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

APPELLANTS' OPENING BRIEF

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

Dated: April 19, 2024

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

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NATURE OF PROCEEDINGS

This case involves a constitutional challenge to Delaware's statutes permitting early voting at least ten days before the election and enabling certain voters who are particularly likely to qualify as absentee voters in multiple elections to obtain presumptive absentee voter status. Both sets of provisions adopt common methods of voting that are used by dozens of other states. Both are entirely consistent with the Delaware Constitution, and both fall well within the General Assembly's broad authority to enact election laws that reflect its policy judgments with respect to voter access and election administrability. Yet the Superior Court held that both statutes are unconstitutional in a decision that disregarded the plain text of both the relevant constitutional provisions and the challenged statutes—and that, if affirmed, would make Delaware an outlier among states. This Court should reverse.

Plaintiffs Gerald Hocker, a state Senator, and Michael Mennella, an individual who has served in the past as an elections inspector (collectively, "plaintiffs"), brought this action seeking to declare both statutes invalid, naming as defendants State Election Commissioner Anthony Albence and the Delaware Department of Elections (collectively, "the Department"). Plaintiffs first allege that Delaware's early-voting laws, 15 *Del. C.* §§ 5401-5408 (the "Early Voting Laws"), violate Article V, Section 1 of the Delaware Constitution by permitting early voting to occur before election day. Section 1 provides in relevant part that the "general election

shall be held biennially on the Tuesday next after the first Monday in the month of November," and that "the General Assembly may by law prescribe the means, methods and instruments of voting" so as to preserve the freedom and purity of elections. Plaintiffs also challenge 15 *Del. C.* § 5503(k), which is known as the "Permanent Absentee Voting Law," even though that label is a misnomer. That statute was enacted over a decade ago (with Hocker's support), and plaintiffs have participated in elections in which the law applied without challenging it. The statute permits a subset of voters already eligible to vote by absentee—specifically, those who are likely to qualify to vote by absentee in multiple elections and to face challenges applying for an absentee ballot each year—to apply for presumptive absentee status, which they may maintain until their eligibility to vote via absentee changes. 15 *Del. C.* § 5503(k)(3)-(4). Plaintiffs contend that the Permanent Absentee Voting Law conflicts with Article V, Section 4A of the Delaware Constitution, which states that the General Assembly shall enact laws providing that eligible voters who are unable to vote "at any general election at the regular polling place" "may cast a ballot [absentee] at such general election."

The Superior Court granted a declaratory judgment holding that both the Early Voting Laws and the Permanent Absentee Voting Law are invalid. The court first held that plaintiff Hocker had standing and rejected the Department's arguments that the case was not properly transferred to the Superior Court and that plaintiffs had

waived their challenges. On the merits, the court held that the Early Voting Laws conflicted with Section 1's provision that the general "election" is held on election day. In the court's view, Section 1 forecloses laws permitting voters to cast ballots on days other than election day. That holding departs from the established plain meaning of the term "election"—that is, the voters' *final* selection of their preferred candidate. It also departs from the judicial consensus that because the election is the final selection, early-voting laws are entirely consistent with provisions establishing a single election day—because early voting does not change the fact that the voters' final selection does not occur until election day. The Superior Court next held that the Permanent Absentee Voting Law conflicts with Article 5, Section 4A, which the court construed to allow an individual to vote by absentee only at each election at which that individual is unable to vote in person. The court believed that the Permanent Absentee Voting Law would permit individuals to vote absentee even at elections in which they were able to vote in person—but the court did not acknowledge or consider 15 *Del. C.* § 5503(k)(3) and (4), which prohibit that result and limit permanent absentee status to those who remain unable to vote in person.

SUMMARY OF ARGUMENT

1. Plaintiffs lack standing to challenge the Early Voting Laws and the Permanent Absentee Voting Law. Although plaintiff Hocker asserts standing in his capacity as a candidate based on his alleged intent to run for reelection when his term ends in *2026*, that allegation cannot establish the requisite actual and imminent injury. A candidate's standing to challenge an election law is "dependent upon [the individual's] status as an active candidate in the *affected* election." *Albence v. Higgin*, 295 A.3d 1065, 1088 n.157 (Del. 2022) (emphasis added). But Hocker is not—and cannot—be a candidate in the 2024 election because his term does not end until 2026. An injury that might be felt, if ever, two years from now is hardly imminent.

Mennella also lacks standing because he has not alleged a concrete injury traceable to the contested laws. He alleges only that he has in the past served as an elections inspector—but he does not allege that his hypothetical reprise of that role in the future will be affected in any way by early voting or voters' permanent absentee status. And neither Hocker nor Mennella have standing as voters based on a vote-dilution theory, as the alleged vote dilution is not a particularized injury.

2. The Superior Court erred in holding that the Early Voting Laws are invalid under Article V, Section 1 of the Delaware Constitution. Section 1 states that the "general election shall be held" on election day, "but the General Assembly

may by law prescribe the means, methods and instruments of voting so as best to . . . preserve the freedom and purity of elections." The Early Voting Laws do not conflict with Section 1's provision that the "election" will be held on election day because the general "election" is not "held" until Delaware voters make a final selection of a candidate to fill public office. *See 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)). While the Early Voting Laws permit voters to begin casting ballots before election day, the *final selection* still occurs on election day—after all, no winners can be declared until *all* votes have come in. That early voting is entirely consistent with Section 1's establishment of election day is confirmed by the Constitution's contemplation of absentee voting, which by definition involves casting ballots before election day in many cases.

Because the General Assembly needs no specific enumerated grant of authority to legislate (beyond the general authority granted in Article II, Section 1 of the Delaware Constitution), the conclusion that the Early Voting Laws do not conflict with Section 1's establishment of election day is a sufficient basis on which to uphold the legislation. But in all events, the Early Voting Laws fall well within the affirmative authority conferred by Section 1's second clause. Early voting is a "means" or "method[]" of voting, and by improving access to voting, the Early Voting Laws preserve the freedom and purity of elections.

