No. 22-30

IN THE

Supreme Court of the United States

DAVID RITTER,

Petitioner,

—v.—

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a unanimous decision, the Third Circuit held that federal law required that Plaintiff Voters' votes be counted, rather than disqualified based on Plaintiff Voters' inadvertent failure to handwrite an inconsequential date on the return envelopes containing their mail ballots. It is undisputed that all of the mail ballots at issue were timely received and date-stamped by the County Board of Elections.

Petitioner Ritter, a candidate for a local judgeship, sought a stay of the Third Circuit's order in this Court but did not file a petition for certiorari. The Board of Elections, which now "adopts in full" the argument made in Ritter's petition, did not join the stay application. This Court denied the stay, and Plaintiff Voters' mail ballots were subsequently counted. With all the ballots counted, Ritter emerged with fewer votes. He then voluntarily conceded the election, publicly announcing that he had "decided that [his] campaign … must end" and that he would forego any further challenge because "this election must be concluded." The Board then certified the election consistent with Pennsylvania law. Weeks after that, Ritter filed this petition for certiorari, seeking *Munsingwear* vacatur. The question presented is:

> Should *Munsingwear* vacatur be granted to a petitioner who never filed a petition for certiorari while the election outcome was unresolved, and who voluntarily conceded the election at issue before it was certified?

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INTRODUCTION

On June 9, 2022, this Court denied Candidate-Intervenor David Ritter's application for a stay pending certiorari. The next week, the ballots at issue in the underlying election were counted as required by a unanimous Third Circuit decision. Ritter's opponent received more votes. The week after that, on June 21, Ritter conceded the election and announced that he would forgo any further legal challenge. The Lehigh County Board of Elections (the "Board") accordingly certified the result. Another two weeks later, on July 7, Ritter filed this petition for certiorari seeking *Munsingwear* vacatur of the Third Circuit's decision, even though he had caused the dispute to become moot. And a month after that, the Board filed a one-sentence brief in support (even though it had not joined Ritter's initial stay application).

Neither Ritter nor the Board sought certiorari during the pendency of Ritter's stay application or in the weeks immediately following this Court's denial of a stay. Rather, Ritter voluntarily mooted the case by conceding the race and forswearing any further challenge, after which the Board certified the election. Ritter accordingly is not entitled to vacatur, and his petition should be denied.

The underlying litigation here involved 257 mail ballots that were cast in the 2021 Lehigh County municipal election. The ballots were cast by eligible, registered voters, and timely received and date-stamped by the Board. None implicated any fraud concerns. But the voters who cast them inadvertently omitted an irrelevant handwritten date on the outer return envelope in which they mailed their ballots.

Because all of the ballots were timely received and date-stamped by Election Day, the absence of the handwritten date on the return envelope was immaterial. Indeed, the handwritten date was so inconsequential that the Board accepted ballots with any date whatsoever handwritten on the return envelope, even dates that were obviously wrong. The county clerk testified he would have accepted ballots where the handwritten date was *from the future*. On those facts, a Third Circuit panel unanimously concluded that federal law required Plaintiff Voters' ballots to be counted because the missing handwritten date was immaterial. Ritter (but not the Board) requested a stay of that decision, which this Court denied. The votes were then counted, and Ritter lost the election.

Ritter did not challenge that result. Instead, five days later, he conceded, announcing he would not pursue any further challenge. After the initial counting of the votes, but before the Board certified the election, he made the following statement:

> There will be no recount, nor any objections to the certification of this election. … I remain disappointed in the way the legal issues were resolved, and I used every available tool to defend my rights and the rights of those who voted for me. But now a 10th Judge must be seated on the bench. As both a resident and a 25-year employee of Lehigh County, I believe that the citizens, courthouse employees, and nine sitting Judges all deserve to have a full contingent of Judges in place.

> For the good of Lehigh County, this election must be concluded.[1]

With Ritter's assent, the Board certified the election the following week.

Neither Ritter nor the Board filed a petition for certiorari during the nearly six weeks between the Third Circuit's initial decision and the election's certification. Nor did Ritter ask this Court to construe his stay application as a petition. Instead, he waited until after the election was certified to seek *Munsingwear* vacatur of the Third Circuit's decision.

The petition should be denied for at least three reasons. First, vacatur is not available to a party who sleeps on his rights or moots his appeal by voluntary action. That is the case here. Ritter elected not to seek certiorari when the case was live, deciding instead to moot the controversy by conceding the election rather than seeking a recount or any other challenge under state law, and thus paving the way for final certification. And the Board did not even seek a stay of the decision below, let alone file a petition for certiorari; rather, it took no position on Ritter's stay application, counted the ballots, and certified the election after Ritter conceded. Because the case became moot as a result of Ritter's and the Board's own actions, vacatur is not warranted. The petition

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[1] *David Ritter Concedes Lehigh County Judge Race, Ending a Monthslong Battle from the 2021 Election*, ALLENTOWN MORNING CALL (June 21, 2022), https://www.mcall.com/news/breaking/mc-nws-lehigh-county-judge-ritter-cohen-20220621-suv3fcbci5brvlhhrxtf3ewnku-story.html.

can and should be denied on that ground alone. *See, e.g.*, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23–29 (1994).

Second, Ritter fails to show that certiorari would have been granted if the case were not now moot. The Third Circuit's narrow decision and the particular facts upon which that decision rests—for example, the concession that ballots in return envelopes where voters had written obviously "inaccurate dates were counted in this election," App. 25 (Matey, J., concurring)—make this case especially unsuitable for certiorari. Ritter's merits arguments are identical to those that this Court previously found insufficient to justify a stay. Nothing has changed to alter that conclusion.

Third, equitable considerations weigh against the vacatur request. Ritter suggests that the decision below might unleash "havoc" (Pet. i, 33), but the Third Circuit's narrow decision was easily implemented in this case and has not been extended beyond the specific facts concerning the immaterial handwritten return-envelope date at issue.

