No. 21A772

In the Supreme Court of the United States

DAVID RITTER,

Applicant,

v.

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

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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

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INTRODUCTION

This Court has granted a lot of stays in a lot of election cases.[1] Those stays were warranted—sometimes based on *Purcell* alone, sometimes based on the underlying merits, and sometimes both. This case presents the same concerns that justified those stays: A federal court has invalidated a state election law based on a misguided view of its authority. And its decision changes the rules in the middle of disputed primaries and only months before the general election. Given the breadth of the Third Circuit's reasoning, election officials will be scrambling from now until November to figure out all the other regulations of mail-in voting that are "immaterial" because they do not implicate a voter's "age, citizenship, residency, or felony status." App.14a.

But the need for a stay here is even stronger than it was in the prior cases. On the equities, the Third Circuit did not just change the rules in the middle of the game; it changed the rules after the game had already been played. *Purcell*'s concerns with fairness and voter confidence are heightened in this post-election context. And the fault for this late timing lies mostly with the plaintiffs, who needlessly delayed bringing their follow-on suit. As for the merits, this case is not just another federal court usurping a state legislature's authority over elections. It would meet this Court's criteria for certiorari even outside the election context, as it implicates a 2-1 circuit split

[1] *E.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Clarno v. People Not Politicians Ore.*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *RNC v. DNC*, 140 S. Ct. 1205 (2020); *accord DNC v. Wis. State Leg.*, 141 S. Ct. 28 (2020) (denying application to vacate stay); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020); *Thompson v. Dewine*, 2020 WL 3456705 (U.S.).

and has spawned contradictory orders from the state and federal courts in this very election.

Lehigh County has been ordered both to count and to not count undated ballots. It risks contempt no matter what it does, hence its decision to take no position on Ritter's stay application. Indeed, the whole State is waiting for this Court's decision so they can figure out what the law in Pennsylvania even is right now. Oz-Amicus-Br. 2-7; *see Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, Pa. Dep't of State (May 24, 2022), bit.ly/3NLG8x0 (instructing counties to segregate undated ballots "in light of the conclusion of the Third Circuit" but warning that "a determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation").

The plaintiffs would need some pretty powerful arguments to justify leaving this chaos in place, but they offer none. Ritter obviously has appellate standing: He is a candidate challenging a decision that requires invalid ballots to be counted in the election that he's currently winning. *See Bush v. Gore*, 531 U.S. 98 (2000). Ritter did not disrupt the status quo: Cohen did by challenging Lehigh County's initial decision to set aside the undated ballots, the plaintiffs did by filing a late federal suit, and the Third Circuit did by enjoining the State's written election law. And nothing turns on whether election officials count ballots with the wrong date, as opposed to no date: The materiality statute simply doesn't apply to state laws that govern ballot validity.

The plaintiffs keep insisting that this Court should not concern itself with "257 votes in a single county election." Opp.19, 2, 17. (Never mind that they ostensibly

filed this lawsuit to vindicate just 5 votes in that same election.) Yet the integrity of every election matters. The Third Circuit's invalidation of Pennsylvania's written election law matters. And the Third Circuit's extension of the federal materiality statute to routine regulations of mail voting matters. Better to stay that decision now than wait until it affects the outcome of the current recounts, a U.S. Senate election in November, or the presidential election in 2024.

ARGUMENT

Ritter will limit this reply to three main points:

1. Ritter has appellate standing. Candidates' standing to stop the unlawful counting of additional votes has been clear since at least *Bush v. Gore*.

2. This Court can grant a stay based solely on the equities. The Third Circuit upset the status quo by enjoining Pennsylvania's written law, *Purcell* applies with more force in the post-election context, and the plaintiffs satisfy none of the possible exceptions to *Purcell*.

3. The questions presented in Ritter's petition will be certworthy and close. The plaintiffs concede that the private-right-of-action question has split the circuits 2-1. And the plaintiffs do not dispute that the Third Circuit's interpretation of the materiality statute has spawned directly contradictory orders against Lehigh County and has independent importance.

For all these reasons and the reasons in Ritter's opening motion, this Court should grant a stay pending certiorari.

I. Ritter has appellate standing.

The plaintiffs suggest that Ritter might lack appellate standing—or at least that his standing is uncertain enough to make this case a bad vehicle. Though their argument is underdeveloped, the plaintiffs appear to be making two points: first, Ritter cannot prove that counting the 257 undated ballots will cause him to lose to Cohen; and second, only Lehigh County has standing to challenge the Third Circuit's

decision. *See* Opp.17-19. If these arguments were valid, then this Court should have dismissed *Bush v. Gore* for lack of standing. They are invalid.