3. The Superior Court also erred in declaring 15 *Del. C.* § 5503(k) inconsistent with Article V, Section 4A of the Delaware Constitution. Properly construed, 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. Section 5503(k) complies with that constitutional framework. The provision codifies the General Assembly's judgment that a small segment of voters already eligible to vote via absentee are so likely to maintain that eligibility from year to year that they should be *presumed* unable to appear in future elections until they provide contrary notice. And to ensure that those voters do not wrongly maintain permanent absentee status if something changes and they become able to vote in person in a subsequent year, Sections 5503(k)(3)-(4) require voters to inform the Department of changes to their absentee status, and the Department to cancel voters' permanent absentee status if they no longer qualify. The Superior Court's conclusion that Section 5503(k) permits voters ineligible for absentee status to vote absentee was thus simply mistaken.

STATEMENT OF FACTS

I. THE EARLY VOTING LAWS

In 2019, the General Assembly passed and Governor Carney signed legislation governing early in-person voting in Delaware. *See* 82 Del. Laws, ch. 79, § 1 (2019). The legislation added Chapter 54—titled "Early Voting"—to Title 15 of the Delaware Code. 15 *Del. C.* §§ 5401-5408. The Early Voting Laws' central provision states that "the State Election Commissioner shall designate locations at which a qualified voter, duly registered, may vote in person during at least 10 days before an election, up to and including the Saturday and Sunday immediately before an election." 15 *Del. C.* § 5402. The legislation governs general, primary, and special elections alike. 15 *Del. C.* § 5401. And the Early Voting Laws mandate that while early voting shall be conducted using the same procedures followed on election day, the Department of Elections must also establish "procedures for daily updates of polling records to ensure the integrity of each election." 15 *Del. C.* §§ 5405, 5408. Finally, all "[e]arly voting ballots must be tabulated at the same time as absentee ballots." 15 *Del. C.* § 5407. By design, the Early Voting Laws did not go into effect until January 1, 2022. 82 Del. Laws, ch. 79, § 3 (2019).

Enactment of the Early Voting Laws helped bring Delaware in line with most other states with respect to early voting: as of March 2024, only three other states do not permit early in-person voting. *See Early In-Person Voting*, National Conference

of State Legislatures (March 12, 2024).[1] As the lead sponsor of the Early Voting Laws explained, "Early voting reduces stress on the voting system, creates shorter lines on Election Day, and increases access to voting as well as voter satisfaction. This new law will help increase voter turnout in our elections, which should always be a common goal." *Governor Carney Signs Early Voting Legislation*, Office of the Governor of Delaware (June 30, 2019).[2]

Delawareans first made use of the new early voting option in early 2022, when they went to the polls to fill a vacated seat in the state House of Representatives. *See* 2022 Special Election 4th Representative District: Election Information (2022).[3] Voters continued to participate in early voting in both the 2022 primary and general elections. *See* 2022 State of Delaware Election Calendar (Oct. 7, 2022).[4] Plaintiff Hocker was reelected at the 2022 general election, garnering 100% of the total votes and 4,866 early votes. *See* 2022 General Election Report (Nov. 8, 2022).[5]

[1] https://www.ncsl.org/elections-and-campaigns/early-in-person-voting.

[2] https://news.delaware.gov/2019/06/30/governor-carney-signs-early-voting-legislation/.

[3] https://elections.delaware.gov/elections/special/xb0422/index.shtml.

[4] https://elections.delaware.gov/public/calendar/pdfs/2022ElectionCalendar.pdf.

[5] https://elections.delaware.gov/results/html/index.shtml?electionId=GE2022.

II. THE PERMANENT ABSENTEE VOTING LAW

The Delaware Constitution has expressly provided for absentee voting since 1943, when the General Assembly added Section 4A to Article V. Del. Const. art. V, § 4A; *Higgin*, 295 A.3d at 1077. Since then, the General Assembly has gradually expanded Section 4A's scope to allow voters to cast absentee ballots under a wider variety of circumstances. In its current form, Section 4A provides:

> The General Assembly shall enact general laws providing that any qualified elector of this State, duly registered, 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, either because of being in the public service of the United States or of this State, or his or her spouse or dependents when residing with or accompanying him or her, because of the nature of his or her business or occupation, because of his or her sickness or physical disability, because of his or her absence from the district while on vacation, or because of the tenets or teachings of his or her religion, may cast a ballot at such general election to be counted in such election district.

In broad strokes, then, Section 4A empowers the General Assembly to legislate as needed so that Delaware voters who meet the enumerated criteria can vote by absentee when they are unable to vote in person.

The General Assembly implemented Section 4A in Chapter 55 of Delaware's election laws, which governs the particulars of absentee voting. Tracking the criteria laid out in Section 4A of the Constitution, Sections 5502(1)-(8) list the eight categories of reasons permitting qualified voters to cast absentee ballots in a given election. Section 5503 sets out the procedures voters must follow to request absentee

ballots, the conditions those voters must satisfy, and how voters are to submit absentee ballots.

In 2010 and again in 2012, the General Assembly passed (with Hocker's support) and the Governor signed amendments to Section 5503 that gave a subset of eligible absentee voters the option of applying for "permanent absentee status." 15 *Del. C.* § 5503(k). Section 5503(k) now provides that "a registered voter eligible to vote by absentee ballot for reasons stated in § 5502 (1), (2), (4), (7) or (8)" or certain reasons listed in § 5502(3) "may apply in writing to the Department for permanent absentee status." 15 *Del. C.* § 5503(k). Thus, an eligible absentee voter may apply for "permanent absentee status" if the voter is unable to vote in person for reasons including: public service for the United States or Delaware; temporarily residing outside of the United States; service in the armed forces; maintaining an occupation of providing care to a parent, spouse or child who is living at home and requires constant care; or physical disability. *See* 15 *Del. C.* § 5503(k); 15 *Del. C.* § 5502. Section 5503(k) does *not* allow eligible absentee voters to obtain permanent absentee status if their reason for being unable to vote in person in an election is an occupation (other than constant in-home care of a family member); vacation; or absence on a particular day due to the teachings of one's religion. *See* 15 *Del. C.* § 5503(k); 15 *Del. C.* § 5502. The legislation brought Delaware into line with the over twenty states that provide presumptive absentee status to at least some voters. *See Table 3:*

