



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF
DELAWARE’S BRIEF AS AMICUS CURIAE IN SUPPORT OF
REVERSAL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	viii
ARGUMENT	1
I. THE 1972 <i>OPINION</i> 'S REACH IS LIMITED TO THAT OF AN "ADVISORY OPINION"	2
II. THE NONBINDING 1972 <i>OPINION</i> MUST BE SET WITHIN ITS LIMITED HISTORICAL CONTEXT INAPPLICABLE TO MODERN SOCIETY	3
A. The Delaware Constitution was Amended to Expand Accessibility, Not to Preclude Alternative Voting Methods	4
B. The 1972 <i>Opinion</i> Did Not Contemplate, Much Less Decide, Vote by Mail Because Vote by Mail Did Not Exist as a Method of Voting Anywhere in the United States in 1972.....	6
III. THE COURT SHOULD REJECT RACIST AND ANTI-DEMOCRATIC BALLOT RESTRICTIONS	8
A. Enabling Mail Voting Increases Voter Access and Strengthens Democracy	8
B. The Moral Arc of Voting Rights Bends Toward Increased Access	11
C. Plaintiffs' Demand Would Exacerbate Racial and Gender Disparities in Ballot Access	13
D. Overturning Vote-By-Mail Shortly Before Election Day Further Burdens Voters, Especially from Historically Disenfranchised Communities	15
IV. CONCLUSION	17

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Abbott v. Gordon</i> , 2008 WL 821522 (Del. Super. Ct. Mar. 27, 2008).....	8
<i>Bourland v. Hildreth</i> , 26 Cal. 161, 210 (1864).....	7
<i>Democratic Nat’l Comm. v. Wis. State Legis.</i> , 141 S. Ct. 28, 31 (2020).....	15, 16
<i>Higgin v. Albence</i> , 2022 WL 4239590 (Del. Ch. Sept. 14, 2022)	1, 3, 6
<i>In re Governor for Op. of the Justices</i> , 997 A.2d 668 (Del. 2010)	3
<i>In re Governor for Op. of the Justices</i> , 155 A.3d 371 (Del. 2017)	2, 3
<i>O’Brien v. Skinner</i> , 414 U.S. 524 (1974).....	14
<i>Op. of the Justices</i> , 88 A.2d 128 (Del. 1952).....	4
<i>Op. of the Justices</i> , 288 A.2d 273 (Del. 1967)	4
<i>Op. of the Justices</i> , 295 A.2d 718 (Del. 1972)	<i>passim</i>
<i>Op. of the Justices</i> , 380 A.2d 109 (Del. 1977)	4
<i>Op. of the Justices</i> , 413 A.2d 1245 (Del. 1980)	3
<i>Op. of the Justices</i> , 424 A.2d 663 (Del. 1980)	3
<i>Peterson v. City of San Diego</i> , 34 Cal. 3d 225 (1983).....	7, 9
<i>Republican State Comm. of Delaware v. Dep’t of Elections</i> , 250 A.3d 911 (Del. Ch. 2020)	2
<i>State ex rel. v. Carey</i> , 49 Del. 143 (Del. 1957).....	1
<i>State v. Lyons</i> , 5 A.2d 495 (1939).....	6

<i>State ex rel. Walker v. Harrington</i> , 30 A.2d 688 (1943)	5, 6
<i>State of Kansas, etc v. Bennett, Governor, etc.</i> , 547 P.2d 786 (1976).....	4
<i>Sussex Cty. Dep’t of Elections v. Sussex Cty. Republican Comm.</i> , 58 A.3d 418 (Del. 2013)	8
<i>Wilmington Sav. Fund Soc. v. Green</i> , 288 A.2d 273 (Del. 1972)	4
<i>Young v. Red Clay Consolidated Sch. Dist.</i> , 122 A.3d 784 (Del. Ch. 2015).....	8

CONSTITUTIONS

U.S. CONST. amend. XXIV	5
CA. CONST. ART. II, § 1	7
CA. CONST. ART. II, § 5	7
DEL. CONST. ART. I § 21	13
DEL. CONST. ART. V § 1	1, 2, 7
DEL. CONST. ART. V § 2	14
DEL. CONST. ART. V § 4A	<i>passim</i>