Indeed, equity disfavors the request. Ritter asks the Court for vacatur in large part to help shape the rules for "upcoming elections" in Pennsylvania. *E.g.*, Pet. 15, 33. But Ritter is not a candidate in 2022. Rather, he is just another citizen, with no particular stake or interest (equitable or otherwise) in the upcoming election. And Ritter's request is contrary to this Court's *Purcell* principle, which counsels against needlessly sowing confusion by federal judicial revision of election rules in the run-up to Election Day.

STATEMENT OF THE CASE

This case arises out of the near-disenfranchisement of 257 mostly elderly Lehigh County voters due to an immaterial paperwork mistake on the return envelopes containing their mail ballots.[2] The voters' ballots were initially excluded based on a direction in state law that mail-ballot voters "fill out, date and sign" a form declaration on the outer envelope used to return mail ballots (the "Return Envelope"). Plaintiff Voters, all indisputably eligible and registered to vote, signed the Return Envelopes and timely returned their ballots, which election officials date-stamped upon receipt. But Plaintiff Voters inadvertently omitted a handwritten date on the Return Envelopes. Election officials counted ballots in Return Envelopes with any handwritten date, even if it was obviously wrong (*e.g.*, a birthdate from decades ago), and testified that literally any string of numbers would be accepted, without regard to its accuracy, even a date from the future.

On those undisputed facts, a unanimous Third Circuit panel (McKee, Greenaway Jr., and Matey, JJ.) concluded that disenfranchising voters for failing to handwrite a date whose content did not matter violates the Materiality Provision of the Civil Rights Act, which prohibits denying "the right of any individual to vote in any election" based on an "error or omission on any record or paper relating to any

[2] For ease of reference, the term "mail ballots" is used herein to encompass both absentee and mail ballots, which are treated identically under Pennsylvania law.

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); App. 10–23; App. 23–26 (Matey, J., concurring).

A. Pennsylvania's Mail Ballot Process

In 2019, Pennsylvania enacted new mail-in voting provisions, which allow all registered eligible voters to vote by mail. Act of Oct 31, 2019, Pa. Laws 552, No. 77 § 8. *See McLinko v. Dep't of State*, No. 14 MAP 2022, --- A.3d ----, 2022 WL 3039295 (Pa. Aug. 2, 2022).

A voter seeking to vote by mail must complete an application and have their identity and qualifications verified. The voter must provide their name, address, and proof of identification to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Voters must also show that they are qualified to vote in Pennsylvania—namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not incarcerated on a felony conviction. 25 Pa. Cons. Stat. § 1301; *see* CA3 Dkt.33-2, JA 180–182 (mail ballot application).

The county board of elections verifies the provided proof of identification and compares it with information in a voter's record. 25 P.S §§ 3146.2b,

3150.12b; *see also id.* § 3146.8(g)(4).[3] The county board's determinations are conclusive unless challenged prior to Election Day. *Id.* Once the county board verifies the voter's eligibility, it sends a mail-ballot package that contains a ballot, an inner envelope marked "Official Election Ballot" (otherwise known as the "secrecy envelope"), and a pre-addressed outer Return Envelope, on which a voter declaration form is printed. *Id.* §§ 3146.6(a), 3150.16(a).

At "any time" after receiving their materials, the mail-ballot voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The voter delivers the ballot by mail or in person to their county elections board. To be considered timely, a ballot must be received by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt, county boards of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Statewide Uniform Registry of Electors ("SURE") system.[4]

This case involved the direction that a voter "shall … fill out, date and sign the declaration printed on [the return] envelope." *See* 25 P.S. §§ 3146.6(a),

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[3] *See also* Pa. Dept. of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (Sept. 11, 2020) at 2, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

[4] See *Guidance Concerning*, *supra* n.3 at 2–3.

3150.16(a); *see also* CA3 Dkt.33-2, JA 130, 187 (Return Envelope). Plaintiff Voters signed the declarations on their Return Envelopes, and the Board date-stamped those envelopes confirming their timeliness. However, Plaintiff Voters inadvertently failed to add a handwritten date next to their signatures.

This envelope-dating provision was the subject of state-court litigation during the 2020 election cycle. The Pennsylvania Supreme Court concluded on state law grounds that timely-received mail ballots contained in signed but undated Return Envelopes would be counted. *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020).[5] A majority of the Justices also suggested, without deciding, that invalidating votes for failure to include the handwritten date "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons." *Id.* at 1074 n.5 (opinion announcing the judgment); *id.* at 1089

[5] One of the four Justices in the majority, Justice Wecht, concurred separately, writing that he viewed the "shall … date" language in the Election Code as mandatory and thus a potential basis for voters to be disqualified, but that he would only apply that rule prospectively if voters were given "adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere to those requirements." *In re Canvass*, 241 A.3d. at 1089 (Wecht, J., concurring and dissenting) (quotation marks and emphasis omitted).

n.54 (Wecht, J., concurring and dissenting) (expressing similar concern).[6]

After that ruling, the Pennsylvania Department of State issued guidance on the envelope-dating requirement. In the run-up to the 2021 elections at issue in this case, the Commonwealth instructed county boards of elections that ballots in Return Envelopes without a handwritten date should not be counted but that "*there is no basis to reject a ballot for putting the 'wrong' date on the envelope, nor is the date written used to determine the eligibility of the voter*." CA3 Dkt.33-2, JA 192 (emphasis added).

