No. 21A_____

In the Supreme Court of the United States

DAVID RITTER,

Applicant,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E. RICHARDS, KENNETH RINGER, SERGIO RIVAS, ZAC COHEN, and LEHIGH COUNTY BOARD OF ELECTIONS,

Respondents.

EMERGENCY APPLICATION FOR STAY

To the Honorable Samuel A. Alito, Jr., Associate Justice of the U.S. Supreme Court and Circuit Justice for the Third Circuit

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant is David Ritter, a Republican candidate in the 2021 election for Lehigh County Court of Common Pleas. Applicant was intervenor-defendant in the district court and appellee in the Third Circuit.

Respondents are Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, and Sergio Rivas—plaintiffs in the district court and appellants in the Third Circuit. Respondents also include Zac Cohen—a Democratic candidate in the 2021 election for Lehigh County Court of Common Pleas, intervenor-plaintiff in the district court, and appellee in the Third Circuit. Respondents also include the Lehigh County Board of Elections—defendant in the district court and appellee in the Third Circuit.

The proceedings below were:

1. *Migliori v. Lehigh County Board of Elections*, No. 22-1499 (3d Cir.) – judgment entered and stay denied May 27, 2022

2. *Migliori v. Lehigh County Board of Elections*, No. 5:22-cv-397 (E.D. Pa.) – judgment entered March 16, 2022; injunction pending appeal denied March 18, 2022

The related proceedings include:

1. *Ritter v. Lehigh County Board of Elections*, No. 9 MAL 2022 (Pa.) – appeal denied January 27, 2020

2. *Ritter v. Lehigh County Board of Elections*, No. 1322 C.D. 2021 (Pa. Commw. Ct.) – judgment entered January 3, 2022

3. *Ritter v. Lehigh County Board of Elections*, No. 2021 C. 2805 (Lehigh Cnty. Ct. Comm. Pleas) – judgment entered November 30, 2021.

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit:

The Pennsylvania Supreme Court has not been shy about overriding the State's democratically enacted election laws. In 2020, that court suspended several "conceded[ly] … constitutional" laws due to COVID-19. *Republican Party of Penn. v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J.). One of those laws requires voters to sign and date a declaration with their mail-in ballot. *See Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissental). Though a majority of the Pennsylvania Supreme Court suspended the dating requirement in 2020, a different majority held that undated ballots would not be counted in future elections. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1080 (Pa. 2020) (op. of Wecht, J.). Sure enough, when Lehigh County decided to count undated ballots in a 2021 election, the Pennsylvania courts ordered it to stop. *Ritter v. Lehigh Cnty. Bd. of Elections*, 2022 WL 16577, at *10 (Pa. Commw. Ct. Jan. 3), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

Yet the Third Circuit has now gone where even the Pennsylvania Supreme Court wouldn't. For that same 2021 election, the Third Circuit has ordered Lehigh County to count over 250 undated ballots—enough to eliminate David Ritter's lead three times over. Its decision adopts a novel interpretation of an obscure federal statute that would let federal courts set aside any state election law that they deem "immaterial." It splits with the Pennsylvania courts' interpretation of that same federal statute in this same election. And it orders Lehigh County to do what the state courts ordered it not to do. It also changes the rules after the election ended, in favor

of five voters who inexplicably waited months to file a follow-on federal suit. And it risks changing the outcome not only in Ritter's election, but also in ongoing contests over Pennsylvania's just-completed primaries and the general election in November.

This Court should stay the Third Circuit's judgment pending certiorari. According to the plaintiffs, Lehigh County could certify the election results in as little as six days. *See* CA3 Dkt. 83 at 14. The Third Circuit's mandate will issue on Friday, June 3. *See* CA3 Dkts. 85, 86. To give itself time to consider Ritter's emergency application, this Court should at least enter an administrative stay by June 2.

OPINIONS BELOW

The Third Circuit's decision is not yet reported but is reproduced at App.1a-20a. The district court's decision is reported at *Migliori v. Lehigh County Board of Elections*, 2022 WL 802159 (E.D. Pa. Mar. 16), and is reproduced at App.21a-48a.

JURISDICTION

The district court entered summary judgment against the plaintiffs, but the Third Circuit reversed. This Court has jurisdiction to stay and review the Third Circuit's final decision. 28 U.S.C. §2101(f); §1651(a), §1254(1).