When courts change election laws, "it's hard to imagine anyone who has a more particularized injury than the candidate." *Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting). The Third Circuit's decision injures Ritter by threatening to erase his election victory; keeping him from being a judge; and negating the time, money, and sweat he spent on his campaign. *See id.* (collecting cases that these injuries give candidates standing); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 & n.4 (5th Cir. 2006) (citing "[v]oluminous" authority on the same point). These injuries are not "rank speculation." Opp.19. If this Court reverses the Third Circuit, then Lehigh County *will* certify Ritter as the winner. He is currently leading by 71 votes, and he cannot lose unless the 257 undated ballots are unlawfully added to the mix. *See* Opp.34 (admitting that, until the plaintiffs sued, Lehigh County was going to certify the election for Ritter).

Ritter does not need to prove with certainty that the undated ballots will swing the election for his opponent. This Court did not require Bush to prove that the court-ordered recounts would swing the election for Gore (and, apparently, they wouldn't have, *see Florida Recounts Would Have Favored Bush*, Wash. Post (Nov. 12, 2001)). This Court twice reached the merits of Bush's arguments, recognizing its "responsibility to resolve" that post-election controversy between "contending parties." *Bush v. Gore*, 531 U.S. at 111; *see also Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000).

Standing was a nonissue in *Bush* for good reasons. An inaccurate or unlawful "'vote tally'" is itself "'a concrete and particularized injury to candidates.'" *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) (quoting *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020)). As is the "'unfair advantage'" that Cohen will get from a post-election order forcing the county to add 257 invalid votes. *Mecinas v. Hobbs*, 30 F.4th 890, 897-98 (9th Cir. 2022) (collecting cases). Candidates have never been required to prove that the challenged decision "'has changed (or will imminently change) the actual outcome of a partisan election.'" *Id.* at 899. A "risk" of that harm is enough. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). And the risk here is high given Democrats' well-known advantage in mail-in voting. Ritter's Democratic opponent knows which voters mailed undated ballots—including their party registration—and has pushed hard for those votes to be counted. CA3 Dkt. at 33-2 at JA169 ¶25. Tellingly, when Lehigh County opened several of the disputed ballots, they broke 3-0 against Ritter. *Id.* at JA171 ¶50.

The plaintiffs' assertion that Ritter lacks standing because Lehigh County "is not seeking certiorari" is neither true nor dispositive. Opp.2. It's not true because, as the plaintiffs later admit, they have no idea whether Lehigh County will seek certiorari. *See* Opp.16 ("The Board has not indicated"). All Lehigh County has said is that it takes no position on Ritter's stay application; it still has several months to seek certiorari, and it sided with Ritter below. *See* CA3 Dkt. 50. True, the county's participation in this Court would make Ritter's standing irrelevant. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020). But

the converse is not true. Private individuals do not automatically "lack standing" to defend state laws. Opp.18. They can appeal "'in the place of' the government if they have "'a direct stake in the outcome'"—*i.e.*, if they can independently prove standing. *Hollingsworth v. Perry*, 570 U.S. 693, 712 (2013); *Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016). Ritter can independently prove standing here.

This case does not resemble *RNC v. Common Cause Rhode Island*, 141 S. Ct. 206 (2020). There, the Republican Party asked this Court to stay a consent decree before the 2020 election. Unlike that pre-election dispute brought by a political party, this post-election dispute is brought by an individual candidate whose vote tally will be directly affected by the Third Circuit's decision. And this case does not involve a consent decree that all state officials "support." *Id.* Lehigh County has defended Pennsylvania's dating requirement throughout this litigation. *See, e.g.*, CA3 Dkt. 50 at 12 (county agreeing that "the date requirement is sufficiently justified by important governmental interests as to not violate the Materiality Provision"). And the Pennsylvania courts upheld the dating requirement as a lawful enactment of the Pennsylvania legislature. *See Ritter v. Lehigh Cnty. Bd. of Elections*, 2022 WL 16577 (Pa. Cmmw. Ct. Jan. 3, 2022).

