No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Pennsylvania requires voters to sign and date a declaration when they vote by mail. In a private lawsuit filed after a local election, the Third Circuit held that this dating requirement was preempted by the materiality provision of the Civil Rights Act of 1964, 52 U.S.C. §10101(a)(2)(B). That decision "is very likely incorrect," as three Justices have explained, and "could well affect the outcome of the fall elections." *Ritter v. Migliori*, 2022 WL 2070669 (U.S. June 9), at *3, *1 (Alito, J., dissental). Though petitioner planned to ask this Court to review it, he couldn't because the election ended and the results were certified. So the Third Circuit's decision will continue wreaking havoc, but this Court cannot review it on the merits.

The question presented is:

Should this Court vacate the Third Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)?

RELATED PROCEEDINGS

Pennsylvania State Court:

Ritter v. Lehigh Cnty. Bd. of Elections, 2022 WL 16577 (Commw. Ct. Jan. 3)

United States District Court:

Migliori v. Lehigh County Board of Elections, 2022 WL 802159 (E.D. Pa. Mar. 16)

United States Court of Appeals:

Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022)

United States Supreme Court:

Ritter v. Migliori, 142 S. Ct. 1824 (2022)

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JURISDICTION

The Third Circuit issued its decision on May 27, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The materiality provision of the Civil Rights Act of 1964 states:

> No 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).

INTRODUCTION

"Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. DNC*, 141 S. Ct. 2321, 2338 (2021). The Constitution gives state legislatures ample authority to enact those rules. *See* Art. I, §4, cl. 1; Art. I, §1, cl. 2; amend. X. And those rules are particularly important

for mail-in voting, which takes place outside the presence of election officials and presents a heightened risk of fraud. *Brnovich*, 141 S. Ct. at 2348. Hence why laws requiring mail-in voters to follow certain rules—sign and date a declaration, use a sealed secrecy envelope, find a witness, follow deadlines, and more—are ubiquitous. *Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 736 (2021) (Thomas, J., dissental). These workaday rules serve state interests that are "strong and entirely legitimate." *Brnovich*, 141 S. Ct. at 2340.

But these rules have their detractors—well-funded opponents who've been searching for a theory that would let federal courts invalidate regulations of mail-in voting. During the pandemic, opponents tried to argue that the Constitution required federal courts to suspend these laws. This Court disagreed "numerous" times. *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurral). Then opponents, claiming racially disparate impacts, tried to invalidate these laws under §2 of the Voting Rights Act. This Court closed that door as well, explaining that Congress did not preempt "common" regulations that impose only the "'usual burdens of voting.'" *Brnovich*, 141 S. Ct. at 2346-48.

The detractors' next big theory appears to be the materiality provision of the Civil Rights Act. Passed in 1964, that statute prevents States from denying someone "the right to vote" because they made an error or omission on a "record or paper" that is "requisite to voting," unless the error or omission is "material" to whether the voter is "qualified under State law." 52

U.S.C. §10101(a)(2)(B). This statute bans the practice—common in the Jim Crow South—of registrars denying black voters the right to register due to "minor misspelling errors or mistakes in age or length of residence." H.R. Rep. No. 88-914 (Nov. 20, 1963), 1964 U.S.C.C.A.N. 2391, 2491. But today, litigants are trying to stretch this language to cover laws that govern the mechanics of mail-in voting—rules that voters must follow to ensure their mail-in ballots are counted. These laws are preempted by the materiality statute, the theory goes, unless they prove a voter's qualifications, meaning their age, residency, citizenship, or non-felon status. And, of course, most ballot-validity rules do not do that.

This theory has major proponents. The ACLU, who represents the plaintiffs here, has adopted it. The national Democratic Party has adopted it too. The party is currently telling courts that the materiality statute preempts laws requiring voters to mail ballots to the right county, use a secrecy envelope, and meet the postmarking deadline. Worse, the United States has adopted this theory as well. It wrote amicus briefs for the plaintiffs in this case, and it is currently suing Texas and Arizona for their voter-ID laws. The United States' new position is important because the Civil Rights Act places *it* in charge of enforcing the materiality statute. *See* 52 U.S.C. §10101(c).

This expansive reading of the materiality statute was adopted below. With "little effort to explain how its interpretation can be reconciled with the language of the statute," *Ritter*, 2022 WL 2070669, at *1 (Alito,

J., dissental), the Third Circuit held that the materiality statute preempts Pennsylvania's laws requiring mail-in voters to date a declaration. It thus ordered Lehigh County to count 257 undated ballots in a judicial election where petitioner David Ritter led by only 71 votes. When Ritter moved for an emergency stay, this Court denied his application over the dissent of three Justices.

After this Court denied a stay, the case quickly became moot. The very next day, the district court ordered the board of elections to count the 257 undated ballots. The board did so and, less than a week after this Court denied a stay, Ritter learned that the Third Circuit's decision had flipped the result. Instead of winning the election by 71 votes, Ritter lost the election by 5 votes. The county then certified the results and declared his opponent the winner.

Because this case "'has become 'moot while on its way here,'" this Court should follow its "'established practice'": it should "'vacate the judgment below and remand with a direction to dismiss.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *Munsingwear,* 340 U.S. at 39). The Court likely would have granted certiorari had the case not become moot. The Third Circuit's decision was important, wrong, and deepened a split among the lower courts. And the equities strongly favor vacatur, regardless of the odds of certiorari. The mootness here was caused by the election calendar, not Ritter, and leaving the Third Circuit's thinly reasoned decision in place would spawn unfortunate and unreviewable consequences. It jeopardizes a wide range of entirely legitimate state election laws.

