No. 22 – 1499

In the United States Court of Appeals for the Third Circuit

LINDA MIGLIORI, et al.,

Plaintiffs-Appellants,

v.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Defendants-Appellees.

On Appeal from the Eastern District of Pennsylvania
(D.C. Civ. Action No. 5:22-CV-00397)
District Judge: The Honorable Joseph F. Lesson, Jr.

Memorandum of Law filed on behalf of Lehigh County Board of Elections, Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

INTRODUCTION

The Lehigh County Board of Elections (Board) respectfully requests this Court deny Plaintiffs' Appeal seeking to overturn the well-reasoned and well-written Opinion and Order of the District Court dated March 16, 2022. Upon review of the District Court's Opinion and Order, it is clear Appellants' arguments do not lie as a matter of law.

From a substantive standpoint, the sole issue presented to the District Court, and to this Court on appeal, is whether the Board must count 257 mail-in ballots that were submitted with a facially deficient ballot-return envelope. More specifically, all 257 mail-in ballots at issue failed to contain the date, which is required by Pennsylvania law, next to the signature line on the envelope. Upon receipt of the mail-in ballot and discovery of the missing date, these ballots were not opened and immediately set aside pursuant to Pennsylvania law.

STATEMENT OF ISSUES

1. WEHTHER APPELLANTS WAIVED ITS ARGUMENT UNDER SECTION 1983, AND, THEREFORE, ARE NOT PERMITTED TO RAISE IT BEFORE THIS COURT.

   Suggested Answer: Yes.

2. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED APPELLANTS LACK A PRIVATE CAUSE OF ACTION TO BRING SUIT UNDER THE MATERIALITY PROVISION OF THE CIVIL RIGHTS ACT.

   Suggested Answer: Yes.

3. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THE COMMONWEALTH OF PENNSYLVANIA'S DATE REQUIREMENT RELATED TO MAIL-IN BALLOTS DID NOT VIOLATE THE MATERIALITY PROVISON OF THE CIVIL RIGHTS ACT.

   Suggested Answer: Yes.

STATEMENT OF RELATED CASES

This action was not previously presented to this Court. The mail-in ballots at issue in this appeal were considered in a prior state court action, Ritter v. Lehigh County Board of Elections, which was a matter brought by a candidate under the Commonwealth's Election Code. Id., No. 122 Cd 2021, 2022 WL 16577 (Pa. Cmwlth Ct. Jan. 3, 2022) (Petition for Allowance of Appeal denied, 2022 WL 244122). Of note, while the aforementioned action was brought under Pennsylvania's Election Code, the Commonwealth Court did address the Materiality Provision of the Civil Rights Act in its decision.

STATEMENT OF THE CASE

This case does not involve a conflict between state and federal law. Instead, this case involves the review of a state requirement to ensure it is consistent with federal law. Of note, three separate and distinct Courts have concluded that it is, the Commonwealth Court and the United States District Court expressly, and the Pennsylvania Supreme Court by denying review of the determination of the Commonwealth Court. Despite these determinations, the Appellants now ask this Court to conclude that Pennsylvania's requirement that an envelope providing a mail-in ballot contain a date, is invalid.

By way of background, the 2021 Municipal Election was held on November 2, 2021, and in that election, six candidates vied for three open seats on the Court of Common Pleas of Lehigh County. At the current time, two of the three judicial positions have been certified and Judges have been installed. The third position, which remains unofficially, but not officially certified under Pennsylvania Law, has David Ritter winning the judicial position over Zachary Cohen by 71 votes.[1]

For the November 2021 election, the County's Office of Voter Registration and Elections received approximately 22,000 mail-in ballots. Of those ballots, 261 were deemed invalid by the Chief Clerk based upon the omission of a date or the inclusion of an improperly placed date on the

[1] Of note, originally, 261 mail-in ballots were set aside for defects on the ballot-return envelope. 257 of those ballots were for missing dates, and 4 were previously set aside for having the date in the wrong location on the ballot-return envelope. Following a decision by the Court of Common Pleas and the conclusion of the Appeal to the Commonwealth Court, the 4 votes with dates in the wrong location were counted. As a result, at a meeting on February 1, 2022, the Board counted the 4 votes and unofficially recertified the election. Under 25 P.S. §3154, the certification of an election in Pennsylvania is a two-step process. The first step requires the Board to unofficially certify the Election and then it must wait 5 calendar days to officially (finally) certify the Election. At a meeting on February 1, 2022, the Board unofficially certified the Election with David Ritter winning the judicial position by 71 votes over Zachary Cohen.

Pursuant to the District Court's Order dated February 2, 2022, and by agreement of the parties, the Board has not taken any action to officially certify the Election results until this Court enters an Order relative to the remaining 257 mail-in ballots that have not been opened, reviewed, or counted to date.

elector declaration on the ballot-return envelope. Of the 261 ballots, 257 lacked a date, and 4 ballots contained a date, but in the wrong location. As such, the Chief Clerk determined the ballots would not be pre-canvassed or canvassed (counted) based on the Pennsylvania Election Code ("Election Code"),[2] Pennsylvania case law, and guidance from the Pennsylvania Department of State.

In response, Zachary Cohen challenged the Chief Clerk's decision to set aside these mail-in ballots. On November 15, 2021, the Board held a hearing on Cohen's challenge, and the Board voted 3-0 to canvass the 261 mail-in ballots. Two days later, David Ritter filed an appeal to the Court of Common Pleas of Lehigh County.

Following a hearing and the submission of Memorandum of Laws on all issues raised, including an issue concerning the Materiality Provision of the Civil Rights Act, the Court issued a decision affirming the Board's decision to count all 261 mail-in ballots. David Ritter filed an appeal to the Commonwealth Court of Pennsylvania.