The Board accordingly counted ballots where the Return Envelopes had plainly wrong dates on them—where, for example, a voter wrote their own birthdate instead of the date they signed the envelope. CA3 Dkt.33-2, JA 254–255. The Lehigh County clerk affirmed that he would have accepted a mail ballot if

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[6] The remaining three Justices, in dissent, suggested that the envelope-dating rule might prevent supposed "back-dating" or "ensur[e] the elector completed the ballot within the proper time frame." *See In re Canvass*, 241 A.3d at 1091 (Dougherty, J., concurring and dissenting) (cited in Stay Appl. at 3–4). But because a ballot's timeliness under Pennsylvania law is determined by when it was received and stamped by the county board of elections, 25 P.S. §§ 3146.6(c), 3150.16(c), "back-dating" the envelope has no conceivable effect on whether a ballot is considered timely. *Accord* App. 22. Nor does the envelope date "ensur[e] the elector completed the ballot within the proper time frame," because under state law, the proper time frame is "any time" between when a voter receives the ballot and 8 p.m. on Election Day, 25 P.S. §§ 3146.6(a), 3150.16(a).

the envelope date said "1960" or even was "a date in the future." *Id.* As the clerk explained, he did so because state law "doesn't say what date." *Id.*

B. Plaintiff Voters' Ballots Are Excluded for Lack of a Handwritten Date on the Mail-Ballot Return Envelope.

Plaintiff Voters are Lehigh County residents who cast mail ballots in the November 2021 county elections. App 33–35. Some are registered as Republicans and some as Democrats; all five are senior citizens who have voted in Pennsylvania for decades. CA3 Dkt.33-2, JA 62–77, 172–175.

Plaintiff Voters' ballots, and those of 252 other Lehigh County mail-ballot voters, were all timely received before the statutory deadline of 8 p.m. on Election Day, as confirmed by the Board's date stamp. CA3 Dkt.33-2, JA 168, ¶ 24 and 169, ¶ 26; *see also* CA3 Dkt.33-2, JA 449–458. The Board approved these voters' mail-ballot applications and verified their eligibility to vote. CA3 Dkt.33-2, JA 165–166, 168, ¶¶ 3, 23–24; *see also* 25 P.S. §§ 3146.2b(a), 3150.12b(a). The voters signed the declarations on the Return Envelopes. CA3 Dkt.33-2, JA 168, ¶ 24. None of the ballots raised any fraud concerns. CA3 Dkt.33-2, JA 169, ¶ 26. The sole reason the ballots were set aside was because they lacked a handwritten date on their Return Envelopes. App. 33–35.

On November 15, 2021, the Board voted unanimously to count the 257 mail ballots. CA3 Dkt.33-2, JA 169–170, ¶¶ 30–34; *id.* at JA 255–258. Among other reasons, the Board explained that the voters had made a "technical error," that there was no

question that the ballots were "received on time," that "the signatures [on the Return Envelopes] match the poll book," and that the directive on the Return Envelope to include a date could have been made "much more visible to the voters." CA3 Dkt.33-2, JA 256–257.

Ritter, one of the candidates running for election to the Lehigh County Court of Common Pleas in the 2021 municipal election, then sued in state court to block the Board from counting the disputed ballots. CA3 Dkt.33-2, JA 170, ¶¶ 34–35. Of the three Lehigh County judicial vacancies on the ballot in the 2021 county election, the Board certified the election of the two candidates who won by more than 257 votes. CA3 Dkt.33-2, JA 168, ¶¶ 19–20. But the difference between the third and fourth-place candidates (Ritter and Zachary Cohen, respectively) was 71 votes, fewer than the number of disputed ballots at issue. *See* CA3 Dkt.33-2, JA 171, ¶ 50.

Certification of the election results for the third judicial seat was suspended during the state-court proceedings. In December, the Court of Common Pleas ruled against Ritter, holding that state law did not prevent the Board from counting the ballots, noting that there was "no fraud here and, indeed, no apparent reason why the failure to place the date on the return envelope" should disenfranchise county voters. CA3 Dkt.33-2, JA 99. Ritter appealed, and on January 3, 2022, the Pennsylvania Commonwealth Court held in an unpublished, non-precedential 2-1 decision that state law required the Board to set aside timely-received ballots submitted in Return Envelopes that were date-stamped by elections officials but lacked a date handwritten by the voter.

Ritter v. Lehigh Cnty. Bd. of Elections, No. 1322 C.D. 2021, 272 A.3d 989 (Tbl.), 2022 WL 16577, at *10 (Pa. Commw. Jan. 3, 2022). The Pennsylvania Supreme Court denied discretionary review, CA3 Dkt.33-2, JA 445, after which the Board moved to certify the election without counting the excluded ballots.

C. Plaintiff Voters Sue to Protect Their Right to Vote and Obtain a Unanimous Third Circuit Judgment.

Plaintiff Voters promptly filed this federal action against the Board, seeking to restore the Board's initial decision to count their votes. CA3 Dkt.33-2, JA 40. Plaintiff Voters alleged that the refusal to count their ballots violates the Materiality Provision of the Civil Rights Act. CA3 Dkt.33-2, JA 52–59. Candidates Ritter and Cohen intervened. App. 9.

On March 16, 2022, the district court granted summary judgment to defendants. App. 32–33. The district court concluded that the Materiality Provision provided for an individual right under federal law, but held that there was no private remedy to enforce the Materiality Provision. App. 53–62. Even though Plaintiff Voters sued under 42 U.S.C. § 1983, the district court's opinion did not mention the governing legal standard for determining the availability of Section 1983 relief. *Id.*

On May 20, 2022, the Third Circuit reversed, issuing a unanimous judgment ordering that the excluded ballots be counted (and thus restoring the Board's initial decision to count those ballots). The panel unanimously concluded that Plaintiff Voters

had a right of action under Section 1983 and that the Materiality Provision barred the Board from denying their right to vote for failure to include a handwritten date on a Return Envelope where, as here, the ballots were timely received and the content or accuracy of the handwritten date did not matter. App. 28-29. The Court's full opinion followed a week later on May 27. App. 10–23; App. 23–26 (Matey, J., concurring).[7]

On the right-of-action issue, the court of appeals' majority opinion applied this Court's controlling decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), under which the individual federal right set forth in the Materiality Provision is presumptively enforceable via Section 1983. App. 11–12. The court concluded that Ritter had failed to rebut the presumption of Section 1983 enforceability as required by *Gonzaga*. App. 12–18.

