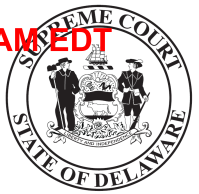
EFiled: May 31 2024 11:36AM EDT
Filing ID 73277514
Case Number 120,2024



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,	)	No. 120, 2024
	)	Court Below: Superior Court of the State of Delaware
Defendants Below-Appellants,	)	C.A. No. S23C-03-014
v.	)	
MICHAEL MENNELLA and THE HONORABLE GERALD W. HOCKER,	)	
Plaintiffs Below-Appellees.	)	

<u>APPELLANTS' REPLY BRIEF</u>

Of Counsel:

Donald B. Verrilli, Jr.
Ginger D. Anders
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave., NW
Suite 500E
Washington, DC 20001
(202) 220-1100

Kathleen Jennings (#913)
Attorney General
Alexander S. Mackler (#6095)
Patricia A. Davis (#3857)
Kenneth Wan (#5667)
STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Carvel State Office Building
820 North French Street, 6th Floor
Wilmington, Delaware 19801
(302) 577-8400

Counsel for Defendants Below-Appellants the Honorable Anthony J. Albence and State of Delaware Department of Elections

Dated: May 31, 2024

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. PLAINTIFFS LACK STANDING 4

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE EARLY VOTING LAWS ARE CLEARLY UNCONSTITUTIONAL 10

A. The Early Voting Laws do not conflict with Section 1's designation of election day, much less clearly conflict. 10

B. The Early Voting Laws fall within the General Assembly's authority to prescribe the means and methods of voting so as best to preserve the freedom and purity of elections. 17

III. PLAINTIFFS HAVE NOT ESTABLISHED THAT 15 *DEL. C.* § 5503(k) CLEARLY CONFLICTS WITH THE DELAWARE CONSTITUTION 21

CONCLUSION 25

TABLE OF CITATIONS

Page(s)

FEDERAL CASES

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)....7

Davis v. FEC,
554 U.S. 724 (2008)....5

Donald J. Trump for President, Inc. v. Way,
492 F. Supp. 3d 354 (D.N.J. 2020)....16

Foster v. Love,
522 U.S. 67 (1997)....11, 13, 14, 16

Gill v. Whitford,
585 U.S. 48 (2018)....9

Lance v. Coffman,
549 U.S. 437 (2007)....9

McConnell v. FEC,
540 U.S. 93 (2003)....5

Millsaps v. Thompson,
259 F.3d 535 (6th Cir. 2001)....16, 20

Nader v. FEC,
725 F.3d 226 (D.C. Cir. 2013)....5

Newberry v. United States,
256 U.S. 232 (1921)....11

Voting Integrity Project, Inc. v. Bomer,
199 F.3d 773 (5th Cir. 2000)....16, 18, 20

Voting Integrity Project, Inc. v. Keisling,
259 F.3d 1169 (9th Cir. 2001)....16

STATE CASES

Albence v. Higgin,
295 A.3d 1065 (Del. 2022) .... *passim*

Dover Hist. Soc'y v. City of Dover Plan. Comm'n,
838 A.2d 1103 (Del. 2003) 5, 9

Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A.,
312 A.3d 597 (Del. 2024) 5

Green v. Cnty. Council of Sussex Cnty.,
415 A.2d 481 (Del. Ch. 1980), *aff'd sub nom. Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179 (Del. 1982) 15

Lamone v. Capozzi,
912 A.2d 674 (Md. 2006) 15, 16

Lyons v. Secretary of Commonwealth,
192 N.E.3d 1078 (Mass. 2022) 16

Opinion of the Justices,
274 A.3d 269 (Del. 2022) 14

Opinion of the Justices,
225 A.2d 481 (Del. 1966) 15

People ex rel. Deister v. Wintermute,
86 N.E. 818 (N.Y. 1909) 19

Sherman v. City of Tempe,
45 P.3d 336 (Ariz. 2002) 16

Sierra v. Dep't of Servs. for Children, Youth and their Families,
238 A.3d 142 (Del. 2020) 10, 19, 20, 24

