IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs*, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, *et al.*, *Defendants*.	Case No. 1:22-cv-00339-SPB

PLAINTIFFS' OPPOSITION TO
INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

The Materiality Provision of the Civil Rights Act prohibits denial of the right to vote based on immaterial mistakes on voting-related paperwork. It provides that the right to vote may not be denied based on 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 is a narrow one, but this case is a textbook violation. Plaintiffs allege the disenfranchisement of thousands of qualified, registered Pennsylvania voters because they made an inconsequential "error or omission" on a form printed on the back of the return envelope containing their timely mail ballots. The voters signed the return envelope form, but either omitted a handwritten date or inadvertently wrote a date that was later deemed "incorrect." This handwritten envelope date is not used to determine whether a voter is qualified to vote—a point that Intervenors concede, admitting that "Plaintiffs are entirely correct that compliance with the date requirement is not material to any individual's qualifications to vote." Mem. in Support of Mot. to Dismiss at 11, ECF No. 194 ("Mot."). Nevertheless, voters' ballots were set aside and never counted based on this inconsequential error or omission.

Plaintiffs have more than plausibly alleged a violation of the Materiality Provision. Indeed, the facts of this case fit the statute's text so snugly that a unanimous panel of the U.S. Court of Appeals for the Third Circuit held less than a

year ago that disenfranchising voters based on the envelope-date requirement would violate the law. *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (Mem) (2022).[1]

Intervenors' motion offers up various theories for why the statute does not mean what it says, all of them wrong and all of them rejected in *Migliori*, too. For example, Intervenors argue that refusing to count thousands of ballots does not deny the right to vote, but the statute plainly states that it protects the right to "cast[] a ballot, and hav[e] such ballot counted." 52 U.S.C. §§ 10101(a)(3)(A), 10101(e). They argue that the statute applies only to voter registration, but by its terms it extends to paperwork relating "to any application, registration, *or other act requisite to voting*." *Id.* § 10101(a)(2)(B). And their main argument—that the Materiality Provision simply cannot apply here without also applying to every other election rule under the sun—is entirely divorced from the text, which limits the statute's scope to the specific scenario where the right to vote is denied based on immaterial paperwork error (*i.e.*, this case).

Plaintiffs have sufficiently pleaded a Fourteenth Amendment violation as well. Pennsylvania law facially protects military and overseas voters from being disenfranchised based on the same type of trivial paperwork error that the individual plaintiffs made in this case. 25 Pa. C.S. § 3515(a). Plaintiffs accordingly allege that

[1] After the Supreme Court denied a stay and allowed the ballots at issue to be counted, *Migliori* became moot. The precedent was vacated as moot in a non-merits order that did not question the Third Circuit's analysis. It remains "persuasive" authority. *E.g.*, *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993).

Defendants' decision to disenfranchise thousands of domestic Pennsylvania voters on that basis resulted in differential treatment of two similarly situated classes of voters. Intervenors' main case in support of their motion actually *upheld* a similar disparate treatment challenge. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012). And their argument that Plaintiffs must offer up specific examples of disparate treatment is inapposite at the motion-to-dismiss stage.

Intervenors' motion should be denied.

BACKGROUND

A. Pennsylvania Expands Mail Ballot Voting[2]

Pennsylvania has long provided absentee-ballot options for voters who cannot appear at their polling place on election day because of certain excused reasons. *See* 25 P.S. §§ 3146.1-3146.9. In 2019, Pennsylvania enacted new mail voting provisions, allowing all registered, eligible voters to vote by mail. Act of Oct 31, 2019, P.L. 552, No. 77, § 8. The Pennsylvania Supreme Court subsequently affirmed the validity of this expansion to universal mail-in voting. *See McLinko v. Chapman*, 279 A.3d 539 (Pa. 2022), *cert denied*, No. 22-414, 2023 WL 124069 (Mem.) (Jan. 9, 2023).

A voter seeking to vote by mail must complete an application to enable county election boards to verify their identity and qualifications. In particular, the voter must provide their name, address, and proof of identity to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identity may include a

[2] The below facts are as set forth in the Amended Complaint at ¶¶ 29–35 (ECF No. 121) ("Am. Compl."). At the motion to dismiss stage, all well-pleaded facts must be accepted as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

Pennsylvania driver's license number or the last four digits of the voter's social security number. 25 P.S. § 2602(z.5)(3). This information gives the boards everything they need to verify that the voters are qualified to vote in Pennsylvania—namely, that they are at least eighteen years old, have been a U.S. citizen for at least one month, have resided in the election district for at least thirty days, and are not incarcerated on a felony conviction—before receiving a mail ballot. 25 Pa. C.S. § 1301.

