**No. 23-3166**

# In The United States Court Of Appeals For The Third Circuit

**PENNSYLVANIA STATE CONFERENCE OF THE NAACP BRANCHES, *et al.*,**

***Plaintiffs-Appellees*,**

**v.**

**SECRETARY COMMONWEALTH OF PENNSYLVANIA, *et al.*,**

***Defendants-Appellees,***

**REPUBLICAN NATIONAL COMMITTEE, *et al.*,**

***Intervenors-Appellants.***

**DEMOCRATIC NATIONAL COMMITTEE, *et al.*,**

***Intervenors-Appellees.***

Appeal from the United States District Court for the Western District of Pennsylvania, Case No. 1:22-cv-339

## BRIEF OF THE COMMITTEE OF SEVENTY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit LAR 26.1, *amicus curiae* the Committee of Seventy makes the following disclosure:

1) For nongovernmental corporate parties, please list all parent corporations: None.

2) For nongovernmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation that is not a party to the proceeding before this Court but that has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (1) the debtor, if not identified in the case caption; (2) the members of the creditors' committee or the top 20 unsecured creditors; and, (3) any entity not named in the caption that is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant: Not applicable.

Dated: Apri1 17, 2024

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# TABLE OF CONTENTS

**Page**

# TABLE OF CITATIONS

**Page(s)**

**CASES**



**STATUTES**

# TABLE OF CITATIONS
(continued)

**Page(s)**

**RULES**



**OTHER AUTHORITIES**

## INTEREST OF AMICUS CURIAE

The Committee of Seventy ("Seventy") is a non-partisan civic leadership organization that advances representative, ethical, and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. Seventy was established in 1904 with the goals of improving voting, getting more competent and more honest people into government, fighting corruption, and keeping people informed and involved in government. One hundred and twenty years later, Seventy continues to focus on public integrity, governmental transparency and effectiveness, and free, fair, secure, and well-run elections.

Seventy participates in litigation only when it is the most effective way to advance Seventy's non-partisan, good government objectives. Such is the case in the current litigation. The central issue before the Court is whether federal law protects eligible voters who seek to have their ballots counted notwithstanding immaterial paperwork mistakes. Seventy has an interest in this issue because strong representative government exists when the processes through which we choose public officials are open, free, consistent, fair, and secure. This means allowing all eligible voters to cast ballots, and it means counting every vote.[1]

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than Seventy, its members, or its counsel provided money for the preparation or submission of this brief. Seventy has moved for leave to file this brief pursuant to Fed. R. App. P. 29(b).

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant rehearing or rehearing *en banc* because the panel majority ignored the plain meaning of a federal statute, embraced a position that a unanimous panel of this Court had previously rejected, and erred on an issue of exceptional importance to American democracy.

This case involves the handwritten date on the outer return envelope submitted by Pennsylvania mail-ballot voters. It is undisputed that the handwritten date serves no purpose whatsoever. Yet when a voter makes a mistake by, for example, forgetting to write the date or writing the wrong date, that mistake is grounds under Pennsylvania law to reject that voter's otherwise valid ballot. Due to errors or omissions with respect to the handwritten date, more than 10,000 voters' ballots were not counted in the 2022 election. *See* Op. 19; Dissent 1 & n.2, 14.

Disregarding the plain terms of the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), the panel majority held that federal law is powerless to protect these voters and ensure their votes are counted. The Materiality Provision prohibits state actors from refusing to count otherwise valid ballots because of paperwork mistakes that are immaterial in determining a voter's qualification to vote in a particular election. That is precisely the situation here: it is undisputed that the handwritten date on the outer return envelope has nothing to do with whether a voter is qualified. Yet the panel majority's decision endorses the

use of mistakes regarding this date as a basis for rejecting ballots. The panel majority concluded that the Materiality Provision does not apply by limiting its reach to voter registration processes. This led the panel majority to the untenable conclusion that federal law prohibits immaterial paperwork errors from adversely affecting registration to vote, but allows such errors to preclude actual voting.

Leaving the panel majority's decision in place would undermine civic engagement and political participation. Thousands of Pennsylvania voters—Republicans, Democrats, and Independents alike—would have their ballots canceled in upcoming elections because of meaningless paperwork issues. Election officials would face unnecessary burdens. The door would be open to nonuniformity in election administration and other purposeless traps for unwary voters.

