No. 22-30

In the Supreme Court of the United States

DAVID RITTER,

Petitioner,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E. RICHARDS, KENNETH RINGER, SERGIO RIVAS, ZAC COHEN, AND LEHIGH COUNTY BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HONEST ELECTIONS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports common-sense voting rules and opposes efforts to reshape elections for partisan gain. As this Court has explained, "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." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). The Project thus has a significant interest in this important case.[1]

[1] All parties received timely notice of and consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This case involves an effort to reinvent the federal Civil Rights Act to strike down innumerable neutral state voting laws that have nothing to do with even alleged race discrimination. Courts have consistently turned away similar efforts, but faced with an emergency proceeding attacking Pennsylvania law, the Third Circuit succumbed.

To protect voting legitimacy and orderly administration of elections, Pennsylvania's law requires any person submitting a vote-by-mail ballot to "date and sign" a declaration printed on the back of the envelope. 25 Pa. Stat. and Cons. Stat. Ann. §§ 3146.6(a), 3150.16(a). Tucked away in a federal statute otherwise prohibiting race discrimination in voting practices, the materiality provision forbids any person "acting under color of law" "to 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 . . . to vote." 52 U.S.C. § 10101(a)(2)(B).

In an unprecedented decision, the Third Circuit held that this materiality provision provides a private cause of action and preempts state mail-in voting requirements. Three Justices of this Court have already recognized and the petitioner has already explained why the Third Circuit's reading "seems plainly contrary to the statutory language." *Ritter* v. *Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting from denial of application for stay). Mail-in voting requirements pertain to voting itself, not an

"act requisite to voting" or voter *qualifications*.[2] Nor do those requirements implicate the *right to vote* protected by the statute. "[T]here is no constitutional right to an absentee ballot." *Mays* v. *LaRose*, 951 F.3d 775, 792 (CA6 2020) (citing *McDonald* v. *Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–09 (1969)). And when the government limits or regulates voting by mail but leaves unencumbered voting in person, courts universally recognize that "[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee [or mail] ballots." *McDonald*, 394 U.S. at 807. For that reason, this Court has held that, short of "in fact absolutely prohibit[ing]" a plaintiff from voting in toto, the right to vote is not impeded. *Id.* at 808 n.7.

These merits points need not be belabored, however, because the question here is primarily whether the Court should exercise its equitable power to vacate the decision below. And on that point, two significant reasons exist to vacate the Third Circuit's

[2] Even if these requirements went to voter qualification, failing to date the ballot *is* material. A majority of the Pennsylvania Supreme Court held that "a voter's failure to comply with the statutory requirement that voters date the voter declaration" is *not* a "'minor irregularity.'" *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079 (Pa. 2020) (Wecht, J., concurring and dissenting); *id.* at 1090 (Dougherty, J., concurring and dissenting); see *Ritter* v. *Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577, at *9 n.8 (Pa. Commw. Ct. 2022) (table opinion). More, "[t]he presence of the date" "establishes a point in time against which to measure the elector's eligibility to cast the ballot," among other important uses. *In re 2,349 Ballots in 2020 Gen. Election*, 241 A.3d 694, 2020 WL 6820816, at *6 (Pa. Commw. Ct. 2020) (table opinion) (reversed on other grounds). Finally, that the Pennsylvania legislature required dating establishes the requirement's materiality.

erroneous decision, apart from the splits it produces and its stand-alone significance.

1. The decision below will cause chaos in upcoming elections. Plaintiffs and the United States are invoking the Third Circuit's reasoning in cases across the country to attack not individual ballot determinations but the substance of state law voting rules. Removing these guardrails, put in place by state legislatures to protect election integrity and orderly administration, will be a significant disturbance to the fall elections and potentially cast doubt on election results.

The threat of the decision below to Pennsylvania elections is especially severe. Wielding the decision below, Pennsylvania has issued guidance that counties must disregard the Commonwealth's voting rules, and it is suing counties that try to adhere to those rules. Apart from that election disruption, the decision below threatens Pennsylvania's entire mail-in voting process. That process was put in place for the first time in 2019, when the General Assembly permitted no-excuse mail-in voting conditioned on guardrails like the date requirement. It enforced that condition via a nonseverability clause in the law by which the entire law is voided if a provision is invalidated—even just in an application. The decision below invalidated Pennsylvania's dating requirement under federal law, so the nonseverability clause may require that the entire mail-in process be voided. Needless to say, this threat will exacerbate confusion in upcoming Pennsylvania elections, making it hard for voters to know how to vote and for Commonwealth officials to run an orderly election. Vacatur of the decision below is necessary.

