IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 22-1499

LINDA MIGLIORI, et al.,

Appellants,

v.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

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

APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE RELIEF

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INTRODUCTION

Appellants Plaintiff Voters[1] are Lehigh County voters who face imminent disenfranchisement solely because they did not handwrite a meaningless date next to their signatures on the envelopes containing their mail ballots. An injunction to preserve the status quo pending appeal is necessary to prevent the certification of the Lehigh County local judicial election at issue in this case, which is slated to go forward on Monday afternoon. Accordingly, Plaintiff Voters respectfully request that the Court grant emergency relief pursuant to Fed. R. App. P. 8 and 3d Cir. L.A.R. 8.1 and 27.7 enjoining certification of that election pending appellate review of the March 16 Opinion and Order issued by the U.S. District Court for the Eastern District of Pennsylvania (Leeson, J.). Appx. 001 and 003.[2]

The District Court's novel holding that Plaintiff Voters lack a private right of action to enforce a venerable federal civil rights statute was wrong and Plaintiff Voters are likely to succeed in this appeal. An injunction pending appeal is accordingly warranted—and in the meantime, this Court should order any

[1] Plaintiff Voters Migliori, Richards and Rivas are named in the March 18, 2022 Notice of Appeal. Plaintiff Voters plan to amend the notice to include the other Plaintiffs below, Fox and Ringer.

[2] Citations to "Appx. ___" refer to relevant pages in the accompanying Appendix to Appellants' Emergency Motion for an Injunction Pending Appeal.

temporary administrative relief necessary to preserve the status quo while it considers this Motion.

Plaintiff Voters are likely to succeed on appeal in demonstrating that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), may be enforced by private parties—a conclusion that flows from the statutory text and structure, legislative history, and case law. And Plaintiff Voters, duly registered voters whose mail ballots were timely received by the County, are also likely to succeed in showing that the requirement that mail-ballot voters write the date on the envelope containing their ballots is not material to determining whether they are qualified to vote. Indeed, that is the position of the Pennsylvania entities charged with administering elections—namely, the Secretary of State and the Attorney General's office. It was also the initial position of Defendant-Appellee the Lehigh County Board of Elections ("the Board"), which voted unanimously to count Plaintiff Voters' mail ballots and initially fought for that position in litigation only to be overturned on state-law grounds by a state court. At the very least, Plaintiff Voters have shown there are serious merits arguments in their favor sufficient to support emergency relief pending appeal.

The irreparable harm is clear: Plaintiff Voters are about to lose their fundamental right to vote. Without immediate emergency relief to enjoin the

impending certification of the election and preserve the status quo pending appeal, the election will be certified on Monday afternoon without counting Plaintiff Voters' votes, which will then be irretrievably lost.

The equities also favor Plaintiff Voters. Plaintiff Voters' loss of fundamental democratic rights—and the fundamental imperative to count every single valid vote—far outweighs any purported interest in promoting the finality of elections or avoiding some modest delay in certifying the election result here (especially as that result was delayed in the first instance by the decision of a candidate, Defendant-Intervenor Ritter, to initiate legal action in state court and contest the Board's original decision to count Plaintiff Voters' ballots). This Court can order relief to preserve the status quo with minimal disruption because the election contest has not yet been certified. The requested relief should be granted and certification of the election should be enjoined pending resolution of the merits on appeal.

STATEMENT OF FACTS

Plaintiff Voters are five registered voters in Lehigh County who cast mail ballots in the November 2021 county elections. Appx. 006. Their ballots, and those of 252 other Lehigh County mail-ballot voters, were set aside because they did not hand write the date on the envelope containing their mail ballots, as

purportedly required by Pennsylvania law, 25 P.S. §§ 3146.6(a), 3150.16(a). *See* Appx. 005-7. Notably, this envelope-dating requirement was the subject of state-court litigation during the 2020 election cycle, wherein the Pennsylvania Supreme Court ultimately concluded that ballots contained in undated envelopes would be counted. *Id.* at 006. A majority of that court's justices suggested at the time that this envelope-dating requirement might run afoul of federal voting rights law, and particularly the Materiality Provision of the Civil Rights Act, which prohibits states from denying the right to vote on the basis of an "error or omission [that] is not material in determining whether such individual is qualified under State law to vote in such election," 52 U.S.C. § 10101(a)(2)(B). *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting).

