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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 / Appellants, v. MICHAEL HIGGIN and MICHAEL MENNELLA, Plaintiffs/Appellees/ Cross-Appellants.	No. 342, 2022 On Appeal from a Decision of the Court of Chancery of the State of Delaware C.A. Nos. 2022-0641-NAC and 2022-0644-NAC

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

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

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Dated: September 29, 2022

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NATURE OF THE PROCEEDINGS

Cross-Appellants Michael Mennella ("Mennella") and Michael Higgin ("Higgin"), plaintiffs below, filed a complaint against Anthony Albence and the Delaware Department of Elections ("Defendants") on July 22, 2022, challenging the constitutionality of two recently passed Delaware statutes, Delaware's Vote-by-Mail Statute, 15 *Del. C.* § 5602A *et seq.*, and Delaware's Same-Day Registration Statute, 15 *Del. C.* § 2036 *et seq*. Appellees Ayonne "Nick" Miles, Paul J. Falkowski, and Nancy Smith ("Miles Plaintiffs"), also plaintiffs below, filed a complaint against the same defendants on July 22, 2022 as well, challenging the constitutionality solely of Delaware's Vote-by-Mail Statute, 15 *Del. C.* § 5602A *et seq.*

The Court of Chancery heard the two cases together on an expedited schedule, and granted summary judgment to Ayonne "Nick" Miles, Paul J. Falkowski, Nancy Smith, Michael Mennella, and Michael Higgin ("Plaintiffs") on the challenge to the Vote-by-Mail Statute and granted summary judgment to the Defendants on the challenge to the Same-Day Registration Statute. Memorandum Opinion (Sept. 14, 2022), Appellants' Ex. A, ("Op.").

Defendants appeal the court's rulings as to standing and the constitutionality of the Vote-by-Mail Statute. Mennella and Higgin cross-appeal the court's ruling on the Same-Day Registration Statute.

SUMMARY OF THE ARGUMENT

Answer to Defendant's Summary of Arguments

1. Denied. The Court of Chancery correctly determined that the Plaintiffs had standing to challenge the Vote-By-Mail Statute. The Plaintiffs properly established harm and met the standing requirements for both legal challenges.
2. Denied. While the Court of Chancery simply assumed standing there is sufficient evidentiary support in the record to find Higgin and Mennella have standing to challenge the Same-Day Registration Statute.
3. Denied. The Vote-by-Mail Statute conflicts with the Delaware Constitution Del. Const. Art. V, § 1 and Art. V, §4A. The General Assembly may not use its broad legislative authority to pass a statute that is in direct contravention to the Delaware Constitution.

Higgin and Mennella's Summary of Argument on Cross Appeal

1. The Court of Chancery erred when it held that the Same-Day Registration Statute is constitutionally permissible. First, the Delaware Constitution requires that the periods designated for voter registration must end at least ten days before the General Election, which naturally includes Election Day. Second, the Court of Chancery's interpretation is contrary to precedent, which have interpreted Article V, Section 4 to "provide[] that all questions of the qualifications of voters should be determined before election day." *State ex*

rel. Walker v. Harrington, 30 A.2d 688, 691 (1943); *see also State v. Lyons*, 40 Del. 77 (1939); *Appeal of Brown*, 49 A.2d 618 (Del. 1946). Third, the Court of Chancery's interpretation results in the unequal treatment of voters. Specifically, individuals who register within the periods defined by Article V, Section 4 must correct their registration records *before* Election Day, but individuals not yet registered may establish entirely new registration records *on* Election Day. Such a result is manifestly unjust and thus irrational and irrational results should be avoided where possible. *See Opinion of Justices*, 225 A.2d 481, 484 (Del.1966). Fourth, due to its inequitable impact, the Same-Day Registration Statute also violates the Constitution's requirement that the registration laws be "uniform." Del. Const., Art. V, Sec. 4, para. 1.

STATEMENT OF FACTS

I. Election Inspector Michael Mennella

Cross-appellant Michael Mennella is a registered voter and resident of Newark, Delaware. Op. at 5. He plans to vote in the November 8, 2022, general election. He has served as an inspector of elections for the Delaware Department of Elections ("DOE") in at least eight elections during the last five to six years. *Id*. Mennella plans to serve as an inspector of elections at the 2022 General Election and future elections. *Id*.

The "inspector of elections" is an "election officer" appointed by the DOE. 15 *Del. C.* § 4702; 15 *Del. C.* § 101(9). The Delaware Code sets forth Mennella's duties and responsibilities. Of primary importance is his responsibility for preparing his polling place for the election and declaring it open for voting. 15 *Del. C.* § 4912; 15 *Del. C.* § 4931. Mennella, and no one else, "mak[es] the proclamation that the election is open." 15 *Del. C.* § 4931.

Before opening the election, Mennella must swear an oath pursuant to 15 *Del. C.* § 4904. While the election is conducted, he is authorized to "[c]ommand the peace," 15 *Del. C.* § 4946(a)(1), and "[p]reserve order and enforce obedience to their lawful commands at and around the place of election during the time of any election and counting of votes," 15 *Del. C.* § 4946(b)(1). Mennella is also authorized to

determine voter eligibility in his polling place pursuant to 15 *Del. C.* § 4938 and to hear voter challenges pursuant to 15 *Del. C.* § 4937(c).

Mennella faces severe penalties for violating Delaware law or not complying with his official duties as an inspector of elections. He may be fined $300 to $500 or *imprisoned* for up to 3 years if under 15 *Del. C.* § 5126. If he is appointed to the inspector position, but refuses to serve, he "shall be fined $50." 15 *Del. C.* § 5112. If he neglects or declines to perform part of his duty, he can be found to have violated his official duty. 15 *Del. C.* §§ 5133, 5130. Finally, if he "induces or attempts to induce any election officers to violate any of the provisions of this title whether or not such election officers violate or attempt to violate any of such provisions shall be imprisoned not more than 5 years." 15 *Del. C.* § 5125.

II. Candidate Michael Higgin

Cross-appellant Michael Higgin is a registered voter and a resident of Bear, Delaware. Op. at 5. He is a General Election candidate for State Representative in District 15. Op. at 5. Higgin plans to vote in the November 8, 2022 General Election, and expects many individuals who have indicated they support him to do so as well. If individuals who are not registered to vote before the deadline (10 days before the General Election) are permitted to vote, he will not be able to target all potential voters in the election to give them information about him and his candidacy, and the positions he holds on issues of import to those voters. Further,

the Department of Elections will not have the opportunity to determine the eligibility of the voter before their vote is cast. Once the vote is cast, there is no remedy for Higgin to challenge that vote, only the voter.

III. Voters Ayonne "Nick" Miles, Paul J. Falkowski, Nancy M. Smith

Ayonne "Nick" Miles, Paul Falkowski, and Nancy Smith are all registered voters that intend to vote in the November 8, 2022, general election.

IV. The Mail-In Voting Laws

Recently, the Delaware General Assembly passed, and the Governor signed, new statutes universally permitting mail-in ballots in Delaware. *See* 15 *Del. C.* § 5602A, *et seq.* ("Vote-by-Mail Statute"). This statute directly conflicts with and violates the Delaware Constitution because it expands the administration of the General Election beyond its constitutionally designated day in violation of Art. V, § 1 of the Delaware Constitution. The Vote-By-Mail Statute further conflicts with the Delaware Constitution because it allows for remote voting, that is, voting at a time and place other than as provided in Art. V, § 1 of the Delaware Constitution and for reasons beyond those permitted in Art. V, § 4A.

V. Voter Registration Laws

The General Assembly also passed, and the Governor signed, statutes that allow a person to register to vote on the same day the General Election is held, including the General Election on November 8, 2022. *See* House Substitute No. 1

for House Bill No. 25 (June 22, 2022), *codified at* 15 *Del. C.* §§ 2036-38 ("Same-Day Registration Statute"). As the Court of Chancery recognized, the Same-Day Registration Statute "extends the deadlines to register to vote in a primary, general, or special election to include the day of the election."[1] Op. at 14 (citing 15 *Del. C.* § 2036). In short, "[t]he last date to register for any … general election shall be the day of that election." 15 *Del. C.* § 2036. These laws violate Art. V, § 4 of the Delaware Constitution, which prohibits potential electors from registering "less than ten days before" the general election.

[1] Cross-appellants challenge the Same-Day Registration Statute as applied to the General Election only, *see* Op. at 15, because Article V, Section 4 of the Delaware Constitution fixes registration deadlines only for the General Election, Del. Const. Art. V, Sec. 4, para. 2.

ANSWERING ARGUMENT ON APPEAL

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE VOTE-BY-MAIL STATUTE.

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs had standing to challenge the Vote-by-Mail Statute?

