Envelopes, Errors, and Elections: Revitalizing the Civil Rights Act's Materiality Provision in the Age of Vote by Mail

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ABSTRACT: This Note examines the interplay between the Civil Rights Act's materiality provision—which prevents the denial of the right to vote on the basis of immaterial errors—and the widespread adoption of vote by mail. The materiality provision's text suggests a wide applicability and possibly a prominent role in protecting absentee votes which would otherwise be discarded. This is particularly relevant as we enter an era where a significant proportion of votes are cast via the mail. However, the provision's ambiguous central concept has created judicial confusion which muddles its otherwise promising scope. To mend this gap, this Note examines a sample of materiality provision cases and develops criteria for analyzing materiality in the modern context before proposing a judicial framework and urging the adoption of a legislative solution.

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INTRODUCTION

The materiality provision of the Civil Rights Act of 1964 protects against the denial of the right to vote for errors or omissions on papers or records related to voting.[1] This provision has been overshadowed by more prominent statutory efforts, which largely relegated it to an afterthought for the past sixty years of election litigation.[2] However, the provision possesses surprising power. Though it was drafted with a specific and narrow problem in mind, Congress used surprisingly broad language in crafting its protections.[3] Now, the materiality provision has become relevant again—for a reason that its drafters certainly would not have considered. The 2020 general election saw more than half of American voters cast their ballot via the mail.[4] This expansion of convenience voting is a laudable achievement in accessibility to the ballot box, but it is not without risks to voters' rights. To combat the threat of voter fraud among voters who don't verify their identity in person, every state combines its absentee balloting program with voter verification devices—signatures, dates, affirmations, security envelopes, or voter ID numbers—all with the purpose of counting qualified voters and excluding those who would seek to commit voter fraud through the mail.[5] But with each additional device, there is a risk that eligible votes run afoul of these requirements and are thrown out.

A new wave of litigation related to voting by mail has begun, including a substantial number of cases challenging absentee ballot requirements for denying the right to vote for errors immaterial to determining voter qualifications.[6] After sixty years of dormancy and in an uncontemplated context, the emerging jurisprudence on the applicability of the materiality provision to these cases is unsurprisingly confused.[7] The keystone term, materiality, is undefined which has led courts to grasp for alternative interpretations and competing factors.[8] Instead of protecting votes, the courts have left the materiality provision in limbo—somewhere between a powerful tool of democratic preservation and superfluous language. Because of the potential scope of protections offered by the materiality provision in a new era of American democracy by mail, it is critical to understand what the materiality provision does and whether it can be utilized uniformly in modern contexts to help guarantee Americans' votes are counted, regardless of how they vote.

This Note seeks to examine the materiality provision in the context of the widespread adoption of vote by mail and to propose a possible solution to the

1. 52 U.S.C. § 10101(a)(2)(b) (2018).
2. *See infra* Section I.A.
3. *See infra* Section II.A.1.
4. *See infra* Section I.B.
5. *See infra* Section I.B.
6. *See infra* Sections I.C, II.B.
7. *See infra* Sections I.C, II.B.
8. Sections II.A–.B; *see also* 52 U.S.C. § 10101(a)(2)(b).

increasing uncertainty in courts nationwide. Part I examines the converging histories of both the materiality provision and the growth of convenience voting in America to explain why the provision has arrived suddenly at the fore of election litigation. Part II seeks to fill in a gap at the center of the materiality provision: the definition of materiality itself in the context of the ballot box. It does so by analyzing the original context of the materiality provision, the usage of materiality elsewhere in the law, and by surveying the sometimes muddled interpretations by courts nationwide. Next, this Note examines how ballot curing—state processes that allow voting-related errors to be corrected—plays into a materiality analysis before identifying the criteria that should be considered in a materiality analysis. Finally, Part III proposes both a uniform judicial standard and a legislative fix to the existing materiality provision language.

I. MATERIALITY AND THE MAIL

The materiality provision passed in 1964 before the widespread adoption of vote by mail. It addressed an issue unrelated to mail-in balloting. It wasn't even particularly seen as an important voting provision of the Civil Rights Act. Nonetheless, convenience voting and the materiality provision have been on a collision course for the past half-century. This Part discusses the history of both the materiality provision and the adoption of vote by mail to examine how each rose from relatively obscure policy choices to a shared moment on the precipice of national importance. Their parallel development demonstrates why and how they should be utilized together by voting rights advocates to preserve valid votes, adapt to modern electoral changes, and prevent an electoral crisis.

A. HISTORY OF THE MATERIALITY PROVISION

The Civil Rights Act of 1964 ("the Act") was a sweeping piece of legislation that aimed to curb discrimination in commerce, public facilities, education, employment, federal programs, and in our nation's elections.[9] The Act "remains one of the most significant legislative achievements in American history"[10] and continues to be a prominent source of civil rights litigation more than fifty years since its passage.[11] Among the goals of the legislation was to correct deficiencies "in the operation and enforcement of the Civil Rights Acts of 1957 and 1960" in order "to guarantee to all citizens the right to vote without discrimination as to race or color."[12] Although well-intentioned, these previous attempts failed to curb state and local efforts to burden the franchise

9. CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 1 (2020).

10. *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm [https://perma.cc/Q6H7-7MGQ].

11. *Over Two Decades, Civil Rights Cases Rise 27 Percent*, U.S. CTS. (June 9, 2014), https://www.uscourts.gov/news/2014/06/09/over-two-decades-civil-rights-cases-rise-27-percent [https://perma.cc/HV3K-NKBB].

12. H.R. REP. NO. 88-914, at 2394 (1963).

of Black Americans.[13] Through insidious but effective, means,[14] many states had stifled Black election participation during the Jim Crow era.[15]

To rectify the failures of previous efforts, the Act required "uniform standards, practices, and procedures to all persons seeking to vote in Federal elections and . . . prohibit[ed] the disqualification of an individual because of immaterial errors or omissions in papers or acts relating to such voting."[16] The Act also curbed the use of literacy tests—though narrowly at the time of enactment when compared to future efforts.[17] In combination with the Voting Rights Act of 1965, the Act catalyzed improved voting rights in the latter half of the twentieth century and created the backbone for modern voter protections.[18]

The materiality provision of the Act, now codified as 52 U.S.C. § 10101(a)(2)(B) ("§ 10101"), provides that no person acting under the color of law shall:

> (B) 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.[19]

This language was designed to tackle a specific form of disenfranchisement that was prevalent throughout the Jim Crow South: the use of errors—real or fabricated—to disenfranchise otherwise eligible voters.[20] In cases documented by Congress in their hearings before the Act's adoption, officials would either seize on minor errors or create absurd technical barriers to deny individuals

13. *See* Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008); BACK, *supra* note 9, at 3.

14. Despite the court-enforced prohibition on some mechanisms of voter suppression during the early twentieth century, like grandfather clauses and "white primaries," voter suppression continued through administrative barriers, intimidation, and outright violence. KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 10 (2015); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 147–48 (2012) (discussing techniques used to administratively disenfranchise Black Americans).

15. At the time the Civil Rights Act of 1964 and Voting Rights Act of 1965 were implemented, there were broad gaps in the registration rates of Black and white Americans. While white registration was routinely above 60% in southern states, Black registration was between 63 and 22 percentage points lower. Notably, in Mississippi, the Black registration rate in 1965 was a mere 6.7%—compared to a 69.9% white registration rate. U.S. COMM'N ON C.R., THE VOTING RIGHTS ACT: TEN YEARS AFTER 43 (1975).

16. H.R. REP. NO. 88-914, at 2394.

17. *Id.* at 2394–95. Literacy tests would be proscribed more broadly the following year by the Voting Rights Act of 1965 and nationwide by amendments to the Voting Rights Act in 1970. 52 U.S.C. § 10301; COLEMAN, *supra* note 14, at 18–19.

18. U.S. COMM'N ON C.R., *supra* note 15.

19. 52 U.S.C. § 10101(a)(2)(B).

20. *See* Levitt, *supra* note 14, at 147.

their right to the ballot box.[21] The materiality provision directly addressed these problems by "divest[ing] from State authorities" the ability to make determinations of voter qualification based on immaterial facts.[22] Although the problem immediately addressed by this provision was racial discrimination at the polls, the provision itself is written without reference to race—much to the chagrin of the provision's contemporaneous detractors.[23] Consequently, the provision applies to a much broader range of errors and omissions than the racially targeted ones specifically contemplated during drafting.[24]

Despite the broad applicability of the materiality provision, it remained a relatively underused statutory tool for the protection of voting rights for much of its existence.[25] In comparison to the Voting Rights Act, which is very actively litigated,[26] the materiality provision is "under-the-radar"[27] and "surprisingly underappreciated."[28] The efficacy of the provision itself has also garnered only very limited, and recent, academic attention.[29] This disparity likely derives from two primary sources. First, the Voting Rights Act—passed the year after the Civil Rights Act and the materiality provision—has been a very effective vehicle for litigating and protecting voting rights since its enactment.[30]

Alternatively, it may be attributable to the infrequent but urgent nature of election litigation, which drives many of these disputes towards settlement, consent decrees, or other preliminary relief.[31] The fleeting nature of electoral

21. *See id.* at 148 (describing a set of cases where individuals were denied for failing to list their age in years, months, and days, for misspelling Louisiana as "Louiseana," for underlining instead of circling their title, and for incorrectly listing their skin color as "'Negro' instead of 'brown,' or 'brown' instead of 'Negro'").

22. H.R. REP. NO. 88-914, at 2445 (1963).

23. *Id.* at 2447 ("It should be particularly noted that the Commission recommendations, which this legislation would begin to implement, are for all purposes and are not restricted in any degree to discrimination on the basis of race, color, religion, or national origin.").

24. *See* Levitt, *supra* note 14, at 149 & nn.216–18.

25. Helen L. Brewer, *Title I of the Civil Rights Act in Contemporary Voting Rights Litigation*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 277, 277 (2023).

26. *Voting Section Litigation*, C.R. DIV., U.S. DEP'T JUST. (July 9, 2024), https://www.justice.gov/crt/voting-section-litigation [https://perma.cc/LH7Y-7CEJ] (demonstrating the Voting Rights Act is more frequently litigated by the Justice Department than the Civil Rights Act).

27. Caroline Sullivan, *This Civil Rights Provision Protects Your Vote from Simple Mistakes*, DEMOCRACY DOCKET (July 8, 2022), https://www.democracydocket.com/analysis/this-civil-rights-provision-protects-your-vote-from-simple-mistakes [https://perma.cc/N7K8-YRGN].

28. Levitt, *supra* note 14, at 88.

29. *Id.* at 87. However, there is a growing academic discussion regarding the availability of a private right to action connected to § 10101. *See generally* Megan Hurd, Note, *Promoting Private Enforcement of the Voting Rights Act and the Materiality Provision: Contrasting* Northeast Ohio Coalition for the Homeless v. Husted *and* Schwier v. Cox, 86 U. CIN. L. REV. 1379 (2018) (discussing the circuit split between the Sixth and Eleventh Circuits over whether there is a private right of action to enforce the materiality provision); Derek Muller, *Federal Courts Note Circuit Split on Whether the "Materiality" Provision of the Civil Rights Act of 1964 Includes a Right Privately Enforceable Under Section 1983*, ELECTION L. BLOG (Mar. 30, 2023, 8:50 AM), https://electionlawblog.org/?p=135321 [https://perma.cc/B6ZH-86YL] (describing the Fifth Circuit's approach to whether there is a private right of action to enforce the materiality provision).

30. BACK, *supra* note 9, at 30.

31. Levitt, *supra* note 14, at 146 & n.207.

disputes also increases the likelihood that a case is ultimately rendered moot which decreases the body of controlling case law.[32] Regardless of the provision's historic underuse, the widespread adoption of vote by mail has thrust the provision to the fore.

B. ADOPTION OF CONVENIENCE VOTING NATIONALLY

The sudden onset of the COVID-19 pandemic required policymakers to implement substantive changes across a wide spectrum of American life.[33] Although the initial hope was that the most serious effects of the pandemic would be short-lived thanks to early attempts at intervention,[34] policymakers soon faced the reality that the effects would drag on for an extended period of time and could threaten the successful administration of the federal elections scheduled in November 2020.[35] Before 2020, the residents of most states[36] utilized traditional voting methods—in person and on election day.[37] To alleviate the risk of viral transmission possible from a high-turnout in-person election, states and the federal government looked towards nontraditional voting methods.[38] Although every state had adopted some form of mail-in balloting before the pandemic which could allow voters to safely exercise their franchise from home, many states required an approved excuse or otherwise limited access to this safer alternative.[39] This gap in the accessibility of safe convenience voting techniques required the hasty adoption of new accessible methods to access the ballot box and rapidly reshaped the landscape of voting in the United States.

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32. *See, e.g.*, Ritter v. Migliori, 143 S. Ct. 297, 297 (2022) (remanding to a materiality provision case to the Third Circuit with instructions to dismiss the case as moot because the election was over).

33. *See generally* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (implementing sweeping policy changes across many facets of the economy); *State Laws in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, https://ballotpedia.org/State_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/Y6PW-8YRK] (noting over five thousand bills were filed in state legislatures related to COVID-19).

34. Dan Mangan, *Trump Issues 'Coronavirus Guidelines' for Next 15 Days to Slow Pandemic*, CNBC (Mar. 16, 2020, 6:28 PM), https://www.cnbc.com/2020/03/16/trumps-coronavirus-guidelines-for-next-15-days-to-slow-pandemic.html [https://perma.cc/98HL-RAL9].

