



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD W. HOCKER and STEVEN
WASHINGTON,

Appellants,

v.

THE HONORABLE ANTHONY J.
ALBENCE, in his official capacity as
State Election Commissioner, and STATE
OF DELAWARE DEPARTMENT OF
ELECTIONS,

Appellees.

)
)
)
) No. 406, 2026

)
) On Appeal from the
) Court of Chancery of the
) State of Delaware

)
) C. A. No. 2026-1021-BWD
)
)
)
)

**APPELLANTS GERALD W. HOCKER
AND STEVEN WASHINGTON'S OPENING BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
NATURE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	3
STATEMENT OF FACTS	5
I. THE COURT OF CHANCERY ERRED IN HOLDING THAT THE PERMANENT ABSENTEE STATUTE DID NOT EXPAND ACCESS TO ABSENTEE VOTING BEYOND THAT EXPLICITLY AND IMPLICITLY PERMITTED BY THE CONSTITUTION	9
Questions Presented	9
Standard and Scope of Review.....	9
Merits of the Argument.....	9
II. DELAWARE’S PERMANENT ABSENTEE VOTING LAW, WHICH REQUIRES THE DEPARTMENT OF ELECTIONS TO ASSUME THAT A VOTER REMAINS ELIGIBLE, FURTHER DEMONSTRATES THE STATUTE DOES NOT PASS CONSTITUTIONAL MUSTER	16
Questions Presented	16
Standard and Scope of Review.....	16
Merits of the Argument.....	16
CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
 <i>Cases</i>	
<i>Albence v. Higgin</i> , 295 A.3d 1065 (Del. 2022)	<i>passim</i>
<i>Albence v. Mennella</i> , 320 A.3d 212 (Del. 2024)	7
<i>DuPont v. DuPont</i> , 85 A.2d 724 (Del. 1951)	14
<i>Op. of Justices</i> , 295 A.2d 718 (Del. 1972)	10, 12
<i>Republican State Comm. v. Delaware</i> , 250 A.3d 911 (Del. Ch. 2020)	10
<i>State v. Lyons</i> , 40 Del. 77 (1939)	12-13
<i>State ex rel. Smith v. Carey</i> , 112 A.2d 26 (Del. 1955)	16-17
 <i>Constitutions and Statutes</i>	
Del. Const. Art. V, § 1	4, 16, 17
Del. Const. Art. V, § 2	12
Del. Const. Art. V, § 4A	<i>passim</i>
15 Del. C. § 5502	6
15 Del. C. § 5503(k)	<i>passim</i>
1 Del. Laws Ch. LXI a.....	9
33 Del. Laws Ch. 103 §14, 264	10

Other Authorities

William N. Eskridge, Jr. *Interpreting Law: A Primer on How to Read Statutes
and the Constitution* at 408 (2016)..... 12

NATURE OF THE PROCEEDINGS

This case presents a constitutional challenge to a statutory provision, 15 *Del. C.* §5503(k) (the “Permanent Absentee Statute”). Appellants Gerald W. Hocker (“Hocker”) and Steven Washington (“Washington”) (together, “Appellants”) ask this Court to determine if the Court of Chancery erred in finding that the law meets the strict requirements set forth in Delaware’s Constitution, related to absentee voting. Appellants contend this Court should find that the law is constitutionally flawed.

The case does not argue the advisability or propriety of such a provision, but, rather, asks the question if the statute, on its face, fails to comply with the explicit and implicit mandates of the Delaware Constitution. Appellants contend the lower court erred when it found the statute constitutional, and asks this Court to reverse that ruling.

Appellants, both candidates in the November 2026 General Election, contend that the statute fails to comply with the Delaware Constitution in that, on its face, the statute extends the eligibility of absentee voters, who file an application for an absentee ballot and aver that they meet certain, limited and transitional or temporary conditions at a single election, to vote indefinitely without any additional application or averment.

