No. 22-1499

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH RINGER; SERGIO RIVAS,

Plaintiffs-Appellants,

ZACHARY COHEN,

Intervenor-Plaintiff–Appellee,

v.

LEHIGH COUNTY BOARD OF ELECTIONS,

Defendant-Appellee,

DAVID RITTER,

Intervenor-Defendant–Appellee.

On Appeal from the United States District Court
for the for the Eastern District of Pennsylvania
No. 5-22-cv-00397

MOTION TO STAY THE MANDATE

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INTRODUCTION

Intervenor-Defendant, David Ritter, ran for a county judgeship in 2021 and currently leads his next-closest opponent by 71 votes. This case will decide whether Lehigh County must count another 257 absentee ballots that lack a date—more than enough to change the outcome of the race.

This Court issued its judgment, but not its opinion, last Friday. *See* Judgment, CA3 Doc. 80 (May 20, 2022). The judgment says this Court will reverse because the federal materiality statute, 52 U.S.C. §10101, preempts Pennsylvania's laws requiring voters to date their absentee ballots, 25 Pa. Cons. Stat. §3146.6(a) & §3150.16(a). The judgment also says that the district court must "order" Lehigh County to count all undated ballots and that this Court's mandate will issue "immediately" with its opinion. Judgment 2-3. But if the mandate issues immediately, then Lehigh County could count the undated ballots and certify the (wrong) winner before Ritter can file a certiorari petition with the U.S. Supreme Court. Ritter asks the Court not to preemptively cut off his right to further review.

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This Court should stay its mandate pending certiorari. *See* Fed. R. App. P. 41(d). This Court's novel interpretation of the materiality statute presents substantial questions and directly conflicts with Pennsylvania's state courts. And Ritter has good cause for a stay, given the irreparable risk that the wrong judge will be seated before he can get further review. This Court recognized that risk earlier in the case when it enjoined the county from "certify[ing] the election results" to "allow time for … this

Court" to consider the case. Order, CA3 Doc. 12 (Mar. 20, 2022). The Supreme Court deserves the same chance. This Court could either stay its mandate pending certiorari, Fed. R. App. P. 41(d)(2), or stay its mandate pending the disposition of Ritter's request for a similar stay from the Supreme Court, *e.g.*, *Trump v. Thompson*, 20 F.4th 10, 49 n.20 (D.C. Cir. 2021).

At the very least, this Court should not issue its mandate "immediately." Judgment 3. The mandate is normally delayed at least "7 days." Fed. R. App. P. 41(b). This 7-day delay is "vital" because "[i]t gives counsel just enough time to prepare and file a motion for a stay" for the Supreme Court. Wright & Miller, 16AA Fed. Prac. & Proc. Juris. §3987 (5th ed.). The certification of this election has already been enjoined for the entire duration of this litigation. Refusing to wait even 7 more days serves no purpose other than burdening the parties and the Supreme Court with ultra-expedited stay proceedings.

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ARGUMENT

This Court can issue a stay pending certiorari if the petition will present a "substantial question" and there is "good cause" for a stay. Fed. R. App. P. 41(d); *see also* 28 U.S.C. §1651(a); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007). Three factors determine whether a stay is appropriate. "First, there must be a reasonable probability that certiorari will be granted .... Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not

stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers). These factors favor a stay here.

I. There is a reasonable probability that certiorari will be granted and a significant possibility that the judgment will be reversed.

A certiorari petition will present a "substantial question"—and thus warrant an anticipatory stay—if there is a "reasonable probability that four Justices will vote to grant certiorari" and a "reasonable possibility that five Justices will vote to reverse." *U.S. ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers). This assessment turns on "the issues that the applicant plans to raise in the certiorari petition," "the Supreme Court's treatment of other cases presenting similar issues," and "the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers).

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The "substantial question" standard requires the appellate court to acknowledge that, even though it obviously believes its decision is correct, it should stay the mandate because the issues are important, open, and subject to reasonable debate. *See Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 2 (1966) (Harlan, J., in chambers) (granting a stay because the issues could not "be regarded as lacking in substance," did not "appear to be precisely controlled by any decision of this Court," and were "highly debatable"); *Rostker v. Goldberg*, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers) (granting a stay because the issues were "difficult and perplexing" and

"[m]y task … is not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole"); *Chandler*, 282 F.3d at 450 (granting a stay "[g]iven the importance of the issue" and "the conflict among the circuits," even though the panel was "unanimous" and "[n]o judge in regular active service requested a vote for rehearing en banc"). The losing party would be in a "near impossible position" if he could not receive a stay unless he "convince[d] a [court] who had just ruled against [him] that [he] is likely to succeed on appeal." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 561 n.4 (D.D.C. 2018).

