Case No. 23-3166

United States Court of Appeals

for the

Third Circuit

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs-Appellees,

– v. –

SECRETARY OF THE COMMONWEALTH, *et al.*,

Defendants-Appellees,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenors-Appellants,

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA,
CASE NO. 1:22-CV-00339 (BAXTER, J.)

BRIEF FOR *AMICUS CURIAE* THE PROTECT DEMOCRACY PROJECT IN SUPPORT OF APPELLEES' PETITIONS FOR REHEARING OR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Protect Democracy Project certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock. The Protect Democracy Project is not aware of any publicly held corporation not a party to the proceeding before this Court that has a financial interest in the outcome of the proceeding. The Protect Democracy Project is not affiliated with any publicly owned corporation not named in the appeal.

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INTEREST OF AMICUS CURIAE[1]

The Protect Democracy Project respectfully submits this brief to assist the Court in evaluating the Appellees' petitions for rehearing. Protect Democracy is a nonpartisan, nonprofit organization that, among other things, works to ensure that American elections are free and fair. Protect Democracy has an interest in ensuring that 52 U.S.C. § 10101(a)(2)(B) (the "Materiality Provision")—which prevents qualified voters from losing their right to vote due to immaterial paperwork errors—is correctly interpreted and enforced.

The panel majority's decision in this case, which limits the Materiality Provision's application to voter registration, creates a substantial risk that voters will be unlawfully disenfranchised. To the extent the panel majority asserts that the legislative history of the Provision supports narrowing the statute's reach in this manner, Protect Democracy submits this brief to clarify that, to the contrary, the legislative history shows that Congress intended its statutory text to be faithfully applied as broadly as it reads.

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than *amicus* and its counsel.

SUMMARY OF ARGUMENT

This appeal presents a "question of exceptional importance," Fed. R. App. P. 35(a)(2), namely, whether Pennsylvania can discard the votes of citizens who submitted timely mail-in ballots simply because they failed to date the outside of the return envelope, a requirement that all agree "serves little apparent purpose" (ECF 230, Majority Opinion ("Op.") 14). The court below and, just two years ago, a unanimous panel of this Court held that the Materiality Provision bars this unjust result. On appeal in this action, however, a 2-1 majority concluded that this statute does not apply beyond the voter registration process—"its role stops at the door of the voting place" (Op. 14)—and thus does not apply in this case.

Appellees' petitions for rehearing demonstrate that the panel majority misread the statutory text. However, the majority's conclusion is also based on the notion that the Materiality Provision's "legislative history . . . supports confining the statute's scope to paperwork used for voter qualification determinations." (*Id.* at 29.) This is incorrect: the Materiality Provision's purpose, context, and legislative history demonstrate that it should be given nothing less than the broad application its plain text calls for. Based on a further misunderstanding of the relevant legislative context, the panel majority also disregards the statute's broad definition of "vote" (*see* Op. 32), which numerous courts have found dispositive of similar questions regarding the statute's reach.

The panel's decision should be reviewed, either by the panel or *en banc*.

ARGUMENT

I. The Legislative History Does Not "Support[] Confining the Statute's Scope" to the Registration Process

After analyzing the statutory text (Op. 24-29), the panel majority asserts that the "legislative history . . . supports confining the statute's scope to paperwork used for voter qualification determinations" (*id.* 29). That is wrong.

First, the legislative history demonstrates Congress's intent to combat voting discrimination whenever and wherever it arises. As detailed in the Dissent (23-27 n.19), and in Protect Democracy's *amicus* submission to the panel (*see* ECF 166 at 5-16), after eight years of legislation and fact-finding, when Congress finally took decisive action in 1964 and 1965, it did so not out of a narrow "concern[] with discriminatory practices during voter registration," as opposed to "during the vote-casting stage" (Op. 31). Rather, Congress's goal was simple and broad: to protect voting rights "regardless of the manner by which any attempt is made to deny or abridge [it] on account of race or color." 111 Cong. Rec. 15,653 (1965) (statement of Rep. McCulloch).

By that time, Congress had been repeatedly informed of the "ingenious," U.S. Comm'n on Civil Rights, Report of the U.S. Comm'n on Civil Rights 1959,

at 30 (1959) ("1959 CRC Report"),[2] and "diverse," U.S. Comm'n on Civil Rights, Civil Rights '63, at 15 (1963) ("1963 CRC Report"),[3] methods used to disenfranchise Black Americans, *see also South Carolina v. Katzenbach*, 383 U.S. 309, 311 (1966) (noting "voluminous legislative history" on this point), which included not only efforts to prevent Blacks from registering (Op. 30-31), but also to prevent the few who managed to register from voting, including through economic intimidation or physical violence.[4] The conclusion was inescapable: "where there is will and opportunity to discriminate against certain potential voters, ways to discriminate will be found." 1959 CRC Report at 133.

