



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/
Cross-Appellants.

No. 342, 2022

On Appeal from a Decision of the
Court of Chancery of the State of
Delaware in 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.

Brief of Lawyers Democracy Fund
as *Amicus Curiae* in Support of Appellees and Affirmance

Of Counsel

Kirstein & Young PLLC
Joanne W. Young
Donald L. Crowell III
1750 K Street NW
Suite 700
Washington, DC 20006
(202) 331-3348 (telephone)
(202) 331-3933 (facsimile)

Dated: October 5, 2022

Cousins Law LLC
Scott Cousins (#3079)
Scott Jones (#6672)
Brandywine Plaza West
1521 Concord Pike, Suite 301
Wilmington, Delaware 19803
(302) 824-7081 (telephone)
(302) 292-1980 (facsimile)

*Attorneys for Amicus Curiae
Lawyers Democracy Fund*

Table of Contents

Identity of Amicus, Interest and Authority to File	1
Introduction and Summary of Argument	2
Argument.....	3
I. The Plain Text of Article V Requires Delaware Voters to Physically Present Themselves at their Registered Polling Place in Order to Cast a Ballot, Absent Enumerated Exceptions	3
A. Delaware Standards of Constitutional Interpretation and the Constitutional Provisions at Issue	3
B. Precedent instructs the Court to interpret the meaning of elections by ballot as requiring a voter’s personal attendance at the polls in accordance with long-standing Common Law in Delaware and Elsewhere	4
C. Contemporary Legal Treatises Published in the Late 1800s Were Unequivocal that Ballot Voting Required Physical Presence of the Voter at the Polls 8	
D. By Express Language, Art. V, § 1 Limits Legislative Authority To Prescribing Measures Which Will “best [] secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation [at that time and place].”	11
II. If the Court Finds Ambiguity under a Plain Meaning Interpretation of Article V, It Examines Constitutional Construction and History, Which Overwhelmingly Support Finding Universal Mail Voting Unconstitutional	13
A. History Shows Delaware Elections “by Ballot” Have Always Required Physical Presence of the Voter for Casting a Ballot at the Polls.....	13
B. The Delaware Charter of 1701 Contained a Full Election Code Which Required Electors to Personally Attend the Polls to Vote Under Penalty of Civil Fine for Simply Not Participating in Elections.....	13
C. The Delaware Constitutions of 1776, 1792, 1831, and 1897 Maintained the Contemporary Common Law Meaning and Practical Requirement that Ballot Elections Required Personal Attendance by Voters	14

D.	Ratification of the Federal Constitution in 1787 and Reconstruction Era Congressional Legislation Codified the Common Law Meaning of Ballot Elections Which Requires Personal Presence of the Voter at the Polls	17
E.	Congress Codified the Common Law Meaning of Ballot Elections When It Passed Reconstruction Era Election Legislation	18
III.	Reading Article V in Accordance with Applicable Canons of Constitutional Construction Confirms a Limitation on the Legislature’s Authority to Expand Absentee Voting Privileges Beyond the Enumerated Classes of Electors in the Delaware Constitution.....	21
IV.	Reading Legislative Authority into Article V that Allows the General Assembly to Exempt All Voters From Voting In Person Would Violate Several Delaware Canons of Textual Construction and Interpretation	21
A.	The General-Specific Canon Requires Finding that Universal Mail Voting Conflicts with the Specific Enumeration of Classes of Eligible Absentee Voters in Section 4A.....	21
B.	This Court Has Held in Several Decisions that Universal Mail Voting is Unconstitutional when interpreting Article V under the Expression-Exclusion Canon	22
C.	Article V Cannot be Read Harmoniously if the Court Ignores the Express Language Limiting Legislative Authority to Prescribe Methods of Voting Only for Purposes of Ensuring Ballot Secrecy and Security at Places of Election.....	24
	Conclusion	26

Table of Authorities

	Page(s)
Cases	
<i>Am. Flint Glass Workers Union v. Anchor Resol. Corp.</i> , 197 F.3d 76 (3d Cir. 1999)	18
<i>Bon Ayre Cmty. Ass'n, Inc. v. Bon Ayre Land, LLC</i> , No. CV K15A-05-002 WLW, 2016 WL 241864 (Del. Super. Ct. Jan. 12, 2016)	21
<i>Bourland v. Hildreth</i> , 26 Cal. 161 (Cal. 1864).....	7
<i>Burlington N. R. Co. v. Oklahoma Tax Comm'n</i> , 481 U.S. 454, 107 S. Ct. 1855, 95 L. Ed. 2d 404 (1987).....	13, 15
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	13
<i>Cede & Co. v. Technicolor, Inc.</i> , 758 A.2d 485 (Del. 2000)	13
<i>Chase v. Lujan</i> , 48 N.M. 261 (1944).....	8
<i>Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.</i> , Del.Supr., 492 A.2d 1242 (1985)	4
<i>CSH Theatres, L.L.C. v. Nederlander of San Francisco Assocs.</i> , No. CV 9380-VCMR, 2018 WL 3646817, at *24 (Del. Ch. July 31, 2018).....	21
<i>Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.</i> , 36 A.3d 336 (Del. 2012)	25
<i>Ex parte Siebold</i> , 100 U.S. 371 (1879).....	20
<i>Field v. Mans</i> , 516 U.S. 59 (1995).....	19
<i>Frieszleben v. Shallcross</i> 19 A. 576, 577 (1890)	15
<i>Harrington,II</i> 42 Del. 246 (1943)	6, 16, 23
<i>Higgin v. Albence</i> , No. 2022-0641-NAC, 2022 WL 4239590 (Del. Ch. Sept. 14, 2022).....	25
<i>In re Opinion of Justices</i> , 44 N.H. 633 (N.H. 1863)	8
<i>In re Opinion of the Justices</i> , 80 N.H. 595 (N.H. 1921)	20

