No. 23-3166

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,
Plaintiffs-Appellees,

v.

SECRETARY OF THE COMMONWEALTH, *et al.*,
Defendants-Appellees,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Intervenors-Appellants,

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Intervenors-Appellees.

Appeal from the United States District Court for the Western District of Pennsylvania, Case No. 1:22-cv-00339 (Hon. Susan Paradise Baxter)

BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

Ezra D. Rosenberg
**Counsel of Record*
Pooja Chaudhuri
Javon Davis
Attorneys for Amicus Curiae
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Ste. 900
Washington, DC 20005
Tel: (202) 662-8600
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
jdavis@lawyerscommittee.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 3d Cir. L.A.R. 26.1.1, Amicus Curiae the Lawyers' Committee for Civil Rights Under Law discloses that it has no parent corporations and that no publicly held corporations hold 10% or more of its stock.

Dated: Washington, DC
April 17, 2024

s/ Ezra D. Rosenberg
Ezra D. Rosenberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Rules

Other Authorities

STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar in combating racial discrimination. The Lawyers' Committee has fought to ensure that all Americans have an equal opportunity to participate in the electoral process.

The Materiality Provision of the Civil Rights Act of 1964 is critical to ensuring such equal opportunity. The Lawyers' Committee has litigated to enforce the Provision and has also filed amicus briefs on the issue. The Lawyers' Committee has an interest in ensuring that the Materiality Provision is applied as intended by Congress—ensuring that voters are not denied the right to vote based on immaterial errors or omissions on paperwork related to the voting process.[1]

[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

In narrowly construing the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), as applying only to errors or omissions as to "voter qualifications" in the registration process, the panel majority ignored the broad language of the Provision, which on its face applies to "any" record or "other requisite to voting," and also the expansive definition of "vote" set forth in subsection (e) of the statute. The legislative history of the Provision and unanimous case law further counsel against the majority's unprecedented and limited construction of this important statute.

Further, courts considering Materiality Provision claims have applied manageable standards in the context of registration and ballot casting rules. Thus, the majority's concerns that the application of the statute to all phases of voting may lead to inconsistent results is unfounded.

ARGUMENT

I. THE MAJORITY'S ANALYSIS MISCONSTRUED THE MATERIALITY PROVISION.

The Materiality Provision provides:

> [n]o 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*, 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).

According to the acceptable canons of statutory construction, "statutes must be read as a whole." *U.S. v. Atl. Rsch. Corp.*, 551 U.S. 128, 135 (2007). Provisions within a statute must be read "in sequence as integral parts of a whole." *Territory of Guam v. U.S.*, 593 U.S. 310, 317 (2021) (cleaned up). This means that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction." *Dolan v. USPS*, 546 U.S. 481, 486 (2006). Thus, while "a word in a statute may or may not extend to the outer limits of its definitional possibilities," its interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.*

The majority did not follow these principles. Rather than provide the expansive construction of the Materiality Provision as clearly intended by Congress

by way of including the phrases "*any* record or paper," "*any* application, registration or *other act requisite to voting*," the majority reasoned that the subordinate clause beginning with "if such error or omission" limited the Provision's reach. The majority focused on the words "in determining" which it assumed described the process of "ascertaining a person's qualifications to vote" only in the context of voter registration. Op. at 22, 27.

But as the majority noted, every "choice must mean something," Op. 38, and therefore, Congress's choice to expand beyond "registration" to "any . . . record" and "any . . . application," and even further include "any . . . other act requisite to voting" demonstrates clear congressional intent to apply the statute to any phase of the voting process. *See, e.g.*, *Atl. Rsch. Corp.*, 551 U.S. at 135–36 (noting use of word "any" throughout, in conjunction with other subsections of statute, evinced congressional intent to broadly construe provision in question). Indeed, to adopt the majority's narrow reading of the Provision would render the phrase "any . . . other act requisite to voting" entirely superfluous. *U.S. v. Cooper*, 396 F.3d 308, 312 (3d. Cir. 2005) ("It is a well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous."). Had Congress intended the Provision to apply only to registration, then the main clause might have read, no state actor 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 voter registration."

