to prohibit enforcement of vote-casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote. "Indeed, they were not intended for that purpose," *Ball*, 289 A.3d at 38 (Brobson, J., concurring in part, dissenting in part), and "[t]here is no reason why the requirements that must be met in order to register (and thus be 'qualified') to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted," *Ritter*, 142 S. Ct. at 1825 (Alito, J.). Unless we cabin the Materiality Provision's reach to rules governing voter qualification, we tie state legislatures' hands in setting voting rules unrelated to voter eligibility.

A few examples illustrate the point. Pennsylvania's Election Code requires that secrecy envelopes containing "any text, mark or symbol which reveals the identity" of the voter "be set aside and declared vo*id*." 25 P.S. § 3146.8. An improper mark on that envelope is a paperwork "error." But the error is not relevant (*i.e.*, material) when a State ascertains whether the voter is qualified to vote. On Appellees' account, the error thus must be disregarded, and the ballot counted. Pennsylvania's Election Code also requires that voters mark their ballot using "the same pen or pencil," or else it will be voided and not count-

ed. *Id.* § 3063(a). Filling out the ballot with two different pens would likewise be a paperwork "error," and one that is not relevant to a voter's eligibility. Under Appellees' approach, that rule too would be unenforceable. The same goes for the rule against overvoting, which requires excluding a ballot from the vote tally if a voter casts more votes than permissible, *id.*, the rule that a ballot must not be counted if it is "impossible to determine [a voter's] choice," *id.*, or the requirement that mail-in voters "fill out" and "sign the declaration" printed on the return envelope, *id.* § 3150.16.

There is no need to belabor this point further. The upshot of Appellees' theory is that the Materiality Provision would preempt many such ballot-casting rules because none are related to a voter's qualification to vote. We thus think the correct conclusion is that the Materiality Provision is concerned only with the process of determining a voter's *eligibility* to cast a ballot.

It follows that individuals are not "denied" the "right to vote" if non-compliant ballots are not counted. Suppose a county board of elections excludes a voter's ballot from the vote tally because he cast more than the permissible number of votes. Or it sets aside a ballot because the voter revealed his identity by improperly marking the secrecy envelope containing the ballot. Is that person denied the right to vote? In both instances, the voter failed to follow a rule—like the date requirement—that renders his ballot defective under state law. We find it implausible that federal law bars a State from enforcing vote-casting rules that it has deemed necessary to administer its elections. *See Ritter*, 142 S. Ct. at 1824 (Alito, J.)

("Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.").

B

The Materiality Provision's textually apparent focus on voter qualification determinations is Appellees' Achilles' heel. Why? Because vote-casting rules like the date requirement have nothing to do with determining who may vote. A voter whose ballot is set aside because of a missing or incorrect date on the return envelope, we know, "ha[s] previously been determined to be eligible and qualified to vote in the election." App. 81.

In our view, the Materiality Provision does not reach something as distinct from "registration" as the casting of a mail ballot at the end of the voting process. The text does not allow it. Even the statute's definition of "vote" distinguishes "casting a ballot" from what precedes it in time: "registration or other action required by State law prerequisite to voting." 52 U.S.C. § 10101(e). The date requirement is embedded in the act of casting a ballot. Indeed, the provisions of Pennsylvania's Election Code where the date requirement appears are captioned "Voting by mail-in electors" and "Voting by absentee electors," 25 P.S. §§ 3150.16, 3146.6, and "set forth . . . requirements for how a qualified elector may cast a valid absentee or mail-in ballot," *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Elec.*, 241 A.3d 1058 (Pa. 2020) (emphasis added). "It is therefore awkward to describe the act of voting as

'requisite to the act of voting.'" *Ritter*, 142 S. Ct. at 1826 n.2 (Alito, J.). And so an outer ballot envelope falls outside the Materiality Provision's scope.

The Pennsylvania General Assembly has decided that mail-in voters must date the declaration on the return envelope of their ballot to make their vote effective. The Supreme Court of Pennsylvania unanimously held this ballot-casting rule is mandatory; thus, failure to comply renders a ballot invalid under Pennsylvania law. *Ball*, 289 A.3d at 20-23. We do not read the Materiality Provision as overriding that pronouncement by requiring that non-compliant ballots nonetheless be counted.

III. THE DISSENT'S POSITION

Our colleague takes a different approach. Her dissent reads each of the elements in isolation—consulting more than half a dozen dictionary definitions—and then reassembles them to conclude the Materiality Provision "covers mistakes on any paperwork necessary for one's ballot to count" and requires those mistakes be ignored whenever they are "not relevant to the State's ability to ascertain whether he is qualified under state law to vote." Dissent Op. 19, 30-31, 34. We part from that theory because what results is a statutory provision Congress did not write with implications it did not intend.

A

The dissent's approach separates the Materiality Provision into two and treats these parts as though one does not inform the other. The phrase "if such error or omission is not material in determining

whether such voter is qualified under State law to vote," it says, identifies what types of errors cannot be used to deny a voter the right to vote: any mistakes that are not "relevant to the State's ability to ascertain whether [an individual] is qualified" to vote. Dissent Op. 15-16, 34. So far, we're onboard. But the dissent then divorces that phrase from everything that comes before it. It does not read the "in determining" phrase as necessarily referring to the process of voter qualification, so it believes the types of "record[s] or paper[s]" covered by the Materiality Provision extend far beyond the paperwork submitted during voter registration. Thus, an "error or omission" can occur on *any* "paperwork necessary for one's ballot to count" (echoing Appellees' theory), and whether that mistake must be ignored depends on whether it is relevant to ascertaining whether the voter is qualified to vote.

But the "in determining" phrase that makes explicit the Materiality Provision's voter qualification focus is the tail that wags the dog. It must confine the scope of "record[s] or paper[s]" to those used at the qualification stage because the dissent's approach runs into the issue that our reading avoids: "judg[ing] the validity of vot[e-casting] rules based on whether they are material to eligibility." *Ritter*, 142 S. Ct. at 1825 (Alito, J.). Think back to our driver's license example. Could you dispute a ticket for running a red light in Pennsylvania on the ground that you have a valid driver's license, and observing this traffic law is not relevant to whether you are a resident of the State, passed all licensing exams, are over eighteen years old, and so forth? If that sounds confusing, that's because it is.

Likewise, when a registered voter submits his mail-in ballot, all that is left for election officials to do is to verify whether it is valid, *i.e.*, whether it complies with the State's vote-casting rules. Put differently, the dissent's reading ignores that vote-casting rules, as we have explained, serve entirely different purposes than voter-qualification rules. It makes little sense to block enforcement of laws meant to protect the integrity of the voting process due to their inescapable irrelevance in determining whether an individual meets registration requirements.

The dissent appears to believe its approach would not result in stymying enforcement of important vote-casting rules. We have already provided a list of examples to illustrate the practical consequences of adopting the dissent's view, *see supra* Part II.A, and its attempt to distinguish the date requirement from those rules does not persuade us.

Our colleague tackles low-hanging fruit like state laws about voting deadlines, polling locations, and the use of secrecy envelopes, *see* Dissent Op. 21-22 n.17, explaining none are covered by its reading of the Materiality Provision because they do not involve "record[s] or paper[s]." We don't disagree. What troubles us is the dissent's treatment of rules about the ballot. Consider that Appellees, recognizing the potentially sweeping implications of their position in this case, have argued that the ballot is not a paper "requisite to voting," and so does not come within the Materiality Provision's sweep. *See* NAACP Br. 46; Sec'y Br. 55-56. But by elsewhere urging that Congress was "concerned with protecting voters' rights at every step of the voting process," and that the Mate-

riality Provision covers an outer ballot envelope because it is "paperwork necessary for one's ballot to count," Dissent Op. 19, 30 (emphasis added), the dissent would have difficulty explaining why that same logic does not apply to the ballot itself. Of all the "paperwork required to vote," the ballot *see*ms to us to be the most necessary to have one's vote counted. Moreover, excluding the ballot from the Materiality Provision's reach while including the envelope in which the completed ballot travels—on the ground that one is "requisite to voting" and one is not—counters commonsense. The dissent thus concedes, as it must, that "good reason" exists to conclude its interpretation brings into play state rules concerning the ballot itself. Dissent Op. 36 n.27. But there is nothing wrong with that, says our colleague, for no matter Pennsylvania's interest in its election laws, it simply was "Congress's goal" in 1964 "to restrain a State's ability to discard ballots cast by qualified voters." *Id.* Legislative history does not support that. To assert otherwise without any indication from a Committee Report is judicially to rewrite Congress' stated intent.

To downplay the implications of its position, the dissent briefly mentions the rule against overvoting, claiming it still would be enforceable under its reading because "the State could not determine the candidate for whom the voter intended to vote." Op. 36 n.27. In other words, there is a legitimate reason for prohibiting overvotes. The dissent also claims its interpretation would not "give license to bad actors who attempt to exploit certain State election laws for improper purposes," such as "by having voters make errant marks on ballots to signal the vote where such

marks are prohibited by State law." *Id.* Why that is so it does not say. Presumably, the dissent again believes these rules serve a legitimate purpose while the date requirement does not. But the Materiality Provision simply does not care whether a rule furthers important state interests. It targets rules that require unnecessary information during voter *qualification* processes and prohibits disqualifying individuals making immaterial errors or omissions in paperwork related to registration. It does not prevent enforcement of neutral state requirements on how voters may cast a valid ballot, no matter the purpose those rules may serve.

Perhaps the dissent recognizes as much, as it argues the declaration on the return envelope does in fact "play[] a role in helping the State to determine that all mail-in voters [are] qualified to vote," and the signature "provides the name of the voter" and thus a means "to determine whether the name is associated with a qualified voter"—*i.e.*, to ascertain his identity. Dissent Op. 34-35 n.26, 38 & n.30. We do not see it that way. Even if verifying a voter's identity, in theory, is a necessary step in determining an individual's qualification to vote, Pennsylvania does not, in practice, use the signature on the declaration to do that. *See In re Nov. 3, 2020 Gen. Election*, 662 Pa. 718, 741-43 (Pa. 2020). Moreover, the declaration is printed on an envelope a voter uses to submit—*i.e.*, cast—his mail ballot. It (the declaration) is not even remotely a form used in Pennsylvania's voter qualification process. The voter who submits his mail-in package has already been deemed qualified to vote—first, when his application to register is approved and again when his application for a mail ballot is ac-

cepted. *See* App. 81; NAACP Br. 30; 25 P.S. §§ 3150.12b(a), 2811; 25 Pa.C.S. § 1301(a). Moreover, in signing and dating the declaration, the voter merely attests that he is "qualified to vote in this election," "ha[s] not already voted," "marked [his] ballot in secret," and "understand[s] [he is] no longer eligible to vote at [his] polling place after" returning the voted ballot. App. 58. That signed and dated attestation is used to determine whether the ballot is validly cast, not whether the individual is qualified under state law to vote.

B

Our dissenting colleague grounds her rationale for reading the Materiality Provision to extend to all "paperwork required to vote"—and thus to ensnare a ballot return envelope—in Congress' use of "act requisite to voting" and the statute's broad definition of "vote." We address a few points here.

To be sure, there is an argument that limiting the phrase "record or paper relating to any application, registration, or other act requisite to voting" to paperwork submitted during registration or similar processes renders "other act requisite to voting" superfluous. Dissent Op. 21. Sometimes, "no matter how" we read a statute, "there will be redundancies." *Bobb v. Att'y Gen.*, 458 F.3d 213, 223 (3d Cir. 2006) (citation omitted). And reading the Materiality Provision as the dissent does—*i.e.*, it simply refers to "paperwork required to vote"—would also render language superfluous; namely, the deliberate references to "registration" and "application." Why did Congress list these specific procedures when it just

as easily could have said the Materiality Provision applies to "any record or paper relating to an act requisite to voting"? The dissent's reading ignores not just the limiting effect of "application" and "registration" but also the import of the voter qualification focus in the "in determining" phrase that follows.

The dissent claims support in legislative history for interpreting the phrase to cover "more than registration-related papers." Dissent Op. 21, 23-27 & n.19. It accepts that the enacting Congress was concerned with "the threshold problem" of "discriminatory practices in voter registration." *Id.* at 25 n.19, 27. But rather than limiting the statute's reach accordingly, the dissent believes it can expand it because "Congress's concerns about voter discrimination did not vanish after registration." *Id.* at 27. No doubt those concerns existed after Congress passed the Civil Right Act of 1964. They led the following year to enactment of the landmark Voting Rights Act of 1965. But before us today is the statutory interpretation of the Materiality Provision. Even our colleague's own account of that law's historic record consists of nothing but instances of discriminatory and arbitrary practices *during registration*. *See id.* at 24-26 n.19. That is what Congress meant to address and what the text reflects.

We close this segment by commenting on the dissent's conclusion that a voter whose ballot is not counted for omitting or incorrectly dating the return envelope is "denied the right . . . to vote." Citing the statute's definition of "vote" as including "having [a] ballot counted," the dissent believes setting aside non-compliant ballots deprives affected voters of their right to vote. Dissent Op. 16-17, 37-38. We have

already explained why, in our view, the definition does not help much, as voters must still follow certain rules to make their vote effective. *See* supra Part II.A. The dissent's response is circular. It acknowledges that "States have the authority to set neutral requirements for voting." *Id.* at 17 n.13. But, it claims, if "a state requirement denies an individual the right to vote in an election due to an inconsequential paperwork error or omission of the type captured by the Materiality Provision, then the state rule cannot be used to disqualify a vote." *Id.* That just begs the question at the heart of this case: Does the Materiality Provision (a federal override for determining voter qualification) cover the date requirement (a Pennsylvania vote-casting rule)?

* * * * *

Confining the role of the Materiality Provision to qualification determinations places its parts into a whole that can be squared with the statute's text, context, and historic backdrop. It prohibits turning away otherwise eligible individuals based on errors or omissions in supplying information that is not material in determining whether they are qualified to vote. This removes unnecessary barriers blocking access to the voting place. But it lets States decide the rules that must be followed to cast a valid ballot. Pennsylvania's date requirement, regardless what we may think of it, does not cross over to a determination of *who* is qualified to vote, and the Materiality Provision likewise does not cross over to *how* a State regulates its vote-casting process.

Because we hold the date requirement for casting

a mail-in ballot is not covered by, and thus does not violate, the Materiality Provision, we reverse the District Court's order and remand for it to consider the merits of the Plaintiffs' equal protection challenge.

SHWARTZ, Circuit Judge dissenting.

In the 1950s and 1960s, Congress set out to guarantee all eligible Americans the right to vote. It investigated, legislated, and, when its efforts fell short, enacted "sterner and more elaborate measures" to eliminate barriers to voting. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966). One such measure was to ensure that States' immaterial voting requirements did not prevent otherwise qualified voters from registering to vote, casting ballots, and having their votes counted. Congress did so, in part, through the Civil Rights Act of 1964 as amended by the Voting Rights Act of 1965, in which it enacted what is now codified as 52 U.S.C. §10101(a)(2)(B) (the "Materiality Provision"). This law forbids State actors from denying voters the right to vote in any election due to errors or omissions on required paperwork when such mistakes do not affect the State's ability to determine the voters' qualifications to vote.[7]

More than one million Pennsylvania voters mailed in their ballots in the November 2022 election. Of them, 10,000 timely-received ballots were not counted because they did not comply with the State law requirement that the voters' declarations ('the declarations") on the mailing envelopes include a date below the voter's signature,[8] *Ball* v. Chapman,

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[7] The words "paperwork" and "document" refer to any record or paper covered by the Materiality Provision. The word "mistake" refers to the errors and omissions covered by the Materiality Provision.

[8] These voters either omitted the date, wrote an incomplete date, or recorded an incorrect date below their signatures. Ex-

284 A.3d 1189, 1192 (Pa. 2022) (per curiam), even though the date on the envelope is not used to (1) evaluate a voter's statutory qualifications to vote, (2) determine the ballot's timeliness, or (3) confirm that the voter did not die before Election Day or to otherwise detect fraud.

Some of those voters, and organizations representing similar interests ("Plaintiffs"), sued the Secretary of the Commonwealth of Pennsylvania and county boards of elections to have their ballots counted, contending that the exclusion of those ballots denied those voters their right to vote under federal law.[9, 10] The District Court agreed, granted Plaintiffs'

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amples of erroneous dates include dates that only had the month and day but no year, or with a month and year but no day, dates that listed a year in the past or in the future, dates that were likely the voter's birth date, and dates written using the European style of day/month/year.

[9] Plaintiffs are correct that 42 U.S.C. § 1983 provides them a private right of action to enforce the Materiality Provision. Vote.Org v. Callanen, 89 F.4th 459, 478 (5th Cir. 2003) (holding that "a remedy for [§] 10101 violations [may be sought] by way of [§] 1983"); Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003) (concluding that § 10101 "may be enforced by a private right of action under § 1983"); but see Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016) (stating that § 10101 could not be enforced under § 1983 based on cases relying on a district court opinion that had no allegation of state action and did not discuss § 1983).

Applying the test announced in Gonzaga University v. Doe, 536 U.S. 273 (2002), despite having some doubt that it applies to civil rights claims, see id. at 279-83 (justifying the test based on "confusion" stemming from noncivil rights cases), Plaintiffs may use § 1983 seek relief. Under Gonzaga, a plaintiff must show that the law he claims has been violated creates a personal right. Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh, 382 F.3d 412, 421-22 (3d Cir. 2004). To determine

whether a statute gives rise to a personal right, we consider whether: (1) Congress intended that the statute benefit the plaintiff; (2) the plaintiff has shown that the right is "not so vague and amorphous that its enforcement would strain judicial competence"; and (3) the statute imposes a binding obligation on the State, which may be shown by its couching of the right "in mandatory, rather than precatory, terms." Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (internal quotation marks and citations omitted). Once the plaintiff establishes such a right, then there is a rebuttable presumption that the plaintiff may enforce that right via § 1983. Id. at 341; see also Health and Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 186 (2023) (same). Plaintiffs have established there is a personal right in § 10101, and the presumption has not been rebutted.

First, § 10101 embodies a right, which the parties do not dispute, as the first subsection of the statute provides that all qualified citizens "shall be entitled and allowed to vote." 52 U.S.C. 10101(a)(1). This subsection, and the Materiality Provision itself, benefit a voter. Moreover, the right embodied in the statute is not "vague and amorphous," and the statute "is couched in mandatory terms," Blessing, 520 U.S. at 340, in that it provides that no State actor "shall . . . deny the right of any individual to vote[.]" 52 U.S.C. § 10101(a)(2)(B); cf. Wisniewski v. Rodale, Inc., 510 F.3d 294, 302 (3d Cir. 2007) ("[A]n explicit reference to a right and a focus on the individual protected . . . suffices to demonstrate Congress's intent to create a personal right."). Therefore, § 10101 creates a personal right.

Second, Appellants have not rebutted the presumption that the right is enforceable and that a remedy can be secured via § 1983 because Congress did not (1) expressly foreclose the use of § 1983, or (2) create a comprehensive enforcement scheme incompatible with individual enforcement. Gonzaga, 536 U.S. at 284 n.4. Here, Appellants argue that § 10101(c) contains an "elaborate enforcement scheme," as it permits private individuals to seek a declaration that they are entitled to vote only after the Attorney General prevails in a lawsuit showing that a State actor engaged in a pattern or practice of discrimination. 52 U.S.C. § 10101(c), (e). This, however, is not the only remedy available to private plaintiffs. Congress specifically provided federal courts with jurisdiction over § 10101 claims and gave

the "party aggrieved," i.e., the aggrieved voter, the right to bring suit without exhausting other remedies. See 52 U.S.C. § 10101(d). This means that an individual need not await any action by the Attorney General, or a finding of a pattern or practice of discrimination, before seeking to enforce his rights under the statute. As a result, the statute does not embody a comprehensive scheme for relief incompatible with individual enforcement.

Furthermore, the 1957 Civil Rights Act specifically added the aggrieved person/no exhaustion provision at the same time it gave the Attorney General civil enforcement authority. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (1957). It would be inconsistent to read the statute to remove one roadblock to private suits (exhaustion requirements) and simultaneously erect another by allowing private persons to obtain relief only when the Attorney General chooses to bring (and wins) a pattern and practice suit. See Schwier, 340 F.3d at 1295-96; see also Morse v. Republican Party of Virginia, 517 U.S. 186, 213, 230-34 (1996) (holding the Voting Rights Act "only authorizes enforcement proceedings brought by the Attorney General and does not expressly mention private actions," but nevertheless "Congress must have intended [] to provide private remedies"); United States v. Mississippi, 380 U.S. 128, 137 (1965) (acknowledging "private persons might file suits under § [10101]"). Thus, because § 10101 does not provide a comprehensive enforcement scheme that is inconsistent with a plaintiff's ability to seek relief under § 1983, Plaintiffs have a private of right action and can sue under § 1983.

Although Plaintiffs asserted in their complaint that § 10101 contains an implied right of action, they did not do so before us. Nonetheless, there is textual support for concluding such an implied right of action exists. To determine whether an implied right of action exists, courts consider whether (1) plaintiff was the beneficiary of the statute, (2) the text indicates that the statute created a remedy, (3) implying the remedy is consistent with the legislative scheme, and (4) the implied cause of action is in an area not traditionally relegated to state law such that it would be inappropriate to infer a federal cause of action. See S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771, 777 n.4 (3d Cir. 2001) (quoting West Virginia

Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18 n.1 (3d Cir. 1989) (citing Cort v. Ash, 422 U.S. 66, 78 (1975))). Each of these considerations support concluding that § 10101 contains an implied private right of action. First, because the statute directs State actors not to deny an individual the right to vote, the beneficiary of the statute is the voter. The statute also instructs federal district courts to accept suits from a "party aggrieved" regardless of whether that party has exhausted administrative remedies. 52 U.S.C. § 10101(d). This conveys that Congress intended that voters whose rights were denied be permitted to immediately come to court. Second, following a finding that a wrongdoer engaged in a pattern or practice of voter discrimination, the statute provides an avenue for a voter to obtain declaratory relief. Although Congress identified this declaratory relief in a particular circumstance, the text's reference to allowing courts to consider suits by aggrieved persons without satisfying administrative or other prerequisites shows that the statute does not limit aggrieved parties to seeking only such relief. Third, allowing a voter to bring suit for violations of the statute is consistent with the text and legislative scheme. Fourth, although the statute covers election activity, including State elections subject to state law, it serves the purpose of ensuring that State actors do not misuse state law to deny a voter the right to have their vote counted, a right Congress explicitly extended to voters in State elections in the Voting Rights Act of 1965. Therefore, there are reasons to conclude that § 10101 has an implied right of action.

[10] Amicus curiae Alabama and sixteen other States (the "Seventeen States") contend that § 1983 cannot apply here. No party made such an argument and amici are generally not permitted to inject new issues into an appeal, "at least in cases where the parties are competently represented by counsel." New Jersey Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 382 n.2 (3d Cir. 2012) (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) (citation omitted)). Nevertheless, I will address it. The Seventeen States argue that Plaintiffs may not rely on § 1983 to enforce § 10101 because Gonzaga requires that § 1983 can only be used to enforce new rights that Congress creates and that statutes promulgated under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth

Amendment can only create remedies. This is incorrect for at least three reasons.

First, the Gonzaga Court itself approvingly noted that the Supreme Court had previously "recognized, for example, that Title VI of the Civil Rights Act of 1964" (which prohibits discrimination in federally assisted programs, Pub. L. No. 88-352, 78 Stat. 241, 252-53 (1964)) "creat[ed] individual rights." 536 U.S. at 284 (citation omitted). Thus, it cannot be that the Court was ruling that legislation enacted pursuant to the Fourteenth Amendment cannot satisfy the Gonzaga test as the Court used the Civil Rights Act of 1964, which was promulgated in part based on the Fourteenth Amendment, as an example of a statute that can create rights.

