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Case Number 342,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HONORABLE ANTHONY J. ALBENCE, in his official capacity as State Election Commissioner, and STATE OF DELAWARE DEPARTMENT OF ELECTIONS,	)	
	)	No. 342, 2022
Defendants-Below/Appellants/ Cross-Appellees,	)	On Appeal from a Decision of the Court of Chancery of the State of Delaware
v.	)	C.A. Nos. 2022-0641-NAC & 2022-0644-NAC
MICHAEL HIGGIN and MICHAEL MENNELLA,	)	
Plaintiffs-Below/Appellees/ Cross-Appellants.	)	

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

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

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: October 3, 2022

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PRELIMINARY STATEMENT

Plaintiffs'[1] answering brief does not address materially important and settled law set forth in Defendants' opening brief. For example, Plaintiffs do not dispute that: (1) standing is a threshold jurisdictional question that must be resolved before reaching the merits; (2) the potential that no plaintiff would have standing is not a reason to find standing; (3) absent a constitutional prohibition, the authority of the General Assembly is unrestrained; (4) all doubts are resolved in favor of the constitutionality of a statute "unless invalidity is beyond doubt"; and (5) implied limitations on constitutional or statutory provisions are strongly disfavored.

Plaintiffs fall back on supposed "precedent" that this Court has never adopted and that the Court of Chancery itself seriously questioned. Plaintiffs also try to inject new facts for the first time on appeal, resort to policy-based arguments, and dismiss legislation bolstering Delawareans' fundamental right to vote as merely "fashionable." Plaintiffs' unavailing arguments confirm that this Court must reverse the Court of Chancery's rulings on standing and the Vote-by-Mail Statute and affirm the court's ruling on the Same-Day Registration Statute.

[1] Capitalized terms have the same meaning as in Appellants' Opening Brief, herein as "DOB at ___." Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal is cited as "PAB at ___."

COUNTERSTATEMENT OF FACTS

Plaintiffs' answering brief attempts to impermissibly insert new facts into the record on appeal to cure deficiencies in their standing argument. *See* PAB at 10, 18. The *Miles* Plaintiffs claim, for the first time on appeal, that they "intend to vote in the November 8, 2022 election." PAB at 10. The record in the proceedings below is devoid of any evidence of the *Miles* Plaintiffs' intention to vote in the upcoming General Election. Similarly, the *Higgin* Plaintiffs allege, for the first time on appeal, that the Vote-by-Mail Statute will harm Higgin because it "requires a candidate to waste valuable time and resources on campaigning to people who may have already voted through mail-in voting." PAB at 18. Plaintiffs may not offer new facts on appeal. *Draper v. State*, 146 A.2d 796, 800 (Del. 1958) (holding that the defendant could not supplement the record on appeal). As such, Plaintiffs' new averments attempting to bolster their standing claim should not be considered.

ARGUMENT

I. THE STANDARD OF REVIEW FOR STANDING DETERMINATIONS IS *DE NOVO*.

Before this Court is a question of law regarding Plaintiffs' standing, and therefore, the standard of review is *de novo*. *Office of the Comm'r Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015). Plaintiffs correctly acknowledge that this Court reviews questions of law *de novo*. PAB at 12. However, Plaintiffs' attempt to invoke the "substantial evidence test" (*id*.) fails because, among other reasons, there were no issues of material fact for the Court of Chancery to resolve (Op. at 5 n.2 (noting "Plaintiffs [did] not dispute Defendants' recitation of facts other than one immaterial assertion by Defendants regarding 15 *Del. C.* § 4937")).[2] As such, this Court reviews *de novo* "the trial court's formulation and application of legal concepts to undisputed facts." *Turner v. State*, 957 A.2d 565, 572 (Del. 2008).

[2] The cases on which Plaintiffs rely contemplate appellate review of questions of law and fact, which is not the case here. *See* PAB 12 (citing *Burton v. State*, 2016 WL 3568189 (Del. June 22, 2016) (reviewing findings of fact and law made during an evidentiary hearing about possible witness recantation)); *Warren v. Goldinger Bros, Inc.*, 414 A.2d 507, 509 (Del. 1980) (reviewing findings of law and fact regarding a land dispute). *Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451, 458 (Del. 2000), cited by Plaintiffs, confirms standing questions are reviewed *de novo* – wherein this Court states unequivocally "[o]ur scope of review with regard to the Claimants' standing implicates rulings of law that we review *de novo.*"

II. PLANTIFFS LACK STANDING TO CHALLENGE THE VOTE-BY-MAIL STATUTE.

The Court of Chancery erred by finding Plaintiffs had standing when they failed to establish that the Vote-By-Mail Statute caused them actual and concrete injury and failed to meet the standing requirements this Court articulated in *Riverfront Hotel LLC v. Board of Adjustment of City of Wilmington*, 213 A.3d 89 (TABLE), 2019 WL 3884031, at *1 (Del. July 11, 2019). DOB at 5–9. Furthermore, the court erred in relying on *In re Delaware Public Schools Litigation*, 239 A.3d 451 (Del. Ch. 2020), when the court ignored the traditional Delaware standing test and adopted a novel, general public interest standing that this Court has never recognized. DOB at 9–10. As this Court has consistently held, "a plaintiff must demonstrate standing in accordance with the federal courts' interpretation of Article III standing, as enumerated in *Lujan v. Defenders of Wildlife*,[3] as well as satisfy the prudential "zone-of-interests" test." *Riverfront Hotel LLC*, 213 A.3d at 89; *Reeder v. Wagner*, 974 A.2d 858, 2009 WL 1525945, at *2 (Del. June 2, 2009).

Plaintiffs bear the burden of establishing standing. *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) ("The party invoking the jurisdiction of the court bears the burden of establishing the elements of standing."); *Id.* at 1110 (holding the "degree and manner of evidence

[3] 504 U.S. 555 (1992).

that is required to establish standing varies as the successive stages of any litigation proceeds"). Plaintiffs failed to meet their standing burden as articulated in *Riverfront Hotel* because they failed to marshal any facts demonstrating they suffered an injury.

Plaintiffs fail to address Defendants' argument that the Court of Chancery erred in finding Plaintiffs had standing when they failed to establish any harm or meet traditional standing requirements, and instead advance the same arguments proffered below. *See* PAB 12–27; A323–27. Once more, Plaintiffs primarily focus on the court's analysis in *Public Schools*—again to the point of lifting the court's commentary nearly wholesale into their brief—to argue why a more lenient, flexible approach to standing than ever before applied in Delaware should apply in this case. PAB 12–15.