To address this problem, the Commission on Civil Rights urged Congress to pass broad legislation to prohibit, among other things, "*any* arbitrary action or . . . inaction which deprives or threatens to deprive any person of the right to *register, vote, and have that vote counted* in any Federal election." 1963 CRC Report at 248 (emphasis added). In 1964, Congress did just that by enacting the Materiality

[2] Available at: https://www2.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf.

[3] Available at: https://www.crmvet.org/docs/ccr_63_civil_rights.pdf.

[4] *See* 1959 CRC Report at 56-57 (Black registrants intimidated from voting in Florida, one explaining "I am too old to be beaten up"); *id.* at 64-65 (58 Black registrants in Fayette County, Tennessee; only one voted due to intimidation); U.S. Comm'n on Civil Rights, Report of the U.S. Comm'n on Civil Rights 1961, vol. 1, at 164 (1961) ("1961 CRC Report"), *available at* https://www.crmvet.org/docs/ccr_61_voting.pdf (46 Black registrants in McCormick County, South Carolina; only one voted after the others lost their jobs).

Provision, barring disenfranchisement in "*any* Federal election" based on immaterial "error[s] or omission[s] on *any* record or paper relating to *any* application, registration, *or other act requisite to voting*," Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (1964) (emphasis added). In 1965, in the face of continued resistance, Congress expanded that ban to "*any* election," Pub. L. No. 89-110, § 15, 79 Stat. 437, 445 (1965) (emphasis added).

In short, the Materiality Provision was part of Congress's effort to pass "the most effective legislation that can be devised within the framework of the Constitution," H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2467, a law which, as President Johnson declared, would not only "eliminate illegal barriers to the right to vote," but also "ensure that properly registered individuals are not prohibited from voting."[5] Any effort to "confin[e] the statute's scope" in the name of "legislative history" (Op. 29) is profoundly mistaken.

<u>*Second*</u>, no "legislative history" affirmatively "supports confining the statute's scope" to voter registration (*id.*). To be sure, "references to 'registration' and its many permutations abound" in the House Judiciary Committee Report on the 1964 Civil Rights Act (*see id.* 30-31). That is unsurprising: "arbitrary

[5] Pres. Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), *available at* https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise.

registration procedures" were the "most prevalent" of the "many forms" of discrimination employed by Southern voting officials at the time. 1961 CRC Report at 133. And, in fact, these tactics were so effective that Southern states had little need to deploy similar techniques later in the voting process.

But it does not follow from Congress's recognition that "[v]oter registration . . . was the *principal* means to suppress Black voter participation" in the 1960s (Op. 16 (emphasis added)), that discriminatory registration practices were the Materiality Provision's *only* targets. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.), and, as discussed above, Congress's stated intent in passing the Civil Rights Acts and the Voting Rights Act was to ensure an effective right to *vote*—not merely to register. And, indeed, "nothing in [the Materiality Provision's] statutory language nor its legislative purpose indicates that Congress chose to *allow*" the rejection of votes based on immaterial paperwork errors "at other stages in the process." *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *21 (W.D. Tex. Nov. 29, 2023).

Thus, the panel erred in holding that the inevitable focus on voter registration in the *Congressional Record* supports a conclusion that Congress intended the Materiality Provision to "stop[] at the door of the voting place."

(Op. 14.) "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *see Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). And particularly where, as in the Materiality Provision, Congress has legislated in broad terms—reaching "any record or paper relating to any application, registration, or other act requisite to voting," 52 U.S.C. § 10101(a)(2)(B)—"the fact that [a statute] has been applied in situations not expressly anticipated by Congress . . . simply demonstrates [the] breadth of [the] legislative command," and is no reason to narrow its scope, *Bostock v. Clayton Cty., Ga.*, 590 U.S. 644, 653 (2020) (Gorsuch, J.) (citations and quotation marks omitted).

II. The Applicable Definition of "Vote" Is Not a Mere "Cross-Reference" To a Statute Concerning Registration

The panel majority minimizes another critical aspect of the statute: its broad definition of "vote," which "includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted . . . ." 52 U.S.C. § 10101(e). Several courts have held that this language dispels any doubt that the Materiality Provision protects "not only [] registration and eligibility to vote, but also the right to have that vote counted." *Ford v. Tennessee Senate*, No.

06-2031 D V, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006); *see also In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582, at *9 (N.D. Ga. Aug. 18, 2023) (same); *La Unión del Pueblo Entero*, 2023 WL 8263348, at *18 (holding that this "capacious definition of 'vote' easily dispenses with" this issue).

The panel majority, by contrast, dismisses this part of the statute as a "mere[] cross-reference[] [to] the definition of 'vote' from Title VI of the Civil Rights Act of 1960." (Op. 32.) The majority then further reasons that, because the 1960 Act purportedly "focus[ed] on . . . the opportunity to register," the fact that this definition had its origins in that statute "strengthens [its] view" that the Materiality Provision is likewise concerned only with "access [to] the ballot in the first instance." (Op. 32-33.)