After the application is submitted, county boards of elections confirm applicants' qualifications by verifying the provided proof of identity and comparing the information on the application with information contained in a voter's record. 25 P.S. §§ 3146.2b, 3150.12b, § 3146.8(g)(4); *see also* Am. Compl. ¶ 41, 80. A county board's determinations as to a voter's eligibility are conclusive by operation of law, absent a subsequent and successful challenge brought before the county board of elections. 25 P.S. §§ 3146.2b, 3150.12b, § 3146.8(g)(4). Once a county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by each county show which voters have requested mail ballots. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The voter delivers the ballot, in the requisite envelopes, to their county elections board. To be considered timely, a

county board of elections must receive a ballot by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, every county board of elections stamps every Return Envelope with the date of receipt to confirm its timeliness and enters this information in the Statewide Uniform Registry of Electors ("SURE") system, the voter registration system used to generate poll books. Am. Compl. ¶ 42 & n.2. Elections officials thus determine the timeliness of the voter's ballot by when it was received and stamped by the county board of elections, not based on the handwritten date. Am. Compl. ¶ 81 (citing 25 P.S. §§ 3146.6(c), 3150.16(c)).

Pennsylvania's expansion of mail-ballot voting has been embraced by Pennsylvania voters. In 2020, 2.7 million Pennsylvanians voted by absentee or mail ballot. Am. Compl. ¶ 44. And in the most recent 2022 general election, 1.4 million Pennsylvanians requested mail ballots. *Id.* ¶ 45.

B. Litigation Over the Envelope-Date Requirement[3]

This case involves the Pennsylvania Election Code's instruction that a voter "shall . . . fill out, date and sign the declaration printed on [the return] envelope." 25 P.S. §§ 3146.6(a), 3150.16(a). The issue here is whether an indisputably qualified, registered voter who (1) applies for and obtains a mail ballot, (2) fills it out, places it in the secrecy envelope and in the Return Envelope, and signs the declaration on the Return Envelope, and then (3) timely returns the envelope to their local board of elections by 8 p.m. on Election Day as confirmed by an official date stamp, may nevertheless have their vote invalidated because they did not add a superfluous

[3] The below facts are as set forth in the Amended Complaint at ¶¶ 36–56.

handwritten date next to their signature on the Return Envelope, or because the date they wrote on the envelope was later deemed "incorrect" by a county board of elections.

The envelope-dating provision has been the subject of repeated litigation and guidance from the Department of State, including a unanimous Third Circuit panel decision (later vacated as moot, *i.e.*, on non-merits grounds) holding that refusing to count ballots on that basis violates federal law, in particular the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B).

First, in 2020, the Supreme Court of Pennsylvania, in the context of a fast-moving post-election lawsuit, concluded 3-1-3 that otherwise valid mail ballots contained in signed but undated Return Envelopes would be counted in that election. *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020), *cert. denied*, *Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (Mem.) (2021). A majority of that Court suggested (albeit without deciding) that invalidating votes for failure to comply with the envelope-dating provision "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons," contrary to the Materiality Provision. *Id.* at 1074 n.5 (opinion announcing the judgment for three Justices); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting) (expressing similar concern).

Next, controversy over the envelope-dating requirement arose in the November 2021 municipal elections. In Lehigh County, 257 timely-received mail ballots were set aside based on mail ballot voters' inadvertent failure to handwrite a date on the

Return Envelope. *Migliori*, 36 F.4th at 157. Voters sued, and a unanimous Third Circuit panel ordered Lehigh County to count the votes. *See Migliori*, 36 F.4th at 162–64; *see also id.* 164–66 (Matey, J., concurring). The court concluded that because omitting the handwritten date on the Return Envelope was not "material in determining whether [a voter] is qualified to vote under Pennsylvania law," disenfranchising voters based on that omission violated the Materiality Provision. *Id.* at 162–63; *accord* 52 U.S.C. § 10101(a)(2)(B). Judge Matey concurred that the defendants had offered "no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code . . . is material as defined in § 10101(a)(2)(B)." *Migliori*, 36 F.4th at 165 (Matey, J., concurring).