Plaintiffs' standing arguments miss the mark because: (1) this Court has never reviewed or had the chance to consider the novel extension of the standing doctrine outlined by *Public Schools*; (2) the *Public Schools* commentary on "public interest standing," relied upon by the Court of Chancery to establish standing should be rejected because it does not require Plaintiffs to satisfy the traditional elements of standing; (3) the public interest test, as outlined in *Public Schools* and followed by the Court of Chancery, is not binding because it is *dicta*; and (4) extension of the *Public Schools* public interest standing theory to this case essentially eviscerates standing because it does not require any injury in fact. By permitting Plaintiffs to

bypass Delaware's traditional standing analysis, the court improperly found that, in "cases involving issues of public concern and government accountability," Delaware courts "relax injury in fact" and have "shown a willingness to look beyond "'federal complexities and technicalities involving standing . . . in favor of [a] just determination on the ultimate merits.'" Op. at 30 (citing *Public Schools*, 239 A.3d at 510). The finding misstates this Court's precedent, as it directly contradicts this Court's holding in *Riverfront Hotel*, which required a plaintiff to satisfy federal standing requirements under Article III, 213 A.3d 89, and dramatically expands the standing doctrine in a manner never approved by this Court.

The Court of Chancery further erred in adopting generalized public interest standing first articulated in *Public Schools*. DOB at 9–10. In *Public Schools*, the court inserted a fallback in case its primary standing findings were overturned, commenting in *dicta* that plaintiffs would have "public interest standing." 239 A.3d at 540. The *Public Schools* commentary on public interest standing, however, cannot be relied upon as "clear precedent" as Plaintiffs urge. PAB at 16. "Indeed, perhaps the *most* well-settled proposition of common law is that dictum does not constitute binding precedent." *In re MFW S'holders Litig.*, 67 A.3d 496, 521 (Del. Ch. 2013) ("In Delaware, such dictum is without precedential effect."), *aff'd sub nom.*; *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("[This] Court follows the traditional definition of 'dictum' describing it as judicial statements that

would have no effect on the outcome of the case") (internal citations omitted). *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 716 (Del. 1995) ("This language is *obiter dicta* and is, therefore, not binding as legal precedent."). Thus, the court erred when it relied on *Public Schools* to implement informal standing requirements for Plaintiffs and adopted a novel jurisdictional doctrine—which would curtail traditional standing notions.

Plaintiffs next urge this Court to adopt the Court of Chancery's generalized public interest standing, first articulated in *Public Schools*, because Plaintiffs have an interest in the statute and voting laws are "fundamental rights" and "of great importance".[4] PAB at 17. To abandon traditional standing requirements in favor of a nebulous idea of generalized standing "would, in effect, swallow the rule of standing generally" and permit anyone "to challenge any government conduct on the most tenuous of standing grounds." *O'Neill v. Town of Middletown*, 2006 WL 4804652, at *20 (Del. Ch. Jan. 18, 2006) (rejecting an argument to expand taxpayer standing based on plaintiffs' "desire to see general compliance with the laws of the

[4] Plaintiffs also cite to taxpayer standing to advocate for adoption of public interest standing. PAB at 16. Taxpayer standing is limited and "reserved for a narrow set of claims involving challenges either to expenditure of public funds or use of public lands." *O'Neill*, 2006 WL 4804652, at *20. This Court explicitly rejected the idea of "'impermissibly expand[ing] the scope of claims recognized under taxpayer standing doctrine in Delaware (thereby not only eviscerating traditional notions of standing analysis where challenges to governmental conduct are concerned, but also undermining certain principles of separation of powers, as well).'" *Reeder*, 974 A.2d 858 (quoting *O'Neill*, 2006 WL 4804652, at *7).

state, which is insufficient, by itself, to merit standing."). Indeed, "[w]hether styled as a constitutional or prudential limit on standing, . . . where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (internal citations omitted).

Plaintiffs further assert that "voter dilution" creates sufficient injury to satisfy standing for Higgin (as a candidate and a voter) and the *Miles* Plaintiffs (as voters).[5] PAB at 18-20 (unconstitutional votes "dilute the impact of lawfully cast votes for Higgin" and "will dilute [Plaintiffs'] votes"). Plaintiffs cite *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016) in support of their claim of voter dilution, but *Howell* does not support Plaintiffs here. In *Howell*, the Virginia Supreme Court, admittedly creating a new, fact-intensive rule whole cloth, found voter dilution sufficient to confer standing because Virginia's Governor—via executive order—expanded the voting population to include convicted felons, who were not otherwise eligible to vote. *Id.* at 714. Thus, the *Howell* court found the addition of hundreds of thousands of new voters who were not part of the pre-executive order voting pool constituted

[5] Plaintiffs' assertion that Defendants "concede" Plaintiffs' vote dilution claim mischaracterizes Defendants' argument. *See* PAB at 19 n.5; DOB at 7. Plaintiffs' claims concern neither the Voting Rights Act nor minority access to the electoral process, and accordingly, are not within the limited type of cases where courts have recognized vote dilution. *See Thornburg v. Gingles*, 478 U.S. 30, 38-41 (1986); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. Of Educ.*, 4 F.3d 1103, 1119 (3d. Cir. 1993).

voter dilution. *Id.* Here, by contrast, Plaintiffs' votes are not being diluted. The Vote-by-Mail Statute gives eligible Delawareans additional options to exercise the right to vote. There is no impact or infringement on Plaintiffs' voting rights.[6]

The Court of Chancery contended that under *Dover Historical Society*, while "[g]eneral or abstract harm" does not confer standing, "a shared injury *might*." Op. at 32–33 (emphasis added). But *Dover Historical Society* does not change the requirement that there still must be *an* injury, which Plaintiffs do not have. Each Plaintiff's vote counts for the same share as it did prior to the new legislation. Plaintiffs' access to their right to vote was expanded, not infringed. Any Plaintiff's ability to campaign or participate in the election remains unaffected. This Court should follow the overwhelming precedent finding that a claim for vote dilution is a generalized grievance insufficient to confer standing. *See Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020); *Bolus v. Boockvar*, 2020 WL 6880960, at *4 (M.D. Pa. Oct. 27, 2020), *report and recommendation adopted*, 2020 WL 6882623 (M.D. Pa. Nov. 23, 2020)).

Plaintiffs also allege Mennella in particular will be injured because, as an election inspector, he will need to "make the proclamation that the election is open" which somehow (Plaintiffs do not explain) impacts individuals voting by mail. PAB

[6] Plaintiffs also casually assert that "half the state will likely be affected by the new statutes' adverse effects," with no citation to any evidence in the record. PAB at 19.

at 21. Mennella stresses the "real dilemma" for him is due to his concern that the Vote-By-Mail Statute is unconstitutional. *Id*. Mennella's belief regarding constitutionality is irrelevant to his ability to function as an election inspector. Moreover, he articulates no actual or concrete injury he will suffer when he opens the election when some voters vote by mail. Such circular reasoning has been expressly rejected by this Court. *See Kelly v. Trump*, 2020 WL 6392865, at *3 (Del. Ch. Nov. 2, 2020) *aff'd* 256 A.3d 207 (Del. 2021) (dismissing a case based on standing when plaintiff claimed her religious belief was chilled due to indirect governmental actions).