On the merits, the court concluded that omitting the handwritten date on the Return Envelope was not "material in determining whether [a voter] is qualified to vote under Pennsylvania law." App. 19; *accord* 52 U.S.C. § 10101(a)(2)(B). The court explained it was "at a loss to understand how the date on the outside of the envelope could be material when incorrect dates—*including future dates*—are allowable but envelopes where the voter simply did not fill in a date are not." App. 21. "If the substance of a string of numbers does not matter," the court

[7] On appeal, the Commonwealth of Pennsylvania appeared as *amicus curiae* in support of Plaintiff Voters' position, confirming that the handwritten envelope date had no value to the State with respect to voter eligibility, *e.g.*, CA3 Dkt.42.

explained, "then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications." *Id.*; *see* App. 21–22.

Judge Matey concurred. He "agree[d] that [Plaintiff Voters] can enforce the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), under 42 U.S.C. § 1983," emphasizing that Ritter "did not challenge" that the Materiality Provision creates an individual federal right "[a]t all," rendering the statute presumptively enforceable via Section 1983. App. 23–24 & n.2 (Matey, J., concurring).

On the merits, Judge Matey concluded that Ritter had offered "no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code … is material as defined in § 10101(a)(2)(B)." App. 24–25. Instead, Ritter had conceded "that voter declarations with inaccurate dates were counted in this election," leaving himself "little room … to defend the District Court's decision." App. 25.

D. This Court Denies Ritter's Stay Application, and Ritter Concedes the Election Without Seeking Certiorari.

Candidate-Intervenor Ritter next sought a stay in this Court, which the Board did not join.

Ritter's stay application advanced substantially the same merits arguments that he offers in the present petition. *See* Stay Appl. at 9–19, No. 21A772 (May 27, 2022) ("Stay Appl."). For example, Ritter suggested that the Third Circuit's unanimous decision

implicated election rules well beyond the requirement to handwrite an immaterial string of numbers on the Pennsylvania mail-ballot Return Envelope, amounting to a dangerous "*de facto* green light" for federal courts to "rewrite" election laws across the country. Stay Appl. 9–11; *compare* Pet. 21. He argued that the return-envelope-dating requirement was a "ballot validity" rule rather than a mere external paperwork requirement falling within the ambit of the Materiality Provision. Stay Appl. 9, 12–13; *compare* Pet. 3, 10, 17–19. Ritter also suggested the case was cert-worthy because of a purported 2-1 circuit split on the question whether private plaintiffs can enforce the Materiality Provision's guarantees. Stay Appl. 16–17; *compare* Pet. 23–24.

Ritter never asked the Court to construe his stay application as a petition for certiorari, nor did he file such a petition at that time or in the weeks that followed.

On June 9, 2022, this Court denied Ritter's application for a stay. *See Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022). Justice Alito, joined by Justices Thomas and Gorsuch, dissented, suggesting that he "would agree" with the decision to deny a stay except for his concern that the Third Circuit's decision could "affect the outcome of the fall elections." *Id.* (Alito, J., dissenting). Justice Alito expressly suggested that "any petition for certiorari and brief in opposition should be filed expeditiously." *Id.*

After the denial of the stay, the district court ordered the Board to open and count the disputed ballots. On June 16, a week after the stay was denied, the Board counted the outstanding ballots, which

broke in favor of Ritter's opponent, Zachary Cohen, putting Cohen ahead by five votes.[8] Ritter told the media that, "[o]ver the next few days my legal team and I will discuss our options regarding an appeal to the United States Supreme Court."[9]

Ritter did not file a petition for certiorari at that point, either, however. Nor did he seek a recount or any other available relief or recourse under state law. Nor did he attempt to delay certification of the election—or to seek expedited consideration of any appeal to this Court, as Justice Alito's dissent suggested.

Instead, five days later, on June 21, with the election still uncertified, Ritter announced that he had "decided that my campaign to serve on the Lehigh County Court of Common Pleas must end."[10] As quoted above, *supra* p. 2, Ritter explained that he had

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[8] Katherine Reinhard & Robert H. Orenstein, *Cohen wins Lehigh County Judicial Election by 5 Votes*, PA. CAPITAL-STAR (June 17, 2022), https://www.penncapital-star.com/election-2022/cohen-wins-lehigh-county-judicial-election-by-5-votes/.

[9] *E.g.*, *Final Count Gives Lehigh County Judge Candidate 5-vote Edge*, LEHIGHVALLEYLIVE.COM (last updated June 18, 2022), https://www.lehighvalleylive.com/elections/2022/06/final-count-gives-lehigh-county-judge-candidate-5-vote-edge-local-senate-candidate-concedes.html.

[10] *David Ritter Concedes Lehigh County 2021 Judicial Race*, WLVR LEHIGH VALLEY PUB. RADIO (June 21, 2022), https://wlvr.org/2022/06/david-ritter-concedes-lehigh-county-2021-judicial-race/#.YvsfrXbMI2x.

decided to concede the election and to forego further challenges.[11]

The Board did not join Ritter's stay application, and did not file a petition for certiorari when that application was denied by the Court. Instead, after Ritter conceded, the Board formally certified the election result the next week on June 27. Cohen has since been sworn in.

On July 7, 2022—nearly seven weeks after the Third Circuit's judgment, and four weeks after this Court denied his stay application—Ritter filed this petition, seeking *Munsingwear* vacatur of the opinion below. On August 10, the Board filed a one-sentence response, stating, "Petitioner adopts in full the argument set forth in the petition submitted on behalf of David Ritter." Board Resp. 2.

E. Subsequent State Court Rulings Align with the Third Circuit's Decision.

Following the Third Circuit's decision, the Pennsylvania Department of State issued new guidance in connection with the May 2022 primary regarding how to treat timely-received mail ballots in Return Envelopes that were missing a handwritten envelope date.[12] It advised counties to count those

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[11] *See, e.g.*, *David Ritter Concedes*, ALLENTOWN MORNING CALL, *supra* n.1.

