No. 22-30

In the Supreme Court of the United States

DAVID RITTER,

Petitioner,

v.

LINDA MIGLIORI, ET AL.,

Respondents.

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

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch files amicus curiae briefs in cases involving issues it believes are of public importance, including cases involving the proper interpretation of federal voting and civil rights laws. *See*, *e.g.*, Brief of Amicus Curiae Judicial Watch, Inc. in Support of Petitioner, *Husted v. A. Philip Randolph Institute,* No. 16-960 (proper interpretation of Section 8 of the National Voter Registration Act); and Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioners, *Brnovich v. Democratic National Committee*, No. 19-1257 (Section 2 of the Voting Rights Act).

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this brief.

briefs as a means to advance its purpose and has appeared as amicus in this Court on many occasions.

Amici curiae have an interest in the proper interpretation of the materiality provision of the Civil Rights Act of 1964. The Third Circuit's reasoning badly misconstrues this provision, applying it to regulations concerning the casting and counting of ballots, something its text and legislative history show it was not intended to cover. The materiality provision concerns those seeking to become qualified to vote, not voters who are *already qualified*, but whose ballots were rejected because of a failure to comply with a state law concerning ballots. The ruling risks extending the Civil Rights Act beyond its intended reach, thereby allowing political operatives to preempt reasonable state laws regarding, among other things, mail-in balloting.

Amici curiae respectfully request that this Court grant Petitioner's request for certiorari and vacate the Third Circuit's decision under *Munsingwear*.

RELEVANT FEDERAL STATUTE

The materiality provision of Section 1971 of the Civil Rights Act of 1964 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).

SUMMARY OF ARGUMENT

In requesting certiorari, Petitioner in this case ultimately seeks to vacate an unreviewed Third Circuit ruling that badly misinterprets the materiality provision of the Civil Rights Act of 1964. The materiality provision is expressly addressed to applications to register to vote, registration, and, generally, becoming qualified to vote under state law. The Third Circuit, however, applied the materiality provision to regulations concerning the casting and counting of ballots by voters who were already qualified to vote.

The Third Circuit's ruling was erroneous. As set forth below, it interpreted the materiality provision in a way that is contrary to its ordinary public meaning. At its core, the provision concerns *becoming qualified to vote*. Regulations affecting cast ballots are simply not covered by this description. No one would describe a deficiency in a particular *ballot* by saying that it caused a *voter* to "become unqualified to vote."

The Third Circuit's ruling is also contrary to several principles of statutory interpretation. The

ruling unjustifiably reads a word ("ballot") into the statute. It renders *more than half* of the provision's words superfluous. It ignores the applicable interpretative canon of *ejusdem generis*. And the legislative history of the provision, if it were to be consulted, amply confirms that the provision was intended to govern voter registration.

In its present, unvacated form, the Third Circuit's ruling already is causing untold harm to state efforts to regulate elections and, in particular, to regulate the new, widespread practice of unrestricted mail-in balloting. The Court should grant the petition and vacate the Third Circuit's ruling.

ARGUMENT

I. The Third Circuit Ruling in *Migliori v. Cohen* Misinterpreted the Materiality Provision of Section 1971 of the Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)).

In *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), the Third Circuit held that the materiality provision of the Civil Rights Act of 1964 rendered the Pennsylvania dating requirement for mail-in ballot declarations unenforceable. *Id.* at 163-64. The court of appeals first noted that for a Pennsylvanian to be qualified to vote, he or she had to satisfy four pre-requisites: that "they are [at least] 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction." *Id.* at 163. The court of appeals then

reasoned that this dating requirement did not help "determine any of these qualifications," ruled 25 Pa. §§ 3146.6(a) and 3150.16(a) immaterial under § 10101(a)(2)(B), and concluded that the absence of a date on the declaration was not a legally permissible reason to reject mail-in ballots. *Id*. at 163-64.