In fact, the only side with doubtful standing here is the plaintiffs'. As they stress, their alleged injury is the denial of their "right to vote"—a right that is "'individual and personal in nature.'" Opp.36 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). They lack standing to enforce the voting rights of others, and they lack standing to secure remedies that go beyond their individual injuries. *See Gill*, 138

S. Ct. at 1929, 1934. Yet the Third Circuit ordered Lehigh County to count not just the plaintiffs' five votes, but also the votes of 252 other Pennsylvanians who are not parties to this case. App.17a. If this Court stayed the Third Circuit's decision except as it applies to the individual plaintiffs, then their right to vote would be fully vindicated without jeopardizing Ritter's election. Cohen might object, but he lacks standing to do so for another reason: he never appealed the district court's decision. *See Diamond v. Charles*, 476 U.S. 54, 63-64 (1986). When it comes to standing, then, the plaintiffs are throwing stones in glass houses.

II. The equities alone warrant a stay.

The plaintiffs do not dispute that, under *Purcell*, this Court regularly issues stays in election cases based solely on the equities. They instead argue that *Purcell* doesn't apply because the Third Circuit's decision actually preserves the electoral status quo, Opp.16, and was issued post-election, Opp.33. If *Purcell* does apply, the plaintiffs say they overcome it because their claims are entirely clearcut, Opp.36, they caused no undue delay, Opp.34-35, and a stay will cause them irreparable harm, Opp.36-37. The plaintiffs are incorrect on each point.

A. The Third Circuit upset the status quo, not Ritter.

The plaintiffs claim, repeatedly and paradoxically, that the Third Circuit's decision actually vindicates the status quo. Though they filed this federal case, they claim that Ritter upset the status quo when he appealed the election board's decision to count the undated ballots to the Pennsylvania courts. The plaintiffs get things backward both legally and factually.

Legally speaking, the status quo is set by the Pennsylvania legislature, not Lehigh County. Under our system, "state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Wis. State Legislature*, 141 S. Ct. at 29 (Gorsuch, J., concurral). A federal court necessarily changes the electoral status quo when it "swoop[s] in and alter[s] carefully considered and democratically enacted state election rules." *Id.* at 31 (Kavanaugh, J., concurral).

Factually speaking, Ritter is not the one who picked this fight. As Lehigh County has explained, it initially determined that the undated ballots "would *not* be … counted … based on the Pennsylvania Election Code …, Pennsylvania case law, and guidance from the Pennsylvania Department of State." CA3 Dkt. 50 at 10 (emphasis added). It was Cohen who challenged that decision, not Ritter—hence why the proceedings before the election board were titled, "In re: Ballot Challenges of … Zachary Cohen Campaign." CA3 Dkt. 33-2 at JA194, JA228-35; *see also* CA3 Dkt. 50 at 10 (county explaining that "Cohen challenged the [initial] decision to set aside these mail-in ballots" and that "the Board held a hearing on Cohen's challenge"). Only after the Board accepted Cohen's challenge did Ritter have to appeal to the state courts. *See* CA3 Dkt. 50 at 10. He won that appeal, and the Pennsylvania Supreme Court denied review. So before the plaintiffs filed this suit, the status quo was a dating requirement that the Pennsylvania legislature had enacted and the Pennsylvania courts had upheld. The plaintiffs' follow-on federal suit, and the Third Circuit's agreement with it, are what changed the status quo.

B. *Purcell* applies post-election.

The plaintiffs fault Ritter for failing to "cite a case where *Purcell* supported the grant of a stay" in a post-election dispute, Opp.33, but Ritter cited several, Mot.22-24. As the Seventh Circuit explained after the 2020 election, "'the *Purcell* principle'" protects "federalism," limits the "improper exercise of the federal judicial power," and safeguards voter confidence. *Wis. Elections Comm'n*, 983 F.3d at 925. This "*same imperative* of timing and the exercise of judicial review applies with much *more force* on the back end of elections." *Id.* (emphases added). The plaintiffs notably cite no case where a court *declined* to apply *Purcell* in this context. While they are right that post-election stays are rare, that's because the lower courts understand that post-election injunctions are verboten. *See SW Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.").

The plaintiffs contend that, after everyone's already voted, federal injunctions no longer risk voter confusion, Opp.33; but that argument misses the point. The reason why *Purcell* is concerned with voter confusion is because confused voters lose confidence in the system. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Yet as Ritter explained and the plaintiffs never dispute, post-election injunctions do far more damage to voter confidence. They look more political, seem less fair, reward the worst form of gamesmanship, and give voters no opportunity to adjust. *See* Mot.23; Oz-Amicus-Br.6-7. Post-election injunctions also burden election administrators in the crucial period when they are trying to accurately count and finalize results. This case

alone has dragged out the 2021 election and left the people of Lehigh County without a judge for over five months.

