

No. 22-30

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In The  
**Supreme Court of the United States**

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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**

—◆—  
**BRIEF OF AMICUS CURIAE  
LANDMARK LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

—◆—  
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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights. Specializing in constitutional and voting litigation, Landmark presents below a unique perspective about the legal issues and national implications of the lower court's decision.

**INTRODUCTION AND  
SUMMARY OF ARGUMENT**

The Third Circuit's incorrect interpretation of the materiality provision of the Civil Rights Act compels the Court to grant Petitioner's writ of certiorari. Otherwise, commonsense protections enacted and implemented by the states and necessary to ensure the integrity of voting systems will be at risk. With the widespread adoption and implementation of vote-by-mail, there is a greater need for states to enact protections guarding against voter fraud and other improper

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<sup>1</sup> The parties have consented to the filing of this brief. Counsel for Amicus Curiae informed the parties of its intent to file a brief on July 22, 2022. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

activities. Pennsylvania’s law requiring voters to date and sign a declaration on the envelope containing their mail ballot serves an important state interest by helping ensure those ballots are not submitted after election deadlines. Further, signing and dating said envelope is not relevant to determining whether the individual is qualified under Pennsylvania law to vote and is therefore not preempted by the materiality provision.

Vacating the Third Circuit’s decision prevents lower courts from relying on it to nullify commonsense protections used by states to ensure the integrity of their voting systems and to protect an inherently vulnerable method of voting. Ensuring integrity in the voting system is a fundamental obligation and a compelling interest of our government at all levels, from federal to local. Failure to properly implement and enforce protections breeds distrust and undermines confidence in the electoral process. And public confidence in the electoral process is crucial. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Doubts about the system’s integrity “breeds distrust of our government” and “drives honest citizens out of the democratic process.” *Id.*

Amicus *Curiae* therefore urges the Court to grant certiorari, vacate the lower court’s decision and rule that Pennsylvania’s requirements do not violate the materiality provisions of the Civil Rights Act (52 U.S.C. § 10101(a)(2)(B)).



## ARGUMENT

The Constitution delegates the power to regulate the time, place, and manner of elections to the individual states. U.S. Const. art. I, § 4. Free, fair, and honest elections preserve liberty. And “Preservation of the integrity of the electoral process is a legitimate and valid state goal.” *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1972). Assigning states the duty to regulate their elections allows them to tailor their election processes to local conditions and preferences; to address issues arising in a state’s electoral experience; and to facilitate elections in which a state’s citizens have confidence. As James Madison stated at Virginia’s ratifying convention:

It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.

*The Debates in the Several State Conventions* vol. 3, 367 (J. Elliot ed. 1876) (James Madison, Virginia).

States therefore have a unique constitutional obligation to protect the integrity of their electoral systems. And this obligation is heightened when a particular state decides to implement widespread and easily accessible mail voting. Unlike traditional, in-person voting, the vote-by-mail process contains opportunities for

fraud. Mail ballots are sometimes delivered and left unsecured in mailboxes in high population density locales. Opportunities to illicitly collect and complete these ballots abound. Further, sophisticated entities can train and deploy operatives to visit high density communities and collect ballots – and in the process – exert undue influence on vulnerable voters. Unmonitored ballot drop-off stations can function as collection points for unsavory actors to seize ballots. Ballot envelopes without signatures and dates leaves election officials with few tools to verify identity and timeliness.

Enacting laws to guard against fraud serves a legitimate state interest. As “fraud can affect the outcome of a close election” and “dilute the right to citizens to cast ballots that carry appropriate weight” states must continue to be allowed to enact and enforce protections. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021). The issue here is whether states such as Pennsylvania will continue be permitted to implement minor but essential protections for vote-by-mail systems or whether those protections will be thrown out by activist courts.

**A. Mail voting is inherently risky and commonsense protections are necessary to protect the voting process and prevent fraud.**

Vote-by-mail or “absentee” voting, while becoming fashionable nationally as a method of voting, is particularly vulnerable to corruption such as vote



manipulation, voter intimidation, and fraudulent ballot harvesting. What began decades ago as an ad hoc exemption for individual voters who would be absent from their locale on election day, has ballooned into common practice or even the legal standard. In the 2020 general election and in response to the COVID-19 crisis, around 65 million individuals cast their vote by mail. Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. Elections Project (Nov. 23, 2020).<sup>2</sup> And states vary in how they regulate this type of voting. Ballots are mailed to voters (sometimes without their request or knowledge) and are left in unsecured mailboxes. Cal. Elec. Code § 3000.5 Once completed, these ballots can sit in mailboxes for hours before collection. In some states, these ballots require a witness to verify the identity of the voter by signing the vote-by-mail identification ballot. Va. Code § 24.2-707. Some states require vote-by-mail ballots to contain prepaid postage and do not obtain a postmark date stamp. 15 Del. Code § 5504(c). In other instances, voters are required to pay for postage. Ga. Code Ann. § 21-2-381(a)(1)(A). Certain jurisdictions limit who can vote-by-mail to certain classes of persons while others have moved to almost 100% mail vote. Ala. Code § 17-11-3(a) (limiting who can vote via absentee ballot), Colo. Rev. Stat. § 1-5-401 (all mail elections).

