No. 22-1499

In the United States Court of Appeals for the Third Circuit

LINDA MIGLIORI, et al.,

Appellants,

v.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. Action No. 5:22-cv-00397)
District Judge: Honorable Joseph F. Leeson, Jr.

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

INTRODUCTION 1

ARGUMENT 3

I. PRIVATE PARTIES CAN ENFORCE THE MATERIALITY PROVISION 3

A. Plaintiff Voters May Enforce the Materiality Provision's Guarantees Via Section 1983 3

B. Plaintiff Voters Also May Enforce the Materiality Provision's Guarantees Via an Implied Right of Action 8

II. DISENFRANCHISING PLAINTIFF VOTERS BASED ON THE IMMATERIAL ENVELOPE-DATING REQUIREMENT VIOLATES FEDERAL LAW 11

A. The Materiality Provision Applies Without Regard to Racial Discrimination 11

B. The Materiality Provision is Not Limited to Voter Registration 13

C. The Materiality Provision Prohibits the Board from Disenfranchising Voters for Failure to Handwrite a Date on Their Mail Ballot Envelopes 15

III. RITTER'S OTHER ARGUMENTS LACK MERIT 19

A. Ritter's Laches Argument Fails 19

B. This Court May Properly Order the Board to Comply with the Law 24

TABLE OF CITATIONS

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001).....3

Ali v. Federal Bureau of Prisons,
552 U.S. 214 (2008).....14

Armstrong v. Brown,
768 F.3d 975 (9th Cir. 2014).....25

Bailey v. Patterson,
323 F.2d 201 (5th Cir. 1963).....25

Bell v. Southwell,
376 F.2d 659 (5th Cir. 1967).....11

Blessing v. Freestone,
520 U.S. 329 (1997).....6, 7

Blunt v. Lower Merion School District,
767 F.3d 247 (3d Cir. 2014).....21

Bostock v. Clayton County,
140 S. Ct. 1731 (2020).....12

Bush v. Gore,
531 U.S. 98 (2000) (per curiam).....27

Chapman v. Houston Welfare Rights Organization,
441 U.S. 600 (1979).....5

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012).....14

Circle Schools v. Pappert,
381 F.3d 172 (3d Cir. 2004).....25

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113, (2005).....6, 7

Coalition for Education in District One v. Board of Elections,
495 F.2d 1090 (2d Cir. 1974) 11

Common Cause v. Thomsen,
No. 19-CV-323-JDP, 2021 WL 5833971 (W.D. Wis. Dec. 9, 2021) 15

Condon v. Reno,
913 F. Supp. 946 (D.S.C. 1995) 15

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia,
6 F.3d 990 (3d Cir. 1993) 26

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia,
893 F. Supp. 419 (E.D. Pa. 1995).....27

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia,
91 F.3d 586 (3d Cir. 1996) 27

Cromwell v. Kobach,
199 F. Supp. 3d 1292 (D. Kan. 2016).....26

Crookston v. Johnson,
841 F.3d 396 (6th Cir. 2016) 23

Fishman v. Schaffer,
429 U.S. 1325 (1976).....23

Fitzgerald v. Barnstable School Committee,
555 U.S. 246 (2009).....7

Florida State Conference of N.A.A.C.P. v. Browning,
522 F.3d 1153 (11th Cir. 20008) 12

Friedman v. Snipes,
345 F. Supp. 2d (S.D. Fla. 2004).....15

Galvan v. Levine,
490 F.2d 1255 (2d Cir. 1973) 25

Gonzaga University v. Doe,
536 U.S. 273 (2002).....3, 5

Governmentt Employees Retirement System of Virgin Islands v. Government of Virgin Islands,
995 F.3d 66 (3d Cir. 2021) 20, 24

Howlette v. City of Richmond, Virginia,
485 F. Supp. 17 (E.D. Va. 1978) 19

In re Aimster Copyright Litigation,
334 F.3d 643 (7th Cir. 2003) 25

In re Energy Future Holdings Corp.,
904 F.3d 298 (3d Cir. 2018) 20

Kamen v. Kemper Fin. Servs., Inc.,
500 U.S. 90, (1991).....5

Kelly v. Commonwealth,
240 A.3d 1255 (Pa. 2020).....24

King v. Whitmer,
505 F. Supp. 3d 720 (E.D. Mich. 2020) 24

Loughrin v. United States,
573 U.S. 351 (2014).....9, 13

Martin v. Crittenden,
347 F. Supp. 3d 1302 (N.D. Ga. 2018).....18

Martin v. Wilks,
490 U.S. 755 (1989).....20

Middlesex County Sewerage Authority v. National Sea Clammers Association,
453 U.S. 1 (1981).....7

Monell v. Department of Social Services,
436 U.S. 658 (1978).....5

Nader v. Keith,
385 F.3d 729 (7th Cir. 2004).....23

Pennsylvania Democratic Party v. Boockvar,
238 A.3d 345 (Pa. 2020).....27

Pennsylvania Democratic Party v. Republican Party of Pennsylvania,
No. 16-cv-5664, 2016 WL 6582659 (E.D. Pa. Nov. 7, 2016).....23

Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio,
40 F.3d 1454 (3d Cir. 1994).....21

Russello v. United States,
464 U.S. 16 (1983).....12

Salem Engineering Co. v. National Supply Co.,
75 F. Supp. 993 (W.D. Pa. 1948).....20

