

Fordham Law Voting Rights and Democracy Forum

Volume 1 | Issue 3

May 2023

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Recommended Citation

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

Available at: <https://ir.lawnet.fordham.edu/vrdf/vol1/iss3/3>

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TITLE I OF THE CIVIL RIGHTS ACT IN CONTEMPORARY VOTING RIGHTS LITIGATION

*Helen L. Brewer**

The Civil Rights Act of 1964¹ (“CRA”) outlawed discrimination in several fundamental aspects of everyday life. The United States Supreme Court has referred to the CRA’s eleven titles as a “comprehensive[] undertaking” designed to prevent and address discrimination in various contexts.² While many may be familiar with the CRA’s Title VII prohibitions on employment discrimination,³ for example, Title I’s voting provisions are likely less familiar. Distinct from the Voting Rights Act of 1965⁴ (“VRA”), Title I seeks to abolish discrimination at every stage of the voting process, from registering to vote to casting a ballot.⁵ Sometimes seen as a “surprisingly underappreciated” provision of the CRA, Title I has received less national attention than some of its counterparts in recent memory.⁶ Yet today, Title I is playing an increasingly prominent role in contemporary voting rights litigation.

This Essay analyzes how Title I of the CRA fits into contemporary voting rights litigation. Part I provides an overview of Title I, tracing its congressional legislative history and early jurisprudence. Part II then illustrates a resurgence in Title I litigation by examining case studies in Wisconsin and Arizona in the lead-up to and aftermath of the 2022 elections. Part III offers a more comprehensive analysis of Pennsylvania’s Title I litigation from the 2022 elections. Lastly, Part IV briefly concludes with a look ahead to future Title I litigation.

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¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–h). For a complete overview of the Civil Rights Act of 1964 and its eleven titles, see CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, *THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW* (2020).

² *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 246 (1964).

³ See 42 U.S.C. § 2000e-2 (addressing discrimination in the workplace based on “race, color, religion, sex, or national origin.”).

⁴ Pub. L. No. 89-100, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁵ See 52 U.S.C. § 10101. Although originally codified through various subsections in 42 U.S.C. § 1971, Title I’s provisions are now codified at 52 U.S.C. § 10101, preceding the statutory provisions of the VRA.

⁶ Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 88 (2012).

I. TITLE I: AN OVERVIEW

Title I built on previous iterations of the CRA by adding voter protections designed to combat common forms of disenfranchisement, such as holding individuals to differing “standards” to determine whether an individual is “qualified” to vote;⁷ restricting the use of “literacy” or interpretation tests;⁸ and denying an individual’s right to vote based on immaterial “error[s] or omission[s]” on registration or other voting documents.⁹

When Congress designed Title I, it explicitly sought to prohibit registrars from rejecting voter registration applications because of minor, technical errors unrelated to a person’s qualifications to vote.¹⁰ To illustrate the need for these federal protections, congressional supporters of the CRA cited examples of registrars who regularly disqualified Black applicants because of “spelling errors or miscalculations of age,” but “conveniently overlooked” the same errors for white applicants.¹¹ Congress pointed to evidence of registrars rejecting Black registrants for miscalculating their age by one day, or, as one anecdote highlighted, turning away a Black applicant who, when asked to provide their age in years, months, and days, wrote “5 months and 30 days instead of 6 months and 0 days.”¹²

Congress was also concerned with reports of registrars treating different voters in disparate and discriminatory ways during the voting process.¹³ Beyond holding Black registrants’ applications to impossibly high technical standards, registrars often went out of their way to help white applicants fill out their applications correctly.¹⁴ Reports revealed that registrars helped white registrants answer application questions they did not know the answers to.¹⁵ Yet registrars offered no such help to Black applicants, instead rejecting them for minor errors, often not even informing them “why [they] failed or whether and when [they] may reapply.”¹⁶

⁷ 52 U.S.C. § 10101(a)(2)(A).

⁸ *Id.* § 10101(a)(2)(C).

⁹ *Id.* § 10101(a)(2)(B). Section 10101(a)(2)(B) is commonly referred to as the “materiality” provision. *See* BACK, *supra* note 1, at 7 (citing *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (referring to 42 U.S.C. § 1971(a)(2)(B), now codified at 52 U.S.C. § 10101(a)(2)(B), as “the materiality provision.”)).

