No. 24-363

IN THE

Supreme Court of the United States

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, et al.,

Petitioners,

v.

AL SCHMIDT, SECRETARY OF PENNSYLVANIA, et al.,

Respondents.

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

DSCC AND DCCC'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

UZOMA N. NKWONTA
Counsel of Record
JACOB D. SHELLY
DANIEL J. COHEN
WILLIAM K. HANCOCK
OMEED ALERASOOL
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 968-4490
UNkwonta@elias.law

Counsel for DSCC and DCCC

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RULE 29.6 DISCLOSURE STATEMENT

I, Uzoma N. Nkwonta, counsel for DSCC and DCCC and a member of the Bar of this Court, certify that DSCC and DCCC have no parent corporation, and that no publicly held company owns 10% or more of their stock.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta
Counsel of Record
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490
UNkwonta@elias.law

Counsel for DSCC and DCCC

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INTRODUCTION

In election after election since the advent of universal mail-in voting in Pennsylvania, thousands of eligible citizens have been denied their right to vote because of minor errors on the envelopes in which they returned their timely received mail ballots. The materials submitted by these disenfranchised Pennsylvanians provided more than enough information to verify their identities and eligibility to vote. They used officially issued ballot envelopes bearing unique barcodes and numeric designators, they listed their addresses, they printed and signed their names, and their ballots were timely received by election officials. But because these voters either made a mistake when writing the date or left the date field blank, their ballots were not counted—even though Pennsylvania law, undisputed evidence, and judicial findings establish that the date written by a voter on their mail ballot envelope plays no role in determining the voter's eligibility or the ballot's timeliness.

Congress long ago forbade states from imposing such needless barriers to the franchise. The Materiality Provision of the Civil Rights Act of 1964 prohibits state and local officials from "deny[ing] the right of any individual to vote . . . because of an error or omission" that "is not material in determining whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Rejecting the ballots of otherwise-qualified voters simply because they misdated or forgot to date their ballot envelopes

squarely violates the Materiality Provision, and the district court properly enjoined this practice.

Nonetheless, despite recognizing that the date requirement "serves little apparent purpose," Pet'rs' App. 17a, a divided panel of the Third Circuit reversed the district court (and contradicted an earlier panel's decision that had been subsequently mooted) in concluding that the Materiality Provision is wholly inapplicable to the outer envelope used in mail voting in Pennsylvania. Instead, the panel majority concluded that the Materiality Provision applies only to the qualification determination stage of voting—which, in its view, is limited to voter registration—and no more.

The panel majority's reasoning was flawed at every turn. It disregarded the plain statutory text and misinterpreted legislative history, all while misconstruing the scope of the Materiality Provision. These are serious errors that warrant reversal. Even so, ongoing litigation in Pennsylvania's state and federal courts may result in a definitive finding that the date requirement violates the state or federal constitutions, which would render this case moot. The Court should therefore defer consideration of the Petition to allow those cases to be resolved in the ordinary course, and to assure the existence of a live controversy that is ripe and ready for this Court's resolution.

BACKGROUND

I. Pennsylvania law requires mail-in voters to date the declaration on their ballot envelope.

In 2019, the Pennsylvania General Assembly enacted Act 77, which authorized all qualified voters to cast a mail-in ballot. Pet'rs' App. 20a–21a, 134a.[1] Pennsylvania law requires that an elector who casts a mail-in or absentee ballot place their completed ballot in an inner secrecy envelope, which is then placed in a second, outer envelope. 25 P.S. § 3146.6(a). The elector must sign and date a declaration printed on that outer envelope for their vote to be counted. *Id.* § 3150.16(a). The Pennsylvania Supreme Court has interpreted the instruction to date the signed declaration (*i.e.*, the "date requirement") to be mandatory under Pennsylvania law, and thus ballots deemed noncompliant with this provision—even if timely cast by eligible voters—are excluded from the official count. *See Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023).