[12] *See* Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (May 24, 2022), https://www.dos.pa.gov/

ballots but to keep them segregated, and also reminded counties that untimely ballots, ballots with unsigned Return Envelopes, and ballots without a secrecy envelope should not be counted.

In subsequent cases arising out of the 2022 primary, state courts held, principally as a matter of state law, that timely-received mail ballots from the 2022 primary election may not be excluded purely for lack of a handwritten date on the Return Envelope. *Chapman v. Berks Cnty. Bd. of Elections,* No. 355 M.D. 2022 (Pa. Commw. Aug. 19, 2022); *Dave McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022 (Pa. Commw. Jun. 2, 2022).

REASONS FOR DENYING THE PETITION

I. Vacatur Is Not Warranted Because This Appeal Became Moot By Petitioner's Own Actions and Delay.

Plaintiff Voters agree that this case became moot when Ritter conceded and the Board certified the election. *See* Pet. 15–16. But *Munsingwear* vacatur is unwarranted where mootness is the result of a petitioner's own voluntary actions. That is the case here. Ritter decided to concede and publicly forwent further legal challenges, after which the Board certified the result. Neither Ritter nor the Board filed a petition for certiorari while the case was still live. Neither could be entitled to vacatur now.

VotingElections/Other ServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf.

Vacatur is available as a remedy where appellate review of a challenged judgment "was prevented through happenstance," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)—"that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.'" *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (quoting *Karcher v. May*, 484 U.S. 72, 82, 83 (1987)). Vacatur is appropriate where the party appealing has been "frustrated by the vagaries of circumstance" or especially "when mootness results from unilateral action of the party who prevailed below." *Id.* at 25; *accord Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (vacatur where prevailing party's actions resulted in mootness).

Munsingwear vacatur is not warranted, however, where the party seeking it caused the case to become moot. "The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp,* 513 U.S. at 24 (denying vacatur where party seeking vacatur voluntarily settled the case). The party's motivation in mooting the case is irrelevant; vacatur is improper even where the party seeking vacatur caused the case to become moot by "action taken in good faith and in conjunction with the opposing party." *E.g.*, *Alvarez v. Smith*, 558 U.S. 87, 97–99 (2009) (Stevens, J., concurring in part and dissenting in part); *see U.S. Bancorp*, 513 U.S. at 24-25.

Munsingwear vacatur is also unavailable to a party who "slept on [their] rights" and failed to take timely action, *e.g., Munsingwear*, 340 U.S. at 40–41,

or who never sought to appeal in the first place, *see Karcher*, 484 U.S. at 83 ("the *Munsingwear* procedure is inapplicable" when "the losing party … declined to pursue its appeal").

The party seeking vacatur bears the burden to demonstrate their "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. And here, Ritter cannot demonstrate an entitlement to vacatur in light of those established principles. He voluntarily mooted the appeal, and both he and the Board failed to pursue relief when the controversy remained live.

Ritter chose to concede the election, announcing that he had "decided that my campaign to serve on the Lehigh County Court of Common Pleas must end."[13] He explained that "[t]here will be no recount, nor any objections to the certification of this election. … [T]his election must be concluded."[14] Ritter thus voluntarily abandoned procedural options that might have affected the final result or delayed final certification, paving the way for the election's conclusion.[15] In his

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[13] *David Ritter Concedes*, WLVR, *supra* n.10.

[14] *See, e.g.*, *David Ritter Concedes*, ALLENTOWN MORNING CALL, *supra* n.1.

[15] For example, under Pennsylvania law, Ritter could have petitioned for a recount under either 25 P.S. § 3154(e) or § 3261. And if Ritter had disagreed with any Board determinations of voter intent during the recount process, he could have challenged those determinations in the Court of Common Pleas. Certification of the election

own words, *he decided* to end his campaign, concede the race, forego any recount or additional procedures, and hasten final certification and the conclusion of the election. In doing so, Ritter affirmatively mooted his own appeal.[16] That is a sufficient basis to deny *Munsingwear* vacatur.

Moreover, Ritter failed to take adequate action to preserve his appellate rights while the case was still live. Ritter sought a stay of the Third Circuit's judgment, but did not file a petition for certiorari at that time, or ask this Court to construe his stay application as a petition for certiorari.[17] Nor did he file a petition after the Court denied the requested stay, even though Justice Alito expressly suggested that a

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results would have been suspended until the completion of the recount. 25 P.S. § 3154(f).

[16] This case is fundamentally different from *Trump v. District of Columbia*, 141 S. Ct. 1262 (2021) (referenced at Pet. 26, 27), an Emoluments Clause case where President Trump's loss of the election mooted the case. For one thing, unlike Ritter, President Trump never conceded the subject matter of the lawsuit (i.e., the validity under the Emoluments Clause of various financial benefits he received while in office).

[17] *See, e.g.*, *United States v. Texas*, No. 22A17(22-58), --- S. Ct. ----, 2022 WL 2841804, at *1 (U.S. July 21, 2022) (granting certiorari in response to suggestion to construe stay application as a petition); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2022) (per curiam) (construing stay application as petition for certiorari at request of applicant); *Nken v. Mukasey*, 555 U.S. 104 (2008) (same); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970) (same).

petition for certiorari be filed "expeditiously." *Ritter*, 142 S. Ct. at 1824. Ritter had six weeks from the Third Circuit's decision, and three weeks from this Court's denial of the stay application, to file a petition for certiorari before the Board certified the election. He did not.

As for the Board, its one-sentence brief "adopting" Ritter's arguments does not even attempt to explain how it might independently be entitled to vacatur. After the Third Circuit's judgment, the Board took no action at all to preserve any appellate rights. It instead filed a letter taking no position on Ritter's stay application. *See* Board Letter, No. 21A771 (May 31, 2022). And after this Court denied that application, the Board did not file a petition for certiorari either. Even now, the Board gives no indication that it would have sought plenary review if the case had not become moot. *Cf. Karcher*, 484 U.S. at 83 (vacatur not warranted where government body decided against taking merits appeal). Rather, the Board decided to let the chips fall where they may, which in this case meant counting the disputed ballots and certifying the election.

