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Case Number 342,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HONORABLE ANTHONY J. ALBENCE, in his official capacity as State Election Commissioner, and STATE OF DELAWARE DEPARTMENT OF ELECTIONS,	)	
Defendants-Below/Appellants,	)	No. 342, 2022
v.	)	On Appeal from a Decision of the Court of Chancery of the State of Delaware
MICHAEL HIGGIN and MICHAEL MENNELLA,	)	C.A. Nos. 2022-0641-NAC & 2022-0644-NAC
Plaintiffs-Below/Appellees.	)	

DELAWARE DEPARTMENT OF ELECTIONS, and ANTHONY J. ALBENCE, State Election Commissioner,	)
Defendants-Below/Appellants,	)
v.	)
AYONNE "NICK" MILES, PAUL J. FALKOWSKI, and NANCY M. SMITH,	)
Plaintiffs-Below/Appellees.	)

APPELLANTS' OPENING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: September 23, 2022

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NATURE OF PROCEEDINGS

Two months ago, Delaware's Governor signed two laws passed by the General Assembly that enable all Delaware voters to cast ballots by mail (the "Vote-by-Mail Statute") and extend the deadline to register to vote (the "Same-Day Registration Statute"). The same day, Plaintiffs filed lawsuits in the Court of Chancery challenging the new statutes as unconstitutional. The cases proceeded on a coordinated, expedited track. Following briefing on cross-motions for summary judgment and oral argument, the Court of Chancery issued its Memorandum Opinion on September 14, 2022 (the "Opinion"). Ex. A.

The Opinion granted in part and denied in part the parties' cross-motions for summary judgment. The Opinion assumed without deciding that Plaintiffs Higgin and Mennella (the "Higgin Plaintiffs") had standing to challenge the Same-Day Registration Statute (Op. at 25) and found that Plaintiffs had standing to challenge the Vote-by-Mail Statute based on their interests as voters (Op. at 37–38). Further, the Opinion found that the Same-Day Registration Statute does not violate the Delaware Constitution. Op. at 50. The Opinion found that the Vote-by-Mail Statute violates the Delaware Constitution (Op. at 51), and granted Plaintiffs' request for a permanent injunction against the statute as applied to general elections (Op. at 74).

Defendants now appeal the court's rulings as to: (1) Plaintiffs' standing; and (2) the constitutionality of the Vote-by-Mail Statute.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery erred by departing from established precedent requiring a plaintiff demonstrate standing under traditional Delaware standing doctrine, which adopts federal Article III standing. *Riverfront Hotel LLC*, 213 A.3d 89 (TABLE) (Del. 2019). The Court of Chancery erred in its reliance on the standing test suggested in *In re Delaware Public Schools Litigation*, 239 A.3d 451 (Del. Ch. 2020) ("*Public Schools*"), by excusing Plaintiffs' lack of injury and finding standing because of a general public interest to participate in an election. Such generalized "public interest standing" does not exist under Delaware law.

2. The Court of Chancery erred when it assumed, without deciding, the *Higgin* Plaintiffs had standing to challenge the Same-Day Registration Statute. As this Court has stressed, "standing is properly a threshold question that the Court may not avoid." *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 129 (TABLE) (Del. 2021); *see also Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003).

3. The Court of Chancery's holding that the Vote-by-Mail Statute conflicts with the Delaware Constitution was based on an advisory opinion that relied on cases that erroneously found an implied restriction on voting by mail. Under modern principles of constitutional and statutory interpretation, an implied restriction – especially an implied restriction founded on the comments of a member

of the legislative body adopting the provision – cannot be engrafted to create a constitutional limitation not found in the plain text. To the extent this Court finds that advisory opinion applies to the Vote-by-Mail Statute, it should abrogate the earlier rulings because there can be no implied limitation absent ambiguity (and no ambiguity exists here). Absent an express constitutional prohibition, the authority of the General Assembly is unrestrained, *State ex rel. Craven v. Schorr*, 131 A.2d 158, 161 (Del. 1957), every presumption is in favor of the validity of a legislative act, and all doubts are resolved in its favor. *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974). Here, Article V Section I of the Delaware Constitution expressly permits the General Assembly to "prescribe the means, methods and instruments of voting." Furthermore, nothing in the Delaware Constitution prohibits the General Assembly from enacting the Vote-by-Mail Statute and there is no clear and convincing evidence overcoming the presumption of constitutionality. *Sierra v. Dep't of Servs. for Children, Youth and Their Families*, 238 A.3d 142, 155–56 (Del. 2020).

STATEMENT OF FACTS

On July 22, 2022, the Governor signed into law the Vote-by-Mail Statute, allowing voters to cast ballots by mail for all primary, general, and special elections. 83 *Del. Laws*, c.353 (A254–63); codified at 15 *Del. C.* §§ 5601A–5621A. The Vote-by-Mail Statute sets forth procedures for voters to apply for, receive, and submit ballots by mail. *Id.*

The Governor also signed into law the Same-Day Registration Statute, revising voter registration deadlines set forth in Sections 2036 and 2037 of Title 15. 83 *Del. Laws*, c.354 (A265). Sections 2036 and 2037 previously required voters to be registered by the fourth Saturday prior to the date of a primary or general election, or by 10 days prior to a special election, to vote in that election. *Id*. Under the Same-Day Registration Statute, the deadlines to register to vote are extended to include the day of the election. *Id.*

Both statutes took effect immediately, including for the General Election on November 8, 2022. A267; A275.

ARGUMENT

I. PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE EITHER STATUTE.

A. Question Presented.

Whether the Court of Chancery erred by holding that Plaintiffs had standing to challenge the Vote-by-Mail Statute and the Same-Day Registration Statute, when they did not establish any harm suffered by the statutes and do not meet the standing requirements articulated by this Court in *Riverfront Hotel LLC*, 213 A.3d at 89 (Del. 2019). The question was preserved by Defendants below. A205–25; A366–76.

B. Scope of Review.

This Court reviews questions of law, including whether a party has standing, *de novo*. *Office of the Comm'r Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015).

C. Merits of Argument.

The Delaware Supreme Court has been clear that a plaintiff must demonstrate standing under traditional Delaware standing doctrine, and the Court of Chancery erred when it relaxed standing for Plaintiffs in the instant case. Op. at 27–38. In its reasoning, the court credited *dicta* articulated in *Public Schools*, 239 A.3d 451, when it excused Plaintiffs' lack of concrete injury and standing, and by holding a generalized public interest standing to participate in a free and equal election. Op. at 25, 28, 29.