¹⁰ *See* BACK, *supra* note 1, at 5–6. Qualifications to vote may include things like citizenship, age, and residency in the district in which one seeks to vote. *See, e.g.*, Ariz. Rev. Stat. ANN. § 16-101 (2023); 25 PA. STAT. AND CONS. STAT. ANN. § 1301 (West 2002).

¹¹ 110 CONG. REC. 1593 (1964).

¹² 110 CONG. REC. 6715 (1964).

¹³ *See* BACK, *supra* note 1, at 5–6.

¹⁴ *See* 110 CONG. REC. 6716 (1964).

¹⁵ *See id.*

¹⁶ *Id.*

The CRA was used often and effectively in its early days to stamp out practices like these. Congress's inspiration for the CRA of 1964 came largely from litigation under earlier iterations of the Act that enjoined these discriminatory practices.¹⁷ Despite the statute's frequent invocation in its early years, litigation based on the VRA ultimately gained prominence and came to overshadow Title I.¹⁸

II. CASE STUDIES: THE 2022 ELECTION CYCLE

During the 2022 election cycle, courts in several states saw an uptick in Title I litigation. In Wisconsin, plaintiffs filed suit in state court invoking Title I, along with other state and federal laws.¹⁹ In Arizona, several plaintiffs are arguing, in part, that newly enacted state laws violate Title I.²⁰ And in perhaps the most thoroughly litigated Title I cases in recent months, several Pennsylvania lawsuits invoking the statute reached the state's highest court,²¹ the Third Circuit,²² and the U.S. Supreme Court.²³ Each case presents courts with the opportunity to further develop Title I jurisprudence and clarify how Title I applies to the myriad of voting rights issues too many voters face across the country today.²⁴

A. Wisconsin

In Wisconsin, plaintiffs contend that rejecting an absentee ballot because it lacks certain components of a witness's address violates Section 10101(a)(2)(B) of Title I, known as the materiality provision.²⁵ Under Wisconsin law, a voter's absentee ballot must include a witness certificate containing the witness's name and

¹⁷ See, e.g., *United States v. McElveen*, 180 F. Supp. 10 (E.D. La. 1960); *United States v. Wilder*, 222 F. Supp. 749 (W.D. La. 1963).

¹⁸ See Daniel Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 139 (2001) (suggesting that Title I may "have assumed greater importance" had the VRA not been enacted the next year).

¹⁹ *League of Women Voters of Wis. v. Wis. Elections Comm'n*, CV-002472 (Wis. Cir. Ct. 2022).

²⁰ *Mi Familia Vota v. Hobbs*, CV 22-00509-PHX-SRB (D. Ariz. 2022). As of this writing, the Author's employer, the Fair Elections Center, represents plaintiffs in the *Mi Familia Vota* and *League of Women Voters of Wisconsin* suits. Both are active litigations.

²¹ *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022) (mem.).

²² *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022).

²³ *Ritter v. Migliori*, 143 S. Ct. 297 (2022) (granting certiorari and remanding to the Third Circuit with instructions to dismiss as moot).

²⁴ See *infra* Parts II.A, II.B, III.

²⁵ Complaint at 22, *League of Women Voters of Wis. v. Wis. Elections Comm'n*, Wis. Cir. Ct. (Sept. 30, 2022) (CV-002472) [hereinafter LWVWI Complaint].

address.²⁶ A ballot “may not be counted” if the witness’s address is “missing.”²⁷ Wisconsin law, however, does not define what constitutes a “missing” address nor a complete address. Previously, the Wisconsin Elections Commission (“WEC”) had issued guidance defining a complete address as a witness’s street number, street name, and municipality.²⁸ That guidance also allowed election clerks to use personal knowledge or other reliable information to fill in missing aspects of a witness’s address when they had such knowledge or information.²⁹

In September 2022, however, a Wisconsin court enjoined the WEC’s 2016 guidance, despite it being in effect for nearly six years.³⁰ The judge concluded that the guidance violated state law and blocked its use in the November 2022 midterm elections.³¹ Less than a week later, the WEC withdrew its guidance.³² The WEC then informed the municipal clerks that it was retaining its three-component definition of an “address” (street number, street name, and municipality).³³ In the absence of the 2016 guidance, though, some Wisconsin absentee voters’ ballots face rejection if their witness omits a required component of their address—even if a clerk could clearly and reliably discern that information.³⁴ Whereas before the judicial order, a clerk could find and fill in a missing zip code for a witness who lists the same street address as the voter, for instance, such a ballot must now be rejected.