An intervenor-defendant in that case—Court of Common Pleas candidate David Ritter—asked the U.S. Supreme Court to stay the Third Circuit's order, making many of the same arguments that the Intervenors rely on in the instant motion. For example, Ritter suggested the Third Circuit's interpretation of the Materiality Provision was too broad and that it implicated numerous non-paperwork election rules. *Compare* Ritter Stay Appl. at 11, 14, *Ritter v. Migliori*, No. 22-30 (U.S. May 27, 2022) ("*Ritter* Stay Appl."), *with* Mot. at 12–14. Ritter also argued the return-envelope-dating requirement was a "ballot validity" rule that went to whether a voter had correctly filled out their ballot, rather than external paperwork falling within the Materiality Provision's ambit. *Compare Ritter* Stay Appl. 12–14, *with* Mot. 9–11.

The Supreme Court denied the stay, with three justices dissenting, thus allowing the Third Circuit's decision requiring Lehigh County to count the 257 mail

ballots to go into effect. *See Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Mem). The 2021 election was then certified with those ballots counted, which the parties agreed mooted the controversy. The Supreme Court later granted Ritter's request to vacate the Third Circuit's decision as moot, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), in a short-form order that did not question the correctness of the Third Circuit's decision, *see Ritter v. Migliori*, 143 S. Ct. 297 (Mem) (2022).

Issues around the envelope date also arose in the 2022 primary election. In particular, the Commonwealth Court of Pennsylvania twice held that such mail ballots must be counted as a matter of both state and federal law in suits arising out of the 2022 primary. *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12–*29 (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). Those courts also concluded that "the failure of an elector to handwrite a date on the declaration on the return envelope does not relate to the timeliness of the ballot or the qualification of the elector." *Berks Cnty.*, 2022 WL 4100998 at *28.

Consistent with those decisions, the Secretary of the Commonwealth advised counties in the months leading up to the 2022 general election to count otherwise valid and timely-received mail ballots even where voters omitted a handwritten date, or wrote a wrong date like a birthdate, on the Return Envelope. Am. Compl. ¶ 59.

Most recently, on October 16, 2022, less than a week after the *Migliori* vacatur, and with voting in the 2022 general election already underway, a group of petitioners

led by Intervenors brought a King's Bench petition in the Supreme Court of Pennsylvania, seeking to invalidate mail ballots with no handwritten date on the Return Envelope or with an "incorrect" handwritten date on the Return Envelope in the upcoming election. On November 1, 2022, the Court, which now and at the time had only six justices, issued an order directing that such mail ballots should be segregated and not counted, but indicating that it was now "evenly divided" on whether the federal Materiality Provision prohibited disenfranchising voters on that basis. Am. Compl., Ex. I (ECF No. 121-9).[4] On November 5, 2022, the Court issued a supplemental order stating that "incorrectly dated outer envelopes" include "(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022 through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022 through November 8, 2022." Am. Compl., Ex. K (ECF No. 121-11).

C. The 2022 General Election

In the 2022 general election, which involved elections for the U.S. Senate, U.S. House of Representatives, and Pennsylvania House and Senate, the Defendant county boards of elections segregated thousands of timely-received mail-in ballots cast by registered and eligible Pennsylvania voters based on missing or incorrect dates on their outer return envelopes. *E.g.*, Am. Compl. ¶ 66.

[4] The Pennsylvania Supreme Court thus deadlocked on the question whether disenfranchising Pennsylvania voters based on the envelope-date rule violates federal law. Accordingly, Intervenors are necessarily wrong to suggest that a ruling in Plaintiffs favor in this case could somehow "create a split of authority with the Pennsylvania Supreme Court on the date requirement's validity," Mot. at 2, 10.

Plaintiffs—both individual voters and nonpartisan organizations dedicated to promoting democracy and civic engagement—filed this lawsuit, alleging that invalidating qualified, eligible voters' ballots due to a trivial paperwork mistake with respect to the handwritten date violates the federal law Materiality Provision. Am. Compl. ¶¶ 75–82 (citing 52 U.S.C. § 10101(a)(2)(B)). Plaintiffs also alleged that disenfranchising voters on this basis violated the Equal Protection Clause, because it requires treating domestic mail-ballot voters differently from similarly-situated military and overseas voters, since Pennsylvania law mandates counting the ballots of military and overseas voters notwithstanding immaterial paperwork errors. *Id.* ¶¶ 83–88 (citing 25 Pa. C.S. § 3515(a)). Various Republican Party entities intervened in this lawsuit and filed the instant motion to dismiss.