2. The decision below also threatens the constitutionality of the federal materiality provision. Congress lacks general authority to regulate state elections. It can rely here only on its enforcement authority under the Fifteenth Amendment, which prohibits intentional discrimination in voting based on race. But breaking with other courts, the Third Circuit held that the materiality provision was not "limit[ed]" to "instances of racial discrimination." App. 18 n.56.

This holding would unmoor the materiality provision from its constitutional dock. The provision would not be congruent and proportional to any record of Fifteenth Amendment violations, for Congress was clear that the provision targeted discriminatory *acts* by local officials, not discriminatory *laws*. Congress has no current record of voting rules (much less absentee requirements) being used as cover for pervasive race discrimination. And as interpreted by the Third Circuit, the materiality provision has no nexus to discrimination, for it does not require even a showing of discriminatory effect, much less intent. Constitutional avoidance—the real canon applicable when a statutory reading is actually unconstitutional—thus reiterates the need for this Court to vacate the decision below, if not reverse it. Otherwise, the materiality provision may well be unconstitutional.

To prevent chaos from overtaking elections this fall, the Court should vacate or reverse the decision below.

ARGUMENT

I. The decision below will disrupt elections.

This Court should vacate the Third Circuit's decision to prevent it from spawning chaos in upcoming elections. The petitioner has identified cases nationwide in which professional plaintiffs and the United States are seeking to leverage the Third Circuit's erroneous reading of the materiality provision to work mischief in state elections. Pet. 21, 29–30. That consequence is bad enough. But the Third Circuit's decision will cause special chaos in Pennsylvania elections, for two reasons. First, Pennsylvania itself is suing counties that dare follow Commonwealth voting requirements. Second, no-excuse mail-in voting in Pennsylvania was permitted for the first time in 2019, and included with the legislative safeguards that the decision below destroyed was a robust non-severability clause. Thus, the decision below could well bring the entire Pennsylvania mail-in voting regime into serious question.

On the first point, not only has Pennsylvania ordered all counties to count undated ballots in future elections and started helping professional plaintiffs to pick off other voting requirements one at a time, Pet. 11–12, its Department of State is now suing individual counties that try to adhere to those requirements. As the *Philadelphia Inquirer* recently explained, "[n]ew lawsuits have revived questions that many thought were long settled, beginning with the question of whether to count undated mail ballots."[3] Invoking the

[3] Jonathan Lai & Jeremy Roebuck, *Fights over Pa. election rules that seemed settled after 2020 have now come roaring back*, The

decision below and departing from its demand just last year that counties "throw out undated mail ballots,"[4] Pennsylvania's Department of State is now arguing that "no county board can exclude a ballot from its final election returns based on" a failure "to date the declaration on a ballot return envelope."[5] It argues that "[t]he Third Circuit's interpretation of federal law should be followed" by the state courts, and it relies even on the decision below's questionable § 1983 analysis.[6]

These efforts by Pennsylvania to undermine its own voting rules will confuse voters, disrupt election administration, and interfere with the integrity of upcoming elections. As one recent report explained, "Pennsylvanians continue to experience poorly administered and somewhat chaotic elections, with less access to the ballot, expensive litigation, and delayed election results."[7] Pennsylvania's efforts to use the decision below to further meddle with the General Assembly's work will heighten the difficulties faced by Pennsylvanians. Pennsylvania "elections officials . . . say[] the shifting landscape has left them mired in uncertainty as rules that seem to be ever-changing fuel public distrust and confusion."[8] The

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Philadelphia Inquirer, June 15, 2022, https://perma.cc/LYW5-4YT8.

[4] *Ibid.*

[5] Mem. in Supp. of Pet'rs' Emergency Appl. for Peremptory J. and Summ. Relief at 6, *Chapman* v. *Berks Cnty. Bd. of Elections*, No. 355-MD-2022 (Pa. Commw. Ct. July 11, 2022), https://perma.cc/X77G-34NK.

[6] *Id.* at 19.

