No. 21A772

In the
Supreme Court of the United States

DAVID RITTER,

Applicant,

v.

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

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR A STAY

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the U.S. Supreme Court and
Circuit Justice for the Third Circuit

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INTRODUCTION

The Lehigh County Board of Elections voted unanimously in November 2021 to count the ballots at issue here—257 ballots cast by Republicans and Democrats alike, which all parties agree: (1) were timely received and date-stamped by election officials, (2) were cast by eligible, registered voters, whose qualifications were verified by the Board, and (3) do not implicate any fraud concerns.

Candidate David Ritter, the applicant here, brought post-election litigation in state court to disrupt that status quo. He succeeded in preventing the tabulation of the ballots based on the voters' inadvertent omission of a handwritten date on the outer return envelope containing the ballots. That handwritten date plays no part in assessing the voters' eligibility to vote or the timeliness of their ballots, which were date-stamped when received and were timely because they were received by 8 p.m. on Election Day. The handwritten date is so inconsequential that the Board of Elections accepted ballots where voters wrote *any date whatsoever* on the return envelope, even dates from decades ago. The county clerk affirmed he would have accepted envelope dates *from the future*. Yet voters who mistakenly omitted the envelope date were disenfranchised.

On those undisputed facts, a unanimous Third Circuit panel ordered the ballots counted pursuant to the Civil Rights Act's Materiality Provision, 52 U.S.C.

§ 10101(a)(2)(B), the very result predicted by a majority of the Pennsylvania Supreme Court when it considered the envelope-dating rule in 2020. The Third Circuit's decision thereby restored the Board's initial decision to count the disputed ballots. This Court should preserve that status quo and deny the application for a stay.

Only Candidate-Intervenor Ritter disagrees with the result here. The Board of Elections, the actual defendant in this case, is not seeking certiorari and has not joined or supported this application for a stay. Ritter's standing to even pursue a further appeal is thus questionable at best. There is no split on the merits, and no serious dispute that 42 U.S.C. § 1983 affords voters a right to sue. At the end of the day, the decision below involves the routine application of a federal statute to a single local election, requiring the counting of 257 votes by voters who were unquestionably eligible to vote and whose votes were concededly received in a timely manner. And because it is undisputed that the contents of the handwritten return envelope date did not matter in this election, such that any string of numbers in the form of a date, even an *obviously incorrect one*, was accepted, this case raises no important federal issue. There can be no real dispute that the omission of a voter-written date is immaterial when the accuracy of the date does not matter. Appx. 19a (Matey, J., concurring) (defendants' concession that the accuracy of the date did not matter left "little room" to defend the case). On these facts, there is no likelihood that the Court will grant review, much less reverse.

Nor can Ritter meet the other stay requirements. His purported harm is speculative, as he cannot show that counting the additional votes will change the result. So is the suggestion that the decision here might affect other elections. And on the ostensible application of *Purcell* principles, Ritter identifies no burden at all on state or county actors, and fails even to acknowledge that *he is the one who initiated post-election litigation in the first place*. It was Ritter who sued the Board of Elections after it had voted unanimously in November 2021 to count the ballots at issue here, touching off months of delay and altering the status quo. The Third Circuit's decision restores the pre-litigation status quo, and denying a stay will preserve it, allowing this election to be concluded with every valid vote by every qualified voter counted.

STATEMENT

This case involves the disenfranchisement of 257 Lehigh County voters due to a trivial paperwork mistake on the return envelopes containing their mail ballots.[1] The ballots at issue were excluded based on a direction in state law that mail-ballot voters "fill out, date and sign" a form declaration on the outer envelope used to return mail ballots (the "Return Envelope"). Plaintiff Voters, all indisputably eligible and

[1] For ease of reference, the term "mail ballots" is used herein to encompass both absentee and mail ballots. As noted below, the relevant rules governing the treatment of absentee and mail ballots are identical.

registered to vote, signed the Return Envelopes and timely returned their ballots, which were then date-stamped by election officials. But the Plaintiffs omitted a handwritten date on the Return Envelopes containing their ballots, leading those ballots to be set aside. In contrast, voters who wrote a date in the wrong place on the Return Envelope, or wrote a date that was clearly incorrect, had their ballots counted. Any string of numbers was accepted, without regard to its accuracy.

A unanimous Third Circuit panel concluded that disenfranchising voters for failure to handwrite a date whose content did not matter violates the Materiality Provision of the Civil Rights Act, which prohibits denying "the right of any individual to vote in any election" 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). Appx. 7a-17a; Appx. 18a-20a (Matey, J., concurring).

1. Pennsylvania's Mail Ballot Process.

Pennsylvania has long provided absentee-ballot options for voters who cannot attend a polling place on election day. *See* 25 P.S. § 3146.1–3146.9. In 2019, Pennsylvania enacted new mail-in voting provisions, which allow all registered, eligible voters to vote by mail. Act of Oct 31, 2019, P.L. 552, No. 77, § 8.

A voter seeking to vote absentee or by mail ballot must complete an application and provide their name, registration address, and proof of identification to their

county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identification 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). As part of the application process, voters provide all the information necessary to verify that they are qualified to vote in Pennsylvania—namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not incarcerated on a felony conviction. 25 Pa. C.S. § 1301; *see* CA3 Dkt.33-2, JA 180–182 (mail ballot application).

After the application is submitted, 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. 25 P.S §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).[2] The county board's determinations on that score are conclusive unless challenged prior to Election Day. *Id.* Once the county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer Return Envelope, on which a voter declaration form is printed. *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by the

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

county show which voters have requested mail ballots. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

At "any time" after receiving their materials, the mail-ballot voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The voter delivers the ballot, in the requisite envelopes, by mail or in person to their county elections board. To be considered timely, a ballot must be received by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Statewide Uniform Registry of Electors ("SURE") system, the voter registration system used to generate poll books.[3]

This case involves the instructions regarding the Return Envelope in which a voter places their mail ballot, in particular the direction that a voter "shall … fill out, date and sign the declaration printed on such envelope." *See* 25 P.S. §§ 3146.6(a), 3150.16(a); *see also* CA3 Dkt.33-2, JA 130.[4] It is undisputed that Plaintiff Voters followed all of the above requirements—they signed the declarations on their Return

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[3] See Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* at 2-3 (Sept. 11, 2020).