And regardless, the consequences of the Third Circuit's decision are not strictly post-election. The plaintiffs do not dispute that it invalidates Pennsylvania's dating requirement for the general election too, where the mail-in voting process begins in "less than four months." Mot.23. Four months is likely not enough time to redesign Pennsylvania's envelopes, redraft guidance, reeducate voters, and retrain election administrators about the dating requirement. Worse, the Third Circuit's logic is so sweeping that it throws many other regulations of mail-in voting into doubt as well—uncertainty that will roil Pennsylvania's officials, parties, candidates, and voters for the foreseeable future. The mental gymnastics that the plaintiffs must perform to explain why voters still must *sign* their ballot declaration illustrates the point. *See* Opp.26.

C. The merits are not entirely clearcut in favor of the plaintiffs.

To overcome *Purcell*, the plaintiffs must "at least" show that the merits are "entirely clearcut" in their favor; but they fail right out of the gate. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). The plaintiffs claim that Pennsylvania's dating requirement easily violates the materiality statute because Pennsylvania counts wrong-dated ballots but not undated ballots. Opp.36. But that argument assumes that the plaintiffs have a private right of action—an issue they lost in the district court and that has split the federal circuits. And it assumes that the materiality statute covers ballot-validity laws in the first place—a question that divided the state and federal courts in this case. As the Pennsylvania courts observed, the notion that

the materiality statute governs "'the counting of ballots by individuals *already deemed qualified to vote*'" finds no support in "'the case law.'" *Ritter*, 2022 WL 16577, at *9. The plaintiffs were able to dig up only two district-court cases that tentatively endorse this reading. *See* Opp.27. Because the Third Circuit's decision breaks new grounds and splits with multiple courts, the merits cannot be entirely clearcut.

D. The plaintiffs unduly delayed.

Another reason that the plaintiffs cannot overcome *Purcell*—and perhaps the easiest reason for this Court to grant a stay—is that they "unduly delayed bringing the complaint to court." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). They stress that they filed their federal lawsuit "*two business days* … after Ritter's state-court litigation concluded." Opp.34. But the end of Ritter's state-court litigation is not the relevant starting point.

The plaintiffs could have challenged Pennsylvania's dating requirement in 2019, when it was enacted. Though the plaintiffs insist otherwise, Opp.35 n.15, that case would have been justiciable: The plaintiffs are voters who are directly regulated by the requirement and who don't think they should have to date their ballots. And the plaintiffs could have raised the same challenge under the materiality statute that they raised here. By filing their "facial challenge to [this] mail-in voting statutory provisio[n] more than one year after the enactment of Act 77" and only "days before the county boar[d] of election w[as] required to certify the election results," it is "beyond cavil that [the plaintiffs] failed to act with due diligence." *Kelly v. Commonwealth*, 240 A.3d 1255, 1256-57 (Pa. 2020), *cert. denied*, 141 S. Ct. 1449 (2021).

In all events, the plaintiffs certainly cannot justify waiting nearly three months after election day to bring their claims. The plaintiffs filled out their ballots and so would have known if they intentionally left the date blank. And Lehigh County emailed three of the plaintiffs before election day that their undated ballots were invalid. *See* CA3 Dkt. 33-2 at JA169, JA172, 174-75. That the other two were not emailed is irrelevant: They voluntarily declined to sign up for email alerts notifying them if their mail-in ballot was invalid. *See id.* at JA173, JA175. And according to the plaintiffs, they needed only one voter to bring this lawsuit and secure relief for all 257 voters who submitted undated ballots.

Even less persuasive is the plaintiffs' suggestion that they couldn't sue earlier because, until the state courts ordered it to set aside the undated ballots, Lehigh County was on their side. *See* Opp.34-35. As explained, Lehigh County was initially *not* on their side; Cohen challenged the county's decision to exclude the undated ballots in November 2021, and the plaintiffs could have sued in federal court then too. Even after the election board changed positions, the plaintiffs knew that Ritter was challenging their ballots in state court; yet they never intervened in those proceedings or filed their federal suit then either. At all times, moreover, the plaintiffs could have sued Lehigh County. Its agreement with the plaintiffs would not have defeated federal jurisdiction, *Pope v. United States*, 323 U.S. 1, 11 (1944), especially because Ritter would have intervened and opposed the plaintiffs (as he did here). And at all times, the plaintiffs could have sued the Secretary of the Commonwealth—the State's

chief election official who, at the time, defended the legality of the dating requirement. *See* CA3 Dkt. 50 at 32 (quoting guidance from the Secretary instructing counties that, under state supreme court precedent, "a voter's declaration envelope must be … dated for the ballot to count").

