EFiled: Oct 04 2022 10:00AM EDT
Filing ID 68206986
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, Defendants-Below/Appellants, v. MICHAEL HIGGIN AND MICHAEL MENNELLA, Plaintiffs-Below/Appellees	No. 342, 2022 On Appeal from a Decision of the Court of Chancery of the State of Delaware C.A. Nos. 2022-0641-NAC & 2022-0644-NAC
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	

AMICI CURIAE BRIEF OF SCHOLARS OF STATE CONSTITUTIONAL LAW IN SUPPORT OF REVERSAL

REID COLLINS & TSAI LLP
Norman M. Monhait (DSBA No. 1040)
300 Delaware Avenue, Suite 770
Wilmington, DE 19801
nmonhait@reidcollins.com
Counsel for Amici Curiae

Dated: September 30, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

As set forth in their accompanying motion, *Amici Curiae* (*Amici*) are nationally recognized legal scholars with expertise in state constitutional law. They have researched and published extensively on questions at the intersection of state constitutional interpretation and democracy. *Amici* have a professional interest in promoting the proper understanding and application of interpretive principles that govern state constitutions, especially in cases concerning democracy issues. By their accompanying motion, *Amici*, listed below (with institutional affiliations provided for identification purposes only), seek the Court's acceptance of this brief.

- **Jessica Bulman-Pozen**, Betts Professor of Law at Columbia Law School; Faculty Director, Center for Constitutional Governance
- **Erin Daly**, Professor of Law at Widener University Delaware Law School
- **Joshua A. Douglas**, Ashland, Inc-Spears Distinguished Research Professor of Law at the University of Kentucky Rosenberg College of Law
- **Stephen E. Friedman**, Professor of Law at Widener University Delaware Law School
- **James May**, Distinguished Professor of Law at Widener University Delaware Law School
- **Miriam Seifter**, Associate Professor of Law at the University of Wisconsin Law School; Faculty Co-Director, State Democracy Research Initiative

- **Robert F. Williams**, Distinguished Professor of Law Emeritus at Rutgers Law School

- **Robert Yablon**, Associate Professor of Law at the University of Wisconsin Law School; Faculty Co-Director, State Democracy Research Initiative

- **Quinn Yeargain**, Assistant Professor of Law at Widener Law Commonwealth

INTRODUCTION

The Delaware Constitution, like the constitution of every other state in the nation, is committed to rule by the people. As part of that commitment, the Constitution not only safeguards the fundamental right to vote, but also guarantees that elections be "free and equal," Del. Const. art. I, § 3. It authorizes the General Assembly to facilitate the franchise by "prescrib[ing] the means, methods, and instruments of voting," and requires the General Assembly to take certain steps to ensure that elections meaningfully reflect the people's will. Del. Const. art. V. Over the course of Delaware's history, the Constitution's trajectory has been in the direction of a more inclusive democracy. *See* Randy J. Holland, *The Delaware State Constitution* 208-10 (2d ed. 2017).

The General Assembly's vote-by-mail legislation, 83 Del. Laws ch. 353 (2022), fits comfortably within this democratic tradition and within the General Assembly's broad authority to prescribe voting methods. Arguing to the contrary, Plaintiffs contend that by requiring the General Assembly to establish absentee

voting for certain electors, Article V, § 4A implicitly bars the General Assembly from authorizing vote-by-mail. That position is untenable. The Constitution must be read as a whole to effectuate its central democratic commitments. Doing so makes plain that Article V, § 4A is—as its wording indicates—a pro-voter provision. It requires the General Assembly to allow absentee voting for certain individuals who are at special risk of exclusion. It does not impliedly limit the voting methods that the General Assembly may choose to make available under Article V, § 1 as it seeks to assure electoral participation.

Notably, several state courts with parallel constitutional provisions have rejected similar challenges to vote-by-mail legislation. These courts have recognized, consistent with the democratic character of their constitutions, that provisions specially protecting some voters do not restrict the legislature's authority to take broader steps to foster voting. Such constitutional provisions, these courts hold, set a floor, not a ceiling. *Amici* urge this Court to rule likewise and to reverse the Court of Chancery's decision.[1]

[1] *Amici* focus on the claim that vote-by-mail conflicts with Article V, § 4A. *Amici* do not directly address Plaintiffs' alternative argument that vote-by-mail is barred by language in Article V, § 1 that sets a single election day—an argument not resolved below. Nor do *Amici* directly address the claim raised in Plaintiffs' cross-appeal that Article V, § 4 prohibits same-day registration—an argument the Court of Chancery rejected. That said, the interpretive approach *Amici* advocate—an approach that foregrounds the Constitution's foundational democratic principles—counsels against Plaintiffs' reading of these provisions as well.

