APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

[Filed: May 27, 2022]

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor – Plaintiff

v.

LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

App. 2

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY,
Circuit Judges.

(Opinion filed: May 27, 2022)

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OPINION

McKee, *Circuit Judge.*

The Materiality Provision of the Civil Rights Act[1] prohibits any "person acting under color of law [from] deny[ing] the right of any individual to vote in any election because of an error or omission . . . if such error or omission is not material in determining

[1] 52 U.S.C. § 10101(a)(2)(B).

whether such voter is qualified . . . to vote in such election."[2] In Pennsylvania, an error or omission is material to a voter's qualifications to vote if it is pertinent to either the voter's age, citizenship, residency, or felony status[3] or the timeliness of the ballot.[4]

We are asked to determine if a date on the outside of a mail-in ballot, required under state law, is material to the voter's qualifications and eligibility to vote. However, in resolving that question, we must decide whether private plaintiffs can even bring this suit to enforce the Materiality Provision.

We hold that private plaintiffs have a private right of action to enforce § 10101 under 42 U.S.C. § 1983, and further hold that the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16 are immaterial to a voter's qualifications and eligibility under § 10101(a)(2)(B). Accordingly, we will remand to the District Court and direct that Court to enter an order that the undated ballots be counted.

I. Factual Background

In 2019, the Pennsylvania General Assembly enacted new mail-in voting provisions, which permitted all registered voters to vote by mail.[5] To receive the

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[2] *Id.*

[3] *See* 25 Pa. Cons. Stat. §§ 1301(a), 2811, 3150.16(b).

[4] *Id.* § 3146.6.

[5] Act of Oct. 31, 2019, PA. LAWS 552, No.77 § 8.

mail-in ballot, a voter must first complete an application that requires the voter to provide his or her name, address of registration, and proof of identification.[6] The county board of elections then verifies that information and compares the application to the information on record for the voter.[7] If the information on the request for a mail-in-ballot is consistent with the registration information for that voter, the voter receives a ballot package that contains a ballot, a secrecy envelope, a return envelope, and instructions for completing the absentee or mail-in ballot.[8] The voter casts his or her vote by marking the ballot, placing it in the secrecy envelope, and then placing the secrecy envelope in the return envelope.[9] Under the Pennsylvania Election Code, the voter must "fill out, date and sign the declaration," otherwise known as the "voter declaration" printed on the return envelope.[10] The voter then mails or delivers the ballot to the county elections board.[11] Delivery is timely if received by the board of elections by 8:00 p.m. on

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[6] 25 Pa. Cons. Stat. §§ 3146.2, 3150.12.

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

[8] JA 165.

[9] JA 166.

[10] 25 Pa. Cons. Stat. §§ 3146.6(a), 3150.16(a).

[11] *Id.*

Election Day.[12] When county boards of elections receive a mail-in ballot, the ballot's envelope is stamped with the date of receipt and logged into the Statewide Uniform Registry of Electors (SURE) system.[13]

The Lehigh County Board of Elections (LCBE) held an election on November 2, 2021, to fill vacancies for the office of Judge of the Court of Common Pleas of Lehigh County. Six candidates ran for three available judgeships. Candidates Thomas Caffrey and Thomas Capehart received the most votes and were sworn into office. During the counting of the ballots, the LCBE set aside 257 out of approximately 22,000 mail-in or absentee ballots that lacked a handwritten date next to the voter declaration signature. The LCBE also received four ballots with the date in the wrong location on the outer envelope and set those aside. It is undisputed that all of these ballots were received by the deadline of 8:00 p.m. on election day. As of November 15, 2021, candidate David Ritter received the third most votes in the election, which is seventy-four votes more than the candidate in fourth place, Zachary Cohen.

II. Procedural History

The LCBE convened a public hearing on November 15, 2021, to consider whether to count the disputed (i.e., undated) ballots. During the hearing, the chief clerk testified and offered his conclusion that the undated declaration ballots were not effective and

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[12] *Id.*

[13] *Id.* § 1222.

should not be counted because the declaration on the outside envelope was undated. Similarly, the LCBE's solicitor testified that he understood that the Pennsylvania Department of State had advised that a dated declaration was required. There was also testimony that the LCBE "ha[d] decided to count ballots where voters provided their birthday dates."[14] The LCBE voted 3-0 to count the undated ballots.

On November 17, 2021, Ritter appealed with the Lehigh County Court of Common Pleas. An evidentiary hearing and oral argument followed. The trial court later issued an opinion and order on November 30, which affirmed the LCBE's decision to count the disputed ballots.

Ritter then appealed the trial court's decision to the Commonwealth Court of Pennsylvania. The court granted a stay pending to the Court of Common Pleas. That court prohibited the LCBE from opening and counting the disputed ballots. On January 3, 2022, the court issued its opinion and order, ultimately concluding that the undated ballots should not be counted. However, on January 27, the trial court entered an order, directing the LCBE to count the four misdated ballots but not the 257 undated ballots.[15]

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[14] JA 254.

[15] The Supreme Court of Pennsylvania denied a petition for allowance of appeal by the LCBE on the same day. *Ritter v. Lehigh Cnty. Bd. of Election*, No. 9 MAL 2022, 2022 WL 244122 (Pa. Jan. 27, 2022).

On January 31, Plaintiffs Linda Migliori, Sergio Rivas, Richard Richards, Francis J. Fox, and Kenneth Ringer (Voters) sued the LCBE in the Eastern District of Pennsylvania. They argued that the LCBE's decision to not count their votes simply because they had not entered the date on the outside envelope violated their rights under the Materiality Provision of the Civil Rights Act. Ritter and Cohen both intervened in the action, and the parties cross-moved for summary judgment.[16]

Voters are five individuals between the ages of 66 and 76 residing in Lehigh County. Some are Democrats and some are Republicans. They used mail-in ballots in the November 2021 county elections.[17] Their ballots, along with 252 other Lehigh County mail-in ballot voters,[18] were set aside and not counted merely because they did not write a date on the envelope.[19] We again note that it is undisputed that their ballots were received before the 8:00 p.m. deadline and the only thing that prevents their vote from being counted is the

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[16] *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 WL 802159, at *1 (E.D. Pa. Mar. 16, 2022).

[17] *Id.*

[18] According to Cohen's campaign, of the disputed ballots the "average age of these voters was 71 at the time they voted. 224 of them were over 55 and 193 were over 65. Fifteen of the [d]isputed [b]allots came from voters over the age of 90, one of whom was 100 years old and another was 103 years old." JA 169.

[19] *Migliori*, 2022 WL 802159, at *1.

fact that they did not enter a date on the outside envelope.[20]

On March 16, 2022, the District Court granted the LCBE and Ritter's motions for summary judgment.[21] The Court held that there was no private right of action to enforce the Materiality Provision.[22] This expedited appeal followed.

III. Discussion[23]

As noted at the outset, we must determine whether the District Court erred in finding Voters have no right of action to enforce the Materiality Provision of the Civil Rights Act. We conclude that it did and reverse. We hold that Voters may enforce the Materiality Provision of the Civil Rights Act (52 U.S.C. § 10101(a)(2)(B)) by an action brought under 42 U.S.C. § 1983. Accordingly, we need not decide whether

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[20] As noted above, their votes would have been counted if they had entered any date, even an obviously incorrect one.

[21] *Migliori*, 2022 WL 802159, at *15.

[22] *Id.*

[23] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment de novo. *Tundo v. County of Passaic*, 923 F.3d 283, 286 (3d Cir. 2019). We also review a district court's legal conclusions de novo. *Acierno v. Cloutier*, 40 F.3d 597, 609 (3d Cir. 1994) (en banc).

Congress also intended to create an implied right of action.[24]

1. Enforcement Via 42 U.S.C. § 1983[25]

In *Gonzaga University v. Doe*, the Supreme Court held that a federal statute that unambiguously confers an individual right is presumptively enforceable by private plaintiffs via § 1983.[26] Accordingly, to determine whether a federal statute is enforceable by private plaintiffs via § 1983, we must first ask "whether

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[24] Moreover, this matter is expedited and comes before us on cross motions for summary judgment. There are no genuine disputes of material fact for the District Court to resolve. We will resolve the underlying legal issues in the interest of judicial economy rather than remanding the case back to the District Court for a legal ruling that could result in further delay and an additional appeal. *See Hudson United Bank v. LiTenda Mortg. Corp.* 142 F.3d 151, 159 (3d Cir. 1998).

[25] Appellees argue that Voters waived whether they could enforce the Materiality Provision via § 1983 because it "was not developed below." Appellee Ritter Br. at 33; *see also* Appellee LCBE Br. at 9. Though they describe the issue as waiver, it is unclear whether the Appellees are really making a forfeiture argument here because they contend that Voters at no point adequately developed this argument below. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) ("The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. '[F]orfeiture is the failure to make the timely assertion of a right [;] waiver is the 'intentional relinquishment or abandonment of a known right.'" (alterations in original)). Regardless, we find this argument unpersuasive as Voters clearly pled that they were asserting their claims through § 1983 throughout their complaint.