And it will disrupt the November elections. Vacatur avoids these consequences, with no prejudice to the individual plaintiffs who brought this case. This Court should enter that relief to "clea[r] the path for future relitigation of the issues" and "eliminat[e] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

STATEMENT OF THE CASE

Under Pennsylvania's election code, voters must date a declaration on the envelope of their mail-in ballot. Around 250 voters failed to do that in Lehigh County's 2021 election, and the Pennsylvania courts deemed those undated ballots invalid. Five voters then filed a follow-on suit in federal court, again arguing that the undated ballots must be counted. The voters lost in the district court, the Third Circuit reversed on appeal, and this Court denied an emergency stay. Then, in fast succession, the undated ballots were counted, the result was flipped, and the election was certified. So this controversy ended, but the Third Circuit's precedent remains untouched—inflicting consequences both immediate and far-reaching.

A. Pennsylvania requires mail-in voters to sign and date a declaration.

The Pennsylvania legislature authorized no-excuse mail-in voting for the first time in 2019. To vote this way, Pennsylvanians must place their ballot in an inner secrecy envelope and then place the inner secrecy envelope in an outer mailing envelope. The mailing envelope contains a declaration that the voter must "fill out, *date* and sign." 25 Pa. Stat. §3150.16(a)

(emphasis added); *accord* §3146.6(a). The declaration affirms that the voter, among other things, is qualified to vote in this election from this address and hasn't voted already. *See Envelope Guide*, Pa. Dep't of State, bit.ly/3LBsM4Q (last visited July 6, 2022).

According to Pennsylvania's courts, this dating requirement serves "'weighty interests.'" *Ritter v. Lehigh Cnty. Bd. of Elections*, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3). It helps prove "when the elector actually executed the ballot." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1090 (Pa. 2020) (op. of Dougherty, J.). It "'establishes a point in time against which to measure the elector's eligibility.'" *Id.* It helps "ensur[e] the elector completed the ballot within the proper time frame." *Id.* at 1091. And it prevents third parties from collecting and "fraudulent[ly] back-dat[ing] votes." *Id.*; *accord* App.65 ("Where … the outer envelope remains undated, the possibility for fraud is heightened."). As in other States, dating requirements like Pennsylvania's "deter fraud," "create mechanisms to detect it," and "preserv[e] the integrity of the election process." *Republican Party of Penn.*, 141 S. Ct. at 736 (Thomas, J., dissental) (cleaned up).

B. Ritter runs for a judgeship in 2021 and initially wins the third and final seat.

Lehigh County's court of common pleas is a trial court with general jurisdiction. Its judges serve 10-year terms. They run in partisan elections for their first term and retention elections after that.

In November 2021, Lehigh County held an election for three new judges on the court of common pleas. Six candidates ran—three Republicans and three Democrats—so the top three vote-getters would win the seats. After the votes were tallied, the three Republicans finished in the top three. But the margin between the third-place candidate (David Ritter) and fourth-place candidate (Zac Cohen) was less than 75 votes:

Candidate	Vote Total
Tom Caffrey (REP)	35,301
Tom Capehart (REP)	33,017
David Ritter (REP)	32,602
Zachary Cohen (DEM)	32,528
Maraleen Shields (DEM)	32,041
Rashid Santiago (DEM)	29,453

Caffrey and Capehart were seated. But Ritter was not. His opponent, Cohen, filed a challenge with the county board of elections.

C. In the state contest, the Pennsylvania courts agree with Ritter that undated ballots cannot be counted.

Of the 22,000 absentee votes cast in Lehigh County's 2021 election, 257 had no date on the outer envelope. In other words, 1% of mail-in voters failed to comply with Pennsylvania's dating requirement. After Cohen's challenge, the board of elections decided to count those undated votes, but Ritter challenged that decision in court. The state trial court ruled for

Cohen, but the commonwealth court reversed on appeal.

A three-judge panel of the commonwealth court agreed with Ritter that the 257 undated ballots could not be counted. In addition to state-law claims, the court addressed whether the dating requirement violates the materiality provision of the Civil Rights Act. That statute was "inapplicable," according to the commonwealth court, because the dating requirement does not regulate whether a voter is *qualified* to vote, but whether a qualified voter's ballot is *valid*. 2022 WL 16577, at *9. The materiality statute does not invalidate the dating requirement, which is an election-integrity measure that serves "'weighty interests.'" *Id.*

The commonwealth court instructed the trial court to "issue an order … directing [Lehigh County] to exclude the 257 [undated] ballots from the certified returns." *Id.* at *10. The commonwealth court's decision became final on January 27, 2022, when the Pennsylvania supreme court denied Cohen's petition to appeal. 271 A.3d at 1286. The trial court promptly directed Lehigh County to "exclude the 257 ballots at issue in this case." CA3 Dkt. 33-2 at JA128.