At bottom, Plaintiffs have not established any actual, concrete and particularized injury. The court therefore erred when it concluded Plaintiffs suffered sufficient injury to confer standing. The court further erred when it relied on *dicta* in *Public Schools* and adopted generalized, public interest standing. The Court of Chancery's determination that Plaintiffs had standing under the novel public interest standing theory should be reversed.

III. THE *HIGGIN* PLAINTIFFS LACK STANDING TO CHALLENGE THE SAME-DAY REGISTRATION STATUTE.

A court is not permitted to assume standing, a threshold jurisdictional issue, when standing has been challenged. DOB at 11–15; *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121 (Del. 2021) ("[S]tanding is properly a threshold question that the Court may not avoid."). The Court of Chancery erred in assuming standing, and the decision below should be reversed on this basis alone. Plaintiffs do not dispute Defendants' argument that the Court of Chancery erred when it assumed, without deciding, standing. *See* PAB 24-28.

Conceding that the court erred in assuming standing, the *Higgin* Plaintiffs now press this Court to hold that they had standing to challenge the Same-Day Registration Statute. PAB at 24-28. Mennella reiterates his incorrect understanding of the duties of an election inspector. PAB at 25-26. But Commissioner Albence specifically refuted Mennella's mistaken understanding of an inspector's duties related to the Same-Day Registration Statute. *See* A307 ¶21; A401 ¶¶2–4. Mennella did not offer any response and on appeal simply ignores the evidence. Mennella will not suffer any actual injury because he will be able to perform his limited, statutorily defined duties as an election inspector, has no duty or authority to refuse to open polling places based on a belief that a statute is unconstitutional, and his ability to address challenges to voters is limited to issues of identity, residency, and bribery. 15 *Del. C.* §§ 4939-41; *see also In re Admin. Order No. 1-MD-2003 (Appeal of*

Honorable James P. Troutman), 936 A.2d 1, 11 (Pa. 2007) ("Appellant lacks . . . standing, because the challenged order does not directly interfere with his obligations as clerk of court.") (Saylor, J., concurring).

The Court of Chancery did not fully evaluate Mennella's standing and instead, chose not to "dwell on all the possible **hypothetical** fact scenarios that could arise." Op. at 25. (emphasis added). The court's speculation as to hypothetical facts further highlights the court's struggle to understand how Mennella suffers actual and concrete injury. The court was required to review the evidence at the summary judgment stage, to determine if Plaintiffs had standing. *Dover Hist. Soc.*, 838 A.2d at 1110. The court did not do so and its decision not to dismiss Mennella for lack of standing should be reversed.

As to Higgin, the Court of Chancery correctly concluded that Higgin did not "marshal 'specific facts' supporting his standing." Op. at 23. In the court's view, "Higgin offers very little, if any evidence that his campaign efforts have been disrupted. Nor has he explained how the Same-Day Registration Statute has personally or concretely impeded (or will impede) his continuing campaign efforts." *Id.* Higgin does no better in the current appeal – nor could he, as it is inappropriate to offer new facts on appeal. *Draper*, 146 A.2d at 800. Neither plaintiff presented competent evidence to support his contention that he is injured by the Same-Day Registration Statute. Thus, neither has standing.

This Court should reinforce its longstanding and repeated holdings that courts must make a threshold standing determination when standing is in dispute and reinforce that every putative plaintiff must establish the standing requirements articulated in *Dover Historical Society*, *Riverfront Hotel*, and *Lujan*. *See Morris*, 246 A.3d 121; *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, (Del. 2016); *Ala. By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 264 (Del. 1995) ("As a preliminary matter, a party must have standing to sue in order to invoke the jurisdiction of a Delaware court."). Despite neither plaintiff proving he will be injured by the Same-Day Registration Statute, the court erroneously assumed, without deciding, standing. Thus, the Court of Chancery should be reversed.

IV. THE VOTE-BY-MAIL STATUTE DOES NOT CONFLICT WITH ARTICLE V, SECTION 4A.

The Vote-by-Mail Statute was well within the General Assembly broad legislative power to enact. Indeed, the Court of Chancery correctly concluded that nothing in the Delaware Constitution expressly prohibits the General Assembly from passing the Vote-by-Mail Statute. Nevertheless, the court found the statute conflicted with Article V, Section 4A's absentee voting provisions based on an implied limitation identified by three court opinions whose reasoning and precedential value the court questioned.

To find that implied limitation, those opinions pieced together disparate provisions of Article V and read into the constitutional text meaning and language that simply did not exist. This Court should correct the prior misinterpretations of the Delaware Constitution and re-affirm the General Assembly's authority to pass the Vote-by-Mail Statute because nothing in the Delaware Constitution prohibits it. The Court should reject Plaintiffs' misguided contention that the General Assembly could only enact mail-in voting through constitutional amendment and their misreading of Article V to require in-person voting. To the extent the Court even considers Section 4A, application of the proper analytical framework demonstrates the Vote-by-Mail Statute is unequivocally valid under the Delaware Constitution.

A. The General Assembly is Not Required to Enact Mail-in Voting Solely by Constitutional Amendment.

Providing Delawareans the ability to participate in elections by mail-in voting is a valid exercise of the General Assembly's broad legislative authority, whether the General Assembly chooses to enact such procedures by statute or by constitutional amendment.[7] But Plaintiffs erroneously contend that the *only* way the General Assembly could have enacted voting by mail was through a constitutional amendment. PAB at 32. To support their mistaken belief, Plaintiffs point to past amendments of Article V, Section 4A (governing absentee voting) and the fact that the current General Assembly passed the Vote-by-Mail Statute after an earlier attempt to amend the Delaware Constitution was unsuccessful. The General Assembly is under no such restriction.

As a threshold matter, Plaintiffs conceded in the proceedings below that because the text of the Delaware Constitution is unambiguous, the Court of Chancery should not consider legislative history at all. A344 ("[B]ecause the text is unambiguous, the Court can decide this matter in Plaintiff's favor without resorting

[7] Plaintiffs acknowledge "the Delaware General Assembly has broad legislative authority" that is only "limited by the Delaware Constitution." PAB at 29. But Plaintiffs then appear to proceed under a framework that the General Assembly can only do what the Delaware Constitution expressly permits. Not so. As the Court of Chancery explained, a fundamental principle of constitutional analysis includes the General Assembly's freedom to legislate as it sees fit, *unless* restricted by the Delaware Constitution. *See* Op. at 38–42.

to legislative history."). Indeed, the court's ruling on the Vote-by-Mail Statute does not turn *at all* on the statute's legislative history. The Court need not and should not consider the statute's legislative history to find that the Vote-by-Mail Statute is permitted under the Delaware Constitution's broad grant of authority to the General Assembly. *See* 2A Sutherland Statutes and Statutory Construction ("Sutherland") § 48:13 (legislative statements are only used to "interpret ambiguous statutes," and even then, "are not dispositive on the issue of legislative intent, and, more generally, have limited value to clarify the intent of an entire legislative body").