[4] Ritter's stay application includes, on page 3, an image of a mail ballot envelope from a different election, namely the one from 2020. The one used in this election is reproduced in the record at CA3 Dkt.33-2, JA 187.

Envelopes, and the Lehigh County Board of Elections (the "Board") date-stamped those envelopes confirming their timeliness—except that they did not add a superfluous handwritten date next to their signatures.

This envelope-dating provision was the subject of state-court litigation during the 2020 election cycle. There, the Pennsylvania Supreme Court concluded that mail ballots contained in signed but undated Return Envelopes would be counted. *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020). One of the four Justices in the majority, Justice Wecht, concurred separately, writing that he viewed the "shall … date" language in the Election Code as mandatory and thus a potential basis for voters to be disqualified, but that he would only apply that rule prospectively, in circumstances where voters were given "adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere to those requirements." *Id.* at 1089 (Wecht, J., concurring and dissenting) (internal quotation marks omitted).

A majority of the Justices also suggested, albeit without deciding, that invalidating votes for failure to comply with the envelope-dating provision "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons." *In re Canvass*, 241 A.3d 1058 at 1074 n.5 (opinion announcing the judgment for three Justices); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting) (expressing similar concern). Justice Wecht was so concerned that he urged the Pennsylvania

General Assembly to review the Election Code with "[the Materiality Provision] in mind." *Id.*[5]

Since the Pennsylvania Supreme Court's 2020 ruling counting timely-received mail ballots contained in signed but undated Return Envelopes, the Pennsylvania Department of State has also issued administrative guidance on the envelope-dating requirement. In the run-up to the 2021 elections at issue here, the Commonwealth instructed county boards of elections that ballots in undated Return Envelopes should not be counted but 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*." CA3 Dkt.33-2, JA 192 (emphasis added).

Consistent with that guidance, in the election at issue here, the Board counted ballots where the Return Envelopes had plainly wrong dates on them—where, for

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[5] The remaining three Justices, in dissent, separately attempted to articulate purposes that might be served by the envelope-dating rule, such as preventing supposed "back-dating" or "ensuring the elector completed the ballot within the proper time frame." *See In re Canvass*, 241 A.3d at 1091 (Dougherty, J., concurring and dissenting) (cited in Stay App. at 3-4). However, none of those suggested purposes were embraced by the majority. Indeed, because a ballot's timeliness under Pennsylvania law is determined by when it was received and stamped by the county board of elections, 25 P.S. §§ 3146.6(c), 3150.16(c), "back-dating" the envelope has no conceivable effect on whether a ballot is considered timely. *Accord* Appx. 16a ("Upon receipt, the [Board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless."). Nor does the envelope date "ensur[e] the elector completed the ballot within the proper time frame," because under state law, the proper time frame is "any time" between when a voter receives the ballot and 8 p.m. on Election Day, 25 P.S. §§ 3146.6(a), 3150.16(a).

example, a voter wrote their own birthdate instead of the date they signed the envelope. CA3 Dkt.33-2, JA 254–255. The county clerk affirmed that he would have accepted a mail ballot if the envelope date said "1960" or even was "a date in the future." *Id*. As the clerk explained, he did so because state law "doesn't say what date." *Id*.

2. The 2021 Election at Issue.

Plaintiff Voters are Lehigh County residents who cast mail ballots in the November 2021 county elections. Appx. 22a, 24a-25a. Their ballots, and those of 252 other Lehigh County mail-ballot voters, were set aside because they signed but did not write a date on the Return Envelope containing their mail ballots. *Id*.

Plaintiff Voters are long-time Pennsylvania voters, some registered as Democrats and some as Republicans. They are in their late 60s and 70s, and most have been voting in the county for decades—some for nearly half a century. CA3 Dkt.33-2, JA 62–77, 172–175. Like the five Plaintiff Voters, three-quarters of the 252 other Lehigh County voters facing disenfranchisement in the 2021 county election for failure to include a date on the mail ballot Return Envelope are senior citizens. CA3 Dkt.33-2, JA 169, ¶ 25. Fifteen are over the age of 90, and two were over 100 years old when they voted. *Id*.

It is undisputed that all of the Lehigh County voters whose ballots were excluded are eligible and registered to vote in Lehigh County. CA3 Dkt.33-2, JA 168, ¶¶ 23–24. The Board approved their mail-ballot applications and verified their

qualifications. CA3 Dkt.33-2, JA 165-166, 168, ¶¶ 3, 24; *see also* 25 P.S. §§ 3146.2b(a), 3150.12b(a). The voters all signed the declarations on the Return Envelopes containing their mail ballots. CA3 Dkt.33-2, JA 168, ¶ 24. It is also stipulated that none of the ballots raises any fraud concerns. CA3 Dkt.33-2, JA 169, ¶ 26. The Board timely received the disputed ballots before the statutory deadline of 8 p.m. on Election Day, and date-stamped the Return Envelopes accordingly upon receipt. CA3 Dkt.33-2, JA 168, ¶ 24 and 169, ¶ 26; *see also* CA3 Dkt.33-3, JA 449-458 (photocopies of the Board-stamped envelopes in the record).

3. The Board Votes to Count the Ballots and Ritter Sues the Board in State Court.

On November 15, 2021, the Board voted unanimously to count the 257 mail ballots without a date on the outer envelope. CA3 Dkt.33-2, JA 169–170, ¶ 30–34; *id.* at JA 255-258. Among other reasons, the Board members explained that the voters had clearly intended to submit their mail ballots and made a "technical error," that there was no question that the ballots were "received on time," that "the signatures [on the Return Envelopes] match the poll book," and that the directive on the Return Envelope to include a date was in small print and could have been made "much more visible to the voters." CA3 Dkt.33-2, JA 256-257.