ARGUMENT

I. THE DEMOCRATIC PRINCIPLES THAT ANIMATE THE DELAWARE CONSTITUTION COUNSEL IN FAVOR OF UPHOLDING THE CHALLENGED VOTE-BY-MAIL LAW.

A. The text and structure of the Delaware Constitution reveal an overarching commitment to democratic self-government.

The Delaware Constitution is, fundamentally, a democracy-facilitating document, and its animating democratic principles provide the proper backdrop for assessing the vote-by-mail law challenged here. From the very beginning, the state's constitutional tradition has "emphasized the role of the people and the importance of elections." *Young v. Red Clay Consolidated Sch. Dist.* (*Young I*), 122 A.3d 784, 820 (Del. Ch. 2015). It has also recognized that, for government to remain both by and for the people, the people must be able to participate in the electoral process. *Id.* Legislative efforts to facilitate voting and political participation do not flout the Constitution; to the contrary, they align with the document's central premises.

Through and through, the text and structure of the Delaware Constitution reflect its democratic underpinnings. The Constitution begins with the recognition that all political power "is inherent in" and "derived from the people." Del. Const. pmbl.; *see also League of Women Voters of Delaware, Inc. v. Dep't of Elections*, 250 A.3d 922, 925 (Del. Ch.), *judgment entered sub nom. League of Women Voters of Delaware, Inc. v. State* (Del. Ch. 2020) ("In Delaware (as in the United States in general), the people are ultimately sovereign."). In Article I, the Bill of Rights, the

Constitution identifies basic rights of the people that are preconditions to democratic self-government, including freedoms to worship, speak, publish, assemble, and petition, as well as rights of due process and equality under the law. In so doing, the Constitution affords protections that extend significantly beyond the federal baseline. *See Sanders v. State*, 585 A.2d 117, 145 (Del. 1990); Joy Mulholland, Ph.D. & Richard H. Morse, *Article I of the Delaware Constitution: Liberty Begins at Home*, Del. Law., Winter 2011/2012, at 18.

The Constitution recognizes that none of these other fundamental rights will be secure unless the people have the right to vote. As the Court of Chancery recently observed, "the right to vote in a free and equal election is not simply a right enshrined in Delaware's Constitution; it is the fundamental right on which our democracy rests." *League of Women Voters of Delaware*, 250 A.3d at 925. The paramount importance of the franchise finds expression in multiple constitutional provisions, including Article I, § 3 (the Elections Clause), which requires that "all elections shall be free and equal," and Article V, § 2, which guarantees that all qualified citizens "shall be entitled to vote at [each] election." *See Young v. Red Clay Consol. Sch. Dist.* (*Young II*), 159 A.3d 713, 758 (Del. Ch. 2017) (explaining that the purpose of the Elections Clause "is 'to ensure that the right of citizens to vote in an election is unfettered'") (quoting *Abbott v. Gordon*, 2008 WL 821522, at *19 (Del. Ch. Mar. 27, 2008)); *cf. League of Women Voters v. Commonwealth*, 178 A.3d 737,804-09

(Pa. 2018) (explaining that the Pennsylvania Constitution's Elections Clause—from which Delaware's provision was drawn—broadly protects and equalizes the right of suffrage).

The Constitution further ensures that the people's votes are meaningful by protecting the integrity of the franchise, Del. Const. art. V, §§ 1, 3, and by protecting voters from undue influence or interference. Del. Const. art. V, §§ 2, 3, 5. The Constitution included these provisions in an effort to curtail practices of vote-buying and corruption and thus "re-establish free and open elections." *Young I*, 122 A.3d at 824. These provisions, in other words, are not meant to hamper democratic self-rule, but rather to invigorate it.[2]

This is just a partial account of the ways that the Delaware Constitution establishes a commitment to democracy that outpaces the Federal Constitution. *See id.* at 813 ("The Elections Clause has independent content that is more protective of electoral rights than the federal regime."). And Delaware is not alone. State constitutions around the country affirmatively protect the right to vote in ways the U.S. Constitution does not. Joshua A. Douglas, *The Right to Vote Under State*

[2] To reinforce the popular control that the franchise aims to provide, the Constitution includes additional mechanisms to ensure the General Assembly is both democratically responsive and empowered to fulfill its duties of representation. Article II, for instance, requires the General Assembly to meet regularly and adhere to procedural safeguards, such as keeping and publishing journals to inform the people of their work. Del. Const. art. II, §§ 4, 10.