It is undisputed that all 257 of the mail ballots at issue here were timely received by the County. Appx. 007. It is also undisputed that Plaintiff Voters are otherwise eligible and registered voters in Lehigh County. Appx. 044, at ¶¶ 23–25. It is also undisputed that Plaintiff Voters' ballots do not raise any fraud concerns. *Id.* at ¶ 26. Indeed, the Board initially decided unanimously to count Plaintiff Voters' ballots. Appx. 007.

Of the three Lehigh County judicial vacancies on the ballot in 2021, two candidates won by more than 257 votes, and the Board has certified their elections. Appx. 044, at ¶¶ 19–20. The difference between the third and fourth-place candidates, however, is 71 votes. *See id.* After the Board decided that it would proceed to count the 257 mail ballots that did not include a handwritten date on the envelope, one of the candidates, Defendant-Intervenor Ritter, brought suit in state court, arguing that the ballots in undated envelopes should not be counted under state law. Appx. 046, at ¶¶ 34–35. After more than two months of litigation, during which certification of the election results for the third vacancy was suspended by operation of state law, the state courts ultimately agreed, holding that state law required the Board to set aside timely received ballots submitted in undated envelopes. Appx. 007; Appx. 055-74.

On January 31, 2022, mere days after the state trial court's order not to count their ballots, Plaintiff Voters filed this action, arguing, among other things, that the refusal to count their votes because of a failure to write a date on the envelope of their timely received mail ballots violates the Materiality Provision of the Civil Rights Act of 1957 and their fundamental constitutional right to vote. Appx. 007.

On March 16, 2022, the District Court issued an opinion and order granting summary judgment to Defendants. With respect to the Materiality Provision, the

Court held that there was no private right of action to enforce that provision in federal court, *i.e.*, that only the U.S. Attorney General may bring federal lawsuits to enforce the individual right to vote guaranteed by this provision in the Civil Rights Act. Appx. 020-27. In reaching that conclusion, the District Court, among other things, broke with the Eleventh Circuit's unanimous decision in *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003), which is by far the most extensive judicial examination of private enforcement under the Materiality Provision. Appx. 027.

On March 17, the day after the District Court's decision, the Board scheduled a meeting for Monday, March 21, 2022, to certify the last remaining election result without counting Plaintiff Voters' ballots. Appx. 036-40.

On March 18, Plaintiff Voters noticed an appeal of the District Court's decision and sought an emergency injunction pending appeal in the District Court, pursuant to Fed. R. Civ. P. 62 and Fed. R. App. P. 8, to preserve the status quo and their right to vote pending their appeal to this Court. Appx. 081-85. In their motion, Plaintiff Voters noted that the District Court overlooked an entire subsection of the relevant statute, ignored important legislative history bearing on Congressional intent, and misread the Eleventh Circuit's unanimous decision in

Schwier. *See id.*, at 098-100. The District Court summarily denied the motion for relief pending appeal. *Id*., at 034.

Plaintiff Voters now move for emergency relief in this Court to maintain the status quo and protect their right to vote from permanent extinguishment during the pendency of their appeal.

ARGUMENT

In determining whether emergency relief pending appeal is merited, this Court considers whether: (1) appellants have demonstrated a likelihood of success on the merits; (2) appellants will be irreparably harmed absent an injunction; (3) the requested relief will substantially injure Defendants (*i.e.*, the balance of hardships); and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987*)*; *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). The first two factors are "the most critical." *E.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009). In a challenge to governmental action, the third and fourth factors typically merge. *See Osorio-Martinez v. U.S. Att'y Gen.*, 893 F.3d 153, 178 (3d Cir. 2018).

This Court has "viewed favorably what is often referred to as the 'sliding-scale' approach" to considerations of emergency relief. *E.g.*, *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015). Under that approach, emergency relief pending

appeal may be granted, for example, where an applicant shows that there are "serious questions going to the merits" and that the irreparable harm they face if the requested relief is denied "decidedly outweighs any potential harm" to the opposing party if the relief is granted. *Id.* at 570.

