

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

Plaintiffs,

v.

AL SCHMIDT, *in his official capacity as Acting  
Secretary of the Commonwealth, et al.*,

Defendants.

No. 1:22-cv-339

Judge Susan Paradise Baxter

**BRIEF OF AL SCHMIDT IN RESPONSE TO PLAINTIFFS' AND  
INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In the 2022 General Election, more than 10,000 indisputably eligible voters had their ballots cancelled for failing to handwrite a date that serves no purpose in the administration of Pennsylvania’s elections. This case is about whether federal law permits denying those individuals’ right to vote.

It is not the first case to present this issue. Indeed, the Third Circuit already has unanimously concluded that 52 U.S.C. § 10101(a)(2)(B) prohibits denying eligible individuals their right to vote for neglecting to write a meaningless date on the declaration that is returned alongside an absentee or mail-in ballot. See *Migliori v. Lehigh Cnty. Bd. of Elections*, 36 F.4th 153 (3d Cir. 2022), vacated as moot, *Ritter v. Migliori*, 143 S.Ct. 297 (Mem.) (2022).

This Court should reach the same conclusion. Section 10101(a)(2)(B) forbids denying anyone’s right to vote for making “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). Because the undisputed facts establish that writing a date on the declaration submitted with an absentee or mail-in ballot serves no purpose in the administration of Pennsylvania’s elections, it is not “material” to determining an individual’s eligibility. Under § 10101(a)(2)(b), then, omitting that date cannot be the reason for cancelling an

eligible voter's ballot and plaintiffs should be granted judgment in their favor on Count I.

Doing so would obviate the need to resolve Count II, which alleges that Pennsylvania law unreasonably discriminates between domestic voters and military-overseas voters. The two classes of voters, however, are not similarly situated for purposes of voting remotely, and any differential treatment is reasonable. Therefore, there is no violation of the U.S. Constitution's Equal Protection Clause.

### **BACKGROUND**

Citizens of Pennsylvania are qualified to vote if they: (1) are at least 18 years old on the day of the election; (2) have been a U.S. citizen for at least one month prior to the election; (3) have lived in Pennsylvania and in their election district for at least thirty days prior to the election; and (4) are not imprisoned for a felony conviction. [Pa. Const. art. VII, § 1](#); [25 P.S. § 2811](#); [25 Pa.C.S. § 1301\(a\)](#).<sup>1</sup> Each county board first assesses compliance with these conditions when an individual registers to vote. [25 Pa.C.S. § 1328](#). County boards approve applications to register only for applicants that meet all eligibility criteria. [Id. § 1328\(b\)](#). A qualified,

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<sup>1</sup> See also [Mixon v. Commonwealth](#), 759 A.2d 442, 451 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (2001) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); [1972 Op. Atty. Gen. No. 121](#) (concluding that [Dunn v. Blumstein](#), 405 U.S. 330 (1972), prohibits the enforcement of certain durational residency requirements longer than 30 days); [U.S. Const. amend. XXVI](#) (prohibiting denial of right to vote to citizens 18 years of age or older on account of age).

registered voter may apply to cast a ballot in an election as an “absentee elector” (under some conditions) or as a “mail-in elector.” 25 P.S. §§ 3146.1, 3150.11.

Identical procedures govern how voters may request and return absentee and mail-in ballots. County boards of elections must first confirm that an applicant meets Pennsylvania’s criteria to vote either absentee or by mail. *Id.* §§ 3146.2b, 3150.12b. As part of that, county boards must verify an applicant’s proof of identification (such as their driver’s license or the last four digits of their social security number). *Id.* §§ 3146.2b, 3150.12b; *see also* 25 P.S. § 2602(z.5) (defining proof of identification).

County boards of elections begin mailing ballots to approved absentee and mail-in electors at least 14 days before an election. *Id.* §§ 3146.5(b)(1), 3150.15. Voters may mark their ballots any time between receiving the ballot and 8 p.m. on Election Day; they then place the ballot in a secrecy envelope and place the secrecy envelope in a return envelope. *Id.* §§ 3146.6(a), 3150.16(a).

Return envelopes have a pre-printed declaration on their back through which a voter attests to their eligibility to vote. *Id.* §§ 3146.4, 3150.14(b). Voters “shall then fill out, date and sign” the declaration. *Id.* §§ 3146.6(a), 3150.16(a). That declaration is submitted with the ballot. *Id.* §§ 3146.6(a), 3150.16(a).

