No. 22-30

In the Supreme Court of the United States

DAVID RITTER,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Ritter's petition warned that leaving the Third Circuit's decision unvacated would "spawn unfortunate … consequences" and "disrupt the November elections." Pet.4-5. That warning turned out to be a massive understatement. In the intervening months, the Third Circuit's decision has created an outright "constitutional crisis" in Pennsylvania. Elias, *A Constitutional Crisis Is Brewing in Pennsylvania*, Democracy Docket (July 19, 2022), bit.ly/3qaGfZ6. The State is now *suing* several counties over the dating requirement. *See* Schouten, *Pennsylvania Officials Sue County Election Boards in the Latest Confrontation Over Certifying Results*, CNN (July 12, 2022), cnn.it/3QjjQn7. Other litigants are suing to invalidate *all* no-excuse mail voting in Pennsylvania—since by invalidating the dating requirement, the Third Circuit arguably triggered the strong nonseverability clause in Pennsylvania's mail-voting law. *See Bonner v. Chapman*, 364 M.D. 2022 (Pa. Commw. Ct. filed July 20); Levy, *Republicans Challenge Pennsylvania's Mail-In Voting Law Anew*, AP (July 21, 2022), bit.ly/3TOY5P1. Pennsylvania's legislative leaders fear their State will be unable to "conduct an orderly election in November" if the Third Circuit's decision remains on the books. PA.Leg-Br.2.

As Ritter's seven amici all attest, the results of the Third Circuit's decision are far-reaching. That decision "transformed the … little used Materiality Provision into a newfound nuclear warhead targeting virtually all state ballot-casting requirements." LDF-Br.12. If left on the books, the decision threatens countless "guardrails" that "protect election integrity

and orderly administration." HEP-Br.4. And it will justify the invalidation of tools "necessary to secure the integrity of the election process." Landmark-Br.12. Even supporters describe the decision as "large in potential ramifications." Sullivan, *This Civil Rights Provision Protects Your Vote from Simple Mistakes*, Democracy Docket (July 8, 2022), bit.ly/3eysnFH.

Respondents ignore all those warnings and urge this Court to deny *Munsingwear* vacatur because Ritter eventually conceded the election. BIO.18-19. Specifically, after his emergency stay application was denied and the undated votes were counted, Ritter released a statement saying that, after he "used every available tool to defend [his] rights and the rights of those who voted for [him]," his opponent had more votes. BIO.2. By making this statement, Respondents say, Ritter triggered the *Bancorp* exception to *Munsingwear*, which applies when the party seeking vacatur intentionally moots the case. BIO.19-23 (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994)). But Ritter had no way to stop the election's certification—the case-mooting event—except the emergency stay that he sought and this Court denied. Neither a recount nor a more expedited certiorari petition could have stopped certification long enough to let this Court hear and decide the case. When *Bancorp* said "a suitor's conduct … may disentitle him to the relief he seeks," 513 U.S. at 25, it's hard to imagine a case it had less in mind than this one.

Meanwhile, Respondents' attempts to minimize the importance of the Third Circuit's decision (BIO.23-

35) run headlong into their out-of-court admissions that "[i]n future elections, this issue could impact thousands of voters in Pennsylvania." *ACLU Comment on Supreme Court Action in Pennsylvania Uncounted Ballot Challenge*, ACLU (June 9, 2022), bit.ly/3qlIr01. And Respondents artfully avoid defending the Third Circuit's interpretation of the materiality statute, even after three Justices explained in detail why it was "plainly contrary to the statutory language." *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissental).

As for the equities, Respondents ultimately resist vacatur for precisely the reason that *Munsingwear* exists: because if the Third Circuit's unreviewable decision stays on the books, it will "spawn" far-reaching "legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950); BIO.33-35. That backwards logic is inequitable and needlessly leaves Pennsylvania voters and candidates in the lurch this November. The Court should instead wipe the slate clean and vacate the decision below.

ARGUMENT

I. No exception to *Munsingwear* applies.

Ritter fiercely litigated his rights before the county election board, then the state trial court, then the state appellate court, then the federal district court, then the Third Circuit, and then in emergency proceedings in this Court. He did not "caus[e] the case to become moot," BIO.19, by eventually issuing a concession statement.

1. Respondents fault Ritter for the mootness, proposing two things they think he should have done. But neither option makes sense.