²⁶ See WIS. STAT. ANN. § 6.87(2) (West 2018).

²⁷ *Id.* § 6.87(6d).

²⁸ LWVWI Complaint, at 14.

²⁹ See *id.* at 14–15; Scott Bauer, *Wisconsin Judge Refuses to Suspend Absentee Ballot Ruling*, ASSOCIATED PRESS (Sept. 13, 2022), <https://apnews.com/article/2022-midterm-elections-wisconsin-voting-supreme-court-28666f5631db0f9540b45e3b7c221224> [<https://perma.cc/8CVZ-GRND>].

³⁰ Temporary Injunction, *White v. Wis. Elections Comm’n*, 22-CV-1008 (Wis. Cir. Ct. Sept. 7, 2022).

³¹ See *id.*

³² See Shawn Johnson, *Following Judge’s Order, Wisconsin Elections Commission Withdraws Guidance Directing Clerks to Fix Absentee Ballot Witness Certificates*, WIS. PUB. RADIO (Sept. 13, 2022, 6:10 PM), <https://www.wpr.org/following-judges-order-wisconsin-elections-commission-withdraws-guidance-directing-clerks-fix> [<https://perma.cc/84Y6-J2NE>].

³³ Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (*White v. Wisconsin Elections Commission*, 22-CV-1008), Wisconsin Elections Commission (Sept. 14, 2022), <https://elections.wi.gov/media/16801/download> [<https://perma.cc/8TKC-MMPD>] (clarifying that, despite its guidance withdrawal, the court’s temporary injunction did not overturn the WEC’s existing definition of “address”).

³⁴ Plaintiffs also allege that some clerks have deemed the WEC’s definition of an “address” in a communication to be non-binding and have applied a different definition of “address,” including state name and zip code. LWVWI Complaint at 3–4.

The Wisconsin plaintiffs argue that “[s]tate names and zip codes are immaterial to identifying the voter’s witness.”³⁵ Because the witness’s name and the voter’s contact information are listed on a ballot return envelope, the plaintiffs contend, clerks have enough information to contact the witness or the voter if necessary.³⁶ Accordingly, the plaintiffs argue that immaterial omissions like a witness’s zip code have no bearing on whether a voter is properly qualified to vote and thus, under the materiality provision, cannot be lawful reasons to reject an absentee ballot.³⁷

B. Arizona

In Arizona, several groups have brought different claims under Title I in federal district court.³⁸ The suits are in response to Arizona’s recently enacted laws regarding proof and investigation of citizenship status in the voter registration process.³⁹ One such law requires voters to note their birthplace when registering to vote with a state form.⁴⁰ Challengers contend that requiring a voter to list their birthplace violates Title I’s materiality provision because a prospective voter’s birthplace is not material to their citizenship status nor their current residence and, thus, has no bearing on whether they are qualified to vote.⁴¹

Another provision of Arizona’s new laws would appear to subject some voters—but not all—to additional investigation into their citizenship status.⁴² While these laws were set to take effect at the start of 2023, they have not yet been enforced as of this writing.⁴³

³⁵ LWVWI Complaint, at 3.

³⁶ Memorandum of Law in Support of Plaintiff’s Motion for Emergency Declaratory Relief and Temporary Injunction at 14–15, *League of Women Voters of Wis. v. Wis. Elections Comm’n* (Wis. Cir. Ct. Oct. 4, 2022) (CV-002472).

³⁷ *Id.* at 15–20.

³⁸ In December 2022, a federal district court consolidated *Mi Familia Vota v. Hobbs*, CV 22-00509-PHX-SRB (D. Ariz. 2022), with eight other cases.

³⁹ See H.B. 2492, 55th Leg., Reg. Sess. (Ariz. 2022); H.B. 2243, 55th Leg., Reg. Sess. (Ariz. 2022).

⁴⁰ See ARIZ. REV. STAT. ANN. § 16-121.01 (2023).

⁴¹ See, e.g., LUCHA Plaintiff’s First Amended Complaint at 65–66, *Mi Familia Vota v. Hobbs* (D. Ariz. July 18, 2022) (CV 22-00509-PHX-SRB).