Return envelopes contain a unique barcode associated with the voter that is used to track the ballot through the Statewide Uniform Registry of Electors (SURE) System. *See* Plfs.’ SOF ¶ 12 (ECF No. 283); DOS Response to Plfs.’ SOF ¶ 12. After



sealing the return envelope, the voter delivers the entire package to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a). An absentee or mail-in ballot is timely if returned to the voter’s county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.8(g)(1)(ii).

County boards have a statutory obligation to track the date that every absentee or mail-in ballot was received and make that information available for public inspection. *Id.* §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so, including date stamping envelopes when received and scanning return envelopes’ barcodes into the SURE system. *See* Plfs.’ SOF ¶ 12; DOS Response to Plfs.’ SOF ¶ 12.

If the package has been returned by 8 p.m. on Election Day, county boards are to “examine the declaration on the envelope of each ballot” (except when external records indicate the voter appears to have died before Election Day) and compare the information on the envelope to a list of absentee or mail-in voters. 25 P.S. § 3146.8(g)(3). If a county board has confirmed that the individual is entitled to vote, confirmed that the voter has provided additional identification (if required), and “is satisfied that the declaration is sufficient,” the return envelope shall be opened and the ballot shall be canvassed and counted. *Id.* § 3146.8(g)(3)-(4).

Separate rules govern uniform military and overseas electors. 25 Pa.C.S. §§ 3501–3519. Ballots from this class of voters can be counted if the ballot was

delivered to the county board by 5 p.m. on the seventh day after the election so long as the ballot was submitted by 11:59 p.m. on the day before Election Day. *Id.* §§ 3509, 3511. Military-overseas voters return their ballot with a declaration that the Secretary prescribes under 25 Pa.C.S. § 3503. Like absentee and mail-in ballots from domestic voters, absentee ballots from military voters are canvassed under 25 P.S. § 3146.8, but overseas military voters benefit from an explicit instruction that “[a] voter’s mistake or omission in the completion of a document under this chapter” shall not “invalidate a document submitted under this chapter” so “long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote.” 25 Pa.C.S. § 3515(a)(1).

In any election, thousands of voters do not perfectly comply with instructions for submitting a mail-in or absentee ballot. For example, voters may forget to write a date on their declaration or may write an incorrect date. Relevant here, the Pennsylvania Supreme Court has held that, as a matter of Pennsylvania law, any absentee or mail-in ballot must be set aside if a county board of elections concludes that the voter failed to handwrite a date on the declaration returned alongside the ballot or wrote an incorrect date. *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023). The Supreme Court held that the correct date is the date on which the voter signed the declaration, but the Court acknowledged that how counties will verify the accuracy of a written date “is a question that falls beyond [the Court’s] purview.” *Id.* at 23.

The *Ball* decision means that, as a matter of state law, thousands of ballots returned by eligible voters could be set aside in any election. Indeed, despite the attention that this issue has received in recent years and despite both the Department of State’s and county boards’ education efforts, for the 2022 General Election, 10,506 ballots from qualified electors were excluded from the final count because county boards of elections determined that the accompanying declarations were not correctly dated. [Plfs.’ SOF ¶ 36](#); [DOS Response to Plfs.’ SOF ¶ 36](#).

## **ARGUMENT**

### **I. Plaintiffs Should Be Granted Judgment in their Favor on Count I**

#### **A. Federal Law Prohibits Denying the Right to Vote Because of Voters’ Immaterial Mistakes**

Federal law instructs that no one shall “deny the right of any individual to vote ... 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 provision was enacted to end trivial requirements that “served no purpose other than as a means of inducing voter-generated errors that could be used to justify” denying the right to vote. [Fla. State Conf. of NAACP v. Browning](#), [522 F.3d 1153, 1173 \(11th Cir. 2008\)](#). It guards against “state election practices that increase the number of errors or omissions on papers or records related to voting and provide

an excuse to disenfranchise otherwise qualified voters.” *League of Women Voters of Ark. v. Thurston*, No. 20-05174, 2021 WL 5312640, at \*4 (W.D. Ark. Nov. 15, 2021). As the Third Circuit has already ruled, § 10101(a)(2)(B) forbids counties from setting aside ballots merely because a voter forgot to date, or incorrectly dated, the envelope declaration submitted alongside their ballot. *Migliori*, 36 F.4th at 164.<sup>2</sup> Application of § 10101’s text compels that result. See *Mack v. Yost*, 63 F.4th 211, 222 (3d Cir. 2023) (“We begin, as with any statute, with the text.”).

