No. 22-1499

In the United States Court of Appeals for the Third Circuit

LINDA MIGLIORI, *et al.*,

Plaintiffs-Appellants,

v.

LEHIGH COUNTY BOARD OF ELECTIONS, *et al.*

Defendants-Appellees.

On Appeal from the Eastern District of Pennsylvania
(D.C. Civ. Action No. 5:22-cv-00397)
District Judge: Honorable Joseph F. Leeson, Jr.

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March 29, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Legislative Materials

Other Authorities

Constitutions & Statutes

State Constitutions and Statutes

Federal Statutes

INTRODUCTION

Plaintiff Voters are a bipartisan group of Lehigh County voters who face disenfranchisement because they did not handwrite an inconsequential date on the envelopes containing their timely-submitted mail ballots. Federal law prohibits that unjust result. In particular, the Civil Rights Act's Materiality Provision bars the Lehigh County Board of Elections from denying Plaintiff Voters' right to vote based on an omission that has no bearing on their qualification to vote. This Court should reverse the District Court's holding that Plaintiff Voters may not enforce this plainly applicable provision of federal law, and uphold Congress's command that every valid vote be counted.

The Materiality Provision prevents the right to vote from being denied due to an error or omission that "is not material in determining whether [a voter] is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). That commonsense rule of law applies to the extraneous envelope-dating requirement at issue here. It is undisputed that Plaintiff Voters are eligible and registered to vote, that Defendant-Appellee the County Board of Elections (the "Board") verified their identities when it approved their mail ballot applications, and that the Board timely received their ballots. Plaintiff Voters' omission of a handwritten date on an envelope has no bearing on their qualifications to vote. Indeed, the Pennsylvania Secretary of State, the State Attorney General's office,

and four out of seven Justices of the Pennsylvania Supreme Court have all said as much. And the Board initially agreed—it voted unanimously to count Plaintiff Voters' ballots, only to be overturned on state-law grounds by a state court.

The District Court did not disagree that the envelope-dating requirement is immaterial. Rather, the court held—applying reasoning that no other court has adopted, and that a unanimous panel of the Eleventh Circuit rejected—that private litigants may *never* sue to enforce the Materiality Provision, and that only the U.S. Attorney General may bring such suits. That is wrong on multiple levels.

For one, the District Court applied the wrong legal standard. Plaintiff Voters sued under 42 U.S.C. § 1983 to enforce the rights secured by the Materiality Provision. Under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), a federal statute that unambiguously confers an individual right is presumptively enforceable by private plaintiffs via Section 1983. The Materiality Provision does just that—it guarantees "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). But the District Court ignored Section 1983 entirely and failed to apply *Gonzaga*. That alone is reversible error.

And even under the test the District Court did apply, Plaintiff Voters would also be able to sue directly under the Materiality Provision itself. The statutory text and structure, legislative history, and case law all show that Congress intended the Materiality Provision to be enforced by private parties as well as the Attorney

General. For example, the statute contemplates lawsuits by a "party aggrieved," a paradigmatic statutory term of art denoting private plaintiffs. And it discusses administrative exhaustion requirements that are inapplicable to the Attorney General. Moreover, the statute's structure and legislative history show that when Congress gave the Attorney General enforcement authority in the 1957 Civil Rights Act, it did so to "supplement existing law," which had allowed private suits to enforce what is now 52 U.S.C. § 10101 since the Reconstruction Era. The District Court's dangerous error undermines Congress's goal of protecting the right to vote and requires reversal.

Other legal arguments to limit the Materiality Provision are even less plausible. The suggestion that the statute applies only in the context of racial discrimination finds no support in the statutory text. To be sure, the misuse of immaterial rules to disenfranchise Black voters was a key force behind the Civil Rights Act, but Congress permissibly chose a broad-based, race-neutral rule to prohibit such misdeeds. Nor would the text allow Defendants' theory that the Materiality Provision applies only to voter registration. Rather, the statute broadly applies to any action "necessary to make a vote effective." 52 U.S.C. §§ 10101(3)(A), 10101(a)(3)(E).

The District Court's decision should be reversed.

JURISDICTIONAL STATEMENT

Plaintiff Voters' claims arise under 52 U.S.C. § 10101 and 42 U.S.C. § 1983. The District Court had subject matter jurisdiction over Plaintiff Voters' claims pursuant to 28 U.S.C. § 1331.

Plaintiff Voters timely filed their notice of appeal on March 18, 2022. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The final judgment being appealed from, entered on March 16, 2022, resolved all of Plaintiff Voters' claims.

STATEMENT OF THE ISSUES

1. Did the District Court err in holding that Plaintiff Voters may not bring suit to enforce the rights guaranteed by the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), either through an action under 42 U.S.C. § 1983 or through an implied right of action under the Materiality Provision itself? *See* JA 23–30, 604–609, 745–50.
2. The Materiality Provision of the Civil Rights Act prohibits states from denying the right to vote on the basis of an "error or omission [that] 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). Can the Lehigh County Board of Elections deny Plaintiff Voters the right to vote because

they did not handwrite a date on the envelope containing their mail ballots, where such an omission is immaterial to determining whether Plaintiff Voters are qualified to vote under Pennsylvania law and where there is no dispute that they are qualified and that their mail ballots were timely received? *See* JA 52–54, 501–508, 609–612, 735–744.

STATEMENT OF RELATED CASES

This action has not previously been before this Court. The mail ballots at issue here were considered in a prior state court action, *Ritter v. Lehigh County Board of Elections*, which was resolved in an unpublished, 2-1 decision by the Commonwealth Court, No. 1322 C.D. 2021, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022), and is discussed *infra*. The Board was the defendant in that case. Ritter, an Intervenor-Defendant in this action, was the plaintiff, and Zac Cohen, an Intervenor-Plaintiff here, also sought intervention in the state court case. The five Plaintiff Voters who brought the action here were not parties to the *Ritter* state court litigation.

STATEMENT OF THE CASE

This case involves a conflict between federal voting rights law, namely the Materiality Provision of the Civil Rights Act, and the application of a provision of the Pennsylvania Election Code. The Materiality Provision prohibits the denial of the right to vote based on 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). The Pennsylvania Election Code provision at issue here directs mail ballot voters to write the date along with their signature on the outer envelope used to return their mail ballots. Plaintiff Voters signed the outer envelopes and returned their ballots on time but now face disenfranchisement because they omitted a date, and the Board will not count mail ballots contained in undated envelopes.

A. Pennsylvania's Mail-In Ballot Process

Pennsylvania has long provided absentee-ballot options for voters absent from their municipality on Election Day for specified reasons or those with a disability that prevents attendance at a polling place. *See* 25 P.S. § 3146.1–3146.9. In 2019, the Pennsylvania General Assembly enacted new mail-in voting provisions, which permit all registered, eligible voters to receive a ballot by mail, vote it, and return it to their county election office. Act of Oct. 31, 2019, P.L. 552,

No. 77, § 8. In 2020, 2.7 million Pennsylvania voters voted either by absentee or mail ballot.[1]

Under current law, a voter seeking to vote absentee or by mail ballot must complete an application process. The process for absentee and mail ballots is identical: The voter must provide their name, registration address, and proof of identification to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. In so doing, applicants provide all the information necessary to verify that they are qualified to vote in Pennsylvania: they are at least 18 years old, a U.S. citizen for at least one month, and have resided in the election district for at least 30 days. 25 Pa. C.S. § 1301; *see* JA 180–182 (mail ballot application). Proof of identification for purposes of the absentee and mail ballot application includes either a Pennsylvania driver's license number or the last 4 digits of the voter's social security number. 25 P.S. § 2602(z.5)(3). The county board of elections confirms applicants' qualifications by verifying the provided proof of identification and comparing the information on the application with information contained in a voter's record.[2] Once the county elections board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains the ballot, a "secrecy

[1] Pa. Dep't of State, *Report on the 2020 General Election* at 9 (May 14, 2021),

[2] Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* at 2 (Sept. 11, 2020).

envelope" marked with the words "Official Election Ballot," and a pre-addressed outer return envelope which includes a voter declaration form.