35. L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10470, ELECTION 2020 AND THE COVID-19 PANDEMIC: LEGAL ISSUES IN ABSENTEE AND ALL-MAIL VOTING 1 (2020).

36. Some states had adopted all-mail balloting prior to 2020. These states included Colorado, Oregon, and Washington. *Voting Outside the Polling Place Report Table 18: States with All-Mail Elections*, NAT'L CONF. STATE LEGISLATURES (Jan. 28, 2024) [hereinafter *States with All-Mail Elections*], https://www.ncsl.org/elections-and-campaigns/table-18-states-with-all-mail-elections [https://perma.cc/X8WU-8YFE].

37. Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html [https://perma.cc/XFD8-XDJS]; *Voting by Mail and Absentee Voting*, MIT ELECTION DATA + SCI. LAB (Feb. 28, 2024), https://electionlab.mit.edu/research/voting-mail-and-absentee-voting [https://perma.cc/YUD9-BGQU].

38. WHITAKER, *supra* note 35, at 2.

39. *Id.*

1. Convenience Voting Before the Pandemic

The United States has a long history of convenience voting. As early as the Civil War, soldiers for both the "Union and Confederate . . . [armies were given the opportunity] to cast ballots from their battlefield units and have them be counted back home."[40] These policies were slowly expanded to allow civilians to vote absentee—though in a very limited capacity.[41] By 1938, "all but a handful of states [had] adopted some form of civilian absentee balloting."[42] Across the middle of the twentieth century, absentee balloting became substantially more available; but, general restrictions on voting hampered the use of absentee ballots for many voting-age Americans.[43] The late 1970s saw the beginning of an era of liberalization and experimentation in methods for convenience voting, including no-excuse absentee balloting, all-mail elections, and early in-person voting.[44] In the twenty-first century, convenience voting laws made voting increasingly accessible outside of the confines of election day.[45]

On the eve of the COVID-19 pandemic, thirty-three states allowed no-excuse absentee balloting.[46] Five states had adopted all-mail elections.[47] Forty-three states offered at least limited forms of early in-person voting.[48] The availability led to a stark uptake in convenience voting methods over traditional in-person election day voting; between 1996 and 2016, the percentage of voters either voting early or by mail increased from 10.5% to 40.1%.[49] As voters became more comfortable with these voting methods, their adoption enjoyed substantial popularity; Pew Research found that 71% of Americans approved of no-excuse convenience voting in 2018.[50]

2. Mechanics of No-Excuse Vote by Mail Methods

To understand the role that the materiality provision could play, it is necessary to understand how these voting methods work in practice. Take for example, no-excuse absentee balloting—the most common form of

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40. *Voting by Mail and Absentee Voting*, *supra* note 37.

41. *Id.*; JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 10 (2006).

42. FORTIER, *supra* note 41, at 10.

43. *Id.* at 12–13.

44. *Id.* at 13–16.

45. Wendy R. Weiser, Eliza Sweren-Becker, Dominique Erney & Anne Glatz, *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. FOR JUST. (Sept. 17, 2020), https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020 [https://perma.cc/B9WE-4V7J].

46. *Id.*

47. *Id.*

48. *See* Abigail Field, *The Lasting Impacts of the 2020 Election: Voting Early in Person and Casting Mail Ballots*, VOTING RTS. LAB (Sept. 26, 2022), https://votingrightslab.org/the-lasting-impacts-of-the-2020-election-voting-early-in-person-and-casting-mail-ballots [https://perma.cc/XE28-BBPA].

49. *See* Scherer, *supra* note 37.

50. Kristen Bialik, *How Americans View Some of the Voting Policies Approved at the Ballot Box*, PEW RSCH. CTR. (Nov. 15, 2018), https://www.pewresearch.org/short-reads/2018/11/15/how-americans-view-some-of-the-voting-policies-approved-at-the-ballot-box [https://perma.cc/FX5H-WPLC].

convenience voting.[51] In permitting localities, registered voters may request a ballot from their elections authority to be delivered to their homes by mail.[52] The details of each state's program vary considerably; but, voters may be allowed to return their ballot by mail, returning them in person (on election day at the polls or at their local election office), dropping them in an official drop box, or having a third party collect it.[53] Substantive differences exist in other administrative policy choices, including: deadlines for ballot returns;[54] whether or not the state pays for return postage of the ballot;[55] whether you must request a ballot each election;[56] and the requirements for securing and verifying your ballot.[57]

Unlike the voter-by-voter flexibility offered by no-excuse absentee voting, all-mail elections represent more wholistic changes to election administration. "In mostly-mail elections, all registered voters are sent a ballot in the mail. . . . [W]ell ahead of Election Day."[58] Oregon trailblazed the use of all-mail elections; after field testing the program during the 1980s and 1990s, the State adopted all-mail administration for all elections by referendum in 1998.[59] For more than a decade, Oregon was the sole practitioner of universal all-mail elections until Washington implemented the system in 2012, trailed shortly by Colorado in 2014.[60]

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51. *See* SARAH J. ECKMAN & KAREN L. SHANTON, CONG. RSCH. SERV., IF11477, EARLY VOTING AND MAIL VOTING: OVERVIEW & ISSUES FOR CONGRESS 1 (2020).

52. *Id.*

53. *Id.*

54. *See generally Voting Outside the Polling Place Report Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (June 12, 2024), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots [https://perma.cc/2SHQ-WFWQ] (noting that while close of polls on election day is the most common deadline for absentee ballot return, states vary widely in when a ballot may be rejected for arriving late).

55. *See generally Voting Outside the Polling Place Report Table 12: States with Postage Paid Election Mail*, NAT'L CONF. STATE LEGISLATURES (Jan. 28, 2024), https://www.ncsl.org/elections-and-campaigns/table-12-states-with-postage-paid-election-mail [https://perma.cc/QDE3-8HYJ] (observing that only a minority of states have paid postage for the return envelope of absentee ballots).

56. *See generally Voting Outside the Polling Place Report Table 3: States with Permanent Absentee Voting Lists*, NAT'L CONF. STATE LEGISLATURES (Feb. 6, 2024), https://www.ncsl.org/elections-and-campaigns/table-3-states-with-permanent-absentee-voting-lists [https://perma.cc/E82F-BSGT] (illustrating the various policies across states regarding permanent absentee ballot voting and the differences in such policies).

57. States have a wide variety of requirements for verifying an absentee/mail ballot. These requirements can include, but are not limited to: voter signature, witness signature, copy of photo ID, verification of voter ID number, Social Security number or driver's license number, and/or notarization. The materiality—and validity—of these types of measures is the focus of this Note's analysis. *See generally Voting Outside the Polling Place Report Table 14: How States Verify Voted Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (Jan. 22, 2024) [hereinafter *How States Verify Voted Absentee/Mail Ballots*], https://www.ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots [https://perma.cc/T8G8-6YD4].

58. *States with All-Mail Elections*, *supra* note 36.

59. *See* FORTIER, *supra* note 41, at 14.

60. *States with All-Mail Elections*, *supra* note 36.

In these states, and the five others that have followed suit, the election takes place over an extended period of time rather than a single election day—voters have an opportunity to return or drop off their ballot anytime between receiving it and a set deadline.[61]

3. The Pandemic and the Rapid Expansion of Convenience Voting

The administration of a federal election during a deadly pandemic was a daunting task.[62] In the United States, elections are administered on a state-by-state basis, which makes policy change slow and irregular.[63] This decentralization has long been seen as both a feature and a bug—allowing innovation at the state level, while increasing the risk of "mismanagement and inconsistent application of the law."[64] The pandemic introduced uncertainty which threatened to upend the delicate balance of state-run elections; voters entered election season in 2020 worried about COVID-19, the difficulty of voting, and the validity of an election held during a pandemic.[65] To alleviate this uncertainty, conditions were ripe for uniform, federal intervention. But even in normal partisan conditions, there is limited appetite for federal intervention in elections;[66] and, it would be difficult to characterize the political conditions in 2020 as conducive to bipartisanship on election administration.[67] Consequently, efforts for emergency federal intervention in election policy uniformly hit dead ends in Congress.[68] The only major federal intervention came in the form of Help America Vote Act ("HAVA") emergency funding which passed in the CARES Act—while this appropriation of $400 million was substantial, it did little to provide uniform guidance to states beyond instructing them "to prevent, prepare for, and respond to

61. *Id.*

62. *See* discussion *supra* Section I.A.

63. *See Election Administration at State and Local Levels*, NAT'L CONF. STATE LEGISLATURES (Dec. 22, 2023), https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/62VP-4RF8].

64. *See id.*

65. Carroll Doherty, *Voters Anxiously Approach an Unusual Election – and Its Potentially Uncertain Aftermath*, PEW RSCH. CTR. (Oct. 7, 2020), https://www.pewresearch.org/short-reads/2020/10/07/voters-anxiously-approach-an-unusual-election-and-its-potentially-uncertain-aftermath [https://perma.cc/RVV5-7R98].

66. *See* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 206–10 (2007) (discussing difficulties in reauthorizing the Voting Rights Act in 2006).

67. Morgan Chalfant, *Trump: 'The Only Way We're Going to Lose This Election Is If the Election Is Rigged,'* HILL (Aug. 17, 2020, 7:22 PM), https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the [https://perma.cc/PS3G-3VX8]; James Comer, *Reps. Comer & Jordan: Democrats Want to Use Mail-In Ballots to Steal Election and Deny Trump Second Term*, FOX NEWS (Oct. 2, 2020, 5:00 AM), https://www.foxnews.com/opinion/mail-in-ballots-james-comer-jim-jordan [https://perma.cc/Z6JR-2NHV].

68. *See, e.g.*, National Disaster and Emergency Balloting Act of 2020, S. 4033, 116th Cong. (2020); VoteSafe Act of 2020, S. 3725, 116th Cong. (2020); VoteSafe Act of 2020, H.R. 7068, 116th Cong. (2020); EASE Act, H.R. 7905, 116th Cong. (2020); Pandemic Democracy for All Act, S. 3961, 116th Cong. (2020).

coronavirus, domestically or internationally, for the 2020 [f]ederal election cycle."[69] In the absence of direction, states were on their own to head off possible disaster in November 2020.

To adapt, states leaned on systems already in place—expanding convenience voting, adapting the number and type of polling places, and moving to ensure adequate staffing at the polls. Thirty-nine states and the District of Columbia modified their voting procedures for the 2020 general election;[70] notably, of the remaining eleven states, five had already adopted all-mail elections or allowed all-mail elections at the county-level prior to the onset of the COVID-19 pandemic.[71] Fourteen states made it easier to use absentee ballots either by suspending excuse requirements or creating explicit carveouts to those requirements related to COVID-19.[72] Ten states sent absentee applications to every registered voter in order to encourage use of mail-in balloting.[73] Four states and the District of Columbia introduced requirements that prepaid postage be supplied with absentee ballots.[74]

Beyond changes to mail-in balloting procedures, the fear of transmission at polling places caused a rash of closures that threatened the administration of traditional election-day voting.[75] To respond, in addition to more creative solutions,[76] some states adopted preventive measures to limit polling place closures including site quotas, process requirements, and notice requirements.[77] Finally, the pandemic particularly threatened recruitment of poll workers[78]

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69. CARES Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 530 (2020).

70. *See Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA (Nov. 19, 2020) [hereinafter *Response to the Coronavirus*], https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/NN5C-4PFC].

71. *Compare id.*, *with States with All-Mail Elections*, *supra* note 36. In addition to the all-mail election states, North Dakota allowed counties to opt-in to all-mail elections. *See States with All-Mail Elections*, *supra* note 36.

72. *See Response to the Coronavirus*, *supra* note 70.

73. *Id.*

74. *Id.*

75. Cameron Joseph & Rob Arthur, *The US Eliminated Nearly 21,000 Election Day Polling Locations for 2020*, VICE (Oct. 22, 2020, 6:56 AM), https://www.vice.com/en/article/pkdenn/the-us-eliminated-nearly-21000-election-day-polling-locations-for-2020 [https://perma.cc/58EA-6RAC].

76. Nolan D. McCaskill, *Election Sites at Pro Sports Venues Draw Voters — but Also Pushback*, POLITICO (Nov. 2, 2020, 1:31 PM), https://www.politico.com/news/2020/11/02/sports-venues-election-voting-sites-crowds-432522 [https://perma.cc/2XGZ-FU96] (reporting states utilizing large venues as polling places); Jolie McCullough, *Texas Supreme Court Rejects Republican-Led Effort to Throw Out Nearly 127,000 Harris County Votes*, TEX. TRIB. (Nov. 1, 2020, 12:00 PM), https://www.texastribune.org/2020/11/01/texas-drive-thru-votes-harris-county [https://perma.cc/4MND-NCFT] (noting drive-through voting).

77. *Voting Laws Roundup 2020*, BRENNAN CTR. FOR JUST. (Dec. 8, 2020), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020-0 [https://perma.cc/ZL4T-AEZC].