However, Ritter, one of the candidates running for election to the Lehigh County Court of Common Pleas in the 2021 general election, sued in state court to block the Board from counting the disputed ballots, arguing that doing so violated

state law. CA3 Dkt.33-2, JA 170, ¶¶ 34–35. Of the three Lehigh County judicial vacancies on the ballot in the 2021 county election, the Board certified the election of the two candidates who won by more than 257 votes. CA3 Dkt.33-2, JA 168, ¶¶ 19–20. However, the difference between the third and fourth-place candidates (Ritter and Zachary Cohen, respectively) is currently 71 votes, less than the number of disputed ballots at issue here. *See* CA3 Dkt.33-2, JA 171, ¶ 50.

Certification of the election results for the third judicial seat was suspended by operation of state law during the state-court proceedings. In December, the Court of Common Pleas ruled against Ritter, holding that state law did not prevent the Board from counting the ballots, noting that there was "no fraud here and, indeed, no apparent reason why the failure to place the date on the return envelope" should disenfranchise county voters. CA3 Dkt.33-2, JA 99. Ritter appealed.

On January 3, 2022, the Pennsylvania Commonwealth Court held in an unpublished, non-precedential 2-1 decision that state law required the Board to set aside timely received ballots submitted in Return Envelopes that were date-stamped by elections officials but lacked a date handwritten by the voter. *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 WL 16577, at *10 (Pa. Commw. Ct. Jan. 3, 2022). In two sentences of dicta at the end of its opinion, the court also stated that the Materiality Provision's prohibition against disenfranchising voters for minor paperwork errors was "not applicable" because the envelope-dating directive "does not, in any way, relate to whether that elector has met the qualifications necessary

to vote in the first place." *Id.* at *9. The unpublished Commonwealth Court decision also suggested, without further analysis, that the envelope-dating requirement was material under the statute in light of the three-Justice minority opinion in the 2020 absentee ballots case. *Id.*; *see also supra* n.5. The Pennsylvania Supreme Court denied discretionary review, CA3 Dkt.33-3, JA 445, after which the Board moved to certify the election without counting the excluded ballots.

4. Plaintiff Voters Sue to Protect Their Right to Vote and Obtain a Unanimous Third Circuit Judgment.

Within days, Plaintiff Voters filed this federal action against the Board, seeking to restore the Board's initial decision to count the ballots in dispute. CA3 Dkt.33-2, JA 40. Plaintiff Voters alleged, among other things, that the refusal to count their ballots for failure to write an inconsequential date on the Return Envelope violates the Materiality Provision of the Civil Rights Act. JA 52–59. Candidates Ritter and Cohen intervened. Appx. 7a.

On March 16, 2022, the district court issued an opinion and order granting summary judgment to the defendants. Appx. 21a-22a. The district court concluded that the Materiality Provision provided for an individual right under federal law, but held that there was no private remedy to enforce the Materiality Provision in federal court. Appx. 38a-45a. Despite the fact that Plaintiff Voters sued under 42 U.S.C. § 1983 to enforce the right to vote guaranteed by the Materiality Provision, the district court's opinion did not mention Section 1983 or refer to the governing legal

standard for the availability of Section 1983 relief for violation of federal rights. The court instead relied on the test for whether there is an implied right of action to sue under the Materiality Provision itself pursuant to *Alexander v. Sandoval*, 532 U.S. 275 (2001). Appx. 38a-45a.

The Third Circuit reversed. The panel unanimously concluded that Plaintiff Voters have a right of action under Section 1983 and that the Materiality Provision bars the Board from denying the right to vote for failure to include a handwritten date on a Return Envelope, where, as here, the content or accuracy of the date does not matter. Appx. 7a-17a; Appx. 18a-20a (Matey, J., concurring); *see also* CA3 Dkt.82 (Amended Judgment).[6]

On the right-of-action issue, the court of appeals' majority opinion applied this Court's controlling decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Appx. 8a-9a. The court of appeals agreed with the district court that the Materiality Provision confers an individual federal right, which under *Gonzaga* is then presumptively enforceable in a Section 1983 action. *Id*. The court concluded that Ritter had failed to rebut that presumption with either "specific evidence from the statute itself" or a "comprehensive enforcement scheme that is incompatible with

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[6] On appeal, the Commonwealth of Pennsylvania appeared as *amicus curiae* in support of Plaintiff Voters' position, asserting that the handwritten envelope date served no purpose with respect to the voter's eligibility to vote in the election, e.g., CA3 Dkt.42.

individual enforcement under § 1983." *Id.* at 9a (quoting *Gonzaga*, 536 U.S. at 284); *see id.* at 9a-13a. Among other things, the court noted that, far from precluding private lawsuits, the statutory text "specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court." *Id.* at 9a (citing 52 U.S.C. § 10101(d)). Moreover, while another subsection of the statute, subsection 10101(c), also provides for a parallel right of action by the Attorney General, the court explained that "the mere existence of a public remedy by the Attorney General is inadequate, without more, to rebut the presumption" of Section 1983 enforceability. *Id.* at 12a (citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009)).

On the merits, the court concluded that disenfranchising the Lehigh County voters for omitting a handwritten date on the mail ballot Return Envelope violated the Materiality Provision. Emphasizing defendants' concession that the *content* of the date made no difference to a voter's eligibility, the court concluded that omitting the date was not "material in determining whether [a voter] is qualified to vote under Pennsylvania law." Appx. 14a; *accord* 52 U.S.C. § 10101(a)(2)(B).

The court first identified the criteria for qualification to vote under Pennsylvania law, namely that a voter is "18 years old, ha[s] been a citizen for at least one month, ha[s] lived in Pennsylvania and in their election district for at least thirty days, and [is] not imprisoned for a felony conviction." Appx. 14a (quoting Pennsylvania's amicus curiae brief, CA3 Dkt.42 at 10, and citing 25 P.S. § 2811 and 25 Pa.C.S. § 1301(a)). It then considered reasons why the envelope date might "help[]

determine any of these qualifications," concluding that "we can think of none." *Id*. The court explained it was "at a loss to understand how the date on the outside of the envelope could be material when incorrect dates—*including future dates*—are allowable but envelopes where the voter simply did not fill in a date are not." *Id*. at 15a. The court dismissed various proffered rationales for the envelope-date rule as unrelated to determining a voter's eligibility to vote in the election, emphasizing that the acceptance of obviously wrong dates was the "nail in the coffin" with respect to any materiality argument. *Id*. at 14a-15a. "If the substance of a string of numbers does not matter," the court explained, "then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications." *Id*.