Even if this Court were to evaluate the legislative history of the Vote-By-Mail Statute—which is not necessary or dispositive—the Court cannot, as Plaintiffs urge, announce an implied limitation on the General Assembly based on the individual legislators' statements and actions. First, the Court should not give weight to cherry-picked debate commentary in construing the constitutionality of a challenged statute. *See Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, -A.3d-, 2022 WL 4587490, at *12 n. 70 (Del. Sept. 30, 2022) (comments made by the mayor, city solicitor, and commissioner are not binding upon the Commission in a zoning matter). Additionally, the significance of any legislative events does not support Plaintiffs' unfounded conclusion that the General Assembly "knew" the only way to enact voting by mail was via constitutional amendment. Perhaps individual legislators preferred to enact mail-in voting procedures via constitutional amendment to better

safeguard them against future legislative changes, but it is not within the Court's purview to investigate the motives of legislators to divine legislative intent when no ambiguity exists. *See State ex rel. Craven v. Schorr*, 131 A.2d 158, 161 (Del. 1957) (holding "no court may properly inquire into" the motives of legislators); *Bilski v. Kappos*, 561 U.S. 593, 608 (2010) (the "established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision").

B. Voting by Mail is Distinct from Absentee Voting.

The Court of Chancery erroneously equated voting by mail to absentee voting as contemplated by Section 4A. DOB at 19–21. The court disregarded the plain text of Section 4A, which specifically requires the General Assembly to promulgate voting procedures for those voters "unable to appear" in-person due to enumerated reasons. Del. Const. Art. V § 4A. Section 4A does not otherwise address voters unable to appear in-person for other reasons or who might choose not to appear in-person.

Plaintiffs contend solely there are only "two types of voting – in-person and *in-absentia*" and thus no difference between a voter "unable" to vote in-person and a voter who is simply unwilling to vote in-person. PAB at 30–31. But in the

Opinion, the court carefully identified *Lyons*,[8] *Harrington*,[9] and *Opinion of the Justices*[10] as the source of this binary read on the manner of voting. *See* Op. at 62 ("Thus, at least according to *Lyons* and *Harrington*—on which *Opinion of the Justices* relies—the constitutional fulcrum on which validity and invalidity turns is whether or not the voter is required to appear at the polling place and not simply how a vote is cast."); *see also id.* ("[P]ermitting widespread voting by mail would—regardless of whether you call it absentee voting, mail-voting, or something else—improperly render Section 4A surplusage under *Lyons*, *Harrington*, and *Opinion of the Justices*."). *Lyons* and *Harrington* turned on strained analyses of Article V, Section 2's "offer to vote" language—which the *Opinion of the Justices* later engrafted into *dicta* regarding Section 4A. DOB at 23–36. The Court of Chancery itself questioned the soundness and precedential value of those cases. Op. at 66–73.

A proper reading of the "offer to vote" language in Section 2 does not dictate the result that *Lyons* and *Harrington* reached. Section 2 governs qualifications for voting, including age and residency—it has nothing to do with how voting is to be conducted. "Offer to vote" describes the "hundred or election district" of which an individual must have been a resident for at least thirty days prior to an election for

[8] 5 A.2d 495 (Del. 1939).
[9] 30 A.2d 688 (Del. 1943).
[10] 295 A.2d 718 (Del. 1972).

the individual to be qualified to vote at that election. Del. Const. Art. V § 2. It makes little sense for an implied requirement that voting take place in-person to be buried in the middle of a clause addressing the age and residency requirements for voters. Indeed, the courts did not grapple with a logical question that arises: if the drafters intended to mandate all voting to take place in-person, why was that requirement not expressly included in Article V?

The claim that the Vote-by-Mail Statute renders Section 4A's absentee voting provisions superfluous is based on a muddled reading of different provisions in Article V, with the result being a rejection of the distinction between mail-in voting and absentee voting that finds no support in the constitutional text. As Plaintiffs note in their brief (PAB at 44), the constitutional text "means what it says, no matter what the effect may be. To give it a different meaning would be, in the court's opinion, judicial legislation." *State ex rel. Southerland v. Hart*, 129 A. 691, 694 (Del. Super. 1925); *see also Ewing v. Beck*, 520 A.2d 653, 661 (Del. 1987) ("It is a settled principle that Courts will not engage in 'judicial legislation' where the statute in question is clear and unambiguous."). Under a proper analysis of both Article V and case law, the Court need not reach Section 4A and should find that because there is no constitutional prohibition on mail-in voting, the Vote-by-Mail Statute is valid.

C. Section 4A Contains No Express or Implied Restriction on Voting by Mail.

Should the Court proceed to an analysis under Section 4A, the Vote-by-Mail Statute is constitutional. Plaintiffs do not dispute the Court of Chancery's finding that neither Section 4A nor any other provision expressly prohibits the General Assembly from enacting the Vote-by-Mail Statute. *See* PAB at 37–41. Rather, the entirety of Plaintiffs' claim rests on an *implied* constitutional restriction that a pair of courts "stretch[ed] and strain[ed]" to find (Op. at 72). PAB at 37–41. But the modern Court seeks to avoid engrafting implied limitations the plain text does not expressly state. DOB at 23; *Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007) ("[A] court may not engraft upon a statute language which has clearly been excluded therefrom." (citation omitted)).

Plaintiffs urge this Court to make *Lyons*, *Harrington*, and *Opinion of the Justices* precedential "consistent with the text of the Constitution, which requires in-person voting." PAB at 37. The Delaware Constitution contains no such requirement. *See supra*. And Plaintiffs miss the point entirely: the Court of Chancery raised well-founded concerns that the commentaries in those cases were ***inconsistent*** with the constitutional text and of limited precedential value. Instead

of engaging the court's concerns, Plaintiffs simply quote from and cite to those cases as binding and unquestioned precedent. PAB at 37–41.[11]

Plaintiffs also lose sight of the purpose of advisory opinions in asserting that the *Opinion of the Justices* is binding precedent on the basis of the General Assembly's post-1972 amendments to Section 4A. PAB at 40. Advisory opinions provide guidance to the Governor and General Assembly regarding constitutional issues and interpretation. *See* 10 *Del. C.* § 141. But the General Assembly's amendments of Section 4A to add categories of absentee voters[12] do not render *dicta* within an advisory opinion binding on ***this Court***, a question Plaintiffs ignore altogether. *See, e.g.*, *Op. of the Justices*, 413 A.2d 1245, 1248 (Del. 1980) ("[A]dvisory opinions do not decide a case, do not adjudicate a dispute and are not judicial rulings in any sense. For those reasons, they are not binding on any court and do not carry precedential effect.").