78. *Finding—and Keeping—Qualified Poll Workers*, NAT'L CONF. STATE LEGISLATURES (Aug. 24, 2023), https://www.ncsl.org/elections-and-campaigns/finding-and-keeping-qualified-poll-workers [https://perma.cc/39CU-BF56].

who are typically older than the rest of the voting population.[79] Ultimately, most polling places were adequately staffed thanks to aggressive recruiting drives, increased pay, and relaxed requirements on who could serve as a poll worker.[80]

2020 produced monumental changes in how Americans vote. Despite legitimate fears that the general election would be disrupted,[81] "the . . . election saw among the highest levels of turnout recorded in recent elections."[82] The usage of nontraditional convenience voting techniques spiked—from 40.1% in the 2016 general election to 69.4% in the 2020 general election.[83] For the first time ever, the majority of voters cast their vote prior to election day.[84] Despite the substantive increase in the use of mail-in ballots, the return and rejection rates held steady with prior general elections.[85] Although some political figures leveled accusations of lowered levels of security during the 2020 election,[86] the integrity of the count has been consistently praised.[87] Given the decentralized, nonuniform adoption of measures to avert the possible risks of an election administered in a pandemic, it is hard to overstate the relative success of states in administering the 2020 general election.

After the emergency conditions of the COVID-19 pandemic dissipated, states adopted diverging policy trajectories. Some changes were intended to expire as emergency measures.[88] This includes many of the COVID-19-

79. U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2022 COMPREHENSIVE REPORT 22 (2023) [hereinafter EAC 2022].

80. *Voting Laws Roundup 2020*, *supra* note 77.

81. *Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19*, PEW RSCH. CTR. (Apr. 28, 2020), https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19 [https://perma.cc/T889-P2DZ].

82. *See* Scherer, *supra* note 37.

83. *See id.*

84. U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT 1 (2021).

85. *Id.* at 13.

86. Matthew Choi, *Trump, in White House Address, Continues to Level Unfounded Charges of Election Fraud*, POLITICO (Nov. 5, 2020, 10:45 PM), https://www.politico.com/news/2020/11/05/trump-address-election-fraud-434535 [https://perma.cc/96F8-JVP9].

87. *See, e.g.*, Press Release, Joint Statement from Elections Infrastructure Gov't Coordinating Council & the Election Infrastructure Sector Coordinating Exec. Comms. (Nov. 12, 2020), https://www.cisa.gov/news-events/news/joint-statement-elections-infrastructure-government-coordinating-council-election [https://perma.cc/ZT32-MJPK].

88. *See Response to the Coronavirus*, *supra* note 70 (noting many of the changes were only for the "November 3, 2020, general election").

specific exceptions,[89] as well as the trend of automatically sending absentee ballot applications.[90]

A number of states participated in a wave of restrictive voting legislation in the years following 2020; these included restrictions on absentee ballot return windows, stricter signature and ID requirements, limits on ballot application distribution, and prohibiting the use of drop boxes.[91] On the other hand, some states found their foray into enhanced convenience voting beneficial and made the pandemic-era changes permanent. California, Nevada, and Vermont made all-mail elections the norm following 2020.[92] Virginia was the only state to make their no-excuse mail balloting permanent during 2020,[93] but Massachusetts followed suit in 2022.[94] In-person voting understandably rebounded relative to convenience voting in 2022; however, the majority of voters still utilized convenience voting techniques, which represented a substantial increase relative to the 2018 midterms.[95] Further, voters felt overall more confidence in casting their vote by mail in 2022 than in 2020.[96] Although it's fair to say that the traditional in-person voting on election day isn't going anywhere, neither is convenience voting.

C. MATERIALITY IN THE COURTS AFTER 2020

Perhaps unsurprisingly, the rapid adoption of new voting methods and hotly contested federal elections in 2020 and 2022 set the stage for an increase in voting-related litigation. Compared to the 226 cases nationwide in 2018, 2020 saw nearly 550 instances of election litigation on contested election results, the use of vote by mail, voter suppression, and many other

89. *See, e.g.*, ALA. ADMIN. CODE r. 82-2-3.06-.04ER (2020); Press Release, Off. of the Sec'y of State of W. Va., Secretary of State Mac Warner Announces Voting Options for Voters to Continue Making Safe Decisions in 2020 General Election (July 27, 2020) (on file with the *Iowa Law Review*) (emphasizing West Virginia's procedures allowing confined voters to "apply to a county clerk for an absentee ballot"); Press Release, Governor Chris Sununu, Governor Sununu Signs HB 1266 into Law (July 17, 2020) (on file with the *Iowa Law Review*) (noting the temporary nature of New Hampshire's absentee voting process changes).

90. *See, e.g.*, Press Release, Mich. Dep't of State, Benson: All Voters Receiving Applications to Vote by Mail (May 19, 2020) (on file with the *Iowa Law Review*) (specifying the policy was specific to the "August and November elections"); Press Release, Off. of the Governor of Ill., Gov. Pritzker Signs Legislation to Expand Vote by Mail, Promote Safe Participation in the 2020 Election (June 16, 2020) (on file with the *Iowa Law Review*).

91. *See, e.g.*, *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 [https://perma.cc/4K35-ASQW]; *Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022 [https://perma.cc/43PP-2U3X]; *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023 [https://perma.cc/78RD-RJ3E].

92. *States with All-Mail Elections*, *supra* note 36.

93. *Voting Laws Roundup 2020*, *supra* note 77.

94. MASS. GEN. LAWS ch. 54, § 25 B (2022).

95. U.S. ELECTION ASSISTANCE COMM'N, *supra* note 84, at 10.

96. PEW RSCH. CTR., TWO YEARS AFTER ELECTION TURMOIL, GOP VOTERS REMAIN SKEPTICAL ON ELECTIONS, VOTE COUNTS 48 (2022).

topics.[97] The total amount of litigation dropped in 2022, but remained significantly elevated[98]—possibly signaling a continued trend of increasing election litigation over time.[99] Overshadowed by voluminous and well-publicized election litigation,[100] there appears to be a growing trend of litigation specifically targeting the validity of vote by mail requirements under the materiality clause.[101] These cases primarily concern the voter verification requirements associated with mail-in ballots including, but not limited to, birth dates,[102] so-called "wet signatures,"[103] and dated outer envelopes.[104] Although multiple circuit courts have addressed materiality provision claims, the varied nature of these cases and requirements has prevented a distinct circuit split from materializing.[105]

The Supreme Court has expressed interest in the issue—granting *certiorari* on *Ritter v. Migliori* out of the Third Circuit before ultimately remanding the case as moot.[106] The increased use of vote by mail and the varied nature of voter verification devices virtually ensure that these cases will continue to arise under § 10101.

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97. *Election-Litigation Data: 2018, 2020, 2022 State and Federal Court Filings*, STATE DEMOCRACY RSCH. INITIATIVE UNIV. WIS. L. SCH. (Mar. 21, 2023), https://statedemocracy.law.wisc.edu/featured/2023/election-litigation-data-2018-2020-2022 [https://perma.cc/8NAT-X5WY].

98. *Id.*

99. Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150, 151 (2022).

100. *See generally* William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 9:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/9FL9-3QT2] (describing the various lawsuits filed after the 2020 general election).

101. *See, e.g.*, Migliori v. Cohen, 36 F.4th 153, 162–64 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022); Ball v. Chapman, 289 A.3d 1, 1 (Pa. 2023); *In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023); Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 20 (S.D.N.Y. 2022); Democratic Party of Va. v. Brink, 599 F. Supp. 3d 346, 346 (E.D. Va. 2022); Common Cause v. Thomsen, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021).

102. *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *2 (analyzing outer envelope birth date requirements).

103. Vote.Org v. Callanen, 39 F.4th 297, 302 (5th Cir. 2022) (staying an injunction pending appeal on "wet signature" requirements). A "wet signature" is a physical signature, often required to be in ink, as opposed to a digital or scanned signature. Libertarian Party of Ill. v. Pritzker, 455 F. Supp. 3d 738, 741 (N.D. Ill. 2020).

104. *Migliori*, 36 F.4th at 163–64 (holding undated outer envelopes were not material).

105. *Compare Callanen*, 39 F.4th at 309 (staying an injunction pending appeal on "wet signature" requirements), *with Migliori*, 36 F.4th at 163–64 (holding undated outer envelopes were not material).

106. *Ritter*, 143 S. Ct. at 297–98 (remanding to the Third Circuit with instructions to dismiss the case as moot). Justice Alito also authored a rebuke of the Third Circuit during a dissent on a motion to stay, calling the decision "very likely wrong." Ritter v. Migliorii, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting). The Author notes that the *Ritter* dissent uses a different spelling than the majority or the Third Circuit; Migliorii spelled with two 'i's will be used when referring to the dissent.

The following Sections proceed by first examining the types of requirements and security devices needed to vote by mail. Next, Section I.C.2 briefly addresses a parallel question of whether § 10101 has an implied private cause of action under 42 U.S.C. § 1983—an open question among circuits which could render this analysis moot. Finally, Section I.C.3 concludes by providing a brief overview of cases analyzed in Part II.

1. Overview of Requirements on Mail-in Ballots

Casting an absentee ballot—like any other—requires a voter to navigate a series of requirements both to prove their eligibility and to prevent fraud; this has been described as the "usual burden[] of voting."[107] A state's interest in achieving these goals through verification requirements is "clearly compelling and significant," but they must be weighed against the constitutional and statutory protections granted to voters against disenfranchisement.[108] In trying to strike this balance, states have developed a multitude of processes to verify voters without overly burdening this fundamental right.[109] However, the number and severity of these devices is a frequent point of contention.[110] Without proper verification, voters face the risk of their vote being discarded or may need to attempt to cure their ballot by providing the missing information to their local election officials.[111] Because materiality cases turn on the efficacy and necessity of these verification requirements, it is necessary to complete a brief overview of their types and prevalence.

Thirty-one states require a voter signature on returned absentee ballots.[112] Of these, twenty-seven states attempt to verify the signature on the ballot or envelope against a signature on file—either electronically or manually.[113] Nine states require at least one witness to sign the absentee ballot; North Carolina and Rhode Island require two witnesses or a notary to sign an individual's ballot for it to be valid.[114] Mississippi, Missouri, and Oklahoma require every absentee ballot envelope be notarized.[115] Other states employ less common checks on voter identity. Arkansas, for example, requires a copy of a photo ID to be submitted with an absentee ballot in order for one's vote to be counted.[116] Georgia requires a voter's driver's license or state ID number

107. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197–99 (2008).

108. Frederick v. Lawson, 481 F. Supp. 3d 774, 799 (S.D. Ind. 2020).

109. *See generally How States Verify Voted Absentee/Mail Ballots*, *supra* note 57 (highlighting witnessing, notarization, and production of an identity document as some of the absentee/mail ballot verification methods used by states).

110. *Election-Litigation Data: 2018, 2020, 2022 State and Federal Court Filings*, *supra* note 97 (showing vote by mail cases, including challenges to verification methods, represented fourteen percent of litigation in 2022).

111. *How States Verify Voted Absentee/Mail Ballots*, *supra* note 57.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. ARK. CONST. amend. 51, § 13(b)(1)(A).

and birth date to be written on the return security envelope.[117] Although these top-line verifications could be burdensome or tricky for the average voter, many states have statutory language which introduces additional pitfalls endangering votes. For example, in Pennsylvania, the statute states that voters returning absentee ballots "shall . . . mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen."[118] Further, the voter must "fill out, date and sign" the outer envelope provided by the state.[119] Pennsylvania does send out instructions with an absentee ballot,[120] but the specificity of the statute inherently increases the risk that a voter runs afoul of one these requirements—whether it be green ink or a missing date.[121]

2. Parallel Question on the Existence of a Private Cause of Action

There is a shadow looming over the inquiry of this Note—even if the materiality provision does prohibit discarding votes under some existing verification statutes, there may not be a private cause of action.[122] The Sixth Circuit has come out strongly against a private right to action, holding that the provision "is enforceable by the Attorney General, not by private citizens."[123] The Third Circuit, the Eleventh Circuit, and, most recently, the Fifth Circuit have come to the opposite conclusion, with the Third Circuit holding that "Congress intended § 1983 to be a channel for private plaintiffs to enforce the Materiality Provision of the Civil Rights Act"[124] The United States has also weighed in; the Department of Justice entered a statement of interest defending the existence of a private right to action through § 1983 in a case pending before the Northern District of Florida.[125]

Given the increased prevalence of materiality cases and the presence of a circuit split on this subject,[126] it is likely that this issue is taken up by the U.S. Supreme Court in the near future. At this moment, the Sixth Circuit's finding that no private right to action exists is an outlier.[127] If the Supreme Court were to adopt this interpretation, the Attorney General would be the sole allowable

117. GA. CODE ANN. § 21-2-386 (West 2022). Notably, a district court granted a motion for preliminary injunction on a materiality challenge to Georgia's birth date requirement on August 18, 2023. *In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023).

118. 25 PA. STAT. AND CONS. STAT. ANN. § 3146.6 (West 2023).

119. *Id.*

120. Migliori v. Cohen, 36 F.4th 153, 157 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

121. 25 PA. STAT. AND CONS. STAT. ANN. § 3146.6; *Migliori*, 36 F.4th at 157.

122. Muller, *supra* note 29.

123. McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000).

124. *Migliori*, 36 F.4th at 164; *accord* Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003) (holding that the materiality provision was enforceable by a private right of action).

125. Vote.org v. Byrd, No. 23-cv-00111, 2023 WL 7169095, at *1 (N.D. Fla. Oct. 30, 2023).

126. *See* discussion *supra* Section I.C.

127. Muller, *supra* note 29; Vote.Org v. Callanen, 89 F.4th 459, 476 (5th Cir. 2023) (outlining how § 10101(a)(2)(B) includes an "implied but established private right to sue").

plaintiff in these cases; given the constraints on Department of Justice resources and other effective avenues for litigation, it is likely that the materiality clause would fade back into obscurity.[128] However, so long as the majority of circuits—and potentially the Supreme Court—continue to recognize the private right to action under § 1983, then an understanding of the materiality provisions bounds will be critical.