To begin, setting aside ballots because a voter did not properly date the return envelope’s declaration “den[ies] the right ... to vote.” Section 10101 defines “vote” to include “all action necessary to make a vote effective including ... having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office ....” 52 U.S.C. § 10101(e); see also *id.* § 10101(a)(3)(A) (incorporating this definition of “vote” into § 10101(a)(2)(B)). Given the unmistakably broad definition of “vote,” the statute squarely protects against cancelling ballots for immaterial paperwork errors. Indeed, federal courts have

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<sup>2</sup> The Supreme Court’s order vacating the judgment in *Migliori* as moot is not an assessment of the merits of the Third Circuit’s analysis. Federal appellate courts continue to treat cases where the Supreme Court has vacated the judgment as persuasive authority. See, e.g., *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017) (citing *In re Chrysler LLC*, 576 F.3d 108, 118 (2d Cir.), cert. granted, judgment vacated sub nom. *Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009)); *Doe I v. Governor of Pa.*, 977 F.3d 270, 273 (3d Cir. 2020) (citing *Beers v. Att’y Gen. United States*, 927 F.3d 150 (3d Cir. 2019), cert. granted, judgment vacated sub nom. *Beers v. Barr*, 140 S. Ct. 2758 (2020)).

repeatedly interpreted § 10101(a)(2)(B) to prohibit voiding a ballot because of mistakes made on a document returned with a mail-in ballot. *See La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540-42 (W.D. Tex. 2022); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018); *Thurston*, 2021 WL 5312640, at \*4.

Next, a mailing envelope is a “record or paper.” And because omitting a date (or writing an incorrect date) on a return-envelope declaration is now a disqualifying error under Pennsylvania law, *Ball*, 289 A.3d at 28, writing a correct date is an “act requisite to voting.”<sup>3</sup>

Finally, the RNC has conceded in both this litigation and litigation before the Pennsylvania Supreme Court that the handwritten date on a voter’s declaration is not material in determining a voter’s eligibility. *RNC Br. in Supp of Mot. to Dismiss at*

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<sup>3</sup> The RNC argues that completing the declaration on the ballot return envelope is not an “act requisite to voting,” but is voting itself. *RNC Br. at 11-12*. Yet something is “requisite” if it is “needed for a particular purpose,” *see Requisite*, Merriam Webster Dictionary, and dating a declaration is needed for the purpose of counting a ballot. Completing an envelope declaration is no more the “act of voting” than is completing any other form that is not a ballot. In Pennsylvania, completing a declaration is neither “the marking of a ballot to indicate support for candidates or ballot measures, [nor] the action of transporting a ballot to the appropriate authorities for it to be counted.” *Ball*, 289 A.3d at 26 (Wecht, J.). Under Pennsylvania law, the ballots at issue here will be set aside and never accessed or reviewed. *Id.* at 28; 25 P.S. § 3146.8(g)(3)-(4) (describing canvassing procedures).

11-12 (ECF No. 194); *Ball*, 289 A.3d at 24 & n. 139. Time and again, courts in the Commonwealth have recognized that the handwritten date at issue here serves no role in the administration of Pennsylvania’s elections. *Migliori*, 36 F.4th at 164 (concluding that cancelling timely ballots from qualified electors who neglected to properly date their declaration “serves no purpose other than disenfranchising otherwise qualified voters.”); *In re Canvass of Absentee and Mail-in Ballot*, 241 A.3d 1058, 1077 (Pa. 2020) (opinion announcing judgment) (concluding that the handwritten date is “unnecessary and, indeed, superfluous.”); *Chapman v. Berks Cnty. Bd. Of Elections*, No. 355 MD 2022, 2022 WL 4100998, at \*20 (Pa. Cmwlth. Ct. Aug. 19, 2022) (explaining that parties “have not identified a specific purpose served by dating the declaration on the return envelope, and the Court cannot discern any.”).