B. Scope of Review

The Supreme Court reviews rulings of law implicating standing *de novo*. However, the Court has exercised restraint in the review of lower court findings, and given deference to findings of fact and law that are supported by the record below. *Rosenbloom v. Esso V.I., Inc.*, 766 A.2d 451, 458 (Del. 2000). The "standard of review as to findings of facts and conclusions of law of the Court of Chancery permits reversal only if there be no substantial evidence to support such ultimate findings so as to demonstrate them to be 'clearly wrong.'" *Warren v. Goldinger Bros., Inc.*, 414 A.2d 507, 509 (Del. 1980). *See also Burton v. State*, 2016 Del. LEXIS 369, *6-7, 146 A.3d 64 (Del. 2016) ("We will only disturb the Superior Court's findings if they are not based on competent evidence or are clearly erroneous.").

C. Merits of Argument

Plaintiffs—one political candidate, one election inspector, and five voters—represent a diverse makeup of the electoral process. Indeed, Plaintiffs represent all

components of the election process, and they represent the universe of people who are affected by the new statutes. Each Plaintiff suffers unique harm if an unconstitutional statute is allowed to stand. The Chancery Court correctly found that Plaintiffs had standing to challenge the Mail-In-Voting Statute and, although the Court below assumed Plaintiffs Higgin and Mennella had standing to challenge the Same Day Registration Statute, there is a sufficient factual and legal basis in the record to support such a finding.

1. Delaware's Law on Standing

"The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance." *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). In order to establish standing, "a plaintiff or petitioner must demonstrate first, that he or she sustained an 'injury-in-fact'; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected." *Id*. Public interest standing "permits a suitable plaintiff 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." *In Re Del. Pub. Schs. Litig.*, 239 A.3d 451, 512-513 (Del. Ch. 2020).

Furthermore, state court standing doctrine is appropriately more flexible than federal standing doctrine because the state courts play a different and more

expansive role than the federal courts. *See In Re Del. Pub. Schs. Litig.,* 239 A.3d at 510 (citing John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 Conn. L. Rev. 639, 658–63 (2008)). State courts draw their power from the original sovereignty of the several states as governments with plenary and unenumerated powers. The federal courts, by contrast, can only exercise the sovereign power that the states delegated to the United States as a limited government with enumerated powers. *In Re Del. Pub. Schs. Litig.,* 239 A.3d at 510 (citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-77 (2018); Randy J. Holland, *State Constitutions: Purpose and Function, in The Delaware Constitution of 1897: The First One Hundred Years* 3, 13-14, 14 (Randy J. Holland & Harvey Bernard Rubenstein eds. 1997)).

"The Delaware Constitution contains provisions that illustrate the broader expanse of state court power." *Del. Pub. Schs. Litig.*, 239 A.3d at 510-511. Article I, Section 9 provides that "[a]ll courts shall be open; and every person for any injury done him or her in his or her reputation, person, movable or immovable possessions shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land ...." Del. Const. Art. I, § 9. "This provision traces its lineage through Article I, Section 9 of the Delaware Constitution of 1792, to Article 22 of the Delaware Declaration of Rights of 1776, and ultimately to Chapter 40 of Magna Charta." *Del. Pub. Schs. Litig.*, 239 A.3d at 510-511 (citing

Randy J. Holland, *The Delaware State Constitution* 64–65 (2011); *see also* Maurice A. Hartnett, III, *Delaware's Charters and Prior Constitutions*, *in First One Hundred Years*, *supra*, at 29 ("The Delaware Declaration of Rights, somewhat uniquely, provided a 'remedy at law for any injury.' A similar provision still remains in the Delaware constitution.")).

"Another significant provision is Article I, Section 10, which… was 'intended to establish for the benefit of the people of the state a tribunal to administer the remedies and principles of equity.'" *Del. Pub. Schs. Litig.*, 239 A.3d at 511 (citing *Du Pont v. Du Pont*, 85 A.2d 724, 727, 729 (Del. 1951)). The power of a court of equity to hear claims has always been and necessarily remains broad and flexible. "Historically, equity jurisdiction has taken its shape and substance from the perceived inadequacies of the common law and the changing demands of a developing nation." *Id.* (citing *Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008) (internal quotation marks omitted)).

2. The Court of Chancery's Rulings

In the Court of Chancery, the court assessed Plaintiffs' standing differently for the analysis of the two statutes. It found Plaintiffs had standing to challenge the Vote-by-Mail Statute under state law because Plaintiffs "have a substantial interest in this court reaching a decision on the merits, particularly given the fundamental nature of voting." Op. at 2. The court found that Plaintiffs were not "'mere

intermeddlers'" because "[t]hey represent various groups directly affected by these laws. Op. at 27 (citing *Dover Hist. Society*, 838 A.2d at 1111). Additionally, it held that because of the public importance of the right to vote, there can be public importance standing as well. *See* Op. at 27 ("The constitutionality of laws that change basic aspects of voting—one of the most fundamental rights Delawareans possess—are of great public importance").

The Court not only relied on the clear precedent provided by *In re Del. Pub. Schs. Litig*., but also noted the finding of standing was supported by other precedent, citing a particular type of case where Delaware courts have found standing, and a federal court would not – taxpayer standing. Op. at 30. The court demonstrated Delaware's "willingness to look beyond" the federal standard by showing examples of times Delaware had done just that: *City of Wilm. v. Lord*, 378 A.2d 635, 637-38 (Del. 1977), *Reeder v. Wagner*, 2009 WL 1526945, at *2 (Del. June 2, 2009) (TABLE), and *Ritchie CT Opps, LLC v. Huizenga Managers Fund*, LLC, 2019 WL 2319284, at *9 (Del. Ch. May 30, 2019). Op. at 30.

The court ultimately found that "[f]or Higgin, a political candidate, and Mennella, an anticipated election official, an election implicating votes cast in contravention of the Delaware Constitution may have significant real-life consequences." Op. at 31. Additionally, the court held that voters "have a right to participate in free and fair elections under which all votes legally made— and only

votes legally made—count." Op. 31. The court explained that Plaintiffs had stated an injury in fact because "[r]egardless of how laudable the purpose behind the Vote-by-Mail Statute may be, the statute cannot introduce into the General Election votes prohibited under the Delaware Constitution." Op. at 31.

With regard to the Same-Day Registration statute,[2] the court assumed that Plaintiffs Higgin and Mennella had standing, following the Chancery Court's approach in *Republican State Comm. of Del. v. Dep't of Elections*.[3] Op. at 22-25. However, Higgin and Mennella contend the record contains sufficient factual and legal support to make a finding of standing.

3. Standing to Challenge the Vote-by-Mail Statute

The trial court correctly found Plaintiffs to have standing to challenge the Vote-by-Mail Statute because: (1) Plaintiffs "have a substantial interest in this court reaching a decision on the merits," Op. at 2, as "[t]hey represent various groups directly affected by these laws, Op. at 27 (citing *Dover Hist. Society,* 838 A.2d at 1111), and (2) "[t]he constitutionality of laws that change basic aspects of voting—one of the most fundamental rights Delawareans possess—are of great public importance," Op. at 27.

[2] The only plaintiffs to challenge the same-day-registration statute at the trial level were Michael Mennella and Michael Higgin, in C.A. No. 2022-0641-NAC.
[3] 250 A.3d 911, 918 (Del. Ch. 2020).

While Defendants claim that "Higgin's complete failure to marshal facts to support his standing to bring the lawsuit is dispositive," Appellants' OB, 7, a closer look at the record indicates otherwise. Higgin is a registered voter and a resident of Bear, Delaware. Higgin Aff. ¶ 3, A146. Higgin is a General Election candidate for State Representative in District 15. Op. at 5; Higgin Aff. ¶ 4, A146. Higgin plans to vote in the November 8, 2022 General Election, and expects many individuals who have indicated they support him to do so as well. If unconstitutional votes are counted, that will dilute the impact of lawfully cast votes for Higgin, and may cause him to lose an election he might have otherwise won.[4] A political candidate has limited time and resources, and the mail-in voting process requires a candidate to waste valuable time and resources on campaigning to people who may have already voted through mail-in voting. Higgin's injury is real and concrete – a diversion of significant resources, and a potentially unlawful political outcome on Election Day if unlawful ballots are counted.

Additionally, as voters, all Plaintiffs will have their votes diluted by votes cast under the unconstitutional methods allowed by the new voting by mail process. The votes cast pursuant to the new statutes, and in violation of the Delaware Constitution,

[4] Higgin's counsel discussed other incidents where recounts were necessary to determine proper ballots that changed the outcome of an election. Summ. J. Arg. Tr. at 65:10-22.

will dilute their votes.[5] Such an event is hardly speculative,[6] as Defendant Albence admits in his affidavit that he has already received 456 applications for mail-in ballots for the upcoming general election. Albence Aff. ¶ 29. There is no dispute that, if permitted, many Delawareans will vote by mail in 2022. Plaintiffs, however, will not. Plaintiffs are among a subset of the voter population that will cast their votes in accordance with the Delaware constitution. An injury is not generalized when half the state will likely be affected by the new statutes' adverse effects. *See Howell v. McAuliffe*, 788 S.E.2d 706, 714 (Va. 2016) (finding that voters had standing to challenge "unconstitutional manipulations of the electorate, and remarking, "[T]he relevant comparison here is between a statewide electorate packed with 206,000 disqualified voters and one without them. Every qualified voter (though not every member of the general public) suffers the same vote-dilution injury."). Plaintiffs are not only concerned with "lawfulness"[7] or "obedience to the

[5] Defendants attempt to dismiss such a claim by pointing out that most voter dilution claims are made in context to a minority challenging unequal access to the electoral process. Appellents' OB, 7. By doing so they concede the well-established principle in American jurisprudence – when one's vote is set to be diluted by an unlawful scheme, the process is unconstitutional.