3. Overview of Cases Examined

In order to wade through the growing, diverse sphere of litigation on the subject of materiality, this Note examines a select group of cases, both historic and ongoing, to draw out common themes and consequential differences. These cases highlight the different approaches to and understanding of the materiality provision even as it is applied to fairly similar factual circumstances. Although this sample is far from exhaustive, it does provide a *lingua franca* in these cases and a path towards building a more coherent jurisprudence surrounding the materiality provision. This Section outlines the factual backgrounds of each highlighted case before they are analyzed in Section II.B.

i. Ritter v. Migliori

In *Ritter*, the Supreme Court granted certiorari before vacating judgment and remanding the case as moot.[129] The underlying Third Circuit case was *Migliori v. Cohen*—which arose out of a 2021 election in Lehigh County, Pennsylvania.[130] There, a six-candidate judicial election was held to fill three vacancies.[131] Pursuant to a 2019 act of the Pennsylvania General Assembly which set out several requirements to count mail-in ballots, "257 out of approximately 22,000 mail-in or absentee ballots that lacked a handwritten date" on the ballot's outer envelope were set aside.[132] Absent the uncounted ballots, fourth-place finisher and first candidate out, Cohen, trailed third-place candidate Ritter by seventy-four votes.[133] The Lehigh County Board of Elections subsequently voted to count the ballots in question, and Ritter initiated suit in the county's Court of Common Pleas to prevent the additional ballots from being counted.[134] The trial court affirmed the board's decision, but Ritter appealed and the Commonwealth Court of Pennsylvania entered a narrow ruling ordering the election board to count only four misdated ballots while throwing out the remaining 253 ballots.[135]

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128. *See* Sullivan, *supra* note 27 (noting constraints on DOJ resources); BACK, *supra* note 9, at 3 (highlighting the efficacy of the Voting Rights Act over the Civil Rights Act voting provisions).

129. Ritter v. Migliori, 143 S. Ct. 297, 297–98 (2022).

130. Migliori v. Cohen, 36 F.4th 153, 157 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

131. *Id.*

132. *Id.*; *see infra* Section I.D.

133. *Migliori*, 36 F.4th at 157.

134. *Id.* at 157–58.

135. *Id.* at 158.

In response, a group of voters initiated a federal suit against the Board of Elections alleging that their undated privacy envelopes represented immaterial errors protected under the materiality provision.[136] Finding that no private right to action existed, the district court granted summary judgment for the Board without addressing the materiality of the undated envelopes;[137] the Third Circuit promptly accepted the appeal.[138] This Note examines both the Third Circuit's analysis and Justice Alito's dissent to the Supreme Court's dismissal of the case.

ii. Florida State Conference of NAACP v. Browning

This 2008 case predates the other cases examined; it developed from a challenge to Florida's efforts to implement HAVA.[139] In response to administrative issues with the 2000 general elections—most prominently in Florida—HAVA implemented major changes to the administration of federal elections.[140] One of these provisions was a requirement that states "create a centralized, periodically updated database for its registration rolls, and that each registered voter must be linked to a unique identification number in this database."[141] To aid states in building these databases, voters must include either their Social Security number or their driver's license number; if either of these were missing, then the State must assign "that voter a unique identification number for entry into the database."[142]

To implement HAVA and the identification number requirement, the State enacted Florida Statutes section 97.053(6).[143] The provision dictates the requirements for voter registration applications, including that first-time voters pass a verification process related to their identification number; under this process, "before an application is accepted and the voter is listed as registered, the Florida Department of State must first verify or match the number provided in the application."[144] That is, either their Social Security number or driver's license number match with those on file with the relevant agency—the Social Security Administration or the State Department of Highway Safety and Motor Vehicles, respectively.[145] While voters could resolve an error, either of their own or by the government, the process for doing so

136. *Id.*

137. Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-cv-00397, 2022 WL 802159, at *13 (E.D. Pa. Mar. 16, 2022).

138. *Migliori*, 36 F.4th at 158.

139. Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1155–56 (11th Cir. 2008).

140. KAREN L. SHANTON, CONG. RSCH. SERV., R46949, THE HELP AMERICA VOTE ACT OF 2002 (HAVA): OVERVIEW AND ONGOING ROLE IN ELECTION ADMINISTRATION POLICY 1 (2023).

141. *NAACP*, 522 F.3d at 1156.

142. *Id.*

143. *Id.*

144. *Id.*; 2003 Fla. Sess. Law Serv. 415 (West).

145. *NAACP*, 522 F.3d at 1156; 2003 Fla. Sess. Law Serv. 415 (West).

was opaque and could easily result in the voter's disenfranchisement.[146] Among other challenges to section 97.053(6), voters brought a materiality challenge under § 10101.[147]

iii. Vote.Org v. Callanen

As a part of the more recent wave of § 10101 litigation, the Fifth Circuit considered the materiality provision during an interlocutory appeal of a permanent injunction of the State of Texas's 2021 voter registration statute in *Callanen*.[148] There, Vote.Org, a non-profit, aimed "to simplify and streamline political engagement by . . . facilitating voter registration."[149] As a portion of this mission, the organization created a website designed to allow voters to register to vote digitally; after an individual entered the requisite information and uploaded an electronic signature, Vote.Org would transmit the form to the local registrar by both hard copy and fax.[150]

The program was, in the eyes of the court, "an unmitigated disaster."[151] Setting aside a series of other critical failures, the Secretary of State issued an opinion that all of the potential registrations lacked an original, wet signature; consequently, every applicant needed to cure their signature defect or be their application would be thrown out.[152] In 2021, the Texas Legislature codified the Secretary of State's interpretation in section 13.143(d-2) of the Texas Election Code; the statute requires a faxed registration applications to be subsequently supported by an original, wet signature delivered in person or by mail within four days.[153] Vote.Org challenged the new law on the grounds that under § 10101, a voter's failure to include a wet signature is immaterial to the voter's qualification to vote.[154]

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146. *NAACP*, 522 F.3d at 1157–58. If an error occurred, voters received generic notices and had two possible solutions. If the government erred in the matching or in their initial data entry, the voter could resolve the issue by providing proof to the county Supervisor of Elections that their application was correct. *Id.* Alternatively, if the voter had erred the only solution was to file a new application with the correct information before the application window, called "the book closing date," had passed twenty-nine days prior to the election. *Id.* at 1156–57. In either case, if the voter failed to solve the error, they could not vote, or their provisional vote would not be counted. *Id.* at 1157–58. Further, there was no mechanism for rectifying an error after the election. *Id.*

147. *Id.* at 1158 (referenced in the text as 42 U.S.C. § 1971(a)(2)(B), the provision's previous location in the Code before being reorganized as 52 U.S.C. § 10101(a)(2)(B)); *see* 52 U.S.C. § 10101(a)(2)(B).

148. Vote.Org v. Callanen, 39 F.4th 297, 300 (5th Cir. 2022).

149. *Id.* at 301.

150. *Id.*

151. *Id.*

152. *Id.* The court also noted that the application left many voter's registration signature lines "blank, blacked out, illegible, or otherwise unacceptable" and that Vote.Org had ultimately failed to fax in the registration to the voter's registrar. *Id.*

153. TEX. ELEC. CODE ANN. § 13.143(d-2) (West 2023); *Callanen*, 39 F.4th at 301 (5th Cir. 2022).

154. *Callanen*, 39 F.4th at 302.

iv. In re Georgia Senate Bill 202

As a part of the titular bill, Georgia introduced new standards for the proper completion of an absentee ballot; among other information requested, the statute requires that the voter print his or her date of birth on the outer security envelope containing their ballot.[155] Critically, this was a duplicative effort after the voter had already confirmed they were of voting age during the application process to receive the ballot.[156] The plaintiffs filed a motion to enjoin the rejection of absentee ballots for errors or omissions on the birth date requirement.[157] The plaintiffs contended the birth date requirement is immaterial to determining a voters qualification—which was already confirmed by their application—and merely raised the risk of voter error.[158]

v. League of Women Voters of Arkansas v. Thurston

League of Women Voters addressed a similar problem to that found in *In re Georgia Senate Bill 202*, whether information provided on both an absentee ballot application and a voter registration application could be considered material to determining a voter's qualification.[159] Arkansas required that both documents contain "the voter's name, address, date of birth, and signature," which must match the signature on file.[160] The plaintiff's claim turned on the fact that the information requested was material in the first instance, but that duplicative requests for that information violated § 10101 because it was no longer necessary to determine eligibility.[161] For example, a voter's address on their registration application could be and almost certainly is used to determine a voter's qualification under the residency requirement; however, on the second application, an error or omission in the address field did not inhibit, and thus was not material to, the state's ability to identify the voter as qualified.[162]

D. Materiality Provision Litigation and What's at Stake

As noted, there is an emerging trend of plaintiffs challenging individual restrictions found within state voter verification mechanisms as immaterial barriers on their right to vote prohibited by § 10101 of the Civil Rights Act.[163] The litigation appears to be driven by a surge in voting by mail, at least partially catalyzed by pandemic era changes,[164] and the lack of clarity within

155. GA. CODE ANN. § 21-2-385(a) (West 2022).

156. *Id.*

157. *In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *2 (N.D. Ga. Aug. 18, 2023).

158. *See id.*

159. *See id.*; League of Women Voters of Ark. v. Thurston, No. 20-cv-05174, 2023 WL 6446015, at *1 (W.D. Ark. Sept. 29, 2023).

160. *League of Women Voters*, 2023 WL 6446015, at *1.

161. *Id.* at *17–18.

162. *See id.*

163. *See* discussion *supra* Section I.C.

164. EAC 2022, *supra* note 79, at 10.

the statutory text as to what is "material" in the context of voting.[165] Given this uncertainty and the historical underuse of the provision, it would be fair to disregard the materiality provision as unimportant.[166]

But close elections are common and consequential.[167] A recent example came from The University of Iowa College of Law's home congressional district where the 2020 U.S. House race was decided by six votes.[168] It doesn't take much imagination—or a very long memory—to picture a U.S. Senate race or a presidential contest on a knife edge.[169] With more than half of U.S. voters opting for convenience voting methods,[170] it is critical to know what restrictions represent lawful checks on voter fraud and which are unlawful restrictions on the franchise.

A clear interpretation of the materiality provision, consistently applied, may offer voters protection from disenfranchisement and prevent rejected ballots from deciding elections. The materiality provision is very likely to play a deciding role in a major election in the near future; as Justice Alito noted in his *Ritter* dissent, "[if] left undisturbed, [the materiality provision] could well affect the outcome of . . . elections, and it would be far better for us to address th[e] interpretation before, rather than after, it has that effect."[171] That is undoubtedly correct. After all, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[172]

II. LETTERS AND LAWSUITS: THE BOUNDARIES OF MATERIALITY IN PRACTICE

Finding a workable standard for materiality requires identifying the boundaries of the surprisingly indefinite materiality clause. This Part attempts to address the problematic nature of defining materiality and applying it in practice. The Note proceeds by first looking at the plain meaning of materiality, its statutory meaning, and its usage in other legal contexts. Then, it turns to the case law to find whether consistent jurisprudential themes have emerged. Finally, the analysis will address the role of ballot curing and the dynamic nature of "material" errors in vote-by-mail balloting, before identifying common factors that should be considered in materiality provision interpretation.

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165. 52 U.S.C. § 10101(a)(2)(B).

166. *See* Levitt, *supra* note 14, at 87–89.

167. *See id.* at 89–93.

168. Zachary Oren Smith, *Rita Hart Is Asking the U.S. House to Review Mariannette Miller-Meeks' 6-Vote 2nd District Win*, IOWA CITY PRESS-CITIZEN (Dec. 3, 2020, 8:35 AM), https://www.press-citizen.com/story/news/politics/elections/2020/12/02/iowa-2nd-congresssional-district-2020-election-results-challenged/3793867001 (on file with the *Iowa Law Review*).

169. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (2000 presidential race); *In re* Contest of Gen. Election, 767 N.W.2d 453 (Minn. 2009) (2008 Minnesota Senate race).

170. EAC 2022, *supra* note 79, at 10.

171. Ritter v. Migliorii, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting).

172. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

A. *LOST IN TRANSIT: THE SEARCH FOR A DEFINITION OF MATERIALITY*

The materiality provision proscribes denying the right to vote if the voter, or anyone else, makes an error or omission which is "not material in determining whether such individual is qualified under State law to vote."[173] This plain language demonstrates the goal of the provision is to safeguard access to the ballot box for eligible voters who may face barriers—inadvertent or insidious. But "material," the keystone term, is not defined anywhere in the statute.[174] As a result, the protections offered by the provision are more easily definable by extreme and outlandish examples of immaterial errors than by practical considerations on the margin between materiality and immateriality.[175] It is worthy of celebration that more preposterous iterations of disenfranchisement, where the materiality provision can be wielded most clearly, have become a rarity; but the lack of clarity for this provision's central concept leaves a judicial Rorschach test.

