No. 24-363

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

By its terms, the Materiality Provision applies beyond just the voter registration context. Where a voter's mail ballot is excluded, left unopened and uncounted, because of an immaterial mistake on required paperwork like the envelope form here, the statute protects them—no less than a voter who makes an immaterial error on a registration form, or on some paper form presented at the polling place.

Intervenor-Respondents note, "voting by mail was relatively rare at the time of the Provision's enactment but has become more common in recent years." GOP BIO 1. But pointing out that the statute's text applies to forms of paperwork not in widespread use in the 1960s is not a "new theor[y]" or a "bolt-from-the-blue." *E.g.*, GOP BIO 1, 11. It is a plain reading of the broad-based text that Congress deliberately deployed. *See Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 675-76 (2020).

Today, Americans of all political stripes vote by mail—which is why the panel majority's counter-textual reading of an important federal statute presents a cert-worthy question. Pennsylvania and its largest counties agree the question presented is worthy of review. *See* PA BIO 1-6; Phila. BIO 8-9. Even Berks County, which defended the case alongside Intervenor-Respondents, agrees. Berks BIO 1.

Intervenor-Respondents acknowledge that the lower federal courts are divided. A different, unanimous panel of the Third Circuit reached the opposite conclusion from the panel majority just a few years ago, only to have its decision vacated as moot. *Migliori* v. *Cohen*, 36 F.4th 153, 162-66 (3d Cir.), *vacated as moot Ritter* v. *Migliori*, 143 S. Ct. 297 (2022) (Mem.). A Fifth Circuit merits panel thought the since-vacated result in *Migliori* was "obvious." *Vote.org* v. *Callanen*, 89 F.4th 459, 480 (5th Cir. 2023). Federal district courts in Pennsylvania, Georgia, Arkansas, Wisconsin, and Texas have all recently concluded that the Materiality Provision applies to mail-ballot related paperwork. *E.g.*, Pet. 24-25 (collecting authorities). Among federal judges to have addressed the question in a merits decision (as opposed to the non-

precedential stay opinions Intervenor-Respondents cite), the panel majority is the outlier.

Intervenor-Respondents float further percolation but never say what additional development is needed. Nor do they contest the circumstances that make *this* case an especially good vehicle for resolving the question presented. Other cases invariably involve factual disputes about whether a particular paperwork error actually is "material." Here, an undisputed full-discovery record demonstrates that the envelope date is meaningless in determining voter identity or qualifications, or in determining timely ballot receipt or in preventing fraud. Pet.26-27; Pet.App.163a-170a. The legal question is purely distilled: Does the Materiality Provision apply to immaterial mistakes on the paperwork that voters must fill out for their mail ballots to be opened and counted?

That question, which has divided federal courts and implicates the rights of millions, is perfectly teed up for consideration. The Court should grant certiorari, or, if the state courts invalidate the envelope-date requirement on state constitutional grounds, it should grant, vacate, and remand.

ARGUMENT

I. THE DECISION BELOW IS WRONG.

Intervenor-Respondents spend the bulk of their brief (at 13-34) attempting to defend the decision below on the merits, confirming that the question presented is sufficiently meaty and well-developed to grant review now.

A. Intervenor-Respondents and the Panel Majority Misread or Ignore Text.

Thousands of qualified voters' ballots were set aside "because of an error or omission on [a] record or paper relating to [an] … act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Their error or omission undisputedly was "not material in determining whether" they are "qualified under State law to vote in [the] election." *Id.*; *see* Pet.App.163a-170a. Eligible, duly-registered voters simply slipped up in writing a useless date on a required form.

The Materiality Provision applies by its terms in those circumstances. Intervenor-Respondents' textual contortions fail.

First, the envelope form is a covered "record or paper."

The statute applies to "any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). In limiting this language to only papers relating to *registration* (thereby deleting "other act requisite to voting" entirely), the panel majority violated a "cardinal rule" of statutory construction. *E.g., RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Intervenor-Respondents improperly invoke *ejusdem generis* to defend the ruling below. GOP BIO 15-18. But *ejusdem generis* only operates where there is textual ambiguity. *E.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980). Here the statute unambiguously extends beyond registration-related paperwork.