States With Permanent Absentee Voting Lists, National Conference of State Legislatures (Feb. 6, 2024).[6]

Section 5503(k) also imposes a number of limitations on permanent absentee status. Section 5503(k)(3) mandates that the Department "shall cancel a person's permanent absentee status" in enumerated circumstances, including "receipt of written notification that the reason that the person has stated for voting by absentee ballot is no longer valid." 15 *Del. C.* § 5503(k)(3). Section 5503(k)(4) requires voters maintaining permanent absentee status to "keep the Department informed of changes in address, changes in name or changes in the reason that the person has listed for voting by absentee ballot." Finally, Section 5503(k)(5) directs the Department to post a list of permanent absentee voters online. As of April 2023, plaintiffs reported that the list contained approximately 20,000 voters. A018.

In anticipation of the 2022 election cycle, the Department sent a letter to all voters on the permanent absentee voter list. A016-017.[7] The letter reminded voters of the authorized reasons for maintaining permanent absentee status and their

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[6] https://www.ncsl.org/elections-and-campaigns/table-3-states-with-permanent-absentee-voting-lists.

[7] The Department's letter is provided in the Appendix at A074-075. The complaint quotes the letter, but its quotation differs from the letter's text. And a court may "decide a motion to dismiss by considering documents referred to in a complaint." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006).

continuing obligation to inform the Department of any changes to their personal information. A074. And the letter emphasized that voters must contact the Department if they "no longer qualify to be or wish to remain a Permanent Absentee voter." A075.

III. PROCEDURAL HISTORY

A. In 2022, Mennella filed a complaint challenging the Early Voting Laws and the permanent absentee status provisions in the Court of Chancery. Mennella named as defendants State Election Commissioner Anthony Albence and the Delaware Department of Elections. Mennella sought a declaratory judgment that the Early Voting Laws and Absentee Status Law are invalid under the Delaware Constitution. Specifically, Mennella contended that the Early Voting Laws conflict with Article V, Section 1 of the Delaware Constitution, which provides that "[t]he general election shall be held biennially on the Tuesday next after the first Monday in the month of November." Del. Const. art. V, § 1. And he challenged the Absentee Status Law as inconsistent with Article V, Section 4A.

In January 2023, the Court of Chancery dismissed the complaint for lack of subject-matter jurisdiction because equitable relief was not required to resolve the case, but granted "leave to transfer subject to 10 *Del. C.* § 1902." *Mennella v. Albence*, 2023 WL 309042, at *2 (Del. Ch. Jan. 19, 2023). This Court denied

Mennella's subsequent Application for Certification of Interlocutory Appeal. *Mennella v. Albence*, 292 A.3d 111 (Del. 2023).

B. On March 16, 2023, Mennella filed in the Superior Court the Chancery Court Order dismissing his action. He filed the Amended Complaint in June 2023, adding Hocker as an additional plaintiff. A012.

The State moved to dismiss the Amended Complaint. The Superior Court denied that motion, and sua sponte granted plaintiffs a declaratory judgment that both statutes are invalid—despite plaintiffs' failure to move for that relief.

The court first held that Hocker had standing to challenge both the Early Voting Laws and the Absentee Status Law. The court relied solely on the fact that Hocker had sought reelection in the past and stated in the complaint that he intends to run in future elections. Ex. A at 6. Because Hocker had standing, the court did not examine whether Mennella had standing as well. *Id.*

The court then held that plaintiffs had validly transferred the case from the Court of Chancery under 10 *Del. C.* § 1902. Ex. A at 6. The court acknowledged that Mennella failed to "file a written election of transfer," as required by 10 *Del. C.* § 1902. Ex. A at 7-8. But the court excused that failure, finding "Mennella's failure to file this written election of transfer in the Court of Chancery to be untidy but harmless." *Id.* at 9.

Next, the court concluded that plaintiffs' claims are neither waived nor time-barred. That was so even though the Early Voting Laws were enacted in 2019 and the Permanent Absentee Voting Law was first enacted in 2010, and even though plaintiffs participated in elections in which these laws applied without challenging them. *Id.* at 9-13.

Turning to the merits, the court held that the Early Voting Laws conflict with Article V, Section 1's provision that the "general election shall be held" on election day. *Id.* at 15. In the court's view, "[a]ny enactment of the General Assembly that provides for casting ballots on other days than that day enumerated by Article V, Section 1, unless permitted elsewhere [sic] Article V, runs afoul of" the Constitution. *Id.* at 18-19. The court rejected the State's argument that the plain meaning of the term "election" is the voters' "final selection" of their preferred officeholder and that the fact that some ballots are cast early does not change the fact that the voters' collective final selection does not occur until election day. The court reasoned that the Department's proffered definition of "election'" was found in a U.S. Supreme Court decision and was therefore irrelevant—yet the Superior Court did not offer its own construction of "election." *Id.* at 18. The court also held that the Early Voting Laws did not fall within the General Assembly's authority under the second clause of Article V, Section 1, which states that "the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy

and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat." Del. Const. art. V, § 1. The court agreed with the Department that early voting is a "means" or "method" of voting. Ex. A at 19. But the court reasoned that the Department did not sufficiently explain how early voting furthers the purposes set forth in Section 1. *Id.* at 19-20.

The Superior Court then held that the Permanent Absentee Voting Law violated Article V, Section 4A of the Constitution. The court construed the constitutional provision to "allow[] a voter to participate in absentee voting at only the election at which they are unable to appear." *Id.* at 23. The court reasoned that Section 5503(k) was inconsistent with Section 4A because the statute "impermissibly grant[ed] eligibility to vote by absentee ballot indefinitely," so that a voter who had obtained permanent absentee status would be able to vote absentee in future elections even if they had become able to vote in person. *Id.* at 22 (internal quotation marks and citation omitted). The court did not acknowledge Sections 5503(k)(3) or (k)(4), which require voters to notify the Department when their inability to vote in person has changed and require the Department to cancel their presumptive absentee status upon that notification. *Id.* at 22-23 & n.67.