This Court recently articulated that "a plaintiff must demonstrate standing in accordance with the federal courts' interpretation of Article III standing, as enumerated in *Lujan v. Defenders of Wildlife*,"[1] and "satisfy the prudential 'zone-of-interests' test." *Riverfront Hotel LLC*, 213 A.3d at 89 (declining to find standing for public interest in "lawfulness" (citing *Dover Historical Soc'y*, 838 A.2d at 1111)); *see also Kelly v. Trump*, 2020 WL 6392865, at *3 (Del. Ch. Nov. 2, 2020) *aff'd* 256 A.3d 207 (Del. 2021). Accordingly, to establish standing, a plaintiff carries the burden of demonstrating that he suffered an injury that is "concrete and particularized, and [] actual or imminent, not conjectural or hypothetical." *Dover Historical Soc'y*, 838 A.2d at 1110 (citing *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)).

Here, Plaintiffs failed to meet their standing burden as articulated in *Riverfront Hotel* and *Lujan*. First, the record is devoid of facts or evidence that Plaintiffs Miles, Falkowski, and Smith intend to vote in the upcoming General Election or voted in prior elections. They only allege they are registered to vote. A042. It is insufficient to simply be registered to vote without affirmative facts in the record demonstrating engagement in the voting process, particularly here where Plaintiffs are challenging an election law. Thus, the court erred when it concluded

[1] 504 U.S. 555 (1992).

they were sufficiently injured by the Vote-By-Mail Statute by being registered to vote.[2]

Second, the court erred in concluding that Plaintiff Higgin had standing based on his status as a candidate[3] because, as the court correctly noted: "[f]aced with a motion for summary judgment, Higgin must marshal 'specific facts' supporting his standing. **He has not.**" Op. at 23 (emphasis added) (citing *Dover Historical Soc'y*, 838 A.2d at 1110). Here, Higgin's complete failure to marshal facts to support his standing to bring the lawsuit is dispositive.[4]

Third, the court erred in finding standing for Plaintiff Mennella because the undisputed record established that Mennella is not currently serving as an election inspector in the upcoming General Election and therefore has no involvement in the

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[2] Plaintiffs argued they have standing to challenge the Statutes because of voter dilution. Historically, voter dilution has only been applied to Voting Rights Act cases where a minority is challenging unequal access to the electoral process. *See Thornburg v. Gingles*, 478 U.S. 30, 38-41 (1986); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. Of Educ.*, 4 F.3d 1103, 1119 (3d. Cir. 1993). This matter is neither a Voting Rights Act case nor a case wherein a minority is challenging unequal access to the electoral process.

[3] Defendants are not aware of a Delaware case that has analyzed candidate standing. Other courts have analyzed candidate standing and such analysis is persuasive. *See Gallagher v. New York State Bd. of Elections*, 496 F. Supp. 3d 842, 851 (S.D.N.Y. 2020) (candidate lacked standing to challenge statute that did not impact his race).

[4] Notably, when analyzing Higgin's standing to challenge the Vote-by-Mail Statute, the court—relying on the same set of facts—contradicts itself, and abandons its previous finding that Higgin failed to "marshal 'specific facts'" to survive summary judgment. Op. at 31. The court's application of the facts to its legal analysis are incompatible.

election process. A028–31; A122–25; A142–45; A423; A476. Even assuming *arguendo* that Mennella will serve as an election inspector in the upcoming General Election, the potential injury he claims is illusory, as it is based on his misconception that an election inspector's role and duties are broader than what Title 15 contemplates. *See* A330–32. Mennella's incorrect belief as to his duties was directly contradicted by two affidavits from Commissioner Albence. A303–04; A401–02. Mennella, however, failed to submit any affidavit or competent evidence in response to Commissioner Albence's affidavits and, like Higgin, failed to demonstrate his standing.

Despite Plaintiffs' failures and lack of "concrete and particularized, and [] actual or imminent" injury, the court held that because Plaintiffs "have a right to participate in a free and fair election under which all votes legally made—and only votes legally made—count," Plaintiffs had adequately established injury. Op. at 31. The court further reasoned that Plaintiffs' injury was not a generalized grievance (which would defeat standing), and that voting rights are within the zone of interests implicated by the Vote-By-Mail Statute. *Id*. at 32–38. The court made such determination in part due to its concern that if Plaintiffs did not have standing, then

no one would have standing.[5] The court concluded that Plaintiffs "represent various groups directly affected by these laws. The constitutionality of laws that change basic aspects of voting—one of the most fundamental rights Delawareans possess—are of great importance. All this is enough to establish standing."[6] *Id*. at 27.

In crafting "less rigid" standing requirements for Plaintiffs[7] and asserting that the Court of Chancery can "adapt or reshape existing" jurisdictional doctrines, the court relied heavily (and erroneously) on *Public Schools.* Op. at 25, 28, 29. The Court of Chancery in *Public Schools* did not expand or relax Delaware's traditional standing doctrine. 239 A.3d at 509-38. It found that the plaintiffs in that case satisfied all traditional standing requirements and went on to opine "[t]o the extent this decision has reasoned incorrectly and the plaintiffs lack standing under

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[5] Defendants contend that a plaintiff need concrete and particularized, and actual or imminent injury to have standing to challenge the Statutes. It is likely that the Department of Elections and Commissioner of Elections would have standing to seek a declaratory judgment regarding constitutionality. *See New Castle Cnty. Council v. State*, 698 A.2d 401, 404 (Del. Super. Ct.), *aff'd,* 692 A.2d 414 (Del. 1996). Furthermore, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362 n.55 (Del. Ch. 2008) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

[6] There is no dispute that voting is one of the most fundamental rights that Delawareans possess. However, whether an issue is important or involves a fundamental right should not impact and has not impacted in the past this Court's determination on standing. *See DeShields v. State*, 534 A.2d 630, 639 (Del. 1987) (death row inmate did not have standing to challenge execution method).

[7] While it is accurate that state courts may impose more lenient standing requirements, Delaware has not chosen to do so. *See Riverfront Hotel LLC*, 213 A.3d at 89.

traditional Delaware standing doctrine, they have *standing as appropriate parties to raise constitutional and statutory issues of substantial public importance, whose impact on the law is real, and where the ongoing violations are likely to continue and to evade judicial review*." *Id.* at 540 (emphasis added). Such holding is incongruent with the Supreme Court's precedent and, notably, has not been adopted by other Vice Chancellors. *See In re Morrow Park Holding LLC*, 2022 WL 3025780, at *27 (Del. Ch. Aug. 1, 2022). Such generalized public interest standing has never been recognized by this Court.

In this case, the court waived longstanding requirements for standing to permit Plaintiffs to challenge the Vote-By-Mail Statute. The court's adoption of novel "public interest standing" was in error and this Court should reverse the determination that Plaintiffs had standing to challenge the Vote-By-Mail Statute. *Barry v. Town of Dewey Beach*, 2006 WL 1668352, at *4 (Del. Ch. June 8, 2006) (noting that a common concern for obedience to law is an example of an interest that is insufficient to warrant standing).

II. THE COURT OF CHANCERY ERRED IN ASSUMING, WITHOUT DECIDING, THE *HIGGIN* PLAINTIFFS HAD STANDING TO CHALLENGE THE SAME-DAY REGISTRATION STATUTE.