The majority's constricted view of the Provision is also out of sync with the repeated use of the word "vote," which appears twice, including once in the subordinate clause, and the word "voting," which appears once in the main clause. Congress saw fit to define "vote" in another subsection of the statute as "*all action necessary to make a vote effective* including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(e); *see, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning.") (cleaned up). Subsection (a)(3)(A) explicitly provides that this definition of "vote" applies to all of subsection (a)(2), which includes the Materiality Provision at subsection (a)(2)(B). *See* 52 U.S.C. § 10101(a)(3)(A). Thus, the definition of "vote" could not be clearer—the drafters imbued the word with broad meaning, applying "vote" and "voting" not only to the registration phase but also to the process of "casting a ballot" and "having such ballot counted."

Once the meaning of the main clause becomes clear, it follows that the subordinate clause—"if such error or omission is not material in determining whether such individual is *qualified* under State law to vote in such election"—takes its meaning from the main clause. Therefore, in this context, an official determination on whether a voter is "qualified" constitutes an "act requisite to voting." This is because at every stage of the voting process—registration, voting in person, requesting an absentee ballot if the voter votes by mail, and voting an absentee ballot—election officials must ensure that the voter is qualified before the voter may cast a ballot.

For example, if voters do not have the proper identification at the polls, then they would not be "qualified" to vote in that election. Indeed, the Supreme Court considered the issue in *Crawford*, i.e., whether an Indiana law requiring voters to furnish a photo ID prior to voting was "one effective method of establishing a voter's qualification to vote." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193 (2008). Citing to a congressional report, the Court noted that "a good registration list will ensure that citizens are only registered in one place . . . election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list." *Id.* (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005), at 136–137 (Carter–Baker Report)). *Crawford* thus demonstrates

that the determination of whether a voter is qualified to vote does not occur only at the registration stage.

The legislative history also underscores that the drafters of the 1964 Materiality Provision understood that they were confronting various methods—beyond registration—that were used to prevent a voter from *qualifying to vote*. Between 1957 and 1964, the Commission on Civil Rights conducted nationwide hearings documenting instances of discriminatory voting practices, in particular, the methods employed by voter registrars to determine whether a voter was qualified to vote and reject applications of Black voters. Identity verification was one of the myriad ways that registrars prevented Black voters from registering to vote and voting. The "identification muddle" was a unique tactic used against Black voters, who registrars claimed were difficult to identify because they looked the same. *See generally*, U.S. Comm'n on Civil Rights, Report of the U.S. Comm'n on Civil Rights 1961, vol. 1, at 44, 50 (1961). In one documented instance, a Louisiana registration clerk denied a young Black woman the right to vote because none of the documents she produced, including those provided by other voters, satisfied the identification requirement. *Id.* at 53–54. Applying twice, the voter was rejected both times, the first because of "one error, one omission, and the second because of one statement which appeared to be false" and "six omissions and one statement which appeared to be false." *Id.*

This example demonstrates both that a voter's identification was part of the exercise of determining whether a voter was qualified to vote and that omissions related to a voter's identity resulted in the rejection of a "paper or record relating to any application, registration, or other act requisite to voting." The same rationale applies to absentee ballot applications and absentee ballots: election officials must determine whether a voter is qualified, including by verifying the voter's identity, based on what the voter puts on paper. Thus, inadvertent errors or omissions on this paperwork that do not necessarily help an election official determine the voter's identity or serve any other purpose are subject to the Provision in the same way that an error or omission on a voter registration application would be subject to the Provision.

That is the rationale other courts have adopted in applying the Provision outside the registration context. *See e.g.*, *Vote.org v. Ga. Bd. of Elections*, 661 F. Supp. 3d 1329, 1340 (N.D. Ga. 2023)*; LUPE v. Abbott*, No. 5:21-cv-0844, 2023 WL 8263348, at *14 (W.D. Tex. Nov. 29, 2023); *In re Georgia Senate Bill 202*, No. 1:21-mi-55555, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023). It was precisely for that reason that a Georgia district court found in 2018 a strong likelihood of success on a claim that a county's practice of rejecting absentee ballots on which the voter had either omitted or incorrectly listed date of birth violated the Materiality Provision. *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018). The

court reasoned that a "county election official can confirm the identity of the voter with the information that is provided" on the absentee ballot envelope and, as such, the voter's date of birth was immaterial to determining the voter's qualifications or identity for the purpose of counting the ballot. *Id.*

The Third Circuit's reasoning that the Provision applies only to "who may vote," Op. 14, 24, 26, 35, is contrary to the text of the statute and its legislative history which demonstrate clear congressional intent to construe the word "vote" in the broadest possible manner. Therefore, as the district court correctly put it, "[t]he Materiality Provision prohibits rules or regulations which add immaterial requirements to the act of voting. This must include the actual casting of a vote." *Pa. State Conf. of NAACP v. Schmidt*, No.1:22-cv-00339, 2023 WL 8091601, at *31 (W.D. Pa. Nov. 21, 2023).