This Note next examines the original intent and understanding of Congress in Section II.A.1 and then turns to other areas of law to find comparable standards of materiality in Section II.A.2.[176]

1. Mailing It In: Discerning the Original Intent of Congress

To determine the meaning of the statute, it is, of course, first helpful to return to the text of the statute and the legislative history of the provision. The Congressional Record clearly demonstrates that the motivation for the provision was to curb discriminatory practices against Black Americans.[177] This is supported by the discussion of materiality in committee, which largely focused on discrete incidents of voter disenfranchisement targeted against voters of color.[178] However, the text of the statute sweeps more broadly, suggesting a wider application. First, the statute omits references to race, despite explicitly tying race to protections of other sections within the law.[179] Although courts have been divided on whether to read race into the materiality provision, others have recognized that Congress chose a "broader remedy."[180] Next, the language of the statute is expansive on its face, much more so than the explicit congressional intent would suggest—providing protections against disenfranchisement for "*any* individual . . . in *any* election because of an error or omission on *any* record or paper relating to *any*

173. 52 U.S.C. § 10101(a)(2)(B).

174. *See generally* 52 U.S.C. § 10101.

175. *See* Levitt, *supra* note 14, at 148 (outlining extreme instances of disenfranchisement).

176. *See* discussion *infra* Sections II.A.1–.2.

177. H.R. REP. NO. 88-914, at 2394 (1963) ("Title I designed to meet problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color.").

178. *See, e.g.*, Levitt, *supra* note 14, at 148–49.

179. *See id.*; Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008).

180. *See NAACP*, 522 F.3d at 1173; Levitt, *supra* note 14, at 148–49.

application, registration, or *other act* requisite to voting."[181] Further, Congress chose to excise language limiting the protection to only mistakes made by the voters prior to passing the provision—further extending the scope of its protections.[182] In drafting such expansive language it is evident that Congress intended for the provision to apply to a more robust set of situations than those discussed in committee, but the bounds of this intent are unclear.

Looking to the contemporaneous debate in the House and Senate also yields minimal clarity on the boundaries of materiality. In expressing dismay over the federal intrusion into the state administration of elections, Senator Ellender (D-LA) noted that as constructed "the test of the materiality of an error or omission would be decided by the judges."[183] Although the Senator's intent to preserve his vision of federalism may not have been without ulterior motives,[184] his suggestion that the materiality would require a judicially developed test appears well-founded. In describing the materiality of errors, members of Congress used varying terms—none of which are particularly more descriptive than the language of the text itself. Most commonly, members referred to the errors they were contemplating as "minor"[185] or "technical."[186] Neither of these descriptions add substantive context to the nature of materiality so much as they do the character of the error. While a major error is very likely material, a minor or technical error can be material or immaterial depending on the context. It does not appear that shedding light on the meaning of materiality was of consequence during the passage of § 10101; accordingly, it is necessary to look elsewhere to shape our understanding of materiality.

2. Outside the (Mail and/or Ballot) Box: Materiality in Other Areas of Law

Materiality is not an uncommon concept in the law, and its usage elsewhere is a frequent touchstone for courts seeking to understand the

181. *See* 52 U.S.C. § 10101(a)(2)(B) (emphases added). The debate also seemed to focus on registration as the focal point for the materiality clause. *See, e.g.*, 110 CONG. REC. 6681, 6715–16 (1964) (statement of Sen. Kenneth Keating); *id.* at 6735 (statement of Sen. Philip Hart). The focus on registration appears to highlight the Congressional focus on "the specific and flagrant abuses" which they considered prior to passing the language. *Id.* at 6716 (statement of Sen. Kenneth Keating). But nonetheless, the language of the statute is far more expansive than the narrow framing found in these statements.

182. *See* Levitt, *supra* note 14, at 151.

183. 110 CONG. REC. 6681, 6753 (1964) (statement of Sen. Allen Ellender).

184. 83 CONG. REC. 811, 813 (1938) (statement of Sen. Allen Ellender) ("I stand for white supremacy at all times."); *id.* at 828 (Sen. Allen Ellender) ("[A]s long as I am a Member of the Senate the white people of the United States can depend on their junior Senator from Louisiana to fight in every way he knows how, with all the power that is in him, for white supremacy as against an amalgamation of the races, or a mongrelization, which would lead to a deterioration of the country we all love so dearly."); *id.* at 834 (Sen. Allen Ellender) ("We shall at all cost preserve the white supremacy of America.").

185. *See, e.g.*, H.R. REP. NO. 88-914, at 2491 (1963).

186. *See, e.g.*, 110 CONG. REC. 6681, 6714 (1964) (statement of Sen. Kenneth Keating); *id.* at 6731 (recommendations of the Civil Rights Commission); *id.* at 6735 (statement of Sen. Philip Hart); *id.* at 6740 (statement of Sen. Philip Hart).

materiality provision. The first logical step in this plain meaning analysis is to look to the dictionary definition; Black's Law Dictionary defines materiality as "[h]aving some logical connection with the consequential facts" or alternatively "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; or essential."[187] Unfortunately, the broad range of materiality from logically connected to essential is reflective of the variations that exist in the law.[188] In criminal procedure and securities litigation, materiality requires the information in question is likely to be outcome determinative.[189] In proceedings concerning false statements to the federal government, a lower threshold exists; the standard for materiality is a "natural tendency to influence."[190] In the context of hiding evidence under the Federal Sentencing Guidelines, "the threshold for materiality is 'conspicuously low.'"[191] Taken together, these definitions of materiality offer little guidance.

Legal scholars' struggle to capture the essence of materiality is not new, and a uniform standard has proved evasive.[192] Although all definitions of materiality share some common DNA and purpose, their relative weight is decidedly policy specific.[193] In his standout analysis of materiality, Justin Levitt, a professor of law at Loyola Law School specializing in the law of democracy, suggests materiality across legal usage shares four primary qualities.[194] First, materiality serves as a threshold to gauge legal significance.[195] Here, that is whether a state may legally deny an individual the right to vote.

Second, because of its dependent nature, materiality is highly context specific; a fact or figure may be clearly material in one context but irrelevant in another.[196] This is evident even within the policy world of voting; a signed affidavit may be material as an absentee voter, but not as a voter who verifies their identity in person. Third, "materiality has an object." It is directed towards a particular status in question—it is anchored to "a particular fact, a particular statement, a particular action, or a particular change"; here, that is the error in question.[197] Finally, materiality "has probative weight . . . beyond

187. *Materiality*, BLACK'S LAW DICTIONARY (6th pocket ed. 2021).

188. *See* Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) ("The term 'material' not surprisingly signifies different degrees of importance in different legal contexts."); Levitt, *supra* note 14, at 104 ("'Materiality' can be a protean concept.").

189. *See NAACP*, 522 F.3d at 1173.

190. *See* United States v. Johnson, 19 F.4th 248, 256 (3d Cir. 2021) (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995)).

191. *See NAACP*, 522 F.3d at 1173–74 (quoting United States v. Dedeker, 961 F.2d 164, 167 (11th Cir. 1992)).

192. *See* Donald A. Wiesner & Albert E. Harum, *Materiality: The Legal Rule of Thumb*, 4 AM. BUS. L.J. 58, 65–66 (1966).

193. *See* Levitt, *supra* note 14, at 105–06.

194. *See id.*; *Justin Levitt*, LOYOLA L. SCH., https://www.lls.edu/faculty/justinlevitt [https://perma.cc/GH44-AJ7J].

195. *See* Levitt, *supra* note 14, at 105.

196. *See id.*

197. *See id.*

mere relevance."[198] Herein lies the crux of the question. These parameters, and the use of materiality in other areas of law, offer informative outer bounds to the possible interpretation of materiality in voting, but they fail to clarify its proper probative weight and what factfinding may be necessary to meet the requisite burden as applied in § 10101.

B. FAILURE TO DELIVER: TRACKING INTERPRETATIONS OF THE MATERIALITY PROVISION

Although the materiality provision has been historically under litigated, the increased volume of cases in recent years creates an opportunity to begin to outline judicial interpretations of § 10101 materiality. This Section will examine several federal challenges, outlined above, under the materiality provision to identify how judicial interpretations of materiality differ and what common themes underpin their analysis.[199]

1. *Ritter v. Migliori*

It is critical to begin with *Ritter v. Migliori* from 2022 as it is the Supreme Court's only foray into the question of materiality in this context.[200] The *Ritter* line of cases is particularly illuminating because it draws out two competing visions of materiality present in the courts. The Third Circuit identified the relevant qualifications from title 25, section 1301(a) of the Pennsylvania Consolidated Statutes: an individual must be "[eighteen] 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."[201] With this as the benchmark for a § 10101 analysis, the court found no "persuasive reason for how [a] requirement" to date the security envelope "helped determine any of [the requisite] qualifications."[202] Although they acknowledged the possible fraud deterrence and prevention value of dated envelopes, the court found the acceptance of ballots with incorrect (but not missing) dates and an admission by the Deputy Secretary for Elections & Commissions "that the date is not used to 'determine the eligibility'" of the voter to be fatal to this argument.[203] In focusing on this direct relationship between materiality and qualification, the court found that setting aside the ballots "serve[d] no purpose other than disenfranchising otherwise qualified voters" which was the behavior Congress had aimed to proscribe.[204]

At the Supreme Court, the *Ritter* dissent took a markedly different approach, noting that the Third Circuit was "very likely wrong" in their

198. *See id.* at 106.

199. *See* discussion *supra* Section I.B.3.

200. Ritter v. Migliori, 143 S. Ct. 297, 297–98 (2022).

201. Migliori v. Cohen, 36 F.4th 153, 163 (3d Cir. 2022) (paraphrasing 25 PA. STAT. AND CONS. STAT. ANN. § 1301(a) (West 2003)), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

202. *Id.*

203. *Id.* at 163–64.

204. *Id.* at 164.

interpretation and application of § 10101.[205] Justice Alito, joined by Justices Thomas and Gorsuch, suggested that the statute can be read to have:

> five elements: (1) the proscribed conduct must be engaged in by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election."[206]

With this framework, the dissent found that the Third Circuit had erred in finding that the second and fifth elements were met.[207] In analyzing the second element, the Justices made a distinction between the right to vote and the act of casting a ballot.[208] Noting that the act of voting "requires compliance with certain rules,"[209] they concluded that "failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right."[210]

To illustrate this point, Justice Alito offers several hypotheticals, including a voter who goes to the wrong polling place, a voter who mails their ballot to the incorrect location, or a voter who may go on the wrong day or after the polls have closed.[211] For the dissent, these each represent a forfeiture of the right to vote. Certainly, the Supreme Court has long held that the "[r]easonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth."[212] Further, the "unremarkable burden[]" lies on voters, with appropriate notice, to identify the proper polling place where they are eligible to cast a ballot.[213] Justice Alito correctly identifies that not counting a ballot in these circumstances is not a denial of the right to vote. But by highlighting these scenarios and bifurcating the act of voting from the right to vote, the dissent hides the ball.

None of the highlighted scenarios concern "error or omission on any record or paper" protected by § 10101.[214] Instead, the Justices look to allowable restraints on voting in other circumstances to suggest that additional restraints may be prescribed by states in the sphere controlled by § 10101. It may be that under sets of facts like those laid out by Justice Alito—where Congress

205. Ritter v. Migliorii, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting).

206. *Id.* at 1825 (citing 52 U.S.C. § 10101(a)(2)(A)–(B)).

207. *Id.*

208. *Id.*

209. *Id.* (quoting Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 669 (2021)).

210. *Id.* In addition to logical failures present in this argument discussed in this Section, the dissent's argument fails to consider the expansive definition of voting present in § 10101(e). 52 U.S.C. § 10101(e). This distinction is more wholistically considered *infra* Section II.D.5.

211. *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

212. *See* Burdick v. Takushi, 504 U.S. 428, 438 (1992).

213. *See Brnovich*, 594 U.S. at 678.

214. 52 U.S.C. § 10101(a)(2)(B).

has not created safeguards—mistakes unrelated to voter qualification (late arriving ballots, going to the wrong polling place, etc.) may be met with a swift rejection that does not constitute a denial of the right to vote. However, in cases like *Ritter* which concern "error or omission on any record or paper relating to any application, registration, or other act requisite to voting,"[215] a mistake by the voter that puts them out of "compliance with certain rules" *is protected* by § 10101 if that mistake "is not material in determining whether such individual is qualified."[216] Consequently, failing to count these otherwise eligible ballots is not forfeiture by the voter, but denial by the state.

The dissent next addresses element five—the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election."[217] Here, the Justices find that the element "weighs even more heavily against the Third Circuit's interpretation."[218] They take issue with the idea that the requirements necessary to register—as found in title 25, section 1301 of the Pennsylvania Consolidated Statutes[219]—"should be the same as the requirements that must be met in order to cast a ballot that will be counted."[220] That is, there are requirements that registered voters must follow in order to have their ballot counted that are unrelated directly to their qualifications to register. This is certainly true.[221] But again, the dissent hides the ball by leaning on its favored hypotheticals: a lost voter, a late voter, and a voter who mailed their ballot elsewhere.[222] The dissent says these requirements have nothing "to do with the requirements that must be met in order to establish eligibility to vote, and it would be absurd to judge the validity of voting rules based on whether they are material to eligibility."[223] On these hypotheticals, the dissent is correct; were a voter to show up a day late or at a precinct she is not legally allowed to vote in, it would be "absurd" or "silly" to judge their mistake by whether or not they were eligible to vote—that is very likely why Congress has not done so here.[224] It would be even more

215. *Id. Ritter* concerns the date on the outer security envelope of ballots required by Pennsylvania law; thus, the envelope falls neatly into the third category of § 10101, a paper or record related to another act requisite to voting—here, placing the ballot in a signed security envelope for its return.

216. 52 U.S.C. § 10101(a)(2)(B); *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting); *Brnovich*, 594 U.S. at 669.

217. *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting) (quoting 52 U.S.C. § 10101(a)(2)(B)).