In short, mootness was not a quirk of the "election calendar" (Pet. 4, 13), or a result of "happenstance" (Pet. 26–28). Ritter's passive-voice account that "[t]he disputed ballots were counted, the results were certified, and the election ended" (Pet. 26), elides his own active role in conceding the race and forgoing any further challenge.

Ritter points to no case where the Court granted *Munsingwear* vacatur to a party who, having never sought certiorari, voluntarily acted to moot the

case. A party cannot obtain vacatur where, as here, they have mooted the case through their own voluntary action. *U.S. Bancorp,* 513 U.S. at 24. Ritter's petition should be denied on that basis alone.

II. The Underlying Issues Are Not Worthy of Certiorari.

Even if Ritter had not mooted the controversy through his own actions, vacatur would be inappropriate because he has failed to identify issues that would otherwise have been worthy of certiorari. *E.g.*, Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 19.4 n.34 and accompanying text (11th ed. 2019) (discussing this basis for denial of vacatur); *see also, e.g.*, *Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chi.*, 701 F.2d 653, 657 (7th Cir. 1983); Pet. 16–17 (acknowledging longstanding position of the United States that such a showing is required for vacatur).[18]

A. The Right-of-Action Issue Is Not Worthy of Certiorari, and the Unanimous Panel Decided It Correctly.

The threshold right-of-action issue would not have merited a grant of certiorari if the appeal had not become moot.

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[18] In addition, this appeal would have been an especially unsuitable vehicle for a grant of certiorari because Candidate-Intervenor Ritter, as the party driving the appeal, would have lacked standing to independently prosecute it. *See* Plaintiff Voters' Stay Opp. at 17–19, No. 21A772 (May 31, 2022).

Whether private plaintiffs may enforce the rights guaranteed by the Materiality Provision in an action under Section 1983 is not the subject of an important or re-occurring circuit split. Only two circuits, the Eleventh and now the Third, have applied the established framework governing the availability of Section 1983 relief set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to claims under the Materiality Provision. Both agreed that Section 1983 relief is available for such claims. *See* App. 11-18; *id.* at 23–24 (Matey, J., concurring); *Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003). Districts courts independently considering the question have also agreed. *See Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020), *rev'd and remanded on other grounds*, 860 F. App'x 874 (5th Cir. 2021); *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 215 F. Supp. 3d 1201, 1219 (D. Utah 2016).

The Sixth Circuit reached a contrary result, but did so before this Court's now-controlling decision in *Gonzaga*. In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit held that the Materiality Provision "is enforceable by the Attorney General, not by private citizens." *Id.* at 756. Those ten words (plus a citation to an equally conclusory district court opinion from decades earlier) comprise the entirety of the *McKay* court's analysis, which did not address Section 1983 enforceability at all. The Sixth Circuit subsequently reaffirmed its stance, but solely because "*McKay* … binds this panel." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017). There is thus no split in the circuits that have actually applied *Gonzaga*. Nor is there reason to think any other

circuit court might adopt the Sixth Circuit's unexplained, pre-*Gonzaga*, outlier position.

Moreover, and consistent with every decision to conduct substantial analysis of the issue, the Third Circuit's resolution of the right-of-action question was manifestly correct.

Once a Section 1983 plaintiff demonstrates that Congress "intended to create a federal right," the right is presumptively enforceable in a Section 1983 action. *Gonzaga*, 536 U.S. at 283–84 (emphasis omitted). To overcome the presumption, a defendant must show either that Congress expressly foreclosed Section 1983 relief in the text of the statute, or that it implicitly did so by creating an incompatible remedy scheme. *E.g., id.* at 284–85 n.4.

As this Court has repeatedly observed, "the existence of a more restrictive *private* remedy" is "the dividing line" between those cases where a Section 1983 action will lie, and those where the presumption of Section 1983 enforceability is rebutted based on an incompatible remedy. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009) (emphasis added) (quoting *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005)). More restrictive *private* remedies define that "dividing line" because they typically require private plaintiffs "to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit"—restrictions that could be "circumvent[ed]" if broader Section 1983 relief was available. *Fitzgerald*, 555 U.S. at 254 (citation omitted); *compare Rancho Palos Verdes*, 544 U.S. at 122–24 (no Section 1983 remedy where Congress expressly provided for narrow set of

private remedies that did not include money damages in the Telecommunications Act) (cited in Pet. 24–25).

The Third Circuit applied the established *Gonzaga* framework. The Materiality Provision (which guarantees "the right of any individual to vote in any election" without being disenfranchised for immaterial paperwork errors, 52 U.S.C. § 10101(a)(2)(B)) plainly creates a federal right, as Ritter and the Board conceded below. *See* App. 23–24 and n.2 (Matey, J., concurring). Under *Gonzaga*, the right is presumptively enforceable via Section 1983, and Ritter could not rebut that presumption. He and the Board conceded below that the statute nowhere expressly forecloses private suits. App. 13. And he does not point to any more restrictive private remedy that might be incompatible with Section 1983 relief, because there is none in the statute. *See* App. 17 (citing *Fitzgerald*, 555 U.S. at 256).

Instead, Ritter points only to a parallel *public* remedy (i.e., enforcement by the U.S. Attorney General) set forth in 52 U.S.C. § 10101(c). (Pet. 24–25.) But the mere existence of parallel public remedies is not incompatible with private Section 1983 remedies. *See, e.g.*, *Fitzgerald*, 555 U.S. at 258–59.