A. Question Presented.

Whether the Court of Chancery erred by assuming, without deciding, that the *Higgin* Plaintiffs had standing to challenge the Same-Day Registration Statute despite concluding that neither plaintiff put forth specific facts to support standing. The question was preserved by Appellants below. A208–14; A371–76.

B. Scope of Review.

This Court reviews questions of law, including whether a party has standing, *de novo*. *Office of the Comm'r Del. Alcoholic Beverage Control*, 116 A.3d at 1226.

C. Merits of Argument.

The Court of Chancery's decision to assume, without deciding, standing is in error because where a plaintiff does not have standing, a court cannot consider the merits of the argument.[8] *Id.*, 116 A.3d at 1226 ("Standing is a 'threshold' issue: if the plaintiff does not have standing, the appeal is improper and this Court cannot consider the merits of the argument.") (citations omitted).

[8] To highlight the importance of a standing determination, the Delaware Supreme Court in *Riverfront Hotel LLC v. Bd. of Adjustment of City of Wilmington*, raised the issue of standing *sua sponte* and held that the plaintiff did not have standing to assert the claims contained in the appeal. 213 A.3d 89 (TABLE) (Del. 2019).

It is a fundamental principle of Delaware law that a plaintiff who lacks standing must have his suit dismissed for lack of jurisdiction. *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016) ("[A] party must have standing to sue in order to invoke the jurisdiction of a Delaware court. Standing is therefore properly viewed as a threshold issue to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers.") (quotations omitted); *see also Ala. By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 264 (Del. 1995). Standing "refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance." *El Paso Pipeline GP Co., L.L.C.,* 152 A.3d at 1256 (quotation omitted). Where, as here, a "plaintiff does not have the standing" this Court has repeatedly held that it "cannot consider the merits of the argument." *Office of the Comm'r Del. Alcoholic Beverage Control*, 116 A.3d at 1226; *see also Morris*, 246 A.3d at 129 ("[S]tanding is properly a threshold question that the Court may not avoid.").

In this case, Defendants challenged the *Higgin* Plaintiffs' standing.[9] *See* A208–14. In response, the *Higgin* Plaintiffs failed to include a verified affidavit or *any other facts or evidence to support their standing*. *See generally* A312–55. As such, the only facts presented to the court to support the *Higgin* Plaintiffs' standing were contained in the *Higgin* Plaintiffs' Verified Complaint. *See* A017–40. As the court correctly determined, when "[f]aced with a motion for summary judgment, [plaintiffs] must marshal 'specific facts' supporting [their] standing." Op. at 23 (citing *Dover Historical* Soc'y, 838 A.2d at 1110). The *Higgin* Plaintiffs failed to do so. *Id*. Notwithstanding this complete failure to support the record—and the court's acknowledgment that the *Higgin* Plaintiffs failed to meet their burden—the court inappropriately assumed, without deciding, standing. *See id.* at 25 (citing *Republican State Comm. of Del. v. Dep't. of Elections*, 250 A.3d 911, 918 (Del. Ch. 2020)). The Court reasoned that sidestepping standing was proper "given the

[9] The court also raised the issue of standing with Plaintiffs. During oral argument on the *Higgin* Plaintiffs' motion for temporary restraining order, the Vice Chancellor noted that he found standing an "interesting and important question" and was "look[ing] forward to the parties engaging on [standing] in their briefing." A100–01. Despite the direction from the court, the *Higgin* Plaintiffs failed to put forth any facts via affidavit or other evidence to support standing, relying entirely on attorney argument. *See Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1010–11 (Del. 2021) (holding "the resolution of a legal action must rest on competent, reliable evidence"); *In re Morrow Park Holding LLC*, 2022 WL 3025780, at *32 (holding party failed to demonstrate standing where the party asserted unsupported basis for standing during summary judgment).

expedited nature of this litigation" and his conclusion that the *Higgin* Plaintiffs did not prove success on the merits. *Id*.

It was inappropriate for the court to assume standing. Such approach defies this Court's binding precedent requiring Delaware courts to evaluate standing when raised (or *sua sponte*) and determine standing before turning to the merits of a plaintiff's case. *Morris*, 246 A.3d at 129 ("[T]he Court may not avoid [standing]."). Furthermore, as this Court has noted, Delaware courts follow federal law on standing, specifically *Lujan,* which requires federal courts to decide standing before addressing the merits of a plaintiff's case. *California v. Texas*, 141 S.Ct. 2104, 2113 (2021) ("We proceed no further than standing."). Stated simply, courts should sufficiently scrutinize the threshold jurisdictional standing requirement before permitting any plaintiff to challenge the merits of a law enacted by the General Assembly. To permit a trial court to simply sidestep the jurisdictional issue of standing altogether will embolden plaintiffs who would otherwise have no standing to proceed to the merits of a lawsuit they were not entitled to bring in the first instance.[10]

[10] Beyond the instant case, Defendants are aware of at least three other highly politicized cases where a Delaware court assumed, without deciding, standing. *See Republican State Comm. of Del.*, 250 A.3d 911; *League of Women Voters of Delaware, Inc. v. Department of Elections*, 250 A.3d 922, 934 (Del. Ch. 2020) ("Accordingly, in this unusual circumstance and for purposes of this decision only, I assume without deciding that the Plaintiffs have standing to proceed."); *Lorrah v. Carney*, Del. Ch. C.A. No. 2022-0134, Fioravanti, V.C. (Feb. 28, 2022) (Oral

Moreover, the reasons set forth by the court—importance and expedited schedule—do not grant courts the discretion to avoid making a jurisdictional standing determination.[11] It was erroneous for the court assume standing, especially when the *Higgin* Plaintiffs failed to meet their burden of establishing standing. Op. at 23, 25.

Ruling) ("For purposes of this ruling, I will assume without deciding that the plaintiff has standing and that her claims are ripe."). A014. Defendants respectfully urge this Court to provide clarity as to this practice because without standing, a court lacks jurisdiction.

[11] There may be prudential reasons that a court can avoid finding standing, *i.e.*, when the claim is already moot, *see Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 170 (2000). There are no prudential reasons supporting the court's decision to assume, without deciding, standing.

III. THE VOTE-BY-MAIL STATUTE DOES NOT CONFLICT WITH THE DELAWARE CONSTITUTION

A. Question Presented.

Whether the Vote-by-Mail Statute, passed by the General Assembly pursuant to its broad legislative authority to regulate elections, is valid under the Delaware Constitution, which contains no express prohibition on mail-in voting. The question was preserved by Appellants below. A221–38; A377–91.

B. Scope of Review.

This Court reviews the Court of Chancery's grant of summary judgment, questions of statutory interpretation, and issues of constitutional law *de novo*. *See Croda Inc. v. New Castle Cty.*, -A.3d. -, 2022 WL 2898848, at *3 (Del. July 22, 2022); *Del. Solid Waste Authority v. Del. Dep't of Natural Resources and Envtl. Control*, 250 A.3d 94, 105 (Del. 2021).