STATUTES

15 Del. C. § 101A	8
15 Del. C. § 302	11
15 Del. C. § 303	12
15 Del. C. § 1302 (g).....	12
15 Del. C. § 5503	12

15 Del. C. § 560112

OTHER AUTHORITIES

Ben Christopher, *California’s (mostly) all-mail 2020 election, explained*, *CalMatters* (Aug. 14, 2020), calmatters.org/explainers/california-all-mail-election-explained-november-2020.7

Bolinger, *California Election Laws During the Sixties and Seventies: Liberalization and Centralization*, in West’s *Cal. Ann.Elec.Code*, 126 (1977 ed)...9

Chris Barrish, *‘They don’t want to go to the polls’: Delaware lawmakers on verge of approving vote-by-mail system*, *WHYY* (June 27, 2022), whyy.org/articles/delaware-lawmakers-on-verge-of-approving-vote-by-mail-system/.....13

Daniel M. Thompson et al., *Universal vote-by-mail has no impact on partisan turnout or vote share*, 117 *PNAS* 14052 (2020), pnas.org/doi/10.1073/pnas.200724911710

Darrell M. West, *How Does Vote-By-Mail Work and Does It Increase Election Fraud?*, *Brookings Inst.* (June 23, 2020), <https://www.brookings.edu/policy2020/votervital/how-does-vote-by-mail-work-and-does-it-increase-election-fraud/>10

David W. Nickerson and Todd Rogers, *Do You Have a Voting Plan? Implementation Intentions, Voter Turnout, and Organic Plan Making*, 21 *Psychological Science* 194 (2010).....15

Delaware Department of Elections, *2020 General Election Report, November 3rd 2020*, <https://elections.delaware.gov/results/html/index.shtml?electionId=GE2020> (last visited Sept. 30, 2022).....12

Delaware Department of Elections Registration Lookup, ivote.de.gov/VoterView (last visited Sept. 28, 2022).....12

Edward Moreton, *Note: Voting By Mail*, 58 *S. Cal. L. Rev.* 1261 (1985)7

Emily Widra et al., <i>Where People in Prison Come From: The Geography of Mass Incarceration in Delaware</i> , Prison Policy Initiative (Sept. 2022), https://www.prisonpolicy.org/origin/de/2020/report.html	14
Hannah Klain et al., Brennan Ctr. Just., <i>Waiting to Vote: Racial Disparities in Election Day Experiences</i> at 8 (2020).....	13
Jen Fifield, <i>Republicans helped Arizona champion voting by mail. Now they want it gone</i> , <i>Arizona Mirror</i> (June 13, 2022), azmirror.com/2022/06/13/republicans-helped-arizona-champion-voting-by-mail-now-they-want-it-gone	9
Jesse Yoder et al., <i>How Did Absentee Voting Affect the 2020 U.S. Election?</i> , 7 <i>Sci. Advances</i> 1 (2021), science.org/doi/10.1126/sciadv.abk1755	10
M. Keith Chen et al., <i>Racial Disparities in Voting Wait Times: Evidence from Smartphone Data</i> 51 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26487, 2019)	13
Mark Kumleben, Samuel Woolley, and Katie Joseff, <i>Protect Democracy, Electoral Confusion: Contending with Structural Disinformation in Communities of Color</i> (2022)	16
MIT Election Data & Sci. Lab, <i>Voting by mail and absentee voting</i> (March 16, 2021), electionlab.mit.edu/research/voting-mail-and-absentee-voting	4, 7
Molly Guptill Manning, <i>Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America’s Armed Forces</i> , 19 <i>N.Y.U. J. Legis. & Pub. Pol’y</i> 335 (2016)	5
NCSL, <i>States with No-Excuse Absentee Voting</i> , <i>Nat’l Conf. of State Legs.</i> (July 12, 2022), ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx	9, 11
NCSL, <i>Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options</i> , <i>Nat’l Conf. of State Legs</i> (July 12, 2022), ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx	8
Paul Gronke, <i>Early Voting Reforms and American Elections</i> , 17 <i>Wm. & Mary Bill of Rts. J.</i> 423 (2008).....	4, 7, 9

Priscilla L. Southwell, *A Panacea for Latino and Black Voters? Elevated Turnout in Vote By Mail Elections*, 47 Soc. Sci. J. 819 (2010).....10

Priscilla L. Southwell, *Analysis of the Turnout Effects of Vote by Mail Elections, 1980–2007*, 46 Soc. Sci. J. 211 (2009)10