ARGUMENT

I. PLAINTIFFS LACK STANDING

A. Question Presented

Whether a state senator who is not an active candidate for office, an individual who has acted in the past as an elections inspector, or either individual in their capacity as voters, have standing to challenge the Early Voting Laws and the Permanent Absentee Voting Law. This issue was raised and addressed below. Ex. A at 4-6; A051-054; A126-133.

B. Scope of Review

This Court reviews questions of law, including standing, *de novo*. *See Higgin*, 295 A.3d at 1085.

C. Merits of Argument

Neither plaintiff has standing to challenge the Early Voting Laws and the Permanent Absentee Voting Law. "Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers." *Higgin*, 295 A.3d at 1085-86 (citations omitted). "The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing." *Id.* at 1086 (citation omitted). A plaintiff therefore must demonstrate that: "(i) the plaintiff has suffered an 'injury-in-fact,' i.e., a concrete and actual invasion of a

legally protected interest; (ii) there is a causal connection between the injury and the conduct complained of; and (iii) it is likely the injury will be redressed by a favorable court decision." *Id.* (citations omitted). The injury-in-fact requirement requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Dover Hist. Soc'y v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) (quoting *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)). This Court's "standards for determining standing are generally the same as the requirements for establishing Article III standing in federal court." *Higgin*, 295 A.3d at 1086.

1. Hocker does not have standing as a candidate to challenge the laws at issue. In concluding otherwise, the Superior Court relied solely on *Higgin*, which explained that "a candidate who runs the risk of defeat because of the casting of ballots that are the product of an extra-constitutional statute has standing to challenge that statute." *Id.* at 1087; Ex. A at 6. Based on Hocker's allegation that he "intends to run to maintain his Senate seat in future elections," the court concluded that he "is in fact a candidate" with standing to challenge the election laws. Ex. A at 6.

That was error. *Higgin* was clear that its standing "conclusion [wa]s *dependent* upon Higgin's status as an *active candidate in the affected election*." 295 A.3d at 1088 n.157 (emphases added). There, "the uncontested facts show[ed] that

Higgin was a candidate for State Representative in District 15 of Delaware in the 2022 election" who was "actively campaigning" at the time. *Id.* at 1087. Higgin's candidacy therefore would have suffered "imminent injury . . . on election day had the challenged statutes been left unchecked." *Id.* at 1088. That was "sufficient to satisfy [the court's] standing requirements." *Id.*

Nothing of the sort is present here. Hocker is not a candidate in the 2024 election, much less an "actively campaigning" candidate. Indeed, he *cannot* be a candidate in 2024: He was reelected in 2022, and his term does not end until November 2026. *See* Del. Const. art. II, § 2; *Election Office Table*, State of Delaware Department of Elections (2022).[8] So although Hocker alleges that he "plans to run again for State Senate in future elections," A012, he cannot allege that he is an "an active candidate in the affected election"—*i.e.*, the 2024 election. *Higgin*, 295 A.3d at 1088 n.157. Hocker therefore has not alleged the requisite imminent injury. Any alleged injury suffered by his candidacy will not arise until *two years* from now. An injury that will not be felt for years, if ever, is hardly imminent. *Cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 226 (2003) (alleged injury arising from election rule was "too remote temporally" and not

[8] https://elections.delaware.gov/candidates/pdfs/Schedule_of_Elections_Table.pdf.

sufficiently imminent where candidate would not stand for reelection for several years).

2. Similarly, Mennella lacks standing in his capacity as a past-and-speculatively-future elections inspector at a polling place. He asserts in conclusory fashion that he acted as an elections inspector in the past and "plans to serve as an inspector of elections at the 2024 General Election." A012. But Mennella does not allege that his hypothetical future role will be affected by early voting or voters' permanent absentee status. *See id.* The complaint invokes no provision of Delaware law expressly tying his responsibilities as an elections inspector to administering these two ancillary methods of voting.

Mennella does allege that his duties would require him to make "voter eligibility" determinations. A022. But those determinations are unrelated to early voting and a voter's permanent absentee status (indeed, absentee voters, by definition, do not appear at the polling place). Rather, Delaware law limits an inspector's role to determining a challenge to a voter's identity, residency, and involvement with bribery. *See* 15. *Del. C.* §§ 4937(c), 4939, 4940, 4941. Mennella therefore has not alleged any injury that is traceable to the challenged laws and that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Dover Hist. Soc'y*, 838 A.2d at 1110 (citation omitted).

3. Nor do Hocker or Mennella have standing "as Delaware voters." A024. Plaintiffs' theory appears to be that "their votes would be diluted by illegally cast ballots" because of the challenged laws. *Id.* But that theory founders on the principle that, to establish standing, an injury must be "particularized" and involve an interest "distinguishable from the public at large." *Dover Hist. Soc'y*, 838 A.2d at 1105, 1110 (citation omitted). For that reason, courts have found standing based on vote dilution only where the plaintiff-voters suffer injury as individuals—for instance, where their votes will be given less weight than other voters' because of the challenged statute. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 69 (2018). Here, plaintiffs have alleged no such individualized harm that is distinguishable from the interest of scores of other Delaware voters. Perhaps recognizing as much, this Court reasoned in *Higgin* that the plaintiff had established standing only because his allegations went "beyond a claim of voting dilution." 295 A.3d at 1087. In the same vein, federal courts have rejected claims of standing based on a vote-dilution theory where the only allegation is that some voters are being permitted to cast allegedly unlawful ballots. *See, e.g.*, *Lutostanski v. Brown*, 88 F.4th 582, 586 (5th Cir. 2023); *Bognet v. Sec'y Commonwealth of Pennsylvania*, 980 F.3d 336, 355 (3d Cir. 2020). Because Hocker and Mennella have alleged nothing more than a "generalized grievance," they lack standing in their capacity as voters. *Dover Hist. Soc'y*, 838 A.2d at 1113.