[6] Defendants claim that "the record is devoid of facts or evidence" that Plaintiffs Miles, Falkowski, and Smith do intend to vote in the upcoming General Election. Appellants' OB, 6. Even if so, Mennella raises his objections to the law as a voter as well, and has declared his intention to vote. Mennella Aff. ¶5, A142.

[7] Defendants cite *Riverfront Hotel LLC*, 213 A.3d at 89, as authority that a Plaintiff does not have standing to bring a case to challenge "lawfulness", but the case they cite has a very narrow ruling, and does not apply generally. Appellants' OB, 6. The

law"[8] as Defendants contend, but allege particular injuries. Vote dilution is a significant issue – one at the core of the American democratic process. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing[.]") (internal citations omitted). To have a vote diluted by an unconstitutional process is serious and an injury particular to that voter.

Turning to the final plaintiff, Defendants argue that "the court erred in finding standing for 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 election process." Appellants' OB, 7-8. Defendants' statement mischaracterizes the court's finding: it was undisputed that although Mennella had not yet been *asked* to serve as an election inspector, based on his sworn statements concerning his experience and previous service, it was likely that he would serve. Op. at 24, n. 78. Defendants did not contest that fact and the court appropriately considered it undisputed. *Id.*

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case deals with a variance granted by the Board of Adjustment and the exact holding is: "Neither the public interest in lawfulness nor an interest in limiting competition is sufficient for zone-of-interests standing in a zoning case." *Riverfront Hotel LLC v. Bd. of Adjustment*, 2019 Del. LEXIS 446, *3, 213 A.3d 89 (Del. 2019). Regardless, Plaintiffs do not simply challenge "lawfulness." They seek redress for injuries.

[8] *See* Appellants' OB, 10, citing *Barry v. Town of Dewey Beach*, 2006 WL 1668352, at *4 (Del. Ch. June 8, 2006). The court in that case did not find standing for the plaintiffs because they did not articulate a particular injury, unlike the instant case.

Defendants do not and cannot dispute the fact that an election inspector has specific duties that will require him to be intimately involved in the election process, which may be marred by an unconstitutional mail-in voting statute. According to the Delaware Code, Inspector Mennella, and no one else, "mak[es] the proclamation that the election is open." 15 *Del. C.* § 4931. Mennella faces severe penalties for violating Delaware law or not complying with his official duties as an inspector of elections. *See* 15 *Del. C.* §§ 5112, 5126. Mennella shall be deemed to have knowingly and willfully violated his official duty if he does not fulfill each of the prescribed duties of an inspector. *See* 15 *Del. C.* §§ 5133, 5130. If Inspector Mennella "induces or attempts to induce any election officers to violate any of the provisions of this title whether or not such election officers violate or attempt to violate any of such provisions shall be imprisoned not more than 5 years." 15 *Del. C.* § 5125.

The conflict between the election processes in the new statutes and the Delaware Constitution present a real dilemma for Mennella, who faces serious consequences if he chooses incorrectly. Just as the creditors in *Burkhart v. Genworth Fin., Inc.* were not "'required to stand by helplessly until a distant maturity date arrives while his debtor is fraudulently depleted of all assets,'" 250 A.3d 842, 855, (Del. Ch. 2020), an election inspector has standing to bring suit before he is asked to open the polling place prior to Election Day to unconstitutional processes.

Finally, Defendants also take issue with the doctrine of standing articulated in *In re Del. Pub. Schs. Litig.* Appellants' OB, 8-10. Defendants assert that the Chancery Court "waived longstanding requirements for standing to permit Plaintiffs to challenge the Vote-By-Mail Statute" by adopting "public interest standing." Op. at 10. To be clear, the trial court did heavily rely on *In re Del. Pub. Schs. Litig.*, 239 A.3d at 512-513, a case that succinctly articulates Delaware's doctrine of standing and the historical jurisprudence on the matter. That case found that "a suitable plaintiff" can "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." 239 A.3d at 512-513. That is precisely the factual and legal scenario presented in this case.

Such a finding is hardly an adoption of a "novel" doctrine, as Defendants suggest, but is consistent with Delaware precedent. The court's finding still required a "suitable plaintiff" – one with an injury within the zone of interest – and was in complete accord with the decision of this Court in *Dover Historical Society*, which reversed the Superior Court and held "the landowner/residents in the Historic District of Dover have an enforceable right in the 'aesthetic benefit' derived from the Historic District as a whole." *Dover Historical Society,* 838 A.2d at 1114.

As the trial court stated, "Given Delaware's willingness to recognize standing in cases involving public issues that affect all citizens, it is reasonable to conclude

that public interest concerns are relevant factors in deciding whether an individual citizen has established an injury in fact." Op. at 30. Indeed, the holding was the following:

> Plaintiffs' concerns raise more than voting dilution. They strike at the voting right itself. Plaintiffs, like all voters, have a right to participate in free and fair elections under which all votes legally made – and only votes legally made—count. Regardless of how laudable the purpose behind the Vote-by-Mail Statute may be, the statute cannot introduce into the General Election votes prohibited under the Delaware Constitution. Plaintiffs adequately allege that it could. Accordingly, they have stated an injury in fact.

Op. at 31.

The fact that Defendants do not think, apparently, that the plaintiffs in *In re Del. Pub. Schs. Litig.* had a concrete and particularized injury within the zone of interest, and thus the finding of standing in that case was based only on a brand-new standing doctrine, is immaterial to this case. Here, as articulated above, Plaintiffs face particularized and imminent injuries. The fact that the law being challenged is one of grave public interest only heightens the injuries Plaintiffs will incur. The injury is the loss of political participation in the democratic process – either due to vote dilution, a loss of a political campaign, or penalties incurred for upholding the constitution as an election inspector. There can be no greater injury than to infringe these fundamental rights.

II. HIGGIN AND MENNELLA HAVE STANDING TO CHALLENGE THE SAME-DAY REGISTRATION STATUTE.

A. Question Presented

While the Court simply assumed standing, is there sufficient evidentiary support in the record to find that Higgin and Mennella had standing to challenge the Same-Day Registration Statute?

B. Scope of Review

As stated above, the Supreme Court reviews rulings of law implicating standing *de novo*. However, the Court has exercised restraint in the review of lower court findings, and given deference to findings of fact and law that are supported by the record below. *Rosenbloom v. Esso V.I., Inc.*, 766 A.2d 451, 458 (Del. 2000). The "standard of review as to findings of facts and conclusions of law of the Court of Chancery permits reversal only if there be no substantial evidence to support such ultimate findings so as to demonstrate them to be 'clearly wrong.'" *Warren v. Goldinger Bros., Inc.*, 414 A.2d at 509.

C. Merits of the Argument

Both Higgin and Mennella have unique interests in this case. As previously mentioned, Mennella is a registered voter and resident of Newark, Delaware, and has served as an inspector of elections for the Delaware Department of Elections ("DOE") in at least eight elections during the last five to six years. Mennella Aff.

¶4, A142. Mennella plans to serve as an inspector of elections at the 2022 General Election and at other future elections. *Id.* at ¶5.

The "inspector of elections" is an "election officer" appointed by the DOE.[9] 15 *Del. C.* § 4702; 15 *Del. C.* § 101(9). The Delaware Code sets forth Mennella's duties and responsibilities. Of primary importance is Mennella's responsibility for preparing his polling place for the election and declaring it open for voting. 15 *Del. C.* § 4912; 15 *Del. C.* § 4931. Mennella is also authorized to determine voter eligibility in his polling place, 15 *Del. C.* § 4938, and hears voter challenges, 15 *Del. C.* § 4937(c). As previously mentioned, Mennella faces severe penalties for violating Delaware law or not complying with his official duties as an inspector of elections.

The Delaware Code outlining the responsibilities of election inspectors was not updated to accommodate the voting processes set forth in the new statutes and in Commissioner Albence's affidavit submitted to the trial court. Under 15 *Del. C.* § 4938, Mennella and the other election officers "shall only admit to a voting machine a person whose name appears on the poll list, who is authorized to vote by the department of elections or who is authorized to vote by court order." However,

[9] The Court of Chancery referred to Mennella as a voluntary officer, but in fact he is compensated for his duties. Working at the Polls, https://elections.delaware.gov/information/electionofficers.shtml (last accessed Sept. 28, 2022).

under the new statute there will not be a set poll list, since the new statute allows people to register up to and on the day of the election. 15 *Del. C.* § 2036.