STATE STATUTES

15 *Del. C.* § 4904 .... 7, 8

15 *Del. C.* § 4931 18

15 *Del. C.* § 4939 8

15 *Del. C.* § 4940 8

15 *Del. C.* § 4941 8

15 *Del. C.* § 5503(k) .... *passim*

15 *Del. C.* § 5507(4) 8

77 Del. Laws, Chapter 269 (2010) 23

CONSTITUTIONAL PROVISIONS

Del. Const. art. V, § 1 .... *passim*

Del. Const. art. V, § 2 13

Del. Const. art. V, § 4A 3, 14, 21, 22, 23

Del. Const. art. V, § 4B 14

OTHER AUTHORITIES

2024 Voting Locations, Delaware Department of Elections (2024), https://elections.delaware.gov/elections/votinglocations.shtml 6, 7

Absentee Voting, How do I vote my ballot and return my voted ballot? Delaware Department of Elections (2024), https://elections.delaware.gov/voter/absentee/citizen.shtml 8

Josiah Henry Benton, *Voting In The Field: A Forgotten Chapter of the Civil War* (1915) 13

John C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* (2006) 13

Charles G. Guyer & Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware* (Milford Chronicle Publishing Co. 1958) 12

P. Orman Ray, *Absent-Voting Legislation, 1924-1925*, Am. Pol. Sci. Rev. 347 (1926) 13

Universal Dictionary of the English Language 1829
(R. Hunter & C. Morris eds. 1898)..11

N. Webster, *An American Dictionary of the English Language*
(C. Goodrich & N. Porter eds. 1869)..11

Webster's Complete Dictionary of the English Language
(C. Goodrich & N. Porter eds. 1882)..11

Working at the Polls, Delaware Department of Elections (2024),
https://elections.delaware.gov/elections/electionofficers.shtml...........................6

INTRODUCTION

Plaintiffs ask this Court to take the extraordinary step of striking down the Early Voting Laws and the Permanent Absentee Voting Law based on unsupported arguments that willfully misconstrue both the Delaware Constitution and the challenged statutes. Plaintiffs are unable to muster any coherent response to the Department's defense of the statutes, let alone the clear and convincing evidence of unconstitutionality that is a prerequisite to striking down statutes duly enacted by the General Assembly in the exercise of its broad authority over voting and elections. What is more, accepting plaintiffs' arguments would render Delaware an outlier, one of the few states in the nation not to permit either of those common voting practices. This Court should reject plaintiffs' arguments and reverse the Superior Court's decision.

At the outset, plaintiffs are unable to rehabilitate their standing to bring the suit. Hocker cannot establish standing as a candidate because an alleged injury that might occur in 2026, but not sooner, is simply not an *imminent* injury—a conclusion supported by both common sense and precedent. And Mennella's asserted standing as an elections inspector cannot survive an encounter with the relevant statutes. Notwithstanding plaintiffs' newly minted assertions that Mennella will have sweeping authority to administer the election laws, Delaware law strictly limits inspectors' responsibilities—inspectors are, after all, private citizens who have taken

a single training class. Mennella will have no occasion, much less authority, to administer early voting or absentee voting and is therefore unaffected by the challenged statutes. Finally, plaintiffs cannot identify any particularized injury that would support a vote-dilution theory of standing.

On the merits, plaintiffs' brief only serves to confirm the weakness of their constitutional challenges. The text and structure of the Constitution make clear that the Early Voting Laws do not conflict with Article V, Section 1's provision that the "election" be held on election day, because the "election" is the voters' final selection of a candidate to fill public office—and that does not occur until *all* votes have been cast on election day. Plaintiffs disagree, but they are unable to offer any different construction of the term "election" or refute the voluminous evidence that the term is not synonymous with "any date on which voting occurs." Instead, plaintiffs spend pages and pages recounting historical constitutional provisions that do not undermine the Department's construction.

Next, plaintiffs concede that the conclusion that the Early Voting Laws do not conflict with Section 1 is sufficient to uphold the legislation. But if the General Assembly needed a specific grant of authority, the second clause of Article V, Section 1 would provide it, because early voting is a "means, method[] [or] instrument[] of voting" that "preserve[s] the freedom and purity of elections." Del. Const. art. V, § 1. Plaintiffs' contrary arguments—that providing for voting at

expanded times is not legislating with respect to a "method" of voting, and that early voting might not actually broaden voter access—defy common sense.

Finally, plaintiffs have no response to the Department's demonstration that 15 *Del. C.* § 5503(k), the Permanent Absentee Voting Law, is entirely consistent with Article V, Section 4A's instruction that voters may vote absentee only if they are unable to vote in person in that election. Plaintiffs' argument that Section 5503(k) improperly creates indefinite absentee status depends on their refusal to acknowledge Section 5503(k)'s actual text, which merely establishes a presumption of inability to vote in person, subject to strict notice requirements. Plaintiffs' remaining arguments are nothing more than inchoate complaints that Section 5503(k) might not be rigorously enforced. But plaintiffs provide no support whatsoever for that speculative claim—Section 5503(k) has operated without incident for years—and in any event, plaintiffs' hypothetical enforcement concerns have no place in this facial challenge.