<i>Justices</i> ,	
295 A.2d.....	25
<i>Klotz v. Warner Commc'ns, Inc.</i> ,	
674 A.2d 878 (Del. 1995)	21
<i>Leatherbury v. Greenspun</i> ,	
939 A.2d 1284 (Del. 2007)	22
<i>Lehman v. McBride</i> ,	
15 Ohio State 573 (Ohio 1863).....	8
<i>Mooney v. Phillips</i> , 173 Tenn. 398, 118 S.W.2d 224, 226 (1938),	
<i>Mooney v. Phillips</i> , 173 Tenn. 398, 118 S.W.2d 224, 226 (1938)	8
<i>Morissette v. United States</i> ,	
342 U.S.....	4
<i>Morrison v. Springer</i> ,	
15 Iowa 304 (1863).....	8
<i>People ex rel. Twitchell v. Blodgett</i> ,	
13 Mich. 127 (1865).....	8
<i>Republican State Comm v. Del. Dep't of Elections</i> ,	
250 A3d 911 (Del. Ch. 2020).....	22, 23
<i>Snyder v. Andrews</i> ,	
708 A.2d 237 (Del. 1998)	4
<i>State ex rel. Walker v. Harrington</i> ,	
42 Del. 14 (1942)	6
<i>State ex rel. Whitley v. Rinehart</i> ,	
140 Fla. 645 (1939).....	8
<i>State v. Cooper</i> ,	
575 A.2d 1074 (Del. 1990)	4
<i>State v. Lyons</i> ,	
40 Del. 77 (1939)	6, 16, 23
<i>State, ex rel. Oberly v. Troise</i> ,	
526 A.2d 898 (Del. 1987)	3
<i>Terex Corp. v. S. Track & Pump, Inc.</i> ,	
117 A.3d 537 (Del. 2015).....	24
<i>Turnbull v. Fink</i> ,	
668 A.2d 1370 (Del. 1995)	3
<i>Walt v. State</i> ,	
727 A.2d 836 (Del. 1999)	22
<i>Whitman v. Am. Trucking Associations</i> ,	
531 U.S. 457 (2001).....	25
<i>Williams v. Stein</i> ,	
38 Ind. 89 (1871).....	9

Statutes

2 U.S.C. § 9	18, 20
42 U.S.C. §§ 1983 & 1985.....	18
52 U.S.C. 20101-20107	20
52 U.S.C. § 20301	20
Del. Const. art. IV (1831)	11
Article V, § 1 of the Delaware Constitution.....	passim
Del. Const. art. 25 (1776).....	13
Del. Const. art. 28 (1776).....	15
Del. Const. art. IV, § 1 (1792).....	15
Del. Const. art. V, § 2	5

Other Authorities

2A Sutherland Statutory Construction § 47:23 (7th ed.)	22
2B Sutherland Statutory Construction § 50:1 (7th ed.)	4
Commentaries on American Law (1889).....	8, 9, 17
Commentaries on the Constitution of the United States § 824 (1833).....	17
Constitutional Studies, State and Federal (1897, NY Ed.)	10
Debates and Proceedings of the Constitutional Convention of the State of Delaware, Commencing December 1, 1896	12
Laws of the State of Delaware (1797 ed.)	12, 14
The Constitution of the United States Defined and Carefully Annotated	17
Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (2d ed. 1871)	18
The Soldier Vote in the Election of 1864 (Oct. 1944)	15
Pub. L. 42-22, 17 stat. 13 (1871)	19

Identity of Amicus, Interest and Authority to File

Lawyers Democracy Fund (“LDF”) is a Delaware non-profit organization that promotes ethics, integrity, and professionalism in the electoral process nationwide. LDF seeks to ensure all citizens can vote and that appropriate procedures and protections prevent vote dilution, voter disenfranchisement, and instill public confidence in election procedures and outcomes. To accomplish this, LDF conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. LDF also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files *amicus* briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration. LDF is a resource for lawyers, courts, journalists, policymakers, and others interested in the electoral process.

Introduction and Summary of Argument

The universal mail voting legislation at issue in this case directly conflicts with Article V, § 1 of the Delaware Constitution. It cannot exist in Delaware absent a constitutional amendment. The phrase election “by ballot” in Section 1 plainly means, as universally understood at common law during and prior to ratification of the 1897 Delaware Constitution: the complete election system for choosing public officers by physical attendance at a polling place and recording individual votes in secret, by means of paper ballot or machine. No Delaware Court has ever held differently, and this Court has reached the same conclusion at least three times on other grounds to strike down unconstitutional absentee voting legislation. Delaware canons of textual interpretation, both as to the structure of the text of Article V and the history the phrase, lead the Court to the same conclusion.

