No. 22-1499

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LINDA MIGLIORI, et al., Appellants,

v.

LEHIGH COUNTY BOARD OF ELECTIONS, et al., Appellees

Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 5:22-CV-00397 (Hon. Joseph F. Leeson, Jr.)

DAVID RITTER'S RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE RELIEF

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I. INTRODUCTION

The election at issue in this appeal happened four months ago. A new election season is now already underway for various offices. In the meantime, *three courts*—the District Court, alongside the Pennsylvania Commonwealth Court and Supreme Court—have denied Appellants the ultimate remedy they seek. Also in the meantime, a seat on the Lehigh County Court of Common Pleas has sat *empty* for over two months and counting, despite that seat being part of the last election and despite a case backlog that gets no easier to manage.

Notwithstanding all of the foregoing, Appellants now come to this Court claiming if they get just one more shot at it, this time (unlike the prior times by them and others advocating the same position) the relief serially denied will finally be afforded. Respectfully, the Court should immediately deny this request for relief, as it is has no support in law. Accordingly, there is no reason to stop the forthcoming certification of the final election results from the November 2021 election, and the Lehigh County Board of Election should be permitted to proceed, as planned, with the final certification on Monday. In short, the Court should immediately DENY Appellants' pending Emergency Motion.

II. STATEMENT OF FACTS

As the relevant facts are already set forth in the District Court's Summary Judgment Opinion, Appellants' Emergency Motion, and the Board's Response, Ritter presents below merely a few additional relevant events, all of which are set forth in the parties' Stipulated Facts before the District Court. *See* District Court Record, ECF No. 27.

A. Pennsylvania state court litigation regarding the Disputed Ballots

This dispute concerns 257 mail-in or absentee ballots that have no date on the voter declaration on the outer envelope of the ballot (hereafter, "the Disputed Ballots"), submitted for the November 2, 2021 Municipal Election in Lehigh County. After the November 2 election, the Board voted to count the Disputed Ballots. On November 17, 2021, Ritter promptly filed an appeal of the Board's decision with the Court of Common Pleas of Lehigh County. The Lehigh County trial court held an evidentiary hearing, and then heard argument, at a transcribed hearing on November 22, 2021. The Court heard testimony from the Board's chief clerk and also heard testimony from Richard Richards, one of the Appellants in this matter. The trial court judge issued an opinion and order on November 30, 2021, which affirmed the Board's decision.

On December 1, 2021, Ritter appealed the trial court's decision to the Pennsylvania Commonwealth Court and argued, *inter alia*, that the Court of Common Pleas had no authority to ignore *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020). On January 3, 2022, the Commonwealth Court issued an opinion and order, and relying on *In re Canvass*, concluded the Disputed Ballots could **not** be counted. *See Ritter v. Lehigh Cty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 WL 16577 (Pa. Cmwlth. Jan. 3, 2022). As is material here, not only did the Commonwealth Court hold that the Disputed Ballots could not be counted under the Pennsylvania Election Code, the Court further ruled that the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), was "inapplicable," and further ruled that even if it did apply, it was not violated because "the dating of mail-in ballots is a 'material' requisite under the Election Code[.]" *See Ritter*, 2022 WL 16577, at *9.

Candidate Cohen filed a petition for allowance of appeal with the Pennsylvania Supreme Court on January 7, 2022. On January 27, 2022, the Pennsylvania Supreme Court denied the petition. *Ritter v. Lehigh*

Cty. Bd. of Elections, No. 9 MAL 2022, 2022 WL 244122 (Pa. Jan. 27, 2022).

Following that decision, also on January 27, 2022, the Lehigh County Court of Common Pleas issued an order on remand directing the Board "to exclude the 257 ballots at issue in this case that fail to include a date on the return envelope from the certified returns of the 2021 municipal election of Lehigh County."

B. The present lawsuit, parties, and procedural posture

On January 31, 2022, ninety days after the November 2, 2021 election, Appellants filed this matter. Appellants asserted the following three claims: Count I (Violation of the Materiality Provision of the Civil Rights Act), Count II (Undue Burden on the Right to Vote Under the First and Fourteenth Amendment), and Count III (Denial of Voting Rights Without Notice and Procedural Due Process). Appellants voluntarily dismissed Count III. The parties stipulated to the relevant facts and proceeded on cross motions for summary judgment.