The date on the envelope is not used to verify the voter's qualifications or the ballot's timely return. A voter is qualified to vote in Pennsylvania if they:

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[1] The Election Code continues to authorize "absentee" voting for a limited class of voters, as it has for decades. *See* 25 P.S. § 3146.6. Because Act 77 makes "mail-in" voting the primary mechanism for voting before election day—and because the date requirement applies equally to absentee and mail-in voting, *compare id.*, *with id.* § 3150.16—Respondents use the term "mail ballots" to encompass both mail-in and absentee ballots.

will be at least 18 years old on election day; will have been a U.S. citizen and a resident of the district in which they intend to vote for at least 30 days prior to election day; and have not been imprisoned for a felony within five years of election day. 25 P.S. § 1301(a). A ballot's timeliness is established solely by scanning the unique barcode on each ballot envelope upon receipt at the county board of elections. Pet'rs' App. 21a, 49a, 136a–37a.

II. Disenfranchised voters and their advocates challenged the date requirement under the Materiality Provision.

In 2021, five voters challenged the Lehigh County Board of Elections' decision not to count their ballots in a closely contested local election due to the voters' failure to comply with the date requirement. *Migliori v. Cohen*, 36 F.4th 153, 156–58 (3d Cir. 2022). A unanimous panel of the Third Circuit ruled in their favor, holding that the date requirement violates the Materiality Provision because, in the context of Pennsylvania's election administration, a handwritten date is "superfluous and meaningless." *Id.* at 164. As the court explained, the declaration date is "not entered as the official date received in the SURE [Statewide Uniform Registry of Electors] system, nor used for any other purpose." *Id.* After the disputed election was certified, however, this Court vacated the opinion as moot, *Ritter v. Migliori*, 143 S. Ct. 297, 298 (2022), reflecting this Court's "established practice" of "revers[ing] or vacat[ing] the

judgment below" when a case becomes moot while on appeal, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Similar Materiality Provision claims were filed in state court after the 2022 primary elections. In two separate cases, the Pennsylvania Commonwealth Court found *Migliori*'s analysis persuasive and concluded that the date requirement violates the Materiality Provision. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *26–27 (Pa. Commw. Ct. Aug. 19, 2022) (explaining that the date requirement serves no purpose); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *10–11 (Pa. Commw. Ct. June 2, 2022) (same). When the issue reached the Pennsylvania Supreme Court, however, the justices divided equally, *see Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022), and so the dispute remained unresolved.

In the 2022 general election, county boards did not count the votes of more than 10,000 Pennsylvanians solely because of the date requirement. Pet'rs' App. 48a, 140a. Six affected voters and various civic organizations—Petitioners here—challenged that disenfranchisement in the Western District of Pennsylvania, asserting that the date requirement violates the Materiality Provision and the U.S. Constitution. Respondents DSCC and DCCC filed a parallel action bringing similar claims. *See Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-cv-00340-SPB (W.D. Pa. filed Nov. 7, 2022). Several

Republican Party committees intervened to defend the rejections of these ballots in both actions, which were assigned to the same district court judge and shared discovery but were not consolidated. On November 21, 2023, the court granted summary judgment for Petitioners on their Materiality Provision claim and ordered supplemental briefing on standing in *Eakin*. *See generally* Pet'rs' App. 82a–177a; *see also* Order, *Eakin* (Nov. 21, 2023), ECF No. 348. The Republican Party committees appealed the summary judgment ruling to the Third Circuit, Int.-Def.'s Notice of Appeal, *Pa. State Conf. of NAACP v. Schmidt,* No. 23-3166 (3d Cir. filed Dec. 6, 2023) ("*Schmidt II*"), ECF No. 1, where DSCC and DCCC intervened. Mot. to Intervene, *Schmidt II* (Dec. 22, 2023), ECF No. 92; Order Granting Mot. to Intervene, *Schmidt II* (Jan. 3, 2024), ECF No. 129.