⁴² See, e.g., ARIZ. REV. STAT. ANN. § 16-165(I) (2023) (“[E]ach month the county recorder shall compare persons who are registered to vote in that county and who the county recorder has reason to believe are not United States citizens and persons who are registered to vote without satisfactory evidence of citizenship . . . to verify the citizenship status of the persons registered.”).

⁴³ An agreement between some plaintiffs and the former secretary of state temporarily blocked H.B. 2243’s use in the 2022 election cycle. As of this writing, however, both H.B. 2243 and H.B. 2492 are in effect. Nonetheless, it is unclear how the current secretary of state will enforce both laws. See *Majority of Arizona Counties Will Not Enforce New Voter Purge Law*, DEMOCRACY DOCKET (Jan. 25, 2023), <https://www.democracymarket.com/news-alerts/majority-of->

The statutes, however, do not provide election officials with specific processes to follow when conducting citizenship investigations.⁴⁴ The plaintiffs allege that the citizenship investigation provision therefore violates Title I because it requires county recorders—acting on the statute’s undefined “reason to believe”⁴⁵ that some voters are not citizens—to divide voters into those they suspect may not be citizens and those they do not so suspect, and subject only the former group to citizenship investigations.⁴⁶

III. A DEEPER LOOK: PENNSYLVANIA’S 2022 ELECTIONS

Pennsylvania has seen perhaps the most extensive Title I litigation in both federal and state courts. The Supreme Court of Pennsylvania,⁴⁷ the Third Circuit,⁴⁸ and the U.S. Supreme Court all considered challenges brought under the materiality provision in the 2022 election cycle, putting Title I center stage in the state.⁴⁹

In *Migliori v. Cohen*,⁵⁰ for example, the Third Circuit determined that rejecting absentee ballots for failing to include a date next to a voter’s signature on the return envelope violated Title I’s materiality provision.⁵¹ The court agreed with the plaintiffs’ contention that the date is immaterial to a person’s eligibility to vote.⁵² The U.S. Supreme Court, however, vacated this holding, remanding the case to the Third Circuit with instructions to moot it because the primary election it concerned was already over.⁵³

Although the U.S. Supreme Court did not publish its reasoning behind its decision to vacate the Third Circuit’s order, Justice Alito published a dissent from an earlier denial of a stay in

arizona-counties-will-not-enforce-new-voter-purge-laws
[<https://perma.cc/M6UZ-C86S>].

⁴⁴ Given this uncertainty, by January 2023, most of Arizona’s county recorders submitted written assurances in court stating that they have not yet implemented the statutory changes and “will not implement any voter purges” pursuant to H.B. 2492 and H.B. 2243 “until further instruction is received from the Secretary of State or clear legal direction is available, or upon further” court order. *See id.* (citing Graham County Recorder’s Amended Notice of Written Assurance, *Mi Familia Vota v. Hobbs* (D. Ariz. Jan. 19, 2023) (CV 22-00509-PHX-SRB)).

⁴⁵ ARIZ. REV. STAT. ANN. § 16-165(I) (2023).

⁴⁶ *See, e.g.*, Second Amended Complaint for Poder Latinx, Chicanos por la Causa, and Chicanos por la Causa Action Fund at 48–49, *Mi Familia Vota v. Hobbs* (D. Ariz. Nov. 15, 2022) (CV 22-00509-PHX-SRB).

⁴⁷ *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022) (mem.).

⁴⁸ *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022).

⁴⁹ *Ritter v. Migliori*, 143 S. Ct. 297 (2022) (granting certiorari and remanding to the Third Circuit with instructions to dismiss as moot).

⁵⁰ 36 F.4th 153 (3d Cir. 2022).

⁵¹ *See id.* at 164.

⁵² *See id.*

⁵³ *Ritter*, 143 S. Ct. at 297–98 (granting certiorari and remanding to the Third Circuit with instructions to dismiss as moot).

the case in June 2022.⁵⁴ Joined by Justices Thomas and Gorsuch, Justice Alito would have stayed the Third Circuit's order allowing undated and incorrectly dated ballots to be counted.⁵⁵ This dissent offers a window into at least three current Justices' likely approach to the materiality provision of the CRA, furnishing some of the Court's only substantive analysis on the materiality provision in recent years. It is not unheard of for Supreme Court Justices to signal a receptiveness to and lay out roadmaps for civil rights challenges in nonbinding opinions like these.⁵⁶ Justice Alito's *Migliori* dissent could serve such a purpose. Therefore, it is timely to analyze both its apparent misinterpretation of the materiality provision and how the provision would function under a proper reading.