Priscilla L. Southwell, *Vote-by-Mail: Voter Preferences and Self-Reported Voting Behavior in the State of Oregon*, 28 Am. Rev. Pol. 139 (2007).....14

Randy J. Holland, *The Delaware State Constitution* 215 (2d ed. 2017)6

United States Census Bureau, *Voting and Registration in the Election of November 2020*, t.12 (2021).....14

Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. Census Bureau (April 29, 2021), <https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html#:~:text=Much%20of%20the%20surge%20in,person%20prior%20to%20Election%20Day> 11

RETRIEVED FROM DEMOCRACYDOCKEY.COM

STATEMENT OF INTEREST

The ACLU-DE is the ACLU's state affiliate and its mission is to defend the rights granted to individuals and groups of individuals by the United States Constitution and its Amendments, including the Bill of Rights, the Delaware Constitution, and the statutes effectuating those constitutional provisions. The ACLU-DE has a long history of legal advocacy for constitutional rights for all Delaware citizens. The ACLU-DE is a private, nonprofit membership corporation founded in 1961 as an affiliate of the American Civil Liberties Union. The ACLU-DE has over 3,300 members within the State of Delaware. The mission of the ACLU-DE and the common interest of its members are to preserve and protect fundamental constitutional rights such as the right to vote and protection against racially discriminatory laws. Historically, the ACLU and its affiliates have given priority to cases and issues protecting the right to vote. The ACLU-DE believes that democracy works best when all who are capable of participating responsibly are allowed to do so. The ACLU-DE has extensively lobbied the executive and legislative branches to protect the rights of eligible voters in Delaware, and has a significant interest in protecting the voting rights of its members and all Delawareans. The motion to file this brief has been approved by ACLU-DE's Legal Review Panel.

ARGUMENT

The Court of Chancery wrongfully determined that an advisory opinion issued a half-century ago was binding precedent precluding the General Assembly from enacting vote by mail. First, while *Opinion of the Justices* addresses “expand[ing] or limit[ing] the categories of absentee voters identified in Article V, Section 4A,” *Higgin v. Albence*, No. 2022-0641-NAC, 59-60 (Del. Ch. Sep. 14, 2022) (citing 295 A.2d 718, 722 (Del. 1972) (“1972 *Opinion*”), that non-binding opinion has no relevance on whether the General Assembly has authority to enact vote by mail under art. V. Sec. 1. Second, to the extent the Court wishes to acknowledge the dicta of the 1972 *Opinion* at all,¹ such consideration should be minimal because the 1972 Court’s evaluation of Art. V. Sec. 4A relied upon understandings that had limited applicability at the time and even less applicability to modern society. *See* Appellants’ Opening Brief at 25-27 & n.14. Finally, this Court should relegate the 1972 *Opinion* to the realm of history where it belongs and prevent these forms of racist and anti-democratic restrictions from affecting methods of voting today.

¹ “A court should refrain from dicta upon constitutional questions.” *State ex rel. Smith v. Carey*, 49 Del. 143, 147 (1955) (explaining the Court’s refusal to accept a case “cited as a precedent for the expression of views by way of dictum upon a question of public importance”).

I. THE 1972 *OPINION*'S REACH IS LIMITED TO THAT OF AN "ADVISORY OPINION"

This Court has acknowledged that "advisory opinions" are "limited to the questions posed to the court." *Republican State Comm. of Delaware v. Dep't of Elections*, 250 A.3d 911, 919 n.47 (Del. Ch. 2020). However, the 1972 *Opinion* went beyond the narrow set of questions posed to it when it discussed remote voting in general elections under art. V, § 4A. Appellants' Opening Brief at 25. The utility of advisory opinions is even further diminished when "regular adversarial proceedings are available as a means to obtain a binding decision on a legal question." *In re Governor for Op. of the Justices*, 155 A.3d 371, 372 (Del. 2017). The availability of regular, adversarial proceedings now, fifty years later, should lead to this court to disregard the dicta of the 1972 *Opinion*. Finally, most relevant to this matter, though, is that the 1972 *Opinion* provides *no* analysis of the General Assembly's authority under art. V. §1 to provide alternative methods of casting a ballot for all voters. While art. V. §4A guarantees accessibility for subcategories of voters who will be absent on Election Day, it does nothing to abrogate the state's plenary authority over voting methods under art. V. §1 for all voters.