Constitutions, 67 Vand. L. Rev. 89, 101-05 (2014). More broadly, state constitutions consistently go beyond the U.S. Constitution in expressing fidelity to core democratic principles. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 879-94 (2021).

B. Construed in light of its democratic character, the Constitution authorizes the General Assembly to expand mail-in voting.

These democratic principles directly inform the interpretive question now before the Court. As this Court has long recognized, it is necessary to give effect "to the whole Constitution," and "[e]very provision of the Constitution must be construed, whenever possible, to give effect to every other provision." *Op. of the Justices*, 225 A.2d 481, 484 (Del. 1966). Here, that means harmonizing Article V, § 4A with other provisions, including Article I, § 3 and Article V, §§ 1 and 2, in a manner that advances the overarching democratic objects of the people for whose benefit the Constitution operates. *See State v. Roberts*, 282 A.2d 603, 606 (Del. 1971) (noting that "the Constitution and each part thereof must be harmonized and construed as a whole"); *see also Young 1*, 122 A.3d at 846 (construing the Elections and Anti-Bribery Clauses together); *State ex rel. Biggs v. Corley*, 172 A. 415, 417 (Del. 1934) (similar interpretive approach); *cf.* Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 58 (2d ed. 1871) ("Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for

themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.").

More specifically, Article V, § 1 authorizes 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." This is a "broad power," but it "does not extend to statutes that interfere with the right to vote in a free and equal election." *League of Women Voters of Delaware*, 250 A.3d at 926. In other words, Article V, § 1 tasks the General Assembly with implementing the "free and equal" guarantee of Article I, § 3 and ensuring that eligible citizens can vote as "entitled" under Article V, § 2. Article V, § 4A, in turn, bolsters the Constitution's more open-ended voting guarantees by specifying a particular voting method—absentee voting—that the General Assembly *must* provide to a subset of electors who were understood to be particularly at risk of exclusion. *Cf.* 2 Frank P. Grad & Robert F. Williams, *State Constitutions for the Twenty-First Century* 83 (2006) (noting that state constitutions commonly enumerate powers "out of an abundance of caution or out of a desire to remind the legislature of its responsibilities," not to limit the legislature's broader baseline powers).

Article V, § 4A is thus properly understood as a participation-facilitating provision. Its plain words do not limit the General Assembly's Article V, § 1

authority to prescribe voting methods. Rather, it merely mandates one discrete voter-friendly act—"The General Assembly *shall enact* general laws" that enable certain individuals to vote absentee. Del. Const. art. V, § 4A. It is a well-established principle of interpretation that "shall" does not mean "shall only" or "shall not do anything else." *See, e.g.*, FTC v. Tarriff, 584 F.3d 1088, 1090-91 (D.C. Cir. 2009) ("We know of no usage, nor do appellants bring forward any, that suggests that the use of 'shall' mandating one act implies a corresponding 'shall not' forbidding other acts not inconsistent with the mandated performance. . . . A direction to a teenage son that he 'shall' clean his room does not thereby forbid him from taking out the trash, walking the dog, or going to school."); 2A Norman Singer, *Sutherland Statutory Construction* § 47:25 (7th ed.) ("The [expressio unius] maxim does not mean that anything not required is forbidden.").

Adopting an exclusionary reading here would be especially inapt. It would leave the General Assembly powerless to provide for mail-in voting even when the General Assembly finds it to be the voting method that would "best . . . secure" the objectives Article V, § 1 delineates, and even when the General Assembly determines that, absent mail-in voting, some citizens constitutionally "entitled to vote" would otherwise be unable to do so and elections would be less "free and equal" as a result. Such a result stands at odds with both the Constitution's plain text and its overarching democratic structure. Simply put, Article V, § 4A exists to

require the General Assembly to aid some voters, not to bar it from aiding the rest. *Cf.* Grad & Williams, at 85 ("It is evident that application of the *expressio unius* maxim creates the gravest kind of mischief when it is used to limit state legislative powers by virtue of a negative implication from a constitutional enumeration of such powers."); Stephen E. Friedman, *Mail-In Voting and the Pennsylvania Constitution*, 60 Duq. L. Rev. 1, 10, 27-28 (2022) (explaining that Pennsylvania's mail-in voting law "effectuates" that state's similar Elections Clause rather than violating any state constitutional requirement).