I. PLAINTIFFS LACK STANDING

In their attempt to establish standing, plaintiffs stray far beyond the allegations in the complaint. But their newly crafted arguments are unavailing.

A. Hocker does not have standing as a candidate because his claimed injury—that his candidacy will be harmed by early and absentee voting—is not sufficiently imminent. Hocker is not a candidate in the 2024 election, and he will not be a candidate, if ever, until the *2026* election.

This Court held in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022) that a candidate's standing to challenge an election law is "dependent upon [the individual's] status as an active candidate in the affected election." *Id.* at 1088 n.157. The "affected election" here is the 2024 general election—in which Hocker is not a candidate. That is fatal to his claim of standing. Plaintiffs attempt to sidestep *Higgin*'s clear command by accusing the Department of omitting the end of the quoted sentence. Answering.Br.16. That is a non sequitur: in full, the sentence states that the "conclusion" that Higgin had standing—which was "dependent" on his status as a candidate in "the affected election"—"renders consideration of [his and other plaintiffs'] . . . other standing arguments based on their status as registered voters unnecessary." 295 A.3d at 1088 n.157. The latter half of the sentence, which concerned Higgin's alternate theory of standing as a *voter*, is thus irrelevant to *Higgin*'s conclusion that *candidate* standing is tied to "the affected election."

Plaintiffs protest that *Higgin*'s statement of the standard cannot be taken seriously because courts "do not typically hide dispositive standards in footnotes." Answering.Br.16 n.2. But *Higgin* makes clear throughout that the Court was applying the well-established principle that a plaintiff's claimed injury must be "imminent" rather than conjectural, 295 A.3d at 1088—and that the plaintiff's status as a candidate in the "affected election" is what made his injury sufficiently imminent. *Id*. (assessing "*Higgin's candidacy and the imminent injury it would have suffered on election day*") (emphasis added); *id*. at 1087 (what gives a candidate standing is "injury to candidates *participating in the affected election*") (emphasis added).

Moreover, Delaware standing law "generally follow[s] Article III's standing requirements," including its imminence requirement. *Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 608 (Del. 2024); *Dover Hist. Soc'y v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). The federal courts have generally found no Article III standing where the putative candidate-plaintiff is not running in the upcoming election. *See McConnell v. FEC*, 540 U.S. 93, 226 (2003) (candidate would not stand for reelection for several years); *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013) (while plaintiff "might have been able to establish standing as a competitor" if he had shown injury to "his ability to fight the next election," statement of future intent to run was "too speculative"); *cf. Davis v.*

FEC, 554 U.S. 724, 734 (2008) (finding imminent injury where plaintiff had "declared his candidacy" in the "rapidly approaching" election). *Higgin* is therefore consistent with the broader understanding of imminence in the context of suits by putative candidates. And because Hocker cannot be "an active candidate in the affected election," *Higgin*, 295 A.3d at 1088 n.157, he lacks standing.[1]

B. Mennella too lacks standing as an elections inspector—a purely administrative position in which any willing voter may serve after a single training session.[2] Even putting aside the speculative nature of Mennella's assertion that he will serve as an elections inspector in the future, Mennella is unable to explain how his hypothetical future role will be affected by early voting or voters' permanent absentee status.

Mennella first hypothesizes, going well beyond the complaint, that he has standing to challenge the Early Voting Laws because he will "[n]ecessarily" serve at an early voting site. Answering.Br.21. But the Department designates only a

---

[1] Plaintiffs' lengthy discussion of Delaware courts' "power" is beside the point. Answering.Br.16-20. It is true that Delaware's courts may, under certain circumstances, hear cases "that the federal courts cannot." *Higgin*, 295 A.3d at 1086-87. But Delaware law holds that plaintiffs bear the burden of establishing an imminent injury, and that in turn requires candidacy in the affected election.