218. *Id.*

219. *See* 25 PA. STAT. AND CONS. STAT. § 1301(a) (West 2023) ("An individual who will be at least [eighteen] years of age on the day of the next election, who has been a citizen of the United States for at least one month prior to the next election and who has resided in this Commonwealth and the election district where the individual offers to vote for at least [thirty] days prior to the next ensuing election and has not been confined in a penal institution for a conviction of a felony within the last five years shall be eligible to register as provided in this chapter.").

220. *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

221. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 438 (1992); *Brnovich*, 594 U.S. at 679–80.

222. *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

223. *Id.*

224. *Id.*

absurd to apply § 10101 in these cases because none of the suggested hypotheticals have anything to do with the proscription on the denial of the right to vote based on immaterial *mistakes on papers or records*.[225]

Although states are undoubtedly allowed to place regulations on voting beyond the boundaries of qualification, § 10101 limits this ability in one narrow but critical way, which simply isn't addressed by the dissent's foray into other areas of voting regulation.

The dissent next questions whether § 10101 could be interpreted to preempt state requirements when they can impose "[o]ther requirements [which] must be met in order for a mail-in ballot to be counted."[226] But § 10101 does precisely that. By prohibiting the denial of vote on these grounds under the color of law, Congress has removed the ability of any state actor, whether the legislature or a poll worker, from throwing out ballots on the grounds of an error or omission on paperwork related to voting which is immaterial to the state's qualifications.[227] Pursuant to other restraints not found in § 10101, states may change the qualifications for voting, but may not then disenfranchise voters for mistakes on records or papers related to voting which are not material to those new qualifications. Perplexingly, the dissent suggests that the Supreme Court of Pennsylvania's interpretation—that the State's requirement to fill out the outer envelope date field is mandatory—somehow shields it from the restraints placed on the State by federal law.[228] Not only does this interpretation turn a blind eye to the Supremacy Clause, it ignores the Pennsylvania Supreme Court's own concerns that the provision may run afoul of § 10101.[229] Pennsylvania or any other state may wish to include a requirement unrelated to voter qualification on papers or records related to voting—and may use language to make it mandatory—but the materiality provision places restraints on the ability of a state to enforce that provision by disenfranchising voters when they make a mistake. While the *Ritter* dissent omits this consideration,

225. *See* 52 U.S.C. § 10101(a)(2)(B).

226. *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

227. *See* 52 U.S.C. § 10101(a)(2)(B).

228. *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting); *see also In re* Canvass of Absentee & Mail-in Ballots, 241 A.3d 1058, 1079–80 (Pa. 2020) (Wecht, J., concurring).

229. *See In re Canvass of Absentee & Mail-in Ballots*, 241 A.3d. at 1074 n.5 (majority opinion) ("The DNC argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. . . . Under this section, the so-called 'materiality provision' of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors."); *id.* at 1090 n.54 (Wecht, J., concurring) ("The [Opinion Announcing the Judgement of the Court] does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the date requirement could qualify as 'not material in determining whether such individual is qualified under State law to vote.' Given the complexity of the question, I would not reach it without the benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.").

the Supreme Court of Pennsylvania was correct to identify this possibility as they interpreted state law.[230]

Finally, the dissent concludes by more directly addressing the Third Circuit's framework for interpreting the materiality provision.[231] They consider the "indisputably important . . . requirement that a mail-in ballot be signed."[232] They posit that a hypothetical voter who has another individual sign their privacy envelope or typed their signature would be protected by the Third Circuit's interpretation.[233] According to the dissent, these voters' errors "would not be 'material in determining whether such individual is qualified under State law to vote in such election,'" thus the ballot would need to be counted.[234] In crafting these details, the Justices have crafted a peculiar edge case—a qualified voter, who for one reason or another, has someone else fill out their signature block or does so electronically. Assuming this voter is not allowed to do so under accessible ballot marking regulations,[235] the voter would be in clear violation of title 25, section 3150.16(a) of the Pennsylvania Consolidated Statutes—just like the voters in *Migliori*.[236] But the dissent overlooks how the purpose served by the signature requirement differs substantively from the date requirement. Although Pennsylvania is not among the states that perform a signature verification,[237] the signature on the outer envelope accompanies and verifies a declaration that reads:

> I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.[238]

This declaration, affirmed by a signature, is a tool specifically designed to help a poll worker receiving a ballot in the mail determine whether the voter "is qualified under State law."[239] Unlike the date requirement, which is "not used

230. *Id.* at 1078–79 (majority opinion); *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting).

231. *Ritter*, 142 S. Ct. at 1826.

232. *Id.*

233. *Id.*

234. *Id.*

235. 25 PA. STAT. AND CONS. STAT. § 3150.16(a.1) (West 2023); *Accessible Remote Ballot-Marking Solution for Mail Voting*, PA. DOS VOTING & ELECTION INFO., https://www.vote.pa.gov/Voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx [https://perma.cc/4ZCD-XEXY].

236. 25 PA. STAT. AND CONS. STAT. § 3150.16(a) ("The elector shall then . . . sign the declaration printed on such envelope.").

237. *See generally How States Verify Voted Absentee/Mail Ballots*, *supra* note 57.

238. *In re* Canvass of Absentee & Mail-in Ballots, 241 A.3d 1058, 1065 (Pa. 2020).

239. 52 U.S.C. § 10101(a)(2)(B).

'to determine the eligibility' (i.e., qualifications) of a voter," the voters signature serves to affirm directly their qualification.[240]

Especially in an absentee balloting environment where poll workers must rely on limited information to ensure voter eligibility, there are few more useful tools than a legal affirmation. As a result, Justice Alito's hypothetical *would* have made a material error in not signing the declaration—it directly undermines the election official's confidence in determining whether that voter is qualified to vote in that election under the laws of the state.[241]

2. *Florida State Conference of NAACP v. Browning*

It is next valuable to turn to *NAACP v. Browning* from the Eleventh Circuit, which predates the surge in mail-in voting which occurred over the last decade.[242] The Eleventh Circuit considered whether errors or omissions on a HAVA mandated voter ID number constituted a material error.[243] It approached the question in this case from two angles. First, the court examined the history of the materiality provision and the meaning of materiality to determine if a typo in the voter's identification number was a material error under the § 10101 framework.[244] The court came to the conclusion that there were "two kinds of 'materiality,' [in other areas of the law] one similar to minimal relevance and the other closer to out-come determinative."[245] However, the court did not reach a determination on where § 10101 materiality falls on this spectrum; instead, they found that by mandating that states gather or create voter identification numbers in HAVA (either by Social Security number or an acceptable alternative), Congress had definitively made that information material to determining whether a voter was qualified.[246]

The court also analyzed the plaintiff's contention that "whether or not the underlying information sought by the registration is material, an error caused by a typo cannot be material because it does not reflect the absence of any actual, substantive element that makes the applicant ineligible."[247] Brushing this argument away, the court found that it was reliant on the flawed premise "that the materiality provision refers to the nature of the error rather

240. Migliori v. Cohen, 36 F.4th 153, 164 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

241. Ritter v. Migliorii, 142 S. Ct. 1824, 1826 (2022) (Alito, J., dissenting); 52 U.S.C. § 10101(a)(2)(B).

242. *See* Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1153 (11th Cir. 2008); *see also supra* note 37 (noting the surge in mail-in voting).

243. *NAACP*, 522 F.3d at 1173–74.

244. *Id.*

245. *Id.* The court derived these interpretations from the context of materiality's usage in criminal procedure (outcome-determinative), securities law (outcome-determinative), wire-fraud ("natural tendency to influence"), and sentencing guidelines ("tend to influence"). *See id.*

246. *Id.* at 1174 ("Read together, HAVA section 303(a) removes specific kinds of information from § 1971(a)'s domain by making those kinds of information automatically material.").

247. *Id.*

than the nature of the underlying information requested."[248] In finding that such a framework would result in absurd outcomes, they settled on "[a] more sound interpretation"—determining whether "the information contained in the [erroneous paper or record] is material to determining the eligibility of the [prospective voter]."[249]

3. *Vote.Org v. Callanen*

Here, Vote.org brought a challenge to Texas's "wet signature" requirement under the argument that supplying the original ink signature was immaterial to the voter's qualification if a signature had been otherwise provided; the district court found for the plaintiffs and issued a permanent injunction on section 13.143(d-2) of the Texas Election Code.[250] In denying summary judgment to the State and implementing the injunction, the district court noted that the voter's original signature was not used in practice to verify the registrant's qualification to vote or used to "conduct a voter-fraud investigation."[251] Further, despite being grounds to deny an application, "the wet signature is not saved or stored for later use"; rather, it is scanned for later reference if the voter's signature needs to be compared.[252] Under these facts, the court found that the wet signature requirement was "not material to [the] determination [of] whether a registrant is qualified to vote" and granted summary judgment for *Vote.Org*.[253] The Fifth Circuit stayed the injunction, finding that the State had shown a likelihood of success on the issue; although their analysis of materiality is brief, it does provide insight into how the court frames the issue.[254]

The Fifth Circuit identified two grounds on which they determined that § 10101's protections were inapplicable on these facts. They first found that the availability of a curing process, as well as alternative methods for registration, removes the possibility that the wet signature requirement results in a denial of the right to vote—this contention and the role of curing will be discussed further in Sections II.C & II.D.5.[255]

Next, the court took issue with the district court's framing of materiality. They note that among other requirements, a qualified voter must be registered to vote, and to register, the voter must be in compliance with section 13.002 of the Texas Election Code which describes the requirements for a registration application—including compliance with the wet signature requirement for faxed

248. *Id.* at 1174–75.

249. *Id.* at 1175.

250. Vote.Org v. Callanen, 39 F.4th 297, 302 (5th Cir. 2022).

251. Vote.Org v. Callanen, 609 F. Supp. 3d 515, 531–32 (W.D. Tex. 2022), *reversed*, Vote.Org v. Callanen, 89 F.4th 459 (5th Cir. 2023).

252. *Id.* at 531.

253. *Id.* at 532.

254. *Callanen*, 39 F.4th at 308–09.

255. *See id.* at 306; *see also infra* Section II.C (discussing the role of curing in determining materiality); *infra* Section II.D.5 (discussing the meaning of vote denial).

applications under section 13.143(d-2).[256] Consequently, failure to follow-up a faxed application with a physical copy of the original signature is a material error to determining because "that . . . is one of the ways an individual becomes qualified to vote" as defined by the statute.[257]

This reasoning highlights a key point of ambiguity in the original text of § 10101; without a clear definition of materiality or voter qualification, courts may circularly rely on a state's own procedural requirements to determine if those requirements are material. Under this argument, any procedural requirement imposed by the State during the registration process is automatically material because it is "one of the ways an individual *becomes* qualified to vote."[258] By conflating substantive qualification with the procedural mechanisms for becoming qualified, this framing seems to be inconsistent with the intent of the statute. The materiality provision provides that a person may not be denied the right to vote for an error or omission on an "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."[259] Failure to send in a wet signature is certainly an omission on a registration. Given the evidence that the wet signature isn't used to directly verify qualifications or even retained by the voting office, it seems difficult to imagine that the State could argue that it is material to determining voter qualification without a bootstrap reference to the State's own requirement.[260] Thus, the State predicates the acceptance of a faxed registration—and the voter's ability to vote—on the section 13.143(d-2) requirement that a voter follow up their dry signature with a wet signature only to have it scanned without consideration or reference. This additional barrier, which opens voters to additional errors and risks their franchise without notable justification related to qualification, seems to be exactly the type of situation Congress was contemplating when enacting § 10101.[261]

4. Other Cases and Approaches to Analyzing Materiality

The rush of litigation in the post-pandemic era is still underway, and the number of theories of materiality has outpaced definitive answers in trial courts. Before proceeding to a more direct analysis of the features of the materiality provision, a brief survey of additional cases is useful to add color and substance to judicial interpretations (and confusion) surrounding these cases.

256. *See Callanen*, 39 F.4th at 306; TEX. ELEC. CODE ANN § 13.002 (West 2023).

257. *See Callanen*, 39 F.4th at 306.

258. *Id.* (emphasis added).

259. 52 U.S.C. § 10101(a)(2)(b) (emphasis added).

260. *See supra* notes 251–53 and accompanying text (describing how the State does not utilize the wet signature to actually determine if a voter is qualified).

261. *See supra* note 21 and accompanying text.

i. In re Georgia Senate Bill 202 *& Birth Date Requirements*

To analyze this challenge to the materiality of a voter's birth date on the security envelope of their ballot, the district court applied *dicta* from *NAACP*, "a reviewing court must ask whether, 'accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant.'"[262] While voters must "be at least eighteen years of age,"[263] the court analyzed the birth date requirement as applied, rather than utilizing a more deferential standard to the State.[264] The court found that the age qualification was verified by the State during the application process and that "the Birthdate Requirement is not used to determine whether a voter is qualified to vote" when they turn in their ballot, but instead is simply used as a verification of voter identity.[265] Thus, without evidence the State actually used the birth date to determine voter qualifications in practice, any errors were immaterial and could not justify denial of the right to vote.[266]

ii. League of Women Voters of Arkansas v. Thurston *& Repetitious Information*

In *League of Women Voters*, a group of voters challenged Arkansas's no-cure rejection of ballots which had mismatching signatures, dates of birth, or addresses relative to the voters on file data.[267] The case turned on whether redundant information—offered on both the application and the ballot—could constitute a material error even if the mistake would not substantively interfere with voter identification.[268] Unlike *In re Georgia Senate Bill 202*, the court did not turn to the information's actual usage first; instead, they stipulated that address, birth date, and name were "obviously material" to their corresponding voter requirements, namely Arkansas residency, age, and voter identification.[269] The court found that information does not become immaterial simply because it is requested multiple times.[270]

Noting the split between prospective (at registration) and actual voters (at time of balloting) identification, the opinion noted that Arkansas "permissibly

262. *In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023) (quoting Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1175 (11th Cir. 2008)).