The Court of Chancery appeared to agree that the Constitution is most logically read to permit the vote-by-mail statute challenged here. *See, e.g.*, Op. at 73 ("[I]f I were writing on a blank slate, I would likely conclude that the Vote-by-Mail Statute is not prohibited by the Delaware Constitution."); *id*. at 73 n.221 (describing the idea that "Section 4A provides a constitutional floor" as a "straightforward and compelling harmonization"). The court concluded, however, that it was constrained by statements in three prior rulings: *Opinion of the Justices*, 295 A.2d 718, 722 (Del. 1972); *State ex rel. Walker v. Harrington*, 30 A.2d 688 (Del. 1943); and *State v. Lyons*, 5 A.2d 495 (Del. 1939). In an unusual step, the court detailed potential grounds for this Court to "revisit that precedent," noting that the key passage in *Opinion of the Justices* "is dictum in an advisory opinion," and that *Harrington* and *Lyons* pre-date the establishment of the modern Supreme Court. Op. at 66.

Amici will not restate the persuasive analyses of the Court of Chancery and the State as to why these rulings, which did not address the precise issue here, should be set aside. It bears noting, however, that the conclusions in these rarely cited cases flout the core democratic premises of the Constitution outlined above. That is all the more reason to disregard them. Treating them as no longer vital would be faithful to the Constitution's words and to the democratic order the Constitution guarantees.

II. RECENT RULINGS FROM SIBLING STATES UPHOLDING VOTE-BY-MAIL LAWS ARE INSTRUCTIVE.

Courts in several other states have been called upon to interpret constitutional provisions similar to Delaware's in response to similar legal challenges. These courts all rejected the challenges and upheld the challenged voting laws. Although these decisions are not binding precedent, they offer persuasive analysis in analogous circumstances, and they underscore the importance of voting access under state constitutions. *See Caprigione v. State ex rel. Jennings*, 279 A.3d 803, 808-10 (Del. 2021) ("[W]e have recognized 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."). They also bolster the conclusion that the older Delaware cases noted above do not merit continued respect.

A. Pennsylvania

The Pennsylvania Supreme Court's decision in *McLinko v. Department of State*, 279 A.3d 539 (2022), is especially noteworthy given the striking

constitutional, statutory, and doctrinal parallels. Delaware's "free and equal" elections provision (and, indeed, almost all of Delaware's Bill of Rights) was drawn nearly verbatim from the Pennsylvania Constitution. *See Young I*, 122 A.3d at 821. This Court routinely considers constitutional analysis from that state. *See, e.g.*, *Op. of the Justices*, 274 A.3d 269, 273-78 (Del. 2022) (construing an ambiguous provision in the state constitution based on the Pennsylvania Constitution because both documents have similar provisions and their debates occurred "relatively close in time and location"); *Capriglione*, 279 A.3d at 808-10.[3]

McLinko involved a 2019 Pennsylvania statute that established "universal mail-in voting." 279 A.3d at 543-44. The plaintiffs there, like Plaintiffs here, argued that the law conflicted with a state constitutional provision requiring that the legislature "shall" enact laws that provide a vote-by-mail option for those who cannot vote in-person on election day for specified reasons. *See* Pa. Const. art. VII, § 14(a). They insisted that allowing the legislature to extend vote-by-mail beyond

[3] In the Court of Chancery, Plaintiffs quoted this Court's decision in *Sanders v. State* for the proposition that "[t]he laws and history of our sister States have no bearing upon the scope of our own constitutional protections." 585 A.2d at 146. The Court in *Sanders* was making a far narrower point than Plaintiffs suggest, as evidenced by the fact that this Court routinely looks to case law of other states. Indeed, in the very same paragraph, the Court explained that it "may look also to the reasoning of cases decided in other courts, including the United States Supreme Court, and determine if they provide persuasive answers to the questions before us." *Id*. The Court in *Sanders* was construing the Delaware Constitution's prohibition on "cruel punishments" and merely sought to convey that this provision called for the Court to identify a Delaware-specific standard of decency. *Id*.

these enumerated categories of voters would render the constitutional provision "mere surplusage." *McLinko*, 279 A.3d at 580. They also leaned heavily on two century-old Pennsylvania Supreme Court cases that had read the state's constitution to require in-person voting. As in the older Delaware cases, those older Pennsylvania cases inferred the in-person voting constraint from constitutional language referring to the need for voters to be residents of the election district where they "offer to vote." *See id.* at 573.