[2] Elections workers are nominally compensated for their time. *See generally Working at the Polls*, Delaware Department of Elections (2024), https://elections.delaware.gov/elections/electionofficers.shtml.

small fraction of total polling places as early voting sites. *See 2024 Voting Locations*, Delaware Department of Elections (2024).[3] Mennella's suggestion that he might be asked to serve at one is therefore pure speculation. And to the extent Mennella is concerned that he might be placed at an early voting site, or that his "refus[al] to administer the election at early voting sites" could result in "fines and even prison time," Answering.Br.21, he could simply choose not to volunteer as an inspector in the first place. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (individuals "cannot manufacture standing merely by inflicting harm on themselves").

In all events, Mennella will not "be forced to choose between his official duties and the Delaware Constitution" for the simple reason that none of his official duties involve authority over early voting. Answering.Br.21. Mennella asserts that his oath of office, which states that he will "not receive or consent to the receiving of the vote of any person whom I shall believe not entitled to vote," 15 *Del. C.* § 4904, gives him sweeping authority to turn away would-be voters whom he does not think should be allowed to vote, and will therefore require him to "reject[] early votes" in furtherance of his belief that early voting is unconstitutional. Answering.Br.22. But that oath obviously does not supersede the specific provisions

[3] https://elections.delaware.gov/elections/votinglocations.shtml.

of Delaware law establishing the limited responsibilities of an elections inspector—and those provisions authorize an elections inspector *only* to determine challenges to a voter's identity, residency, and involvement with bribery. *See* 15 *Del. C.* §§ 4939, 4940, 4941. Mennella would therefore have no authority to turn away anyone whom he does not believe should be voting. Indeed, under Mennella's view, the inspectors' oath would empower (or even require) an inspector who does not believe women should be entitled to vote to turn them away from the polls. 15 *Del. C.* § 4904. That cannot be right.[4]

Nor does Mennella have standing to challenge the Permanent Absentee Voting Law. Once again going beyond the complaint, Mennella suggests that he would receive absentee ballots because absentee voters return their ballots to polling places. Answering.Br.23. Not so. Absentee voters are required by law to return their ballot either by "mailing it to the Department" or by "[d]elivering it … to the Department." 15 *Del. C.* § 5507(4); *see Absentee Voting, How do I vote my ballot and return my voted ballot?* Delaware Department of Elections (2024).[5] So

---

[4] Mennella's oath argument fails for another reason: even under Mennella's reading, the oath requires an inspector to refuse the vote "of any person" not entitled to vote, but says nothing about objections to *when* an *eligible* voter votes. 15 *Del. C.* § 4904.

[5] https://elections.delaware.gov/voter/absentee/citizen.shtml.

Mennella has not credibly alleged that his hypothetical role would be affected by absentee voting, much less by the Permanent Absentee Voting Law.

C. Finally, Hocker and Mennella do not have standing "as voters" on the theory that their votes are diluted by the votes of registered, eligible voters who could vote in person on election day but who choose instead to vote early or absentee. Answering.Br.23. That is the very definition of a generalized grievance, that is, an asserted interest in having others comply with the law as plaintiffs understand it. *Dover Hist. Soc'y*, 838 A.2d at 1116; *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Plaintiffs do not allege the sort of *particularized* injury—such as that their votes are given less weight than other votes—that would be necessary to establish standing based on vote dilution. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 69 (2018). Plaintiffs' only contrary argument relies (Ans.Br.23-25) on the Court of Chancery's decision upholding voter standing in *Higgin*—but this Court notably did not affirm or endorse that court's holding. *See* 295 A.3d at 1088 n.157. For good reason: a claim of vote dilution based on some eligible voters' use of allegedly illegal voting procedures is nothing more than an "undifferentiated, generalized grievance." *Lance*, 549 U.S. at 442.

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE EARLY VOTING LAWS ARE CLEARLY UNCONSTITUTIONAL

Plaintiffs cannot come close to showing by "clear and convincing evidence," *Sierra v. Dep't of Servs. for Children, Youth and their Families*, 238 A.3d 142, 155-56 (Del. 2020), that the Early Voting Laws conflict with Article V, Section 1's provision that the "election" will be held on election day. Plaintiffs have no real response to the plain meaning of "election"—the voters' *final* selection of a candidate, which does not occur until election day—or to the Delaware Constitution's structure, which contemplates that votes may be cast on days other than the day on which the "election" is held. Instead, plaintiffs focus on irrelevant historical constitutional provisions and a single outlier decision from Maryland, none of which can overcome the Constitution's text and structure. Nor can plaintiffs establish that early voting does not fall within the General Assembly's broad, additional authority to prescribe methods of voting in furtherance of the freedom of elections.

