IN THE 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*.	Case No. 1:22-cv-00339-SPB

PLAINTIFFS' OMNIBUS OPPOSITION TO INTERVENOR-DEFENDANTS', LANCASTER COUNTY BOARD OF ELECTIONS', AND BERKS COUNTY BOARD OF ELECTIONS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Thousands of Pennsylvanians were disenfranchised in the 2022 general election because they made an irrelevant mistake on a form printed on the back of the mail ballot envelope. The federal Materiality Provision prohibits refusing to count voters' votes because of such meaningless errors on voting-related paperwork. 52 U.S.C. § 10101(a)(2)(B). The undisputed facts reveal a clear violation here, which is why Plaintiffs are entitled to summary judgment. The cross-motions filed by Intervenors and two of the county Defendants should be denied.

No record evidence supports the speculation that a handwritten date might "ensure[] the elector completed the ballot within the proper time frame," or prevent the counting of "potentially fraudulent back-dated votes." Intervenor-Defs.' Mem. in Support of MSJ at 3, ECF No. 271 ("GOP Br.") (citation omitted). In fact, the counties conceded in discovery that the proper time to complete a mail ballot is "any time" between the voter's receiving it and 8 p.m. on Election Day, and that it is *impossible* for a mail ballot to be improperly counted due to a "backdated" signature on the return envelope form. SMF ¶¶ 10, 55.[1] The counties conceded that the handwritten date is not used to determine if a ballot is timely received. SMF ¶¶ 11–12, 53–54. The counties conceded that the handwritten envelope date has no bearing on whether the votes of people who die before Election Day are counted (they aren't). SMF ¶¶ 61–64. They acknowledged that they excluded ballots even when the envelope dates were obvious voter misprints like transposed digits and birthdays. SMF ¶¶ 67, 68, 70, 74,

[1] Citations to "SMF" refer to Plaintiffs' Local Rule 56(B)(1) Statement submitted in support of their Motion for Summary Judgment, ECF No. 283.

75, 77. They acknowledged that they sometimes *counted* ballots where the handwritten date was *wrong*, such as dates from before mail ballots were even available, or dates like September 31 *that literally do not exist*. SMF ¶¶ 26, 39, 91–93, 78–79. The Materiality Provision does not allow thousands to be disenfranchised on this arbitrary basis. The moving Defendants' arguments to the contrary all fail.

The moving counties' justiciability arguments lack merit. On standing, the undisputed facts show that Plaintiff organizations diverted resources specifically to mitigate voter disenfranchisement in Lancaster and Berks Counties. And on mootness, the undisputed facts (including the counties' own testimony) show that voters can obtain concrete relief even though the 2022 election has been certified.

The moving Defendants are also wrong to assert that Plaintiffs have no private right of action to contest mass disenfranchisement. Plaintiffs sued under 42 U.S.C. § 1983 to enforce the rights secured by the Materiality Provision. Under *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), a federal statute that confers an individual right is presumptively enforceable via Section 1983. The Materiality Provision guarantees "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). That crystal-clear guarantee of federal rights ends the matter—and if more were required, additional statutory text, context, and legislative history all confirm that Congress intended for the Materiality Provision to be privately enforced.

Intervenors also rehash various debunked theories for why the Materiality Provision does not mean what it says. They argue that refusing to count thousands of ballots does not deny anyone the right to vote, but the statutory text contradicts

them by protecting 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 Materiality Provision applies only to voter registration or qualification, but again the text extends further, to errors or omissions on paperwork "relating to any application, registration, *or other act requisite to voting*." *Id.* § 10101(a)(2)(B) (emphasis added). Completing the form on the return envelope is clearly an "act requisite to voting," separate from marking the ballot, as evidenced by the fact that the counties disenfranchised voters without ever even opening their ballots. The moving Defendants say that applying the Materiality Provision here would threaten sundry unrelated election rules, but in reality, the statute is limited to the scenario where the right to vote is denied due to an *immaterial paperwork error on required, voting-related paperwork*. That is this case.

Intervenors' arguments with respect to the Equal Protection claim fare no better. State law treats in-state and overseas mail voters differently with respect to providing a handwritten date on the relevant declaration form. It is undisputed that at least some counties accepted overseas mail voters' ballots without a handwritten date, even while rejecting in-state voters' ballots for the same issue. That disparate treatment is unjustified. The cross-motions should be denied.

ARGUMENT[2]

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. Plaintiffs Can Sue Berks and Lancaster Counties

On the undisputed facts in the record, Plaintiffs have demonstrated standing

[2] The undisputed facts are set forth in Plaintiffs' summary judgment brief, ECF No. 275 ("Pls. SMJ Br."), SMF, and Appendix ("APP_"), ECF Nos. 277–82.

to seek relief from the Berks and Lancaster County Boards of Elections, which defeats the moving counties' first argument (Lancaster Cnty. Mem. in Support of MSJ at 3–10, ECF No. 267 ("Lancaster Br.")). An organization has standing to sue where the defendant's actions "perceptibly impaired" the organization's ability to provide its primary services or carry out its mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 308–14 (3d Cir. 2014) (McKee, J., writing for the majority in relevant part).[3] In particular, an organization suffers a cognizable harm when it has "redirected its efforts and diverted its resources to address the" defendants' conduct, but otherwise "would have spent its time, money, and resources furthering its primary aims." *Online Merchs. Guild v. Hassell*, No. 21-CV-369, 2021 WL 2184762, at *4 (M.D. Pa. May 28, 2021); *see also Blunt*, 767 F.3d at 313; *Disability Rts. Pa. v. Pa. Dep't of Hum. Servs.*, No. 19-CV-737, 2020 WL 1491186, at *5–6 (M.D. Pa. Mar. 27, 2020) (question is "whether the organization had diverted resources it might use elsewhere").