First, Respondents say that Ritter could have prevented mootness by "petition[ing] for a recount" and then suing in court to "suspend" certification. BIO.20-21 n.16. On what grounds? If he tried relitigating the undated ballots, his lawsuit would have been dismissed. *See Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) (*"Res judicata* … bars a later action on all or part of the claim which was the subject of the first action."). Other than that, Ritter had no meaningful issue to raise with the final count. Respondents' suggestion that Ritter should have continued challenging the election only as a "delay" tactic, BIO.16, is shocking.

Second, Respondents say that Ritter could have prevented mootness by petitioning for certiorari between June 9 (when this Court denied his emergency stay application) and June 27 (when Lehigh County certified the election). BIO.15-17. But as Respondents know, that petition wouldn't have been considered by this Court until September 28, three months too late. *See* Sup. Ct. R. 15.3, 15.5; Case Distribution Schedule (Summer), O.T. 2022, bit.ly/3aSafoq. Even if Ritter's case was highly expedited, it still could not have been decided, or even argued, before the election was certified on June 27.

2. Even if one of those tactics would have worked, the *Bancorp* exception still wouldn't apply. *Bancorp* applies when the party seeking vacatur "voluntarily

forfeited his legal remedy" by settling or failing to appeal. *Bancorp*, 513 U.S. 18 at 23-25. It asks whether the party seeking vacatur mooted the case out of a "desire to avoid review." *Alvarez v. Smith*, 558 U.S. 87, 97 (2009); *cf. Munsingwear,* 340 U.S., at 39-40 (lower-court judgment would have been vacated even though the party seeking review could have easily prevented the mootness). Far from avoiding review, Ritter did everything he could to seek and preserve it.

Anticipating this problem, Respondents imply that—regardless of whether their proposed delay tactics were available—Ritter's concession statement alone disentitles him to relief because that statement *caused* the Board of Elections to certify the election. *E.g.*, BIO.3 ("With Ritter's assent, the Board certified the election the following week."). But the certification timeline in Pennsylvania is mandatory and must proceed regardless whether candidates concede. 25 Pa. Stat. § 3154(f); *cf., e.g.*, Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. Rev. 1573, 1618 (2001) ("A concession has no legally binding effect in an election."). That's why, earlier in this very case, Respondents needed injunctions to prevent certification even though neither candidate had conceded. *See, e.g.*, D.Ct. Dkt. 52-1 at 16; CA3 Dkt. 6-1 at 24-25. And that's why this Court has applied *Bancorp* even after the election was over. *E.g.*, *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

II. Certiorari would have been likely.

In contesting whether this Court would have granted certiorari, Respondents claim that this case lacks "importance," BIO.28, that the Third Circuit's

holding was "very narrow," BIO.28, and that the Third Circuit's interpretation was "consistent with" other cases interpreting the materiality statute, BIO.29. On all three fronts, the opposite is true.

1. The "importance" of this unreviewable precedent is no longer up for debate. BIO.28. The Third Circuit's decision is "large in potential ramifications." Sullivan, *supra*. It is "a nuclear warhead," LDF-Br.12, that has "throw[n] existing rules into doubt" and will "disrupt the conduct of upcoming elections," Jud.Watch-Br.14. Pennsylvania's legislative leaders state that, if the decision is left on the books, their State might not even "be able to conduct an orderly election in November." PA.Leg-Br.2. Candidates for office warn that the grave uncertainty it has generated will "creat[e] 'voter confusion and consequent incentive to remain away from the polls' in Pennsylvania's 2022 elections." Oz-Br-2. It has left "administrators and candidates across the state scrambling." Lai & Roebuck, *Fights Over Pa. Election Rules That Seemed Settled After 2020 Have Now Come Roaring Back*, Phil. Inquirer (June 16, 2022), bit.ly/3ASE4OI. And even Respondents' lawyers boast that "[i]n future elections, this issue could impact thousands of voters in Pennsylvania." *ACLU Comment*, *supra*.

Consider the immediate consequences of the decision in Pennsylvania alone. State officials are instructing counties to ignore the legislature's dating rules in future elections. Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*, 2 (May 24, 2022), bit.ly/3JB2rVj. And Pennsylvania's secretary of state is suing

counties that continue to follow the legislature's rules. *See* Mem., *Chapman* v. *Berks Cnty. Bd. of Elections*, No. 355-MD-2022 (Pa. Commw. Ct. July 11), bit.ly/3KM9tai. So much for the decision being "easily implemented." BIO.4.