Schwier v. Cox,
340 F.3d 1284 (11th Cir. 2003).....4, 7

Society Hill Civic Association v. Harris,
632 F.2d 1045 (3d Cir. 1980).....20

Southwest Pennsylvania Growth Alliance v. Browner,
121 F.3d 106 (3d Cir. 1997).....20

Stein v. Cortés,
223 F. Supp. 3d 423 (E.D. Pa. 2016)..... 23, 24

Summers v. Earth Island Institute,
555 U.S. 488 (2009)..... 24, 25

Taylor v. Howe,
225 F.3d 993 (8th Cir. 2000).....10

United States v. Metropolitan St. Louis Sewer District (MSD),
952 F.2d 1040 (8th Cir. 1992).....20

Whitewood v. Wolf,
992 F. Supp. 2d 410 (M.D. Pa. 2014).....26

Wisniewski v. Rodale, Inc.,
510 F.3d 294 (3d Cir. 2007) 10

Constitutions & Statutes

State Constitutions and Statutes

25 P.S. § 2811 16

25 P.S. § 3146.2b 18

25 P.S. § 3146.6(b)(3).....17

25 P.S. § 3146.8(d).....17

25 P.S. § 3150.12b 18

25 P.S. § 3150.16(a).....13

25 P.S. § 3150.16(b)(3).....17

25 P.S. § 3157 22

25 P.S. § 3263 23

25 P.S. § 3313 23

25 P.S. § 3456 23

25 P.S. § 3553 16

25 Pa.C.S. § 1301(a) 16

Federal Statutes

52 U.S.C. § 10101(a)(2)(B) ..... passim

52 U.S.C. § 10101(d) 8

52 U.S.C. § 10101(e) 14

52 U.S.C. § 10101(f) 8

52 U.S.C. § 10101(g) 9

Rules

Fed. R. Civ. P. 8(c) 20

Legislative Materials

Civil Rights Act of 1957: Hearings on S. 83 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong. (1957) 10

H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966 9

INTRODUCTION

The District Court erred in ruling that private plaintiffs cannot enforce the Civil Rights Act's Materiality Provision, and neither Ritter nor the Board can rehabilitate that error. They do not engage Plaintiff Voters' and the U.S. Department of Justice's arguments regarding the statute's text, structure, and history, all of which support private enforcement. And their last-ditch suggestion that Plaintiff Voters waived relief under Section 1983 is manifestly wrong, as even a glance at the Complaint and the briefing below shows.

Defendants' merits arguments fare no better. At bottom, they remain unable to explain how voters' omission of a date on the envelope containing their timely-received mail ballots is material to determining whether they are "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). In Pennsylvania, voter qualifications depend on a voter's age, residence, and citizenship status as of Election Day, none of which can change based on the date that a voter writes on an envelope. A ballot's timeliness turns on when it was received and time-stamped, not the handwritten envelope date. The handwritten date is so inconsequential that in the election here, consistent with the state guidance, the Board counted mail ballots with *obviously wrong dates from decades ago* on the envelope.

Defendants contest none of this. Instead, Ritter conjures scenarios where the date written on an envelope (if accurate) might serve some purpose *other than*

determining voter qualifications. The Commonwealth of Pennsylvania's authoritative amicus brief dispatches these hypotheticals (at 12–15), showing the envelope date plays no role in determining a voter's qualifications, which is the only question here.

Ritter also offers up two side arguments, both meritless. For one, he argues that laches applies. But Plaintiffs did not need to sue any earlier than they did. The Board initially *accepted Plaintiff Voters' ballots*. After that, *Ritter* sued the Board, touching off months of state court litigation. Plaintiff Voters filed this suit within two business days of the Board's first move towards disenfranchising them after the state litigation concluded. That is nowhere close to inexcusable delay, and the District Court did not abuse its discretion in concluding as much.

Ritter also argues that relief here cannot extend to the 252 identically-situated Lehigh County voters who also face disenfranchisement for not writing a date on their mail-ballot envelopes. But courts enjoining unlawful government policies need not artificially limit relief in this way. Indeed, it would be bizarre (and likely unconstitutional) for a court to declare that federal law prohibits disenfranchising voters based on the envelope-dating requirement, but then allow the Board to violate federal law 252 times. The Board is the defendant here. It can be ordered to comply with the law *and* apply the law equally to all Lehigh County voters. This Court should reverse and do just that.

ARGUMENT

I. PRIVATE PARTIES CAN ENFORCE THE MATERIALITY PROVISION

The District Court's conclusion that private parties cannot enforce the Materiality Provision was legal error requiring reversal. None of Defendants' arguments support denying a private right of action to enforce a venerable civil rights law.

A. Plaintiff Voters May Enforce the Materiality Provision's Guarantees Via Section 1983

1. Defendants' waiver argument is baseless.

Defendants barely engage Plaintiff Voters' and the United States government's chief argument that the District Court erred in applying *Alexander v. Sandoval*, 532 U.S. 275 (2001), rather than *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Pls. Br. 19–24; DOJ Br. 8–14. Instead, Defendants elide the main issue by advancing a specious waiver argument that Plaintiff Voters failed to raise *Gonzaga* below. *See* Ritter Br. 34–36; Board Br. 6–10.

