

No. 23-3166

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**IN THE UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT**

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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.*

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**BRIEF OF AMICI CURIAE LOCAL ELECTION OFFICIALS  
IN SUPPORT OF REQUEST FOR REHEARING *EN BANC***

Sarah R. Schalman-Bergen  
LICHTEN & LISS-RIORDAN, P.C.  
729 Boylston Street, Suite 2000  
Boston, MA 02116  
Tel: (267) 256-9973  
ssb@llrlaw.com

Jonathan B. Miller  
Sophia House  
PUBLIC RIGHTS PROJECT  
490 43rd Street, Unit #115  
Oakland, CA 94609  
Tel: (510) 738-6788  
jon@publicrightsproject.org  
sophie@publicrightsproject.org

*Counsel for Amici Curiae*

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## **STATEMENT OF INTEREST**

*Amici* are current and former Pennsylvania election officials and county commissioners, joining this brief in their individual capacities. In Pennsylvania, county boards of elections have jurisdiction over primaries and elections, and are required to “inspect systematically and thoroughly the conduct of primaries and elections.” 25 Pa. Stat. Ann. §§ 2641, 2642(g). These boards are tasked with canvassing and computing the votes in each election district and certifying election results to the Secretary of the Commonwealth. Their broad responsibilities include overseeing federal, state, and local elections, including in-person and mail-in voting procedures. As officials deeply invested in the democratic process, *amici* have an interest in ensuring that all eligible citizens in their districts can exercise the right to vote. This commitment extends to safeguarding the integrity of the electoral process and the rights of voters by ensuring that all timely-submitted ballots from qualified voters are accurately counted and not unjustly rejected due to non-material errors.

## **SUMMARY OF ARGUMENT**

Election officials shoulder the responsibility of ensuring that all qualified voters in their districts can exercise the right to vote and that valid, timely ballots cast by these voters are accurately counted. The approach upheld by the Majority, which requires election officials to expend time and resources enforcing unnecessary barriers to voting, is at odds with responsibility. The Majority’s decision is

irreconcilable with the Materiality Provision of the Civil Rights Act of 1964 as amended through the Voting Rights Act of 1965. *See* 52 U.S.C. § 10101(a)(2)(B). That provision protects voters from disenfranchisement due to non-compliance with immaterial technical requirements. The Majority's interpretation of the Materiality Provision, which directly contradicts this Court's decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), neglects the broad scope and remedial nature of the provision, which, by its plain text, encompasses all aspects of the voting process, not just registration. This clear legal error warrants review by the entire Circuit.

Enforcing the envelope-dating requirement places excessive demands on election officials, who must divert crucial resources to detecting and attempting to correct immaterial errors. These demands compound the challenges election officials face in the days leading up to election day, a time of intense pressure and scrutiny. Rejecting the timely-submitted ballots of eligible voters for mistakes that are irrelevant to their eligibility also risks eroding public trust in the electoral process. Federal law demands that absentee ballots received on time, even if incorrectly or incompletely dated, must be counted if they are otherwise valid. Given the importance of the issue for the upcoming election, rehearing should be granted.

## ARGUMENT

### **I. THE PANEL MISCONSTRUED THE PLAIN TEXT OF THE MATERIALITY PROVISION**

In 2022, a unanimous panel of this Court in *Migliori v. Cohen* recognized that disenfranchising voters based on incorrect or missing dates on mail-in ballot return envelopes violates federal civil rights law. 36 F.4th 153 (3d Cir.), *stay denied*, *Ritter v. Migliori*, 142 S. Ct. 1824, *vacated as moot*, 143 S. Ct. 297 (Mem.) (2022). That decision was correct when decided and should have been followed by the Majority. The Civil Rights Act’s Materiality Provision prohibits refusing to count a person’s vote based on an “error or omission” on a voting-related “record or paper” that is “not material in determining” a person’s qualifications to cast their vote. 52 U.S.C. § 10101(a)(2)(B). The *Migliori* ruling, though vacated as moot, underscored a vital principle of election law: minor clerical errors should not disenfranchise voters. Four judges of this Circuit have reached the same conclusion.