Again, opportunities for fraud abound when individuals vote by mail ballot. *U.S. Elections: Report of the Commission on Federal Election Reform* 46 (2005)

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<sup>2</sup> Available at <https://electproject.github.io/Early-Vote-2020G/index.html> (last visited August 3, 2022).

(“Carter – Baker Report”).<sup>3</sup> Voting occurs outside the strictly regulated confines of the precinct, where election officials guard against undue influence and electioneering, ensure compliance with voting laws and maintain chain of custody of ballots. For these reasons, the absentee ballot process “remains the largest source of potential voter fraud.” *Id.* Fraud occurs in several ways. First, blank ballots mailed to wrong addresses or apartment buildings can be intercepted. *Id.* Second, voters are particularly susceptible to pressure or intimidation when voting at home or nursing home. *Id.* Finally, third-party organizations can operate illicit “vote buying schemes” that are “far more difficult to detect when citizens vote by mail.” *Id.* Fraud, therefore, “is a real risk that accompanies mail-in voting. . . .” *Brnovich*, 141 S. Ct. at 2348.

Even a study skeptical of the incidence of voter fraud generally acknowledge the dangers in vote-by-mail. It notes that – when fraud does occur, “absentee ballots are the method of choice.” *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 56 (2014).<sup>4</sup>

Other factors contribute to vulnerabilities in electoral processes. Millions of voters’ names appear on multiple state voter registration lists because states do

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<sup>3</sup> Available at [https://ucdenver.instructure.com/courses/3034/files/378056?module\\_item\\_id=188418](https://ucdenver.instructure.com/courses/3034/files/378056?module_item_id=188418) (last visited August 3, 2022).

<sup>4</sup> Available at [https://elections.delaware.gov/pdfs/PCEA\\_rpt.pdf](https://elections.delaware.gov/pdfs/PCEA_rpt.pdf) (last visited August 3, 2022).

not routinely share registration data. *Id.* at 28 (2014). In 2012, Pew research foundation found that about 24 million (one in eight) voter registrations were no longer valid or contained significant inaccuracies with 1.8 million deceased individuals listed on voter rolls and 2.75 million names on registrations in more than one state. Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (February 2012).<sup>5</sup>

These inaccuracies can, in part, be traced to states' failures to enforce the provisions of the National Voter Registration Act (NVRA), which require state election officials to ensure the accuracy of registration lists by confirming residency and periodically removing the names of dead or out of state residents from voter rolls. 52 U.S.C. § 20507.

The inherent risks arising from vote-by-mail require certain commonsense protections to guard against improper activity. Limitations on who can handle mail ballots protect against undue influence on vulnerable voters and ballot harvesting. Deadlines on receipt of mail ballots ensures that unsavory actors do not seek to manufacture or collect. And signature verification helps election officials verify the identity of those who execute a mail-ballot.

Commonsense protections on mail voting serve another important purpose – they provide the public

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<sup>5</sup> Available at [https://www.pewtrusts.org/~media/legacy/uploaded\\_files/pcs\\_assets/2012/pewupgradingvoterregistrationpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploaded_files/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf) (last visited August 3, 2022).

with reasonable assurances about the integrity of the electoral process. Lack of protections undermines voter confidence in the outcome of the election leading to a lack of confidence in our democracy. If voters are unsure about whether their legally cast vote will be diluted by false votes, they are less likely to vote.

Finally, as noted previously by the Court, “every voting rule imposes a burden of some sort” and it is in the state’s interest to prevent voter fraud. *Brnovich*, 141 S. Ct. at 2340. And states, “may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.” *Id.* at 2348. They should not have to react once fraud has occurred.

Pennsylvania’s requirement that an individual sign and date his/her mail-ballot envelope guards against fraud and helps ensure those ballots are executed and received on time. Without a signature, election officials have no way to verify the veracity of the ballot. Undated envelopes can be submitted after election deadlines and influence the outcome of an election. These commonsense measures require little effort on the part of the voter and serve an important state interest.