Again, the panel majority's use of legislative history and context is faulty.

First, Congress's incorporation of this broad definition of "vote" into the Materiality Provision cannot be so easily dismissed. When adopting the initial version of the Materiality Provision in 1964, Congress expressly provided that, "[f]or purposes of this subsection . . . the term 'vote' shall have the same meaning as in subsection (e) of this section." Pub. L. No. 88-352, § 101(a)(3)(a), 78 Stat. at 241. While this is indeed a "cross-reference" to the definition of "vote" first introduced in the 1960 Act, *see* Pub. L. No. 86-449, § 601(a), 74 Stat. 86, 91

(1960), Congress's express decision to "borrow parts" of related statutes is properly viewed as a direct expression of "the intent of Congress" that is entitled to full respect under the "traditional rule[s] of statutory construction," *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 470-71 (3d Cir. 1994).

And lest there be any doubt about Congress's intent, when it expanded the Materiality Provision in 1965, it also *again* adopted the same, broad definition of "vote," this time expressly reiterating it in full. *See* Pub. L. No. 89-110, §§ 14(c)(1), 15(a), 79 Stat. at 445. As the related House Report makes clear, this "definition of the term 'vote'" applies to "all sections of the act," and "makes it clear that the act extends to . . . all actions connected with registration, voting, or having a ballot counted in such elections." H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2464. It is hard to imagine a clearer expression of congressional intent.

Second, even assuming the origins of this definition were relevant, the 1960 Act was not exclusively "focus[ed]" on voter registration (Op. 32). While it did, *inter alia*, create alternative federal mechanisms for registration, *see* Pub. L. No. 86-449, § 601, 74 Stat. at 90-92, the Act's expanded definition of "vote" was embedded in a lengthy provision that also provided the Attorney General with additional powers to ensure that eligible voters were not only "declared qualified to

vote" (*i.e.*, registered), but also actually "permit[ted] . . . to vote at an appropriate election," *id.*, 74 Stat. at 90.

Thus, in the 1960 Act—as in the 1964 and 1965 Acts—registration was not the final goal; it was the first step toward "having [a] ballot counted." 52 U.S.C. § 10101(e). The Materiality Provision's connection to the 1960 Act provides no basis for limiting its scope.

III. The Panel Majority Has Opened the Door to the Discriminatory Tactics the Materiality Provision Was Enacted to Prevent

The legislative history and animating purpose of the Materiality Provision underscores a final misstep by the panel majority: it takes too much comfort in the notion that it is merely permitting "enforcement of neutral state requirements on how voters may cast a valid ballot." (Op. 40.)

The panel majority concedes that the "vote-casting rule" it enforces "serves little apparent purpose." (*Id.* 14–15.) Yet the hard-won lesson that led to the passage of the Materiality Provision is that arbitrary "state election practices" only "increase the number of errors or omissions on papers or records related to voting" and thus "provide an excuse to disenfranchise otherwise qualified voters." *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021). Under the panel majority's ruling, however, legislatures could adopt modern versions of the "neutral" requirements Congress sought to banish with the Materiality Provision—*e.g.*, requiring mail-in voters to

write on their return envelopes (i) an interpretation of the state constitution, *see* 1959 CRC Report at 59, or (ii) a list of their prior employers, *id.* at 74, or (iii) their age in years, months, and days, *see* 1961 CRC Report at 56. If officials rejected the submissions of voters who "failed to follow [these] rules" (Op. 32) because their envelopes are "defective under state law" (*id.*), under the panel majority's ruling the Materiality Provision would not be offended because the state was merely "enforcing vote-casting rules that it has deemed necessary to administer its elections" (*id.* 35).

That cannot be the law. The Materiality Provision "is intended to address" precisely these "practices," *Thurston*, 2021 WL 5312640, at *4, in the service of "Congress' broader, well-documented aim of eradicating all manner of arbitrary and discriminatory denials of the right to vote," *La Unión del Pueblo Entero*, 2023 WL 8263348, at *21. The Materiality Provision does not to give voters "the right to cast a defective ballot" (Op. 33), but it does prevent states from establishing voting rules that "serve little apparent purpose" (*id.* 14) other than to deem some voters' paperwork "defective" (*id.* 32). Such rules create the "opportunity to discriminate" that Congress sought to eradicate with the Materiality Provision—and, unfortunately, "[t]he history of voting in the United States shows" that, once that opportunity is available, "ways to discriminate will be found." 1959 CRC Report at 133.

CONCLUSION

For the above reasons, Protect Democracy supports Appellees' petitions for rehearing.

Respectfully submitted,

Dated: New York, New York
April 17, 2024

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COMBINED CERTIFICATIONS

In accordance with applicable Federal and Local Rules, I certify as follows:

1. I am a member in good standing of the Bar of this Court.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that this brief was electronically filed with the Court using the CM/ECF system, which will provide notice to and service on all counsel of record.

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