[26] 536 U.S. 273, 284 (2002).

Congress intended to create a federal right."[27] If a federal right is found, we then ask whether defendants rebutted the presumption that it can be enforced in an action under § 1983.[28]

The District Court found that the Materiality Provision unambiguously confers a personal right because it "places '[a]ll citizens' qualified to vote at the center of its import and provides that they 'shall be entitled and allowed' to vote."[29] We agree.

Accordingly, we need only decide if Appellees rebutted the presumption that this right is enforceable under § 1983. A defendant can rebut the presumption but only by "showing that Congress 'specifically foreclosed a remedy under § 1983.'"[30] The presumption is generally only rebutted in exceptional cases.[31] To rebut the presumption, a defendant must point to either "specific evidence from the statute itself" or "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[32] Appellees cannot establish either.

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[27] *Id.* at 283 (emphasis omitted).

[28] *See id.*

[29] *Migliori*, 2022 WL 802159, at *10 (alteration in original).

[30] *Gonzaga*, 536 U.S. at 284 n.4 (citing *Smith v. Robinson*, 468 U.S. 992, 1004–05 n.9 (1984)).

[31] *Livadas v. Bradshaw*. 512 U.S. 107, 133 (1994).

[32] *Gonzaga*, 536 U.S. at 284 n.4.

The text of § 10101 does not preclude a § 1983 remedy, and neither Appellee argues that it does. Specifically, § 10101(d) explains that federal courts "shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies."[33] Thus, this section specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court. It does not shut the door on the mechanisms by which a party may pursue enforcing their right under the statute.

Nor does § 10101 include a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983 and therefore indicative of a congressional intent to foreclose a private right of action. The Supreme Court has found that statutory enactments preclude private enforcement actions pursuant to § 1983 in very few instances. In doing so, the Court "ha[s] placed primary emphasis on the nature and extent of that statute's remedial scheme."[34] In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, the Court discussed how the relevant statute both provided "a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties" for the agency's use and authorized "private persons to initiate enforcement actions" in several

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[33] 52 U.S.C. § 10101(d).

[34] *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253 (2009).

provisions.[35] The Court thus concluded it was "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies."[36] In *Smith v. Robinson*, the Court explained how "the review scheme in the [statute] permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review."[37] The Court explained "that Congress could not possibly have wanted [individuals] to skip these procedures and go straight to court by way of § 1983."[38]

Appellees argue that the inclusion of a right of action for the United States precludes a right of action for private plaintiffs.[39] It is true that the statute refers to the Attorney General's enforcement ability.[40] But this is distinguishable from the agency authorizations recognized in *Sea Clammers*. Here, as Intervenor-Appellee Ritter concedes, "the Attorney General's enforcement authority is not made

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[35] *Blessing v. Freestone*, 520 U.S. 329, 347 (1997) (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 13–14, 20 (1981)).

[36] *Id.*

[37] *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1009 (1984)).

[38] *Id.* (citing *Smith*, 468 U.S. at 1011).

[39] *See* Appellee Ritter Br. at 38–39; Appellee LCBE Br. at 12.

[40] *See* 52 U.S.C. § 10101(c).

exclusive."[41] Nor does this statute include an express provision for only specific situations for which private suits are authorized. Whereas in *Sea Clammers*, because the statute expressly authorized citizen suits in specific provisions, the Court could not assume that Congress intended to authorize additional judicial remedies for private citizens where it was not expressly stated.[42] Because the statute here does not contain this type of limiting provision and the Attorney General's enforcement authority is not exclusive, the presumption of a private right of enforcement under § 1983 is simply not rebutted.

Moreover, this case is also distinguishable from *Smith*. Unlike in *Smith*, this statute does not provide for "aggrieved individuals to invoke 'carefully tailored' local administrative procedures."[43] Instead, as mentioned above, the statute expressly gives aggrieved parties direct access to the federal courts "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies."[44] This reinforces our conclusion that the presumption of a private right of action under § 1983 is not rebutted.[45]

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[41] Appellee Ritter Br. at 39.

[42] *Sea Clammers*, 453 U.S. at 14–15.

[43] *Blessing*, 520 U.S. at 1363 (quoting *Smith*, 468 U.S. at 1009).

[44] 52 U.S.C. § 10101(d).

[45] The Court also found that a statute precluded § 1983 claims in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). Intervenor-Appellee Ritter relies on this case as support for

In holding that there was no private right to enforce the Materiality Provision of the Civil Rights Act, the District Court concluded that under *Wisniewski v. Rodale, Inc.*, the Attorney General's authority to enforce § 10101 is inconsistent with a private remedy and therefore rebuts the presumption that arises under *Gonzaga*.[46] However, *Wisniewski* involved an implied right of action that did not implicate § 1983.[47] Moreover, for reasons we do not understand, the District Court neither cited § 1983 nor engaged in *Gonzaga*'s two-part test.[48] Moreover, *Wisniewski* is

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whether the presumption was rebutted here. His reliance is misguided, however, as that case found the relevant statute precluded § 1983 claims because Congress expressly narrowed the availability of privately enforceable judicial remedies. *Id.* at 121. Whereas here, the statute does not provide for a limited private remedial scheme.

[46] *Migliori*, 2022 WL 802159, at *10.

[47] *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 301 (3d Cir. 2007).

[48] The District Court applied only the implied right of action framework under *Alexander v. Sandoval*, 532 U.S. 275 (2001). *Migliori*, 2022 WL 802159, at *12–13. Under this test, an implied right of action exists if "a statute . . . manifest[s] Congress's intent to create (1) a personal right, and (2) a private remedy." *Three Rivers Ctr. for Indep. Living v. Housing Auth. of City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004) (citing *Sandoval*, 532 U.S. at 286). The District Court did cite *Gonzaga* in answering the first prong of this test, but that is because both the § 1983 analysis under *Gonzaga* and the implied right of action analysis under *Sandoval* begin with this question. *See Migliori*, 2022 WL 802159, at *12. As stated above, because we need not decide whether Congress also intended to create an implied right of action, we need not engage with the test under *Sandoval*.

readily distinguishable because it involved comprehensive administrative proceedings, including a provision that allowed an administrative agency to bring civil suits. Section 10101(c) only provides for suits by the Attorney General. It does not establish a cause of action for private individuals. When Congress added a provision for civil enforcement by the Attorney General,[49] it acknowledged that private individuals had enforced the substantive rights in § 10101(a) via § 1983 for nearly a century.[50] Moreover, it did not make the Attorney General's enforcement mandatory.[51]

Finally, the mere existence of a public remedy by the Attorney General is inadequate, without more, to rebut the presumption of a private right of action under § 1983.[52] "[T]he existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which . . . an action would lie under § 1983 and those in which . . . it would not."[53] And here, § 10101 "contains no express private remedy, much less a more restrictive one."[54] Accordingly, for all the reasons stated above, we find that Appellees have failed to rebut the presumption of an enforceable right

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[49] 52 U.S.C. § 10101(c).

[50] H.R. REP. No. 85-291, at 1977 (1957).

[51] 52 U.S.C. § 10101(c) ("[T]he Attorney General *may* institute for the United States . . . a civil action . . . ." (emphasis added)).

[52] See Fitzgerald, 555 U.S. at 256.

[53] *Id.* (first omission in original)

[54] *Id.*

under § 1983. We therefore hold that private plaintiffs may enforce the Materiality Provision via § 1983, and the District Court erred in finding that Voters have no right of action.

2. Materiality[55]

Because we find that private plaintiffs may enforce the Materiality Provision via § 1983, we now turn to whether the LCBE's refusal to count Voters' ballots for omitting the date violates this provision.[56] To answer

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[55] Intervenor-Appellee Ritter has argued that Voters claim is barred under the doctrine of laches. Appellee Ritter Br. at 22. We review a decision about the doctrine of laches for abuse of discretion. *Kars 4 Kids, Inc. v. America Can!*, 8 F.4th 209, 219 n.10 (3d Cir. 2021). This argument is unavailing and merits only the briefest of discussion because Voters timely filed their complaint. We thus do not find that the District Court abused its discretion in concluding that "Ritter has failed to established Plaintiffs engaged in inexcusable delay in the filing of this matter." *Migliori*, 2022 WL 802159, at *7. We also reject Ritter's argument that Voters lack Article III standing for the remedy they seek. Ritter confuses standing for scope of remedy, which is non-jurisdictional and thus subject to forfeiture. *See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017). Because this argument was not raised below, it is forfeited.

[56] The Materiality Provision applies to any "record or paper relating to any application, registration, or other act requisite to voting." § 10101(a)(2)(B). We find that the mail-in ballot squarely constitutes a paper relating to an act for voting. We reject Appellees' argument that the Materiality Provision does not apply here because the provision applies only to instances of racial discrimination and voter registration. Appellee Ritter Br. at 44, 46. When interpreting a statute, we first start with the plain meaning of the language. *Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003). If the plain meaning is "unambiguous, then the first [step] is also

this query, we must ask whether this requirement is material in determining whether such individual is qualified to vote under Pennsylvania law. In Pennsylvania, a voter is qualified if, by Election Day, "they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction."[57] In other words, the requirement is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.

