


**In the
Supreme Court of the United States**



PENNSYLVANIA STATE CONFERENCE
OF THE NAACP, ET AL.,

Petitioners,

v.

AL SCHMIDT, SECRETARY OF PENNSYLVANIA, ET AL.,

Respondents.

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

**BRIEF IN OPPOSITION OF RESPONDENT
BERKS COUNTY BOARD OF ELECTIONS**

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QUESTION PRESENTED

Does Section 10101(a)(2)(B) of the Civil Rights Act of 1964, called the Materiality Provision, override mandatory provisions of State election law that compel election officials to set aside and not count absentee and mail-in ballots that fail to comply with the State's facially nondiscriminatory and neutrally applied vote-casting rule requiring voter declarations submitted with mail-in and absentee ballots to be dated, when that rule does not affect a voter's eligibility to vote?

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WHY THE PETITION SHOULD BE DENIED

This Court should eventually decide the question presented in this case, but now is not the right time.

Like many other county boards of elections—which are local government entities with limited resources and staffing—Respondent Berks County Board of Elections (“Berks County”) is weary of repeated litigation challenging unambiguous election rules. Each election cycle, major political parties, candidates, and voter advocacy groups like Petitioners invent new and creative legal arguments why they are entitled to have additional votes counted—or why certain votes should not be counted—in a results-oriented calculation based on whichever action will cause their preferred candidates to prevail.

The present case is just the latest in a series of state and federal lawsuits challenging Pennsylvania’s facially nondiscriminatory and neutrally applied vote-casting rules duly adopted by the Legislature and signed into law by the Governor. Berks County would welcome the clarity and finality that would come from the United States Supreme Court resolving this controversy on the merits. But now is not the right time.

Pennsylvania’s Election Code was amended in 2019 to allow universal no-excuse mail-in voting (in addition to traditional excuse-based absentee voting). Act of Oct. 31, 2019, P.L. 552, No. 77, § 8 (effective Oct. 31, 2019); 25 Pa. Stat. §§ 3150.11-3150.18. The Election Code, as amended, requires voters casting their vote by mail-in or absentee ballot, among other requirements,

to “fill out, date and sign” a voter declaration printed on the outer envelope in which the voter’s official election ballot is returned. *See* 25 Pa. Stat. §§ 3146.6(a), 3150.16(a). The Election Code requirement that voter declarations be dated has become known as the “Date Requirement.”

On November 1, 2022, the Pennsylvania Supreme Court ruled 4-2 that the Date Requirement is a mandatory vote-casting requirement and ordered all county boards of election (including Berks County) to set aside and not count mail-in and absentee ballots submitted in an outer envelope on which the voter declaration was either undated or incorrectly dated. *See Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) (*per curiam*); *see also* 289 A.3d 1 (Pa. 2023) (opinion filed Feb. 8, 2023). In that same decision, the Pennsylvania Supreme Court was evenly divided 3-3 on whether this mandatory Date Requirement violated the Materiality Provision. *Id.*

Immediately after the Pennsylvania Supreme Court decided *Ball v. Chapman*, Petitioners filed their legal challenge in the district court below, claiming the Date Requirement violates not only the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), but also violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. After expedited discovery, on November 21, 2023, the district court granted Petitioners’ motion for summary judgment on their statutory claim, ruling that setting aside and not counting undated or incorrectly dated ballots violates the Materiality Provision. *Pennsylvania State Conference of NAACP Branches v. Secretary of Commonwealth of Pennsylvania*, 703 F.Supp.3d 632 (W.D. Pa. 2023).

On March 27, 2024, the Third Circuit, in a 2-1 panel decision, reversed the district court’s summary judgment order. *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024). The Third Circuit majority analyzed the text, context, and historic backdrop of the Materiality Provision, and determined States are free to adopt vote-casting rules that have nothing to do with determining who may vote, like Pennsylvania’s Date Requirement, without running afoul of the Materiality Provision. *Id.* at 134 (quoting *Ball v. Chapman*, 289 A.3d at 38 (Brobson, J., concurring in part, dissenting in part) and *Ritter v. Migliori*, ___ U.S. ___, 142 S.Ct. 1824, 1825, 213 L.Ed.2d 1034 (2022) (Alito, J., dissenting from denial of application for stay)).

Although Petitioners had challenged the Date Requirement on both federal statutory and constitutional grounds, the district court’s summary judgment order avoided reaching the constitutional question and decided the case instead solely on Petitioners’ statutory Materiality Provision claim. The Third Circuit remanded the case to the district court for a ruling on Petitioners’ constitutional challenges that the district court had not yet decided.

On remand, the district court promptly ordered the parties to file summary judgment motions and briefs on the remaining constitutional questions,¹ and those

¹ After remand from the Third Circuit, Petitioners sought and were granted leave to amend their Complaint to assert a third claim challenging the Date Requirement based on an alleged unconstitutional burden on citizens’ right to vote under the First and Fourteenth Amendments pursuant to *Anderson v. Celebrezze*,

motions have been fully briefed and are ripe for consideration by the district court. The district court stayed its summary judgment decision on the constitutional claims pending this Court's decision on Petitioners' pending petition for a writ of certiorari.

Rather than taking up this case piecemeal and deciding the Materiality Provision issue now, this Court should wait and see what the district court and Third Circuit decide on the undecided constitutional challenges to the Date Requirement. Regardless of what happens before the district court and Third Circuit on those claims, one party or another will file a new petition for a writ of certiorari. At that point, this Court will have a fully developed record and lower court decisions on all of Petitioners' legal challenges to the Date Requirement. At that point, if it chooses to do so, the Court can decide all those issues at one time.

460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).



CONCLUSION

The petition for a writ of certiorari should be denied without prejudice to being refiled after the district court and Third Circuit rule on the remaining constitutional challenges to Pennsylvania's vote-casting rule at issue.

Respectfully submitted,

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