In a decision that directly contradicted the prior panel's ruling in *Migliori*, the Third Circuit reversed the district court. Pet'rs' App. 17a. In a divided opinion, the court concluded that the Materiality Provision does not apply to the date requirement based on its reasoning that "the Materiality Provision is concerned only with the process of determining a voter's *eligibility* to cast a ballot." Pet'rs' App. 37a. *Contra Migliori*, 36 F.4th at 162 n.56. Because "[t]he voter who submits his mail-in package has already been deemed qualified to vote," the majority held, the "signed and dated attestation is used to determine whether the ballot is validly cast, not whether the individual is qualified under state law to vote." Pet'rs' App. 43a–44a. Judge

Shwartz dissented, arguing that the Materiality Provision "forbids State actors from denying voters the right to vote in any election due to errors or omissions on required paperwork when such mistakes do not affect the State's ability to determine the voters' qualifications to vote." Pet'rs' App. 48a.

On September 27, 2024, Petitioners filed the instant Petition for a Writ of Certiorari.

III. Other legal challenges to the date requirement remain pending.

Despite the Third Circuit's ruling, federal litigation over the date requirement persists. On May 8, 2024, after the Third Circuit's mandate was filed, the district court ordered briefing on "any dispositive motions on [Petitioners'] remaining equal protection claim" on behalf of military voters. Order, *Pa. State Conf. of the NAACP v. Schmidt*, No. 22-cv-339, (W.D. Pa. May 8, 2024) ("*Schmidt I*"), ECF No. 385. Petitioners subsequently filed an amended complaint adding a federal constitutional claim under the First and Fourteenth Amendments. *See* Mot. for Leave to File Am. Compl., *Schmidt I* (May 17, 2024), ECF No. 387. By July 25, 2024, dispositive motions were fully briefed on the federal constitutional claims. Similarly, supplemental briefing on the constitutional right-to-vote claim in *Eakin* concluded in June 2024. While proceedings in the district court are otherwise stayed pending this Petition, *see* Order, *Schmidt I* (Oct. 22, 2024), ECF No. 467, the constitutional claims remain ripe for adjudication below and in *Eakin*.

Meanwhile, in separate proceedings, a Pennsylvania trial court and two panels of Pennsylvania's intermediate court have determined that the date requirement violates the Pennsylvania Constitution's Free and Equal Elections Clause. *See Baxter v. Phila. Bd. of Elections*, No. 1305 CD 2024, 2024 WL 4614689, at *3 (Pa. Commw. Ct. Oct. 30, 2024), *judgment stayed for 2024 general election*, 2024 WL 4650792 (Pa. Nov. 1, 2024); *Black Pol. Empowerment Project v. Schmidt*, No. 283 MD 2024, 2024 WL 4002321, at *2 (Pa. Commw. Ct. Aug. 30, 2024), *vacated on other grounds,* No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 13, 2024). As of the date of this Response, a petition for allowance of appeal in *Baxter* is pending before the Pennsylvania Supreme Court. *See* Pet. for Allowance of Appeal, *Baxter v. Phila. Cnty. Bd. of Elections*, No. 395 EAL 2024 (Pa. filed Nov. 12, 2024).

ARGUMENT

In upholding the date requirement, the Third Circuit panel majority misconstrued the Materiality Provision's plain text, misinterpreted the relevant legislative history, and misidentified the consequences that could result from a contrary ruling. These errors warrant reversal. But a ruling by this Court may be premature while a number of federal and state constitutional challenges to the date requirement remain pending.

I. The panel majority's decision was wrong because it directly conflicts with and undermines the Materiality Provision.

Despite recognizing that the date requirement "serves little apparent purpose," Pet'rs' App. 17a, the panel majority reversed the district court and upheld this meaningless procedural hurdle to mail voting in Pennsylvania. To reach this outcome, the majority had to ignore the plain statutory text of the Materiality Provision, invert the legislative history of the Civil Rights Act of 1964, and rely upon an untenable and inapplicable parade of horribles. In doing so, it neutered the Materiality Provision's unambiguous text despite Congress's explicit intent to protect the right to vote.