Plaintiff Voters clearly sought relief under Section 1983 for both their constitutional and Materiality claims. *See* JA40 (first page of Complaint: Plaintiff Voters "seek[] declaratory and emergency injunctive relief pursuant to 42 U.S.C. § 1983"), JA41 (first paragraph of jurisdictional allegations: "This is a civil and

constitutional rights action arising under 42 U.S.C. § 1983 and the Civil Rights Act, 52 U.S.C. § 10101"); JA52, 54, 57 (identifying claims as arising under Section 1983). The parties simultaneously cross-moved for summary judgment, and Ritter and the Board first raised their no-private-right-of-action defense in their opening briefs. JA612–615 (Ritter Br.); *see also* JA499–501 (Board Br.).

Plaintiff Voters argued from the outset that *Gonzaga* controls the private-right-of-action analysis. Their first opportunity to address the issue was in opposition to defendants' summary judgment motions. *See* JA752, 753, 755–756 & n. 21 (Pl. Voters' Summ. J. Opp. Br.). The *first* paragraph of Plaintiff Voters' discussion of the private-right-of-action issue in that brief recited the applicable legal standard:

> To bring a private suit under a federal statute, a §1983 plaintiff must show that "Congress *intended to create a federal right*," and this right must be "unambiguously conferred." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis in original). … Once the plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable under section 1983. *Gonzaga*, 536 U.S. at 284.

JA752.[1] Only in subsequent pages did Plaintiff Voters reference *Sandoval*, parrying Defendants' misguided arguments. See JA753, 755–756 & n. 21 (Pl. Voters' Summ. J. Opp. Br.). There is no waiver here.

[1] Moreover, Plaintiff Voters asked the District Court to follow *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), which emphasized *Gonzaga* as the applicable framework. Pl.'s Br. 38.

Defendants' waiver argument would fail even if Plaintiff Voters had not clearly argued *Gonzaga* below. Litigants waive *issues* on appeal, not particular *legal theories*. *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Nor were Plaintiff Voters required to say anything more about Section 1983.[2] That statute is not, as the Board suggests (at 9), "[a] theory or argument [that is a] completely separate issue [from the Materiality Provision]." Rather, Section 1983 is merely a mechanism to enforce rights guaranteed in federal law. *See, e.g.*, *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617 (1979). That includes the Materiality provision.

2. Defendants cannot rebut the presumption of Section 1983 enforceability.

Ritter does not contest that the Materiality Provision provides an individual, personal right (as the District Court held, JA24).[3] Such personal federal rights are "presumptively enforceable" via Section 1983. *Gonzaga*, 536 U.S. at 284.

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[2] The Board also suggests (at 10) that a policy or custom was not pleaded under *Monell v. Department of Social Services*, 436 U.S. 658, 690–91 (1978). Even if that argument was preserved, Plaintiff Voters challenged the Board's *policy* (pursuant to a state court order) of not counting mail ballots with undated envelopes. *See, e.g.*, JA40–41.

[3] The Board appears to argue (at 16–17) that the Materiality Provision does not provide for an individual right, but that assertion conflicts with the explicit, clear, mandatory guarantee of the "right of an individual to vote." 52 U.S.C. § 10101(a)(2)(B); *see also* DOJ Br. at 9–11.

Neither Ritter nor the Board rebuts the presumption of enforceability. They must make a "difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing v. Freestone*, 520 U.S. 329, 346 (1997) (citation omitted). At best, the Board (at 16–17) argues only that "the vesting of … authority within the Attorney General" amounts to the type of comprehensive scheme incompatible with parallel private enforcement. But such parallel civil-enforcement authority does not by itself rebut the presumption of Section 1983 enforceability. *See* Pl.'s Br. 28; DOJ Br. 13–14.

Ritter meanwhile mistakenly relies (at 36-37) on *City of Rancho Palos Verdes v. Abrams*. 544 U.S. 113, 122–24 (2005). There, unlike here, Congress expressly provided for a narrow set of privately enforceable judicial remedies in the Telecommunications Act—remedies that included injunctive relief but not damages as with Section 1983. 544 U.S. 113, 122–24 (2005); *see* Ritter Br. 36–37. The Court explained that when Congress expressly provides for a narrower *private* remedy, that may indicate "that Congress did not intend to leave open a more expansive remedy under §1983." *Id.* at 121; *see also id.* ("[T]he existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under §1983 and those in which we have held that it would not."). In contrast, the Court has

repeatedly affirmed the availability of a Section 1983 remedy to enforce federal rights where (as here) the relevant statute does not explicitly set forth a limited private remedial scheme. *Id.* at 121–22 (collecting cases); *see also, e.g.*, *Blessing*, 520 U.S. at 348.

Defendants cite no authority suggesting that the presumption of Section 1983 enforcement might be overcome here. This case does not involve highly technical or regulated areas where Congress established particularized private remedial schemes inconsistent with Section 1983 relief.[4] *See, e.g.*, *City of Rancho Palos Verdes*, 544 U.S. at 122–124 (telecommunications infrastructure siting); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13–14, 20 (1981) (waste discharges around fishing beds under Federal Water Pollution Control Act). Rather, it involves a civil rights statute with roots in the Reconstruction-era Enforcement Acts—a law that is deeply intertwined with Section 1983, and that was enforced by private plaintiffs for almost a century before Congress first gave the Attorney General parallel authority. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1295 (11th Cir. 2003); *see also* Pl.'s Br. 31–37.