Appellees cannot offer a persuasive reason for how this requirement helped determine any of these qualifications.[58] And we can think of none. Appellees try to make several reaching arguments. None of which we find persuasive. For example, Appellees argue that the date confirms a person is qualified to vote from their residence since a person may only vote in an election district s/he has resided in for at least thirty days before the election and one's residency could change in a matter of days.[59] It is unclear how this date

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the last." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.D. 249, 253–54 (1992)). Here, the text of the provision does not mention racial discrimination and includes "other act[s] requisite to voting" in a list alongside registration. Thus, we cannot find that Congress intended to limit this statute to either instances of racial discrimination or registration.

[57] 25 Pa. Cons. Stat. §§ 1301(a), 2811.

[58] *See* Appellee Ritter Br. at 49–50.

[59] *Id.* at 50.

would help determine one's residency, but even supposing it could, this argument assumes the date on the envelope is correct. However, the LCBE counted ballots with obviously incorrect dates.[60]

Intervenor-Appellee Ritter also argues that the date requirement is "material in determining an elector's qualification to vote in future elections" because a voter found guilty of knowingly signing a voter declaration that is false is not allowed to vote for four years.[61] This argument is particularly unpersuasive. Under the provision, materiality is limited to errors or omissions determining qualification "to vote in *such* election," not future elections.[62]

Intervenor-Appellee Ritter also claims that the date requirement "serves a significant fraud-deterrent function" and "prevents the tabulation of potentially fraudulent back-dated votes."[63] Even if this is true, the provision is clear that an "error or omission is not material" unless it serves to "determin[e] whether such individual is qualified under State law to vote in such

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[60] The Deputy Secretary for Elections & Commissions sent an email on behalf of the Pennsylvania Department of State reminding counties 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. You should process these ballots normally." JA 192.

[61] Appellee Ritter Br. at 54.

[62] 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

[63] Appellee Ritter Br. at 55.

election."[64] Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote. But whatever sort of fraud deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote. It must be remembered that all agree that the disputed ballots were received before the 8:00 p.m. deadline on Election Day. It must also be remembered that ballots that were received with an erroneous date were counted. We are at a loss to understand how the date on the outside 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. Surely, the right to vote is "made of sterner stuff" than that.

Ironically even the LCBE—the main defendant in this case—at first agreed that the omissions were immaterial.[65] The nail in the coffin, as mentioned above, is that ballots were only to be set aside if the date was *missing*—not incorrect. If the substance of the string of numbers does not matter, then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications. As Voters persuasively argue, "[t]he fact that anything that looks like a date, including a date from decades past or future, is acceptable highlights why the handwritten-envelope date cannot be material to

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[64] 52 U.S.C. § 10101(a)(2)(B).

[65] *Migliori*, 2022 WL 802159, at *3 ("[T]he LCBE voted unanimously to count the disputed ballots.").

accurately assessing anything." Moreover, the Deputy Secretary for Elections & Commissions explicitly stated that the date is not used "to determine the eligibility" (i.e., qualifications) of a voter.[66] This, without more, slams the door shut on any argument that this date is material.

Upon receipt, the LCBE timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless. It was not entered as the official date received in the SURE system, nor used for any other purpose. Appellees have offered no compelling reasons for how these dates—even if correct, which we know they did not need to be—help determine one's age, citizenship, residency, or felony status. And we can think of none. Thus, we find the dating provisions under 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under the Materiality Provision.

All five Voters were qualified to vote in Lehigh County when they submitted their mail-in ballots and submitted their ballots on time. Accordingly, because their omissions of the date on their outside envelopes is immaterial to determining their qualifications, the LCBE must count their ballots. Otherwise, the LCBE will violate the Materiality Provision by denying Voters their right to vote based on an omission immaterial to determining their qualifications to vote.

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[66] JA 192.

IV. Conclusion

Congress intended § 1983 to be a channel for private plaintiffs to enforce the Materiality Provision of the Civil Rights Act. That provision was created to ensure qualified voters were not disenfranchised by meaningless requirements that prevented eligible voters from casting their ballots but had nothing to do with determining one's qualifications to vote. Ignoring ballots because the outer envelope was undated, even though the ballot was indisputably received before the deadline for voting serves no purpose other than disenfranchising otherwise qualified voters. This is exactly the type of disenfranchisement that Congress sought to prevent.

Accordingly, we find the dating provisions in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B). There is no basis on this record to refuse to count undated ballots that have been set aside in the November 2, 2021, election for Judge of the Common Pleas of Lehigh County. We will thus remand this matter to the District Court and direct that Court to enter an order that the undated ballots be counted.

MATEY, *Circuit Judge*, concurring in the judgment.

Much about this case is not disputed. And given the lack of genuine disagreement on key questions, I agree that the Appellants can enforce the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), under 42 U.S.C. § 1983.

For one, the Appellees did not challenge the argument that § 10101(a)(2)(B) creates an individual

federal right.[1] At all.[2] That is significant because "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 n.7 (3d Cir. 2004) (quoting *Gonzaga*, 536 U.S. at 284).

For another, the Appellees offered no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code, 25

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[1] We have held that a statute creates a personal right when it satisfies all three of *Blessing v. Freestone*'s factors: "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States . . . [i.e., it] must be couched in mandatory, rather than precatory, terms." *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Port Auth. of N.Y. & N.J.*, 730 F.3d 252, 254 (3d Cir. 2013) (alteration in original) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997)). The statute must also use "rights-creating language," *Lewis v. Alexander*, 685 F.3d 325, 345 (3d Cir. 2012) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)), and focus on the individuals protected, not the entity regulated, *N.J. Primary Care Ass'n v. N.J. Dep't of Hum. Servs.*, 722 F.3d 527, 538 (3d Cir. 2013) (citing *Gonzaga*, 536 U.S. at 287–90).

[2] At oral argument, Ritter conceded that the Materiality Provision contains rights-creating language, Oral Arg. at 55:28–55:49, and the Lehigh County Board of Elections agreed with all parts of Ritter's argument, Oral Arg. at 1:01:09–1:01:12. And "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *See Wright v. Spaulding*, 939 F.3d 695, 704 (6th Cir. 2019) (alteration in original) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)).

Pa. Cons. Stat. §§ 3146.6(a), 3150.16(a), is material as defined in § 10101(a)(2)(B). Instead, they agree that no party contests that voter declarations with inaccurate dates were counted in this election.[3] Add up both concessions, and the Appellees have little room left to defend the District Court's decision.

But more room may exist in a future contest, and just because a statute is *sometimes* ignored does not mean the statute is *always* immaterial. Administrative guidance, particularly on the process of counting ballots, has been known to fluctuate. Perhaps the Commonwealth will change its rules raising fresh facts and unforeseen outcomes in a different race. Note, too, the importance of the time- and date-stamped ballots here produced by the SURE system.[4] A system that, despite its name, could fail or freeze, or just run out of

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[3] Which follows the current guidance of the Pennsylvania Department of State 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. You should process these ballots normally." (App. at 79, 192.) This guidance was confirmed by members of the Lehigh County Board of Elections who stated they would even count ballots with birthdates written instead of the date the voter signed the declaration. (App. at 254–55.)

[4] 25 Pa. Cons. Stat. § 1222 (establishing Pennsylvania's electronic voter registration system, the SURE system, to be implemented by regulations from the Commonwealth's Department of State).

funding down the road.[5] Surely, the lack of that evidence might form a different case and controversy, one where the materiality of the date on the voter declaration might make a difference.

Those questions are for tomorrow. Today, it is enough to conclude, as the majority does, that the Appellees have explained no material issues left for litigation. For that reason, I concur in the Judgment.

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[5] Indeed, the only regulation that requires "[r]eturned absentee ballots [to] be immediately stamped showing the time and date of receipt" makes no mention of the SURE system. 4 Pa. Code § 171.14(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

[Filed: May 23, 2022]

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor – Plaintiff

v.

LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY, *Circuit Judges*.

AMENDED JUDGMENT

This judgment is issued at the direction of the Court pursuant to Fed. R. App. P. 36(a)(2).

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on May 18, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on March 16, 2022, is reversed insofar as it found Appellants lack the capacity to bring suit under 52 U.S.C. § 10101 as there exists a private right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002).

In addition, inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B). Accordingly, because it is undisputed that all the undated ballots that have been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County were received by the deadline, there is no basis on this record to refuse to count them.

This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted.