[7] Honorable Seth Grove, Election Reform in Pennsylvania: Missed Opportunities and Continued Chaos, at 9 (July 19, 2022), https://perma.cc/2V93-D6BW.

[8] Lai & Roebuck, *supra* note 3.

decision below "left elections administrators and candidates across the state scrambling."[9] Particularly given that the controversy giving rise to the decision below appears moot, this Court should follow its usual procedures and vacate the decision below, thereby preventing the decision from spawning chaos in the Commonwealth's elections—many of which are determined by a few votes.[10] The decision below leaves critical questions about Pennsylvania elections up in the air: "Which votes should be counted, which should be rejected, and where does Pennsylvania draw the line?"[11]

The second and even more fundamental threat of the decision below to Pennsylvania elections comes from its effect on the entire mail-in voting regime. As the decision below recognized, "[i]n 2019, the Pennsylvania General Assembly enacted new mail-in voting provisions." App. 5. This law, Act 77, "created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day." *Pa. Democratic Party* v. *Boockvar*, 238 A.3d 345, 352 (Pa. 2020); see Act of Oct. 31, 2019, P.L. 552, No. 77. Like all voting legislation, Act 77 entailed safeguards on these expanded voting opportunities, and it involved extensive legislative and executive compromises.

As the Chairman of Pennsylvania's House State Government Committee has explained (and a recent

[9] *Ibid.*
[10] Grove, *supra* note 7, at 17–20, 24.
[11] Lai & Roebuck, *supra* note 3.

lawsuit[12] alleges), "part of that compromise" was to "include[] a clause declaring that its provisions are nonseverable."[13] Section 11 of Act 77 provides: "If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void."[14] Lest there be any doubt, Section 11 specifically says that Sections 6 and 8—which included the requirement that mail-in ballots be dated—is "nonseverable."[15]

Under Pennsylvania law, "nonseverability provisions are constitutionally proper." *Stilp* v. *Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). They are a vital expression of legislative intent. They establish the General Assembly's determination "that a taint in any part of the statute ruins the whole." *Ibid.* And they are often used to vindicate "the concerns and compromises which animate the legislative process" by "'bind[ing] the benefits and concessions that constitute the deal into an interdependent whole.'" *Ibid.* (quoting Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. Chi. L. Rev. 903, 914 (1997)). When an act "involv[es] such compromise," "a nonseverability provision . . . may be essential to securing the support necessary to enact the legislation in the first place." *Ibid.* As the House State Government Committee Chairman recently explained, "[i]n the absence of a nonseverability clause, negotiations for compromise on [a wide-ranging] bill could simply become a prelude to lawsuits seeking the nullification of provisions which

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[12] Pet. for Review in the Nature of an Action for a Declaratory J., *Bonner* v. *Chapman*, No. 364-MD-2022 (Pa. Commw. Ct. July 20, 2022), https://perma.cc/W7NV-RB9U.
[13] Grove, *supra* note 7, at 158.
[14] *Ibid.*
[15] *Ibid.*

had been weighed and bargained for in negotiations."[16] In short, the nonseverability clause is an essential part of the statute, and "the plain language of the statute . . . is the best indicator of legislative intent." *Commonwealth* v. *Cobbs*, 256 A.3d 1192, 1216 (Pa. 2021) (cleaned up); see 1 Pa. Stat. and Cons. Stat. Ann. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

Even if Pennsylvania courts were to look beyond the text of the nonseverability clause, the need to vindicate legislative compromises about mail-in voting is clear. Vote-by-mail options involve a tradeoff; as ballot-casting convenience expands, regulation must counterbalance risk. As Judge Posner explained, "[v]oting fraud is a serious problem in U.S. elections generally," "and it is facilitated by absentee voting." *Griffin* v. *Roupas*, 385 F.3d 1128, 1130–31 (CA7 2004). After comparing no-excuse absentee voting to take-home exams, Judge Posner warned that absentee voters "are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot." *Id.* at 1131.

Indeed, the Commonwealth itself has faced voting fraud, illegal vote-by-mail activity, and improperly cast and handled mail ballots:

- In *Marks* v. *Stinson*, 19 F.3d 873 (CA3 1994), two elections officials conspired with a candidate to cause illegally obtained absentee ballots to be cast and County Board of elections rejected four-hundred

[16] *Id.* at 159.

absentee ballots because they were from unregistered voters).

