



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

Defendants-Below/Appellants,)

On Appeal from a Decision of the
Superior Court of the State of
Delaware

v.)

MICHAEL MENELLA and THE)
HONORABLE GERALD W.)
HOCKER,)

C.A. No. S23C-03-014 MHC

Plaintiffs-Below/Appellees.)

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF DELAWARE AND THE LEAGUE OF WOMEN
VOTERS OF DELAWARE IN SUPPORT OF APPELLANT AND THE
REVERSAL OF THE DECISION BELOW**

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STATEMENT OF INTEREST

The ACLU-DE is a private, nonprofit membership corporation founded in 1961 as an affiliate of the American Civil Liberties Union. The ACLU-DE has over 3,300 members within the State of Delaware. The mission of the ACLU-DE and the common interest of its members are to preserve and protect fundamental constitutional rights such as the right to vote and protection against racially discriminatory laws. Historically, the ACLU and its affiliates have given priority to cases and issues protecting the right to vote, recognizing that democracy works best when everyone participates. The ACLU-DE has extensively lobbied the executive and legislative branches to protect the rights of voters in Delaware and has a significant interest in protecting the voting rights of its members and all Delawareans. The motion to file this brief has been approved by the ACLU-DE's Legal Review Panel.

The League of Women Voters of Delaware (LWVDE) is a nonpartisan, grassroots organization working to protect voting rights and ensure that every Delawarean is represented. LWVDE empowers voters and defends democracy through advocacy, education, and litigation at the state and local level. Active since 1921, LWVDE has 325 members throughout the state of Delaware that are involved in educating voters on the electoral process and providing candidate information through voter forums and our Vote411 website. LWVDE has a long

history of supporting legislation before the Delaware General Assembly on both early voting and the maintenance of a permanent absentee voter lists in the belief that such legislation permissibly expands ballot access consistent with the Delaware Constitution.

ARGUMENT

The Superior Court wrongfully determined that Delaware’s early voting and permanent absentee voting statutes violate the Delaware Constitution. Specifically, the court erred by issuing a declaratory judgment regarding 15 *Del. C.* § 5402 and 15 *Del. C.* § 5503(k) on a limited factual record. Absent a full record, the ruling risks violating the Equal Protection Clause, the Delaware Constitution’s Elections Clause, and Art. V, § 1 of the Delaware Constitution.

Further, the court erred in that it did not analyze any Delaware-specific record to justify a departure from sister states’ widespread understanding of the constitutional text at-issue—that the designation of an election day in constitutional text does not preclude early voting.

I. THE DECLARATORY RELIEF GRANTED BY THE SUPERIOR COURT WAS IMPROPER AT THIS PROCEDURAL STAGE

The Superior Court granted a declaratory judgment, invalidating laws relied upon by tens of thousands of Delawareans, on a scant factual record. The court’s opinion and order were issued *sua sponte* in response to *Appellant’s* motion to dismiss. *Mennella v. Albence*, 2024 WL 758606, at *1 (Del. Super. Ct. Feb. 23, 2024) (“[d]efendants moved to dismiss the [a]mended [c]omplaint and that is the motion currently before the Court.”). The court therefore issued its premature and sweeping order based solely on briefs, oral argument, and a letter with two exhibits

regarding a separate and distinct motion apart from the granting of declaratory relief.
Id.

The ripeness element for declaratory judgments requires material facts to be static. *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 481 (Del. 1989); *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 816 (Del. 2018). And, this Court has made clear, declaratory judgments on weighty legal issues are disfavored when the record is underdeveloped. *See Stroud*, 552 A.2d at 481 (“[t]he significance of these issues requires this Court to demand that the dispute between the parties be close to a ‘concrete and final form,’” (quoting *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987))). For example, in weighing the constitutionality of statutory deadlines for absentee and mail-in ballots in an as-applied challenge *vis-a-vis* the Elections Clause, a Delaware court was “compelled” to its “result by the current state of the record,” which failed to convince the court that voters would be burdened, thus preventing the court from “invalidat[ing] a statute and craft[ing] one of [its] own.” *League of Women Voters of Delaware, Inc. v. Dep’t of Elections*, 250 A.3d 922, 938 (Del. Ch. 2020) (weighing a motion for summary judgment and request for final injunctive relief to enforce a declaratory judgment sought by plaintiffs). Discovery on, and analysis of, the merits of Appellee’s claims was necessary prior to granting declaratory relief.