Second, the implications of the Seventeen States's position illustrate why it is wrong. Under their theory, (1) all § 1983 actions for statutory violations require the underlying statute to confer a new right, (2) statutes enacted pursuant to the Fourteenth and Fifteenth Amendments cannot establish new rights, and (3) together this means that no federal civil rights law enacted pursuant to those Constitutional Amendments are enforceable by private action unless the statute includes an express cause of action. Adopting the Seventeen States's theory would: (1) eliminate almost all avenues to enforce the civil rights laws promulgated pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments; (2) ignore that Congress enacted many civil rights laws without including an express private right of action "against a backdrop of decisions in which implied causes of action were regularly found[,]" Morse, 517 U.S. at 213, 231 (internal quotation marks and citation omitted); and (3) be inconsistent with the purpose of § 1983, which Congress enacted to enforce the civil rights laws against State actors, see, e.g., Talevski, 599 U.S. at 176-77; Lugar v. Edmondson Oil Co., 457 U.S. 922, 934 (1982) (noting Congress viewed § 1983 as a mechanism for private plaintiffs to enforce the rights embodied in the Reconstruction Amendments); Lynch v. Household Fin. Corp., 405 U.S. 538, 545 (1972) ("The broad concept of civil rights embodied . . . in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of §[] 1983[.]").

motion for summary judgment,[11] and ordered that such ballots be counted in the twelve counties over which the Court had Article III jurisdiction.[12] Penn-

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Third, Gonzaga developed the rights-creation test to clarify "confusion" that the Court thought had resulted from several of its earlier ruling. Gonzaga, 536 U.S. at 279-83. However, the cases it cited as giving rise to "confusion" all arose outside of the civil rights context. See id. Therefore, it follows that Gonzaga's test was crafted to examine cases where plaintiffs seek to use § 1983 to enforce a right arising outside of the civil rights context.

[11] The Purcell doctrine, which disfavors courts providing election-related relief in the weeks before an election, does not counsel against deciding this dispute. First, the doctrine is often invoked to ensure that courts avoid deciding matters that could result in "voter confusion" and cause voters to "remain away from the polls." Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam); see also Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."). Here, the District Court's ruling occurred after the polls closed. Second, the District Court's ruling occurred well before any upcoming election, providing ample time for voters to plan how they would like to vote. Third, the District Court's order affected election officials, not voters, and provided clear guidance about whether to count certain mail-in ballots. Thus, ruling in this case did not present any risk voter confusion.

[12] The District Court's remedy, which was limited to twelve counties based on its Article III jurisdiction, Pennsylvania State Conf. of NAACP v. Schmidt, No. 1:22-cv-00399, 2023 WL 8091601, at *35-36 (W.D. Pa. Nov. 21, 2023), did not violate the Equal Protection Clause. Two Supreme Court cases tell us why. In Katzenbach v. Morgan, the Supreme Court held that a federal law that required the States to grant voting rights to non-English speakers who attended schools in Puerto Rico that taught predominantly in a non-English language, but not to non-English speakers who attended schools beyond the territorial limits of the United States, did not violate the Equal Protection Clause. 384 U.S. 641, 654-58 (1966). The Court upheld

the law because it "d[id] not restrict or deny the franchise but in effect extend[ed] the franchise to persons who otherwise would be denied it by state law." Id. at 657. Likewise, in McDonald v. Board of Election Commissioners, the Court considered an Illinois law that allowed for absentee voting in certain circumstances, including where a voter would be absent from his resident county on Election Day. 394 U.S. 802, 803 (1969). Plaintiffs, who were pre-trial detainees in their county of residence, alleged that the law violated the Equal Protection Clause because it permitted pre-trial inmates at jails located outside of their counties of residence to vote absentee, while the plaintiffs were excluded from doing so. Id. at 803, 806. The Court concluded that the "different treatment" afforded to similarly situated voters in different counties did not give rise to an Equal Protection Clause violation, in part because expanding voting to people who otherwise would not be entitled to it "should not render void [the] remedial legislation, which need not . . . 'strike at all evils at the same time.'" Id. at 810-11 (quoting Semler v. Dental Exam'rs, 294 U.S. 608, 610 (1935)). Thus, under Morgan and McDonald, remedies that fall short of extending voting rights to all similarly situated individuals do not violate the Equal Protection Clause, as making voting more accessible often comes in stages and need not be an all-or-nothing proposition.

Appellants' reliance on Bush v. Gore, 531 U.S. 98 (2000), to support their view that the District Court's order violated the Equal Protection Clause is misplaced. First, Bush expressly stated that its "consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Id. at 109. Second, the present case does not involve a lack of a uniform standards for determining whether a ballot expressed the voter's choice. Finally, reported cases involving Equal Protection challenges to a remedy citing Bush, see, e.g., Ne. Ohio Coal. For the Homeless v. Husted, 696 F.3d 580, 583-84 (6th Cir. 2012); Democratic Party of Georgia, Inc. v. Crittenden, 347 F. Supp. 1324, 1339-41 (N.D. Ga. 2018); Friedman v. Snipes, 345 F. Supp. 2d 1356, 1381-82 (S.D. Fla. 2004), are factually distinguishable and ignore Bush's statement about the limits of its ruling. 531 U.S. at 109. Furthermore, Bush itself did not cite Morgan, and only

sylvania State Conf. of NAACP v. Schmidt, No. 1:22-cv-00399, 2023 WL 8091601, at *28-34 (W.D. Pa. Nov. 21, 2023).

The Republican National Committee intervenors appeal but, notably, the county boards of election and the Secretary do not. My colleagues agree with the intervenors' view that the Materiality Provision applies only to paperwork used to register to vote and not to the declarations on the envelopes used to mail ballots. For the reasons set forth below, the Materiality Provision, in my view, is not limited to that narrow group of documents and, therefore, I respectfully dissent.[13]

I

I begin with a review of the relevant Pennsylvania law. To be qualified to register and to vote in Pennsylvania, an individual must (1) be at least eighteen years old on the date of the election, (2) be a citizen of the United States for at least one month before the election, (3) reside in the election district for at least thirty days before the election, and (4) not

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Justice Ginsburg cited McDonald in her dissent. Id. at 143 (Ginsburg, J., dissenting). Likewise, Husted, Crittenden, and Friedman do not cite Morgan, and the singular references to McDonald in Crittenden and Friedman were for unrelated purposes. Accordingly, these cases do not show that the District Court's remedy violated Equal Protection.

[13] A prior panel reached the same conclusion when it held that the Materiality Provision required that officials count ballots contained in envelopes where the declaration lacked a date, and I agree with their conclusion. Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022), vacated as moot sub nom., Ritter v. Migliori, 143 S. Ct. 297, 298 (2022).

have been confined for a felony in the preceding five years. 25 Pa. Cons. Stat. § 1301; 25 Pa. Stat. and Cons. Stat. § 2811.

Qualified voters can vote in person, absentee, or by mail-in ballot. See 25 Pa. Stat. and Cons. Stat. §§ 3146.6(a), 3150.16(a). To vote by mail-in ballot,[14] the voter must complete an application that contains the voter's date of birth, length of residency in the district, and proof of identification. 25 Pa. Stat. and Cons. Stat. § 3150.12. If the voter's county board of elections verifies the voter's identity and qualifications, then it sends him a mail-ballot package, which contains a ballot, a secrecy envelope, and a pre-addressed return envelope, on which a voter declaration is printed. 25 Pa. Stat. and Cons. Stat. § 3150.12-.15.[15] The law instructs the voter to mark the ballot in secret, place the ballot in the secrecy envelope, place the secrecy envelope in the return envelope, and "fill out, date and sign the declaration." 25 Pa Stat. and Cons. Stat. §§ 3146.6(a), 3150.16(a) (the "date requirement"). Although the formatting of the declaration varies by county, each declaration contains the following language above the signature and date lines:

> I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I

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[14] I focus on only documents that mail-in voters submit because that is the group of voters at issue in this case. See United States v. Meyers, 484 F.2d 113, 114 (3d Cir. 1973) ("[W]e will limit our review to the pertinent facts.").

[15] In the November 2022 election, the boards of elections did not begin sending the relevant mail-in ballot materials to voters until August 2022.

> marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

Pa. Supp. App. at 284; see also 25 Pa. Stat. and Cons. Stat. § 3146.6(b)(3) (setting forth required language for mail-in and absentee declarations). Of import here, the first line of the declaration requires the voter to declare that he is qualified to vote.

After the voter completes these steps, he is required to mail or deliver the packet to the designated county location so it is received by 8:00 P.M. on Election Day. 25 Pa. Stat. and Cons. Stat. §§ 3146.6(a), 3150.16(a). When the county board of elections receives the packet, it scans the bar code on the return envelope. The bar code corresponds to the voter who requested the ballot and records when election officials receive the ballot package.

As stated previously, more than 10,000 eligible voters had their timely-ballots disqualified because the dates that appeared below their signatures had no date, an incomplete date, or an incorrect date and thus did not satisfy the State law's date requirement.

II

A

The question in this case is whether the disquali-

fication of those votes violates the Materiality Provision. To answer this question, I consider the full text of the Materiality Provision and the entire statutory section of which it is a part.

"As in any statutory construction case," courts must begin "with the statutory text and proceed from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." Sebelius v. Cloer, 569 U.S. 369, 376 (2013) (internal quotation marks and citation omitted) (alterations in the original); see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 697 n.10 (1995) (observing that Congress's choice to "explicitly define[]" a statutory term "obviat[es] the need for us to probe its meaning as we must probe the meaning of [] undefined [] term[s]"). When a statutory term is undefined, we may consider dictionary definitions to ascertain the term's ordinary meaning. Pa., Dep't of Pub. Welfare v. U.S. Dep't of Health & Hum. Servs., 647 F.3d 506, 511 (3d Cir. 2011) (citation omitted). "[W]hen the meaning of the statute's terms is plain, our job is at an end[,]" as "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." Bostock v. Clayton Cnty., 590 U.S. 644, 673-74 (2020) (citations omitted).

The Materiality Provision provides that:

> [n]o person acting under the color of law shall[]. . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to

> any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B). This is a conditional statement consisting of two parts. I will refer to the part the Materiality Provision that precedes "if such error or omission" as the first clause, and the language that follows this phrase as the second clause. As explained herein, the first clause identifies the types of papers covered by the Materiality Provision, and the second clause informs the first clause by identifying the types of errors or omissions that cannot be used to deny a voter the right to vote.

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The first clause begins with "[n]o person acting under color of law shall[] . . . deny the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). To understand the meaning of the phrase "deny the right of any individual to vote," it is necessary to consider the meaning of "right." Black's Law Dictionary defines "right" as "a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others," or "that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law." Right, Black's Law Dictionary (4th ed. 1951) (internal quotation marks and citation omitted).[16] To "de-

[16] See also Right, Black's Law Dictionary (4th ed. 1968)

ny" means, as relevant here, to "refuse to grant," Deny, Black's Law Dictionary (4th ed. 1951).[17] Finally, the statute's definition of "vote" provides that

> the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election[.]

52 U.S.C. § 10101(e); see also id. § 10101(a)(3)(A) (providing that "the term 'vote' shall have the same meaning as in subsection (e) of this section"); see Babbitt, 515 U.S. at 697 n.10 (deferring to a statute's definition of a term). This definition demonstrates that the Materiality Provision applies to a variety of actions connected with the voting process. Accordingly, this part of the first clause unambiguously provides that the State may not refuse to grant voters their entitlement to have their ballots counted so long as the remaining conditions of the Materiality Provision are satisfied.[18, 19]

(same); accord Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (describing "rights" as "interests of the person so fundamental that the State must accord them its respect") (citation omitted).

[17] See also Deny, Webster's Third New Int'l Dictionary of the English Language Unabr. (1963) ("to refuse to grant").

[18] Appellants' contention that we should interpret the phrase "right . . . to vote" as the common law understood it in 1964, i.e., to not encompass mail-in voting fails because Congress provided the strongest possible indication that the common law definition was not applicable: its own definition. Unit-

The next portion of the first clause provides "be-

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ed States v. Shabani, 513 U.S. 10, 13 (1994) (citations omitted). Its definition governs. Babbitt, 515 U.S. at 697 n.10. Mail-in voting falls squarely within that definition, as the definition does not limit the act of voting to casting ballots in person.

[19] States have the authority to set neutral requirements for voting. If, however, a state requirement denies an individual the right to vote in an election due to an inconsequential paperwork error or omission of the type captured by the Materiality Provision, then the state rule cannot be used to disqualify a vote because the Materiality Provision supersedes state law. See Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015) (explaining that under the Supremacy Clause of the Constitution, see U.S. Const. art. VI, cl. 2, "[c]ourts . . . must not give effect to state laws that conflict with federal laws" (citation omitted)). The Majority chooses to adopt a narrow interpretation of the Materiality Provision due, at least in part, to a concern that a plain reading may prevent States from enforcing election laws that, albeit reasonable, have nothing to do with determining whether someone is qualified to vote. It is not a judge's job to curtail the scope of a constitutional law, see infra at 28-30, even if the judge thinks its application could go too far. See Bob Jones Univ. v. United States, 461 U.S. 574, 612 (1983) (Powell, J., concurring) ("The contours of public policy should be determined by Congress, not by judges[.]"). The text makes clear the types of mistakes Congress sought to regulate (i.e., those on mandatory paperwork other than registration forms). The history shows that Congress extended the Materiality Provision to the States and broadly defined the term "vote" to combat the evil of voter disenfranchisement. Accordingly, Congress's choice to judge States' voting laws against the benchmark of whether a mistake is material to determining a voter's qualifications is not "confusing." Majority Op. at 38. Rather, the Materiality Provision's plain text and history demonstrate that Congress endeavored to legislate expansively, and it determined that the interest in preventing neutral-looking laws from disenfranchising qualified voters outweighed the potential consequence of voiding a limited number of state voting laws. Congress has the authority to do so, and we are required to apply the law as written.

cause of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). The Majority holds that this portion of the Materiality Provision shows that it applies to only registration paperwork. I part company with them, as I view the language as written: to capture errors or omissions on any records or papers that relate to any application, registration, or "other act requisite to voting." Id.

To determine what constitutes any "other act requisite to voting," I am guided by the statute's definition of "vote," see Babbitt, 515 U.S. at 697 n.10, as well as the ordinary meaning of "requisite" and "other." As previously noted, the statute defines "vote" to include "all action necessary to make a vote effective including, but not limited to, action required by State law prerequisite to voting, casting a ballot, and having such ballot counted[.]" 52 U.S.C. § 10101(e). "Requisite" ordinarily means "required," Requisite, Webster's Third New Int'l Dictionary of the English Language Unabr. (1963) ("required by the nature of things or by circumstances or by the end in view: essential, indispensable, necessary"),[20] and "other" means "[d]ifferent or distinct from that already mentioned," Other, Black's Law Dictionary (4th ed. 1951), or "not being the one (as of two or more) first mentioned," Other, Webster's Third New Int'l Dictionary of the English Language Unabr. (1963). Therefore, by its terms, the first clause of the Materiality Provision

[20] See also Requisite, Webster's New Twentieth Century Dictionary (2d ed. 1969) ("required by the nature of things or by circumstances; necessary for some purpose; so needful that it cannot be dispensed with").

covers mistakes on paperwork necessary for one's ballot to count, including on papers distinct from application or registration forms. To conclude that the Materiality Provision limits "other act[s] requisite to voting" to only registration-related conduct would place limits on the text that simply are not there.[21] 52 U.S.C. § 10101(a)(2)(B). Had Congress wished to limit "any … other act requisite to voting," id., to registration-related conduct alone, it could have written "any . . . other act requisite to registering to vote," or defined "vote" more narrowly, but it did not.

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[21] Because the phrase "requisite to voting" is not ambiguous, the ejusdem generis canon of statutory interpretation does not apply. See Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-89 (1980). However, applying that canon would not lead to a different outcome in this case. This canon instructs that "where general words follow an enumeration of specific items, [they] are read as applying only to other items akin to those specifically enumerated." Id. at 588; see also Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 224-25, 227-28 (2008) (declining to apply the rule to the phrase "'any officer of customs or excise or any other law enforcement officer'" so as to limit "'any other law enforcement officer'" because Congress "easily could have written 'any other law enforcement officer acting in a customs or excise capacity'" but instead "used [an] unmodified, all-encompassing phrase" (emphasis omitted)). If we applied the canon, as well as the canon noscitur a sociis, a related canon that provides that "a word is known by the company it keeps," Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961), "it would not significantly narrow the ambit of" "requisite to voting" to preclude inclusion of the declaration, Harrison, 466 U.S. at 588; see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001) (noting that a catch-all phrase can be construed "to embrace only objects similar in nature to those objects enumerated by the preceding specific words"). The declaration is of the same species as a voter application or registration form, as all three types of documents exist to enable someone to exercise the right to vote and provide information concerning the voter's qualifications to vote.

Interpreting the first clause to cover more than registration-related papers makes sense for additional reasons. First, doing so ensures that no words in the statute are rendered superfluous. "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." Washington Mkt. Co. v. Hoffman, 101 U.S. 112, 115 (1879). Limiting the Materiality Provision to papers relating to the initial registration would render the phrase "or other act requisite to voting" meaningless, see United States v. EME Homer City Generation, L.P., 727 F.3d 274, 293 (3d Cir. 2013) (cautioning that "general phrases cannot be so narrowly construed that they become meaningless"),[22] because the Materiality Provision already applies to "any record or paper relating to any . . . registration,"[23] 52 U.S.C. 10101(a)(2)(B).

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[22] Conversely, this interpretation of "requisite to voting" does not render "application or registration" superfluous, as "Congress may have simply intended to remove any doubt that" applying and registering to vote count as acts requisite to voting. Fort Stewart Schs. v. FLRA, 495 U.S. 641, 646 (1990) (noting that Congress may insert "technically unnecessary" examples "out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (ex abundanti cautela)" (italics omitted)).

[23] This interpretation of "any . . . other act requisite to voting" also does not violate the canon against federalism. Concluding that the phrase covers paperwork other than registration forms does not infringe upon a State's right to enact neutral and uniform legislation to regulate elections, subject to the Materiality Provision, which itself is limited to mistakes on paperwork requisite to voting that are irrelevant to determining a voter's qualifications. State laws that set voting deadlines, identify polling locations, permit mail-in voting, and require the use of a secrecy envelope for mail-in ballots, for example, all lie out-

Second, this interpretation gives effect to the Materiality Provision's repeated use of the word "any." See 52 U.S.C. § 10101(a)(2)(B). "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." United States v. Gonzales, 520 U.S. 1, 5 (1997) (internal quotation marks and citation omitted). Accordingly, this construction aligns with Congress's use of "any" to emphasize the variety of papers the Materiality Provision covers.[24]

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side the sphere of the Materiality Provision, as such requirements cannot result in errors on papers requisite to voting. See, e.g., Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 55 (S.D.N.Y. 2022) (distinguishing between errors regarding a voter's assigned polling place and errors "on any record or paper"); Friedman, 345 F. Supp. 2d at 1372-73 (declining to issue an injunction under the Materiality Provision that would require counting absentee ballots received after a deadline, as this was not an error or omission "on any record or paper"); see also Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (failure to present identification "is by definition not an error or omission on any record or paper" (internal quotation marks and citation omitted)), aff'd sub nom. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008).

[24] The Majority relies on the fact that the statutory subsections neighboring the Materiality Provision may more obviously apply to only registration and voter qualifications to support the view that the Materiality Provision only applies to initial registration paperwork. See 52 U.S.C. § 10101(a)(2)(A), (C) (prohibiting State actors from using (1) non-uniform practices to "determin[e] whether any individual is qualified under State law or laws to vote in any election," and (2) "literacy test[s] as a qualification for voting . . . unless" certain requirements are met). These neighboring provisions, however, do not alter the scope of the Materiality Provision. First, they are not phrased as conditional statements and thus are not structured in the same way as the Materiality Provision. Secon, the Materiality Provision

Third, this interpretation is consistent with the historical context in which the Materiality Provision was enacted.[25] As explained in more detail in note

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reaches errors or omissions any paperwork "requisite to voting." Neither § 10101(a)(2)(A) nor (C) contain such "requisite to voting" language. Therefore, the subsections differ, and with "differing language" comes differing meanings. Russello v. United States, 464 U.S. 16, 23 (1983) (observing that when "Congress includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and citations omitted)).

[25] Between 1957 and 1965, Congress engaged in an eight-year effort to research and combat discrimination in elections. In 1957, Congress, "disturbed by allegations that some American citizens were being denied the right to vote . . . because of their race, color, creed, or national origin[,]" U.S. Comm'n on Civil Rights, Report of the U.S. Comm'n on Civil Rights 1959, at ix (1959) ("1959 CCR Report"), passed the Civil Rights Act of 1957, which, among other things, outlawed intentional acts of voter intimidation in federal elections and established the U.S. Commission on Civil Rights ("CCR") to "investigate" discrimination in voting, see 71 Stat. at 634-36 (§§ 101-06).

The CCR's initial report detailed the history of persistent, "ingenious and sometimes violent methods" State actors employed to disenfranchise Black voters since the end of the Civil War. 1959 CCR Report at 30. This report advised Congress that the "[t]he history of voting in the United States shows . . . that where there is will and opportunity to discriminate against certain potential voters, ways to discriminate will be found." Id. at 133. Congress responded by passing the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960). Relevant in that legislation, Congress defined the term "vote" using the identical, broad definition now codified at 52 U.S.C. § 10101(e). See 74 Stat. at 91-92.

By 1963, the CCR advised Congress that: (1) voter discrimination endured, (2) "present legal remedies . . . [were] inadequate[,]" and (3) "the promise of the 14th and the 15th amendments to the Constitution remain[ed] unfulfilled." U.S. Comm'n

on Civil Rights, Civil Rights '63, at 13, 26 (1963) ("1963 CCR Report"). The report further catalogued that the "techniques of discrimination" used to "subvert the Constitution of the United States" remained "diverse." Id. at 15, 22. Among the most "common" included the "use of plainly arbitrary procedures" by certain officials, such as (1) the "requirement of vouchers or some other unduly technical method of identification," (2) the "rejection for insignificant errors in filling out forms," (3) the "failure to notify applicants of rejection," (4) the "imposition of delaying tactics," and (5) the "discrimination in giving assistance to applicants." Id. at 22; see also U.S. Comm'n on Civil Rights, 1961 U.S. Comm'n on Civil Rights Report: Voting, at 137 (1961) ("1961 CCR Report") (describing the arbitrary requirement "to calculate [one's] age to the day" as a "common technique of discriminating against would-be voters on racial grounds"). As a result of this report, Congress passed the Civil Rights Act of 1964 to remedy "problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960[.]" H.R. Rep. No. 88-914, title I (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2394 ("1963 House Report"); see also id. at 2448 (explaining further that Congress sought rectify the failure of prior legislation "to end wholesale voter discrimination in many areas").

The 1964 legislation included an initial version of the Materiality Provision that applied only to federal elections, which the House Report described as "prohibiting the disqualification of an individual because of immaterial errors or omissions in papers or acts relating to [] voting." Id. at 2394. The House Report reflects that Congress largely envisioned the Materiality Provision to address discriminatory practices in voter registration. Id. at 2391, 2491 (Congressmen expressing their views that the Materiality Provision required registration officials to disregard minor errors or omissions if they are not material in determining whether an individual is qualified to vote). However, in framing the problem, Congress understood from the CCR's initial report that "where there is will and opportunity to discriminate against certain potential voters, ways to discriminate will be found." 1959 CCR Report at 133. Accordingly, the initial focus on registration merely reflects that, at the time the legislation was enacted, registration was the threshold problem

that needed to be addressed, but it was not the only problem that Congress did, in fact, address. Indeed, the definition of vote that is in § 10101 demonstrates that it is illogical to conclude that Congress, who was seeking to ensure that Black Americans could vote, intended to enact legislation that only allowed Black Americans to register to vote but gave no regard to whether those same individuals could actually have their votes counted once registered. See, e.g., 1963 House Report at 2393 (explaining "H.R. 7152, as amended, . . . would reduce discriminatory obstacles to the exercise of the right to vote[,]" not just the right to register to vote).

Ultimately, "the provisions of the 1957, 1960, and 1964 Civil Rights Acts to eliminate discriminatory voting practices [proved] to be clearly inadequate," 111 Cong. Rec. 15,645 (1965) (statement of Rep. Emanuel Celler), and "[p]rogress" remained "painfully slow," H.R. Rep. No. 89-439 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2441. The CCR expressed concerns that Congress's prior efforts had "failed to produce any significant increase in [Black] registration and voting." U.S. Comm'n on Civil Rights, Voting in Mississippi, at 49 (1965). Even the Supreme Court observed that when Congress banned specific discriminatory practices, "some of the States affected . . . merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," "defied and evaded court orders," or "simply closed their registration offices to freeze the voting rolls." Katzenbach, 383 U.S. at 314. Consequently, Congress passed the Voting Rights Act of 1965, which expanded the Materiality Provision to cover all elections, Pub. L. No. 89-110, 79 Stat. 437, 445 (1965), thereby ensuring that, even in State and local elections, voters were not denied the right to cast a ballot based on inconsequential paperwork mistakes that had no impact on determining whether the voter was qualified to vote. A fulsome consideration of the legislative history surrounding the Voting Rights Act demonstrates that Congress clearly understood that it was acting in an area normally reserved to the States and did so because of the extraordinary need to protect the franchise. Congress regarded the Voting Rights of Act of 1965 as "essential to prevent any last minute nullification of the enfranchisement of qualified citizens." 111 Cong. Rec. 10958, 11021-22 (May 19, 1965) (statement of Sen.