C. Merits of Argument.

The Court of Chancery's ruling on the Vote-by-Mail Statute rests on a slender reed. In deciding that the Vote-by-Mail Statute violates the Delaware Constitution, the court found no express limitation on the General Assembly's authority to enact the statute. Rather, the court felt bound by an advisory opinion identifying an implied restriction. *See* Op. at 73 ("[I]f I were writing on a blank slate, I would likely conclude that the Vote-by-Mail Statute is not prohibited by the Delaware Constitution."). The court pointedly observed that the genesis of the implied

restriction is in a pair of decisions nearly a century ago that "cobble together various passages and, in doing so, stretch and strain to imply a constitutional restriction where none appears in the plain text of the document or based on ordinary principles of constitutional interpretation." Op. at 72. Indeed, those courts erroneously sought out an implied restriction, driven by concerns of that era regarding fraudulent elections that the General Assembly has since enacted significant and extensive legislation to address. But later the Delaware Supreme Court, without grappling with the earlier courts' rationale, compounded that error in *dicta* in a non-binding advisory opinion fifty years ago.

However, the proper framework for judicial analysis is to avoid finding an implied restriction on the General Assembly's authority where no ambiguity exists, and to resolve any uncertainties in favor of affirming the constitutionality of a statute. Following that framework, the only—and correct—result that follows is to uphold the validity of the Vote-by-Mail Statute.

1. The Court Presumes Duly Enacted Legislation to Be Constitutional.

The Delaware General Assembly has a broad grant of authority to enact legislation, subject only to specific constitutional constraints. This Court has long recognized the "fundamental principles that 'absent a constitutional inhibition, the power of the legislature as the repository of the legislative power with its broad and ample sweep, has full and unrestrained authority to exercise its discretion in any

manner it sees fits in its wisdom or even folly to adopt.'" *Schorr*, 131 A.2d 158 at 161 (quoting *Collison v. State ex rel. Green*, 2 A.2d 97, 101 (Del. 1938)). Given the General Assembly's broad legislative authority, this Court presumes that duly enacted legislation is constitutional, which a statute's challengers bear the burden of overcoming by "clear and convincing evidence of unconstitutionality." *See Sierra*, 238 A.3d 142 at 155–56 (Del. 2020).

This Court has further opined that the presumption of constitutionality "not only imposes upon one attacking the constitutionality of a statute the burden of demonstrating its invalidity, but also requires a measure of self-restraint upon courts in review over claims of unconstitutionality." *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001) (citation omitted). In exercising that judicial restraint, "[t]his Court has a duty to read statutory language so as to avoid constitutional questionability and patent absurdity and to give language its reasonable and suitable meaning." *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008) (internal quotation marks omitted). This Court resolves all doubts in favor of the statute's validity and will not declare a statute unconstitutional "unless its invalidity is beyond doubt." *Justice*, 325 A.2d at 97 at 102 (Del. 1974).

2. Delawareans Enjoy a Fundamental Right to Participate in Free and Equal Elections.

The Delaware Constitution establishes that "[a]ll elections shall be free and equal." Del. Const. Art. I § 3. The right to free and equal elections was part of the

1792 Delaware Constitution and remained in the 1831 and 1897 Constitutions. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 30 (2002). Delaware courts have recognized this clause to provide Delaware citizens with an "unfettered" right to vote in elections. *Young v. Red Clay Consolidated Sch. Dist.*, 122 A.3d 784, 837–38 (Del. Ch. 2015) (quoting *Abbott v. Gordon*, 2008 WL 821522, at *19 (Del. Super. Ct. Mar. 27, 2008)). Accordingly, "[o]ur election statutes are intended to 'assure the people's right to free and equal elections. . . .'" *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 423 (Del. 2013) (quoting 15 *Del. C.* § 101A).

3. Mail-in Voting is Not Absentee Voting.

Plaintiffs challenged the Vote-by-Mail Statute as inconsistent with Article V, Section 4A of the Delaware Constitution,[12] which requires the General Assembly to enact legislation providing for absentee voting for qualified and registered voters "who shall be unable to appear to cast his or her ballot at any general election at the regular polling place of the election district in which he or she is registered" due to specific reasons that include illness or physical disability, being on vacation, the nature of the voter's occupation, or conflicts with religious beliefs. Del. Const. Art. V § 4A. The court's analysis, in turn, focused on Section 4A. However, a central

[12] Plaintiffs also challenged the statute as inconsistent with Article V, Section 1, but the court declined to address that claim. Op. at 51.

assumption underlying this analysis is that mail-in voting, as provided for by the statute, is absentee voting. Op. at 61. But Section 4A contemplates absentee voting as predicated on a voter's *inability* to appear in-person to vote. *See* Art. V § 4A ("[A]ny qualified elector of this State, duly registered, who shall be ***unable to appear*** to cast his or her ballot . . . .") (emphasis added). Indeed, under the absentee voting procedures promulgated by the General Assembly, a voter applying to vote by absentee ballot must attest to the reason he or she is qualified to vote under that method. *See* 15 *Del. C.* § 5503(d)(2)h. (requiring a statement of "[t]he reason that the elector cannot appear at the regular polling place for the elector's election district on the day of the election, which shall identify at least 1 of the reasons set forth in § 5502 of this title").

In contrast, the Vote-by-Mail Statute allows all registered voters to apply for and submit a mail-in ballot, and they need not identify a reason. Voters do not need to be "unable to appear" in-person to vote: they may otherwise be able to appear to vote at physical poll locations, but choose not to do so. Looking to the similarities between the absentee voting and vote-by-mail procedures, the court dismissed the distinction between the two alternatives to in-person voting as simply a distinction without a difference. Op. at 61. But that conclusion ignores the plain text of Section 4A, which specifically contemplates voters who are "unable to appear" for in-person voting. *See Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp.,*

Inc., 36 A.3d 336, 344 (Del. 2012) ("[T]he General Assembly 'is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.'" (quoting *Colonial Ins. Co. of Wisconsin v. Ayers*, 772 A.2d 177, 181 (Del. 2001))); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) ("It is fundamental that the Courts ascertain and give effect to the intent of the General Assembly as clearly expressed in the language of a statute.").

Because vote-by-mail is fundamentally distinct from absentee voting, the Court's analysis need not reach Section 4A at all. Rather, the analysis of the statute's validity starts and ends with the General Assembly's broad authority to regulate the "means, methods and instruments of voting." Del. Const. Art. V § 1. There is no constitutional prohibition on the General Assembly's ability to authorize voting by mail, and the General Assembly is free to legislate as it deems fit. *See Schorr*, 131 A.2d 158 at 161.