Here, no party disputes that the organizational plaintiffs reassigned staff, members, and/or volunteers from their core, intended election-related efforts—engaging and turning out new voters, and educating prospective voters about the issues at stake—towards responding to Defendants' imposition of the envelope-dating requirement, including by making thousands of calls and texts to affected voters, attending board meetings to advocate for cure opportunities, and even stationing volunteers at the polls to warn voters about potential disenfranchisement. *Id.*; SMF

[3] For purposes of their motion for summary judgment, Plaintiff organizations do not rely on injuries to their members to establish standing. *See* Lancaster Br. 6–8.

¶¶ 27–32; *see, e.g.*, APP_1068, 1084-1088, 1108-09, 1114, 1126, 1133. Lancaster and Berks County claim that they did not cause this diversion of resources. Lancaster Br. 3, 8. But the undisputed facts are to the contrary.

With respect to Berks, the Pennsylvania State Conference of the NAACP (the "State Conference") specifically diverted resources in response to the Berks Board's imposition of the envelope-dating requirement to disenfranchise voters. *See* SMF ¶ 27; APP_1068-1074. In the runup to the November 2022 election, the State Conference's Reading branch created social media posts about the Berks Board's conduct, sharing the Board's statements about the envelope-dating requirement, posting reminders to Berks County voters to write the date on the return envelope form, and providing information about where and how Berks County voters could cure any envelope-dating defect. *Id.* at 1067-1068. Resources devoted to these efforts would otherwise have gone toward the State Conference's intended mission. *Id.*

With respect to Lancaster County, the League of Women Voters of Pennsylvania (the "League") specifically diverted resources in response to the Lancaster Board's enforcement of the envelope-dating requirement.[4] *See* SMF ¶ 28; APP_1084-1085, 1095, 1097. The League's members, staff, and volunteers spent time and resources contacting the Lancaster Board, attending Board meetings, urging the Board to notify voters whose ballots had been set aside and to allow voters the chance to cure, and then alerting Lancaster County voters directly after the Board refused

[4] The League also diverted resources in response to the Berks Board's imposition of the envelope-dating requirement. APP_1086.

to do so. *Id.* That time and those resources would otherwise have been spent toward the League's intended voter engagement and election protection efforts. APP_1087.

And Plaintiffs have already begun diverting resources to address the harm that the envelope-date requirement will cause in the 2023 election cycle. For example, the League has already developed a webinar addressing how to vote a mail ballot in advance of the 2023 municipal primary, expending resources on these and related efforts "instead of having [them] available for its other voter engagement and community initiatives." APP_1087–1088. *See also*, *e.g.*, SMF ¶¶ 28, 30; APP_1114–1115. Plaintiffs' future harms are anything but "speculative," Lancaster Br. 4. Rather, Plaintiffs' diversion of resources to stop the inevitable next tranche of mass disenfranchisement is "the predictable effect of Government action," which is cognizable injury. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019).

B. The Individual Plaintiffs' Claims Are Justiciable.

The moving counties argue that the individual voter plaintiffs do not have standing as against Lancaster or Berks County (Lancaster Br. 4–6), but Plaintiffs have never argued otherwise. Rather, each individual plaintiff has standing to seek nominal damages and injunctive relief as against their own county board of elections, which set aside and refused to count their vote in the November 2022 election due to an incorrect or missing envelope date. SMF ¶¶ 22–26.[5]

Nor are the individual voters' claims moot due to the certification of the 2022 election (Lancaster Br. 10–11). Certification has no effect on the Voter Plaintiffs'

[5] Because organizational plaintiffs have standing to sue Lancaster and Berks Counties, *supra* 4–6, it does not matter that the individual voters reside elsewhere.

request for nominal damages, which redress is in itself sufficient to support a case or controversy "where a plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021). And injunctive relief also remains available. The Materiality Provision protects the right to have one's "ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. §10101(e). Even though it will not change the result of the election, Plaintiff voters are entitled to have their improperly excluded mail ballots counted and reflected in the public totals. Am. Compl. at 37–38, ECF No. 121. It is undisputed that county boards maintain records of the total number of votes received by each candidate in past elections, *see* APP_846 (Berks Dep.); APP_930-931 (Westmoreland Dep.); APP_1183 (Greenburg Report), and that they can update those records if ordered to do so by a court. APP_1183-1184 (Greenburg Report); APP_931-932 (Westmoreland Dep.). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). As long as plaintiffs' ballots remain uncounted, their claims are not moot.