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There is a reasonable probability that certiorari will be granted and a significant possibility that the judgment will be reversed here for two independent reasons.

First, the judgment creates a new federal right of action in tension with decades of Supreme Court doctrine. In *Alexander v. Sandoval*, the Supreme Court held that "private rights of action to enforce federal law must be created by Congress." 532 U.S. 275, 286 (2001). It explained that such rights are created by Congress only when the statutory text "displays an intent to create … a *private remedy*." *Id.* (emphasis added). It emphasized that "[w]ithout [statutory intent to create a private remedy], 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." *Id.* at 286-87; *see also Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701, 709 (3d Cir. 2020) (only "Congress creates federal causes of action," so "where the text of a statute does not provide a cause of action, there ordinarily is no cause of action"). And importantly, "[t]he express

provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 304-305.

Nor is 42 U.S.C. §1983 an end-around of this doctrine. Instead, a functionally identical test governs when a plaintiff may vindicate federal statutory rights under §1983. When enforcement is sought under §1983, "[t]he defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The Supreme Court's §1983 cases have invoked *Sandoval*'s holding that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others" in holding that a federal statutory right was not enforceable through §1983. *Id.* (quoting *Sandoval*, 532 U.S. at 290). And they have held "evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under §1983.'" *City of Rancho Palos Verdes*, 544 U.S. at 120. As a general matter, a statute that provides for "agency enforcement creates a strong presumption against implied private rights of action that must be overcome." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007).

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The plaintiffs sue to vindicate their rights under the Civil Rights Act's materiality provision, codified at 52 U.S.C. §10101(a)(2)(B). The materiality provision is enforced through 52 U.S.C. §10101(c), which provides for exclusive enforcement in civil actions by the Attorney General:

> Whenever any person has engaged … in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), *the Attorney General* may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief

The enforcement provision does not, by its terms, contemplate suits by private citizens. *See id.* That Congress expressly provided for enforcement of the materiality provision by the Attorney General "creates a strong presumption against [an] implied private right[] of action that must be overcome." *See Wisniewski*, 510 F.3d at 305 & n.1.

In addition to the explicit means of enforcement provided by §10101(c), the language of other provisions of §10101 also suggest that Congress did not intend to create a private remedy. For example, §10101(e) provides that, upon the request of the Attorney General, the court shall make a finding of whether any race-based deprivation of the right to vote was pursuant to a pattern or practice. *See* 52 U.S.C. §10101(e). This provision does not provide for such a request by any other parties. Similarly, §10101(g) contemplates only suits where the Attorney General is the plaintiff. That provision describes the procedure required "in the event neither the Attorney General nor any defendant files a request for a three-judge court." Rather than refer to both parties in the general sense, Congress deliberately refers to the plaintiff party as the "Attorney General" and to the other side of the caption as "defendant."

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Second, the judgment turns on a novel interpretation of the materiality provision—one that, if accurate, would create roving federal review over all sorts of state election laws. The materiality provision provides that:

> No person acting under color of law shall … deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election

52 U.S.C. §10101(a)(2)(B).

But Pennsylvania law did not "deny the right of any [Plaintiffs'] to vote in any election." *Id.* Instead, it recognized their right to vote and allowed them to do so by a variety of means. It simply required them to adhere to the same neutral, generally applicable, and nondiscriminatory rules as everyone else. If the materiality provision referred to the ability to have one's attempted vote counted, rather than to the qualifications for voting, then it would subject a wide range of state election laws to federal supervision. After all, it might not be "material in determining whether [an] individual is qualified under State law to vote" to require them to vote within a certain timeframe, in certain places, or only once. But, of course, the Civil Rights Act does not forbid such requirements: "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Even if Pennsylvania denied Plaintiffs' right to vote, it did not do so based on an error or omission that was "not material in determining whether such individual is qualified under State law." To the contrary, state law makes dated declarations material to the validity of a ballot. The Pennsylvania courts said so in this very case, creating a

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direct split of authority that warrants Supreme Court review. *See Ritter v. Lehigh Cty. Bd. of Elections*, 2022 WL 16577, at *9 (Pa. Cmwlth. Jan. 3), *pet'n for allowance of appeal denied*, 271 A.3d 1285 (Pa. 2022). The dating requirement, the courts explained, is important because it "'establishes a point in time against which to measure the elector's eligibility,'" "'ensures the elector completed the ballot within the proper time frame,'" and "'prevents the tabulation of potentially fraudulent back-dated votes.'" *Id.* at *4.