Because the 1972 *Opinion* was decided in the absence of adversarial proceedings, went beyond the question posed to it, and addressed a provision of the constitution that is not at issue in this case, it should not be relied upon in this matter.

II. THE NONBINDING 1972 *OPINION* MUST BE SET WITHIN ITS LIMITED HISTORICAL CONTEXT INAPPLICABLE TO MODERN SOCIETY

In their original complaints, appellees treat the 1972 *Opinion* as if it were binding case law. *See* Higgin Compl. ¶11 (“the Delaware Courts *have held* that this list is exhaustive”) (citing to 295 A.2d at 722) (emphasis added); Miles Compl. ¶11 (“the reasons for which a voter may vote by absentee ballot in a general election are strictly limited and the list is exhaustive”) (citing to 295 A.2d at 722; Del. Const. art. V, §4A). However, this Court has regularly acknowledged that advisory opinions are not binding and do not carry precedential effect. *See Op. of the Justices*, 413 A.2d 1245, 1248 (Del. 1980); *Op. of the Justices*, 424 A.2d 663, 664 (Del. 1980); *In re Request of the Governor for an Op. of the Justices*, 997 A.2d 668, 671 (Del. 2010); *In re Request for an Op. of the Justices*, 155 A.3d 371, 372 (Del. 2017). This Court has explained, instead, that advisory opinions are “personal” and distinct from its “judicial powers.” 413 A.2d at 1248 (advisory opinions are “authoritative for one reason: the persons giving them are the members of the highest Court of this State and, in effect, are what one would expect the Justices to say if the issue had been presented to them in litigation.”). It is through this personal lens and historical context that this Court should observe the 1972 *Opinion*, reject its applicability to

this matter, and distinguish it such that Delaware's vote by mail law is ruled constitutional.²

A. The Delaware Constitution was Amended to Expand Accessibility, Not to Preclude Alternative Voting Methods

Reading Del. Const. art. V, §4A to preclude alternative means of access to the ballot is ahistorical as it was enacted for the very purpose of ensuring that soldiers could vote. The option to vote away from the polls first arose during the Civil War to allow soldiers to vote from the battlefield. Beginning in the late 1800s, some states expanded absentee voting for civilians who would be away from the polls on Election Day. MIT Election Data & Sci. Lab, *Voting by mail and absentee voting* (March 16, 2021), electionlab.mit.edu/research/voting-mail-and-absentee-voting. Still, absentee voting was restrictive and represented only a very low percentage of ballots cast. Paul Gronke, *Early Voting Reforms and American Elections*, 17 Wm. & Mary Bill of Rts. J. 423, 425 (2008).

Congress considered expanding absentee voting for soldiers stationed abroad during World War II as most state absentee voting laws were unworkable in wartime.

² In fact, the Court has previously used its judicial powers to modify advisory opinions. See *Wilmington Sav. Fund Soc. v. Green*, 288 A.2d 273, 275 (Del. 1972) (modifying *Op. of the Justices*, 232 A.2d 103 (Del. 1967)). Furthermore, the Court has also found ways to distinguish advisory opinions and instead rely upon the decisions issued by the courts of other states. See *Op. of the Justices*, 380 A.2d 109, 114-15 (Del. 1977) (distinguishing *In re Op. of Justices*, 88 A.2d 128 (Del. 1952), and relying upon *State of Kansas, etc. v. Bennett, Governor, etc.*, 547 P.2d 786 (1976)).

However, the inclusion of Black soldiers in absentee voting regimes was a roadblock for effective absentee voting legislation. Molly Guptill Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 N.Y.U. LEGIS. & PUB. POL'Y 335, 371 (2016), https://digitalcommons.nyu.edu/fac_articles_chapters/1170. Some representatives insisted on maintaining “white superiority” through the poll tax, and “sectional hostilities and prejudices cloaked in the guise of ‘states’ rights’ overpowered notions of democracy and universal suffrage.” *Id.* at 337-38, 371.

In both 1942 and 1944, turnout among servicepeople was extraordinarily low, and in 1942 it was less than one percent. *Id.* at 339. The 1942 Soldier Voting Act exempted servicepeople from paying state poll taxes, but the 1944 Act abandoned this measure and “affirmed the power of the states to make determinations about which votes would be counted.” *Id.* at 376. It took two more decades for the United States to ban the poll tax in the 24th Amendment. U.S. Const. amend. XXIV.