Ultimately, the Commonwealth Court reversed the decision of the Court of Common Pleas, concluding the mail-in ballots should not be counted. In so doing, the Commonwealth Court addressed the Materiality Provision of the Civil Rights Act, and relied upon the Pennsylvania Supreme Court's decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020). Zachary Cohen then filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on January 27, 2022. Ritter v. Lehigh County Board of Election, No. 9 MAL 2022, (Pa. Jan. 27, 2022), 2022 WL 244122.

On January 31, 2022, 5 individuals, with the assistance of the ACLU, filed the instant suit. All five of the named plaintiffs voted by mail-in ballot in the election, and their ballots were

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2601-3591.

rejected because of the lack of a date on the ballot-return envelope. Initially, this suit sought a preliminary injunction seeking to enjoin the Board from officially certifying the election and future relief consistent with that position.

Following initiation of that litigation, the parties agreed to have the Board unofficially certify the election, but to then take no further action relative to officially certifying the election. Subsequently, the parties, with the Court's consent, agreed to file a stipulation of facts and convert this matter to cross-motions for summary judgment for the District Court's disposition. The cross-motions for summary judgment were submitted, and by Opinion and Order dated March 16, 2022, the U.S. District Court, through the Honorable Joseph F. Leeson, granted summary judgment in favor of the Board and against Plaintiffs. In so doing, the District Court concluded that the 257 ballots at issue should not be counted.

Consistent with the aforementioned Opinion and Order, the Board set a meeting for the purpose of formally/officially certifying the election results at issue for March 21, 2022. Prior to that meeting, however, Appellants filed their Notice of Appeal to this Court, and requesting a stay pending appeal to the District Court. Upon examination, the District Court denied the requested stay and Appellants immediately sought the same relief from this Court. This Court entered a temporary stay to allow a three-judge panel to review the request for a stay pending the entire appeal, which has not been decided at the time of the filing of this Memorandum of Law. In the interim, this Court issued a briefing schedule on the merits, and this Memorandum of Law is filed in accordance and consistent with that briefing schedule.

SUMMARY OF ARGUMENT

The District Court's determination that Material Provision of the Civil Rights Act does not provide for a private cause of action, and that Pennsylvania's date requirement for mail-in ballots does not violate that same provision is well-reasoned, and impeccably supported. In reaching its conclusion, the District Court determined the statutory language, legislative history, as well as a review of the substantive interpretations of that language by courts in preceding cases, dictate Congress did not intend to provide for a private cause of action. In the absence of a private cause of action, the District Court appropriately and properly concluded that Plaintiffs/Appellants were unable to set forth a legally viable claim under the Materiality Provision.

Moreover, the District Court undertook a thorough and comprehensive substantive review of Pennsylvania's date requirement for mail-in ballots and accurately concluded, even if a private cause of action existed, no violation of the Materiality Provision is present. Stated otherwise, the District Court's determination that the date requirement is sufficiently justified by important governmental interests as to not violate the Materiality Provision is correct.

The comprehensive analysis and discussion of these issues is set forth in clear, logical, and unequivocal terms, and nothing set forth in Appellants' Memorandum of Law presents a new issue that the District Court failed to address. In the absence of any such presentation, there is absolutely nothing upon which this Court can relay to reach an alternative or different conclusion on appeal.

Although Appellants now attempt to circumvent the District Court's decision by arguing the District Court failed to consider Appellant's private cause of action for the enforceability of the Materiality Provision under Section § 1983, 42 U.S.C. § 1983, this argument is waived as they failed to set forth a viable claim before the District Court and abandoned any such argument that it may have had when it failed to even cite to Section 1983 in its Memorandum of Law in Support

of its Motion for Summary Judgment. Although the Board acknowledges Appellants did cite to Section 1983 twice in its Memorandum of Law in Opposition to the Board's Motion for Summary Judgment, such a cursory reference is radically insufficient to raise such a complex issue.

Indeed, the argument Appellants now raise on appeal concerning Section 1983 is five (5) pages in length and sets forth a new legal standard (Gonzaga v. Jane Doe, 536 U.S. 273 (2002)) that was not raised, developed, or discussed to the District Court, in any recognizable fashion.[3] Given the complexity and length of the argument presented to this Court, any such argument to the District Court would be easily discernible. Even a cursory review of the Memorandums of Law submitted by Appellants to the District Court evidence that such an argument was not preserved and cannot now be reviewed by this Court.

[3] Although Appellants did not cite to the holding in their Memorandum of Law in Support of their Motion for Summary Judgment, the Board also acknowledges that Appellants did cite to Gonzaga v. Jane Doe, 536 U.S. 273 (2002) once in its Memorandum of Law in Opposition to the Board's Motion for Summary Judgment, but failed to develop or present any such issue relative to that holding.

ARGUMENT

Where, as here, the District Court correctly concluded the Material Provision of the Civil Rights Act, 52 U.S.C. §10101 (a)(2)(B), does not provide for a private cause of action, and even if it did, which is expressly denied, the Appellants challenge to Pennsylvania's date requirement fails as a matter of law. Upon examination, we are confident this Court will find no error in the legal analysis of the District Court and the conclusions drawn therefrom. While we acknowledge that this Court's standard of review is de novo given the grant of summary judgement by the lower court, U.S. ex rel. Kosenske v. Carlislie HMA, Inc., 554 F.3d 88 (3d Cir. 2009), the issues presented by Appellants on appeal fail to present a basis upon which this Court can conclude an alternative or different result from that of the District Court. As Appellees are entitled to judgment as a matter of law, and there are no genuine issues of material fact at issue, The District Court must be affirmed.

1. WEHTHER APPELLANTS WAIVED ITS ARGUMENT UNDER SECTION 1983, AND, THEREFORE, ARE NOT PERMITTED TO RAISE IT BEFORE THIS COURT.