19, history shows that Congress investigated the problem of voter discrimination and learned that it was pervasive, adaptable, and destructive. Although Congress sought to address what, at the time, was the threshold problem for Black Americans trying to vote, Congress's concerns about voter discrimination did not vanish after registration. Congress's underlying concern was wrongful disenfranchisement. In light of the important problem Congress sought to address, and its adoption of broad statutory language, it follows that the Materiality Provision applies to mistakes on paperwork including, but not limited to, voter registration forms. See Katzenbach, 383 U.S. at 309 (describing 'voluminous legislative history' addressing 'unremitting and ingenious defiance of the Constitution'").[26]

Fong).

[26] The Materiality Provision does not require proof that the State law under review was motivated by discriminatory animus as the plain language of the Materiality Provision contains no such requirement. See Bostock, 590 U.S. at 674 (identifying no constitutional problem when legislation "reaches beyond the principal evil legislators may have intended or expected to address," as "it is ultimately the provisions of . . . legislative commands rather than the principal concerns of our legislators by which we are governed" (internal quotation marks and citations omitted)). Additionally, Congress's choice for the Materiality Provision to cover facially neutral, but nonetheless immaterial, post-registration requirements is an appropriate and necessary approach to remedy voter discrimination, particularly because States used what appeared to be facially neutral voting requirements to disenfranchise certain voters. See Condon v. Reno, 913 F. Supp. 946, 950 (D.S.C. 1995) (describing the requirement for a voter to calculate his age in exact months, which disparately affected Black voters in the Jim Crow South, and which Congress sought to eradicate by way of the Materiality Provision); cf. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S.

Reading the statute to cover paperwork that is created after a voter is registered also does not render the Materiality Provision unconstitutional. First, with respect to federal elections, the Elections Clause provides that "[t]he Times, Places and Manner of holding" federal elections "shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause on its own thus supplies authority for Congress to prohibit the disenfranchisement of voters for immaterial paperwork mistakes in elections where federal candidates are on the ballot.

Second, both the Fourteenth and Fifteenth Amendments empowered Congress to promulgate legislation such as the Civil Rights Acts of 1957, 1960, and 1964 and the Voting Rights Act of 1965. U.S. Const. amends. XIV, § 5, XV, § 2. Although the Supreme Court has stated that such legislation need only be reviewed for a rational basis, Katzenbach, 383 U.S. at 324, it also has indicated that legislation enacted under the Fourteenth Amendment must be congruent and proportional to the injury Congress

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721, 721-22 (2003) (observing in the analogous Fourteenth Amendment context that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct"). In any event, an amicus has cited a report finding that the types of errors and omissions that occurred in this case disproportionately disenfranchised minority voters. See SeniorLAW Center Amicus Br. at 11-12 (citing 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/).

sought to prevent, City of Boerne v. Flores, 521 U.S. 507, 520 (1997). See Vote.Org v. Callanen, 89 F.4th 459, 486 n.11 (5th Cir. 2003) ("The Supreme Court has not decided whether legislation enacted under the Fifteenth Amendment on voting rights must be congruent and proportional or simply a rational means of executing a constitutional prohibition" (internal quotation marks, citations, and alterations omitted)).

The interpretation of the Materiality Provision set forth herein survives constitutional muster under either standard. See id. ("The Materiality Provision satisfies either test."). As already noted, the historical record shows that Congress sought to eliminate a variety of evils plaguing the voting process when it passed the Civil Rights Acts and the Voting Rights Act. See supra n.19; accord Shelby Cnty. v. Holder, 570 U.S. 529, 534 (2013) (noting that "Congress determined [that the Voting Rights Act of 1965] was needed to address entrenched racial discrimination in voting," not merely in registering to vote); id. at 545 (quoting favorably Katzenbach, 383 U.S. at 308, for the proposition that in 1966 "'[t]he 'blight of racial discrimination in voting' had 'infected the electoral process in parts of our country for nearly a century'"); id. at 548 (observing that the Voting Rights Act of 1965 "has proved immensely successful at redressing racial discrimination and integrating the voting process"—not registration, alone). This history demonstrates that Congress was concerned with protecting voters' rights at every step of the voting process, not just during registration. "[P]rohibit[ing] those acting under color of law from using immaterial omissions, which were historically used to prevent racial minor-

ities from voting, [and] from blocking any individual's ability to vote[,]" is a rational, congruent, and proportional remedy to address a State actor's effort to interfere with the franchise. Vote.Org, 89 F.4th at 487; see Florida State Conf. of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) ("[W]e recognize that Congress in combating specific evils might choose a broader remedy."); accord La Unión del Pueblo Entero v. Abbott, No. 5:21-cv-0844, 2023 WL 8263348, at *21 (W.D. Tex. Nov. 29, 2023) ("Congress's enactment of a broader rule is entirely rational: after identifying a record of a problem at the registration stage, Congress was not limited to crafting a solution with an obvious loophole allowing officials to use forms at later stages in the same way, and for the same purpose.").

For these reasons, the first clause of the Materiality Provision covers mistakes on paperwork submitted both in connection with a voter's initial registration to vote and those required to ensure that the voter's vote is counted.[27, 28]

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[27] Other courts have reached similar conclusions. See, e.g., La Unión del Pueblo Entero, 2023 WL 8263348, at *19 (concluding that the Materiality Provision applies because the "preparation of a carrier envelope is an 'act requisite to voting' for individuals who cast a mail ballot"); League of Women Voters of Arkansas v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023) (applying the Materiality Provision to absentee ballot applications); In re Georgia Senate Bill 202, No. 1:21-mi-55555, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023), appeal docketed, No. 23-13245 (11th Cir.) (holding that returning an absentee ballot and completing the outer envelope is an act requisite to voting); Common Cause v. Thomsen, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (observing that the Materiality Provision "isn't limited to . . . voter registra-

tion"); Ford v. Tenn. Senate, No. 06-2031, 2006 WL 8435145, at *7, 10-11 (W.D. Tenn. Feb. 1, 2006) (holding that under the Materiality Provision, State officials could not set aside in-person voters' ballots because they had not met the requirement to separately sign both a ballot application form and a poll book).

Appellants have identified only one district court that has ruled differently. In Friedman, the court declined to enjoin the counting of absentee ballots received after a deadline, principally because this was not an error or omission on a record or paper. 345 F. Supp. 2d at 1373. Thus, that case differs from this case, which involves paperwork. Relatedly, although the Friedman court viewed the Materiality Provision as being "designed to eliminate practices that could encumber an individual's ability to register to vote[,]" id. at 1370-71 (emphasis and citation omitted), and stated that it found no authority to hold that the Materiality Provision was intended to apply after a voter was deemed qualified, id. at 1371, it made these observations in a case where the alleged errors were (1) not on paperwork, and (2) did not affect state officials' ability to determine voter qualifications. Thus, these comments are dicta from an out-of-circuit district court.

[28] The Majority speaks of a category of state election laws it calls "ballot-casting" or "vote-casting" measures, which it views as distinct from registration rules. This categorization is not grounded in the text of the statute, which draws no such distinction. In fact, its definition of "vote" demonstrates that the statute covers actions beyond registration. Cf. United States v. Mosley, 238 U.S. 383, 386 (1915) (stating "the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box"). Moreover, this distinction does not account for situations where same-day voter registration is permitted. See, e.g., Va. Code § 24.2-420.1. More specifically, in a same-day registration jurisdiction, a voter could make a paperwork mistake on the registration form that the Materiality Provision would forgive. If, however, moments later the voter made the identical mistake on another document requisite to voting, then, under the Majority's view, the Materiality Provision would not apply and the ballot could be discarded. Such an outcome would be inconsistent with the plain meaning of the Materiality Provision and Congress's goals in enacting it.

2

The Materiality Provision's second clause limits the Provision to cover errors or omissions only "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Thus, mistakes on paperwork related to any act requisite to voting cannot provide a basis to discard someone's vote "if" the voter's mistake is immaterial "in determining whether" the voter is "qualified under State law to vote in such election." Id.

The statute defines the phrase "qualified under State law" to "mean qualified according to the laws, customs, or usages of the State[.]" Id. at § 10101(e).[29] "Material" means "having influence" or is "relevant." See Material, Black's Law Dictionary (4th ed. 1951) ("having influence or effect; going to the merits"); Material, Webster's Third New Int'l Dictionary of the English Language Unabr. (1963) ("of, relating to, or consisting of matter," "relevant, pertinent").[30] "De-

[29] As is the case in Pennsylvania, see 25 Pa. Cons. Stat. § 1301(b), States generally define voter qualifications to consist of substantive personal attributes. See, e.g., La Unión del Pueblo Entero, 2023 WL 8263348, at *22 (citing Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959) (residence, age, criminal record)). Such qualifying attributes are "distinct from rules governing the conduct of elections, including the manner of determining qualifications." Id. at *22 (citing Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 13-17 (2013); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) (distinguishing qualifications and compliance with poll tax)).

[30] See also Wearry v. Cain, 577 U.S. 385, 392 (2016) (ex-

termine" means "to reach a decision about after thought and investigation," "decide upon," "find out exactly," "ascertain," or "resolve." Determine, Webster's New World Dictionary, College Ed. (1960). In this context, "in" means "used as a function word to indicate means or instrumentality." In, Webster's Seventh New Collegiate Dictionary (7th ed. 1963); see also In, Webster's New World Dictionary, College Ed. (1960) ("during the course of").[31] Thus, the phrase "in determining" within the Materiality Provision addresses whether the error or omission is used to ascertain or decide the voter's qualifications.

Therefore, read together, the Materiality Provision means that State actors cannot deprive a voter of the right to vote due to an error or omission he makes on papers that he must complete to have his ballot counted, including on papers distinct from application or registration forms, if the mistake is not relevant to the State's ability to ascertain whether he is qualified under state law to vote in the election.[32]

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plaining that in the context of the Brady rule, "[e]vidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury") (internal quotation marks and citations omitted)); Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (describing materiality in the context of summary judgment as "facts that might affect the outcome of the suit under the governing law").

[31] See also Webster's Third New Int'l Dictionary of the English Language Unabr. (1963) ("to settle a question or controversy about"; "to come to a decision concerning as the result of investigation or reasoning").

[32]Contrary to the Majority's suggestion, determining whether an individual is qualified to vote does not end after the individual registers. On Election Day, States continue to verify voter qualifications up until the time they count voters' ballots, such as by requiring voters to sign-in or present identification

Inversely, if someone makes an error or omission on paperwork required to vote and that mistake is relevant to the State actor in ascertaining whether the voter is qualified to vote, then the State actor can

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immediately prior to voting at a polling location or by ensuring that the voter had not died, moved from the district or the Commonwealth, or been incarcerated for a felony. Cf. Vote.Org, 89 F.4th at 489 (observing, as a broad principle, that States' "interest in voter integrity is substantial," and "that interest relates to the qualifications to vote").

It is worthwhile to note that the declaration here played a role in helping the State to determine that all mail-in voters were qualified to vote. As noted, the declaration contained the language "I hereby declare that I am qualified to vote in this election" above the date and signature line. See, e.g., Pa. Supp. App. 284. Thus, the declaration provides additional assurance to election officials that the mail-in voter is qualified to vote. See 25 Pa. Stat. and Cons. Stat. § 3146.8(g)(3) ("When the county board meets to pre-canvass or canvass . . . mail-in ballots . . . the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d)[,]" which addresses deceased voters, 25 Pa. Stat. and Cons. Stat. § 3146.8(d),"and shall compare the information thereon with that contained in the . . . Mail-in Voters File . . . . If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the . . . Mail-in Voters File . . . verifies his right to vote . . ., the county board shall provide a list of the names of electors whose . . . mail-in ballots are to be pre-canvassed or canvassed." (internal quotation marks omitted)).

Accordingly, even assuming the Materiality Provision only covers documents States use to determine voter qualifications, the declaration and signature themselves—but not the date—fit the bill. They aid election officials in verifying the name of the voter and that he was qualified to vote on the date of the election. Therefore, the signed declaration was material to determining voter qualifications but, as explained herein, the date was not.

deny him the right to vote for making that mistake.[33]

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Applying this interpretation of the Materiality Provision, the declaration here is squarely covered by

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[33] As explained herein, Congress wrote broadly when it enacted the Materiality Provision to include a host of paperwork beginning with "registration" through "having a ballot counted." 52 U.S. C. § 10101(e). Although it is unnecessary to decide here, there is good reason to conclude the Materiality Provision covers ballots. This, however, does not mean that State officials are, for example, required to count a ballot that contains votes for multiple candidates for a single position. This is because it would be impossible to "have such ballot counted and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e), because the State could not determine the candidate for whom the voter chose to vote.

Conversely, where a voter's choice is discernable, the Materiality Provision may require States to count those votes, say where the ballot is marked in black ink despite a state law requiring the ballots to be marked in blue ink. This is consistent with Congress's goal to restrain a State's ability to discard ballots cast by qualified voters.

Furthermore, as stated previously, see supra n.17, the interpretation herein also does not invalidate the broad array of State election laws that do not relate to paperwork required to vote or give license to bad actors who may attempt to exploit certain State election laws for improper purposes, such as those individuals who might implement a pay-to-vote scheme by having voters make errant marks on ballots to signal their vote, where such marks are prohibited by State law. See, e.g., 18 U.S.C. § 597; 52 U.S.C. § 20511.

Contrary to the Majority's characterization, these observations are not based upon whether there are legitimate interests being furthered, but rather are based upon what the law says. Moreover, they are consistent with Congress's goal of safeguarding the right of all qualified voters to participate in the democratic process—an interest shared by federal and state actors alike.

the Provision's first clause. First, the declaration appears on the mailing envelope and thus is a paper. Second, although the declaration is not itself a registration or application, it is another paper required for a voter to have his vote counted. *See* 25 Pa. Stat. and Cons. Stat. §§ 3146.6(a), 3150.16(a). Third, qualified voters who failed to date their declarations or who wrote an incorrect or incomplete date had their ballots discarded for noncompliance with the date requirement.[34] As a result of the disqualification of those ballots, affected voters were deprived of their right to have their votes counted.[35]

The components of the second clause are also satisfied. The record shows that the date errors and omissions were not relevant to a voting official's determination that the voter was qualified to vote. Although the declaration embodies the voter's representation that he was qualified to vote, and the signa-

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[34] One member of the Majority asserts that even if the view espoused herein governed, an argument could be made that declarations that contain no date or incomplete dates should not be counted, but declarations that have an erroneous date, such as the wrong year, should be counted. No party has advocated such view. To the contrary, the parties agreed at oral argument that, for the purposes of the date requirement, there is no difference between a declaration that omits a date and a declaration that has an erroneous date. This is consistent with the conclusion of the Pennsylvania Supreme Court, which held that both "undated or incorrectly dated" return envelops could not be counted because they failed to comply with State law. *Ball* v. Chapman, 289 A.3d 1, 22-23 (Pa. 2023). The *Ball* court split as to whether such ballots should nonetheless be counted under the Materiality Provision.

[35] Elections officials confirmed that all rejected ballots were signed and timely received and came from voters who were otherwise registered and qualified to vote.

ture provides the name of the voter,[36] the evidence shows that election officials did not use the date or absence thereof to determine a voter's qualifications (i.e., a voter's age, citizenship, county and duration of residence, or incarceration status). *See* 25 Pa. Cons. Stat. § 1301(b).[37]

Election officials denied qualified voters the right to vote by declining to count timely-received ballots contained in return envelopes with signed declarations that were missing or had incorrect dates, even though such errors or omissions were immaterial to ascertaining whether those individuals were qualified to vote. Accordingly, enforcement of the State's date requirement violates the Materiality Provision. Thus, timely received ballots cast by qualified voters that were contained in envelopes with signed declarations that have omitted or mistaken dates should have been (and should be) counted.

My colleagues disagree with this conclusion.

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[36] The signature is being used for the sole purpose of providing a name and the name is needed to determine whether the name is associated with a qualified voter. Pennsylvania specifically prohibits election officials "from rejecting absentee or mail-in ballots based on signature comparison[.]" In re: Nov. 3, 2020 General Election, 240 A.3d 591, 611 (Pa. 2020).

[37] Election officials did not use the handwritten date to establish whether the ballot was timely received, and a voter whose mail-in ballot was timely received could have only signed the declaration at some point between the time that he received the mail-ballot from election officials and the time election officials received it back. Election officials discarded ballots received after the Election Day deadline and did not count the ballots of voters who died before Election Day. In addition, no county board of elections identified any fraud concern due to a declaration missing or having an incorrect date.

They hold the majority, and their view prevails. From a practical perspective, this means that the State may toss a ballot cast by a qualified voter based upon mistakes on required paperwork immaterial to determining voter qualifications.

Today's ruling is a clear reminder that all voters must carefully review and comply with every instruction and requirement imposed upon them. If they do not, they risk having their otherwise valid votes discounted based on even the most inconsequential mistake. One can only hope that election officials do not capitalize on the Majority's narrow interpretation of the Materiality Provision by enacting unduly technical and immaterial post-registration paperwork requirements that could silence the voices of qualified voters.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
ERIE DIVISION

No. 1:22-CV-00339

PENNSYLVANIA STATE CONFERENCE OF THE NAACP; LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; PHILADELPHIANS ORGANIZED TO WITNESS EMPOWER AND REBUILD; COMMON CAUSE PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; MAKE THE ROAD PENNSYLVANIA; MARLENE G. GUTIERREZ; BARRY M. SEASTEAD; AYNNE MARGARET PLEBAN POLINSKI; LAURENCE M. SMITH; JOEL BENCAN,

Plaintiffs,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY[1] OF THE COMMONWEALTH OF

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[1] According to the Pennsylvania Department of State's website, Al Schmidt officially became the Secretary of the Commonwealth on June 29, 2023. *See* http://www.dos.pa.gov/about-us/Pages/Secretary-of-the-Commonwealth. The Court takes judicial notice of information that is publicly available on government websites. *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017) (citing *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)). *See also Kengerski v. County of Allegheny*, 2023 WL 348959, at *2 (W.D. Pa. Jan. 20, 2023) (information found on

PENNSYLVANIA; ADAMS COUNTY BOARD OF ELECTIONS; ALLEGHENY COUNTY BOARD OF ELECTIONS; ARMSTRONG COUNTY BOARD OF ELECTIONS; BEAVER COUNTY BOARD OF ELECTIONS; BEDFORD COUNTY BOARD OF ELECTIONS; BERKS COUNTY BOARD OF ELECTIONS; BLAIR COUNTY BOARD OF ELECTIONS; BRADFORD COUNTY BOARD OF ELECTIONS; BUCKS COUNTY BOARD OF ELECTIONS; BUTLER COUNTY BOARD OF ELECTIONS; CAMBRIA COUNTY BOARD OF ELECTIONS; CAMERON COUNTY BOARD OF ELECTIONS; CARBON COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; CLARION COUNTY BOARD OF ELECTIONS; CLEARFIELD COUNTY BOARD OF ELECTIONS; CLINTON COUNTY BOARD OF ELECTIONS; COLUMBIA COUNTY BOARD OF ELECTIONS; CRAWFORD COUNTY BOARD OF ELECTIONS; CUMBERLAND COUNTY BOARD OF ELECTIONS; DAUPHIN COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; ELK COUNTY BOARD OF ELECTIONS; ERIE COUNTY BOARD OF ELECTIONS; FAYETTE COUNTY BOARD OF ELECTIONS; FOREST COUNTY BOARD OF ELECTIONS; FRANKLIN COUNTY BOARD OF ELECTIONS; FULTON COUNTY BOARD OF ELECTIONS; GREENE COUNTY BOARD OF ELECTIONS; HUNTINGDON COUNTY BOARD OF ELECTIONS; INDIANA COUNTY BOARD OF ELECTIONS; JEFFERSON COUNTY BOARD OF ELECTIONS; JUNIATA COUNTY BOARD OF ELECTIONS; LACKAWANNA COUNTY BOARD OF ELECTIONS; LANCASTER COUNTY BOARD OF ELECTIONS; LAWRENCE COUNTY BOARD OF ELECTIONS; LEBANON COUNTY

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government websites is widely considered both self-authenticating and subject to judicial notice) (other citation omitted).

BOARD OF ELECTIONS; LEHIGH COUNTY BOARD OF ELECTIONS; LUZERNE COUNTY BOARD OF ELECTIONS; LYCOMING COUNTY BOARD OF ELECTIONS; MCKEAN COUNTY BOARD OF ELECTIONS; MERCER COUNTY BOARD OF ELECTIONS; MIFFLIN COUNTY BOARD OF ELECTIONS; MONROE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; MONTOUR COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; NORTHUMBERLAND COUNTY BOARD OF ELECTIONS; PERRY COUNTY BOARD OF ELECTIONS; PHILADELPHIA COUNTY BOARD OF ELECTIONS; PIKE COUNTY BOARD OF ELECTIONS; POTTER COUNTY BOARD OF ELECTIONS; SCHUYLKILL COUNTY BOARD OF ELECTIONS; SNYDER COUNTY BOARD OF ELECTIONS; SOMERSET COUNTY BOARD OF ELECTIONS; SULLIVAN COUNTY BOARD OF ELECTIONS; SUSQUEHANNA COUNTY BOARD OF ELECTIONS; TIOGA COUNTY BOARD OF ELECTIONS; UNION COUNTY BOARD OF ELECTIONS; VENANGO COUNTY BOARD OF ELECTIONS; WARREN COUNTY BOARD OF ELECTIONS; WASHINGTON COUNTY BOARD OF ELECTIONS; WAYNE COUNTY BOARD OF ELECTIONS; WESTMORELAND COUNTY BOARD OF ELECTIONS; WYOMING COUNTY BOARD OF ELECTIONS; YORK COUNTY BOARD OF ELECTIONS,

Defendants.

MEMORANDUM OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

IN RE: ECF Nos. 267, 270, 271, and 274

BAXTER, District Judge,

I. INTRODUCTION

The right to vote "is regarded as a fundamental political right because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). This case implicates that right through a legal challenge to the "vote by mail" practices currently in place in the Commonwealth of Pennsylvania; specifically, whether mailed-in ballots, which either lack a date or include an incorrect date on the outside envelope, may yet be counted.

The individual Plaintiffs in this case are voters from across the Commonwealth whose mail ballots were not counted due to their failure to properly date the voter declaration on the outer return envelope of their ballot. Numerous community organizations are also Plaintiffs. The Defendants are Al Schmidt ("Secretary Schmidt") in his official capacity as the Secretary of the Commonwealth of Pennsylvania, and each of the Commonwealth's sixty-seven county boards of election.[2] Plaintiffs and some of the Defendants have moved for summary judgment.

In one of the pending motions for summary judgment, two Defendants raise justiciability concerns, arguing that the Plaintiffs lack constitutional standing to pursue their claims. The question of Article III standing to sue is a threshold requirement in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Indeed, standing is necessary for subject mat-

[2] Plaintiffs allege that each county board has jurisdiction over the conduct and management of primaries and general elections in their respective counties. ECF No. 121, ¶ 38.

ter jurisdiction. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). The Court will begin its discussion and analysis with that motion. Before doing so, a summary of the claims at issue is provided.

II. SUMMATION OF THE COMPLAINT AND THE PARTIES

The Amended Complaint identifies five individual Plaintiffs: Barry Seastead ("Seastead") of Warren County; Marlene Gutierrez ("Gutierrez") and Aynne Margaret Pleban Polinski ("Polinski") of York County; and Joel Bencan ("Bencan") and Laurence Smith ("Smith") of Montgomery County.[3] *See* ECF No. 121. These individuals are registered Pennsylvania voters who allege they were disenfranchised in the November 2022 election because their mail ballots were not counted. ECF No. 121, ¶ 5. The six organizational Plaintiffs are the Pennsylvania State Conference of the NAACP ("NAACP"); the League of Women Voters of Pennsylvania (the "League"); Philadelphians Organized to Witness, Empower and Rebuild ("POWER"); Common Cause Pennsylvania ("Common Cause"); Black Political Empowerment Project ("B-PEP"); and Make the Road Pennsylvania ("MTRP"). These organizations allege that their voter education and get-out-the-vote efforts were burdened by the hyper-technical rules that disenfranchise vot-

[3] Pursuant to Rules 21 and 41(a)(2) of the Federal Rules of Civil Procedure, the remaining Plaintiffs moved to terminate Jean Terrizzi, Marjorie Boyle, and Deborah Diehl as plaintiffs in this action. *See* ECF No. 262. The Court granted the motion and those three individuals were removed from the docket as parties to this action. *See* ECF No. 263.

ers. *Id.* at ¶ 4.