As Congress debated soldiers’ voting rights, Delaware’s Supreme Court struck down the Soldiers’ Vote Act, which permitted Delawareans stationed at military encampments outside the state to vote at out-of-state polling places in those encampments. *State ex rel. Walker v. Harrington*, 42 Del. 246, 30 A.2d 688 (1943). In response, art. V, § 4A was added to the Delaware Constitution to allow absentee voting for soldiers and others who could not be physically present due to work,

sickness, or disability. Over time, constitutional amendments added inability to go to the polls due to vacation (1977) or religion (1983) to this list of excuses making one eligible to cast an absentee ballot. In 1993, Delaware granted the right to vote absentee to spouses and dependents of those in service to the United States. Randy J. Holland, *The Delaware State Constitution* 215-16 (2d ed. 2017). The history of art. V. §4A demonstrates its purpose: widening accessibility for those who could not vote in-person on Election Day, not limiting alternative voting methods.³

B. The 1972 *Opinion* Did Not Contemplate, Much Less Decide, Vote by Mail Because Vote by Mail Did Not Exist as a Method of Voting Anywhere in the United States in 1972

In 1972, the Justices of the Supreme Court could not have contemplated the type of mail voting at issue in this lawsuit. Mail voting, as distinct from absentee voting with a legally recognized excuse, did not exist in any state at the time of the 1972 *Opinion*. No state allowed voters to cast their ballots away from the polls solely for convenience purposes and without a state-approved excuse until the late 1970s.

³ Recognizing the purpose of the Absentee amendments is particularly relevant when considering the pre-Amendment cases relied upon in *Higgin v. Albence*, No. 2022-0641-NAC, 59-60 (Del. Ch. Sep. 14, 2022). Because neither *State v. Lyons*, et.al. 5 A.2d 495 (Del. Gen. Sess. 1939), nor *State ex rel. Walker v. Harrington*, 30 A.2d 688 (Del. 1943), were about voters who could otherwise vote in-person, their analysis completely ignores the relevant expansive powers of the General Assembly to develop the methods of voting for all voters in art. V §1.

MIT Election Data & Sci. Lab, *Voting by mail and absentee voting* (March 16, 2021), electionlab.mit.edu/research/voting-mail-and-absentee-voting.

In 1978, California became the first state to allow any registered voter to vote by mail without an excuse.⁴ Ben Christopher, *California's (mostly) all-mail 2020 election, explained*, *CalMatters* (Aug. 14, 2020), calmatters.org/explainers/california-all-mail-election-explained-november-2020. Texas began to allow voters to cast their ballots early in-person and without an excuse in 1988. Paul Gronke, *Early Voting Reforms and American Elections*, 17 *Wm. & Mary Bill of Rts. J.* 423, 428 (2008). These changes set in motion a proliferation of early in-person and mail voting options that do not

⁴ California's vote by mail history is instructive: after the California Supreme Court held unconstitutional a law permitting Civil War soldiers to vote absentee during the 1863 election, *Bourland v. Hildreth*, 26 Cal. 161, 210 (1864), voters approved a constitutional amendment granting the legislature the power to enact absentee voting laws in 1922. Edward Moreton, *Note: Voting By Mail*, 58 *S. Cal. L. Rev.* 1261, 1265 (1985).

In 1965, California authorized mail ballot voting for new residents and in small precincts. *Peterson v. City of San Diego*, 34 Cal. 3d 225, 229, 666 P.2d 975, 977 (1983). The California legislature expanded mail balloting based on the legislature's broad authority to regulate the method of voting: "All elections by the people shall be by ballot or by such other method as may be prescribed by law; provided, that secrecy in voting is preserved." Ca. Const. art. II, § 5 (amended 1972). At the time, the California Constitution also provided for a means of voting for "duly registered voters who expect to be absent from their respective precincts or unable to vote therein, by reason of physical disability, on the day on which any election is held." Ca. Const. art. II, § 1 (amended 1972). These two sections of the California constitution closely resemble that of Delaware's art. V, § 4A and art. V, § 1, and demonstrate that mail voting and absentee voting may exist within the same constitutional framework.

require voters to be ill, away from home, or otherwise have an excuse for alternative voting arrangements. Today, 35 states and Washington, DC permit some form of early, mail, or other alternative to in-person Election Day voting for all voters. *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, Nat'l Conf. of State Legs (July 12, 2022), [ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx](https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx). Mail and other alternative methods of voting have expanded in ways this Court did not contemplate in 1972.