II. PLAINTIFFS CANNOT ESTABLISH THAT THE EARLY VOTING LAWS ARE CLEARLY UNCONSTITUTIONAL

A. Question Presented

Whether plaintiffs have established by clear and convincing evidence that the Early Voting Laws unconstitutionally conflict with Article V, Section 1 of the Delaware Constitution. This issue was raised and addressed below. Ex. A at 15-20; A056-067; A136-141.

B. Scope of Review

This Court reviews questions of law, including constitutional claims, *de novo*. *Higgin*, 295 A.3d at 1085.

C. Merits of Argument

The Early Voting Laws fall well within the General Assembly's far-reaching authority under the Delaware Constitution to legislate with respect to elections. The General Assembly possesses "legislative power [that] 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." *Collison v. State*, 2 A.2d 97, 100 (Del. 1938). To overcome the presumption of constitutionality that "accompanies every statute," *Higgin*, 295 A.3d at 1088 (citation omitted), therefore, plaintiffs must establish by clear and convincing evidence that the Early Voting Laws conflict with a "limitation in the Constitution upon the power of the General Assembly." *Opinion of the Justices*, 295 A.2d 718, 720 (Del. 1972); *see New Castle*

Cnty. Council v. State, 688 A.2d 888, 891 (Del. 1996) ("[I]n the absence of limitations imposed by either the federal or state constitutions, the General Assembly's power to legislate has been described by this Court as 'unlimited.'") (citation omitted). Plaintiffs have not come close to doing so here, and the Superior Court erred in concluding otherwise. Indeed, in so holding, the Superior Court unilaterally made Delaware one of just four states to not offer early in-person voting. *See Early In-Person Voting*, National Conference of State Legislatures.

Plaintiffs contend that the Early Voting Laws conflict with Article V, Section 1 of the Delaware Constitution. That provision, titled "Time and manner of holding general election" states in full:

> 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; but the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.

Del. Const. art. V, § 1. In plaintiffs' view, Section 1's first clause (before the semicolon) implicitly prohibits any ballots from being cast before the designated election day. That is wrong. The plain meaning of the term "election" and the surrounding constitutional structure establish that the "general election" is not held until Delaware voters make a final selection of a candidate to fill public office—which occurs on election day even if some voters cast a ballot earlier. That

conclusion is sufficient to uphold the Early Voting Laws: the General Assembly needs no specific grant of authority beyond that conferred by Article II, Section 1 of the Constitution, and the challenged statute does not conflict with Section 1's first clause. But if the General Assembly needed a specific grant of authority, the second clause of Article V, Section 1 (after the semicolon) provides just that grant. Early voting is unquestionably a means or method of voting that increases access to voting and thereby preserves the freedom and purity of elections.

1. The Early Voting Laws do not conflict with Section 1's designation of election day, much less by clear and convincing evidence.

The Superior Court held that the Early Voting Laws conflict with Section 1's direction that the "general election shall be held biennially on the Tuesday next after the first Monday in the month of November" because the Early Voting Laws permit "casting ballots on other days than that day enumerated by Article V, Section 1." Ex. A at 18-19. In so holding, the court disregarded the plain meaning of the term "election," which is the *final selection* of a candidate to fill public office. The court also ignored the Constitution's structure, and in particular, its absentee voting provisions, which unmistakably contemplate that votes may be cast on days other than the day on which the "election" is held—thereby confirming that Section 1 does not preclude early voting.

a. The plain meaning of the term "election" does not preclude the General Assembly from providing for early voting.

i. The Early Voting Laws' consistency with Section 1's provision that the "election" is "held" on election day turns on the meaning of the term "election." As always, an "analysis of a Delaware Constitutional provision begins with that provision's language itself." *Capriglione v. State ex rel. Jennings*, 279 A.3d 803, 806 (Del. 2021) (internal quotation marks and citation omitted). The Court's task is to ascertain "the original public meaning of the language at issue." *Id.*

When Article V, Section 1 was enacted in 1897, the term "election" had a well-established meaning: "the combined actions of voters and officials meant to make a *final selection* of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added) (citing N. Webster, *An American Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds. 1869)). Contemporaneous dictionaries uniformly defined "election" in terms of the voters' collective choice or selection of an officeholder. *See An American Dictionary of the English Language* 433 (defining "election" as "[t]he act of choosing a person to fill an office"); *Webster's Complete Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds. 1882) (same); *Universal Dictionary of the English Language* 1829 (R. Hunter & C. Morris eds. 1898) (defining "election as "[t]he act of electing, choosing, or selecting out of a number by vote for appointment to any office"). And just a few decades after Section 1's

enactment, the U.S. Supreme Court observed that the "word [election] now has the same general significance as it did when the [U.S.] Constitution came into existence—*final choice* of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921) (emphasis added).

Because an "election" is the voters' collective *final selection* of an officeholder, Section 1's provision that the "general election shall be held biennially on [election day]" means that Delaware voters must make a final selection of their preferred officeholder on that date. Section 1 is thus concerned only with the *final* selection: so long as the final selection is made on election day, the "election" is "held" on election day in accordance with Section 1. Put another way, by focusing on the final selection, Section 1 implicitly contemplates that some steps in furtherance of the election might take place *before* election day. The Early Voting Laws are therefore entirely consistent with Section 1: even though those Laws permit some voters to cast their ballots before election day, by definition, the voters' collective final selection still cannot be made until *all* ballots are cast. That does not occur until election day. After all, it is undisputed that even with the Early Voting Laws in effect, scores of Delaware voters cast their ballots on election day, and no winners are—or can be—selected before all the votes have come in on election day. The date on which the election is "consummated," *Foster*, 522 U.S. at 72 n.4, thus remains election day.