Together, all Plaintiffs raise two legal claims: first, that Defendants violated the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B) (Count I) and second, that the Defendants violated the Equal Protection Clause of the fourteenth amendment to the United States Constitution ("Equal Protection Clause") (Count II).[4] The body of the Amended Complaint generally does not differentiate between the two groups of Plaintiffs and the language used throughout the pleading references all Plaintiffs, but the contours of the individuals' claims and the organizations' claims differ significantly. At Count I, each of the individual Plaintiffs plead that they were disenfranchised by the unnecessary and superfluous date requirement to their mail ballot. Each of the organizational Plaintiffs challenge the application of the date requirement more generally because they have been forced to divert resources to reeducate voters who are at risk of disenfranchisement. At Count II, each individual Plaintiff pleads that Defendants' refusal to count the undated or misdated mail ballots of domestic voters while at the same time counting the undated or misdated ballots of overseas and military voters imposes arbitrary distinctions unsupported by any legitimate or compelling government interest, thereby violating their right to equal protection under the law. The organizational Plaintiffs invoke the Equal Protection Clause as well, despite the fact they have no right to vote. *See* ECF No. 121, ¶ ¶ 2-5, 84-88.

With this background, the Court turns first to

[4] Plaintiffs seek relief on both claims via 42 U.S.C. § 1983.

the motion for summary judgment filed by Defendant Lancaster County.

III. STANDING

Defendant Lancaster County Board of Elections ("Lancaster County" or "Lancaster County Board") has moved for summary judgment. ECF No. 267. Defendant Berks County Board of Elections ("Berks County" or "Berks County Board") has joined in that motion as a co-movant. *See* ECF No. 269. Their motion argues that the Plaintiffs lack standing because no Plaintiff has demonstrated an injury that is directly traceable to their conduct. *See* ECF No. 276, p. 2 (emphasis added).[5]

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[5] Lancaster County supports its motion with numerous exhibits (ECF Nos. 267-2 through 267-14) and has also submitted a Concise Statement of Material Facts in accordance with our Local Rules (ECF No. 268). In joining Lancaster County's motion, the Berks County Board did not proffer any exhibits of its own nor did it file a concise statement. Instead, Berks County stated that "[a]ll of the arguments asserted by Lancaster [County] apply equally to Berks [County]" and that Lancaster County's "supporting memorandum of law and concise statement of material facts" are incorporated by reference in its motion. *See* ECF No. 269, p. 1. Such "me too" motions should contain a "statement of the relief sought and a statement that no brief is necessary and that no separate [concise statement] is necessary because the party joins in those submissions filed by other counsel." *Schmotzer v. Rutgers University-Camden*, 2018 WL 547540, at *1 (D.N.J. Jan. 24, 2018). The Berks County Board's motion contains such statements. *See* ECF No. 267, p. 1. However, when a party merely joins in a motion for summary judgment without presenting its own evidence, the party fails to establish the necessary factual foundation to support the motion. *See, e.g.*, *People v. Roberts*, 70 V.I. 168, 176, 2019 VI SUPER 21, ¶ 14 (V.I. Super. 2019) (citations omitted). Thus, although the Court will construe the Berks County Board as properly moving

All Plaintiffs oppose the motions for summary judgment by the Lancaster and Berks County Boards, arguing that they do have standing to pursue their claims. *See* ECF No. 313. The Plaintiffs have also filed a Responsive Concise Statement to the Lancaster County Board's Concise Statement. ECF No. 314.

Lancaster County asserts the Plaintiffs lack standing because none of their injuries were the result of any action taken by the Board. *See* ECF No. 267, p. 3. The Board points out that the individual Plaintiffs neither live in Lancaster County nor have ever had a ballot rejected by Lancaster County Board. *Id.* Lancaster County posits that the organizational Plaintiffs cannot bring claims on behalf of their membership because they have not identified any member who would suffer harm from the Lancaster County Board's actions. *Id.*, p. 4.

The Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. "Federal courts are courts of limited jurisdiction, and where there is a question as to our authority to hear a dispute, it is incumbent upon the courts to resolve such doubts, one way or the other, before proceeding to a disposition on the merits." *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 418 (3d Cir. 2010). *See also Gill v. Whitford*, 585 U.S. ___, 138 S.Ct. 1916, 1929 (2018) (cleaned up) ("A fed-

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for summary judgment, its reliance on the evidence presented solely by its co-movant to support its own motion for summary judgment may not provide the Court with sufficient "grist to evaluate" Berks County's motion. *See Egli v. Strimel*, 2016 WL 1292254, at *1 n.1 (E.D. Pa. Apr. 8, 2016).

eral court is not a forum for generalized grievances…")).[6]

The party which invokes the jurisdiction of the federal court bears the burden of establishing it. *Spokeo Inc., v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016); *Animal Sci. Prod., Inc., China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011). This means that the Plaintiffs—as the parties invoking this Court's jurisdiction—must "clearly . . . allege facts demonstrating" all three elements of constitutional standing: (1) an "injury in fact," (2) that is "fairly traceable" to the defendant's conduct, and (3) that is likely to be redressed by favorable judicial intervention. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992). "The injury-in-fact requirement is 'very generous' to claimants." *Cottrell v. Alcon Lab'ys*, 874 F.3d 154, 162-63 (3d Cir. 2017) (citation omitted). Thus, a plaintiff "need only allege a 'specific, identifiable trifle of injury.'" *Online Merchants Guild v. Hassell*, 2021 WL2184762, at *4 (M.D. Pa. May 28, 2021) (quoting *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017) (citations omitted)).

But an injury alone does not establish standing. Each plaintiff must also demonstrate that the injury is "fairly traceable" to the defendant's challenged conduct. *See Lezark v. I.C. System, Inc.*, 2023 WL 4571457, at *9 (W.D. Pa. July 18, 2023) (citing

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[6] This Opinion uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See, e.g.*, *Rush v. City of Phila.*, 78 F.4th 610, 649 (3d Cir. Aug. 30, 2023); *see also* Jack Metzler, Cleaning Up Quotations, 18 *Journal of Appellate Practice and Process* 143 (2017).

Spokeo, 578 U.S. at 338). "Traceability means that the injury was caused by the challenged action of the defendant as opposed to an independent action of a third party." *Id.* (quoting *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 156 (3d Cir. 2022)). This element of standing is often referred to as "causation." *See* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.5 (3d ed. 1998, Apr. 2022 update). However, this requirement is not equivalent to establishing proximate cause or "but-for" causation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014); *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) (holding that "Article III standing demands a 'causal relationship,' but neither the Supreme Court nor our Court has ever held that but-for causation is always needed."). The central inquiry is whether there is a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560.

The weight of the Plaintiffs' burden of establishing standing changes at each successive stage of litigation. *Road-Con, Inc., v. City of Phila.*, 2022 WL 17669015, at *5 (E.D. Pa. Dec. 14, 2022) (citing *Lujan*, 504 U.S. at 561). In the face of a summary judgment motion, Plaintiffs

must demonstrate standing with more than "mere allegations" and instead are required to "set forth by affidavit or other evidence specific facts, which … will be taken as true." *See Norman v. TransUnion, LLC*, 2023 WL 2903976, at *9 (E.D. Pa. Apr. 11, 2023) (citing *Lujan*, 504 U.S. at 561)). *See also Greenberg v. Lehocky*, 81 F.4th 376, 384 (3d Cir. Aug. 29, 2023) (to establish standing at summary

judgment stage, plaintiff can no longer rest on mere allegations, but must set forth by affidavit or other evidence specific facts establishing standing). A plaintiff must also show standing for each claim and for each form of relief sought. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

The Supreme Court has cautioned that "standing is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also Boyle v. Universal Health Servs., Inc.*, 36 F.4th 124, 131 (3d Cir. 2022). "Article III standing to sue each defendant … requires a showing that each defendant caused [the plaintiff's] injury and that an order of court against each defendant could redress the injury." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (citing *Lujan*, 504 U.S. at 560-61). Thus, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester*, 581 U.S. at 438.

A. Standing of the Individual Plaintiffs against Lancaster and Berks Counties

1. The "Materiality Provision" Claims

To determine whether the individual Plaintiffs have standing, the Court looks first to the legal claims they alleged in the Amended Complaint. *See, e.g.*, *Boley*, 36 F.4th at 131. Count I is a claim brought under the Materiality Provision of the Civil Rights Act ("Materiality Provision") challenging the mandatory application of Pennsylvania's requirement that mail ballots contain a hand-written date

next to the voter's signature. *See* ECF No. 121, ¶¶ 72-81. More specifically, each individual Plaintiff claims that the refusal to count their vote because of a missing or incorrect date violated the Materiality Provision. "[A] person's right to vote is 'individual and personal in nature.'" *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 912 (M.D. Pa.), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020). The denial of this right, therefore, is usually "always sufficiently concrete and particularized to establish a cognizable injury." *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960)). Because a plaintiff's standing "must be evaluated separately as to each defendant," the standing of each individual Plaintiff will be discussed in turn. *See Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 900 (4th Cir. 2022) (citations omitted).

Each individual Plaintiff has filed a sworn declaration. *See* ECF No. 121-2; 121-4; 121-6; 121-7; 121-8. The Defendants do not contest the averments contained in any of the individual Plaintiffs' declarations. Each of the individual Plaintiffs explains that they are long-time registered voters who utilized a mail-in ballot to exercise their right to vote in the November 2022 election. Each completed their ballot and delivered it to their respective county board of elections. And each mail ballot was not counted due to a dating error or omission on the voter declaration. *Id.* Thus, every individual Plaintiff has adequately established that their right to vote was violated because their ballot was not counted. *See* e.g., *Disability Rts.*, 24 F.4th at 913. Put another way, because their ballots were not counted, they have each estab-

lished an injury-in-fact. *Id. See also Vote.org v. Georgia State Election Bd.*, 2023 WL 2432011, at *5 (N.D. Ga. Mar. 9, 2023); *Trump for President*, 502 F. Supp.3d at 918 ("All citizens of the United States have a constitutionally protected right to vote. And all citizens have a constitutionally protected right to have their vote counted.") (citations omitted).

However, each of the individual Plaintiffs must yet establish that their injury was "fairly traceable" to the Defendants' actions to have standing. "For purposes of traceability, the relevant inquiry is whether the plaintiff's injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Collins*, 141 S. Ct. at 1779 (quoting *Lujan*, 504 U.S. at 560-61). Lancaster and Berks Counties contend that each of the individual Plaintiffs' injuries cannot be traced to any action it undertook. *See* ECF No. 267, p. 4. For example, Lancaster County argues that although the individual Plaintiffs "may have injuries caused by or connected to the action of other defendants," they have failed to show that their ballots were not counted as the result of any action taken by the Lancaster County Board. *Id.* The Court agrees.

The evidence of record reveals that the five individual Plaintiffs reside in just three counties: Seastead is a resident of Warren County, Polinski and Gutierrez are residents of York County, and Smith and Bencan are residents of Montgomery County. The individual Plaintiffs have not met their burden of pointing to evidence from which their injuries (the rejection of their ballots by election officials in Warren, York, and Montgomery counties) can be traced to any action by the Lancaster or Berks Coun-

ty Boards. The Court can only conclude that each of the individual Plaintiffs has failed to meet their burden of establishing standing to challenge any action by the Lancaster or Berks County Boards.

In sum then, although each individual Plaintiff may have standing to challenge the actions of the county boards that failed to count their mail-in ballots, they do not have standing to bring a Civil Rights Act claim against Lancaster or Berks County.

2. The Equal Protection Claims

At Count II, each of the individual Plaintiffs claims that the rejection of their ballots violated the Equal Protection Clause of the Fourteenth Amendment. *See* ECF No. 121, ¶¶ 84-88. Their claim is based on a state law which applies "a different rule to military and overseas voters who vote by mail" than it does to those who vote by mail from within the Commonwealth. *Id.* at ¶ 86. According to the individual Plaintiffs, the rejection of some ballots—but not others— because of a missing or incorrect date amounts to line-drawing that is inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *Id.* at ¶ 85. *See also Pennsylvania State Conf. of NAACP v. Schmidt*, 2023 WL 3902954, at *7 (W.D. Pa. June 8, 2023).

A "person's right to vote is 'individual and personal in nature.'" *Gill*, 585 U.S. ___, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). So "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). *See also*

Mohr v. Erie Cnty. Legislature, 2023 WL 3075956, at *8 (W.D.N.Y. Apr. 24, 2023). Although each of the individual Plaintiffs may have an equal protection injury, they have not pleaded, let alone provided evidence of, any injury stemming from an equal protection violation that is directly traceable to either Lancaster or Berks County. Therefore, the individual Plaintiffs lack standing to assert their equal protection claim against the Lancaster or Berks County Boards.

B. Standing of Organizational Plaintiffs against Lancaster and Berks Counties

In addition to the individual voters, several organizations are Plaintiffs in this action. Federal courts permit organizations and associations to have standing based on the recognition that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *International Union, United Auto. Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274, 290 (1986). Such entities may assert standing in two ways. First, organizations may have standing to bring claims which stem from injuries that were directly sustained by the organization. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n.11 (1979); *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002) (citing *Babbitt*). This is often referred to as "organizational standing" or "direct organizational standing." *See, e.g.*, *Online Merchants*, supra. Absent injury to itself, an association may pursue claims solely as a representative of its members. *See, e.g.*, *New York State Club Ass'n, Inc., v. City of New*

York, 487 U.S.1 (1988); *Public Interest Research Group of N.J., Inc. v Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997). This is referred to as "associational standing." *See Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 162-63 (3d Cir, 2007).[7] Contrary to the arguments advanced by the Lancaster County Board, the Plaintiff organizations do not claim they have standing based on injuries their members sustained; that is, they do not claim associational standing. *See* ECF No. 287, pp. 6-8. Instead, they assert direct organizational standing. *See* ECF No. 313, p. 11 n.3 ("For purposes of their motion for summary judgment, Plaintiff organizations do not rely on injuries to their members to establish standing.").[8]

An entity has direct organizational standing when it suffers injuries because of the defendant's allegedly unlawful conduct. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). This occurs, for example, when an organization must divert resources to counteract the allegedly unlawful conduct. *See id.* (finding injury-in-fact where the organization alleges that the unlawful conduct "perceptibly impaired" its ability to provide counseling and referral services by requiring it to "devote significant resources to identify and counteract the defendant's

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[7] The terms are often confused and commingled. *See, e.g.*, *Online Merchants Guild*, 2021 WL 2184762, at *4 n.3 (noting that "organizational standing" is often called "direct standing," "personal standing," or "individual standing" whereas "associational standing" is sometimes referred to as "representative standing.").

[8] *See also* ECF No. 267-5, pages 18-19 (NAACP); ECF No. 267-6, page 18 (League); ECF No. 267-7, page 17 (POWER); ECF No. 267-8, page 16 (Common Cause); ECF No. 267-9, page 14 (B-PEP); and ECF No. 267-10, page 14 (MTRP).

[unlawful conduct]"); *Fair Hous. Rts. Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 n.5 (3d Cir. 2016) (finding standing where the organization alleged that its mission had been frustrated "because it has had to divert resources in order to investigate and prosecute the alleged discriminatory practices"); *ERISA Indus. Comm. v. Asaro-Angelo*, 2023 WL 2808105, at *3 (D.N.J. Apr. 6, 2023) (citing *Fair Hous. Rts. Ctr.*)). On this point, the Court of Appeals has emphasized the importance of adequate evidence to support direct organizational injury. *See, e.g.*, *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998). "At the summary judgment stage, bare allegations of injury . . . are not enough to establish standing." *Id.* Accordingly, the summary judgment record must contain sufficient evidence to support the organizational Plaintiffs' claim of Article III standing. *Id. See also ERISA Indus. Comm. v. Asaro-Angelo*, 2023 WL 2808105, at *3 (D.N.J. Apr. 6, 2023).

As previously noted, there are six organizational Plaintiffs in this case: The Pennsylvania Conference of the NAACP ("NAACP"); The League of Women Voters of Pennsylvania ("the League"); Philadelphians Organized to Witness, Empower, and Rebuild ("POWER"); Common Cause Pennsylvania ("Common Cause"); Black Political Empowerment ("B-PEP"); and Make the Road Pennsylvania ("MTRP").

1. The NAACP State Conference

The NAACP is a "non-profit, non-partisan organization that works to improve the political, educational, social, and economic status of African-Americans and other racial and ethnic minorities, to

eliminate racial prejudice, and to take lawful action to secure the elimination of racial discrimination among other objectives." ECF No. 121, ¶ 11. Broadly, the NAACP alleges that the failure to count timely-submitted mail-in ballots premised solely on a missing or incorrect date "will disenfranchise potentially thousands of votes, directly affecting [the organization's] members and interfering with its ability to carry out its mission …." *Id.* ¶ 13. As for an injury-in-fact, the NAACP asserts that the Defendants' "failure to count such ballots also has caused and will cause [the organization] to divert resources in this and future elections from its existing voter education and mobilization efforts" to "investigating and educating voters about any available cure processes or to advocate that new processes be developed to ensure that voters who are eligible and registered and who submitted their ballots on time are not disenfranchised by a trivial paperwork mistake." *Id.* The NAACP supports this alleged injury with the declaration of Sandra Thompson, the NAACP's President. *See* ECF No. 280, pp. 34-38. No Defendant disputes or contradicts Thompson's declaration. She declares that but for Defendants' application of the rule regarding dated mail-in ballots, the organization's "voter contact and education efforts would have been directed to other, existing get-out-the-vote programs like monitoring the polls and engaging and educating new voters." *Id.*, p. 36, ¶ 10.

Thompson provided specific examples of this diversion of resources. For example, because of the Defendants' actions, the NAACP was forced to spend "additional time and resources toward organizing and coordinating an Election Day command center in

Philadelphia, with approximately 17 students from Howard University Law School," to attempt to contact voters who had submitted mail-in ballots with a missing or incorrect date. *Id.* at ¶ 11. The organization's Field Director and two other volunteers were deployed to contact affected voters, which diverted the director and volunteers from their intended mission, which was to conduct "election protection on Election Day in Philadelphia." *Id.*, at ¶ 12. Further, Thompson declares that the NAACP had to divert resources away from its espoused mission in favor of a social media campaign in York and Reading, Pennsylvania, as well as in Pittsburgh and Philadelphia, to alert the public to the availability of procedures to "cure" any ballot in which the date was omitted or incorrect, thereby ensuring that the ballot would be counted. *Id.*, at ¶¶ 13-14.

As to the Berks County Board, the NAACP's Reading, Pennsylvania branch (the county seat of Berks County) specifically posted on social media on November 4, 2022, that "[t]he Berks County Office of Election Services has been segregating these ballots throughout the current election cycle and will continue to do so per the ruling." ECF No. 280, p. 40.[9] The Reading, Pennsylvania branch also posted to social media sites that "Berks County election officials want voters to know they can fix undated mail ballots." *Id.*, pp. 42-43. Thus, the NAACP has provided sufficient uncontroverted evidence to support its assertion that Defendant Berks County Board's actions

[9] The NAACP has also submitted a press release from Berks County dated November 3, 2022, which states that the Elections Services Office had begun "segregating these ballots." ECF No. 280, p. 41.

forced it to divert resources away from its mission and toward the re-education and re-connection with voters, including through a social media campaign, to inform them on how to properly cast and cure their ballots. Given this, the Court concludes that Plaintiff NAACP has sufficiently established an injury-in-fact.

But an injury-in-fact alone does not establish standing. The NAACP must also show that the injury is "fairly traceable" to the Defendants' conduct. *Spokeo*, 578 U.S. at 338. Lancaster County argues that the NAACP has failed to point to any evidence which demonstrates that its injury is directly traceable to any of Lancaster County's conduct or actions. *See* ECF No. 267, p.9. Instead, the Lancaster County Board contends that the NAACP's diversion of resources was caused by the Pennsylvania Supreme Court's decision in *Ball v. Chapman*, 284 A.3d 1189 (Pa. Nov. 1, 2022).[10] To support its argument, Lancaster County points to the NAACP's answer to an interrogatory which asked the basis for its standing. In that interrogatory response, the organization stated:

> Following the Pennsylvania Supreme Court's November 1, 2022 decision in *Ball v. Chapman*, No. 102 MM 2022, the boards of elections in the counties where the [NAACP] operates implemented a rule requiring election officials to set aside—and not count—votes received in mail ballot envelopes missing a meaningless voter-written date or showing a

[10] *Ball v. Chapman* is discussed in detail *infra*. For these purposes, in *Ball*, the Pennsylvania Supreme Court ordered that undated or misdated mail-in ballots in the November 2022 election be segregated and not counted.

> date that the board of elections determined to be "incorrect."

ECF No. 267-5, p. 13. Contrary to Lancaster County's argument, the NAACP claims that it was a rule implemented by county elections officials that caused its injury. Where the rule originated is irrelevant to their claim that the counties implemented the rule and this implementation is the cause of the injury alleged.

On the other hand, the NAACP's generalized allegation against the counties is insufficient to establish that the organization's injuries were traceable to an action of Lancaster County, which they must be. The NAACP has not pointed to any evidence which demonstrates that Lancaster County's actions required it to divert resources. Indeed, Thompson's declaration, does not speak to any activity undertaken by Lancaster County. Instead, Thompson only points to actions taken by election officials in York County and Berks County.

We are left with the NAACP's injury that is traceable to Berks County. Now, the Court must determine whether it can redress that injury. This third and final prong of the constitutional standing inquiry looks forward, asking whether the injury will be redressed by a favorable decision from the Court. *See Freeman v. Corzine*, 629 F.3d 146, 153-54 (3d Cir. 2010). "'Redressability is not a demand for mathematical certainty,' but it does require a 'substantial likelihood' that the injury in fact can be remedied by a judicial decision." *Id.* (quoting *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

The Amended Complaint asserts that injunctive and declaratory relief against Defendants would redress Plaintiffs' injuries. *See* ECF No. 121, p. 37, ¶¶ 1-2. The NAACP asks that the Court declare that the date requirement violates federal law and enjoin the county boards from refusing to include the undated or misdated mail-in ballots from the 2022 election in the official tally or record of that contest.[11] *Id.*, pp. 37-38. Such orders would alleviate the need for the NAACP to redirect its future efforts away from educating the public on the dating requirement and back toward its other professed goals and mission. These forms of declaratory and injunctive relief are certainly at this Court's disposal and would, if directed at Berks County, address the NAACP's injury there. Therefore, the NAACP has established redressability. *See, e.g.*, *OpenPittsburgh.org v. Voye*, 563 F. Supp. 3d 339, 419 (W.D. Pa. 2021) (holding that injunctive relief is a form of relief at the Court's disposal which cuts against … the argument that plaintiffs have failed to establish redressability).

The Court concludes that while the NAACP has standing to assert its claim against the Berks County Board, it does not have standing against the Lancaster County Board of Elections because the NAACP has failed to trace its injury to any action of Lancaster County.

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[11] Restated in the affirmative, the NAACP seeks an injunction ordering that the undated and misdated mail-in ballots be counted and included in the official tally of the 2022 election and that such ballots be counted in all future elections.

2. The League of Women Voters of Pennsylvania

The League is a "nonpartisan statewide nonprofit" organization "dedicated to helping the people of Pennsylvania exercise their right to vote, as protected by law." ECF No. 121, ¶ 14. The League has "2,500 members across Pennsylvania, including in Crawford, Elk, Erie, Forest, McKean, Venango, and Warren Counties." *Id.* The League's mission includes "voter registration, education, and get-out-the-vote drives." *Id.*, ¶ 15. The League contends that as a result of the Lancaster County Board's actions in refusing to count undated or misdated mail-in ballots, it was forced to redirect and divert resources away from its mission and goals to counteract the allegedly unlawful conduct. In support of its claims, the League submitted the signed declaration of Meghan Pierce, the League's Executive Director. *See* ECF No. 280, pp. 51-75. Pierce declares that:

- After November 1, 2022, the county boards of elections required elections officials to set aside—and not count—votes received in mail ballot envelopes missing a … voter-written date or showing a date that the board of elections determined to be "incorrect" *Id.*, p. 52, ¶ 7.
- This requirement caused the League to redirect its limited resources, including staff and volunteer time, to efforts to inform voters of this change and educate them as to how to avoid disenfranchisement. *Id.*
- The League was forced to contact hundreds of voters and provide them with information

to help them cure their ballot or vote provisionally to prevent disenfranchisement. *Id.*, ¶ 8.