II. PLAINTIFFS HAVE A PRIVATE RIGHT OF ACTION

The Third Circuit has forcefully rejected moving Defendants' argument (GOP Br. 4–5; Lancaster Br. 12–14) that Plaintiffs have no private right of action to challenge the mass disenfranchisement of Pennsylvania voters based on the envelope-date rule. *Migliori v. Cohen*, 36 F.4th 153, 159–162 (3d Cir.), *vacated as moot*, 143 S. Ct. 297 (Mem.) (2022).[6] The same analysis applies here.

[6] *Migliori* was vacated as moot but remains "persuasive" authority. *E.g.*, *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993).

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983. Am. Compl. 3, 5, 33. To show that a federal law may be enforced via Section 1983, a plaintiff must demonstrate that Congress "intended to create a federal right." *Gonzaga*, 536 U.S. at 283–84. Where a statute secures a federal right, "the right is presumptively enforceable by § 1983." *Id.* at 284; *accord Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

That presumption is rarely overcome. *E.g.*, *Migliori*, 36 F.4th at 159–160 (citing *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)). To do so, a defendant must show either that Congress expressly foreclosed Section 1983 relief in the text of the statute, or that it implicitly did so by creating a private remedy scheme that is incompatible with Section 1983 relief. *E.g.*, *Gonzaga*, 536 U.S. at 284–85 n.4. The mere fact that a statute also provides for a parallel public remedy (*i.e.*, government enforcement) is not sufficient. Instead, as the Supreme Court has repeatedly observed, it is "the existence of a more restrictive *private* remedy" in the statute that is "the dividing line" between those cases where a Section 1983 action will lie, and those where the presumption of Section 1983 enforceability is rebutted. *Fitzgerald*, 555 U.S. at 256 (emphasis added) (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005)). Whether Congress provided for a more restrictive *private* remedy defines the "dividing line" because such restrictions (such as special filing or exhaustion requirements, or limits on damages) could be "circumvent[ed]" if broader Section 1983 relief was available. *Id.* at 254 (citation omitted).[7]

[7] That was the case in *Rancho Palos Verdes*, on which Intervenors (GOP Br. 5)

Here, the *Gonzaga* framework yields a clear answer: Plaintiffs have a right of action under Section 1983. None of the moving Defendants attempts to contest that the Materiality Provision secures federal rights, nor could they, given the statute's crystal-clear language guaranteeing "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). *See Migliori*, 36 F.4th at 159; *Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003).[8] Such language "imparts an individual entitlement with an 'unmistakable focus on the benefitted class.'" *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 526 (3d Cir. 2009) (quoting *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004)). Indeed, the Materiality Provision's mandatory language (*i.e.*, "No person … shall deny"), and clear focus on individual rights (*i.e.*, "the right of any individual to vote") is strikingly similar to the language in other statutes that has been deemed privately enforceable. *See, e.g.*, *Gonzaga*, 536 U.S. at 284 & n.3 (guarantees in Title VI of the Civil Rights Act and Title IX that "*[n]o person … shall* be subject to discrimination" in federally-supported

misplace their reliance. There, unlike here, Congress expressly provided for a narrow set of *private* remedies in the Telecommunications Act—including injunctive relief but not damages as with Section 1983. 544 U.S. at 122–24. The Court explained that when Congress expressly provides for a narrower *private* remedy, that may indicate "that Congress did not intend to leave open a more expansive remedy under §1983." *Id.* at 121. In contrast, a Section 1983 remedy is available where (as here) the statute does not set forth an incompatible private remedy scheme. *Id.* at 121–22.

[8] The Sixth Circuit reached a contrary conclusion in a case decided prior to *Gonzaga*, *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), where court held in a single unadorned sentence that the Materiality Provision "is enforceable by the Attorney General, not by private citizens." *Id.* at 756. Another Sixth Circuit panel opinion, on which Intervenors now rely (GOP Br. 5) reaffirmed that conclusion in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017). But it did so solely because the earlier *McKay* decision "binds this panel." *Id.* Intervenors also rely (at 5) on a footnote from a non-merits stay ruling in *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.5 (5th Cir. 2022), noting only that the court there "reserve[ed] the question." Neither of those cases includes anything close to the analysis in *Migliori* or *Schweier*.

programs indicated an individual right); *Schwier*, 340 F.3d at 1296 (Materiality Provision is "clearly analogous to the right-creating language cited … in *Gonzaga*").

Nor can the moving Defendants rebut the presumption that the rights guaranteed by the Materiality Provision are enforceable in a Section 1983 action. The moving Defendants attempt to do so based solely on the fact that the Materiality Provision can also be enforced by the U.S. Attorney General, as set forth in 52 U.S.C. § 10101(c). *E.g.*, GOP Br. at 5. But the mere existence of parallel public remedies cannot defeat the strong presumption of Section 1983 enforceability. *See, e.g.*, *Fitzgerald*, 555 U.S. at 258–59. The moving Defendants cannot point to any statutory text expressly precluding private suits, because there is none. And they cannot argue that the Materiality Provision contains some narrower set of private remedies that might be inconsistent with Section 1983 remedies, because it does not. *See id*. at 256. *Compare Rancho Palos Verdes*, 544 U.S. at 121. To the contrary, Section 10101 "specifically contemplates an aggrieved party (*i.e.*, private plaintiff) bringing this type of claim in court," *Migliori*, 36 F.4th at 160, and specifically precludes exhaustion requirements that might otherwise constrain private enforcement under Section 1983, *see* 52 U.S.C. § 10101(d) (eliminating such requirements in "proceedings instituted pursuant to this section" by a "party aggrieved").

