

No. 24-363

In the Supreme Court of the United States

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

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE COMMONWEALTH, *et al.*,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**BRIEF FOR SECRETARY OF THE
COMMONWEALTH AL SCHMIDT**

KATHLEEN M. KOTULA
KATHLEEN A. MULLEN
PENNSYLVANIA DEPARTMENT
OF STATE
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120

MICHAEL J. FISCHER
Counsel of Record
JACOB B. BOYER
AIMEE D. THOMSON
OFFICE OF GENERAL COUNSEL
333 Market Street
17th Floor
Harrisburg, PA 17101
(717) 831-2847
mjfischer@pa.gov

Counsel for Respondent Secretary Al Schmidt

December 12, 2024

QUESTION PRESENTED

Anyone who votes by mail in Pennsylvania must return with their mail ballot a declaration attesting that they are qualified to vote. The Pennsylvania Supreme Court has ruled that election officials must reject even timely returned mail ballots from qualified voters if the voter has failed to correctly write a date on that declaration. That date, however, serves no function in Pennsylvania's elections.

Federal law prohibits "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]" 52 U.S.C. § 10101(a)(2)(B).

The question presented is whether rejecting a timely received mail ballot from a qualified voter who failed to properly date their declaration denies "the right of any individual to vote" "because of an error or omission on any record or paper relating to any * * * act requisite to voting" that is "not material in determining whether such individual is qualified under State law to vote in such election."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
REASONS TO GRANT THE PETITION	1
I. The question presented is important.....	1
II. The decision below is wrong.....	6
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2023).....	2
<i>Bissonnette v. LePage Bakeries Park St., LLC</i> , 601 U.S. 246 (2024).....	9
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	10
<i>Common Cause v. Thomsen</i> , 574 F. Supp. 3d 634 (W.D. Wis. 2021)	11
<i>In re: Georgia Senate Bill 202</i> , No. 21-1259, 2023 WL 5334582 (N.D. Ga. Aug. 18, 2023).....	11
<i>Martin v. Crittenden</i> , 347 F. Supp. 3d 1302 (N.D. Ga. 2018).....	11
<i>Migliori v. Cohen</i> , 36 F.4th 153 (3d Cir. 2022).....	10
<i>NAACP v. Browning</i> , 522 F.3d 1153 (11th Cir. 2008).....	6, 7, 10
<i>Union del Pueblo Entero v. Abbott</i> , 705 F. Supp. 3d 725 (W.D. Tex. 2023)	10
<i>United States v. Paxton</i> , No. 23-50885 (5th Cir. Dec. 15, 2023).....	11
<i>Vote.Org v. Callanen</i> , 89 F.4th 459 (5th Cir. 2023)	10
<i>Yates v. United States</i> , 574 U.S. 528 (2015).....	9

TABLE OF AUTHORITIES—Continued

STATUTES	Page(s)
52 U.S.C. § 10101(a)(2)(B).....	7, 8, 9, 10, 11
52 U.S.C. § 10101(e)	8
25 Pa. Stat. § 3146.2.....	1
25 Pa. Stat. § 3146.2b.....	1
25 Pa. Stat. § 3146.4.....	1, 2
25 Pa. Stat. § 3146.6(a)	2
25 Pa. Stat. § 3146.8(g)(1)(ii)	2
25 Pa. Stat. § 3146.9(b)(5).....	2
25 Pa. Stat. § 3150.11.....	1
25 Pa. Stat. § 3150.12.....	1
25 Pa. Stat. § 3150.12b.....	1
25 Pa. Stat. § 3150.14.....	1, 2
25 Pa. Stat. § 3150.16(a)	2
25 Pa. Stat. § 3150.17(b)(5).....	2
Pa. Act of Mar. 9, 1945, P.L. 29, No. 17, § 10	3
Pa. Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8	3
OTHER AUTHORITIES	
H.R. Rep. 88-914 (1963), <i>as reprinted in</i> 1964 U.S.C.C.A.N 2391	6, 7

REASONS TO GRANT THE PETITION

Secretary of the Commonwealth Al Schmidt submits this brief to complement the petition for a writ of certiorari. He agrees the petition should be granted.

I. The question presented is important.

This case is about whether thousands of indisputably qualified Pennsylvanians can be denied their right to vote for failing to write a date that serves no function in Pennsylvania's elections. Resolution of the federal question that governs the outcome here is thus critically important.

In 2019, Pennsylvania made mail voting available to all registered, eligible voters. *See* 25 Pa. Stat. § 3150.11.¹ To vote by mail, a registered voter must apply to their county board of elections and provide, among other information, their name, address, date of birth, proof of identification, and the amount of time they have resided in their election district. *Id.* §§ 3146.2, 3150.12. Counties review applications, verify the applicant's proof of identification, and compare the voter's information in the application with information the voter provided during registration. *Id.* §§ 3146.2b, 3150.12b. The registration information is housed in county-specific voter rolls within the Statewide Uniform Registry of Electors ("SURE") system. 134a-135a. Through this process, counties reaffirm that the applicant meets the qualifications to vote in Pennsylvania.