A. The decision contravenes the unambiguous statutory text.

The panel majority inverted, effaced, and distorted the text of the Materiality Provision to artificially narrow the scope of "record[s] or paper[s]" that are subject to its protections. The broad terms of the Provision do not permit the panel majority's contrived distinction between "paperwork used in the voter qualification process" and "papers provided during the vote-casting stage." Pet'rs' App. 33a–34a. Instead, the Provision's plain text explicitly applies to "*any* record or paper relating to *any* application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B) (emphases added). When those terms are given their plain meaning,

Pennsylvania's mail ballot envelope certainly qualifies as a "paper relating to an[] . . . act requisite to voting." *Id.* The majority's contrary holding departed from the plain text in multiple ways.

First, the panel majority's interpretation violated basic rules of grammar and syntax. The Materiality Provision first outlines its scope and core mandate in the primary clause—"No person acting under color of law shall . . . 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"—before identifying in the secondary clause what types of errors or omissions may ***not*** serve as a basis to deny an individual's right to vote: those that are "not material in determining whether such individual is qualified" to vote. 52 U.S.C. § 10101(a)(2)(B). The panel majority read this language to mean that any paper or record covered by the Materiality Provision must "itself relate to ascertaining a person's qualification to vote." Pet'rs' App. 30a. But the secondary clause does not modify the phrase "record or paper" in the primary clause; it only modifies the phrase "error or omission." 52 U.S.C. § 10101(a)(2)(B). This is clearly stated by the opening words of the secondary clause: "if *such error or omission* is not material." *Id.* Under the panel majority's interpretation—and by its own admission—the secondary clause thereby becomes the "tail that wags the dog." Pet'rs' App. 40a.

Second, the panel majority misused the canon of *ejusdem generis* to collapse the terms "application, registration, or other act requisite to voting" into merely "registration." Pet'rs' App. 44a. But that canon "neither demands nor permits that we limit a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 462 (2022). The panel majority's reading ignores that "application," "registration," and "other act requisite to voting" each carry distinct meanings.

Under Pennsylvania law, for example, voters fill out an "application" when requesting a mail ballot *after* they are already registered. 25 P.S. § 3146.2. And in other states, the envelope enclosing the mail ballot—the same kind of paper at issue here—is referred to as an "absentee ballot *application*." *See, e.g.*, N.C. Gen. Stat. § 163-230.1 (emphasis added). Similarly, the panel majority rendered the phrase "other act requisite to voting" entirely superfluous. There is simply no textual support for erasing these additional terms from the Materiality Provision.

The panel majority's narrow reading also cannot be reconciled with the Civil Rights Act's statutory definition of "vote," which Congress broadly defined as including "all action necessary to make a vote effective." 52 U.S.C. § 10101(e). This expressly "includes . . . ***having such ballot counted*** and included in the appropriate totals of votes cast." *Id.* (emphasis added). Therefore, the Materiality Provision's protection against being "deni[ed] the

right . . . to vote" necessarily includes protections for having one's ballot counted—even beyond the registration stage of the voting process. 52 U.S.C. § 10101(a)(2)(B). Otherwise, the statutory definition of "vote," and its express incorporation into subsection (a), *id.* § 10101(a)(3), would be ineffectual.

Finally, the panel majority erred in concluding that "individuals are not 'denied' the 'right to vote' if non-compliant ballots are not counted." Pet'rs' App. 37a. This interpretation, once again, cannot be reconciled with the statute's express protection of the right to vote, which the statute defines to include "having [a] ballot counted." 52 U.S.C. § 10101(e). The panel majority's conclusion also misunderstands the overarching purpose of the Materiality Provision, which is to distinguish between permissible and impermissible bases for rejecting votes. And the majority's circular reading would render the Materiality Provision meaningless—even at the voter registration stage—because any immaterial error would be the result of a voter's "fail[ure] to follow the rules." Pet'rs' App. 34a. That is all the more reason to reject the panel majority's analysis: "the Civil Rights Act of 1964 stands as . . . one of the Nation's great triumphs" and courts "have no right to make a blank sheet of any of its provisions." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J., concurring).