The moving Defendants rely (GOP Br. 5; Lancaster Br. 13) on *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), but *Sandoval* does not apply here. *Sandoval* involves the availability of an implied right of action to sue directly under a federal statute like Section 10101. Whether a statutory violation may be enforced *via Section*

1983, however, "is a different inquiry." *Gonzaga*, 536 U.S. at 283. "Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Id.* at 284. The district court decision in *Migliori*, on which the moving counties oddly place most of their reliance (Lancaster Br. 12–14), was *reversed* precisely for ignoring the difference between a right of action under Section 1983, and an implied right of action under *Sandoval*. *Migliori*, 36 F.4th at 159, 161.

Nor would it matter if *Sandoval* did somehow apply, because the statutory text and the legislative history demonstrate that Congress contemplated private enforcement of the Materiality Provision's guarantees. *See* 532 U.S. at 286.

As a matter of text, Section 10101 necessarily contemplates private suits. As noted, the statute authorizes federal jurisdiction over "proceedings instituted pursuant to this section … by *a party aggrieved*"— *i.e.*, by a disenfranchised voter— and also abrogates judicially-imposed exhaustion requirements that had previously barred private suits under the predecessor statute to Section 10101, but would have no application to Attorney General actions. *See* 52 U.S.C. § 10101(d) (emphasis added); *see also Migliori*, 36 F.4th at 160; *Schwier*, 340 F.3d at 1296.[9]

Section 10101's structure and history confirm the point. Section 10101

[9] The statute also provides for certain special remedies (like federal monitoring) "[i]n any proceeding instituted pursuant to subsection (c)," 52 U.S.C. § 10101(e), or in a "proceeding instituted by the United States," 52 U.S.C. § 10101(g). If Congress had intended that Attorney General civil actions pursuant to subsection 10101(c) be the exclusive means of enforcing the statute, there would have been no need to specify who was doing the enforcing; it could have referred simply to proceedings "pursuant to this section," which is the language it used in subsection 10101(d) in referring to actions by a "party aggrieved." *See Russello v. United States*, 464 U.S. 16, 23 (1983).

(formerly 42 U.S.C. § 1971) was originally part of the Reconstruction-Era civil rights laws passed by Congress in the 1870s, which included a provision virtually identical to current Section 10101(a)(1). *See* Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-42 (1870) (the "Second Enforcement Act"). From the first, those original civil rights laws were enforced by private parties under Section 1983. *See Schwier*, 340 F.3d at 1295.[10]

In 1957, present-day Section 10101 took shape. Congress codified the original, privately-enforceable voting rights statute from the Second Enforcement Act as what is now subsection 10101(a), added new substantive voting rights protections, added new enforcement authority for the U.S. Attorney General, and confirmed broad federal jurisdiction over actions "pursuant to this section" by a "party aggrieved," *see* 52 U.S.C. § 10101(c), (d); Pub. L. No. 85-315, § 131, 71 Stat. 637 (1957). In 1964, Congress added the Materiality Provision to subsection 10101(a), alongside the original voting rights guarantee from the Second Enforcement Act. Pub. L. No. 88-352, § 101, 78 Stat. 241 (1964). Congress thus constructed Section 10101 with a longstanding, privately-enforced voting rights guarantee as its keystone, adding additional substantive voting rights guarantees (including the Materiality Provision) that were similarly meant to be privately enforceable. *E.g.*, *Russello*, 464 U.S. at 23 (statute's "evolution" and structure inform its meaning).

The legislative history makes this understanding explicit. In adding the Attorney General right-of-action in the 1957 Civil Rights Act, Congress emphasized

[10] Such private actions included, for example, *Smith v. Allwright*, 321 U.S. 649 (1944), in which the Supreme Court struck down white primary laws in a suit brought under the Enforcement Acts. *Id.* at 658; *see also, e.g.*, *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947).

that it was "supplement[ing] existing law," under which the voting guarantees in Section 10101's predecessor statute were enforced through private suits. H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1976–77. The Attorney General, whose office drafted the 1957 Act, assured Congress that "private people will retain the right they have now to sue in their own name" to enforce the rights contained in Section 10101 despite the addition of federal government enforcement. *See Civil Rights Act of 1957: Hearings on S. 83*, 85th Cong. at 67–73 (1957).

Under Section 1983 or otherwise, Plaintiffs may challenge disenfranchisement based on an immaterial paperwork error.