[4] The Supreme Court has found the presumption of 1983 enforceability overcome in only three cases. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009). Significantly, the Court "has never held that an implied right of action ha[s] the effect of precluding suit under § 1983 ... ." *Id.* at 256.

The presumption of Section 1983 enforceability is especially strong here. Defendants cannot overcome it.

B. Plaintiff Voters Also May Enforce the Materiality Provision's Guarantees Via an Implied Right of Action

Plaintiff Voters prevail even under *Sandoval's* implied-right-of-action analysis, as set forth in Plaintiff Voters' and the Department of Justice's ("DOJ") briefs. *See* Pl.'s Br. 25–40; DOJ Br. 14–21. Defendants' scant responses miss the mark.

Defendants fail to grapple with subsection 10101(d)'s clear textual reference to "proceedings instituted pursuant to this section" by a "party aggrieved," and its elimination of exhaustion requirements in such proceedings, 52 U.S.C. § 10101(d). Both terms indicate Congress's expectation that private parties would bring actions under Section 10101. *See, e.g.*, Pl.'s Br. 26–28. Ritter's only response (at 40) is to suggest that the "part[ies] aggrieved" might be the persons referenced in subsection 10101(f). But that makes no sense. Subsection (f) relates to *the people doing the aggrieving*: state officials "cited for an alleged contempt under this Act" for disenfranchising voters. The subsection provides certain protections for their defense in a contempt action *against* them. *See* 52 U.S.C. § 10101(f). Those defendants could not possibly be the "part[ies] aggrieved" who "institute[]" a proceeding under Section 10101.

Meanwhile, Defendants ignore entirely Plaintiff Voters' and DOJ's other statutory text and structure arguments. *See* Pl.'s Br. 29–33; DOJ Br. 17–18. They ignore the specification in subsections 10101(e) and (g) of proceedings "instituted by the United States," *e.g.*, 52 U.S.C. § 10101(g), which would be superfluous if private parties could not also institute proceedings under the statute. And they disregard the structural argument that Congress's placing the Materiality Provision in subsection 10101(a), alongside rights from the 1870 Enforcement Act that were always privately enforced, indicates an intention for private enforcement as to the Materiality Provision as well. Plaintiff Voters' interpretation gives meaning to every word and provision and is consistent with a century of practice. *E.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014). That analysis shows that Congress contemplated private enforcement of Section 10101.

The legislative history confirms it. *See* Pl.'s Br. 34–37; *see also* DOJ Br. 15–16, 18–19. Ritter says in a single sentence (at 40–41) that the legislative history "do[es] not indicate an intent to create a private remedy." But he never cites, quotes, or discusses the legislative record, which is replete with statements indicating that DOJ civil enforcement power was intended to supplement preexisting private enforcement. *See, e.g.*, H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1975–1976 (discussing history of private enforcement and explaining decision to abrogate cases requiring private plaintiffs to exhaust

administrative remedies); *Civ. Rts. Act of 1957: Hr'gs on S. 83 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 85th Cong. at 67–73 (1957) (testimony of Attorney General that "private people will retain the right they have now to sue in their own name").

Ritter's reliance (at 39) on *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007), is unavailing. *Wisniewski* involved FTC Act provisions that are enforced only by the FTC. *Id.* at 304. There, it was "[t]he reference to FTC enforcement combined with the absence of other enforcement provisions" that "create[d] a presumption that FTC enforcement of the statute is exclusive." *Id.* Here, by contrast, the statutory text and structure contain multiple references, express and implied, to civil actions brought by private litigants. Those references are consistent with decades of practice and supported by the legislative history.

Further, none of the cases Ritter cites (at 41–42) for the proposition that only the Attorney General can enforce the statute—from the Sixth Circuit and several district courts—feature any analysis other than a cursory reference to 52 U.S.C. § 10101(c), let alone the type of analysis required under *Sandoval*. And Ritter fails to grapple with decisions of the Second, Fifth, and Eighth Circuits (jurisdictions from which most of his cited district court cases emanate) that adjudicate, on the merits, private enforcement actions under Section 10101. *See, e.g.*, *Taylor v. Howe*, 225 F.3d 993 (8th Cir. 2000); *Coal. for Educ. in Dist. One v. Bd. of*

Elections, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

Finally, Ritter misreads the Eleventh Circuit's *Schwier* decision (at 42–43). Pl.'s Br. 38–39; *see also* DOJ Br. 12 n.5. *Schwier* remains the only circuit court decision to comprehensively analyze these issues—and unlike the District Court, the *Schwier* court correctly emphasized that *Gonzaga* controls the analysis. The District Court's erroneous private-right-of-action decision should be reversed.

II. DISENFRANCHISING PLAINTIFF VOTERS BASED ON THE IMMATERIAL ENVELOPE-DATING REQUIREMENT VIOLATES FEDERAL LAW

A. The Materiality Provision Applies Without Regard to Racial Discrimination

Ritter offers no good argument for adding a racial discrimination requirement to a provision that does not mention race. As Plaintiff Voters and the DOJ already explained, the statute does not bear it. Pls. Br. at 47–51; DOJ Br. 22–25.