Initially, as a threshold matter, the Board of Elections contends any and all arguments raised in Appellants' Memorandum of Law to this Court concerning Section 1983 or any rights encompassed thereunder, are waived. As Appellants failed to raise an argument and/or issue, in any manner, concerning Section 1983 to the District Court, the presentation of any such issues to this Court must not be considered.

When examining the issues presented to this Court in the context of waiver, the question for the Court to answer is s not whether a party's position has been mostly consistent, or generally inclined toward the same subject as that raised on appeal, but whether the same "theory" was "squarely" raised in the trial court. Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545, 558 (3d Cir. 2017) (citing United States v. Joseph, 730 F.3d 336, 338–42 (3d Cir. 2013)).

Under the Third Circuit Court of Appeals seminal precent in United States v. Joseph, 730 F.3d 336 (3rd Cir. 2013), "merely raising an issue that encompasses the appellate argument is not enough." Id. at 337. Whether an argument remains fair game on appeal is determined by the "degree of particularity" with which it is raised in the trial court, id. at 341, and parties must do so with "exacting specificity," id. at 339. This Courts "precedents reveal at least two characteristics that identical arguments always have. First, they depend on the same legal rule or standard. Second, the arguments depend on the same facts." Id. at 342 (citation omitted).

Here, we do not contest that the Appellants are utilizing the same set of facts argued before the Trial Court. Instead, we bring to the Court's attention that Appellants failed to raise any type of legal argument regarding Section 1983 before the Trial Court, which is clearly a separate legal rule and/or standard than a review of the Materiality Provision of the Civil Rights Act of 1957, 52, U.S.C. § 101010(a)(2)(B).

Before the District Court, on cross-motions for summary judgment, Appellants raised two issues. First, whether cancellation of a voter's mail in ballot for omitting a handwritten date on the outer envelope violates the CRA's prohibition on denying the right to vote based on an error or omission that is "not material in determining whether such individual is qualified under State Law to vote in such election…when the handwritten date is unrelated to the voter's qualifications. The second issue raised whether the omission of the handwritten date violates the First and Fourth Amendments by imposing a burden on voters that serves no government interest. A theory or argument under Section 1983 is clearly a completely separate issue that would need to be raised with specificity to the District Court.

Nevertheless, on appeal to this Court, Appellants first argument under Section A of their Memorandum of Law states, "Plaintiff Voters brought their Materiality Provision claim under 42

U.S.C.§ 1983 as well as 52 U.S.C. § 10101." See page 20 of Appellants Memorandum of Law. The complexity of the argument raised under Section 1983 before this Court, which is five (5) pages, clearly demonstrates that if such an argument was raised to the District Court, it would be readily identifiable.

Yet, Appellants did not raise a Section 1983 claim before the Trial Court in any manner, nor did they include a single cite to Section 1983 in their Motion for Summary Judgment or their Memorandum of Law in Support. Although the Board acknowledges Appellants did cite to Section 1983 twice in its Memorandum of Law in Opposition to the Board's Motion for Summary Judgment, such a cursory reference is radically insufficient to raise such a complex issue.[4] Moreover, the Board acknowledges that Appellants also cite to Gonzaga v. Jane Doe, 536 U.S. 273 (2002), for the first time in its Memorandum of Law in Opposition to the Board's Motion for Summary Judgment. However, upon review of that Memorandum of Law, it is clear that Appellants failed to raise, develop, or discuss a substantive issue under its holding.

In the absence of the development of any type of argument to indicate a separate basis for a private cause of action under Section 1983 or the standard now referenced under Gonzaga, such argument is waived. As their Memorandum of Law solely focused on the Materiality Provision of the Civil Rights Act and the argument that an individual has the right to bring such a claim, the presentation of a Section 1983 argument to this Court is improper.

[4] Appellants failed to even plead a viable claim under Section 1983 to the District Court in its Complaint, let alone develop a recognizable issue or argument in its Memorandums of Law to that Court. Indeed, they failed set forth any factual averments required for the County to be liable under Section 1983. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (appellants were required to show that it had an established policy or custom that resulted in the alleged constitutional violations at issue); see also Schlichten v. County of Northampton, 279 Fed.Appx. 176 (3rd Cir. 2008) (unreported); Wolfe v. City of Pittsburgh, 140 F.3d 236 (3rd. Cir. 1998).

Moreover, the Board of Elections did not present any type of argument to discuss the possibility of a cause of action under Section 1983 or cite Section 1983 in any manner in its Motion or Memorandum of Law in Support. In turn, as the District Court was not presented with an issue concerning the rights related to Section 1983, the District Court did not cite to Section 1983 in its Opinion or Order, nor address any type of argument that encompassed it in any fashion.

Given the lack of any type of development of presentation to the District Court by Appellants concerning Section 1983, the rights encompassed by Section 1983, or the holding in Gonzaga in their Motion for Summary Judgment or Memorandum of Law in Support thereof, that argument and/or claim is waived, and is not subject to this Court's review on appeal.

2. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED APPELLANTS LACK A PRIVATE CAUSE OF ACTION TO BRING SUIT UNDER THE MATERIALITY PROVISION OF THE CIVIL RIGHTS ACT.

The first issue presented to the District Court and to this Court is whether the Materiality Provision of the Civil Rights Act, 52 U.S.C. §10101(a)(2)(B), sets forth a private cause of action for enforceability. Whether a private cause of action exists under a given statute depends on the intent of Congress. Alexander v. Sandoval, 532 U.S. 275 (2001).

"A private right of action is the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." Wisniewski v. Rodale, Inc., 510 F.3d 294, 296 (3d Cir. 2007). "Many federal statutes provide a private right of action through their express terms." Id. at 297. "Other federal statutes, however, merely define rights and duties, and are silent about whether an individual may bring suit to enforce them." Id. Where a statute is silent, Courts have concluded that an implied cause of action did exist. Id.

