



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.

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.

No. 342, 2022

On Appeal from the Court of
Chancery of the State of
Delaware

C.A. Nos. 2022-0641-NAC and
2022-0644-NAC

**BRIEF OF AMICUS CURIAE JUDICIAL WATCH, INC.
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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IDENTITY AND INTERESTS OF AMICUS CURIAE¹

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch files amicus curiae briefs in cases involving issues it believes are of public importance, including cases involving the proper interpretation of federal election statutes. *See, e.g.*, Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Appellants, *Gill v. Whitford*, No. 16-1161 (partisan gerrymandering claim under the First and Fourteenth Amendments); and Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Appellants, *Rucho v. Common Cause*, No. 18-422 (same).

Amicus curiae have an interest in the proper interpretation of constitutional provisions as it relates to state election law. Counsel for amicus have litigated a wide range of voting and election cases in both federal and state court, such as a recent successful challenge to Maryland’s 2021 congressional redistricting maps as an unlawful partisan gerrymander in violation of the Maryland State Constitution. *See*

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

Mem. Opinion and Order, *Parrott v. Lamone*, No. C-02-CV-21-1773 (Md. Cir. Ct. March 25, 2022). Amicus respectfully submits that the Delaware General Assembly likewise exceeded its state constitutional authority when it passed the vote-by-mail legislation at issue in the case. Amicus writes to highlight the dangers of absentee voting and the importance of having election regulations properly enacted in accordance with state and federal law. Adhering to bedrock constitutional principles—like prohibiting impermissible legislative amendments to the constitution—prevents long term damage to democratic principles for the sake of short-term gains. Moreover, adhering to such principles promotes public trust and upholds the legitimacy of electoral outcomes. This is critical no matter how well-intended the election regulation in question.

For this reason, amicus respectfully request that this Court affirm the Chancery Court’s order and enter judgment in favor of Plaintiffs-Appellees.

INTRODUCTION

This case concerns the constitutionality of two state laws passed by the Delaware General Assembly, which afford every voter the opportunity to vote by mail and register to vote up to the day of the general election. While the Court of Chancery below correctly found that the Plaintiffs-Appellees had standing under Delaware state law, it did so without expressing an opinion with respect to their standing rights under federal law, which Delaware state courts sometimes follow.

Amicus respectfully submit that Plaintiffs-Appellees have standing under both state and federal law. Based on the principles outlined by federal courts in voting cases involving vote dilution and rights of candidates to stand for office, it is clear that Plaintiffs-Appellees have also sufficiently showed injuries that would satisfy the federal law standard.

The Delaware Constitution expressly limits absentee voting to a certain limited category of individuals. It does not allow for the General Assembly to enlarge this category or add new sets of individuals by legislative act. This is for good reason. Absentee and mail-in voting is prone to fraud and illicit activity, as the courts have acknowledged over the years. The Court should be mindful of the pitfalls of absentee voting and how the Delaware Constitution provides a check on the legislative branch to ensure the integrity of Delaware elections when evaluating Defendants' arguments in this case.

ARGUMENT

1. Delaware State Courts Generally Follow Federal Courts In Evaluating Standing.

Though the issues in this case involve state statutory and constitutional challenges, federal standing principles in the voting context are relevant since the “standards for evaluating standing to sue in federal court are ‘generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware.’” *Higgin v. Albence*, 2022 Del. Ch. LEXIS 232, at *23 (Del. Ch.

Sept. 14, 2022) (quoting *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1111 (Del. 2003)). Moreover, as the lower court noted, Defendants almost exclusively rely on federal law to argue that Plaintiffs-Appellees lack standing here. *Id.* at *22 (citing Defs.’ Opening Br. in Supp. of Mot. for Summ. J. at 18-19). While the court was correct to note that Delaware state law affords broader standing rights to plaintiffs than federal law, the Plaintiffs-Appellees here as voters and candidates for office would satisfy even the more demanding federal test.

A. Federal Courts Recognize Injuries Beyond the Right of Suffrage to Voters and Candidates for Office.

The “right to vote is ‘individual and personal in nature.’” *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). “Thus, ‘voters who allege facts showing disadvantage to themselves as individuals have standing to sue’ to remedy that disadvantage.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). And the “‘right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Reynolds*, 377 U.S. at 555); *Reynolds*, 377 U.S. at 555 n.29 (“[T]he right to have the vote counted” means counted “at full value without dilution or discount.” (quotation marks omitted)). *See also Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999); *Gill*, 138 S. Ct. at 1929-30; *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam).

