

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HONORABLE ANTHONY J.)
ALBENCE, in his official capacity as) No. 120, 2024
State Election Commissioner, and)
STATE OF DELAWARE) Appeal from the Superior Court of
DEPARTMENT OF ELECTIONS,) the State of Delaware,
C.A. No. S23C-03-014
Defendants Below-Appellants,)
v.)
MICHAEL MENNELLA and THE)
HONORABLE GERALD W.)
HOCKER,)
Plaintiffs Below-Appellees.)

**BRIEF OF MASSACHUSETTS, ARIZONA, CALIFORNIA, THE
DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MINNESOTA,
NEVADA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA,
VERMONT, AND WASHINGTON AS AMICI CURIAE SUPPORTING
APPELLANTS AND REVERSAL**

Of Counsel:

Nicole M. Mozee, Esq. (#6443)*
10 Beaver Valley Road
Wilmington, DE 19803
(302) 478-1473
Nicole.M.Mozee@wilmu.edu

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
M. Patrick Moore Jr.
First Assistant Attorney General
David C. Kravitz
State Solicitor
Adam M. Cambier
Vanessa A. Arslanian
Erin E. Fowler
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
**Counsel of Record*
Additional counsel listed on
signature page

Dated: April 26, 2024

TABLE OF CONTENTS

IDENTITY AND INTERESTS OF AMICI	1
ARGUMENT	3
I. Election Day Provisions Similar to Delaware’s Do Not Prevent State Legislatures from Providing for Early Voting.	3
A. Federal Statutes Comparable to Delaware’s Election Day Provision Allow for Early In-Person Voting.	3
B. States With Election Day Provisions Similar to Delaware’s Have Consistently Adopted Early Voting.	7
II. Early Voting Is a Method of Voting That the Delaware Constitution, Like Other States’ Constitutions, Expressly Authorizes the Legislature to Adopt.	13
CONCLUSION	18

TABLE OF CITATIONS

CASES	PAGES
<i>Albence v. Higgin</i> , 295 A.3d 1065 (Del. 2022)	6-7
<i>Aprile v. State</i> , 146 A.2d 180 (Del. 1958)	14
<i>Bd. of Assessment Review of New Castle County v. Silverbrook Cemetery Co.</i> , 378 A.2d 619 (Del. 1977)	7
<i>Commonwealth v. Blackington</i> , 24 Pick. 352 (Mass. 1837)	10
<i>Donald J. Trump for President, Inc. v. Way</i> , 492 F. Supp. 3d 354 (D.N.J. 2020)	5
<i>Foster v. Love</i> , 522 U.S. 67 (1997)	<i>passim</i>
<i>Justice v. Gatchell</i> , 325 A.2d 97 (Del. 1974)	14
<i>Lamone v. Capozzi</i> , 912 A.2d 674 (Md. 2006).....	11
<i>Lyons v. Sec’y of the Commonwealth</i> , 192 N.E.3d 1078 (Mass. 2022)	10
<i>Mennella v. Albence</i> , 2024 WL 758606 (Del. Super. Feb. 23, 2024).....	13
<i>Millsaps v. Thompson</i> , 259 F.3d 535 (6 th Cir. 2001).....	5, 16
<i>Opinion of the Justices</i> , 225 A.2d 481 (Del. 1966)	7

<i>Opinion of the Justices</i> , 295 A.2d 718 (Del. 1972)	13
<i>Sherman v. City of Tempe</i> , 45 P.3d 336 (Ariz. 2002).....	10
<i>State Hwy. Dep't v. Del. Power & Light Co.</i> , 167 A.2d 27 (Del. 1961)	11, 14
<i>State v. Brown</i> , 195 A.2d 379 (Del. 1963)	14
<i>State v. Hobson</i> , 83 A.2d 846 (Del. 1951)	14
<i>State v. Roberts</i> , 282 A.2d 603 (Del. 1971)	7
<i>Voting Integrity Project, Inc. v. Bomer</i> , 199 F.3d 773 (5 th Cir. 2000).....	5, 16
<i>Voting Integrity Project, Inc. v. Keisling</i> , 259 F.3d 1169 (9 th Cir. 2001).....	5