- Three staff members and approximately thirty volunteers spent time contacting voters, including on the phone and through social media. *Id.*
- As to the Lancaster County Board specifically, the failure to permit voters whose ballots would not be counted because of the date omission or other mistake forced the League to undertake a social media campaign and to attend board meetings and urge the Lancaster County Board to notify voters so they could cure their ballots, all of which diverted resources the League had dedicated to other programs, including "get-out-the-vote efforts." *Id.*, *see also id.* at p. 54, ¶ 13(b).
- As to the Berks County Board specifically, the League was forced to post to social media about the risk of disenfranchisement and the opportunity to voters to correct defective mail ballot return envelopes. ECF No. 267-6, p. 13; ECF No. 280, p. 55.

Pierce's uncontested declaration is sufficient evidence to establish the League's standing to bring its claim against the Lancaster and Berks County Boards. First, the League has demonstrated an injury-in-fact. It has had to expend and divert resources to address Lancaster County's refusal to count certain ballots and to inform voters on the ramifications of Lancaster County's conduct. *See, e.g.*, *ERISA Indus. Comm. v. Asaro-Angelo*, 2023 WL 2034460, at *5

(D.N.J. Feb. 16, 2023). Second, Pierce's declaration sufficiently traces the injury to the Lancaster County's allegedly unlawful conduct. As a result of that conduct, the League spent time attending public meetings at which they offered statements urging the Lancaster County Board of Elections to notify voters on how to cure their ballots, drafted and issued statements condemning Lancaster County's inaction, and published social media posts concerning Lancaster County's conduct. *See id.*, p. 54, ¶ 13(b). *See also id.*, p. 64 (Statement of League of Women Voters of Lancaster County). As concerns Berks County, the League was forced to divert resources from its other programs and projects to a new social media campaign to inform voters about Berks County's refusal to count certain undated and misdated ballots. The League has provided similar uncontested evidence concerning its diversion of resources in Allegheny, Lehigh, and Montgomery counties. ECF No. 267-6, ¶ 12-13. This demonstrates that the League's injuries are traceable to the actions of both Lancaster and Berks Counties.

That leaves the question of redressability; that is, whether the League's injury may be redressed by a favorable decision of this Court. The Amended Complaint asserts that injunctive and declaratory relief would redress the League's injuries. *See* ECF No. 121, p. 37, ¶¶ 1-2. As was the case with the NAACP, the Court can redress the League's injury with declaratory and injunctive relief. *See discussion, supra*. Thus, the League has standing to bring its claim against both Lancaster County and Berks County.

3. Philadelphians Organized to Witness, Empower and Rebuild

POWER is a nonprofit organization which has amongst its priorities "civic engagement and organizing communities so that the voices of all faiths, races, and income levels are counted and have a say in government." ECF No. 121, ¶ 17. Bishop Dwayne Royster has submitted a declaration which is uncontradicted. *See* ECF No. 280, pp. 76-79. Royster, the organization's executive director, states that his organization was forced to divert resources from its planned efforts to conduct phone and text banks to mitigate the effects of the Defendants' conduct in not counting the offending ballots. *Id.*, p. 77, ¶ 8. As noted above, this establishes an injury-in-fact. The problem, however, is that nothing in Royster's declaration traces POWER's injury to an action of Lancaster County or Berks County. Instead, Royster's declaration connects the organization's injury to actions taken in Philadelphia County. For example, Royster notes that "[w]hen Philadelphia published a list of over 3,000 voters who were at risk of having their ballots thrown out over technical errors," POWER was forced to expend time and resources "to contact those voters," that is, voters in Philadelphia. *Id.* Moreover, POWER's members and volunteers "made more than 1,200 manual calls and sent more than 2,900 texts to voters whose names appeared on Philadelphia's at-risk list." *Id.* The organization also "stationed volunteers at City Hall." *Id.*, ¶ 9. Lacking is any connection to the actions of the Lancaster or Berks County Boards, which defeats POWER's standing on traceability as to these two moving counties.

4. Common Cause Pennsylvania

Common Cause Pennsylvania is a non-profit political advocacy organization that "seeks to increase the level of voter registration and voter participation in Pennsylvania elections, especially in communities that are historically underserved and whose populations have a low propensity for voting." ECF No. 121, ¶ ¶ 21-22. Khalif Ali, the state organization's Executive Director, has filed a declaration in which he states that his organization also had to divert resources and expend additional time and effort to counteract the actions of Defendants instead of pursuing its mission of educating voters and increasing turnout and participation in the voting process. *See* ECF No. 280, pp. 82-84. He explains that Common Cause Pennsylvania has had to produce a "webinar public information series entitled 'Demystifying Democracy'" to resolve voter confusion created by the Defendants' actions. *Id.* at p. 84, ¶ 15. He further states that Common Cause "responded to inquiries from voters both via the nonpartisan Election Protection hotline and directly to [Common Cause] via email and telephone." *Id.* at p. 81-82, ¶ 8. The Defendants do not dispute Ali's declaration. Because this is evidence that Common Cause suffered an injury in fact, the inquiry turns to whether the injury is traceable to the Defendants.

The difficulty here is that to find traceability the Court would have to assume that these actions occurred in all sixty-seven counties. Because the declaration does not specify if this is true, and references "Defendants" generally [*see generally* ECF No. 267-8], Common Cause has failed to satisfy its burden of

submitting evidence which indicates that the actions of the Lancaster County or Berks County, specifically, caused its injury.

5. Black Empowerment Project

B-PEP is a non-profit, non-partisan organization that works to "ensure that the Pittsburgh African-American community votes in every election." ECF No. 121, ¶ 24. Walt Hales, the Coordinator for Outreach to Citizens and Religious Organizations for B-PEP, has submitted a declaration. *See* ECF No. 280, pp. 94-100. B-PEP is a non-profit, non-partisan organization that works "to ensure that the Pittsburgh-area African American community votes in each and every single election." *Id.* at p. 94, ¶ 5. Hales further declares that the organization "has numerous supporters, of various ages and races, throughout the Pittsburgh Region, working with numerous community organizations to empower Black and brown communities." *Id.* B-PEP undertakes numerous actions during election cycles, including "voter registration drives, get-out-the-vote activities, education and outreach about the voting process," and its efforts are focused on "predominately Black neighborhoods in Allegheny County, with some efforts in Westmoreland and Washington Counties." *Id.* at ¶ 6. By way of injury, Hales states that the organization was forced to "redirect its limited resources, including staff and volunteer time, to efforts to inform voters of the change [in voting rules] and educate them as to how to avoid disenfranchisement." *Id.* at ¶ 8. The organization also had to "expend time and money developing, printing, and distributing hundreds of flyers and other education materials to dozens of

churches for the purpose of informing prospective voters of the envelope dating issues generated by the *Ball* decision." *Id.* This took resources from the organization's get-out-the-vote efforts, as well as other initiatives "including the Greater Pittsburgh Coalition Against Violence and Corporate Equity and Inclusion Roundtable initiatives." *Id.*

Hale's uncontested declaration states an injury-in-fact. However, his declaration traces the injury to actions taken only in Allegheny, Washington, and Westmoreland Counties; the injury is not traceable to the actions or inactions of either Lancaster or Berks County. First, he specifically limits B-PEP's mission and activities to the Pittsburgh region. *See id.*, p. 94, ¶ 5. Second, the organization's election-related activities focus predominately on the African American neighborhoods of Allegheny County with some efforts in Westmoreland and Washington counties. *Id.* at ¶ 6. Third, Hales acknowledges that the programs from which resources were diverted furthered its mission in Allegheny County, including the Greater Pittsburgh Coalition Against Violence. *Id.* at ¶ 8. Given this evidence, the Court must conclude that although B-PEP has sufficiently demonstrated an injury, that injury is not traceable to the Lancaster or Berks County Boards.

6. Make the Road Pennsylvania

Plaintiff Make the Road Pennsylvania ("MTRP") has submitted the declaration of its Civic Engagement Director, Diana Robinson. *See* ECF No. 280, pp. 101-103. According to Robinson, MTRP is a "non-profit, mission-based organization … dedicated to building the power of the working-class in Latino and

other communities … through organizing, policy innovation, and education services." *Id.* at p. 101, ¶ 5. The organization runs "active programs to register voters in historically underserved communities of color, especially in Berks, Bucks, Lehigh, Northampton, and Philadelphia Counties." *Id.* at pp. 101-02, ¶ 7. Further, because many of MTRP's efforts are "focused on communities where many voters are not native English speakers," they had to direct additional time and resources to determine how, "if at all, they would inform non-English speakers of any problems with the dating of their mail ballot envelopes." *Id.* at p. 102, ¶ 9.

Although this diversion of resources is sufficient to establish an injury-in-fact, the injury is not traceable to Lancaster County. Robinson's declaration does not mention any action undertaken by Lancaster County election officials nor does she indicate that MTRP has any presence in or involvement with communities in that county, so it lacks constitutional standing to bring suit against it.

Robinson's declaration does state that in Berks County, it runs "active programs to register voters in" communities "of color." *Id.* at p. 101, ¶ 7. *See also* ECF No. 267-10, ¶ 10-11. Based on this, MTRP has demonstrated that its injury is traceable to the actions of Berks County officials. And, as noted above, the injury is redressable by an injunctive and/or declaratory order from this Court. *See discussion supra.* Accordingly, the Court concludes that although MTRP lacks standing to sue the Lancaster County Board, it has demonstrated sufficient standing to bring its claim against the Berks County Board of Elections.

The resolution of the standing arguments in these two motions for summary judgment does not end the standing analysis in this case. Even though no other Defendant raises standing concerns, the Court has an independent responsibility to ensure its jurisdiction; that is, whether any of the Plaintiffs have standing to sue all the other nonmoving Defendants. *See Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 414 (3d Cir. 2013) (citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 433 (2011) ("Federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.")).

C. Individual Plaintiffs Against the Nonmoving County Board Defendants

The individual Plaintiffs have sued each of the sixty-seven county boards of elections in the Commonwealth of Pennsylvania. As just discussed, only two of those county boards have moved for summary judgment based on lack of standing. But the allegations of each individual Plaintiff—and the evidence each has proffered—do not support standing against most of the nonmoving county boards because each Plaintiff's injury is not particularized to any action of those Defendants. Each individual Plaintiff has only presented evidence supporting standing as to their own county of residence and even then, only as to their claims under the Civil Rights Act.[12]

[12] No individual Plaintiff has offered any evidence relative to traceability or redressability as to their equal protection

Seastead states in his declaration that he is a Warren County voter who sought to vote in the November 2022 election in that county. *See* ECF No. 121-2, *generally*. He is 68 years old, has been registered in Warren County for decades, and votes regularly. For the November 2022 election, Seastead properly requested a mail ballot, marked his ballot, and inserted it into the secrecy envelope and then into the outer return envelope on which he signed the voter declaration. Seastead's ballot was not counted because of an "invalid" date. Seastead believed he wrote the date on which he filled out the ballot and is unaware why the Board of Elections rejected the date he wrote as "incorrect." Seastead was not notified of any opportunity to cure any defect prior to Election Day. He had no opportunity to cure any defect regarding the date prior to Election Day and only learned after Election Day that his vote was not counted.

Aynne Pleban Polinski is a York County voter who sought to vote in the November 2022 election. Polinski is 71 years old and is a qualified voter who regularly votes in elections. In her declaration, Polinski states that she has been a registered voter in York County since 2016. *See* ECF No. 121-6, *generally*. For the November 2022 election, Polinski properly requested a mail ballot, marked her ballot, and inserted it into the secrecy envelope and then into the outer return envelope on which she signed the voter declaration. The York County Board of Elections did not count her ballot based on a missing date. She was not notified of any opportunity to cure any defect pri-

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claim. Accordingly, no individual Plaintiff has standing to pursue an equal protection claim against any county board.

or to Election Day and only learned after Election Day that her vote was not counted.

Marlene Gutierrez has submitted a signed declaration in which she declares that she is a York County voter who sought to vote in the November 2022 election. *See* ECF No. 121-4, *generally*. She is 64 years old and has been a registered voter in York County since September 2020. For the November 2022 election, Gutierrez properly requested a mail ballot, marked her ballot, and inserted it into the secrecy envelope and then into the outer return envelope on which she signed the voter declaration. She believed she had followed all the instructions but learned on Election Day that her ballot would not be counted and she did not have time to cure her ballot. The York County Board did not count Gutierrez's ballot because of a missing date.

Laurence Smith declares that he is a Montgomery County voter who sought to vote by mail in the November 2022 election. *See* ECF No. 121-8, *generally*. He is 78 years old and has been a registered voter for decades. He has voted regularly in Montgomery County since moving there in 1991. For the November 2022 election, Smith properly requested a mail ballot, marked his ballot, and inserted it into the secrecy envelope and then into the outer return envelope on which he signed the voter declaration. The Montgomery County Board of Elections did not count Smith's ballot based on a missing date on the voter declaration. Smith believed he had followed all the necessary steps to complete the declaration and he was unaware of what the Montgomery County Board of Elections concluded was wrong with the date form. Smith was not notified of any opportunity to cure any

defect prior to Election Day.

Joel Bencan is also a Montgomery County voter who sought to vote by mail in the November 2022 election. His declaration states that he is 71 years old, has been a registered voter for decades, and has participated regularly in elections since the Nixon Administration. *See* ECF No. 121-7, generally. Bencan properly requested a mail ballot, marked his ballot, and inserted it into the secrecy envelope and then into the outer return envelope on which he signed the voter declaration. The Board of Elections did not count Bencan's ballot based on a missing date. Bencan believed he had followed all the necessary steps to complete the voter declaration, and he was unaware of why the Board rejected the date he wrote as "incorrect." Bencan was not notified of any opportunity to cure any defect prior to Election Day.

"For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339. Here, the five individual Plaintiffs contend only that the actions of Warren, York, and Montgomery counties have affected them in a personal way; that is, those counties did not count their mail-in ballots and/or failed to provide them with an opportunity to correct their offending ballots. In suing all the remaining counties, the individual Plaintiffs instead advance "undifferentiated, generalized grievance[s] about the conduct of government," which cannot give them standing. *See Mason v. Adams County Recorder*, 901 F.3d 753, 757 (6th Cir. 2018) (citing *Lance v. Coffman*, 549 U.S. 437, 439-42 (2007)). The Sixth Circuit's decision in Mason is instructive. There, the plaintiff brought a Fair Housing Act claim against every county recorder

in the State of Ohio, challenging the "maintenance of records that contain racially restrictive covenants." *Id.* at 754-55. The Court of Appeals concluded that the plaintiff, who was a resident of Hamilton County, Ohio, did not have standing to sue all the county recorders in the state because his injury was not particularized. *Id.* at 757. The same holds true here. The individual Plaintiffs' claims against the remaining county boards will be dismissed for a lack of standing. Each individual Plaintiff only has standing against his or her own county board of elections.

D. Organizational Plaintiffs Against the Nonmoving County Board Defendants

The same is true for the allegations of the organizational Plaintiffs. As discussed above, the organizational Plaintiffs have standing relative to their claim against some of the county Defendants: NAACP and MTRP against the Berks County Board and the League against the Lancaster County Board.

Further review of the evidence of record reveals that some of the organizational Plaintiffs have standing against some of the other nonmoving county boards. As detailed above, each organizational Plaintiff has provided undisputed evidence of injury. But this evidence demonstrates that their injury is not traceable or redressable as to every county board. Reviewing all the evidence of record, the NAACP has established that its injury is traceable to the Allegheny, Philadelphia, and York County Boards. ECF No. 280, p. 34-50. Besides the Berks and Lancaster County Boards, the League has shown that its injury is traceable to the Allegheny, Lehigh, and Montgomery County Boards. ECF No. 267-6, p. 10-14; ECF

No. 280, p. 51-103. POWER's injury is traceable to the Philadelphia County Board. ECF No. 267-7, p. 11-12; ECF No. 280, p. 76-79. B-PEP has shown injury traceable to the Allegheny, Westmoreland, and Washington County Boards. ECF No. 267-9, p. 10; ECF No. 280, p. 94-100. MTRP has shown its injury is traceable to Bucks, Lehigh, Northampton, and Philadelphia County Boards in addition to Berks County Board. ECF No. 267-10, p. 10-11; ECF No. 280, p. 10-103. Common Cause has not established that its injury is traceable to any specific county board of elections, as it must. ECF No. 267-8, p. 9-12; ECF No. 280, p. 101-103.

The Court has already determined that such injuries are redressable through the ordering of declaratory and injunctive relief; but as to the remaining nonmoving county board Defendants, these organizations have failed to demonstrate a particularized injury. *See, e.g.*, *Sprint Commc'ns, L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008) (holding that each plaintiff must plead facts specific to his or her own injury); *Rogers v. Morrice*, 2013 WL 5674349, at *4 (D.N.J. Oct. 16, 2013) (conclusory statements and non-particularized allegations against individual defendants did not establish standing). In other words, none of the organizational Plaintiffs demonstrates that they were harmed as an organization by any of the actions of the remaining county board Defendants.

Because the organizational Plaintiffs lack standing to bring their claims against the other county boards, those claims will be dismissed.

E. The Individual Plaintiffs Against Defendant Schmidt

Defendant Schmidt is the Secretary of the Commonwealth Department of State. He is sued in his official capacity. According to the Amended Complaint, it is his duty "[t]o receive from county boards of elections the returns of primary and elections, to canvass and compute the votes cast for candidates and upon [ballot] questions required by the provisions of this act, to proclaim the results of such primaries and elections, and to issue certificates of election." ECF No. 121, page 19, ¶ 37. As noted above, the individual Plaintiffs have demonstrated an injury-in-fact. They have adequately demonstrated that their votes were denied because of a missing or incorrect date and that they were not afforded, in some instances, an opportunity to cure their ballot. These are highly personal and concrete injuries. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 912 (M.D. Pa.), *aff'd sub nom. Donald J Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020).

The individual Plaintiffs still must establish that Secretary Schmidt caused their injuries. Here, the individual Plaintiffs point to a November 1, 2022, email from a Department of State official sent to all county boards of elections instructing them to "refrain from counting any absentee and mail-in ballots received for the November 8, 2022, general election that are contained in undated or incorrectly dated outer envelopes." ECF No. 121-9, p. 2. This email directed county election officials to "segregate and preserve any ballots contained in undated or incorrectly

dated outer envelopes … Do not count the votes cast on ballots with undated or incorrectly dated ballots." *Id.* Two days later, the acting Secretary issued new guidelines which instructed counties that "ballots which are administratively determined to be undated or incorrectly dated" should be coded as "CANC-NO SIGNATURE within the SURE system."[13] ECF No. 121-10, p. 2.

These communications link Schmidt to the segregation and non-counting of the individual Plaintiffs' ballots and thereby trace the individual Plaintiffs' injuries to the Secretary's actions.[14] Furthermore, the individual Plaintiffs have sufficiently demonstrated that a favorable decision from this Court would redress their injuries. They specifically

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[13] The SURE system is the Commonwealth's Statewide Uniform Registry of Electors, a uniform integrated computer system that, *inter alia*, tracks mail and absentee ballots from application through final tabulation. *See* ECF No. 279, p. 188-250 (Deposition transcript of Jonathan Marks, Pennsylvania Deputy Secretary for Elections and Commissions).

[14] This determination differs from an earlier decision reached by the Court in *Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. Nov. 21, 2020). There, the Court concluded that the individual Plaintiffs had failed to establish that the Secretary of the Commonwealth had caused their injury (denial of their ability to vote). The Court noted that the only connection the plaintiffs pointed to was an email, in which the Secretary encouraged county officials to adopt a "notice-and-cure policy." *Id.*, at 913. This, the Court concluded, "does not suggest in any way that Secretary Bookvar encouraged counties to allow exactly these types of votes to be counted." *Id.* Thus, the email evidence failed to establish that the Secretary caused the plaintiff's injuries. *Id.* Here, the opposite is true. The November 1, 2022, email coupled with the Secretary's issuance of additional guidance to the counties two days later links the individual Plaintiffs' voting injuries to the Secretary's actions.

request that the Secretary be enjoined from "refusing to include [their] ballots when reporting the 2022 election totals," thus ensuring that their votes are counted. *See* ECF No. 121, p. 38. This demonstrates that the individual Plaintiffs have standing to bring both their Materiality Provision and equal protection claims against Secretary Schmidt.

F. The Organizational Plaintiffs Against Defendant Schmidt

All the organizational Plaintiffs have established an injury. The declarations of their various leaders assert that because of the Secretary's actions ordering the segregation and non-counting of ballots which contained a missing or incorrect date, their organizations had to divert already scarce resources away from their missions and toward the warning and re-education of voters who may have filled out their ballots incorrectly. And, as noted above, these organizations have likewise established causation given the email and the Secretary's issuance of a guideline instructing the counties to segregate and not count the offending ballots. Finally, this injury is redressable in that an order from this Court requiring the ballots to be counted would permit the organizational Plaintiffs to redirect their resources back to their stated goals and mission for future elections.

Accordingly, the Court concludes that the organizational Plaintiffs have standing to bring their Civil Rights Act claim against Secretary Schmidt.

G. Summary of the Plaintiffs' Standing

The foregoing analysis of the standing of each

Plaintiff against each Defendant may be best summarized graphically. To wit, the Court offers the following chart:

Plaintiff	Standing to Pursue Materiality Provision Claims	Standing to Pursue Equal Protection Claims
Barry Seastead	Warren County; Secretary Schmidt	Secretary Schmidt
Aynne Marg Pleban Polinski	York County; Secretary Schmidt	Secretary Schmidt
Marlene Gutierrez	York County; Secretary Schmidt	Secretary Schmidt
Laurence Smith	Montgomery County; Secretary Schmidt	Secretary Schmidt
Joel Bencan	Montgomery County; Secretary Schmidt	Secretary Schmidt
NAACP	Allegheny, Berks, Philadelphia, and York Counties; Secretary Schmidt	n/a
League of Women Voters	Allegheny, Berks, Lancaster, Lehigh, Montgomery Counties; Secretary Schmidt	n/a
POWER	Philadelphia County; Secretary Schmidt	n/a
Common Cause	Secretary Schmidt	n/a
B-PEP	Allegheny, Westmoreland, Washington Counties; Secretary Schmidt	n/a

Plaintiff	Standing to Pursue Materiality Provision Claims	Standing to Pursue Equal Protection Claims
MTRP	Berks, Bucks, Lehigh, Northampton, Philadelphia Counties; Secretary Schmidt	n/a

So then, after the standing analysis, twelve county boards remain as active Defendants in this action based on a Plaintiff's identifiable and traceable injury in fact: Allegheny, Berks, Bucks, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, Washington, Warren, Westmoreland, and York. Because no Plaintiff has established standing against Adams County, Armstrong County, Beaver County, Bedford County, Blair County, Bradford County, Butler County, Cambria County, Cameron County, Carbon County, Centre County, Chester County, Clarion County, Clearfield County, Clinton County, Columbia County, Crawford County, Cumberland County, Dauphin County, Delaware County, Elk County, Erie County, Fayette County, Forest County, Franklin County, Fulton County, Greene County, Huntingdon County, Indiana County, Jefferson County, Juniata County, Lackawanna County, Lawrence County, Lebanon County, Luzerne County, Lycoming County, McKean County, Mercer County, Mifflin County, Monroe County, Montour County, Northumberland County, Perry County, Pike County, Potter County, Schuylkill County, Snyder County, Somerset County, Sullivan County, Susquehanna

County, Tioga County, Union County, Venango County, Wayne County, and Wyoming County, the claims brought against them will be dismissed for a lack of constitutional standing in a separate order.

IV. MOOTNESS AND RIPENESS

In addition to the standing inquiry, the Court's continuing obligation to ensure its jurisdiction includes an assessment of whether the Plaintiffs' claims are moot. *See Seneca Res. Corp. v. Twp. of Highland, Elk Cnty., Pa.* 863 F.3d 245, 252 (3d Cir. 2017). Lancaster and Berks County raise this issue in their motion for summary judgment. *See* ECF No. 267, pp. 10-11. Mootness is a doctrine which "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit," and which is "concerned with the court's ability to grant effective relief." *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (citations omitted). In other words, "a case is moot if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief." *Id.*, at 335 (quoting *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698-99 (3d Cir. 1996)).