Other grounds also exist for finding the universal mail voting law at issue here unconstitutional. The full text of Article V, § 1, for example, limits the legislature to providing only different ways of recording and tallying votes, which must be for the purpose of enhancing ballot secrecy and security *at the time and place of elections*. Appellants ask this Court to hold as acceptable under Section 1 a universal mail voting law which eliminates nearly all government supervision over elections – *i.e.*, everything from the time, place, and manner of voting, to who is actually exercising the vote and casting the ballot. Such reading cannot meet constitutional muster.

Appellant’s interpretation would erase half of the words in Article V, § 1, as well as lead to patently absurd results when reading all sections of Article V together. The enumeration of permitted classes of absentee voters under Section 4a would also be rendered meaningless by act of legislation.

Accordingly, for these several reasons, Article V expressly limits the General Assembly’s authority to establish universal mail voting elections in Delaware until a constitutional amendment is passed.¹ The Court should affirm.

Argument

I. The Plain Text of Article V Requires Delaware Voters to Physically Present Themselves at their Registered Polling Place in Order to Cast a Ballot, Absent Enumerated Exceptions

A. Delaware Standards of Constitutional Interpretation and the Constitutional Provisions at Issue

Delaware courts follow the “plain meaning rule” for construction of statutes or the Delaware Constitution.” *Turnbull v. Fink*, 668 A.2d 1370, 1378 (Del. 1995) (citing multiple sources). Under the plain meaning rule, the Court gives words their ordinary meaning as understood at time of ratification, except where the meaning is ambiguous or the words could have multiple meanings. *E.g.*, *State, ex rel. Oberly v. Troise*, 526 A.2d 898, 902 (Del. 1987). When the meaning of the text is “reasonably

¹ Universal mail voting is a manner of holding elections whereby every voter receives or is able to cast a ballot which can be voted by mailing it (or delivering it some other way) to the designated election office. Voting *in absentia* (absentee) means voting other than at the place of the election (the poll).

susceptible of different conclusions or interpretations,” it is ambiguous. *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, Del.Supr., 492 A.2d 1242, 1246 (1985)).

B. Precedent Instructs the Court to interpret the Meaning of Elections by Ballot as Requiring a Voter’s Personal Attendance at the Polls in accordance With Long-Standing Common Law in Delaware and Elsewhere

When constitutional provisions use borrowed terms of art with well-established meaning at common law, the court accepts such definition as their plain meaning. *State v. Cooper*, 575 A.2d 1074, 1078 (Del. 1990) (citing *Morissette v. United States*, 342 U.S. at 263); *see also* 2B Sutherland Statutory Construction § 50:1 (7th ed.) (“All legislation is interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment.”).

The primary constitutional provision at issue in this case is Article 5, Section 1, which states:

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

Del. Const. art. V, § 1. (emphasis added).

Article V uses two relevant phrases which had widely known definitions at common law before ratification of Delaware’s first constitution in 1776 and every

constitution that followed, including the current 1897 constitution. These are: (1) an election “by ballot”; and (2) to “offer to vote” (gleaned from Del. Const. art. V, § 2 for contextual support).

The phrase election “by ballot” has always meant a poll-type election where qualified voters were required to personally attend and cast their ballots. An “offer to vote” is the process of a voter establishing their qualifications for voting at the polling place in their district of residence. Most pre-1900 state constitutions provided the “offer to vote” language in a form that connected it with a particular polling place where such offer was to be made. *E.g.*, Del. Const. art V, § 2 (“election district in which he or she may offer to vote”). Offering to vote happened immediately before one would cast a ballot. Thus, as discussed *infra*, an election “by ballot” indicates that the manner of holding the election is a an in-person ballot election, while “offer to vote” (in their district of residence) indicates a requirement that the voter must cast a ballot at a specific polling place – both required the voter personally attending a poll somewhere.

Many state high court decisions prior to the 1897 Delaware constitutional convention addressed the meaning of these phrases – and offer to vote, in particular – in response to challenges to laws passed seeking to allow deployed soldiers to cast ballots *in person* at extraterritorial polling places (within their encampments, which voting would otherwise follow all requirements of ballot elections). *See, e.g.*, Act

No. 192, Relating to the Elections of this Commonwealth, *in* Laws of the General Assembly of the Commonwealth of Pennsylvania Passed at the Session of 1838-9, at 528-29 (Packer, Barrett and Parke, 1839). All such pre-1897 state high court decisions uniformly held that the phrases election “by ballot,” and “offer to vote” mandated personal attendance in order to vote at an election.

Indeed, this Court has already, conclusively, decided the issue in this case in *State ex rel. Walker v. Harrington (Harrington II)*, which involved Delaware soldier casting ballots *in-person* at a polling place in Camp Upton, New York. *State ex rel. Walker v. Harrington*, 42 Del. 14 (1942) (*Harrington I*) (dismissed on procedural grounds but provides factual background for same case taken up by Court in *Harrington II* one year later). The law at issue was Delaware’s 1898 soldier voting act which enabled deployed soldiers to establish polling places at their encampments and vote in person at such places in the same manner as if they were voting at a polling place in their home district. *Harrington II* struck that law down because it violated several provisions of the Delaware constitution, including the bribery challenge provision, Article V, Section 3, for which it agreed with the reasoning of *State v. Lyons*, 40 Del. 77 (1939) , striking down a mail voting law on similar grounds. *Harrington II* also agreed with the reasoning in the earlier. *Harrington II*, 42 Del. at 251.