The Materiality Provision prohibits state actions that deny "any individual" their "right to vote" based on an "error or omission" that is "not material" to voter qualifications. 52 U.S.C. § 10101(a)(2)(B). It nowhere mentions race or color. Ritter does not suggest this statutory language is ambiguous, or identify any other language in subsection (a)(2)(B) that hints at a racial animus element. Rather, he points (at 44–45) to the general goals of the 1964 Civil Rights Act to suggest that

the Court find a racial animus element in subsection (a)(2)(B). But where "the meaning of the statute's terms is plain, [a court's] job is at an end." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

The statute's broader structure further undercuts Ritter's argument. Congress included a racial discrimination element in a neighboring subsection, 10101(a)(1), but omitted one in the Materiality Provision. *See* Pl.'s Br. 48. That difference is presumed to be intentional. *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983). Ritter ignores this point.

And the statutory title of subsection 10101(a), if relevant, is in accord. The titular reference to "[r]ace, color, or previous condition" relates only to subsection (a)(1). *See* Pls. Br. at 48–49 n.14; DOJ Br. at 23–24. The multi-part statutory title also references "uniform standards for voting qualifications," "errors or omissions from papers," and "literacy tests," with each piece separated by a semicolon. Under that rubric, "errors and omissions from papers" corresponds to the Materiality Provision. Ritter ignores this point, too. His attempt to limit the statute's scope lacks merit.[5]

[5] Ritter cites (at 45) *Florida State Conference of N.A.A.C.P. v. Browning*, but the court there concluded that Congress intended the Materiality Provision to apply more broadly than "the historically motivating examples of intentional and overt racial discrimination ... ." 522 F.3d 1153, 1173 (11th Cir. 2008); *see also* Pls. Br. 49. Plaintiff Voters have already distinguished the other cases Ritter cites, *see id.* at 50 n.15.

B. The Materiality Provision is Not Limited to Voter Registration

Ritter's argument (at 46) that the Materiality Provision "applies exclusively to voter registration laws" also misses the mark.

The text governs here, too. The Materiality Provision covers immaterial errors or omissions on "any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). In other words, it covers omissions or errors on any paper that state law might require for a voter to vote.[6] This Court should not take Ritter's invitation to gut the phrase "any application, registration, or other act requisite to voting," leaving only the word "registration." Courts "'must give effect, if possible, to every clause and word of a statute.'" *Loughrin*, 573 U.S. at 358 (citation omitted). The broader and more natural reading that Plaintiff Voters, the DOJ, and the Commonwealth of Pennsylvania advance does that. *See* Pls.' Br. at 51–53, DOJ Br. 25–29; Pa. Br. 16–19. It is also consistent with Congress's expansive definition of the term "vote" in Section 10101 as including "all action necessary to make a vote effective." 52 U.S.C. § 10101(e).

Ritter's resort (at 47–48) to *ejusdem generis* fails. That principle holds "that 'when a general term follows a specific one, the general term should be understood

[6] Here, the form on the mail ballot envelope that voters must complete under 25 P.S. § 3150.16(a) for their vote to count is literally a "record or paper" made "requisite to voting" by Pennsylvania law. 52 U.S.C. § 10101(a)(2)(B).

as a reference to subjects akin to the one with specific enumeration.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 223 (2008) (citation omitted). But *ejusdem generis* cannot be used to "render the general statutory language meaningless." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012). Ritter's reading would do just that.

And Ritter's argument that the Materiality Provision only applies to omissions on papers related to "acts requisite to voting *that are similar to applications or registrations*" is unpersuasive. Ritter Br. 48 (emphasis added). The paperwork required to submit a mail-in ballot *is* similar to the mail ballot *application*; both require voters to attest that they are qualified to vote, and both are prerequisites under Pennsylvania law to counting a mail-in ballot.

Ritter's pinched reading of the Materiality Provision would thwart Congress's central goal of ensuring that voters are not denied the franchise based on immaterial technicalities. And Ritter cannot identify a single case adopting his position.[7] Meanwhile, federal courts have repeatedly applied the Materiality

[7] The cases Ritter references (at 46 n.11) are off point. *Friedman v. Snipes* involved a *deadline* to submit ballots, *not* an error or omission "on any record or paper." 345 F. Supp. 2d 1356, 1371–72 (S.D. Fla. 2004); *see also* Pls. Br. at 53 n.16; Pa. Br. 18. *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995), did not address the Materiality Provision at all. The others simply state as a matter of general background that the Civil Rights Act sought to curb discrimination in voter registration.

Provision outside the voter registration context. *See* Pls. Br. 52 and DOJ Br. 26 (collecting cases); *see also, e.g.*, *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2021 WL 5833971, at *3 (W.D. Wis. Dec. 9, 2021) ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration.").

C. The Materiality Provision Prohibits the Board from Disenfranchising Voters for Failure to Handwrite a Date on Their Mail Ballot Envelopes

On the merits, Defendants cannot explain how handwriting a date on the outer envelope of a timely-received mail ballot is "material in determining whether [a mail ballot voter] is qualified under State law to vote" in Pennsylvania. 52 U.S.C. § 10101(a)(2)(B). Indeed, as the Commonwealth of Pennsylvania's comprehensive brief explained, it is not. Pa. Br. 9–16.