Judge Matey concurred as to both the right-of-action issue and on the merits. On the right-of-action issue, Judge Matey "agree[d] that [Plaintiff Voters] can enforce the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), under 42 U.S.C. § 1983," emphasizing that Ritter "did not challenge" that the Materiality Provision creates an individual federal right "[a]t all," rendering the statute presumptively enforceable via Section 1983. Appx. 18a-19a and n.2 (Matey, J., concurring).

On the merits, Judge Matey concluded that Ritter had offered "no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code … is material as defined in § 10101(a)(2)(B)." Appx. 19a. "Instead," Judge Matey explained, Ritter had conceded "that voter declarations with

inaccurate dates were counted in this election," leaving himself "little room … to defend the District Court's decision." *Id*. Judge Matey suggested that a different set of rules might raise "fresh facts and unforeseen outcomes in a different race," but concluded that "those are questions for tomorrow." *Id*. at 20a.

The Third Circuit's decision thus restored the status quo before Ritter challenged the Board's initial decision to count the disputed ballots. Ritter now seeks to upset the status quo again, requesting a stay of the Third Circuit's decision pending a petition for certiorari. The Board has not indicated that it will seek certiorari and has not joined or supported Ritter's stay application.

ARGUMENT

A stay from this Court is available "only under extraordinary circumstances." *E.g., Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). To obtain one, the applicant must first demonstrate a reasonable probability that four Justices are likely to grant certiorari, and a fair prospect that a majority of the Court will vote to reverse the judgment. *See, e.g., Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In addition, an applicant must also show they are likely to suffer irreparable harm absent a stay and that the balance of the equities favors a stay. *See, e.g., Hollingsworth*, 558 U.S. at 190. Ritter cannot meet that demanding standard and his application should be denied.

I. THIS COURT IS NOT LIKELY TO GRANT CERTIORARI OR TO REVERSE THE JUDGMENT.

This Court is not likely to grant certiorari. The case involves the routine application of federal law to a single disputed local election. It presents no splits of authority requiring this Court's review, and no important federal question. And the case is a poor vehicle. Ritter, an intervenor, stands alone in seeking to continue litigating this case, and does so on the basis of uncontested facts that narrow the case considerably, including the undisputed fact that the actual content of the envelope date was so irrelevant that ballots in envelopes with obviously wrong dates from decades ago were counted. Nor is the Court likely to reverse, because the unanimous judgment of the court of appeals was correct.

A. Ritter's Lack of Standing Makes This Case a Uniquely Unsuitable Vehicle.

Ritter, an intervenor, is the only party suggesting he will appeal the Third Circuit's ruling. The Board of Elections has not signaled any interest in seeking Supreme Court review and has not joined Ritter's application for a stay. The Commonwealth of Pennsylvania appeared below in support of Plaintiff Voters' request to count the votes, agreeing that the date requirement was immaterial. *See* CA3 Dkt.42. Thus, neither the Commonwealth nor the County seeks this Court's intervention. Under these circumstances, Ritter likely lacks standing to independently prosecute a further appeal. That unavoidable vehicle problem makes a grant of certiorari especially unlikely here.

"To appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016). This Court has held that private individuals lack standing to independently defend a challenged governmental policy's validity when the relevant officials "have chosen not to." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2015). That is precisely the case here: The Board as defendant-in-interest is no longer pursuing this case; it "would rather stop than fight on." *Bethune-Hill*, 139 S. Ct. at 1956. And the Commonwealth of Pennsylvania supports the result below.

Ritter's status as a candidate does not resolve the issue. Once the proper defendants wish to stop litigating, an intervenor may lack standing to independently defend challenged electoral arrangements even when those arrangements somehow affect them. *See Bethune-Hill*, 139 S. Ct. at 1951 (holding that intervenor legislative body representing the challenged districts lacked standing to appeal where relevant state officials declined to appeal a redistricting decision that changed the composition of the districts); *see also Wittman*, 578 U.S. at 544 (reserving decision on whether candidate-intervenor might have had standing to sue under different circumstances). That makes sense, as it is voters, not politicians or political entities, who are injured by the loss of the right to vote.

Moreover, Ritter has not shown that the counting of the votes would injure him in any way. He baldly asserts that counting the votes will "likely" change the result in the election, but as the votes have not been tabulated, that is rank speculation.

Because Ritter now stands alone, without the Board (or any relevant Commonwealth official) willing to continue defending the exclusion of the disputed ballots, this case presents a flawed vehicle. This Court would be required to needlessly expand the law of candidate standing, potentially opening the appellate courts to a flood of new intervenor-driven appeals, before even getting to the issues Ritter seeks to raise—and all to stop the counting of 257 votes in a single county election. Ritter's serious standing problems make a grant of certiorari especially unlikely and counsel in favor of denying a stay.

B. The Right-of-Action Issue Is Not Worthy of Certiorari and the Unanimous Panel Resolved It Correctly.

Ritter is unlikely to obtain certiorari—and extremely unlikely to obtain a reversal—on the threshold right-of-action issue here.

Whether private plaintiffs may enforce the rights guaranteed by the Materiality Provision by suing under Section 1983 is not the subject of a well-developed, important, or re-occurring circuit split. Two circuits, the Eleventh and now the Third, have applied the established framework governing the availability of Section 1983 relief set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and its progeny, and determined that such relief is available for violations of "the right of

any individual to vote in any election" guaranteed in 52 U.S.C. § 10101(a)(2)(B). *See* Appx. 8a-13a; *id.* at 18a-19a (Matey, J., concurring); *Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003).

The Sixth Circuit is the only circuit to reach a contrary conclusion, but it did so in a case decided prior to this Court's controlling decision in *Gonzaga*. In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit held that the Materiality Provision "is enforceable by the Attorney General, not by private citizens." *Id.* at 756. Those ten words (plus a citation to an equally conclusory district court opinion) comprise the entirety of the *McKay* court's analysis. More recently, the Sixth Circuit reaffirmed its stance, but solely because "*McKay* binds this panel." *Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017). In sum, there is no split in the circuits that have applied *Gonzaga*, and there is no reason to think any other circuit court might adopt the Sixth Circuit's unexplained, pre-*Gonzaga* position.