The California Supreme Court opinion in *Bourland v. Hildredth*, and, in particular, the detailed concurring opinion by Justice Sawyer, expressed the English and American common law understanding of voting by ballot and offering to vote:

In the election of all civil officers, however, in every State in the Union, the personal presence of the elector was required at the [polling] place ... whether the vote was by ballot or by the voice, and these elections were always held within the district for which the officers were elected. ***The very idea of an election*** embraced the idea of a place appointed within the district for the meeting of the voters ... and the presence of the elector in person to offer or claim his vote, to deposit his ballot, or announce his choice by the living voice. ***Men had no other conception of the process of voting, or of offering to vote, or of claiming their votes.***

[* * *]

The mode of voting established by the Constitution is by ballot, and there can be no possible difference of opinion as to what, in the minds of the people who adopted the Constitution, constituted the process of voting by ballot.

Bourland v. Hildredth, 26 Cal. 161, 216–17 (Cal. 1864) (emphasis added). The same common law understanding was relied upon in numerous other state high court decisions interpreting “manner of holding elections” language in state constitutions. For example, in Ohio, for example, it was held:

Let it be borne in mind, that voting by ballot requires the *personal attendance* of the electors at the polls. It appears to be a rule of the common law, that, in voting by ballot at public elections, each elector must appear in person and deliver his own ballot at the polls. ... ***This is not only a rule of the common law, but it has been the universal***

understanding of the nature of the act itself, from the origin of our government, and was the understanding at the time when the present constitution was adopted. Voting by proxy, therefore, could not be authorized short of an amendment of the constitution.

Lehman v. McBride, 15 Ohio State 573, 583 (Ohio 1863) (citations omitted) (emphasis added); *accord, e.g., In re Opinion of Justices*, 44 N.H. 633, 634-635 (N.H. 1863) (*NH 1863 Advisory Opinion*) (“By the common law, in elections of public and municipal corporations, and in al[l] other public elections, every vote must be personally given. ... The history of [elections]... in New-England, ... was in accordance with the general rule of the common law”); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 128 (1865) (same); *Morrison v. Springer*, 15 Iowa 304, 340 (1863) (same) *State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 653–54 (1939) (same); *Chase v. Lujan*, 48 N.M. 261 (1944) (same); *Mooney v. Phillips*, 173 Tenn. 398, 118 S.W.2d 224, 226 (1938) (“constitutional provisions that voting shall be by ballot is to insure secrecy... word “ballot” is not used in a literal sense but merely by way of designating a method of conducting elections that will *guarantee the secrecy and integrity of the ballot*”).

C. Contemporary Legal Treatises Published in the Late 1800s Were Unequivocal that Ballot Voting Required Physical Presence of the Voter at the Polls

Many state high court decisions used as supporting authority the legal treatise published by the “*American Blackstone*,” Chancellor James Kent, *Commentaries on*

American Law, which compiled the existing legal authorities at common law relating to public elections by ballot and stated: “[I]n the case of elections in public and municipal corporations, and in all other elections of a public nature, every vote must be personally given.” Kent, James, *2 Commentaries on American Law* 294 (1889) (citing *Case of the Dean and Chapter of Fernes, or de Capitulariter Congregatis*, Pasch 5 Jacobi (King’s Bench, Ireland 1600-1612); *Atty. Gen. v. Scott*, 27 English Reports 113, 1 Ves Sen 413, 417-418 (1749).

Another treatise on constitutional law published in 1871 by Thomas M. Cooley, stated the same proposition and clarified that a ballot can be both the material (*i.e.*, manner, method, or instrument) for voting as well as the form of election:

“A ballot may be defined to be a piece of paper, or other suitable material, with the name written or printed upon it of the person to be voted for; ***and where the suffrages are given in this form, each of the electors in person deposits such a vote in the box or other receptacle provided for the purpose and kept by the proper officers.***”

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 599-600 (2d ed. 1871) (emphasis added) (citing Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* § 103 (1856)); *see also*, *e.g.*, *Williams v. Stein*, 38 Ind. 89, 91-93 (1871) (ballot secrecy case citing Cooley and Cushing treatises).

These and the many other legal sources throughout the 1800s expressed what was known to the framers of every Delaware constitution: the phrase “by ballot” encompassed not only the paper on which the vote was recorded but also the comprehensive system of attending a polling place to qualify for voting, offer one’s vote, and then and there only cast one’s ballot. *See also* James Schouler, LL.D., *Constitutional Studies, State and Federal* (1897, NY Ed.) (“One must, at all [elections], according to our State constitutions, vote only at the place where he resides.”).

By following this Court’s plain meaning rule and assigning to the Article V, Section 1 phrase election “by ballot” its then-known common law definition, the *only* outcome this Court can and must reach is that personal attendance by qualified electors at their polling place is required under Art. V, Section 1 to participate in an election by ballot. This is an express constitutional limitation on the lawmaking power of the General Assembly, which no other provision of the Delaware Constitution contradicts. Only after an explicit constitutional amendment eliminating this limitation could universal mail voting elections in Delaware be permitted under the Constitution.

D. By Express Language, Art. V, § 1 Limits Legislative Authority To Prescribing Measures Which Will “best [] secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation [at that time and place].”