A voter is qualified in Pennsylvania if, by Election Day, "they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction." Pa. Br. 10; *see* 25 P.S. § 2811; 25 Pa.C.S. § 1301(a). The date on a mail-ballot envelope does not in any way affect whether its receipt is timely, and cannot alter a voter's age, residence, citizenship, or felony status. Defendants do not dispute that these are the qualifications to vote in Pennsylvania. Nor do they argue that the date bears directly on any of them.

Instead, Defendants' main argument (Ritter Br. 50–52) is that a hypothetical scenario may exist wherein a person's residence or felony status has changed between when they receive their mail ballot and when they vote. In those circumstances, the argument goes, the date the voter writes on the mail-ballot envelope, if accurate, might help demonstrate that the voter lied when they attested to their qualifications.[8] That argument fails for multiple reasons.

First, Ritter's hypotheticals assume an *accurate* date on the envelope—but that is not what is required. Consistent with state guidance, JA192, any string of numbers in the form of a date, even a clearly incorrect one, allows a ballot to be counted, as happened in the election here. *See* JA254–255 (county clerk agreeing ballots would be accepted if the date "would say 1960" or if it was "a date in the future"); *see also* Pl.'s Br. 9; Pa. Br. 11–12. The fact that anything that looks like a date, including a date from decades past or future, is acceptable highlights why the handwritten-envelope date cannot be material to accurately assessing anything. *See* Pl.'s Br. 43–46.

Second, even in Ritter's hypotheticals, an accurate envelope date would not bear on a voter's qualification to vote—the only question that matters. Whether a

[8] Ritter notes (at 49) that 25 P.S. § 3553 makes the attestation on the envelope subject to criminal penalties. However, the penalties in Section 3553 are triggered when a voter "sign[s]" the attestation. *Id*. The envelope dating requirement is not mentioned.

voter is qualified is assessed as of Election Day. *See* Pa. Br. 13. That is why, for example, the votes of mail-ballot voters who die between mailing their ballot and Election Day are not counted. *See, e.g.*, 25 P.S. § 3146.8(d). The same is true for residency, citizenship, and felony status.[9] *See* Pa. Br. 13. Thus, it is irrelevant that a handwritten-envelope date (if accurate) could be used for some purpose *other than assessing qualifications*, such as providing evidence in a post-hoc perjury case against a fictitious voter who wrongfully casts a mail ballot. If the envelope date is not "material in determining whether [a mail-ballot voter] is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), it may not be used to disenfranchise voters.

On that issue, there is broad agreement. The Commonwealth of Pennsylvania concludes that the envelope date "does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law." Pa. Br. 9. The Secretary of State's guidance says that "the date written" on the envelope is not "used to determine the eligibility of the voter." JA192. Even the state court that ruled in Ritter's favor held that the envelope date "does not, in any way, relate

[9] Ritter's already-voted argument (at 51) is meritless because mail-ballot voters are legally prohibited from voting in person unless they surrender their mail ballots. *See* 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3); Pa. Br. 2–3, 12.

to whether that elector has met the qualifications necessary to vote in the first place." *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3, 2022).[10]

Contrary to Ritter's suggestion (at 52–53), this case is just like *Martin v. Crittenden*, where a voter's ability to write their year of birth on their absentee ballot envelope had no actual bearing on their qualifications. 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018); *see* JA165–166; *see also* Pa. Br. 2–3 (citing 25 P.S. §§ 3146.2b, 3150.12b).

Ritter's rump anti-fraud arguments (at 54–56) also fail. He concedes that Plaintiff Voters' signed mail ballots were not fraudulent and were timely received and date-stamped. JA169, JA449–458. And he does not (and cannot) contest that because the ballot's receipt date governs its timeliness, it is impossible to "back-date" an untimely-received ballot. Pa. Br. 13–14; *compare* JA31–32 (suggesting that the envelope-dating requirement is justified by concerns about "back-

[10] The Pennsylvania Supreme Court's *In re Canvass* decision is not to the contrary. As the Board's quotations (at 20–26) demonstrate, three judges on the court affirmatively viewed the envelope-dating requirement as immaterial, and a fourth viewed it as "mandatory" (and thus "weighty") for purposes of state law, while remaining noncommittal about whether it served any actual function (let alone one material to determining voter qualifications).

dating").[11] Ritter wrongly relies on *Howlette v. City of Richmond, Va.*, 485 F. Supp. 17 (E.D. Va. 1978), which involved a local requirement that signatures on petitions supporting municipal bond referenda be individually notarized. *Id.* at 27. Unlike with the notarization requirement in *Howlette*, merely writing a date—any date—does not "impress[] upon the signers … the seriousness of the act," *id.* at 23, which is perhaps why hundreds of qualified voters in Lehigh County simply omitted it.

III. RITTER'S OTHER ARGUMENTS LACK MERIT

A. Ritter's Laches Argument Fails

Ritter's laches argument fails for two independent reasons.

1. As an Intervenor, Ritter has no laches defense.

This Court should reject Ritter's laches argument because, as an intervenor, he may not raise defenses beyond those raised by the Board. "[A]n intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." *E.g.*, *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997) (citation omitted); *see also United States v. Metro. St. Louis Sewer Dist. (MSD)*, 952 F.2d 1040, 1043 (8th Cir. 1992) (intervenors could not raise *res judicata*

[11] The Board's defense of the District Court's ruling on Plaintiff Voters' constitutional claim (at 26–31) is irrelevant. That claim is not at issue in this appeal.

defense); *Soc'y Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1060 (3d Cir. 1980) (same), *abrogated on other grounds by Martin v. Wilks*, 490 U.S. 755 (1989).