A mail-ballot voter then marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the outer return envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The voter delivers the entire package by mail or in person to their county elections board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards of elections stamp the envelope with the date of receipt and log it in the Statewide Uniform Registry of Electors ("SURE") system, the voter registration system used to generate poll books.

At issue in this appeal is the instruction that a voter date as well as sign the form on the outer envelope containing their mail ballot. *See* 25 P.S. §§ 3146.6(a) (providing, as part of a lengthy set of instructions, that "[t]he elector shall then fill out, date and sign the declaration printed on such envelope"); *id.* § 3150.16(a) (same); *see also* JA 130.

This envelope-dating requirement was the subject of state-court litigation during the 2020 election cycle. In a lawsuit filed under state law, the Pennsylvania Supreme Court concluded that ballots contained in signed but undated envelopes had to be counted for the November 2020 election. *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020). A

majority of the Justices suggested, without deciding, that invalidating mail ballots for failure to meet the envelope-dating requirement might violate the Materiality Provision. In particular, the opinion announcing the judgment found "persuasive" the argument that invalidating votes for failure to comply with the envelope-dating rule "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons." *Id.* at 1074 n.5. And a concurring Justice opined that it was "inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require." *Id.* at 1089 n.54 (Wecht, J., concurring and dissenting); *see also id.* (suggesting that the General Assembly review the Election Code with "that binding provision [*i.e.*, the Materiality Provision] in mind").

The Pennsylvania Department of State has also issued administrative guidance on the envelope-dating requirement. It instructed county boards of elections in 2021 that "there is no basis to reject a ballot for putting the 'wrong' date on the envelope, nor is the date written used to determine the eligibility of the voter." JA 192. Accordingly, in the recent county elections at issue in this appeal, the Board in fact counted ballots with the wrong date on them—where, for example, voters wrote their own birthdates instead of the dates they signed their ballot envelopes. JA 254–255, at 61:5–62:18.

B. Plaintiff Voters, Long-time Registered Voters in Lehigh County, Timely Submit their Mail Ballots

Plaintiff Voters are five voters in Lehigh County who cast mail ballots in the November 2021 county elections. JA 6. Their ballots, and those of 252 other Lehigh County mail-ballot voters, were set aside because they did not write the date on the envelope containing their mail ballots. *Id.*

Plaintiff Voters are long-time Pennsylvania voters, some registered as Democrats and some as Republicans. Linda Migliori is a 70-year-old retired preschool teacher living in Schnecksville, Pennsylvania. JA 62–64, 172–173. She has been a registered voter in Lehigh County for 24 years and votes in every presidential election and important off-year elections. *Id.* Sergio Rivas is a 76-year-old resident of Allentown, Pennsylvania, who has been a registered voter in Lehigh County for 18 years and in Pennsylvania for more than 55 years, and he votes in every election. JA 73–74, 175. Mr. Rivas cites his age as a reason for voting by mail; he has found it difficult in recent years to vote in person. *Id.* Richard E. Richards and Francis J. Fox are lifelong residents of the Lehigh Valley; both are 66 years old, have been registered Pennsylvania voters since reaching the legal voting age, and vote in every election. JA 66–71, 173–174. Kenneth Ringer is a 70-year-old small business owner in Macungie, Pennsylvania, who finds it difficult to get away from his business to vote in person on Election Day. JA 76–

77, 174–175. He is a registered voter in Lehigh County and has voted in Pennsylvania for 20 years. *Id*.

The material facts concerning their ballots are undisputed. Plaintiff Voters, and 252 other similarly situated Lehigh County voters, are eligible and registered to vote in Lehigh County. JA 168, ¶¶ 23–24. All signed the declarations on the outer envelopes of their mail ballots. *See id*., ¶ 24. None of these ballots raises any fraud concerns. JA 169, ¶ 26. The Board timely received all 257 ballots, including those of Plaintiff Voters, before the statutory deadline of 8:00 p.m. on Election Day. JA 168, ¶ 24; 169, ¶ 26. Consistent with its procedures, the Board stamped the date of receipt on each envelope, confirming timely receipt. JA 449-458 (photocopies of Plaintiff Voters' envelopes time-stamped by the Board).

Like the five Plaintiff Voters, the vast majority of impacted Lehigh County voters are senior citizens. JA 169, ¶ 25. Three quarters of them are over 65, and fifteen of them are over the age of 90, including two voters now facing disenfranchisement who were over 100 years old when they voted in November. *Id.* Together, the 257 affected voters make up over 1% of all Lehigh County voters who voted by mail in the November 2021 Municipal Election. *See* JA 168, ¶ 21.

C. Ritter Obtains a State Court Order Requiring the County to Deny Plaintiffs Their Right to Vote for Failure to Date the Envelopes Containing Their Mail Ballots

Of the three Lehigh County judicial vacancies on the ballot in the 2021 county elections, the Board has certified the election of the two candidates who won by more than 257 votes. JA 168, ¶¶ 19–20. The difference between the third and fourth-place candidates, however, is 71 votes, less than the number of disputed ballots at issue here. *See* JA 171, ¶ 50.

On November 15, 2021, the Board voted unanimously to count the 257 mail ballots without a date on the outer envelope. JA 169–170, ¶ 30–34. In response, one of the candidates, Defendant-Intervenor-Appellee Ritter, sued in state court to block the Board from counting the disputed ballots, arguing that doing so violated state law. JA 170, ¶¶ 34–35. Certification of the election results for the third vacancy was suspended by operation of state law during the state-court proceedings.

On January 3, 2022, the Pennsylvania Commonwealth Court held in an unpublished, 2-1 decision that state law required the Board to set aside timely received ballots submitted in undated envelopes. *Ritter v. Lehigh County Board of Elections*, No. 1322 C.D. 2021, 2022 WL 16577, at *10 (Pa. Commw. Ct. Jan. 3, 2022); *see also* JA 10. The Pennsylvania Supreme Court subsequently denied a

petition for review. *See Ritter v. Lehigh Cnty. Bd. of Elections*, No. 9 MAL 2022, 2022 WL 244122, at *1 (Pa. Jan. 27, 2022) (per curiam); *see also* JA 445.

D. Plaintiff Voters Challenge the Envelope-Dating Requirement in Federal Court as Immaterial but the District Court Grants Summary Judgment in Defendants' Favor

On January 31, 2022, four days after the Pennsylvania Supreme Court's decision declining review, Plaintiff Voters filed this action. JA 40. Plaintiff Voters alleged, among other things, that the refusal to count their votes for failure to write a date on the envelope of their timely received mail ballots violates the Materiality Provision of the Civil Rights Act of 1957 and their fundamental constitutional right to vote.[3] JA 52–59. With respect to their Civil Rights Act claim, Plaintiff Voters sued under 42 U.S.C. § 1983 and 52 U.S.C. § 10101. *See* JA 52.

On March 16, 2022, the District Court issued an opinion and order granting summary judgment to Defendants. JA 4–33. Regarding the Materiality Provision, the District Court held that there was no private right of action to enforce the law in federal court, *i.e.*, that only the U.S. Attorney General may bring federal lawsuits to enforce the individual right to vote guaranteed by this provision in the

[3] Plaintiff Voters are not appealing the District Court's ruling on their constitutional claim. However, Plaintiff Voters note their disagreement with the District Court's ruling in that respect and maintain among other things that the envelope-dating requirement does not further any legitimate state interest.

Civil Rights Act. JA 23–30. On March 17, the day after the District Court's decision, the Board scheduled a meeting for Monday, March 21, 2022, to certify the last remaining election result without counting Plaintiff Voters' ballots. Appendix to Appellants' Emergency Mot. for Inj. Pending Appeal, at 36–40 (Dkt. No. 6-1).

Plaintiff Voters filed a notice of appeal the next day and sought an emergency injunction pending appeal to enjoin the election's certification and preserve the status quo. On March 20, this Court enjoined the certification of the election pending further order of court. It then issued an expedited briefing schedule. Orders (Dkt. Nos. 12, 18).