Appellants wrongly push this Court to interpret the second part of Article V, § 1 as broadly granting the Legislature unfettered authority to conduct elections in whatever manner it pleases. In doing so, they entirely ignore half of the language in Section 1. This language carefully restricts the “means, methods, and instruments” that the legislature may prescribe to those that secure secrecy and enhance voter integrity *at the time and place of election*.

First, Section 1 permissively grants the legislature authority to establish a means, method, or instrument of voting, subject to two express limitations: (1) the method is one that will “*best* [] secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation” (Del. Const art. V, § 1); and (2) effectuate such ballot integrity measures at the time and place of election—*i.e.*, “thereat.” *Id.*; *see also* THEREAT, Black's Law Dictionary (11th ed. 2019) (“At that place or time; there”).

Second, the phrase “means, method, and instruments” of voting, as identified by the 1893 Amendment to Article V, § 1 (then Article IV of the 1831 constitution), indicates this provision was meant to affect the “means of voting,” as identified in the heading of the language change (*i.e.* whether votes were tallied by ballot, voice,

or machine, etc. at the polls) not the manner of holding the election encompassed by the first part of Section 1. *See* Laws of the State of Delaware, Vol. XIX, Pt. II, Ch. 541, at 616 (1893).

Lastly, framers of the Delaware Debates of 1897 made clear when keeping the 1893 amendment language in the 1897 constitution that its only purpose was to enable the use of machine voting and it this would unquestionably continue protecting the secret ballot. *See* Debates and Proceedings of the Constitutional Convention of the State of Delaware, Commencing December 1, 1896, at 1173-74.

William C. Spruance: ...I think as was said by the gentleman from Dover [passing the 1893 amendment] gave us the widest latitude to provide for a secret ballot.

William Saulsbury: I know that is the case. ...I was a member of the Legislature and that Mr. Fulton brought a bill which I very gladly introduced for him, to ratify his amendment. The object of the amendment was to make the Meyers voting machine Constitutional if the Legislature could ever be induced to adopt it.

William C. Spruance: This was supposed to complete that purpose.

William Saulsbury: *It was passed entirely for that purpose.*

Id. (emphasis added).

II. If the Court Finds Ambiguity under a Plain Meaning Interpretation of Article V, It Examines Constitutional Construction and History, Which Overwhelmingly Support Finding Universal Mail Voting Unconstitutional

A text's legal history including "prior versions on the same subject, is a valuable guide for determining what object an act is supposed to achieve" because frequently legislative enactments are not accompanied by a contemporaneous Commentary. *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 495 (Del. 2000); *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860, 95 L. Ed. 2d 404 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity....").

A. History Shows Delaware Elections "by Ballot" Have Always Required Physical Presence of the Voter for Casting a Ballot at the Polls

As far back as America's colonial period, votes were primarily given by voice (*viva voce*) or by some other polling of the voter, including paper ballots, as was the practice under English common law. *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality opinion); *see also* Del. Const. art. 25 (1776) ("The common law of England ... shall remain in force, unless they shall be altered by a future law of the Legislature....").

B. The Delaware Charter of 1701 Contained a Full Election Code Which Required Electors to Personally Attend the Polls to Vote Under Penalty of Civil Fine for Simply Not Participating in Elections

In Delaware elections were first held by *viva voce*, as other colonies, as well as by ballot. The Delaware Charter of 1701 regulated the qualifications and manner of

holding elections by incorporating a 1700 law titled *An Act to ascertain the Number of Members of the Assembly, and to regulate the Elections.*” Del. Charter of 1701, Section II. As to the time and place of election, the Act provided as follows:

[T]he freemen and inhabitants of the respective counties of this government ... to meet *on the first day of October yearly*, for ever, at the most usual place of elections in the said respective counties; ... (c) and *then and there* chuse their representatives or delegates to serve them in the assembly

And that the said poll shall not be delayed, *nor the election adjourned to another place or part of the country other than where the same begins....*

An ACT for regulating elections, and ascertaining the number of Members of the Assembly. (a), contained in Laws of the State of Delaware, Chap. LXI. a., at 146-157 (1797 ed.) (emphasis added) [*1700 Act for Regulating Elections*]. The Act of 1700 identified every aspect of the election, including voter attendance to qualify for voting (“offer to vote”) and to cast their ballot. *Id.* Physical attendance at the polls was a pre-requisite to voting, as it was an obligation of citizenship, which would subject a qualified elector to civil fine for failing vote.” *Id.* Thus, in colonial Delaware, it was an obligation both to vote and to vote in person. *Id.*

C. The Delaware Constitutions of 1776, 1792, 1831, and 1897 Maintained the Contemporary Common Law Meaning and Practical Requirement that Ballot Elections Required Personal Attendance by Voters

Little if anything changed from the Delaware Charter of 1701 to the 1776 Constitution, the latter of which stated that all elections would be “by ballot” in

accordance with the existing Delaware session laws which were incorporated as part of the Constitution. Del. Const. art. 28 (1776). The 1792 Constitution maintained the requirement of elections being held “by ballot.” Del. Const. art. IV, § 1 (1792). The 1831 Constitution kept the same ballot election system as the 1792 Constitution. Del. Const. art. IV, Sec. 1.²

During the Civil War, many states passed legislation (later found unconstitutional, like this Court’s decision in *Harrington*,) to enable their deployed soldiers to vote by ballot at their encampments and have those election results returned to the state’s election district. Oscar Osburn Winther, *The Soldier Vote in the Election of 1864* (Oct. 1944). Delaware, however, chose not to pass any soldier absentee voting laws until after its 1898 after its 1897 constitutional convention - the chief concern in the state was keeping soldiers away from the state’s polling places. *Id.* at 448 n.28 (“It is apparent that the chief concern of the lawmakers was not soldier voting but the finding of some way to forestall Union soldier intervention at the polls on election day.”).