For similar reasons, a reversal on the right-of-action issue is exceedingly unlikely. The Third Circuit correctly applied this Court's controlling decisions on that Section 1983 right-of-action issue, including *Gonzaga* as well as the Court's subsequent, unanimous decision in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009). Those decisions hold that once a Section 1983 plaintiff demonstrates that Congress "intended to create a federal right," the right is presumptively enforceable in a Section 1983 action. *Gonzaga*, 536 U.S. at 283-284.

The presumption is rarely overcome. To do so, a defendant must show either that Congress expressly foreclosed Section 1983 relief in the text of the statute, or that it implicitly did so by creating an incompatible remedy scheme. *E.g., Gonzaga*, 536 U.S. at 284-85 n.4. As the Court has repeatedly observed, it is "the existence of a more restrictive private remedy," which is necessarily incompatible with Section 1983's broader private remedy scheme, that is "the dividing line" between those cases where a Section 1983 action will lie, and those where the presumption of Section 1983 enforceability is rebutted. *Fitzgerald*, 555 U.S. at 256 (quoting *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005)).[7] The reason more restrictive *private* remedies define the "dividing line" is that they typically require private plaintiffs "to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit," restrictions which could be "circumvent[ed]" if broader Section 1983 relief was available. *Fitzgerald*, 555 U.S. at 254 (citation omitted).

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[7] Ritter's application relies extensively (Stay App. at 17-19) on *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), confusing the question of a Section 1983 right of action with the availability of an *implied* right of action to sue directly under Section 10101. But whether a statutory violation may be enforced through Section 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." *Gonzaga*, 536 U.S. at 283. "Plaintiffs 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." *Id.* at 284. The Third Circuit expressly withheld any decision on the separate implied-right-of-action analysis under *Sandoval* and that issue thus is not presented here. Appx. 12a n.48.

Here, the Third Circuit applied the established *Gonzaga* framework and unanimously concluded that the presumption of Section 1983 enforceability was not rebutted—and the question was not close. *See* Appx. 8a-13a; *see also* Appx. 18a-19a (Matey, J., concurring). Ritter conceded that the Materiality Provision creates a federal right. *See* Appx. 19a and n.2 (Matey, J., concurring). He also conceded that the statute nowhere expressly forecloses private suits. *See* Appx 10a. And he never pointed to any more restrictive private remedy scheme in Section 10101 that might be incompatible with Section 1983 relief, because there is none. *See* Appx. 12a (citing *Fitzgerald*, 555 U.S. at 256).

Instead, Ritter points only to a parallel *public* remedy (i.e., enforcement by the U.S. Attorney General) set forth in 52 U.S.C. § 10101(c). (Stay App. at 19). But the mere existence of parallel public remedies is not incompatible with private Section 1983 remedies. *See, e.g., Fitzgerald*, 555 U.S. at 258-59 (affirming 1983 right of action notwithstanding the existence of "parallel" government enforcement authority over Title IX).

That is especially true here in light of the statutory text and the legislative history. *See, e.g.*, Appx. 9a-12a. The statute clearly contemplates private suits by, for example, authorizing federal jurisdiction over "proceedings instituted pursuant to this section … by a *party aggrieved*" (i.e., by a disenfranchised voter), and also by abrogating judicially-imposed exhaustion requirements that had previously barred private suits under the predecessor statute to Section 10101—exhaustion

requirements that would have no application to Attorney General suits. *See* 52 U.S.C. § 10101(d) (emphasis added); *see also Schwier*, 340 F.3d at 1296. And in adding the Attorney General right-of-action to Section 10101 as part of the 1957 Civil Rights Act, Congress emphasized that it was "supplement[ing] existing law," under which the voting rights guarantees in Section 10101's predecessor statute had long been enforced through private Section 1983 suits. H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1976 (emphasis added); *see also id*. at 1977 ("Section 1983 … has been used to enforce the rights … as contained in section 1971 [now codified at 52 U.S.C. § 10101]."). Indeed, the Attorney General, whose office drafted the 1957 Act, assured Congress that "private people will retain the right they have now to sue in their own name" to enforce the rights in Section 10101's predecessor statute. *See Civil Rights Act of 1957: Hearings on S. 83*, 85th Cong. at 67–73 (1957). The Attorney General's right to sue is thus plainly supplemental to, and not a substitute for, private enforcement.

Because the *Gonzaga* line of cases controls the Section 1983 right-of-action question, and because the Third Circuit correctly applied that controlling authority, there is neither a likelihood that certiorari will be granted nor a fair probability that the panel's unanimous conclusion will be reversed.

C. The Merits Determination Here Is Not Worthy of Certiorari and the Unanimous Panel Resolved It Correctly.

Ritter's arguments with respect to the application of the Materiality Provision similarly do not merit a stay. There is no split of authority, and the decision below is both fact-bound and entirely correct.

Ritter claims that "state and federal courts in Pennsylvania are split" as to the meaning of the Materiality Provision (Stay App. at 10-11) but he cites no split between the Third Circuit's decision and any other state high court. Instead, he cites only to an unpublished intermediate state appellate court decision. But unpublished decisions of the Pennsylvania Commonwealth Court are *non-precedential*. *See* 210 Pa. Code § 69.414(a) (unreported panel decisions of the Commonwealth Court may not be cited "as binding precedent"). The decision therefore binds no future state courts, and thus augurs no "conflict" whatsoever.[8]

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[8] This case is thus unlike the one outlier example cited by Ritter in which the Court granted certiorari from a (binding, precedential) decision of the California Court of Appeal that conflicted with a Ninth Circuit panel opinion, and that involved the important issue of state court enforcement of the Federal Arbitration Act. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015); Pet. For Certiorari at 2, *DirecTV, Inc. v. Imburgia*, 2014 WL 5359805 (2014) ("[B]ecause the Court of Appeal's decision is binding on every state trial court in California, and 'non-severability' clauses of the type at issue here are found in millions of individual consumer arbitration agreements in that State and elsewhere, the scope of the problem is truly monumental."). Not only was the state appellate court decision in *DIRECTV* binding on lower courts, but the conflict at issue there, over the enforcement of arbitration clauses, raised a uniquely important issue of federal law. *See, e.g.*, *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (under the Federal Arbitration Act, "state courts have a prominent role to play as enforcers of agreements to arbitrate.").