CONSTITUTIONAL PROVISIONS

Alaska Const. art. V, § 3	15
Alaska Const. art. V, § 5	7, 8
Ariz. Const. art. 7, § 11	7
Cal. Const. art. IV, § 2(b).....	7, 8
Del. Const. art. V, § 1	<i>passim</i>
Del. Const. art. V, § 4A	6, 11, 12

Fla. Const. art. VI, § 5(a)	7, 9
Haw. Const. art. II, § 8.....	7
Ill. Const. art. III, § 6.....	7, 8
Ind. Const. art. II, § 14(a).....	7
Kan. Const. art. 4, § 2	7, 9
Ky. Const. § 148	7
Ky. Const. § 153	15
Me. Const. art. 2, § 4.....	7
Md. Const. art. I, § 3(b).....	8
Md. Const. art. XV, § 7.....	7
Mass. Const. art. LXIV, § 3	7, 8
Minn. Const. art. VII, § 7.....	7
Mo. Const. art. VIII, § 1.....	7, 8
Neb. Const. art. XVII, § 4.....	7, 9
N.J. Const. art. II, § 1	7, 8
N.M. Const. art. VII, § 1(B).....	15
N.Y. Const. art. III, § 8	7, 8
Ohio Const. art. XVII, § 1.....	7
Or. Const. art. II, § 14	7
Pa. Const. art. VII, § 2.....	7, 8

R.I. Const. art. II, § 2	15
R.I. Const. art. IV, § 1	7
Tenn. Const. art. II, § 7	7, 9
Utah Const. art. IV, § 9	7
Vt. Const. §§ 43-44	7
Va. Const. art. IV, §§ 2-3	7
Va. Const. Art. V, § 2	7, 8
W. Va. Const. art. IV, § 7	7, 8
Wash. Const. art. II, § 5	7, 8
Wisc. Const. art. XIII, § 1	7
Wy. Const. art. VI, § 17	7

STATUTES

2 U.S.C. § 1	2, 3
2 U.S.C. § 7	3
3 U.S.C. § 1	2, 4
3 U.S.C. § 21(1)	4
15 Del. C. § 5401(1)	13
52 U.S.C. § 20302	5
Fla. Stat. § 101.657	9

K.S.A. § 25-1119	9
K.S.A. § 25-1122a.....	9
K.S.A. § 25-1123	9
La. Rev. Statutes § 18:402	4
La. Rev. Statutes § 18:1309	4
Mass. Gen. Laws ch. 54, § 25B	9
Neb. St. § 32-808	9
Neb. St. § 32-938	9
Neb. St. § 32-942	9
Tenn. St. § 2-6-102(a)(1)	9
Tenn. St. § 2-6-103	9

OTHER AUTHORITIES

Robert F. Bauer & Benjamin L. Ginsberg, Co-Chairs, <i>The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration</i> (2014).....	14, 15, 16
Jacob Kovacs-Goodman, <i>Post Election Litigation Analysis and Summaries</i> , Stanford-MIT Healthy Elections Project (Mar. 10, 2021).....	12
Nat’l Conference of State Legislatures, <i>Early In-Person Voting</i> (March 12, 2024).....	1, 8, 14
Patrick Howell O’Neill, <i>Why more, earlier voting means greater election security—not less</i> , MIT Technology Review (Dec. 10, 2020)	16

U.S. Elec. Assistance Comm’n, <i>EAVS Deep Dive: Early, Absentee, and Mail Voting</i> (2017).....	16
U.S. Elec. Assistance Comm’n, <i>Election Administration and Voting Survey 2022 Comprehensive Report</i> (June 2023).....	8

IDENTITY AND INTERESTS OF AMICI

Amici States—Massachusetts, Arizona, California, the District of Columbia, Hawai‘i, Illinois, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Vermont, and Washington—join Delaware in respectfully asking this Court to reverse the judgment below. Most of the *amici* have state constitutional provisions which set the date of the statewide general election as the Tuesday following the first Monday in November. And each of the *amici* is among forty-six States, together with the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, that have implemented a system of early in-person voting reflecting the well-considered judgments of their legislatures as to how best to manage their elections.¹ Early voting among the *amici* States ranges in duration from 8 to 46 days, commencing as early as 50 days before the election and typically ending just before the date of the election, as designated by federal and state law. Several *amici* States permit weekend early voting, and some grant local election officials discretion as to whether to provide additional early voting days. As our legislatures envisioned, early voting has increased participation in democratic self-governance, and it has done so in a manner entirely consistent with our state constitutions and federal law.