The Pennsylvania Supreme Court rejected the plaintiffs' challenge. The court was unpersuaded by the contention that the constitutional requirement of mail-in voting for some classes of voters amounted to an implied prohibition on extending it to other voters. According to the court, the state constitution's vote-by-mail provision "guaranteed the ability [of designated classes of voters] to participate in the electoral process," and did not preclude the legislature from making a "policy decision . . . to afford all qualified voters the convenience of casting their votes by mail." *Id*. at 581. As for the earlier "offer to vote" cases, the court concluded that they should be abrogated, explaining that they were poorly reasoned and difficult to square with subsequent legal developments. *See id*. at 573-76.

B. Massachusetts

The Massachusetts Supreme Judicial Court's decision in *Lyons v. Secretary of Commonwealth* (*Mass. Lyons*), 192 N.E.3d 1078 (Mass. 2022), offers similarly

valuable guidance. The plaintiffs in *Mass. Lyons* challenged legislation that, among other things, provided for no-excuse early voting by mail. *Id*. at 1085. As in this case, their central argument was that the only provision of the state constitution addressing absentee voting authorizes it only for certain categories of voters and that the legislature was thus impliedly prohibited from extending it others. *See id.* at 82; *see also* Mass. Const. art. 45.

As in Pennsylvania, the court disagreed. It explained that, when faced with a claim that the legislature exceeded its authority, courts "must view the Constitution as a whole." *Mass. Lyons*, 192 N.E.3d at 1089. That meant taking account of the democratic commitment that inhered in the Constitution and recognizing the legislature's "essential role in enacting the laws that will transform fundamental constitutional principles, including the right to vote, into practical realities." *Id*. at 1091. Applying this approach, the court concluded that the Constitution's absentee voting provision was a means to expand voter access in the circumstances it described, but not a prohibition on further legislative expansion. *Id*. The court explained that the plaintiffs' effort to read an implied prohibition into the constitution failed to appreciate the legislature's presumptive power to act. *Id*. at 1092-93.

C. New Jersey

Finally, an older decision from the New Jersey Supreme Court, *Gangemi v. Berry*, 134 A.2d 1 (N.J. 1957), also deserves mention as an earlier rejection of claims like the one in this case. At issue in *Gangemi* was a state law that extended mail-in voting to any registered voter who "expects" to be absent from the state on election day. *Id*. at 6. The plaintiff contended that the law was impliedly prohibited by a provision of the New Jersey Constitution that states: "[t]he Legislature may provide for absentee voting by members of the armed forces of the United States in time of peace." N.J. Const. art II, ¶ 4.

The court rejected that argument as inconsistent with the constitution's structure and proper interpretive principles. Expressing skepticism of the plaintiff's attempt to apply *expressio unius* logic, the court observed that the maxim should "not to be applied with the same rigor in construing a state constitution as a statute." *Gangemi*, 134 A.2d at 6. Instead, the court stressed the need to "consider the whole of the instrument," including the fact that the people had vested the "whole lawmaking power" in the legislature and that the constitution affirmatively guaranteed the right to vote. *Id*. at 5-6 (internal quotation marks omitted). Against this backdrop, the court found "no good reason to suppose that by this express inclusion of a provision for military absentee voting in time of peace, . . . it was designed to exclude all civilian absentee voting by legislative authority. The one

does not Per se imply the other." *Id.* at 7. The court continued: "So to hold would do violence to reason and logic. Such a curtailment of basic legislative power . . . cannot be made to rest upon vague and uncertain implication." *Id*. The same can equally be said of the claim Plaintiffs advance here.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to give voice to the democratic commitment embedded in the Constitution. The vote-by-mail law does not run afoul of any constitutional limitations. The decision below invalidating the statute should be reversed.

Respectfully submitted,

/s/ Norman M. Monhait

Norman M. Monhait (DSBA No. 1040)
REID COLLINS & TSAI LLP
300 Delaware Avenue, Suite 770
Wilmington, DE 19801
(302) 467-1765
nmonhait@reidcollins.com

Counsel for Amici Curiae

Dated: September 30, 2022