Despite conceding that the date is immaterial, the RNC repeats its discredited hypotheses about what purposes the date might serve. *RNC Br. in Supp. of Summ. J.* (“RNC Br.”) at 2 (ECF No. 271); *see also* *RNC Br. in Supp of Mot. to Dismiss at 5-6*. The Acting Secretary already has explained in detail the date’s initial purpose, why the date no longer serves that function, and why the RNC’s suggested uses are indisputably wrong. *Opp’n to Mot. to Dismiss at 9-14* (ECF No. 224).

Language that voters “shall ... date” their declaration was added to the Election Code in 1945 at a time when there were distinct deadlines for a voter to

submit their ballot (Election Day) and for the county to receive it (two weeks later). Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, §§ 1306-07. At that time, county boards were specifically instructed to set aside during canvassing all ballots returned in envelopes dated sometime after Election Day (the deadline to complete the ballot). *Id.*, sec. 10, § 1307. In 1968, the General Assembly aligned the deadline for voters to complete and for county boards to receive mailed ballots and also eliminated the explicit requirement that county boards set aside ballots returned with declarations dated sometime after Election Day. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, § 1308(a).

As the General Assembly recognized by removing the explicit requirement to set aside ballots based on the accompanying declaration date, once the deadline for voters to complete and for county boards to receive a ballot were aligned, the date lost its utility. All ballots returned by the deadline necessarily were completed by then, and counties independently verify and log when ballots are received. [25 P.S. §§ 3146.9\(b\)\(5\), 3150.17\(b\)\(5\)](#); [Plfs.' SOF ¶ 12](#); [DOS Response to Plfs.' SOF ¶ 12](#). The single deadline for completing and returning a ballot also means the declaration date does not help detect fraudulently back-dated ballots.

Further, voters who have requested and successfully returned an absentee or mail-in ballot may not vote in person no matter when they completed their mail-in ballot. [25 P.S. § 3050\(a.4\)\(5\)\(ii\)\(F\)](#). Even those who did not successfully return their

absentee or mail-in ballot may vote only provisionally at their polling place unless they surrender their blank absentee or mail-in ballot and its envelope *Id.* §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3).

Nor does the date assist in separating eligible ballots from ineligible ones. Ballots are counted in an election only if the individual who submitted the ballot satisfied Pennsylvania’s eligibility criteria *as of Election Day*. See Pa. Const. art. VII, § 1 (imposing residency requirements for the time period “immediately preceding the election”); 25 P.S. § 2811(2), (3) (same); *id.* § 3146.8(d) (directing county boards to discard absentee and mail-in ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone “who will be at least 18 years of age on the day of the next election” to register). Counties do not use the date to assess compliance with these criteria. Plfs.’ SOF ¶¶ 47-52; DOS Response to Plfs.’ SOF ¶¶ 47-52. If a county assessed eligibility as of the date written on the declaration, the county would be assessing eligibility at the wrong point in time. A person who dies a week before Election Day, for example, is not eligible to have their vote counted no matter what date is on the declaration.

Despite conceding that the date is immaterial, the RNC cites the date’s supposed use in a criminal complaint from the 2022 primary election as reason to cancel thousands of ballots from qualified voters. RNC Br. at 3-4. There, a woman in Lancaster County allegedly returned her deceased mother’s ballot and dated the



declaration 12 days after her mother's death. DOS Response to RNC's SOF ¶¶ 49, 52; [Ex. 12 to RNC SOF](#). But as the criminal complaint makes clear, the ballot was rejected for reasons completely unrelated to that handwritten date. The mother had been removed from the voting rolls *three days before* the ballot arrived. *Id.* When Lancaster County received and scanned the ballot, the SURE system indicated that the mother was dead. *Id.* ¶ 48. Even if the handwritten date had been sometime before the mother's death, the ballot still would have been rejected. *See* [25 P.S. § 3146.8\(d\)](#). Indeed, a Lancaster County Commissioner testified that the date had no bearing on the county's decision to reject the ballot. DOS Response to RNC's SOF ¶ 48. It was the mother's pre-election death, not the date, that was material to her eligibility to vote.

Even if a date could serve as evidence in the criminal prosecution of someone who unsuccessfully tried to submit an ineligible ballot, the date still is not material in determining a voter's qualifications, the relevant inquiry under § 10101. Nor is it even correct to suggest that the date was the *only* evidence of potentially criminal activity in the Lancaster County incident. *Contra* [RNC Br. at 4](#). The ballot was received in the mail two full weeks after the individual's death. Lancaster County dated stamped the envelope when it was received, making clear from the face of the envelope that it had been delivered at a date that was well after the mother died. DOS

Response to RNC's SOF ¶ 52. Those circumstances should and would have been investigated no matter what was written on the envelope.