SUMMARY OF ARGUMENT

I.A. Plaintiff Voters properly brought suit under 42 U.S.C. § 1983 to enforce their rights under the Materiality Provision. A federal law that unambiguously creates a personal, individual right is presumptively enforceable in a Section 1983 action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *see also* 42 U.S.C. § 1983 (providing right to damages and injunctive relief for violations of rights "secured by the Constitution and laws" of the United States). The Materiality Provision's text clearly grants such a personal right: The statute expressly secures "the right of any individual to vote in any election." 52 U.S.C.

§ 10101(a)(2)(B). Nor is this the rare case where Congress has so covered the field with a comprehensive regulatory scheme that private enforcement is impossible. *E.g.*, *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). To the contrary, the text of Section 10101, its structure, and the legislative history plainly demonstrate Congress intended joint enforcement of Section 10101's substantive guarantees by both the Attorney General *and* private parties. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) (so holding).

The District Court agreed that the Materiality Provision creates an individual right, but ignored this straightforward Section 1983 enforceability analysis. That legal error warrants reversal.

I.B. In addition to Section 1983, Plaintiff Voters also have an implied private right of action to sue directly under the Materiality Provision. Here, the statute's text, structure, legislative history, and case law all support the conclusion that Congress intended both an individual right and an individual remedy. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Section 10101's text expressly provides for private enforcement. In particular, subsection 10101(d) contemplates that a "party aggrieved" may "institut[e] proceedings pursuant to this section," *i.e.*, pursuant to Section 10101, and provides that they may do so without exhausting administrative remedies. 52 U.S.C. § 10101(d). This "aggrieved party" language is a term of art that typically indicates a private-party litigant, a conclusion that is

especially clear here because the statute also discusses administrative exhaustion requirements, which apply to private-party plaintiffs and not federal law enforcers. Moreover, Congress's use of different, more specific language when referring to actions brought by the Attorney General ("pursuant to subsection (c)" versus "pursuant to this section") further demonstrates that Congress in drafting Section 10101 contemplated that both individual plaintiffs and the federal Department of Justice would be able to enforce the statute's voting rights guarantees.

Statutory structure also supports private enforcement. Congress built Section 10101 on the foundation of the original voting rights guarantees in the 1870 Enforcement Act. Those guarantees were enforced by private parties for nearly a century before Congress placed them in what is now subsection 10101(a) as part of the 1957 Civil Rights Act. *See, e.g.*, *Schwier*, 340 F.3d at 1295. Congress then added the Materiality Provision to that same subsection in 1964. Congress's use of privately enforceable rights to build Section 10101 further supports the conclusion that the statute's other guarantees are similarly enforceable.

The legislative history also shows that Congress intended for the Attorney General civil enforcement power in Section 10101 to "*supplement* existing law," which (as noted) had long provided for a private right of action already. H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1976 (emphasis added).

Indeed, the sitting Attorney General in 1957 assured Congress in his testimony in support of the legislation that the goal of enacting Section 10101 was "not taking away the right of the individual to start his own action," but that "private people will retain the right they have now to sue in their own name." *See Civil Rights Act of 1957: Hearings on S. 83 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong. at 67–73 (1957).

The case law also supports this analysis. The Eleventh Circuit is the only appellate court to fully analyze whether private plaintiffs can sue to enforce the Materiality Provision. *Schwier*, 340 F.3d at 1294–97. Numerous courts have adjudicated claims arising under Section 10101 on the merits; by contrast none have embraced the District Court's erroneous reasoning, which applied the wrong Supreme Court test and ignored the import of subsection 10101(d), the statutory structure, and key pieces of legislative history.

II.A. On the merits, the envelope-dating requirement violates the Materiality Provision. *See, e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (invalidating mail ballots due to omission of voters' year of birth on the outer envelope likely violated the Materiality Provision). The Board verified Plaintiff Voters' registration status and qualifications to vote when it received their mail ballot applications. Plaintiff Voters timely submitted their mail ballots, as evidenced by the Board's records and time stamps. The inclusion

or omission of a handwritten date on the return envelope neither changes nor impacts those critical facts. The fact that the Board followed official Pennsylvania Department of State guidance to count mail ballots bearing *any* date, including obviously incorrect ones like a decades-old birth date, highlights the requirement's immateriality. *See* JA 254–55, at 61:5–62:18.

II.B. The other legal arguments raised against the application of the Materiality Provision here cannot be squared with the statutory text. The Materiality Provision contains no language requiring racial animus or disparate impact. Inclusion of such language in *other* subsections of the act shows Congress knew how to create such a requirement but that it chose not to do so here. And the argument that the Materiality Provision applies only to voter registration is similarly refuted by the statute's text, which broadly protects "*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(a)(3)(A), 10101(e) (emphases added).

This Court should reverse and order that federal law requires the Board to count Plaintiff-Voters' ballots.

ARGUMENT

This Court reviews a district court's grant of summary judgment *de novo*, without any deference to the determinations made by the district court. *See, e.g.*, *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, 94 (3d Cir. 2009). This Court reviews *de novo* a district court's legal conclusions, such as the conclusion regarding whether or not a federal statute is enforceable by private parties. *See, e.g.*, *Acierno v. Cloutier*, 40 F.3d 597, 609 (3d Cir. 1994).

I. PLAINTIFF VOTERS CAN ENFORCE THE RIGHTS GUARANTEED TO THEM IN THE MATERIALITY PROVISION

The District Court erroneously held that private parties have no right of action to enforce the Materiality Provision. That conclusion is wrong in at least two ways. For one, the District Court mistakenly based its conclusion on *Alexander v. Sandoval*, 532 U.S. 275 (2001), which does not apply to the enforceability of federal laws under Section 1983. Plaintiff Voters sued under Section 1983 here. And under the proper analysis for Section 1983 claims, established by *Gonzaga University v. Doe*, 536 U.S. 273 (2002), Plaintiff Voters plainly can bring suit to enforce the individual rights guaranteed by the Materiality Provision. The District Court's application of the incorrect standard is legal error that warrants reversal.

Moreover, Plaintiff Voters would also have a direct right of action under the *Sandoval* framework. Section 10101's text, structure, and legislative history demonstrate that Congress intended to continue longstanding private enforcement of the statute's voting rights guarantees, which over nearly a century had yielded important court victories. The District Court's contrary conclusion that only the Attorney General can enforce the rights guaranteed in Section 10101 ignores key statutory text and legislative history and cannot be squared with Congress's overriding purpose in enacting the 1957 Civil Rights Act of *expanding* voting rights protections by *supplementing* existing law.

A. The Materiality Provision Is Privately Enforceable Via a Section 1983 Action

Plaintiff Voters brought their Materiality Provision claim under 42 U.S.C. § 1983 as well as 52 U.S.C. § 10101. Whether a statute is privately enforceable under Section 1983 and whether it is enforceable on its own via an implied right of action are separate, but partially overlapping inquiries. *See Gonzaga*, 536 U.S. at 283 ("[W]hether a statutory violation may be enforced through § 1983 'is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.'" (citation omitted)).

Both inquiries begin with a question that the District Court answered in the affirmative: "[W]hether Congress *intended to create a federal right*." *Gonzaga*, 536 U.S. at 283. But where a Plaintiff sues under Section 1983, the inquiry also

typically ends there. That makes good sense: Congress enacted Section 1983 as part of the Reconstruction-Era Enforcement Acts, updating a provision from the Civil Rights Act of 1866. *See Mitchum v. Foster*, 407 U.S. 225, 238 (1972). These foundational civil rights statutes were "part of the basic alteration in our federal system wrought in the Reconstruction era," and Section 1983 in particular "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* Section 1983 provides a right of action to sue for damages or equitable relief where a person has been "subjected … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983.

Thus, where Congress has passed a law securing an individual right, "the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284. A defendant can rebut that presumption, but only by "showing that Congress 'specifically foreclosed a remedy under § 1983.'" *Id.* at 284 n.4 (citation omitted). To do so, they must point either to "specific evidence from the statute itself," or else to "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*; *see also Blessing v. Freestone*, 520 U.S. 329, 341 (1997). In practice, once an individual right is established, the presumption is rarely rebutted. *Cf. Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (instances

where an individual right secured by federal law is not enforceable via Section 1983 are "exceptional cases").