Absent relief, Inspector Mennella must open his polling place, thereby permitting election-day registration to occur. In other words, by simply carrying out that statutory duty, Inspector Mennella will allow the election to occur under circumstances he believes are unconstitutional. Although he must swear to comply with Delaware's laws, Inspector Mennella cannot simultaneously honor Delaware's Constitution and these conflicting statutes. His injuries are self-evident and sufficient to confer standing. While Mennella may incur *additional* injuries through his likely mandatory duty to oversee and participate in the registration of voters on Election Day, it is not necessary to establish those duties and attendant injuries with precision to find Mennella has standing.

Higgin is a political candidate whose political future is dependent on the election. He is "very interested in ensuring that the election of November 8, 2022 is conducted in accordance with the laws of Delaware, including the Delaware Constitution." Higgin Aff. ¶ 8, A147. He wants "a fair election and all votes made and tabulated in [his] race to be done in accordance with the law." *Id.* at ¶ 9.

An active campaigner, "[i]t is critical for [him] to know who is registered to vote so [he] can best use [his] time and resources to provide those voters with information about [his] platform and candidacy." Higgin Aff. ¶ 7, A147. Without

a set registration deadline like the Delaware constitution prescribes, he will not have a set list of potential voters to target, and thus will have no guidance on how to use his valuable time and resources. Further, if the Same-Day-Registration law were to stand, the Department of Elections will not have the opportunity to determine the eligibility of a voter before their vote is cast. Once the vote is cast, there is no remedy for Higgin to challenge that vote. Higgin will very much be affected by the new statute.

III. THE VOTE-BY-MAIL STATUTE CONFLICTS WITH THE DELAWARE CONSTITUTION ART. V, §4A AND ART. V, §1.

A. Question Presented

Whether the Vote-by-Mail Statute, 83 *Del. Laws.* ch. 353 codified at 15 Del. C. §5602A *et. seq.*, conflicts with the Delaware Constitution.

B. Scope of Review

This Court "reviews the Court of Chancery's decision to grant summary judgment *de novo*." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020). "Where, as here, the only issues in contention are interpretations of statutory or constitutional language—both of which are questions of law—summary judgment is appropriate." *Republican State Comm. v. State*, 250 A.3d 911, 916 (Del. Ch. 2020); *see also* Ct. Ch. R. 56(c).

C. Merits of Argument

Joining with a sentiment that has become nationally fashionable, the Delaware General Assembly passed a statute that would allow no-excuse vote-by-mail in Delaware. 83 *Del. Laws* c.353. codified at 15 *Del. C.* 5601A, *et seq*. This was done after years of pursuing a constitutional amendment that would permit vote-by-mail. The General Assembly recognized, as this Court should also, that an amendment is necessary to lawfully permit vote-by-mail in our state. Delaware law, court precedent and the Delaware Constitution itself so require such an amendment.

The court correctly ruled that the Vote-By-Mail statute is unconstitutional. The court properly relied on relevant Delaware caselaw, and understood it was *not* "writing on a blank slate."[10] Op. at 73. The Court's conclusion that prior cases and the Delaware Constitution itself required voting in-person, unless the voter met one of the valid excuses enumerated in Article V, §4A is fully supported.

Defendants blithely state that long-standing Delaware court precedent should be disregarded or overruled, and that this Court should adopt the analysis and reasoning of decisions from states that have different constitutions and differing legislative and legal precedent.

1. The General Assembly is Constrained by the Constitution.

While the Delaware General Assembly has broad legislative authority, it is limited by the Delaware Constitution.[11] *See Collison v. State*, 2 A.2d 97, 100 (Del. 1938) ("the legislative power is as broad and ample in its omnipotence as sovereignty itself, except in so far as it may be curtailed by constitutional restrictions express or necessarily implied"). When a Delaware statute conflicts with the Constitution of Delaware, the Constitution controls. *See, e.g.*, *State ex rel. Southerland v. Hart*, 129

[11] Federal law may also limit legislative authority. *See League of Women Voters of Del., Inc. v. State Dep't of Elections*, 250 A.3d 922, 925 (Del. Ch. 2020) ("The General Assembly's authority is not without limits, however. For instance, some areas have been ceded to, and preempted by, the Federal Government.").

A. 691, 694 (Del. Super. Ct. 1925) ("Nor can there be any doubt that if there is a conflict between the Constitution and the statute the former must control."); *In re Opinion of Justices*, 575 A.2d 1186, 1188 (Del. 1990) ("… when an amendment to the Delaware Constitution conflicts with a pre-existing statute, the amendment to the Constitution is controlling."); *Evans v. State*, 872 A.2d 539, 553 (Del. 2005) ("'[I]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.'") (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

The broad power of the General Assembly does not extend to lawmaking that interferes with the Constitution. The Court properly determined that the Vote-by-Mail statute conflicts with the Delaware Constitution because it "vastly expands the categories of such voters and, as such, is inconsistent with the Constitution." Op. at 60. Similarly, in a previous Court of Chancery decision, the Court noted that "absent some other authority, Article V, Section 4A prohibits the General Assembly from allowing general absentee voting…" *See Republican State Comm. v. State*, 250 A.3d 911, 918 (Del. Ch. 2020).

2. Vote-By-Mail is Absentee Voting.

There are two types of voting – in-person and *in-absentia.* Defendants' attempt to make a distinction between a voter's *inability* to appear in-person to vote and their *unwillingness* to appear in-person falls flat and is absurd. Appellants' OB, 20-21. Whether by choice or by circumstance, if a voter does not appear in-person

to vote, the voter is an absentee voter. If the voter is an absentee voter, Section 4A applies. The court properly found that vote-by-mail is absentee voting, and that it "cannot adopt a distinction that is contradicted by Delaware law and, frankly, common usage." Op at 61.[12]

The court correctly understood that the "constitutional fulcrum on which validity and invalidity turns is whether or not the voter is required to appear at the polling place and not simply how a vote is cast." Op. at 62.

The Court correctly identified that voting by mail is absentee voting:

> "Under this reading of the case law, if both Section 4A and the Vote-by-Mail Statute enable citizens to vote without appearing in-person, and the Vote-by-Mail Statute is unlimited as to such eligibility, then the Vote-by-Mail statute necessarily would paint over the specific categories of eligible citizens enumerated in Section 4a. In short, permitting widespread voting by mail would-*regardless of whether you call it absentee voting, mail-voting or something else*-improperly render Section 4A surplusage under *Lyons, Harrington* and *Opinion of the Justices."*

Op. at 62 (emphasis added).

[12] The opinion cites to the Court's use of the terms "mail in voting" and "absentee voting" interchangeably. "As signed into law by Governor John Carney on July 1, 2020, the Vote By Mail Statute amends Title 15 of the Delaware Code to allow voters who would not meet the usual requirements for absentee voting to vote by mail." *Republican State Comm*., 250 A.3d at 915.

Contrary to the assertion by the Defendants, vote-by-mail is *not* functionally distinct from absentee voting and the court was absolutely correct to analyze the statute under Section 4A.

3. Universal Vote-by-Mail Requires A Constitutional Amendment.

The court found that "the plain text of Article V, Section 4A does not clearly and convincingly reflect a prohibition on expanding the categories of permitted absentee voting [by the General Assembly]" Op. at 70. In fact, since Section 4A was added to the Delaware Constitution in 1943, the General Assembly has, *by constitutional amendment*, added to the list of reasons a voter might be eligible to vote absentee.

> "In 1977, the section was amended to permit persons absent from their district because of vacation to use absentee ballots. In 1983, a person unable to attend the polls because of the tenets or teachings of his or her religion was also permitted to use an absentee ballot. In 1993, the spouse and dependents of those in service of the state or of the United States were also granted the right to vote by absentee ballots."

See Randy J. Holland, *The Delaware State Constitution*, 216 (2d ed. 2017).

The clear and unequivocal understanding of the General Assembly, based on the same analysis and reasoning that guided the court in this and the previous matter, is that a constitutional amendment is required to permit anyone other than those specified to vote remotely, i.e., by mail.

a. Passage of a Statute to Allow Vote-By-Mail was Intended to Circumvent the Constitutional Amendment Process.

The constitutional amendment process is not simple by design. The framers understood that the Delaware Constitution was going to be the basis of laws for centuries to come. Understanding that times would change and that changes might be necessary, they created a system to amend the constitution in Article XVI, §1. The Delaware Supreme Court has called this process "a very 'special' power." *State v. Bender*, 293 A.2d 551, 554 (Del. 1972).

The 150th General Assembly completed the first "leg" of an amendment[13] process in 2020 by Zoom. As prescribed by Article XVI, §1, after the first leg is completed,

> "…the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election . . . and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yea and nay vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.