D. Individual voters file a new federal lawsuit, lose, but win on appeal.

Four days after the state-court proceedings ended, five individual voters filed a new federal lawsuit. The voters claimed that they did not date their mail-in ballots and argued that Pennsylvania's dating requirement violated the materiality statute. Though they claimed to be vindicating their individual right to

vote, they did not ask for only their five ballots to be counted; they asked that Lehigh County be ordered to count all "257" undated ballots. D.Ct. Dkt. 1 at 20-21. Ritter intervened as a defendant, and Cohen intervened as a plaintiff.

The district court quickly entered summary judgment against the plaintiffs. It ruled that the plaintiffs lacked a private right of action to enforce the materiality statute. App.53-62. The court "did not find the question of the existence of a private right of action to be particularly close." *Migliori v. Lehigh Cnty. Bd. of Elections*, 2022 WL 827031, at *1 (E.D. Pa. Mar. 18).

The individual voters (but not Cohen) appealed. D.Ct. Dkt. 58. After expedited briefing and argument, the Third Circuit issued a judgment on May 20. The judgment warned that the court would soon issue an opinion for the plaintiffs, that the opinion would direct the district court to "order that the undated ballots be counted," and that the Third Circuit would "immediately" issue its mandate with the opinion. CA3 Dkt. 82 at 2-3. Ritter asked the Third Circuit to either stay its mandate pending certiorari or delay the issuance of its mandate seven days so that Ritter could seek a stay from this Court. CA3 Dkt. 81. The Third Circuit agreed to delay its mandate seven days. CA3 Dkt. 85.

The Third Circuit issued its decision at the end of May. It held that Congress intended for the materiality statute to be enforced through §1983's private right of action. It discounted the fact that the materiality provision "refers to the Attorney General's enforcement ability," and it supported its conclusion by

consulting legislative history. App.11-18. The Third Circuit then held that Pennsylvania's dating requirement did not comply with the materiality statute. It reasoned that any state election law that does not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony" violates the statute. App.19. It did not explain how the text of the statute reaches ballot-validity requirements in the first place.

Importantly, throughout this litigation, Lehigh County was enjoined from certifying the election. *See* D.Ct. Dkt. 13; CA3 Dkt. 12. The plaintiffs sought that relief at every stage because, "[o]nce the Elections Board certifies the election …, Plaintiffs lose any opportunity to obtain meaningful redress." D.Ct. Dkt. 3 at 20; *accord* D.Ct. Dkt. 52-1 at 17 (arguing that, if "the County … certif[ies] the election," then "Plaintiffs will likely lose any opportunity for appellate review"). Certification, they argued, is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. "[O]nce an election is certified, 'there can be no do-over [or] redress.'" CA3 Dkt. 6-1 at 24-25; *accord* D.Ct. Dkt. 3 at 19 ("once certified, an excluded vote cannot be restored"); CA3 Dkt. 6-1 at 3 ("irretrievably lost"); *id.* at 7-8 ("permanent loss").

E. The Third Circuit's decision goes into effect and flips the result.

Ritter sought an emergency stay from this Court to prevent the Third Circuit's decision from going into effect. Justice Alito entered an administrative stay, but the full Court later denied Ritter's application.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. They would have granted the stay,

noting their "concern" that the Third Circuit's decision would affect "the federal and state elections that will be held in Pennsylvania in November." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). The Third Circuit's interpretation of the materiality statute, they explained, "broke new ground." *Id.* It is "very likely wrong" and "could well affect the outcome of the fall elections." *Id.* These Justices would have entered a stay and ordered expediting briefing so that "the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October." *Id.* at *2.

One day after this Court denied a stay—before the Third Circuit's mandate had even issued—the district court ordered Lehigh County to count the 257 undated ballots. App.31. The board of elections counted them six days later. Though the plaintiffs told this Court that Ritter could not "show that counting the additional votes will change the result," Stay-Opp.3, that's precisely what happened. Instead of winning the election by 71, Ritter lost the election by 5. Lehigh County certified the election for Cohen. *See* Pratt, *Eight Months Later, Lehigh County Certifies 2021 General Election*, WLVR (June 28, 2022), bit.ly/3bQwNWX.

The Third Circuit's decision literally changed the outcome of Ritter's election, but the fallout did not end there. Even though the Third Circuit's decision "was issued in the context of the November 2021 election in Lehigh County," the State has ordered all counties to count undated ballots in future elections (unless the Third Circuit's decision is overturned by this Court). *Guidance Concerning Examination of Absentee and*

Mail-In Ballot Return Envelopes 2-3, Pa. Dep't of State (May 24, 2022), bit.ly/3NLG8x0 (*Guidance*). And a Pennsylvania judge, relying heavily on the Third Circuit's decision, ordered all counties to count undated ballots in the May primaries. *See Dave McCormick for U.S. Senate v. Chapman*, Mem. Op., No. 286 M.D. 2022 (Pa. Commw. Ct. Jun. 2, 2022).