Even if *ejusdem generis* applied, it would confirm Petitioners' plain-text reading. Papers relating to "other act[s] requisite to voting" may properly be limited to papers

that are "similar in nature" to papers relating to a voter "application" or "registration." *See Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001). Here, the paper envelope form at issue is (1) a required form (2) that must be completed by the voter (3) in which the voter provides information regarding their voter qualifications—all similar to a registration form or a mail-ballot application. Pet.20.[1]

Intervenor-Respondents point to snippets of legislative history, but legislative history (even if utilized properly) *never* overrides "clear statutory language." *E.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 574 (2011); *see also* Pet.21. Moreover, legislative history *confirms* that Congress's goal was to end once and for all the use of irrelevant paperwork mistakes as a barrier to the franchise. *E.g.*, Pet.5-7, 14-16, 22-23; *see also* Ct.App.Dkt.166. Limiting the Materiality Provision to voter registration—effectively inviting Jim Crow states to block voters at the polls with other paperwork—would have been self-defeating and contrary to Congress's stated goals. *Id.*

Second, Intervenor-Respondents' assertion that the Materiality Provision "requires that the paper or record be used 'in determining' whether an individual is 'qualified' to vote" (GOP BIO 18) is the same "wag-the-dog" reading the panel majority erroneously invented. Pet.17-19. The Materiality Provision's reference to "determining" voter

[1] The terms "registration" and "application" are not "interchangeabl[e]." GOP BIO 16. Collapsing two words into one fails to "give each word some operative effect." *E.g.*, *Walters* v. *Metro. Educ. Enters.,* 519 U.S. 202, 209 (1997).

qualifications comes in a subordinate clause relating to the type of *error or omission* that can trigger the statute's prohibition. 52 U.S.C. § 10101(a)(2)(B) ("if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election"). Transposing that reference to limit a more distant referent in a separate clause (namely, "record or paper" in the main clause) is not a natural way to read text.

Intervenor-Respondents' arguments based on Section 10101's "structure" (at 18-20) are also misplaced. The other subsections they point to *directly* regulate voter qualification determinations—for example, subsection 10101(a)(2)(A) prohibits using non-uniform practices "in determining whether any individual is qualified under State law or laws to vote in any election." By contrast, the Materiality Provision prohibits vote denial based on paperwork errors, and refers to voter qualifications only in a subordinate, conditional clause. With such "differing language" comes differences in statutory meaning. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Nor does the special remedy available in pattern-or-practice cases under subsection 10101(e) indicate, much less "reinforce[]," any "qualification-and-registration focus of § 10101(a)." GOP BIO 19. Subsection 10101(e) sets out circumstances in which federal courts and federal registrars may supplant local officials and take over a local election system. As Intervenor-Respondents point out, a voter may then obtain "an order declaring him qualified to vote" from the federal registrars. 52 U.S.C. § 10101(e). But the statute further provides—in language Intervenor-Respondents omit—"an applicant so declared qualified to vote *shall be permitted to vote in [the] election*." *Id.* (emphasis added). This language *confirms* that Congress

wanted to broadly protect the right to vote (including "casting a ballot, and having [it] counted," 52 U.S.C. §§ 10101(a)(3), (e)), and *not merely the right to register*.

Moreover, the mail-ballot envelope form at issue here, on which voters sign an attestation stating "I am qualified to vote in this election," *is* used to determine voters' qualifications. Pet.20. Here, voters all signed the attestation. Excluding their votes because of a mistake on another immaterial element of this qualifications-confirming form (like the date) is just as unlawful as denying registration because a voter omitted their exact age in days on a registration form, or because they made some immaterial error on a required form at the polls. *E.g.*, *Ford* v. *Tenn. Senate*, No. 06-cv-2031, 2006 WL 8435145, at *7, *10-11 (W.D. Tenn. Feb. 1, 2006).

Third, Intervenor-Respondents cannot rewrite the statute's protection of the "right of any individual to vote in any election."

Intervenor-Respondents argue (at 20-22) that this statutory term applies only to methods of voting commonly used in the 1960s. They cite only inapposite cases where the plaintiffs brought constitutional claims to force the adoption or expansion of unavailable voting methods. GOP BIO 21-24 (citing *McDonald* v. *Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969), and *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973)).[2] But where states do

[2] Intervenor-Respondents' reference (at 21) to *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), is a non sequitur. The constitutional right to bear arms is interpreted "with reference to 'history,' " *id.* at 20, but federal statutes are interpreted based on their text. *E.g.*,

make some means of voting available, as Pennsylvania did with mail-ballot voting, they must comply with federal statutes. Whatever methods are allowed, "the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." *United States* v. *Mosley*, 238 U.S. 383, 386 (1915).