The critical move in the Third Circuit's decision was to interpret § 10101(a)(2)(B) to generally proscribe the rejection of *ballots*, cast in *particular elections*, because of immaterial errors or omissions *on those ballots*. In so ruling, the court of appeals extended the materiality provision well beyond its traditional application to immaterial errors or omissions on applications to register to vote. The important determinations underpinning this move appeared in a footnote in the ruling and were accompanied by very little discussion. Claiming to apply a plain-language analysis, the court of appeals declared "that the mail-in ballot squarely constitutes a paper relating to an act for [sic] voting." *Migliori*, 36 F.4th at 162 n. 56. It rejected the argument that the provision only applies to voter registration on the ground that the text of the provision "includes 'other act[s] requisite to voting' in a list alongside registration. Thus, we cannot find that Congress intended to limit this statute to … registration." *Id*.

The Third Circuit's ruling is fatally undercut by the "ordinary public meaning" of the language of § 10101(a)(2)(B), and by fundamental considerations and principles of statutory interpretation.

A. The Ordinary Public Meaning of the Words in § 10101(a)(2)(B) Establishes That the Provision Does Not Apply to Determinations Regarding the Validity of Particular Ballots.

The Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (citation omitted). "[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citation omitted).

The relevant provision of the Civil Rights Act of 1964 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).

The ordinary public meaning of these words is clear: state actors may not declare individuals ineligible to vote because of immaterial errors or omissions on any paperwork they submitted in order to become eligible. That the statute applies only to *becoming qualified to vote*—and not to the validity of any particular ballot or attempt to vote—is confirmed by the fact that it expressly restricts its reach (1) to paperwork "relating to any application, registration, or other act requisite to voting," and (2) to errors or omissions affecting whether an "individual is qualified under State law to vote in [an] election." Indeed, each of these clauses provides context for the other, confirming that § 10101(a)(2)(B) applies to acquiring eligibility, but not to voting. *See Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (it is axiomatic that to "discern [their] ordinary meaning, … words must be read and interpreted in their context, not in isolation") (internal quotations and citations omitted).

Reading the statute broadly to apply to any act related in any way to voting, as the Third Circuit has done, is contrary to the "ordinary public meaning" of its words. Note that a ballot might fail to comply with state or federal law for any number of reasons. A mail-in ballot might be undated, as in this case. Or it might be mailed after the election-day deadline. An in-person ballot might be cast in the wrong precinct. And any ballot might contain an "overvote," where

more votes are recorded than the voter was allowed to cast. Or a ballot might be "spoiled" by being opened prematurely.

In each of these cases, the ordinary way to refer to the problem is to say that the *ballot* "is invalid" or "does not comply with the law." No one refers to a late, or overvoted, or spoiled ballot by saying that the *voter* "is not qualified to vote." The problem is with the ballot, not with the qualifications of the voter.

Accordingly, the Third Circuit's interpretation conflicts with the ordinary public meaning of § 10101(a)(2)(B), and should be rejected.

B. Section 10101(a)(2)(B) Does Not Refer to "Ballots."

At the most basic level, § 10101(a)(2)(B) simply does not say what the Third Circuit construes it to say. The word "ballot," with or without modifiers like "mail-in" or "absentee," does not appear anywhere in that section.

It is significant, moreover, that the word "ballot" *does* appear in another subsection of the same statute. Thus, Congress certainly knew how to specify "ballot" when it meant to do so. *See* 52 U.S.C. § 10101(e) (defining the word "vote" to include "casting a ballot, and having such ballot counted"); *see id.* (authorizing the impoundment of an "applicant's ballot pending determination of" a relevant proceeding).

If Congress had intended to convey the meaning inferred by the Third Circuit, it easily could have done so in any number of ways. It could have referred to "any record, paper, *or ballot*." It could have specified records "relating to any application, registration, *casting of a ballot*, or other act requisite to voting." Or it could have added, after the final clause of § 10101(a)(2)(B), "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election *or whether a ballot is valid or should be counted*."

But Congress did none of those things. The Third Circuit is simply not at liberty to supply the missing meanings. *See Burrage v. United States*, 571 U.S. 204, 218 (2014) (the "role of this Court is to apply the statute as it is written") (citations omitted).