263. GA. CODE ANN. § 21-2-216 (West 2022).

264. *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8.

265. *Id.*

266. *Id.* The court also addressed the state defendant's contention that because the birth date was explicitly not used for determining the voter's qualifications, the materiality provision did not apply. The court found that this reading was too narrow. They noted "the fact that the outer envelope is not used to determine voter qualifications merely reinforces the immateriality of the Birthdate Requirement. It has never been the law that the Materiality Provision only applies to that initial determination of whether a voter is qualified to vote." *Id.* at *10.

267. League of Women Voters of Ark. v. Thurston, No. 20-cv-05174, 2023 WL 6446015, at *5 (W.D. Ark. Sept. 29, 2023).

268. *Id.* at *17.

269. *Id.* at *16; *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8.

270. *League of Women Voters*, 2023 WL 6446015, at *17.

require[s] voters to reassert their qualifications at multiple stages in the absentee voting process to confirm that voters are qualified, remain qualified, and are the same people who have already been qualified."[271] The court did address the fact that in practice "election officials can confirm a voter's identity in spite of common errors."[272] But unlike the *Senate Bill 202* court, the court found "that the Materiality Provision 'does not establish a least-restrictive-alternative test'" and the non-matching information was material regardless of if it could sometimes be irrelevant to voter identification.[273]

C. A CURE FOR WHAT (M)AILS US: MATERIAL ERRORS & BALLOT CURING

Twenty-four states have some requirement that election officials notify voters that there is an error on an absentee ballot and give them an opportunity to correct, or "cure," their ballot.[274] Although this process has become increasingly common, the original text of § 10101 does not contemplate the possibility that a material error may be rendered immaterial through such an administrative process.[275] This creates another critical ambiguity in the materiality provision. Under one interpretation, it may be that errors are irreversible at the moment they are made; thus, the materiality or immateriality of a given error would be immutable. Some courts have signaled acceptance of this interpretation, and the rigidity of this framework may have influenced some of the existing jurisprudence.[276]

Alternatively, errors may only be material so long as they prevent election officials from determining an individual voter's qualifications. Dubbed dynamic materiality by Justin Levitt, this interpretation squares with the materiality provisions underlying intent of reducing the number of unnecessary rejections based on voter error.[277] This interpretation creates phases of protection. Prior to curing, the materiality provision prevents disenfranchisement on missing or erroneous information unnecessary to determining voter eligibility the same as it would any other voter. Curing provides a clearer cut protection in the second phase. Just as a voter ID number is interpreted as presumptively material under federal law,[278] a state

271. *Id.* at *17.

272. *Id.*

273. *Id.* (quoting Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1175 (11th Cir. 2008)). This standard is echoed in a Florida challenge to wet signature requirements, which found that the requirement of an original signature did not violate the materiality clause because it was not necessary to find a least restrictive alternative. Vote.Org v. Byrd, No. 23-cv-111, 2023 WL 7169095, at *6 (N.D. Fla. Oct. 30, 2023).

274. *Voting Outside the Polling Place Report Table 15: States with Signature Cure Processes*, NAT'L CONF. STATE LEGISLATURES (Dec. 28, 2023) [hereinafter *States with Signature Cure Processes*], https://www.ncsl.org/elections-and-campaigns/table-15-states-with-signature-cure-processes [https://perma.cc/33MN-UHFB].

275. *See* 52 U.S.C. § 10101(a)(2)(B); Vote.Org v. Ga. State Election Bd., 661 F. Supp. 3d 1329, 1339–40 (N.D. Ga. 2023) ("[T]he statute is silent on this point.").

276. *See* Levitt, *supra* note 14, at 154.

277. *See id.*

278. *See* Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1174 (11th Cir. 2008).

process that allows voters to correct errors which would have disqualified their ballot renders those errors definitionally immaterial—and thus protected under the umbrella of § 10101. Consequently, a state's adoption of ballot curing can be seen as an implicit endorsement of a dynamic theory of materiality, accepting *per se* that a material error can become immaterial.

However, this distinction cuts both ways and has caused confusion about how the materiality clause's protections function in this context. In *Vote.Org v. Callanen*, the court considered whether the existence of a curing requirement inherently made all errors immaterial since they were theoretically eligible to be amended.[279] They reasoned that because under Texas law "the county registrar is *required* to notify the applicant in short order and allow ten days to cure" and there are other means of registration, no one is deprived of a vote.[280] Essentially, the existence of multiple paths to voting meant that a denial, even on an immaterial ground, was absolved of its conflict with federal law—to quote the opinion, "[t]hat proves too much."[281] The Fifth Circuit appears to make a similar error to the *Ritter* dissent. They suggest that "under Vote.Org's theory"—that the existence of a curing process is irrelevant to the materiality of an error before an actual cure—"an individual's failure to comply with *any* registration requirement would deprive that person of the right to vote."[282] The court frames this argument dismissively, but it is almost certainly true. A person whose application is denied registration because of an error is, at that moment, denied the right to vote. This denial is no different procedurally than how an individual who was denied an opportunity to register because they misspelled Louisiana or didn't know their age in years, days, and months is denied the right to vote that moment without consideration for whether they've exhausted alternative registration options.[283] Section 10101 does not shield voters from being denied the right to vote for *any* error, but it does do so for errors on paper relating to any application, registration, or other material without consideration of an exhaustion requirement or a reference to curability.[284] The Fifth Circuit erred in waiving concerns that the right to vote can be denied before every door has been closed, and in doing so, muddled the relationship of curing and materiality.

Allowing curing to serve as a blanket immunity to immateriality protections is antithetical to the intent of § 10101 and not derived from the text of the statute. In future materiality provision jurisprudence, curing should be weighed as amplifying, not muting, the protections of the materiality provision by serving as an administrative process that creates clear

279. *See* Vote.Org v. Callanen, 39 F.4th 297, 305 (5th Cir. 2022) ("The defendants contend that enforcement of the wet signature rule does not result in anyone being deprived of the right to vote because the Texas Election Code confers a right to cure and allows other means of registration.").

280. *Id.* at 306. Remember here, the wet signature requirement related to faxed applications. *Id.*

281. *Id.*

282. *Id.*

283. *See supra* note 21 and accompanying text.

284. 52 U.S.C. § 10101(a)(2)(b).

guidelines and requirements for transforming material errors into immaterial errors—thus saving the vote.

D. TRACKING OPTIONS: CRITERIA FOR MATERIALITY PROVISION INTERPRETATION

The materiality provision's broad sweep and ambiguity have created a judicial Rorschach test. Despite the limited number of materiality provision cases, they have produced a diverse set of frameworks which utilize different criteria. Without an infusion of clarity, neither voters nor states will have a coherent picture of when this provision may sway a vote or an election. However, the surge in cases, inexhaustively outlined above, has provided a growing set of factors that may be used to craft a more clearly outlined test. Below are several factors identified in existing jurisprudence that have produced clarity and confusion for courts in seemingly equal measure: they are (1) probative value; (2) procedural or substantive requirements; (3) actual use; (4) immutability and curing; and (5) vote denial. Each of these factors is examined, in turn, below.

1. Probative Value

The exact probative value of any given error is the epicenter of a materiality provision analysis; it is also among the most elusive factors in this analysis. Courts have steered away from this question by addressing the issue on other grounds.[285]

Materiality can lie on a spectrum from outcome determinative to minimum relevance;[286] anywhere from a "trifling" value to nearly the totality of a relationship.[287] The variety of outcomes in materiality cases demonstrates courts have not adopted a version of this test at either extreme. Instead, they have hedged towards a more intermediate level of scrutiny. Neither an outcome determinative test (which would favor vote inclusion at the cost of efficient election administration) nor a minimum relevance test (which would skew heavily towards vote exclusion on marginally relevant errors) captures the balance required for the materiality provision to be a useful tool to support voters. This analysis proposes an intermediate test, modified from existing Social Security Act jurisprudence, which is that a given error is material if it is "relevant and probative so that there is a reasonable possibility that it would change the administrative outcome."[288] Combined with the factors considered below, this standard captures the essence of the existing case law while preserving the intent of § 10101.

285. *See, e.g.*, Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1174 (11th Cir. 2008).

286. *Id.* at 1173–74.

287. *See* Wiesner & Harum, *supra* note 192, at 65–66.

288. *See* Fry v. Massanari, 209 F. Supp. 2d 1246, 1253 (N.D. Ala. 2001) (quoting Caulder v. Bowen, 791 F.2d 872, 877 (11th Cir. 1986)).

2. Procedural or Substantive Requirements

In determining whether a voter is qualified, requirements can be divided into two categories: substantive and procedural.[289] Substantive requirements or qualifications are the enumerated qualities that every voter must possess to register and then vote. Most commonly, during the registration phase, these are citizenship, residency, minimum age, and the absence of any legal disability on one's right to vote, like felon status.[290] Procedural requirements are additional requirements that a state imposes on a voter during the registration and voting process. For example, the wet signature requirement in *Vote.Org v. Callanen* is a procedural requirement,[291] as are the ink and date requirements from the challenged statute in the *Ritter* line of cases.[292] A subject of debate then is whether § 10101 can be reasonably interpreted to include one or both of these types of qualifications.[293] Subsection (e) of § 10101 defines "qualified under State law" as meaning "qualified according to the laws, customs, or usages of the State."[294] Unfortunately, this doesn't do much to clarify the disconnect. The *Common Cause* court argues that this is demonstrative of an inclusivity procedural qualification because "[u]nder Wisconsin law, an individual is not qualified to vote without" following the procedure in question—there, having a compliant voter ID.[295]

But this creates a circular logic which cannot accord with the materiality provision. If the materiality provision referred to procedural qualifications, then it would be rendered moot.[296] For a substantively qualified voter to be denied the right to vote, as contemplated by the provision, the error in question must be procedural; but if the provision is inclusive of procedural qualifications, then *any* error is material and thus unprotected by the clause.[297] That is, "the provision would allow the state to disenfranchise for *every* error that causes disenfranchisement. Conversely, it would prohibit disenfranchisement only for errors that by definition do not disenfranchise."[298] This also aligns with the underlying intent of the bill. Congressional concern

289. *See* Levitt, *supra* note 14, at 147 n.208.

290. *See, e.g.*, ARK. CONST. art. 3, § 1; VA. CONST. art. II, § 1; Common Cause v. Thomsen, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021).

291. *See* Vote.Org v. Callanen, 39 F.4th 297, 306–07 (5th Cir. 2022) (describing the wet signature requirement as "one of the ways an individual becomes qualified").

292. *See* 25 PA. STAT. AND CONS. STAT. ANN. § 3146.5 (West 2023); Migliori v. Cohen, 36 F.4th 153, 157 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022). This analysis contends that under this framework, the registration process is a procedural requirement and being registered is a substantive requirement at the ballot casting phase.

293. *Compare* Levitt, *supra* note 14, at 147 n.208 (arguing that the materiality provision protects substantive qualifications and otherwise "would have absolutely no effect"), *with Common Cause*, 574 F. Supp. 3d at 639 (arguing that the qualification is inclusive of all requirements imposed by the state including nonsubstantive ones).

294. 52 U.S.C. § 10101(e).

295. *Common Cause*, 574 F. Supp. 3d at 639–40.

296. *See* Levitt, *supra* note 14, at 147 n.208.

297. *Id.*

298. *Id.*

with the insidious games played to disenfranchise voters was not that they weren't enshrined in state law.[299] Certainly, a state could implement a procedural qualification that an individual correctly spell their state or know their age in days, but it is hard to imagine that disenfranchisement on these grounds is not exactly what is contemplated by the materiality provision simply because they have the additional blessing of the state legislature. For these reasons, it appears evident that the materiality provision refers to the substantive qualification as enumerated in state and federal law.

3. Actual Use

Another common theme of materiality provision litigation is the nature of the relationship between the requirement in question and the actual procedure to determine a voter's qualification. In several instances, election officials admit that requirements for which voters are ultimately disenfranchised share no meaningful relationship with determining voter qualification.[300]

If a state fails to prove that a piece of information is used to determine and contributes to findings of voter eligibility, it would seem that it is dispositive in light of the language of the statute that provides protection "if such an error is not material in determining whether such individual is qualified."[301] The statute does not provide for *post hoc* analysis of ways in which a requirement theoretically could have been used; but instead, it requires that vote denial be based only on material errors to determining a specific individuals qualification. Nonetheless, while some courts have found this to "slam[] the door shut" on immaterial voting requirements,[302] others have vexingly reasoned around this by finding workarounds, like curability and procedural qualifiers.[303] An actual use requirement—that is, a ballot field or device must be *actually used* by election officials to determine eligibility for an error in that field to become material—better aligns with the plain text of the statute, serves to streamline vote administration, and reduces the number of tossed ballots. For

299. *See supra* note 21 and accompanying text.