What the plaintiffs could not do is the one thing they did: Wait for nearly three months after election day, once the state contest litigation was over and certification was imminent. *See* Mot.24 (collecting cases). Their undue delay means that the equities weigh heavily against them here.

E. A stay will not irreparably harm the plaintiffs.

The plaintiffs do not even argue that "[they] would suffer irreparable harm" if the Third Circuit's decision is stayed. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). As predicted, they discuss their "right to vote"; "[i]f Ritter prevails," they say, then these "voters *will* assuredly be disenfranchised." Opp.36-37. But if Ritter prevails on the merits, then Pennsylvania's dating requirement is lawful; enforcing lawful regulations against voters who failed to follow them disenfranchises no one. *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973). Even crediting this theory of harm, any denial of the plaintiffs' right to vote would come from this Court's decision on the merits, not from its decision to grant a stay. A stay would delay the counting of their votes, but that harm is not irreparable. As Ritter explained, their right to vote would be fully vindicated by counting their ballots later, after a final decision in their favor. Mot.26. The plaintiffs offer no counterargument.

Instead of claiming irreparable harm to themselves, the plaintiffs claim irreparable harm to the public if "the November 2021 county court election is held open

indefinitely." Opp.36. But staying the Third Circuit's decision would not leave the seat open. A stay would return the parties to the status quo ante, where the state courts had ordered Lehigh County to set aside the undated ballots and the district court had dismissed the plaintiffs' federal suit. Lehigh County should certify the election for Ritter. If the plaintiffs continued this litigation, Ritter could serve until this Court either denies certiorari or rules against him on the merits. If the plaintiffs do not continue this litigation or Ritter prevails, he could serve out the rest of his 10-year term.

Even if a stay kept the seat open, the plaintiffs could hardly complain. They twice convinced the lower courts to enjoin Lehigh County from certifying the election—thus keeping the seat open—while they litigated their claims. *See* Mot.5-7. It is not suddenly "time for this controversy to end" because the plaintiffs have notched their first win. Opp.37. It is time for this controversy to end when this Court gets a chance to review the Third Circuit's momentous decision and to determine the *lawful* winner of the 2021 election for the Lehigh County Court of Common Pleas.

III. Certiorari is a reasonably probability, and reversal is a fair prospect.

Ritter's petition for certiorari will present two questions: whether federal plaintiffs have a private right of action to enforce the materiality statute, and whether the materiality statute applies to state laws that regulate the validity of mail-in ballots. Both questions are important, and the Third Circuit answered both incorrectly. But for purposes of this emergency stay application, the question is not whether this Court *will* grant certiorari and *will* reverse, but whether certiorari is reasonably probable and reversal is a fair prospect. *Hollingsworth v. Perry*, 558 U.S.

183, 190 (2010). Given that these two questions have divided the lower courts, the answer to that question is plainly yes.

A. Private plaintiffs lack a cause of action to enforce the materiality statute in federal court.

There is a reasonable probability that this Court will grant certiorari because the circuits are split on whether private plaintiffs can enforce the materiality statute. The plaintiffs concede the 2-1 split. *See* Opp.20 (acknowledging that "[t]he Sixth Circuit" has "reach[ed] a contrary conclusion" from the Third and Eleventh Circuits). Though the plaintiffs claim that the Sixth Circuit's decision predates this Court's decision in *Gonzaga*, they quickly admit that the Sixth Circuit has reaffirmed its precedent after *Gonzaga*. Opp.20. And though they insist that "there is no split in the circuits that have applied *Gonzaga*," Opp.20, that's just a fancy way of saying that they think the Sixth Circuit's side of the split is wrong. The plaintiffs' disagreement with one side of a circuit split does not eliminate the split or decrease the reasonable probability that four Justices will grant certiorari to resolve it. *See Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J., concurral) (voting to grant a stay because "the Circuits diverge" on the question presented).

Instead of contesting the probability of certiorari, the plaintiffs spend most of their firepower contesting the probability of reversal. But Ritter needs only a "fair prospect" of winning on the merits. *Hollingsworth*, 558 U.S. at 190. That standard is almost *per se* satisfied where, as here, Ritter won this issue in the district court and the issue has split the federal circuits. But even on a more granular level, Ritter's

arguments for why the plaintiffs have no private right of action are powerful and persuasive.