4. The Delaware Constitution Contains No Express Prohibition on Voting by Mail.

But even assuming *arguendo* that mail-in voting is equivalent to absentee voting, the Vote-by-Mail Statute remains valid under the Delaware Constitution. Importantly, the court found that the Delaware Constitution does not expressly restrict the General Assembly from passing the Vote-by-Mail Statute. Op. at 70, 72–73. Section 4A mandates the General Assembly to enact legislation to enable voters in the enumerated categories of reasons that prevent them from voting in-

person in their respective election districts to cast ballots.[13] As the court correctly recognized, although the plain text of Section 4A requires the General Assembly to provide for absentee voting for voters in those specific categories, nothing in Section 4A prevents the General Assembly from enacting absentee voting for *additional* categories of voters. Op. at 70. Section 4A contains no provision that the enumerated categories are the *only* circumstances under which absentee voting is to be permitted. In other words, the plain text of Section 4A establishes a floor, not a ceiling, on absentee voting.

5. The Supreme Court Should Decline to Adopt the Limited Case Precedent Implying a Restriction on Voting by Mail.

Because there is no express prohibition in the Delaware Constitution on the Vote-by-Mail Statute, only an "implied" restriction would invalidate the statute. *Collison*, 2 A.2d at 100. The court's conclusion that there is an implied constitutional prohibition on the Vote-by-Mail Statute perpetuates a flawed reading of Article V that the court itself called into doubt.

As a threshold matter, the court reluctantly found an implied restriction in the limited decades-old (and readily distinguishable) Delaware case law addressing absentee voting and mail-in voting. *See* Op. at 73 ("[I]f I were writing on a blank slate, I would likely conclude that the Vote-by-Mail Statute is not prohibited by the

[13] Pursuant to this mandate, the General Assembly has enacted procedures for absentee voting, codified in Chapter 55 of Title 15.

Delaware constitution. . . . I am not writing on a blank slate, however."). According to the court, under this set of cases, Section 4A establishes the only circumstances in which a voter may cast a ballot outside of in-person voting, unless altered by constitutional amendment, and accordingly, the Vote-by-Mail Statute impermissibly invades Section 4A by allowing any voter to cast an absentee ballot, even if he or she does not fall under one of the enumerated categories. Op. at 59–60.

But as the court observed, the precedential value of this line of decades-old cases is questionable. *See* Op. at 66–73. The court's observation is particularly apt considering modern judicial pronouncements counseling against engrafting an unstated implied limitation. *Giuricich*, 449 A.2d at 238 (holding that where a limitation is not set forth in the text of the statute, "it is reasonable to assume that the Legislature was aware of the omission and intended it."); *Leatherbury v. Greenspun,* 939 A.2d 1284, 1292 (Del. 2007) ("a court may not engraft upon a statute language which has clearly been excluded therefrom." (citation omitted)); *In re Last Will & Testament & Tr. Agreement of Moor,* 879 A.2d 648, 652 (Del. Ch. 2005) (holding that it is impermissible to "read into the statutory text words of restriction that were not included by the . . . legislature[] . . .").

The court thus explicitly invited this Court to reconsider the rulings setting forth an implied limitation on mail-in voting, explaining: "However, although I am compelled by Delaware precedent to find that Plaintiffs have demonstrated actual

success on the merits as to the Vote-by-Mail Statute, I believe the Delaware Supreme Court may conclude that it has grounds to revisit that precedent." Op. at 65–66. An examination of those cases reveals that the implied restriction compelling the court's decision is illusory and the court's decision should be reversed.

a. *Opinion of the Justices*

The primary locus of the implied restriction is found in an advisory opinion issued by the Supreme Court in 1972. *See Opinion of the Justices*, 295 A.2d 718 (Del. 1972). At the Governor's request, the Court addressed the constitutionality of a subpart of the version of the absentee voting statute then in place. The statute, as amended earlier that year, provided for absentee voting for those

> unable to appear at the polling place of his election district because of being: (1) In the public service of the United States or of this State, (2) In the Armed Forces of the United States or the Merchant Marine of the United States, or attached to and serving with the Armed Forces of the United States in the American Red Cross, Society of Friends, or United Service Organizations, or (3) Unavoidably absent from the county in which he resides on the day of the general election, or (4) Sick or physically disabled.

Id. (citing 58 *Del. Laws* c.397). The Delaware Supreme Court concluded that then-Section 5503(3) did not deny the right to vote to those "unavoidably absent" on the day of the primary election while granting the right to those "unavoidably absent" on the day of the general election, which would violate Article I, Section 3 of the Delaware Constitution. *Id.* 721–22. Reviewing the prior versions of Section 5503, the court concluded that the General Assembly intended to amend Section 5503 to

cover any general, primary, or special election, whereas the statute previously only applied to general elections. *Id.* Thus, the court concluded that the limitation of subsection (3) to "the general election" was the result of an obvious drafting error that inadvertently failed to strike the term "general" from the statutory text. *Id.* at 722. The court found that subsection (3) should be read as "Unavoidably absent from the county in which he resides on the day of the election" and therefore, presented no constitutional issues with respect to primary elections. *Id.* at 722.

However, the court then went beyond the questions posed to it and briefly observed "a caveat as to general elections." *Id.* The court read Article V, Section 4A to "specifically enumerate[] the classifications of persons eligible to vote by absentee ballot at general elections." *Id.* The court opined, therefore, "that by expressly including certain classifications, the drafters of [Section 4A] impliedly excluded all other classifications. It is beyond the power of the Legislature, in our opinion, to either limit or enlarge upon the [Section 4A] absentee voter classifications specified in the Constitution for general elections." *Id.* As a result, according to the court, subsection (2) imposed "unconstitutional limitations" and subsection (3) imposed an "unconstitutional enlargement" on the "'business or occupation' classification of absentee voter in [Section 4A]." *Id.*

But as the court identified in the instant case, the Delaware Supreme Court did not cite any authority for or elaborate further on its passing conclusion that the

drafters of Section 4A "impliedly excluded" any categories of absentee voters not expressly included in the provision. *See* Op. at 54. Indeed, the court's conclusion contravenes the principle that any implied constitutional limitation must be clear and necessary. *See Collison*, 2 A.2d at 100 (describing "constitutional restrictions" as "express or *necessarily* implied" (emphasis added)); *Marshall v. N. Va. Transp. Auth.*, 657 S.E.2d 71, 76 (Va. 2008) ("[W]hen a court, in determining the constitutionality of a statute, departs from the express limitations of the Constitution and relies instead on implied constitutional restrictions, the legislative usurpation must be very clear and palpable to justify the court's holding that an enactment is unconstitutional."); *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (holding that a statute's use of the term "shall" with respect to a list of actions does not render the list "exhaustive" or exclusionary).