In Sandoval, the United States Supreme Court set forth the following test for determining whether a private cause of exists:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress …. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy …. Statutory intent on this latter point is determinative …. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

See Wisniewski, 510 F.3d at 299–300 (alterations in original) (quoting Sandoval, 532 U.S. at 286–87).

The Materiality Provision provides that no one acting under the color of law may "deny the right of any individual to vote in any election because of an error or omission" on a registration application or voting ballot if the error or omission "is not material" in determining whether the individual is qualified to vote. 52 U.S.C. §10101(a)(2)(B). Of significant import here, subsection (c) of that Section continues on to state when any person has deprived another of "any right or privilege secured by subsection (a) ... the Attorney General may institute for the United States ... a civil action or other proper proceeding for preventive relief." 52 U.S.C. §10101(c) (emphasis added).

The clear identification of the Attorney General in subsection (c) of Section 10101, without further identification of enforcement by private citizens, is conclusive; simply stated, Congress did not intend to provide for a private cause of action to enforce this statute. To that end, it is well settled that "[t]he first step in interpreting a statute is to determine 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (quoting Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (internal citations omitted)). "Where the language of the statute is clear ... the text of the statute is the end of the matter." Steele v. Blackman, 236 F.3d 130, 133 (3d Cir. 2001); see

also Bell v. Reno, 218 F.3d 86, 90 (2d Cir.2000) (if the tools of statutory construction reveal Congress' intent, that ends the inquiry).

At the outset, the clear language of the statute here directs that the Attorney General is exclusively vested with the authority to seek redress. See Willing v. Lake Orion Community Schools Bd. of Trustees, 924 F.Supp. 815 (S.D. Mich. 1996) (concluding that Section 1971 of the Voting Rights Act (now Section 10101(a)(2)(B)) does not afford a private cause of action); see also Good v. Roy, 459 F.Supp. 403, 405 (D. Kan. 1978) (subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons.... [T]he unambiguous language of Section 1971 will not permit us to imply a private right of action ….”; thereby, refusing to imply a private right of action).

Appellants try to circumvent the clear language of the statute by arguing Congress, with the enactment of the Civil Rights Act, intended to supplement the already existing private enforcement of civil rights, including voting, dating back 1870. Citing Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003), Appellants argue the Civil Rights Act of 1957 did not intend to supplant this private cause of action, but to simply to add an additional layer of enforceability. The reliance on Schwier, however, is flawed and the Eleventh Circuit’s rationale is legally wanting.

First and foremost, the Sixth Circuit addressed this very issue in its decision in McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). In that decision, the Sixth Circuit concluded that the clear language of Section 10101 demonstrates that Congress intended to have this provision enforced by the Attorney General, and the negative implication of the express language of the statute does not permit private rights of action. Id. (citing 42 U.S.C. § 1971(c); Willing v. Lake Orion Community Sch. Bd. of Trustees, 924 F.Supp. 815, 820 (E.D.Mich.1996). This holding is well founded and consistent with the well-settled tenets of statutory construction principles.

Nevertheless, the Eleventh Circuit began its review of the issue with the dismissal of the McKay decision by simply stating that it ended its analysis too early by relaying on the express

terms of the statutory language. Then the Court undertook analysis in which it sought to supplant its interpretation of Congress' implied intent over the clear and unambiguous statutory language actually written by Congress. Is so doing, the Court analogized two prior decisions that held other provisions of the Voting Rights Act were enforceable by private causes of action, even though those sections also provide for enforcement by the Attorney General. See Allen v. State Board of Elections, 393 U.S. 544 (1969); Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) (plurality opinion).

The Schwier Court then continued on to note that the provision giving the Attorney General the right to bring a civil suit under §1971 (now 10101(c)) was not added until 1957, and, therefore, from the enactment of §1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 under § 1983. Id. Relying on this analysis, and although admitting that Congress did not provide for a private right of action expressly, the Court concluded that Congress must have intended to continue to permit a private cause of action by implication for the enforceability of the Materiality Provision under Section 1983. Id.

The Eleventh Circuit's failure to undertake an examination of the clear language of the Materiality Provision as actually written by Congress and acknowledging that its actual language does not expressly provide for a private right of action, leaves its decision unpersuasive, at best. By ignoring the clear and unambiguous language in the statute, the Court tries to convince the reader that the explicit reference to the Attorney General was intended to add additional layers of enforceability. This argument, however, would require this Court to assume Congress was aware of a private right of enforcement at the time the codification of the Materiality Provision was completed in 1957 (in the Civil Rights Act of 1957), under Section 1983, but wanted to leave such a right implicit. Rather than seek to expressly provide a private cause of action within the statute, Congress purposefully left the existence of a private cause of action to the implicit interpretations of the Courts even with the addition of three new subsections to the statute. Such an argument is

illogical and requires this Court to draw an absurd conclusion in the interpretation of the statutory language.

As further support for this position, Appellants cite subsections (c) and (d) of Section 10101. Appellants argue the permissive versus mandatory language of Subsection (c) as it relates to the Attorney General's enforcement, as well as Subsection (d)'s language relative to jurisdiction, as its only evidence to support Congress' implied intent. Contrary to Appellants' specious assertions, in the absence of express statutory language establishing a private cause of action for the enforcement of the Materiality Provision, particularly in light of the prior existence of such a right as argued by Appellants, a Court's imposition of such a right by implication is clearly erroneous.