On March 16, 2022, the District Court denied Appellants' Motion for Summary Judgment and granted Ritter's and the Board's Motions for Summary Judgment, concluding that Appellants' claims fail as a

matter of law. Appellants appealed on March 18, 2022, and filed that same day with the District Court an emergency motion for injunction pending appeal. The District Court immediately denied Appellants' motion, finding that Appellants are unlikely to succeed on the merits of their claims and the public interest favors finality of elections.

III. ARGUMENT

Two points warrant clarification at the outset of the argument.

One, Appellants' claim regarding the Materiality Provision—that it requires their undated-voter-declaration ballots to be counted—has been rejected by ***three*** courts, and one of those courts did so ***twice***. Indeed, the Commonwealth Court of Pennsylvania addressed the Materiality Provision, and found it inapplicable. *Ritter v. Lehigh County Board of Elections*, No. 1322 CD 2021, 2022 WL 16577, at *9 (Pa. Cmwlth. Jan. 3, 2022). Next, the Pennsylvania Supreme Court refused to review that opinion. *Ritter v. Lehigh County Board of Elections*, No. 9 MAL 2022, 2022 WL 244122 (Pa. Jan. 27, 2022). And then the District Court here, upon cross-motions for summary judgment (*i.e.*, based on a full and final factual record), likewise dismissed the merits of the claim.

(Appx. 027.) When Appellants asked for an injunction pending appeal, the District Court rejected the claim *again*. (Appx. 034.)

Two, while the Appellants claim the date on the voter declaration is "meaningless," that position has been serially rejected by Pennsylvania appellate courts and the District Court. To be abundantly clear, the "date" is not some inconsequential line or field on a mailing envelope, instead it is part of the voter declaration for mail-in and absentee ballots. (Supp. Appx. 002.)[1] More fully: it is a *factual* part of the voters' attestation that they were lawfully able to vote, and did so in a lawful manner (subject to criminal sanction for misrepresentation, 25 P.S. § 3553). (Appx. 028-030.) Given its importance as a factual part of the voter declaration, the Pennsylvania Supreme Court in 2020 ruled, in a split decision, that a fully dated voter declaration was required in

[1] The full text of the voter declaration is as follows:

> **Voter's declaration:** I hereby declare that I am qualified to vote in this election from the address stated on the reverse side of this envelope; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

(Supp. Appx. 002.)

all elections going forward. *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020). The Commonwealth Court analyzed that decision and concluded that it meant a dated voter declaration was required. *Ritter*, 2022 WL 16577, at *9. The Pennsylvania Supreme Court, when asked, refused to review the Commonwealth Court's decision. *Ritter*, 2022 WL 244122. Later, shortly before this case was filed in the District Court, the Commonwealth Court, in another matter, *again* ruled that dated voter declarations are required. *See In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381-1385, 1395-1399 & 1403 CD 2021, 2022 WL 96156, at *3 (Pa. Cmwlth. Jan. 10, 2022) (plurality). The Pennsylvania Supreme Court then refused to review that decision as well. *See In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 20-24 MAL 2022, 2022 WL 536196 (Pa. Feb. 23, 2022). In other words, in just 2022 alone, Pennsylvania's appellate courts have **four times** refused to conclude dated voter declarations are "meaningless."[2]

[2] In light of the Commonwealth Court now twice ruling a dated voter declaration is mandatory, and the Pennsylvania Supreme Court twice refusing to review those decisions, Appellants' reliance on the amicus brief from the Pennsylvania Attorney General below about the importance of the dating

Against these threshold clarifications, and for the further points below, Appellants' Motion should be denied. Appellants cannot satisfy *any* of the elements for the "extraordinary relief" they seek. *Donald J. Trump for Pres., Inc. v. Sec. of Pennsylvania*, 830 Fed. Appx. 377, 389 (3d Cir. 2020) ("Injunctions pending appeal, like preliminary injunctions, are extraordinary remed[ies] never awarded as of right." (quotations removed); setting forth four elements for injunction pending appeal)).

A. Appellants cannot show a likelihood of success on the merits.

1. The District Court's analysis is correct.

Appellants' merits claim is simple: they allege the Disputed Ballots must be counted as a matter of law under the Materiality Provision. Three courts now have rejected this claim, as set forth above. And when the District Court did so, it explained that it "did not find the question of the existence of a private right of action to be particularly

requirement is misplaced. *See* Appellants Mot. at 27. Simply put, as a matter of law, the date is material, and the Attorney General's views to the contrary (which conflict with the views of the leaders of the General Assembly, who also submitted an amicus brief in the District Court (Supp. Appx. 128-147)) are not shared by Pennsylvania's highest courts.

close." (Appx. 034.)[3] Hence, their claims are neither likely to succeed, nor are they even substantial, as the District Court correctly observed.