ii. Courts have long construed the plain meaning of the term "election" in exactly this manner, holding that statutes and constitutional provisions setting the "election" on a particular day are not violated by early voting provisions that permit voting before that day. In *Lyons v. Secretary of Commonwealth*, 192 N.E.3d 1078 (Mass. 2022), for instance, the Massachusetts Supreme Judicial Court relied on the plain meaning of "election" to reject the same argument that plaintiffs make here. Like the Delaware Constitution, the Massachusetts Constitution provides that "elections" "shall be held biennially on the Tuesday next after the first Monday in November." Mass. Const. art. 64, § 3. Yet the Massachusetts high court unanimously rejected the contention that "art. 64's requirement that the election 'be held' on a set date, must be read to imply that no votes can be cast other than on that day." *Lyons*, 192 N.E.3d at 1095. Invoking the definition of "election" set out in *Foster*—which was derived from Webster's dictionary—the court concluded that the state constitution did not "preclude early voting" because the "election is not 'consummated' during the early voting period, and the 'final selection' of winners must wait for the polls to close on the day designated in the Constitution." *Id.* at 1096 (quoting *Foster*, 522 U.S. at 71, 72 n.4).

Every federal court of appeals to encounter the issue has likewise rejected challenges to states' early voting laws on the theory that the laws violate federal statutes establishing a uniform election day. Much like the Delaware Constitution,

2 U.S.C. § 7 states that the uniform election day shall be "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." Yet the Fifth, Sixth, and Ninth Circuits have all held that this statute does not conflict with, or preempt, state laws providing for early in-person voting. *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 777 (5th Cir. 2000) (Texas law); *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (Tennessee law); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001) (Oregon law). In each case, the court held that early voting laws did not conflict with the uniform election day because they did not "create a regime of combined action meant to make a final selection on any day other than federal election day." *Millsaps*, 259 F.3d at 547; *see Keisling*, 259 F.3d at 1176; *Bomer*, 199 F.3d at 776. That reasoning applies with full force here.[9]

b. The Constitution's structure confirms that early voting is constitutional.

The Constitution's surrounding provisions—in particular, the provisions governing absentee voting—eliminate any doubt that Section 1's provision that the "general election" shall be held on election day permits some voting to take place

[9] The Maryland Court of Appeals invalidated an early-voting law on the ground that it conflicted with a state constitutional provision designating an election date. *See Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006). But that decision is an outlier: it is to our knowledge the only one declaring an early voting statute inconsistent with holding a single election day.

before that day. *See Opinion of the Justices*, 274 A.3d 269, 272 (Del. 2022) (Courts must also "examine other sections of the Constitution that give meaning to the provision under consideration."). Sections 4A and 4B of Article V—titled "General laws for absentee voting" and "Uniform laws for absentee registration"—direct the General Assembly to provide for absentee voting by certain voters who are "unable to appear to cast [their] ballot at any general election at the regular polling place," including those who are absent from the State because of their service in the "Armed Forces or Merchant Marine of the United States," and those who cannot vote on election day "because of the tenets or teachings of [their] religion." Del. Const. art. V, §§ 4A, 4B. By definition, many voters in those categories of absentee voters will cast their vote on a day other than election day: they will have to mail in their ballot ahead of time, often from overseas, or vote in advance by some other means.[10] Sections 4A and 4B, then, presume that votes will be validly cast prior to election day.

Those provisions—which must inform Section 1's construction—confirm that Section 1's statement that the "general election" is held on election day does not preclude voting before that day. That makes sense: as discussed above, the plain meaning of "election" establishes that the general election (the final selection) is

[10] Delaware law allows for distribution of absentee ballots up to 60 days "prior to an election." 15 *Del. C.* § 5504(b).

held on election day as long as voting does not culminate before that day. As Sections 4A and 4B demonstrate, weeks or even months of absentee early voting have no effect on when the election is held for purposes of Section 1. The same must be true of in-person early voting.

For just those reasons, courts have consistently concluded that the longstanding existence of absentee voting laws—states have permitted absentee voting for more than a century, *Bomer*, 199 F.3d at 776—demonstrates that provisions stating that the election is held on election day require only that the election be *consummated* on election day. As the Sixth Circuit explained in rejecting a similar challenge to a state's early voting law, there exists "no principled distinction between [early voting laws] and the mechanics of absentee voting" for purposes of determining consistency with a provision stating that the election is held on election day. *Millsaps*, 259 F.3d at 547; *Keisling*, 259 F.3d at 1175 ("We find it difficult to reconcile a decision rejecting the Oregon [early voting] law with the maintenance of absentee balloting."); *Bomer*, 199 F.3d at 776 (similar). And invitations to carve out an "exception for absentee voting" to strike down early voting laws while maintaining absentee voting simply "invites arbitrary line-drawing." *Millsaps*, 259 F.3d at 548.

c. The Superior Court's reasons for invalidating the Early Voting Laws lack merit.

The Superior Court concluded, with little analysis, that the "conflict" between the Early Voting Laws and Article V, Section 1 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." Ex. A at 16. That reasoning assumes that Section 1 requires all voting in an election to occur on election day, thereby disregarding both the plain meaning of "election" and the Constitution's absentee voting provisions.

The Superior Court dismissed the well-established meaning of "election" as the voters' final choice of officeholder on the ground that "*Foster* and its definition of 'the election'" are irrelevant because this case "does not require an interpretation of federal statutes." Ex. A at 18. But although *Foster* involved the federal election statutes, its definition of "election" was based on the universal plain meaning of that term—as elucidated by numerous dictionaries contemporaneous with Article V, Section 1's enactment—not on any consideration unique to the federal-law context. *See* 522 U.S. at 71. Further, the court below pointed to no peculiar feature of Section 1's language—whose reference to holding an "election" "biennially on the Tuesday next after the first Monday" in November tracks the federal statute and numerous state laws—that required departing from the plain meaning of the term "election."