In addition to being non-precedential, the *Ritter* state court decision does not meaningfully address the Materiality Provision. It contains two lines of dicta regarding the Materiality Provision in an opinion otherwise addressed exclusively to state law, *see Ritter*, 2022 WL 16577, at *9—not enough substance to create a cert-worthy conflict even if it were included in precedential opinion. Moreover, the Commonwealth Court's dicta cannot be reconciled with the view of a majority of the Pennsylvania Supreme Court that the envelope-date requirement, if used to disenfranchise mail-ballot voters, could risk running afoul of federal law. *See In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing the judgment); *id.* at 1089 n.54 (Wecht, J.).

On the merits, the Third Circuit was correct in unanimously concluding that the Materiality Provision applies here. The "nail in the coffin" in this case is the undisputed fact that *obviously wrong* envelope dates from decades past and even from the future were considered acceptable, while no date was not. Appx. 15a; *accord* Appx. 19a and n.2 (Matey, J., concurring). Even if certiorari were granted, the remarkable fact that the *content* of the envelope date was concededly immaterial would control here—and limit the import of any judicial resolution to that peculiar set of facts.

Ritter's merits arguments grossly distort both the Materiality Provision and the scope of the decision below. His suggestion that the decision below applies to "*any* law requiring voters to do something before their mail-in vote can be counted" (Stay App. at 11) misrepresents the court's opinion, which relates only to the particular

dating requirement on the mail ballot envelope in Pennsylvania, where the content of the date makes no difference to eligibility to vote. Appx. 13a-16a.

And Ritter's supposition that the opinion below might be extended more broadly falls flat. The Materiality Provision applies only in narrow, specific circumstances: where the right to vote in an election is denied because of an "error or omission *on a record or paper* relating to" some act that is made "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) (emphasis added). In other words, it applies only where a state actor disenfranchises a voter based on a *minor paperwork error*, if that error is unrelated to their eligibility to vote under state law in the election. *See also, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008).

The Materiality Provision accordingly does not apply to rules concerning when or where to vote at all. Nor does it apply to polling place conduct, or voter assistance, or whether to allow fusion voting or write-in candidates, or numerous other rules concerning the manner of voting itself, by mail or otherwise. It would not apply to a requirement that a mail ballot be placed in a secrecy envelope, because that is not "an error or omission on a record or paper," 52 U.S.C. § 10101(a)(2)(B). Nor would it apply to the failure to sign the voter declaration (at least not on the Pennsylvania mail ballot Return Envelope), because the content of the voter's signature (or the lack thereof) *is* material to determining whether they are qualified to vote. *See, e.g., Diaz*

v. Cobb, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006). Nor (depending on the specifics of state law) would it apply to notarization requirements and the like, if they bear on determining a voter's eligibility to vote.

Instead, the Materiality Provision applies only to legally inconsequential errors on paperwork made requisite to voting. And contrary to Ritter's assertions (Stay App. at 11), courts have applied the statute to such paperwork in the mail ballot context. *See, e.g., Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (requirement to write birth year on mail ballot envelope likely immaterial); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (duplicative information requirement on mail ballot envelope potentially immaterial).

Moreover, whatever the Materiality Provision's particular bounds, it certainly applies in the unique factual circumstances presented here, where the envelope date was concededly so immaterial that *obviously erroneous* dates were considered acceptable, and yet omitting an envelope date resulted in a voter's disenfranchisement. Appx. 15a; *accord* Appx. 19a and n.2 (Matey, J., concurring).

Ritter's further arguments offer no basis for a probable reversal. He argues that the Materiality Provision does not govern "ballot validity," suggesting that the problem for the affected Lehigh County voters here was that their "ballots themselves were invalid." (Stay App. at 12-13.) But Plaintiff Voters were disenfranchised because

of an error on the *Return Envelopes*, not on the ballots themselves.[9] The correct analogy is not to a voter who "shows up to the wrong precinct or tries to vote after election day." (Stay App. at 13-14.) It is to a qualified voter who shows up at the polls on time, makes an inconsequential error on some required but immaterial paperwork while checking in, and is then unlawfully disenfranchised for the error. *See, e.g., Ford v. Tennessee Senate*, No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (disenfranchisement for immaterial paperwork errors regarding polling place poll book unlawful).

Ritter also argues that the Materiality Provision does not apply to immaterial paperwork errors that are required by a state's "written law," and instead only applies to "ad hoc executive action." (Stay App. at 14-15.) That argument was never raised below, and in any case the distinction has no grounding in the statutory text. The Materiality Provision applies where a voter has been disenfranchised "because of an error or omission on any record or paper relating to any application, registration,

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[9] That distinction matters under state law, which calls a ballot a "ballot," and calls an envelope an "envelope." 25 P.S. §§ 3146.6(a), *id.* § 3150.16(a). It also matters under the Materiality Provision, which does not apply to the marking of the ballot itself, but rather to errors or omissions on "record[s] or paper[s] relating to" an "act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Here, because filling out the Return Envelope paperwork was made requisite to voting, the Materiality Provision applies.

or other act requisite to voting," regardless of which state actor generates the "paper" at issue or makes its completion "requisite to voting." 52 U.S.C. § 10101(a)(2)(B).[10]

Finally, Ritter belatedly questions whether Congress had constitutional authority in 1964 to enact the Materiality Provision. (Stay App. 15-16.) Ritter did not raise this issue below either. As with his other undeveloped arguments, it is thus unlikely to warrant a grant of certiorari or reversal. *See, e.g., E.E.O.C. v. Fed. Lab. Rels. Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals.").