Despite this, Appellants contend that, under a "sliding scale" approach, they need only show a serious question on the merits and irreparable harm that outweighs harm to other parties. Appellants Mot. at 7-8 (citing *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015)). But this Court in *In Re Revel* described the analysis as follows: the applicant must make "a sufficient showing that (a) it can win on the merits, … *and* (b) will suffer irreparable harm absent a stay[.]" 802 F.3d at 571 (emphasis in original). If it has, the Court will balance the relative harms considering all four factors using the sliding scale analysis. *Id.* If the first two requisite showings are not made, "inquiry into the balance of harms [and the public interest] is unnecessary and the stay should be denied without further analysis." *Id.* (alteration in original). Appellants have not shown they can win on the merits (or that they will suffer irreparable harm, as discussed below). Therefore, an injunction pending

[3] Ritter endorses and advocates that this Court affirm the District Court's finding that no private right of action exists under the Materiality Provision (he argued exactly that to the trial court (Supp. Appx. 004, ¶ 3)).

appeal is not warranted even under Appellants' preferred analytical rubric.

Furthermore, even if this Court accepts (which it should not) that Appellants are likely to succeed on their argument that they have a private right of action under the Materiality Provision, that does not end the inquiry. This is so because that defense was only the *first* of *four* defenses Ritter raised in opposition to the merits of Appellants' claim. (Supp. Appx. 003-127.) The District Court did not review those three alternative grounds because it did not need to do so given its threshold holding about lack of standing, but given Appellants' averment here that they are likely to succeed, those three alternative defenses warrant the Court's consideration.

2. Section 101 of the Civil Rights Act is aimed at discriminatory conduct and, thus, is inapposite.

First, unlike other federal statutes—such as the Help America Vote Act—Section 101 is not a general regulation of state election laws; rather it is aimed specifically and exclusively at state election laws that illegally discriminate based on race, which is not at issue here. Turning, initially, to the plain language of Section 101, Subsection (a), which contains the Materiality Provision, is titled "[r]ace, color, or previous

condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests[.]" 52 U.S.C. § 10101(a). The Materiality Provision's focus on racial discrimination comes into sharper focus when considered against the broader statuary scheme. Specifically, Section 101 was enacted as part of the landmark 1964 Civil Rights Act, which sought to eliminate certain racially discriminatory conduct by states. *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Accordingly, both the structure and history of the statute suggest that Section 101 is limited to claims of racial discrimination.

Moreover, while sometimes disagreeing on its precise contours, federal courts appear to uniformly acknowledge that an allegation of discrimination—whether based on race or otherwise—is a prerequisite to applying Section 101. *Compare Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) (concluding Section 101 was designed to prohibit racial discrimination and, thus, dismissing a claim under that provision since the "[p]laintiffs ha[d] not alleged, much less proven, any discrimination based on race"); *Ballas v. Symm*, 351 F. Supp. 876, 889 (S.D. Tex. 1972) (holding Section 101 "applies

specifically and exclusively to situations of racial discrimination"), *aff'd*, 494 F.2d 1167 (5th Cir. 1974); *Malinou v. Bd. of Elections*, 271 A.2d 798, 803 (R.I. 1970) (concluding Section 101 "is aimed at any state law which has the effect of denying citizens their right to vote because of their race"); *with*, *Ball v. Brown*, 450 F. Supp. 4, 7 (N.D. Ohio 1977) (finding "the prevalent trend permits [Section 101] actions to redress non-racial discrimination" and, thus, concluding that "plaintiff's allegations of discrimination in voter registration on the basis of sex are properly before the Court"); *Frazier v. Callicutt*, 383 F. Supp. 15, 19 (N.D. Miss. 1974) (holding Section 101 applies to "non-racial discrimination as well as racial").

Here, Appellants did not allege at any point that requiring a dated voter declaration is borne out of an *intent* to discriminate against a certain class of voters; nor has any discriminatory *impact* been alleged—let alone proven. Hence, Appellants are unlikely to succeed on the merits of their Materiality Provision claim for this additional, independent reason.