Del. Const. art XVI, §1.

In the 151st General Assembly (the session that just ended on June 30, 2022) both houses heard testimony from attorneys that SB 320 (now codified at 15 *Del. C.*

[13] Del. Const Art. XVI, §1 provides, "Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals..."

5602A et. seq,) was unconstitutional. In the Senate, Senator Bryant Richardson argued that the constitution supersedes all laws and that SB 320 was unconstitutional. 151st General Assembly Senate - 35th Legislative Day Session 2, 11:28:11.

Senator Gay, the bill's primary sponsor, stated the following:

> "Removing absentee balloting from our constitution, I believe, is the right policy and procedure. We need to be able to move swiftly and adeptly as the General Assembly in order to continue to modernize and protect any voting access statutes as they develop over time.
>
> Should the Supreme Court determine at some point related to this bill, or any bill that we pass in our good judgment, that we have exceeded our powers, the Supreme Court will tell us so. Having clarity on that issue is positive for this body, its positive for the voters of Delaware…"

151st General Assembly Senate - 35th Legislative Day Session 2, 11:54:40.

There are several important points in Senator Gay's comments. First, is the admission that removing absentee balloting from the constitution is the right "policy and procedure." In order to remove absentee balloting, an amendment to the constitution is required. This is the sponsor of the bill admitting that the constitution should be amended.

Second, the phrase "we need to able to move swiftly and adeptly…in order to continue to modernize" is clearly a reference to avoiding the amendment process. Indeed, the amendment process requires action by two sessions of the General Assembly so it is anything but "swift." If the General Assembly removes absentee

voting from the constitution by amendment, they would have the ability to control elections statutorily.

Finally, "should the Supreme Court determine…that we have exceeded our powers" confirms that she and other members of the General Assembly were aware of the serious concerns regarding their ability to take this action.

In 2020, when the General Assembly relied on its emergency powers for continuity of government, they had to address the requirement in Del. Const. Art. XVII, § 1 that specifies that in exercising the emergency powers, the General Assembly "shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the General Assembly to do so would be impracticable." Del. Const. art XVII, §1.

In passing HB 346, the General Assembly found that compliance with Section 4A, would be "impracticable" and that, consequently, it was not bound thereby:

> … due to the highly contagious nature of COVID-19 and the need to protect the electors and polling workers …, voting by mail is necessary and proper for insuring the continuity of governmental operations, and to conform to the requirements of Article V, § 4A would be impracticable.

HB 346, Sec. 1(13).

The point is that the General Assembly was cognizant of the requirements on Article V, §4A in 2020 and that they needed to specify why compliance with the requirements of Section 4A was not required.

In 2022, the justifications that were used in 2020 are no longer being used and were ignored. The powers under Article V, §1 were cited. The General Assembly cannot be permitted to circumvent the constitutional amendment process statutorily.

The process to amend the Delaware Constitution is properly and intentionally stricter than that to pass a statute. A statute requires a simple majority in each house, but an amendment requires 2/3 of all members of both houses of the General Assembly. A simple majority vote cannot change the constitution.

In 1966, the Delaware Supreme Court engaged in an analysis regarding whether the Lieutenant Governor was a member of the Senate for the purposes of establishing a quorum and whether, while sitting as the President of the Senate, he or she could cast a tie-breaking vote on roll calls for certain types of resolutions. As part of the analysis the Court discussed the significance of the number of members of the General Assembly needed for particular reasons.

> The Constitutional Debates of 1897 . . . make manifest the strong aversion of the framers of the Constitution to important legislative action by a majority of a quorum of either House. There was, apparently, general dissatisfaction with such practice and procedure then prevailing. Because of the smallness in number of each House, and to insure the expression of the will of the majority of the people of the state and the attendance of the Legislators, the framers of the Constitution resolved to substitute the requirement that the more important legislative functions and decisions be performed and made by a majority *or greater portion*, of all members elected to each House, rather than a quorum as theretofore…Equally deliberate and uniform were the provisions requiring decisions by greater than a majority of the members elected: the expulsion of a member by 'two-thirds of all members elected; to the House involved Art. 2, s 9; the enactment of

> laws relating to certain roads and highways – by 'two-thirds of all members elected to each House, Art. 2, s19…*constitutional amendments – by agreement of 'two-thirds of all members elected to each House' of two consecutive General Assemblies*, Art 16, s.1" (emphasis added).

Opinion of the Justices, 225 A.2d 481, 484 (Del. 1966) (emphasis added).

The framers understood that certain actions taken by the General Assembly should require more votes than a simple majority. Amendments not only take 2/3 of both houses of the General Assembly, they take two sessions. There is a reason for this. "Because constitutional amendments only become effective if two successive General Assemblies vote in favor of them, the electorate has an opportunity to reject a proposed amendment that has been approved by the first General Assembly by engaging with their legislators and, if needed, replacing them with legislators who will vote in accordance with their views." *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 643-44 (Del. 2017). Amending the constitution is plainly a significant act.

b. Delaware Case Precedent

The court acknowledged that there is relevant precedent to which it must adhere. While the Court of Chancery suggested that this Court may conclude that is has grounds to revisit that precedent, Plaintiffs submit that the precedent is consistent with the text of the Constitution, which requires in-person voting. This precedent should therefore be affirmed.

In *State v. Lyons*, the Court "invalidate[d] a vote-by-mail statute adopted by the General Assembly in 1923." Op. at 67. "The court found the absentee ballot laws unconstitutional and held that Section 2 'contemplates and *requires the personal attendance of the voter at the polls* and no power now exists in the Legislature to provide for absentee voting.'" Randy J. Holland, *The Delaware State Constitution* 211 (citing *State v. Lyons*, 5 A.2d 465 (Ct. Gen Sess. 1939)) (emphasis added). The *Lyons* decision relied on the debates of the 1897 Constitutional Convention, namely, a comment by Delegate William Spruance on why a provision for absentee voting was unnecessary:

> "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."

Lyons, 5 A.2d at 502.

In *Walker v. Harrington II,* this Court found that the Soldiers Vote Act was unconstitutional. *See State ex. rel. Walker v. Harrington*, 30 A.2d 688 (Del. 1943). The Soldiers Vote Act, passed in 1898, allowed voters stationed at military encampments to vote. According to the late Justice Randy J. Holland, the question before the Court was "whether the Constitution requires that the polling places for the reception of ballots be located within the geographical and territorial confines of the State of Delaware." Randy J. Holland, *The Delaware State Constitution* 211

(citing *State ex rel. Walker v. Harrington II,* 30 A.2d 688, 691 (Del. 1943)). The Court reaffirmed the constitutional requirement that a voter appear in-person on election day.

It is worthy of note that Section 4A was added by constitutional amendment that same year. The General Assembly, clearly considering the *Lyons* decision from 1939, would have initiated the amendment process even before *Harrington II* was decided in 1943,[14] and included the language "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…" Del. Const Art. V, §4A. In-person voting was expected absent an inability to appear in person for specified reasons.

In 1972, the Governor of Delaware asked the Supreme Court to address the constitutionality of a portion of the absentee voting statute. The Delaware Supreme Court held that the General Assembly has the authority to statutorily provide for absentee voting in primary elections but that there was a limitation on their power as to statutory changes to absentee voting in the General election. *Opinion of the Justices,* 295 A.2d 718 (Del. 1972). The Court held that in *Lyons* and *Harrington II* "the Court found in the Constitution an implied limitation upon absentee voting in general elections." *Id.* at 721. The Court noted that the Constitution was amended shortly after the *Harrington* decision to add Section 4A to Article 4. *Id.*

[14] Because the amendment process implicates two successive legislative sessions.

The Court was also asked "May the General Assembly constitutionally provide by statute for absentee voting by any person in an election other than the general election?" *Id.* at 720. The Court stated:

> The answer . . . lies in the fundamental precept that the General Assembly has all legislative power not expressly or impliedly limited by the Constitution. The "legislative hand is free except as the constitution restrains." *Collison v. State ex. rel. Green,* Del. Supr., 9. W.W. Harr. 4670, 2 A.2d 97 (1938). This is sometimes known as the residual power doctrine.
>
> Accordingly, it is not necessary to find in the Constitution an express grant to the General Assembly of authority to provide for absentee voting **in primary elections**; the inquiry is whether there is any limitation in the Constitution upon the power of the General Assembly to do so. **In the absence of such constitutional limitation,** the power of the General Assembly to provide for absent voting **in primary elections**, as it has done in § 5503, is unquestionable.

Id. (emphasis added).

It is undisputed that *Opinion of the Justices* is the most binding precedent relevant to Section 4A. While the Court of Chancery described the court's instruction as an advisory opinion, it has been far more in practice. This case has been heavily relied upon and has guided the actions of the General Assembly since 1972.[15] The Court opined:

> But there is a caveat as to general elections in this connection: Del. Const. Art. 5, § 4A specifically enumerates the classifications of person eligible to vote by absentee ballot at general elections. We are of the opinion that by expressly including certain classifications, the drafters

[15] In fact, relying on that language, the General Assembly has, in compliance, *amended that section of the constitution* in 1977, 1983 and 1993.