Federal courts have recognized burdens on the right to vote that do not directly affect a voter's ability to cast a ballot. The "right of suffrage can be denied by a debasement or dilution of ... a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Judicial Watch v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) (quoting, *inter alia*, *Reynolds*, 377 U.S. at 555); *Libertarian Party of Ind. v. Marion Cnty. Bd. of Voter Registration*, 778 F. Supp. 1458, 1463 (S.D. Ind. 1991) (restricting party's access to voter registration list burdens "members' freedom to associate to express their views to the voters and the voters' ability to express preferences in light of the political views"); *see also U.S. v. Saylor*, 322 U.S. 385, 386, 389-90 (1944) (upholding a charge that stuffing a ballot box injured citizens "in the free exercise" of their "rights and privileges," which included the right "to have their votes ... given full value," unimpaired by unlawful votes); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (voters' constitutional rights violated if congressional districts have unequal populations, diluting the weight of the voters' lawfully cast votes in districts with greater population counts).

Likewise, a candidate's constitutional right to stand for office is not limited to whether the voting regulation restricts the candidate's ability to run. Federal courts have found that a burden on a candidate's rights is also a burden on a voter's right to freely associate and express political preferences. *See e.g., Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Nader v. Keith*, 385 F.3d 729,

737 (7th Cir. 2004) (“the right to stand for office is to some extent derivative from the right of the people to express their opinions by voting.” (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986))). And there is a long history of candidate standing to bring their claims regarding federal elections. *See generally* George W. McCrary, *A Treatise on the American Law of Elections*, (Henry L. McCune eds. 4th ed. 1897); and J. Harris, *Election Administration in the United States* (1934). In essence, aggrieved candidates in federal elections have standing to bring a federal lawsuit in federal court to hear claims regarding violations of federal law. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Bush*, 531 U.S. 98; *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

B. Plaintiffs-Appellees Have Sufficiently Shown an Injury for Purposes of Standing.

The uncontested facts below show that Michael Higgin is a registered voter and resident of Bear, Delaware and has filed as a candidate for state office as State Representative in District 15 of Delaware. Higgin Aff. ¶ 3-4. As a candidate for state office, Mr. Higgin is actively campaigning, fundraising, meeting with voters, and distributing campaign literature on a daily basis. *Id.*, ¶ 6. The new mail-in voting law which drastically expands the number of voters who are now eligible for mail-in voting makes Mr. Higgin’s right to campaign and stand for office more burdensome as the pool of voters to reach is substantially greater. These are sufficient injuries for

candidates and electors to challenge voting regulations which make their campaigns more burdensome and costly. *See Nader*, 385 F.3d at 737 (“the right to stand for office is to some extent derivative from the right of the people to express their opinions by voting.”) (citation omitted); *Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020) (electors “raising their own rights as candidates in the Minnesota general election,” have prudential standing to challenge the Minnesota Secretary of State’s “usurpation of its constitutional right under the Elector Clause” when the Secretary altered the ballot receipt deadline).

2. Mail-In Voting Is Susceptible to Fraud and Abuse.

A. Courts and Delaware’s Constitution Have Long Recognized the Risk of Mail-In Voting.

While mail-in balloting can increase a voter’s opportunity and participation in the democratic process, it can also be highly susceptible to fraud and abuse. As the “Seventh Circuit once observed: Voting fraud is a serious problem in U.S. elections generally ... and it is facilitated by absentee voting.” *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 153 (5th Cir. 2020) (Ho, J., concurring) (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *see also Veasey v. Abbott*, 830 F.3d 216, 256 (5th Cir. 2016) (en banc) (“the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting”).

Indeed, state and federal officials have universally acknowledged the existence of the threat of fraud due to mail-in voting. *See Adam Liptak, Error and*

Fraud at Issue as Absentee Voting Rises, N.Y. Times (Oct. 6, 2012), <https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html> (Mail-in voting fraud “is vastly more prevalent than the in-person voting fraud that has attracted far more attention, election administrators say”). “Voting by mail is ... problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner.” *Id.*

Fraud perpetuated through “absentee ballots” reveal “that not only is the risk of voter fraud real but that it could affect the outcome of a close election.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008). In Indiana, for example, a trial court ordered a special election in a local race when one candidate “paid supporters to stand near polling places and encourage[d] voters” many of whom “were poor, infirm, or spoke little English—to vote absentee.” *Id.* at 196 fn. 13 (citing *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004)). The candidate’s supporters “asked the voters to contact them when they received their ballots” and “assisted the voter in filling out the ballot.” *Id.*; see also *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2348 (2021) (“Fraud is a real risk that accompanies mail-in voting,” which “invalidated the results of a 2018 [North Carolina] race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots”); *Griffin*, 385 F.3d at 1130-31 (noting Illinois’ “particularly gamey history” of election

fraud “facilitated by absentee voting” (citing, *inter alia*, John C. Fortier & Norman J. Ornstein, “Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform,” 36 U. MICH. J.L. & REFORM 483 (2003))).