There has been no discovery or other factual development in this case on necessary questions that should have been prerequisites to granting declaratory relief. Specifically, the court did not determine: 1) whether invalidating the statutes violates the Equal Protection Clause or Delaware’s Elections Clause. U.S. Const. amend. XIV, § 1; Del. Const. art. I, § 3; or 2) whether invalidating the early voting statute violates Art. V, § 1 of the Delaware Constitution. Del. Const. art. V, § 1. The parties did not address these considerations in their motion to dismiss in Superior Court, nor should they have, considering that discovery had yet to begin. A full factual record is necessary for determining these two issues.

A. A FULL FACTUAL RECORD IS NEEDED TO DETERMINE WHETHER INVALIDATING THE CHALLENGED LAWS WOULD VIOLATE THE EQUAL PROTECTION CLAUSE OR THE ELECTIONS CLAUSE OF THE DELAWARE CONSTITUTION.

The Elections Clause states that “[a]ll elections shall be free and equal.” Del. Const. art. I, § 3. The Clause has been held to be ““more protective of electoral rights than the federal regime.”” *League of Women Voters of Delaware*, 250 A.3d at 931 (quoting *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 813 (Del. Ch. 2015)). While, “[t]here is a dearth of case law addressing [the Elections Clause],” *Young*, 122 A.3d at 815 (quoting *Abbott v. Gordon*, 2008 WL 821522, at *19 (Del. Super. Mar. 27, 2008)), there is no shortage of case law addressing the federal Equal Protection Clause. As Delaware’s Elections Clause has been found to be more

protective of the right to vote than the Equal Protection Clause, a violation of the latter should establish a violation of the former.

The Equal Protection Clause prevents states which “grant[ed] the right to vote on equal terms,” from “valu[ing] one person’s vote over that of another” through “arbitrary and disparate treatment.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). See e.g. *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (holding that early voting access, once granted, could not be arbitrarily revoked for a group of voters); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) (invalidating as unconstitutional North Carolina’s repeal of same-day registration because the court “refus[ed] to consider the elimination of voting mechanisms successful in fostering minority participation”); see *id.* at 245 (determining that the repeal of same-day voter registration “would bear more heavily on African-Americans than whites.”).

Here, Delaware’s voting regime, firmly established and broadly relied upon, has provided access to the ballot such that judicial repeal would disproportionately and unconstitutionally impact subsets of voters. While Delaware was not required to offer early voting or presumptive absentee status to Delawareans, once voters had those options, they cannot be repealed if doing so disproportionately harms similarly

situated voters. *See Obama for Am.*, 697 F.3d at 435; *League of Women Voters of N.C.*, 769 F.3d at 242, 245.

Repealing these laws will likely have a disproportionate impact across similarly situated voters in violation of constitutional protections. In particular, studies suggest that the full factual record will show that the removal of early voting leads to disproportionately reduced participation in the electoral process by certain groups of historically disenfranchised voters. For example, “those in child-rearing years and prime working years,” “racial and ethnic minorities, and “unaffiliated voters” have all been found to be disproportionately impacted by changes in early voting laws. Ethan Kaplan and Haishan Yuan, *Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio*, *Am. J Econ: Applied Economics* 58 (2020). *See also*, Michael C. Herron, and Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, *Political Research Quarterly* 665 (2014). In fact, when Florida simply reduced its early voting period from fourteen to eight days in 2011, researchers found that Hispanic voters who had used early voting in 2008 “were less likely to cast valid ballots of any type in 2012” as compared to Black and white users of early voting in 2008. Daniel A. Smith, *When Florida Rolled Back Early Voting, Minorities Were Especially Affected*, *Scholars Strategy Network* (Mar. 3, 2014)

<https://scholars.org/contribution/when-florida-rolled-back-early-voting-minorities-were-especially-affected>.