> 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. at 722.

Discussing this case, the preeminent scholar on the Delaware Constitution and former Delaware Supreme Court Justice, Randy J. Holland, stated:

> The General Assembly may not *add or subtract* from the list of classifications. The General Assembly does not have the power to either *limit or enlarge* on the Section 4A absentee voter classifications specified in the Delaware Constitution for general elections.

The Delaware State Constitution at 215 (emphasis added). If the General Assembly wants to increase or decrease the classification of voters that may vote by absentee ballot, it must do so by constitutional amendment. Consistently, the constitutional classifications of absentee voters have been deemed "exhaustive." *Republican State Comm.*, 250 A.3d at 918 (citing *Opinion of the Justices*, 295 A2d 718, 722 (Del. 1972)).

c. Other State Decisions

The Court of Chancery noted that Defendants had to go outside the state to find law that supported their view. *See* Op. at 62 ("Finding Delaware law to be no help, Defendants turn elsewhere."). The Court then addressed two cases cited by the Defendants in which the courts determined that their state constitutions permitted mail-in voting. As the Court also noted, those courts "interpreted their own state

constitutions against the background of different decisional law and legislative amendments." Op. at 63.

Ultimately, the Court correctly held that "*McLinko* and *Mass. Lyons,* are incompatible with currently binding Delaware precedent." Op. at 65. This Court has traditionally, and appropriately, looked outside Delaware for guidance in interpretation of a matter only when there is an open question or an absence of Delaware law on the issue before it. That is not the case here, and the Court should uphold the law and precedent in Delaware.

4. The Vote-by-Mail Statute Violates Article V, Section 1 of the Delaware Constitution.

While not addressed by the lower court, the Vote-by-Mail Statute is also unconstitutional under Article V, § 1.

The Delaware Constitution requires the General Election to be held on one specific day. Del. Const. Art. V, § 1. The Delaware Constitution of 1897—the version presently in effect—provides, "The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot[.]" Del. Const. Art. V, § 1. The Constitution specifies one day for an election to be held. The Vote-by-Mail Statute conflicts with this Constitutional requirement by expanding the administration of the election over multiple days.

In the court below, Defendants argued that "Plaintiffs' argument [that mail-in voting violates the Delaware Constitution] requires intentionally misunderstanding

the meaning of 'election.'" A222. They contend that "an 'election' does not consist solely of the act of voting, but rather consists of 'the combined actions of voters and officials meant to make a final selection of an officeholder."[16] A223. Even if that were true, the statute still contravenes the Constitution because under the new mail-in voting statutes this two-step election process of voting and tallying happens over a period of days, and not on Election Day as prescribed by the Constitution.

Under the newly enacted laws, electors who vote by mail can mail the ballot back to the Department of Elections, deliver it to the Department of Elections, or place it in a secure drop-box. *See* 15 *Del. C.* § 5608. The ballots must arrive at the Department of Elections "before the polls close on the day of the election." *See* 15 *Del. C.* § 5609. Election judges may begin counting ballot envelopes 30 days before the day of the election. *See* 15 *Del. C.* § 5611A. Election judges must also "[t]ally any mail votes that were written-in" at that time, *see* 15 *Del. C.* § 5611A, a point that Defendants neglect to address in their brief, and directly contradicts their argument.

The new mail-in voting statutes thus allow votes to be both cast *and* counted before election day. If the ballot is separated from the envelope before election day, there is no way to know who cast what ballot. Therefore, the voting is completed.

[16] Of course, the need to prepare for election day has been an historical consistency, with ballot preparation and delivery, establishing polling locations and advising voters where they may vote, among other administrative matters. So, the fact that an election requires administration is not a new development that should permit a deviation from the understanding that an election is held on one day.

Under such a process, Delaware's General Election will no longer occur on one prescribed day, as the Constitution requires. It will happen over a longer period, at least 30 days before the day of the election, and votes will even be tallied during that time. Therefore, the mail-in voting statutes do not just institute another "means" or "method" of voting, as Defendants claim. A224. The statutes establish a different *time* at which voters can cast their vote. Such a process is in direct violation of Del. Const. Art. V, § 1.

Defendants also advocated that "the most natural meaning of the election day under Article V, Section I is that it is the day when voting, whether in-person or otherwise, must be completed." A224. However, the Constitution does not say that the election shall be "completed" on one specific day. It says the election shall be "held" on one specific day. Defendants' proffered interpretation finds no support in the Constitution's text. It is, rather, their preferred theory about what the law should be. Yet "no presumption springing from theory may be permitted to override the clear meaning of the written document from which it is drawn." *Du Pont v. Du Pont*, 85 A.2d 724, 728 (Del. 1951). The text "means what it plainly says, no matter what the effect may be. To give it a different meaning would be … judicial legislation." *State ex rel. Southerland,* 129 A. at 694. The import given to Election Day throughout the Constitution demonstrates the elevated status of the day, and further cements the text's plain meaning.

As mentioned *supra*, this Court has traditionally, and appropriately, looked outside Delaware for guidance in interpretation of a matter only when there is an open question or an absence of Delaware law on the issue before it. As the constitutionality of expanding the occurrence of the General Election beyond one day is an issue of first impression, should the Court determine that it should look beyond our borders for guidance, a decision of our neighboring state Maryland, should be considered.

Lamone v. Capozzi, 912 A.2d 674 (Md. 2006), a 2006 decision by Maryland's highest court, is instructive. That court considered whether Maryland's early voting scheme conflicted with the Maryland constitution. *Id*. at 675. The Maryland Constitution, much like Delaware, provided, "'All general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur.'" *Capozzi*, 912 A.2d at 675 (quoting Md. Const. Art. XV, § 7).

In 2006, Maryland's General Assembly enacted early voting statutes, and registered voters challenged the law in court, alleging that the early voting statutes conflicted with the constitutional requirement that voting occur on election day or by absentee ballot. *Capozzi*, 912 A.2d at 680-81. Maryland, like Defendants, argued that early voting was not inconsistent with the constitution because an election consists of "'the combined actions of voters and officials meant to make a final

selection of an office holder.'" *Capozzi*, 912 A.3d at 687. The Court disagreed, finding it "clear" from the Maryland Constitution that the election shall be held "*on*" one specific day, and that "apart from absentee voting, in-person ballot casting must begin and end on the same day. Thus, any statute that allows for a ballot to be cast before the prescribed day must be in derogation of the Constitution." *Id*. at 691.

The Court of Appeals of Maryland ultimately concluded that "[e]arly voting … fundamentally *changes* the very principles established in the Constitution." *Capozzi*, 912 A.3d at 687 (emphasis in original). The same is true here. Delaware law clearly fixes the general election on one specific day. Allowing mail-in voting and tallying some of those votes before Election Day fundamentally changes Delaware's constitutional arrangement in Del. Const. Art. V, § 1 and thus cannot stand. Such actions are clear and convincing evidence of a constitutional violation.

MICHAEL HIGGIN AND MICHAEL MENNELLA'S ARGUMENT ON CROSS-APPEAL

I. THE DELAWARE CONSTITUTION REQUIRES VOTER REGISTRATION TO END AT LEAST TEN DAYS BEFORE THE GENERAL ELECTION.

A. Question Presented

Does Article V, Section 4 of the Delaware Constitution require all voter registration to end at least ten days before the General Election?

B. Scope of Review

This Court "reviews the Court of Chancery's decision to grant summary judgment *de novo*." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020). "Where, as here, the only issues in contention are interpretations of statutory or constitutional language—both of which are questions of law—summary judgment is appropriate." *Republican State Comm. v. State*, 250 A.3d 911, 916 (Del. Ch. 2020); *see also* Ct. Ch. R. 56(c).

This Court also "reviews *de novo* questions of law, including questions of statutory interpretation and constitutional law." *Del. Solid Waste Auth. v. Del. Dep't of Nat. Res. & Envtl. Control*, 250 A.3d 94, 105 (Del. 2021). Interpreting the Delaware Constitution "begin[s] with the text of the Constitution." *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017). The text "means what it plainly says, no matter what the effect may be. To give it a different meaning would be … judicial legislation." *State ex rel. Southerland v. Hart*, 129 A. 691, 694

(Del. 1925). Importantly, and "[o]bviously, no presumption springing from theory may be permitted to override the clear meaning of the written document from which it is drawn." *Du Pont v. Du Pont*, 85 A.2d 724, 728 (Del. 1951). When interpreting the constitution, "[t]he ruling must come from the interrelationship of concepts set forth in the Constitution, the language of the Constitution, and the prior case law that has construed the Constitution." *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 747 (Del. 1982) "[W]henever avoidable, no constitutional provision should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result." *Op. of Justices*, 225 A.2d 481, 484 (Del. 1966).