- In *Opening of Ballot Box of the First Precinct of Bentleyville*, 598 A.2d 1341 (Pa. Commw. Ct. 1991), four signatures on absentee ballots did not match those on applications for the absentee ballots, and six independent voters were improperly given partisan ballots.
- In *In re Center Township Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th 555 (C.P. 1989), absentee ballot applications and absentee ballots were completed and submitted for fifteen fictitious persons. The candidate then beat their opponent by 14 votes. The nomination was voided, and a run-off election was ordered.

As these examples illustrate, unsecure vote-by-mail processes only increases the chance for fraud, other illegal electoral activity, and improperly cast ballots. It makes good sense that a legislative compromise expanding mail-in voting would insist on guardrails like the date requirement. Mail-in voting entails "increased risk[s]," and "in enacting the 'no excuse' mail-in voting system that it did, the Pennsylvania legislature chose to tolerate the risks inherent in that approach"—while implementing many "safeguards" "to catch or deter fraud and other illegal voting practices." *Donald J. Trump for President, Inc.* v. *Boockvar*, 493 F. Supp. 3d 331, 395–96 (WD Pa. 2020). These safeguards, including the dating requirement, are "inherent in th[e] legislative plan." *Id.* at 395. Because "balancing the competing

interests involved in the regulation of elections is difficult and an unregulated election system would be chaos, state legislatures may" "impose extensive restrictions on voting." *Griffin*, 385 F.3d at 1130. "[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which" "judges should not interfere." *Id.* at 1131; see *Boockvar*, 493 F. Supp. 3d at 396 ("Pennsylvania may balance the many important and often contradictory interests at play in the democratic process however it wishes").

Given that text and purpose point to the same conclusion—that expanded mail-in voting is predicated on protections like the date requirement—Pennsylvania courts will likely apply the nonseverability provision of Act 77. And there is no question that the Third Circuit below held invalid a provision of Act 77 "or its application." § 11. Pennsylvania law requires that mail-in ballots be dated, see *supra* p. 3 note 2, and "the Third Circuit held that this state-law rule is preempted by" the federal materiality provision. *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from denial of application for stay); App. 22 (following Pennsylvania law "will violate the Materiality Provision"). In other words, the Third Circuit invalidated this provision, at least as applied to respondents, just as they asked it to. See CA3 Appellants' Reply Brief 28, 2022 WL 1185151 (April 15, 2022) ("disenfranchising voters for failure to comply with the immaterial envelope-dating requirement is unlawful"). Because at least this application of Pennsylvania law was "held invalid," Section 11 of Act 77 states that "the remaining provisions or applications of this act are void."

Therefore, the decision below may well mean that the no-excuse mail-in voting process authorized for the first time by Act 77 is invalid *in toto*. And *that* would mean that for the upcoming elections, voters who rely on this process are submitting invalid ballots that will not count. Havoc in Pennsylvania elections is thus imminent. Voters will not know whether they can mail in their ballots, and election administrators will not know whether to plan for a deluge of in-person voting. Election pandemonium is a real possibility. And these issues may not be settled until emergency litigation comes after ballots are being counted, only continuing the chaos started by the thinly reasoned decision below. The best course is to vacate that decision, leaving these serious questions for full adjudication in a proper case.

II. The decision below threatens the constitutionality of the materiality provision.

Another reason to vacate the decision below is that its interpretation of the materiality provision raises severe constitutional problems. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County* v. *Holder*, 570 U.S. 529, 543 (2013). Though Congress can modify some state regulations of federal congressional elections, U.S. Const. art. I, § 4; but see *id.* art. I, § 2, cl. 1, it generally lacks power to modify state regulations of *state* elections. Thus, the materiality provision "was passed by Congress under the authority of the Fifteenth Amendment" to enforce its protection of "the right to vote regardless of race." *United States* v. *Mississippi*, 380 U.S. 128, 138 (1965). Under this Court's precedents, "racially discriminatory motivation is a necessary ingredient of

a Fifteenth Amendment violation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion).