Instead, the court's conclusion appears to have been based on its reading of a pair of cases from 1939 and 1943, referenced earlier in the advisory opinion. Op. at 54–55. Citing *State ex rel. Walker v. Harrington*, 30 A.2d 688 (1943), and *State v. Lyons*, 5 A.2d 495 (1939), the court concluded without elaboration that "[i]n each of those cases, the Court found in the Constitution an implied limitation upon absentee voting in general elections." *Op. of the Justices*, 295 A.2d at 721. Thus, the only opinion that the Supreme Court has expressed on absentee voting was in brief *dicta*

within a non-binding advisory opinion.[14] Furthermore, as set forth below, the *Lyons* and *Harrington* cases to which the court cited themselves have no to limited precedential value today.

b. *Lyons*

In *Lyons*, seven individuals indicted for conspiracy to commit fraud with respect to ballots cast pursuant to a 1923 statute authorizing absentee voting challenged the constitutionality of the statute. 5 A.2d at 496. According to the defendants, the statute conflicted with Article V, Section 2 of the Delaware Constitution, which sets forth the age and residency qualifications to vote. *Id.* at 500; A003–04. Section 2 (as it does today) required that the voter, at the time of the election, have been "for the last thirty days a resident of the hundred or election district in which he may offer to vote." *Id.* The Court of General Sessions'[15] analysis focused on the meaning of the phrase "in which he may offer to vote." *Id.* The court concluded that the phrase implied that voting could *only* take place via in-person attendance at the polling places, based on "two considerations." *Id.* at 501, 503.

[14] "[A]dvisory opinions [given under 10 *Del. C.* § 141] do not decide a case, do not adjudicate a dispute and are not judicial rulings in any sense. For those reasons, they are not binding on any court and do not carry precedential effect." *Op. of the Justices*, 413 A.2d 1245, 1248 (Del. 1980) (citation omitted).

[15] The court noted that both *Lyons* and *Harrington* are "decisions from the 'leftover judge' era of appellate review," pre-dating the formal formation of a separate Supreme Court in 1951 by constitutional amendment. Op. at 72–73 & n.219; *see also* Op. at 55 & n.177.

First, the court focused on a brief portion of the debates at the Constitutional Convention of 1897, during which a provision concerning absentee voting by military servicemembers was considered and rejected. *Id.* at 501–02. Although the drafters adopted substantially from the New York Constitution, the drafters declined to include a provision from New York that specifically guaranteed that military servicemembers would not be deprived of the ability to vote due to their absence from their election district and granted the state legislature power to provide for absentee voting for those voters. *Id.* As discussed by the *Lyons* court, delegate William Spruance reported on the reason for not including the provision:

> That applied more particularly, perhaps, to such times as in the late War of the Rebellion when large numbers of citizens were in the service of the country and their votes, under special act of Assembly, were taken in the field. It was thought that such an unfortunate condition of affairs as that would not be likely to occur again. At all events, it was so removed that we thought it was not necessary to put it in.

Id. at 502. The *Lyons* court concluded from the commentary "an inescapable fact that the direct question of absentee voting came before the Convention and was intentionally eliminated in so far as citizens in actual military service were concerned," leading to an "unmistakable" "inference . . . that the Convention expressly refrained from providing for absentee voting." *Id.* at 502. But in doing so, the court improperly imputed to one delegate's comments legislative meaning of the *absence* of a particular provision. *See Schorr*, 131 A.2d at 161 (holding "no court may properly inquire into" the motives of legislators); *see also Bilski v.*

Kappos, 561 U.S. 593, 608 (2010) (the "established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision").

Furthermore, Spruance's commentary does not say that the drafters intended to *prohibit* absentee voting; that conclusion impermissibly adds a limitation not found in the plain text. Just a few decades removed from the Civil War, Spruance's commentary reflects cautious (if ultimately inaccurate) optimism that the country would never again face a horrific situation where so many of its citizens would be stationed in the battlefield. Thus, the drafters deemed it *unnecessary* to include the specific provision—it does not obviously follow that they sought to generally restrict absentee voting. Notably, the *Lyons* court observed that "it is of course true that the refusal of the Constitutional Convention to affirmatively provide for absentee voting does not necessarily operate as a denial of the power of the Legislature to provide for that method of balloting." *Id.* But citing "other," unspecified portions of the constitutional debates, the court then abruptly concluded that the drafters did not consider the state legislature could provide for absentee voting. *Id.*

Second, the *Lyons* court resolved "any lingering doubt . . . that the Constitution contemplated the personal attendance of voters at polls" by looking to Article V, Section 3. *Id.* at 502. Section 3 bars anyone who has participated in bribery or undue influence in connection with an election from registering for or

voting in that election and provides for challenges to voters on the basis of bribery. According to the *Lyons* court, Section 3 "has been explicit in its attempt to frustrate bribery" by providing for challenges to votes, and "[n]o voter can meet that challenge without his personal presence at the polls." *Id.* Thus, the *Lyons* court's conclusion that Section 3 invariably requires physical presence at a polling place is not only implied, but essentially logistical: the court could not contemplate how a voter could be challenged and respond to a challenge other than in-person, and thus found that the Constitution compels "personal attendance of the voter at the polls so as to insure the counting of his vote." *Id.*

The *Lyons* court also drew attention to the fact that "the Constitution had carefully prescribed for uniform laws for the registration of voters with proper provisions for determining that prospective voters duly possess the necessary and prescribed qualifications." *Id.* at 502. Presumably, the court was referring to Section 4 of Article V, although it is unclear where the court located a provision that "the sole ground of challenge [on election day] should be the violation of Article 5, Sec. 3." *Id.* Yet at the same time the court appears to have overlooked certain substantive revisions made to Section 4 in the 1925 amendment to the Delaware Constitution. Prior to the 1925 amendment, Section 4 required a biennial registration of voters ahead of each general election, established a registration period beginning, at the earliest, 120 days prior to the election and ending no less than ten days prior to the

election, and required that "[v]oters shall be registered upon personal application only." A005. The 1925 amendment struck out the predecessor language entirely and replaced it with a new Section 4 that eliminated the biennial registration requirement, the set time period for pre-election registration, and the provision for personal registration. A008–10. The *Lyons* opinion is conspicuously silent regarding the effect of the 1925 amendment, which effectively abandoned a registration scheme contemplating in-person voter registration at designated times. The Constitution's voter registration provisions as of 1939 thus undercut, rather than support, the *Lyons* court's conclusion. In sum, the bases on which the *Lyons* court rested its conclusion that Article V, Section 2 impliedly barred any manner of voting other than in-person voting are, upon closer examination, tenuous and require a highly selective understanding of the constitutional text and its history.