Though the plaintiffs told this Court that the Third Circuit's decision would not affect laws other than the dating requirement, *see* Stay-Opp.26-27, that assurance quickly proved false. Less than a week after the Third Circuit's decision, a group of plaintiffs sued to invalidate Pennsylvania's law requiring mail-in ballots to be placed in secrecy envelopes. The plaintiffs argued that, under the Third Circuit's decision, this requirement is not "material in determining whether [voters are] qualified under [Pennsylvania] law to vote." *Dondiego v. Lehigh Cnty. Bd. of Elections*, Dkt. 1 ¶43, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The defendants quickly settled. *Dondiego*, Dkts. 43-44, No. 5:22-cv-2111-JLS (E.D. Pa. June 15, 2022). The settlements will continue, as Pennsylvania's attorney general agrees with the plaintiffs' reading of the materiality statute and has urged courts to invalidate the State's election law. *E.g.*, CA3 Dkt. 42; D.Ct. Dkt. 40.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision, "[i]f left undisturbed," will leave a dangerous interpretation of the materiality statute on the books, threaten to invalidate countless regulations of mail-in voting, and inject

chaos into the state and federal elections in November. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). It should not be left undisturbed. Because the case became moot on its way here, this Court should do what it typically does when the election calendar prevents a litigant from obtaining review: *Munsingwear* vacate. *E.g.*, *Bognet v. DeGraffenreid*, 141 S. Ct. 2508 (2021).

This case became "moot while on its way here." *Munsingwear,* 340 U.S. at 39. The parties' dispute was about which ballots would be counted in Lehigh County's 2021 election for the court of common pleas. After the Third Circuit's decision but before this Court granted certiorari, the ballots were counted, the results were certified, and the election ended. As the plaintiffs have argued throughout this case, certification marks the end of the parties' controversy.

When a case becomes moot on its way here, the Court's "established practice" is to invoke *Munsingwear*—to grant certiorari, vacate the judgment, and remand with instructions to dismiss the case as moot. 340 U.S. at 39. That remedy promotes "fairness" by "expung[ing] an adverse decision" that the petitioner could not get this Court to review. *Camreta v. Greene*, 563 U.S. 692, 712 & n.10 (2011). Though the United States has argued that vacatur is inappropriate unless the underlying case would have been certworthy, it admits that vacatur can "still … be appropriate" even when that's not true. Pet. 23 n.4, *Hargan v. Garza*, 2017 WL 5127296 (U.S. Nov. 3, 2017). Because *Munsingwear* is "rooted in equity," the fact that the case became moot "before certiorari does not

limit this Court's discretion." *Garza*, 138 S. Ct. at 1792-93. But under any standard, the Third Circuit's judgment should be vacated here.

If this case had not become moot, the Court likely would have granted certiorari. The Third Circuit's expansive interpretation of the materiality statute is the kind of disruptive usurpation of the States' authority over elections that this Court hasn't hesitated to review. And the Third Circuit's holding that plaintiffs have a private right of action creates a 2-1 circuit split. Three Justices said they would have granted certiorari at the stay stage. It's likely that at least one more would have joined them at the merits stage—where the facts, law, and stakes would have crystallized and the burdens of granting emergency relief would have dissipated. *Compare Moore v. Harper*, 142 S. Ct. 1089 (2022) (denying an emergency stay), *with Moore v. Harper*, 2022 WL 2347621, at *1 (U.S. June 30) (granting certiorari). Or the prospect of certiorari is at least close enough to justify wiping the slate clean under *Munsingwear*.

Certiorari aside, the equities alone warrant vacatur. The mootness here "occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng. v. Arizona,* 520 U.S. 43, 71 (1997). The case became moot when the new election results were certified over Ritter's rigorous defense of the original results. But that certification left in place a decision that "could well affect the outcome of the fall elections" and is being invoked to attack state election laws across the country. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). It was issued hastily and did not

address the statutory question at the core of this case. The state election laws that it will jeopardize include legitimate requirements necessary to the administration of the upcoming elections. And vacatur is far less burdensome than an emergency stay or expedited review, which three Justices already indicated they were willing to support. The equities, as they normally do, point to *Munsingwear*.

I. This case became moot on its way here.

Article III courts may decide "only … ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

The controversy underlying this case has ended. The plaintiffs sued so that their undated ballots would be counted in Lehigh County's 2021 election. That election ended, the plaintiffs' ballots were counted, the results were certified, and the offices were filled. Even if Ritter convinced this Court to reverse the Third Circuit, none of that would change. Lehigh County would not (if it even could, legally) uncertify the election, uncount the plaintiff's votes, or remove Cohen from office. As is typical in election cases, this dispute over which votes will be counted became moot once the votes were counted and the election was certified. *See, e.g.*, *Bognet*, 141 S. Ct. at 2508 (granting pre-certiorari vacatur in a dispute over the validity of certain ballots in Pennsylvania's 2020 election after the case became moot because the election was certified); *Brockington*

v. Rhodes, 396 U.S. 41, 43 (1969) (granting vacatur because a case involving "a particular office in a particular election" becomes "moot" once the "election is over").

The plaintiffs agree. Throughout this case, they asked the lower courts to enjoin Lehigh County from certifying the election, precisely because of certification's case-mooting effect. As they put it, certification is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. That final act eliminates "any opportunity for appellate review." D.Ct. Dkt. 52-1 at 16. It's the point after which "'there can be no … redress.'" CA3 Dkt. 6-1 at 24-25. Pennsylvania's chief elections official agrees. *See* Sec'y-BIO 1, *Bognet*, 2021 WL 1040374 (U.S. Mar. 15, 2021) ("This case is moot" because "Pennsylvania has officially certified all results" and "Petitioners do not suggest that this Court could, at this late date, change the outcome of a single race."). The plaintiffs cannot argue otherwise now.*

II. Absent mootness, the questions presented are certworthy.

As noted, the United States takes the position that "vacatur under *Munsingwear* is appropriate if, among other things, the case would have merited this Court's plenary review had it not become moot." Reply 2, *Yellen v. U.S. House of Representatives*, 2021

* If the plaintiffs change positions and provide some convincing reason why this case is not moot, then this Court should grant certiorari on the merits. The questions presented should be (1) whether Pennsylvania's dating requirement violates the materiality statute and (2) whether plaintiffs have a private right of action to enforce the materiality statute.