A. The Early Voting Laws do not conflict with Section 1's designation of election day, much less clearly conflict.

1. Despite their insistence that "the text of the Delaware Constitution controls this case," Answering.Br.28, plaintiffs never attempt to define the critical constitutional term "election," much less explain why their preferred definition forecloses the casting of some ballots before election day. Section 1 states that the

"general election shall be held" on election day. When Section 1 was enacted in 1897, "election" had a settled meaning, uniformly reflected in both Supreme Court decisions and contemporaneous dictionaries: "the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster v. Love*, 522 U.S. 67, 71 (1997) (citing N. Webster, *An American Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds. 1869)); *Webster's Complete Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds. 1882); *Universal Dictionary of the English Language* 1829 (R. Hunter & C. Morris eds. 1898); *Newberry v. United States*, 256 U.S. 232, 250 (1921) ("*final choice* of an officer by the duly qualified electors") (emphasis added). "Held" or "hold" had a settled meaning as well: "to direct and bring about officially." *Webster's Complete Dictionary of the English Language* 632. Section 1 therefore provides that the voters' collective final choice of officeholder must be brought about—consummated—on election day. The Early Voting Laws are entirely consistent with that command: even though some voting in furtherance of the election occurs before election day, the election—the voters' collective final choice of candidate—is not actually consummated until all ballots are cast and the polls close on election day. Under the Early Voting Laws, then, the election is held on election day.

Plaintiffs appear to assume that an "election" is held on any day on which some votes are cast. Answering.Br.28 (asserting that the Early Voting Laws "allow

the election to occur on ten separate days"). But plaintiffs are unable to identify even a single dictionary definition (or other guide to meaning) to support that view. That is no doubt because there was (and is) uniform agreement that "election" means the voters' final collective choice. And there is no question that that final choice is made on election day, even under the Early Voting Laws. The voters' final choice cannot very well be made on a day on which some voters vote but many votes remain to be cast on subsequent days. It is, after all, undisputed that even with the Early Voting Laws in effect, many Delaware voters cast their ballots on election day, and no winners are selected before that day.

Plaintiffs' remaining textual arguments are no more persuasive. Plaintiffs first engage in a lengthy "historical examination" of the Delaware Constitution, but that accounting is beside the point. Answering.Br.29. Their argument appears to be that the Delaware Constitution has long stated—as it does now—that the general "election" occurs on a particular day. Answering.Br.29-31. But the Department's construction is just as consistent with those historical antecedents as it is with the current version of Section 1.

If anything, Section 1's historical precursors support the Department, not plaintiffs. At the 1897 Delaware Constitutional Convention, the drafters explained that the purpose of amending Section 1 was to "conform to" the federal statute providing that federal elections take place on election day. Charles G. Guyer &

Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 1171 (Milford Chronicle Publishing Co. 1958). Courts have uniformly held that the federal election day statute permits state early voting provisions, *see* pp. 16, *infra*, and early voting and absentee voting, which necessarily involves ballots being cast before election day, have long coexisted with the federal statute. *See generally* Josiah Henry Benton, *Voting In The Field: A Forgotten Chapter of the Civil War* (1915) (describing Civil War-era absentee voting); P. Orman Ray, *Absent-Voting Legislation, 1924-1925*, 20 Am. Pol. Sci. Rev. 347, 347 (1926); John C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* 15 (2006). That is yet more evidence that Section 1's reference to election day has never been understood to foreclose early voting.

Plaintiffs next rely on voter residency requirements (Ans.Br.30-32), but those too are immaterial. The requirement that voters reside in Delaware for one year "preceding an election," Del. Const. art. V, § 2, simply ties a voter's residency to the date the election occurs—which, under the Department's construction of "election," is election day, regardless of whether some voters vote early. The administrative difficulties that plaintiffs conjure have thus never occurred.

Finally, plaintiffs echo the Superior Court's assertion that "*Foster* is inapposite" because it "involved the federal Election Day statute." Answering.Br.32-33. As the Department has explained, Opening.Br.30-31, that

misses the point: *Foster* did not craft a federal-law definition of "election," but instead relied on the general plain meaning of that term as explicated in dictionaries. 522 U.S. at 71. Plaintiffs suggest no reason to think that the term means something different in the Delaware Constitution than it usually means. Nor does *Foster*'s particular holding help plaintiffs: *Foster* held that the state primary system at issue was inconsistent with the federal election day statute because the state election was *consummated*—the final choice made—before the federal election day. *Id*. at 72. *Foster* nowhere suggested that voting cannot begin before election day so long as the final choice occurs on election day, and indeed, *Foster*'s definition of "election" as the voters' *final* choice implicitly contemplates that voting can begin earlier. *Id*.