A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be five (5) days from the date that the Court's opinion is entered on the docket.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 23, 2022

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:22-cv-00397

[Filed: June 10, 2022]

LINDA MIGLIORI, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
LEHIGH COUNTY BOARD OF ELECTIONS *et al.*,	)
Defendants.	)

O R D E R

AND NOW, this 10th day of June, 2022, upon consideration of the Order of the Third Circuit Court of Appeals in Appeal Number 22-1499, in which the Third Circuit reversed this Court's March 16, 2022 order entering judgment in Defendants' favor to the extent this Court determined that Plaintiffs lacked the capacity to bring suit and directed that this Court enter an Order, forthwith, directing that the undated ballots at issue in this matter be counted, and considering that the time for rehearing of that decision having passed, *see* attached Order, and the Supreme Court having denied David Ritter's Application for Stay of the Third

Circuit's Order, *see Ritter v. Migliori*, No. 21A772, 596 U.S. __ (June 9, 2022),[1] **IT IS HEREBY ORDERED THAT**:

1. Defendant Lehigh County Board of Elections **SHALL** count the undated ballots at issue in this matter.

2. The Court's Order dated March 16, 2022, ECF No. 50, is **VACATED**.

3. Judgment is **ENTERED** in favor of Plaintiffs and against Defendants.

4. This matter remains **CLOSED**.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[1] The Order vacated an emergency stay entered on May 31, 2022 by Justice Samuel A. Alito, Jr.. Justices Alito, Thomas, and Gorsuch dissented from the denial of the stay.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:22-cv-00397

[Filed: March 16, 2022]

LINDA MIGLIORI, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
LEHIGH COUNTY BOARD OF ELECTIONS *et al.*,	)
Defendants.	)

O P I N I O N

Plaintiffs' Motion for Summary Judgment, ECF No. 33 -- Denied
Defendants' Motions for Summary Judgment, ECF Nos. 33 and 34 -- Granted

Joseph F. Leeson, Jr. **March 16, 2022**
United States District Judge

I. INTRODUCTION

This matter involves a recent election held in Lehigh County to elect a judge to the Court of Common

Pleas. The ballots of the five Plaintiffs here,[1] as well as 252 other ballots, were not counted in the election because those 257 ballots lacked a handwritten date next to the voter declaration signature on the outer envelope.

The issue of whether to count the undated ballots was litigated in the state courts, which determined that the 257 ballots could not be counted. Plaintiffs now bring claims arising under federal law before this Court. In particular, Plaintiffs assert that the Lehigh County Board of Election's (LCBE) decision to not count the undated ballots violates the Civil Rights Act of 1964, the First Amendment, and the Fourteenth Amendment.

The LCBE agreed to pause certification of the election until these questions could be resolved. Following an expedited briefing schedule agreed to by the parties and intervenors, Plaintiffs, the LCBE, and Intervenor-Defendant David Ritter filed cross-motions for summary judgment. Upon review, this Court grants Defendants' motions for summary judgment and enters judgment in favor of Defendants on all counts.

II. PROCEDURAL HISTORY

On January 31, 2022, the five named Plaintiffs filed suit in the Eastern District of Pennsylvania. *See* Compl., ECF No. 1. Each Plaintiff is a citizen of Lehigh County who is registered to vote. *See* Joint Stip. of Facts ("JSOF") ¶¶ 55, 64, 71, 79, 88, ECF No. 27. In

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[1] Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, and Sergio Rivas.

addition, each Plaintiff submitted a ballot in the November 2, 2021 election that was undated next to the voter declaration signature. *See id.* ¶ 53. Accordingly, Plaintiffs' ballots were not counted. *See id.* Plaintiffs asserted three claims in their Complaint: (1) Count I for violation of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), (2) Count II for undue burden on the right to vote in violation of the First and Fourteenth Amendments, and (3) Count III for violation of procedural due process under the Fourteenth Amendment. *See* Compl. On February 10, 2022, Plaintiffs stipulated to the voluntary dismissal of Count III, their procedural due process claim. *See* Stip. Count III, ECF No. 26. Accordingly, only Counts I and II remain.

Following initiation of this action, this Court granted the intervention motions of David Ritter and Zachary Cohen, who are the two candidates in the subject election. *See* Order 2/2/22, ECF No. 18; Order 2/11/22, ECF No. 29. On February 8, 2022, this Court approved a stipulation reached by the parties, which set the briefing and hearing schedule for this matter. *See* Stip., ECF No. 23. The parties have agreed to proceed by way of cross-motions for summary judgment. *See id.* In accordance with that stipulation, Plaintiffs, the LCBE, and Ritter all filed cross-motions for summary judgment on February 11, 2022. *See* Pl. MSJ, ECF No. 33; LCBE MSJ, ECF No. 32; Ritter MSJ, ECF No. 34. Thereafter Plaintiffs, Ritter, and Cohen filed responses to the various motions. *See* Pl. Resp, ECF No. 44; Ritter Resp., ECF No. 43; Cohen Resp., ECF No. 45. Ritter and Plaintiffs also filed replies in

support of their respective motions. See Ritter Reply, ECF No. 47; Pls. Reply, ECF No. 48.

In addition to the motions and responses, this Court granted leave for the filing of two amici briefs. The first amicus brief was filed by leaders within the Pennsylvania Legislature.[2] *See* Legis. Amicus, ECF No. 37. The second was filed by the Commonwealth of Pennsylvania. *See* Commw. Amicus, ECF No. 40.

On February 24, 2022, all parties, intervenors, and amici indicated to the Court that they wished to rely solely on their briefs and waived oral argument. Accordingly, the oral argument originally scheduled for March 2, 2022 was cancelled.

III. UNDISPUTED MATERIAL FACTS

Pursuant to the expedited briefing schedule, ECF No. 24, the parties filed a Joint Stipulation of Facts. *See* JSOF. The relevant undisputed facts are drawn therefrom.

A. The 2020 Election Cycle

Pennsylvania law provides for the provision of absentee ballots to qualifying voters as well as mail-in ballots to any registered voter who requests one. *See id.* ¶ 1. To acquire either an absentee or mail-in ballot, the

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[2] The amicus brief was filed by the Speaker of the Pennsylvania House of Representatives, Bryan Cutler, the Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff, the President Pro Tempore of the Pennsylvania Senate, Jake Corman, and the Majority Leader of the Pennsylvania Senate, Kim Ward.

voter must fill out an application that requires them to provide their name, address of registration, and proof of identification. *See id.* ¶ 2. Once this information is verified, the voter receives a ballot package that contains a ballot, a "secrecy envelope," a return envelope—which contains the voter declaration required by Pennsylvania law—and instructions for completing the absentee or mail-in ballot. *See id.* ¶ 3.

After marking his or her ballot and placing it in the secrecy envelope, the voter is to then place the secrecy envelope into the return envelope. *See id.* ¶ 4. Title 25 P.S. §§ 3146.6(a), 3150.16(a) require that the voter "fill out, date and sign the declaration," otherwise known as the "voter declaration," printed on the return envelope. *See id.* ¶ 6. During the 2020 election cycle, this provision was the subject of several legal challenges. *See id.* ¶ 7. Following a split decision from the Pennsylvania Supreme Court, undated ballots from the 2020 election cycle were counted. *See id.* ¶ 7. After this decision, the LCBE made design changes to the outer envelope for absentee and mail-in ballots in anticipation of the 2021 election cycle. *See id.* ¶ 8. This redesign was approved by the Secretary of the Commonwealth. *See id.* ¶ 9.

B. The 2021 Lehigh County Election

On November 2, 2021, Lehigh County held an election to fill vacancies for office of Judge of the Court of Common Pleas of Lehigh County. *See id.* ¶¶ 16–17. Six candidates vied for three available judgeships. *See id.* ¶ 17. Candidates Judge Thomas Caffrey and Judge Thomas Capehart garnered the most votes, and have already been sworn into office. *See id.* ¶¶ 19–20. As of

November 15, 2021, candidate David Ritter received the third most votes in the election, and therefore was the presumptive third and final successful candidate for judge. *See id.* ¶ 18. Ritter's lead over the candidate in fourth place, Zachary Cohen, currently stands at seventy-four votes. *See id.*

During the counting of the ballots, any mail-in or absentee ballots that lacked a handwritten date next to the voter declaration signature were set aside. *See id.* ¶ 22. In total, 257 of the approximately 22,000 mail-in and absentee ballots were set aside as undated. *See id.* ¶¶ 21, 23. An additional four ballots were received with the date in the wrong location on the outer envelope; these ballots were also set aside. *See id.* Both the undated and misdated ballots are referred to, collectively, as the disputed ballots. All of the disputed ballots were timely received by the LCBE. *See id.* ¶ 26.

C. State Court Litigation regarding the Disputed Ballots

On November, 15, 2021, the LCBE convened a public hearing to consider whether to count the disputed ballots. *See id.* ¶ 30. During the hearing, both Ritter and Cohen presented argument on the issue. *See id.* ¶ 33. Following argument, the LCBE voted unanimously to count the disputed ballots. *See id.* ¶ 34.

On November 17, 2021, Ritter filed an appeal with the Lehigh County Court of Common Pleas, challenging the LCBE's decision to count the ballots. *See id.* ¶ 35. Following an evidentiary hearing and oral argument, the Court of Common Pleas affirmed the LCBE's decision to count the disputed ballots. *See id.* ¶¶ 36, 38.