Public confidence in our electoral system and the judicial process surrounding election issues, already precariously low, also would further suffer. Just two years ago, a unanimous panel of this Court in *Migliori v. Cohen* reached the exact ***opposite*** conclusion as the panel majority and held that the Materiality Provision prohibits state actors from rejecting otherwise valid ballots because of mistakes in the handwritten date. *See* 36 F.4th 153 (3d Cir. 2022), *stay denied*, *Ritter v. Migliori*, 142 S. Ct. 1824, *vacated as moot*, 143 S. Ct. 297 (Mem.) (2022). Though *Migliori* later was vacated as moot, the fact that two different panels of this Court reached opposite conclusions on the same issue of critical public importance could

undermine public confidence in judicial processes related to our electoral system. Under these circumstances, the Court should grant rehearing or rehearing *en banc* to review further this important question that has divided members of this Court.

## ARGUMENT

### I. The panel majority's decision is contrary to the plain meaning of the Materiality Provision, disenfranchises thousands of voters, burdens election officials, and undermines public confidence in the electoral process.

The Materiality Provision sets forth a sweeping prohibition: state actors may not "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 statute defines the word "vote" to include "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 totals of votes cast***." *Id.* at § 10101(a)(3)(A), (e) (emphasis added). The Materiality Provision thus prohibits any state actor from using a paperwork mistake that is immaterial to a voter's qualification to vote as the basis for refusing to count that voter's ballot. When statutory language is unambiguous, the "judicial inquiry is complete," and the Court must give effect to the statute's plain meaning. *Conn. Nat'l Bank v. Germain*, 503

U.S. 249, 253–54 (1992); *see Parker v. NutriSystem, Inc.*, 620 F.3d 274, 277 (3d Cir. 2010) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end.").

The handwritten date on Pennsylvania's mail-ballot declaration form is a "record or paper relating to" an "act requisite to voting," and undisputedly not "material in determining" whether a voter "is qualified under State law to vote." Thus, the Materiality Provision prohibits the cancellation of ballots based solely on errors or omissions relating to the handwritten date.

The panel majority mistakenly read the phrase "material in determining whether such individual is qualified under State law to vote in such election" as limiting the types of "record[s] or paper[s]" covered by the provision—which they concluded could only be those relating to voter registration—rather than limiting the types of "error[s] or omission[s]" covered by the provision. Op. 27–29. Relying on "context" and legislative history to bolster this erroneous reading, the panel majority held that the Materiality Provision applies only to processes related to voter registration.

However, the Materiality Provision sweeps as broadly as it seems. It protects "the right of ***any*** individual to vote in ***any*** election" notwithstanding immaterial errors or omissions "on ***any*** record or paper relating to ***any*** application, registration,

***or other act requisite to voting***[.]" 52 U.S.C. § 10101(a)(2)(B) (emphases added). Contrary to the statute's explicitly broad scope, the panel majority concluded that immaterial paperwork mistakes cannot prevent a citizen from registering to vote, but can prevent that same citizen's vote from being counted. The requirement to place a handwritten date on the outer return envelope plainly is an "act requisite to voting." Rehearing is necessary to address this incongruous result.

The panel majority reasoned also that the specific terms used to describe the kinds of "record[s] or paper[s]" covered by the Materiality Provision ("application" and "registration") must constrain the general term that follows them ("other act requisite to voting") so that all three refer to the registration process. Op. 29. But conflating those terms to mean only "registration" effectively reads the phrase "other act requisite to voting" out of the statute. *See Migliori*, 36 F.4th at 162 n.56 ("[W]e cannot find that Congress intended to limit this statute to … registration."); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is this Court's duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks and citations omitted)). A proper reading of the provision would use the "common attributes" shared by the specific terms to inform—not replace—the meaning of the general term that follows. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. ----, 2024 WL 1588708, at *5 (Apr. 12, 2024) (describing the *ejusdem generis* canon of statutory interpretation). The specific terms "application" and "registration" both

refer to documents that are used in the voting process—as are the outer return envelopes used in voting by mail. Congress thus intended the Materiality Provision to cover ***more*** than registration and, indeed, every act "requisite to voting," including casting a ballot and having such ballot counted.[2]

These issues go to the heart of American democracy and are exceptionally important to Pennsylvania's voters, election officials, and electoral process. Every citizen, regardless of political persuasion, has a strong interest in exercising the "fundamental political right" to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). That right encompasses not just the opportunity to submit a ballot, but the ability to have that ballot counted. Voters should not have to worry that an inadvertent mistake involving a meaningless paperwork requirement may deprive them of their most basic rights as citizens. If the panel majority's decision is allowed to stand, the voices of thousands of citizens will be ignored for no good reason.