Congress's intent to create a personal, individual right with Section 10101's Materiality Provision is clear here from the statute's text, which expressly refers to, and secures in mandatory terms, "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(B). Such language "imparts an individual entitlement with an 'unmistakable focus on the benefitted class.'" *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 526 (3d Cir. 2009) (quoting *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004)). Indeed, the Materiality Provision's mandatory language (*i.e.*, "No person … shall deny"), and clear focus on individual, personal rights (*i.e.*, "the right of any individual to vote") is strikingly similar to (and if anything, more explicit than) the rights-creating language in other statutes that the Supreme Court has held are privately enforceable. *See Gonzaga*, 536 U.S. at 284 & n.3 (language in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, mandating that "[*n*]*o person … shall* be subject to discrimination" in federally-supported programs indicates an individual right); *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) (text of Materiality Provision is "clearly analogous to the right-creating language cited by the Supreme Court in *Gonzaga*") (concluding that Materiality Provision creates individual right enforceable in Section 1983 action).

Because the Materiality Provision "confers an individual right, the right is presumptively enforceable." *Gonzaga*, 536 U.S. at 284. There is no basis to rebut the strong presumption of Section 1983 enforceability here. Section 10101's text does not preclude Section 1983 private enforcement. Indeed, as explained below, it expressly contemplates such enforcement—specifically in subsection 10101(d), which speaks of actions by a "party aggrieved," *i.e.*, by a private individual who has been denied the right to vote, and which addresses (and eliminates) the type of administrative exhaustion requirements that may hinder actions by private individuals. *See infra* at 27-28. Nor is there an all-encompassing remedial or regulatory scheme at play that makes Section 1983 private enforcement impossible.[4] *See, e.g.*, *Blessing*, 520 U.S. at 341. Just the opposite: As further explained below, when Congress enacted new provisions for Attorney General civil enforcement of the civil rights laws, now codified at subsection 10101(c), it understood that the substantive rights in subsection 10101(a) had already been enforceable and enforced for nearly a century by private individuals in Section

[4] To displace the possibility of a Section 1983 action, the remedial scheme crafted by Congress must be all-encompassing enough to demonstrate that Congress wanted all remedial activity to go through one channel. For example, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the Court held that Section 1983 actions to enforce federal anti-dumping rules were precluded where Congress had enacted a comprehensive permitting scheme, a system of penalties, and specific citizen-suit provisions to channel private actions. *Id.* at 20–21.

1983 suits, and it gave every indication that they would remain so. *See, e.g.*, *Schwier*, 340 F.3d at 1295; *see infra* at 31-37.

The District Court agreed, concluding correctly that "§ 10101 provides a personal right to Plaintiffs." JA 24. But the District Court then failed to apply *Gonzaga's* Section 1983 enforceability presumption, or to consider whether this was one of the few exceptions where a private, individual right secured by federal law cannot be enforced in a Section 1983 action. Instead, the court reasoned that demonstrating an individual right was "not the end of the inquiry" because "[a]s *Sandoval* made clear, a private right of action only lies where Congress intended to create not only a personal right but a *private remedy* as well." *Id.*

That was legal error. *Sandoval* applies where a plaintiff has *not* sought relief under Section 1983 and proceeds instead on a proffered implied right of action; it is in *that* context where a plaintiff must demonstrate that Congress intended "to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. By contrast, "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284. Under the applicable *Gonzaga* analysis, Plaintiff Voters can bring a Section 1983 action to enforce their rights under the Materiality Provision. That conclusion alone warrants reversal.

B. The Materiality Provision Is Enforceable Via an Implied Private Right of Action

Even if Plaintiff Voters had not sued under Section 1983, they could rely directly on Section 10101 to bring suit. The statutory text and structure, legislative history, and case law all support the conclusion that there is an independent right of action to sue directly under Section 10101. This Court can reverse on that ground as well.

Courts consider two factors in determining whether a federal law implies a private right of action. First (and as in the Section 1983 context), the court considers whether the statute's text and structure indicate that Congress intended to create an individual right. *See Sandoval*, 532 U.S. at 286; *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 301 (3d Cir. 2007). Second, and especially where an implied right of action is sought, the court considers the statute's text and structure, as well as legislative history, to determine whether Congress intended that there be a private remedy to enforce that right. *See Wisniewski*, 510 F.3d at 301; *accord Sandoval*, 532 U.S. at 286; *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004).

The first requirement was addressed above. *See supra* at 22. As to the second, all relevant sources, including text, structure, and legislative history, demonstrate that Congress contemplated private lawsuits to enforce violations of

Section 10101's substantive provisions, *i.e.*, that there would be a private remedy for violations of the right to vote guaranteed by the Materiality Provision.

Statutory Text. *First*, the statutory text indicates that Congress intended a private remedy. In addition to the expansive rights-creating language in the Materiality Provision itself, two other subsections of the statute discuss *who* may sue to enforce those rights. One subsection makes clear that private individuals may do so; the other provides for parallel enforcement by the Attorney General.

Subsection 10101(d) confers jurisdiction on the federal courts to preside over "proceedings instituted pursuant *to this section*," *i.e.*, pursuant to Section 10101. 52 U.S.C. § 10101(d) (emphasis added). It then directs that this jurisdiction shall be assumed "without regard to whether the *party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." *Id.* (emphasis added). This "party aggrieved" language evidences Congress's understanding that private individuals would enforce the substantive rights set forth in Section 10101, as they had before the 1957 Civil Rights Act added the Attorney General to the enforcement regime. *See, e.g.*, *Schwier*, 340 F.3d at 1296.

"Aggrieved parties" or "aggrieved persons" are a term of art, "universally understood to mean the persons whose rights are being violated, *not* the Attorney General." *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020) (citing *Schwier*, 340 F.3d at 1296), *rev'd and remanded on other grounds*,

860 F. App'x 874 (5th Cir. 2021) (emphasis added). Congress's use of this term of art indicates its intention to maintain a private remedy. *See, e.g.*, *Mitchell v. Cellone*, 389 F.3d 86, 90 & n.4 (3d Cir. 2004) (discussing Fair Housing Act, which accords right of action to "[a]n aggrieved person"); *Bowers v. NCAA*, 346 F.3d 402, 419 (3d Cir. 2003) (discussing implied private right of action under the Rehabilitation Act, which refers to the rights of "any person aggrieved"); *see also, e.g.*, *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 377-78 (4th Cir. 2001) (discussing Metropolitan Washington Airports Act affording separate rights of action to "any aggrieved party" and Attorney General).

Nor does the statutory reference to suits by a "party aggrieved" exist in a vacuum. Congress went further: It authorized district courts to entertain suits brought by "a party aggrieved" *whether or not* they have exhausted administrative remedies. 52 U.S.C. § 10101(d). The Attorney General is not typically required to exhaust administrative remedies before bringing a civil action in federal court. *See, e.g.*, *United States v. Tennessee*, 798 F. Supp. 483, 488 (W.D. Tenn. 1992) (holding that the Attorney General is not required to exhaust remedies under the Individuals with Disabilities Education Act and indeed is "*not authorized*" to access the administrative process in the first place). By contrast, exhaustion frequently applies as a jurisdictional bar to private litigants, like those Congress clearly meant to exempt from that requirement in the Materiality Provision. Indeed,

in the period before subsection 10101(d)'s enactment, federal courts had imposed just such an exhaustion requirement on individual plaintiffs seeking to enforce the voting rights guarantees of forerunner civil rights statutes. *See Peay v. Cox*, 190 F.3d 123 (5th Cir. 1951) (cited in H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1975–1976). The inclusion in the statute's plain text of subsection 10101(d)'s exhaustion-related language makes it especially clear that Congress contemplated private actions to remedy violations of the statute. *Accord Schwier*, 340 F.3d at 1296.