Finally, Plaintiffs dismiss *McLinko*[13] and *Mass. Lyons*[14] on the basis that they are rulings from other states and "incompatible with currently binding Delaware

[11] Plaintiffs also attempt to elide the problems in the courts' reasoning by repeatedly citing to the late Justice Holland's scholarship, which traces and describes the limited court commentaries on Section 4A. But the point remains that the Court can revisit and reconsider the value of those cases.

[12] Again, the General Assembly's previous actions on absentee voting through constitutional amendment do not mean it could *only* enact mail-in voting through constitutional amendment.

[13] 279 A.3d 539 (Pa. 2022).

[14] 192 N.E.3d 1078 (Ma. 2022).

precedent." PAB at 41–42 (quoting Op. at 65). The point is that this Court can now address whether sister states' holdings on similar issues are helpful precedent. Citing no authority, Plaintiffs assert that "[t]his Court has traditionally, and appropriately, looked outside Delaware for guidance in interpretation of a matter *only when* there is an open question or an absence of Delaware law on the issue before it." PAB at 42 (emphasis added). This is an overreach. This Court "recognize[s] that the decisional law of other states may be persuasive, especially when there is a 'historical convergence' between the laws or constitutional provisions at issue." *Capriglione v. State ex rel. Jennings*, 279 A.3d 803, 808 (Del. 2021) (citing *Juliano v. State*, 254 A.3d 369, 378–79 (Del. 2020)).

The Pennsylvania and Massachusetts high courts within the past two months addressed the very same issues before this Court, construing substantively similar constitutional provisions and addressing the specific policy concerns animating historical judicial interpretations. DOB at 36–42. The Court of Chancery itself recognized the persuasive value of *McLinko* and *Mass. Lyons* in this appeal and a potential reconsideration of *Lyons*, *Harrington*, and the *Opinion of the Justices*. *See* Op. at 65.

* * *

Adopting Plaintiffs' arguments against the Vote-by-Mail Statute requires the Court to find three key, implied restrictions in the Delaware Constitution: (1) the

General Assembly could not enact voting by mail provisions through statute rather than by constitutional amendment; (2) the criteria Delawareans must meet to qualify to vote simultaneously preclude any forms of voting other than in-person voting; and (3) the mandate that the General Assembly must make absentee voting available for certain categories of voters precludes the General Assembly from making absentee voting available for additional groups of voters.

But each of these restrictions defies the fundamental principles of constitutional analysis this Court follows and contravenes the broad legislative authority the Delaware Constitution grants to the General Assembly. To the extent this Court even considers Section 4A, it must find that the Vote-by-Mail Statute is valid.

V. THE VOTE-BY-MAIL STATUTE IS VALID UNDER ARTICLE V, SECTION 1.

A. Voting by Mail Does Not Alter the General Election Day.

Plaintiffs also re-assert their argument from the proceedings below that the Vote-by-Mail Statute violates Article V, Section 1. PAB at 42–46. However, the Court of Chancery declined to address that argument in the Opinion (Op. at 51), so the claim is not properly before this Court. *See Haskins v. Del. Corr. Ctr.*, 751 A.2d 878 n.3, 2000 WL 628332 (Del. Apr. 28, 2000) ("Because the Superior Court did not reach that issue in its decision, it is not properly before us in this appeal.").

Nevertheless, even if this Court chooses to consider Plaintiffs' contentions, Plaintiffs' argument fails. Article V, Section 1 provides as follows:

> **§ 1. Time and manner of holding general election**
>
> Section 1. 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 threat.

Under Section 1, the General Election must take place on the Tuesday after the first Monday of November and be conducted via ballot, but the General Assembly is otherwise broadly empowered to regulate elections. According to Plaintiffs, the Vote-by-Mail Statute is inconsistent with the first clause of Section 1 because it enables voters to submit ballots prior to the date of the General Election (*i.e.*, November 8, 2022) and thus impermissibly alters election day.

Plaintiffs' argument should be rejected. It rests solely on an understanding that an "election" consists of nothing more than the act of voting. Plaintiffs' interpretation directly contradicts the text of the Delaware Constitution and finds no support in the ordinary, common-sense usage of the terms. *See Marker v. State*, 450 A.2d 397, 399 (Del. 1982) ("Constitutional phrases must, if possible, be given their ordinary or plain meaning.").

The first clause of Section 1 specifically employs the term "election," not "voting." The second clause, in contrast, addresses the "means, methods and instruments of *voting*" (emphasis added). And surrounding provisions in the Delaware Constitution address the act of "voting," distinct from an "election." Article V, Section 2, for example, sets forth the "[q]ualifications for voting" that an individual must meet to be "entitled to *vote* at such *election*" (emphasis added). By way of further example, Section 3 prohibits individuals from "*vot[ing]* at such *election*" (emphasis added) if they engaged in bribery. Thus, the plain text of Article V intentionally distinguishes the act of voting from an election. Indeed, if the drafters meant for all *voting* to take place only on the day the General Election is held, they could have so provided. *See Freeman v. X-Ray Assocs., PA.*, 3 A.3d 224, 229 (Del. 2010) ("[W]e cannot overlook the legislature's use of different terms . . . [a] redundant interpretation is at odds with the commonly accepted rule of statutory

interpretation that requires us to give each distinctive term an independent meaning." (citing *Gen. Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988))).

An election has not taken place simply because voters have cast their ballots. There must be some processes in place to count the ballots and formalize the results of those ballots. As the United States Supreme Court has opined, an "election" consists of more than the act of voting: rather, it is "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). Indeed, the Delaware Constitution provides that following the close of polls on election day, DOE must deliver the voting records to the Prothonotary of the Superior Court. Del. Const. Art. V § 6. The Superior Court, as a board of canvass, then certifies the results the second day after the election day, upon which the voters' selections are made official. *Id.*; 15 *Del. C.* §§ 5701–5709. Thus, an election "may not be consummated prior"[15] to election day, but there is no constitutional prohibition on allowing voters to submit ballots prior to election day.

Plaintiffs' attempt to bolster their misreading of Section 1 with reference to the Vote-by-Mail Statute's procedures falls flat because Plaintiffs misunderstand those procedures. Plaintiffs erroneously contend the Vote-by-Mail Statute "allow votes to be both cast *and* counted before election day." PAB at 43 (emphasis in original). Not so. Notably, the Vote-by-Mail Statute specifically *prohibits* the

[15] *Foster*, 522 U.S. at 72 n.4.

tabulation of any mail-in ballots prior to the day of the election. *See* 15 *Del. C.* § 5608A(b). Rather, the statute allows certain processing steps to take place within 30 days prior to the election, in preparation for tabulating valid ballots. *See* 15 *Del. C.* §§ 5611A–5612A. Plaintiffs' citation to a "tally" under Section 5611A is also inaccurate. PAB at 43.[16] Section 5611A(3)d. refers to a tally of written-in votes on mail-in ballots, which is a specific process at DOE county offices of sorting votes for declared write-in candidates and non-declared write-in candidates. A401–02 ¶5. Again, that process is entirely distinct from tabulating and announcing the results of an election.