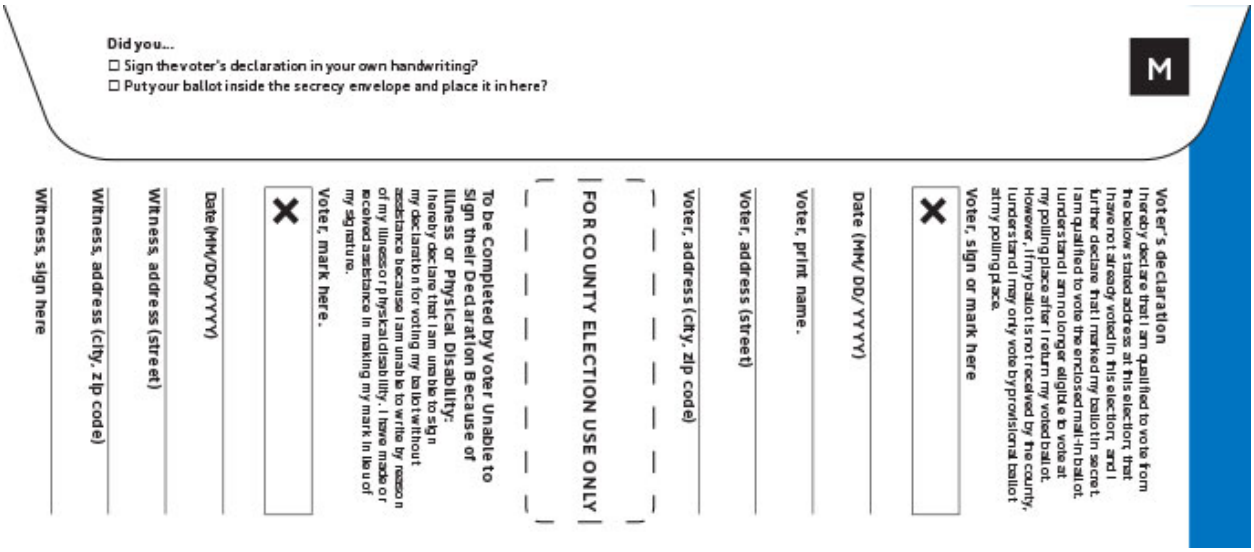
STATEMENT OF THE CASE

The question in this case is whether Pennsylvania's law requiring voters to date their mail-in ballots violates federal law. If it does not, then Ritter wins a seat on the Lehigh County Court of Common Pleas. If it does, then Lehigh County must count 257 undated ballots, likely erasing Ritter's 71-vote lead. Ritter already won this issue in state court—the normal avenue for settling post-election disputes between candidates. But when individual voters raised the same question in a later

federal suit, the Third Circuit ruled against Ritter. The Third Circuit then declined to stay its decision pending certiorari, requiring this emergency application.

I. Pennsylvania law requires voters to date a declaration on their mail-in ballots.

The Pennsylvania legislature authorized no-excuse mail-in voting for the first time in 2019. To vote this way, Pennsylvanians must place their ballot in an inner secrecy envelope and then place the inner secrecy envelope in an outer mailing envelope. The outer envelope contains a declaration that the voter must "fill out, *date* and sign." 25 Pa. Stat. §3150.16(a) (emphasis added); *accord* §3146.6(a). The declaration requires the voter to state, among other things, that they are qualified to vote in this election from this address and haven't voted already:



See Envelope Guide, Pa. Dep't of State, bit.ly/3LBsM4Q (last visited May 27, 2022); *accord* CA3 Dkt. 33-2 at JA187.

Pennsylvania's courts have already concluded that this dating requirement serves "'weighty interests.'" *Ritter*, 2022 WL 16577, at *9. It helps prove "when the elector actually executed the ballot." *Nov. 2020 Gen. Election*, 241 A.3d at 1090 (op.

of Dougherty, J.). It helps verify the declaration by, for example, "'establish[ing] a point in time against which to measure the elector's eligibility.'" *Id.* It helps "ensur[e] the elector completed the ballot within the proper time frame." *Id.* at 1091. And it prevents third parties from collecting and "fraudulent[ly] back-dat[ing] votes." *Id.*; *accord* App.47a ("Where … the outer envelope remains undated, the possibility for fraud is heightened"); *Republican Party of Penn.*, 141 S. Ct. at 736 (Thomas, J., dissental) (explaining that dating requirements "deter fraud," "create mechanisms to detect it," and help "preserv[e] the integrity of the election process" (cleaned up)).

II. Ritter runs for a judgeship in 2021 and wins the third and final seat.

The Lehigh County Court of Common Pleas is a trial court with general jurisdiction. Its judges serve 10-year terms. They run in partisan elections for their first term and retention elections after that.

In November 2021, Lehigh County held an election for three new judges on the Court of Common Pleas. Six candidates ran—three Republicans and three Democrats—and the top three vote-getters would win the seats. After the votes were tallied, the three Republicans were the top three. But the margin between the third-place candidate (David Ritter) and the fourth-place candidate (Zac Cohen) was less than 75 votes:

Candidate	Vote Total
Tom Caffrey (REP)	35,301
Tom Capehart (REP)	33,017
David Ritter (REP)	32,602
Zachary Cohen (DEM)	32,528
Maraleen Shields (DEM)	32,041
Rashid Santiago (DEM)	29,453

Caffrey and Capehart have already been sworn into office, but Ritter has not. As of today, Ritter's lead over Cohen is 71 votes.