Text meanwhile forecloses Intervenor-Respondents' suggestion (*e.g.*, at 23-24) that "neutral" "ballot-counting" or "ballot-casting" rules cannot interfere with the right to vote.

Congress expressly defined "voting" for purposes of the Materiality Provision to include "all action necessary to make a vote effective," not just those needed to register or vote in person. 52 U.S.C. §§ 10101(a)(3)(A), (e). Voting, per the statute, includes, without limitation, "registration or other action required by State law prerequisite to voting, *casting a ballot*, and *having such ballot counted*." 52 U.S.C. § 10101(e) (emphasis added). This definition, which expressly includes ballot-casting and ballot-counting activities, is "virtually conclusive." *E.g.*, *Dep't of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 59 (2024). The panel majority overrode the definition Congress wrote and undermined Congress's essential purpose.

B. The Federalism and Constitutional Avoidance Canons Do Not Apply Here.

Intervenor-Respondents point (at 33-34) to non-textual canons that apply where a statute is ambiguous, which this statute is not.

Garland v. *Cargill*, 602 U.S. 406, 415 (2024). And "history" supports Petitioners' plain-text reading.

They invoke the "federalism canon," citing irrelevant cases about agency authority to address the COVID-19 pandemic through sweeping emergency action. (GOP BIO 33, citing *Ala. Ass'n of Realtors* v. *HHS*, 594 U.S. 758 (2021)). Their suggestion that the federalism implications of the core civil rights statutes enacted in 1964 and 1965 were somehow unclear is unserious. Regardless, Congress gave a clear statement as to the Materiality Provision's intervention into state election administration, prohibiting those "acting under color of law" from denying votes, broadly defined, based on irrelevant paperwork mistakes. *See* 52 U.S.C. § 10101(a)(2)(B).

As for constitutional avoidance, there is no ambiguity to resolve and no constitutional problem to avoid. In enacting the statute, Congress relied on its "broad authority" under the Elections Clause. *E.g.*, H.R. Rep. No. 88-914 (1963), *reprinted* 1964 U.S.C.C.A.N. 2391, 2492 (Rep. McCulloch). Intervenor-Respondents skip right to the Fifteenth Amendment, but the Elections Clause independently supplies Congress with authority to prohibit disenfranchisement for immaterial paperwork mistakes in federal elections, like the 2022 midterms from which this litigation arose. *E.g.*, *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013).

Nor is Congress's authority under the Reconstruction Amendments otherwise subject to doubt. The "measures protecting voting rights" in the 1964 and 1965 Acts, necessarily including the Materiality Provision, are paradigmatic examples of proper remedial legislation under those Amendments. *City of Boerne* v. *Flores*, 521 U.S. 507, 518-20, 524-27 (1997); *accord South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *see also Nev. Dep't of Hum. Res.* v. *Hibbs*, 538 U.S. 721, 727-28 (2003).

C. Intervenor-Respondents' Consequentialist Appeal Fails.

Intervenor-Respondents imply (*e.g.*, at 14 and 30-33) that numerous "mandatory paper-based election rules" would be rendered unenforceable if the Materiality Provision were applied outside the context of voter registration forms, creating "absurd" results or even "unleash[ing] … chaos." They never back up this talk.

Nearly all of the election rules they point to (at 31-32) are inapposite. Most are signature requirements, which may well be material in determining a person's qualifications, for example as an attestation to the voter's qualifications. Prohibitions on "voting for more candidates than there are offices," GOP BIO 31, and secrecy envelope requirements similarly are not implicated because they do not involve voter errors on required paper forms, as already explained. *See* Pet.21 n.3.

What Intervenor-Respondents *never* do is point to any common-sense rule whereby a qualified voter is excluded solely for making some minor, undisputedly irrelevant mistake in completing a required form. *None*. That is because Congress outlawed such indefensible practices in 1964. The panel majority's contrary holding, reopening a dangerous door, was manifestly wrong.

II. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN EXCEPTIONALLY IMPORTANT QUESTION.