II. COURTS HAVE ROUTINELY ADJUDICATED MATERIALITY PROVISION CLAIMS BEYOND THE VOTER REGISTRATION CONTEXT.

The majority seemed to suggest that courts have no manageable standards for applying the Materiality Provision outside the voter registration context. Op. 34. But these fears are unsubstantiated. Courts have successfully applied the Provision to immaterial errors or omissions on paperwork related to the absentee and in-person voting process without issue. *See Vote.org v. Ga. Bd. of Elections*, 661 F. Supp. 3d at 1341 (applying Materiality provision to wet signature requirement for absentee

ballot envelopes); *LUPE v. Abbott*, 2023 WL 8263348, at *19 (applying Materiality Provision because the "preparation of a carrier envelope is an 'act requisite to voting' for individuals who cast a mail ballot"); *In re Georgia Senate Bill 202*, 2023 WL 5334582 at *10, 14 (finding Materiality Provision not limited to voter registration because otherwise, "a state could impose immaterial voting requirements yet escape liability each time by arguing that the very immateriality of the requirement takes it outside the statute's reach"); *Martin v. Crittenden*, 347 F. Supp. 3d at 1308 (applying Provision to strike date requirement for absentee ballot envelopes); *Ford v. Tenn. Senate*, No. 06-2031, 2006 WL 8435145, at *7, *10–11 (W.D. Tenn. Feb. 1, 2006) (applying Materiality Provision to requirement that in-person voters separately sign ballot application form and poll book); *but see League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023) (applying Materiality Provision to absentee ballot applications but finding rule allowing rejection of ballots because of mismatched signatures material); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (applying Materiality Provision to student ID on grounds that "an individual isn't qualified to vote under Wisconsin law unless he or she has one of the forms of identification" required, but concluding "any required information on an ID is indeed 'material' to determining whether the individual is qualified to vote); *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (applying Materiality Provision to remote

ballot requests but finding applicant's name, address of registration, mailing address if requesting ballot by mail, signature, and reason for remote ballot request was "material to determining voter qualification").

Here, election officials conceded that dating the ballot was not necessary to determining the voter's qualifications. *Schmidt*, 2023 WL 8091601, at *32 (noting undisputed evidence shows "twelve county boards did not use handwritten date for any purpose related to determining a voter's age, citizenship, county or duration of residence, or felony status, and each of the twelve county boards has acknowledged as much"). Nor did the date requirement serve any other governmental purpose such as helping election officials determine when a ballot was postmarked and returned, as a separate process already existed for doing that. *Id.* (noting "whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board"). Where the date rule resulted in the rejection thousands of absentee ballots in the 2022 election, the district court correctly found that the Materiality Provision applied and rendered unlawful the rejection of absentee ballots with no or an incorrect date. *Id.* at 35–36.

CONCLUSION

For the reasons set forth above, this Court should grant Plaintiffs-Appellees' petition for rehearing en banc.

Dated: April 17, 2024

Respectfully submitted,

/s/ Ezra D. Rosenberg
Ezra D. Rosenberg
Pooja Chaudhuri
Javon Davis
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, DC 20005
Tel.: (202) 662-8600
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
jdavis@lawyerscommittee.org

Attorneys for Amicus Curiae

COMBINED CERTIFICATIONS

In accordance with applicable Federal and Local Rules, I certify as follows:

1. I am a member in good standing of the Bar of this Court.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,496 words, excluding the parts exempted. In making this certificate, I have relied on the word count of the word- processing system used to prepare the motion.

3. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

4. The text of the attached brief is identical to the text in the paper copies.

5. The electronic file containing the brief was scanned for viruses and no virus was detected.

Dated: Washington, DC
April 17, 2024

Respectfully submitted,

s/ Ezra D. Rosenberg
Ezra D. Rosenberg

CERTIFICATE OF SERVICE

I hereby certify that this motion was electronically filed with the Court using the CM/ECF system, which will provide notice to and service on all counsel of record.

Dated: Washington, DC
April 17, 2024

Respectfully submitted,

s/ Ezra D. Rosenberg
Ezra D. Rosenberg