Here, the individual Plaintiffs claim that the mandatory application of the date requirement for mailed-in ballots violates their statutory and constitutional rights and that, as a result, they were disenfranchised. They seek, among other forms of relief, an order from this Court declaring the dating requirement violative of the Materiality Provision and the Equal Protection Clause of the Fourteenth Amendment and further directing the Defendants to

open their ballots, count, and record their votes. *See* ECF No. 121, p. 38; ECF No. 275, p. 19. The Plaintiffs further assert that the Defendants maintain "digital and paper records of the total number of votes received by each candidate in past elections … [and] are capable of updating records of the total number of votes received by each candidate in past elections if ordered to do so by a court." ECF No. 283, ¶¶ 113-114. No other party disputes this. *See* ECF No. 295 (Lancaster County), ¶¶ 113-114; ECF No. 300 (Secretary Schmidt), ¶¶ 113-114; ECF No. 305 (Republican National Committees), ¶ 113-114.

Plaintiffs' claims are not moot. The requirement to date the voter declaration on the outside envelope of a mail-in ballot in Pennsylvania remains in effect. In this case, the Court can order meaningful relief by (1) declaring that the mandatory application of the Date Requirement violates the Materiality Provision and the Equal Protection Clause and (2) directing the Defendants to count and record the Plaintiffs' votes from the 2022 election. *See, e.g.*, *Natural Resources Defense Council v. U.S. E.P.A.*, 703 F.2d 700, 703 (3d Cir. 1983) (case was not moot because Court could order relief which would alter the status quo); *see also Org. for Black Struggle v. Ashcroft*, 2021 WL 1318011, at *3 (W.D. Mo. Mar. 9, 2021) (because state's regulation was still in effect, plaintiff's claim that it violated the materiality provision was not moot).

Related to the mootness doctrine is the doctrine of ripeness. Ripeness "seeks to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Planned Parenthood of Cent. N.J. v. Farmer*,

220 F.3d 127, 147 (3d Cir. 2000) (cleaned up). That is, the doctrine "serves to determine whether a party has brought an action prematurely and counsels abstention until such time as the dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine." *Khodara Env't, Inc., v. Blakely*, 376 F.3d 187, 196 (3d Cir. 2004) (citation omitted). "A plaintiff challenging a governmental enactment or policy satisfies the ripeness aspect of the case or controversy requirement by demonstrating that operation of the enactment or policy will cause him to sustain some immediate injury and that the judicial relief requested would address that injury." *Cities Servs. Co. v. Dep't of Energy*, 520 F. Supp. 1132, 1139 (D. Del. Aug. 28, 1981) (citing *Duke Power Co. v. Carolina Environmental Study Grp.*, 438 U.S. 59, 81 (1978)). In the constitutional sense, a case is ripe if "the requisite injury is in sharp enough focus and the adverseness of the parties concrete enough to permit a court to decide a real controversy and not a set of hypothetical possibilities." *Martin Tractor Co. v. Federal Election Commission*, 627 F.2d 375, 379 (D.C. Cir. 1980).

Where, as here, a plaintiff seeks declaratory relief, courts must employ a "somewhat refined test by examining: (1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Koons v. Platkin*, 2023 WL 3478604, at *36 (D.N.J. May 16, 2023) (cleaned up). "Parties' interests are adverse where harm will result if the declaratory judgment is not entered." *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995). Here, absent a declaratory judgment from this Court, the individual Plaintiffs will remain dis-

enfranchised and their votes will remain uncounted. Their claim that the mandatory application of the Date Requirement violates the Materiality Provision and the Equal Protection Clause presents "a real and substantial threat of harm." *See NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 342 n.9 (3d Cir. 2001).

The conclusiveness of the judgment examination asks whether "a declaratory judgment definitively would decide the parties' rights." *Id.* at 344 (citation omitted). This Court must consider whether "the legal status of the parties would be changed or clarified and [whether] further factual development … would facilitate decision, so as to avoid issuing advisory opinions, or the question presented is predominately legal." *Travelers Ins.*, 72 F.3d at 1155. In this case, declaratory relief would affect the "legal status of the parties" by determining whether the Commonwealth must count and record their mail-in ballots retroactively and prospectively. A judgment from this Court would determine that issue. *See, e.g.*, *Koons*, 2023 WL 3478604, at *37. The Plaintiffs' challenge presents a "purely legal" question with little need for further factual development. Their claims focus on whether the Commonwealth's mandatory application of the Date Requirement violates federal law, unreasonably burdening their right to vote. Resolving their claim would conclusively determine whether the application of the requirement infringes on their rights.

Finally, the Court must consider whether the declaratory relief sought here "would be useful to the parties and others who would be affected." *Id.* A declaratory judgment here would be of utility to not only the Plaintiffs but to others. If successful, not only

would the Plaintiffs have their votes counted and recorded, but declaratory relief would also be useful to all citizens of the Commonwealth by deciding whether the mandatory application of the Date Requirement for mail-in ballots violates federal law and is not required. Withholding declaratory judgment in this case would continue the confusion and uncertainty now extant in the Commonwealth's voting procedures. Finally, the Defendants' interests would be served by a decision in this matter by resolving the uncertainty: either they can enforce the Date Requirement or they cannot.

In sum then, the Plaintiffs' claims are neither moot nor unripe. The Court will now proceed to the merits of the Plaintiffs' claims and the cross-motions for summary judgment.[15]

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[15] In addition to standing, Lancaster County also moved for summary judgment arguing that the Materiality Provision does not provide a private right of action. *See* ECF No. 267, p. 12-14. The private enforceability of the Materiality Provision was raised earlier in this case by other defendants in the context of a motion to dismiss. In declining to dismiss the Plaintiffs' Amended Complaint, this Court determined that the Plaintiffs had stated a plausible claim for relief, that is, that after accepting their factual allegations as true, it was plausible that the Plaintiffs, as private individuals, could enforce the Materiality Provision. *See* ECF No. 329, p. 9. *See also Migliori v. Cohen*, 36 F.3d 153, 156 (3d Cir. May 27, 2022) (*vacated on other grounds*, 143 S. Ct. 297 (Oct. 11, 2022)). This determination, however, is not law of the case because it was based on a motion to dismiss, not on the standards applicable to a motion for summary judgment. *See Corliss v. Varner*, 247 Fed. Appx. 353, 354 (3d Cir. 2007) (noting law of the case doctrine is inapplicable "where the legally relevant factors differ between a motion to dismiss, which relies on plaintiff's allegations in his complaint, and a motion for summary judgment which relies on the evidence in

V. The Cross Motions for Summary Judgment

The cross motions for summary judgment are as follows. The Plaintiffs have moved for summary judgment on both claims. *See* ECF No. 274.[16] Lancaster County Board of Elections filed a brief in opposition to the Plaintiffs' motion (ECF No. 294) and Westmoreland County Board of Elections filed a response joining in that opposition (ECF No. 297).[17]

Secretary Schmidt did not move for summary judgment. Instead, the Secretary filed a brief stating his position to the Plaintiffs' motion. *See* ECF No. 298.[18] The Secretary does not oppose the Plaintiffs' motion for summary judgment as to Count I (relating to the Materiality Provision) but opposes their motion as to the Equal Protection claim. *See* ECF No. 298, p. 2.

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the record") (citations omitted). This argument has also been raised on summary judgment by other Defendants. Lancaster County's remaining basis for summary judgment will be discussed in conjunction with those other motions, *infra*.

[16] Plaintiffs submitted multiple appendices in support of their motion and filed a Concise Statement of Material Facts per the Local Rules of this Court. ECF No. 277-282; ECF No. 283, *respectively*.

[17] In accordance with Local Rule 56(C)(1), the Lancaster County Board filed a Responsive Concise Statement (ECF No. 302), but Westmoreland County Board did not. Nor did Westmoreland County move for summary judgment. Berks County Board of Elections filed a document entitled "Response in Opposition to Plaintiffs' motion for summary judgment and concise statement of material facts." ECF No. 308. In actuality, the filing is a Responsive Concise Statement and not an opposition brief.

[18] The Secretary also filed a Responsive Concise Statement (ECF No. 300), and an appendix (ECF No. 301).

Certain political committees associated with the Republican Party as well as several individual voters sought leave to intervene "as defendants to defend the [Pennsylvania] General Assembly's duly enacted laws governing the elections in which the Individual Voters, and the Republican Committees, their candidates, their voters, and their supporters, exercise their right to vote and their constitutional rights to participate in elections." ECF No. 27, p. 1. These proposed intervenors were the Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania (collectively, "the RNC"). The Court previously denied the motion as to the individual voters but granted leave for the committees to intervene as defendants. *See* ECF No. 167.

The RNC filed a motion for summary judgment in support of the mandatory application of the date requirement. ECF No. 270.[19] Briefs in opposition to the RNC's motion were filed by five County Boards of Elections jointly (Allegheny, Bucks, Chester, Montgomery, and Philadelphia County Boards) (*see* ECF No. 310). The Plaintiffs then filed an omnibus opposition to Lancaster County, Berks County, and the RNC's motions for summary judgment. ECF No. 313. The RNC filed a reply brief. *See* ECF No. 318.[20]

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[19] The RNC also filed an appendix (ECF No. 273) and a Concise Statement (ECF No. 272).

[20] Responsive Concise Statements were filed by the Secretary [ECF No. 299], Plaintiffs [ECF No. 315], and the five County Boards [ECF No. 311]. The five County Boards jointly filed an Appendix. ECF No. 312. Additionally, the five County Boards included additional material facts in their Responsive Concise Statement and the RNC filed a response to those [ECF

Several non-parties have also demonstrated an interest in this litigation. The Lawyers Democracy Fund ("LDF") and Restoring Integrity & Trust In Elections, Inc. ("RITE") have both filed briefs amicus curiae in support of the RNC's position. *See* ECF No. 328; ECF No. 333.

Also, the Civil Rights Division of the United States Department of Justice has filed a Statement of Interest of the United States.[21] ECF No. 229. The Department of Justice argues that the Commonwealth's date requirement violates the Materiality Provision.

A. The Standard of Decision

In resolving the competing motions for summary judgment, the following standards will guide the Court's decision. Federal Rule of Civil Procedure 56(a) requires the court to enter summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A disputed fact is "material" if proof of its existence or nonexistence would affect the outcome of the case under

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No. 321].

[21] 28 U.S.C. § 517 authorizes the Attorney General of the United States "to attend to the interests of the United States in a suit pending in a court of the United States."

applicable substantive law. *Anderson*, 477 U.S. at 248; *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 257; *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1287-88 (3d Cir. 1991).

When determining whether a genuine issue of material fact remains for trial, the court must view the record and all reasonable inferences to be drawn therefrom in favor of the nonmoving party. *Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993); *Clement v. Consol. Rail Corp.*, 963 F.2d 599, 600 (3d Cir. 1992); *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988). To avoid summary judgment, however, the nonmoving party may not rest on the unsubstantiated allegations of his or her pleadings. Instead, once the movant satisfies its burden of identifying evidence that demonstrates the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings with affidavits, depositions, answers to interrogatories or other record evidence to demonstrate specific material facts that give rise to a genuine issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Further, under Rule 56, a defendant may seek summary judgment by pointing to the absence of a genuine fact issue on one or more essential claim elements. The Rule mandates summary judgment if the plaintiff then fails to make a sufficient showing on each of those elements. When Rule 56 shifts the burden of production to the nonmoving party, "a complete failure of proof concerning an essential el-

ement of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. *See Harter v. G.A.F. Corp.*, 967 F.2d 846, 851 (3d Cir. 1992).

The foregoing standards are no differently applied when reviewing cross-motions for summary judgment. *Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008). "Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist." *Id.* (quoting *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)). If review of cross-motions reveals no genuine issue of material fact, then judgment may be granted in favor of the party entitled to judgment in view of the law and undisputed facts. *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 302 (3d Cir. 1998) (citation omitted).

The Local Rules of this Court require that a motion for summary judgment under Federal Rule 56 be supported by "a separately filed concise statement setting forth the facts essential for the Court to decide the motion, which the moving party contends are undisputed and material." LCvR 56(B)(1). Local Rules such as ours have been found "essential to the Court's resolution of a summary judgment motion due to its role in organizing evidence, identifying undisputed facts, and demonstrating precisely how each side proposed to prove a disputed fact with admissible evidence." *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 613 (3d Cir. 2018) (citations omitted). *See*

also Weimer v. County of Fayette, 2022 WL 28119025, at *10 (W.D. Pa. July 19, 2022) ("The purpose of Local Rule 56(B)(1) is to aid the Court in deciding a motion for summary judgment by identifying material facts and supporting documentation to determine whether the fact is disputed.") (citation omitted) *reversed in part on other grounds*, 2023 WL 7221027 (3d Cir. Nov. 2, 2023).

The Plaintiffs filed a Concise Statement in support of their motion. *See* ECF No. 283. Moving Defendants Lancaster and Berks Counties and the RNC have also filed Concise Statements in support of their motions.[22] As indicated in their Responsive Concise Statements, the moving Defendants, in large part, do not dispute the Plaintiffs' factual assertions. *See* ECF Nos. 295 (Lancaster County) and 305 (RNC).[23] The

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[22] The Local Rules mandate that a concise statement set forth facts essential for the Court to decide the motion for summary judgment and each statement must be supported by a citation to a particular pleading, deposition, answer to interrogatory, admission on file or other part of the record. See Local Rule of Civil Procedure 56(B)(1). Courts within the Western District of Pennsylvania require strict compliance with the provisions of Local Rule 56. *See, e.g.*, *Peay v. Sager*, 2022 WL 565391, at *1 (W.D. Pa. Feb. 1, 2022), *report and recommendation adopted*, 2022 WL 562936 (W.D. Pa. Feb. 24, 2022), *aff'd*, 2022 WL 17819629 (3d Cir. Dec. 20, 2022); *First Guard Ins. Co. v. Bloom Servs., Inc.*, 2018 WL 949224, at *2-3 (W.D. Pa. Feb. 16, 2018). In large part, the RNC's Concise Statement advances legal conclusions rather than facts supported by evidence. *See, e.g.*, ECF No. 272, ¶¶ 36 ("… the current state of the law is that the General Assembly's date requirement is mandatory and that election officials may not count any noncompliant ballot in any election after the 2020 general election." (citation omitted)); 40, 47. The RNC's Concise Statement does not comply with the Local Rules. *See* ECF No. 272.

[23] Defendant Schmidt also filed a Responsive Concise

following factual background is recounted from the parties' Concise Statements and the exhibits attached thereto. Disputes of fact will be noted. In the interest of clarity and brevity, the Court will primarily cite to the Plaintiffs' Concise Statement where the moving Defendants' statements agree.

B. The Undisputed Facts

Although the Commonwealth has long made absentee ballots available for voters who could not cast their ballot on Election Day, new mail-in voting provisions were enacted in 2019 by the General Assembly to make voting by mail an option for all registered voters. *See* ECF No. 283, ¶¶ 1-2. Millions of Pennsylvanians availed themselves of this new option in the November 2020 and November 2022 elections. *Id.* at ¶ 3.

To vote by mail, voters apply to their county board of elections, providing their date of birth, address, length of time as a resident of the voting district, and proof of identification (either a Pennsylvania driver's license number or, if the voter does not have a Pennsylvania driver's license, the last four digits of the voter's Social Security number). *Id.* at ¶ 5. The county boards of elections then verify that they are qualified to vote in Pennsylvania. In the Commonwealth, a qualified voter is one who, on the day of the next election, has been a United States citizen for at least one month, is at least 18 years old, has resided in the election district for at least 30 days, and has not been confined in a penal institu-

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Statement which does not appear to contradict the Plaintiffs' Concise Statement on any material fact. *See* ECF No. 300.

tion for a conviction of a felony within the last five years. *Id.* at ¶ 4. *See also* 25 Pa. C.S. § § 1301, 1327(b). Once the voter's proof of identification has been verified, the county boards compare the information in the application to the information provided at the time of registration using the data from the Statewide Uniform Registry of Electors ("SURE") system. *Id.* at ¶ 6. Each county maintains its own official voter rolls within the Commonwealth's SURE system. *See* ECF No. 279, pp. 207, 267. Only after verifying the voter's qualifications to vote do the county boards issue vote by mail ballot packages to voters. ECF No. 283, ¶ 7. The county board's decision that an individual is qualified to vote is conclusive unless the voter's eligibility is challenged prior to Election Day. *Id.* at ¶ 8. *See also* 25 P.S. § 3150.12b.

The county board then mails a ballot package to the voter. *Id.* at ¶ 9. The ballot package consists of the ballot itself, instructions, a "Secrecy Envelope," and a larger pre-addressed outer "Return Envelope" on which a voter declaration form is printed. *Id.* at ¶ 9. The Election Code provides that the inner Secrecy Envelope be marked with the words "Official Election Ballot" and nothing else. 25 P.S. § 3146.4. The larger outer Return Envelope is to contain "the form of declaration of the elector, and the name and address of the county board of election of the proper county." ECF No. 305, at ¶ 9 ("Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors' qualifications, together with a statement that such elector has not already voted in such primary or election.").[24] *Id.* The

[24] The Commonwealth provides the county boards with ap-

outer Return Envelope is printed with a unique barcode associated with the individual voter. That unique barcode is used to track the ballot through the SURE system. ECF No. 300, ¶ 6. During his deposition, Deputy Secretary of State Jonathan Marks clarified: "The counties do record returned ballots in the SURE system. … There is a barcode, a unique barcode on each envelope that's returned to the County that the County uses to scan. And that unique barcode is attached to that specific voter who requested the absentee or mail-in ballots. So, yes, the counties record those envelopes as returned in the SURE system." ECF No. 279, p. 223-244. Further, the Election Code requires the mail-in voter to "fill out, date and sign the declaration printed on" the outer Return Envelope. ECF No. 300, at ¶ 13. *See also* 25 P.S. § 3150.16(a). The voter declaration includes a line for the voter to sign and date the declaration.[25] *Id.* This is a reproduction of the back of the outer envelope:

The voter declaration on the outer Return Envelope reads:

> I hereby declare that I am qualified to vote in this election; that I have not already voted in this election, and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am

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proved envelope templates, but the format and layout of the outer envelope may vary by county. ECF No. 279, p. 209 (Marks deposition).

[25] The exact phrasing under the date line varies by county – for example, some counties use "Today's date (required)/Fecha de hoy (obligatorio)," while others use "Today's date (MM/DD/YYYY) (required)." *Id.* at ¶ 46.

> no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

ECF No. 288, p. 210.

The voter is instructed to mark their ballot, put it inside the Secrecy Envelope, and place that into the outer Return Envelope. The voter declaration on the Return Envelope is to be completed at "any time" between receiving the ballot package and 8:00 p.m. on Election Day. *Id.* at ¶¶ 10, 54. *See also* 25 P.S. § 3150.16(a). After completing the ballot, the voter either mails the ballot to the county board of elections or personally delivers it to the board's office.

The county board of elections must receive the voter's completed ballot package by 8:00 p.m. on Election Day. *Id.* at ¶ 11. Upon receipt of the ballot package, the county boards stamp or otherwise mark the Return Envelope with the date of receipt to confirm its timeliness and log its receipt into the SURE system. *Id.* at ¶ 12.[26]

The requirement of placing a date on the Return Envelope of a mail-in ballot has been the subject of repeated litigation in both state and federal courts. *Id.* at ¶ 14. In the run up to the 2022 election, the Secretary of the Commonwealth advised county elec-

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[26] Under the Election Code, county boards of elections have a statutory obligation to track the date that every mail ballot was received and make that information available for public inspection. 25 P.S. § § 3146.9(b)(5), 3150.17(b)(5).

tion officials to count otherwise valid and timely-received mail ballots even where voters omitted a handwritten date, or wrote a plainly wrong date like a birthdate, on the voter declaration on the Return Envelope. *Id.* at ¶ 15. This guidance was reaffirmed on October 11, 2022. *Id.* at ¶ 16.

On October 16, 2022, a group of petitioners brought a King's Bench petition[27] in the Supreme Court of Pennsylvania seeking to invalidate mail ballots based on voter errors or omissions with respect to the date of the declaration on the outer Return Envelope. *Id.* at ¶ 17. On November 1, 2022, that Court issued a unanimous order, without opinion, directing that county boards "refrain from counting" mail ballots "contained in undated or incorrectly dated outer envelopes," because the justices were evenly divided[28] on the issue of whether failing to count the disputed ballots violates the federal Materiality Provision. *Id.* at ¶ 18. *See also Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

Later that same day, Deputy Secretary Marks sent an email to all county elections officials advising

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[27] A King's Bench Petition is not an appeal from a lower court decision, but instead is an action initiated directly in the Supreme Court of Pennsylvania based on its "general superintendency over inferior tribunals even when no matter is pending before a lower court." See *Thomas v. Piccione*, 2013 WL 5566506, at *4 n.4 (W.D. Pa. Oct. 9, 2013) (quoting *Bd. of Revision v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2013)).

[28] At the time of the decision, the Pennsylvania Supreme Court had only six justices due to the recent death of Chief Justice Max Baer around October 1, 2022. *See* http://www.pacourts.us/news-and-statistics/news/news-detail/1115/pennsylvania-supreme-court-announces-passing-of-chief-justice-max-baer.

of the Supreme Court's order to "refrain from counting any absentee and mail-in ballots received for the November 8, 2022, General Election that are contained in undated or incorrectly dated outer envelopes," and to "**segregate** and **preserve** any ballots contained in undated or incorrectly dated outer envelopes … [officials] **must remember to do two things** as [they] pre-canvass and canvass absentee and mail-in ballots: Segregate AND preserve these undated and incorrectly dated ballots; and Do not count the votes cast on ballots with undated or incorrectly dated ballots." *Id.* at ¶ 19 (emphasis and underlining in original).

On November 3, 2022, Acting Secretary of the Commonwealth Leigh Chapman issued new guidance instructing county election officials that "ballots which are administratively determined to be undated or incorrectly dated" should be coded as "CANC – NO SIGNATURE within the SURE system" and should be "segregated from other ballots." *Id.* at ¶ 20. Then, on November 5, 2022, the Supreme Court of Pennsylvania issued a supplemental order defining "incorrectly dated outer envelopes" as "(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022;[29] and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022." *Id.* at ¶ 21; ECF No. 281, p. 31-2.

The November 2022 General Election involved races for the United States Senate, United States

[29] These dates—September 19 through November 8, 2022—will be referred to herein as the "*Ball* date range."

House of Representatives, Pennsylvania Governor, and Pennsylvania House and Senate offices. *Id.* at ¶ 33. The county boards of elections reported receiving approximately 1.2 million mail and absentee ballots in the election. *Id.* at ¶ 35. Approximately 10,500 mailed ballots were segregated by county boards of elections based on missing or incorrect dates on the voter declaration on the outer Return Envelopes. *Id.* at ¶ ¶ 36, 38. County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose related to determining a voter's age (*id.* at ¶ 46), citizenship (*id.* at ¶ 48), county or duration of residence (*id.* at ¶ 49), felony status (*id.* at ¶ 50), or timeliness of receipt (*id.* at ¶ ¶ 51-52). All the voters whose ballots were set aside in the November 2022 election solely because of a missing or incorrect date on the outer Return Envelope had previously been determined to be eligible and qualified to vote in the election by their county board of elections. *Id.* at ¶ 42.

C. The Materiality Provision Claim

Plaintiffs argue that the mandatory application of the Date Requirement violates the Materiality Provision of the Civil Rights Act. *See, e.g.*, ECF No. 275. The RNC and Lancaster and Berks Counties disagree.[30] *See, e.g.*, ECF No. 271, pp. 11-12. No other

[30] Secretary Schmidt agrees with the Plaintiffs and argues in favor of the motion for summary judgment on the Materiality Provision claim. He states that in the 2022 general election, more than 10,000 eligible voters had their ballots cancelled for "failing to handwrite a date that serves no purpose in the administration of Pennsylvania's elections." ECF No. 298, p. 6.

county board offers argument on this point.

