

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**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF DOCTOR OZ FOR SENATE
AND DR. MEHMET OZ AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER AND VACATUR**

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**MOTION FOR LEAVE TO FILE BRIEF
OF *AMICI CURIAE***

Proposed *Amici* Doctor Oz for Senate and Dr. Mehmet Oz respectfully request leave of the Court to file the attached *amici curiae* brief in support of Petitioner's petition for a writ of certiorari. Counsel of record for all parties has received timely notice of the intent to file this brief under Rule 37.2. No party objects to the filing of this brief. Petitioner, Respondent Zac Cohen, and Plaintiff Voter Respondents all consent to the filing of this brief. The Lehigh County Board of Elections has no objection to the filing of this brief.

Amicus Doctor Oz for Senate is the principal campaign committee for *Amicus* Dr. Mehmet Oz, the Republican general election nominee to represent Pennsylvania in the U.S. Senate. Proposed *Amici* support and seek to uphold the will of Pennsylvania's voters, Pennsylvania's free and fair elections, and the General Assembly's duly enacted laws governing those elections. Proposed *Amici* have a substantial and particularized interest in ensuring that their supporters can exercise their constitutional right to vote in the imminent 2022 general election without their votes being diluted by the counting of invalid ballots.

Proposed *Amici* therefore fully support Petitioner's request for relief, the restoration of Pennsylvania's commonsense and constitutional date requirement for mail-in and absentee ballots, and the prevention of further erosion of the Pennsylvania Election Code under the Third Circuit's "very likely wrong" decision in this case. *Ritter v. Migliori*, 142 S. Ct. 1824, 1824

(2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). Proposed *Amici* seek to submit their brief to provide additional material underscoring that the Third Circuit’s flawed interpretation of the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B), “could well affect the outcome of the fall elections,” including the U.S. Senate election in which Proposed *Amici* and their supporters seek to exercise their constitutional right to vote. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). As Proposed *Amici* explain in their brief, the public interest strongly favors granting vacatur to prevent the Third Circuit’s decision from harming public confidence, disrupting “the functioning of our participatory democracy,” and creating “voter confusion and consequent incentive to remain away from the polls” in Pennsylvania’s 2022 elections. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

For the foregoing reasons, proposed *Amici* respectfully request that the Court grant this motion to file the attached brief.

AUGUST 10, 2022

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*¹

Amicus Doctor Oz for Senate is the principal campaign committee for *Amicus* Dr. Mehmet Oz, the Republican general election nominee to represent Pennsylvania in the U.S. Senate. *Amici* support and seek to uphold the will of Pennsylvania’s voters, Pennsylvania’s free and fair elections, and the General Assembly’s duly enacted laws governing those elections. *Amici* have a substantial and particularized interest in ensuring that their supporters can exercise their constitutional right to vote in the imminent 2022 general election without their votes being diluted by the counting of invalid ballots.

Amici therefore fully support Petitioner’s request for relief, the restoration of Pennsylvania’s commonsense and constitutional date requirement for mail-in and absentee ballots, and the prevention of further erosion of the Pennsylvania Election Code under the Third Circuit’s “very likely wrong” decision in this case. *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). *Amici* submit this brief to provide additional material underscoring that the Third Circuit’s flawed interpretation of the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B),

¹ No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. Counsel of record for all parties has received timely notice of the intent to file this brief under Rule 37.2. Petitioner, Respondent Zac Cohen, and Plaintiff Voter Respondents all consent to the filing of this brief. The Lehigh County Board of Elections has no objection to the filing of this brief.

“could well affect the outcome of the fall elections.” *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). As explained more fully below, the public interest strongly favors granting vacatur to prevent the Third Circuit’s decision from harming public confidence, disrupting “the functioning of our participatory democracy,” and creating “voter confusion and consequent incentive to remain away from the polls” in Pennsylvania’s 2022 elections. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit panel’s judgment in this case issued on May 20, 2022, three days after completion of voting in the primary election in which Dr. Oz prevailed and secured the Republican nomination to represent Pennsylvania in the U.S. Senate. Yet Dr. Oz’s principal competitor in the primary election, David McCormick, invoked the Third Circuit’s decision in a “Hail Mary” effort to overturn the result of the primary election. Citing that decision—and in contravention of the Pennsylvania Supreme Court’s 2020 ruling—the Pennsylvania Commonwealth Court blessed Mr. McCormick’s effort and ordered county boards of elections to count undated mail-in and absentee ballots in the May 2022 primary election.