III. In state contest litigation, the Pennsylvania courts agree with Ritter that undated ballots cannot be counted.

Of the 22,000 absentee votes cast in Lehigh County's 2021 election, 257 had no date on the outer envelope. (In other words, only 1% of mail-in voters failed to comply with Pennsylvania's dating requirement.) The board of elections initially decided to count those undated votes, but Ritter challenged its decision in state court. The trial court ruled for Cohen, but the Commonwealth Court reversed on appeal.

The Commonwealth Court agreed with Ritter that the 257 undated ballots could not be counted. In addition to state-law claims, the court addressed whether the dating requirement violates the federal materiality statute. That statute forbids "deny[ing] the right of any individual to vote" based on an "error or omission" that is "not material in determining whether such individual is qualified under State law to vote." 52 U.S.C. §10101(a)(2)(B). The materiality statute is "inapplicable," according to the Commonwealth Court, because the dating requirement does not regulate whether a voter is *qualified* to vote, but whether a qualified voter's ballot is *valid*. *Ritter*, 2022 WL 16577, at *9 (citing *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004)). Even assuming the statute applied, the Commonwealth Court held that the dating requirement does not violate the statute because it "is a 'material' requisite under the [Pennsylvania] Election Code." *Id.*

The Commonwealth Court instructed the trial court to "issue an order … directing [Lehigh County] to exclude the 257 [undated] ballots from the certified

returns." *Id.* at *10; *see also id.* at *1 (requiring "an order … directing the Board to exclude the 257 ballots from the certified returns of the Municipal Election"). The Commonwealth Court's decision became final on January 27, 2022, when the Pennsylvania Supreme Court denied Cohen's petition to appeal. 271 A.3d at 1286.

IV. Individual voters file a new federal lawsuit, lose in the district court, but win in the Third Circuit.

Four days after the state-court proceedings ended, five individual voters filed a new federal lawsuit. The voters claimed that they did not date their mail-in ballots and argued that Pennsylvania's dating requirement violates the federal materiality statute. Though they claimed to be vindicating their *individual* right to vote, they did not ask for only their five ballots to be counted; they asked that Lehigh County be ordered to count all "257" undated ballots. D.Ct. Dkt. 1 at 20-21. (The plaintiffs did not move to certify a class action either.) Ritter intervened as a defendant, and Cohen intervened as a plaintiff. Lehigh County was enjoined from certifying the election while the district court considered the case. D.Ct. Dkt. 13.

The district court entered summary judgment against the plaintiffs. It concluded that they lacked a private right of action to enforce the materiality statute. App.45a. The court "did not find the question of the existence of a private right of action to be particularly close." *Migliori v. Lehigh Cnty. Bd. of Elections*, 2022 WL 827031, at *1 (E.D. Pa. Mar. 18).

The individual voters (but not Cohen) appealed. D.Ct. Dkt. 58. The Third Circuit again enjoined Lehigh County from certifying the election while it decided the case. CA3 Dkt. 12. After briefing and oral argument, the Third Circuit issued a

judgment on May 20. The judgment warned that the Third Circuit would soon issue an opinion against Ritter, that the opinion would direct the district court to "order that the undated ballots be counted," and that the Third Circuit would "immediately" issue its mandate with the opinion. CA3 Dkt. 82 at 2-3. Ritter thus asked the Third Circuit to either stay its mandate pending certiorari or delay the issuance of its mandate seven days so that Ritter could seek a stay from this Court. CA3 Dkt. 81. The Third Circuit agreed to delay its mandate seven days and dismissed Ritter's motion as moot. CA3 Dkt. 85.

The Third Circuit issued its opinion earlier today. It held that Congress intended for the materiality statute to be enforced through §1983's private right of action. It discounted the fact that the materiality statute "refers to the Attorney General's enforcement ability," and it supported its conclusion by consulting the statute's legislative history. App.8a-13a. The Third Circuit then held that Pennsylvania's dating requirement did not comply with the materiality statute. It reasoned that any state election law that did not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony" violated the statute. App.14a. It did not address why the materiality statute applied to run-of-the-mill ballot-validity requirements in the first place. Judge Matey concurred in the judgment alone. App.18a-20a.

V. The Third Circuit's decision has immediate and widespread effects on Pennsylvania's elections.

The Third Circuit's decision has already reverberated throughout the State. As noted, it will likely change the result in Ritter's 2021 race. But the judgment also

came down just days after Pennsylvania's 2022 primary elections. Several of those races were decided by slim margins, and the Third Circuit's order to count undated ballots could change the outcomes. The runner-up in the Republican primary for U.S. Senate is using the Third Circuit's decision to try and force counties to count all undated ballots in his tight race. *See* Vigdor, *McCormick Sues to Count Undated Mail-In Ballots, Trailing Oz in Pennsylvania Senate Race*, N.Y. Times (May 23, 2022), nyti.ms/3wWZvvY. And in Lehigh County alone, several races were decided by less than 100 votes and could flip if those ballots are added to the mix. *See* Scolforo, *Ruling in Lehigh County Ballot Case Could Help Decide Pennsylvania Senate Race Between Oz, McCormick; 2 Local Races*, Morning Call (May 22, 2022), bit.ly/3yU5lRD.