Regardless, even if mail-in ballots were counted prior to election day, that still does not mean an election has occurred prior to election day. Rather, the election day marks when voting is to be completed, following which the results of the votes are tabulated and finalized. There is simply no prohibition found in the constitutional text on permitting ballots to be submitted prior to election day. *See Collison v. State ex rel. Green*, 2 A.2d 97, 101 (Del. 1938) ("[A]bsent a constitutional inhibition, the power of the legislature as the repository of the legislative power with its broad and ample sweep, has full and unrestrained authority

[16] Plaintiffs erroneously contend the tally requirement is "a point that Defendants neglect to address in their brief, and directly contradicts their argument." PAB at 43. But naturally, Defendants had not yet had an opportunity to respond to Plaintiffs' opening brief.

to exercise its discretion in any manner it sees fit in its wisdom or even folly to adopt.").

Finally, Plaintiffs urge the Court to adopt a ruling from Maryland to find a conflict with Section 1. PAB at 45–46. Plaintiffs' reliance on that case is misplaced and this Court should decline to follow the Maryland court's analysis. In *Lamone v. Capozzi*, the court did not address voting by mail, but rather considered the constitutional validity of a state statute allowing "early voting," wherein voters were permitted to cast ballots during a designated period prior to election day. 912 A.2d 674 (Md. 2006). The court found the statute violated Maryland's constitutional provision establishing that "[a]ll general elections in this State shall be held on the Tuesday next after the first Monday in the month of November, in the year in which they shall occur." Md. Const. Art. XV § 7. According to the Maryland court, the early voting statute was invalid because the court read the Maryland Constitution to require all in-person voting to "begin and end on the same day." *Id.* at 691. Notably, the court repeatedly based its interpretation of Article XV § 7 on separate provisions of the Maryland constitution designating other elections to be "held on the Tuesday next after the first Monday of November." *See id.* at 676–77 ("Other constitutional provisions, addressing specific elections, are consistent. . . ."); *id.* at 687 ("[The early voting statute] is clearly inconsistent with the words of, and the plain meaning of Article XV, § 7 and the other constitutional provisions . . . ."); *id.* at 691 ("Article

XV, § 7 and the other constitutional provisions prescribing the date of election are clear . . . ."). Delaware's Constitution, in contrast, does not contain similar provisions designating the day of various other elections.

Notably, the Maryland court did not reject *Foster*'s concept of an "election" as consisting of "the combined actions of voters and officials meant to make a final selection of an officeholder." *Lamone*, 912 A.2d at 692; *Foster*, 522 U.S. at 71. Instead, to reconcile its reading with *Foster*, the court determined those "combined actions" "must occur" on the designated Tuesday for election day. *Lamone*, 912 A.2d at 692. But as discussed, the Delaware Constitution specifically contemplates and requires certain actions by officials to finalize the voters' selection of an officeholder to take place *after* election day. The *Lamone* court also ignored other precedent upholding under *Foster* early voting statutes as consistent with statutory designations of an election day,[17] simply dismissing them because the cases did not specifically involve state constitutional challenges. *Id.* at 690–92. The Maryland court's faulty reasoning is inapplicable to the Vote-by-Mail Statute at issue before this Court and does not support a finding that the statute violates Section 1.

[17] *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000); *Millsaps v. Thompson*, 259 F.3d 535, 545–48 (6th Cir. 2001).

B. Voting by Mail is a Means, Method or Instrument of Voting.

Plaintiffs challenge the Vote-by-Mail Statute as invalid under Section 1 solely on the basis that it affects the "time" of the General Election. However, as discussed next, voting by mail is a means, method or instrument of voting that the General Assembly is empowered to legislate under Section 1. Plaintiffs do not contend otherwise on appeal and have waived any contrary argument. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

Voting by mail falls squarely within the "manner" of conducting elections Section 1 grants the General Assembly broad power to regulate. Given their plain, common-sense meaning, the terms "means, methods and instruments of voting" refer to the processes, procedures, systems, and tools employed to facilitate voting in a general election. *See Marker*, 450 A.2d at 399 ("Constitutional phrases must, if possible, be given their ordinary or plain meaning."); *see also* Sutherland § 73:8 ("Where terms are not defined in a statute, courts turn to their ordinary and contemporary dictionary meaning."). The Merriam-Webster Dictionary defines "means" as "something useful or helpful to a desired end"; "method" as "a procedure or process for attaining an object"; and "instrument" as "a means whereby something

is achieved, performed, or furthered."[18] Here, the General Assembly determined to make mail-in voting an additional option available to voters to participate in elections.

Indeed, the Court of Chancery described voting by mail as "how a vote is cast" (Op. at 62)—plainly within the "means, methods and instruments of voting." Similarly, in 2020, the Court of Chancery addressed an emergency statute the General Assembly enacted to allow voters to vote by mail in that year's General Election, during the COVID-19 pandemic. *League of Women Voters of Del., Inc. v. Dep't of Elections*, 250 A.3d 922 (Del. Ch. 2020). In that case, the court specifically recognized mail-in voting as a "method" of voting, describing the General Assembly as having "*expanded* the number of methods Delawareans had to vote," in addition to in-person and absentee voting. *Id.* at 935 (emphasis in original). As then, the Vote-by-Mail Statute does not replace or eliminate in-person voting or absentee voting as methods of voting, but rather, provides Delawareans an additional method of voting.

Accordingly, because voting by mail is a means, method or instrument of voting the General Assembly is specifically authorized to "prescribe" and allowing voters to vote by mail does not alter the designated day for holding a general election,

[18] *See* https://www.merriam-webster.com/dictionary/means; https://www.merriam-webster.com/dictionary/method; https://www.merriam-webster.com/dictionary/instrument.

the Court should affirm the Vote-by-Mail Statute as consistent with Article V, Section 1.

DEFENDANTS' RESPONSE TO CROSS-APPEAL

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

1. Denied. The Court of Chancery properly held that the Same-Day Registration Statute is constitutional. The court correctly concluded that there is no express or implied deadline in Delaware's Constitution for Delawareans to register to vote, a conclusion supported by a significant 1925 amendment to Article V, Section 4. The *Higgin* Plaintiffs' policy-based arguments are irrelevant to this Court's constitutional analysis. The Court of Chancery correctly dismissed Plaintiffs' demand to have the court "modify the constitutional text." Op. at 44.

ARGUMENT ON CROSS-APPEAL

I. THE SAME-DAY REGISTRATION STATUTE DOES NOT CONFLICT WITH THE DELAWARE CONSTITUTION

A. Question Presented.

Whether the Court of Chancery correctly held that the Same-Day Registration Statute does not violate the Delaware Constitution, which contains no express or implied deadline for voter registration to end prior to the General Election. A238–41; A391–94.