Allowing the handwritten date requirement to cancel votes is not good government. The panel majority's decision opens the door to variable and unfair practices across the Commonwealth because the Commonwealth's 67 counties may

[2] The panel majority posits that construing the general term "other act requisite to voting" broadly would render the specific terms "application" and "registration" superfluous. Op. 41–42. But just last week, the Supreme Court rejected a similar argument concerning statutory interpretation as "exactly backwards." *Bissonnette*, 2024 WL 1588708, at *5 ("It is the specific terms … that limit the residual clause, not the residual clause that swallows up these narrower terms.").

take different approaches to enforcing the handwritten date requirement. For example, some counties may reject as invalid ballots with abbreviated years ("24" instead of "2024") or partial dates ("Oct. 2024), while other counties may count those ballots. Some counties may reject as invalid ballots with a facially valid month and date but no year, while other counties may count such ballots. By contrast, if the Materiality Provision applied to the handwritten date, there would be a uniform (and sensible) practice all across the Commonwealth: ballots will not be rejected because of errors or omissions respecting the handwritten date on the outer return envelope.

The panel majority's decision also invites the risk of additional paperwork requirements that would avoid the Materiality Provision but serve only as traps for the unwary. Under the panel majority's decision, there is nothing to stop state legislators or election officials from imposing additional paperwork requirements in the mail-ballot process and using mistakes on that paperwork to disenfranchise mail-ballot voters. As this Court previously observed, the right to vote is "'made of sterner stuff' than that." *Migliori*, 36 F.4th at 163.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Unfortunately, polling suggests that more than a third of Americans lack confidence that votes will be accurately cast and counted. *See* Justin McCarthy,

*Confidence in Election Integrity Hides Deep Partisan Divide*, GALLUP (Nov. 4, 2022), https://news.gallup.com/poll/404675/confidence-election-integrity-hides-deep-partisan-divide.aspx.

The panel majority's decision would arbitrarily cancel the votes of thousands of Pennsylvania Republicans, Democrats, and Independents for failure to comply with a pointless paperwork requirement. Allowing this decision to stand can only further undermine public confidence in the electoral process. Rehearing or rehearing *en banc* is an opportunity for this Court to enhance faith in our electoral process by ensuring that votes are not rejected for arbitrary reasons.

## II. Rehearing is necessary to promote public confidence in the judicial process surrounding election issues.

"The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary." Judicial Conference of the United States, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, at 9 (Sept. 2020), http://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf. Unfortunately, the public's trust and confidence in the judiciary is waning. *See, e.g.*, Matthew Levendusky et al., *Has the Supreme Court become just another political branch? Public perceptions of court approval and legitimacy in a post-Dobbs world*, SCIENCE ADVANCES (Mar. 8, 2024), https://www.science.org/doi/epdf/10.1126/sciadv.adk9590; Megan Brenan, *Views of Supreme Court Remain New Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-

court-remain-near-record-lows.aspx ("less than half of Americans say they have 'a great deal or 'a fair amount' of trust and confidence" in the judicial branch of the federal government).

It is imperative that the judiciary act to reassure the public that decisions about important issues—particularly election-related issues that could determine who serves as our political leaders—are made consistently, carefully and transparently. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "'generat[es] the feeling, so important to a popular government, that justice has been done'")); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) ("In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." (quoting 5 The Writings and Speeches of Daniel Webster, 163)).

In this case, a sharply divided panel of this Court held that the Materiality Provision cannot save thousands of otherwise valid ballots from rejection on account of meaningless paperwork mistakes. But just two years ago, a unanimous panel of this Court reached the exact ***opposite*** conclusion. *See Migliori*, 36 F.4th at 164. Though *Migliori* was vacated as moot, nothing material to the merits of the parties' respective positions has changed in the last two years: the text, context, and

legislative history of the Materiality Provision remains as it was, and discovery has confirmed that the handwritten date on the outer return envelope serves absolutely no purpose. Yet the conclusion of the two-judge panel majority in this case is now the law of the Third Circuit, even though four judges from this Court would have it otherwise.

Setting aside the merits of the panel majority's holding, rehearing *en banc* would give this Court the opportunity to speak with one voice on an important electoral issue. Whether the panel majority's holding stands or not, a full and fair hearing in which the full court decides the meaning of the Materiality Provision—and the fate of untold thousands of mail-ballots with meaningless paperwork mistakes—will reassure the public that the law of the Third Circuit reflects the true consensus of the members of this Court, not a quirk of how litigation of these issues happened to unfold. *See Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923) ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done").

## CONCLUSION

For these reasons, the Court should grant rehearing or rehearing *en banc*.

Dated: April 17, 2024

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**CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK**

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that at least one of the attorneys whose names appear on the brief is a member of the bar of this court.

In accordance with Local Appellate Rule 31.1(c), I certify that Microsoft Defender Offline scanned the file and did not detect a virus and that any paper copies that Amicus submits will be identical to the text of the electronic brief.

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,575 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word for Microsoft 365 MSO. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: April 17, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2024, a copy of the foregoing Brief of the Committee of Seventy as *Amicus Curiae* in Support of Petition for Rehearing was filed electronically through the appellate CM/ECF system with the Clerk of the United States Court of Appeals for the Third Circuit. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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