No more than a few weeks before election day, counties send approved voters a package with a mail ballot, a secrecy envelope, and a larger pre-addressed return envelope. 25 Pa. Stat. §§ 3146.4, 3150.14. Each return envelope has printed on it a declaration for the

¹ Before 2019, only certain voters could vote by absentee ballot.

voter to attest that they are qualified to vote in the election and have not already voted. *Id.* §§ 3146.4, 3150.14. The return envelope also has a barcode unique to both the voter requesting the mail ballot and the election. 135a-136a.

Any time after receiving their package, a voter may complete their ballot, place it into the secrecy envelope, and then place the secrecy envelope into the return envelope. 25 Pa. Stat. §§ 3146.6(a), 3150.16(a). The Election Code instructs that voters “shall then fill out, date and sign the [return-envelope] declaration.” *Id.* §§ 3146.6(a), 3150.16(a).

Voters must complete and return their ballots to their county board before 8:00 p.m. on election day. *Id.* §§ 3146.6(a), 3150.16(a). During canvassing, counties must set aside any mail ballot received after the 8:00 p.m. deadline. *Id.* § 3146.8(g)(1)(ii). Counties must also maintain records of when each mail ballot was received. *Id.* §§ 3146.9(b)(5), 3150.17(b)(5).

In every election since the Commonwealth made mail voting available to all eligible voters, thousands of indisputably qualified voters have failed to properly date the declaration that must be returned with their mail ballot. Some voters omit the date, while others inadvertently write the wrong month, or write their birthdate instead of the current date. Pennsylvania’s Supreme Court has held that these ballots must be set aside, even if the ballot was returned by the statutory deadline and there is no doubt about the voter’s eligibility. *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).

But, as the comprehensive record developed in this case definitively shows, the date written on the voter’s

declaration is “wholly irrelevant.” 163a.² That is because no county uses the date “to determine when a voter’s mail ballot was received.” 164a. Rather, upon receipt, counties stamp or mark each return envelope with the date and time it was received. 137a. Counties also scan the barcode on the return envelope, which creates an electronic record in the SURE system of when the ballot was received. *Id.* Counties use these independent means to verify that a mail ballot was received by the statutory deadline. 164a-165a. Further, “the undisputed evidence shows that * * * county boards of elections did not use the handwritten date on the return envelope for any purpose related to determining a voter’s age, citizenship, county or duration of residence, or felony status.” 165a-166a.

The Third Circuit, for its part, understood that the date “serves little apparent purpose.” 17a.

The upshot, then, is that in every election, thousands of timely received ballots from qualified voters are rejected because the voter failed to perform an act that

² The date once served a purpose. Before 1968, Pennsylvania imposed distinct deadlines for voters to complete and to return an absentee ballot; ballots received within a certain period after election day would count if completed by election day. *See* Act of Mar. 9, 1945, P.L. 29, No. 17, § 10. The date, therefore, confirmed the ballot was *completed* on time. The date ceased serving that function in 1968 when Pennsylvania’s General Assembly aligned the deadlines to complete and to return the ballot. *See* Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8. Since then, a ballot returned on time necessarily was completed on time. And once the date ceased serving any function, the General Assembly deleted a provision in Pennsylvania’s Election Code that had directed counties to set aside an absentee ballot if the date written on the declaration fell after election day. *Id.*

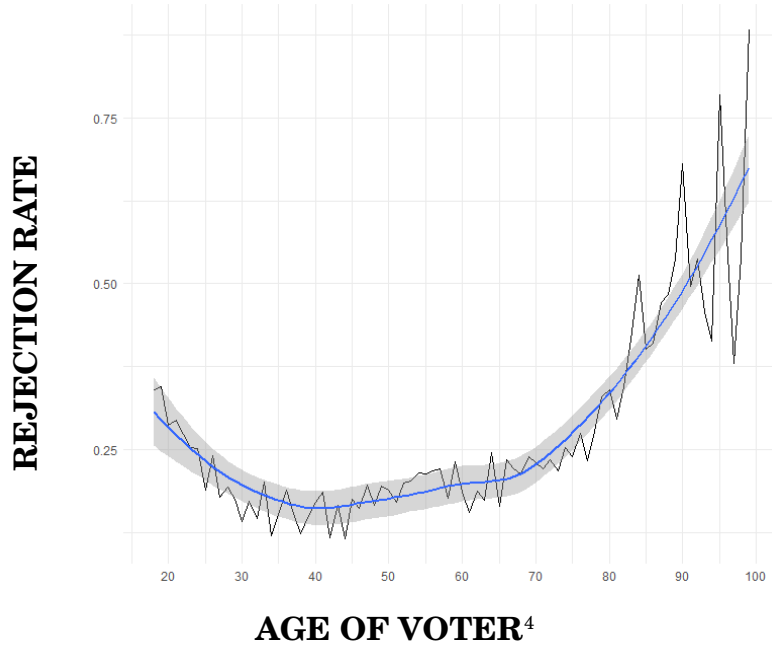
serves no purpose in the administration of Pennsylvania's elections.