Fortunately, Mr. McCormick’s and the Pennsylvania Commonwealth Court’s lawless *post hoc* rewriting of the rules did not change the outcome of the primary election. But unfortunately, it signaled only the beginning of the trouble wrought by the Third Circuit’s decision.

Pennsylvania's Acting Secretary of State has now invoked the Third Circuit's decision in an effort to change the rules governing future Pennsylvania elections—including the imminent 2022 general election. Relying on the Third Circuit's decision, the Acting Secretary has sued to compel county boards of elections to count undated mail-in and absentee ballots in the 2022 general election and beyond. The Acting Secretary's suit follows directly on the heels of her Department issuing guidance positing that the Third Circuit's decision requires boards of elections to count undated mail-in and absentee ballots.

A group of private plaintiffs also joined the effort to wield the Third Circuit's decision to invalidate another Pennsylvania election-integrity rule. Those plaintiffs took aim at Pennsylvania's secrecy-envelope requirement for mail-in and absentee ballots in a suit against two county boards of elections. Rather than defend that requirement on the merits, the county boards capitulated and quickly settled.

Regrettably, the mischief arising from the Third Circuit's deeply flawed decision is not limited to Pennsylvania. Other election plaintiffs—including the Democratic Party and even the United States—are now invoking the materiality provision in a sweeping campaign to invalidate commonsense and constitutional election-integrity rules across the country.

If left on the books, the Third Circuit's misconstruction of the materiality provision could change the outcome of an election this fall or in the future. At a minimum, the Third Circuit's decision threatens to unleash chaos in the upcoming general

election, to spawn litigation and election disputes across the country, and to erode public trust and confidence in the integrity of our elections. American democracy deserves better. The Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot.

ARGUMENT

I. THE PUBLIC INTEREST STRONGLY FAVORS VACATING THE THIRD CIRCUIT'S DECISION

For the reasons Petitioner has explained, the Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot. *See* Pet. 12–33.

The public interest strongly favors vacatur for an additional reason. The Third Circuit's non-final decision was limited to “th[e] record” before it and “the November 2, 2021, election for Judge of the Common Pleas of Lehigh County.” Pet. App'x 23. It was “very likely wrong” even on that record. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). Yet the decision is now being wielded sweepingly, in a manner that “could well affect the outcome” of other elections, including the imminent “fall elections” in which millions of Pennsylvanians and Americans will vote. *Id.*

Indeed, the Pennsylvania Commonwealth Court relied upon the Third Circuit's erroneous reasoning when it changed the rules for the May 2022 primary election *after* that primary election had been held and ordered county boards of elections to count undated mail-in and absentee ballots. *See McCormick for U.S.*

Senate v. Chapman, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022). Moreover, the Acting Secretary is now actively using the Third Circuit's decision in an attempt to change the rules governing Pennsylvania's elections this fall and beyond.

A majority of the Pennsylvania Supreme Court has held that any mail-in or absentee ballot that lacks a voter-completed date is invalid under the Pennsylvania Election Code and may not be counted in any election after the 2020 general election. *See In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079–80 (Pa. 2020) (Wecht, J., concurring and dissenting); *id.* at 1090–91 (Dougherty, J., concurring and dissenting). Accordingly, the election boards for three Pennsylvania counties—Berks, Fayette, and Lancaster—have declined to include undated mail-in or absentee ballots in their certified vote totals for the May 2022 primary election. The number of such ballots is insufficient to change the outcome of any contest in the primary election, including Dr. Oz's 940-vote victory over Mr. McCormick. *See Pa. Dep't of State, 2022 General Primary: Tuesday, May 17, 2022 Unofficial Returns*, <https://www.electionreturns.pa.gov/> (last visited Aug. 8, 2022).

Nonetheless, the Acting Secretary of State has sued to compel those three boards to include undated mail-in and absentee ballots in their certified vote totals for both the May 2022 primary election and future elections. *See* Petition, Prayer For Relief ¶¶ 1, 3, *Chapman v. Berks Cnty. Bd. of Elections*, No. 355

MD 2022 (Pa. Commw. Ct. July 11, 2022), <https://bit.ly/3d7reUP>. The Acting Secretary’s suit does not stop there: she also seeks a declaratory judgment that *all* county “boards of elections may not exclude from certified election returns transmitted to the Acting Secretary [undated] absentee and mail-in ballots.” *Id.*, Prayer For Relief ¶ 2. The Acting Secretary’s petition specifically invokes the Third Circuit’s order in this case—and this Court’s denial of a stay of that order—as a basis for this sweeping requested relief. *See id.* ¶¶ 13–14.