Similar disproportionate impact would arise if permanent absentee voting were repealed. Voters with disabilities have been identified as having difficulty applying for absentee ballots successively, which is why they have been included among the categories of voters who can apply for presumptive absentee status. *See* 77 Del. Laws, c.269, §§ 5-8 (2010); 15 *Del. C.* § 5503(k); 15 *Del. C.* § 5502(4). Without permanent absentee status, these voters will either have to file a separate absentee ballot applications to participate in each election, or face the well-documented and confusing impediments that voters with disabilities face when casting ballots in-person in Delaware, such as a lack of accessible parking, inaccessible parking marked as accessible parking, inaccessible and confusing paths from the parking area of polling facilities, inaccessible ramps and entrances, poor directional signage, poll workers who lack adequate training to set up equipment that helps voters with disabilities, and inaccessible electronic pollbooks. *See* Disabilities Law Program, 2022 *Delaware General Election Accessibility Report*, Community Legal Aid Society, Inc. (May 2023). In a state in which one in four adults have a disability, striking down permanent absentee voting could result in reduced participation among this vast number of voters. Centers for Disease Control and

Prevention, *Disability & Health U.S. State Profile Data for Delaware* (last visited Apr. 22, 2024).

Factual records are important to a court’s determination of these issues. *See, e.g., League of Women Voters of N.C.*, 769 F.3d at 234, 252 (referencing data regarding racially disparate use of early voting and an 11,000-page record in a challenge to rolling back early voting) (Motz, J. dissenting). Therefore, the court was incorrect to grant declaratory relief considering the importance of the issues and the underdevelopment of the record. Its decision should be remanded to develop a record on these constitutional concerns.

**B. A FULL FACTUAL RECORD IS NEEDED TO DETERMINE
WHETHER INVALIDATING EARLY VOTING WOULD
VIOLATE ART. V, § 1 OF THE DELAWARE CONSTITUTION**

The Superior Court’s analysis of the early voting statute under Art. V, § 1 of the Delaware Constitution was similarly devoid of a factual record upon which the court could have based its order. In striking down the early voting statute, the court correctly indicated that early voting is “obvious[ly] ... a manner of voting,” under Art. V, § 1, yet concluded that “[d]efendants fail[ed] to articulate how Delaware’s Early Voting Statue accomplishes Article V, Section 1’s mandate to ‘secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.’” *Mennella*, 2024 WL 758606 at *7-8 (quoting Del. Const. art. V, § 1) (emphasis added). Even if such analysis were

necessary,¹ the court was in no position to determine whether early voting accomplished those ends without a factual record before it. Indeed, the parties were not provided an opportunity to make their case regarding whether early voting was “enacted ‘so as best to,’” and/or actually does “achieve the ends” of Art. V, § 1.

Appellants would have likely won on that record, as there is ample evidence that early voting was enacted to advance and would have in actuality advanced the ends of Art. V, § 1. Regarding the purity of elections and preventing fraud, the primary sponsor of the legislation indicated that “[e]arly voting reduces stress on the voting system,” and a fellow co-prime sponsor added that early voting allows “more

¹ In addition to pointing out relevant legislative history of Art. V, § 1, *Amici* agree with appellants that, because “the General Assembly needs no affirmative grant of authority to legislate” and early voting laws do not conflict with the establishment of an election day, that this Court is not required to consider any potential affirmative grant within the Delaware Constitution to legislate in this arena. *Amici* also share appellants’ skepticism that Art. V, § 1’s “provision that the General Assembly may prescribe the means and methods of voting “so as best to ... preserve the freedom and purity of elections,” should be construed as a limit rather than an independent objective of the General Assembly’s authority. Appellants’ Opening Brief at 31-34. Legislative history suggests that the intent behind adding this language to the Delaware Constitution was not to cabin the General Assembly’s authority, but “to give the widest latitude to the [l]egislature.” Charles G. Guyer & Edmond C. Hardesty, *Debates and Proceedings of the Constitutional Convention of the State of Delaware 1172-72* (Milford Chronicle Publ’g Co. 1958). So, it was unnecessary for the Superior Court to determine whether early voting accomplishes the safety and security goals of Art. V. § 1.