Ritter then appealed the trial court's decision to the Commonwealth Court of Pennsylvania. *See id.* ¶ 40. On January 3, 2022, the Commonwealth Court issued its opinion and order, ultimately concluding that the undated ballots should not be counted. *See id.* ¶ 44. On January 27, 2022, the trial court entered an order, directing the LCBE to count the four misdated ballots but not to count the 257 undated ballots. *See id.* ¶ 48.

On January 31, 2022, Plaintiffs filed the within lawsuit in the Eastern District of Pennsylvania. *See* Compl.

IV. LEGAL STANDARDS

A. Motion for Summary Judgment – Review of Applicable Law

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed fact is "material" if proof of its existence or nonexistence might affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 257.

The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the non-moving party must go beyond the pleadings with affidavits, depositions, answers to interrogatories

or the like in order to demonstrate specific material facts which give rise to a genuine issue. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (stating that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). The party opposing the motion must produce evidence to show the existence of every element essential to its case, which it bears the burden of proving at trial, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. The court must consider the evidence in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

B. The Defense of Laches – Review of Applicable Law

"Laches is an equitable defense which can limit or bar certain claims." *Fenton v. Balick*, 821 F. Supp. 2d 755, 761 (E.D. Pa. 2011) (citing *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 134 (3d Cir.2000)). "Declaratory judgments are equitable in nature and thus the doctrine of laches applies." *Id.* (citing *Building Ind. Ass'n of Lancaster Cnty. v. Manheim Twp.*, 710 A.2d 141, 146–47 (Pa. Commw. Ct. 1998)). "Under Pennsylvania law, the doctrine of laches has two elements: (1) inexcusable delay; and (2) prejudice." *Id.* (quoting *Holmes*, 215 F.3d at 134). "Laches arises when a defendant's position or rights are so prejudiced by length of time and inexcusable delay, plus attendant facts and circumstances, that it

would be an injustice to permit presently the assertion of a claim against him." *Id.* (quoting *Jacobs v. Halloran*, 710 A.2d 1098, 1102 (Pa. 1998)).

C. Claim Preclusion (Res Judicata) – Review of Applicable Law

"Claim preclusion—which some courts and commentators also call res judicata—protects defendants from the risk of repetitious suits involving the same cause of action once a court of competent jurisdiction has entered a final judgment on the merits." *Beasley v. Howard*, 14 F.4th 226, 231 (3d Cir. 2021) (quoting *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011)). The doctrine prevents parties "from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *See id.* (quoting *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, —— U.S. ——, 140 S. Ct. 1589, 1594 (2020)).

Where a defendant seeks to invoke claim preclusion based on a matter litigated in Pennsylvania state court, this Court "must give the same preclusive effect to the [state court] judgment . . . that the courts in Pennsylvania, the state in which the judgment was entered, would give." *See Rosemont Taxicab Co. v. Phila. Parking Auth.*, 327 F. Supp. 3d 803, 815 (E.D. Pa. 2018) (quoting *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d Cir. 2006)). Under Pennsylvania law, a defendant may invoke claim preclusion only where the prior action and current matter share four "identities":

(1) "the things sued upon or for;"

(2) "the cause of action;"

(3) "the persons and parties to the action;" and

(4) "the capacity of the parties to sue or be sued."

See id. (quoting *Turner*, 449 F.3d at 548).

"Although Pennsylvania requires an 'identity of persons and parties' for claim preclusion to apply, that concept includes a party's privies." *Toll Bros., Inc. v. Century Sur. Co.*, 318 F. App'x 107, 110 (3d Cir. 2009) (quoting *Turner*, 449 F.3d at 548 n.11). Privity is defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another so as to represent the same legal right." *See id.* (quoting *Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. Super. Ct. 1995)). Accordingly, "privity is not established by the mere fact that persons may be interested in the same question or in proving the same facts." *Bergdoll v. Pennsylvania*, 858 A.2d 185, 197 n.4 (Pa. Commw. Ct. 2004) (quoting *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1317 (Pa. Super. Ct. 1983)).

D. Civil Rights Act (52 U.S.C. § 10101) – Review of Applicable Law

The Civil Rights Act of 1964 was enacted, in part, to "enforce the constitutional right to vote." *See* Pub. L. 88-352. Formerly codified in 42 U.S.C. § 1971, the provisions of the Act aimed at securing the right to vote are currently codified in 52 U.S.C. § 10101. *See* 52

U.S.C. § 10101 (formerly 42 U.S.C. § 1971). The opening provision thereof provides that

> [a]ll citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

See id. § 10101(a)(1)

In pursuit of that purpose, § 10101(a)(2) prohibits three categories of activity related to voting and voting qualification. *See id.* § 10101(a)(2). First, § 10101(a)(2)(A) prohibits the application of "any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." *See id.* § 10101(a)(2)(A). Second, § 10101(a)(2)(B), otherwise known as the "materiality provision," prohibits denial of "the right of any individual to vote in any election because of 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." *See id.* § 10101(a)(2)(B). Finally,

§ 10101(a)(2)(C) places restrictions on the use of literacy tests as a means of determining voter qualification. *See id.* § 10101(a)(2)(C).

Subsection (c) of § 10101 provides for enforcement of the law's substantive provisions through suit brought by the Attorney General. *See id.* § 10101(c). In relevant part, § 10101(c) provides that

> [w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief . . . .

See id. § 10101(c).

E. Determining the Existence of Implied Private Rights of Action – Review of Applicable Law

"A private right of action is the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 296 (3d Cir. 2007). "Many federal statutes provide a private right of action through their express terms." *Id.* at 297. "Other federal statutes, however, merely define rights and duties, and are silent about whether an individual may bring suit to enforce them." *Id.* "For some statutes in this latter

category, courts have held that 'implied' private rights of action exist." *Id.*

Prior to the Supreme Court's decision in *Cort v. Ash*, 522 U.S. 66 (1975), the judicial approach to finding implied rights of actions was "less restrictive." *See id.* at 298 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)). The existence of a private right of action turned on "Congress's general purpose in enacting the statute" rather than "Congress's intent regarding a private right of action." *See id.* With the passage of *Cort*, the Supreme Court began to alter the focus of the inquiry from that of "congressional purpose" to one of "congressional intent" to create a private right of action. *See id.* (citing *Cort*, 522 U.S. 46; *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)).

In 2001, the Supreme Court revisited this issue in *Alexander v. Sandoval*. *See* 532 U.S. 275 (2001). Therein, the Supreme Court did not consider the factors set out by *Cort*, and instead, it set forth the following test for determining whether a private right of action exists:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress . . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy . . . . Statutory intent on this latter point is determinative . . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a

> policy matter, or how compatible with the statute.

See Wisniewski, 510 F.3d at 299–300 (alterations in original) (quoting *Sandoval*, 532 U.S. at 286–87).

Accordingly, whether a private right of action exists under a given statute depends on the intent of Congress. *See Sandoval*, 532 U.S. 275, 286–87 (2001). A reviewing court must determine whether Congress intended to create a personal right *and* a private remedy for vindication of that right. *See Wisniewski*, 510 F.3d at 301. While *Sandoval* began and ended its analysis based on the "text and structure" of the statute, the Third Circuit has determined that *Sandoval* left open the possibility that legislative history and other considerations relevant to congressional intent can inform the analysis. *See id.* at 301 n.16 ("Although we have acknowledged that Justice Scalia, the author of the *Sandoval* majority opinion, disapproves of the use of legislative history . . . nothing in *Sandoval* expressly condemns its use.").

F. Undue Burdens on the Right to Vote under the First and Fourteenth Amendments – Review of Applicable Law

"Voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). "States may prescribe '[t]he Times, Places

and Manner of holding Elections for Senators and Representatives . . . .'" *Id.* (quoting U.S. CONST. art I., § 4, cl. 1).

"Election laws will invariably impose some burden upon individual voters." *Id.* Accordingly, in determining the appropriate level of scrutiny to be applied to laws that burden the right to vote,

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.

See id. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Where the right to vote is "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *See id.* (quoting *Norman v. Reed*, 502 U.S. 298, 289 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

V. ANALYSIS

Plaintiffs present two claims for relief. First, Plaintiffs assert that the decision to not count the undated ballots is a violation of the materiality provision, 52 U.S.C. § 10101(a)(2)(B). Specifically, Plaintiffs argue that their failure to include a handwritten date on the outer envelope amounts to an immaterial omission, or, put another way, one that has no material effect on their qualification to vote. Second, Plaintiffs claim that the handwritten date requirement itself is an undue burden on the right to vote that violates the First and Fourteenth Amendments. In particular, Plaintiffs argue that the government lacks an important interest in the requirement sufficient to sustain it in light of the burden it imposes on voters.

Prior to addressing Plaintiffs' claims on the merits, Defendants assert two threshold defenses in their respective motions: (1) laches and (2) claim preclusion, or res judicata. This Court addresses those threshold defenses before turning to the merits of Plaintiffs' claims. In summary, this Court finds neither threshold defense applicable and reviews Plaintiffs' claims on the merits.