Where, as here, statutory language is clear and unambiguous, Courts are required to give effect to all the words of the statute and recognize that if Congress intended to provide a nonexclusive enforceability provision, especially where the right was in existence at the time of the amendment, it would have said so. In the absence of a clear directive in the statute itself, an implication crafted by a Court is simply insufficient to render such a determination proper or persuasive. Based on the Sixth Circuit's logical approach to the language, together with the parameters set forth under the well-settled statutory construction principles, this Court must find Appellants lack the requisite private right of action to pursue a claim under Section 10101(a)(2)(B) or Section 1983.[5]

In addition, although the arguments are waived, as noted above, Appellants attempt to utilize Section 1983 to enforce the Materiality Provision is also misplaced as a substantive matter. As general matter, Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; Blessing v. Freestone, 520 U.S. 329, 341 (1997). It is well settled, that Section 1983

[5] The Board continues to maintain its position that any argument for the pursuit of a private right of action under Section 1983 is waived.

safeguards certain rights conferred by federal statutes. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106, 110 S.Ct. 444, 448–449, 107 L.Ed.2d 420 (1989).

However, it is also well settled that Section 1983, 42 U.S.C. § 1983, does not create substantive rights, but provides a remedy for the violation of rights created by federal law. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). A Court's initial inquiry when examining a Section 1983 claim, is to determine whether a statute confers any right at all, and is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute "confer[s] rights on a particular class of persons." Gonzaga University v. Doe, 536 U.S. 273 (2002); see also California v. Sierra Club, 451 U.S. 287, 294 (1981).

This makes obvious sense, since Section 1983 merely provides a mechanism for enforcing individual rights "secured" elsewhere, i.e., rights independently "secured by the Constitution and laws" of the United States. Id. "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617 (1979).

The Court's role in discerning whether personal rights exist in the Section 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Id. Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under Section 1983 or under an implied right of action. Id.

This Court has traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. Blessing. First, Congress must have intended that the provision in question benefit the plaintiff. Wright v. City of Roanoke Redevelopment Housing

Authority, 479 U.S. 418, at 430 (1987). Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Id., at 431–432, 107 S.Ct., at 774–775. Third, the statute must unambiguously impose a binding obligation on the States. Id. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. Wilder v. Virginia Hospital Association, 496 U.S. 498, at 510–511 (1990); see also Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539–1540, 67 L.Ed.2d 694 (1981) (discussing whether Congress created obligations giving rise to an implied cause of action).

As the Materiality Provision lacks an implied right of action, as noted prior, circumvention of that element by attempting to utilize Section 1983, will not lie as a matter of law, for the same reasons. In the absence of an implied right of action, Section 1983 cannot be utilized to create a new avenue of redress. In addition, Section 1983 is not available to a plaintiff when the statute provides for a comprehensive enforcement scheme that is incompatible with individual enforcement under Section 1983. Blessing v. Freestone, 520 U.S. 329, 341 (1997). Here, the clear language of the Materiality Provision provides for the Attorney General to seek redress for any violation in federal court.

Given the clear and undisputed intent of the Materiality Provision, to prevent the imposition of discrimination by States within the context of voting, the vesting of such authority within the Attorney General demonstrates the need, as well as Congress' express desire for a comprehensive enforcement scheme. Moreover, the failure to include an express private individual right or remedy for a violation of the Materiality Provision clearly demonstrates Congress' determination to provide for a comprehensive enforcement scheme assigned exclusively to the Attorney General, not individuals. Based on the foregoing, it is clear that the District Court did not err, and the Court's Order must be affirmed.

3. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THE COMMONWEALTH OF PENNSYLVANIA'S DATE REQUIREMENT RELATED TO MAIL-IN BALLOTS DID NOT VIOLATE THE MATERIALITY PROVISON OF THE CIVIL RIGHTS ACT.

At the outset, the Board recognizes that "[t]he right to vote is ... a right of paramount constitutional significance, the violation of which permits federal court intercession." Hall v. Holder, 117 F.3d 1222, 1231 (11th Cir.1997). While it is undisputed that the right to vote is fundamental, this right it not absolute; it is subject to control by the States. Friedman v. Snipes, 345 F.Supp.2d 1356 (S.D. Fla. 2004). See, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.") (citing U.S. Const., Art. II, § 26, §1.); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote ...."); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (stating that the "'equal right to vote' is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." (internal citation omitted)).

Although Courts have an obligation to ensure that a state does not engage in the "arbitrary and disparate treatment of the members of its electorate," Bush v. Gore, 531 U.S. at 105, Courts must also not act in a manner that would contravene the well-established and long-held principle that States "'have broad powers to determine the conditions under which the right of suffrage may be exercised.'" McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 807 (1969) (quoting Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959)). This is especially true in the context of mail-in ballots as there is no fundamental right to vote by absentee (mail-in) ballot. See Id.

On appeal, the ACLU, on behalf of the named Appellants, argues the mandatory requirement to date the ballot-return envelope under Pennsylvania law violates the Materiality Clause of the Civil Rights Act. A review of the applicable law, however, demonstrates Appellants' argument lacks merit.

Initially, we note, several Courts have been tasked with defining materiality under this provision and posit an examination of those decisions is helpful. In Hoyle v. Priest, 265 F.3d 699, 704 (8th Cir.2001), the Eight Circuit held that an Arkansas voting initiative procedure, which required petition signers to be "qualified electors," was material and outside the scope of 42 U.S.C. § 1971(a)(2)(B)). Additionally, a Virginia District Court, in Howlette v. City of Richmond Virginia, 485 F.Supp. 17, 21–22 (E.D.Va.1978), concluded a city referendum procedure which required that the signatures of qualified voters on a referendum petition be verified by a notary and subjecting those who take the oath to possible criminal liability for perjury was not "immaterial" and thus did not violate 42 U.S.C. § 1971(a)(2)(B)).

Likewise, the Pennsylvania Supreme Court has addressed this issue, holding that a requirement for voting qualification is material and/or mandatory if it serves weighty interests. In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1091 (Pa. 2020). The Board does not question that Section 3150.16(a) of Pennsylvania's Election Code, 25 P.S. §2150.16(a), plainly and unambiguously mandates that electors date the voter declaration on the ballot-return envelope. The question then becomes, for our purposes here, whether that requirement is at odds with and/or constitutes a violation the Materiality Provision.