300. *See, e.g.*, Vote.Org v. Callanen, 39 F.4th 297, 306 (5th Cir. 2022) ("[S]everal election administrators admitted in depositions that the rule serves no purpose related to determining an applicant's qualifications to vote."); Migliori v. Cohen, 36 F.4th 153, 164 (3d Cir. 2022) ("[Election officials] explicitly stated that the date is not used 'to determine the eligibility' (i.e., qualifications) of a voter."), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022); *In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023) ("State Defendants even admit that the Birthdate Requirement is not used to determine whether a voter is qualified to vote . . . .").

301. 52 U.S.C. § 10101(a)(2)(B).

302. *Migliori*, 36 F.4th at 164.

303. *See, e.g.*, *Callanen*, 39 F.4th at 305–07. It is also critical to recognize the interplay of actual use and substantive versus procedural qualification lies at the heart of much judicial confusion. When viewed together, actual use can be seen as the touchstone for finding distinctions in otherwise unclear qualification questions. For example, the Georgia birth date requirement could have been used to determine voter age (though it wasn't in actuality); if so, then it would arguably be material to a substantive voter requirement. *See In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8. Instead, it was used as a duplicative verification of voter identity in which case it becomes a procedural qualification which is not material in determining any underlying substantive qualifications. *Id.*

these reasons, a new judicial or legislative standard should seek to incorporate an actual use analysis.

4. Immutability and Curing

As discussed in Section II.C, the adoption of curing processes and the pliable nature of material errors have vexed courts and thrown what otherwise could be relatively simple materiality analyses into a tailspin.[304] It is fundamental that any interpretation of the materiality provision account for this very common practice, or it risks further confusion in half of states.[305] This analysis proposes that curing already fits neatly into the materiality provision by simply creating a state process by which to render material errors immaterial. Rather than stripping voters of the protection offered by the materiality provision, as suggested in *Callanen*, the materiality provision in curing states still prevents disenfranchisement for immaterial errors regardless of their curability.[306] Instead, curing offers a clear path forward for material errors unprotected by the provision to be resolved. This interpretation provides the most clarity to administrators and the greatest possible protection for voters.

5. Vote Denial and When Materiality Matters

Section 10101's protections only apply when an action will "deny the right of any individual to vote in any election."[307] But the question of what rises to the level of vote denial is often litigated. State defendants argue "that a vote is denied under § 101[01] only if the would-be voter is absolutely prohibited from voting."[308] Indeed, this question tripped up Justice Alito's analysis in *Ritter*.[309] Setting aside the exhaustion discussion above, at first blush, this reading is compelling. Although voting itself may require a series of administrative efforts prior to entering the voting booth, literally

304. *See supra* Section II.C.

305. *See States with Signature Cure Processes*, *supra* note 274.

306. *See Callanen*, 39 F.4th at 305–07.

307. 52 U.S.C. § 10101(a)(2)(B).

308. La Unión del Pueblo Entero v. Abbot, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022).

309. Ritter v. Migliorii, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting). Unfortunately, Justice Alito's narrow vision of what constitutes vote denial under § 10101 is gaining steam. In March 2024, the Third Circuit again addressed the outer-envelop date requirements discussed in the *Ritter* line of cases. *See generally* Pa. State Conf. of NAACP Branches v. Sec'y of the Commonwealth of Pa., 97 F.4th 120, 125 (3d Cir. 2024). There, the court acknowledged the expansive definition under § 10101(e), but then proceeded to a statutory analysis. *Id.* at 125–27. The court found that the immediate context and legislative history found that "the Materiality Provision only applies when the State is determining *who* may vote. In other words, its role stops at the door of the voting place." *Id.* at 123, 125–26. This narrow tailoring discounts the plain text of the statute in favor of constraints derived from outside the provided congressional definitions. *See id.* at 147 (Shwartz, J., dissenting) ("To conclude that the Materiality Provision limits 'other act[s] requisite to voting' to only registration-related conduct would place limits on the text that simply are not there. Had Congress wished to limit 'any . . . other act requisite to voting,' to registration-related conduct alone, it could have written 'any . . . other act requisite to registering to vote,' or defined 'vote' more narrowly, but it did not." (alterations in original) (footnote omitted) (citations omitted)).

or metaphorically, the act of voting and a denial of the right to vote happens at the point of actualizing that right. But such a narrow reading is discordant with the text of § 10101. Subsection (e) defines vote very broadly as:

> includ[ing] all action necessary to make a vote effective including, but not limited to, registration or other actions required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election[310]

Consequently, a denial of the right to vote does not require the ultimate denial of the act of casting a ballot. Instead, a denial at any phase of the voting process amounts to a denial of the right to vote under this subsection—and triggers a materiality analysis. Like other portions of the materiality provision, the text creates broad protections. But this is in line with the original intent of the law, which focused not on denial at the precipice of the ballot box but beginning at the registration phase—often the beginning of a voter's interactions with the state.[311] In crafting an interpretation of the materiality provision, a solution must consider the full sweep of the provision's protections from registration until the ballot is counted.

III. SIGNED, SEALED, DELIVERED: TWO MODEST PROPOSALS

The materiality provision's strength is also the source of consternation for jurists tasked with interpreting it. The language of the provision's protections is surprisingly expansive[312]—which is what allows it to remain relevant almost sixty years after its adoption in a voting context not contemplated by seriously its drafters;[313] however, this breadth opens space for conflicting interpretations and considerations. As outlined above, this analysis demonstrates the variety of factors that courts have found convincing to varying degrees, with a goal of identifying which interpretations produce the most logical, vote-friendly outcomes. Having set the stage, this Note now offers two modest proposals. First, a judicial standard that aims to restate the jurisprudence of the materiality provision in clear terms while capturing each of the factors that underpin the provision's analysis. Second, recognizing that courts are unlikely to find unanimity without Supreme Court intervention—and in trepidation of what that may bring—this Note offers updated legislative language to revitalize the materiality provision in the face of jurisprudential disconcert and a new era of voting.

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310. 52 U.S.C. § 10101(e).

311. *See, e.g.*, 110 CONG. REC. 6681, 6715–16 (1964) (statement of Sen. Kenneth Keating); 110 CONG. REC. 6681, 6735 (1964) (statement of Sen. Philip Hart); 110 CONG. REC. 6681, 6716 (1964) (statement of Sen. Kenneth Keating).

312. *See supra* notes 179–82 and accompanying text; *see also supra* Section II.D (outlining the breadth of the materiality provisions protections).

313. *See* Vote.Org v. Ga. State Election Bd., 661 F. Supp. 3d 1329, 1339–40 (N.D. Ga. 2023) ("[T]he statute is silent on this point.").

A. *LETTER OF THE LAW: TOWARD A UNIFORM JUDICIAL STANDARD*

As outlined above, the scope of the materiality provision reflects a congressional mandate to protect the right to vote against "[s]uch trivial information [which] serve[s] no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants."[314] In balancing the necessity of ink color, birth dates, and misspelling state names with the access to the ballot box, the materiality provisions demonstrates that "the right to vote is 'made of sterner stuff.'"[315]

However, judicial confusion threatens this substantive protection of the right to vote just as it can become most useful. Because the right to vote in our democracy supports all other rights, a uniform interpretation of the materiality provision is critical.[316] Considering all factors laid out above, this Note proposes the following standard. An error is material under § 10101 when:

> 1. The error occurs at any point during the voting process, from registration to the ballot being counted.[317]
>
> 2. The error is relevant and probative of a substantive qualification for voting, as enumerated in state or federal law.[318]
>
> 3. The error occurs in a field that is actually used to contribute to a finding of voter qualification.[319]
>
> 4. The error's damage to the required information's probative value is such that the state can prove there is a reasonable possibility it would change a finding of voter qualification as applied.[320]
>
> 5. The error has not been rendered immaterial by a subsequent administrative action such as curing or voter verification through other means.[321]

These factors take into account the legislative history, the wide scope of the text, and the challenges faced by courts across the country interpreting the materiality provision. They also do so without proposing any novel concept. Instead, they build on this analysis to determine the logical usage and outcome for each factor courts have considered. In practice, the application of these factors will bring uniformity to judicial reasoning without straying from the legislative text or completely upsetting those cases that have already been settled.

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314. *See In re* Ga. Senate Bill 202, No. 21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023).

315. Migliori v. Cohen, 36 F.4th 153, 163 (3d Cir. 2022), *vacated*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

316. *See supra* Section I.D.

317. *See supra* Section II.D.5; 52 U.S.C. § 10101(e).

318. *See supra* Sections II.D.1–.2; *supra* Section II.C.

319. *See supra* Section II.D.3.

320. *See supra* Section II.D.1.

321. *See supra* Sections II.C, II.D.4.

B. RETURN TO SENDER: A CALL TO LEGISLATIVE ACTION

As this Note has demonstrated, the materiality provision as written carries all of the necessary weight to substantively protect voters in a new era of voting by mail. If the analysis proposed in Section III.A were adopted, many absentee ballots would be saved and the risk of an election turning on disposed ballots would be greatly reduced. However, even on a subject as unifying as the right to vote, getting courts to take up a uniform standard is like "herding cats."[322] Perhaps more concerningly, the Supreme Court appears to have at least three votes sympathetic to a narrow interpretation of the materiality provision that does not align with the text or intent of the statute.[323] Thus, this Note urges something more difficult than herding cats—suggesting that Congress pass legislation.

The existing text of the materiality provision is ripe for small, incremental changes to the language to capture the original intent of the subsection and strengthen it for generations to come. This Note proposes the following legislative text:

> SEC. 1. Amending the Materiality Provision.
>
> Section 101 of the Civil Rights Act of 1964 (52 U.S.C. § 10101) is amended—
>
> (1) in subsection (2)(a) by adding at the end the following new subparagraphs:
>
> > (i) An error pursuant to this subsection shall be 'material' when it constitutes an error which is relevant and probative of a substantive & enumerated qualification for voting, which occurs in an informational field used, in practice, by any state, county, parish or political subdivision to determine voter eligibility, and which has probative value such that it creates a reasonable possibility it would change the determination of the voter's qualification as applied;
> >
> > (ii) Subsection (2)(a) should not be construed to include an exhaustion requirement. Under the subsection, a state actor denies the right to vote when they reject any application, registration, or otherwise take an action which inhibits a voter's progress in voting procedure such that they could not exercise their franchise without first taking action to correct the error, regardless of the availability of alternative methods for application, registration, or voting or the availability of an administrative ballot curing process.

322. BARBARA RODRIGUEZ MUNDELL & WALLACE B. JEFFERSON, HERDING LIONS: SHARED LEADERSHIP OF STATE TRIAL COURTS 1 (2012).

323. *See generally* Ritter v. Migliorii, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting) (outlining opposition to an expansive reading of the protections offered by the materiality provision).

(2) In subsection (2)(e) by adding the following language to paragraph 9 (additions italicized):

> When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration, *absentee applications, absentee ballot security & voter verification requirements*, or other action required by State law prerequisite to voting, *requesting an absentee ballot,* casting a ballot *in person or absentee*, and having such a ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which voters are received in an election;

Like the proposed test in Section III.A, this draft legislative language aims to dispense with judicial confusion by making clear that the fundamental goal of § 10101 is vote preservation.[324] This proposal cuts to the heart of the matter: the definition of materiality. By defining materiality in the voting context through (1) substantive, enumerated requirements; (2) actual use; and (3) setting an appropriate probative value; the text should focus on materiality inquiries without creating new asymmetries in interpretation. Next, the language modernizes § 10101 by acknowledging the dynamic nature of error materiality in the light of ballot curing; by excluding an implied exhaustion requirement, the draft text would allow a voter to challenge a denial earlier and with a better chance to reach a resolution ahead of the election. Finally, Section 1(2) modernizes the definition of "vote" to acknowledge the extended, often intensive process that many voters face to get from step one to the ballot box. This improvement is particularly salient in light of the narrow definition of "acts requisite to voting" applied in *Ritter* and subsequent cases that blunts the utility of the materiality act in this space.[325] In its entirety, this proposal is meant as a clarification to the rampant judicial confusion around this critical provision with an eye towards counting every vote and increasing the accessibility of convenience voting—a correct answer to the judicial Rorschach test.

CONCLUSION

The way Americans vote is changing, and changing fast.[326] Despite substantive need for improvement to meet modern challenges in election administration, improvements to voting laws are hard to come by.[327] The stakes of these changes are not small; uncounted absentee ballots already affect elections.[328] And there is no reason to think that a statewide or presidential election will not be decided by margins less than the number of

324. *See* discussion *supra* Section II.A.
325. *See* note 309 and accompanying text.
326. *See supra* Section I.B.
327. *See* notes 66–68 and accompanying text.
328. *See supra* Sections I.C.3.i, II.B.1.

uncounted, flawed absentee ballots.[329] The materiality provision thus offers a wholly unique opportunity. It is an existing, expansive regulation on disenfranchisement that has gained renewed relevance in a context its drafters could not have contemplated.[330]

If adopted by the courts, the interpretation of the materiality provision proposed in this analysis could be a powerful tool to preserve otherwise eligible voters from needless disenfranchisement. While courts have grappled with the provision's simplistic language, there are workable solutions to each of the factors considered which could bring uniformity and legitimacy to materiality provision cases.[331] Further, Congress can and should take the materiality provision farther—updating its language to make its modern role evident to the courts, advocates, and voters.[332] Voting is too fundamental to our democracy and the stakes are too high to continue to ignore this powerful provision; much like its original drafters, this "is a challenge we must not shirk and dare not fail to meet."[333]

329. *See supra* Section I.C.
330. *See supra* Section II.A.1.
331. *See supra* Section II.D.
332. *See supra* Section III.B.
333. H.R. REP. NO. 88-914, at 2519 (1963).