Most drastically, the Third Circuit's decision might invalidate Pennsylvania's entire no-excuse mail voting regime. When Pennsylvania authorized mail voting, it provided that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). One of those provisions was the dating requirement that the Third Circuit invalidated here. A lawsuit has already been filed seeking a declaration that the Third Circuit's decision triggered the nonseverability provision and voided the rest of the mail-voting regime. *See Bonner*, 364 M.D. 2022. And under Pennsylvania law, "nonseverability provisions are constitutionally proper" and regularly enforced. *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006); *see also* HEP-Br.8-10. If the Third Circuit's decision remains on the books, every mail ballot cast in the November election is vulnerable. PA.Leg-Br.17; HEP-Br.12.

2. Respondents say that the Third Circuit's decision about undated ballots was "narrow" because it relied in part on the fact that Pennsylvania counts *mis*-dated ballots already. BIO.28. But the case is worthy of this Court's attention because of the seismic premise upon which that discussion was based: That the

materiality statute governs ballot-validity rules in the first place. App.18 n.56.

Because that premise is wrong, the discussion of misdated ballots was irrelevant. Rejecting the ballot of an already-registered voter does not deny him the "*right* to vote" on a "*requisite to* voting" in the first place. 52 U.S.C. §10101(a)(2)(B) (emphases added); HEP-Br.3. Three Justices explained all this at the stay stage. *Ritter*, 142 S. Ct. 1824 (Alito, J., dissental). That opinion went through the statute element-by-element and explained why applying it to "the rules for casting a ballot" was "plainly contrary to the statutory language." *Id.* at 1824-25.

In their first opportunity to address Justice Alito's analysis, Respondents ignore it. Throughout their brief, Respondents barely acknowledge that the question is whether the statute applies in the first place. BIO.28-29. Those to give that question serious attention, by contrast, have concluded that the statute does *not* apply to ballot-validity rules. *E.g.*, *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) ("Nothing in my review of the case law in this jurisdiction or in other jurisdictions indicates that [the materiality statute] appl[ies] to the counting of ballots by individuals *already deemed qualified to vote*."); PA.Leg-Br.8 ("the Materiality Provision has no application to the matters at hand"); Landmark-Br.10 ("Rules that apply to mail voting are not related to whether an individual is qualified to vote"); Jud.Watch-Br.5 ("the court of appeals extended the materiality provision well beyond its traditional application"). Nor do Respondents attempt to reconcile the

Third Circuit's interpretation with Congress's authority to enact such laws under the Fourteenth and Fifteenth Amendments. *See* HEP-Br.16.

It is precisely because the Third Circuit's decision is not "narrow" that a wide range of similar ballot rules in Pennsylvania are now in doubt. LDF-Br.2; PA.Leg-Br.11-13; Landmark-Br.11-12; Jud.Watch-Br. 15-16; *see Ritter*, 142 S. Ct. at 1826 (Alito, J., dissental) (noting that Third Circuit's holding would void signature requirements). Pennsylvania's legislative leaders are rightly concerned that the decision jeopardizes their ability to require that ballots even "be cast through specifically prescribed methods" and in the "proper locations." PA.Leg-Br.11-12. If the Third Circuit's decision stands, they say, "it is unclear what, if any, election administration rules may ultimately be left in place." *Id.* at 13. No mere risk, the Third Circuit's decision is being cited for that very purpose by powerful interests across the country. Pet.29-30; Oz-Br.-6-7; Landmark-Br.-11-12; Jud.Watch-Br.15-16.

3. Respondents concede that the Third Circuit's decision splits from the Sixth Circuit over whether the materiality statute can be privately enforced. *See* BIO.24. But they say the circuit split doesn't count because the Sixth Circuit hasn't "actually applied *Gonzaga*." *Id.* (citing *Gonzaga University v. Doe*, 536 U.S. 273 (2002)). To be clear, the Sixth Circuit held that the materiality statute couldn't be privately enforced *in 2016*, fourteen years after *Gonzaga*. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629-30 (6th Cir. 2016). Respondents' disagreement with the Sixth Circuit's decision doesn't eliminate the split or

decrease the reasonable probability that four Justices would have granted certiorari to resolve it.