It does not matter that Ritter "conceded" that the materiality statute creates an individual right. *Cf.* Opp.15, 22; App.18a-19a & n.2. That the statute creates an individual right is only the first part of this Court's two-part test for recognizing private rights of action under §1983. The second part of the test—the question in dispute here—is "whether Congress meant the judicial remedy expressly authorized by [the materiality statute] to coexist with an alternative remedy available in a §1983 action." *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120-21 (2005). That Ritter does not dispute the first half of the test is neither unusual nor relevant. *See, e.g.*, *id.* (granting certiorari, and finding no cause of action under §1983, even though the petitioner "conceded below … that §332(c)(7) creates individually enforceable rights").

On the question presented, the plaintiffs are incorrect to assert that the only alternative remedies that can displace §1983 are *private* judicial remedies. Opp.20-21. While this Court has held that private judicial remedies can displace §1983, it has never held that public judicial remedies *cannot* displace §1983. This Court's prior cases have considered public *administrative* remedies, but not public *judicial* ones. *E.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *Blessing v. Freestone*, 520 U.S. 329 (1997). But the materiality statute creates a public judicial remedy for the Attorney General and provides unusually detailed specifications. *See* §10101(c)-

(g). Whether that kind of alternative remedy displaces §1983 will be a question of first impression for this Court, further illustrating the likelihood of certiorari here.

Nothing in law or logic prevents Congress from choosing a public judicial remedy over private lawsuits under §1983. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress … to determine … who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). One choice that Congress often makes is to "leave the enforcement of federal law to federal actors." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015). The question is simply what Congress did here. Because it "provid[ed] a judicial remedy" in the materiality statute, this Court should assume that "'Congress intended to preclude others.'" *Rancho Palos Verdes*, 544 U.S. at 127, 121 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). The notion that the specific controls the general is a bedrock principle of statutory interpretation. *See United States v. Bormes*, 568 U.S. 6, 12 (2012); *Hinck v. United States,* 550 U.S. 501, 506 (2007).[2]

Plaintiffs' counterpoints about the materiality statute do not move the needle. What the plaintiffs think Congress intended when it enacted the statute in 1964—an intent they claim to glean from the legislative history—is irrelevant. Opp.23. This Court cannot "dig into the legislative history" to overcome the legally enacted text, or

[2] This argument does not "confus[e]" the Court's implied-right-of-action cases with its §1983 cases. *Cf.* Opp. 21 n.7. This Court "reject[s] the notion that [its] implied right of action cases are separate and distinct from [its] §1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under §1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

apply a "more relaxed rule for statutes" that were enacted in a different era of statutory interpretation. *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1098 (D.C. Cir. 2017) (Kavanaugh, J.),

Nor can the plaintiffs' theory be saved by §10101(d). They quote this provision as referring to "proceedings instituted pursuant to this section … by a party aggrieved." Opp.22. But that is not what the provision says. It refers to jurisdiction over "proceedings instituted pursuant to this section" without anywhere saying whom they will be instituted "by," and then says that those proceedings may be instituted "without regard to whether the party aggrieved" has exhausted other remedies. 52 U.S.C. §10101(d). Eliminating exhaustion requirements is consistent with Congress's decision to provide for exclusive public enforcement. If anything, §10101(d) throws a wrench in the plaintiffs' theory. It refers to proceedings instituted "pursuant to this section," not pursuant to §1983, and it refers to exhaustion requirements to filing suit, when Congress would have known that those requirements already don't exist under §1983.

Of course, the Court is not going to decide who's right in an emergency stay application. But the plaintiffs' counterarguments only prove that this debate presents difficult questions of first impression. No wonder it has split the circuits. This Court should enter a stay now so it can resolve this split later, sparing Ritter and others from irreparable harm in the interim.

B. The materiality statute does not reach state election laws that regulate the validity of mail-in ballots.

The Third Circuit's interpretation of the materiality statute is also reasonably likely to warrant this Court's review. The plaintiffs do not deny the most pressing problem with leaving the Third Circuit's decision in place: It commands Lehigh County to count the same 257 ballots that the Pennsylvania courts commanded Lehigh County not to count. The plaintiffs note that the Commonwealth Court's opinion is unpublished, Opp.24, but the decision still binds *Lehigh County* with respect to *these* ballots in *this* election. 210 Pa. Code §69.414(a); *see also* CA3 Dkt. 55-2 at JA128 (trial court "direct[ing]" Lehigh County to "exclude the 257 ballots at issue in this case"). Absent a stay, Lehigh County has no option that allows it to act lawfully.

