

IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

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No. 102 MM 2022

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DAVID BALL, ET. AL.

*Petitioners,*

v.

LEIGH M. CHAPMAN, *et al.*,

*Respondents.*

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BRIEF OF AMICUS CURIAE THOMAS MORE SOCIETY IN  
SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE

Amicus curiae, the Thomas More Society, is a not-for-profit, national public interest law firm based in Chicago, Illinois. Thomas More Society believes that the outcome of elections determines the meaning of the American way of life. The Thomas More Society is committed to the belief that our democracy – that “government of the people, by the people, for the people” – can be achieved only if our legal system safeguards the right of all citizens to freely and fairly elect their representatives. Through litigation and education, Thomas More Society’s Election Integrity practice is focused on ensuring elections are conducted in accordance with state and federal laws and the constitution.

No one other than the amicus curiae, its members, or its counsel authored any part of this brief, or financed the preparation of this brief.

## ARGUMENT

### I. SECTION 10101(A)(2)(B) WAS PASSED TO PREVENT DISCRIMINATION AGAINST BLACK AMERICANS IN REGISTERING TO VOTE.

The materiality provision of 52 U.S.C. § 10101(a)(2)(B) is aimed at racial discrimination. It is not a rule of general applicability governing all election practices. This conclusion is supported by the legislative history of it, the text of it, and the precedent interpreting it.

Section 10101(a)(2)(B) was passed as part of the Civil Rights Act of 1964. PL 88-352, July 2, 1964, 78 Stat. 241. “The measure was at the time the latest entry in a spurt of federal enforcement of voting rights after a long slumber following syncopated efforts during Reconstruction.” *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). It was enacted with an “aim at eliminating racially motivated practices which restrict exercise of the elective franchise.” *Ballas v. Symm*, 351 F.Supp. 876, 888–89 (S.D. Tex. 1972), *aff’d*, 494 F.2d 1167 (5th Cir. 1974). Although initially passed as part of the Civil Rights Act of 1964, § 10101(a)(2)(b) was incorporated into the Voting Rights Act of 1965, PL 89-110, August 6, 1965, 79 Stat. 437. The VRA likewise had a single aim of eliminating racial discrimination in voting. *Shelby Cnty.*,

*Ala. v. Holder*, 570 U.S. 529, 534 (2013) (“The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem.”) It is among a series of provisions intended to prevent race or color inhibiting the right to vote. 52 U.S.C. § 10101(a). Among those provisions are a prohibition on literacy tests, 52 U.S.C. § 10101(a)(2)(C), and penalties for voter intimidation, 52 U.S.C. § 10101(a)(3)(b).

The text of Section 10101 further supports its aim at racial discrimination. Section 10101(a) states “race, color, or previous condition not to affect right to vote.” 52 U.S.C. § 10101(a). Section 10101 guarantees the right to vote without distinction of race, color, or previous condition of servitude.” 52 U.S.C.A. § 10101(a)(1).

Its legislative history and text have led courts to conclude that the primary purpose Section 10101(a)(2)(B) is “to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). It was “enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements.” *Indiana Democratic*

*Party v. Rokita*, 458 F.Supp.2d 775, 839 (S.D. Ind. 2006), aff'd sub nom. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008). In sum, Section 10101(a)(2)(B) was designed to eliminate errors and omissions which could be used as a pretext to discriminate against black voters and to deny them the ability to vote.

The Secretary of State has directed that “[a]ny ballot-return envelope that is undated or dated with an incorrect date but that has been timely received by the county shall be included in the pre-canvass and canvass.” *Pa. Dep’t of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 26, 2022). This guidance clearly conflicts with the Pennsylvania Election Code which mandates that a voter using an absentee or mail-in ballot “shall . . . fill out, **date**, and sign the declaration” included with the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). The Secretary does not provide any explanation for her directive that is in direct conflict with the requirements of the Election Code. The only plausible explanation for her directive is that the dating requirement violates Section 10101(a)(2)(B). Otherwise, her directive is blatantly lawless. But there is no evidence – nor so much as an allegation – that Election Code’s dating requirement is being used as a

pretext to deny voters the right to vote on the basis of race or color. Accordingly, the Court should grant petitioners application and declare the Secretary's guidance void and invalid.

**II. SECTION 10101(A)(2)(B) CAN ONLY BE APPLIED TO STATE ELECTIONS TO REMEDY RACIAL DISCRIMINATORY PRACTICES.**

In all events, there is no question that Section 10101(a)(2)(B) can only apply to state elections to eliminate race-based impediments to voting. Congress can regulate the time, place, and manner of *federal* elections. U.S. Const. art. I, § 4, cl. 1. “[T]he Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16, (2013). But Congress can only regulate who can vote in federal *and* state elections to advance the Fifteenth Amendment. U.S. Const. amend. XV. “The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command.” *Shelby Cnty., Ala.*, 570 U.S. at 553. Therefore, as it relates to state races, the materiality provision only applies when the error or omission is being used to discriminate against a voter based on race. The Secretary's guidance directs county boards of election to count *all* undated ballots whether the ballot is cast for state or

federal official. The only possible way the Secretary could justify her guidance for ballots cast for state officials is to show that the undated ballot provision of the Election Code serves some racially discriminatory purpose. That she cannot do. Accordingly, the Court should, at a minimum, declare the Secretary's guidance void and invalid as it relates to ballots for state officials.

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## CONCLUSION

Based on the foregoing amicus curiae, Thomas More Society, respectfully requests this Court to grant petitioners their requested relief.

Respectfully submitted,

Dated: October 24, 2022

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## Certificate of Compliance

I certify that this brief contains 930 words and complies with the word count limit under Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(a)(1).

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I certify that this document does not contain any confidential information or documents and complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that mandate filing confidential information and documents differently from non-confidential information and documents.

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## Certificate of Service

I certify that on October 24, 2022, I have served via PAC file a true and correct copy of this document on all counsel of record.

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