¹ See Nat’l Conference of State Legislatures, *Early In-Person Voting* (March 12, 2024), <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>.

In this case, however, the trial court concluded that a constitutional requirement that an election occur on a certain date is an implied prohibition of in-person voting before that date. This argument has been rejected by multiple federal appellate courts (interpreting provisions of federal law that set the date for federal and presidential elections, *see* 2 U.S.C. § 1; 3 U.S.C. §§ 1, 21(1)). It is inconsistent both with the weight of legal precedent and *actual* election practice in the dozens of states that set an election date by constitutional provision and nonetheless allow for early voting. Because, as the State has persuasively explained, Albence Br. 21-35, early voting is consistent with the Delaware Constitution and furthers free elections by providing greater in-person access to the polling place—and because a conclusion otherwise is unsound as a matter of law and is out of step with the law in forty-six States authorizing the practice used to cast over 21 million ballots nationwide in the 2022 general election—*Amici* States respectfully submit this brief as *amici curiae* in support of Appellants and urge reversal of the judgment below.

ARGUMENT

I. Election Day Provisions Similar to Delaware’s Do Not Prevent State Legislatures from Providing for Early Voting.

Election date provisions set forth in federal law have been found to be consistent with early voting time and again, throughout the country. Likewise, the constitutions of Delaware’s sister States with similar provisions have been interpreted to be compatible with early voting, rather than preclusive of it. The lower court’s departure from the great weight of authority on this point should be rejected.

A. Federal Statutes Comparable to Delaware’s Election Day Provision Allow for Early In-Person Voting.

Plaintiffs’ claim that early voting violates the Delaware constitution’s election date provision echoes arguments that early voting violates the federal statutes that set a single election date for federal elections. Federal courts have repeatedly rejected such arguments.

Like the Delaware Constitution, federal statutes set a particular date as the date for elections to the House, Senate, and presidency. *Compare* Del. Const. art. V, § 1 (stating that “[t]he general election shall be held” on the Tuesday after the first Monday of November), *with* 2 U.S.C. § 7 (stating that the Tuesday after the first Monday of November “is established as the day for the election” of U.S. Representatives); 2 U.S.C. § 1 (linking date of Senate elections to House elections);

3 U.S.C. § 1 (stating that presidential electors shall be appointed “on election day”); 3 U.S.C. § 21(1) (defining election day). The Supreme Court addressed the meaning of “the election” in these statutes in *Foster v. Love*, 522 U.S. 67 (1997). There, the Supreme Court struck down a Louisiana open primary system for federal elections. *Id.* at 69-70. That system involved an October preliminary election that determined the winner if any candidate received a majority of votes cast (which occurred “over 80%” of the time). *Id.* That left nothing for election day: no ballots to be cast; no returns to be calculated. *Id.* The Court concluded that “a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with *no act* in law or in fact to take place on the [election] date chosen by Congress” was impermissible. *Id.* at 72 (emphasis added). But that was because “[w]hen the federal statutes speak of ‘the election’ of a [federal officeholder], they plainly refer to the *combined actions of voters and officials* meant to make a *final selection* of an officeholder.” *Id.* at 71 (emphasis added).²

Multiple federal circuit courts, citing *Foster*, have held that state statutes permitting early voting are consistent with the federal statutes setting “the day for

² Louisiana amended its law following *Foster*, such that its preliminary election for federal officials now occurs in November (with a runoff to follow if no candidate receives a majority). La. Rev. Statutes § 18:402. Notably, before both the November election and any runoff, like so many of its sister States, Louisiana provides for early voting in person, entirely consistent with the election date provisions in federal law. La. Rev. Statutes § 18:1309.

the election.” See *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000); *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); accord *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001) (holding that Oregon mail voting statute allowing mail ballots to be cast before election day did not conflict with federal law).³ Each of these cases relied in part on the “combined action” and “final selection” language from *Foster. Bomer*, 199 F.3d at 775-76; *Millsaps*, 259 F.3d at 547; *Keisling*, 259 F.3d at 1175. Critically, each of these courts also grounded its decision in the existence of absentee voting. Because absentee voting necessarily involves at least some voting taking place before the statutorily prescribed election day, and because Congress was surely aware of (and approved of and in some cases has required, see, e.g., 52 U.S.C. § 20302) the longstanding and widespread practice of absentee voting, these courts determined that it would be improper to construe the federal statutes’ reference to “the day for the election” to require that *all* voting take place on that particular day. *Bomer*, 199 F.3d at 776-77; *Millsaps*, 259 F.3d at 547-48; *Keisling*, 259 F.3d at 1175-76.