That is especially true here in light of the statutory text and the legislative history. The statute clearly contemplates private suits, by authorizing federal jurisdiction over "proceedings instituted pursuant to this section … by a *party aggrieved*" (i.e., by a disenfranchised voter), and by abrogating exhaustion requirements that had limited private, but not public, suits prior to the 1957 Civil Rights Act. *See* 52 U.S.C. § 10101(d) (emphasis added); *see also*

Schwier, 340 F.3d at 1296. Congress made clear that, in adding the Attorney General right-of-action to Section 10101 as part of the 1957 Civil Rights Act, it was "supplement[ing] existing law," under which "Section 1983 … has been used to enforce the rights … as contained in section 1971 [now codified at 52 U.S.C. § 10101]." H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1976, 1977. The Attorney General, whose office drafted the 1957 Act, explicitly assured Congress that "private people will retain the right they have now to sue in their own name." *See Civ. Rts. Act of 1957: Hr'gs on S. 83 Before the Subcomm. on Const. Rts. Of the S. Comm. on the Judiciary*, 85th Cong. 67–73 (1957).

The right-of-action issue is squarely controlled by this Court's *Gonzaga* analysis, and would not have presented a cert-worthy issue.

B. The Merits Determination Here Is Not Worthy of Certiorari, and the Unanimous Panel Resolved It Correctly.

Ritter devotes all of two sentences to his suggestion that the lower courts are divided with respect to the Materiality Provision (Pet. 22), citing two federal cases that are *consistent* with the Third Circuit's decision.[19] He also points to the unpublished

[19] *Vote.Org v. Callanen*, 39 F.4th 297, 305–06 (5th Cir. 2022), upheld a wet-signature requirement that applied to one method of registering to vote. *Friedman v. Snipes* involved a *deadline* to submit ballots, *not* an error or omission "on any record or paper." 345 F. Supp. 2d 1356, 1371–72 (S.D. Fla. 2004). Neither decision conflicts with *Migliori*.

Pennsylvania Commonwealth Court's decision in *Ritter*, but that decision relied on state law, not the Materiality Provision, and has been eclipsed by more recent state court decisions holding that both state law *and* federal law require such mail ballots to be counted. *See Chapman v. Berks County Board of Elections,* No. 355 M.D. 2022 (Pa. Commw. Aug. 19, 2022); *Dave McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022 (Pa. Commw. Jun. 2, 2022). None of this scant authority would have supported a grant of certiorari.

Nor does Ritter succeed in recasting the Third Circuit's narrow decision, which applies only to the circumstances of this case, into a question of national importance independently worthy of review. Ritter tries to concoct some categorical, general rule about "mail-in ballots" or the "validity of mail-in ballots" from the decision below (*e.g.*, Pet. 17, 18, 19), but the Third Circuit announced no such rule. Indeed, the cases that Ritter relies on demonstrate that federal courts can and do reach different results in different Materiality Provision cases based on different facts. *Compare Friedman v. Snipes,* 345 F. Supp. 2d 1356, 1371–72 (S.D. Fla. 2004) (rejecting materiality challenge to mail ballot deadline) *with Martin v. Crittenden,* 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (holding that refusing to count ballots based on superfluous requirement to write birth year on envelope violates Materiality Provision); *see also supra* n.19 and *infra* p.30 (noting additional cases).

The Materiality Provision applies only in very narrow circumstances: where the right to vote in an election is denied (1) because of an "error or omission on any record or paper relating to" some act (2) that is

made "requisite to voting," (3) "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). In other words, it applies *only where a state actor disenfranchises a voter based on a minor paperwork error*, if that error is unrelated to their eligibility to vote under state law in the election. *See, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008).

Contrary to Ritter's unsupported suggestion (Pet. 20-21), the Materiality Provision thus does not apply to rules concerning when or where to vote at all, either in person or by mail. Nor does it apply to numerous other rules concerning the manner of voting itself, by mail or otherwise. It would not apply to a requirement that a mail ballot be placed in a secrecy envelope, because that is not "an error or omission *on* any record or paper," 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Nor would it apply to the failure to sign the voter declaration (at least not on the Pennsylvania mail ballot Return Envelope), because the voter's signature *is* material to determining whether they are qualified to vote. *See, e.g., Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006). Nor (depending on the specifics of state law) would it apply to notarization and witness requirements and the like, if they are material to determining a voter's eligibility to vote.

But the Materiality Provision *does* apply where voters are disenfranchised based on legally inconsequential errors on *paperwork* made requisite to voting, including paperwork in the mail ballot context. *See, e.g., Martin*, 347 F. Supp. 3d at 1308–09;

League of Women Voters of Ark. v. Thurston, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (duplicative information requirement on mail ballot envelope potentially immaterial). It applies to inconsequential paperwork requirements imposed upon mail ballot voting in the same way that it applies to inconsequential in-person paperwork requirements at the polling place, *see, e.g.*, *Ford v. Tenn. Senate*, No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (disenfranchisement for immaterial paperwork errors regarding polling place poll book unlawful). The Third Circuit's decision fits comfortably within that narrow scope. Indeed, whatever the Materiality Provision's outer bounds, it certainly applies in the unique circumstances presented here, where the envelope date was so immaterial that *obviously erroneous* dates were accepted. App. 21–22; *accord* App. 24 and n.2 (Matey, J., concurring); *see also* App. 25–26 (Matey, J., concurring) (noting that a different set of circumstances might raise "fresh facts and unforeseen outcomes in a different race," but concluding that "those are questions for tomorrow").[20]

Ritter claims that litigants have "seized on the Third Circuit's decision to challenge all sorts of regulations." Pet. 21. But he cites only one case filed after the *Migliori* decision—and there, the claims were voluntarily dismissed pursuant to a settlement,

[20] Contrary to Ritter's suggestion (Pet. 2, 12, 18, 22, 29), the Materiality Provision does not "invalidate" state law at all, but merely prevents a voter from being disenfranchised for a minor paperwork error that does not bear upon their eligibility to vote.

with no changes whatsoever to how ballots would be counted. *See Dondiego v. Lehigh Cnty. Bd. of Elections*, Dkt. Nos. 43, 44, No. 5:22-cv-2111-JLS (E.D. Pa. June 15, 2022). The only other case he cites, *DCCC v. Kosinski*, involved New York's absentee ballot cure process, and it was filed in February 2022, months *before* the Third Circuit issued its decision. *See* Compl., *DCCC v. Kosinski*, No. 1:22-cv-1029 (S.D.N.Y. Feb. 4, 2022), ECF No. 1.