The plaintiffs claim that the Commonwealth Court's discussion of the federal materiality statute was "dicta," Opp.25, but they do not explain how that's possibly true. The court addressed the materiality statute because it was an alternative ground (other than the state constitution) for counting the undated ballots. The Court's analysis was short, but it was definitely a holding:

> **[W]e conclude** that section 10101(a)(2)(B) is inapplicable because section 1306-D(a) of the Election Code dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote, and does not, in any way, relate to the whether that elector has met the qualifications necessary to vote in the first place. Further, because this Court has, among other things, adopted the rationale of the CDO as persuasive authority, **we conclude** that the dating of mail-in ballots is a "material" requisite under the Election Code because it is justified by the "weighty interests" pronounced by Judge Brobson in his opinion from this Court and endorsed by the CDO. **As such, section 10101(a)(2)(B) cannot serve as a basis to alter our conclusion in this case**.

Ritter, 2022 WL 16577, at *9 (emphasis added; citations removed). At the time, Cohen agreed that this conclusion was a holding. *See* Pet'n for Allowance of Appeal at 6, No. 9 MAL 2022 (Pa. Jan. 7, 2022) (stating, as a question presented, whether the Commonwealth Court "commit[ted] reversible error in not finding [the dating requirement] to be preempted by the Materiality Provision"); *id.* at 18 ("The Commonwealth Court disagreed, concluding that the [materiality] provision was 'inapplicable' because, in its view, that provision only affects laws regarding voter *qualifications*."). And Lehigh County considers it a holding too. *See* CA3 Dkt. 50 at 37 ("[A]s determined by … the Commonwealth Court," the dating requirement "does not constitute a violation of the Materiality Provision.").

The Pennsylvania Supreme Court declined to review the Commonwealth Court's decision. As the Commonwealth Court persuasively explained, a majority of the state supreme court has already held that the dating requirement is a valid and binding part of the State's election code. *See Ritter*, 2022 WL 16577, at *7-9. The plaintiffs' attempt to parse Pennsylvania precedent differently from the Pennsylvania courts is unpersuasive. *See* Opp.25.

Even if the Pennsylvania courts agreed with the Third Circuit, this Court's review would still be warranted. The Commonwealth Court's decision remains a persuasive opinion from three members of that court. And it reflects the mainstream interpretation of the federal materiality statute. *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004); *see* Mot.13. The plaintiffs fail to cite another case that permanently enjoined a state election law under the materiality statute. Nor do the

plaintiffs dispute that, in cases where a federal court has invalidated a state election law, this Court regularly grants certiorari. *See* Mot.9. (And it even more regularly grants stays. *See supra* n.*.)

The plaintiffs instead pretend that this case is idiosyncratic and easy because Pennsylvania counts ballots with the wrong date. Opp.2, 25, 27. If a ballot can have the wrong date, the plaintiffs reason, then dates must not matter and the dating requirement must violate the materiality statute. This reasoning underscores the danger of the Third Circuit's decision: Under this view, federal courts can set aside any state election law that they conclude is ineffective or is enforced unevenly by state executives. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (describing states' "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). This view is mistaken.[3]

Just like the Third Circuit, the plaintiffs skip a key analytical step. The materiality statute does not apply at all unless an election official has "den[ied]" someone "the right … to vote" by deeming him not "qualified" based on something "not material

[3] Although it shouldn't matter, the plaintiffs' policy objections to the dating requirement are not sound. It is not at all clear to Ritter that Pennsylvania law actually allows for the counting of misdated ballots, which is why the plaintiffs' inconsistency argument is based on a guidance document and the testimony of a "county clerk" in response to a hypothetical question. Opp.1, 8. And of course there are, in fact, good reasons for ballot-dating requirements. *Cf. Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 736 (2021) (Thomas, J., dissental) (explaining that dating requirements "deter fraud," "create mechanisms to detect it," and help "preserv[e] the integrity of the election process" (cleaned up)).