Upon examination, and to which this Court must afford full faith and credit to, the Pennsylvania Supreme Court conclusively concluded that the date requirement encompasses weighty governmental interests. In re Canvass. To that end, in In re Canvass of Absentee and

Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020), the Pennsylvania Supreme Court considered whether the date on the elector declaration on the outside envelope of a mail-in ballot is a mandatory requirement for purposes of Section 1306-D(a) of the Election Code. A divided Court issued three opinions on this issue.

In an Opinion Announcing the Judgment of the Court ("OAJC"), Justice Donahue, joined by Justices Todd and Baer, determined undated mail-in ballots should be canvassed because an undated signature on an elector declaration constituted a minor irregularity that did not warrant invalidation of the ballots. In so doing, Justice Donahue stated:

> The date that the declaration is signed is irrelevant to a board of elections' comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter's declaration is sufficient even without the date of signature. Every one of the … ballots challenged [in these matters], were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.
>
> [In our prior decision,] [w]e did not address … whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification. …
>
> [W]e conclude that while failures to include a … date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in *Shambach*, 'ballots containing mere minor

> irregularities should only be stricken for compelling reasons.' *Shambach*, 845 A.2d at 799; *see also Appeal of Gallagher*, 351 Pa. 451, 41 A.2d 630, 632 (1945) ("[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

Id. at 1078. Thus, three of the Justices of the Supreme Court determined that the lack of a date on the elector declaration on the outside envelope did not justify invalidation of mail-in ballots.

In contrast, Justice Dougherty, in a concurring and dissenting opinion joined by Chief Justice Saylor and Justice Mundy disagreed concluding, "the statutory language expressly requires that the elector provide [a date]." *Id.* at 1090 (Pa. 2020) (Dougherty, J., concurring and dissenting). Thus, three of the Justices of the Supreme Court determined the lack of a date on the elector declaration on the outside envelope of mail-in ballots rendered those ballots invalid.

However, the seventh Justice of the Supreme Court, Justice Wecht, authored a concurring and dissenting opinion in which he agreed with Justices Dougherty and Mundy and Chief Justice Saylor, that an elector's failure to comply with the date requirement on the elector declaration rendered the mail-in ballots invalid. In so doing, Justice Wecht believed this ruling, which announced a new rule of law, should only be applied prospectively so that the undated mail-in ballots would be canvassed in the November 2020 election, but they would not be counted in future elections. To that end, Justice Wecht opined:

> I part ways with the conclusion reflected in the [OAJC] … that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a 'minor irregularity.' This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory. Thus, in future elections, I would treat the date … requirement as mandatory in both particulars, with the omission of [the date] sufficient without more to invalidate the ballot in question. However, under the circumstances in which the issue

has arisen, I would apply my interpretation only prospectively. So despite my reservations about the OAJC's analysis, I concur in its disposition of these consolidated cases. …

The only practical and principled alternative is to read 'shall' as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute 'minor irregularities' and countervailing 'weighty interests.'

I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments. But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion [below] as well as Justice Dougherty's Concurring and Dissenting Opinion. And even to indulge these arguments requires the court to referee a tug of war in which unambiguous statutory language serves as the rope. That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so.

Ultimately, I agree with Judge Brobson's description of the greatest risk that arises from questioning the intended effect of mandatory language on a case-by-case basis:

> While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an 'equal' election, particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by

> absolving them of their responsibility to execute their ballots in accordance with law.

We must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext. Substantive perfection is the ever-elusive concern of the legislature. Ours must be consistency of interpretive method without fear or favor, a goal that recedes each time a court takes liberties with statutory language in furtherance of salutary abstractions. Because the OAJC favors a more intrusive and ambitious inquiry, I respectfully dissent.

But just because I disagree with the OAJC's interpretation of the date … requirement does not inexorably lead me to the conclusion that the votes at issue in this case must be disqualified. While it is axiomatic that *ignorantia legis neminem excusat* (ignorance of the law excuses no one), this Court may elect to apply only prospectively a ruling that overturns pre-existing law or issues a ruling of first impression not foreshadowed by existing law. Indeed, we have done so in at least one case under the Election Code. In *Appeal of Zentner* [626 A.2d 146 (Pa. 1994)], we confronted a statute governing candidates' obligation to submit statements of financial interests by a time certain that had been revised specifically to correct our previously fluid interpretations of the predecessor statute. We were forced to consider whether our newly strict construal of the revised statute should result in the invalidation of entire ballots already cast because they included one or more candidates who had failed to satisfy the statutory disclosures. We held, as the legislature clearly intended, that a candidate's 'failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy.' But we also concluded that to 'void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement.' Thus we determined that our holding should apply prospectively but not to the election at issue.

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77, introducing no-excuse mail-in voting with no inkling that a looming pandemic would motivate millions of people to avail themselves of the opportunity to cast their ballots from home in the very first year that the law applied. Soon thereafter, Act 12, introduced and enacted

with unprecedented alacrity in response to the pandemic, further amended the Election Code to address emergent concerns prompted by the looming public health crisis. While aspects of the new provisions that are relevant to this case were not wholly novel to the Code, as such—for example, the provisions that authorized no-excuse mail-in voting by and large just expanded the pool of voters to whom the rules that long had governed absentee balloting applied—the massive expansion of mail-in voting nonetheless presented tremendous challenges to everyone involved in the administration of elections, from local poll workers to the Secretary of the Commonwealth. Importantly, it transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement. Moreover, as the OAJC highlights in multiple connections, the Secretary issued confusing, even contradictory guidance on the subject. Thus, local election officials and voters alike lacked clear information regarding the consequence of, e.g., failing to handwrite one's address on an envelope that already contained preprinted text with that exact address or record the date beside the voter's declaration signature.