The qualifications to vote in Pennsylvania are age, citizenship status, duration of residency in the district, and felony incarceration status. *See* 25 Pa. Stat. Ann. § 1301(a); *Migliori*, 36 F.4th at 163–64. Thus, as the *Migliori* court reasoned, a “requirement is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.” 36 F.4th at 162–63. The envelope-dating requirement, as the Majority acknowledges, serves no clear purpose. It has no

bearing on any of Pennsylvania’s voter eligibility requirements, nor does it aid in affirming the timely receipt or mailing of a ballot. Majority at 14. In practice, it serves only as a procedural obstacle that risks disenfranchising voters over minor clerical errors unrelated to their legal eligibility to vote.

The Panel’s attempt to restrict the scope of the Materiality Provision to state laws governing who may vote, rather than how qualified voters may cast valid ballots, contradicts the plain text of that provision and renders other parts of the law superfluous. The Materiality Provision protects a voter’s right to “cast a ballot and have it counted” based on an immaterial “error or omission on any record or paper relating to any application, registration, *or other act requisite to voting.*” 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see also id.* §§ 10101(a)(3)(A), (e). The Majority’s narrow focus on “registration” neglects the Materiality Provision’s applicability to “other act[s] requisite to voting,” abrogating its duty to “give effect, if possible, to every clause and word of a statute.” *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (internal citation omitted). The Panel also overlooked the Civil Rights Act’s broad and inclusive definition of “voting.” As the district court observed, the Act “defines ‘voting’ not only as qualifying or registering to vote but also as ‘all action necessary to make voting effective including but not limited to . . . casting a ballot and having such ballot counted and included in the appropriate totals of votes cast.’” *Pennsylvania State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339,



2023 WL 8091601, at \*31 (W.D. Pa. Nov. 21, 2023), *rev'd and remanded sub nom. Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, No. 23-3166, 2024 WL 1298903 (3d Cir. Mar. 27, 2024).<sup>1</sup>

The Materiality Provision encompasses the entire electoral process, from registration to the final tallying of ballots. Other federal courts in Texas, Georgia, and Arkansas have recognized this and held that the Materiality Provision applies to forms associated with the mail ballot process. *See, e.g., La Unión del Pueblo Entero v. Abbott*, 2023 WL 8263348, *appeal docketed* No. 23-50885 (5th Cir.); *In re Georgia Senate Bill 202*, No. 1:21-cv-1259JPB, 2023 WL 5334582 (N.D. Ga. Aug. 18, 2023), *appeal docketed* No. 2313245 (11th Cir.); *League of Women Voters of Arkansas v. Thurston*, No. 5:20-cv-05174, 2023 WL 6446015, at \*16 (W.D. Ark. Sept. 29, 2023). Requiring election officials to reject votes based on the envelope-dating requirement impedes their duty to facilitate an inclusive, efficient, and fair voting process. As stewards of the electoral process, *amici* recognize the untenability of the Panel's conclusion, which warrants further review by the Third Circuit.

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<sup>1</sup> The district court elaborated that “under this reasoning, a state requirement that prospective voters write the first stanza of the national anthem on their **application** to register to vote would violate the Materiality Provision, but a regulation requiring voters to write that stanza at the **polling place** (or when filling out their mail-in ballot) in order to have their ballot counted would not. This turns the language of the statute on its head.” *Pennsylvania State Conf. of NAACP*, 2023 WL 8091601, at \*30 (emphasis in original).

**II. ENFORCING THE ENVELOPE-DATING REQUIREMENT IMPOSES UNNECESSARY BURDENS ON ELECTION OFFICIALS AND REQUIRES THEM TO EXPEND RESOURCES TO SCREEN AND DISREGARD OTHERWISE-VALID BALLOTS**

The enforcement of the envelope-dating rule in Pennsylvania's November 2022 election disenfranchised more than 10,000 voters. Dissent at 1. With increased turnout anticipated in the 2024 Presidential election, many more Pennsylvanians could be deprived of the right to vote this November. As election officials who experience the challenges of administering elections firsthand, *amici* understand the burden the envelope-date rule places on the voting process. Rejecting ballots for reasons entirely unconnected to voters' actual qualifications not only violates voters' civil rights but also cuts against the foundational principles of a fair and inclusive electoral process and creates unnecessary and burdensome responsibilities for election officials.