Moreover, Ritter identifies no split of authority or other reason for review, much less reversal, on this point. "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003). Assuming that (as Ritter suggests) the "congruent and proportional" rubric from *City of Boerne v. Flores* applies, the voting rights measures in the 1964

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[10] Ritter argues a materiality plaintiff must allege "that the defendant went *beyond* state law" (Stay App. at 15) by misreading two materiality cases, both of which involved attempts to *enforce* state paperwork requirements. *See Schwier v. Cox*, 412 F. Supp. 2d 1266, 1275 (N.D. Ga. 2005) (describing how Georgia's voter registration form expressly stated that provision of voter social security numbers were "required by" Georgia statutes), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *Martin*, 347 F. Supp. 3d at 1306 (describing state statute providing that counties could reject mail ballots "if the elector has failed to furnish required information").

Civil Rights Act and 1965 Voting Rights Act, which include the Materiality Provision, are paradigmatic examples of valid remedial legislation, as *City of Boerne* itself said. *See* 521 U.S. 507, 518 (1997) (noting the validity of Congress's "suspension of literacy tests and similar voting requirements" as well as "other measures protecting voting rights" and collecting cases); *see also, e.g., Hibbs*, 538 U.S. at 738 (VRA was a "valid exercise[] of Congress' § 5 power"); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (similar).[11] And the legislative record Congress amassed in passing the Materiality Provision contained substantial evidence that minor paperwork errors were being arbitrarily used to deny voting rights to Black citizens. *See, e.g.,* H. Rep. No. 88-914 (1963).[12]

II. THE BALANCE OF HARMS AND THE EQUITIES WEIGH AGAINST A STAY.

Ritter also fails to show a likelihood of irreparable harm, and the equities weigh against him.

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[11] Congress's authority under the Fourteenth and Fifteenth Amendments is in addition to its power to regulate elections pursuant to the Elections Clause, U.S. Const. Art I, § 4, cl. 1.

[12] For example, Congress found that "[t]estimony shows that … registrars will overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting a Negro application for the same or more trivial reasons." H. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491.

A. Ritter's Irreparable Harm Arguments Are Misplaced.

Ritter's irreparable harm arguments principally rest on harms he claims will be suffered by "others" (Stay App. at 20), not by Ritter. He suggests that counting the timely mail ballots of a few hundred undisputedly registered and eligible voters will harm the "authority of legislatures." (Stay App. at 21 (citations omitted).) But the Commonwealth of Pennsylvania is not asking this Court for a stay. And while the inability of Pennsylvania "to enforce its duly enacted plans" may inflict "irreparable harm *on the State*," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (emphasis added), it does not harm Ritter. Ritter cannot rely on alleged harms experienced by others, or theoretical, generalized harms, to show that *he himself* urgently requires this Court's extraordinary intervention. *See, e.g., Ruckelshaus*, 463 U.S. at 1316 (stay applicant must show "that *the applicant* will suffer irreparable injury if the judgment is not stayed pending his appeal" (emphasis added).) This is especially true where the relevant state authorities have sought no such relief.

The only harm to himself that Ritter identifies is his unsupported claim that "there's a strong 'likelihood' that the 257 undated ballots will erase [his] 71-vote lead." (Stay App. at 20.). But that is entirely speculative. No one knows who will win the election once the 257 outstanding ballots are counted—the secrecy envelopes remain unopened—and it could well be Ritter. With a 71-vote lead, the 257 uncounted ballots would need to break almost 2-1 against him in order for him to lose. Even if losing an election after every valid vote is counted could constitute irreparable harm, as

opposed to the fair and just result, the theoretical prospect of such a loss is not a sufficient "likelihood" of irreparable harm to justify prolonging this case.

B. The Equities Weigh Against a Stay.

On the equities and the public interest, denying a stay will return this case to the pre-litigation status quo—namely, the Board's decision to count the disputed ballots. Ritter disrupted that status quo when he initiated post-election litigation. Now, Ritter invokes the Court's "*Purcell* principle." (Stay App. at 22-25.) But this is not a *Purcell* case, and in any event, the concerns underlying *Purcell* weigh *against* Ritter's request, not in favor of it.

To start, Ritter stands alone before the Court—no one entrusted to enforce Pennsylvania's election laws joins his application. That matters, because the *Purcell* principle Ritter calls upon is premised on the "*State's* extraordinarily strong interest in avoiding … changes to its election laws and procedures." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (emphasis added). *Purcell* is not a tool for private litigants to wield when "no state official has expressed opposition." *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206, 206 (2022) (Mem.). Accordingly, this Court has distinguished cases involving private plaintiffs from those "where a State defends its own law," *id.*, and Ritter cites no case granting a *Purcell*-type stay where a candidate attempts to usurp the state's supposed interest as his own. Under those circumstances, a stay applicant generally "lack[s] a

cognizable interest in the State's ability to 'enforce its duly enacted laws.'" *Id.* (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)).

Moreover, as Ritter acknowledges (Stay App. at 22), *Purcell* principles typically apply to cases involving changes to the law *before* Election Day, when last-minute changes might threaten to tax election administrators or confuse candidates or voters. That is why Justice Kavanaugh's recent concurring opinion in *Milligan* underscored the importance of assessing the feasibility of changes proposed "*before an election*" as part of the *Purcell* analysis. 142 S. Ct. at 881 (emphasis added). None of that is at issue here, and no one has suggested any concrete hardship or burden that might be imposed on the Board or the public by counting 257 mail ballots that the Board itself sought to count back in November of 2021. *Id.* Ritter cannot cite a case where *Purcell* supported the grant of a stay in a dispute over the lawfulness of already-voted ballots, let alone one in which election administrators were not seeking this Court's intervention.[13]

Moreover, were *Purcell* concerns applicable here, they would counsel against Ritter's stay request. Ritter's claim that the Third Circuit "changed the rules after

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[13] The cases Ritter cites (Stay App. at 22-23) are inapposite. For example, in *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), the Court discussed laches—not *Purcell*—where the challenges to Wisconsin law were raised well after "election results ha[d] been certified as final." *Id.* at 926. And *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), was a pre-election decision, not a post-election one. *Id.* at 1061.