B. The legislative purpose of the Materiality Provision was broad, remedial, and not limited to voter registration.

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, [the judiciary's] job is at an end." *Bostock v. Clayton County*, 590 U.S. 644, 673–74 (2020). In other words, "the Court only looks to legislative history, if at all, 'when interpreting *ambiguous* statutory language.'" *United States v. Stevens*, 70 F.4th 653, 657 (3d Cir. 2023) (quoting *Bostock*, 590 U.S. at 674 (emphasis in original)). "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Bostock*, 590 U.S. at 674 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)). Nonetheless, the panel majority misapplied the history of the Civil Rights Act of 1964 in an effort to buttress its atextual construction of the Materiality Provision. *See* Pet'rs' App. 31a–34a.

Because Congress referenced schemes that disenfranchised voters at the registration phase, the panel majority concluded that Congress was concerned exclusively with "discriminatory practices during voter registration." Pet'rs' App. 33a–34a. But that narrow focus cannot be squared with the text that Congress enacted. *See supra* Section I.A; *cf. Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) (Congress "says what it means and means what it says"). Just as the tail cannot wag the dog, *contra* Pet'rs' App. 40a, courts cannot use one legislative

impetus for expanding voting protections to shrink the enacted statute's broad protective scope down to something far narrower than what Congress chose.

Indeed, this Court has recognized that where a statute's text "reaches beyond the principal evil legislators may have intended or expected to address[, that] . . . simply demonstrates the breadth of a legislative command." *Bostock*, 590 U.S. at 674 (cleaned up). This is particularly so in the context of civil-rights statutes like the Materiality Provision, which aim both to remedy ongoing harms and prevent similar future harms. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (recognizing "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

The broad remedial purpose behind the Civil Rights Act of 1964 is evident from its title to its endnotes. For example, the concomitant House report noted that the Act sought to provide broad and sweeping protections for "the civil rights of persons within the jurisdiction of the United States" and was written to be "general in application and national in scope" precisely to "provide means of expediting the vindication of th[e] right" to vote. H.R. Rep. No. 88-914, pt. 1, at 16, 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391, 2393. To this end, "Title I [wa]s designed to meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without

discrimination as to race or color." *Id.* at 19, *reprinted in* 1964 U.S.C.C.A.N. at 2394. To adopt the panel majority's logic—despite the explicitly broad text and remedial purpose of a statute—would require legislators to detail every conceivable application of its provisions, or risk a court judgment that constrains its enforcement.

Moreover, the House report specifically noted that the Materiality Provision would help apply "uniform standards, practices, and procedures to all persons seeking to vote in Federal elections [] by prohibiting the disqualification of an individual because of immaterial errors or omissions in papers *or acts relating to such voting*." *Id.* at 19 (emphasis added), *reprinted in* 1964 U.S.C.C.A.N. at 2394. The House minority report also recognized the statute's expansive scope in opposing its "extension of Federal control to *all material steps* in Federal, State, and local elections." *Id.* at 78 (emphasis added), *reprinted in* 1964 U.S.C.C.A.N. at 2447. And even those dissenting legislators expressed that they "believe and are certain that . . . the right to vote is meaningless *unless one's vote is properly counted*. They are interrelated and are both civil rights." *Id.*, pt. 2, at 24 (emphasis added), *reprinted in* 1964 U.S.C.C.A.N. at 2510.