3. The Materiality Provision is not implicated, since it applies exclusively to voter registration laws.

Second, Section 101 applies only to voter registration laws and regulations, which are not at issue here. Turning initially to the text of Section 101, that statute, by its plain terms, prohibits denial of the right to vote "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) (emphasis added). It is unsurprising, therefore, that the vast majority of the decisions arising under this statute deal specifically with voter registration schemes.[4] Moreover, on the few occasions that courts have been expressly asked to extend this statute beyond the limited scope of voter registration laws, they have declined to do so. *See Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004) (explaining Section 101 "was designed to eliminate

[4] *See, e.g.*, *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1358 (N.D. Ga. 2006) ("[A]s the Eleventh Circuit has noted, [the Materiality Provision] 'was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.'" (quoting *Schwier*, 340 F.3d at 1294)); *accord Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020).

practices that could encumber an individual's ability to *register* to vote" and "[n]othing in [the Court's] review of the case law in this jurisdiction or in other jurisdictions indicates that section [101] was intended to apply to the counting of ballots by individuals *already deemed qualified to vote*" (emphasis in original)); *Indiana Democratic Party*, 458 F. Supp. at 841 ("[T]he act of presenting photo identification in order to prove one's identity is by definition not an 'error or omission on any record or paper' and, therefore, [Section 101](a)(2)(B) does not apply to this case."). Hence, Appellants are unlikely to succeed on the merits of their Materiality Provision claim for this additional, independent reason.

4. Assuming *arguendo* the Materiality Provision applies, Appellants' claim is without merit, since a dated voter declaration *is* material in ascertaining a voter's qualification.

Third, even if the Materiality Provision applies, Appellants still cannot show a likelihood of success on the merits under the present facts. To illuminate, it is important to reiterate that the dating requirement does not apply to ***a ballot*** as such, but rather, to ***a voter declaration***, attesting, on pain of criminal penalty, that the elector, *inter alia*, (1) is qualified to vote from the stated address; (2) has not already voted in the election; and (3) is qualified to vote the enclosed

ballot. *See In re Canvass*, 241 A.3d at 1065 (citing 25 P.S. § 3150.14). Accordingly, while Appellants suggest they are aggrieved because "they did not handwrite a meaningless date next to their signatures," Appellants Mot. at 1, this imprecise characterization obfuscates the statutory scheme. As developed below, the specific date on which any one of the foregoing three representations are made is material in determining whether an individual is qualified under Pennsylvania law to vote.

Turning, to the first attestation on the declaration, under the Election Code, a person is qualified to vote "in the election district where he or she ... offer[s] to vote" if "[h]e or she shall have resided" there at least thirty days immediately preceding the election. 25 P.S. § 2811. Residence, under the Election Code, does not depend on mere registration status; rather, it "means the place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one.'" *In re Stabile*, 36 A.2d 451, 453 (Pa. 1944) (quoting *Case of Fry*, 71 Pa. 302, 307 (1872)). It is self-evident that whether a person resides at a specific address—and, therefore, is qualified to vote from there—may change in a matter of days. And the

truthfulness of an elector's representation in this regard may change based on the date on which it is made.

To illustrate, consider a hypothetical voter who received a mail-in ballot forty-five days before the 2021 general election, but on October 3, 2021 discovered that he must unexpectedly relocate to a different state and on October 19, 2021 (two weeks before the election) completed his move. If the voter signed the voter declaration on October 1, 2021, he truthfully attested to being a qualified voter and, indeed, would have had no reason to know that his residence would change. However, if the voter signed the voter declaration on October 20, 2021, he plainly made a false representation and is guilty of fraud. Absent a dated declaration, under such circumstances, whether the elector had been truthful would be difficult, if not impossible to establish.

Similarly, an elector's representation that he has not yet voted in the election may be true or false depending on the date on which the attestation is made, which does not require a hypothetical to imagine.

As for the general representation that the elector is qualified to vote the enclosed ballot, in addition to relocation, other factors also bearing on an individual's qualification to vote can change with time.