ARGUMENT

I. PLAINTIFFS HAVE PLEADED A VIOLATION OF THE MATERIALITY PROVISION

A. The Materiality Provision Applies Here.

The Materiality Provision prohibits denying "the right of any individual to vote in any election" based on 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). In plain terms, it applies where a state actor denies a person's right to vote based on a minor error or omission on voting-related paperwork, where that error is unrelated to ascertaining a voter's eligibility. *Id.*; *see also, e.g.*, *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d

1153, 1175 (11th Cir. 2008); H.R. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491 ("state registration officials" must "disregard minor errors or omissions if they are not material in determining whether an individual is qualified to vote"). The statute prevents states from "requiring unnecessary information" on voting-related paperwork in order to have their votes counted, *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003), and prohibits "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." *E.g.*, *League of Women Voters of Ark. v. Thurston*, No. 20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021).

Congress codified the Materiality Provision as part of the 1964 Civil Rights Act, in response to the practice of Black voters' registrations being rejected for spelling errors, typos, or other "trivial reasons" in filling out the requisite forms. H. Rep. No. 88-914 at 2491; *see also Schwier*, 340 F.3d at 1294. But while the law's immediate aim involved addressing disenfranchisement in the Jim Crow South, Congress crafted the statute in race-neutral terms, to provide a broader prophylactic against unfair disenfranchisement based on trivial paperwork mistakes, the better to protect the fundamental right to vote for all. *See Browning*, 522 F.3d 1153, 1173 (explaining that, "in combating specific evils," Congress may nevertheless "choose a broader remedy").

The statute applies here as a matter of plain text. As alleged, in this case thousands of Pennsylvanians were denied their right to vote:

- based on an "error" or "omission" (namely, leaving off or incorrectly inputting the handwritten date on the mail ballot Return Envelope form);
- on a "record or paper" that is related to an "act requisite to voting" (namely, the form declaration printed on the outer Return Envelope, which the counties required voters to complete in order to have their ballots canvassed and counted);
- that is immaterial to whether the voter "is qualified under State law to vote in [the] election" or for that matter on whether the mail ballot was timely received (namely, because the handwritten date on the envelope has no bearing at all on whether a voter is qualified to vote or has voted timely).

52 U.S.C. § 10101(a)(2)(B).

Courts have repeatedly held that denying the right to vote for failure to complete some extraneous or duplicative paperwork requirement violates the Materiality Provision, *including in the mail ballot context*. For example, in *Martin v. Crittenden*, a district court held that plaintiffs were likely to show that rejecting their mail ballots, based on the omission of their year of birth on the outer return envelope, violated the Materiality Provision. 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018). *See also Sixth Dist. of African Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. Dec. 9, 2021) (denying motion to dismiss in challenge to state law requiring correct date of birth on absentee ballots). Similarly, in *League of Women Voters of Arkansas v. Thurston*, a district court denied a motion to dismiss where voters challenged under the Materiality Provision a state law requiring absentee voters to submit duplicative proofs of name, address, date of birth, and registration status when applying for ballots, and then again when casting them. 2021 WL 5312640, at *4. Courts have applied the same rule to in-person voting: In *Ford v. Tennessee Senate*, a district court held that voters' ballots could not be set

aside because voters had not met an unnecessary "technical requirement" to sign *both* a ballot application form and a poll book, because doing so would violate the Materiality Provision. No. 06 Civ. 2031, 2006 WL 8435145, at *6, *11 (W.D. Tenn. Feb. 1, 2006). And of course, in *Migliori*, the Third Circuit unanimously held that disenfranchising voters based on the precise envelope-date rule at issue here violated the Materiality Provision, rejecting many of the same legal arguments now offered by the Intervenors. 36 F.4th at 162–66.

Nothing has changed since *Migliori*. It remains the case that the handwritten date on the Return Envelope form has no bearing whatsoever on "whether [a mail ballot voter] is qualified under State law to vote in [the] election." 52 U.S.C. § 10101(a)(2)(B); *see Migliori*, 36 F.4th at 163–64. Pennsylvania law establishes the only "qualifications" to be entitled to vote, namely age, citizenship status, residence in the election district, and felony incarceration. *See* Pa. Const. art. VII, § 1; 25 Pa. C.S. § 1301. The envelope-dating requirement bears no relationship to any of these, as Intervenors in fact concede, admitting that the envelope date "is not material to any individual's qualifications." *E.g.*, Mot. at 12. It also remains the case that the handwritten date has nothing to do with whether a ballot was timely, because timeliness is determined by when the board of elections received the mail ballot and date stamps it. *See* Am. Compl. ¶¶ 2, 81; *Migliori*, 36 F.4th at 164 ("Upon receipt,

the [Board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless."). Intervenors do not contest that point either.[5]

As a matter of plain text and common sense, denying the right to vote because of a paperwork error that has no possible bearing on a voter's qualifications or the timeliness of their ballot is unlawful under the Materiality Provision. *See Martin*, 347 F. Supp. 3d at 1309 (granting relief and explaining that "the qualifications of the absentee voters" were "not at issue because [county] elections officials have already confirmed such voters' eligibility through the absentee ballot application process").