Moreover, the *Lyons* court's analysis ignored the context of Article V, Section 2. Section 2 concerns the qualifications for Delaware citizens to be able to vote: namely, residency, length of residency, and age. Section 2 further provides the circumstances disqualifying otherwise eligible citizens from voting and the circumstances under which disqualified voters may regain eligibility, and provides that military servicemembers stationed in Delaware are not considered residents by virtue of being stationed there. Those provisions have remained largely unchanged since the 1897 Constitution. *See* A003–04. Thus, Section 2 addresses qualifications

and eligibility to vote—not the manner by which voting must take place. Indeed, Article V specifically addresses the manner of voting in Section 1, which provides that the General Assembly "may by law prescribe the means, methods and instruments of voting." Like Section 2, Section 1 has remained largely unchanged since 1897. *See* A003. Yet oddly, the *Lyons* court failed to mention Section 1 at all, instead scrutinizing the phrase "in which he may offer to vote" divorced from context. The surrounding text shows that the phrase addresses the residency of an individual in determining whether he is qualified to vote: the inquiry is whether the individual has been "for the last thirty days a resident of the hundred or election district in which he may offer to vote." The most natural reading of that provision is thus not that the individual must vote in person, but that the individual must have resided in that particular district for at least the thirty days immediately preceding the election.

c. *Harrington*

Four years after *Lyons*, the *Harrington* court assessed the constitutionality of an 1898 statute known as the "Soldiers' Vote Act," which enabled military servicemembers who were stationed outside their home district to vote at polling places at their encampments or other encampments if they were detached from their companies. *Harrington*, 30 A.2d at 690, 691–92. Relying heavily on *Lyons*, the *Harrington* court concluded that the Delaware Constitution did not authorize the

Soldiers' Vote Act. *Id.* at 691–92. Similar to the *Lyons* court, the *Harrington* court's conclusion appears to be animated by concerns about the ability to challenge and prosecute voters for engaging in bribery. At the heart of the court's analysis was a provision in Article V, Section 3 that a voter challenged on the basis of bribery must either refrain from voting or swear or affirm to the election officer that he had not engaged in bribery, under the penalty of perjury. *Id.* at 691. According to the court, the question that arose was "whether there could be a prosecution for perjury, if the oath or affirmation should be false and was administered at a polling place located outside of the territorial limits of the State." *Id.* at 692. Here, the court found that Article V, Section 7 "clearly" contemplated prosecutions for elections offenses, whether the individual was within Delaware or not. *Id.* But at the same time, the court found no constitutional provision that a voter could be tried in Delaware for perjury for making a false oath or affirmation outside of the State. *Id.* The court thus inferred that the drafters of the Delaware Constitution "intended that electors, when offering to vote must personally appear at polling places within the limits of the State, for their respective hundreds or districts." *Id.*

According to the court, this implication was further bolstered by Article V, Section 5, providing that "Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest, during their attendance at elections, and in going to and returning from them." *Id.* The court concluded that because, in its

view, the drafters of the Delaware Constitution contemplated voters would vote in-person and there was no explicit mechanism to prosecute voters for bribery who had made oaths and affirmations outside of the State, therefore the Delaware Constitution did not authorize the Soldiers' Vote Act.[16] Here again, the court found an implied restriction far beyond the actual text and provisions of the Constitution.

As in *Lyons*, the *Harrington* court was particularly focused on the ability to prevent fraud and bribery from marring elections in the State. But it is notable that the court's finding of an implied restriction in the Delaware Constitution on absentee voting was driven by the paramount goal of ensuring that the State could fully utilize the tools available to confront and prevent fraud and bribery. To the *Lyons* and *Harrington* courts, it was inconceivable that those efforts could be undertaken if some voters were casting absentee ballots or voting outside their election district. Accordingly, the courts read into the Delaware Constitution an intentional, implied prohibition on any voting taking place other than in-person voting at one's assigned polling place.[17]

[16] Following the *Harrington* decision, the General Assembly amended Article V to add Section 4A. *See* 44 *Del. Laws* c.1.

[17] The Opinion made a compelling observation that the General Assembly adopted the statutes at issue in *Lyons* and *Harrington* "close in time to the constitutional convention" of 1897, indicating "that the framers did not understand there to be an implied prohibition on absentee voting in the Constitution." Op. at 71.

Although the Courts' concerns were legitimate, it is evident that the rationale underlying their decisions no longer exists today.[18] Indeed, the current absentee voting law specifically provides that votes cast by absentee ballot are subject to challenge for the same reasons (including bribery) and under the same processes as with other voters under Title 15, and provides for specific procedures with respect to challenges to absentee ballots. 15 *Del. C.* § 5513. The addition of Section 4A to Article V of the Delaware Constitution would not have suddenly eliminated the supposed necessity of voter challenges to take place in person. Moreover, Title 15 now includes robust requirements for all voters, whether in-person or absentee, to confirm their identity and qualifications and registration procedures, and DOE is able to verify voter eligibility and registration status and maintain the secrecy of absentee ballots. *See, e.g.*, 15 *Del. C.* §§ 1101–05, 1301–05, 2001–65, 2301–08, and Ch. 55.

* * *

In the Opinion, the Court of Chancery expressed its view that it was bound by prior court precedent finding an implied restriction on the Vote-by-Mail Statute in the Delaware Constitution, but expressed its discomfort with that precedent. An examination of that limited case law validates the lower court's discomfort. The

[18] Notably, Plaintiffs confirmed in the proceedings below that their challenge to the Vote-by-Mail Statute is not premised on any claim or allegation regarding fraud in elections. A418 at 14:13–14.

notion that the Delaware Constitution impliedly precludes the General Assembly's legislative action here is, ultimately, a palimpsest of flawed reasoning, strained readings of the constitutional text and history, and contemporaneous concerns about the conduct of elections that are no longer salient. Notably, *Lyons* and *Harrington* appear to be isolated rulings that other courts have rarely cited or relied upon in the eighty years since they were issued, and the non-binding 1972 advisory opinion placed outsized weight on those rulings. This Court now has the opportunity to re-affirm the fundamental principle against reading into the constitutional text implied restrictions on the General Assembly's legislative authority.

6. Recent Decisions from Sister Courts Support the Validity of the Vote-by-Mail Statute.

Opinions issued in recent months by the highest courts of Pennsylvania and Massachusetts further support a finding that the Vote-by-Mail Statute is constitutional. *See McLinko v. Commonwealth of Pennsylvania, Department of State*, 279 A.3d 539 (Pa. 2022); *Lyons v. Sec. of the Commonwealth*, 192 N.E.3d 1078 (Ma. 2022) ("*Mass. Lyons*").

a. *McLinko*

In *McLinko*, the Pennsylvania Supreme Court reversed a lower court decision ruling that a 2019 statute (referred to as "Act 77") violated the Pennsylvania Constitution. Among other provisions, the statute established universal mail-in voting. The provisions at play in *McLinko* are virtually identical to those in this case.