Ex. A at 18. And although the court held that the "definition assigned to 'the election' in *Foster* is not the definition of 'general election' as it appears in Article V, Section 1," the court did not offer any alternative definition of "election," much less explain why that term requires that all voting *begin* on election day. *Id.*

Moreover, the Superior Court did not attempt to reconcile its unreasoned conclusion that all voting must occur on election day with the Constitution's absentee voting provisions. Those provisions demonstrate that the Constitution distinguishes between "voting," which may begin before the election, and the "election," which occurs on election day. The coexistence of Section 1 and Sections 4A and 4B demonstrates that the fact that some voting occurs before election day does not alter the fact that the election—the final selection—is held on election day. But on the Superior Court's view, any voting that occurs before election day is void *ab initio*. As the existence of Sections 4A and 4B show, that cannot be right.

Plaintiffs thus have not come close to demonstrating that the Early Voting Laws clearly conflict with Article IV, Section 1's first clause. The statute therefore must be upheld.

2. The Early Voting Laws fit 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 affirmative grant of authority in the Constitution to legislate, and because the Early Voting Laws do not conflict with

Article V, Section 1's establishment of election day, this Court can and should uphold the legislation without further analysis. But even if the General Assembly required an express grant to enact the Early Voting Laws, the second provision of Article V, Section 1 provides such a grant. That provision states that "the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat." Del. Const. art. V, § 1. Early voting is a means or method of voting that helps preserve the freedom and purity of elections.

a. Early voting clearly involves the "means, methods and instruments of voting." Dictionaries contemporaneous with Section 1's enactment define "method" as a "mode or manner of doing any thing." *Webster's Complete Dictionary of the English Language* 834; *see Universal Dictionary of the English Language* 3117 (defining "method" as a "mode or manner of procedure"). And early voting is a quintessential "mode or manner" of voting. Indeed, the entire point of the Early Voting Laws is to provide voters with the option of using an additional manner of voting—*i.e.*, another method by which to vote. In a similar vein, the Court of Chancery recently described a COVID-era mail-in voting law as increasing "the number of *methods* Delawareans had to vote." *League of Women Voters of*

Delaware, Inc. v. Dep't of Elections, 250 A.3d 922, 935 (Del. Ch. 2020) (emphasis added).

Plaintiffs argued below that the Early Voting Laws regulate the timing of voting and therefore do not concern the "methods" of voting. But in common parlance, the "method" of taking some act can include when the act is performed. Section 1, after all, requires that the election be consummated on election day but does not further limit the timing of voting—leaving that for the General Assembly. The Constitution's absentee voting provisions once again reinforce that conclusion. Section 4A directs the General Assembly to enact laws providing that certain categories of voters can vote absentee (voting that, as noted above, must in at least some circumstances take place before election day), but the provision does not specify 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, and Section 1's reference to the "means or methods" of voting must be construed in light of that understanding.

b. The Superior Court correctly agreed that the Early Voting Laws provide a method of voting, but incorrectly concluded that the legislation falls outside the General Assembly's broad authority because it does not "preserve the freedom and purity of elections." This Court has never held that Section 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," Del. Const. art. V, § 1, establishes a limit on the General Assembly's authority, nor has it invalidated a statute on that ground. In any event, the Early Voting Laws unquestionably "preserve the freedom and purity of elections."

The terms "freedom" and "purity" are by their nature capacious. The use of such expansive terms makes sense in the context of Section 1. Enacted in 1897, the provision sensibly gave the General Assembly wide latitude to set out the "manner of holding general election[s]," while listing the overarching values that ought to guide the General Assembly's exercise of that authority. Del. Const. art. V, § 1. It follows that an early voting law self-evidently designed to relieve burdens on the voting system and to increase access to voting helps "preserve the freedom and purity of elections." *Id*. Indeed, plaintiffs have not seriously attempted to argue otherwise, instead resorting to conclusory assertions unsupported by any reasoning. A023 (stating without elaboration that "[n]or are Delaware's Early Voting Laws intended to 'secure secrecy and the independence of the voter, preserve the freedom and purity of elections [or] prevent fraud, corruption and intimidation thereat'"); A111 (arguing only that the Early Voting Laws are not a "manner" of voting). In those circumstances, plaintiffs have fallen far short of demonstrating 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 exceed the General Assembly's broad authority under Section 1's second clause.

III. PLAINTIFFS CANNOT ESTABLISH THAT THE PERMANENT ABSENTEE VOTING LAW CLEARLY CONFLICTS WITH THE DELAWARE CONSTITUTION

A. Question Presented

Whether plaintiffs have established by clear and convincing evidence that the Permanent Absentee Voting Law, 15 *Del. C.* § 5503(k), unconstitutionally conflicts with Article V, Section 4A of the Delaware Constitution. This issue was raised and addressed below. Ex. A at 21-24; A067-071; A141-144.

B. Scope of Review

This Court reviews questions of law, including constitutional claims, *de novo*. *Higgin*, 295 A.3d at 1085.

C. Merits of Argument

Plaintiffs have not carried their burden of establishing that the Permanent Absentee Voting Law clearly conflicts with Article V, Section 4A of the Delaware Constitution. Properly construed, that constitutional provision empowers the General Assembly to enact laws allowing individuals meeting certain criteria to vote by absentee in each general election in which they are unable to vote in person. Section 5503(k) is entirely consistent with those requirements: it merely establishes a presumption that certain voters whose absentee eligibility is particularly likely to endure may vote absentee until their eligibility changes. The Superior Court's contrary conclusion disregards Section 5503(k)'s text and infringes on the General

Assembly's substantial leeway to make legislative judgments about the most effective and efficient means of facilitating absentee voting.

1. Section 5503(k) provides presumptive absentee status to a subset of voters whom the Constitution makes eligible to vote absentee. The provision enables voters in enumerated categories—those who are absent by reason of public service, membership in the Armed Forces, illness or physical disability; who are authorized to vote absentee by federal law; or whose occupation is providing care to a relative who requires "constant care"—"may apply in writing to the Department for permanent absentee status." 15 *Del. C.* § 5503(k).