Intervenor-Respondents never dispute that the question presented is worthy of review, and they agree that voter confidence and trust are important. GOP BIO 12-13. The arbitrary disenfranchisement of thousands of qualified voters undermines these values.

Even absent a split in federal appellate authority, certiorari may be warranted in cases involving a "clear misreading by the lower courts of the applicable and important federal statute." *E.g.*, *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991).

Intervenor-Respondents do not contest that lower federal courts are divided on how to interpret the Materiality Provision. In recent years, district court judges in five different states have looked at the statute and agreed that "the text of § 10101(a)(2)(B) isn't limited to ... voter registration." *Common Cause* v. *Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021); *see also* Pet. 24-25 (collecting cases). Indeed, even just among Third Circuit judges, four (the unanimous *Migliori* panel and Judge Shwartz in dissent here) agreed the Materiality Provision applies to mail-voting-related paperwork, while only two (the panel majority) concluded it does not.

The suggestion of some "benefit from further percolation" (at 11) rings entirely hollow without any explanation for *how* more percolation might further elucidate the issue. To the contrary, Intervenor-Respondents' extensive merits briefing shows the issue is developed and ready for decision.

Most importantly, Intervenor-Respondents do not dispute that *this* case is unique because the immateriality of the envelope date is uncontested, unlike in other cases where challenged practices ostensibly relate to a voter's age or identity. Pet.26-27. This case is thus an ideal vehicle to resolve a statutory question, arising with increasing frequency in the federal courts, that implicates the voting rights of millions.

III. IF THE PENNSYLVANIA COURTS INVALIDATE THE ENVELOPE-DATE RULE, THE COURT SHOULD GRANT, VACATE, AND REMAND.

As Intervenor-Respondents acknowledge (at 34-35), the Pennsylvania Commonwealth Court recently held that voters' ballots may not be excluded based on the envelope-date requirement. *Baxter* v. *Philadelphia Bd. of Elections*, No. 1305 C.D. 2024, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024). That ruling, interpreting the Free and Equal Elections Clause of the Pennsylvania Constitution, is a matter of first impression. *Id.* at *10. Intervenor-Respondents intervened in *Baxter* and sought further review in the Pennsylvania Supreme Court. The *Baxter* plaintiffs agreed that review should be granted, and have also asked the Commonwealth Court to publish its decision. Application to Report, No. 1305 C.D. 2024 (Pa. Commw. Ct. Nov. 27, 2024). *Baxter* may thus result in binding statewide precedent that effectively resolves the issue in this litigation.

If that happens, the Court should grant, vacate, and remand, just as it did in *Ritter* when the shoe was on the other foot.

Intervenor-Respondents suggest (at 35) that vacatur should not follow because the individual voter-petitioners in this case sought nominal damages against their home counties. But while a plaintiff's affirmative desire to continue pursuing nominal damages may stave off mootness in some instances, *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 290-292 (2021), that would not necessarily preclude a grant of *Munsingwear* vacatur where the controversy between the parties is functionally over in light of "the conditions and circumstances of the particular case." *Azar* v. *Garza*, 584 U.S. 726, 729 (2018) (citation

omitted). Indeed, if the state courts resolve the underlying issue, the three county defendants against whom such damages were sought would likely just end the litigation by "accept[ing] the entry of a judgment for nominal damages . . . without a resolution of the merits" rather than continue defending a dead policy. *Uzuegbunam*, 592 U.S. at 293-94 (Kavanaugh, J., concurring). All of which is why, if the Court is not inclined to grant the petition outright, it should at a minimum hold it pending *Baxter's* resolution.

Intervenor-Respondents' argument (at 36) that vacatur would be inequitable because Petitioners "could have brought" state constitutional challenges "in this case" is misguided. Federal courts have limited authority to enforce state constitutional rights. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). Petitioners properly brought their federal claims in federal court, whereas voters aggrieved by the denial of their right to vote under the Pennsylvania Constitution sought to enforce their rights in state court. If those voters obtain a precedential state law ruling resolving the dispute over the envelope-date rule before this Court can resolve the federal law question here, vacatur of the Third Circuit's aberrant decision should follow.

CONCLUSION

The petition should be granted. If the Pennsylvania courts resolve the envelope date issue, the Court should grant, vacate, and remand.

Respectfully submitted,

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