Appellants initially filed this action in the Court of Chancery against the Appellees, State Election Commissioner Anthony J. Albence and the Delaware

Department of Elections (the “Department”). Following expedited briefing, the Court of Chancery determined, based on cross motions for summary judgment, that there were no facts in dispute, and that the statute met constitutional requirements. Appellants brought this appeal and sought and were granted expedited scheduling in this Court. Appellants seek reversal of the ruling of the Court of Chancery.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that the Permanent Absentee Statute is a valid exercise of legislative authority and did not expand access to absentee voting beyond that Constitutionally permitted. On its face, 15 *Del. C.* § 5503(k) allows an individual to vote in multiple elections, over multiple years, who, on a single occasion and for a temporary or transitional reason, avers he or she is eligible to vote absentee. Yet the Constitution, in permitting absentee voting, uses both a mandatory term and requires that only a voter who “shall” be unable to appear may vote absentee, and a singular term, “may cast **a ballot** at such general **election**” Del. Const. Art. V, § 4A. (emphasis added). The result is that, in contravention of the Constitution and this Court’s authority, including as held in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022), the pool of voters who may vote absentee is impermissibly expanded by statute. Appellees conceded below that the law requires the Department to assume the voter is eligible in each successive election to which the voter did not aver eligibility. The statutory scheme in 15 *Del. C.* § 5503(k) is patently unconstitutional.

2. The Court of Chancery erred in determining that it is not a violation of the Constitution to allow the Department to simply assume an elector is eligible to vote absentee, and place the determination of eligibility in the hands of electors rather than in the province of the Department of Elections. Administrative

convenience does not pass constitutional muster. Indeed, the General Assembly may provide for absentee voting only by those who “*shall* be unable to appear ... at the regular polling place.” Del. Const. Art. V, § 4A (emphasis added). “Shall” is a term of certainty, used in laws and regulations to express what is mandatory. The Department conceded below that the Permanent Absentee Statute works on a *presumption* of absentee voting eligibility, not confirmation of the same, which confirms the law’s invalidity. By failing to require that the Department assure the eligibility of an absentee voter at each election, the General Assembly has acted in contravention of the Constitutional mandate that any such laws be enacted “so as to best 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.

STATEMENT OF FACTS

The Honorable Gerald W. Hocker is a registered voter, resident of the State of Delaware, and member of the Delaware Senate. Senator Hocker currently represents Delaware's 20th Senate District. Senator Hocker has filed to run again for State Senate in the November 2026 General Election. As a candidate, Senator Hocker has a direct interest in assuring that the election is conducted in a manner that is fair, lawful and in accordance with the Delaware Constitution. Steven Washington is a registered voter and a candidate for the Delaware State Senate, District 1. He, too, has a direct interest in assuring the election is conducted in a manner than is fair, lawful and in accordance with the Delaware Constitution.

The Delaware Constitution allows for absentee voting, with strict restrictions.

It provides that:

any qualified elector of this State, duly registered, who shall be unable to appear to cast his or her ballot at any general election at the regular polling place of the election district in which he or she is registered, either because of being in the public service of the United States or of this State, or his or her spouse or dependents when residing with or accompanying him or her[,] because of the nature of his or her business or occupation, because of his or her sickness or physical disability, because of his or her absence from the district while on vacation, or because of the tenets or teachings of his or her religion, may cast a ballot at such general election to be counted in such election district.

Del. Const. Art. V, § 4A

The Delaware Constitution further allows the General Assembly to enact laws that permit voting by absentee ballot, but those laws must be in accordance with the Delaware Constitution. Del. Const. Art. V, § 4A. Delaware statutes provide a specified list of reasons for which a registrant qualifies to vote by absentee ballot. *See* 15 *Del. C.* § 5502.

Delaware statutes permit registrants to apply to the Department of Elections for “permanent absentee status” for the following reasons:

- (1) Because such person is in the public service of the United States or of this State, or is a citizen of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia, or such person’s spouse or dependents when residing with or accompanying the person, or is absent from this State because of illness or injury received while serving in the armed forces of the United States; or
- (2) Because such person is in the armed forces of the United States or the merchant marine of the United States, or attached to and serving with the armed forces of the United States in the American Red Cross or United Service Organizations; or
- (3) Because such person is sick or physically disabled; or
- (4) Because such person is otherwise authorized pursuant to the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) [52 U.S.C. § 20301 *et seq.*] to vote by absentee ballot; or
- (5) Because such person is otherwise authorized by federal law to vote by absentee ballot.

15 *Del. C.* §§ 5502, 5503(k)(2)

The terms of 15 *Del. C.* § 5503(k) do not require the Department of Elections to verify whether each permanent absentee voter is eligible to vote in each election, and upon information and belief, the Department is not doing so. However, the Department of Elections is required by the statute to automatically send an absentee ballot to each person in permanent absentee status for each election in which the person is entitled to vote. *See* 15 *Del. C.* § 5503(k).