Nor is the Third Circuit's interpretation of the materiality provision "consistent with" other decisions. BIO.27. Other decisions reject the key premise of the Third Circuit's decision: that the materiality statute can affect laws regulating "the counting of ballots by individuals *already deemed qualified to vote*." *Friedman*, 345 F. Supp. 2d at 1371. They conclude the opposite: "It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply," like Pennsylvania's dating requirement, "denies the right of that individual to vote." *Vote.Org v. Callanen*, 39 F.4th 297, 309 n.6 (5th Cir. 2022). It is the Third Circuit's decision that departs from settled law and would have warranted this Court's review had it not become moot.

Although Respondents suggest that little distinguishes Ritter's stay request from this petition, BIO.14-15, they are wrong. The standard for emergency relief is decidedly more demanding than the standard for certiorari. *Compare Moore v. Harper*, 142 S. Ct. 1089 (2022) (denying an emergency stay), *with Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting certiorari). Respondents' earlier assurances about the limited consequences of this case have proven false; the decision has plunged Pennsylvania into electoral chaos, as many amici attest. Still more judges have weighed in against the Third Circuit's interpretation. And Lehigh County, the original defendant, has now joined Ritter in asking this Court for relief.

III. The equities alone warrant vacatur.

Even if certiorari was not forthcoming, the "unique circumstances of this case and the balance of the equities weigh in favor of vacatur." *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018).

1. Respondents seem to argue that Ritter is not entitled to vacatur because he lacks standing, but asserts only a "generalized" interest in future election rules. BIO.31-32. But *Munsingwear* vacatur is always a post-jurisdictional remedy. *See Bancorp*, 513 U.S. at 21. It focuses not on any one party's interest but on "the public interest." *Id*. at 26. Respondents don't have any individualized interest either; vacatur won't uncount their votes, and surely they won't forget to date their ballots again in the future.[1]

2. Respondents misunderstand the *Purcell* principle. BIO.33-35. *Purcell* protects "state election laws" from injunctions issued by "federal district courts." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurral) (*citing Purcell v. Gonzalez*, 549 U.S. 1 (2006)). It would be "absurd" to use *Purcell* as a basis for leaving in place an injunction of a state election law. *Milligan*, 142 S. Ct. at 888 n.3 (Kavanaugh, J.,

[1] Ritter had standing to seek certiorari before this case became moot. *Cf.* BIO.23 n.18; *see Bush v. Gore*, 531 U.S. 98 (2000); Stay.Reply.3-7. And because Lehigh County now joins his certiorari petition, his standing is irrelevant. *Brnovich v. DNC*, 141 S. Ct. 2321, 2336 (2001). In any event, even legitimate doubts about pre-mootness standing do not prevent this Court from granting vacatur. *E.g.*, *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 66 (1997); *Bognet*, 141 S. Ct. 2508.

concurral). And here, the "rules of the road" are anything but "clear and settled" today. *Id.* at 880-81. Some Pennsylvania officials view counting undated mail ballots as illegal, others view not counting undated mail ballots as illegal, and others view the entire mail-ballot regime as void.

If the Third Circuit's decision is left in place, dozens of election laws could be challenged, both before and after the upcoming midterms. Election officials will have to choose between counting illegal ballots and facing expensive litigation that leaves seats unfilled for months. The upcoming elections are therefore "mired in uncertainty." Lai & Roebuck, *supra*. The precedential force of the Third Circuit's unreviewable decision is "a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). And its preclusive force threatens to saddle Lehigh County with costly attorney's fees, based on a decision it never got a chance to ask this Court to review. *See* CA3 Dkt. 93.

This Court can clean up the mess in a single sentence, vacating the Third Circuit's decision pursuant

to its "ordinary practice" of *Munsingwear* vacatur. *Alvarez*, 558 U.S. at 97.[2]

CONCLUSION

This Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot.

[2] Even if the *Purcell* principle counseled against vacating the Third Circuit's decision before the November election, the answer would not be to *deny* this petition. *Cf.* BIO.35-36. The answer would be to hold the petition until after the November elections and then vacate the Third Circuit's decision after those elections end. The Court did just that, at the Solicitor General's suggestion, in several cases after the 2020 election. *E.g.*, Reply Br. for Pet. at 7-8, *Trump v. D.C.*, 141 S. Ct. 1262 (2021); Reply Br. for Pet. at 5, *Trump v. Citizens for Resp. & Ethics in Washington*, 141 S. Ct. 1262 (2021). To be clear, though, *Purcell* does not apply here, and immediate vacatur is needed to undo the disruptive effects that the Third Circuit's decision is *currently* having on the November elections.

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