Election contests and automatic recounts are happening now, as are preparations for the general election in November. Given the conflicting decisions from Pennsylvania's state and federal courts, all relevant stakeholders—election officials, political parties, candidates, campaigns, and voters—need resolution from this Court.

REASONS FOR GRANTING THE STAY

Ritter is entitled to a stay pending certiorari if he can show two things:

1. a "reasonably probability" that four Justices would grant certiorari and a "fair prospect" that five Justices would reverse, and
2. a "likelihood" of irreparable harm absent a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). This Court also "considers the equities (including the likely harm to both parties) and the public interest." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (citing *Hollingsworth*, 558 U.S. at 190). All these factors warrant a stay here.

In election cases, moreover, the equities alone can warrant a stay. Under the "*Purcell* principle," the "traditional test for a stay does not apply (at least not in the same way)" in cases like this one. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). Because the equities overwhelmingly favor maintaining the electoral status quo, this Court has "repeatedly" stayed injunctions against state election laws under *Purcell* alone. *Id.* The Court has entered stays while expressing "no opinion" on the merits, *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); where the plaintiffs had "a fair prospect of success," *Milligan*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurral); and even where the challenged law was "invalid," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). That course would be appropriate here too.

I. There is a reasonable probability that four Justices will vote to grant certiorari and a fair prospect that five Justices will vote to reverse.

The Third Circuit's decision presents two questions that warrant this Court's review, either one of which would be enough to grant a stay. The Third Circuit's interpretation of the materiality statute creates an intractable conflict with the Pennsylvania courts in this very case and is independently important. And the Third Circuit's holding that private plaintiffs have a federal cause of action to enforce the materiality statute deepens a 2-1 circuit split. If this Court reviewed the decision below, it would likely reverse on one or both grounds. At the very least, certiorari and reversal are "reasonabl[y] probab[le]" and a "fair prospect." *Hollingsworth*, 558 U.S. at 190.

A. The Third Circuit's interpretation of the federal materiality statute is certworthy and wrong.

This Court will likely grant certiorari because the state and federal courts in Pennsylvania are split on the meaning of the federal materiality statute. *See* Sup. Ct. R. 10(a)-(b). The Third Circuit held that the statute preempts Pennsylvania's dating requirement for mail-in ballots. In a case concerning the very same election, the Pennsylvania Commonwealth Court held that the materiality statute does not preempt Pennsylvania's dating requirement (and the Pennsylvania Supreme Court denied review). The state and federal courts' interpretations are directly contradictory. *Compare Ritter*, 2022 WL 16577, at *10 (holding that no law governing the validity of mail-in ballots can violate the materiality statute), *with* App.13a-16a (holding that *any* law governing the validity of mail-in ballots can violate the materiality statute).

While this Court regularly grants certiorari to resolve "circuit splits," splits on questions of federal law are worse when the disagreement concerns the state and federal courts *presiding over the same state*. On questions of federal law, the Third Circuit does not bind or trump the Pennsylvania courts. *Johnson v. Williams*, 568 U.S. 289, 305 (2013). Conflicts between these courts are thus particularly unacceptable: here, for example, election officials act unlawfully if they count undated ballots (according to the state courts) and if they don't count undated ballots (according to the federal courts). Indeed, Lehigh County has been ordered both to "exclude the 257 [undated] ballots" at issue and to ensure "that the undated ballots [are] counted." *Ritter*, 2022 WL 16577, at *10; App.17a. This Court regularly grants

certiorari in this context. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) (split between Ninth Circuit and a decision of the intermediate California court that the California Supreme Court declined to review); *Gallardo ex rel. Vassallo v. Marstiller*, 141 S. Ct. 2884 (2021) (split between Eleventh Circuit and Florida Supreme Court).

Even if the courts weren't divided, the Third Circuit's decision would still present an "important question of federal law" that this Court hasn't decided but should. Sup. Ct. R. 10(c). The Third Circuit's interpretation of the materiality statute is novel, to say the least. Ritter is not aware of another case applying that statute to invalidate a state law that regulates the manner of mail-in voting. And the Third Circuit's logic is sweeping. According to the court, *any* law requiring voters to do something before their mail-in vote can be counted is immaterial unless it concerns "age, citizenship, residency, or current imprisonment for a felony." App.17a.

The Third Circuit's reasoning is a "*de facto* green light to federal courts to rewrite dozens of state election laws around the country," including laws requiring voters to date a declaration, sign a declaration, put their ballot in a secrecy envelope, get their signature witnessed, get their signature notarized, and the like. *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurral). Yet these basic requirements for mail-in voting are ubiquitous, and they are important election-integrity measures given the heightened risk of fraud posed by mail-in voting. *Republican Party of Penn.*, 141 S. Ct. at 736 (Thomas, J., dissental); *see Brnovich v. DNC*, 141 S. Ct. 2321, 2348 (2021) ("Fraud is a real risk that accompanies mail-in

voting"). When federal courts invalidate state election laws or threaten new inroads on the States' authority to regulate elections, this Court has not hesitated to grant certiorari, even absent a circuit split. *E.g.*, *Brnovich v. DNC*, 141 S. Ct. at 2336; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (op. of Stevens, J.).