C. Merits of Argument

The Court of Chancery erroneously interpreted Article V, Section 4 to require only a "*minimum* period of registration": at least two registration days falling within the times specified in Section 4. Op. at 44 (emphasis in original). On this basis, the court concluded that "the Same-Day Registration Statute providing for additional days"—including days *outside* the times specified in Section 4—"would not disturb that constitutionally-protected minimum." Op. at 44.

The court found that the last sentence of the second paragraph of Section 4 "does not … foreclose the possibility of same-day registration." Op. at 44. That sentence provides that "such registration may be corrected as hereinafter provided at any time prior to the day of holding the election." Op. at 44 (quoting Del. Const.

Art. V, § 4). The court concluded that the phrase "'such registration' refers to registrations described in the immediately preceding passage and is silent as to registrations occurring on the day of the general election." Op. at 45. The court remarked that "another reasonable interpretation is that the proviso concerns 'corrections' to registration and is therefore, once again, silent as to registrations that occur for the first time on the day of the general election, as there is nothing to 'correct.'" Op. at 45 n. 150.

Last, the court found that the General Assembly's removal of the phrase "be completed" in 1925 supports and "independently compels the conclusion" that the statute is constitutional. Op. at 48-50. The court acknowledged that "reasonable minds may disagree on these points," Op. at 45, but ultimately found itself compelled by the doctrine of constitutional avoidance to uphold the law.

The court's interpretation is contrary to the constitution's text and intention, as well as precedent. It also results in the unequal and unjust treatment of registered voters, contrary to requirement of "uniform" registration laws, Del. Const. Art. V, Sec. 4, and Delaware Bill of Right's promise of "free and equal" elections. Del. Const. Art. I, Section 3. The court's order should therefore be reversed.

1. History and the Constitution's Text, Context, and Structure Require All Registration Days to Occur Within the Times Fixed by Article V, Section 4.

"Prior to 1897 there was no constitutional provision in this State relating to the registration of voters." *State ex rel. Morford v. Tatnall*, 41 Del. 273, 278 (1941). On June 4, 1897, the Delaware Constitution was amended to add instructions for the General Assembly to "'provide by law for a uniform biennial registration….'" *Id.* (quoting Del. Const. Art. V, § 4 (1897)). The Delaware Constitution of 1897 required that "[s]uch registration shall be commenced not more than one hundred and twenty days nor less than sixty days before and be completed not more than twenty nor less than ten days before such election." Del. Const. Art. V, § 4 (1897). The 1897 version of Section 4 of Article 5 provided further, "Application for registration may be made on at least five days during the said period; provided, however, that such registration may be corrected as hereinafter provided, at any time prior to the day of holding the election."

By constitutional amendment in 1925, the "biennial registrations of voters were no longer required." *Tatnall*, 41 Del. at 278. Instead, the General Assembly was required to "enact uniform laws for the registration of voters in this State entitled to vote…." *Id.* The minimum number of days on which registration must occur was decreased from five to two; however, the time periods during which the registration days may occur remained the same, including the requirement that registration end

not less than ten days before each General Election. The provision permitting correction of registration records at any time prior to Election Day was also retained in the amended constitution.

In other words, the time periods for voter registration presently debated were included in the 1897 constitution—the very first regulation of voter registration in Delaware. Notwithstanding that fact, the court found that the constitution's drafters addressed only the registration days *occurring during the time periods described therein*. Op. at 44. The court incorrectly interprets Article V, §4 to be entirely silent on if and when registration may occur outside those time periods. According to the court's logic, because same-day registration occurs outside the time periods described, it is not prohibited and thus constitutionally permissible. *Id*.

The court's interpretation is not supported by historical practice or Section 4's text, context, and structure, which demonstrate that the drafters intended for all registration to occur within the time periods described, and that all registration—save for correction of records—must end at least ten days before each General Election.

Voter registration laws came into vogue in the 1800s. Daniel P. Tokaji, *Symposium: How We Vote: Electronic Voting and Other Voting Practices in the United States: Voter Registration and Election Reform*, 17 WM. & MARY BILL OF RTS. J. 453, 456 (Dec. 2008). For efficiency, states often designated certain days for

registration and imposed deadlines for voter registration. The Supreme Court of the United States has recognized that "[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud." *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding 50-day registration deadline).[17] In contrast, "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot." *Id*. at 680.

In the very early days of voter registration, officials not only needed time to prepare voter records, but to also delivery them to polling locations. In fact, in 1898, one year after Delaware imposed the first voter registration requirement, the General Assembly passed legislation "concerning the appointment of Registration Officers and the preparation and delivery of Registration Books." *Tatnall*, 41 Del. at 279. Available sources indicate that it was not until 1941 that the General Assembly "provide[d] for a permanent registration of voters, and in connection therewith a Board of Registration for each county…." *Id*. at 284. The need to "prepare adequate voter records and protect its electoral processes from possible fraud" *Marston*, 410 U.S. at 68, also plausibly explains why the 1925 amendments applied the ten-day

[17] According to the National Conference of State Legislatures, thirty states (not including Delaware) impose a registration deadline prior to election day. NCSL, Voter Registration Deadlines, https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx (last accessed Sept. 21, 2022). Each of which is longer than ten days. *See Id*.

cutoff to requests to "strike" ineligible registrants from the registration list. Del. Const. Art. V, Section 4, para. 2.

In light of the available methods of registration, the scarcity of registration officers, and the need to prepare and deliver registration books, in addition to recognized concerns about fraud, it is reasonable to conclude that the drafters of Article V, Section 4 intended for *all* registration to conclude ten days prior to each General Election.

The drafters' temporal specificity, which was carried through successive versions of Article V, Section 4, further supports Higgin and Mennella's interpretation. The drafters defined the time periods for registration with care, providing not just a start and end date, but two separate periods during which registration should occur. The inclusion of a registration cut-off of ten days prior to the election is especially puzzling if the drafters did not consider registration prohibited thereafter, as the court concluded.

Lending further support to this interpretation is the inclusion and retention of the provision permitting correction of registration records at any time prior to Election Day. This opportunity to correct registration records makes little sense if registration can also occur at any time prior to Election Day.

The structure and context of Article V, Section 4 also supports Higgin and Mennella's interpretation. Read holistically, Section 4 is meant to comprehensively

address voter registration, except where the drafters specifically afforded the General Assembly the opportunity to modify the process. The first paragraph of Section 4 makes voter registration mandatory to vote: "no person shall vote at such General Election whose name does not at that time appear in said list of registered voters." Del. Const. Art. V, Section 4, para. 1. The third paragraph of Section 4 describes the policy for granting and refusing registration. Del. Const. Art. V, §4, para. 3. These paragraphs set the framework for voter registration in Delaware, and therefore, when voter registration may occur. When considered in light of historical registration practices, and alongside the remainder of Article V, §4 should be interpreted to mean that all registration must stop at least ten days before the General Election.

2. Precedent Requires That Voter Registration End Prior to Election Day.

In *State ex rel. Walker v. Harrington*, 30 A.2d 688 (Del. 1943), the Supreme Court of Delaware considered the constitutionality of the "Soldiers' Vote Act," which authorized qualified military members "to cast their votes at their place of encampment." *Id*. at 690. Therein, the Supreme Court explained that Section 4 of Article V "provides that all questions of the qualifications of voters should be determined *before election day*, and on that day, beyond the fact of the identity of the persons, the sole ground of challenge should be the violation of said Section 3 of Article V." *Id*. at 691-692 (emphasis added).

The Court of Chancery acknowledged that "[t]here can be no question that this language, at least indirectly, supports the Higgin Plaintiffs' argument." Op. at 46. Yet despite its clear significance to the question presented, the Court effectively disregarded these statements as "dicta." Op. at 46.

Whether these statements are dicta is debatable.[18] The 1943 Supreme Court of Delaware would have been familiar with the voter registration practices occurring at that time and familiar with the 1925 amendments to the Article V, Section 4. Furthermore, *Harrington* dealt with voting rights and so the 1943 Court's interpretation of a constitutional article addressing voter registration cannot easily be dismissed as a mere "passing" reference, Op. at 46, void of due consideration.

Importantly, *Harrington* is neither the first nor last time the courts of Delaware have interpreted Article V, Section 4. *State v. Lyons* involved a motion to quash an indictment against seven individuals alleging conspiracy to abet fraud in connection with absentee voting. 5 A.2d 495 (1939). The court recognized that "the *Constitution* had carefully prescribed for uniform laws for the registration of voters

[18] Not all dictum is the same. "[A] court's 'expression of opinion upon a point in a case argued by counsel and deliberately passed upon . . . though not essential to the disposition of the cause, if *dictum*, is a judicial dictum.' Judicial *dictum* is entitled to much weight and should be followed unless it is erroneous." *Wild Meadows MHC, LLC v. Weidman*, 2020 Del. Super. LEXIS 349, *17 (quoting *Cates v. Cates*, 619 N.E.2d 715, 717 (Ill. 1993)).

with proper provisions for determining that prospective voters duly possess the necessary and prescribed qualifications." *Id*. at 502. The court continued,

> It was provided that all questions of the qualifications of voters should be determined before election day and that on that day, beyond the fact of the identity of the persons, the sole ground of challenge should be the violation of *Article* 5, Sec. 3, as above set out.