III. INTERVENORS' STATUTORY ARGUMENTS (STILL) LACK MERIT

On the merits, Intervenors repeat (GOP Br. 5–17) arguments from their motion to dismiss that have already been debunked. *See* Pls.' MTD Opp. at 14–21, ECF No. 228. Intervenors cannot evade the Materiality Provision's plain meaning.

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). The statute applies in specific circumstances: where (1) a person's right to vote is denied (2) based on a minor error or omission on voting-related paperwork, and (3) if that error is unrelated to determining a voter's eligibility. *Id.*; *see* Pl.'s SMJ Br. at 14–17. Here, it is undisputed that thousands of ballots were not counted:

- based on an "error" or "omission" (namely, leaving off or incorrectly handwriting the date on a form printed on the mail ballot return envelope);
- on a "record or paper relat[ed]" to an "act requisite to voting" (namely, the form declaration printed on the mail ballot return envelope, which Defendants required voters to complete to have their ballot counted);
- that is immaterial to whether the voter "is qualified under State law to vote in [the] election" (namely, because the handwritten date 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).

Intervenors' contrary assertions all lack merit.

A. Pennsylvania Voters Were Denied the Right to Vote.

Intervenors first claim (GOP Br. 5–8) that refusing to count thousands of mail ballots cast by registered Pennsylvania voters does not amount to a denial of the right to vote within the meaning of the Materiality Provision. In essence, their argument is that voters' "right" to vote is unharmed even if election officials refuse to count their ballot. That argument is precluded by the statute's text, which specifically 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 Materiality Provision "by definition includes not only the registration and eligibility to vote, but also the right to have that vote counted." *E.*g., *Ford v. Tenn. Senate*, No. 06-2031, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006); *accord Migliori*, 36 F.4th at 162. "[D]eclining to count" a person's vote (GOP Br. 7) *is* denying the right to vote under the statute.

Intervenors do not engage with the text or dispute that it encompasses the

refusal to count a ballot. Instead, they ask the Court to ignore it, because otherwise numerous other "rules for casting a ballot" might be "imperiled." GOP Br. 6–7 (quoting *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting)) & 15–16.[11] This straw-man argument ignores the Materiality Provision's actual scope: The statute is not a general prohibition against disenfranchisement; it prohibits disenfranchisement based on an immaterial "error or omission" on a required, voting-related "record or paper." 52 U.S.C. § 10101(a)(2)(B). Denials of the right to vote *due to immaterial errors on voting-related paperwork* come within that ambit. Denials of the right to vote for other reasons do not.

Applying the Materiality Provision as written to the circumstances presented here accordingly will not render states unable to write and enforce basic election rules, as Intervenors surmise.[12] None of the rules from the inapposite cases they cite—*e.g.*, party registration requirements, or absentee ballot deadlines, or the availability of "fusion voting," or in-precinct voting requirements, or mail-ballot-

[11] To the same negligible effect, Intervenors cite (GOP Br. 8) a footnote from the.*org* motions panel decision, 39 F.4th at 305 n.6. The text Intervenors quote is literally correct: The statute does *not* apply to "any requirement that may prohibit an individual from voting if the individual fails to comply." *Id.* Rather, by its terms, it applies only to *immaterial errors on voting-related paperwork*.

[12] Nor would enforcement of the Materiality Provision in this case impede election officials' ability to prevent fraud. Intervenors repeatedly reference an incident from the May 2022 primary election, in which a Lancaster County woman submitted her recently deceased mother's mail ballot. APP_01042. Intervenors are wrong that the handwritten envelope date was "the only evidence on the face of the ballot declaration" pointing to fraud. GOP Br. 4. The county received the voter's ballot two weeks after her death, and several days after it had removed her from the voter rolls. APP_01042. And when law enforcement contacted the daughter, she admitted to signing her mother's name after her death. *Id*. More to the point, Christa Miller, the official who reported the incident to local police, testified that the county knew Mihaliak's vote was invalid upon receipt, and that it would not have counted regardless of the date written on the envelope. APP_00888-892 (Miller Dep.).

collection practices—involves immaterial paperwork errors.[13] Other examples Intervenors cite also fall outside the plain language of the statute. The Materiality Provision would not apply to a requirement that a mail ballot be placed in a secrecy envelope (GOP Br. 7, 14), because that is not "an error or omission *on* any record or paper," 52 U.S.C. § 10101(a)(2)(B) (emphasis added). It would not apply to prohibitions on overvoting (GOP Br. 14–15), because that error is not on some "paper" that is made "requisite to voting," but rather on the ballot itself. And it would not apply to the failure to *sign* the declaration on the mail ballot return envelope (GOP Br. 7, 13–14, 15) because unlike the handwritten date, the voter's signature—on a form affirming their qualifications—*is* material to determining that they are qualified to vote.[14] Nor does the statute prohibit merely asking voters for extra information on election-related paperwork (GOP Br. 15 (citing *Ball v. Chapman*, 289 A.3d 1, 39 (Pa. 2023) (Brobson, J., dissenting)) so long as they are not disenfranchised for an immaterial mistake.

Unlike the irrelevant examples cited by Intervenors, this case involves just what the statute forbids: refusing to count voters' votes based on an irrelevant paperwork error on a form made requisite to voting.