If the Court grants certiorari here, there's a "fair prospect" it will reject the Third Circuit's interpretation of the materiality statute. *Hollingsworth*, 558 U.S. at 190. That statute prohibits state actors from denying a person's right to vote based on an error or omission not legally material to his qualification to vote under state law:

> 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). The materiality statute cannot be used to invalidate state laws that require voters to complete certain steps before their absentee ballot can be counted. At least two textual features of the statute make that plain. The Pennsylvania courts got those features right, and the Third Circuit got them wrong.

First, the materiality statute governs voter *qualifications*, not ballot validity. It bars election administrators from determining that a voter is not "qualified" based on something that does not pertain to the State's qualifications for voting. *Id.* The qualifications for voting are basic: citizenship, residency, age, non-felon status, and registration. *See* Pa. Const. art. VII, §1; 25 Pa. Stat. Ann. §2811. Voters who are

qualified to vote, but whose votes are not counted because they failed to follow the state-law procedures for casting a valid ballot, cannot state a claim under the materiality statute. *See Friedman*, 345 F. Supp. 2d at 1371 ("Nothing in … the case law … indicates that [the materiality statute] was intended to apply to the counting of ballots by individuals *already deemed eligible to vote*."); *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995) (materiality statute means that "no one could be denied *registration* [to vote] because of errors that were not material in determining *eligibility*"). These voters have not been "den[ied] the right" to vote; they were given that right but failed to cast their ballot properly. 52 U.S.C. §10101(a)(2)(B). These voters have not failed some "requisite to voting"; they erred during the process of voting itself. *Id.* And these voters have not been deemed "[un]qualified"; they are qualified voters who simply failed to legally vote. *Id.*

Here, in fact, the plaintiffs concede that they were qualified to vote. *E.g.*, D.Ct. Dkt. 1 at 4 ("Mr. Fox has been a registered voter in Lehigh County since he was first able to register and votes in every election."); *id.* at 8 ("All of these voters were otherwise qualified electors who were registered to vote."). Their ballots were rejected not because they weren't qualified, but because the ballots themselves were invalid. As the Pennsylvania courts explained, the State's dating requirement "does not, in any way, relate to … whether [an] elector has met the qualifications necessary to vote in the first place." *Ritter*, 2022 WL 16577, at *9. Instead, it "dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote." *Id.* The plaintiffs were treated no differently than a voter who, for example, shows up to

the wrong precinct or tries to vote after election day. No ordinary speaker of English would say that the State deemed such voters "unqualified"; they are qualified voters who simply failed to follow the rules.

If the Third Circuit is right that the materiality statute governs ballot-validity rules, then it would render a wide range of state election laws unlawful. Yet "States may, and inevitably must, enact reasonable regulations of … ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). And "[c]asting 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. If all ballot-validity rules implicated the materiality statute, then "virtually every electoral regulation" concerning mail-in voting would be unlawful. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). After all, it is hard to see how an ordinary ballot-validity rule could ever be material to whether a voter is "qualified … to vote." 52 U.S.C. §10101(a)(2)(B). Yet those rules are ubiquitous, have coexisted with the materiality statute for decades, and are "long recognized" examples of lawful election regulations. *Wis. State Legislature*, 141 S. Ct. at 33 (Kavanaugh, J., concurral).

Second, even if the materiality statute governed ballot validity, it applies to ad hoc executive actions—like an individual county requiring additional information not required by the written law—rather than state laws that are duly enacted by the legislature. Again, the statute forbids an action taken based on an error or omission that is "not material in determining whether [an] individual is qualified under State

law to vote." 52 U.S.C. §10101(a)(2)(B). Putting aside what it means to be "qualified … to vote," the statute asks whether the error or omission was material "under State law." *Id.* Plaintiffs proceeding under the materiality statute must allege that the defendant went *beyond* state law. *See, e.g.*, *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (holding that requiring social security numbers from prospective voters "is not material in determining whether one is qualified to vote under Georgia law" because Georgia law did not require social security numbers); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018) (holding that an election practice violated the materiality statute where it was not required by "Georgia law").

But here, the plaintiffs' problem is with state law itself. Pennsylvania law requires voters to "fill out, *date* and sign" the declarations on their mail-in ballots. 25 Pa. Stat. §3150.16(a) (emphasis added); *accord* §3146.6(a). Pennsylvania courts have interpreted that law to mean that ballots with no such dates are invalid. *Ritter*, 2022 WL 16577, at *9. That conclusion ends the inquiry under the materiality statute. *See id.*; *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020).