² *Frieszleben v. Shallcross*, is an early Delaware case decided before the ratification of the 1897 Delaware Constitution which reviewed the history of Delaware elections “by ballot” and the “offer to vote” language. *Frieszleben* also held that there was no violation of Delaware’s Free and Equal Elections Clause when the legislature implemented qualification and voting requirements on all citizens of the same condition, situation, or circumstances equally. 19 A. 576, 577 (1890).

As this Court in *Lyons* explained after evaluating the ratification history and debates of the 1897 constitutional convention:

It seems also apparent that it was never thought by the Convention that a right existed in the Legislature to provide for a general statute as to absentee voting, for in such circumstances it would have been entirely unnecessary to consider especially those in the Military Service.

In the Constitutional debates there are many statements indicating the clear understanding that the casting of a ballot was to be effected by the personal presence of the voter at the polls.

The election officers are prohibited from receiving the vote unless the person so challenged shall make the affidavit but “such oath or affirmation shall be conclusive evidence to the election officers of the truth of such oath or affirmation.”

Lyons, 40 Del. at 502.

This Court found the same to be true in *Harrington II*, when it evaluated the 1897 Constitutional Convention history in evaluating the constitutionality of soldier absentee voting:

“In the Constitutional debates there are many statements indicating the clear understanding that the casting of a ballot was to be effected by the personal presence of the voter at the polls.

Harrington II, 42 Del. at 251. Accordingly, the constitutional history of Delaware going back to its 1701 Charter provides a well-established history and practice of Delaware elections by ballot encompassing an in-person voting requirement.

D. Ratification of the Federal Constitution in 1787 and Reconstruction Era Congressional Legislation Codified the Common Law Meaning of Ballot Elections Which Requires Personal Presence of the Voter at the Polls

During the federal Constitutional Convention of 1787, the framers understood the common law meaning of elections “by ballot” to require personal presence of the voter at the polls. *See, e.g.,* Madison, James, *in* Farrand, Max, *The Records of the Federal Convention of 1787*. Rev. ed. 1937) (debating whether “[w]hether the electors should vote by ballot or vivâ voce.”). Contemporary legal treatises published around the time of the federal convention stated the same proposition; namely that the manner of holding elections was either by *viva voce* or by ballot, both of which were a form of the ballot election system described *infra* as existing in colonial Delaware. *See, e.g.,* George Pashcal, *The Constitution of the United States Defined and Carefully Annotated* (1868) (““[T]he [] settled opinion seems to be, that *times* relate to the days, the *places* to the precincts for voting, and the *manner* to the *viva voce* or **ballot system**, and the regulations for conducting the elections.”) (emphasis added); Story, Joseph L., *Commentaries on the Constitution of the United States* § 824 (1833) (“In some of the states the choice is by the voters *viva voce*, (as it is in England;) in others it is by ballot.” (citing Tucker, St. George, *Blackstone’s Commentaries with Notes of Reference App*, at 191-92 (1803))).

E. Congress Codified the Common Law Meaning of Ballot Elections When It Passed Reconstruction Era Election Legislation

Following the bloodshed of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the U.S. Congress passed a series of laws known as the Civil Rights Acts, the Klu Klux Klan Acts, and the Enforcement Acts, all of which largely sought to protect minority voting rights and prevent ballot fraud and corruption in federal elections.³

Relevant here, is Section 19 of the Enforcement Act of 1871 (now 2 U.S.C. § 9 and formerly Revised Statutes § 27), which codified the common law meaning of elections by ballot in federal elections. 2 U.S.C. § 9 (“All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect.”). As discussed *supra*, the common law meaning of elections by ballot encompassed a system whereby “each of the electors *in person* deposits such a vote in the box or other receptacle provided for the purpose and kept by the proper officers.” Cooley, *supra*, at 599-600 (emphasis added). “Where Congress uses legal terms that have ‘accumulated settled meaning’ under common law, it must be presumed (unless the statute dictates otherwise) that Congress meant to employ that established meaning *Am. Flint Glass Workers Union v. Anchor Resol.*

³ These acts also established the federal private rights of action for deprivation of civil liberties under *e.g.*, 42 U.S.C. §§ 1983 & 1985.

Corp., 197 F.3d 76, 80–81 (3d Cir. 1999) (citing *Field v. Mans*, 516 U.S. 59, 69 (1995)).