---

[13] *See* GOP Br. 7–8 (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); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (Mem.) (2020) (absentee ballot deadlines)).

[14] Because the statute does not in fact threaten to invalidate "numerous state election rules," its application in this case would not disturb (let alone upend) the federal-state balance, GOP Br. 15 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

B. The Statute Is Not Limited to Registration and Qualification.

Intervenors next argue (GOP Br. 8–11) that the Materiality Provision only "regulates requirements and practices related to qualifications and registration to vote." *E.g.*, GOP Br. 8. 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). Limiting the statute's scope to records or papers relating to "registration," which is just one of the categories listed, 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."); *accord Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008). Intervenors' argument fails on those textual grounds alone. *E.g.*, *Migliori*, 36 F.4th at 162 n.56.

Intervenors' proposed limiting construction reads the statute backwards. Intervenors suggest that the Materiality Provision only applies when the erroneous or omitted information is "used to determine an individual's qualifications to vote"—*i.e.*, when the omitted or erroneous information *is* material to a "qualification determination." GOP Br. 9. But the statute says the opposite: It prohibits refusing to count a person's vote when the erroneous or omitted information "is *not* material" to determining a voter's qualifications. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).[15]

[15] Intervenors point (GOP Br. 9–10) to other provisions of Section 10101(a)(2)

Intervenors similarly do not help themselves with the statement 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." GOP Br. 9; *see also id.* at 12–13. That is just another way of saying that paperwork errors on the handwritten envelope date are used to *invalidate* voters' ballots, even though they have nothing to do with voters' *qualifications*, *i.e.*, precisely what the Materiality Provision forbids.

Nor does it matter that refusing to count a voter's ballot because of a handwritten date on a form declaration does not result in their "being stripped of the right to vote or removed from, or prevented from joining, the list of registered voters." GOP Br. 9. The Materiality Provision applies to "all action necessary to make a vote effective," including any "action required by State law prerequisite to voting, casting a ballot, and having such ballot counted" in the election. 52 U.S.C. §§ 10101(a)(3)(A), 10101(e). Wholesale removal from the voter rolls is not required.

Unable to find support in the text, Intervenors assert that the statute must be limited to voter registration or qualification because "Congress's purpose in enacting the materiality statute was to 'forbid the practice of *disqualifying voters* [stet] for their failure to provide information irrelevant to their eligibility [stet] to vote,'" GOP Br. 10 (misquoting *Schwier*, 340 F.3d at 1294). But while Congress was responding

containing varied uses of the term "qualification," but none of those support their proposed limiting construction. 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). But Intervenors do not suggest that this usage limits the federal prohibition on literacy tests to voter qualifications, thereby allowing literacy tests at the polls or on other pre-voting paperwork. Nor do they explain how those separate provisions limit the very different language of the Materiality Provision.

to the practice of rejecting Black voters' registration forms for immaterial errors, it 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).[16] That makes sense: a rule protecting voter registration but allowing registered voters to be denied an effective vote based on irrelevant paperwork errors would not have accomplished Congress' broader aims. H. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491.[17] And in any event, post-hoc arguments about historical purpose cannot limit the language that Congress actually deployed: "[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).

C. The Form on the Return Envelope Is a Record or Paper Made Requisite to Voting.

Intervenors also wrongly contend (GOP Br. 11–12) that the form declaration printed on the mail ballot 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).

[16] In addition to its power to regulate federal elections under the Elections Clause, U.S. Const. art. I, § 4, the Reconstruction Amendments authorize Congress to enact prophylactic legislation to protect the right to vote in particular, as the Supreme Court has repeatedly confirmed. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (noting the validity of Congress's "suspension of literacy tests and similar voting requirements" as well as "other measures protecting voting rights" and collecting cases); *see also, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003). Intervenors' suggestion (GOP Br. 10) that the statutory text should be ignored in order to avoid some vague "constitutional problem" misses the mark.

[17] That point was dramatically illustrated when county officials, attempting to defend their actions, testified that it would even be permissible to disenfranchise voters for failure to correctly write the make and model of their first car, or their exact age in days, on the mail ballot envelope. *E.g.*, APP_919b-c.

The argument unravels as soon as Intervenors express it. Intervenors state that "casting a ballot—which requires completing the declaration—constitutes the act of voting," and not an "act *requisite* to voting," GOP Br. 10 (citation omitted). But as Intervenors say, completing the form declaration is *required* for the ballot to be accepted and counted, rather than set aside. In other words, completing the form declaration is an "act requisite to voting." 52 U.S.C. § 10101(a)(2)(B).

Lest there be any doubt, thousands of Pennsylvanians were disenfranchised in November 2022 because of a paperwork error in filling out the form on the mail ballot return envelope, not because of any issue with how they filled out the ballot. Their ballots are still in the secrecy envelopes, and have not even been opened. The difference between the form declaration and the ballot itself is clear under state law, which calls a ballot a "ballot," and the declaration a "declaration." 25 P.S. §§ 3146.6(a), 3150.16(a). The Materiality Provision does not apply to the marking of the ballot itself, but does apply to "record[s] or paper[s]" whose completion are made "requisite to voting," like the form declaration here. 52 U.S.C. § 10101(a)(2)(B).