Laches is an affirmative defense that must be raised in a responsive pleading. Fed. R. Civ. P. 8(c). Indeed, because "[l]aches … flows from the relationship of the parties," an intervenor asserting laches in an action where they were not sued is particularly inappropriate. *Salem Eng'g Co. v. Nat'l Supply Co.*, 75 F. Supp. 993, 1000 (W.D. Pa. 1948) (striking intervenor's laches defense). Here, the Board—the defendant actually sued, who will be subject to a judgment and order if Plaintiff Voters prevail—did not assert laches. *See* JA475 (Board Answer). Ritter as an intervenor is not entitled to do so.

2. The District Court did not abuse its discretion in rejecting Ritter's laches argument.

The District Court did not abuse its broad discretion in rejecting laches. A defendant asserting laches must establish (1) an inexcusable delay in bringing the action, and (2) prejudice. *Gov't Emps. Ret. Sys. of V.I. v. Gov't of Virgin Islands*, 995 F.3d 66, 92 (3d Cir. 2021). As an equitable doctrine, determinations regarding laches are "left to the discretion of the lower courts." *In re Energy Future Holds. Corp.*, 904 F.3d 298, 310 (3d Cir. 2018) (citation omitted). An abuse of discretion occurs "when no reasonable person would adopt the district court's view." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265–66 (3d Cir. 2014).

The District Court acted well within its discretion in finding no inexcusable delay. Plaintiff Voters filed suit "[w]ithin just four days of learning that their ballots would go uncounted," and the gap in time between the election and this action was caused by Ritter's state court litigation, not "a delay attributable to Plaintiffs." JA19. Ritter's attempts to identify inexcusable delay all fail.

Notwithstanding Ritter's puzzling suggestion (at 25), Plaintiff Voters did not inexcusably delay when they "failed" to challenge the Pennsylvania mail ballot statute years before the election at issue here. *E.g.*, *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994) ("[I]f no injury has occurred, the plaintiff can be told either that she cannot sue, or that she cannot sue *yet*.") (citation omitted).

Nor was there inexcusable delay in the few days after the election, before the Board unanimously decided to count Plaintiff Voters' votes. While Ritter suggests (at 26–27) that some voters received email notices that their ballots were cancelled, it is undisputed that at least two of the Plaintiff Voters did not. *See* Ritter Br. at 17–18 (noting that there were no email addresses on file for Francis Fox or

Sergio Rivas); *see also* JA173, at ¶ 68; JA175, at ¶ 92.[12] And even if there had been proper notice that ballots were set aside or canceled prior to Election Day, the Board's decision to accept Plaintiff Voters' ballots obviated the need to take further action to protect their rights.[13] JA19.

Nor was there any inexcusable, prejudicial delay in failing to intercede in the Ritter-initiated litigation. Ritter repeatedly asserts (at 27–28) that Plaintiff Voters "did nothing" during that litigation, but never identifies what action Plaintiff Voters failed to take. Ritter *lost* in the Court of Common Pleas and then appealed. Accordingly, as the District Court found, "[u]p and until at least January 3, 2022, when the Commonwealth Court issued its opinion, Plaintiffs had every reason to believe their ballots would be counted." JA19. Even then, there was no inexcusable delay in awaiting "the exhaustion of all state appellate efforts" and a final determination of their state law rights, JA19, before filing suit. After all, the Board was then *defending* its decision to count Plaintiff Voters' votes. Plaintiff

[12] Even for those voters who received some email, the automatically generated emails were far from clear notice of a canceled vote, as the subject line read: "Your Ballot Has Been Received." JA460.

[13] Ritter's argument (at 24) that that the two-day deadline for "any person aggrieved" to challenge a county board decision is an appropriate reference point for assessing delay here is wrong. (citing 25 P.S. § 3157). Plaintiff Voters were not aggrieved by any Board action prior to January 27, when it first indicated it would certify the election without canvassing Plaintiff Voter's ballots. The other state law deadlines he identifies are even further afield. *See infra* at 23.

Voters had no reason to sue the Board—the only defendant named in the Complaint—until January 27, 2022, when the Board first announced that it would certify the 2021 election results without counting their ballots. Thereafter, Plaintiff Voters acted with alacrity, suing within two business days.

Unsurprisingly, Ritter cites no successful laches-defense case on remotely similar facts. Ritter cites *Stein v. Cortés*, 223 F. Supp. 3d 423, 436 (E.D. Pa. 2016), to say federal courts should respect Pennsylvania Election Code deadlines for various types of post-election challenges. But he never identifies an applicable Election Code deadline. *See* Ritter Br. 24–25 (referring to 25 P.S. § 3456 (election contests for "illegal" elections), 25 P.S. § 3313 (contested nominations and elections for Governor and Lieutenant Governor), and 25 P.S. § 3263 (recounts).