B. Scope of Review.

This Court reviews the Court of Chancery's grant of summary judgment, questions of statutory interpretation, and issues of constitutional law *de novo*. *Del. Solid Waste Auth. v. Del. Dep't of Nat. Res. and Envtl. Control*, 250 A.3d 94, 105 (Del. 2021).

C. Merits of Argument.

1. The Same-Day Registration Statute is Valid Under Article V, Section 4.

The Court of Chancery correctly found that the *Higgin* Plaintiffs failed to establish by clear and convincing evidence that the Same-Day Registration Statute violates Article V, Section 4 of the Delaware Constitution. Op. at 43–50. Section 4 provides, among other provisions, that:

> There shall be at least two registration days in a period commencing not more than one hundred and twenty days, nor less than sixty days before,

> and ending not more than twenty days, nor less than ten days before, each General Election . . . .

Art. V § 4. Section 4 further provides that "such registration may be corrected as hereinafter provided at any time prior to the day of holding the election." *Id.* Selectively focusing on the language "nor less than ten days before" and "at any time prior to the day of holding the election," the *Higgin* Plaintiffs contend that under Section 4, registration for the General Election must end ten days prior to the election and any corrections to registration be made prior to the General Election. Thus, according to the *Higgin* Plaintiffs, the Same-Day Registration Statute is invalid because it allows individuals to register on the day of the General Election. *See* PAB at 47, 53. The court disagreed with the *Higgin* Plaintiffs' interpretation of Section 4 and instead relied on the plain text of the section. In doing so, the court concluded "[t]he Higgin Plaintiffs would, in essence, have me modify the constitutional text so that 'such registration' instead reads as 'all registration' and, in doing so, insert an implied limitation on legislative power into Section 4 that does not appear in the plain text." Op. at 44–45.

As the Court of Chancery appropriately recognized, the *Higgin* Plaintiffs' interpretation of Section 4 distorts the plain text of the provisions. Section 4 requires that "[t]here shall be at least two registration days" during a certain period of time leading up to the General Election, establishing a minimum period during which eligible individuals may register to vote in that election. The Same-Day Registration

Statute does not impact that minimum period, but rather, provides additional days for voter registration.

Nor does the provision that corrections to "such registration" may take place "prior to the day of holding the election" mean that voter registration must end before the General Election. "Such registration" refers specifically to the preceding language in Section 4, which describes registration taking place during the minimum two-registration day period. The court correctly rejected the *Higgin* Plaintiffs' unsupported invitation to create an implied constitutional restriction by altering the plain language of Section 4 to replace the term "such registration" with "all registration." Op. at 44–45. Section 4 thus does not even address voter registrations taking place on the day of the election, much less prohibit them.[19]

The Court of Chancery correctly found that the *Higgin* Plaintiffs' challenge to the Same-Day Registration Statute also fails because adopting their interpretation of Section 4 calls into question the constitutionality of other aspects of Delaware's voter registration procedures—which the *Higgin* Plaintiffs do not challenge. Op. at 47. In particular, eligible individuals may register to vote at any time through the Department of Elections and other agencies, including when they apply for a driver's

[19] As the court identified, it is also reasonable to interpret this portion of Section 4 as addressing only "corrections" to registration information, and accordingly, silent as to registrations occurring on election day because there is nothing to "correct" regarding those registrations. Op. at 45 n.150.

license. *See, e.g.*, https://ivote.de.gov/VoterView/registrant/newregistrant; 15 *Del. C.* §§ 2031, 2050(a). There is no statutory "deadline" before which a voter may not register to vote in an election. A307 ¶18. But under the *Higgin* Plaintiffs' preferred reading of Section 4, such longstanding voter registration provisions allow registration to occur *prior* to 120 days before an election and would thus be invalid. Yet the *Higgin* Plaintiffs do not challenge those procedures. Here, contrary to the *Higgin* Plaintiffs' unsupported suggestion otherwise, courts strive to avoid adopting an interpretation that generates constitutional issues. *See Richardson v. Wile*, 535 A.2d 1346, 1350 (Del. 1988) ("[W]here a possible infringement of a constitutional guarantee exists, the interpreting court should strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities.").

The *Higgin* Plaintiffs' sole argument on this issue is that the Court could not invalidate statutes allowing Delawareans to register to vote at the time of applying for a license because those provisions are controlled by federal law. PAB at 60–61. But the *Higgin* Plaintiffs are referring to federal statute providing that state driver's license applications to serve as voter registrations for *federal* elections. *See* 52 U.S.C. § 20504. The federal statute is distinct from state statute and regulations providing for voter registration through the Division of Motor Vehicles,[20] and the

[20] *See* 15 *Del. C.* §§ 2050(a); 2050A.

Higgin Plaintiffs ignore altogether the myriad other ways eligible individuals may register to vote, none of which are time restricted.

The *Higgin* Plaintiffs' reliance on *Harrington* and *Lyons* is, as with Plaintiffs' contentions concerning the Vote-by-Mail Statute, misplaced. PAB at 54–56. *Lyons* assessed the constitutionality of a 1923 statute authorizing absentee voting. DOB at 27–32. To support its (flawed) reading of Article V, Section 2 to allow only in-person voting within one's home precinct, the *Lyons* court referred to the provision of "uniform" voter registration laws in Section 4. 5 A.2d at 502; DOB at 30. The *Lyons* court was concerned about election officials being able to "frustrate bribery" under Section 3 and believed that such challenges could only be resolved if voters appeared in-person at the polling place. *Id.* The court noted in passing its understanding of Section 3 to contemplate "questions of the qualifications of voters should be determined" prior to election day, leaving the "sole ground of challenge" on election day to be on the basis of Section 3 violations. *Id.*[21]

Later, in *Harrington*, the court assessed the constitutionality of the Soldiers' Vote Act, an 1898 statute allowing military servicemembers stationed outside their election districts to vote at polling places where they were encamped. 30 A.2d 688.

[21] As noted in Defendants' opening brief, the *Lyons* court did not identify where it located the "sole ground for challenge" and moreover, was silent about the effect of the 1925 amendment to Section 4. DOB at 30–31. The 1925 amendment is discussed *infra*.

The *Harrington* court adopted the *Lyons* court's interpretation of Sections 2 and 3, including the passing reference to Section 4. *Id.* at 691.