Plaintiff previously filed an action challenging this same statutory structure,¹ after which, in January 2022, the Department of Elections sent a letter to all permanent absentee voters, which explained, “You are, however, responsible for keeping the Department informed of any changes in your residential address, mailing address, email address (if you have one) or political party affiliation.” *See* 15 *Del. C.* § 5503(k)(4).

A registrant in “permanent absentee status” stays in “permanent absentee status” indefinitely until one of the following things happens: correspondence to the registrant is returned as undeliverable, the registrant dies or is disqualified, the registrant’s registration is canceled, the registrant requests to be removed from “permanent absentee status,” or the Department of Elections receives other written notification that the reason that the registrant has stated for voting by absentee ballot

¹ *Albence v. Mennella*, 320 A.3d 212 (Del. 2024).

is no longer valid. *See* 15 *Del. C.* § 5503(k)(3). In reality, many stay on that list much beyond those events occurring, and remain there as ineligible voters.

As required by law, 15 *Del. C.* § 5503(k)(5), Delaware posts the list of permanent absentee voters on its website. In February 2026, there were approximately 22,800 registrants on the permanent absentee list maintained by the Department of Elections. There were 1,170 voters listed who were confirmed to no longer receive mail at the address on file at the Department of Elections, according to the United States Postal Service. Additionally, there were 193 deceased individuals on that same permanent absentee list, according to a cross-reference with the Social Security Administration. These findings are consistent with previous findings in 2022, at which time there were approximately 20,250 registrants on the permanent absentee voter list, which included both registrants who had moved and those who were reported deceased between one and ten years previously.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT THE PERMANENT ABSENTEE STATUTE DID NOT EXPAND ACCESS TO ABSENTEE VOTING BEYOND THAT EXPLICITLY AND IMPLICITY PERMITTED BY THE CONSTITUTION.

Question Presented

Whether the Court of Chancery erred when it held that the Permanent Absentee Statute did not expand “the circumstances qualifying an elector to vote absentee.”

Standard and Scope of Review

This Court reviews constitutional claims *de novo*. *Higgin*, 295 A.3d at 1085.

Merits of Argument

In *Higgin*, this Court considered, in detailed fashion, the history of voting by mail in Delaware elections. The Court recognized that the history stretched from a time when a fine could be imposed for those who did not come to vote who were able,² to allowing, by constitutional amendment, some carefully crafted, restricted and limited categories of persons who might vote absentee.³ Throughout that history, as documented in the *Higgin* decision, the clear preference of legislators,

² “... every person within this government, qualified to elect according to the direction of this act, refusing or neglecting (not hindered by sickness or other unavoidable accident) to attend at the election and to give in his vote ... shall be fined the sum of Twenty Shillings ...” 1 Del. Laws. Ch. LXI a., at 147.

³ Article V, Section 4A.

and the clear mandate of the Constitution as interpreted by the Courts, was that voters were to appear in person on election day in the district in which they resided. The clear intent, based on that history, was, and remains, that in-person voting is the default, and that limited exceptions, that could not be created by statute, were made to allow for limited categories of persons, for limited reasons, to vote absentee.

That preference is very strong. As the Court in *Higgin* noted, “... [t]hat the right to an absentee ballot was to be carefully circumscribed is further evidenced by Section 14 of the 1923 act,”⁴ which distinguished employment which, by its nature required travel, from those jobs that one might find more convenient to follow his or her work or employment in localities other than those in which they may reside”⁵

Delaware has consistently held that to expand the eligibility of an absentee voter, the route must be by amendment to the Constitution. “The right to cast an absentee ballot is limited by our state constitution ... and constitutional limits cabin legislative freedom.” *Republican State Comm. v. Delaware*, 250 A.3d 911, 913 (Del. Ch. 2020). The Constitution’s Article V, Section 4A “specifically enumerates the classifications of persons eligible to vote by absentee ballot at general elections.” *Op. of Justices*, 295 A.2d 718, 722 (Del. 1972). Fifty years ago, the Delaware Supreme Court held that “[i]t is beyond the power of the Legislature ... to either

⁴ *Higgin*, 295 A.3d at 1075, n.54.