³ While courts in the Third Circuit have not specifically concluded that the federal election day statutes allow early voting, they have construed those statutes to permit other critical elements of the voting and counting process to occur before the mandated day of the election. See *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 369 (D.N.J. 2020) (canvassing early-received ballots before election day).

The reasoning in the cases construing the federal election date statutes—specifically, their uniform conclusion that an election date provision cannot be construed to bar votes cast before the specified election date, especially where such votes (*via* absentee voting) have long been a part of American elections—is persuasive in construing Section 1 of Article V of the Delaware Constitution. As the State has explained, the lower court’s rejection of *Foster*’s interpretation of the term “the election” ignores the fact that *Foster* based its conclusion not on any technical point of federal law, but rather on the “the universal plain meaning of that term—as elucidated by numerous dictionaries contemporaneous with Article V, Section 1’s enactment.” Albence Br. 30. The State also correctly notes that the lower court “did not offer any alternative definition of ‘election,’” and that it “did not attempt to reconcile its unreasoned conclusion that all voting must occur on election day with the Constitution’s absentee voting provisions.” *Id.* at 31.

Indeed, in *Albence v. Higgin*, this Court detailed the state’s history of absentee voting, and the various amendments to Section 4A of Article V to facilitate it. 295 A.3d 1065, 1069-81 (2022). Notably, not one of those amendments attempted to create an exception to Section 1’s election date provision for absentee ballots. The silence of the constitutional amendments requiring absentee voting with respect to the *date* of such voting speaks volumes: In order to give full and harmonious effect to both Section 1 and Section 4A of Article V, and to avoid any chance of the latter

impliedly repealing or changing the former, Section 1 cannot be read (as the lower court did) to forbid voting that takes place before the prescribed day of the general election. *See, e.g., Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966) (“If different portions of the Constitution seem to conflict, they must be harmonized if possible. ... [W]henever avoidable, no constitutional provision should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result.”); *see also Bd. of Assessment Review of New Castle County v. Silverbrook Cemetery Co.*, 378 A.2d 619, 620 (Del. 1977); *State v. Roberts*, 282 A.2d 603, 606 (Del. 1971).

B. States With Election Day Provisions Similar to Delaware’s Have Consistently Adopted Early Voting.

Like Delaware, many States have constitutional provisions that provide for a specific election date. Of the forty-six States with early voting, twenty-nine have constitutional provisions specifying that their elections must occur on a certain date.⁴

⁴ *See* Alaska Const. art. V, § 5; Ariz. Const. art. 7, § 11; Cal. Const. art. IV, § 2(b); Fla. Const. art. VI, § 5(a); Haw. Const. art. II, § 8; Ill. Const. art. III, § 6; Ind. Const. art. II, § 14(a); Kan. Const. art. 4, § 2; Ky. Const. § 148; Me. Const. art. 2, § 4; Md. Const. art. XV, § 7; Mass. Const. art. LXIV, § 3; Minn. Const. art. VII, § 7; Mo. Const. art. VIII, § 1; Neb. Const. art. XVII, § 4; N.J. Const. art. II, § 1; N.Y. Const. art. III, § 8; Ohio Const. art. XVII, § 1; Or. Const. art. II, § 14; Pa. Const. art. VII, § 2; R.I. Const. art. IV, § 1; Tenn. Const. art. II, § 7; Utah Const. art. IV, § 9; Vt. Const. §§ 43-44; Va. Const. art. IV, §§ 2-3 & art. V, § 2; Wash. Const. art. II, § 5; Wisc. Const. art. XIII, § 1; W. Va. Const. art. IV, § 7; Wy. Const. art. VI, § 17. State constitutional provisions referenced here are included in a compendium. Ex. B to Mot. for Leave to File *Amicus Curiae* Br., CP 1 – CP 38.