That ballot elections required a voter’s physical presence at the polls was more than just the legal and common understanding at the time, it was a necessary manner of holding elections for the Enforcement Act of 1871 to be enforceable. In particular, that act ensured that federal officers would be present at federal elections to protect voting rights. At “the times and places fixed for registration of voters” and the “times and places for holding elections of Representatives or delegates in Congress and for counting the votes at said election, it directed federal officials as follows:

[I]n their ... respective election districts or voting precincts, on the day or days of registration, ... and on the day or days of election, *to take, occupy, and remain in such position or positions, from time to time, whether before or behind the ballot-boxes, as will, in their judgment, best enable them or him **to see each person offering himself for registration or offering to vote**, and as will best conduce to their or his scrutinizing the manner in which the registration or voting is being conducted.*

An Act to Enforce the Fourteenth Amendment to the Constitution of the United States and for Other Purposes, Pub. L. 42-22, 17 stat. 13 (1871) (“Second Enforcement Act) (emphasis added). Universal mail voting, indeed, any *in absentia* voting system, would have been too easy a method for former confederate loyalists to circumvent the Enforcement Act of 1871. Any state laws broadly eliminating a polling place registration and voting requirement for all voters, would necessarily have been

void under the Supremacy and Elections clauses of the U.S. Constitution. *See also Ex parte Siebold*, 100 U.S. 371 (1879) (upholding constitutionality of Enforcement Act); *In re Opinion of the Justices*, 80 N.H. 595 (N.H. 1921) (“It seems most probable that Congress when it required an election by ballot meant an election where the ballot was presented by the elector in person, and we incline to the opinion that the scheme of [the N.H.] act for voting by proxy would not be a valid law if enacted as to the election of Representatives and Senators in Congress.”).

While Congress has passed numerous election laws since 1899, no legislation has expressly amended the ordinary meaning of voting by written/paper ballot or machine under 2 U.S.C. § 9. Indeed, 20th Century legislation has always specified a particular class of voters, and/or specific offices which could be voted for by mail/absentee. *e.g.*, Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 et seq.; Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. 20101-20107. Accordingly, it is possible that holding elections universally by mail for all voters, as the law at issue here does, could conflict with federal law as applies to some elections for federal office.

III. Reading Article V in Accordance with Applicable Canons of Constitutional Construction Confirms a Limitation on the Legislature’s Authority to Expand Absentee Voting Privileges Beyond the Enumerated Classes of Electors in the Delaware Constitution

When a statute is “reasonably susceptible of different conclusions or interpretations,” it is ambiguous, and the Court must deploy tools of construction to determine and give effect to legislative intent. *Bon Ayre Cmty. Ass’n, Inc. v. Bon Ayre Land, LLC*, No. CV K15A-05-002 WLW, 2016 WL 241864, at *5 (Del. Super. Ct. Jan. 12, 2016) (citations omitted), *aff’d sub nom. Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass’n*, 149 A.3d 227 (Del. 2016).

IV. Reading Legislative Authority into Article V that Allows the General Assembly to Exempt All Voters From Voting In Person Would Violate Several Delaware Canons of Textual Construction and Interpretation

In determining legislative intent, the Court first “examine[s] the text of the act and draw inferences concerning the meaning from its composition and structure.” *Klotz v. Warner Commc’ns, Inc.*, 674 A.2d 878, 879 (Del. 1995) (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.01 (5th ed. 1992)).

A. The General-Specific Canon Requires Finding that Universal Mail Voting Conflicts with the Specific Enumeration of Classes of Eligible Absentee Voters in Section 4A

Delaware recognizes the general-specific canon of interpretation—*generalia specialibus non derogant*—which dictates that in any conflict between constitutional language, the specific language will control the general language. *See CSH Theatres, L.L.C. v. Nederlander of San Francisco Assocs.*, No. CV 9380-VCMR, 2018 WL

3646817, at *24 (Del. Ch. July 31, 2018), *aff'd in part, rev'd in part sub nom. In re Shorestein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39 (Del. 2019). Adhering to this canon requires finding the universal mail voting legislation conflicts with the specific limitations on the General Assembly's authority set forth in Section 1 itself and Article V, Section 4A's enumeration of specific classes of people eligible to vote *in absentia*.

Section 1 enables the legislature to prescribe additional methods of recording votes other than by paper ballot at the place of election. It does not, however, authorize the legislature to effectively eliminate the place of the election nor amend the constitutional classes of voters authorized to vote *in absentia* under Article 4A through legislation. This Court has never interpreted Section 1 to provide such unfettered authority, for it would conflict with the general-specific canon of construction. “[A]bsent some other authority, Article V, §4A prohibits the General Assembly from allowing general absentee voting.” *Republican State Comm v. Del. Dep’t of Elections*, 250 A3d 911, 918 (Del. Ch. 2020).

B. This Court Has Held in Several Decisions that Universal Mail Voting is Unconstitutional when Interpreting Article V under the Expression-Exclusion Canon

The *expressio unius est exclusio alterius* canon states that the expression of one thing is the exclusion of another. *E.g.*, *Walt v. State*, 727 A.2d 836, 840 (Del. 1999); *Leatherbury v. Greenspun*, 939 A.2d 1284 (Del. 2007); 2A Sutherland Statutory