In fact, ascribing importance to the date *introduces* risks that would not otherwise exist. If counties must exclude ballots based on their review of the handwritten date, then that date can be manipulated to require that a county board disqualify a ballot even if the board independently knows that the ballot was completed and received on time.

Moreover, as discovery in this case demonstrates, requiring county boards to disqualify ballots because of a declaration date yields arbitrary disqualification of ballots, including disqualification of some ballots returned with declarations that appear to be properly dated. Plfs.' SOF ¶¶ 71a-71i, 83a, 97; DOS Response to Plfs.' SOF ¶¶ 71a-71i, 83a, 97. In the 2022 General Election, for example, Beaver County set aside ballots because of these handwritten dates:

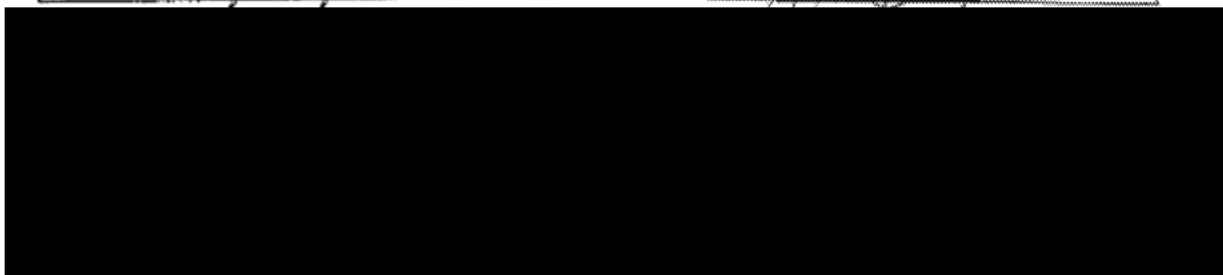


Plfs.' SOF ¶¶ 97b, 97d; DOS Response to Plfs.' SOF ¶¶ 97b, 97d. Allegheny County set aside ballots based on these handwritten dates:



Plfs.’ SOF ¶¶ 71b, 71d; DOS Response to Plfs.’ SOF ¶¶ 71b, 71d.<sup>4</sup> In all four cases, the date written was between when the county had started mailing ballots and Election Day. Plfs.’ SOF ¶¶ 34b, 34d; DOS Response to Plfs.’ SOF ¶¶ 34b, 34d.

In the 2022 General Election, county boards also disqualified ballots where the handwritten date provided clear evidence of when the voter signed their declaration notwithstanding the voter’s misprint. Berks, Chester, Lycoming, and Westmoreland Counties, for example, set aside ballots because voters wrote these dates:




Plfs.’ SOF ¶¶ 67f, 67h, 70b-70c; DOS Response to Plfs.’ SOF ¶¶ 67f, 67h, 70b-70c.

Moreover, because county boards have been instructed to set aside ballots if the date is “incorrect,” octogenarians who put their birthdate on the declaration are now having their ballots cancelled. For example, Centre and Lancaster Counties set aside ballots during the 2022 General Election because of these handwritten dates:

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<sup>4</sup> Three counties would have counted the two ballots that Allegheny County set aside. Plfs.’ SOF ¶ 72; DOS Response to Plfs.’ SOF ¶ 72.



Plfs.’ SOF ¶ 68; DOS Response to Plfs.’ SOF ¶ 68.

Finally, requiring county boards for the 2022 General Election to assess if a declaration date is correct resulted in some voters having their ballot voided because of the accompanying declaration date even though a different county likely would not have cancelled the ballot on the same facts. For example, Bucks and Fayette treated any declaration indicating the voter signed in October 2022—even if no specific date was listed—as correct. Plfs.’ SOF ¶ 81; DOS Response to Plfs.’ SOF ¶ 81. At least Allegheny, Clearfield, Franklin, and Luzerne Counties, however, did not. Plfs.’ SOF ¶¶ 80d-80e, 80g-80i; DOS Response to Plfs.’ SOF ¶ 80d-80e, 80g-80i. Likewise, 18 boards of elections admitted that for the 2022 General Election they did not regard dates written using an international convention (DD/MM/YYYY) as correct, Plfs.’ SOF ¶ 86; DOS Response to Plfs.’ SOF ¶ 86, while 31 other boards tried to consider international dating conventions when judging if a date was correct, Plfs.’ SOF ¶ 87; DOS Response to Plfs.’ SOF ¶ 87.