The Civil Rights Act of 1964 forbids discrimination in many fundamental aspects of American life. The Supreme Court has referred to this Act as a "most comprehensive [] undertaking [designed] to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federal secured

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The Secretary argues that the mandatory application of the Date Requirement violates federal law and he asks that summary judgment be granted against him and in favor of Plaintiffs on that claim. *See id.* ("Because the undisputed facts establish that writing a date on the declaration submitted with an absentee or mail ballot serves no purpose in the administration of Pennsylvania's election, it is not "material" to determining an individual's eligibility."). Given the Secretary's position, a question is raised whether a controversy remains. This requires the Court to revisit subject matter jurisdiction. "[A] suit must be justiciable throughout its pendency." *NLRB v. Gov't of Virgin Islands*, 2021 WL 4990628, at *4 (D.V.I. Oct. 27, 2021) (citing *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 346-47 (3d Cir. 2003)). Article III "affords federal courts the power to resolve only 'actual controversies arising between adverse litigants.'" *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021) (quoting *Muskrat v. United States*, 219 U.S. 346, 361 (1911)). Arguably, Plaintiffs and the Secretary of the Commonwealth are no longer adverse litigants. But the Secretary's position alone is insufficient to destroy standing or to render this case moot. As discussed above, each of the Plaintiffs have constitutional standing against the Secretary. There is an injury to each Plaintiff that is traceable to the Secretary which is likely to be redressed by favorable judicial intervention. *See supra*, p. 30, *et seq.*; *Lujan*, 504 U.S. at 561. Despite the Secretary's legal position in this case, the county boards of elections remain bound by the state Supreme Court's holding directing that undated and misdated mail ballots be segregated and not counted. Because Plaintiffs' injuries can only be redressed by the declaratory judgment sought, an actual case or controversy still remains.

programs and in employment." *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 24, 246 (1964). The opening provision of the statute provides insight into Congress' intent:

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

52 U.S.C. § 10101(a)(1).[31] The statute further prohib-

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[31] Lancaster and Berks Counties also assert that the Materiality Provision only applies to racially motivated laws. *See* ECF No. 294, pp. 8-10. Despite the fact that the heading of 52 U.S.C. § 10101(a) references "[r]ace, color, or previous condition," it only does so in the subjunctive together with other topics: "Race, color or previous condition not to affect the right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions." *See id.*; *see also Thurston*, 2023 WL 6446015, at *16; *Vote.org*, 2023 WL 7169095 at * 3 ("That Congress enacted the Materiality Provision to tackle racial discrimination does not, though, mean the provision applies only to racially discriminatory practice."). And further, § 10101(c) provides that "[w]henever any person has engaged or [is likely to engage in] any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute … a civil action." However, "[i]n any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has

its state officials from denying any individual the right to vote "because of an error or omission on any record or paper" that relates to any "application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (formerly codified at 42 U.S.C. § 1971). Federal courts typically refer to this provision as the "Materiality Provision." *See, e.g.*, *Vote.org v. Byrd*, 2023 WL 7169095, at *6 n.9 (N.D. Fla. Oct. 30, 2023); *League of Women Voters of Arkansas v. Thurston*, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023), *judgment entered*, 2023 WL 6445795 (W.D. Ark. Sept. 29, 2023); *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *7 (N.D. Ga. Aug. 18, 2023). Here, the Plaintiffs contend that Pennsylvania's requirement that voters place a date on the outer envelope when returning their mail ballot for recording and counting violates the Materiality Provision.

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been deprived on account of race or color of any right or privilege secreted by subsection (a)," additional procedure is required to protect the voting rights of people of that particular race or color." 52 U.S.C. § 10101(e). That Congress specifically implicated a racial motivation in some sections of the statute but not in others is not indicative of their intention "to impose a racial motive qualifier uniformly across § 10101." *Thurston*, 2023 WL 6446015, at *16. Given this, the Court will not read one into § 10101(a)(2)(B). *Accord, id.* The Court rejects Lancaster and Berks Counties' argument in this regard.

1. Private Enforcement of the Materiality Provision

a. Private Right of Action

The initial question is whether the Plaintiffs, as private individuals and community organizations, can enforce the Materiality Provision through this lawsuit. The RNC and Lancaster and Berks Counties argue they cannot, contending that the Materiality Provision does not permit private individuals and organizations to bring enforcement actions. This argument was raised by the RNC in their motion to dismiss, albeit in a brief footnote. *See* ECF No. 194, P. 7 n2. At that time, the Court rejected that argument. *See* ECF No. 329, p. 9. In reraising the argument on summary judgment, the RNC points to a decision from the United States Court of Appeals for the Sixth Circuit in support of their position but presents no other argument. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016). They contend that because the Materiality Provision provides for enforcement by the United States Attorney General, Congress must not have intended to permit actions brought by private individuals. *See* ECF No. 271, p. 11; *see also* 52 U.S.C. § 10101(c). The Plaintiffs disagree, arguing that an implied right of action exists and that the rights provided for in the Materiality Provision are enforceable through 42 U.S.C. § 1983. *See* ECF No. 313, pp. 14-17.

The statute itself does not expressly create a private right action. It states only that "the Attorney General may institute . . . a civil action" if "any person has engaged in . . . any act or practice which would deprive any other person of right or privilege

secured by" the Materiality Provision. *See* 52 U.S.C. § 10101(c). Although there appears to be a circuit split on this question, this Court sides with the conclusion that the Materiality Provision includes an implied private right of action. *Compare Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003) *with Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

When assessing whether private plaintiffs may enforce a federal statute without an express cause of action, courts "must first determine whether Congress intended to create a federal right." *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002). *See also Health & Hospital Corp. of Marion Cty. v. Talevski*, 599 U.S. 166, 176 (2023) ("[W]e have crafted a test for determining whether a particular federal law actually secures rights for § 1983 purposes" and citing Gonzaga). "[A]n implied right of action exists if 'a statute … manifests Congress' intent to create (1) a personal right, and (2) a private remedy." *Three Rivers Ctr. for Indep. Living v. Housing Auth. of City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004). Initially, the Court must "analyze the statute's text and structure to determine whether it contains 'rights -creating' language. [The Court] may also look to the legislative history and other indicia of legislative intent." *Bakos v. Am. Airlines, Inc.*, 748 Fed. Appx. 468, 473-74 (3d Cir. Aug. 30, 2018) (internal quotation marks and citations omitted). *See also Alexander v. Sandoval*, 532 U.S. 275, 286-89 (2001) (advising that whether a statute creates an implied private right of action depends on Congress' intent, which must be determined by first looking to the statutory text). "When 'rights or duty-creating language' is not explicitly included in a statute, a court will rarely imply congressional

intent to create a private right of action." *Spencer Bank, S.LA. v. Seidman*, 309 Fed. Appx. 546, 549 (3d Cir. 2009) (quoting *Gonzaga*, 536 U.S. at 284 n.3 (2002)).

Courts look to three factors when determining whether statutory text contains rights-creating language: "(1) the statutory provision must benefit the plaintiffs with a right unambiguously conferred by Congress; (2) the right cannot be so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the States." Lewis v. Alexander, 685 F.3d 325, 344 (3d Cir. 2012) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).

Here, the Materiality Provision expressly provides that "No person acting under color of state law shall … deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election. *See* 52 U.S.C. § 10101(a)(2)(B). This language "clearly imparts an individual entitlement with an unmistakable focus on the benefitted class;" namely, the right of voters to vote, unimpeded by unnecessary and/or immaterial requirements. *Grammar v. John J. Kane Reg'l Ctrs.*, 570 F.3d 520, 526 (3d Cir. 2009) (quoting *Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004)). Moreover, the provision's language is "clearly analogous to the right-creating language cited by the Supreme Court in *Gonzaga* . . . the subject of the sentence is the person acting under color of state law, but the focus of the

text is nonetheless the protection of each individual's right to vote." *Schwier*, 304 F.3d at 1296.

Second, this right is not vague or amorphous such that it strains judicial competence. The provision protects a citizen's right to vote by forbidding a state actor from disqualifying a voter because of their failure to provide or error in providing some unnecessary information on a voting application or ballot. *See id.*, at 1297. And third, the language of the provision is mandatory as opposed to discretionary or precatory: "no person acting under color of state law shall … deny the right of any individual to vote …." 52 U.S.C. § 10101(a)(2)(B). This analysis leads to the conclusion that an implied right of action exists within the Materiality Provision of the Civil Rights Act. *Accord Schwier*, 304 F.3d at 1294 (holding longstanding private right of action to enforce voting rights survived amendment adding enforcement by the Attorney General); *League of Women Voters*, 2023 WL 6446015, at *16; *Vote.org v. Georgia State Election Bd.*, 2023 WL 2432011, at *6 (N.D. Ga. Mar. 9, 2023).

b. Enforcement through § 1983

Apart from an implied private right of action, the Plaintiffs may also enforce the Materiality Provision via an action brought under 42 U.S.C. § 1983. Where a statute is found to secure a federal right, that right "is presumptively enforceable through § 1983." *Gonzaga*, 536 U.S. at 283-84. This presumption is not easily overcome, and the Defendants have failed to do so here. *See Livadas v. Bradshaw*, 512 U.S. 107, 133 (1993). Their argument is that because the Materiality Provision only authorizes suits "by the Attorney General," Congress cannot have intended to

permit such actions to be brought under § 1983. *See* ECF No. 271, p. 11. But the existence of a public remedy available to the Attorney General does not preclude a private action to enforce the statute under § 1983. *See Schwier*, 340 F.3d at 1295-97. *See also Allen v. State Bd. of Educ.*, 393 U.S. 544, 556 (1969) (holding that the goals of the Civil Rights Act were more likely to be realized if private citizens were not "required to depend solely on litigation instituted at the discretion of the Attorney General").

When previously presented with this same issue, the Court of Appeals for the Third Circuit agreed and held that the Materiality Provision imparts a "personal right of action" through § 1983 because it "places all citizens qualified to vote at the center of its import and provides that they shall be entitled and allowed to vote."[32] *Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022) (quotation and citation omitted), cert. granted, judgment vacated sub nom. *Ritter v. Migliori*,___ U.S. ___, 143 S. Ct. 297 (2022). There, the Court of Appeals ruled that the inclusion of a right of action for the United States, by way of the Attorney General, does not preclude a right of action for private plaintiffs through § 1983. The Court noted that the Attorney General's enforcement authority is not made exclusive nor does the Materiality Provision include an "express provision" limiting situations where private actions may be authorized. 36 F.4th at 160-161. So, this Court concludes that private plaintiffs may enforce the Materiality Provision through an action brought under § 1983.

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[32] The Court of Appeals did not decide whether Congress intended to create the implied right of action discussed in Part 1(a) above. *See Migliori*, 36 F.4th at 159.

2. The Court of Appeals' decision in *Migliori*.

The discussion above invokes the Court of Appeals' decision in *Migliori*, which was later vacated as moot by the Supreme Court. The RNC questions the value of that decision and argues that this Court cannot consider *Migliori* because it lacks precedential effect. *See* ECF No. 271, p. 22. The RNC contends that the Court of Appeals' decision is "untested" and "erased" because the Supreme Court vacated it on mootness grounds and thus it cannot be considered in any way.[33] *Id.* Curiously, Lancaster and Berks Counties cite to the District Court's opinion in *Migliori*, not the appellate decision, perhaps believing that because the Supreme Court vacated the Court of Appeals' decision, only the District Court's decision remains good law. *See, e.g.*, ECF No. 267, pp. 12-14 (citing *Migliori v. Lehigh Cnty. Bd. of Elections*, 2022 WL 802159 (E.D. Pa. Mar. 16, 2022)). For their part, the Plaintiffs contend that the Court of Appeals' decision remains "persuasive authority" despite its vacatur. ECF No. 311, p. 14, n.6 (citing *Poly-*

[33] The RNC's argument that the Court of Appeals' *Migliori* decision has been "erased" is somewhat disingenuous in this technological age. *Migliori*, and the Court of Appeals' reasoning, remains in the public domain, easily accessed through legal research sites or by a rudimentary Internet search. Indeed, courts have concluded that because a decision was "[publicly] available through Westlaw and Lexis," it has use to "future litigants as persuasive authority." *Nease v. State Farm Mut. Auto. Ins.*, 2014 WL 6626430, at *2 (E.D. Okla. Nov. 21, 2014) (citing *Summit Fin. Resources LLP v. Kathy's General Store, Inc.*, 2011 WL 3666607, at *2 (D. Kan. Aug. 27, 2011)).

chrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993)).

The Supreme Court's decision to vacate the Court of Appeals' decision in *Migliori* was not unusual. It is "established practice" for the Supreme Court to vacate and direct dismissal of a civil case "which has become moot while on its way here or pending our decision on the merits." *See* Wright and Miller, § 3533.10.3 Other Mootness on Appeal, 13C *Fed. Prac. & Proc. Juris.* § 3533.10.3 (3d ed.) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). *See also Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 219 n.27 (3d Cir. 2012) (citing *Munsingwear*). That is what happened in *Migliori*—the case became moot while the petition for certiorari was pending. *See* Supreme Court Docket No. 22-30. The Supreme Court ultimately granted the petition, vacated the Court of Appeals' judgment, and remanded with instructions to dismiss. *See id.*

Migliori involved a similar challenge to the application of the Date Requirement arising out of a 2021 judicial election in Lehigh County, Pennsylvania. There, two hundred fifty-seven (257) out of approximately twenty-two thousand (22,000) mail-in or absentee ballots were not counted by the Lehigh County Board of Elections because they lacked a handwritten date on the outer envelope. When the results were tabulated, the candidates for county Common Pleas Court judge were separated by a mere seventy-four (74) votes. Litigation in the state courts ensued. Following conclusion of that litigation, disenfranchised voters—including *Migliori*—sued the Lehigh County Board in federal court arguing that the county board's decision to not count the disputed

ballots violated their rights under the Materiality Provision and the First and Fourteenth Amendments. Ritter and Cohen, the candidates for the contested judicial seat, intervened. Cross motions for summary judgment followed and the district court granted summary judgment in favor of Defendants on both claims reasoning that the disenfranchised voters lacked capacity to bring suit under the Materiality Provision and that the Date Requirement did not create an undue burden on the voters' constitutional rights. *See Migliori v. Lehigh County Bd. of Elections*, 2022 WL 802159 (E.D. Pa. Mar. 16, 2022).

On appeal, the Third Circuit held that the Lehigh County Board's application of the dating provisions to the qualified voters' ballots violated the Materiality Provision: "[B]ecause their omissions of the date on their outside envelopes is immaterial to determining their qualifications, [the Lehigh County Board] must count their ballots. Otherwise, [the Lehigh County Board] will violate the Materiality Provision by denying Voters their right to vote based on an omission immaterial to determining their qualifications to vote." 36 F.4th at 164. In its remand, the Circuit directed the district court to order the undated ballots be counted. *Id.*

Immediately thereafter, candidate David Ritter asked the United States Supreme Court to stay the Circuit's order that the misdated ballots be counted. Justice Samuel Alito granted the stay, pending the further review of all the Justices. *See Ritter v. Migliori*, 2022 WL 1743146 (May 31, 2022). Several days later, the full Court denied a stay and vacated Justice Alito's prior order. *Ritter v. Migliori*, ___ U.S. ___, 142 S. Ct. 1824 (June 9, 2022). After the denial

of the stay, the Lehigh County Board began to count the disputed ballots. Candidate Zachary Cohen won election by five votes, overcoming a seventy-one-vote lead initially held by his opponent, Ritter. Ritter did not seek a recount nor challenge the election certification but instead conceded the election. *See* Rudy Miller, "5 Vote Lead will hold up Lehigh County Judges races as opponent concedes," Lehigh Valley Live.com (June 21, 2022), http://www.Lehighvalleylive.com/news/2022/06/5-vote-lead-will-hold-up-lehigh-county-judges-race-as-opponent-concedes. After this concession, the Supreme Court granted certiorari, vacated the Court of Appeals decision, and remanded with instructions to dismiss the case as moot. *See Ritter v. Migliori*, ___ U.S.___, 143 S. Ct. 297 (Oct. 11, 2022). The Third Circuit did so by Order dated November 16, 2022. *See* Migliori v. Cohen, 53 F.4th 285 (3d Cir. Nov. 16, 2022).

Courts typically consider decisions which were vacated as moot by the Supreme Court to lack precedential value. *See id.* (citing *Bennett v. West Texas State Univ.*, 799 F.2d 155, 159 n.3 (5th Cir. 1986)). But some courts have viewed decisions rendered before a case is mooted to have as much precedential value as any other opinion in a "living case, even though [the decision] may not be protected as 'stare decisis' in the sense that it is binding in later cases." *See id.* (citing *Martinez v. Winner*, 800 F.3d 230, 231 (10th Cir. 1986)). Likewise, here, the Court of Appeals' decision, although vacated, may yet be persuasive and/or instructive.

At the time it decided *Migliori*, the Court of Appeals had before it a live case and controversy. The

case was fully briefed (including submission from several amici curiae) and oral argument was heard. *See* Court of Appeals Docket Number 22-1499, ECF Nos. 16, 32, 49, 51, 55, 59, and 78 (oral argument heard on May 18, 2022). The opinion was then circulated to the active judges of the Court of Appeals for their review, although the case was not taken up *en banc*. *See* Court of Appeals Internal Operating Procedure 5.5.4; *see also Transguard Ins. Co. of Am., Inc., v. Hinchey*, 464 F. Supp.2d 425, 435 n.6 (M.D. Pa. 2006). The Third Circuit's decision was thus "forged and tested in the same crucible as all opinions." Wright and Miller, § 3533.10.3 Other Mootness on Appeal, 13C *Fed. Prac. & Proc. Juris.* § 3533.10.3 (3d ed.). Although the opinion itself may now lack precedential value, *see, e.g.*, *Kania v. Archdiocese of Phila.*, 14 F.Supp.2d 730, 736 (E.D. Pa. 1998), the validity of the Court of Appeals' reasoning was unaffected by the cases' subsequent mootness. *See, e.g.*, *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., *dissenting*). This Court considers the reasoning and analysis set out in *Migliori* to be persuasive, if not precedential. *See, e.g.*, *United States v. Barnes*, 2021 WL 6051561, at *15, n.21 (W.D. Pa. Dec. 20, 2021); *Keitt v. Finley*, 2021 WL 5826196, at *3 (M.D. Pa. Dec. 8, 2021). *See also Drinker v. Colonial Sch. Dist.* 78 F.3d 859, 864 n.12 (3d Cir. 1996) (finding an unpublished, non-precedential opinion persuasive as "a paradigm of the legal analysis" to be followed in a factually similar case).

Despite negating the import and impact of the Court of Appeal's decision in *Migliori*, the RNC gives substantial weight to Supreme Court Justice Samuel

Alito's memorandum dissenting from the denial of an application for a stay while a petition for writ of certiorari was pending in the Supreme Court.[34] *See* ECF No. 271, 304, *passim*. But as was the case with the Court of Appeals decision, the Justice's dissent from the denial of a stay also lacks precedential authority. *See* 18 MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2011). *See also* Trevor N. McFadden and Vetan Kapoor, The Precedential Effects of the Supreme Court's Emergency Stays, 44 *Harvard Journal of Law & Public Policy* 827, 882 (Summer 2021) ("…decisions to deny a stay have no precedential value."); Bryan Garner, et al., *Law of Judicial Precedent* 219 (2016) ("[A] refusal to hear a case says nothing about the merits. It says only that, for any number of possible reasons, the Court did not want to review the lower court ruling: The variety of considerations that underlie denial of the writ counsels against according denials of certiorari any precedential value.") (internal citation omitted).

Nonetheless, as with the *Migliori* decision, Justice Alito's dissenting memorandum does have some persuasive value. That value, however, is not as weighty as the Court of Appeals decision in *Migliori* because the Justice's memorandum was issued preliminarily before briefing and/or argument were concluded and is not a decision by the entire Supreme Court.

Furthermore, although his dissent is a signal of his initial take on the issues presented, he was not

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[34] Justice Thomas and Justice Gorsuch joined Justice Alito's memorandum opinion. Presumably, Justice Alito's views reflect theirs as well. The remaining members of the Supreme Court did not explain their reasons for denying a stay.

bound by his preliminary view of the case, which was based solely on an application for a stay; in other words, he may have changed his position upon further briefing or argument.[35] So then, Justice Alito's dissenting statement from the denial of a stay differs from the Court of Appeals decision, which was briefed, argued, and reviewed by the active members of that Court before its publication. This Court will, therefore, accord limited persuasive value to the Justice's dissenting memorandum.

3. Plaintiffs' motion for summary judgment: the Materiality Provision claim

With the important preliminary concerns out of the way, the Court now turns to the actual merits of the competing motions for summary judgment. As noted previously, the Civil Rights Act's Materiality Provision provides that

> [n]o person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

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[35] Justice Alito acknowledged as much himself: "As is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded." *Ritter*, 142 S.Ct. at 1824.

52 U.S.C. § 10101(a)(2)(B). "[T]he word 'vote' includes all action necessary to make a vote effective." *Id.* §§ 10101(a)(2)(3)(A); 10101(e). Here, the term "vote" encompasses the completion of a Pennsylvania mail-in ballot.

The Plaintiffs assert that thousands of Pennsylvania voters were disenfranchised by a paperwork mistake that is immaterial to the voters' qualifications, the timeliness of their ballot, or the validity of their votes. *See* ECF No. 313, *generally*. The RNC argues that the Materiality Provision is inapplicable here and alternatively, that Plaintiffs' claim is based on a counter-textual reading of the statute. *See* ECF No. 271, 304, *generally*.[36]

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[36] Other arguments have been raised by the parties, which to this Court, require less thorough consideration, and divert attention from the main issue of whether the mandatory application of the Date Requirement violates the Materiality Provision. They are dispensed with here summarily. The Lancaster and Berks County Boards argue that the Plaintiffs have failed to establish *Monell* liability. In *Monell*, the Supreme Court held that a municipal entity can be held liable for the constitutional violations of its employees under 42 U.S.C. § 1983. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 656 (1978). Implicit in any Monell claim is the existence of an underlying constitutional violation. *Onyiah v. City of Phila.*, 2023 WL 2467863, at *8 (E.D. Pa. Mar. 10, 2023) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Defendants' argument does not apply to the Civil Rights Act claim because Monell is limited to constitutional violations and does not apply to violations of federal statutes such as the Civil Rights Act. Berks County makes one argument in addition to those made by Lancaster County: the Date Requirement on the outer envelope holds voters accountable to their declaration that they "have not already voted in this election." ECF No. 309. But, it is the signature which holds the voter accountable, not the date. Whether the voter declaration is signed is a separate matter from whether

The question before the Court is whether Pennsylvania's Date Requirement is material to the act of voting. If the error is not material to voting, the requirement of placing a date on the Return Envelope violates the Materiality Provision. *Id.*

a. The Third Circuit's Migliori Framework

When presented with the same issue after the Lancaster County Board of Elections refused to count undated mail ballots in the November 2021 election, the Third Circuit summarized the question and the analysis before it: "To answer this query, we must ask whether the [Pennsylvania Date Requirement] is material in determining whether such individual is qualified to vote under Pennsylvania law. […] [T]he requirement is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony." *Migliori*, 36 F.4th at 162-63. In other words, according to the Circuit, the Date Requirement is immaterial, and therefore violative of federal law, if it does not go to determining age, citizenship, residency, or current imprisonment for a felony.

The evidence shows, and the parties either agree (Plaintiffs, RNC, Secretary Schmidt, the Lancaster County Board and the Berks County Board) or admit (all non-responding county boards)[37], that the county

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the declaration is dated correctly, or at all.

[37] Most of the Defendants to this action have not opposed the motions for summary judgment, either by opposition brief or by responsive concise statement. If facts in a properly supported concise statement are not properly opposed, those facts are deemed admitted. *See* Fed.R.Civ.P. 56(e) ("If a party fails . . . to

boards of elections did not use the handwritten date on the Return Envelope for any purpose related to determining a voter's age, citizenship, county or duration of residence, or felony status. ECF No. 283 (Plaintiffs), 300 (Secretary), 302 (Lancaster County), 305 (RNC), and 308 (Berks County), at ¶ ¶ 47-50. Furthermore, the evidence reflects, and these parties agree or admit, that all of the voters whose ballots were set aside in the November 2022 election solely because of a missing or incorrect date on the voter declaration on the outer Return Envelope had previously been determined to be eligible and qualified to vote in the election by their county board of elections before they were sent their mail-in ballot. *Id.* at ¶ 42.