C. The Third Circuit's Interpretation of § 10101(a)(2)(B) Renders Most of its Words Superfluous.

As previously noted, § 10101(a)(2)(B) applies, by its own terms, to errors or omissions that "relat[e] to any application, registration, or other act requisite to voting," and that are material to "whether [an] individual is qualified under State law to vote." The only way to make sense of these clauses is to assume that they restrict the scope of the provision to applying to register, registering, and other acts confirming that an applicant is qualified to vote.

If § 10101(a)(2)(B) is *not* so restricted—if it applies equally to becoming eligible to vote, to casting

a ballot, and to having one's ballot received and counted—then these specific clauses are superfluous. If that is so, then the 65 words of § 10101(a)(2)(B) can be pared down to 30 words, *without any loss of meaning*, as follows:

> 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~~ [that] is not material ~~in determining whether such individual is qualified under State law to vote in such election~~;

"The surplusage canon … states that 'the courts must lean ... in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.'" *Delaware v. Pennsylvania*, Nos. 220145 & 220146, 2021 U.S. LEXIS 6295, at *60 (July 23, 2021) (citations omitted). The Third Circuit's interpretation should be rejected because it renders most of the words in § 10101(a)(2)(B) unnecessary.

D. The Principle of *Ejusdem Generis* Establishes That the Phrase "Other Act Requisite to Voting" Refers to Acts Like Applying or Registering to Vote.

The Third Circuit also erred when interpreting

the phrase "other act requisite to voting" by failing to consider it in context and, in particular, by failing to apply the principle of *ejusdem generis*. *Migliori*, 36 F.4th at 162 n. 56; *see Southwest Airlines*, 142 S. Ct. at 1788 ("words must be read and interpreted in their context, not in isolation") (internal quotations and citations omitted).

The phrase "other act requisite to voting" appears at the end of a list referring "to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Such a list suggests the application of *ejusdem generis*, a "well-settled canon[] of statutory interpretation." *Southwest Airlines*, 142 S. Ct. at 1789. "[T]he *ejusdem generis* canon … instructs courts to interpret a 'general or collective term' at the end of a list of specific items in light of any 'common attribute[s]' shared by the specific items." *Id*. (citation omitted).

In this case, the specific items in the list, "application" and "registration," inform the meaning of the general phrase "other act requisite to voting." The common attributes shared by the specific items is that they concern whether a voter has become eligible to cast a vote at all—not whether a particular ballot complies with the law.

Because the listed items concern "applying" or "registering" to vote, the general phrase must refer to the same kind of thing.

E. To the Extent Legislative History is Considered, It Clearly Shows That § 10101(a)(2)(B) Was Addressed to Voter Registration.

The propriety of using legislative history to ascertain the meaning of a statutory text is the subject of disagreement. *Compare Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) ("Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful."); *with Milner v. Department of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text," although "ambiguous legislative history" must not be allowed "to muddy clear statutory language").

If it is consulted, however, the legislative history establishes beyond any doubt that the materiality provision was intended to combat

> the intricate methods employed by some State or county voting officials *to defeat Negro registration*. Among the devices most commonly employed are: (1) the application of more difficult literacy tests to Negroes than whites; (2) dilatory handling of Negro *applications* and failure to notify applicants of results; (3) employment

> of subjective character tests such as "good character"; and (4) applying more rigid standards of accuracy to Negroes than white, *thereby rejecting Negro applications* for minor errors or omissions.

H.R. REP. 88-914 (Nov. 20, 1963), reprinted at 1964 U.S.C.C.A.N. 2391, 2491 (emphasis added); *see Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill") (citation omitted).