Consider a hypothetical elector who has been charged with a felony, but is not convicted until October 25, 2021. If that voter's absentee ballot voter declaration is signed at any point before October 25, 2021, the elector has been entirely truthful in representing himself as a qualified voter. *See Voting by Untried Prisoners and Misdemeanants*, 67 Pa. D. & C.2d 449 (Op. Pa. Atty. Gen. 1974) ("It is our opinion, and you are hereby advised, that untried pretrial detainees and convicted misdemeanants must be afforded the right to register and vote by officials responsible for administration of the election laws in the Commonwealth of Pennsylvania."). If, however, he signs the declaration after that date, the attestation is false, since a convicted felon is not qualified to vote under the Election Code. *See* 25 P.S. § 2602(w) (excluding incarcerated felons from the statutory definition of "qualified absentee elector"); *Mixon v. Commonwealth*, 759 A.2d 442, 450 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001).

In short, a dated voter declaration is, in fact, material to determining whether an elector has the right to have his or her ballot canvassed; *i.e.*, whether the elector is "qualified to vote." That was the conclusion originally reached by the Pennsylvania Supreme Court in

2020, as reiterated by the Commonwealth Court in the state court proceedings related to this matter.

Moreover, in addition to its materiality in determining an elector's right to have his or her ballot canvassed in the specific election for which the ballot is offered (*i.e.*, whether the elector is "qualified to vote"), a dated voter declaration is also material in determining an elector's qualification to vote in ***future*** elections. Specifically, under the Election Code, any person who signs a voter declaration "knowing any matter declared therein to be false," 25 P.S. § 3553, is not only guilty of a misdemeanor, but is also automatically "deprived of the right of suffrage absolutely for a term of four years from the date of his conviction[.]" 25 P.S. § 3552; *Com. v. Petrillo*, 386 A.2d 590, 593 (Pa. Super. 1978). As the above examples illustrate, the date on which an attestation is made is material—indeed, arguably determinative—in establishing whether an individual who is not qualified to vote has ***knowingly*** made a false representation, such that he is guilty of a criminal offense and must be disqualified from voting for four years, or merely acted carelessly in failing to inform the board of elections of the change in circumstances. *See generally Com. v. Bobbino*, 18 A.2d 458,

460 (Pa. Super. 1941). Accordingly, a dated voter declaration is material to determining a voter's qualification to vote in both present and future elections.

Finally, as the above rendition shows, requiring a dated voter declaration also serves a significant fraud-deterrent function, which, in of itself, satisfies Section 101's materiality requirement. *See Howlette v. City of Richmond, Va.*, 485 F. Supp. 17, 22-23 (E.D. Va. 1978) (holding a statute requiring each signature on a referendum petition to be notarized does not violate the Materiality Provision), *aff'd*, 580 F.2d 704 (4th Cir. 1978). Like the statutory mandate in *Howlette*, requiring voters to submit a dated voter declaration along with their mail-in or absentee ballot "impresses upon the signers of the [declaration] the seriousness of the act of signing" a declaration and "dissuades non-qualified persons" from voting "by subjecting those who take the oath to potential criminal liability for perjury because of their fraud-deterrent function." *Id.* Accordingly, aside from the materiality of a dated voter declaration in ascertaining an elector's qualification to vote, the statute's safeguard against fraud is, without more, sufficient to overcome any challenge under Section 101.

Hence, Appellants are unlikely to succeed on the merits of their Materiality Provision claim for this additional, independent reason.

B. Appellants will not suffer irreparable injury if denied an injunction.

As a preliminary matter, Appellants appear to contend they will suffer irreparable harm, at least in part, because their appeal will be mooted if injunctive relief is not immediately granted. *See* Appellants Mot. at 25. But as is well established in this Court, imminent mootness alone does not equate to irreparable harm per se. Indeed, as this Court has stated: "the fact that the decision on the stay may be dispositive of the appeal in some cases is a *factor* that an appellate court must consider," yet that factor "*alone does not justify* pretermitting an examination of the nature of the irreparable injury alleged and the particular harm that will befall the appellant should the stay not be granted." *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991) (emphasis added). In short, to the extent Appellants are claiming the forthcoming mootness of their appeal alone is their irreparable injury, that claim is without legal support.