**B. Allowing the Third Circuit’s decision to stand jeopardizes laws necessary to ensure the integrity of mail voting.**

The provision of the Civil Rights Act in question states:

No person acting under color of law shall . . . deny 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*. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

The Third Circuit determined this provision prohibited Pennsylvania from enforcing its law requiring a mail voter to date and sign the declaration printed on the envelope containing the ballot. Failure to date the declaration – according to the Third Circuit is not material in helping to determine “one’s age, citizenship, residency, or felony status.” *Migliori v. Cohen*, 2022 U.S. App. LEXIS 14655, \*17 (3d Cir. 2022). Pennsylvania is thus barred from enforcing this requirement and the Pennsylvania court erred when it ruled those declarations without dates were to be discounted. *Id.* at \*18.

This interpretation fails in two respects. First, disregarding a mail ballot because the voter has failed to date the envelope containing the ballot does not deny individual’s right to vote. The individual has not been denied the opportunity to vote. As Justice Alito succinctly states, “When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules

for casting a ballot.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022, Alito, J., dissental).

Second, the materiality provision of the Civil Rights Act permits nonmaterial errors relating to whether an individual is qualified to vote under state law. Rules that apply to mail voting are not related to whether an individual is qualified to vote and therefore do not fall under the auspices of the materiality provision. Under Pennsylvania law, an individual is qualified to vote if he/she is at least 18 years old on the day of the election, has been a citizen of Pennsylvania for at least one month, has lived in the election district for at least 30 days, and is not imprisoned for a felony. 25 Pa. Cons. Stat. §1301. The applicable section of the materiality statute thus applies to errors or omissions that are not material to determining whether the individual is over 18, a citizen of Pennsylvania, whether the individual lived in the district, and whether the individual is imprisoned for commission of a felony. In other words, errors, or omissions pertaining to these qualifications are not reason to discount an otherwise properly executed ballot. Other types of errors or omissions such as failing to correctly endorse a mail ballot fall outside the purview of the materiality provision. The statute’s plain text controls.

The Third Circuit’s textual analysis disregards the fact that the statute “applies only to errors or omissions that are not material to the question whether a person is qualified to vote.” *Ritter*, 142 S. Ct. at 1826. The materiality provision “leaves it to the States to decide which voting rules should be mandatory.” *Id.* at

1826. Justice Alito’s hypothetical bolsters this point, “Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: ‘p. p. John or Jane Doe.’ Or suppose that a voter, for some reason, typed his or her name instead of signing it.” *Id.* He continues, “Those violations would be material in determining whether a ballot should be counted, but they would not be ‘material in determining whether such individual is qualified under State law to vote in such election.’” *Id.*

**C. Unless the Third Circuit’s decision is vacated, other courts will rely on the materiality provision to preempt other reasonable protections used to secure state’s electoral systems.**

An expansive and unmoored interpretation of § 10101(a)(2)(B) leaves other laws used by states to protect the integrity of the mail vote process in jeopardy. As stated before, vote-by-mail presents risks not associated with traditional, in-person voting. “Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.” *Brnovich*, 141 S. Ct. at 2338. Thus, for a voting system to be “equally open” and provide an “equal opportunity” to cast ballot, the system “must tolerate the ‘usual burdens of voting.’” *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 298 (2008)).

The ‘usual burdens of voting’ via mail ballot are now under attack. For example, the Department of Justice has challenged Arizona’s new law requiring election officials to verify the citizenship of those who register to vote. *United States v. Arizona*, No. 2:22-cv-1124 (D. Ariz. July 5, 2022). DOJ alleges that Arizona’s law violates the Materiality Provision of the Civil Rights Act. In another case, a district court enjoined Texas’s law requiring a voter’s original signature on his/her voting registration application violated the materiality provision (a so called “wet-signature” requirement). *Vote.org v. Callanen*, 2022 U.S. Dist. LEXIS 107341, at \*3 (D. Tex. Jun 16, 2022).<sup>6</sup>

If the Court declines to vacate the decision, other parties and courts will continue to rely on the Third Circuit’s specious reasoning. Laws as benign as obligating an individual to physically sign his/her registration will continue to be at risk. And tools used by states necessary to secure the integrity of the election process will be thrown out.



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<sup>6</sup> The Fifth Circuit has stayed this injunction concluding, in part, that the law deprives no one of their right to vote and that Plaintiffs failed to establish that the “wet-signature” was immaterial in determining whether an individual is qualified to vote. *Vote.org v. Callanen*, 2022 U.S. App. LEXIS 18348, at \*14-\*15 (5th Cir. July 2, 2022).



**CONCLUSION**

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

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