Construction § 47:23 (7th ed.). In *State v. Lyons*, this Court held “[t]he express provisions of the Constitution and the plain inference drawn thereof” mandate a constitutional amendment process to lawfully permit universal *in absentia* voting for all Delaware voters. 5 A.2d 495, 503 (Del. 1939). This Court’s decision in *State ex rel. Walker v. Harrington* reinforced the *Lyons* decision by striking down an 1898 soldier *in absentia* voting law that was passed just one year after ratification of the 1897 Constitution. See 30 A.2d 688 (Del. 1943). In that decision, this Court found the Constitution’s default requirement for voters to personally cast their ballots at their home-district polling places was violated by the 1898 law allowing qualified voters in military or naval service and away from their district on election day to vote (in-person) at extraterritorial polls. *Id.*

This Court separately determined that the *expression-exclusion* doctrine prohibits the General Assembly from enacting no-excuse mail voting without amending Section 4A. See *Op. of the Justices* at 722 (“We are of the opinion that by expressly including certain classifications, the drafters of s 4A impliedly excluded all other classifications.”). Less than two years ago, Delaware’s Chancery Court also affirmed that Section 4A is “meant to be exhaustive.” *Republican State Comm v. Del. Dep’t of Elections*, 250 A3d 911, 918 (Del. Ch. 2020) (citing *Op. of the Justices*).

Appellants do not establish any cognizable basis for this Court to stray from its earlier, sound decisions that all move this Court to affirm and declare the universal mail voting law is unconstitutional based on the *expression-exclusion* doctrine.

C. Article V Cannot be Read Harmoniously if the Court Ignores the Express Language Limiting Legislative Authority to Prescribe Methods of Voting Only for Purposes of Ensuring Ballot Secrecy and Security at Places of Election

Under the harmonious-reading canon, an ambiguous statutory provision should be examined “in a way that will promote its apparent purpose and harmonize it with other statutes” within the [constitutional] scheme.” *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 543–44 (Del. 2015), *as revised* (June 16, 2015) (“All of the pertinent statutory language should be given full effect to produce the most consistent and harmonious result under the wording of the section.”). Appellant’s interpretation of Article V would render substantial portions of Section 1 and Section 4A superfluous and meaningless.

Article V, Section 1 as currently written could never permit universal mail voting. By its nature, elections entirely by mail removes fundamental safeguards for ballot security, secrecy measures, and provides opportunities for bribery, fraud, and corruption. This is plainly contrary to the limitation that “means, methods, and instruments” of voting prescribed under Article V, Section 1 be for the purpose of enhancing election integrity at places of election. Indeed, universal mail voting, with all its vulnerabilities, goes against the meaning of Article V, § 1 because it effectively

eliminates the secret ballot by completely dispensing away with all government supervision over the voting process—*i.e.*, everything from the time, place, and manner of voting, to who is actually exercising the vote and casting the ballot.

Nor can universal mail voting, which lacks equivalent security measures available through in-person balloting, meet the second requirement that such methods of voting prescribed by the legislature enhance ballot integrity *at the time and place of election*. This would raise questions of “patent absurdity,” as well as contradict the harmonious-reading canon, which this Court must always heed. *Op. of the Justices*, 295 A.2d at 721-22; *see also Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) (“[T]he General Assembly ‘is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.’” (quotations omitted)).

Appellants’ interpretation would also result in an absurd reading of Section 4A. Such reading would render meaningless the numerous constitutional amendments passed by prior legislatures and the time, money, and other efforts they exhausted to do so. As the late Justice Scalia famously wrote, this would be a game of hiding “elephants in mouseholes,” which legislative bodies do not play. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). As the decisions in *Lyons* and *Harrington* clearly hold, no elephant exists; *accord Higgin v. Albence*, No. 2022-0641-NAC, 2022 WL 4239590, at *24 (Del. Ch. Sept. 14, 2022), *judgment entered*, (Del.

Ch. 2022) (“[T]he Vote-By-Mail statute necessarily would paint over the specific categories of eligible citizens enumerated in Section 4A.... and *improperly render Section 4A surplusage* under *Lyons, Harrington, and Opinion of the Justices.*”) (emphasis added).

The harmonious-reading canon leads to the conclusion that Section 4A is exhaustive and a constitutional amendment is required to expand those specific classes, just like the legislature did several times in the past. This is the only reading of Article V that avoids Section 4A from being meaningless surplusage.

Conclusion

The Court can and must, based on numerous grounds, hold that universal mail voting is unconstitutional in Delaware absent a constitutional amendment. The meaning of an election “by ballot” has for Delaware’s entire history and during the 1897 constitutional convention meant only an election where voters met in person to cast ballots. The authority the legislature relies upon, is expressly for the purpose of improving the secrecy, security, and safeguards of in-person elections. And Appellant’s interpretation of Article V, would lead to absurd results when reading all parts of that provision together. Any one of these reasons is enough to affirm, as this court should.

Respectfully submitted,

/s/ Scott D. Cousins

Scott D. Cousins (Bar No. 3079)

Scott D. Jones (Bar No. 6672)

COUSINS LAW LLC

Brandywine Plaza West

1521 Concord Pike, Suite 301

Wilmington, Delaware 19803

Telephone: (302) 824-7081

Facsimile: (302) 295-0331

Email: scott.cousins@cousins-law.com

- and -

Of Counsel

Kirstein & Young PLLC

Joanne W. Young

Donald L. Crowell III

1750 K Street NW

Suite 700

Washington, DC 20006

(202) 331-3348 (telephone)

(202) 331-3933 (facsimile)

Dated: October 5, 2022

*Attorneys for Amicus Curiae
Lawyers Democracy Fund*