⁵ 33 Del. Laws ch. 103 § 14, 264.

limit or enlarge upon the § 4A absentee voter classifications specified in the Constitution for general elections.” *Id.* This Court affirmed this limit on legislative power in *Higgin*, where it invalidated the General Assembly’s attempt to expand absentee voting privileges to all Delaware registrants. The Court held: “The Vote-by-Mail Statute runs counter to a time-honored understanding shared by our courts, the General Assembly, and the Department, that the General Assembly is not free to limit or enlarge upon the categories of citizens specifically enumerated in Section 4A who need not vote in person in general elections.” *Higgin*, 295 A.3d at 1069.

15 *Del. C.* §5503 (k) flies directly in the face of that default position. Appellees ask this Court to hold that a voter can be presumed to be eligible to vote absentee, even years and many elections after a single application has been filed claiming eligibility. There is much to support that a statute that permits absentee voting, literally indefinitely, is not in compliance with the Constitution.

As this Court noted in *Higgin*, “... each rendition of this state’s constitution, culminating in the still operative 1897 Constitution, has envisioned that electors will vote in-person at their regular polling place.”⁶ The language in the Constitution, importantly is singular, providing that a voter “may cast **a** ballot at such general **election**” if they meet the criteria to vote absentee.⁷ Additionally, the Delaware

⁶ *Higgin*, 295 A. 3d at 1093-1094.

⁷ Del. Const. Art. V, § 4A (emphasis added).

Constitution is remarkably specific when enumerating the criteria for electors to be eligible to vote at all. That specificity is reflected in Article V, Sections 2A and 2B for example, which prohibit voting in any statewide or local election unless very strict residency requirements are met.

Delaware courts have also examined legal questions to determine if there are implicit terms in the law that they feel compelled to apply. For instance, in *Opinion of the Justices*, the Court found that Section 4A implicitly excluded all other classifications of absentee voters by expressly including certain eligibilities. While that opinion is not binding as precedent, it is instructive.

Finally, it is not just our historical record that proves the intent and purpose of the Constitutional restrictions are violated by 15 *Del C.* 5503(k). As the Court in *Higgin* noted, “[u]nder the linguistic canon known as ‘*expressio (or inclusio) unius*,’ the expression of one thing—here the categories of absentee voters provided in Section 4A—suggest the exclusion of others.”⁸ In *State v. Lyons*, the Court of General Sessions applied the concept and found that by expressly providing for the ability to challenge a voter for bribery, among other provisions, the Constitution required persons to vote in person at the polling location and struck down a statute

⁸ 295 A.3d at 1093 (citing William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution*, (2016), at p. 408).

permitting absentee voting.⁹ Granted, the proper use of the concept requires a consideration of the context, but the context here is clear.

Support is found in the very nature of the reasons one may apply to vote absentee. Each of the reasons involves a temporary or transitory circumstance, which over time may change. Illness, military service or disability are not permanent circumstances. Thus, permanent status is, by its very terms, in contravention of the reasons one may vote absentee.

The General Assembly, when enacting the constitutional amendment authorizing absentee voting could have provided for those who were disabled or serving in the military to vote in multiple elections. Clearly, it is common knowledge that service in the military is a multi-year commitment with possible deployment, about which service members have no control. Those with disabilities do not always recover from those limitations. Family members who need care may survive multiple years. All these factors would have been known to those who drafted the provisions in Section 4A, but they did not provide for expansive and continuing access to a ballot without request. The context of the question before this Court make it clear—in person voting is the default, and to vote absentee, a voter must meet the strict criteria in Section 4A at each “such election.” The opposite default,

⁹ *State v. Lyons*, 5 A.2d 495 (Del. Gen. Sess. 1939)

to allow anyone who previously qualified to vote absentee to continue to do so with no requirement of application or averment of eligibility, is extra-constitutional.

In the court-below, Appellees argued that the statute permits the Department to assume that a voter remains eligible and that the strict Constitutional requirements are continuously met by the people who are on the permanent absentee list. In fact, they used the terms “assume,” “presumption,” “likely to persist,” “could,” “maybe,” and “most likely” repeatedly in seeking to justify the validity of the statute. None of these terms supports compliance with a mandatory requirement the Constitution sets in Section 4A to be eligible to vote absentee—“shall.” In fact, the very words Appellees used reflect uncertainty. There is no need to assume if one knows. There is no presumption if there is fact. “Most likely,” “maybe,” and “could” reflect a guess at best, a hypothetical at worst. This is not the standard to which we should hold our most sacred right—the right to vote to choose our leadership. Further, “no presumption springing from theory may be permitted to override the clear meaning of the written document from which it is drawn.” *DuPont v. DuPont*, 85 A.2d 726, 728 (Del. 1951).