IV. THE UNEQUAL TREATMENT OF IN-STATE AND OVERSEAS VOTERS VIOLATES EQUAL PROTECTION

A. Pennsylvania Law Provides for Unequal Treatment.

Pennsylvania law apparently treats the handwritten envelope dates of in-state mail ballot voters differently from those of overseas mail ballot voters. For in-state mail ballot voters, state law requires invalidating voters' mail and absentee ballots that have no date or a purportedly-incorrect date on their return envelopes. *See Ball*, 289 A.3d at 23; 25 P.S. §§ 3146.6(a), 3150.16(a). But overseas voters may commit such

errors and still have their ballots counted. Specifically, the Uniform Military and Overseas Voters ("UMOVA") provides 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" "as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote." 25 Pa. C.S. § 3515(a).

Intervenors contend (GOP Br. 18–19) that Section 3515's "mistake" provision does not reach overseas mail ballot materials, because it "applies only to 'completion of a document under this chapter'—i.e., under UMOVA itself'—a category that they say includes only "special registration and application documents." GOP Br. 18. Similarly, Intervenors claim "UMOVA is completely silent" as to the date requirement. GOP Br. 19. That is all just wrong. The "chapter" in question covers not only the registration (§ 3505) and application (§§ 3506-3507) documents that military-overseas voters must complete, but also ballots (§§ 3509-3512), and even more specifically, the "standardized absentee-voting materials and their electronic equivalents, authentication materials and voting instructions to be used with the military-overseas ballot of a voter" (§ 3503(c)). Far from being "silent" on the matter, UMOVA expressly provides for a voter declaration to accompany the mail ballot, and states that "a form for the execution of the declaration, *including an indication of the date of execution of the declaration*" must be "a prominent part of all balloting materials for which the declaration is required." § 3503(c)(4)(iii). The declaration and date requirement are plainly addressed "under this chapter" of the Code.[18]

[18] Intervenors also conflate completion of the voter declaration with "the *act* of voting" itself, GOP Br. 19, which is wrong for the reasons already discussed. *Supra* 19–20.

B. The Undisputed Facts Show Unequal Treatment.

The factual record demonstrates actual unequal treatment of in-state and overseas voters. While there are slight variations, each county's mail ballot materials include an outer return envelope bearing a declaration that voters are instructed to sign and date. SMF ¶ 100; APP_966-973 (Marks Dep.); *see, e.g.*, APP_1290 (Berks mail ballot envelope). Each county's absentee ballot materials also include a voter declaration that voters are instructed to sign and date. SMF ¶ 101; APP_966-973 (Marks Dep.); APP_933-936 (Westmoreland Dep.). When military-overseas voters request that their county board of elections mail them a paper ballot, that declaration similarly appears on the outer return envelope. SMF ¶ 101; APP_933-936 (Westmoreland Dep.); *see, e.g.*, APP_1291 (Bucks military-overseas ballot envelope).

Counties provided differing instructions to military-overseas and in-state voters. For example, Berks County's instructions to in-state mail voters for the November 2022 election told the voters to "Sign and date the pre-addressed return envelope," and stated that "YOUR BALLOT WILL NOT COUNT IF IT IS NOT SIGNED AND DATED." SMF ¶ 102, APP_1170. By contrast, Berks County's instructions to military-overseas voters submitting absentee ballots in the same election told the voters to "Fill out the 'Absentee Elector's Declaration' on the back of this envelope with your name and address. Be sure to sign where indicated. Your ballot will not be counted without a signature," but did not indicate that the ballot would not be counted if the declaration on the return envelope lacked a handwritten date. SMF ¶ 103, APP_1169. Similarly, Westmoreland County did not instruct military-overseas voters that their ballots would not be counted for failure to date the

voter's declaration, but the County communicated to in-state voters that "YOUR BALLOT WILL NOT BE COUNTED UNLESS: You sign and date the voter's declaration in your own handwriting[.]" SMF ¶¶ 105-06; APP_1401; APP_1201.

The undisputed record evidence also indicates that at least some counties actually handled military-overseas ballots differently than in-state mail and absentee ballots. For example, at least three county boards of elections—Bucks, Philadelphia, and Tioga—counted timely-received military-overseas ballots in the November 2022 general election even if the voter failed to date their voter declaration or included a date that the county deemed to be incorrect. SMF ¶ 108; APP_118-119 (Bucks Interrog. Resp. reports counting 11 ballots with undated or misdated declarations); APP_535-536 (Philadelphia Interrog. Resp. reports counting 13 ballots with undated or misdated declarations); APP_632 (Tioga Interrog. Resp. reports counting 10 ballots with undated or misdated declarations). At least five additional county boards of elections did not segregate or set aside any timely-received military-overseas ballots in the November 2022 general election based on a missing or incorrect date on the voter declaration. SMF ¶ 110; APP_484, 499, 579, 673, 716 (Montgomery, Northampton, Potter, Washington, and Wyoming Interrogatory Responses).[19] And the Lehigh Board did not check the date on the voter declaration for timely-received military-overseas ballots. SMF ¶ 109; APP_405 (Lehigh Interrog. Resp.).