**B. The RNC’s Contrary Arguments Contravene Federal Law and Pennsylvania Law**

In response, the RNC offers a reading of § 10101(a)(2)(B) that repeatedly defies the statute’s text. The RNC wrongly insists that § 10101 protects only

qualified individuals' right to register to vote. [RNC Br. at 8-9](#). Anyone permitted to register, the RNC mistakenly continues, cannot have been denied the right to vote even if a county board of elections never opens or counts the ballot that person submitted. *Id.* at 6-7. Such a person, the RNC concludes, has simply failed to follow the rules for voting. *Id.* at 6-7. The RNC's reading is unsupportable for multiple reasons.

1. Initially, the RNC's position resists § 10101's foundational premise and would render the statute effectively null. [Ball, 289 at 25](#) (Wecht, J.). Section 10101(a)(2)(B) operates *only* when there is non-compliance with some obligatory voting rule. Election administrators and courts must then ask if the disqualifying error is one that § 10101(a)(2)(B) forbids. If the RNC is right, § 10101(a)(2)(B) would "never be violated, because every 'error or omission' would constitute an elector's accidental forfeiture of his or her vote by failing to follow the rules for voting, rather than a denial of the 'right to vote' for which a state actor would be responsible." [Ball, 289 A.3d at 25](#) (Wecht, J.).

2. Beyond that, the RNC's analysis is deeply at odds with § 10101's text.

First, Congress specifically defined "vote" for purposes of § 10101(a)(2)(B) to include "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.” 52 U.S.C. § 10101(e) ; *see also id.* § 10101(a)(3)(A). That statutory definition is expansive and instructs “courts to look not only for individuals being stripped of their ability to exercise the right to vote generally, but for individuals who are denied the right to have their ballots counted and included in the tallies for an individual election.” *Ball*, 289 A.3d at 25 (Wecht, J.). Had Congress been concerned only with denying individuals’ right to register, Congress would not have adopted a definition of “vote” that includes “all action necessary to make a vote effective,” and that specifically identifies multiple steps following registration. Instead of engaging with this text, the RNC asks the Court to interpret § 10101(a)(2)(B) based on Supreme Court decisions that have nothing to do with the relevant statute. *See RNC Br. at 7-8*. And although the RNC prefers that the Court not resolve this case based on § 10101(a)(2)(B)’s text, “the statute provides Congress’ own expansive definition for the word ‘vote,’ a definition which [courts] are not at liberty to ignore.” *Ball*, 289 A.3d at 24 (Wecht, J.).

Second, the RNC asks the Court to disregard that § 10101(a)(2)(B) protects against denials of the right to vote because of errors or omissions made “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). If a voter is denied the right to vote only when stopped from applying or registering to vote, then “other act

requisite to voting” has no meaning.<sup>5</sup> The RNC invokes the *eiusdem generis* canon as reason to read “other act requisite to voting” as synonymous with registration applications, [RNC Br. at 12](#), but offers no example of what “other act requisite to voting” encompasses if § 10101 is read in that way. Their position thus “runs afoul of the ‘cardinal principle’ of interpretation that courts ‘must give effect, if possible, to every clause and word of a statute.’” [Loughrin v. United States, 573 U.S. 351, 358 \(2014\)](#) (citation omitted). In any event, the declaration is like a registration application. With both, a voter is submitting a document to their county board of elections swearing that they are qualified to vote. *Compare* [25 Pa.C.S. § 1327 with 25 P.S. §§ 3146.4, 3150.14\(b\)](#).