Accordingly, lower courts have "held that only racially motivated deprivations of rights are actionable under" the materiality provision. *Broyles* v. *Texas*, 618 F. Supp. 2d 661, 697 (SD Tex. 2009) (citing *Kirksey* v. *City of Jackson*, 663 F.2d 659, 664–65 (CA5 1981)), *aff'd*, 381 F. App'x 370 (CA5 2010). These courts agree that the materiality provision cannot "be applied outside the context of racial discrimination." *Ind. Democratic Party* v. *Rokita*, 458 F. Supp. 2d 775, 839 n.106 (SD Ind. 2006), *aff'd sub nom. Crawford* v. *Marion Cnty. Election Bd.*, 472 F.3d 949 (CA7 2007), *aff'd*, 553 U.S. 181 (2008).

The Third Circuit, however, departed from this constitutionally grounded approach. Though this case involves no allegations of intentional race discrimination—indeed, election officials do not even know the race of the voter when they apply the date requirement to mail-in ballots—the court rejected the argument that the materiality provision "applies only to instances of racial discrimination." App. 18 n.56. According to the court, because "the text of the provision does not mention racial discrimination," "we cannot find that Congress intended to limit this statute to" "instances of racial discrimination." *Ibid.*

Because "the Constitution requires a showing of" intentional discrimination that the decision below's theory of the materiality provision does not, a violation of the materiality provision on that theory is not "a fortiori a violation of the Constitution." *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997). But the Fifteenth Amendment only permits Congress to "enforce" its substantive provisions "by appropriate

legislation." U.S. Const. amend. XV, § 2. Congress may enforce the Fifteenth Amendment by creating "remedies . . . for actual violations." *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (emphasis omitted).

Thus, the Fifteenth Amendment cannot provide a basis for the materiality provision to the extent that the statute reaches beyond intentional discrimination. Absent other authority, the materiality provision would be unconstitutional. See U.S. Const. art. I, § 8; *id.* amend. X. "States have broad powers to determine the conditions under which the right of suffrage may be exercised," and "each State has the power to prescribe . . . the manner in which [its officers] shall be chosen." *Shelby County*, 570 U.S. at 543 (cleaned up). Alexander Hamilton emphasized the point: "Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it . . . as a premeditated engine for the destruction of the State governments?" Federalist No. 59. "State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority." *NAMUDNO* v. *Holder*, 557 U.S. 193, 217 (2009) (Thomas, J., concurring in judgment in part and dissenting in part).

This Court has held that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997). Elsewhere, plaintiffs and the United States have advanced a trendy theory that this congruent and proportional test applies only to

Congress's Fourteenth Amendment enforcement authority, not its Fifteenth Amendment authority. Given the textual identity between the two amendments' enforcement mechanisms, that theory lacks any foundation in the Constitution. This Court's decisions in *Shelby County* and *NAMUDNO* reinforce the point, for they addressed "the very questions one would ask to determine whether [a statute] is congruent and proportional" even though the statute there was founded on the Fifteenth Amendment. *Shelby County* v. *Holder*, 679 F.3d 848, 859 (CADC 2012) (Tatel, J.) (cleaned up); *see id.* at 885 (Wiliams, J., dissenting, but agreeing on this point); accord *Shelby County* v. *Holder*, 811 F. Supp. 2d 424, 449 (DDC 2011) (Bates, J.); *NAMUDNO*, 557 U.S. at 224–26 (Thomas, J., concurring in judgment in part and dissenting in part); *Shelby County*, 570 U.S. at 542 n.1. Of course, the congruent and proportional test may well be suspect, but only because it permits Congress to go beyond remedying actual constitutional violations. See *Tennessee* v. *Lane*, 541 U.S. 509, 555–60 (2004) (Scalia, J., dissenting).

Thus, to justify a statute under Congress's Fourteenth and Fifteenth Amendment authority, this Court has required at least "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Allen* v. *Cooper*, 140 S. Ct. 994, 1004 (2020) (cleaned up). "On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the [Constitution]. That assessment usually . . . focuses on the legislative record." *Ibid.* "On the other hand, courts are to examine the scope of the response Congress chose to address that injury." *Ibid.* In applying these tests, "a

statute's current burdens must be justified by current needs." *Shelby County*, 570 U.S. at 550 (cleaned up).

As interpreted by the decision below, the materiality provision flunks this means-ends test. Congress has no current record of States adopting neutral voter registration rules to discriminate based on race. And the materiality provision (again, as understood by the Third Circuit) cannot be congruent and proportional to the Fifteenth Amendment because the statute lacks any nexus to intentional racial discrimination.