Additionally, subsection 10101(c), on which the District Court focused, provides that the Attorney General "may institute for the United States … a civil action or other proper proceeding for preventive relief" to enforce the substantive rights set forth in § 10101(a) and (b). That language—"may institute"—is not exclusive. Indeed, Congress often grants the Attorney General a right of action without indicating any intention to disallow private enforcement, especially in the civil rights and voting rights act contexts. *See, e.g.*, *Sandoval*, 532 U.S. at 279–80; *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *see also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252–59 (2009). And as the statutory text (including subsection 10101(d)) and other sources demonstrate, that is precisely what Congress did here, when it added Attorney General enforcement on top of

existing private enforcement of the substantive rights in subsection 10101(a).[5] *See Schwier*, 340 F.3d at 1296 (so holding).

Subsection 10101(c) was enacted as part of the Civil Rights Act of 1957—the same statute that added the "party aggrieved" and exhaustion-related language in subsection 10101(d)—in order to supplement existing enforcement of the civil rights laws. *See infra* at 31-37. Such parallel enforcement is indicated not just by the text of subsection 10101(d), but by subsections 10101(e) and (g). Those subsections, in setting forth certain special remedies (like intensive federal monitoring and the appointment of "voting referees"), state that they apply "[i]n any proceeding instituted pursuant to subsection (c)," 52 U.S.C. § 10101(e), or in a "proceeding instituted by the United States," 52 U.S.C. § 10101(g). But if Congress had intended that Attorney General civil actions pursuant to subsection 10101(c) would be the *exclusive* means of enforcing the statute, it could have referred simply to proceedings "pursuant to this section," which is the exact

[5] Consistent with that, Congress's description of the general relief available to the Attorney General in actions under Section 10101—namely "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order," 52 U.S.C. § 10101(c)—reflects what Congress understood to be the relief that was already available to individual plaintiffs. *See* H.R. Rep. No. 85-291, at 1977 (discussing availability of injunctive relief for private plaintiffs enforcing the substantive rights in Section 10101). However, Congress also understood that private plaintiffs could seek relief in damages. *See* H.R. Rep. No. 85-291, at 1977 (citing *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946)).

language it used in subsection 10101(d). Congress's decision to specify actions brought pursuant to the Attorney General's enforcement authority in some places, but to speak more expansively in others, strongly corroborates the conclusion that the statute contemplates parallel rights of action for both private parties and government enforcers. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each.").

The District Court's opinion discussed subsection 10101(c), but did not even mention subsection 10101(d), even though *Schwier* and other cases cited in Plaintiff Voters' papers relied on this provision. *See* JA 23–25; *see also id.* at JA 751–756. In addition to that significant oversight, the District Court also wrongly concluded that Sections 10101(e) and (g) suggest that the Attorney General is exclusively charged with enforcing Section 10101(a), JA 25, even though the language of those sections shows just the opposite.[6] *See supra* at 29-30.

[6] Because the right to impose "voting referees" and other forms of intensive monitoring to superintend a state's election process upon the showing of a pattern or practice violation *is* made exclusive to the Attorney General, the relevant statutory subsections are expressly restricted to actions brought by the Attorney General under subsection 10101(c). *See* 52 U.S.C. § 10101(e). (allowing for the invocation of federal election monitors in any "proceeding instituted pursuant to subsection (c)"); 52 U.S.C. § 10101(g) (providing that a three-judge panel will be convened in any "proceeding instituted by the United States … under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section"). But those provisions

Viewed correctly, and as a whole, the text of Section 10101, and especially subsection 10101(d), shows that Congress contemplated that aggrieved persons would bring private actions to vindicate their voting rights under the statute.

Statutory Structure. *Second*, statutory structure demonstrates that Congress intended in the 1957 Civil Rights Act to maintain the longstanding scheme of private enforcement of the civil rights laws and *add* a layer of federal enforcement by the Attorney General. *See Alli v. Decker*, 650 F.3d 1007, 1012 (3d Cir. 2011) ("[T]he text of a statute must be considered in the larger context or structure of the statute in which it is found."); *see also, e.g.*, *Russello*, 464 U.S. at 23 (considering the "evolution" of statutory provisions at issue in interpreting textual meaning).

Section 10101 (formerly 42 U.S.C. § 1971) was originally part of the civil rights laws passed by Congress in the Reconstruction Era. In particular, current Section 10101(a)(1), which provides that all citizens "who are otherwise qualified by law to vote … shall be entitled and allowed to vote … without distinction of race, color, or previous condition of servitude," was adopted as part of the

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have no bearing on the broader right of action to bring suit "pursuant to this section" contemplated in subsection 10101(d). Moreover, the legislative history surrounding those subsections also demonstrates that Congress contemplated that private individuals would separately bring suit to enforce the statute's voting rights guarantees. *See infra* at 35-36.

Enforcement Act of 1870. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140, 140–42 (1870).[7] Those original civil rights laws were always enforced by private parties, who could obtain damages and injunctive relief for violations of their civil rights. Indeed, "from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 [now codified as § 10101(a)(1)] under § 1983." *Schwier*, 340 F.3d at 1295. Such private actions included, for example, *Smith v. Allwright*, 321 U.S. 649 (1944), in which the Supreme Court struck down white primary laws in a suit brought under the Enforcement Acts. *Id.* at 658; *see also, e.g.*, *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 926 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947); *Brown v. Baskin*, 78 F. Supp. 933 (E.D. S.C. 1948); *Anderson v. Myers*, 182 F. 223 (C.C.D. Md. 1910), *aff'd*, 238 U.S. 368 (1915).

In 1957, Congress codified that original voting rights statute from the Enforcement Act as what is now subsection 10101(a). It then added several new provisions: subsection 10101(b), a new prohibition against voter intimidation; subsection 10101(c), which for the first time granted the Attorney General the authority to bring civil actions to enforce the civil rights laws (and in particular the

[7] The only change from the original 1870 statute was the deletion of "or shall be" from "citizens from the United States who are *or shall be* otherwise qualified by law to vote." *Compare* Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, *with* R.S. § 2004 (1878), *and* 52 U.S.C. § 10101(a)(1).

substantive voting rights guarantees in subsections 10101(a) and (b)); and subsection 10101(d), which confirmed the federal courts' jurisdiction in all actions brought "pursuant to this section" and provided that such jurisdiction should be exercised "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(c), (d); *see* Pub. L. No. 85-315, § 131, 71 Stat. 637 (1957). In 1964, Congress added the Materiality Provision to subsection 10101(a), alongside the original voting rights statute from the 1870 Enforcement Act. Pub. L. No. 88-352, § 101, 78 Stat. 241 (1964).

When Congress formulated the Civil Rights Act of 1957, it knew that the rights placed in subsection (a) had long been privately enforceable and had a private remedy. Congress constructed Section 10101 with the privately-enforced voting rights guarantee from the 1870 Enforcement Act as its keystone. It then added additional substantive voting rights guarantees to subsection (a) in 1957 and again in 1964 (including the Materiality Provision). And it also added a new Attorney General right of action in subsection 10101(c) on top of this existing scheme of private enforcement, as further means to enforce important rights. In addition to the text itself, the way Congress built the statute—around a substantive right that had been privately enforced for almost a century—shows that it intended for private enforcement and Attorney General enforcement to coexist.

Legislative History. *Third*, the legislative history strongly corroborates the foregoing textual and structural analysis. Eliminating an existing enforcement mechanism would be inconsistent with the Act's overall purpose, which was to expand voting-rights protections.