This case presents significant merits questions about the enforcement of an important federal civil rights statute—merits questions on which Plaintiff Voters are indeed likely to prevail—and an injunction pending appeal is necessary to preserve the status quo and prevent the imminent and permanent loss of Plaintiff Voters' fundamental right to vote before the merits are resolved. Plaintiff Voters are registered voters who will be disenfranchised as soon as the Board certifies the election at issue. An injunction pending appeal would preserve Plaintiff Voters' ability to obtain effective relief. By contrast, the certification of Lehigh County's election, which the Board has noticed for 3:00 p.m. on Monday, March 21,[3] would make effective relief impossible even if Plaintiff Voters prevail on appeal. Accordingly, an injunction is necessary to prevent the irreparable harm of

[3] The Board initially noticed the meeting for 1:30 p.m. on Monday. *See* Appx. 036-37. After Plaintiff Voters filed their Notice Appeal and motion for injunctive relief in the District Court, the Board clarified that the meeting time has been changed to 3:00 p.m. on Monday, March 21. *See id*., at 040.

disenfranchisement to Plaintiff Voters and 252 other similarly-situated Lehigh County voters.

A. Plaintiff Voters Are Likely to Succeed on the Merits

i. Plaintiff Voters are likely to succeed in demonstrating the existence of a private right of action to enforce 52 U.S.C. § 10101

Plaintiff Voters have at least demonstrated that there are "serious questions going to the merits" with respect to whether a private right of action exists under the Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(b). *See In re Revel AC, Inc.*, 802 F.3d at 570. Indeed, the statutory text and structure, legislative history, and case law all support a private right of action, making it likely Plaintiff Voters will succeed in this appeal.

The Materiality Provision provides that it is unlawful to "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). The purpose of the Materiality Provision is to prevent election officers from "requiring unnecessary information" that could result in disenfranchisement over "hyper-technical" errors. *See Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995).

In considering whether there is an implied private right of action with respect to a particular federal law, courts consider two factors. First, the court considers whether the statute's text and structure indicate that Congress intended to create a personal right. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Wisniewski v. Rodale*, 510 F.3d 294, 301 (3d Cir. 2007). Second, the court considers the statute's text and structure, and legislative history, to determine whether Congress intended that there be a private remedy to enforce that right. *See Wisniewski*, 510 F.3d at 301; *accord Sandoval*, 532 U.S. at 286; *Three Rivers Ctr. v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004).

The District Court correctly concluded on the first requirement that Congress intended to create a personal, individual right with Section 10101's Materiality Provision. Appx. 021, 026. That conclusion flows inexorably from the text of the Materiality Provision itself, which expressly refers to "the right of any individual to vote in any election." 52 U.S.C. § 10101(a)(2)(b). Such language "imparts an individual entitlement with an 'unmistakable focus on the benefitted class.'" *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 527 (3d Cir. 2009) (quoting *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004)). As the Supreme Court has explained, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable."

Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002). That presumption in favor of private enforceability thus applies here with full force.

And as to the second requirement, Plaintiff Voters are likely to succeed on appeal in showing—based on the statutory text and structure, legislative history, and case law—that Congress contemplated private lawsuits to enforce violations of Section 10101's substantive provisions, *i.e.*, that there would be a private remedy for violations of the Materiality Provision.

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

Subsection 10101(d) directly evidences Congress's understanding that individuals would continue to enforce the substantive rights set forth in Section 10101, as they had before the 1957 Civil Rights Act added the Attorney General to the enforcement regime. *See, e.g.*, *Schwier*, 340 F.3d at 1296. Subsection 10101(d) provides that, "[t]he district courts of the United States 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 that may be provided by law." 52 U.S.C. § 10101(d) (emphasis added).

The text of this subsection thus contemplates that a "party aggrieved"—*i.e.*, a person whose voting rights have been violated—may "institute[]" "proceedings … pursuant to this section," *i.e.*, Section 10101. *See, e.g.*, *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020) ("[t]he 'party aggrieved' is universally understood to mean the persons whose rights are being violated, not the Attorney General" (citing *Schwier*, 340 F.3d at 1296), *rev'd and remanded on other grounds*, 860 F. App'x 874 (5th Cir. 2021)). Congress's use of this term of art indicates its intention to maintain a private remedy. Indeed, such "aggrieved parties" or "aggrieved persons" language typically indicates a private right of action. *See, e.g.*, *Bowers v. NCAA*, 346 F.3d 402, 426 (3d Cir. 2003) (discussing implied private right of action under the Rehabilitation Act, which refers to the rights of "any person aggrieved"); *see also, e.g.*, *Mitchell v. Cellone*, 389 F.3d 86, 90 (3d Cir. 2004) (discussing Fair Housing Act, which accords right of action to "[a]n aggrieved person"). Moreover, the reference to administrative exhaustion, which would not ordinarily apply in a civil suit brought by the federal government, but frequently applies as a jurisdictional bar to private litigants, further evidences

Congress' intent to maintain a private right of action here. *Accord Schwier*, 340 F.3d at 1296.