The House Report specifically noted that "*registrars* will overlook minor misspelling errors or mistakes in age or length of residence of white applicants, *while rejecting a Negro application* for the same or more trivial reasons." *Id*. (emphasis added). And it concluded:

> It is for these reasons that the committee has amended the 1957 and 1960 Civil Rights Acts to provide that, in Federal elections State *registration officials* must: (1) apply standards, practices, and procedures equally among individuals *seeking to register to vote*; (2) disregard minor errors or omissions if they are not material in determining *whether an individual is qualified to vote*; (3) administer literacy tests in writing.

Id. (emphasis added).

In sum, the legislative history of § 10101(a)(2)(B) shows that its drafters intended to proscribe the rejection of applications to register to vote on the basis of minor errors and omissions.

II. The Petition for Certiorari Should Be Granted Because This Erroneous Decision By the Third Circuit Is Already Having Pernicious Effects as Precedent.

Pursuant to this Court's Rule 10(c), the granting of a writ of certiorari is permissible, regardless of whether there is a direct circuit split,[2] where there arises an "important question of federal law, that has not been, but should be, settled by this Court." Justice Alito observed that "the Third Circuit's interpretation is sufficiently questionable and important to merit review." *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Alito, J., dissenting). This misinterpretation has caused the Third Circuit in *Migliori,* and will cause other courts that follow it, to apply the materiality provision to a myriad of state voting laws that it does not and was never intended to preempt. This will throw existing rules into doubt and disrupt the conduct of upcoming elections.

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[2] Note, however, that the Fifth Circuit, contrary to the Third, has observed that "[i]t cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under [§ 10101(a)(2)(B)]. Otherwise, virtually every rule governing how citizens vote would [be] suspect." *Vote.org v. Callanen*, 2022 U.S. App. LEXIS 18348, at *13 n.6 (5th Cir. July 2, 2022).

This is happening already. In *McCormick v. Chapman*, No. 286 M.D. 2022, 2022 Pa. Commw. Unpub. LEXIS 319, at *32 (Pa. Commw. Ct. Jun. 2, 2022), a state court, in reliance on the Third Circuit's ruling in *Migliori*, ordered all undated ballots in the May 2022 Pennsylvania primary to be counted.

In *Dondiego v. Lehigh Cnty. Bd. of Elections*, Dkt. 1, ¶ 43, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022), plaintiffs alleged that a different provision of Pennsylvania law, which required mail-in ballots to be placed in secrecy envelopes, violated the materiality provision. They argued that *Migliori* provided precedent for the district court to rule that security envelopes were *not,* under § 10101(a)(2)(B), material to determining whether individuals are qualified under state law to vote, and that the law could not be a basis for rejecting ballots that were received by election officials not enclosed in secrecy envelopes. It is worth noting that, under this argument, 1000 ballots, received in one box, none of which were in secrecy envelopes, would have to be counted.

In *DCCC v. Kosinski*, Dkt. 79 at 1, 24, No. 1:22-cv-1029 (S.D.N.Y. May 27, 2022), the national Democratic Party relied on the materiality provision of § 10101(a)(2)(B) in challenging state laws requiring voters to cast provisional ballots at the right location, to cast ballots so that they are received on time, to have mail-in ballots postmarked, and to use the right envelope. According to this suit, the DCCC claims that all of these requirements are unenforceable

under the Civil Rights Act of 1964. By this logic, all such ballots, with or without a postmark, whenever and wherever they were cast or received, would have to be counted.

Further, the Biden administration's Solicitor General has participated as an amicus curiae in the instant case, arguing that the materiality provision of §10101(a)(2)(B) preempts Pennsylvania's mail-in dating requirement. *See Migliori v. Lehigh Cnty Bd. of Elections*, Dkt. 45, No. 22-1499 (3d Cir. April 1, 2022).

Such strained or even outlandish legal claims, based on the incorrect interpretation of the materiality provision in *Migliori*, could become another pandemic, perfectly timed for the 2022 election season. Unless certiorari is granted and *Migliori* is vacated, that pandemic will lead to the abrogation of election rules enacted by state legislatures under the express authority of the U.S. Constitution.

CONCLUSION

Amici curiae respectfully request that the petition for certiorari be granted.

Respectfully submitted,

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