I have returned throughout this opinion to our decision in *PDP*, and I do so once more. I maintained in that case that the Election Code should be interpreted with unstinting fidelity to its terms, and that election officials should disqualify ballots that do not comply with unambiguous statutory requirements, when determining noncompliance requires no exercise of subjective judgment by election officials. The date requirement here presents such a case. But I also emphasized that disqualification is appropriate '[s]o long as the Secretary and county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere' to those requirements. I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification

> in this case. As in *Zentner*, it would be unfair to punish voters for the incidents of systemic growing pains.
>
> In case after case involving the Election Code, especially this year, we have been reminded how important it is that the General Assembly provide unambiguous guidance for the administration of the election process. But it is imperative that we recognize when the legislature has done precisely that, and resolve not to question the legislature's chosen language when it has done so. And perhaps it is a silver lining that many of the problems that we have encountered this year, in which a substantially overhauled electoral system has been forced to make its maiden run in stormy seas, are now clear enough that the legislature and Department of State have notice of what statutory refinements are most needful. It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because this is the second time this Court has been called upon to address the declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity across the Commonwealth.

Id. at 1079-89 (Wecht, J., concurring and dissenting) (footnotes omitted) (emphasis added). As a result, the majority of the Justices of the Supreme Court held that Section 1306-D(a) of the Election Code requires that the elector declaration on the outside envelope be dated and the failure to include a date rendered undated ballots invalid.

In interpreting the Supreme Court's decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, the Department of State, through its Deputy Secretary of Elections and Commissions, issued the following guidance (with emphasis added):

> Since the Municipal Primary on May 18, [2021] the department has seen several news articles suggesting that some counties are continuing to accept and count ballots that do not contain … a date on the voter's declaration.
>
> As you know, the department updated the content and the instructions on the declaration envelope to ensure that voters know they must sign and date the envelope for their ballot to be counted. Furthermore, our updated guidance is consistent with the Supreme

> Court's ruling last September in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, wherein the Court held that in future elections a voter's declaration envelope must be … dated for the ballot to count. Though we share your desire to prevent the disenfranchisement of any voter, particularly when it occurs because of a voter's inadvertent error, we must strongly urge all counties to abide by the Court's interpretation of this statutory requirement.
>
> We also believe that it is prudent to again remind you of our previous clarification of 10/25/2020. As noted in that communication, there is no basis to reject a ballot for putting the 'wrong' date on the envelope, nor is the date written used to determine the eligibility of the voter. You should process these ballots normally.

See Ex. A. This guidance from the Department of State is consistent with the Supreme Court's precedent.

Under Pennsylvania law, and given the determination by the Commonwealth Court, review of which was declined by the Pennsylvania Supreme Court, in the state court challenges to the ballots at issue, under both Pennsylvania statutory law and administrative guidance, failure to sign and date the ballot-return envelope is an unambiguous statutory requirement, and the failure to affix a date as required disqualifies the ballot from consideration. Thus, the District Court's conclusion is consistent with existing state law and no error is present that Plaintiffs' can point to support their position to overturn the District Court's determination in this matter.

Although it is beyond dispute that "voting is of the most fundamental significance under our constitutional structure ... [i]t does not follow … that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." Burdick v. Takushi, 504 U.S. 428 (1992) (citations omitted). In fact, the Constitution itself provides that states may prescribe the "Times, Places and Manner of holding Elections" and the United States Supreme Court has recognized that states retain the power to regulate their elections. Id.; see also Siegel v.

Lepore, 234 F.3d 1163, 1179–80 (11th Cir. 2000); Art. I, § 4, cl. 1 of the Constitution. As the United States Supreme Court noted in Burdick, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " 504 U.S. at 433 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

It is also well-settled that all election laws result in the imposition of a burden on voters. Id. As a result, not every election law will be subjected to strict scrutiny by the courts. Id.; see also Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569–70, 75 L.Ed.2d 547 (1983). In Anderson, the United States Supreme Court established that a court considering a challenge to a state election law must instead weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications forth burden imposed by its rule. "In passing judgment, the Court must consider the extent to which those interests make it necessary to burden the plaintiff's rights." Id. at 789.

Whether an election law is subject to strict scrutiny or some lesser standard of review depends upon the extent to which the law burdens a plaintiff's First and Fourteenth Amendment rights. Burdick, 504 U.S. at 434. If the election law imposes a "severe" restriction on a plaintiff's First and Fourteenth Amendment rights, the election law must be "narrowly drawn to advance a state interest of compelling importance." Id. (citing Norman v. Reed, 502 U.S. 279, 289 (1992)). If the election law imposes "reasonable, nondiscriminatory restrictions" upon the plaintiff's First and Fourteenth Amendment rights, the "State's important regulatory interests are generally sufficient to justify" the restrictions imposed by the election law. Id. (citing Anderson, 460 U.S.

at 788, 103 S.Ct. at 1569–70); accord McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995) (applying strict scrutiny to election law which directly regulated free speech and which did not merely control the "mechanics of the electoral process"); Rosario v. Rockefeller, 410 U.S. 752 (1973); Green Party v. Weiner, 216 F.Supp.2d 176, 187 (S.D.N.Y.2002) (finding that lesser standard of review applied to election law which mandated that primaries for certain parties would be conducted on paper ballots rather than voting machines because law only regulated the "mechanics" of the election).

Here, where Pennsylvania's Election Code imposes only "reasonable, nondiscriminatory" restrictions upon the right to vote, strict scrutiny is not required, a showing that there are important regulatory interests which justify the limited restrictions imposed, a violation of First and Fourteenth Amendment rights will not lie. A review of U.S. Supreme Court precedent supports this conclusion.