2. The Delaware Constitution's neighboring provisions—in particular, the provisions governing absentee voting—remove all doubt that Section 1 permits some voting to take place before election day. As the Department has explained (Opening.Br.27-29), Sections 4A and 4B of Article V expressly contemplate absentee voting, which by definition involves some voters casting their vote prior to election day. Those provisions—which must be read to "give meaning to the provision under consideration," *Opinion of the Justices*, 274 A.3d 269, 272 (Del. 2022)—confirm that Section 1's statement that the "general election" is held on election day does not preclude voting before that day.

Plaintiffs have no coherent response. They assert that the Constitution's absentee voting provisions create an "exception" to the rule "that voting must occur in person on Election Day." Answering.Br.35. But that view finds no support in the absentee voting provisions' text, which contains no suggestion that those provisions *conflict* with Section 1's establishment of election day and therefore create an exception to it. In the absence of any such suggestion, it is "assumed" that the drafters of the absentee voting provisions had Section 1 in mind, and therefore understood the absentee voting provisions to be consistent with Section 1 and its reference to election day. *See Green v. Cnty. Council of Sussex Cnty.*, 415 A.2d 481, 484 (Del. Ch. 1980), *aff'd sub nom. Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179 (Del. 1982). Section 1 accordingly must be construed to "harmonize[]" with the absentee voting provisions, *Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966), and interpreting Section 1 to permit early voting so long as voters' final selection does not occur until election day does just that. Plaintiffs' view, by contrast, improperly manufactures a conflict that need not exist.

3. Lacking any affirmative theory based on the Constitution's text, structure, or history, plaintiffs resort to relying on a two-decade-old outlier Maryland decision construing the Maryland Constitution. In *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006), the court held that the Maryland Constitution's provision that the election is held on election day foreclosed early voting. Like plaintiffs here, the

Lamone court relied on the unsupported assumption that an election occurs on any day on which some voting happens, while failing to identify any definition of election supporting that view. *Lamone* is anomalous: it is the *only* decision declaring an early voting statute inconsistent with an election day provision. In the nearly twenty years since *Lamone*, no court has followed it.

Indeed, while plaintiffs go on and on recounting *Lamone*'s holding, they completely fail to acknowledge the state and federal decisions overwhelmingly going the other way. *See, e.g.*, *Lyons v. Secretary of Commonwealth*, 192 N.E.3d 1078, 1095 (Mass. 2022) (relying on the plain meaning of "election," as set forth *Foster*, to reject the same argument that plaintiffs advance); *Sherman v. City of Tempe*, 45 P.3d 336, 339 (Ariz. 2002) (en banc) (the "word 'election' … refers to election day, not to the start of early voting"); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 777 (5th Cir. 2000) (federal statute establishing an election day does not preempt state early voting laws); *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001); *see also Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 369 (D.N.J. 2020).

The near-uniformity of that authority underscores the sweeping consequences of accepting plaintiffs' argument. Delaware would be left an outlier among states, both in refusing to permit early voting, and in doing so based on a common election

day provision that appears not only in federal law but also in dozens of state constitutions. States.Amicus.Br.7-8 (46 states allow early voting, and 29 of those have constitutional election-day provisions similar to Delaware's). Plaintiffs have provided no justification—textual, structural, or historical—for such a perverse result.

B. The Early Voting Laws fall within the General Assembly's authority to prescribe the means and methods of voting so as best to preserve the freedom and purity of elections.

Because the General Assembly needs no specific grant of authority in the Constitution to legislate, the conclusion that the Early Voting Laws do not conflict with Section 1's establishment of an election day is sufficient to uphold the legislation. Plaintiffs do not dispute that point. Answering.Br.36-40. Instead, they argue only that the Early Voting Laws do not fall within Section 1's express grant of authority to enact "means, methods and instruments of voting." Those arguments are meritless. If the General Assembly needed an express grant of authority to enact the Early Voting Laws, Section 1 provides it.