B. Intervenors' Contrary Arguments All Fail

In contrast to the straightforward reading set forth above, Intervenors ask the Court to adopt a novel interpretation of the Materiality Provision that would contravene the statute's plain text and overarching purpose, breaking with a

[5] While they do not advance any of them as grounds for dismissal, Intervenors do parrot the various potential purposes for the envelope-dating rule identified in Justice Dougherty's non-controlling opinion in the 2020 *In re Canvass* case in the Pennsylvania Supreme Court. *See* Mot. at 5-6 (citing 241 A.3d at 1090). In multiple cycles of litigation, none of those rationales has panned out. For example, because a ballot's timeliness under Pennsylvania law is determined by when it was received and stamped by the county board of elections, 25 P.S. §§ 3146.6(c), 3150.16(c), "back-dat[ing]" the envelope (Mot. at 6) has no conceivable effect on whether a ballot is considered timely. *Accord Migliori*, 36 F.4th at 164 ("Upon receipt, the [Board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless."). Nor does the envelope date "ensur[e] the elector completed the ballot within the proper time frame," Mot. at 6, because under state law, the proper time frame is "any time" between when a voter receives the ballot and 8 p.m. on Election Day, 25 P.S. §§ 3146.6(a), 3150.16(a). And Intervenors' reference to a single supposed "fraudulent ballot" in Lancaster County, in which a daughter forged her deceased mother's signature on an absentee ballot envelope, has no bearing on envelope-dating issue. Mot. at 6 and Ex. A (ECF No. 194-1). Votes cast by persons who die before Election Day *do not count*, 25 P.S. § 3146.8(d), so the mother's ballot would never have been counted, regardless of the envelope date.

unanimous Third Circuit panel decision from just last year. Intervenors' arguments all lack merit, and their motion should be denied.

a. Pennsylvania voters were denied the right to vote.

Intervenors first claim (Mot. at 7–9) that refusing to count thousands of mail ballots cast by registered Pennsylvania voters somehow does not amount to a denial of the right to vote within the meaning of the Materiality Provision. That argument is precluded by the statute's text, which specifically (and capaciously) defines voting as "all action necessary to make a vote 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), 10101(e). The statute "by definition includes not only the registration and eligibility to vote, but also the right to have that vote counted." *Ford*, 2006 WL 8435145, at *11. Refusing to count a person's vote is a denial of the right to vote for purposes of the Materiality Provision.

Intervenors do not really contest the point. Instead, Intervenors wrongly suggest that, if invalidating ballots based on the envelope-date rule is unlawful, then all manner of "rules for casting a ballot" must therefore be implicated as well. Mot. at 8-9 (quoting *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting) and *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022)); *see also* Mot. at 12–14 (similar).[6]

[6] *Vote.Org* was a motions-panel decision on a temporary stay application. Intervenors cite a footnote from that case for the proposition that "[i]t cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under" the Materiality Provision. *Vote.org*, 39 F.4th at 305 n.6. The quoted text is literally correct: The statute indeed does *not* apply to "any requirement that may prohibit an individual from voting if the

That argument willfully ignores the Materiality Provision's narrow scope: There must be disenfranchisement based on some "immaterial error or omission" on some "record or paper" that is made "requisite to voting" for the statute to apply. 52 U.S.C. § 10101(a)(2)(B). In other words, only denials of the right to vote *based on immaterial errors on voting-related paperwork* come within the Materiality Provision's ambit. See *supra* at 10-14. Denials for other reasons just do not.

The Materiality Provision accordingly has no application to the election rules at issue in the hodge-podge of cases Intervenors cite, none of which involve immaterial paperwork errors—rules like party registration requirements, or absentee ballot deadlines, or the availability of "fusion voting," or in-precinct voting requirements, or mail-ballot-collection practices.[7] The statute simply does not apply to rules concerning when or where or how to vote at all, or to numerous other rules concerning the manner of voting itself, by mail or otherwise. Contrary to Intervenors' suggestion, it would not apply to a requirement that a mail ballot be placed in a secrecy envelope (Mot. at 13), because that is not "an error or omission on any record or paper," 52 U.S.C. § 10101(a)(2)(B). It would not apply to overvoting a ballot (Mot. at 13), because that error is not on a paper that is ancillary to the voting process, but

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individual fails to comply." Rather, by its terms, it applies only to immaterial errors on voting-related paperwork. See *supra* at 10-14.