Most of these provisions lack express language allowing the legislature to alter the time or date of the election, while certain of those States’ provisions include such language.⁵ And all of these States have statutes that authorize early in-person voting, meaning that they permit “modes of casting a ballot in person at a polling site or election office prior to Election Day.”⁶

For example, Amended Article LXIV of the Massachusetts Constitution, in language mirroring Section 1 of Article V of the Delaware Constitution, provides that elections “shall be held ... on the Tuesday next after the first Monday in November.” Mass. Const. amend. art. LXIV, § 3 (as amended by art. LXXXII). Nonetheless, the Massachusetts Legislature has authorized early voting starting as

⁵ Of these States, only nine—Alaska, California, Illinois, Missouri, New Jersey, New York, Pennsylvania, Washington, and West Virginia—allow the legislature to change either the day or time of holding the election. Alaska Const. art. V, § 5; Cal. Const. art. IV, § 2(b); Ill. Const. art. III, § 6; Mo. Const. art. VIII, § 1; N.J. Const. art. II, § 1; N.Y. Const. art. III, § 8; Pa. Const. art. VII, § 2; Wash. Const. art. II, § 5; W. Va. Const. art. IV, § 7. Virginia’s Constitution specifies an election day for most offices but allows the Governor to be elected at the “time and place” chosen by the legislature. Va. Const. art. V, § 2. Maryland also has a specific constitutional provision empowering its legislature to allow early voting. Md. Const. art. I, § 3(b).

⁶ See Nat’l Conference of State Legislatures, *Early In-Person Voting* (March 12, 2024), <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>. This definition of early voting is used in the Election Administration and Voting Survey 2022 Comprehensive Report, and includes “in-person absentee voting,” a process by which a voter “visits an election office to request a mail ballot, completes the ballot, and returns the ballot in one trip.” U.S. Elec. Assistance Comm’n, at 3, 10, 72 n.42, 79 (2023), https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf.

many as seventeen days before election day and ending four days before election day. Mass. Gen. Laws ch. 54, § 25B. Likewise, Florida’s Constitution provides that “[a] general election shall be held . . . on the first Tuesday after the first Monday in November,” Fla. Const. art. VI, § 5(a), and the Florida Legislature has authorized an early voting period of at least seven days under Fla. Stat. § 101.657. Kansas’s Constitution similarly requires general elections to “be held biennially on the Tuesday succeeding the first Monday in November in even-numbered years,” Kan. Const. art. 4, § 2, and the Kansas Legislature has authorized early voting starting 20 days before election day until noon the day before the election. *See* K.S.A. §§ 25-1119, 25-1122a, & 25-1123. Nebraska’s Constitution requires general elections to be held “on the Tuesday succeeding the first Monday of November” biennially in even years, Neb. Const. art. XVII, § 4, and the Nebraska Legislature has authorized early voting starting thirty days before election day until the Friday before election day. Neb. St. §§ 32-808, 32-938, 32-942. And the Tennessee Constitution not only sets the general election for the “first Tuesday after the first Monday in November,” but also states “[s]aid elections shall terminate the same day.” Tenn. Const. art. II, § 7. Tennessee’s legislature nevertheless has provided for early voting commencing twenty days before election day. Tenn. St. §§ 2-6-102(a)(1), 2-6-103.

By rejecting the General Assembly’s decision to provide for similar early voting in Delaware, the trial court’s ruling renders Delaware an outlier among its

sister states, and conflicts with the most recent state supreme court to hear this type of challenge. See *Lyons v. Sec’y of the Commonwealth*, 192 N.E.3d 1078, 1089 (Mass. 2022). In *Lyons*, the Massachusetts Supreme Judicial Court held that the election day provision of the Massachusetts Constitution did not limit the state legislature’s plenary powers “and its essential role in enacting the laws that [bring] fundamental constitutional principles, including the right to vote, into practical realities.” *Id.* at 1091 (citing *Commonwealth v. Blackington*, 24 Pick. 352, 356 (Mass. 1837)). The *Lyons* court noted that “[t]he 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 (citing *Foster*, 522 U.S. at 71, 72 n.4); see also, e.g., *Sherman v. City of Tempe*, 45 P.3d 336, 340 (Ariz. 2002) (“[A]lthough votes may be cast prior to election day, measures are not conclusively *voted upon* until the actual day of election.”) (emphasis in original). It further found that under Massachusetts’ early voting scheme, “traditional in-person voting still takes place on election day . . . and voters do not receive notice of results or vote counts that could influence the outcome of the election until after polls close.” *Id.* The *Lyons* court’s reasoning is persuasive here: Under Delaware’s early voting scheme, the election still takes place on the day required by the Delaware Constitution, when the final selection of winning candidates occurs.