WL 4219332 (U.S. Sept. 2021). Ritter satisfies that standard, as three Justices suggested already at the stay stage. *See Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental) ("the Third Circuit's interpretation is sufficiently questionable and important to merit review").

This case would have presented two issues that merit this Court's consideration. First, the question whether the materiality statute applies to laws governing the validity of mail-in ballots is important and has significant consequences for the fall elections. Second, the question whether private plaintiffs can enforce the materiality statute has split the circuits 2-1. Both questions would have been certworthy, and either question is a sufficient basis to vacate under *Munsingwear*.

A. The Third Circuit adopted a broad reading of the materiality statute that will disrupt many elections.

The materiality provision of the Civil Rights Act of 1964 bars election officials from deeming individuals unqualified to vote based on small mistakes on their applications:

> No 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) (emphases added). The statute bars election officials from, for example, denying someone's voter-registration application because he misspelled his name or street address. *See* H.R. Rep. No. 88-914, 1964 U.S.C.C.A.N. at 2491.

The materiality statute does not preempt laws that govern the process of casting mail-in ballots. As Congress explained at the time, the statute is aimed not at "discriminatory laws," but at "'the discriminatory application and administration of apparently nondiscriminatory laws.'" *Id.* At least three parts of the text illustrate why it does not invalidate ordinary laws governing mail-in voting:

1. Laws that regulate the casting of mail-in ballots do not deem a voter not "qualified under State law to vote." §10101(a)(2)(B). States determine whether voters are qualified through the process of registration, and the qualifications for voting are minimal: age, residency, citizenship, and non-felon status. *See Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). But the rules governing the validity of mail-in ballots—the where, when, and how of casting these ballots—do not have "anything to do" with a voter's qualifications. *Id.* They serve different purposes, like improving election administration, confirming voters' identities, deterring fraud, and protecting voters' privacy. It would be "silly" and "absurd" to invalidate all these requirements unless they help confirm a voter's age, residency, citizenship, or non-felon status. *Id.*

2. Laws that require mail-in voters to follow certain rules also do not "deny the right of any individual

to vote." §10101(a)(2)(B). "When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'" *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). The voter's vote is not counted "because he or she did not follow the rules for casting a ballot." *Id.* The failure to follow basic ballot-casting rules "constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*; *see Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (explaining that voters who "chose not to" follow the State's election deadline were not "disenfranchise[d]" by the State).

3. Nor do laws governing how a mail-in ballot must be cast regulate an "act requisite to voting." §10101(a)(2)(B). The materiality statute defines "vote" to include "all action necessary to make a vote effective including … casting a ballot, and having such ballot counted." §10101(e). So dating the declaration *is* "voting" because it is "necessary to make a vote effective." It would be "strained" and "awkward" to "describe the act of voting as 'requisite to the act of voting.'" *Ritter*, 2022 WL 2070669, at *2 n.2 (Alito, J., dissental).

Yet the Third Circuit concluded otherwise. It held that the materiality statute not only reaches laws that govern the validity of mail-in ballots, but also preempts Pennsylvania's law requiring voters to date the declaration on their mailing envelope. The Third Circuit did not grapple with the textual problems discussed above. It "made little effort to explain how its interpretation can be reconciled with the language of the statute." *Id.* at *1.

Unsurprisingly then, the court's analysis was deeply confused. The Third Circuit spent most of its time explaining why the dating requirement does not help Pennsylvania tell whether a ballot was cast on time, and it put near-dispositive stress on the fact that Pennsylvania already counts ballots that contain the *wrong* date (as opposed to *no* date). *See* App.18-22. But none of that matters under the Third Circuit's reading of the materiality statute. If dating the declaration is a "requisite to voting" and disqualifying undated ballots deems an individual "[un]qualified" and "den[ied] the right … to vote"—as the Third Circuit necessarily concluded—then the remaining analysis should have been simple. Timeliness is not a qualification for voting under Pennsylvania law, *see* 25 Pa. Cons. Stat. §1301, so of course the dating requirement would not be "material in determining whether [an] individual is qualified under State law to vote," 52 U.S.C. §10101(a)(2)(B). That the Third Circuit felt the need to say more proves that even it was uncomfortable with the implications of its interpretation.

And the Third Circuit *should have been* uncomfortable, as its interpretation of the materiality statute has no real limits. Many, if not most, regulations of mail-in voting do not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony." App.19. They serve other purposes, like confirming voters' identities, deterring and detecting fraud, and protecting voters' privacy. The Third Circuit's decision implicates not just dating requirements, but also laws that require voters to provide certain identifying information, write with certain instruments, use certain envelopes, meet certain deadlines, find certain

witnesses, and the like. Even the requirement that mail-in voters *sign* a declaration would not be material under the Third Circuit's decision. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Litigants have already seized on the Third Circuit's decision to challenge all sorts of regulations. Immediately on the heels of that decision, private plaintiffs filed a lawsuit challenging Pennsylvania's requirement that mail-in voters use an inner secrecy envelope. Their principal authority was the Third Circuit's decision in this case. *See Dondiego*, Dkt. 2-1 at 9-10, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The national Democratic Party has likewise used the materiality statute to challenge laws requiring mail-in voters to include their name, send their ballot to the right place, get a postmark, meet the deadline, use the right envelope, and more. Its lead authority? The Third Circuit's decision in this case. *See DCCC v. Kosinski*, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y. June 17, 2022).