Additionally, subsection 10101(c), on which the District Court focused, provides that the Attorney General "may institute for the United States … a civil action or other proper proceeding for preventive relief" to enforce the rights set forth in § 10101(a) and (b). The "may institute" language of this subsection, which was enacted as part of the Civil Rights Act of 1957 in order to supplement existing enforcement of the civil rights laws, *see infra* pp. 15-19, is not exclusive. Indeed, the Supreme Court has repeatedly held that Congress may (and often does) grant the Attorney General a right of action without indicating any intention to disallow private enforcement. *See, e.g.*, *Sandoval*, 532 U.S. at 279–80; *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *see also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252–59 (2009). As explained below, that is precisely what Congress intended here when it added Attorney General enforcement on top of existing private enforcement of the substantive rights in subsection 10101(a). *See Schwier*, 340 F.3d at 1296 (so holding). Indeed, Congress's description of the general relief available to the Attorney General in actions under Section 10101, namely "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order," 52 U.S.C. § 10101(c), reflects what

Congress understood to be the relief that was already available to individual plaintiffs. *See* H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1977 (discussing availability of injunctive relief for private plaintiffs enforcing the substantive rights in Section 10101); *see also infra* pp. 15-19.

The District Court's opinion discussed subsection 10101(c), but did not even mention subsection 10101(d), even though this provision is discussed in *Schwier* and other cases cited in Plaintiff Voters' briefs. *See* Appx. 020-22; *see also id.*, at 139-142.[4] Viewed as a whole, the text of Section 10101, and especially subsection

[4] The District Court also referred to subsections 10101(e) and (g), which the court suggested indicate that the Attorney General is exclusively charged with enforcing Section 10101(a). ECF No. 49, at 20. That is wrong. Both of those provisions deal with the use of "voting referees" and other forms of intensive monitoring to superintend a state's election process where a pattern or practice of voting rights violations has been shown. *See* 52 U.S.C. § 10101(e). Because the right to impose that particular, sweeping form of relief *is* made exclusive to the Attorney General (and is not available to aggrieved parties generally), the statutory subsections concerning that form of relief are expressly restricted to actions brought by the Attorney General under subsection 10101(c). *See id.* (allowing for the invocation of federal election monitors in any "proceeding instituted pursuant to subsection (c)"); 52 U.S.C. § 10101(g) (providing that a three-judge panel will be convened in any "proceeding instituted by the United States … under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section"). Moreover, and as explained below, the legislative history surrounding those subsections also demonstrates that Congress contemplated that private individuals would separately bring suit to enforce the statute's voting rights guarantees. *See infra* pp. 17-18 n.5.

10101(d), indicates that Congress contemplated that aggrieved persons would bring private actions to vindicate their voting rights under the statute.

Statutory Structure and Context. *Second*, statutory structure and context demonstrate that Congress intended in the 1957 Civil Rights Act to maintain the existing, longstanding scheme of private enforcement of the civil rights laws and to add a layer of federal enforcement by the Attorney General. In structuring the statute now codified at Section 10101, Congress began by incorporating, as subsection (a) of the expanded statute (*i.e.*, the subsection that now contains the Materiality Provision), a key provision from the 1870 Enforcement Act, one of the original civil rights laws passed prior to the end of Reconstruction. *See* Pub. L. 85315, pt. IV, §131, Sept. 9, 1957, 71 Stat. 637. The provisions of those original civil rights laws, which included what is now 42 U.S.C. § 1983, had long been enforced by private parties, who could obtain damages and injunctive relief for violations of their civil rights. *Schwier*, 340 F.3d at 1295 ("[F]rom the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 [now codified as § 10101(a)(1)] under § 1983") (citing, inter alia, *Smith v. Allwright*, 321 U.S. 649, 658 (1944) (striking down white primary laws in private suit brought under the Enforcement Acts)). When Congress formulated the Civil Rights Act of 1957, it knew that the rights it was placing in subsection (a) had long

been privately enforceable and included a private remedy. Congress added the new Attorney General right of action in subsection 10101(c) on top of this existing scheme of private enforcement as an additional means of enforcing important rights. The way Congress built the statute shows that it intended for those two forms of enforcement to coexist.