The trial court found that the Pennsylvania Constitution limited any voting to take place in-person, with the only exceptions for enumerated categories of absentee voting, and universal mail-in voting fell outside those categories. The trial court looked to Article VII, Section 1 of the Pennsylvania Constitution, which sets forth the qualifications to vote, including that the individual "have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election." 279 A.3d at 547 (quoting Pa. Const. Art. VII § 1). Focusing on the phrase "offer to vote" and relying on Pennsylvania Supreme Court decisions from 1862 and 1924 interpreting that phrase to require in-person voting,[19] the trial court concluded that Section 1 required in-person voting and prohibited ballots cast by mail or outside Pennsylvania. *Id.* at 548. According to the trial court, the only exceptions were found in Article VII, Section 14, mandating the state legislature provide for absentee voting for specific categories of voters. *Id.* at 549. As a result, the trial court held that "Act 77 contravenes Article VII, Sections 1 and 14 of the Pennsylvania Constitution because, in effect, the General Assembly created a new class of voter that could be exempt from the Section 1 qualifications without constitutional authority." *Id.*

[19] *See Chase v. Miller*, 41 Pa. 403 (Pa. 1862); *In re Contested Election of Fifth Ward of Lancaster City*, 281 Pa. 131 (Pa. 1924).

The Pennsylvania Supreme Court disagreed. First, examining the *Chase* and *Lancaster City* decisions, the court found that the interpretation of "offer to vote" was "patently flawed" and not "bound to the interpretation." *Id.* at 572. According to the *McLinko* court, the phrase "offer to vote" is a "descriptive term, used to define the election district residency requirement." *Id.* at 576. Notably, like *Lyons* and *Harrington*, the *Chase* and *Lancaster City* decisions appear to have been animated by concerns about the ability to confirm and challenge the qualifications of absentee voters and confront suspected fraud and bribery.[20] *Id.* at 575–76. Abrogating *Chase* and *Lancaster City*, the Pennsylvania Supreme Court concluded that Article VII, Section 1 of the Pennsylvania Constitution did not establish a requirement that all ballots must be submitted in-person at the voter's polling location. *Id.* at 576.

Next, having found that the Pennsylvania Constitution did not mandate in-person voting, the Pennsylvania Supreme Court concluded that mail-in voting is a "method" of voting under Article VII, Section 4 of the Pennsylvania Constitution that the state legislature has broad authority to enact. *Id.* at 576–80.

Finally, the court rejected an argument by the petitioners that "universal mail-in voting renders Section 14 mere surplusage, as there would be no need for a separate constitutional provision establishing absentee voting for certain categories

[20] Indeed, the defendants in *Lyons* specifically relied on *Chase* and *Lancaster City* in their challenge before the court. 5 A.2d at 501.

of voters if the General Assembly could effectuate the same through legislation." *Id.* at 580. The Pennsylvania court found that Article VII, Section 14 provided a guarantee that certain categories of voters could participate in absentee voting, which Pennsylvania's statute did not disturb. *Id.* at 581. The court reiterated that nothing in Article VII, including Section 14, prohibited the legislature from enacting the vote-by-mail statute. *Id.* The court further concluded that the vote-by-mail statute reflected a policy choice by the legislature that could change in the future, in contrast to the Pennsylvania Constitution's guarantee of absentee voting for certain categories of voters. *Id.* There was thus no conflict between Act 77 and the Pennsylvania Constitution's absentee voting provision. So too, here. As in Pennsylvania, the Vote-by-Mail Statute does not disturb Section 4A's guarantee to certain categories of voters that they will be able to participate in the General Election regardless of their location or ability to travel to their polling places. If a future General Assembly determines to amend or repeal the Vote-by-Mail Statute, Section 4A remains unaffected and those categories of voters will retain the guaranteed right to vote by absentee ballot. Because that guarantee is enshrined in the Delaware Constitution, the General Assembly's ability to amend the provision is necessarily limited. Any constitutional amendment requires the approval of a supermajority of the legislature in two consecutive sessions of the General

Assembly. Del. Const. Art. XVI § 1. It would not be sufficient for a simple majority of the General Assembly to alter Section 4A's provisions.

McLinko supports a reconsideration of the limited precedent locating an implied restriction on absentee or mail-in voting in Article V, Section 2 of the Delaware Constitution. Courts in both Pennsylvania and Delaware decades ago interpreted the phrase "offer to vote" to require in-person voting at the exclusion of any other manner of voting—requirements that are inconsistent with the current voting landscape nationally.[21] Those dated conclusions, as adopted by later courts, do not withstand scrutiny and the Court should not be bound by an erroneous interpretation creating an implied restriction where no express restriction exists.

b. *Mass. Lyons*

In *Mass. Lyons*, the Massachusetts Supreme Judicial Court affirmed the constitutionality of a state statute that provides for universal early voting, including mail-in voting. 192 N.E.3d at 1082–85. The Massachusetts court started with the framework that the state legislature has expansive plenary power to regulate elections that "is restrained only so far, as not to be expressly, or by necessary

[21] Of note, in the proceedings below Plaintiffs did not rely on *Lyons* or *Harrington* to contend that Section 4A precluded the Vote-by-Mail Statute, and even asserted that the Delaware Constitution does *not* include the "offer to vote" provision, in an attempt to distinguish *McLinko*. A411 at 7:7–12.

implication, repugnant to the constitution." *Id.* at 1087 (quoting *Commonwealth v. Blackington*, 41 Mass. (24 Pick.) 352, 357 (Mass. 1837)).

The Massachusetts court rejected an argument by the plaintiffs—identical to Plaintiffs' argument here—that the statute conflicted with Article 45 of the amendments to the Massachusetts Constitution, authorizing the legislature to provide for absentee voting by reason of absence, physical disability, or conflicts with religious beliefs. According to the plaintiffs, by expressly granting authority to the legislature to provide for absentee voting in the three identified circumstances, the Massachusetts Constitution impliedly restricted the legislature from providing for absentee voting under any other circumstances. *Id.* at 1092. The court rejected the plaintiffs' argument, finding that doing so would ignore both the constitutional provisions of broad legislative authority and the fundamental right to vote, as well as the purpose of Article 45. *Id.* The court further explained that application of the *expressio unius* maxim must be done cautiously, if warranted by the circumstances, in interpreting a statute, and "should be applied with even greater caution when interpreting a State constitution, especially where its application would act as a restraint on the plenary power of the Legislature." *Id.* The court found no reason to adopt the "negative implication" interpretation urged by plaintiffs where the text "makes no mention of limiting the Legislature's plenary authority to provide for

other forms of voting or otherwise restricting voting to in person on election day." *Id.* at 1093. The Massachusetts court's analysis is fully applicable here.

* * *

Again, Section 4A requires the General Assembly to enact procedures to allow voters in particular circumstances to participate in general elections via absentee voting. But Section 4A does not restrict the General Assembly from authorizing other manners of voting and it is impermissible to add an implied restriction which does not exist in the plain text of the constitution.

CONCLUSION

The Court of Chancery found standing for Plaintiffs where none exists. The Court of Chancery also found an implied constitutional restriction on the Vote-by-Mail Statute where none exists. For the reasons set forth above, this Court should reverse those rulings.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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