Delaware’s Constitutional structure accounts for the risks associated with mail-in balloting. Article V, Section 4A provides a “list of six reasons for absentee voting,” which is “exhaustive.” *Higgin*, 2022 Del. Ch. LEXIS 232, at *9 (citing 82 Del. Laws ch. 245, § 1 (2020)); *see also Opinion of the Justices*, 295 A.2d 718 (Del. 1978). The Delaware Constitution and precedent allow absentee and mail-in voting in only the following instances: when in public service to the United States or the State of Delaware, due to illness or disability, by reason of absence while on vacation, due to religious tenets or teachings, and due to emergency declaration by the General Assembly in response to an ongoing pandemic. *See* Del. Const. Art. V, Section 4A; *Republican State Comm. of Del. v. Dep’t of Elections*, 250 A.3d 911, 914 (Del. Ch. 2020). These provisions “direct the General Assembly to enact laws permitting absentee voting in certain cases” and “to take all possible precaution against fraudulent abuse of the privilege” of absentee voting. *State ex rel. Smith v. Carey*, 49 Del. 143, 146 (1955). Without amending the Delaware Constitution, any legislative act by the General Assembly to expand absentee voting beyond these requirements is *per se* invalid.

B. State Courts Long Ago Recognized They Must Sometimes Intervene to Protect State Constitutions from Legislative Efforts to Bypass Express Provisions.

The desire of state legislatures to extend remote franchise at expense of state constitutions has a long history. This issue first arose when states began experimenting with absentee voting during the Civil War. *See generally* Josiah Henry Benton, VOTING IN THE FIELD, 3-14 (1915), available at <https://bit.ly/3P4OQaq>. The most prominent episode occurred in Pennsylvania, which the Pennsylvania Supreme Court resolved in *Chase v. Miller*, 41 Pa. 403 (1862). *See also* Benton at 189-233. *Chase* involved a dispute following a local election after the losing candidate challenged the decision to count ballots cast by soldiers in the field. *Chase*, 41 Pa. at 414. The candidate based his challenge on the fact that the state constitution required all voters to cast their ballots in their respective election districts and that soldier's ballots were casts outside the soldiers' district. *Id.* The lower court rejected the challenge, upholding the decisions to count the soldiers' ballots because they complied with the state's absentee voting statute. *Id.* 414-17. However, the Pennsylvania Supreme Court reversed the trial court's ruling on appeal, declaring the losing candidate the winner. *Id.* at 428-29. In doing so, the Court explained that the "right of suffrage is carefully preserved for [all], to be enjoyed when we return to the places which the constitution has appointed for its exercise." *Id.* at 427.

Reflecting on criticisms that would follow a ruling that limited the ability of soldiers to vote, the Court wrote “[o]ur business is to expound the constitution and laws of the country as we find them written. We have no bounties to grant to soldiers, or anybody else.” *Id.* at 428. The court drew resolve from the soldiers in the field, explaining “[w]hilst such men fight for the constitution, they do not expect judges to sap and mine it by judicial constructions.” The court concluded by soberly explaining that its oath prohibited it from adopting a construction that would destroy the right of free and honest suffrage:

Finally, let it be said that we do not look upon the construction we have given the constitutional amendment as stringent, harsh, or technical. On the contrary, we consider it the natural and obvious reading of the instrument, such as the million would instinctively adopt. Constitutions, above all other documents, are to be read as they are written. Judicial glosses and refinements are misplaced when laid upon them. Carefully considered judicial implications may indeed be made from them in support of statutes—never to defeat statutes—when such implications are grounded in the constitution itself, and tend to accomplish its obvious purposes, as well as to promote the public welfare. *But when asked to set up a construction that opposes itself to both the letter and the spirit of the instrument, and which tends to the destruction of one of our fundamental political rights—that free and honest suffrage on which all our institutions are built—this court must say, in fidelity to the oaths we swore, that it cannot be done.*

Id. at 428-29 (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court ruling and enter judgment in favor of Plaintiffs-Appellees.

Date: October 5, 2022

Respectfully submitted,

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