Finally, the Third Circuit's interpretation of the materiality statute must be avoided on constitutional grounds. *See generally Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (following "the traditional practice of … refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties"). States in our federalist system run their own elections. Though Congress can modify state regulations of *federal congressional* elections, U.S. Const., Art. I, §4, its power to modify state regulations

of *state* elections can be justified only under its power to enforce the Fourteenth and Fifteenth Amendments. *See* amends. XIV §5; XV, §2. Congress's exercise of that power must be congruent and proportional to systemic violations of the rights guaranteed by those amendments. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Yet under the Third Circuit's interpretation, the materiality statute prohibits a wide range of state election laws with no relation to race, national origin, or previous condition of servitude. And Congress made no finding that federal supervision of these run-of-the-mill election rules would be necessary to redress systemic constitutional violations. Because the Third Circuit's interpretation "engenders constitutional issues," it should be avoided. *Gomez v. United States*, 490 U.S. 858, 864 (1989).

B. The Third Circuit's holding that private plaintiffs have a federal cause of action to enforce the materiality statute is certworthy and wrong.

In addition to splitting with the Pennsylvania courts over the meaning of the same statute in the same election, the Third Circuit's decision deepens another, more traditional circuit split. Reversing the district court, the Third Circuit held that private plaintiffs do have a cause of action under 42 U.S.C. §1983 to sue for violations of the materiality statute. That holding joins the Eleventh Circuit, *see Schwier v. Cox*, 340 F.3d 1284, 1293 (11th Cir. 2003), but splits with the Sixth Circuit, *see Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (citing *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000)). Courts have acknowledged this split. *See, e.g.*, *id.* (admitting that the Eleventh Circuit had "reached the opposite conclusion"); *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 215 F. Supp. 3d

1201, 1218 & n.6 (D. Utah 2016) (discussing this "circuit split"). Now that this question has percolated for nearly two decades and divided three circuits, this Court is reasonably likely to grant certiorari. *See, e.g.*, *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 422 n.6 (1987) (granting certiorari to resolve a 1-1 split on whether a federal statute could be enforced via §1983).*

Ritter has at least a "fair prospect" of persuading this Court that the district court and the Sixth Circuit have it right. *Hollingsworth*, 558 U.S. at 190. "[Section] 1983 does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005). Instead, it provides an avenue for relief only when Congress intended that federal law to be remedied through a private cause of action. Because Congress provided that the materiality statute should be enforced by the Attorney General alone, *see* 52 U.S.C. §10101(c), individual plaintiffs cannot use §1983 to vindicate that statute.

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The test for whether Congress created a private right of action asks whether the statute "manifests an intent" to create a private right and a private remedy. *Id.* When a plaintiff fails to establish either element, "a [private] cause of action does not exist and courts may not create

* Many district courts have passed on this issue as well. For cases finding no private right of action, see, *e.g.*, *Dekom v. New York*, 2013 WL 3095010, at *18 (E.D.N.Y. June 18) (collecting cases), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); *Duran v. Lollis*, 2019 WL 691203, at *9 (E.D. Cal. Feb. 19). For cases finding a private right of action, see, *e.g.*, *Navajo Nation*, 215 F. Supp. 3d at 1219; *League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15).

one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

When a plaintiff sues to enforce a federal statute under §1983, the *Sandoval* test is modified in one respect. Typically, the plaintiff bears "the burden" of satisfying the second element, an "intent to create a private remedy." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). But under §1983, the burden to satisfy the second element flips to the defendant. *Id.* The plaintiff "presumptively" satisfies the second element because Congress, the theory goes, provided for private enforcement of the violated statute when it enacted §1983. *Id.*

But a burden-shift is far from the end of the analysis. In §1983 cases, a defendant can defeat the presumption by showing that "Congress did not intend [the §1983 private] remedy for a newly created right." *Rancho Palos Verdes*, 544 U.S. at 120. After all, Congress need not always follow §1983's enforcement scheme when enacting new statutes, so the ultimate touchstone remains Congress's intent. One way to show that Congress did not intend to authorize private enforcement of a federal statute through §1983 is "the existence of more restrictive remedies provided in the violated statute itself." *Id.* at 121. Because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," an express provision typically precludes relief under §1983. *Id.*

Sandoval and §1983 are identical in this respect. Regardless of whom the burden falls on, the second element isn't satisfied in either case when Congress intended to remedy violations of the statute only through alternative means. *See, e.g.*,

Sandoval, 532 U.S. at 290 ("as our … 42 U.S.C. §1983 cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights"); *City of Rancho Palos Verdes*, 544 U.S. at 121 (relying on *Sandoval* to apply this proposition to §1983 case).

Here, the presumption in favor of a private remedy is defeated because Congress created an explicit and more restrictive remedy to enforce the materiality statute. It provided that the statute would be enforced only through civil actions by the Attorney General:

> Whenever any person has engaged … 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 for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief[.]

52 U.S.C. §10101(c) (emphasis added). Congress sensibly decided that the materiality statute should be enforced not by any individual—who could thereby upend an election singlehandedly—but by the Attorney General alone. The "existence of [such] express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under §1983." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981).