These nationwide challenges illustrate why the Third Circuit's decision, which "broke new ground," would have been "sufficiently … important to merit review" by this Court. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). As contemplated by this Court's Rule 10(c), certiorari is appropriate, even without a direct circuit split, when it raises an "important question of federal law that has not been, but should be, settled by this Court." The Third Circuit's reasoning is a "*de facto* green light to federal courts to rewrite dozens of state election laws around the country." *Wis. State Leg.*, 141 S. Ct. at 35 (Kavanaugh, J., concurral).

When federal courts invalidate state election laws or threaten new inroads on States' authority to regulate elections, this Court has not hesitated to grant certiorari without waiting for a classic circuit split. *E.g.*, *Moore*, 2022 WL 2347621; *Brnovich*, 141 S. Ct. at 2336; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (op. of Stevens, J.).

That's not to say that the proper reading of the materiality statute hasn't divided the lower courts: It has. The Fifth Circuit—fully aware of the Third Circuit's decision here—just rejected the notion that the materiality statute covers "any requirement that may prohibit an individual from voting if the individual fails to comply." *Vote.Org v. Callanen*, 2022 WL 2389566, at *6 n.6 (5th Cir. July 2) (citing *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental)). The Pennsylvania courts too, in this very case, reached a directly contrary result from the Third Circuit. *See Ritter*, 2022 WL 16577, at *9. And until recently, *no* case in *any* jurisdiction suggested that the materiality statute governs "the counting of ballots by individuals *already deemed qualified to vote*." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004).

For all these reasons, this Court likely would have granted certiorari to review the Third Circuit's novel and sweeping interpretation of the materiality statute. Three Justices have already said as much. Especially given what's transpired since then, certiorari is likely enough to justify vacatur now.

B. The Third Circuit deepened a circuit split on whether private plaintiffs can enforce the materiality statute.

Independently, the Third Circuit's decision would have been certworthy because it created a 2-1 circuit split. The Third Circuit joined the Eleventh Circuit in concluding that §1983 gives plaintiffs a private right of action to enforce the materiality statute. *See* App.11-18; *Schwier v. Cox*, 340 F.3d 1284, 1293 (11th Cir. 2003). The Sixth Circuit has held the opposite. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (citing *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000)).

This circuit split is widely recognized. At the stay stage, the plaintiffs acknowledged it. *See* Stay-Opp.20 (acknowledging that the "Sixth Circuit" has "reach[ed] a contrary conclusion" from the Third and Eleventh Circuits). And several courts have recognized the split as well. *E.g.*, *Vote.Org*, 2022 WL 2389566, at *5 n.5 ("Courts are divided on this point."); *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 215 F. Supp. 3d 1201, 1218 & n.6 (D. Utah 2016) (discussing this "circuit split"); *Ne. Ohio Coal.*, 837 F.3d at 630 (Sixth Circuit recognizing that the Eleventh Circuit had "reached the opposite conclusion"). This "conflict" over an "important" issue is precisely the kind of question that this Court grants certiorari to review. S. Ct. R. 10(a); *e.g.*, *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 422 n.6 (1987) (granting certiorari to resolve a 1-1 split on whether a federal statute could be enforced via §1983).

This split would have been ripe for this Court's review. The issue has percolated for two decades, divided three circuits, and been thoroughly addressed in numerous federal decisions. *E.g.*, *Dekom v. New York*, 2013 WL 3095010, at *18 (E.D.N.Y. June 18) (collecting cases), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); *Duran v. Lollis*, 2019 WL 691203, at *9 (E.D. Cal. Feb. 19); *Navajo Nation*, 215 F. Supp. 3d at 1219; *League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15). The split is not disappearing, as the Sixth Circuit has reaffirmed its position even after this Court's most recent precedent interpreting §1983. *Ne. Ohio Coal.*, 837 F.3d at 630. And the lower courts will continue to split on this question because there are persuasive points on both sides.

The Sixth Circuit's position best conforms to Congress's design and this Court's precedent. Even if a federal statute creates individual rights, §1983 is not available if Congress "did not intend that remedy" for the statute in question. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). For the materiality statute, Congress included a public judicial remedy for "the Attorney General" of the United States. 52 U.S.C. §10101(c). That remedy is contained in the same statute and is highly detailed—dictating who can be the defendant, creating special forms of relief, articulating rebuttable evidentiary presumptions, creating new federal jurisdiction, eliminating exhaustion requirements, appointing and compensating private referees, specifying fast deadlines, assigning counsel to defendants, and creating jurisdiction for three-judge district courts and direct appeals to this Court. *See* §10101(c)-(g). The "'express provision of one

method of enforcing a substantive rule,'" especially a "'comprehensive enforcement scheme'" like this one, means that "'Congress intended to preclude others.'" *Rancho Palos Verdes*, 544 U.S. at 120-21.