The only decision *amici* (and the State of Delaware, *see* Albence Br. 27 n.9) were able to locate that reaches a different conclusion is *Lamone v. Capozzi*, a 2006 decision of the Court of Appeals of Maryland. 912 A.2d 674 (Md. 2006). There, the Maryland court concluded (without supporting citation) that the election date provision in the Maryland Constitution requires that, while absentee votes may be cast earlier, “in-person ballot casting must begin and end on the same day.” *Id.* at 691. The Maryland court indicated that it was “not convinced that it is constitutionally permitted for voting to merely ‘end’ on federal election day, and to begin at any . . . prior date.” *Id.* at 692.

That analysis is unpersuasive when applied to the Delaware Constitution for three reasons. First, the election date provision in Section 1 of Article V does not speak in terms of beginnings and ends; and, if it did, the text would be difficult to reconcile with the absentee voting provisions of Section 4A of Article V. *See supra* at 6-7. Second, being “not convinced” about constitutional propriety, as the Maryland court was, is insufficient here, where plaintiffs have the burden to show by clear and convincing evidence that early voting runs afoul of the Delaware Constitution. *State Hwy. Dep’t v. Del. Power & Light Co.*, 167 A.2d 27, 31 (Del. 1961). Third, Delaware courts do not lightly imply a constitutional restriction on legislative authority without considerable evidence supporting such a restriction, which is not present here. *See Higgin*, 295 A.3d at 1092 (finding constitutional

limitations on absentee voting where “[t]he overwhelming weight of our history, as evidenced by the opinions and actions of generations of legislators, election officials, and judges, compels the conclusion that the categories of voters identified in Section 4A constitute a comprehensive list of eligible absentee voters”); *see also id.* at 1094 (noting that but for that “historical record and constitutional tradition,” the court “might very well have” reached “a different conclusion”).

In addition, the absence of state constitutional challenges (let alone successful ones) to early voting statutes throughout the country is instructive, as litigation over methods of voting is at a fever pitch.⁷ In short, the great weight of legal authority as well as practical experience around the country reflects that early in-person voting is fully consistent with statutory or constitutional provisions specifying that an “election” occurs on a particular date.

⁷ *E.g.*, Jacob Kovacs-Goodman, *Post Election Litigation Analysis and Summaries*, Stanford-MIT Healthy Elections Project at 3, https://web.mit.edu/healthyelections/www/sites/default/files/2021-06/Post-Election_Litigation_Analysis.pdf (Mar. 10, 2021) (“The 2020 general election was the most litigious in modern history[.]”).

II. Early Voting Is a Method of Voting That the Delaware Constitution, Like Other States' Constitutions, Expressly Authorizes the Legislature to Adopt.

Because the Delaware General Assembly has plenary authority to adopt early voting, *see* Albence Br. 21-23, it does not need express authorization to do so. But even if express authorization is required, Article V, Section 1 of the Delaware Constitution provides that authority, because it empowers the General Assembly to “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.”⁸ The trial court recognized that “Early Voting is in fact a manner of voting,” but determined for itself (without a single factual finding) that early voting does not secure voter secrecy and independence, nor preserve the freedom of elections, nor prevent fraud. *Mennella v. Albence*, No. S23C-03-014 MHC, 2024 WL 758606, at *7-8 (Del. Super. Feb. 23, 2024). In so determining, the trial court cast aside the deference to the General

⁸ Article V, Section 1 does not apply to Delaware primaries, only to “elections.” *Opinion of the Justices*, 295 A.2d 718, 720-21 (Del. 1972) (“[I]t is clear that the term ‘general election’ as used in our Constitution does not include primary election.”). Under the lower court’s decision, then, Delaware voters would have greater access to the polls in primaries than in general elections. *See* 15 Del. C. § 5401(1) (applying early voting law to primary elections).