The foremost duty of election officials is to ensure that eligible citizens in their jurisdictions can exercise the right to vote. This responsibility encompasses not only facilitating the ballot-casting processes but also ensuring that trivial defects do not prevent votes from being counted. The envelope-dating requirement introduces an unnecessary layer of complexity into this process, forcing election officials to develop procedures to identify and respond to errors that would otherwise require no attention. Official guidance from the Pennsylvania Department of State provides

that a return envelope missing a date or “dated with a date deemed to be incorrect . . . must be set aside and not counted,”<sup>2</sup> pursuant to *Ball v. Chapman*, 289 A.3d 1, 20–23 (Pa. 2023). An election official must then record the ballot in the state’s electronic ballot-tracking system. The state’s guidance further notes that, “[d]ue to ongoing litigation, ballots that have been administratively determined to be undated or incorrectly dated should be set aside and segregated from other ballots,” and “strongly recommends that counties also segregate into separate groups undated ballots versus incorrectly dated ballots.” Implementing this guidance inevitably diverts officials’ focus and resources away from more critical aspects of election administration. An accurate statement of the scope of the Materiality Provision from this Circuit would render these procedures unnecessary, providing vital clarity and reducing unnecessary burdens on those doing the on-the-ground work of election administration.

Some election boards have adopted notice and cure procedures to ensure that all eligible voters have their votes counted.<sup>3</sup> Some boards assign staff to monitor

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<sup>2</sup> Pa. Dep’t of State, *Guidance Concerning Examination Of Absentee And Mail-in Ballot Return Envelopes 4.0*, at 3 (April 3, 2023), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

<sup>3</sup> Although counties are not required to provide opportunities to cure protective ballots, see *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020), they are free to adopt these procedures and many choose to do so. See *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022 1 (Pa. Commw. Ct. March 23, 2023).

drop boxes and scrutinize the accuracy of envelope dates to bring errors or omissions to voters' attention. The Pennsylvania Department of State "recommend[s] that office personnel remind voters to confirm that they signed and correctly dated their ballots" when voters return their ballots in person.<sup>4</sup> Other notice and cure practices may include setting aside ballots flagged for errors, formally notifying voters of these discrepancies, and processing corrected ballots. Each of these steps demands administrative effort, legal oversight, and additional staffing—resources that election officials could otherwise use to ensure the integrity of the voting process, maintain accurate voter rolls, and facilitate an accessible voting experience,<sup>5</sup> but instead must divert to preventing disenfranchisement based on immaterial errors.

Reinstating the *Migliori* court's proper interpretation of the Materiality Provision by affirming the judgment of the district court would make the electoral process in Pennsylvania smoother and more efficient by reducing the burdens placed on election officials. Voters who have otherwise complied with eligibility requirements and submitted their ballots in a timely manner should not be

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<sup>4</sup> Pa. Dep't. of State, *supra* note 2.

<sup>5</sup> Pa. Dep't. of State, Administration of Voter Registration in Pennsylvania, 2022 Annual Report to the Pennsylvania General Assembly (June 30, 2023), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/Annual%20Reports%20on%20Voter%20Registration/DOS\\_Voter\\_Registration\\_Report\\_2022\\_FINAL.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/Annual%20Reports%20on%20Voter%20Registration/DOS_Voter_Registration_Report_2022_FINAL.pdf) (describing County Boards of Elections' initiatives related to voter roll maintenance, voter outreach, and other improvements to election administration).

disenfranchised over a technicality that holds no significance in determining their eligibility to vote or the validity in counting their vote. Nor should election officials be burdened with enforcing such disenfranchisement.

### **III. REJECTING BALLOTS DUE TO ENVELOPE-DATING ERRORS UNDERMINES PUBLIC TRUST IN THE ELECTORAL SYSTEM**

Requiring election officials to reject ballots based on inconsequential errors not only increases the resource strain on election boards but also risks damaging public confidence in the fairness and integrity of elections. Disqualifying valid ballots from eligible voters due to inconsequential paperwork errors generates understandable frustration among the electorate, and the risks of disenfranchisement are not borne equally by all voters. Senior voters and voters of color are more likely to be adversely affected by the Panel’s decision than are other groups.<sup>6</sup> Enforcement of the envelope-dating rule also opens the door to frivolous legal challenges, including those targeting election officials.<sup>7</sup> As long as the presence or accuracy of

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<sup>6</sup> *See* SeniorLAW Center Amicus Br. at 11-12 (citing Carter Walker & Laura Benshoff, “Philadelphia’s Communities of Color Disproportionately Affected When Mail Ballots Are Rejected Over Small Errors,” SpotlightPA (June 27, 2023), <https://www.spotlightpa.org/news/2023/06/pa-philadelphiamail-ballot-rejection-black-latino/>).