The Acting Secretary’s suit follows her Department’s May 24, 2022 guidance to county boards of elections stating that “in light of the conclusion of the Third Circuit in *Migliori* it is the Department’s position that ballots with an undated return envelope must . . . be counted for the May 17, 2022, Primary.” Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes 2* (May 24, 2022), <https://bit.ly/3JB2rVj>.

A group of private plaintiffs also recently filed suit challenging Pennsylvania’s secrecy-envelope requirement under the federal materiality provision. *See* Compl., *Dondiego v. Lehigh Cnty. Bd. of Elections*, No. 22-cv-2111 (E.D. Pa. May 31, 2022) (Dkt. No. 1). Rather than defending that suit vigorously, the two county boards of elections named as defendants quickly settled with the plaintiffs, *see* Stips. of Settlement, *Dondiego*, No. 22-cv-2111 (E.D. Pa. June 15, 2022) (Dkt. Nos. 43, 44), over the objection of intervenors who sought to uphold the lawful secrecy-envelope requirement on the merits, *see* Letter,

Dondiego, No. 22-cv-2111 (E.D. Pa. June 15, 2022) (Dkt. No. 45).

Alarming, the effort to brandish the Third Circuit’s decision and federalize state and local election administration through the materiality provision has not been limited to Pennsylvania. The United States—which is charged with enforcing the materiality statute, *see* 52 U.S.C. § 10101(c)—not only filed an *amicus* brief supporting the plaintiffs in this case, but also has filed suits challenging election-integrity rules in Texas and Arizona. *See United States v. Texas*, No. 21-cv-1085 (W.D. Tex. Nov. 4, 2021); *United States v. Arizona*, No. 22-cv-1124 (D. Ariz. July 5, 2022). Citing the Third Circuit’s decision as its lead authority, the Democratic Party has also brought suit under the materiality provision against a set of New York election-integrity rules. *See DCCC v. Kosinski*, No. 22-cv-1029 (S.D.N.Y. Feb. 4, 2022).

To be sure, the Fifth Circuit has adopted a construction of the materiality statute more closely aligned with the views of Justices of this Court. *See Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (citing *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay)). The Fifth Circuit’s decision only underscores that the Third Circuit’s decision is “very likely wrong” and should be vacated. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay).

However, the Fifth Circuit’s decision is not binding nationwide, and cannot prevent Pennsylvania’s Acting Secretary, the United States, the Democratic Party, and private plaintiffs across the country from weaponizing the Third Circuit’s flawed decision to

erode the integrity of the nation's elections in the remaining weeks before the imminent 2022 general election. The Fifth Circuit's decision also cannot prevent election officials or courts in Pennsylvania or elsewhere from utilizing the Third Circuit's decision to change "the outcome of the fall elections"—which could include the U.S. Senate election in which *amici* and their supporters seek to exercise their constitutional rights to vote and to participate. *Id.*

Only vacatur from this Court would prevent the Third Circuit's decision "from spawning any [such] consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). Vacatur would promote "[c]onfidence in the integrity of our electoral processes" and "the functioning of our participatory democracy," *Purcell*, 549 U.S. at 4, because it would help to stem the tide of "[l]ate judicial tinkering with election laws" this year that could "lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others," *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays). And vacatur would prevent the Third Circuit's decision—and any invalidation of duly enacted election rules it otherwise would spawn—from undermining voter confidence, disrupting "the functioning of our participatory democracy," and creating "voter confusion and consequent incentive to remain away from the polls" in the 2022 general election and beyond, *Purcell*, 549 U.S. at 4–5.

The millions of Americans—including *amici* and their supporters—who will vote in November and in future elections deserve to do so under the rules duly

enacted by legislatures, not under the cloud of the Third Circuit's "very likely wrong" decision in this case. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). The Court should facilitate voters' participation in free and fair elections across the country and vacate the Third Circuit's decision.

CONCLUSION

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

AUGUST 10, 2022

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