That this case would have raised a question that has split the circuits—a classic justification for certiorari—means that vacatur under *Munsingwear* is an easy call now. The logic of the United States' position on pre-certiorari vacatur is presumably rooted in equity: Denying vacatur to a party who would have gotten review is unfair because it falsely treats him as though he got review *and lost*. *Camreta*, 563 U.S. at 712. And granting vacatur does not prejudice the party who won below because, given the likelihood of this Court's review, that party's win was "'only preliminary.'" *Alvarez*, 558 U.S. at 94. So too here.

III. The equities alone warrant vacatur.

Even if this Court would have denied certiorari, vacatur would still be appropriate. The United States admits that its position on pre-certiorari vacatur is not absolute. *See* Pet. 23 n.4, *Garza*, 2017 WL 5127296 (explaining that vacatur can be appropriate "even if review were not otherwise warranted"). And this Court has refused to place any "limit" on its "discretion" to vacate cases that became moot before certiorari. *Garza*, 138 S. Ct. at 1793; *see also Alvarez*, 558 U.S. at 94 ("The statute that enables us to vacate a lower court judgment when a case becomes moot is flexible"). This Court has granted vacatur many times in this posture, including recently in cases that were mooted by the 2020 election. *See id.* (collecting cases); *e.g.*, *Bognet*, 141 S. Ct. at 2508; *Trump v. D.C.*, 141

S. Ct. 1262 (2021); *Trump v. CREW*, 141 S. Ct. 1262 (2021); *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021); *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021); *Slatery v. Adams & Boyle, P.C.*, 141 S. Ct. 1262 (2021).

Requiring this Court to "undertake a hypothetical disposition of the petition" before it grants pre-certiorari vacatur would impose an "unwarranted burden." 13C Fed. Prac. & Proc. Juris. §3533.10.3 (3d ed.). It might make sense to deny vacatur when it is "apparent that certiorari would not have been granted." *Id.* But that principle cannot be dispositive here, where three Justices have already concluded that the Third Circuit's decision is "sufficiently questionable and important to warrant review." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental).

At bottom, this Court should simply ask the core question that it always asks when deciding whether to invoke *Munsingwear*: Is vacatur equitable under "'the conditions and circumstances of the particular case'"? *Garza*, 138 S. Ct. at 1792. Vacatur is equitable here for at least four reasons.

1. This Court should vacate because the "mootness occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng.*, 520 U.S. at 71. This case plainly falls on "the 'happenstance' side of the line" because it was mooted by "the ordinary course of … proceedings." *Alvarez*, 558 U.S. at 95-96. The disputed ballots were counted, the results were certified, and the election ended. Ritter did not cause any of that to happen; in fact, he tried to stop it by

seeking emergency relief from this Court. And no matter how fast he acted after this Court denied a stay, his petition could not have been granted and resolved before the election ended. When mootness is caused by "the election outcome," as the United States recently explained, then the mootness is "'unattributable to any of the parties.'" Reply 8, *Trump v. D.C.*, 2020 WL 7681471 (U.S. Dec. 2020).

When "happenstance" prevents this Court from reviewing a decision, then "the normal rule" applies and the equities favor vacatur. *Camreta*, 563 U.S. at 713. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). "Vacatur then rightly strips the decision below of its binding effect and clears the path for future relitigation." *Camreta*, 563 U.S. at 713 (cleaned up). This Court has struck that equitable balance in "countless cases," *Great W. Sugar Co. v. Nelson,* 442 U.S. 92, 93 (1979), and nothing about this case warrants a different result. In short, "mootness by happenstance provides *sufficient* reason to vacate." *Bancorp*, 513 U.S. at 25 n.3 (emphasis added).

2. No countervailing purpose would be served by leaving the Third Circuit's decision intact. The primary interest that weighs against vacatur is the notion that "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole.'" *Id.* at 26. Of course, that interest is not sufficient to

avoid vacatur when mootness occurs due to happenstance. *See id.* at 25 & n.3. But it has even less purchase here. While three judges of the Third Circuit obviously believe that their decision is correct, three Justices of this Court have concluded that their decision is "very likely incorrect." *Ritter*, 2022 WL 2070669, at *3 (Alito, J., dissental). So have three Judges of the Fifth Circuit, several Pennsylvania judges, and every federal court until very recently. *See Vote.Org*, 2022 WL 2389566, at *6 & n.6; *Ritter*, 2022 WL 16577, at *9; *Friedman*, 345 F. Supp. 2d at 1371.

Other factors unique to the Third Circuit's decision cut further against its preservation. That decision was issued on a highly "expedited" schedule. App.11 n.24. The entire appeal was briefed, argued, and decided in two months. And the Third Circuit issued its judgment well before its opinion explaining that judgment. Such "rushed, high-stakes, low-information" litigation does not correlate with "good judicial decisions." *DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Relatedly, the Third Circuit's opinion includes virtually no engagement with the statutory text. *See Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). It dedicates its entire analysis of the statute to the *interests* served by Pennsylvania's dating requirement, an issue that has no grounding in any element of the statute. Vacatur is thus needed to "'clea[r] the path for future relitigation'" of the important and nuanced questions surrounding the proper interpretation of the materiality statute, rather than entrenching the Third Circuit's rushed and underdeveloped decision. *Arizonans for Off. Eng.,* 520 U.S. at 71.