In enacting the 1957 Act, Congress sought to "*supplement* existing law," and "to provide means of *further securing and protecting* the civil rights of persons within the jurisdiction of the United States." H.R. Rep. No. 85-291, at 1976 (emphasis added). Because one of the 1957 statute's main innovations was creating and empowering a new Assistant Attorney General for Civil Rights, the legislative history extensively addressed the value of federal enforcement by the Department of Justice. But the legislative history also acknowledged that the "existing law" this new civil enforcer would "supplement" was a system of private enforcement by individuals. That included Section 1983, under which money damages and injunctive relief were available for violations of the very substantive rights that Congress was placing in subsection 10101(a). *See id.* at 1977 (explaining that "Section 1983 … has been used to enforce the rights … as contained in section 1971 [now codified at 52 U.S.C. § 10101]" and noting the remedies available to private enforcers). Indeed, the legislative history expressly acknowledges that between the statute's Reconstruction-Era origins and its 1957 amendment, private plaintiffs filed numerous lawsuits to enforce Section 10101's

guarantees and protect their right to vote. *See id.* at 1977; *see supra* at 32 (collecting cases).

Discussion in the legislative history regarding the jurisdictional provision in subsection 10101(d) further supports Congress's intent to retain private enforcement. The House Report states that this provision was designed to "change existing laws," referring to circuit court decisions requiring that private voting rights plaintiffs exhaust administrative remedies. *See* H.R. Rep. No. 85-291, at 1975–1976; *see also id.* ("[A] waiver of the doctrine of exhaustion of state administrative remedies is necessary in civil-rights cases …. where the action complained of can result in a deprivation of *the individual's right to vote*." (emphasis added)). The House Report goes on to explain that subsection 10101(d) was meant to ensure that federal jurisdiction exists in civil rights cases "regardless of whether or not *the party thereto* shall have any administrative or other remedies provided by law." H.R. Rep. No. 85-291, at 1976. This language—showing Congress's concern that a "party" in a civil rights case might face administrative exhaustion requirements that typically apply to individuals—confirms that Congress contemplated a private remedy and understood that Attorney General

enforcement would supplement a longstanding private right of action, not displace it.[8] *See Schwier*, 340 F.3d at 1296.

The legislative history speaks with one voice. And it directly refutes the District Court's assertion that Congress "did not remark on the topic of private citizen suits" in the legislative history, JA 27. The District Court also selectively relied on a written statement in the legislative history from then-Attorney General Brownell that "[c]ivil remedies have not been available to the Attorney General in this field," *id*. Those remarks about the enforcement powers *of the Attorney General* are irrelevant to whether private individuals could and did independently enforce the statute. Meanwhile, the District Court ignored directly relevant testimony from Attorney General Brownell on the subject of private rights of action. On that score, the Attorney General could not have been clearer. He affirmed his view that the 1957 Act would "not tak[e] away the right of the individual to start his own action ... Under the laws amended if this program

[8] The legislative history from the 1964 Civil Rights Act, which modified the 1957 Act and added the Materiality Provision to subsection (a), similarly shows that Congress contemplated private lawsuits to remedy violations of the voting rights provided in the statute. In discussing a forerunner to the three-judge panel provision in subsection 10101(g), the House Report for the 1964 Act referred to "voting suits brought under the Civil Rights Acts of 1957 and 1960 in which the United States or the Attorney General is plaintiff." H.R. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2395. There would be no need to specify the plaintiff in voting suits under what is now Section 10101 unless private plaintiffs also enforced the rights guaranteed by that statute.

passes, private people will retain the right they have now to sue in their own name." *See Civil Rights Act of 1957: Hearings on S. 83 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., at 67–73 (1957); *accord id.* at 59–61; *see also id.* at 203 (noting that the Department of Justice "drafted the legislation").

In sum, the legislative history shows that Congress sought to supplement, not supplant, existing private remedies with federal civil enforcement. *Schwier*, 340 F.3d at 1295. It would make little sense for Congress to take away an existing, longstanding, and highly effective private right of action to protect the right to vote as a means of "supplement[ing] existing law." And it would make even less sense for it to do so tacitly. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored."). The legislative record strongly supports the opposite conclusion: that both Congress and the Administration, represented by the Attorney General, intended that private litigants *and* the Justice Department could vindicate the voting rights guarantees in Section 10101.

Case Law. *Finally*, case law also supports the conclusion that the statute provides a private remedy and a private right of action. The Eleventh Circuit is the only federal appeals court to comprehensively address the private right of action issue. In *Schwier,* the court carefully examined the statute and the legislative

history and held that Congress intended to maintain the pre-existing, longstanding private right of action. *See* 340 F.3d at 1295–96.

The District Court's summary-judgment decision mistakenly concluded that *Schwier* "only undertook half of the *Sandoval* analysis." *See* JA 29. That criticism highlights the District Court's failure to apply or appreciate *Gonzaga.* In fact, the court in *Schwier* cited both *Gonzaga* and *Sandoval*, correctly emphasizing that, in the Section 1983 context, *Gonzaga* is the key framework. 340 F.3d at 1296–97. But *Schwier* nevertheless did apply both elements of the *Sandoval* test, determining that the Materiality Provision creates a private right, *and* that Congress, in light of the statutory text and the legislative history, intended a private remedy for the violation of the rights set forth in subsection § 10101(a). *See Schwier*, 340 F.3d at 1295–97.

In *Schwier,* the Eleventh Circuit essentially *started* with the second *Sandoval* factor, analyzing both the statutory text and the extensive history of private enforcement with respect to former 42 U.S.C. § 1971 and concluding that Congress in 1957 did not intend to "withdraw existing protection" by canceling such private enforcement. 340 F.3d at 1295–1296. Having determined based on text, context, and legislative history that Congress intended to maintain private enforcement of the rights in Section 10101, the court in *Schwier then* considered the first *Sandoval* factor (*i.e.*, the nature of the right contemplated by the Materiality Provision),

concluding (as the District Court here did) that the Materiality Provision provides an individual, personal right. *Id.* at 1296–97.

Nor is *Schwier* alone. Other courts recently have addressed the issue and held that there is a private right of action to enforce the Materiality Provision. *See, e.g.*, *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Hughs*, 474 F. Supp. 3d at 859. Many other courts have adjudicated the merits of materiality claims brought by voters. *See, e.g.*, *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.*, Case No. SACV 12-00927, 2012 WL 3239903, *5 n.3 (C.D. Cal. Aug. 7, 2012); *Common Cause Ga. v. Billups*, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005). In contrast, the few courts that have held that there is no private right of action, like the Sixth Circuit, have done so with virtually no analysis at all (let alone the type of analysis required under *Gonzaga* or *Sandoval*). *See, e.g.*, *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (stating, without elaboration, that "Section 1971 is enforceable by the Attorney General, not by private citizens."); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (stating that *McKay* "binds this panel"), *cert. denied*, 137 S. Ct. 2265 (2017). And no court

has ever embraced the analysis that Defendants urged below, and that the District Court erroneously adopted here.

At bottom, the District Court's ruling that the Materiality Provision can never be enforced by private plaintiffs cannot be squared with Section 10101's text, structure, or history—let alone with Congress's manifest purpose of expanding voting rights enforcement. This Court should reverse.

II. THE ENVELOPE-DATING REQUIREMENT VIOLATES THE MATERIALITY PROVISION

A. Denying the Right to Vote Based on an Inconsequential Envelope-Dating Requirement Violates the Materiality Provision

The Materiality Provision prohibits state and local governments from denying the right to vote based on an "error or omission" on a "record or paper" related 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). Its essential purpose is to prevent states from "requiring unnecessary information," the omission of which negates a person's right to vote. *Schwier*, 340 F. 3d at 1294; *see also, e.g.*, *Thurston*, 2021 WL 5312640, at *4 (Materiality Provision prohibits "state election practices that increase the number of errors or omissions on papers or records related to voting and provide an excuse to disenfranchise otherwise qualified voters").

Courts have repeatedly held that denying the right to vote for failure to provide extraneous or duplicative information violates the Materiality Provision. For example, in *Martin v. Crittenden*, a Georgia federal court held that plaintiffs were likely to show that the rejection of their mail ballots, based on their omission of their year of birth on the outer envelope, violated the Materiality Provision. 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018). *See also Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, No. 1:21-CV-01284-JPB, 2021 WL 6495360, at *14 (N.D. Ga. Dec. 9, 2021) (denying motion to dismiss in Materiality challenge to state law requiring correct date of birth on absentee ballots). Similarly, in *Thurston*, a district court denied a motion to dismiss where voters challenged under the Materiality Provision a state law requiring absentee voters to submit duplicative proofs of name, address, date of birth, and registration status when applying for ballots, and then again when casting them. 2021 WL 5312640, at *4. And in *Ford v. Tennessee Senate*, a district court granted declaratory relief that the Materiality Provision precluded a requirement that voters sign both a ballot and a poll book in order to vote. No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006).