time to discover and correct any issues with our new voting system.”² Further, regarding securing the independence of the voter and the freedom of elections, the sponsors indicated that the legislation increased access to voting and made voting more convenient, a sentiment widely shared by the bi-partisan supporters of the law.³

Evidence also shows that early voting would actually achieve the ends of Art. V, § 1. The benefits of early voting for the election apparatus include providing poll workers with experience prior to election day, allowing for more time to correct technical glitches with voting machines and electronic systems, and allowing for the forecasting of likely issues that may arise with voting on and before election day, including preventing catastrophic issues such as ballot shortages.⁴ Early voting has

² Office of the Governor, *Governor Carney Signs Early Voting Legislation* (June 30, 2019), <https://news.delaware.gov/2019/06/30/governor-carney-signs-early-voting-legislation/>.

³ *Id.*

⁴ Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice 6 (2013) (citing interviews with state election officials); Ashley Lopez, *Ballot shortages are rare in U.S. elections, but here’s why they sometimes happen*, Delaware Public Media (Nov. 30, 2023) <https://www.delawarepublic.org/npr-headlines/2023-11-30/ballot-shortages-are-rare-in-u-s-elections-but-heres-why-they-sometimes-happen>.

also been found to increase electoral participation⁵ and lead to shorter waiting times on election day.⁶ The court should have considered benefits such as these.

Importantly, the burden was placed on the wrong party in the court’s Art. V, § 1 analysis. In describing principals deemed relevant in constitutional claims challenging laws that expand voter access, the court indicated that “enactments of the General Assembly enjoy a presumption of constitutionality” and that “[a]ll reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation.” *Mennella*, 2024 WL 758606, at *6 (citing *Albence v. Higgin*, 295 A.3d 1065, 1088-89 (Del. 2022)). Therefore, the party seeking to invalidate a statute on constitutional grounds has the burden of rebutting the presumption of validity and constitutionality which accompanies every statute. *Id.* (citing *Higgin*, 295 A.3d 1065 at 1088); *see also*, *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997) (finding party seeking invalidation of stalking statute failed to show it was unconstitutional on its face). However, the court instead required *Appellants* to demonstrate that the ends of Art. V, § 1 are advanced by the Early Voting Statute. For example, the opinion states that “[d]efendants fail to articulate

⁵ Academic research largely shows that early voting increases turnout. *See* Susan Lerner et al., *People Love It: Experience with Early Voting in Selected U.S. Counties*, Common Cause New York and Common Cause Election Protection Project 9-10 (2013); Kaplan and Yuan, *supra* note 2, at 58 (finding that each “day extra of early voting increases turnout by .218 percentage points”).

⁶ Kasdan, *supra* note 7, at 5-6.

how Delaware’s Early Voting Statute accomplish[es]” the ends of Art. V, § 1 without including a single line as to how Appellee-Plaintiffs carried their burden that the law did not accomplish those ends. *Mennella*, 2024 WL 758606, at *7-8 (emphasis added). In fact, the court could not have found that Plaintiff-Appellees met that burden, as their counsel admitted that early voting would not “abuse the privilege and, ... allow for anything like [fraud].” Tr. at 32-33 (explaining that “the statute requires that all the same administrative protections that be used on election day are used on each of the dates that early voting is permitted ... because the same protections are in place, we are not alleging that that’s a greater opportunity for fraud.”). Therefore, Appellees did not even attempt to make this argument, much less satisfy their burden.

Appropriate discovery will demonstrate that early voting advances the ends of Art. V, § 1 and that Plaintiff-Appellees cannot meet their burden in showing that the early voting law is unconstitutional. The court’s declaratory judgment should be reversed and the case remanded for further record development.