3. This Court should vacate the Third Circuit's decision because "it could well affect the outcome of the fall elections." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). Absent vacatur, the Third Circuit's decision will invalidate Pennsylvania's dating requirement for all elections in November. *See Guidance* 2-3. Removing this safeguard against fraud will decrease voter confidence and discourage participation in those elections. *Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006). And it could illegitimately change the outcome of individual elections, as it did here. The logic of the Third Circuit's decision, moreover, undermines the legality of many other regulations of mail-in voting. Signing the declaration no more goes to a voter's qualifications than dating it, as Justice Alito explained. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). The same could be said of many other regulations of mail-in voting, including requirements that voters sign a declaration, find a witness, use a pen, seal the envelope, write their name, fill out the right address, and more.

These extensions of the Third Circuit's decision are not theoretical and won't be confined to Pennsylvania. Plaintiffs across the country are using the Third Circuit's decision as the lead precedent for challenging all sorts of routine regulations of mail-in voting. The United States participated as an amicus in this case, agreeing with the plaintiffs that the materiality statute invalidates Pennsylvania's dating requirement. *See* CA3 Dkts. 45, 75. Based on that interpretation, it is now suing Texas for requiring mail-in voters to provide minimal identifying information. *See United States v. Texas*, Dkt. 1 ¶¶71-76, No. 5:21-cv-

1085 (W.D. Tex. Nov. 4, 2021). And it just sued Arizona for requiring voters to provide certain proof of citizenship. *See United States v. Arizona*, Dkt. 1 ¶¶66-71, No. 2:22-cv-1124 (D. Ariz. July 5, 2022). The Democratic Party, too, is in on the act. It is suing New York on the theory that the materiality statute preempts laws requiring mail-in ballots to be sent to certain places, receive a postmark, avoid identifying marks, and be placed in secrecy envelopes. *See DCCC*, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y.).

These cases will continue to proliferate, and several more are pending now. *E.g.*, *Dondiego*, 5:22-cv-2111 (E.D. Pa.); *Vote.org v. Callanen*, 2022 WL 2181867 (W.D. Tex. June 16); *Afr. Methodist Episcopal Church v. Kemp*, 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021); *Common Cause v. Thomsen*, 2021 WL 5833971 (W.D. Wis. Dec. 9); *League of Women Voters of Ark.*, 2021 WL 5312640. Only vacatur can prevent the Third Circuit's "unreviewable decision 'from spawning any legal consequences'" in this new hotbed of litigation. *Camreta*, 563 U.S. at 713.

4. The *Purcell* principle also favors vacatur here. It is a "bedrock tenet" of election law that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). That principle applies with even more force when a federal court changes the rules after the election has already ended. *See Republican Party of Penn.*, 141 S. Ct. at 734-35 (Thomas, J., dissental); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020). The Third Circuit violated this principle by

granting the plaintiffs' tardy request for sweeping injunctive relief. Especially given its limitless scope, the Third Circuit's decision will confuse voters, candidates, and administrators about what the rules are for the November elections. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Vacating the Third Circuit's decision would not present any similar concerns. That decision does not create a new electoral status quo; it has not been on the books long, and Pennsylvania has warned administrators and voters not to rely on it until this Court resolves this case. *See Guidance* 2. More broadly, *Purcell* exists to protect a "state's election laws" from federal judicial intervention, not to protect lower courts from this Court's review. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). "Correcting an erroneous lower court injunction," as vacatur would do, "does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election law. That would be absurd and is not the law." *Id.* at 882 n.3.

Finally, the fact that this Court denied Ritter's emergency application for a stay does not prevent vacatur. While emergency stays are "'extraordinary,'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers), vacatur under *Munsingwear* is "ordinary," *Alvarez*, 558 U.S. at 94-95. The two requests present entirely different equitable considerations. And emergency stays must be decided quickly, whereas vacatur decisions can be made after longer study and fuller consideration. The two requests also present different demands on this Court's

time and resources. Here, for example, six Justices might have been unwilling to "enter a stay," "grant review," "set an expedited briefing schedule," and "set the case for argument in October." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). But vacatur eliminates the negative effects of the Third Circuit's decision with very little expenditure of this Court's time and resources.

Things have also changed since this Court denied a stay. The Fifth Circuit has now weighed in against the Third Circuit's view. *See Vote.Org*, 2022 WL 2389566, at *6 & n.6. And many of the assurances that the plaintiffs offered in their stay opposition have proven false. The Third Circuit's invalidation of Pennsylvania's dating requirement will not be confined to this one election. *Contra* Stay Opp.2, 17. A court applied it to the very next election, and the State has instructed counties to apply it to all future elections (absent action from this Court). The Third Circuit's judgment also *does* undermine laws other than the dating requirement. Other plaintiffs, the Democratic Party, and the United States have all used it as a basis to attack many routine regulations of mail-in voting. The plaintiffs' assurance that the Third Circuit's decision would not change the outcome of elections was proven false as well, as it flipped the outcome of Ritter's election. And the plaintiffs' main arguments on the equities—that a stay would leave the election unresolved and their votes uncounted—is no longer a concern after the election was certified. *See* Stay-Opp.36-37.

This Court was closely divided on whether to grant an emergency stay. But important developments have occurred since then, and vacatur under *Munsingwear* is a far lighter lift for the Court. Given the havoc that the Third Circuit's decision threatens to wreak on the upcoming elections, vacatur is the only equitable outcome now.

CONCLUSION

This Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot.

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