Assembly that precedent and separation of powers demand. *E.g.*, *State Hwy. Dep’t*, 167 A.2d at 31.⁹

By enacting early voting, the General Assembly reasonably could have concluded that affording voters a greater opportunity to cast ballots in person furthered the freedom of elections and presented no issue with respect to purity or fraud. Indeed, the majority of states have reached the very same conclusion.¹⁰ In 2014, a Presidential Commission—co-chaired by the respective chief counsels to the Romney for President and Obama for America campaigns—acknowledged the benefit to voters of early voting, raised *no concerns whatsoever* about the security of early in-person voting, and recommended its expansion to better facilitate voter participation. Robert F. Bauer & Benjamin L. Ginsberg, Co-Chairs, *The American Voting Experience: Report and Recommendations of the Presidential Commission*

⁹ Delaware courts long have recognized “a strong presumption of constitutionality attending a legislative enactment, which, unless the evidence of unconstitutionality is clear and convincing, a court will be reluctant to ignore.” *State Hwy. Dep’t*, 167 A.2d at 31. “One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity.” *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974) (*citing State v. Brown*, 195 A.2d 379 (Del. 1963)). And “any doubt” as to the necessity of a given legislative enactment “must be resolved in favor of the legislative finding.” *State Hwy. Dep’t*, 167 A.2d at 31 (*citing Aprile v. State*, 146 A.2d 180 (Del. 1958)); *Gatchell*, 325 A.2d at (“[I]f the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control.” (*citing State v. Hobson*, 83 A.2d 846 (Del. 1951))).

¹⁰ See Nat’l Conference of State Legislatures, *Early In-Person Voting* (March 12, 2024), <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>.

on *Election Administration* at 54-58 (2014) (“*Presidential Commission Report*”), https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

By concluding otherwise, with no factual support, the trial court appears to have reversed the burden of demonstrating constitutionality, placing it upon the State rather than the law’s challengers. The resulting decision brings Delaware out of step with several other States, including some *amici*, whose constitutions (like Delaware’s) authorize their respective legislatures to establish the “manners” or “methods” of voting, and which (like the Delaware General Assembly) have exercised their authority to provide for early voting. Rhode Island’s constitution, for example, requires the legislature to provide by law for the “time, manner and place of conducting elections”; so, too, does New Mexico’s, which states that the legislature “shall regulate the manner, time and places of voting.” R.I. Const. art. II, § 2; N.M. Const. art. VII, § 1(B). Similarly, Kentucky’s constitution grants to its General Assembly the “power to provide by general law for the manner of voting.” Ky. Const. § 153. Alaska’s provides that “[m]ethods of voting, including absentee voting, shall be prescribed by law.” Alaska Const. art. V, § 3. Each of these States has enacted early voting.

Moreover, early voting does in fact further the purposes set forth in Delaware’s Article V, Section 1, just as early voting facilitates similar purposes in

our States. Early voting both “preserve[s] the freedom and purity of elections” by expanding access to the franchise and “prevent[s] fraud, corruption and intimidation” by increasing the capacity of election officials to respond to security concerns. Del. Const. art. V, § 1. Extending the voting period affords more individuals the opportunity to vote by reducing wait times, increasing scheduling flexibility, and enabling voters who may experience obstacles to participating on Election Day itself—including elderly and disabled voters—a better opportunity to participate.¹¹ It also spreads out voting so as to lessen the number of people who vote on election day itself, which allows security issues to be addressed as they develop (without the risk that voters will be prevented by disruption from casting a ballot). *See Presidential Commission Report* at 55 (“Election officials from both parties testified to the importance of early voting in alleviating the congestion and other problems of a single Election Day”).¹²

¹¹ *EAVS Deep Dive: Early, Absentee, and Mail Voting*, U.S. Elec. Assistance Comm’n, at 3-4 (2017), https://www.eac.gov/sites/default/files/document_library/files/eavsdeepdive_earlyvoting_101717.pdf; *see also, e.g., Bomer*, 199 F.3d at 777 (“The challenged Texas statutes encourage voting by providing Texas voters with more opportunities to vote. ... [T]he Texas Early Voting statutes further the important federal objective of reducing the burden on citizens to exercise their right to vote by allowing them to vote at a time convenient to them[.]”); *Millsaps*, 259 F.3d at 548 (observing that early voting “make[s] voting more convenient and accessible”).