III. THE COURT SHOULD REJECT RACIST AND ANTI-DEMOCRATIC BALLOT RESTRICTIONS

Delaware courts have affirmed that the Elections Clause of the Delaware Constitution provides Delaware citizens with an “unfettered” right to vote in elections. *Young v. Red Clay Consolidated Sch. Dist.*, 122 A.3d 784, 837–38 (Del. Ch. 2015) (quoting *Abbott v. Gordon*, 2008 WL 821522, at *19 (Del. Super. Ct. Mar. 27, 2008)). Accordingly, “[o]ur election statutes are intended to ‘assure the people’s right to free and equal elections. . . .’” *Sussex Cty. Dep’t of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 423 (Del. 2013) (quoting 15 Del. C. § 101A). Vote by mail affirms this tradition, and taking it away undermines this constitutional right.

A. Enabling Mail Voting Increases Voter Access and Strengthens Democracy

Unlike absentee voting, which is intended to ensure voting is minimally accessible to all voters, mail voting has expanded based on the democratic idea that

political participation should be as easy as possible. *See generally* Paul Gronke, *Early Voting Reforms and American Elections*, 17 Wm. & Mary Bill of Rts. J. 423 (2008). Increasing access to secure and convenient voting methods strengthens our democratic process by increasing civic involvement.

Mail voting was enacted in California with the goals of lowering costs and making voting more convenient and therefore encouraging political participation. *See Peterson v. City of San Diego*, 34 Cal. 3d 225, 229, 666 P.2d 975, 977 (1983) (citing Bolinger, *Election Law During the 60's & 70's*, 28C West's Ann.Elec.Code (1977 ed.) pp. 126–130). In Arizona, the push for no-excuse mail voting in the 1990s came not from politicians but from voters who appreciated the convenience of mail voting. Jen Fifield, *Republicans helped Arizona champion voting by mail. Now they want it gone*, Arizona Mirror (June 13, 2022), azmirror.com/2022/06/13/republicans-helped-arizona-champion-voting-by-mail-now-they-want-it-gone. Former Arizona Governor Jan Brewer, a Republican who was in the state legislature when Arizona expanded mail voting, said the push “was more of the feeling of ‘red, white and blue’ democracy, we should all show up on Election Day.” *Id.*

Mail voting is not partisan. The states that conduct elections entirely by mail—California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont and Washington—include swing states as well as those dominated by Democrats or Republicans. *States with No-Excuse Absentee Voting*, Nat’l Conf. of State Legs.

(July 12, 2022), ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx. Vote-by-mail programs do not favor one party over the other. See Daniel M. Thompson et al., *Universal vote-by-mail has no impact on partisan turnout or vote share*, 117 PNAS 14052 (2020), pnas.org/doi/10.1073/pnas.2007249117; Jesse Yoder et al., *How Did Absentee Voting Affect the 2020 U.S. Election?*, 7 Sci. Advances 1 (2021), science.org/doi/10.1126/sciadv.abk1755.

Today, public benefits of vote-by-mail include increased turnout, particularly for historically disenfranchised communities; additional flexibility for voters, particularly seniors and those with physical or financial impediments to voting in-person; increased productivity, as voters do not have to spend time in the middle of the workweek traveling to the polls and waiting in line; reduced election-administration costs if enough voters who would otherwise vote in-person instead vote by mail; and other well-documented advantages. See, e.g., Priscilla L. Southwell, *A Panacea for Latino and Black Voters? Elevated Turnout in Vote By Mail Elections*, 47 Soc. Sci. J. 819 (2010); Darrell M. West, *How Does Vote-By-Mail Work and Does It Increase Election Fraud?*, Brookings Inst. (June 23, 2020), <https://www.brookings.edu/policy2020/votervital/how-does-vote-by-mail-work-and-does-it-increase-election-fraud/>; Priscilla L. Southwell, *Analysis of the Turnout Effects of Vote By Mail Elections, 1980–2007*, 46 Soc. Sci. J. 211 (2009).