Despite references to the principal evil at the time—discriminatory application of voter registration rules—there is "nothing in the legislative history to support a conclusion that the [statutory text] . . . means anything other than what it says." *Harrison v.*

PPG Indus., Inc., 446 U.S. 578, 589 (1980). If Congress had not intended the Materiality Provision to broadly cover every stage of the voting process, it would have "persuasive[ly] indicat[ed] to the contrary" by drafting and enacting a different statute. *Simmons*, 578 U.S. at 627. In fact, even if there were any textual ambiguity, the overarching thrust of the legislative history of the Civil Rights Act of 1964 and the Materiality Provision demonstrates Congress's broad intent to protect the right to cast a vote that will be counted, thereby extending beyond mere access to voter registration. Contrary to the majority's distorted view, then, "it is ultimately the provisions of those legislative commands rather than the principal concerns of our legislators by which we are governed." *Bostock*, 590 U.S. at 674 (cleaned up).

The panel majority's interpretation does not just get the Materiality Provision wrong: it opens a gaping loophole that would essentially neutralize the venerable statute. Under the panel majority's reasoning, states could implement unlimited technical barriers to disenfranchise voters so long as those barriers are not part of the voter registration process. *See* Pet'rs' App. 27a. This would lead to absurd results inconsistent with the Materiality Provision's purpose. For example, the panel majority would license states to simply relocate a paradigmatic violation that the Materiality Provision was intended to address—*e.g.*, "disqualifying an applicant who failed to list the exact number of months and days in his age," *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995)—from the voter registration context to

the voting process and thereby evade the Materiality Provision's protections. But Congress did not intend its landmark civil rights legislation to be so easily thwarted, which is why it crafted a remedial statute that prevents "diverse techniques" of disenfranchisement. Pet'rs' App. 32a. Here, the plain text and legislative purpose point to the same result: The Materiality Provision should be read to protect voters from disenfranchisement due to immaterial paperwork errors made at all stages requisite to voting.

C. Applying the Materiality Provision to the date requirement would not jeopardize essential state ballot-casting rules and regulations.

The panel majority based its strained analysis upon a slippery slope fallacy, claiming that "[u]nless we cabin the Materiality Provision's reach to rules governing voter qualification, we tie state legislatures' hands in setting voting rules unrelated to voter eligibility," such as rules prohibiting voters from (i) casting votes for more candidates than permissible for a given office, (ii) filling out the ballot with two different pens, and (iii) making identifying marks on the secrecy envelope. Pet'rs' App. 36a–37a. In doing so, the panel majority sidestepped several critical textual limitations that would largely foreclose the very parade of horribles that it used to justify its atextual reading of the statute.

To begin, the Materiality Provision is expressly limited to "any record or paper relating to any

application, registration, or other act requisite to voting[.]" 52 U.S.C. § 10101(a)(2)(B). An act that is "requisite to voting" is necessarily distinct from the act of voting itself, and thus the records and papers covered by the Materiality Provision are necessarily distinct from the paper—that is, *the ballot*—used for marking a vote. In other words, the Materiality Provision applies to errors or omissions on ballot applications, registration papers, and other forms "similar in nature"—like an envelope declaration—that must be completed in order for a ballot to be provided and processed. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).[2]

Nor would a natural reading of the Materiality Provision preempt state prohibitions against identifying marks on the ballot secrecy envelope. The Provision protects voters from disenfranchisement due to an immaterial "error or omission." 52 U.S.C. § 10101(a)(2)(B). These terms presuppose that voters are asked to provide certain information, and that they risk being denied the right to vote if they enter the information incorrectly (*i.e.*, by committing an "error"), or fail to enter the information at all (*i.e.*, an "omission"). The date requirement fits within this

[2] This distinction between materials requisite to voting and the vote itself is further apparent from Pennsylvania's vote-counting procedures. Once county election officials receive a mail ballot, they proceed in two stages: first, in the "pre-canvass," they inspect the ballot envelopes to ensure all prerequisites have been satisfied, and—if so—they remove the ballot; then, in the "canvass," they count the "votes reflected on the ballots." 25 P.S. § 2602(a.1), (q.1).

framework because its enforcement punishes voters for failing to write (correctly or at all) a date in the requested space. In contrast, voters are not permitted to write *anything* on a secrecy envelope, *see* 25 P.S. §§ 3146.6(a), 3150.16(a), so enforcement of that rule does not penalize individuals for failing to provide accurate or complete information. Instead, putting identifying marks on a secrecy envelope is properly understood as something other than an "error or omission" as the Materiality Provision uses those terms.