Start with Congress's failure to identify any constitutional problem with voter registration (much less absentee application) laws themselves. The legislative history of the materiality provision noted that "registrars will overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting a Negro application for the same or more trivial reasons." H.R. Rep. No. 88-914 (Nov. 20, 1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2491. It says that "the crux of the problem" "c[a]me not from discriminatory laws," but "from the discriminatory application and administration of apparently nondiscriminatory laws." *Ibid.* (cleaned up). "[F]or th[is] reason" Congress passed the materiality provision. *Ibid.* Yet this case, like other recent challenges that invoke the materiality provision, attacks a neutral rule of state law—not discriminatory administration by a voting official.

More, as suggested by the legislative example, Congress was not focused on absentee rules at all. Absentee voting was rarely used before the 1970s and did not become prominent until recent years. See *Tex. Democratic Party* v. *Abbott*, 978 F.3d 168, 188 (CA5

2020) ("[T]he right to vote in 1971 did not include a right to vote by mail. In-person voting was the rule, absentee voting the exception."); see also *Voting by mail and absentee voting*, MIT Election Data & Science Lab (Mar. 16, 2021), https://perma.cc/YY6H-9YB8. As noted, absentee voting "facilitate[s]" "[v]oting fraud." *Griffin*, 385 F.3d at 1130–31. State attempts to combat this fraud—while expanding opportunities to vote more broadly—have nothing to do with racial discrimination. Congress never pointed to any history of "pervasive," "flagrant," "widespread," and "rampant" discrimination in absentee voting rules. *Shelby County*, 570 U.S. at 554. And certainly Congress has not pointed to "current conditions" of such discrimination. *Id.* at 550.

Next consider the materiality provision's means. This Court has looked to limitations like "termination dates, geographic restrictions, [and] egregious predicates" "to ensure Congress' means are proportionate to ends legitimate." *City of Boerne*, 521 U.S. at 533. As interpreted by the Third Circuit, the materiality provision's "indiscriminate scope offends th[ese] principle[s]." *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627, 647 (1999). It has no relation at all to intentional discrimination. It requires no proof of any discrimination at all: not discriminatory effects, not past discrimination, not current discrimination. And it has no limits in time, space, or scope.

Moreover, as the United States itself argued below, the statute elsewhere (specifically Section 10101(a)(1)) "already covers the waterfront of direct racial discrimination in voting." CA3 Brief for the United States as *Amicus Curiae* 23, 2022 WL 1045078 (Apr. 1, 2022). According to the United States, "a ban on racial

discrimination in voting is already explicitly achieved by another portion of the same statute." *Ibid.* (cleaned up). On this understanding too, the materiality provision does nothing to combat intentional race discrimination.

In sum, the materiality provision as applied to state elections is unconstitutional if the Third Circuit's interpretation is correct. "It is an elementary principle of statutory interpretation that an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality." *United States* v. *Davis*, 139 S. Ct. 2319, 2350 (2019) (Kavanaugh, J., dissenting). This is not "a case of avoiding *possible* unconstitutionality. This is a case of avoiding *actual* unconstitutionality." *Id.* at 2351. Thus, "every reasonable construction must be resorted to in order to save [the materiality provision] from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895). "This Court's longstanding practice of saving ambiguous statutes from unconstitutionality where fairly possible affords proper respect for the representative branches of our Government." *Davis*, 139 S. Ct. at 2350 (Kavanaugh, J., dissenting).

As noted, many courts have reasonably interpreted the materiality provision to stay within Fifteenth Amendment bounds. See *supra* p. 14. The Third Circuit did not, and indeed failed to grasp the constitutional issue here at all. Not only does this problem show the error of the Third Circuit's interpretation, it shows why this Court should vacate the decision below.

Leaving the Third Circuit's unconstitutional interpretation on the books would perpetuate an unlawful scheme. This scheme disregards Congress's

goals and prerogatives. See *Davis*, 139 S. Ct. at 2350 (Kavanaugh, J., dissenting) ("[A] presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous." (cleaned up)). And this scheme impedes the States in ensuring the integrity of their own election processes.

CONCLUSION

For these reasons, the Court should vacate the decision below or grant certiorari.

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