[19] Over half of the county boards of elections—37 in total—indicated that they did not receive any military-overseas ballots in the November 2022 general election that had a missing or incorrect date on the voter declaration, and so they did not have to determine whether to set aside or count such ballots. SMF ¶ 111.

C. The Unequal Treatment Is Not Justified.

Similarly situated voters must be subject to the same basic rules. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Differential treatment of in-state and military-overseas voters violates Equal Protection where "there is no relevant distinction between the two groups" of voters, and "no reason to provide [in-state] voters with fewer opportunities to vote than military voters." *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012). Intervenors cannot show that in-state and overseas voters are differently situated with respect to the date requirement, GOP Br. 22–24.

This case does not involve requirements related to *where* military-overseas voters vote (GOP Br. 22), or the deadlines surrounding *when* they can vote (GOP Br. 22-23), which plainly relate to the different circumstances that military-overseas and in-person voters face. Here there is "no relevant distinction" between the two groups of voters with respect to the envelope-date requirement, and nothing in the record justifies this disparate treatment of Pennsylvanians' voting rights.[20] 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, 905-06 (S.D. Ohio), *aff'd*, 697 F.3d 423 (6th Cir. 2012). None of the Defendants attempt to identify such *any* justification at all for this particular distinction, let alone a substantial one. And nothing about military-overseas voters' location abroad changes the fundamentally

[20] If anything, the voter's handwritten date is *more* important in the context of military-overseas ballots. Because in-state voters' ballots must be received by 8:00 P.M. on Election Day to be timely, the county board's time-stamp tells the board all it needs to know about that ballot's timeliness. SMF ¶¶ 11-12. In contrast, overseas voters' ballots may be timely received *after* Election Day if the voter sent the ballot prior to Election Day, making the handwritten date at least plausibly relevant to the timeliness of such ballots. *See* 25 Pa. C.S. §§ 3509, 3511.

irrelevant nature of the paperwork mistake at issue in this case.

D. The Appropriate Remedy Is Counting Voters' Votes.

Intervenors suggest (GOP Br. 24) that the unequal treatment of overseas and in-state mail voters should be remedied by disenfranchising overseas voters based on irrelevant paperwork mistakes, rather than counting all votes despite this inconsequential error. It is true that "a mandate of equal treatment … can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 740 (1984). "Ordinarily," however, "extension, rather than nullification, is the proper course." *Sessions v. Morales-Santana*, 582 U.S. 47, 74 (2017) (citation omitted).

So too here. Intervenors argue that the "general rule" from the Election Code should be applied to all, but they ignore the General Assembly's specific instruction that, in any conflict with the Election Code, "the provisions of *this chapter* [*i.e.*, UMOVA] shall prevail." 25 Pa. C.S. § 3519 (emphasis added). That legislative preference indicates that the benefits of UMOVA should be extended to all, rather than withdrawn from overseas voters. And Congress's expressed preference is also clear. With the UOCAVA, it sought to "end[] the widespread disenfranchisement of military voters stationed overseas," as Intervenors acknowledge, GOP Br. 22 (quoting *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). A remedy that ensures that no mail voters are excluded from participation due to a meaningless paperwork error best serves Congress's goal as well as the public interest.

CONCLUSION

Moving Defendants' motions for summary judgment should be denied.

Dated: May 5, 2023

Respectfully submitted,

/s/ Ari J. Savitzky

Witold J. Walczak (PA 62976)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222
Tel: (412) 681-7736
vwalczak@aclupa.org

Marian K. Schneider (PA 50337)
Stephen Loney (PA 202535)
Kate I. Steiker-Ginzberg (PA 332236)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org
sloney@aclupa.org

David Newmann (PA 82401)
Brittany C. Armour (PA 324455)
HOGAN LOVELLS US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
Tel: (267) 675-4610
david.newmann@hoganlovells.com
brittany.armour@hoganlovells.com

Elizabeth Femia
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
Tel: (212) 918-3813
lisa.femia@hoganlovells.com

Ari J. Savitzky
Megan C. Keenan
Luis Manuel Rico Román
Sophia Lin Lakin
Adriel I. Cepeda Derieux
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
asavitzky@aclu.org
mkeenan@aclu.org
lroman@aclu.org
slakin@aclu.org
acepedaderieux@aclu.org

Counsel for the Pennsylvania State Conference of the NAACP, League of Women Voters of Pennsylvania, Philadelphians Organized to Witness, Empower and Rebuild, Common Cause Pennsylvania, Black Political Empowerment Project, Make the Road Pennsylvania, Barry M. Seastead, Marlene G. Gutierrez, Aynne Margaret Pleban Polinski, Joel Bencan, and Laurence M. Smith

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, Plaintiffs served this opposition to Intervenors' motion to dismiss on all parties in this matter.

Dated: May 5, 2023

Respectfully submitted,

/s/ Ari J. Savitzky
Ari J. Savitzky

Counsel for the Plaintiffs