The burden of these rejections falls disproportionately on older voters. In every election for which the relevant data has been analyzed, older voters have had a meaningfully higher rejection rate due to dating errors than have younger voters.³

For instance, based on data available as of December 9, in the 2024 general election the rejection rate for dating errors among mail voters aged 70 and over was 1.6 times the rejection rate among mail voters aged 50 and under. And the rejection rate for mail voters 80 and over was more than double that among mail voters aged 50 and under.

The chart below shows the rejection rate in the 2024 general election of mail ballots due to dating issues by age of the voter:

³ Since the 2023 municipal primary, counties have been able to log the reason a ballot was rejected in the SURE system. These inputs permit the Pennsylvania Department of State to evaluate statewide trends. Yet, not all counties log the reason a ballot was rejected. As a result, the actual frequency of dating errors is almost certainly higher than what can be determined from available data.



This effect is compounded by the fact that more older voters vote by mail than do younger voters. The number of voters aged 50 years and older who voted by mail was nearly double that of voters under 50 years old (1,300,377 voters aged 50 and over voted by mail in this year's general election, while 678,073 voters aged 50 and under did). As a result, in this year's general election, the total number of mail ballots returned by voters aged 50 years and older that were rejected for declaration date issues (3,384 ballots rejected) was more than 2.5 times that of voters aged 50 and under (1,344 ballots rejected).

Rejecting ballots for dating errors does not, however, appear to strongly disfavor one political party over

⁴ The black line reflects the actual rejection rates among voters of each age. The blue line is the same data, smoothed. The shaded gray area represents the confidence interval.

another. For the 2024 general election, data available as of December 4 shows that 2,303 ballots from registered Democrats were rejected for date errors (roughly 0.21% of all mail ballots returned by registered Democrats), 1,852 ballots from registered Republicans were rejected for date errors (roughly 0.29% of all mail ballots returned from registered Republicans), and 574 ballots from voters not registered with either major party were rejected for date errors (roughly 0.24% of all mail ballots returned by those voters).

For the reasons above, Secretary Schmidt agrees that there are compelling reasons to grant the petition.

II. The decision below is wrong.

Rejecting a ballot under the circumstances presented here violates federal law.

Title I of the Civil Rights Act of 1964 prohibits using immaterial paperwork requirements to deny qualified individuals their right to vote. In part, Title I was meant “to counteract state and local government tactics of using, among other things, burdensome registration requirements to disenfranchise African Americans” because some states historically made trivial demands for information that “served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants.” *NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

Before Congress passed Title I, such immaterial paperwork requirements had been used primarily to deny voters’ ability to register; still, Congress was concerned more broadly with “the use of onerous procedural requirements which handicap the exercise of the franchise.” H.R. Rep. 88-914 (1963), *as reprinted in* 1964 U.S.C.C.A.N 2391, 2492 (cleaned up). And by 1964, Congress was keenly aware that broad prophylaxis

was needed to avoid states creatively evading voting rights legislation. *Id.* at 2394 (describing Title I as “designed to meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960”); *see also Browning*, 522 F.3d at 1175 (“Congress in combating specific evils might choose a broader remedy”).

The statute Congress passed broadly prohibits the use of immaterial paperwork requirements to deny the right to vote. The operative provision has two clauses:

No person acting under color of law shall * * *

[1] deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting,

[2] 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).

Naturally read, the first clause defines *when* the statute applies: when the right to vote is denied “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting.” The second clause defines *what* “error[s] or omission[s]” are covered: those “not material in determining whether such individual is qualified under State law to vote in such election.”

Congress defined “vote” for this provision to “include[] all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and *having such ballot counted and*

included in the appropriate totals of votes cast.” Id. § 10101(e) (emphasis added).

Section 10101(a)(2)(B) applies here. First, setting aside a ballot denies the right to vote as defined by Congress. Second, the ballot is being set aside because of an error on the declaration returned with the ballot, which is a “record or paper” relating to an “act requisite to voting.” Third, because the declaration date has no function, failing to properly write a date is an error “not material in determining whether such individual is qualified under State law to vote in such election.”

The Third Circuit’s contrary conclusion embraced an unnatural, unsupportable, and unprecedented reading of the statute.