¹² *See also* Patrick Howell O’Neill, *Why more, earlier voting means greater election security—not less*, MIT Technology Review (Dec. 10, 2020),

Of course, the determination of whether early voting serves these purposes is one that the General Assembly—and other State legislatures—are best suited to make. In *Amici* States’ experience, in-person early voting is a widely accepted, secure method of voting. *Amici* therefore fully support the State’s position that it is also wholly consistent with the text of Article V, Section 1.

<https://www.technologyreview.com/2020/12/10/1013584/expanding-voting-access-improves-election-security>.

CONCLUSION

For the reasons described above, *amici* respectfully request that this Court reverse the judgment below.

Of Counsel:

Nicole M. Mozee, Esq. (#6443)*
10 Beaver Valley Road
Wilmington, DE 19803
(302) 478-1473
Nicole.M.Mozee@wilmu.edu

/s/ M. Patrick Moore
ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
M. Patrick Moore
First Assistant Attorney General
David C. Kravitz
State Solicitor
Adam M. Cambier
Vanessa A. Arslanian
Erin E. Fowler
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

**Counsel of Record*

Dated: April 26, 2024

KRIS MAYES
Attorney General
State of Arizona
2005 N. Central Ave.
Phoenix, AZ 85004

ROB BONTA
Attorney General
State of California
1300 I St.
Sacramento, CA 95814

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th St., NW
Washington, D.C. 20001

ANNE E. LOPEZ
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
115 South LaSalle Street
Chicago, Illinois 60603

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr.
Blvd.
St. Paul, MN 55155

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

CHARITY R. CLARK
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This brief complies with the typeface requirement of Rule 13(a)(1) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.
2. This brief complies with the type-volume limitations of Rule 14(d)(1) and Rule 28(d) because it contains 4,172 words, which were counted in Microsoft Word.

Dated: April 26, 2024

/s/ Nicole M. Mozee

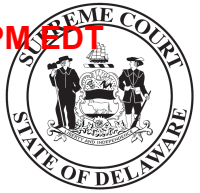
Nicole M. Mozee (#6443)

10 Beaver Valley Road

Wilmington, DE 19803

(302) 478-1473

Nicole.M.Mozee@wilmu.edu



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HONORABLE ANTHONY J.)	
ALBENCE, in his official capacity as)	No. 120, 2024
State Election Commissioner, and)	
STATE OF DELAWARE)	Appeal from the Superior Court of
DEPARTMENT OF ELECTIONS,)	the State of Delaware,
)	C.A. No. S23C-03-014
Defendants Below-Appellants,)	
)	
v.)	
)	
MICHAEL MENNELLA and THE)	
HONORABLE GERALD W.)	
HOCKER,)	
)	
Plaintiffs Below-Appellees.)	

CERTIFICATE OF SERVICE

I, Nicole M. Mozee, hereby certify that on April 26, 2024, the foregoing documents were served via electronic mail (e-mail) and via File&ServeXpress upon all counsel of record:

Of Counsel:

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

Kathleen Jennings (#913)
Attorney General
Alexander S. Mackler (#6095)
Patricia A. Davis (#3857)
Kenneth Wan (#5667)
STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Carvel State Office Building
820 North French Street, 6th Floor
Wilmington, Delaware 19801
(302) 577-8400
*Counsel for Defendants Below-
Appellants the Honorable Anthony J.
Albence and State of Delaware
Department of Elections*

Of Counsel:

M. Jane Brady
Brady Legal Group LLC
36365 Tarpon Drive
Lewes, Delaware 19958
(302) 542-1268
bradylegalgroup@gmail.com

Noel H. Johnson
Public Interest Legal Foundation
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
njohnson@publicinterestlegal.org

*Counsel for Plaintiffs Below-
Appellees Michael Mennella and the
Honorable Gerald W. Hocker*

[SIGNATURE PAGE FOLLOWS.]

/s/ Nicole M. Mozee

Nicole M. Mozee, Esq. (#6443)*
10 Beaver Valley Road
Wilmington, DE 19803
(302) 478-1473
Nicole.M.Mozee@wilmu.edu

Dated: April 26, 2024

*Counsel of Record for Amici Curiae
States Massachusetts, Arizona,
California, the District of Columbia,
Hawai'i, Illinois, Minnesota, Nevada,
New Jersey, New York, Oregon,
Pennsylvania, Vermont, and
Washington*