With respect to Plaintiffs' claim under § 10101(a)(2)(B), this Court concludes that Plaintiffs lack the capacity to bring suit under this provision. Specifically, this Court holds that § 10101 does not provide for a private right of action. With respect to Plaintiffs' First and Fourteenth Amendment claim, this Court finds that the slight burden imposed by the handwritten date requirement is justified by important governmental interests, and accordingly, it does not

amount to an undue burden on the right to vote. Having reached these conclusions, the Court grants Defendants' motions for summary judgment, and enters judgment in their favor on all Counts.

A. Threshold Defenses

In their respective motions, Defendants lodge two threshold defenses. First, Ritter asserts that Plaintiffs' claims should be barred by the doctrine of laches. Second, both Ritter and the LCBE argue that Plaintiffs' claims should be dismissed under the doctrine of claim preclusion or res judicata. Following a review of both defenses, this Court concludes that Defendants have failed to adequately establish either. Accordingly, Defendants' motions for summary judgment on the basis of laches and claim preclusion are denied.

1. The Defense of Laches

Ritter first asserts that this Court should grant summary judgment in his favor based on the affirmative defense of laches. Specifically, Ritter argues that Plaintiffs waited an inexcusable amount of time following the end of the election to file the instant matter. To establish laches, Ritter must show (1) that the Plaintiffs engaged in inexcusable delay in the filing of this action, and (2) that Ritter suffered prejudice as a result. *See Fenton*, 821 F. Supp. 2d at 761 (quoting *Holmes*, 215 F.3d at 134).

A review of the stipulated facts in this matter compels denial of Ritter's laches defense, as he has failed to show that the Plaintiffs engaged in inexcusable delay. The disputed election was held on November 2, 2021. *See* JSOF ¶¶ 16-17. When the

question arose whether to count or dispose of the undated ballots, the LCBE convened a public hearing on November 15, 2021. *See id.* ¶ 30. At that hearing, the LCBE voted to count the undated ballots. *See id.* ¶ 34. Two days after the decision was made to count the ballots, Ritter initiated an appellate process of that decision, which would last until January 27, 2022. *See id.* ¶¶ 35, 40. That appellate process culminated in the Pennsylvania Supreme Court's denial of an allowance of appeal. *See id.* ¶ 46. On January 27, 2022, on remand from the Superior Court, the Lehigh County Court of Common Pleas entered an order directing that the undated ballots not be counted. *See id.* ¶ 48.

Within just four days of learning that their ballots would go uncounted, Plaintiffs filed suit in this Court. *See* Compl. On these agreed-upon facts, this Court finds that the Plaintiffs did not engage in inexcusable delay. Up and until at least January 3, 2022 ,when the Commonwealth Court issued its opinion, Plaintiffs had every reason to believe their ballots would be counted. Moreover, it was not until January 27, 2022 that the order that directed the ballots not be counted was entered. While Ritter had every right to appeal the LCBE's decision and trial court's opinion, he cannot now claim that his exercise of that right represents a delay attributable to Plaintiffs. Accordingly, that Plaintiffs filed this matter following the exhaustion of all state appellate efforts does not indicate that they engaged in inexcusable delay.

Ritter has failed to establish that the Plaintiffs engaged in inexcusable delay in the filing of this

matter. Therefore, Ritter's motion for summary judgment on the basis of laches is denied.

2. The Doctrine of Claim Preclusion

Next, Defendants argue that Plaintiffs claims are barred by the doctrine of claim preclusion or res judicata. In order to successfully assert claim preclusion, Defendants must show an identity of (1) the thing sued for, (2) the cause of action, (3) the persons and parties to the action, and (4) the capacity of the parties to sue or be sued. *See Rosemont Taxicab Co.*, 327 F. Supp. 3d at 815 (quoting *Turner*, 499 F.3d at 548). Here, even assuming that Defendants can make out the three remaining factors, Defendants fail to establish that the Plaintiffs in this lawsuit were party to, or in privity with a party to, the state lawsuit involving the disputed ballots.

Importantly, there is no dispute that the Plaintiffs here were not party to the state lawsuit. Instead, Defendants attempt to argue that the Plaintiffs were in privity with a party to the state lawsuit. On one hand, the LCBE argues that there is a privity "between the voter and the candidate" that is "so close as to be undistinguishable." *See* LCBE MSJ 21. On the other hand, Ritter attempts to claim that the Plaintiffs are in privity with the LCBE and Cohen. *See* Ritter MSJ 24.

Notwithstanding, this Court finds that the Plaintiffs were not in privity with any of the parties to the state lawsuit. Defendants do not argue that the Plaintiffs and the LCBE, Cohen, or Ritter have a "mutual or successive relationship to the same right of property." *See Toll Bros., Inc.*, 318 F. App'x at 110 (quoting

Ammon, 655 A.2d at 554). Moreover, while Defendants certainly argue that Plaintiffs shared interest with Cohen in the underlying state action, they do not argue that their interests were so identical as to "represent the same legal right." *See id.*

Rather, Defendants focus almost exclusively on an "adequate representation" theory of privity. *See* Ritter MSJ 24. In particular, Ritter argues that "Plaintiffs are in privity with the parties and participants in the prior court litigation and their interests were adequately represented there." *See id.* Notwithstanding, the adequate representation exception is far narrower than Ritter would have this Court read it. In *Taylor v. Sturgell*, the Supreme Court indicated that "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *See* 553 U.S. 880, 894 (2008) (alteration in original) (citing *Richards v. Jefferson Cnty., Alabama*, 517 U.S. 793, 798 (1996)). These "certain limited circumstances" include (1) class actions and (2) suits brought by "trustees, guardians, and other fiduciaries." *See id.* (citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 593 (1974)). Accordingly, this exception does not permit a finding of privity where there is a mere overlapping of the interests between one party and another. *See id.*; *see also Bergdoll*, 858 A.2d at 197 n.4.

Neither Ritter nor the LCBE assert that the underlying state action was a class action, or that it was brought by a trustee, guarantor, or fiduciary of any of the Plaintiffs. Rather, Defendants focus solely on the

similarity between the interests of the LCBE and Cohen to those of Plaintiffs here. This argument is unavailing. It is well-settled that privity is not established by a mere shared interest in an identical question or even in proving the same facts. *See id.* Even assuming that Plaintiffs' interests overlap with those of the LCBE and Cohen, Defendants fail to establish a relationship between Plaintiffs and either of those parties sufficient to find them in privity with one another.[3]

In the absence of a sufficient relationship between the Plaintiffs and the parties to the prior state case, this Court concludes that Defendants have failed to establish the privity necessary for the defense of claim preclusion. Accordingly, Defendants' motions for summary judgment on the basis of claim preclusion are denied.

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[3] Ritter, in his motion, cites case law in which electors have been found in privity with a candidate. *See* Ritter MSJ 24–25. In particular, Ritter notes that a voter may be considered in privity with a candidate where they are merely a "pawn" or "puppet" of that candidate. *See id.* at 25 (citing *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 96 (2d Cir. 2005); *Cruz v. Bd. of Elections of New York*, 396 F. Supp. 2d 354, 355 n.1 (S.D.N.Y. 2005)). Even assuming that any such relationship existed between Plaintiffs and Cohen, Ritter admits that Cohen was not a party to the underlying state actions. Notably, Cohen's petition to intervene was denied by the trial court, and he did not seek intervention in the appeal to the Commonwealth Court. *See id.* at 24 n.7. Accordingly, Ritter's claim that Cohen adequately represented Plaintiffs' interests in the state litigation is unavailing.

B. Plaintiffs' Claims

Having addressed the threshold defenses offered by Defendants, the Court turns to a review of Plaintiffs' substantive claims. Plaintiffs assert claims under 52 U.S.C. § 10101(a)(2)(B), the First Amendment, and the Fourth Amendment. With respect to the § 10101 claim, Defendants assert that Plaintiffs lack the capacity to bring suit, as § 10101 does not provide for a private right of action. Defendants also argue for summary judgment on Plaintiffs' constitutional claim, asserting that the burden imposed by the handwritten date requirement is slight in light of the important government interests implicated. This Court agrees that Plaintiffs lack the capacity to bring suit under § 10101(a)(2)(B). In addition, this Court agrees that the slight burden imposed by the handwritten date requirement is sufficiently justified by important government interests. Accordingly, this Court grants Defendants' motions for summary judgment.

1. Private Right of Action under Title 52 U.S.C. § 10101

The parties dispute whether § 10101 provides for a private right of action. Both the LCBE and Ritter contend that § 10101 does not allow for suit by private citizens. In support, the Defendants point to a provision of § 10101 that grants the Attorney General authority to file suit for violations of the statute. In response, Plaintiffs contend that the Attorney General's authority to bring suit is coextensive with that of private citizens.

The question of whether a private right of action exists under § 10101 has not been addressed by the Third Circuit. In order to determine whether a private right of action exists, this Court must ascertain the intent of Congress to create (1) a personal right[4] within the statute and (2) a private remedy for enforcement of that personal right. *See Sandoval*, 532 U.S. at 286–87.