Third, Congress’s repeated use of “any” confirms that § 10101 protects against more than just immaterial errors used to prevent registration. As the Supreme Court has said, “read naturally, the word ‘any’ has an expansive meaning, that is, one or some indiscriminately of whatever kind.” [Ali v. Federal Bureau of Prisons, 552 U.S. 214, 219 \(2008\)](#). Here, the phrase “on *any* record or paper” requires reading the statute to cover documents “of whatever kind.” The phrase “relating to *any*

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<sup>5</sup> Elsewhere, the RNC has been arguing that counties must not only cancel ballots returned with declarations lacking a handwritten date, but also must deny a voter who returns such a declaration the opportunity to correct the mistake or take any other step to successfully vote. *See Republican Nat’l Comm. v. Schmidt*, No. 447 MD 2022 (Pa. Cmwlt. Ct. Mar. 23, 2023); [Republican Nat’l Comm. v. Chapman](#), No. 447 MD 2022, 2022 WL 16754061 (Pa. Cmwlt. Ct. Sept. 29, 2022).

application, registration, or other act requisite to voting” requires a similarly broad reading of the occasions during which an immaterial error cannot justify denying the right to vote.

Fourth, § 10101 forbids denying the right to vote for errors that are not “material *in determining* whether such individual is qualified under State law.” Properly read, then, the right to vote may not be denied because an individual failed to adequately respond to a written request for information if that information was not needed to determine a voter’s eligibility. That is precisely how the Eleventh Circuit has interpreted the statute, explaining that § 10101(a)(2)(B) requires asking “whether, accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant.” [NAACP, 522 F.3d at 1175](#). If the error is not, it cannot be used to deny the right to vote. That is the case here. The statute does not, as the RNC urges, [RNC Br. at 8](#), apply only *when determining* an individual’s eligibility to register. If that were correct, § 10101 could be circumvented by allowing individuals to register but conditioning counting of their ballots on compliance with any sort of immaterial post-registration paperwork requirements. Section 10101(a)(2)(B) would be useless in that case. Still, if § 10101(a)(2)(B) applies only when determining someone’s eligibility to vote, it applies here. The declaration requires a voter to swear, under penalty of criminal conviction, that they are qualified to vote in the election. [25 P.S. §§ 3146.4,](#)



3150.14(b); *see also id.* § 3553 (making it a misdemeanor for anyone to sign an envelope declaration knowing any matter to be false). That obligation relates to determining a voter’s eligibility.

Fifth, while the RNC believes an individual is denied the right to vote only if excluded from registration rolls and unable to vote in *any* election, RNC Br. at 7, 9, § 10101(a)(2)(B) in fact forbids denying the right to vote only for errors that are “not material in determining whether such individual is qualified under State law to vote in *such* election.” The use of “such” corroborates that the statute applies to errors that would be disqualifying even for only the election in which a ballot was submitted. *See Migliori*, 36 F.3d at 163.

At bottom, “the text of § 10101(a)(2)(B) isn’t limited to ... voter registration.” *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021). And § 10101’s text repeatedly communicates that it protects against cancelling a qualified individual’s ballot for the sort of immaterial paperwork errors at issue here.

3. Nothing about Congress’s purpose in enacting § 10101 warrants interpreting the statute based on something other than its text. *Contra* RNC Br. at 9. Congress undoubtedly passed § 10101 “to counteract state and local government tactics of using, among other things, burdensome registration requirements to disenfranchise African–Americans.” *NAACP*, 522 F.3d at 1173. Some states historically made trivial demands for information that “served no purpose other than

as a means of inducing voter-generated errors that could be used to justify rejecting applicants.” *Id.* But “Congress in combating specific evils might choose a broader remedy.” *Id.* at 1175. Section 10101(a)(2)(B) responds to the history of disenfranchising voters by banning demands for needless information. Its text is not limited to registration and does not mention race. As Congress likely understood, if the statute was limited to registration it could easily be circumvented through demands for arbitrary information imposed on voters after registration.

4. As it did in support of the motion to dismiss, the RNC lists a series of election regulations it insists would be in jeopardy if the Court applies § 10101(a)(2)(B) here based on the statute’s plain terms. [RNC Br. at 12-15](#); *see also* [RNC Br. in Supp of Mot. to Dismiss at 12-14](#). But as the Acting Secretary already explained, *see* [Opp’n to Mot. to Dismiss at 15-17](#), every example the RNC provides ignores some aspect of § 10101(a)(2)(B)’s text.

For example, Pennsylvania’s requirement that voters place their absentee or mail-in ballot in a secrecy envelope is not at risk because failing to use that envelope is not an “error or omission *on* any record or paper.” [52 U.S.C. § 10101\(a\)\(2\)\(B\)](#) (emphasis added). The same is true of individuals denied the right to vote because they appeared at the wrong polling place or missed a deadline.