The Department places a duty on voters to confirm they are *ineligible* to vote absentee, which reverses the ordinary presumption that a voter *will* be able to appear in person to vote in future elections absent a contrary notification. That reversal is precisely what makes the Law unconstitutional.

The rich legal history, the language of our Constitution itself, the integrity of our elections, the purpose of restricting who can vote absentee, the intensity with which our elections have been guarded by those responsible for their integrity over the years all demonstrate that the authority before this Court does not support an indefinite authority to vote absentee over multiple elections and multiple years without any certainty whatsoever that the person is still eligible, let alone still alive.

As this Court noted in *Higgin*, in discussing the standing issue in that case, “... it matters little whether the ballots are unlawful because they are constitutionally unauthorized absentee ballots or because they are cast by unlawfully registered voters.”¹⁰ The Court went on to observe, “... simply put, the casting and counting of legally invalid ballots would necessarily lead to an inaccurate vote tally.”¹¹ Such a result deprives Appellants of a free and fair election, one conducted in accord with the Constitution. This Court, in *Higgin*, “agreed” with the Court of Chancery (the court below in that case) that failure to comply with the Constitution “strike[s] at the voting right itself” and endorsed the tenet that “only votes legally made—count.”¹²

¹⁰ *Higgin*, 295 A. 3d at 1087.

¹¹ *Id.* at 1087.

¹² *Id.*

II. DELAWARE’S PERMANENT ABSENTEE VOTING LAW, WHICH REQUIRES THE DEPARTMENT TO ASSUME THAT A VOTER REMAINS ELIGIBLE, FURTHER DEMONSTRATES THE STATUTE DOES NOT PASS CONSTITUTIONAL MUSTER.

Question Presented

Whether the Permanent Absentee Statute, which by necessity requires that the Department of Elections assume continuing eligibility of voters placed on the Permanent Absentee Voter List, violates Article V, Section 1 of the Delaware Constitution’s which requires that any election laws be enacted “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.”

Standard and Scope of Review

This Court reviews constitutional claims *de novo*. *Higgin*, 295 A.3d at 1085.

Merits of Argument

While the Delaware Constitution permits the General Assembly to enact laws to prescribe the means, methods and instruments of voting, it also requires that any such laws be enacted “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. That principle has been noted with approval by this Court. “[I]t is certainly the duty of the General Assembly, in

enacting an absentee voters' law, to take all possible precaution against fraudulent abuse of the privilege." *State ex rel. Smith v. Carey*, 112 A.2d 26, 28 (Del. 1955).

The Department of Election's primary argument supporting the permanent absentee statute is that the law allows the Department to assume the continuing eligibility of permanent absentee voters, as outlined earlier. Few of us would want someone to assume, by our silence, acquiescence or approval of any matter. The law, which by necessity of the continued eligibility for an indefinite period based on a single application, permits electors to remain on the permanent absentee list while the Department of Elections is without a clue if those individuals remain eligible. Such a statutory scheme does not meet the constitutional mandate that the laws the General Assembly passes take care to "best secure" "... the purity of elections" or "prevent fraud [and] corruption" as required by Article V, Section 1.

By granting *indefinite* absentee voting privileges to anyone who is "unable" to vote in person at a *single* election (perhaps many years ago), the General Assembly has legislated outside the bounds of the Section 4A's text, and violated the directive from the framers of the Constitution outlined in Section 1.

Furthermore, passive policing of absentee voting privileges conflicts with this Court's requirement that the General Assembly "take all possible precaution against fraudulent abuse of the privilege." *Carey*, 112 A.2d at 28. "All possible precautions" requires an attestation of absentee voting eligibility at *each* election.

The drafters of Article V, Section 4A wrote with precision. Only registrants experiencing a limited set of circumstances are exempt from in-person voting on Election Day. The General Assembly's scheme is the opposite of precise. It depends on "presumption," chance (undeliverable mail), and the wide-spread mindfulness (request by registrants to cancel) of more than 20,000 Delawareans to work correctly. 15 *Del. C.* § 5503(k)(3). The conflict here is thus not just one of text, but of purpose and spirit.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court find that, while perhaps well-intended, the Permanent Absentee Statute conflicts with the Delaware Constitution and must be declared invalid.

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