Ritter's other citations are even further afield, involving either extraordinary requests to disrupt an imminent, upcoming election based on problems that could have been flagged earlier in the process,[14] or belated attempts to decertify the

[14] *See* Ritter Br. 23, 30 (citing *Crookston v. Johnson*, 841 F.3d 396 (6th Cir. 2016); *Pa. Democratic Party v. Republican Party of Pa.*, No. 16-cv-5664, 2016 WL 6582659 (E.D. Pa. Nov. 7, 2016); *Fishman v. Schaffer*, 429 U.S. 1325 (1976) (Marshall, J., in chambers); *Nader v. Keith*, 385 F.3d 729, 736–37 (7th Cir. 2004)).

results of a statewide contest and disenfranchise millions who had already voted.[15] Plaintiff Voters seek only to prevent disenfranchisement in a completed but uncertified local contest.

Beyond the lack of any inexcusable delay, Ritter also fails (at 30–32) to identify any prejudice that would outweigh the loss of Plaintiff Voters' fundamental right to vote and the public interest in counting all valid votes. *See Gov't Emps. Ret. Sys. of V.I.*, 995 F.3d at 94; *see also* Pa. Br. 1–2. The District Court did not abuse its discretion in rejecting Ritter's laches argument.

B. This Court May Properly Order the Board to Comply with the Law

Ritter's argument that Plaintiff Voters lack standing (at 56–63) confuses standing with scope of remedy and gets both wrong.

On standing, Plaintiff Voters face imminent disenfranchisement for failure to date their mail-ballot envelopes—and a decision declaring such disenfranchisement unlawful and enjoining it "will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Plaintiff Voters are not suing on the rights of others; they themselves are being injured and have standing

[15] *See* Ritter Br. 23, 30 (citing *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020); *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016); *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (per curiam)).

to obtain "each type of relief sought," *id.*, namely declaratory and injunctive relief against the Board, whose policy will disenfranchise them. JA59–60.

Ritter does not contest this. Yet he seeks to limit relief to the five Plaintiff Voters, excluding (and thus disenfranchising) 252 identically situated voters. But that is a scope-of-remedy issue, not one of standing. Questions involving the scope of a proposed remedy are non-constitutional and therefore waivable. *See, e.g.*, *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014); *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003). Ritter's argument, advanced for the first time in this appeal, is waived.

Moreover, government defendants are frequently required to cease enforcing unlawful policies even if cessation benefits non-parties. Indeed, the "nature of the rights" at issue in cases challenging unlawful government policies often "requires that the decree run to the benefit not only of [plaintiffs] but also for all persons similarly situated." *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (enjoining segregated buses in Mississippi); *see, e.g.*, *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) ("[A]n action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality"); *see also, e.g.*, *Circle Schs. v. Pappert*, 381 F.3d 172, 177, 183 (3d Cir. 2004) (enjoining enforcement of statute requiring parental notification

for students who refuse to recite pledge of allegiance); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (enjoining enforcement of Pennsylvania laws prohibiting same-sex marriage). Voting rights cases are no exception: Voters are often identically situated with respect to challenges to particular election rules, such that "the nature of the rights asserted" often "require[s] that any declaratory or injunctive relief run to all persons similarly situated." *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1313–14 (D. Kan. 2016). It would be inefficient (and would reward unlawful governmental action) to require every voter impacted by an unlawful electoral practice to file a separate lawsuit to obtain relief.[16]

Ritter's cases illustrate the same principle. For example, he cites (at 57) *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), which held that a construction contractors association did not have standing to challenge ordinance provisions that did not deal with construction contracts. *Id.* at 996–997. But the association *did* have standing to challenge other provisions relating to construction contracts, enforcement of which was then enjoined *in toto*

[16] Ritter is thus wrong to suggest (at 58–59) that the Lehigh County mail-ballot voters (most of them senior citizens, many without an email address to receive updates from the SURE system) who did not hire a lawyer and bring a follow-on lawsuit have now affirmatively "elected" to waive their right to vote even if a federal court declares that they were illegally disenfranchised.

to benefit anyone, not just the plaintiffs. 893 F. Supp. 419, 447 (E.D. Pa. 1995). This Court affirmed. 91 F.3d 586 (3d Cir. 1996).

Ritter wrongly argues (at 61–62) that Plaintiff Voters are not similarly situated to the other 252 electors whose ballots the Board also set aside for failure to include a date on the envelope. But the record demonstrates that none of the disputed ballots are "naked ballots." JA441 (dissenting Commonwealth Court judge noting that the ballots at issue "were sealed in secrecy envelopes"); JA327–28 (county clerk testifying that the disputed ballots' outer envelopes were opened, but not mentioning any naked ballots). And even if the record were not so clear, the argument is a red herring. Ritter acknowledges (at 7–8) that those 252 ballots "ha[ve] no date" on their return envelope, and that they have been set aside for that reason. Plaintiff Voters do not seek an order requiring the Board to count all 257 ballots *whether or not* they comply with other State-law requirements, such as the secrecy-envelope requirement. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). The sole issue is whether the Board will proceed to canvass (count) the 257 ballots. Ritter's suggestion that the Court ought to treat Plaintiffs Voters' ballots differently from the 252 others that were set aside for the exact same unlawful reason is not only deeply inequitable, but raises troubling equal protection concerns. *Cf. Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

If disenfranchising voters for failure to comply with the immaterial envelope-dating requirement is unlawful (and it is), then it is unlawful as to all voters in Lehigh County. The Board can and should be ordered to comply with the Materiality Provision.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I am a member of the bar of this Court.

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,442 words.

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Dated: April 15, 2022

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