The issue at the heart of Justice Alito's dissent is whether the materiality provision extends to errors on absentee ballot return envelopes. First, Justice Alito would hold that a voter's failure to correctly fill out a ballot return envelope, and the resulting ballot rejection, is the voter's "forfeiture" of their right to vote.⁵⁷ Because the CRA is triggered when a person acting *under color of law* denies a voter their right to vote, Justice Alito would hold that Title I does not apply to the facts of *Migliori*, where a voter's own error caused their vote to be rejected.⁵⁸

Justice Alito's second argument maintains that rules governing whether a ballot will be counted, including directions for filling out ballot return envelopes, are distinct from rules about qualifications to vote. He would hold that Title I's materiality provision applies only to the latter.⁵⁹ Justice Alito's explanation of this distinction is difficult to parse and sometimes appears circular. He seems to reason that the materiality provision is only triggered by a rule or procedure related to determining whether a person is qualified to vote.⁶⁰ For example, rules dictating whether a ballot return envelope has been filled out properly and can be counted, he argues, are unrelated to determining whether a person is qualified to vote.⁶¹ Thus, according to Justice Alito, the materiality provision is

⁵⁴ *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Alito, J., dissenting from the denial of the application for stay) [hereinafter *Migliori* Application for Stay].

⁵⁵ *See id.*

⁵⁶ *See* Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST. L.J. ONLINE 111, 116 (2022). Professor Shapiro points out that nonbinding opinions like concurrences and dissents, as well as the shadow docket, which is where Justice Alito's *Migliori* dissent appears, have been used by the Court in recent years to "make or signal changes in the law." *Id.* at 121.

⁵⁷ *Migliori* Application for Stay, *supra* note 54, at 1825 (Alito, J., dissenting).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.* at 1825–26.

⁶¹ *See id.*

not triggered by, nor does it apply to, a ballot rejected for an incorrect or missing date on a return envelope.⁶²

As the November 2022 elections drew closer, the Pennsylvania Supreme Court heard a petition arguing that the materiality provision prohibits the rejection of ballots with missing or incorrect dates on the return envelope. In *Ball v. Chapman*,⁶³ the state supreme court deadlocked and issued no ruling on whether this practice violates the CRA.⁶⁴ The three justices who would have found that rejecting such ballots violates the materiality provision did, however, “offer[] a rationale that aligns with the Third Circuit’s interpretation” in *Migliori*,⁶⁵ providing an alternative to Justice Alito’s reading of the materiality provision.

These three Pennsylvania justices argued that the materiality provision applies to errors and omissions, including a voter’s error on a ballot return envelope.⁶⁶ They reasoned that a narrower reading like Justice Alito’s would render the materiality provision useless, preventing it from ever being triggered.⁶⁷ Indeed, such a reading would seemingly decimate Title I’s ability to do what Congress made so clear it was intended to do: prevent state officials from denying would-be voters the opportunity to cast a ballot because of minor technical errors.⁶⁸

The Pennsylvania justices also offered an alternative to Justice Alito’s understanding of the types of voting rules to which the materiality provision applies. The justices noted that the materiality provision’s language, stating it applies to “other act[s] requisite to voting,” means, as Justice Alito also maintains,⁶⁹ it must not encompass every single step of voting—if that were the case, the language would be meaningless.⁷⁰ The Pennsylvania justices argued that rules for marking a ballot and delivering it to election authorities for counting, for example, have a closer nexus to the actual act of voting and are thus not acts requisite to voting covered

⁶² *See id.*

⁶³ 289 A.3d 1 (Pa. 2022).

⁶⁴ *See id.* at 28. The Pennsylvania Supreme Court currently has only six justices, as former Justice Baer recently passed away. The resulting vacancy is set to be filled in 2023. *See* J.D. Prose, *Candidates Announce Bids to Fill Pa. Supreme Court Vacancy in 2023*, PENN LIVE PATRIOT-NEWS (Nov. 29, 2022, 5:29 PM) <https://www.pennlive.com/news/2022/11/candidates-announce-bids-to-fill-pa-supreme-court-vacancy-in-2023.html> [<https://perma.cc/3JXE-L9WH>].

⁶⁵ *Ball*, 289 A.3d at 28.