[7] *See* Mot. at 8 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 754, *reh'g denied*, 411 U.S. 959 (1973) (party registration deadline); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (fusion voting); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (in-precinct voting requirement and mail ballot collection rules); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (Mem.) (2020) (absentee ballot deadlines)).

on *the ballot itself*. And it would not apply to the failure to sign the voter declaration on the mail ballot Return Envelope (Mot. 12) because the voter's signature (or the lack thereof) on the envelope *is* material to determining whether they are qualified to vote. *See, e.g., Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).[8]

The Materiality Provision *does* apply here, because this case involves exactly what the narrow terms of the statute forbid, namely denying the right to vote based on an immaterial paperwork error on a form made requisite to having one's vote counted. *See, e.g., Migliori*, 36 F. 4th at 162–66; *Berks Cnty.*, 2022 WL 4100998, at *12–*29; *see also Thurston*, 2021 WL 5312640, at *4; *Martin*, 347 F. Supp. 3d at 1308–09; *Ford*, 2006 WL 8435145, at *11.

b. The statute is not limited only to voter registration and qualification rules.

Intervenors next argue (Mot. at 9–11) that the Materiality Provision only "regulates requirements and practices related to qualifications and registration to vote." *E.g.*, Mot. at 9. Again, the statutory text permits no such limitation.

The Materiality Provision prohibits denial of the right to vote based on immaterial errors or omissions "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).[9] Limiting the provision's scope to records or papers relating to "registration,"

[8] Because the statute's actual scope is far more limited than Intervenors suggest, and does not in fact threaten to invalidate "numerous state election rules" or upend the federal-state balance, Mot. at 14 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), Intervenors' one-sentence federalism argument is of no moment.

[9] Moreover, and consistent with that, the term "vote" includes "all action necessary to make a vote effective including, but not limited to, registration or other action

which is just one of the categories that is expressly listed in the statute, would render the other listed categories (including the broad term "or other act requisite to voting") a dead letter. *See Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) ("[C]ourts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous."); *accord Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008). Courts have rejected Intervenors' argument on these straightforward textual grounds alone. *See Migliori*, 36 F.4th at 163 n.56 (concluding as a matter of "plain meaning" that "we cannot find that Congress intended to limit this statute to either instances of racial discrimination or registration"); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021) ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration.").

Meanwhile, although the statutory text does mention voter "qualifications," it does not do so in any way that supports Intervenors' proposed limiting construction.[10] Intervenors suggest that the statute only applies when the erroneous or omitted information is "used to determine an individual's qualifications to vote" (Mot. at 10)—

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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(a)(3)(A), (e). See *supra* at 15.

[10] Intervenors point (Mot. at 10) to the other provisions of Section 10101(a)(2) containing varied uses of the term "qualification," but none of those support their proposed limiting construction of the Materiality Provision, either. For example, it is true that Section 10101(a)(2)(C) prohibits the use of literacy tests "as a qualification for voting in any election." 52 U.S.C. § 10101(a)(2)(C). They do not even attempt to suggest that this usage limits the federal prohibition on literacy tests, or explain how it relates to the very different language of the Materiality Prohibition.

i.e., when the information *is material* to that determination. That is exactly backwards: the statute provides that if the erroneous or omitted information at issue "is *not* material to determining a voter's qualifications," it *cannot* be a basis for disenfranchisement. Intervenors similarly do not help themselves with the statement (Mot. at 10) that "the date on the absentee or mail-in ballot declaration is not used to determine an individual's *qualifications* to vote, but rather the *validity* of a ballot." That is simply another way of saying that envelope-date paperwork errors are being used to *invalidate* voters' ballots, based on a paperwork rule that has nothing to do with their *qualifications*, *i.e.*, precisely what the Materiality Provision forbids.

Unable to find support in the text, Intervenors assert that the statute is limited to voter registration or qualification because "Congress's purpose in enacting the materiality statute was to 'forbid[] the practice of *disqualifying voters* for their failure to provide information irrelevant to their eligibility to vote,'" Mot. at 9–10 (quoting *Schwier*, 340 F.3d at 1294). But while it may have been responding to the practice of rejecting Black voters' registration forms for immaterial errors, Congress used broader language in crafting the Materiality Provision as a prophylactic rule that protects "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). See *supra* at 11.[11] Post-hoc pronouncements about Congress's historical purpose cannot be used to limit the language that Congress actually chose

[11] *Cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

to deploy: "[W]hen the meaning of the statute's terms is plain, our job is at an end. The 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.*, 140 S. Ct. 1731, 1749 (2020).