<sup>7</sup> “In addition to threats of physical violence, these election officials also have been subjected to frivolous lawsuits intended to harass or financially ruin them as they perform the public service of counting votes. Such stresses have, undoubtedly, contributed to the remarkable turnover in local election officials that we’ve seen across the nation since 2020.” Ongoing Threats to Election Administration: Hearing

envelope dates remains a criterion for rejecting or accepting ballots, it creates an opportunity for actors seeking to manipulate electoral outcomes to challenge the consistency and accuracy of how election officials apply this rule. These challenges are inherently frivolous because, as acknowledged by the court, the envelope-dating requirement has no bearing on a voter's qualifications and is therefore not material to their eligibility to vote.

Requiring election officials to scrutinize unnecessary details of voting paperwork increases the likelihood of errors and allows for differences across counties. Application of the envelope-dating rule has been marked by inconsistency and arbitrariness. *See, e.g.*, NAACP App. Br. 12. The complaint in this case revealed several instances in which ballots were improperly discarded, even when the dates on their return envelopes were within the accepted range. Some ballots were disqualified for having the correct date in the wrong place on the envelope or for minor omissions, while similar ballots were counted in other counties. Among other things, counties may have differing rules about an acceptable date range (how far back can the envelope be dated?), how the envelope is dated (are partial dates or European-style dating—inverting the day and month—appropriate?), or whether only numerical dates are acceptable.

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Before the Comm. on Rules and Admin. Of the United States Senate (Nov. 1, 2023) (Statement of Al Schmidt, Secretary of the Commonwealth of Pennsylvania).

The variation in the application of the envelope-date requirement across jurisdictions accentuates the need for clarity and highlights the potential for inconsistencies and errors in the electoral process. As election officials, *amici* seek a decision that offers uniformity and clarity ahead of the November 2024 election, not only for administrative efficiency but to uphold the integrity of and public confidence in our democratic processes.

### **CONCLUSION**

For the foregoing reasons, the petition for rehearing should be granted and the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Sarah R. Schalman-Bergen  
Sarah R. Schalman-Bergen  
Pa. Bar No. 206211  
LICHTEN & LISS-RIORDAN, P.C.  
729 Boylston Street, Suite 2000  
Boston, MA 02116  
Tel: (267) 256-9973  
ssb@llrlaw.com

Jonathan B. Miller  
Sophia House  
PUBLIC RIGHTS PROJECT  
490 43rd Street, Unit #115  
Oakland, CA 94609  
Tel: (510) 738-6788  
jon@publicrightsproject.org  
sophie@publicrightsproject.org

*Counsel for Amici Curiae*

**APPENDIX A - List of *Amici Curiae***

All *amici* join this brief in their individual capacities.

Kevin E. Boozel  
*Commissioner, Butler County*

Joanna Bryn Smith  
*Councilor, Luzerne County*

Amber Concepcion  
*Commissioner, Centre County*

Rock Copeland  
*Councilor, Erie County*

Chris Drexel  
*Councilor, Erie County*

Beth Gilbert  
*Acting Elections Director, Luzerne County*

Jeff Greenburg  
*Former Elections Director, Mercer County*

Mark Higgins  
*Commissioner, Centre County*

Patty Krushnowski  
*Councilor, Luzerne County*

Josh Maxwell  
*Chair, Board of Elections and Board of Commissioners, Chester County*



Marian Moskowitz  
*Commissioner and Vice-Chair, Board of Elections, Chester County*

Mary Rennie  
*Former Councilor, Erie County*

Jimmy Sabatino  
*Councilor, Luzerne County*

Brittany Stephenson  
*Councilor, Luzerne County*

Jeff Warren  
*Commissioner, County of Northampton*

Alice Yoder  
*Commissioner, Lancaster County*

**COMBINED CERTIFICATIONS**

I am a member of the bar of this Court.

This brief complies with the word limit of Fed. R. App. P. 35(b)(2) because this document contains 2,426 words.

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Dated: April 17, 2024

Respectfully submitted,

/s/ Sarah R. Schalman-Bergen  
Sarah R. Schalman-Bergen

**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2024, I caused a true and correct copy of the foregoing brief to be served via the Court's ECF/CMF system.

Dated: April 17, 2024

Respectfully submitted,

/s/ Sarah R. Schalman-Bergen  
Sarah R. Schalman-Bergen