⁶⁶ *See id.* at 24–25.

⁶⁷ *See id.* at 25.

⁶⁸ *See supra* text accompanying notes 10–12.

⁶⁹ *See Migliori* Application for Stay, *supra* note 54, at 1825 (Alito, J., dissenting).

⁷⁰ *Ball*, 289 A.3d at 26–27 (“By using the word ‘other,’ Congress made clear that, though registering to vote and applying for an absentee ballot unquestionably are acts requisite to voting, the statute sweeps more broadly than that; an ‘other act requisite to voting’ must be something else.” (citing 52 U.S.C. § 10101(a)(2)(B) (emphasis added))).

by the materiality provision.⁷¹ Still, they would hold that filling out an absentee ballot return envelope is distinct from these acts of voting.⁷² They would also find it distinct from registering to vote or applying for an absentee ballot, concluding it must be an “other act requisite to voting” under the statute’s purview.⁷³

In its amicus brief filed in *Migliori* in the Third Circuit, the United States Department of Justice (“DOJ”) also argued that the scope of the materiality provision extends to absentee ballot envelope certificates.⁷⁴ Like the three Pennsylvania justices, the DOJ cited the materiality provision’s broad language, covering “any ‘other act requisite to voting.’”⁷⁵ The DOJ also pointed to Title I’s broad definition of “vote,” noting that it includes “all action[s] . . . prerequisite to voting, casting a ballot, and having such ballot counted.”⁷⁶

The DOJ and the Pennsylvania justices take a different approach from Justice Alito in his *Migliori* dissent. Justice Alito maintains that the CRA does not extend to the facts of *Migliori* (and, by extension, the nearly identical set of facts at issue in *Ball*) because whether a voter dates their ballot return envelope is an issue related to the rules for counting a ballot.⁷⁷ According to Justice Alito, rules related to having one’s vote counted do not fall under the materiality provision’s purview—rather, only rules related to determining whether someone is qualified to vote trigger the statute’s protections.⁷⁸

Taken to its extreme, Justice Alito’s reasoning would seemingly prevent the materiality provision from reaching the very practices Congress designed Title I to prohibit. For example, congressional supporters of Title I’s passage cited a report of a registrar rejecting a registration application because the applicant underlined the prefix “Mr.” on a form when the instructions said to circle it.⁷⁹ Justice Alito’s reading of the materiality provision would seemingly immunize this rejection from the provision’s protections. The registrar could simply argue that they rejected the registration form because of the voter’s failure to follow the instructions for filling out the form, not because of any error related to the voter’s qualifications to vote.

⁷¹ See *id.* at 26.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See Brief for the United States as Amicus Curiae at 7, *Migliori v. Lehigh Cnty. Bd. of Elections* (U.S. Supreme Court Apr. 1, 2022) (No. 22-1499) [hereinafter *United States Amici*].

⁷⁵ *Id.* at 7, 22 (citing 52 U.S.C. § 10101(a)(2)(B)).

⁷⁶ *Id.* at 3 (citing 52 U.S.C. § 10101(e) (internal quotation omitted)).

⁷⁷ See *Migliori* Application for Stay, *supra* note 54, at 1825–26 (Alito, J., dissenting).

⁷⁸ See *id.* at 1825.

⁷⁹ 110 CONG. REC. 1693–94 (1964).

Though not focused on identical issues, the DOJ's discussion of Title I in its *Migliori* amicus brief further reveals the problems with reading a bifurcation between ballot counting rules and voter eligibility rules into the materiality provision. As the DOJ notes, not only does the materiality provision by its terms apply to “any record or paper relating to any application, registration, or other act requisite to voting,”⁸⁰ but Title I defines “vote” to include “all action necessary to make a vote effective,” including “action[s] required by State law prerequisite to . . . casting a ballot, and having such ballot counted.”⁸¹ In other words, the materiality provision encompasses acts a voter must take to ensure their ballot is counted. Justice Alito argues that filling out absentee ballot return envelopes is a prerequisite to having one's ballot counted.⁸² Even under his reading, then, the materiality provision should reach absentee ballot envelopes.