Contrary to the *Higgin* Plaintiffs' suggestion otherwise, the *Harrington* and *Lyons* courts' commentary on Section 4 is, at most, non-binding *dicta*. PAB at 55–56. The issue before both courts was the application of Section 2 to absentee voting statutes. Even if, as the *Higgin* Plaintiffs speculate, the courts "would have been familiar with the voter registration practices occurring at that time" and the 1925 amendment, the *Higgin* Plaintiffs do not explain how that contradicts the Court of Chancery's correct understanding of the language regarding Section 4 as *dicta*. Op. at 46. Furthermore, as the Court of Chancery accurately concluded, the courts[22] did not specifically hold that Section 4 requires all matters relating to voter registration be completed prior to election day. Op. at 46–47. And the courts' use of the term "should" demonstrate that even in *dicta* the courts did not suggest that Section 4 *requires* all registration issues be resolved prior to the day of the election. *Id.*

The *Higgin* Plaintiffs' reliance on *Appeal of Brown*, 49 A.2d 618 (Del. Super. 1946), fares no better. PAB at 56–58. That case addressed the constitutionality of a statute prohibiting any new resident of Delaware from voting in a general election until one year after he had made a recorded "declaration of intent" to become a

[22] The Opinion specifically addressed *Harrington*, as it was the only case the *Higgin* Plaintiffs cited in their argument below, but the court's reasoning is equally applicable to *Lyons*, which analysis the *Harrington* court incorporated.

citizen and resident of Delaware. 49 A.2d at 620. Under the statute, election officials had refused to allow the petitioner to register two months prior to a general election because he had not complied with the statute's provisions after moving to Delaware the prior year. *Id.* at 619–20. The court construed the statute as a registration law and concluded that the one-year declaration requirement was incompatible with Section 4. *Id.* at 624–25. The court recognized that Section 4 provided a "constitutional right" of voter registration to individuals who, like the petitioner, met the qualifications to vote. *Id.* at 625. Section 4 entitled the petitioner to register during at least two days in a time period starting no earlier than 120 days before the general election. *Id.* Thus, by *prohibiting* the petitioner from registering to vote because he had not effectively "registered" *one year* before the election, the statute violated Section 4. *Id.*

There is no conflict between *Brown* and the Court of Chancery's ruling. *Brown* affirms the plain meaning of Section 4: qualified individuals must be provided some opportunity to register to vote during the time immediately preceding the general election. But Section 4 is otherwise silent as to voter registration outside of that guaranteed minimum period. As the court correctly concluded, absent a constitutional prohibition, the General Assembly is free to enact the Same-Day Registration Statute. Op. at 50.

2. The 1925 Amendment to Section 4 Confirms the Validity of the Same-Day Registration Statute.

A significant amendment made in 1925 to Article V, Section 4 further undermines the *Higgin* Plaintiffs' reading of the provisions. A comparison of relevant language in the original text found in the 1897 Delaware Constitution and as amended in 1925 demonstrates key changes:

Original provision	**1925 amendment**
First paragraph: "**The General Assembly shall provide by law for a uniform biennial registration of the names of all the voters in this State who possess the qualifications prescribed in this Article**, which registration shall be conclusive evidence to the election officers of the right of every person so registered to vote at the general election next thereafter, who is not disqualified under the provisions of Section 3 of this Article . . . ."	First paragraph: "**The General Assembly shall enact uniform laws for the registration of voters in this State entitled to vote under this Article**, which registration shall be conclusive evidence to the election officers of the right of every person so registered to vote at any General Election while his or her name shall remain on the list of registered voters, and who is not at the time disqualified under the provisions of Section 3 of this Article . . . ."
Second paragraph: "**Such registration shall be** commenced not more than one hundred and twenty days nor less than sixty days before and **be completed** not more than twenty days nor less than ten days before such election . . . provided, however, that such registration may be corrected as hereinafter provided, at any time prior to the day of holding the election."	Second paragraph: "**There shall be at least two registration days** in a period commencing not more than one hundred and twenty days, nor less than sixty days before, and ending not more than twenty days, **nor less than ten days before**, each General Election . . . provided, however, that such registration may be corrected as hereinafter provided at any time prior to the day of holding the election."

A002–003; A008–009.[23] The primary thrust of the 1925 amendment was to eliminate the original requirement for biennial voter registration to occur for each general election. The General Assembly also eliminated the requirement that "such registration" (*i.e.*, biennial registration) commence, at the earliest, 120 days prior to a general election and end, at the latest, ten days before that election. The amendment effectively replaced the specific biennial voter registration requirement with the system that remains in place today, where voters, once registered, remain registered throughout election cycles unless they no longer meet the qualifications. Thus, the amendment also replaced the narrow pre-election biennial voter registration window with a broader provision that required only a minimum pre-election period during which individuals be allowed to register.

By its plain language, the 1925 amendment specifically *eliminated* the original requirement that voter registration begin no earlier than 120 days and end no later than ten days before a general election. The *Higgin* Plaintiffs ignore that revision.[24] The Court of Chancery correctly found that the Same-Day Registration

[23] These provisions of Section 4 have remained unchanged since the 1925 amendment. *See* Art. V § 4.

[24] The *Higgin* Plaintiffs make conclusory assertions that "the words 'to be completed' and 'ending' modify the same phrase" and means "voter registration must stop 'not more than twenty days, nor less than ten days before, each General Election." PAB at 62. The *Higgin* Plaintiffs ignore the other changes implemented by the 1925 Amendment and their argument lacks merit.

Statute does not conflict with Article V, Section 4 of the Delaware Constitution, a conclusion bolstered by and independently compelled by the General Assembly's 1925 amendment to Section 4. Op. at 49–50.

3. Plaintiffs' Policy Arguments are Unavailing.

Departing from the constitutional text, the *Higgin* Plaintiffs turn to the history of voter registration provisions to urge the Court to adopt their tortured reading of Section 4. PAB at 50–54. Even accepting the *Higgin* Plaintiffs' disjointed and cursory account of the purpose of voter registration periods as accurate, it does not undermine the constitutionality of the Same-Day Registration Statute. To be sure, the *Higgin* Plaintiffs' policy arguments are incongruent with the plain language of Section 4. Furthermore, election officials' need at one point for a ten-day period to prepare and confirm registration records and prevent fraud is not equivalent to a constitutional restriction today on the General Assembly's authority to extend registration deadlines. As the Court of Chancery appropriately recognized, consideration of whether a ten-day period is necessary for those purposes veers into a "policy determination" that is not within the court's province to decide. A459 at 55:20–24.[25] The *Higgin* Plaintiffs' "argument ignores the fundamental principle that

[25] Even if this Court considers the practical concerns facing election officials one hundred years ago, this Court "recognize[s] that the law should be an ever developing body of doctrines, precepts, and rules designed to meet the evolving needs of society." *Schoon v. Smith*, 953 A.2d 196, 205 (Del. 2008) (quotations omitted).

‘absent a constitutional inhibition, the power of the legislature as the repository of the legislative power with its broad and ample sweep, has full and unrestrained authority to exercise its discretion in any manner it sees fit in its wisdom or even folly to adopt.’” *Schorr*, 131 A.2d at 161 (quoting *Collison*, 2 A.2d at 101).

CONCLUSION

For the reasons set forth here and in Defendants' opening brief, this Court should reverse the Court of Chancery's rulings finding standing for Plaintiffs and finding the Vote-by-Mail Statute to be unconstitutional and affirm the Court of Chancery's ruling that the Same-Day Registration Statute is constitutional.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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