Legislative History. *Third*, the legislative history strongly corroborates this textual and structural analysis and demonstrates that Congress believed there had been and would continue to be a private remedy for violations of the statute. Indeed, eliminating an existing enforcement mechanism would be inconsistent with the Act's overall purpose, which was to expand voting-rights protections.

Congress's stated purpose in enacting the 1957 Act was to "*supplement existing law*," and "to provide means of *further securing and protecting* the civil rights of persons within the jurisdiction of the United States." H.R. Rep. No. 85-291 at 1976 (emphasis added). Because one of the main innovations of the 1957 statute was the creation and empowerment of an Assistant Attorney General for Civil Rights in the Civil Division of the U.S. Department of Justice, the legislative history discusses extensively the value of federal enforcement. But the legislative history also explicitly acknowledges that the "existing law" being "supplement[ed]" by this new enforcer was a system of private enforcement by

individuals, including pursuant to Section 1983, under which money damages and injunctive relief were available, for violations of the very substantive rights that Congress was placing in subsection 10101(a). *See id.* at 1977 (explaining that "Section 1983 … has been used to enforce the rights, as legislatively declared in the existing law, as contained in section 1971 [now codified at 52 U.S.C. § 10101]" and noting the remedies available to private enforcers).

The discussion in the legislative history regarding the jurisdictional provision in subsection 10101(d) further supports Congress's intent to retain private enforcement. The House Report explains that this subsection was designed to ensure that federal jurisdiction exists in civil rights cases "regardless of whether or not *the party thereto* shall have any administrative or other remedies provided by law." H.R. Rep. No. 85-291, at 1976. As with subsection 10101(d) itself, this language—showing Congress's concern that a "party" in a civil rights case might face administrative exhaustion requirements that typically apply to individuals—confirms that Congress contemplated a private remedy and understood that Attorney General enforcement would supplement a longstanding private right of action, not displace it.[5] *Accord Schwier*, 340 F.3d at 1296.

[5] The legislative history from the 1964 Civil Rights Act, which modified the 1957 Act and added the Materiality Provision to subsection (a), similarly shows that

The foregoing discussion refutes the District Court's assertion in its decision that Congress "did not remark on the topic of private citizen suits" in the legislative history, Appx. 024. The District Court also selectively relied on a written statement in the legislative history from then-Attorney General Brownell that "[c]ivil remedies have not been available to the Attorney General in this field," *id*. Those remarks about the enforcement powers *of the Attorney General* are irrelevant to the question whether private individuals are independently empowered to enforce the statute. Meanwhile, the District Court ignored much more relevant testimony from Attorney General Brownell specifically on the subject of private rights of action. On that score, Attorney General Brownell could not have been clearer in his oral testimony on the 1957 legislation that, "[w]e are not taking away the right of the individual to start his own action ... Under the laws amended if this program passes, private people will retain the right they have now to sue in their own name." *See Civil Rights Act of 1957: Hearings on S. 83 Before*

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

the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong. 73, 203, 1; 60–61, 67–73 (1957).

The legislative history in sum shows that Congress sought to supplement, not supplant, existing private remedies with federal civil enforcement. *Schwier*, 340 F.3d at 1295. It would make no sense for Congress to take away an existing, longstanding, expressly acknowledged and highly effective private right of action to protect the right to vote as a means of "further securing" that right or "supplement[ing] existing law." Rather, the record demonstrates that Congress, and for that matter the Attorney General, intended that both private litigants and the Justice Department could vindicate the voting rights guarantees in Section 10101.

Case Law. *Finally*, case law also supports the conclusion that there is a private remedy and a private right of action here. The only federal appeals court to comprehensively address the private right of action issue is the Eleventh Circuit in *Schwier*. The *Schwier* court examined the statute and the legislative history in detail and concluded that Congress intended to maintain the pre-existing, longstanding private right of action. *See* 340 F.3d at 1295–96. The District Court's summary-judgment decision mistakenly concluded that *Schwier* "only undertook half of the *Sandoval* analysis." *See* Appx. 026. But *Schwier* expressly

cited *Sandoval*, and it plainly applied both elements of the *Sandoval* test, determining that the Materiality Provision creates a private right, *and* that Congress, in light of the statutory text and the legislative history, intended a private remedy for the violation of the rights set forth in subsection § 10101(a). *See Schwier*, 340 F.3d at 1295–97.[6] On appeal, Plaintiff Voters are likely to demonstrate the *Schwier* court's reasoning is correct.