The Third Circuit departed from this analysis and implied a private remedy where Congress chose a different scheme. But the judiciary long ago "swor[e] off" the habit of loosely finding such private remedies, and this Court should "not accept respondents' invitation to have one last drink." *Sandoval*, 532 U.S. at 287. Congress

enacted §1983 in 1871 and enacted the materiality statute in 1957, complete with its own enforcement mechanism. These statutes have coexisted for a half-century, but only recently has the latter become the subject of private lawsuits. Those floodgates should not be opened until this Court has a chance to weigh in.

II. A stay is needed to prevent irreparable harm.

Ritter and others face a "likelihood" of irreparable harm if this Court denies a stay. *Hollingsworth*, 558 U.S. at 190. Consider just a few of those harms.

Absent a stay, Lehigh County will count undated ballots that violate Pennsylvania's written laws. "The counting of votes that are of questionable legality" itself "threaten[s] irreparable harm to [Ritter], and to [Lehigh County], by casting a cloud upon what he claims to be the legitimacy of his election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurral). "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." *Id.*; *accord Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020) (finding "irreparable harm" where "otherwise invalid ballots will be entered in the vote totals that determine whether [candidates] will be elected").

Worse, there's a strong "likelihood" that the 257 undated ballots will erase Ritter's 71-vote lead, causing Lehigh County to certify his opponent as the winner in just a matter of days. When assessing irreparable harm, this Court must "assum[e] the applicant's position on the merits is correct." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). So here, the Court must assume that a stay is needed to prevent the *wrong* candidate from assuming office. Allowing the wrong candidate to exercise the powers of the office, even temporarily, causes

"irreparably injury" by "deny[ing Ritter] the opportunity to serve" and "seriously harm[ing]" the voters who "elected him." *Kupau v. Yamamoto*, 622 F.2d 449, 457 (9th Cir. 1980). Even if he received back pay, Ritter could never get back the time he was wrongly excluded from office. *Id.* Though a stay might lengthen the time it takes to finally resolve this election dispute, "the consequences of placing political power in unauthorized hands are of far graver concern." *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994).

Finally, a stay is needed to prevent all the irreparable harms that normally occur when federal courts enjoin state election laws. Invalidating a sovereign State's duly enacted law "clearly inflicts irreparable harm." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *accord Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurral). And it does irreparable "damage … to the authority of legislatures." *Wis. State Legislature*, 141 S. Ct. at 30 (Gorsuch, J., concurral). This federal interference also confuses voters, confuses election administrators, disrupts the machinery of elections, deters voting, erodes confidence in electoral outcomes, and causes a host of other "unanticipated and unfair consequences." *See id.*; *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral); *Purcell*, 549 U.S. at 4-5.

The plaintiffs themselves had this case effectively stayed for four months. They obtained two orders enjoining Lehigh County from certifying the election until their claims could be resolved. *See* D.Ct. Dkt. 13; CA3 Dkt. 18. In the plaintiffs' words, this relief was necessary because, "once an election is certified, 'there can be no do-over [or] redress,' and the injury … becomes both 'real and completely irreparable.'" CA3

Dkt. 6-1 at 24-25. If that logic held for the plaintiffs, it should hold for Ritter too. It would be unfair to let the plaintiffs pause this case while they are losing, but then quickly end it after notching their first win.

III. The balance of harms and public interest favor a stay.

In election cases, the equities almost always favor a stay that maintains the electoral status quo. *See RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020); *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral) (collecting cases). And the electoral status quo is set by the state legislature, even if the State's executive branch disagrees. *Id.* at 881; *Carson*, 978 F.3d at 1062. This so-called "*Purcell* principle" is a "bedrock tenet of election law." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). It recognizes that "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 881. And "[c]onfidence in the integrity of our electoral processes" is "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

Though *Purcell* violations typically occur *before* election day, the interests underlying that principle apply "with much more force on the back end of elections." *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021). "Changing the rules in the middle of the game is bad enough"; but changing the rules after the game has already been played risks "severely damag[ing] the electoral system on which our self-governance so heavily depends." *Republican Party of Penn.*, 141 S. Ct. at 735 (Thomas, J., dissental). Injunctions "after election day" exacerbate the perception that federal courts are picking winners and losers in

partisan elections. *Id.* at 734-35. And worse than pre-election injunctions, "post-election" injunctions give voters and candidates "no opportunity to adjust." *Carson*, 978 F.3d at 1061. Granting "post-election relief" also "encourage[s] sand-bagging" by letting plaintiffs "'gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.'" *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). The rationale for *Purcell* is thus "'at its peak'" when the "'claims for relief are not merely last-minute—they are after the fact.'" *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 719 (D. Ariz. 2020) (quoting *King v. Whitmer*, 505 F. Supp. 3d 720, 732 (E.D. Mich. 2020)).