II. EARLY VOTING DOES NOT CONFLICT WITH A CONSTITUTIONALLY ESTABLISHED ELECTION DAY

Delaware’s Constitution is consistent with constitutional clauses of several other states that permit early voting. Because there is no contrary or unique tradition

in Delaware to depart from this broadly accepted understanding, Delaware should adopt this interpretation.⁷

The Superior Court concluded that “[t]he conflict between [Art. V, § 1 and 15 *Del. C.* § 5402] is obvious” because “[o]ur Constitution enumerates the one day an election shall be held biennially and the Early Voting Statute allows for voting at least 10 days before that date.” *Mennella*, 2024 WL 758606, at *6. This ruling dangerously conflicts with the myriad of states that permit early voting and share Delaware’s constitutional text. The Superior Court’s ruling is a clear aberration. *See* Fig. 1. Twenty-two states have early voting as well as a provision within their state constitutions designating a single day for a general election.⁸ Eight states have early

⁷ Amici agree with Appellants that the plain meaning of “election” does not preclude early voting and that the Delaware Constitution’s structure confirms the constitutionality of early voting. Amici advance separate arguments in favor of the constitutionality of early voting to avoid unnecessary repetition.

⁸ A sampling of the constitutional texts in these states which set dates for general elections shows they are largely similar to Delaware’s. *Compare* Del. Const. art. V, § 1 ([t]he general election shall be held biennially on the Tuesday after the first Monday in the month of November), *with* Or. Const. art. II, § 14 ([t]he regular general biennial election in Oregon for the year A. D. 1910 and thereafter shall be held on the first Tuesday after the first Monday in November), Fla. Const. art. VI, § 5 ([a] general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year), *and* Minn. Const. art. VII, § 7 ([t]he general election shall be held on the first Tuesday after the first Monday in November in each even numbered year). That these states and others with similar constitutional text provide for early voting mechanisms is evidence that the constitutional text is not currently viewed as preclusive of such mechanisms.

Case law and political branch engagement here does not demonstrate a historical tradition suggesting that early voting is unconstitutional. Here, the court only analyzed a single inapposite case to find that Art. V, § 1 precludes early voting. *Mennella*, 2024 WL 758606, at *6 (citing *State v. Hart*, 129 A. 691 (Del. Super. Ct. 1925)). In that century-old case, the Superior Court explained that Art. V, Sec. 1 “mean[s] what it plainly says,” and that giving it “a different meaning would be ... judicial legislation.” *Hart* 129 A. 691, 694 (holding that pursuant to Art. III, § 9, the “one plain and pertinent constitutional provision to be considered,” in case of a vacancy for elected office, a person shall be chosen to the office at the next general election). The case did not address the question of whether the establishment of an election day precludes voting from taking place prior to that day.

There is also no evidence of legislative uncertainty surrounding the constitutionality of the early voting law. In *Higgin*, this Court relied, in part, upon the General Assembly’s articulated doubts as to the constitutional validity of the vote-by-mail statute at issue. *Higgin*, 295 A.3d at 1081-83. No such uncertainty as to the validity of early voting exists here, as the legislation passed with an uncomplicated history and overwhelming bi-partisan support within the General Assembly.⁹

⁹ Delaware General Assembly, *House Bill 38* (last visited Apr. 23, 2024), <https://legis.delaware.gov/BillDetail/37089>.

Therefore, Delaware's has no unique historical record, controlling or persuasive caselaw, or legislative history suggesting deviation from the widely accepted understanding that a constitutionally designated election day does not prohibit early voting. As such, this Court should "follow[] the[] lead" of sister states who allow for early voting notwithstanding the constitutionally designated election day. *Higgin*, 295 A.3d at 1094.

III. CONCLUSION

For the reasons set forth above, this Court should reverse the Superior Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2019.

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Date: April 26, 2024

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CERTIFICATE OF SERVICE

I, Dwayne J. Bensing, Esquire, do hereby certify that on April 26, 2024, I caused a copy of the *Brief Of Amici Curiae American Civil Liberties Union Foundation Of Delaware And The League of Women Voters Of Delaware In Support Of Appellant And The reversal Of the Decision Below*, to be served via File & ServeXpress, on all counsel of record.

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