That "permanent absentee status" is something of a misnomer, however, because Section 5503 permits a voter to vote absentee only in those elections in which he is unable to vote in person. Section 5503(k)(3) states that the Department "shall cancel a person's permanent absentee status upon . . . receipt of written notification that the reason that the person has stated for voting by absentee ballot is no longer valid." And Section 5503(k)(4) provides: "Persons in permanent absentee status shall keep the Department informed of . . . changes in the reason that the person has listed for voting by absentee ballot." Taken together, these provisions impose an affirmative duty on (1) each person who has received permanent absentee status to alert the Department if the listed reason for being unable to appear in person

changes; and (2) the Department to cancel the permanent absentee status of voters who alert the Department that they are unable to vote in person.

2. The Superior Court held that Section 5503(k) is inconsistent with Article V, Section 4A of the Delaware Constitution, which provides 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 a number of listed reasons "may cast a ballot [via absentee ballot] at such general election." Del. Const. art. V, § 4A. In dissecting that language, the Superior Court reasoned that the word "'such' refers to the nearest reasonable antecedent 'any general election.'" Ex. A at 23. The court therefore concluded that "Section 4A allows a voter to participate in absentee voting at only the election at which they are unable to appear." *Id.* Section 5503(k) is "clearly at odds" with that instruction, the court reasoned, because it would purportedly allow a voter who may be unable to appear at one election to "check a box on a form and automatically receive absentee ballots in all future general elections regardless of whether or not that voter is still [unable to appear] at the time of those future elections." *Id*.

The Superior Court misunderstood Section 5503(k)'s effect and operation. Nothing in Section 5503(k) permits voters to lawfully vote by absentee in a general election at which they are able to appear in person. Instead, Section 5503(k) singles out the categories of permissible absentee voters set forth in Article V, Section 4A

whose inability to vote in person is most likely to endure from election to election, and for whom reapplying for an absentee ballot each year would be most onerous—for instance, those stationed in the Armed Forces, and those with physical disabilities—and enables them to apply for permanent absentee status.[11] But because Section 5503(k) requires that status to be canceled if a voter's eligibility changes, 15 *Del. C.* § 5503(k)(3)-(4), Section 5503(k) merely establishes a *presumption* that certain categories of absentee voters will remain unable to appear in person at future elections, until they provide the required contrary notice. All told, Section 5503(k)'s interlocking provisions simply reverse the ordinary presumption that a voter *will* be able to appear in person to vote in future elections absent a contrary notification—for the small segment of voters whom the General Assembly has determined are likely to remain unable to vote in person.

Section 5503(k)'s presumption of absentee status is entirely consistent with Section 4A. The constitutional provision simply states that the General Assembly shall legislate as needed so that voters meeting the stated criteria can vote by

[11] The General Assembly denied eligible absentee voters the option of obtaining permanent absentee status if their reason for voting absentee was less likely to persist from year to year or if there was no special reason to expect them to struggle with reapplying for absentee ballots. Accordingly, Section 5503(k) forbids eligible absentee voters from obtaining permanent absentee status if the circumstances justifying absentee voting include their occupation (other than constant in home care of a family member), religion, or vacation. *See* 15 *Del. C.* § 5503(k); 15 *Del. C.* § 5502.

absentee in an election in which they are unable to vote in person. Section 4A says nothing about how the General Assembly should determine whether a voter is unable to vote in person in an election—leaving that judgment to the General Assembly. And by merely establishing a presumption, Section 5503(k) does not run afoul of Section 4A's instruction that absentee status should be available only for those who are unable to appear in person. The Superior Court was able to conclude otherwise only by completely ignoring Section 5503(k)'s provisions for revoking absentee status. *See* Ex. A at 23.

3. Section 5503(k) represents the archetypal legislative judgment that the Constitution commits to the General Assembly. In enacting Section 5503(k), the General Assembly found that "certain voters have difficulty submitting applications for absentee ballots." 77 Del. Laws, ch. 269 (2010). The legislation was also informed by the observation that servicemembers abroad faced challenges applying for and receiving absentee ballots as early as recommended by federal law governing military overseas absentee voting. *See id.* The General Assembly thus made a reasonable policy choice to facilitate the participation of voters most likely to repeatedly qualify as absentee voters and who face special challenges in applying for and receiving absentee ballots in time for each election.

Those legislative judgments about how best to implement Section 4A's directive are precisely the sort of policy choices properly entrusted to the General

Assembly, not the courts. "Courts must be mindful that under our constitutional scheme, in the absence of limitations imposed by either the federal or state constitutions, the General Assembly's power to legislate has been described by this Court as 'unlimited.'" *New Castle Cnty. Council*, 688 A.2d at 891 (citation omitted). "Moreover, the General Assembly's articulation of public policy, while not conclusive, is entitled to great weight." *Id.* That is why courts must accord "deference to legislative judgment in matters 'fairly debatable.'" *Higgin*, 295 A.3d at 1089 (citation omitted). Here, the General Assembly decided, based on the available information and its own judgment, to enact Section 5503(k) to increase voter access while carrying out Section's 4A's charge. The courts should respect that judgment.

At bottom, plaintiffs' complaints about Section 5503(k) boil down to a concern that the Department will enforce absentee ballot requirements too "passive[ly]." A114. But plaintiffs have brought a *facial* challenge, and any (unsupported) belief that Section 5503(k) is underenforced or that voters may not actually comply with Section 5503(k)(4)'s mandate to "keep the Department informed of . . . changes in the reason that the person has listed for voting by absentee ballot" are not reasons to declare the statute facially unconstitutional. And in any event, Plaintiffs have not alleged underenforcement or voter misconduct, and there is no basis on which to speculate about whether voters will break the law by

not reporting changes in their eligibility to maintain permanent absentee status.[12] It is this Court's role to decide whether plaintiffs have shown that Section 5503(k) as written is clearly and convincingly incompatible with Article V, Section 4A. Plaintiffs have not done so.

[12] Such allegations would also be baseless. As noted, prior to the 2022 election cycle, the Department sent a letter to all voters on the permanent absentee voter list reminding them of the authorized reasons for maintaining permanent absentee status and of their continuing obligation to inform the Department of any changes to their eligibility. *See* A074-075.

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

/s/ Kathleen Jennings
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

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