In the voter registration context, courts have similarly held that various "matching statutes" involving voters' social security numbers or state-issued identification numbers also violate the Materiality Provision because the numbers

at issue were extraneous to a voter's qualification to vote under state law. *See Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *see also Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006).

Here, the provision of state law under which Plaintiff Voters will be denied their right to vote directs that a voter handwrite the date on the envelope containing their mail ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a); *see also Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 WL 16577, at *10 (Pa. Commw. Ct. Jan. 3, 2022). That is precisely the type of duplicative or extraneous submission that "is not material in determining whether such individual is qualified under State law to vote in such election" and therefore cannot be used to disenfranchise an otherwise qualified voter. 52 U.S.C. § 10101(a)(2)(B).

To be qualified to vote under Pennsylvania law, a person must be a U.S. citizen and Pennsylvania resident over the age of 18, and must reside in the election district in which the person seeks to vote. 25 Pa. C.S. § 1301.

Here, it is undisputed that Plaintiff Voters were qualified, eligible, and registered to vote in Lehigh County when they signed their mail-in ballot envelopes and submitted their votes. Consistent with state law, their registration status and qualifications were verified by the Board when they applied for a mail ballot in the first place. JA 165–66, at ¶ 3. It is also undisputed that the ballot

envelopes containing Plaintiff Voters' mail ballots were signed by Plaintiff Voters and that those ballots were timely received and so marked with a confirming date by the Board. JA 169, at ¶ 26; JA 449–458. In fact, State law provides that mail ballots *must* be received by the close of the polls on Election Day, *see* 25 Pa. C.S. § 1306-D(c), and thus the date the ballot was received controls whether the ballot is considered timely, while the date handwritten on the envelope it came in is irrelevant.[9]

Indeed, the irrelevance of the date written on the envelope is highlighted by the fact that in this election the Board counted ballots where voters had written obviously incorrect dates on the envelope—for example, a voter's birthday *from 1960*. *See* JA 254–255, at 61:5–62:18. Under this view of state law, if *any* date (or even a string of numbers that looks like a date) is written on the outer envelope, the ballot will be counted, but if there is none, the ballot is invalidated. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) (directing the voter to "date and sign" the envelope); *see*

[9] For this reason, the District Court's suggestion that the envelope-dating requirement might be a "guard against fraud" because where "the outer envelope remains undated, … individuals who come in contact with that outer envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed," JA 32, makes no sense. If the ballot was timely received, it is so marked and considered timely; even if it were plausible that those canvassing mail ballots would attempt to do so (a prospect that it is difficult to imagine the Board endorsing), backdating the envelope would not change when the ballot was received and thus could not render a untimely received ballot timely or vice versa.

also JA 192 (Department of State guidance that "there is no basis to reject a ballot for putting the 'wrong' date on the envelope").

On those undisputed facts, whether or not Plaintiff Voters wrote some date on their signed, timely-received mail ballot envelopes is immaterial in determining whether they are qualified to vote. The envelope date has no bearing on Plaintiff Voters' age or residency (*i.e.*, the qualifications to vote set by state law), because those qualifications were confirmed when they initially applied for a mail ballot.[10] It has no bearing on whether their ballots were timely, because that question is controlled by when the Board received the ballots. Conditioning Plaintiff Voters' right to vote on an extraneous envelope marking that has no possible bearing on Plaintiff Voters' qualifications or the timeliness of their ballots is unlawful under the Materiality Provision. *See Martin*, 347 F. Supp. 3d. at 1309 (granting relief and explaining that "the qualifications of the absentee voters" were "not at issue because [county] elections officials have already confirmed such voters' eligibility through the absentee ballot application process").

[10] Moreover, if a county board of elections for some reason needed to reconfirm a voter's eligibility as of the time their vote is submitted, the relevant date for doing so would be Election Day, not whatever date they signed the outer envelope containing their mail ballot. *See* Pa. Const. art. VIII, § 1; 25 P.S. §§ 1301(a), 2811.

Those with authority to interpret and enforce state law agree. The Commonwealth, speaking through the Attorney General's Office, advised the District Court that "[t]he date written on an absentee or mail-in ballot's return envelope is immaterial to determining the voter's eligibility under Pennsylvania Law."[11] JA 653. Consistent with that, the Pennsylvania Department of State—the Commonwealth agency with statutory authority to prescribe the form and content of the absentee and mail-in voting envelopes, *see* 25 Pa. C.S. §§ 3146.4, 3150.14(b)—instructed county boards of election in 2021 that "the date written" on the envelope is not "used to determine the eligibility of the voter." JA 192. A majority of the Pennsylvania Supreme Court similarly suggested, though it did not decide, that enforcing the envelope-dating requirement would run afoul of federal law.[12]

The Board initially agreed that Plaintiff Voters' ballots should be counted despite the missing date, unanimously voting to count Plaintiff Voters' and the

[11] The Attorney General's Office is one of two Commonwealth agencies with delegated authority over key aspects of election administration in Pennsylvania. The Attorney General has enforcement authority for violations of the Election Code under 25 P.S. § 3555 and 25 Pa. C.S. § 1801, and the Secretary of the Commonwealth has authority for developing procedures for registering voters and determining eligibility under 25 Pa. C.S. § 1327.

[12] *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting).

other 252 undated ballots (in addition to ballots with obviously incorrect dates). *See* JA 169–170, ¶¶ 30-34. The Board defended its position against Ritter's state-court challenge by arguing that the envelope-dating requirement was irrelevant because Plaintiff Voters were qualified and had timely submitted their ballots. The Board argued that "the failure to include a date (or the improper placement of the date) on the elector's declaration on the outside envelope should not result in the disenfranchisement of hundreds of otherwise duly qualified electors where, as here: (1) there is no evidence of fraud; (2) there is no dispute the electors at issue were qualified to vote and otherwise expressed their intent to cast the mail-in ballots; and (3) there is no dispute the mail-in ballots were timely received." JA 782. The undisputed facts have not changed, and the Board's initial reasoning remains correct.

If writing the *wrong date* on the envelope is acceptable for purposes of counting a voter's ballot, then the envelope-dating requirement cannot possibly be material.[13] Federal law requires that Plaintiff Voters' timely received mail ballots be counted.

[13] The cases cited by Defendants in the District Court demonstrate only that an error or omission that *does* implicate the actual qualifications to vote under state law (unlike the envelope-dating rule at issue here) may be material and thus pass muster under the Materiality Provision. For example, *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), involved questions on the voter registration application that tracked the specific voter eligibility criteria under Florida law (citizenship,

B. The Materiality Provision Applies to All Denials of the Right to Vote

Defendant-Intervenor Ritter's alternative legal arguments for constraining the Materiality Provision, raised in their response to Plaintiff Voters' motion for injunction pending appeal, also lack merit.

i. The Materiality Provision by Its Terms Applies Without Regard to Racial Discrimination

Ritter misreads the statute to argue that the Materiality Provision only combats state election laws that discriminate based on race. *See* Ritter Opp. to Emergency Mot. at 10-12 (Dkt. No. 11-1). But when a court interprets the meaning of an unambiguous statute, its "inquiry begins with the statutory text, and ends there as well." *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citations omitted). Simply put, the relevant statutory text is unambiguous: Nothing in the Materiality Provision's language mentions race or racial animus. *See* 52 U.S.C. § 10101(a)(2)(B). Rather, the statute specifies that the right to vote may not be denied "because of an error or omission … if such error or omission is not material in determining" a voter's qualifications." *Id.* Lacking any basis in the

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absence of felony convictions and mental competence). *Id.* at 1213. And *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2021 WL 5833971 (W.D. Wis. Dec. 9, 2021) involved identification requirements for voter registration that Wisconsin law specifically made prerequisite to determining voter qualifications. *Id.* at *3–4. Here, by contrast, it is undisputed that Plaintiff Voters are qualified to vote notwithstanding the envelope-dating requirement.

statutory text, Ritter's proposed limitation on the Materiality Provision's scope is foreclosed.