In short, there are no cert-worthy issues presented by the Third Circuit's fact-specific decision. Indeed, the fact that the *content* of the handwritten Return Envelope date is concededly immaterial, such that obviously wrong dates were considered acceptable, would have limited the import of any further appeal to that peculiar set of facts. The lack of any cert-worthy issues is an independent basis to deny Ritter's petition.

III. Vacatur Is Especially Unwarranted Here.

Ritter suggests that, even if he cannot demonstrate that a petition would have presented cert-worthy issues, vacatur could still be granted on equitable grounds. Pet. 25. But the equities tip sharply against him.

First and most importantly, Ritter himself rendered the case moot and failed to seek certiorari while the election result was still pending. *See supra* pp. 18–23.

Second, none of the usual rationales for *Munsingwear* vacatur apply here. Ritter has no need to preserve his "rights" with respect to the subject matter of this case, or to prevent any undue "prejudice" to his

interests, or to "clear the path for future relitigation between the parties," *Munsingwear*, 340 U.S. at 40. Ritter now is not a candidate at all, but merely a citizen, with no particular stake in the future application of the Materiality Provision to mail ballot return envelopes in Pennsylvania. At most, Ritter's interest in vacatur amounts to a generalized desire to influence electoral rules for the upcoming mid-term elections—one that is indistinguishable from any other Pennsylvania voter.

Nor does the Board suggest it has any interest in relitigating the merits, either. The Board initially voted to *count* the disputed ballots, and it defended that position in state court. When Plaintiff Voters sued in federal court, the Board shifted its position to exclude the ballots. But then, after the Third Circuit ruled to count the ballots, the Board took no position on Ritter's stay application in this Court. Now, with its one-sentence response brief purporting to adopt Ritter's arguments, the Board simultaneously refers to itself as both a "Petitioner" and a "Respondent." *See* Board Resp. 2. Notwithstanding the Board's confusion and shifting positions, it never filed a petition for certiorari or otherwise sought relief from the Third Circuit's judgment while the case was live. And it makes no attempt to explain how its interests would be prejudiced if the Third Circuit's decision restoring the Board's own original determination to count the votes was left standing.

Third, preserving the Third Circuit's decision would affirmatively benefit the law's development. "'Judicial precedents are presumptively correct and valuable to the legal community as a whole,'" a principle which counsels against vacatur. *U.S.*

Bancorp, 513 U.S. at 26 (citation omitted); *id.* at 27 (noting "the benefits that flow to litigants and the public from the resolution of legal questions"). And beyond that general principle, there is particular value in the preservation of circuit authority in areas of law where, as Ritter himself repeatedly emphasizes with respect to the Materiality Provision (*e.g.*, Pet. 3, 21, 29–30, 32), significant questions may be starting to percolate. After all, it is "debate *among* the courts of appeals" that this Court has said best "illuminates the questions that come before us for review." *U.S. Bancorp*, 513 U.S. at 27.

The case for vacatur is thus not strengthened by pointing out that there are other cases involving the Materiality Provision in the federal courts. Besides one voluntarily dismissed case discussed above, the cases Ritter points to all arise outside Pennsylvania, involve various different applications of state law, began before the Third Circuit decided *Migliori*, and do not rely on *Migliori* for any part of their operative legal theories. (*E.g.*, Pet. 29–30.) That is what the early stages of percolation look like, and those cases will be decided in due course, on their own terms. Should any of them present a conflict that warrants review, this Court may take them up in the ordinary course.

Fourth, the *Purcell* principle, to the extent that it applies, cuts against vacatur. "[F]ederal courts ordinarily should not alter state election laws in the period close to an election." *E.g.*, *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring). But here, as Ritter acknowledges, the 2021 election at issue in this case "has already ended" (Pet. 30). No court has applied

Purcell retroactively in the manner Ritter suggests, to vacate a legal ruling that has already been implemented in an election that is now over and certified.[21] That approach would exacerbate uncertainty in the law, not avoid it. *Cf. Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (emphasizing the need to assess feasibility of "the changes in question … before the election").

Nor can Ritter manufacture a *Purcell* issue in connection with "the November [2022] elections." (Pet. 31; *see also* Pet. i, 11, 14, 17, 29 (repeatedly invoking "the fall elections"). For one thing, Ritter, as a former candidate in the 2021 election, has no standing to challenge the rules governing the November 2022 election. *E.g.*, *Hotze v. Hudspeth*, 16 F.4th 1121, 1124–25 (5th Cir. 2021). For another, the decision at issue here does not itself enjoin or alter any state election rules in connection with the 2022 elections. Ritter's concern is not with the actual order and judgment in his case, but with the ability of other litigants, in potential future cases, to cite the Third Circuit's decision as precedent. (*See* Pet. 32; *see also id.* at 21–22.) That is not a *Purcell* problem at all.

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[21] The cases Ritter cites (Pet. 30–31) are inapposite. In *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), the Court discussed laches—not *Purcell*—and the challenges at issue were only raised after the election at issue had been certified. *Id.* at 926. And the dissent in *Republican Party of Pa. v. Degraffenried* emphasized that the judiciary is ill-suited to address election issues after an election's conclusion. 141 S. Ct. 732, 736–37 (2021) (Thomas, J., dissenting).

If anything, the values underlying the *Purcell* principle favor leaving the Third Circuit's opinion undisturbed. Here, an order vacating the Third Circuit's decision in the run-up to the November 2022 election would invite discord. At a moment when the state courts are converging on the same result as *Migliori* under both state and federal law, *see supra* pp. 18, 28, vacatur of the unanimous Third Circuit panel's decision less than two months before the November election would reintroduce confusion in the law and needlessly generate more election-season litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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