The Materiality Provision does not inherently threaten envelope signature requirements either. Each materiality determination must be informed by the election administration procedures at issue: in Pennsylvania, the voter's signature on the outer envelope declaration provides the voter's name and attests that they are "a qualified registered elector[.]" 25 P.S. §§ 3146.6(B)(3), 3150.16(b)(3). Thus, it is conceivable that the presence of a voter signature in some instances may be "material" in determining that the voter is qualified to vote. The date requirement, on the other hand, is not used for *any* purpose, so it is not material in any scenario. *See* Pet'rs' App. 17a; 79a–80a.

In short, the panel majority failed to identify a single election regulation with a legitimate administrative purpose that would be preempted by the Materiality Provision.

II. Ongoing litigation may render this issue moot.

While the Third Circuit panel majority's decision was wrong, the key issue of whether to count mail ballots that do not comply with the date requirement is still being litigated in Pennsylvania state and federal courts, and one or more of those cases could very well moot this one. In *Baxter v. Philadelphia County Board of Elections*, for example, the Pennsylvania Commonwealth Court held that excluding improperly dated ballots violates the Free and Equal Elections Clause of the Pennsylvania Constitution. *See* 2024 WL 4614689, at *19. Although the Pennsylvania Supreme Court temporarily stayed that ruling as to the 2024 general election, *see Baxter*, 2024 WL 4650792, at *1, it did not address the merits, and it is currently considering a petition for allowance of appeal. *See* Pet. for Allowance of Appeal, *Baxter*, No. 395 EAL 2024. If the Commonwealth Court ruling is reinstated or otherwise affirmed, the date requirement will be unenforceable as a matter of state law, and so its compliance with the Materiality Provision will be purely academic. Similarly, the federal constitutional claim in *Eakin v. Adams County Board of Elections* remains ripe for adjudication before the district court. *See, e.g.*, Orders, *Eakin*, ECF Nos. 375, 410, 423.[3] An injunction of the date

[3] Unlike district court proceedings in the underlying case—where constitutional challenges to the date requirement are also otherwise ripe for adjudication—*Eakin* is not stayed pending resolution of the Petition for a Writ of Certiorari.

requirement on federal constitutional grounds would likewise moot the Materiality Provision controversy presented here.

If certiorari is granted, this Court's continued jurisdiction will depend on (i) the Pennsylvania Supreme Court granting the petition for allowance of appeal in *Baxter*, *and* (ii) that court reversing the lower-court consensus that the date requirement violates the Pennsylvania Constitution, *and* (iii) the Western District of Pennsylvania declining to enjoin the date requirement as a violation of the First and Fourteenth Amendments. Until these matters are conclusively resolved, the Court will likely be required to revisit the propriety of certiorari—potentially not just once, but multiple times. *See, e.g.*, *Aikens v. California*, 406 U.S. 813, 814 (1972) (dismissing writ of certiorari when "the issue on which certiorari was granted" was rendered moot by intervening state supreme court decision); *Piccirillo v. New York*, 400 U.S. 548, 549 (1971) (similar).

Deferring consideration of the Petition and permitting this related litigation to play out will allow the Court to resolve the Materiality Provision dispute, if and when it becomes fully necessary, without the risk of future impediments to the Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should defer consideration of the Petition for Writ of Certiorari until ongoing litigation involving the date requirement has been definitively resolved.

Respectfully submitted,

/s/ *Uzoma N. Nkwonta*
Uzoma N. Nkwonta
Counsel of Record
Jacob D. Shelly
Daniel J. Cohen
William K. Hancock
Omeed Alerasool
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 968-4490
UNkwonta@elias.law
Counsel for DSCC and DCCC