Section § 10101(a)(2)(B) also does not protect people who make an error on their ballot. Unlike a voter who neglects to date their declaration, a voter who

overvotes has not made an error or omission on some paper or record “relating to any application, registration, or other act requisite to voting.” 52 U.S.C. § 10101(a)(2)(B). The voter has instead failed to identify her chosen candidate on the ballot itself and so has not successfully registered a vote for that particular contest. The remainder of their ballot is counted.

Finally, Pennsylvania’s rule that voters must sign the declaration on their return envelope is not at risk. The signature is material. The signed declaration affirms the “statement of the elector’s qualifications.” 25 P.S. §§ 3146.4, 3150.14(b). By omitting a signature, the person returning the ballot has not confirmed that they are a qualified voter, which is an omission that is material in determining if the person who completed the ballot is “qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

## **II. The Court Should Rule for Defendants if it Reaches Count II**

Because the Court should enter judgment in favor of plaintiffs on Count I, it need not resolve the Equal Protection claim raised in Count II. But if the Court does so, it should rule for defendants.

Pennsylvania has distinct rules that govern military-overseas voters who vote absentee. Under those rules, an absentee ballot may be counted if it is received by the county board of election by 5 p.m. on the seventh day after the election so long as the ballot was submitted by 11:59 p.m. on the day before Election Day. *Id.*

§§ 3509, 3511. Like domestic voters, military-overseas return a declaration with their ballot, although their declaration is prescribed under 25 Pa.C.S. § 3503. That declaration requires voters to swear that they have submitted their ballot on time, *see* 25 Pa.C.S. § 3503(c)(4)(i)(D), and the voter’s confirmation creates a presumption of timeliness that not even a late postmark overcomes, *id.* § 3511(b).

Military-overseas voters also benefit from a rule that forbids treating any document completed under the Uniform Military and Overseas Voters Act as invalid because of a mistake or omission if “the mistake or omission does not prevent determining whether a covered voter is eligible to vote.” 25 Pa.C.S. § 3515(a)(1).

Some county boards do not set aside absentee ballots from military-overseas voters even if the declaration completed under 25 Pa.C.S. § 3503 was not properly dated. Plfs.’ SOF ¶¶ 104-110; DOS Response to Plfs.’ SOF ¶¶ 104-110. While plaintiffs allege that the disparate treatment of domestic and military-overseas voters violates the Fourteenth Amendment’s Equal Protection Clause, plaintiffs cannot prevail on this claim because domestic voters and military-overseas voters are “similarly situated” in “all relevant aspects.” *Startzell v. City of Phila.*, 533 F.3d 183, 203 (3d Cir. 2008) (articulating standard for Equal Protection Clause claim).

Section 3515 covers a class of voters who may be submitting a ballot during an extended deployment and who may have only one option for how they submit a ballot. It is reasonable to forgive irrelevant mistakes made by a class of voters who

had no alternative but to cast an absentee ballot and no choice but to assume the risk of failing to comply with absentee voting's particular requirements. What is more, § 3515 applies to a class of voters who, unlike domestic voters, may not be able to benefit from any opportunity a county board affords its voter to correct deficiencies made on the forms returned with their ballot. For that reason, too, it is reasonable to be lenient in the consequence of non-compliance with paperwork requirements that do not actually affect a voter's eligibility.

Plaintiffs cite *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), *see* Plfs.' Br. in Supp. of Summ. J. at 23-24 (ECF No. 275), but that decision does not aid them. There, the Sixth Circuit considered domestic and military voters to be similarly situated as to in-person voting. *Id.* at 435. The Sixth Circuit recognized, however, that more permissive voting rules for military members could be appropriate when the accommodation was based on "the difficulties that arise from being physically located outside the United States," *id.* at 434, because typically it is "absence from the country that makes [military members] distinct," *id.* at 435. The distinctions in Pennsylvania law accommodate voters who may be subject to prolonged absences from the country.

## CONCLUSION

For the reasons set forth above, the Court should grant plaintiffs' motion for summary judgment as to Count I and deny the RNC's cross motion as to that count.

If it reaches Count II, the Court should deny plaintiffs' motion for summary judgment on that claim and grant the RNC's cross-motion as to that count.

May 5, 2023

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