Because the statute by its plain terms is not limited to voter registration or qualification, it does not matter that the "mandatory application of the date requirement" does not result "in [their] being removed from, or prevented from joining, the list of registered voters." Mot. at 10–11. Removal from the voter rolls is not required. Refusing to count a person's vote because of an immaterial paperwork error on some voting-related paperwork violates the Materiality Provision's plain terms.

c. The Return Envelope is a record or paper within the meaning of the statute.

Intervenors also wrongly contend (Mot. at 11) that the Return Envelope is not a "record or paper relating to any application, registration, or other act requisite to voting," 52 U.S.C. § 10101(a)(2)(B). They argue that "casting a ballot" constitutes the act of voting itself, and not an "act requisite to voting." Similar assertions appear elsewhere in their brief, as when Intervenors claim that the ballots at issue here were not "filled out correctly" (Mot. at 7-8), or were "invalidat[ed]" as "noncompliant" (Mot. at 10). These arguments conflate the ballot itself with the form on the Return Envelope.

In this case, voters were disenfranchised because of an error in filling out *the form on the mail ballot Return Envelope*. Their ballots are still in the secrecy

envelopes, and have not even been opened. That difference between the form envelope and the ballot itself matters under state law, which calls a ballot a "ballot," and calls an envelope an "envelope." 25 P.S. §§ 3146.6(a), § 3150.16(a). It also matters under the Materiality Provision, which does *not* apply to the marking of the ballot itself, but *does* apply to errors or omissions on "record[s] or paper[s] relating to" an "act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Here, voters are made to complete the paperwork on the Return Envelope as a pre-requisite act to having their votes counted. The act of completing the form is thereby made requisite to voting. The Materiality Provision applies.[12]

[12] In a footnote, Intervenors also suggest that Plaintiffs do not have a "right to sue" under either the Materiality Provision or 42 U.S.C. § 1983. Mot. at 7 n.2. This Court need not consider the argument at all. *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 (3d Cir. 1997); *Schmalz v. Sovereign Bancorp, Inc.*, 868 F. Supp. 2d 438, 457 (E.D. Pa. 2012). If it does, the Materiality Provision is presumptively enforceable via 42 U.S.C. § 1983 because it contains quintessential rights-creating language—it guarantees "the right of any individual to vote in any election," 52 U.S.C. § 10101(a)(2)(B)—and Intervenors do not and cannot rebut that presumption. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *see also, e.g.*, *Migliori*, 36 F.4th at 162-164 (holding Materiality Provision is privately enforceable); *Schwier*, 340 F.3d at 1297 (Materiality Provision "may be enforced by a private right of action under § 1983"). Even under the more stringent standard for a standalone private right of action, *see Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), Congress's intent to create a private remedy for violations of the Materiality Provision is clear. For example, Section 10101 refers expressly to suits by a "party aggrieved" (*i.e.*, a disenfranchised voter) and abolishes administrative exhaustion requirements that only apply in the context of private lawsuits. *See* 52 U.S.C. § 10101(d).

II. PLAINTIFFS HAVE PLEADED A FOURTEENTH AMENDMENT VIOLATION.

Intervenors' motion should also be denied with respect to Plaintiffs' second cause of action, which alleges differential treatment between domestic and overseas mail voters.

A complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In determining whether a claim is plausible, a judge "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). As the Rule 12 stage, a plaintiff need only raise a reasonable expectation " 'that discovery will reveal evidence of' the necessary element." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556).

Plaintiffs' complaint sufficiently alleges unconstitutional disparate treatment. Under Defendants' interpretation of the challenged envelope-dating rule, the Pennsylvania Election Code would invalidate voters' ballots that have no date or a purportedly-incorrect date on their return envelopes. Am. Compl. ¶ 86 (citing 25 P.S. §§ 3146.6(a), 3150.16(a)). But at the same time, state law allows military and overseas voters to commit such errors, stating that a "voter's mistake or omission in the completion of a document shall *not* invalidate their ballot as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote." *Id.* (citing 25 Pa. C.S. § 3515(a)). The facial difference in treatment (Am. Compl. ¶ 87) raises the requisite reasonable expectation "that discovery will reveal evidence of" specific instances where the challenged envelope-dating requirement created

differential treatment between domestic voters and military or overseas voters. *Phillips*, 515 F.3d at 232 (quoting *Twombly*, 550 U.S. at 556).