… under State law." §10101(a)(2)(B). Lehigh County did not deem the plaintiffs unqualified to vote in the 2021 municipal election; it deemed their mail-in ballots invalid for failure to comply with state-law requirements. Even if it could be said that Lehigh County is deeming voters who don't date their ballots "unqualified," the dating requirement would still be valid because it would be "material in determining whether [an] individual is qualified *under State law*." *Id.* (emphasis added). As the plaintiffs' authorities admit, the materiality statute was enacted to stop executive-branch officials from using "'misspelling errors or mistakes in age or length of residence'" to prevent black voters who are otherwise qualified under state law from *registering* to vote. Opp.30 n.12. It does not regulate the mechanics of voting, the counting of ballots, or the substance of state law itself. Ritter made all these arguments below. *See* CA3 Dkt. 49 at 56-66.

The plaintiffs understate the sheer breadth of the Third Circuit's reading of the materiality statute. According to the Third Circuit, every law that governs the validity of mail-in ballots is immaterial (and thus preempted) if it does not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony." App.14a. That reasoning would sweep in virtually every regulation of mail-in voting, including laws requiring voters to use certain writing instruments, use certain envelopes, mail their ballot to the right precinct, declare that their ballot is being delivered by a qualified third party, contain a signature that matches the one on file, and more. *E.g.*, 25 Pa. Stat. §3146.6(a), (b)(2). These examples are not screened out by the capacious phrase "error[s] … on any record or paper *relating to any* … act requisite to

voting." §10101(a)(2)(B); *cf.* Opp.26. Just yesterday, plaintiffs filed a lawsuit arguing that, under the Third Circuit's decision, Pennsylvania's laws requiring mail-in ballots to go in secrecy envelopes and arrive by election day violate the materiality statute. *See Bausch v. Lehigh County Bd. of Elections*, Doc. 2-1 at 9-10, No. 5:22-cv-2111 (E.D. Pa. Mar. 31, 2022).

The plaintiffs cannot avoid these consequences without making a hash of their statutory interpretation. The Third Circuit (incorrectly) stated that "timeliness" is a qualification for voting, App.4, but then somehow concluded that *including a date* is not "pertinent to" timeliness. The plaintiffs, for their part, claim that *signing* the ballot declaration "*is* material to determining whether [someone] is qualified to vote." Opp.26. But declaring you are qualified does not make you qualified; it provides some evidence that you are qualified. In the same way, the dating requirement provides some evidence that you are qualified *at the time* you mailed your ballot. It also provides some protection against fraud. And it provides some evidence that you submitted your ballot on time. Sometimes that evidence will be imperfect or duplicative, and sometimes it will be the only evidence—if, for example, the election office fails to stamp the ballot, the chain of custody gets disrupted, or the post office fails add a to postmark. *See generally Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 360 (D.N.J. 2020) (explaining the many reasons why the post office fails to postmark ballots). But it cannot be true that the signature requirement is material under state law, while the dating requirement that appears in the same statutory sentence

is not. Both are "State law." §10101(a)(2)(b), no matter how election officials are applying them on the ground.

The plaintiffs do not grapple with the grave constitutional questions that the Third Circuit's interpretation raises. They do not meaningfully dispute that Congress's power to enact the materiality statute must come from its power to eliminate racial discrimination in voting. Congress cannot use that authority to enact prophylactic laws unless "many of the laws affected … have a significant likelihood of being unconstitutional" and the "legislative record" contains "generally applicable laws passed because of [racial] bigotry." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). But run-of-the-mill regulations of mail-in voting are perfectly constitutional and are not motivated by racial discrimination.

The plaintiffs' snippet from the legislative record proves Ritter's point. *See* Opp.30 n.12. The snippet admits that the materiality statute was concerned with rogue "registrars" who were refusing to register black voters based on "trivial" mistakes on their applications. H. Rep. No. 88-914 (1963). Worse, in the very next sentence, the snippet confirms that "the basic trouble comes *not* from discriminatory *laws*," but "from the discriminatory application and administration of apparently nondiscriminatory laws." *Id.* (emphases added). By using the materiality statute to invalidate laws instead of the extralegal practices being employed at the time, the

Third Circuit's decision throws the statute into constitutional doubt. Because Ritter's interpretation does not, it should be preferred.[4]

CONCLUSION

This Court should stay the Third Circuit's judgment pending the timely filing and disposition of Ritter's certiorari petition.

Respectfully submitted,

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[4] Ritter argued below that the materiality statute cannot be applied absent evidence of racial discrimination. *See* CA3 Dkt. 55 at 44-45. He is free to expand on that argument here, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), and constitutional avoidance is not an issue that litigants can waive or forfeit anyway, *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955).