Following a review of the text and structure of § 10101, its legislative history, and relevant case law, this Court concludes that § 10101 does not provide for a private right of action. In particular, the Court finds that even if Congress intended to create a personal right in § 10101, the text, structure, and history of the statute indicates that Congress did not intend to create a private remedy for the vindication thereof.

a. Text and Structure of § 10101

In fidelity to the test set forth in *Sandoval*, the Court begins its analysis with the text and structure of § 10101. The opening provision of § 10101 provides insight into the congressional purpose behind the statute, which, although non-dispositive, helps determine the inquiry into Congress's intent to create a personal right. The provision states:

> *All citizens* of the United States who are otherwise qualified by law to vote at any election

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[4] As the Third Circuit did in *Wisniewski*, this Court uses the term "personal right" to refer to the substantive rights granted in statute and the term "private right of action" to refer to the remedial mechanisms for vindicating the personal right. *See Wisniewski*, 510 F.3d at 300 n.15.

> by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, *shall be entitled and allowed* to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

See 52 U.S.C. § 10101(a)(1) (emphasis added).

The subsequent provisions in § 10101 enumerate actions that no individual, acting under color of law, may take with respect to the right to vote. *See id.* § 10101(a)(2). When compared to the language analyzed in *Sandoval*, § 10101 can be read to confer a personal right on individuals. In particular, whereas the provision at issue in *Sandoval* involved the grant of authority to federal agencies, *see Sandoval*, 532 U.S. at 288–89, § 10101 places "[a]ll citizens" qualified to vote at the center of its import and provides that they "shall be entitled and allowed" to vote, *see* § 10101(a)(1). Accordingly, § 10101 provides a personal right to Plaintiffs. However, this is not the end of the inquiry. As *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.

The text and structure of § 10101 strongly suggest that Congress did not intend to create a private remedy for vindication of the personal right. Notably, § 10101(c) sets forth an enforcement mechanism for violations of the rights contained in §§ 10101(a) and (b), stating in relevant part,

> [w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), *the Attorney General may institute* for the United States, or in the name of the United States, *a civil action or other proper proceeding for preventive relief*, including an application for a permanent or temporary injunction, restraining order, or other order. . . .

See § 10101(c) (emphasis added).

This provision vests the power to bring suit in the Attorney General. *See id.* The provision does not, by its terms, contemplate suits by private citizens. *See id.* Moreover, that § 10101(c) provides that the Attorney General "*may* institute . . . a civil action" does not alter the analysis. *See id.* (emphasis added). The fact that the Attorney General's authority to institute suit is permissive rather than mandatory does not compel a finding that the alternative to an Attorney General's institution of suit is a private right of action. To the contrary, that § 10101(c) expressly provides for enforcement by the Attorney General "creates a strong presumption against [an] implied private right[] of action that must be overcome." *See Wisniewski*, 510 F.3d at 305 & n.1 (noting Supreme Court's unwillingness, post *Sandoval*, to find a private right of action where statutes expressly provide for other means of enforcement).

In addition to the explicit means of enforcement provided by § 10101(c), the language of other provisions

of § 10101 also suggest that Congress did not intend to create a private remedy therein. For example, § 10101(e) provides that, upon the request of the Attorney General, the court shall make a finding of whether any race-based deprivation of the right to vote was pursuant to a pattern or practice. *See id.* § 10101(e). This provision does not provide for such a request by any other parties. Similarly, § 10101(g) appears to only contemplate suits where the Attorney General is the plaintiff. That provision describes the procedure required "in the event neither the *Attorney General* nor any *defendant* files a request for a three-judge court." *See id.* § 10101(g) (emphasis added). Rather than refer to both parties in the general sense, Congress deliberately refers to the plaintiff party as the "Attorney General" and to the other side of the caption as "defendant." *See id.*

Accordingly, the text and structure of § 10101 create a strong presumption that Congress did not intend to create a private remedy for vindication of the personal right.

b. Legislative History of § 10101

In addition to the text and structure of the statute, legislative history may provide insight into Congress's intent. House Resolution 6127 contained various amendments and supplements to 42 U.S.C. § 1971, which housed the voting provisions of the Civil Rights Act prior to their transfer to § 10101. On April 1, 1957, the House Judiciary Committee promulgated House Report Number 85-291, in which the Committee reported its findings on various components of House Resolution 6127. *See* H.R. Rep. No. 85-291 (1957). The

Committee reported two substantive changes to § 1971 relevant to this matter. *See id.* at 1976. The first was a declaration of "the right to vote for federal offices." *See id.* This language made it unlawful for anyone acting under color of law "to interfere or attempt to interfere with the right to vote at any general, special or primary election . . . ." *See id.* In reporting this amendment, Congress was careful to note that this declaration "does not provide for a remedy." *See id.*

Rather, the Committee reported that a separate substantive amendment was slated to create a remedy for enforcement of § 1971. In particular, the Committee noted that "subsection (c) does provide a remedy in the form of a civil action instituted on the part of the Attorney General to prevent an act which would deprive a person of any right of privilege secured by" § 1971. *See id.* Congress viewed this amendment as creating a remedy for the enforcement of § 1971. *See id.* This understanding is confirmed by Representatives who provided minority views on the legislation. In those remarks, a number of Representatives characterized subsection (c) as a "plenary grant of authority to the Attorney General . . . ." *See id.* at 2014.

Indeed, as Attorney General Herbert Brownell, Jr. noted in his remarks to the Speaker of the House, prior to enactment of House Resolution 6127, "[t]he only method of enforcing existing laws protecting [the right of franchise] is through criminal proceedings." *See id.* at 1979. The Attorney General went on to state that "[c]ivil remedies have not been available to the Attorney General in this field. We think that they should be." *See id.* Consistent with this view of

enforcement, in discussing the alternative to Attorney General civil action enforcement, the Representatives did not remark on the topic of private citizen suits. *See id.* at 2014. Rather, the contemplated alternative to civil suit by the Attorney General was continued enforcement through criminal actions. *See id.*

In their response to Defendants' motions, Plaintiffs argue that enforcement by the Attorney General does not entirely eliminate the possibility of private rights of action. Plaintiffs point to the 1957 amendments of § 1971 as proof that some form of enforcement existed prior to the amendment. Plaintiffs suggest that the prior era of enforcement took the form of private actions. While Plaintiffs are correct that agency enforcement mechanisms do not, per se, preclude a private right of action, the presence of the Attorney General enforcement provision creates a strong presumption against the existence of a private right of action. *See Wisniewski*, 510 F.3d at 305 & n.1. The remarks in the Report cited above suggest that the alternative to the newly devised Attorney General enforcement mechanism was not one of private civil suits, but rather a criminal action. Accordingly, the legislative history of § 10101 tracks with the text and structure of the statute in suggesting that Congress did not intend to create a private right of action.

c. Case Law Analysis of § 10101

Although Congress's intent can be determined from the text, structure, and legislative history of § 10101, the Court finds it useful to briefly review the inter-circuit treatment of the question. In particular, Plaintiffs cite case law from the Eleventh Circuit,

which found that § 10101 does provide for a private right action. Plaintiffs request that this Court follow the Eleventh Circuit's lead. For the reasons set forth below, this Court declines to do so.

In *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), the Eleventh Circuit had the occasion to address whether § 10101 provides for a private right of action.[5] The court ultimately concluded that a private right of action was available. *See id.* at 1297. In doing so, the Eleventh Circuit relied heavily on two Supreme Court cases: *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). *See id.* at 1294–1296. In each of those cases, the Supreme Court found private rights of action despite statutory provisions providing for Attorney General enforcement. *See id.* at 1294 (citing *Allen*, 393 U.S. 544; *Morse*, 517 U.S. 186). However, both *Morse* and *Allen* were decided based on a jurisprudence of private rights of action that was dispensed with by the Supreme Court in *Sandoval*. The permissive scheme of granting private rights of action whenever necessary to effectuate congressional purpose was replaced with a more narrowed analysis, one focused exclusively on Congress's intent.[6] *See Sandoval*, 532 U.S. at 286–87.

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[5] Because of the date on which the case was decided, *Schwier* refers to the relevant provisions in their previous codification: 42 U.S.C. § 1971.

[6] As the Third Circuit has explained, early jurisprudence on the existence of private rights of action rested on a notion that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *See Wisniewski*, 510 F.3d at 298 (quoting *Borak*, 377 U.S. at 433). Even

This Court does not disagree with *Schwier*'s conclusion that private rights of action may coexist with other statutory enforcement measures. *See Schwier*, 340 F.3d at 1296 (concluding Congress's provision for enforcement by Attorney General does not compel conclusion that no private right of action exists). However, after reaching this conclusion, the *Schwier* court was required, under *Sandoval*, to determine whether Congress indicated an intent to include a private right of action parallel to the Attorney General enforcement provisions. *See Sandoval*, 532 U.S. at 286–87. On that question, the test applied by the Eleventh Circuit in *Schwier* only undertook half of the *Sandoval* analysis. *See id.* at 1296–97.