Nor does the fact that *other* parts of Section 10101 *do* mention race and racial animus support Ritter's position. Quite the opposite: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *E.g.*, *Russello*, 464 U.S. at 23 (citations omitted); *see also, e.g.*, *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 107 (3d Cir. 2018). Here, Congress expressly prohibited denial of the right to vote on the basis of "race, color, or previous condition of servitude" in subsection 10101(a)(1). *See* 52 U.S.C. § 10101(a)(1). In the Materiality Provision, it prohibited vote denial on a different basis. Congress knew precisely how to make racial discrimination an element of a statutory violation, and did so with respect to subsection (a)(1), but not the Materiality Provision. Defendants' proposed limitation on the Materiality Provision would defy the text as Congress wrote it.[14]

[14] Defendants' reliance on Section 10101's title also does them no good. For one, "[t]he title of a statute ... cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). And, while the statute's multi-part title does refer to "[r]ace, color, or previous condition," it *also* references "uniform standards for voting qualifications," "errors or omissions from papers," and "literacy tests," with each piece separated by a semicolon. Each part of the

To be sure, when Congress added the Materiality Provision to Section 10101 in 1964—at the height of the Civil Rights Movement—it clearly had in mind the ongoing disenfranchisement of Black voters in the Jim Crow South. But as the Eleventh Circuit explained when it rejected the same argument Ritter raises here, "in combating specific evils," Congress may nevertheless "choose a broader remedy." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008); *cf. Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (Black, J.) (announcing judgment upholding nationwide ban on literacy tests containing no animus requirement); *id.* at 147–150 (Douglas, J., concurring in part and dissenting in part) ("The relevance of the means which Congress adopts to the condition sought to be remedied, the degree of their necessity, and the extent of their efficacy are all matters for Congress.").

That is what Congress did with the Materiality Provision: It chose a broad-based remedy to protect the right to vote. *Browning*, 522 F.3d at 1173; *see also Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2021 WL 5833971, at *3 (W.D. Wis. Dec. 9, 2021) (noting that "the text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration" and accordingly concluding that

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section title corresponds with a distinct subsection to Section 10101, with "errors and omissions from papers" corresponding to the Materiality Provision, and "race, color or previous condition not to affect right to vote" corresponding with subsection (a)(1).

"§ 10101(a)(2)(B) is not direct[ed] solely to cases of dirty tricks motivated by race discrimination"). Consistent with the statute's plain text, courts have repeatedly adjudicated and enforced the Materiality Provision's guarantees against duplicative or extraneous requirements imposed on voters without regard to race or racial animus. *See Schwier*, 412 F. Supp. at 1276; *Martin*, 347 F. Supp. 3d at 1308–09 (holding that requirement to write birth year on ballot envelope likely violated the Materiality Provision without mentioning racial discrimination); *see also*, *e.g.*, *Thurston*, 2021 WL 5312640, at *4 (permitting Materiality Provision claim to proceed without requiring allegation of racial discrimination); *Ford*, 2006 WL 8435145 at *11 (finding violation of Materiality Provision based on vote denial for failure to sign poll book without discussion of racial discrimination); *Reed*, 492 F. Supp. 2d at 1270-1271 (finding likely violation of Materiality Provision based on denial of voter registration due to lack of ID number match without discussion of racial discrimination).[15] The Court should reject Defendants' misreading of the

[15] Ritter relied mainly on outlier cases decided in the 1970s that incorrectly read a racial animus requirement into *every* subsection of Section 10101. *See* Dkt. No. 11-1 at 13–14 (citing *Ballas v. Symm*, 351 F. Supp. 876 (S.D. Tex. 1972), *aff'd* 494 F.2d 1167 (5th Cir. 1974); *Malinou v. Bd. of Elections*, 271 A.2d 798 (R.I. 1970)). And while *Indiana Democratic Party v. Rokita* was decided somewhat more recently, its reasoning relies exclusively on cases decided before 1981, and similarly discussed only the general goal of § 10101 to eradicate racial discrimination in voting, without addressing the text of subsection (a)(2)(B) in particular. 458 F. Supp. 2d 775, 839 & n.106 (S.D. Ind. 2006).

Materiality Provision, which would restrict the statute's protections in a manner that Congress manifestly did not intend.

ii. The Materiality Provision Applies to Any Immaterial Denial of the Right to Cast an Effective Vote.

Intervenor Defendant-Appellee Ritter is similarly wrong to claim that the Materiality Provision "applies exclusively to voter registration laws." Ritter Opp. to Emergency Mot. at 15, Dkt. No. 11-1. Here again, that limitation lacks any basis in the statutory text.

The Materiality Provision prohibits denial of the right to vote based on immaterial "error[s] or omission[s] on any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Limiting the provision's scope to records or papers relating to "registration," which is just one of the categories that is expressly listed in the statute, would render the other listed categories (including the broad term "or other act requisite to voting") a dead letter. *See Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) ("In interpreting a statute, courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous."); *accord Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008).

And if there were any doubt, Congress also included in the statute an expansive definition of the term "vote" as including "*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 and included in the appropriate totals of votes cast* with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. §§ 10101(a)(3)(A), 10101(e) (emphases added).

In light of that clear statutory language, courts have repeatedly concluded that the Materiality provision "by definition includes not only the registration and eligibility to vote, but also the right to have that vote counted" and "prohibits officials from disqualifying votes for immaterial errors and omissions." *Ford*, 2006 WL 8435145, at *11; *see Thomsen*, 2021 WL 5833971 at *3 ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration."); *see also, e.g.*, *Martin*, 347 F. Supp. 3d 1302 (challenging disqualification based on failure to provide birth year on returned mail ballot envelopes); *Thurston*, 2021 WL 5312640 (challenging disqualification based on absentee voters' failure to provide duplicative name, address, and date of birth with absentee ballots). Moreover, the Department of Justice, which has non-exclusive statutory authority to institute civil actions for violations of the Materiality Provision, agrees: The DOJ Manual states that the Materiality Provision "prohibits any person acting

under color of law from denying eligible persons the right to vote or failing *or refusing to count their votes*." U.S. Dep't of Justice, Justice Manual § 8-2.271 (2018) (emphasis added).

Here, the state-issued envelope that a voter uses to return mail ballots is undoubtedly a "record or paper" relating to an action (mailing in their mail ballots) that voters like Plaintiff Voters must take to have their votes counted. 52 U.S.C. § 10101(a)(2)(B). Accordingly, the Materiality Provision applies.[16] Because denying Plaintiff Voters their right to vote for failing to write an inconsequential date on that envelope violates the Materiality Provision, this Court should reverse and Plaintiff Voters' timely-received mail ballots should be counted.

CONCLUSION

The District Court should be reversed, judgment granted for Appellants Plaintiff Voters, and a permanent injunction entered to enjoin the Lehigh County Board of Elections from certifying the outstanding election results without

[16] *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004) is inapposite. As the Commonwealth of Pennsylvania has pointed out, JA 664-665, the district court in that case reasoned that a voter's attempt to vote after the deadline was not an error made on a "record or paper" requisite to voting. *Friedman*, 345 F. Supp. 2d at 1371–72. Here, there can be no doubt that the failure to handwrite a date on a government-issued mail ballot envelope is the type of error or omission on a record or paper covered by the plain statutory language.

canvassing those mail ballots that have been set aside solely because the outer return envelope does not include a date.

Respectfully submitted,

Dated: March 29, 2022

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CERTIFICATIONS

At least one of the attorneys whose name appears on this brief is a member of the bar of this Court, or has filed an application for admission pursuant to L.A.R. 46.1.

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,757 words.

The text of this electronic brief is identical to the text in paper copies that will be filed with the Court.

Dated: March 29, 2022

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