Following *Migliori*'s guidance that a requirement is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony, and given the evidence and the parties' agreement that the handwritten date was not used to determine any of those, the Date Requirement is therefore immaterial. Federal law prohibits a state from erecting immaterial roadblocks, such as this, to voting. 52 U.S.C. § 10101(a)(2)(B).

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properly address another party's assertion of fact as required by Rule 56(c), the court may: . . . grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it."); Local Rule 56(E) ("Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purposes of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party.").

b. Justice Alito's Ritter framework

Justice Alito's dissenting memorandum in *Ritter* provides another way to analyze the question at hand. Paraphrasing the statute, he noted five distinct elements to be considered, the satisfaction of which would likely amount to a violation of the Materiality Provision: "(1) the proscribed conduct must be engaged in by a person who is 'acting under color of law'; (2) it must have the effect of 'deny[ing]' an individual 'the right to vote'; (3) this denial must be attributable to 'an error or omission on [a] record or paper'; (4) the 'record' or 'paper' must be 'related to [an] application, registration, or other act requisite to voting'; and (5) the error or omission must not be 'material in determining whether such individual is qualified under State law to vote in such election." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from denial of a stay). For completeness, an analysis under this framework is undertaken as well.

It is not disputed that the Defendants were acting under color of state law when they failed to count the Plaintiffs' ballots. Nor does any party dispute that the error and/or omission here involved a record or paper, *i.e.*, the mail-in ballot, or that a ballot is a record related to an act requisite to voting.[38] This

[38] In their brief in support of their cross-motion for summary judgment, the RNC argues that although a mail-in ballot is a "record or paper," completing the declaration printed on the paper ballot is not a record or paper relating to any application, registration, or other act requisite to voting. *See* ECF No. 271, p. 18. But, to cast a mail-in ballot, the voter must write a date on the envelope near the pre-printed verification. This is necessary to complete the act of voting and, thus, implicates the statute. *See* 52 U.S.C. § 10101(a)(2)(B).

leaves two points of inquiry relevant in this case: does the dating requirement have the effect of denying the Plaintiffs the right to vote, and is that requirement material to the act of voting in the Commonwealth?

(*i*) *Does the mandatory application of the Date Requirement deny the Plaintiffs their right to vote?*

The Materiality Provision prohibits "deny[ing] the right of any individual to vote." 52 U.S.C. § 10101(a)(2)(B). The Defendants argue the application of the Date Requirement does not impinge on the right to vote of any Pennsylvanian because it effects only the "act of voting," not the "right to vote." *See* ECF No. 271, p. 12. According to the Defendants, the Materiality Provision only prohibits immaterial requirements affecting the qualification and registration of a voter; not whether the State puts up any additional requirements when they cast their vote. *Id.* So then under this reasoning, a state requirement that prospective voters write the first stanza of the national anthem on their **application** to register to vote would violate the Materiality Provision, but a regulation requiring voters to write that stanza at the **polling place** (or when filling out their mail-in ballot) in order to have their ballot counted would not. This turns the language of the statute on its head.

A distinction between registering or qualifying to vote versus actually voting cannot stand given the text of the statute because the Materiality Provision takes a more expansive view. Pointedly, the Civil Rights Act defines "voting" not only as qualifying or

registering to vote but also as "all action necessary to make voting effective including but not limited to … casting a ballot and having such ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. § 10101(a)(3)(A), § 101010(c). According to the text of the statute, declining or refusing to count a qualified citizen's vote based on an immaterial reason is a denial of their right to vote. *See, e.g.*, *Ford v. Tenn. Senate*, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006), *appeal dismissed as moot sub. nom. Ford v. Wilder*, 469 F.3d 500 (6th Cir. 2006). The Court does not disagree with Justice Alito's observation that even after qualifying and registering, a voter "may not be able to cast a vote for any number of reasons." *Ritter*, 124 S. Ct. at 1825. The Defendants call attention to Justice Alito's reasons why a voter may not be able to cast their ballot: they showed up at the polls after Election Day, they failed to sign or use the secrecy envelope on an absentee ballot, they attempted to vote for three candidates for a single office, they sent their mail-in ballot to the wrong address, or went to an incorrect polling location on Election Day. *See* ECF No. 271, p. 13 (citing *Ritter*, 124 S. Ct. at 1825). Although the Court expresses no opinion on Justice Alito's examples here, they are not supportive of the argument that the Date Requirement is immaterial.

This is because immaterial rules exist that would prohibit a voter from casting their ballot despite Defendants' refusal to acknowledge this in their argument. If, for example, the voter was required to wear a red t-shirt at the polling place on Election Day and was not permitted to cast a ballot because a green shirt was worn instead (or was permitted to do so,

but the ballot was later not counted because the wrong color shirt was worn), that would be an immaterial voting rule which would be barred by the statute. Similarly, the same would be true of a rule which required a mail ballot to include the placement of an "I Voted" sticker on the return envelope for the vote to be counted, for example. This Court counts the Date Requirement to be one of those immaterial rules.

Defendants are concerned as well that "other rules" related to casting a ballot will be put at risk should the Materiality Provision's reach not be limited merely to voter registration and qualification concerns. *See* ECF No. 271, pp. 12-13. That misapprehends the provision's purpose. The Materiality Provision prohibits rules or regulations which add immaterial requirements to the act of voting. This must include the actual casting of a vote. The **act of voting** entails more than qualifying to receive a ballot. The purpose would be lost if after qualifying to vote, a voter's ballot would not be counted by reason of obstacles that the statute was enacted to prohibit in the first place.

And here, there is no dispute that the individual Plaintiffs' votes were not counted. The record demonstrates this immaterial error or omission of a date resulted in rejection of ballots and disenfranchised the Plaintiffs, as well as others across Pennsylvania in the November 2022 election. Indeed, the record evidence reveals that over 7600 mail ballots in the twelve counties were not counted for this reason. *See* ECF No. 277, p. 41 (Allegheny – 1009 ballots), p. 93 (Berks – 782 ballots), p. 131 (Bucks – 357 ballots); ECF No. 278, p. 44 (Lancaster – 232 ballots), p. 56

(Lehigh – 390 ballots), p. 137 (Montgomery – 445 ballots), p. 151 (Northampton – 280 ballots), p. 185 (Philadelphia – 2617 ballots), p. 301 (Warren – 18 ballots), p. 322 (Washington – 66 ballots), p. 361 (Westmoreland – 95 ballots), and p. 434 (York – 1354 ballots).

(ii) The Materiality of the Date Requirement

There are many reasons to date a document. The date a person signed a contract, for example, may indicate that agreement's effective date. *See, e.g.*, *In re TK Holdings, Inc.*, 2020 WL 3397839, at *5 (Bankr. D. Del. June 18, 2020) (holding that the effective date of a contract is typically the date the parties signed the agreement). And, of course, the date a document is signed may be relevant in fixing an event in time or history when considering whether a claim is barred by a statute of limitations or whether a habeas petition has been timely filed. *See, e.g.*, *Bray v. Clarke*, 2019 WL 7504860, at *2 n.1 (E.D. Va. Nov. 19, 2019). Dates may also be wholly irrelevant, as in this case. The requirement at issue here is irrelevant in determining when the voter signed their declaration. In fact, there is no indication on the ballot that the voter's declaration and the date must be the same day. The ballot only states that the voter place "today's date" on the envelope. *See* Figure 1, *supra*. No further explanation or instruction is provided. The requirement of "today's date" is untethered from any other requirement on the ballot. A voter could fill out a ballot on October 19th, then sign the voter declaration on October 20th, date the declaration on October 30th ("today's date") and mail the ballot on No-

vember 2nd.[39]

The important date for casting the ballot is the date the ballot is received. Here, the date on the outside envelope was not used by any of the county boards to determine when a voter's mail ballot was received in the November 2022 election. ECF No. 283, at ¶¶ 51-52. Instead, the counties time-stamped ballots when they were returned. *Id.* The lack of a date next to the voter declaration on the return envelope was not material to the determination of when the ballot was received. The counties' use of the Commonwealth's SURE system also renders the Date Requirement irrelevant in determining when the ballot was received. The outer return envelope of each mail ballot has a unique barcode associated with the individual voter. The Election Code mandates that county boards track the date that every mail ballot is received by the board (*see* 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5)) and a voter-specific barcode is used to do that. When the ballot is re-

[39] The RNC claims that the Date Requirement has been useful in detecting fraud in at least one criminal case. The RNC points to the case of *Commonwealth v. Mihaliak* in which a daughter completed and returned the mail ballot of her deceased mother in the 2022 primary. ECF No. 271, p. 9. The RNC misses the mark in two important ways. First, record evidence contradicts the RNC's statement as the county board's own Rule 30(b)(6) designee testified that the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope. ECF No. 315, p. 48-55. Second, and more importantly, any factual dispute regarding the initial detection of a fraudulent ballot in the *Mihaliak* forgery prosecution is irrelevant to whether the mandatory application of the Date Requirement to reject ballots violates the Plaintiffs' statutory rights.

ceived, the county boards of elections stamp or otherwise mark the return envelope with the date of receipt to confirm its timeliness and then log it into the SURE system. *Id.* at ¶ 12. Irrespective of any date written on the outer Return Envelope's voter declaration, if a county board received and date-stamped a 2022 general election mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received under the Commonwealth's Election Code. On the other hand, if the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope. *Id.* at ¶¶ 10, 54, 56. *See also* 25 P.S. § § 3146.6(c), 3150.16(c). Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.

Nor does the requirement of dating the outer return envelope have anything to do with determining a voter's qualifications to vote. A qualified voter in Pennsylvania must be of a particular age, must reside in the voting district where they cast their ballot for a certain duration, and must not have been incarcerated based on a felony conviction within the last five years. *See* ECF No. 283, ¶ 4 (citing 25 Pa. C.S. §§ 1301, 1327(b)). To receive a ballot, those wishing to vote by mail must additionally provide proof of identification (such as a Pennsylvania driver's license number). The undisputed evidence shows that the twelve remaining county boards of elections did not use the handwritten date on the return envelope for any purpose related to determining a voter's age, cit-

izenship, county or duration of residence, or felony status, and each of the twelve county boards has acknowledged as much. *See* ECF Nos. 277, p. 34 (Allegheny County), p. 87 (Berks County), p. 128 (Bucks County); 279, pp. 81-83 (Lancaster County); 278 p. 52 (Lehigh County), 131 (Montgomery County), p. 144 (Northampton County), pp. 178-179 (Philadelphia County), p. 297 (Warren County), p. 309 (Washington County), p. 353 (Westmoreland County), p. 381 (York).[40] Furthermore, it is not disputed by any party that all voters whose ballots were set aside in the November 2022 election solely because of a missing or incorrect date on the voter declaration on the Return Envelope had previously been determined to be eligible and qualified to vote in the election by their county board of elections. *Id.* at ¶ 42. It follows that because the date on the Return Envelope was not used to determine any of those qualifications, it is immaterial.

Further, the record is replete with evidence that the county boards' application of the *Ball* order in the November 2022 general election created inconsistencies across the Commonwealth in the way "correctly dated" and "incorrectly dated" ballots were rejected or counted by different counties. This further supports the Court's conclusion that the Date Requirement is not material. Concerning the election at issue here, the Supreme Court of Pennsylvania set a specific date range (September 19th through Novem-

[40] The Washington County Board has limited its admission to the 2022 Election. The Westmoreland County Board limited its admission to the 2021 and 2022 Elections, but Greg McCloskey, its deponent, did not limit his deposition testimony to those to elections.

ber 8th) in which a ballot would be considered correctly dated.[41] *See* ECF No. 281, p. 31-32 (*Ball v. Chapman* supplemental order). This date range did not account for differences in ballot readiness across the counties. Counties begin sending ballots to voters on different dates. In the November 2022 election, Elk County first sent ballot packages to voters on September 16, 2022, but the Elk County Board's strict compliance with the *Ball* order would have made a returned Elk County ballot dated September 17, 2022 "incorrect."

Variations of these scenarios played out in counties across the Commonwealth. The record reveals that some counties precisely followed the *Ball* date range even where the date on the return envelope was an impossibility because it predated the county's mailing of ballot packages to voters. For example, Berks County counted ballots if the (incorrect) date on the Return Envelope was September 20, 2022, even though the county did not begin sending ballot packages to voters until seventeen days later on October 7, 2022. *Id.* at ¶ 92. Lancaster County counted ballots if the (incorrect) date on the Return Envelope was September 20, 2022, even though it did not begin sending ballot packages to voters until September 26, 2022. *Id.* at ¶ 93.[42]

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[41] The Supreme Court's November 1, 2022 order directed that undated and incorrectly dated ballots not be counted. 284 A.3d 1189. And, four days later, the Supreme Court issued its supplemental order defining "incorrectly dated" using the date range. *See* ECF No. 281, p.31-2.

[42] Other counties indicated that they would not strictly comply with the Supreme Court's *Ball* date range: Westmoreland County did not begin sending mail ballot packages to

Simple voter error and partial omissions related to the date declaration also resulted in rejection of mail ballots that were timely received according to their entry into the SURE system. At least 605 **timely-received** ballots were set aside because the declaration date included an incorrect month that showed the voter signed their declaration prior to September, and another 427 **timely-received** ballots were set aside because the date included an incorrect month showing the voter signed their ballot after November 8, 2022. *Id.* at ¶¶ 74-75. These ballots were timely received based on their entry into the SURE system, yet because of an obvious error by the voter in relation to the date, these ballots were not counted. This shows the irrelevance of any date written by the voter on the outer envelope.

Moreover, at least 530 **timely-received** ballots were set aside because the handwritten date included a year prior to 2022. *Id.* at ¶ 66. Such a date is a factual impossibility given that the mail ballot package would have been mailed to the voter in 2022. *Id.* at ¶ 65. Of those 530 rejected mail ballots, at least 474 ballots had a month and day within the *Ball* date range, but included a past year and at least 50 ballots had the voter's year of birth instead of the day the voter signed the declaration. *Id.* at ¶ ¶ 67-68. Conversely, and contrary to the *Ball* order, the Montgomery County Board decided to count ballots if they determined the voter had written their date of birth on the voter declaration. *Id.* at ¶ 69. And at

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voters until September 30, 2022. Thus, it would not have counted mail ballots that were dated within the *Ball* date range if the handwritten date on the Return Envelope was between September 19 and September 29, 2022. *Id.* at ¶ 90.

least 228 **timely-received** ballots were set aside due to a date that included a future year, but a month and day within the *Ball* date range. *Id.* at ¶ 70.

Likewise, across the Commonwealth other **timely-received** ballots were set aside because the voter declaration date omitted the year[43] (*id.* at ¶ 71); omitted the month (*id.* at ¶ 76); omitted the day[44] (*id.* at ¶ 80); included a day that does not exist[45] (*id.* at ¶ 77); put the date elsewhere on the envelope (*id.* at ¶ 83); or included a cross-out to correct an erroneous date (*id.* at ¶ 97). Additional inconsistencies arose out of county boards' differing utilization of standard dating conventions. Eighteen county boards of elections determined that the date written on the voter declaration was within the "correct" date range based strictly on the American dating convention of writing the month, day, and year (MM/DD/YYYY) in that order. These county boards set aside ballots if the voter used a European dating convention of day, month, year (DD/MM/YYY). *Id.* at ¶ 86. At the same time, at least thirty-one other counties tried to account for both the American and European dating conventions

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[43] Again, contrary to the *Ball* order, at least three county boards of elections – Blair, Fayette, and Montgomery – decided to count ballots with partial dates if the "information in the date line was sufficient to determine that the ballot was returned within the appropriate date range." *Id.* at ¶ 72.

[44] Conversely, Bucks and Fayette counties counted mail ballots "dated October 2022 with no day listed," because the board was "able to ascertain what day the ballot was mailed and what day it was received," and the "entire month of October is included in the date range" set forth in the *Ball* order. *Id.* at ¶ 81.

[45] However, Luzerne County did just the opposite by counting a ballot dated 09/31/2022, despite September only having 30 days. *Id.* at ¶ 78.

in determining whether the Return Envelope was dated correctly. *Id.* at ¶ 87. Ballots were set aside for having incorrect dates which, if construed using the European[46] dating convention, would have been within the *Ball* date range. *Id.* at ¶ 88.

For all of the foregoing reasons, the application of the Date Requirement violates the federal Materiality Provision. Accordingly, the ballots of the individual Plaintiffs should be counted because their statutory rights have been violated.

D. The Equal Protection Claim[47]

The individual Plaintiffs raise an equal protection claim against Secretary Schmidt. They allege that the Commonwealth applies the envelope Date Requirement to domestic mail voters but not to over-

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[46] The parties use the terms European dating convention and International dating convention interchangeably. However, the terms reflect different dating conventions and should not be confused for each other. European dating convention is day, month, year (DD/MM/YYYY). International dating convention, defined by ISO 8601, is year, month, day (YYYY/MM/DD). *See* http://www.iso.org/iso-8601-date-and-time-format.html. Despite the parties' conflation of the terms, the parties' meaning remains clear to this Court because the parties use examples after every mention of dating convention. No party is referring to the International dating convention in their briefing materials. This Court will use the term European dating convention to describe a date that is written as day, month, year (DD/MM/YYYY).

[47] The Plaintiffs' equal protection challenge is not extensively briefed by the parties. Indeed, several filers do not address this claim, instead limiting their briefing to the merits of the Materiality Provision challenge. See ECF No. 229 (DOJ); ECF No. 328 (LDF); ECF No. 333 (RITE); ECF No. 294 (Lancaster County); ECF No. 297 (Westmoreland County); ECF No. 309 (Berks County).

seas and military voters. *See, e.g.*, ECF No. 121, p. 36-7. For those ballots, any mistake or omission in the completion of the ballot does not invalidate the ballots "as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote." ECF No. 121, at ¶ 86; 25 Pa. C.S. § 3515(a). Disenfranchising qualified domestic voters while simultaneously counting the ballots of non-domestic voters for the same error or omission on the voter declaration serves no legitimate or compelling governmental interest. *Id.* at ¶ 87. Of the remaining Defendant counties, none refused to count a military-overseas ballot due to a missing or incorrect date on the voter declaration. The Court notes the following, based on Plaintiffs' responses to the RNC's concise statement:

County	Number of Military/ Overseas Ballots Received	Number of Military/Overseas Ballots Counted
Allegheny	151	151 (none were undated) ECF No. 315, ¶ 58
Berks	146	Does not state the number of military/overseas ballots not counted. Id., ¶ 61
Bucks	466	466 (11 military/overseas ballots were undated or missing dates but were counted anyway). Id., ¶ 64

County	Number of Military/ Overseas Ballots Received	Number of Military/Overseas Ballots Counted
Lancaster	188	188 (none were undated)
Lehigh	101	101 (did not review military/overseas ballots for date requirement) Id., ¶ 93
Montgomery	914	914 (none were undated) Id., ¶ 100
Northampton	91	Does not state the number of military/overseas ballots not counted. Id., ¶ 102
Philadelphia	1014	1014 (13 of which were undated but counted anyway) Id., ¶ 105
Warren	8	8 (none were undated) Id., ¶ 115
Washington	51	51 (none were "required to be set aside") Id., ¶ 116
Westmoreland	109	109 (none were undated) Id., ¶ 118
York	185	Does not say how many of these were counted; only that it set aside 1354 undated ballots out of 37,296 total mail ballots re-

County	Number of Military/ Overseas Ballots Received	Number of Military/Overseas Ballots Counted
		ceived Id., ¶ 120

Despite this evidence, however, a decision on the Plaintiffs' equal protection claim would amount to unnecessary constitutional adjudication. *See, e.g.*, *New Jersey Payphone Ass'n, Inc. v. Town of W. New York*, 299 F.3d 235, 239 n.2 (3d Cir. 2002). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on question of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughin*, 323 U.S. 101, 105 (1944); *see also Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive non-constitutional ground is available."). Federal courts "have been instructed as a matter of established federal jurisdiction, that a court faced with both constitutional and non-constitutional claims must address the non-constitutional claims first, if doing so will enable the court to avoid a constitutional confrontation." *Erie Telecommunications, Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1092 (3d Cir. 1988). *See also Indiana Right to Life Victory Fund v. Morales*, 66 F.4th 625, 631–32 (7th Cir.) *certified question answered*, 217 N.E.3d 517 (Ind. 2023) (cleaned up) ("When we are faced with *both* statutory *and* constitutional questions, we must prioritize resolving the statutory issues if doing so would prevent us from engaging in

unnecessary constitutional analysis."); *Free Speech Coal., Inc. v. Att'y Gen. United States*, 974 F.3d 408, 430 (3d Cir. 2020) ("[W]e must avoid deciding a constitutional question if the case may be disposed of on some other basis.") (cleaned up); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 496 (3d Cir. 1980) ("[W]e are constrained to avoid passing upon a constitutional question if the case might be disposed of on statutory grounds and we should not reach to decide a constitutional issue, however intriguing.") (cleaned up). This is prudential principle of judicial restraint. *In re Application of Storag Etzel GmbH for an Ord., Pursuant to 28 U.S.C. § 1782, to Obtain Discovery for Use in a Foreign Proceeding*, 2020 WL 2949742, at *13 (D. Del. Mar. 25, 2020) (citing *Hagans*, 415 U.S. at 547), *report and recommendation adopted in part sub nom. In re Storag Etzel GmbH*, 2020 WL 2915781 (D. Del. June 3, 2020). *See also In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 680 (3d Cir. 2019) ("Although the constitutional issue is an interesting one, we again decline to define the parameters of the First Amendment right in a case where the common law right affords sufficient protection.").

Here, the Court has concluded that the Commonwealth's mandatory application of its Date Requirement violates the Materiality Provision of the Civil Rights Act. Since the Court is confident that the Plaintiffs' motion for summary judgment should be granted on that basis, there is no need to reach their constitutional claim. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (fundamental rules of judicial restraint require that federal courts "must consider non-constitutional grounds for decision" before

"reaching any constitutional questions") (citation omitted). In light of this, the Plaintiffs' equal protection claim will be dismissed.

E. Conclusion

For all of the reasons stated above, the Court concludes that the Commonwealth's mandatory application of the Date Requirement is immaterial, violating the Materiality Provision of the Civil Rights Act.[48] The Plaintiffs have demonstrated the absence of a genuine dispute as to any material fact and they are entitled to judgment as a matter of law on that claim. For the reasons stated above, their motion for summary judgment based on a claimed equal protection violation, however, will be dismissed.

F. RNC's motion for summary judgment: the Materiality Provision Claim

"When confronted with cross-motions for summary judgment ... 'the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" *Hussein v. UPMC Mercy Hospital*, 2011 WL 13751, at *2 (W.D. Pa. Jan. 4, 2011) (quoting *Marciniak v. Prudential Fin. Ins. Co. of Am.*, 184

[48] Where "compliance with both state and federal law is impossible," federal law "must prevail." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). *See also United States v. Rice*, 2023 WL 4086278. At *2 (W.D. Pa. Jun. 20, 2023) ("The Supreme Court of the United States has explained: 'The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law will prevail.' *Gonzales [v. Raich]*, 545 U.S. 1, 29 (2005).").

Fed. Appx. 266, 270 (3d Cir. 2006)). "If review of [the] cross-motions reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts." *Id.* (citing Iberia Foods Corp. v. Romeo, 150 F.3d 298, 302 (3d Cir. 1998)). *See also Bancorp Bank v. Eckell, Sparks, Levy, Auerbach, Monte, Rainer & Sloane, P.C.*, 2016 WL 9776074, at *2 n.1 (E.D. Pa. Oct. 5, 2016)).

The RNC argues it is entitled to summary judgment because 1) the Plaintiffs have no private right of action; 2) Pennsylvania's Date Requirement does not violate federal law; 3) specifically, the Date Requirement does not violate the Materiality Provision; and 4) the Date Requirement does not violate the Equal Protection Clause. *See* ECF No 271, *generally*. As noted above, the Court has rejected these arguments, excepting the equal protection claim. All of these arguments have been addressed fully in this opinion.

VIII. CONCLUSION

In summary then, fifty-five counties will be dismissed because Plaintiffs have failed to establish standing against them. Lancaster and Berks Counties' motion for summary judgment will be denied since at least one Plaintiff has standing against each county and denied in all other aspects. The Plaintiffs' motion for summary judgment will be granted on the claim that the dating requirement violates the Materiality Provision of the Civil Rights Act. Plaintiffs' equal protection claim will be dismissed.

The RNC's motion for summary judgment will be

denied on the Materiality Provision, and their claim that the Materiality Provision does not violate equal protection will be dismissed.

An appropriate order and judgment will be filed separately.