Importantly, *Sandoval* requires that a reviewing court inquire into (1) whether Congress intended to create a personal right, and (2) if so, whether Congress also intended to create a private *remedy* for enforcement of that personal right. *See Sandoval*, 532 U.S. at 286–87. In *Schwier*, the Court asked only whether Congress intended to create a personal right in the relevant statute. *See Schwier*, 340 F.3d at 1296 (inquiring into whether "the statute contains 'explicit right- or duty-creating language.'" (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002))) . Finding that Congress did intend to create a specific personal right, and having found that the language in the statute was mandatory, the *Schwier* court determined

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with *Cort*, the inquiry continued to focus on congressional purpose rather than congressional intent. *See id.*; *see also Cort*, 422 U.S. at 82 (concluding "it is not necessary to show an intention to *create* a private right of action" (emphasis in original)).

that § 1971 did provide for private enforcement. *See id.* at 1296–97.

While this Court agrees that § 10101 provides for a personal right, the inquiry does not end there. Rather, *Sandoval* also requires inquiry into whether Congress intended to create a private remedy for the vindication of the personal right. *See Sandoval*, 532 U.S. at 286–87. While the Eleventh Circuit's review of the specific and mandatory nature of the statutory language may help inform whether Congress intended to create a personal right, these considerations are not dispositive of whether Congress intended there to be a private *remedy*. Since the Eleventh Circuit did not address the second—and important—portion of the *Sandoval* test, this Court does not find *Schwier* persuasive on the question of Congress's intent to create a private *remedy* for the personal rights set forth in § 10101.

In conclusion, having reviewed the text of the statute, the structure of its provisions, and the legislative history, this Court concludes that Congress did not intend to provide a private remedy for the vindication of the personal rights contained in § 10101. Congress's deliberate provision of Attorney General enforcement creates a strong presumption against the existence of a private right of action that Plaintiffs fail to overcome. Accordingly, Plaintiffs are without capacity to bring suit under § 10101, and Defendants' motion for summary judgment on this claim is granted.

2. Claims arising under the First and Fourteenth Amendments

Next, Plaintiffs assert that the burden placed on the right to vote by the handwritten date requirement violates the First and Fourteenth Amendments. In particular, Plaintiffs argue that the government lacks an important interest to justify the burden imposed by the handwritten date requirement. There are two steps to analyzing this claim. First, this Court must set out the burden imposed by the regulation, which, in turn, will determine the level of scrutiny to be applied. *See Burdick v. Takushi*, 504 U.S. at 433–44. Second, this Court must apply the appropriate level of scrutiny to the regulation. *See id.*

On the first step, this Court concludes that the burden imposed by the handwritten date requirement is slight. That voters must provide a handwritten date next to the voter's signature is a minor limitation on the fundamental right to vote. The parties to this matter agree on this point. *See* Pls. MSJ 16. Accordingly, the regulation will survive if an important regulatory interest exists to support it.

This Court concludes that there are important interests sufficient to sustain the regulation in light of the minor requirement imposed. Indeed, these interests were recently reviewed by the Pennsylvania Supreme Court. *See In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058 (2020)). There, two opinions reviewed the differing views on this issue. *See id.* The plurality opinion concluded that the voter declaration date requirement "does not implicate any weighty interest." *See id.* at

1078. However, Justice Dougherty, writing a concurring and dissenting opinion signed by then-Chief Justice Saylor and Justice Mundy, concluded that there was "an unquestionable purpose behind requiring electors to date and sign the declaration." *See id.* at 1090–91 (Dougherty, J., concurring and dissenting). As Justice Dougherty noted, "the date on the ballot envelope provides proof of when the 'elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place.'" *See id.* at 1090 (Dougherty, J., concurring and dissenting) (quoting *In re: 2,349 Ballots in the 2020 General Election*, No. 1162 C.D. 2020, 2020 WL 6820816 (Pa. Commw. Ct. Nov. 19, 2020)). Moreover, Justice Dougherty noted that the date next to the voter declaration "prevents the tabulation of potentially fraudulent back-dated votes." *See id.* (Dougherty, J., concurring and dissenting).

Justice Dougherty's concurring and dissenting opinion was cited with approval by the Commonwealth Court in its review of the undated ballots at issue here. *See Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1332 C.D. 2021, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3, 2022). In reviewing Ritter's challenge to the LCBE's decision to count the undated ballots, the Commonwealth Court found that Justice Dougherty's opinion "persuasively explains why there are 'weighty interests'" that support the handwritten date requirement. *See id.* Accordingly, having "adopted the rationale of [Justice Dougherty's opinion] as persuasive authority," the Commonwealth Court concluded "that the dating of mail-in ballots . . . is justified by 'weighty interests' . . . ." *See id.*

While the opinions of Justice Dougherty and the Commonwealth Court do not bind this Court, this Court finds them persuasive in its own review of this claim.[7] In particular, this Court concludes that the Commonwealth of Pennsylvania, as well as its citizens, have important interests in the integrity of the election process by holding fair, efficient, and fraud-free elections that are supported by the handwritten date requirement. An elector's compliance with the signature and date requirement is an important guard against fraud. Where an elector fully complies with the instructions on the outer envelope, the electoral authorities conducting the election can be assured of the date on which the ballot was executed. Where, however, the outer envelope remains undated, the

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[7] This Court also finds persuasive the rationale of Justice Wecht in his concurring and dissenting opinion. *See In re Canvass November 3, 2020*, 241 A.3d at 1079; *see also Ritter*, 2022 WL 16577, at *4 (noting Justice Wecht's opinion "served as a tie-breaker in the case"). Therein, Justice Wecht expressed his "increasing discomfort with [the Pennsylvania Supreme] Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent." *See In re Canvass November 3, 2020*, 241 A.3d at 1080. Justice Wecht agreed with the proposition that "the real danger" to our democracy is "leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory) . . . ." *See id.* 1087 (quoting *In re 2,349 Ballots*, slip op. at 12–13). This Court is persuaded by Justice Wecht's analysis. The handwritten date requirement is mandatory, and to permit each county election board to read it otherwise could well result in disparate vote-counting policies based on the same statutory language. As Justice Wecht suggested, the policy determination of "what requirements are necessary to ensure the security of our elections against fraud" is one best left to the legislature. *See id.*

possibility for fraud is heightened, as 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. Moreover, that the parties agree to the timeliness of the ballots in this particular case does not alter the analysis. That these Plaintiffs returned their ballots before the deadline does not obviate the requirement's general purpose of combatting fraud in elections.

Accordingly, this Court finds that an important public interest in the integrity of an election process that ensures fair, efficient, and fraud -free elections is served by compliance with the statute mandating the handwritten date requirement. These important government interests outweigh the minor condition imposed by the handwritten date requirement. Therefore, summary judgment is granted in Defendants' favor on Plaintiffs' constitutional claim.

VI. CONCLUSION

Plaintiffs asserted two claims for relief, and following a review of each, this Court enters judgment in Defendants' favor on both claims. First, Plaintiffs lack the capacity to bring suit under § 10101. Second, the handwritten date requirement does not pose an undue burden on Plaintiffs' right to vote under the First and Fourteenth Amendments. Accordingly, summary judgment is entered in Defendants' favor on both counts – the relief requested in Plaintiffs' motion for summary judgment is denied.

A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:22-cv-00397

[Filed: March 16, 2022]

LINDA MIGLIORI, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
LEHIGH COUNTY BOARD OF ELECTIONS *et al.*,	)
Defendants.	)

O R D E R

AND NOW, this 16th day of March, 2022, upon consideration of Plaintiffs' Motion for Summary Judgment, ECF No. 33, Defendant Lehigh County Board of Elections' Motion for Summary Judgment, ECF No. 32, Defendant David Ritter's Motion for Summary Judgment, ECF No. 34, Ritter's Response to Plaintiffs' motion, ECF No. 43, Plaintiffs' response to Defendants' motions, ECF No. 44, Intervenor-Plaintiff Zachary Cohen's response in support of Plaintiffs' motion, ECF No. 45, Ritter's reply in support of his motion, ECF No. 47, Plaintiffs' reply in support of their motion, ECF No. 48, the Amicus Brief in Support of

Defendants' Motions for Summary Judgment,[1] ECF No. 37, the Amicus Brief of the Commonwealth of Pennsylvania in Support of Plaintiffs' Motion for Summary Judgment, ECF No. 40, and for the reasons set forth in the Court's Opinion issued this date **IT IS HEREBY ORDERED THAT**:

1. Plaintiffs' Motion for Summary Judgment, ECF No. 33, **is DENIED**.

2. Defendants' Motions for Summary Judgment, ECF Nos. 32 and 34, are **GRANTED**.

3. **JUDGMENT IS ENTERED** in Defendants' favor and against Plaintiffs on all remaining Counts.

4. The matter is **CLOSED**.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

[1] This Amicus Brief was filed by the Speaker of the Pennsylvania House of Representatives, Bryan Cutler, the Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff, the President Pro Tempore of the Pennsylvania Senate, Jake Corman, and the Majority Leader of the Pennsylvania Senate, Kim Ward.