Ritter's election had ended" glosses over the fact that it is *Ritter himself* who first sought judicial intervention to alter the status quo. The Board voted to count the ballots at issue, after which Ritter sued the Board. The Third Circuit's decision merely restores the status quo prior to court intervention. Ritter should not be heard to invoke equitable doctrines against judicial intervention when he is the one who sought judicial intervention in the first place. Denying Ritter's stay request would return this case to the pre-litigation status quo and honor the determination of the on-the-ground election administrators whom the state legislature empowered to make the determinations at issue here.[14]

In any case, Ritter's attempt to fit this case into the *Purcell* rubric fails on its own terms. Ritter argues (Stay App. at 24) that Plaintiff Voters delayed in bringing suit, recycling laches arguments that the panel and the district court both rejected. *See* Appx. 13a, 34a-35a. In fact, Plaintiffs filed a timely action within *two business days* after the Board first announced, in late January 2022, after Ritter's state-court litigation concluded, that it would certify the 2021 election without counting their

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[14] Ritter's suggestion (Stay App. at 23) that the decision here "will alter the outcomes in Pennsylvania's just-finished primaries" is completely speculative, and he cites nothing to indicate that there are a sufficient number of ballots in undated mail ballot Return Envelopes in any close contest to make a difference. The self-serving amicus brief submitted by candidate Dr. Oz is similarly speculative and should be disregarded. Nor does the decision below purport to affect the rules for any future elections, which are determined in the first instance by state and county election administrators.

ballots. That is not undue delay, especially because—as the district court recognized—until January 2022 "Plaintiffs had every reason to believe their ballots would be counted." Appx. 34a. Indeed, until the Board changed positions and announced that it would not count Plaintiffs' votes, Plaintiffs had no quarrel with the Board—and thus no injury to take to federal court, *see Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81 (1985).[15]

Ritter's argument that Plaintiff Voters improperly "s[at] back and "wait[ed]" for his state court litigation to conclude (Stay App. at 24), also runs headlong into the record, which makes clear that at least some of Plaintiff Voters could not have done so even if they had justiciable claims, because they had no way of being notified of their disenfranchisement. *See* CA3 Dkt.33-2, JA 173, ¶ 68 and JA 175, ¶ 92. If anything, it is Ritter's central role in delaying the outcome of this election that strongly disfavors his request of a stay.

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[15] Ritter suggests that Plaintiffs also unduly delayed in their suit because "[t]he dating requirement had been the law for over two years." (Stay App. at 24). Ritter ignores that Plaintiffs had no reason to challenge the Pennsylvania mail ballot statute years before the November 2021 election. *See Trump v. New York*, 141 S. Ct. 530, 534-35 (2020) (discussing "related doctrines" of standing and ripeness). To support the point, Ritter cites *Bowyer v. Ducey*, 506 F. Supp. 3d 699 (D. Ariz. 2020), and *Wood v. Raffensperger*, 501 F. Supp. 3d 1310 (N.D. Ga 2021). But neither case suggests that Plaintiff Voters were required to intervene in Ritter's state court suit against the Board or else forfeit federal statutory claims that had not yet ripened because their votes were being counted.

Moreover, as Judge Matey's concurring opinion underscores, the merits of Plaintiff Voters' claims are "entirely clearcut." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Most importantly, Ritter conceded and the record conclusively shows that in this election, the envelope date was so inconsequential that the Board "would even count ballots with birthdates written [on the Return Envelope] instead of the date the voter signed the declaration." Appx. 19a (Matey, J., concurring). That undisputed fact means this is not a case where "the date on the voter declaration might make a difference." *Id.* It is hard to imagine a more clearcut violation of the Materiality Provision than disenfranchising qualified voters for failure to handwrite a concededly irrelevant string of numbers in the general form of a date on a Return Envelope that was timely-received and date-stamped by elections officials.

Lastly, Ritter is wrong to suggest that voters and the public will be unharmed if a stay is granted and the November 2021 county court election is held open indefinitely. Ritter contends that a stay would not cause "any appreciable harm to the plaintiffs," because most *other* voters have had their ballots counted. (Stay App. at 26.) But as this Court has made clear, "a person's right to vote is 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)); *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people can" comply with a challenged requirement). Ritter elsewhere argues

(Stay App. at 20-21) that he is irreparably injured because, if Plaintiff Voters prevail and the disputed ballots are counted, he *might* lose the election. But if Ritter prevails, the voters *will* assuredly be disenfranchised, based solely on their inadvertent failure to include an inconsequential date on the mail ballot Return Envelope, even as voters who wrote wrong dates from decades ago had their ballots counted.

Meanwhile, the harm to *all* residents of Lehigh County, including Plaintiff Voters, from leaving the 2021 general election open (and a judgeship unfilled) for another six months or more cannot be discounted. The Board is no longer pursuing this case. In attempting to seal a victory through litigation rather than earn it by the ballot, Ritter alone now seeks to hold a public office hostage, threatening even more delay unless the timely-received ballots of 257 registered Lehigh County voters are excluded, contrary to the Board's original determination. It is time for this controversy to end. Ritter's stay request should be denied.

III. NO ADMINISTRATIVE STAY SHOULD ISSUE.

Ritter suggests that the Court should grant an administrative stay to "give itself time" to consider his emergency application. (Stay App. at 2, 27.) But there is no need to do so here, because even after the mandate issues on June 3, the Board's process for certifying the election result will likely take at least one additional week, and perhaps longer—enough time to resolve the stay application.

Once the mandate issues, the Board will need to schedule a public meeting to officially canvass the remaining ballots, consistent with the Pennsylvania Sunshine

Act's notice requirements. *See* 65 Pa C.S.A § 709. That section requires advance notice of at least 24 hours for a special meeting. Alternatively, the Board may post a change in the agenda of any regularly scheduled meeting, but again only if it does so 24 hours in advance. Here, because June 3 is a Friday, the very earliest that the public canvass could take place would be Monday, June 6 (and it could be later).

Once that public canvass of the ballots occurs, the Election Code requires the Board to wait another five days before final certification, 25 P.S. § 3154(f). The earliest this period would be complete would be Friday, June 10, and if there is even minimal delay, certification would be held over to the following week of June 13. At the expiration of the five-day period, and in the event no petition for a recount has been filed, the Board then would certify the results. *Id.* Because state law already builds at least six days of pre-certification process into the timeline (and given the calendar here, it is likely more than that), an administrative stay is unnecessary and should be denied.

CONCLUSION

The application should be denied in its entirety.

Respectfully submitted,

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