1. Early voting is straightforwardly a "means" or "method[]" of voting under Section 1. Ignoring the support that conclusion finds in both dictionaries and Delaware decisions, Opening.Br.32-33, plaintiffs insist that early voting concerns only the *time* of voting, not the *method*. But they do not explain why the timing of an act must be mutually exclusive from the method of executing that act, rather than

one *aspect* of the method of execution. Recipes, for instance, describe the method of making a dish—and they often include instructions on *when* particular steps can or should be taken (e.g., brining the night before). Indeed, on plaintiffs' view, Section 1's "means or methods" provision would not confer authority on the General Assembly to prescribe the hours during which the polls are open because that would involve the timing and not the method of voting. Yet no one could seriously argue that the General Assembly lacks that power. *See* 15 *Del. C.* § 4931.

Plaintiffs likewise make much of Section 1's title—"Time and manner of holding general election"—but that title does not aid them. The "time" for holding the "election" refers to when voters make their final selection of a candidate (i.e., election day). Regulating where, when, and how *voting* occurs, meanwhile, involves the "means, methods and instruments of voting." The Constitution's absentee voting provisions reinforce that conclusion. Section 4A directs the General Assembly to enact laws governing absentee voting, without specifying when those votes must be cast or received. Section 4A thus presumes that the General Assembly has authority to provide for the timing of voting. Section 1's reference to the "means or methods" of voting must be construed against that backdrop.

Finally, plaintiffs resort to relying on New York and Pennsylvania authorities that purportedly narrowly construe those states' constitutions. But neither concerns language analogous to the Delaware Constitution's provision addressing "the means,

methods and instruments of voting." *See* Answering.Br.38 (citing *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909), and the Pennsylvania Constitution).

2. The Early Voting Laws also fall within the General Assembly's authority to prescribe the means and methods of voting "so as best to … preserve the freedom and purity of elections." With no citations, plaintiffs assert that this provision requires the General Assembly to choose the "best" method of furthering freedom and purity. Answering.Br.39-40. Not so. The Constitution's drafters intended the relevant language "to give the widest latitude to the Legislature." *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 1173. That history is consistent with this Court's never having held that Section 1's second clause establishes a limit on the General Assembly's authority.

At any rate, the Early Voting Laws undeniably operate "so as best to … preserve the freedom and purity of elections" by relieving burdens on the voting system and increasing access to voting. Plaintiffs do not dispute that legislation that improves voting access and administrability furthers the freedom of elections. Answering.Br.39. But plaintiffs maintain that the legislation must be struck down because it is not "self-evident that early voting relieves burdens." *Id.* Nonsense. As the parties challenging the statute, plaintiffs bear the burden of establishing that it does not fall within Section 1's "means or methods" provision, *Sierra*, 238 A.3d at

155-56, and they have not attempted to do so. Nor could they. As the State Amici confirm, "early voting has increased participation in democratic self-governance" in the amici states. States.Amicus.Br.1. Confirming that point, a Presidential Commission Report (among other empirical studies) found that early voting both expands voter access and helps to "alleviat[e] the congestion and other potential problems of" voting on one day. *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 54-58 (Jan. 2014); *Millsaps*, 259 F.3d at 548 (early voting "make[s] voting more convenient and accessible"); *Bomer*, 199 F.3d at 777. The Early Voting Laws unquestionably further the freedom and purity of elections.

III. PLAINTIFFS HAVE NOT ESTABLISHED THAT 15 *DEL. C.* § 5503(k) CLEARLY CONFLICTS WITH THE DELAWARE CONSTITUTION

Plaintiffs have also not carried their heavy burden of establishing that 15 *Del. C.* § 5503(k) clearly conflicts with Article V, Section 4A of the Constitution. As plaintiffs appear to agree, Section 4A authorizes the General Assembly to enact laws permitting voters meeting listed criteria to vote by absentee in each general election in which they are unable to vote in person. Answering.Br.44. And the plain language of Section 5503(k)—which plaintiffs ignore—implements that framework. Plaintiffs' contrary contentions are premised on mischaracterizations of Section 5503(k) and the Department's position.

Most fundamentally, plaintiffs are mistaken about how Section 5503(k) operates. Never once acknowledging the provision's actual text, plaintiffs repeat the error that they and the Superior Court made below, asserting that Section 5503(k) "grant[s] eligibility to vote by absentee ballot *indefinitely*, without consideration of the applicant's eligibility at each election." Answering.Br.43 (emphasis added). As the Department explained, however, Section 5503(k) permits certain categories of constitutionally eligible absentee voters—who are particularly likely to need to vote absentee year after year, and for whom repeatedly reapplying for absentee status is likely to be most onerous—to seek "permanent absentee status." But that label is a misnomer, as it entitles recipients only to vote absentee so long as their eligibility

does not change—upon which the voter must inform the Department, and the department must cancel the absentee status. Opening.Br.37-40; 15 *Del. C.* § 5503(k). In tandem, these provisions create a presumption that certain voters are unable to vote in person in the particular election—subject to their obligation to inform the Department if that is no longer the case.[6]