Intervenors complain that the amended complaint "offered no example" showing that 25 Pa. C.S. § 3515 is actually applied in the way it is written. Mot. at 16. But "to expect the Plaintiff to identify" particular examples of enforcement "at the pleading stage without benefit of discovery, is unduly harsh." *Carter v. City of Phila.,* 181 F.3d 339, 357–58 (3d Cir. 1999); *see also, e.g.*, *Fought v. City of Wilkes-Barre*, 466 F. Supp. 3d 477, 500 (M.D. Pa. 2020) (finding § 1983 claim for failure to adequately train police officers did not require showing of specific training to survive motion for dismissal, because plaintiff cannot be expected to know "the specific training the City should have offered" without discovery). Rule 12(b)(6) does not require specific evidence. Indeed, "that is exactly what discovery is *for*—to discover and marshal *evidence* regarding the claims at issue." *Dong-A Ilbo v. Lim*, No. 08-2399, 2009 WL 10685313, at *1 n.1 (E.D. Pa. Aug. 24, 2009) (emphasis in original).

Intervenors' next argument—that military and overseas voters are not similarly situated to domestic voters—overlooks the conclusion of the very case they cite. Mot. at 16–17 (repeatedly citing *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012)). In *Husted*, the Sixth Circuit found plaintiffs *could* establish an equal protection violation based on differential treatment of in-state and overseas voters. 697 F.3d at 435; *see also Obama for Am. v. Husted*, No. 12-cv-636, 2014 WL 2611316, at *4 (S.D. Ohio June 11, 2014) (on remand, granting summary judgment to plaintiffs who "demonstrated that § 3509.03 is unconstitutional to the extent it treats UOCAVA

voters more favorably than non-UOCAVA voters with regard to in-person early voting"). As the circuit court in *Husted* explained, in at least some contexts "there is no relevant distinction between the two groups" of voters, and "there is no reason to provide [domestic] voters with fewer opportunities to vote than military voters." 697 F.3d at 435. Here too, there is "no relevant distinction" between the two groups of voters with respect to the dating requirement, and so they are similarly situated in this context. Am. Compl. ¶¶ 86–88.

Intervenors' final argument (Mot. at 18-19), that treating similarly situated voters differently would survive rational basis review, fails twice. For one thing, more than a rational basis is required when the franchise is at stake. "The United States Supreme Court has reiterated time and again the particular importance of treating voters equally," and its precedents support the "principle that voters cannot be restricted or treated in different ways without substantial justification from the state." *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 905 (S.D. Ohio), *aff'd*, 697 F.3d 423 (6th Cir. 2012).[13] Intervenors do not even try to argue any substantial justification exists.

For another, even applying rational-basis scrutiny, nothing about military and overseas voters' location abroad could justify invalidating the mail ballots of

[13] *See also United States v. Williams*, 124 F.3d 411, 422 (3d Cir. 1997) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny. . . . For equal protection purposes, "fundamental rights" include such constitutional rights as . . . the right to vote.") (citations and quotation marks omitted). Courts have also analogized to *Anderson-Burdick* sliding-scale scrutiny in analyzing claims of disparate treatment of voters. *See, e.g.*, *Husted*, 697 F.3d at 429; *Donatelli v. Mitchell*, 2 F.3d 508, 513–14 (3d Cir. 1993).

otherwise-qualified domestic voters based on a trivial paperwork error while counting the mail ballots of military and overseas voters who make immaterial mistakes. Even if "there is a compelling reason to provide more opportunities for military voters to cast their ballots, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well." *Husted*, 697 F.3d at 434. Plaintiffs have alleged that Defendants have *no* legitimate reason to treat military and overseas voters differently from domestic voters in this context. Am. Compl. ¶ 87. That is sufficient to defeat Intervenors' motion to dismiss.[14]

CONCLUSION

This Court should deny Intervenors' motion to dismiss.

[14] To the extent Intervenors contend that some factual reason exists to support the difference, that is an issue to be uncovered and resolved through discovery, not at the motion to dismiss stage.

Dated: February 3, 2023

Respectfully submitted,

/s/ Ari J. Savitzky

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, Plaintiffs served this opposition to Intervenors' motion to dismiss on all parties in this matter.

Dated: February 3, 2023

Respectfully submitted,

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