Nor is *Schwier* alone. Other courts recently have addressed the issue and held that there is a private right of action to enforce the Materiality Provision. *See, e.g.*, *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Hughs*, 474 F. Supp. 3d at 859. Many other courts have adjudicated the merits of materiality claims brought by voters. *See, e.g.*, *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376

[6] In *Schwier*, the Eleventh Circuit *started* with the second *Sandoval* factor, analyzing the extensive history of private enforcement with respect to former 42 U.S.C. § 1971 and concluding that Congress in 1957 did not intend to "withdraw existing protection" by canceling such enforcement. 340 F.3d at 1295-1296. Having determined based on statutory text, context, and legislative history that Congress intended to maintain private enforcement of the rights in Section 10101, the court in *Schwier then* considered the first *Sandoval* factor (*i.e.*, the nature of the right contemplated by the Materiality Provision), concluding (as this Court did) that the Materiality Provision provides an individual, personal right. *Id.* at 1296–97.

F.2d 659 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.*, Case No. SACV 12-00927, 2012 WL 3239903, *5 n.3 (C.D. Cal. Aug. 7, 2012); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005). In contrast, the few courts that have held that there is no private right of action, like the Sixth Circuit, have done so with virtually no analysis. *See, e.g.*, *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (stating, without elaboration, that "Section 1971 is enforceable by the Attorney General, not by private citizens."); *see also Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (stating that *McKay* "binds this panel"). And none has ever embraced the analysis that Defendants urged below, and that the District Court adopted here.

Plaintiff Voters are likely to prevail on the merits of their appeal on the private enforceability of the Materiality Provision. At a minimum, Plaintiff Voters have demonstrated that there are substantial questions on that score, which is sufficient to support a grant of temporary relief pending appeal.

ii. Plaintiff Voters are likely to succeed on the merits of their materiality claim[7]

The essential purpose of the Materiality Provision is to prevent states from "requiring unnecessary information," the omission of which negates a person's right to vote. *Schwier*, 340 F.3d at 1294; *see also Thurston*, 2021 WL 5312640, at *4 (Materiality Provision prohibits "those state election practices that increase the number of errors or omissions on papers or records related to voting and provide an excuse to disenfranchise otherwise qualified voters"). Courts have held that rejecting mail ballots because of the failure to provide unnecessary information violates the Materiality Provision. *See*, *e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (Plaintiff Voters likely to succeed in demonstrating that rejection of mail-in ballots based on voters' failure to provide their year of birth violated Materiality Provision).[8]

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[7] Plaintiff Voters are also appealing the District Court's ruling on Count II of their Complaint for violation of Plaintiff Voters' fundamental right to vote under the First and Fourteenth Amendments. For the purposes of this Motion, however, Plaintiff Voters focus on the serious questions relating to their claim under the Materiality Provision, which are more than sufficient to support the requested emergency relief.

[8] The Materiality Provision applies to any "application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). The statute directs that "vote" in this context means "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate

Here, Plaintiff Voters are likely to succeed in demonstrating that the handwritten date on the envelope containing a mail ballot "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); *see also In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (opinion announcing judgment) (suggesting this to be the case); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting) (similar). It is undisputed that Plaintiff Voters' registration status and qualifications to vote were already verified by the Board pursuant to its processes at the time Plaintiff Voters applied for a mail ballot. Appx. 041-42, at ¶ 3. *Compare Martin*, 347 F. Supp. 3d. at 1309 (noting that "the qualifications of the absentee voters" were "not at issue because [county] elections officials have already confirmed such voters' eligibility through the absentee ballot application process"). There also is no dispute that the ballot envelopes were signed by Plaintiff Voters, and no dispute that Plaintiff Voters'

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totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. §§ 10101(a)(3)(A), 10101(e) (emphases added). Therefore, the statute "by definition includes not only the registration and eligibility to vote, but also the right to have that vote counted" and "prohibits officials from disqualifying votes for immaterial errors and omissions." *E.g.*, *Ford v. Tenn. Senate*, No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006).

ballots were timely received. Appx. 045, at ¶ 26. Whether a voter handwrote the date on their signed, timely-received mail ballot envelope is immaterial in determining that voter's eligibility to cast a ballot. That was the position of the Board before Defendant-Intervenor Ritter brought a state court lawsuit against them challenging the counting of the ballots. *See* Appx. 167. And it continues to be the position of the Commonwealth of Pennsylvania. *See id*., at 180-199. Indeed, the County Election Board's own Chief Clerk testified in the state court case that he would count the mail ballots if a voter had put the wrong date on the ballot, *see* Appx. 260-61, at 61:5–62:14. If counting the *wrong* date is acceptable, the envelope-dating requirement cannot possibly be material.