B. The Moral Arc of Voting Rights Bends Toward Increased Access

Alternative methods of voting proved popular where they became available. Between the 1996 and 2016 presidential elections, the percentage of ballots cast via non-traditional methods, including early and absentee, surged from 10.5% to 40.1%. Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. Census Bureau (April 29, 2021), [census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html#:~:text=Much%20of%20the%20surge%20in,person%20prior%20to%20Election%20Day](https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html#:~:text=Much%20of%20the%20surge%20in,person%20prior%20to%20Election%20Day). Twenty-seven states and Washington, DC allow mail voting without an excuse, and an additional eight states conduct elections entirely by mail. *States with No-Excuse Absentee Voting*, Nat'l Conf. of State Legs. (July 12, 2022), ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx.

Even as Delaware voters could not vote by mail, the state changed and expanded access to the ballot in other ways not contemplated by the 1972 Supreme Court. Indeed, the Commissioner of Elections is entrusted with developing standards and operating procedures for the purpose of having a statewide uniform election system that uses technology in the conduct of general, primary special and school elections. *See* 15 Del.C. § 302. Pursuant to that mission, voters can now register via fax, email, or through a Department of Elections online portal, options which did not

exist⁵ at the time of the 1972 *Opinion*. 15 Del.C. § 1302 (g) (“The State Election Commissioner shall make the State’s Voter Registration Application available on the internet by January 1, 2006.”) (emphasis added); *see also* Delaware Department of Elections Registration Lookup, ivote.de.gov/VoterView (last visited Sept. 28, 2022). The State Election Commissioner uses appropriate technology to maintain a permanent record of each registration application (i.e. an electronic database of all registered voters) accessible via internet, which did not exist at the time of the 1972 *Opinion*. *See* 15 Del.C. § 303. Finally, voters have even cast ballots on secure internet-based systems from home computers, which did not exist at the time of the 1972 *Opinion*. *See* 15 Del.C. § 5503 (l).

In 2020, Delaware voters could cast their ballots by mail under a program enacted as an emergency measure for the COVID-19 pandemic. *See* 15 Del.C. 5601, *et. al.* Nearly one-third of voters, over 160,000 people, took advantage of this option and cast their ballots by mail. Delaware Department of Elections, *2020 General Election Report, November 3rd 2020*, <https://elections.delaware.gov/results/html/index.shtml?electionId=GE2020> (last visited Sept. 30, 2022). The system operated without incidents

⁵ Although the Fax machine was invented prior to the 1972 *Opinion*, it was not yet widely used until the 1980’s and was unlikely to have been incorporated into Department of Elections operations, much less widely understood by the Justices of the Supreme Court, at that time. *See* Wikipedia, the Free Encyclopedia, Fax, <https://en.wikipedia.org/wiki/Fax> (last visited Sept. 29, 2022).

related to fraud or security. Chris Barrish, *'They don't want to go to the polls': Delaware lawmakers on verge of approving vote-by-mail system*, WHYY (June 27, 2022), [whyy.org/articles/delaware-lawmakers-on-verge-of-approving-vote-by-mail-system/](https://www.whyy.org/articles/delaware-lawmakers-on-verge-of-approving-vote-by-mail-system/). The Court should consider that limiting access to a popular, safe method for voters to participate in the political process without any compelling justification is anti-democratic.

C. Plaintiffs' Demand Would Exacerbate Racial and Gender Disparities in Ballot Access

Even in 2022, access to the polls in the United States—including in Delaware—is inferior for Black voters. Although the General Assembly has recently recommitted the State to the ideals of equal protection under the law, art. I § 21, empirically, Black and Latino voters have to wait longer to vote. Hannah Klain et al., Brennan Ctr. Just., *Waiting to Vote: Racial Disparities in Election Day Experiences* at 8 (2020). This is true even when controlling for contemporary segregation, suggesting that even directing Election Day personnel and resources to historically disenfranchised communities may be inadequate. These effects are self-reinforcing; long waits at the ballot box can harm voter turnout in future elections. Klain, *supra*, at 8. This effect is also noticeable in Delaware, where communities with more Black voters have longer wait times at the polls. *See* M. Keith Chen et al., *Racial Disparities In Voting Wait Times: Evidence From Smartphone Data* 51 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26487, 2019).