The lower court concluded that § 10101(a)(2)(B) governs “the voter qualification process” but not “the vote-casting stage”—even though nothing in the statute’s text hints at such a distinction. 34a. That court so concluded by inverting § 10101(a)(2)(B)’s two clauses, which the court deemed necessary because (it said without any explanation) the second clause must “drive[] the interpretation of the rest of the statute.” 29a. That court then construed the second clause’s use of “in determining” as defining what *records or paper* the statute covers, instead of as defining the types of *errors* it covers, and further held that “in determining” somehow limits the statute’s application to registration-related paperwork.

These inexplicable choices effectively excised much of the first clause (marked below):

No person acting under color of law shall * * *

[1] deny the right of any individual to vote ~~in any election~~ because of an error or omission on any record or paper ~~relating to any application, registration, or other act requisite to voting,~~

[2] if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

The lower court acknowledged that it was doing away with much of the first clause but answered that the first clause's inclusion of "application" and "registration" would be redundant if the statute extended beyond registration. 44a. Yet, the *ejusdem generis* canon teaches that is not true.

Even though § 10101(a)(2)(B) reaches past registration, "application" and "registration" retain meaning by confining the other paper-based "act[s] requisite to vote" the statute covers to only those similar to applications and registrations. *See, e.g., Yates v. United States*, 574 U.S. 528, 545 (2015) (explaining *ejusdem generis* canon). Shortly after the Third Circuit issued its decision, this Court called the same rationale that animated the lower court's textual analysis here "exactly backwards." *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 255 (2024).

The Third Circuit's inventive approach to statutory interpretation is in tension with that of the Fifth and Eleventh Circuits, each of which has analyzed § 10101(a)(2)(B) and neither of which has suggested

the second clause somehow limits the statute to errors made during registration. Rather, as the Eleventh Circuit explained, the second clause asks “whether, accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant.” *Browning*, 522 F.3d at 1175. The inquiry focuses not on a particular stage of the voting process, but on “the nature of the underlying information” that the voter has failed to provide. *Id.* The Fifth Circuit likewise wrote that, under the second clause, courts must ask whether the requirement the voter failed to comply with is material to “determining whether such individual is qualified” to vote. *Vote.Org v. Callanen*, 89 F.4th 459, 487 (5th Cir. 2023).⁵

Before the Third Circuit’s decision here, no court had held that § 10101(a)(2)(B) was limited to records or papers related to voter registration—and few had even considered the possibility. That the registration limitation had not previously occurred to anyone strongly suggests it does not exist. *See Clinton v. City of New York*, 524 U.S. 417, 428 (1998) (recognizing argument’s weakness because it had not previously occurred to anyone).

Rather, before the lower court’s decision, courts—including the Third Circuit itself—had applied § 10101(a)(2)(B) to records or papers beyond voter registration. *See Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *vacated as moot by Ritter v. Migliori*, 143 S. Ct. 297 (2022) (ruling that § 10101(a)(2)(b) prohibits rejecting Pennsylvania mail ballots for declaration-date errors); *Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 756-760 (W.D. Tex. 2023) (rejecting

⁵ *Vote.Org* and *Browning* both dealt with state rules that applied during registration, so neither court addressed whether § 10101(a)(2)(B) is limited to documents related to registration. *Vote.Org*, 89 F.4th at 468; *Browning*, 522 F.3d at 1156.

argument that § 10101(a)(2)(B) is limited to registration);⁶ *In re: Georgia Senate Bill 202*, No. 21-1259, 2023 WL 5334582, at *11 (N.D. Ga. Aug. 18, 2023) (enjoining Georgia law that required rejecting absentee ballots for errors on declaration returned with the absentee ballot); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (“But the text of § 10101(a)(2)(B) isn’t limited to * * * voter registration.”); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018) (enjoining Georgia law that required rejecting absentee ballots for errors on declaration returned with the absentee ballot).

The Third Circuit therefore reached the wrong conclusion on this important federal question.

CONCLUSION

For the reasons above, Secretary Schmidt supports granting the petition for a writ of certiorari.

Respectfully submitted,

KATHLEEN M. KOTULA
KATHLEEN A. MULLEN
PENNSYLVANIA DEPARTMENT
OF STATE
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120

MICHAEL J. FISCHER
Counsel of Record
JACOB B. BOYER
AIMEE D. THOMSON
OFFICE OF GENERAL COUNSEL
333 Market Street
17th Floor
Harrisburg, PA 17101
(717) 831-2847
mjfisher@pa.gov

Counsel for Respondent Secretary Al Schmidt

December 12, 2024

⁶ A motions panel stayed this decision pending appeal but did not suggest that § 10101(a)(2)(B) regulates only registration. *United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023).