B. Plaintiff Voters Will Lose Their Right to Vote Without Emergency Relief

A voter's loss of the opportunity to "fully exercise their voting and associational rights" is the quintessential irreparable harm. *Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 879 (3d Cir. 1997); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). That is because "the right of suffrage is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). And once an election is certified, "there can be no do-over [or] redress,"

and the injury to Plaintiff Voters becomes both "real and completely irreparable ...." *League of Women Voters of N.C.*, 769 F.3d at 247.

Here, Plaintiff Voters' stand to be disenfranchised in a matter of days unless this Court acts to preserve the status quo. The Board has noticed a meeting for Monday at 3:00 p.m. to certify the election. *See* Appx. 040. In the absence of an injunction pending appeal, the County will certify the election and Plaintiff Voters will likely lose any opportunity for appellate review—and any chance at having their votes counted. The harm Plaintiff Voters stand to suffer is clear and irreparable.

C. The Public Interest Favors Emergency Relief Pending Appeal

The public interest strongly favors maintaining the status quo while this appeal is pending. The disputed ballots have not been counted, and the results have not been certified for the single remaining race for common pleas judge in Lehigh County. Issuing an injunction pending appeal *before* the Board has certified the election will preserve rather than disrupt the status quo, and will advance the strong public interest in counting all valid votes.

The public interest "favors permitting as many qualified voters to vote as possible." *League of Women Voters*, 769 F.3d at 247–48 (citations and quotation marks omitted). Indeed, in a recent non-precedential decision, this Court

emphasized the paramount value placed on counting every vote: "Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 390–91 (3d Cir. 2020). Here, absent an injunction pending appeal, 257 voters' ballots will be set aside and not counted even though all parties agree the ballots were submitted by registered, eligible voters, were received on time, and otherwise complied with the rules for mail ballots. It is in the public interest to resolve the important civil rights question whether federal law prohibits refusing to count those otherwise valid ballots for failure to comply with an immaterial envelope-dating requirement. *Cf. Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997) ("In the absence of legitimate countervailing concerns, the public interest clearly favors the protection of constitutional rights.").

Even if the Board had identified a meaningful interest in enforcing the requirement to write the date on the mail-ballot envelope, it would not outweigh the harm of disenfranchisement that Plaintiff Voters and 252 similarly situated voters will suffer. And in any case, it is doubtful the Board could identify such an interest. After all, the Board initially resolved to count Plaintiff Voters' ballots and then defended that position throughout the state-court proceedings initiated by

Defendant-Intervenor Ritter. The Board has also maintained that even a clearly erroneous date suffices to count the ballot, *see* Appx. 260-61, at 61:5 – 62:14. And the Commonwealth of Pennsylvania asserted point blank in a filing in the District Court that the envelope-dating requirement "is not 'material' and cannot be used to disenfranchise any Pennsylvania voter." Appx. 191. Whatever tenuous public interest may exist in enforcing the immaterial envelope-dating requirement cannot justify rushing to finalize an election before all votes are properly counted.

Nor can a general desire for finality outweigh voters' fundamental rights. To be sure, Plaintiff Voters are asking for relief that would entail some modest additional delay in certifying the last unresolved contest for common pleas court judge in Lehigh County. But any inconvenience that might flow from that delay can be minimized through expedited appellate briefing. And any such inconvenience is outweighed by the overwhelming public interest in counting every vote.

CONCLUSION

For the foregoing reasons, Plaintiff Voters respectfully request that the Court (1) grant emergency relief pursuant to Fed. R. App. P. 8 enjoining the certification of the Lehigh County election at issue in this action to preserve the status quo

pending appellate review; and (2) immediately grant any temporary administrative relief necessary to preserve the status quo while the Court considers this motion.

Respectfully submitted,

Dated: March 19, 2022

s/ Stephen A. Loney, Jr.

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* *Application for admission pending*

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellants' Emergency Motion for Injunction Pending Appeal and for Temporary Administrative Relief is being filed electronically on March 19, 2022 using the Court's CM/ECF system, and will be served electronically by the Notice of Docket Activity generated by the court's electronic filing system on:

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