As such, many of the benefits of vote-by-mail are disproportionately realized in historically marginalized communities. Voters who identify as female⁶, Hispanic, or Asian relied heavily on vote-by-mail in 2020; invalidating the law would therefore disproportionately harm these communities.⁷ See United States Census Bureau, *Voting and Registration in the Election of November 2020* at t.12 (2021). The benefits are also realized by Black voters, who tend to face the steepest obstacles to voting in-person and thus stand to benefit the most from the option. Klain, *supra*, at 8.

⁶ In Oregon, for example, which has conducted elections exclusively by mail since 1998, women “were consistent in both their preference for vote-by-mail and their view that they voted more often as a result of this reform. . . . [W]omen, especially those with children at home, expressed a preference for vote-by-mail because it allowed them to vote despite their somewhat hectic lifestyles.” Priscilla Southwell, *Vote-by-Mail: Voter Preferences and Self-Reported Voting Behavior in the State of Oregon*, 28 Am. Rev. Pol. 139, 142–43 (2007)

⁷ Another historically and structurally disenfranchised group of people are those involved in the criminal legal system. See, e.g., art. V. § 2 (“[T]he General Assembly may impose the forfeiture of the right of suffrage as a punishment for crime.”). Given that “incarceration” is not a constitutionally valid excuse to vote absentee, see art. V. § 4A, eligible voters who are incarcerated could be universally disenfranchised if they are unable to vote by mail. This is unconstitutional on its face. See *O'Brien v. Skinner*, 414 U.S. 524 (1974) (finding certain restrictions on absentee voting by pretrial detainees unconstitutional under the Equal Protection Clause). It is doubly intolerable given that incarceration disproportionately impacts Black voters; in Wilmington, Black residents make up 57% of the population, but 80% of the police department’s arrests target Black people. See Emily Widra et al., *Where People in Prison Come From: The Geography of Mass Incarceration in Delaware*, Prison Policy Initiative (Sept. 2022), <https://www.prisonpolicy.org/origin/de/2020/report.html>.

D. Overturning Vote-By-Mail Shortly Before Election Day Further Burdens Voters, Especially from Historically Disenfranchised Communities

The 2022 General Election is almost underway; mail ballots are scheduled to be sent on October 10 and early voting is set to begin on October 28. Voters who relied on voting by mail in the 2020 Election and in the 2022 primaries earlier this year may lose that option in the eleventh hour, creating confusion and almost certainly reducing turnout. Indeed, much of the electorate has already established a plan to vote by mail, and many have requested mail-in ballots. Def's Opening Br. at 58. Advance planning can increase democratic participation; while research is comparably limited on what happens when such plans must be changed on short notice, it is fair to logically conclude that such disruptions undermine turnout. *See* David W. Nickerson and Todd Rogers, *Do You Have a Voting Plan? Implementation Intentions, Voter Turnout, and Organic Plan Making*, 21 *Psychological Science* 194, 197 (2010).

Considerable weight ought to be given to the especially burdensome effect that eliminating a means of voting would have on the imminent 2022 election. “The Court’s precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled.” *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Roberts, J., concurring). Chief Justice Roberts succinctly identified the reason:

“[B]ecause running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers’ policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.”

*Id.*⁸ What’s more, a last-minute reduction in voting options presents significant harm to minority voters. *See*, Mark Kumleben, Samuel Woolley, and Katie Joseff, Protect Democracy, *Electoral Confusion: Contending with Structural Disinformation in Communities of Color* at 19 (2022) (The absence of credible information related to election logistics across the country has “fallen disproportionately on communities of color.”).

⁸ Despite Plaintiffs’ suggestion to the contrary, “let[ting] the public know” about this litigation is grossly insufficient to overcome the burden of the litigation itself; it is farcical for Plaintiffs to suggest that the Delaware Department of Elections is responsible for “[a]ny possible disenfranchisement” in this context. Pls.’ Reply Br. at 36.

IV. CONCLUSION

The Court of Chancery improperly relied upon the 1972 *Opinion* to rule that the vote by mail statute is unconstitutional. For the reasons set forth above, this Court should reverse that ruling.

/s/ Dwayne Bensing

Dwayne J. Bensing (Del. Bar No. 6754)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF DELAWARE
100 W. 10th St., Suite 706
Wilmington, DE 19801
(302) 295-2113 | dbensing@aclu-de.org
Attorney for Amici

Dated: September 30, 2022

RETRIEVED FROM DEMOCRACYDOCKET.COM