Finally, this Court's interpretation of the materiality provision must be avoided on constitutional grounds. States in our federalist system run their own elections. *Council of Alter. Political Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999). Though Congress can modify state regulations of federal congressional elections, U.S. Const., Art. I, §4, its power to modify state regulations of *state* elections can be justified only under its power to enforce the Fifteenth Amendment, §5. And that power must be congruent and proportional to systemic violations of the rights guaranteed in that amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Under this Court's interpretation, the materiality provision cannot be congruent and proportional because it lacks any nexus to intentional racial discrimination, and Congress has no record of States using neutral, nondiscriminatory regulations of absentee voting for that purpose.

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II. There is good cause for a stay because it will prevent irreparable harm.

In addition to the merits of the case, "[t]he other assessment usually undertaken in deciding an application for stay of mandate is whether irreparable injury will take place if the stay is not granted." *Books*, 239 F.3d at 828. This assessment "assume[s] the

applicant's position on the merits is correct." *Philip Morris*, 561 U.S. at 1305 (Scalia, J., in chambers). Irreparable harm means "potential harm" that "cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co. v. C.F. Air Freight*, 882 F.2d 797, 801 (3d Cir. 1989).

Assuming that Ritter's position on the merits is correct, irreparable injury will occur if a stay is not granted. This Court's earlier injunction in this case already implicitly held that the denial of public office on the basis of an (assumed) erroneous judgment is irreparable harm. In requesting that relief, Plaintiffs argued that "once an election is certified, 'there can be no do-over [or] redress,' and the injury … becomes both 'real and completely irreparable.'" Appellants' Emergency Mot. for Inj. Pending Appeal 24-25, CA3 Doc. 6-1 (Mar. 19, 2022).

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That conclusion goes both ways: Absent a stay, Ritter's opponent could wrongly assume office, and Pennsylvanians will be subject to the power of an official who was seated in error. A number of cases have held that the loss of a mere *chance* of election constitutes irreparable harm. *E.g.*, *Valenti v. Mitchell*, 962 F.2d 288, 299 (3d Cir. 1992); *Queens Cnty. Republican Comm. v. N.Y. State Bd. of Elections*, 222 F. Supp. 2d 341, 346 (E.D.N.Y. 2002); *Lawless v. Lower Providence Township*, 2002 WL 31356304, at *2 (E.D. Pa. Oct. 17). A fortiori, having won office, the complete loss of that office for a period of time is an irreparable injury. There is also a great and irreparable injury to the public in seating an official improperly. And the State is irreparably harmed when it is unable to enforce its duly enacted laws. *Maryland v. King*, 133 S. Ct. 1, 3 (2012).

Equity favors a stay here too, especially given Plaintiffs' needless delay. Equity strongly disfavors last-minute relief against state election laws because it undermines "[c]onfidence in the integrity of our electoral processes" and "the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Especially in election cases, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Here, before filing a federal lawsuit, Plaintiffs sat on their rights for months—waiting even after they received notice that their votes were cancelled, after the election concluded, and throughout the state-court litigation concerning their votes. Their delay only decreases their equitable right to relief and increases "the chaos and suspicions of impropriety" that occur when invalid ballots are counted "after election day and potentially flip the results of an election." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurral).

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CONCLUSION

For all these reasons, this Court should stay its mandate pending certiorari. Alternatively, this Court should stay its mandate pending the disposition of Ritter's stay application with the U.S. Supreme Court. At a minimum, this Court should stay its mandate for at least seven days after the issuance of its opinion.

Dated: May 23, 2022

Respectfully submitted,

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This document complies with Rule 27(d) because it contains 2,712 words, excluding the parts that can be excluded. This brief also complies with Rule 27(d)(1)(E) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: May 23, 2022 *s/ Joshua J. Voss*

CERTIFICATE OF SERVICE

I e-filed this document with the Court via ECF, which will email everyone requiring notice.

Dated: May 23, 2022 *s/ Joshua J. Voss*