Properly understood, Section 5503(k) is entirely consistent with Article V, Section 4A. The latter provision states that the "General Assembly shall enact general laws providing that any qualified elector of this State … who shall be unable to appear to cast his or her ballot at any general election" for enumerated reasons may vote absentee "at such general election." Del. Const. art. V, § 4A. Section 4A thus provides that to vote absentee in a given election, a voter must be unable to vote in person in that election. But the provision is silent as to how the factual determination whether a voter is unable to vote in person should be made, instead leaving that question to the General Assembly. Section 5503(k) reflects the General Assembly's judgment that for certain categories of absentee voters, a presumption of inability to appear in person makes sense. But nothing in Section 5503(k) permits

---

[6] Plaintiffs misconstrue the Department's reference to Section 5503(k)'s presumption of inability to appear in person. The Department is not asking *this Court* to presume continuing eligibility. Answering.Br.41. Rather, in enacting Section 5503(k), the General Assembly enacted a *legislative* presumption that certain categories of absentee voters will remain unable to appear in person until they provide the required contrary notice.

voters to lawfully vote by absentee in a general election at which they are *able* to appear in person. Opening.Br.38; *see* Brief of *Amici Curiae* Community Legal Aid Society, Inc. and The Arc of Delaware 21. Plaintiffs are therefore dead wrong that "[t]he Department appears to concede the textual conflict between the statute and constitution." Answering.Br.41. When Section 5503(k)'s actual text—as opposed to plaintiffs' strawman version—is considered, there is no conflict whatsoever.

Notably, plaintiffs never suggest that the General Assembly lacks authority to decide how and on what showing a voter should be classified as unable to vote in a given election. Nor could they. In view of Section 4A's silence on the subject, the General Assembly's "legislative judgment" about how to implement Section 4A's directive is precisely the sort of policy choice to which courts must "show[] deference." *Higgin*, 295 A.3d at 1089. While plaintiffs complain that some categories of absentee voters (such as those on vacation during a particular election) are likely to become able to vote in person in the next election, Br.43, the General Assembly permissibly made a different determination with respect to certain of the categories of voters, concluding that some (such as service members abroad and those with disabilities) are in fact likely to remain unable to vote in person over multiple elections and/or "have difficulty submitting applications for absentee ballots." 77 Del. Laws, ch. 269 (2010); Brief of *Amici Curiae* American Civil Liberties Union Foundation of Delaware and The League of Women Voters of

Delaware 14. The General Assembly's factual conclusions concerning those voters, and its policy choice to facilitate those voters' participation through a presumption of inability to vote in person, are entitled to deference. Plaintiffs provide no reason to conclude otherwise.

At bottom, plaintiffs' true complaint about Section 5503(k) appears to be their speculative fear that the provision might be enforced too "passive[ly]" to prevent "fraudulent abuse." Answering.Br.44-45; *see* Answering.Br.42-43. But that complaint is both baseless and misplaced in this facial challenge. Section 5503(k) has been on the books—and voters have continually utilized its presumption—for over a decade. Yet plaintiffs suggest no reason to suspect that voters have systematically violated the statute by not reporting changes in their eligibility to vote absentee. And even if concerns about on-the-ground underenforcement could support an *as-applied* challenge, they have no place in this *facial* challenge. "For a facial challenge to succeed, the statute cannot be valid under any set of circumstances." *Sierra*, 238 A.3d at 156. Plaintiffs have not come close to showing that Section 5503(k) as enacted—as opposed to the imaginary law they have hypothesized—cannot be valid under any set of circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's judgment.

Of Counsel:

Donald B. Verrilli, Jr.
Ginger D. Anders
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave., NW
Suite 500E
Washington, DC 20001
(202) 220-1100

<u>/s/ Kathleen Jennings</u>
Kathleen Jennings (#913)
Attorney General
Alexander S. Mackler (#6095)
Patricia A. Davis (#3857)
Kenneth Wan (#5667)
STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Carvel State Office Building
820 North French Street, 6th Floor
Wilmington, Delaware 19801
(302) 577-8400

Counsel for Defendants Below-Appellants the Honorable Anthony J. Albence and State of Delaware Department of Elections

Dated: May 31, 2024