To that end, in Burdick, the plaintiff was a registered voter who challenged Hawaii's prohibition of allowing voters to vote for write-in candidates in primary or general elections. 504 U.S. at 430. Burdick claimed Hawaii's ban on write-in voting violated his First Amendment right of expression and association and asked the district court to enter a preliminary injunction ordering the state to permit and count write-in votes in the general election. The Ninth Circuit Court of Appeals held, although Hawaii's ban on write-in voting placed some restrictions on Burdick's right to vote, the restriction was justified in light of Hawaii's broad powers to regulate elections and the specific interests advanced by the state. Id. Burdick appealed to the United States Supreme Court, which agreed with the Ninth Circuit Court of Appeals. Id.

The United States Supreme Court recognized Hawaii's election law did have an impact on Burdick's right to vote; however, the Court found that the ban on write-in voting did not

unconstitutionally limit the right of voters to have candidates of their choice placed on the ballot. Id. at 434. In finding that Hawaii's system provided easy access to ballots and that any burden on voters was limited to those voters who chose their candidate days before the election, the Court in Burdick noted that it gave little weight to the interest a voter may have in "making a later rather than an early decision to seek independent ballot status." Id. at 437. In affirming the Ninth Circuit's decision vacating the injunction, the Burdick Court concluded that "[r]easonable regulation of elections does not require voters to espouse positions that they do not support; it does require them to act in a timely fashion if they wish to express their views in the voting booth." Id.

Similarly, in Rosario, the United States Supreme Court upheld another state election law which imposed a deadline by which voters were required to enroll in a political party in order to vote in a subsequent election. In holding that a New York election law did not constitute a ban on the voters' freedom of association under the First Amendment, the Rosario Court emphasized that the statute did not "absolutely disenfranchise the class to which the petitioners belong ... [r]ather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary." Id. at 757.

The Court distinguished the limited restrictions on petitioners' right to vote imposed by the law in those cases from cases in which where a state's election laws "totally denied the electoral franchise to a particular class or residents, and there was no way in which the members of that class could have made themselves eligible to vote." Id. (referring to Carrington v. Rash, 380 U.S. 89 (1965) (where the Texas constitution prohibited all servicemen from voting regardless of the length of residence in the state); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (state law prohibited residents who were not parents or property owners from participating in school board elections); Cipriano v. City of Houma, 395 U.S. 701 (1969) (state law prohibited

residents who were not property owners from voting in bond elections); Evans v. Cornman, 398 U.S. 419 (1970) (state law prohibited residents of a national facility located in the state from voting in any election)).

Since the voters could have enrolled in a party before the deadline in time to vote in the next election, the Rosario Court held that the deadline imposed by the state did not constitute a ban on the voters' First Amendment freedoms but was merely a time limitation on when the voters had to act in order for them to participate in the next election. Id. at 758; see also Friedman (where law does not deny the right to vote to a class of persons, the state had a substantial interest in regulating their elections in order to make the elections "fair and honest" and to ensure that "some sort of order, rather than chaos, is to accompany the democratic processes).

In support of their position, Plaintiffs previously cited Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016). There, the Court was faced with a challenge to the requirement under Ohio Law that voters who failed to write their correct address and birthdate on absentee-ballot envelopes would not have their ballot counted. While acknowledging the requirements were small, the Court held that Ohio failed to set forth any justification for mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope. The Court, however, did note that "combatting voter fraud perpetrated by mail is undeniably a legitimate concern," (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam), yet before the District Court, Ohio did not even "offer[ ] combatting voter fraud" as a relevant interest.

The Court's decision in Northeast Ohio is factually and legally inapposite here. First, both the Commonwealth Court and the Pennsylvania Supreme Court have examined the sufficiency of the date requirement on the ballot-return envelope, and both Courts have conclusively determined

it serves weighty governmental interests. In so doing, and as noted above, the Pennsylvania Supreme Court stated, the date requirement is not a minor irregularity that can be overlooked; instead, it serves "weighty interests," including fraud prevention, and is mandatory. As such, the absence of a date on the ballot-return envelope is not a minor defect. In re Canvass, see also In re Morrison-Wesley, 946 A.2d 789, 795 (Pa. Cmwlth. 2008) ("[t]he date is essential to determine the validity of the signature").

Likewise, the Commonwealth Court, stating that the Supreme Court's rationale contained in the concurring and dissenting opinion authored by Justice Dougherty in In re Canvass was persuasive, concluded the date requirement was a material requisite under the Election Code because it justified weighty interests, Ritter v. Lehigh County Board of Elections, 2022 WL 16577 (Pa. Cmwlth. 2022), at *9, and the Pennsylvania Supreme Court denied review of this determination.

Thus, the interest, as determined by both the Pennsylvania Supreme Court and the Commonwealth Court of Pennsylvania, of ensuring a fair and honest election, and the manner in which Pennsylvania has elected to address this concern is miniscule and purely mechanical, passes muster under the Burdick/Anderson framework. As a result, the burden placed upon mail-in voters under Pennsylvania Law does not constitute a violation of the Materiality Provision.

CONCLUSION

Based on the foregoing, and review of the District Court's Opinion and Order in this matter, it is clear that the District Court's determination is comprehensive, well-supported, and consistent with both federal and state law. Given that no error exists in the District Court's rationale, the Board respectfully requests this Court enter an Order affirming the District Court's grant of Summary Judgment in its favor and against Plaintiffs/Appellants.

Respectfully Submitted,

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CERTIFICATIONS

The undersigned counsel represents to this Court that he is a member of the bar of this Court pursuant to L.A.R. 46.1.

The undersigned counsel also represents that this Memorandum of Law complies with the word limit of Fed. A. App. P. 32(a)(7(B)(i), as this document, excluding those parts pursuant to Fed. R. App. P. 32(f), contains 10,430 words.

The undersigned counsel also represents that a virus detection program was run on the file and no virus was detected.

In addition, the undersigned counsel represents the text of this Memorandum of Law is identical to the text in paper copies that will be filed with the Court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum of Law has been served on all counsel of record using the Court's CM/ECF system.

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