Purcell easily applies here. The Third Circuit changed the rules after Ritter's election had ended, after the state contest litigation had ended in his favor, and after it was clear which candidates stood to gain or lose from its decision. "This is not a prescription for [voter] confidence." *Republican Party of Penn.*, 141 S. Ct. at 735 (Thomas, J., dissental); *accord Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurral) (explaining that vindicating *Purcell* helps "giv[e] citizens (including the losing candidates and their supporters) confidence in the fairness of the election"). Without a stay, the Third Circuit's decision also will alter the outcomes in Pennsylvania's just-finished primaries, several of which are headed to a recount. And it will change the rules for Pennsylvania's upcoming general election, where the start of mail-in voting is less than four months away. *See* 25 Pa. Stat. §3150.12a(a) (counties start processing mail-in ballot applications 50 days before the election).

The plaintiffs here cannot overcome *Purcell* because, among other things, they "unduly delayed bringing the[ir] complaint to court." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). The plaintiffs filed this lawsuit, bringing essentially a facial challenge to Pennsylvania's dating requirement, on January 31, 2022. The dating requirement had been the law for over two years. The plaintiffs had cast undated ballots—and some had even been informed by county election officials that their ballots were undated—throughout October and November 2021. The election had ended three months earlier. And the state-court litigation over the validity of the undated ballots had already gone through the entire Pennsylvania court system. The plaintiffs had no right to sit back and wait for those proceedings to conclude. The outcome of "election contests … in state court" between candidates has nothing to do with "constitutional challenges in federal court" by individual voters. *Bowyer*, 506 F. Supp. 3d at 718-19; *accord Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1324 (N.D. Ga. 2021) (rejecting this excuse for delay because "constitutional challenges" do not "depend on the outcome of any particular election" or whether the plaintiffs' "preferred candidates won or lost").

Especially in the post-election context, courts regularly find delays even shorter than the plaintiffs' inexcusable. *See, e.g.*, *Kelly v. Commonwealth*, 240 A.3d 1255, 1256-57 (Pa. 2020) (three weeks after election day was too long); *Donald J. Trump for President, Inc. v. Sec'y of Penn.*, 830 F. App'x 377, 390 (3d Cir. 2020) (one week after election day); *King*, 505 F. Supp. 3d at 731-32 (three weeks); *Bowyer*, 506 F. Supp. 3d at 718-19 (one month). Here, the lower courts refused to hold that laches

outright barred the plaintiffs' claim for injunctive relief. But even if the courts were right about that, the plaintiffs' "'dela[y]'" still means that "the balance of equities" for purposes of this stay application tilt sharply in Ritter's favor. *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurral); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *see also Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurral) (granting a stay under *Purcell* "discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process").

Another reason why the plaintiffs cannot overcome *Purcell* is that the merits of their claims are not "entirely clearcut." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral); *see League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1364 n.8 (11th Cir. 2022) (explaining that "*all* of" the factors identified in *Milligan* "must be satisfied" to defeat a stay under *Purcell*). As explained, whether the federal materiality statute trumps Pennsylvania's dating requirement has created a split between Pennsylvania's state and federal courts *in this very case*. Whether that statute can be enforced by private federal plaintiffs has also split the federal circuits. And even absent these splits, the Third Circuit's conclusion that the statute reaches mine-run regulations of mail-in voting is novel and far-reaching. The merits of these questions are anything but clearcut. *See Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 2 (1966) (Harlan, J., in chambers) (granting a stay because the issues did not "appear to be precisely controlled by any decision of this Court" and were "highly debatable").

Nor would a stay cause any appreciable harm to the plaintiffs. Though they will likely stress their "constitutional right to vote," they won this case solely on statutory grounds. And "no one is disenfranchised" when, unlike 99% of their fellow citizens, they failed to date the declaration on their ballot. *Wis. State Legislature*, 141 S. Ct. at 36 (Kavanaugh, J., concurral); *accord Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

Nor will a stay cause any valid votes to be irreparably denied. If the plaintiffs lose this case, then their votes were invalid and could not be counted anyway. If they win this case, then their votes will be counted later. The plaintiffs are individual voters, not candidates, so their injury turns on *whether* their votes are counted, not *when*. The "inconvenience of delay" to these five individuals "poses no threat of irreparable harm." *Araneta v. United States*, 478 U.S. 1301, 1305 (1986) (Burger, C.J., in chambers); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *see also Philip Morris*, 561 U.S. at 1305 (Scalia, J., in chambers) ("Refusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents."). Tellingly, this same voting-based injury is raised in virtually every case where a federal court enjoins a state election law. *E.g.*, *RNC*, 140 S. Ct. at 1211 (Ginsburg, J., dissental). Yet this Court "repeatedly" grants stays in election cases. *Id.* at 1207 (majority op.). This one is no different.

CONCLUSION

For all these reasons, Ritter asks this Court to stay the Third Circuit's judgment pending the timely filing and disposition of his certiorari petition. To ensure

that the Court has time to consider this emergency stay application, Ritter respectfully asks it to enter at least an administrative stay by June 2, 2022.

Respectfully submitted,

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