While Justice Alito suggests that the materiality provision only applies to rules related to determining a voter's qualifications, it is unclear exactly what rules he envisions falling into this category. Nor is it clear how a rule or error that is by definition related to qualifications to vote could ever be found to violate the materiality provision, which explicitly *permits* the rejection of ballots for errors pertaining to voter qualifications. Simply put, Justice Alito's approach to the materiality provision raises concerns about the provision's effectiveness and practical application. His interpretation would render the materiality provision meaningless, as it would only be triggered by errors that would always be permissible bases for rejection under its terms.

Election law scholar Justin Levitt has previously rebutted another possible reading of the materiality provision that presents similar pitfalls.⁸³ Levitt highlights the potential for debate over the meaning of “qualified to vote under State law.”⁸⁴ He notes that this language could be read to refer to substantive qualifications such as age, citizenship, and residency—or to procedural qualifications based on whether a voter followed all state-imposed procedural voting rules.⁸⁵ This second reading would mean that every error at any step of the voting process, from an error on a registration form to (likely) an error on a ballot return envelope, would per se be material to a voter's qualifications under state law.⁸⁶

⁸⁰ United States Amici, *supra* note 74, at 25 (citing 52 U.S.C. § 10101(a)(2)(B)) (emphasis added).

⁸¹ *Id.* at 26–27 (citing 52 U.S.C. § 10101(e)).

⁸² See *Migliori* Application for Stay, *supra* note 54, at 1825–26 (Alito, J., dissenting).

⁸³ See Levitt, *supra* note 6, at 147 n.208.

⁸⁴ *Id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

As Levitt explains, if all procedural steps involved in casting a vote and having it counted are material to a voter's (procedural) qualifications, then every error that could trigger the materiality provision would constitute a permissible reason to deny a voter of their opportunity to cast a vote.⁸⁷ Unlike Justice Alito's reading, this understanding of the statute would trigger the materiality provision more often. Like Justice Alito's approach, however, it would render the materiality provision meaningless because no error that triggers it would ever be found to violate it.⁸⁸ Professor Levitt ultimately argues that such an interpretation of the materiality provision must be rejected.⁸⁹

An approach more like that of the three Pennsylvania justices in *Ball*, focusing on whether an error has occurred on a paper related to an act requisite to voting, might argue that framing the CRA in the narrow, circular manner Justice Alito suggests would not only gut the materiality provision's protections, but also render them nearly impossible to trigger. A Statement of Interest filed by the DOJ in *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*⁹⁰ provides a roadmap to an application of the materiality provision that carries out the statute's text and allows it to reach and prevent the problems Congress designed it to address.⁹¹ This approach would begin by determining whether the error that caused the voting paper at issue to be rejected is related to a voter's qualifications.⁹² If so, the rejection at issue would not violate the materiality provision.⁹³ If not, however, the error would not constitute a lawful basis to reject a ballot.⁹⁴ Alternatively, an approach like Justice Alito's would begin by asking whether the rule with which the prospective voter failed to comply, causing their vote to be rejected, is itself material to determining the voter's eligibility. This would end any analysis of whether an error on a form like a ballot envelope was material to the voter's eligibility before it could begin.

An approach akin to that offered by the three Pennsylvania justices or the DOJ would not limit the materiality provision to errors related to rules for determining voter eligibility, but would instead apply the provision to errors on papers requisite to voting, including those that relate to having a ballot counted. This type of

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ No. 2022-CV-002472 (Wis. Cir. Ct. Oct. 4, 2022).

⁹¹ *See generally* Statement of Interest of the United States, League of Women Voters of Wis. v. Wis. Elections Comm'n (Wis. Cir. Ct. Oct. 14, 2022) (CV-002472).

⁹² *See id.* at 7–8.

⁹³ *See id.* at 7–9.

⁹⁴ *See id.*

understanding of how the materiality provision should function allows it to reach the scenarios it was intended to cover and better aligns with Title I's text.

IV. LOOKING AHEAD: TITLE I'S FUTURE IN ELECTION LITIGATION

While the CRA has been on the books for almost sixty years, the VRA has often taken center stage in voting rights litigation. Today, though, the CRA is playing a prominent role in several cases like the examples discussed above. Legal doctrine interpreting Title I is likely to develop and change as these cases progress and as more challenges are filed. As *Migliori* and *Ball* in Pennsylvania demonstrate, litigation over the scope and applicability of the materiality provision is likely to intensify in the near future. The contours of barriers to voting rights have changed drastically in the decades since the CRA passed, and the time for courts to likewise adapt the CRA to today's voting landscape looks to be at hand.