Furthermore, Appellants will not suffer the irreparable injury of the loss of "their right to vote" without an injunction because their

alleged "disenfranchisement" results solely from their own failure to comply with the requirements of the Pennsylvania Election Code. Appellants had the chance to vote, did so, but failed to date their voter declarations as required under the Election Code, and then did not further inquire about the completeness of their ballots or seek to cure this fatal defect before Election Day. As the District Court recognized, the dating of the voter declaration is "a minor limitation on the fundamental right to vote," which is justified by important state interests. (Appx. 027-030.) Therefore, to the extent the Board's final certification on Monday results in Appellants' ballots not being canvassed, "that result was not caused by [the statutory requirement,]" but by Appellants' "own failure to take timely steps to effect their [vote]." *Arizona Party v. Hobbs*, 18 F.4th 1179, 1189 (9th Cir. 2021) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)). In sum, because any injury Appellants face from the certification of the election results is due to their own actions, they have not shown sufficient harm warranting an injunction pending appeal.

C. The requested injunction will harm David Ritter.

The injury to Ritter is clear and not addressed by Appellants. Ritter is, and has been for the duration of this case, the presumptive winner of the election at issue. After certification by the Board, he will be entitled to be sworn in and immediately begin his service as a commissioned judge. That new role carries certain salary and benefits, 204 Pa. Code § 211.2(d) (listing salaries for a judge of the court of common pleas), which he will be denied if the injunction is granted.

But money is not the entirety of his injury. Indeed, as a practicing attorney who may or may not cease being in private practice as soon as Monday, he is put in an untenable position of trying to continue his trade, while tempering taking on new engagements that he may not be able to fulfill if he is soon without the ability to engage in further private practice. This uncertainty also injures him. And the uncertainty is without justification given that both the highest appeal courts in Pennsylvania *and* the District Court have ruled that there is no impediment to the Board finally certifying his election victory.

Thus, this factor weighs against the proposed injunction pending appeal.

D. The requested injunction will harm the public interest.

The public interest will be harmed by granting an injunction pending appeal. For starters, the public has an interest in the orderly and *timely* administration of public elections; a proposition that even Appellants seem to agree with. *See Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016) ("Crookson's belated challenge to Michigan's election procedures prejudices the State's interest in holding orderly elections."); *Stein v. Cortes*, 223 F. Supp. 3d 423, 436 (E.D. Pa. 2016) ("The Commonwealth has an obvious interest in regulating the conduct of its elections."); *see also* Appellants Mot. at 26 (citing *Donald J. Trump for President*, 830 Fed. Appx. at 390-91, for the proposition that "'Democracy depends on counting all lawful votes ***promptly and finally*** …'" (emphasis added)). As the District Court aptly observed in its opinion denying Appellants' motion for an injunction pending appeal, the public interest favors not just timely administration of elections, but also finality of elections. (Appx. 034.) That interest is being injured here where the office has remained open for two months and counting, with seemingly no end in sight if Appellants' requested relief is granted.

Moreover, the particular office at issue—a judge on the Court of Common Pleas—also factors into the injury to the public interest. Specifically, the Court of Common Pleas has been, and remains, down a commissioned judge who should by right be already fulfilling various duties to the public through the administration of pending cases. This no doubt presents caseload challenges to an already busy court; indeed, as of January 1, 2020, the latest date for which publicly available information is published by the Administrative Office of the Pennsylvania Courts, over 2000 civil cases were pending in Lehigh County. (Supp. Appx. 033-034.)

Next, vacancies in the office of judge are impliedly, if not expressly, against the public interest. The Pennsylvania Constitution has provisions that such openings "shall be filled" by the Governor with appointed judges, and then expressly limits how long an appointed judge can hold the office. *See* Pa. Const. art. V, § 13(b). This signals that Pennsylvania's Organic Law demands that judicial vacancies be short, be immediately filled by an appointed judge, and then be promptly filled by a duly elected judge. *See* Pa. Const. art. V, § 13(b). Applied here, the Pennsylvania Constitution underscores that an elective office for judge

cannot remain indefinitely open without inflicting injury on the public. That is precisely what is happening here.

In sum, the public interest will be harmed if the requested injunction is granted.

IV. CONCLUSION

For the foregoing reasons, David Ritter respectfully requests that this Court deny the pending Emergency Motion.

Respectfully submitted,

Dated: March 19, 2022

/s/ Joshua J. Voss
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CERTIFICATIONS

I hereby certify that I am a member of the Bar of this Court.

I hereby certify that this Response complies with the Length Limit in Fed.R.App.P. 27(d)(2)(A), in that in contains only 5042 words, exclusive of the cover page, table of contents, and signature block.

I hereby certify I served all parties by filing the foregoing Response on the Court's CM/ECF filing system.

Dated: March 19, 2022

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