Id. The court viewed Article 5, Sec. 3, along with the debates of the 1897 Constitutional Convention, to be "determinative of the present question." *Id*. at 500. The court's statements are thus even less so a "passing" reference to the times for registration than those made in *Harrington*.

The *Lyons* opinion was written by Judge Speakman, who would again interpret Article V, Section 4 seven years later in *Appeal of Brown*, 49 A.2d 618 (Del. 1946), while sitting as the Supreme Court's Resident Associate Judge for New Castle County. *Appeal of Brown* involved an appeal by Thomas Malcolm Brown from the decision of the registration officers in New Castle County in refusing to register him to vote.

The primary grounds for the appeal were that the law upon which Mr. Brown was refused registration was unconstitutional. That challenged law "required him to register his declaration of intent to become a citizen and resident of the State, a year or more before the General Election." *Appeal of Brown*, 49 A.2d at 621. The court thus confronted head-on the question of when registration may occur under the Constitution of Delaware.

Distinguishing out-of-state precedent, the court conclusively established that all times for registration are fixed by the Constitution of Delaware.

> I am unwilling to accept the Pope case as an authority, principally, because neither in the pertinent section (Article 1, Section 5), or elsewhere in the Maryland Constitution, is the General Assembly required to fix any period prior to the election within which qualified voters shall register. The right to fix the days for registration is left, without any restriction, to the General Assembly. **This is not true of the Delaware Constitution.** In it, Article V, Section 4, provides that
>
> "There shall be at least two registration days in a period commencing not more than one hundred and twenty days, nor less than sixty days before, and ending not more than twenty days, nor less than ten days before, each General Election, on which registration days persons whose names are not on the list of registered voters established by law for such election, may apply for registration, ***."

Id. at 619 (quoting Del. Const. Art. V, Sec. 4) (emphasis added).

The court provided even more clarity, explaining,

> To register, he has the constitutional right to apply on one of the days **fixed by law**, to the registration officers of his election district, and **no one of these days can, by constitutional provision, be more than one hundred and twenty days before the General Election**.

Id. Because that "is exactly what the statute in question attempts to do," it was held unconstitutional. *Id*. at 621.

The court in *Appeal of Brown* invalidated the General Assembly's attempt to enact "a registration law" that required voter registration to occur outside the time periods described in Article V, Section 4. 49 A.2d at 621. *Appeal of Brown*

demonstrates that Article V, Section 4 provides an implied limitation on the General Assembly's legislative power, contrary to the court's holding in this case. Op. at 44-45. Because the Same-Day Registration Statute similarly provides for voter registration outside Section 4's fixed time frames, it too violates the Constitution.

3. Interpreting Article V, Section 4 to Apply Only to Registrations Accomplished Within the Time Frames Described Produces an Unequal, Nonuniform, and Irrational Result.

The Constitution of Delaware promises "free and equal" elections, Del. Const. Art. I, Sec. 3, and to that end, requires "uniform" voter registration laws," Del. Const. Art. V, Sec. 5, para. 1. Under the court's interpretation of Article V, Section 4, the Same-Day Registration Statute runs afoul of these constitutional requirements. Furthermore, "whenever avoidable, no constitutional provision should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result." *Op. of Justices*, 225 A.2d 481, 484 (Del. 1966). Yet the court's interpretation also does precisely that.

The court found that Section 4's provision that "such registration may be corrected as hereinafter provided at any time prior to the day of holding the election," Del. Const. Art. V, § 4, "does not … foreclose the possibility of same-day registration." Op. at 44. The court concluded that the phrase "'such registration' refers to registrations described in the immediately preceding passage and is silent as to registrations occurring on the day of the general election." Op. at 45. The court

determined that "another reasonable interpretation is that the proviso concerns 'corrections' to registration and is therefore, once again, silent as to registrations that occur for the first time on the day of the general election, as there is nothing to 'correct.'" Op. at 45 n. 150.

If the court is correct, then Delawareans who register to vote during the time periods Section 4 describes may correct "such registration" records at any time "prior to" election day, but not *on* Election Day. In contrast, individuals who do not register to vote may establish an entirely new registration record *on* Election Day.

"To be uniform a law for the registration of electors must of necessity be general. 'General' and 'uniform' as applied to laws have a well defined and generally accepted meaning as antithetical to 'special' or 'discriminatory.'" *Tatnall*, 41 Del. at 281 (quoting *In re Nowak*, 184 Cal. 701, 195 P. 402 (1921)). "A law is general and uniform if all persons in the same circumstances are treated alike." *Tatnall*, 41 Del. at 281.

The scheme that results from the Court of Chancery's interpretation is not "uniform" because it discriminates against Delawareans who choose to register before Election Day. In short, all Delawareans are not "treated alike." *Tatnall*, 41 Del. at 281.

It makes no difference that the Same-Day Registration Statute authorizes the Department to "process registration applications that change a registrant's address

or name until the day of any presidential primary, primary, special, or general election," 15 *Del C.* § 2039, because the court held that the Constitution confines the correction of Section 4-registrations to the days "prior to" Election Day. Said differently, if the constitution regulates when certain registration records can be corrected—as the court held—the General Assembly cannot change those regulations by statute.

The drafters of Article V, §4 did not intend the irrational and unequal voter registration scheme that results from the court's interpretation. "[T]he law favors rational and sensible construction." *Hunt v. Div. of Family Servs.*, 146 A.3d 1051, 1063 (Del. 2015). "[U]nreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Here, the "reasonable result" is the one that treats all Delawareans alike.

4. Higgin and Mennella's Interpretation Does Not Call Into Question the Constitutionality of Other Voter Registration Laws.

The court felt that any alternative interpretation of Article V, Section 4 would require the court to invalidate statutes that control "when individuals can *begin* registering[.]" Op. at 47. That is not entirely true. Registration for federal elections is controlled by federal law, which is superior to conflicting state law. *See Arizona*

v. Inter Tribal Council of Arizona, 570 U.S. 1, 9 (2013). The federal National Voter Registration Act ("NVRA") requires Delaware and most other states to provide for voter registration at motor vehicle offices. 52 U.S.C. § 20504(a)(1). Motor vehicle offices must accept such registrations up to the deadline "provided by state law" (ten days before the election in Delaware). 52 U.S.C. § 20507(a)(1)(A). No Delaware law, including the constitution, can override federal law with respect to when registration can begin.[19]

Regardless, the fact that an interpretation of the constitution might invalidate additional legislation is not a reason to save a plainly unconstitutional law, especially when the interpretation is consistent with this Court's precedent.

5. The 1925 Amendments to Article V, Section 4 Do Not Change the Outcome.

In 1925, Article V, Section 4 was amended to remove the requirement for biennial registration. 34 Del. Laws ch. 1 (1925). The General Assembly also revised the text of paragraph 2. Prior to these amendments, paragraph 2 read, in relevant part:

[19] There is no conflict between federal law and Delaware law with respect to when voter registration must end. States cannot set a deadline of more than thirty (30) days but may set a shorter deadline. 52 U.S.C. § 20507(a)(1)(A); *see also* U.S. Department of Justice, Questions and Answers No. 27, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra ("States can set a voter registration deadline for federal elections shorter than 30 days, and a number of States do so, but cannot set a longer deadline.").

> Such registration shall be commenced not more than one hundred and twenty days nor less than sixty days before and be completed not more than twenty nor less than ten days before such election.

Del. Const. Art. V, Sec. 4 (1897). After the amendments took effect, paragraph 2 read, in relevant part:

> There shall be at least two registration days in a period commencing not more than one hundred and twenty days, nor less than sixty days before, and ending not more than twenty days, nor less than ten days before, each General Election, on which registration days persons whose names are not on the list of registered voters established by law for such election, may apply for registration[.]

Del. Const. Art. V, Sec. 4 (1925).

To be sure, the phrase "be completed" was struck by the 1925 amendments. It was, however, replaced with the word "ending." The words "be completed" and "ending" modify the same phrase and as used here, have the same meaning and effect: voter registration must stop "not more than twenty days, nor less than ten days before, each General Election." The 1925 amendments thus effect no substantive change in the time for registration fixed by the constitution.

CONCLUSION

No matter their propriety, the recently passed mail-in voting and registration deadline laws conflict with the Delaware Constitution and must be declared invalid. For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the Court of Chancery's rulings on standing and mail-in voting, and overturn its ruling on same-day registration.

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Respectfully submitted,

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