



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.

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)
)
) No. 406, 2026

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

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

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

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ARGUMENT

I. THE PERMANENT ABSENTEE STATUTE CLEARLY VIOLATES THE DELAWARE CONSTITUTION AS IT NOT ONLY PERMITS, BUT REQUIRES THE DEPARTMENT OF ELECTIONS TO SEND AN ABSENTEE BALLOT TO AN ELECTOR THE DEPARTMENT DOES NOT KNOW IS ELIGIBLE TO VOTE ABSENTEE.

On its face, 15 *Del. C.* § 5503(k) requires the Department of Elections to mail an absentee ballot to everyone on the Permanent Absentee Voter list without knowing the elector is entitled to vote absentee, or at all.

Appellants accept the interpretive application of settled case law that the legislative power is broad (*Collison v. State ex rel. Green*, 2 A.2d 97 (Del. 1938)) and that acts of the General Assembly are presumed constitutional (*Hoover v. State*, 985 A.2d 816 (Del. 2008)). However, if the laws that are passed are extra-constitutional, as this Court clearly established in *Higgin*,¹ they must fail. This case is no different. If the statute does not pass Constitutional muster, it must fail.

Appellees conceded below that the law requires the Department to assume a voter on the permanent absentee list is eligible in each successive election to which the voter did not aver eligibility. The Department similarly contends in this Court that the legislation allows it to assume the elector's eligibility continues, for certain conditions, beyond a single election.² The Department further claims that nothing in

¹ *Albence v Higgin*, 295 A.3d 1065 (Del. 2022).

² Ans. Br. p. 20.

the Constitution “remotely suggests that the General Assembly lacks discretion to enact Section 5503(k)’s presumption of continued absentee voting eligibility.”³ Such a construct, however, allows an elector 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, at the time they complete an application, eligible to vote absentee. Such a statutory scheme violates Article V, Sections 1 and 4A of the Delaware Constitution. There is simply no provision in the Constitution that could reasonably be argued to support sending absentee ballots to electors whom the Department does not even know are alive or dead. And there is certainly no word in the relevant sections of the Constitution that remotely resembles the concept of assuming eligibility to vote.

“Assume” is defined in the Merriam-Webster Dictionary as follows: “to think that something is true or probably true without knowing it is true.” *Assume*, Merriam-Webster, <https://tinyurl.com/mr2wsrfp> (last accessed 13 September 2026). Clearly, the Department does not know that those on the permanent absentee list are eligible, they are just guessing.

The Department argues that “[p]laintiffs’...myopic read of the statute, if adopted, would disenfranchise the exact people the Delaware Constitution sought to reach – the permanently disabled...and others similarly likely to qualify for absentee

³ Ans. Br. p. 21.

voting over an extended period of time....”⁴ That is simply not true. Those same individuals will still have the ability to register as an absentee voter should they have a present disability that prevents them from appearing in person or are caring for someone who cannot appear in person to vote.

Further supporting Appellants’ contention that no one is going to be disenfranchised is the fact that the Department of Elections has apparently had concerns about the accuracy of the Permanent Absentee List and posted a document on its website that indicates that the Department has mailed every permanent absentee voter a letter advising that they “must submit a new request for an absentee ballot“ and included a form to do so with the letter.⁵ Therefore, anyone still alive and receiving mail at the address on file with the Department will be aware of the need to file an application. The letter further indicates that the deadline to submit an application for an absentee ballot for the November 2026 General Election is October 30, 2026, approximately six weeks away. Simply put, every person on the permanent absentee voter list has been notified regarding what they must do if they want to continue to vote absentee, and there is no urgency in returning the application.

⁴ Ans. Br. p. 3.

⁵See *IMPORTANT NOTICE FOR DELAWARE PERMANENT ABSENTEE VOTERS*, Delaware Department of Elections, <https://tinyurl.com/4k9m8u67>.

Appellees further claim the purpose and spirit of the statute in question is to enable Delawareans who cannot show up in person to be able to vote. Appellants are seeking no remedy from this Court that would prevent anyone who is eligible from voting absentee. The sole consequence that would result if the Court declared the statute unconstitutional is that anyone who qualifies and wants to vote absentee would need to complete an application to do so.

Appellees concede that the sole basis upon which they claim Section 5503(k) is lawful and complies with Article V Section 4A is the fact that the legislation establishes a presumption that certain categories of absentee voters will remain unable to appear in person at future elections, and it places on the voter the administrative burden of notifying the Department of any changes in their status. Appellees claim the provisions do not expand the category of absentee voters beyond what the Constitution allows. They argue that Section 5503(k) does not address who may vote absentee, but instead the manner in which voters may establish their eligibility to do so. However, the statute does expand eligibility, because it allows electors, whom the Department does not know are eligible, to vote absentee and they do so based on a presumption of continued eligibility.

Appellees further claim support for the validity of the statute by noting that Article V, Section 4A is silent as to how a voter's eligibility to vote absentee should be determined. That may be, but the reality is that no determination is being made at

all. In fact, the Department of Elections is making an assumption of eligibility that may or may not be correct, without any determination of eligibility.

Appellees further contend that the use of the words “shall be unable to appear” in the Constitution does not constitute a direction from the Constitution to determine the inability to appear in any particular way. That may be true, but there is **no** determination being made by the Department of Elections that the electors on the permanent absentee list shall be unable to appear. Indeed, the presumption is that they shall be unable to appear because they averred once, in the present tense and at some time in the past, that they were unable to do so.

Remarkably, Appellees characterize Appellants’ use of the word “shall” as “cryptic”.⁶ Shall is not a cryptic word. It is a term of certainty. It is a term of mandatory compliance. While the Constitution does not direct the General Assembly how to determine that the person is unable to appear, nonetheless the person “shall” be unable to appear to be eligible to vote absentee. Absent any determination of eligibility as to future elections, an elector on the permanent absentee list is constitutionally disqualified from voting absentee. The flaw in the statute is that the Department of Elections has no idea if, at the time of each successive election (at

⁶ Ans. Br. p. 23.

which time the Department is distributing a ballot) the person is even dead or alive, let alone able to appear in person or not.

Appellees further argue that the General Assembly has constitutional authority “unquestionably” to “enact a presumption to allocate the administrative burden of determining absentee voters continuing eligibility for absentee status”.⁷ While the legislature enjoys broad authority, generally,⁸ the language in Article V Section 4A, by the use of the word “shall”, clearly restricts the legislature’s authority to assume eligibility to vote. We have a documented history of assuring the integrity of our elections by including the careful, comprehensive and specific provisions in the Constitution itself related to eligibility to vote. In the face of that articulated specificity, it is difficult to reconcile a claim that the legislature can delegate administrative burdens and presume eligibility of someone to vote absentee.

The statute, as written, which requires the Department of Elections to mail a ballot to someone they do not know is eligible to receive it is constitutionally flawed. There is no set of circumstances under which it can be valid to be required to mail a ballot to someone you do not know is qualified to vote. The affidavit that went with the original application, which could be years old, was in the present tense, not in

⁷ Ans. Br. p. 24.

⁸ See *Collison v. State*, 2 A.2d 97 (Del. 1938); *New Castle County Council v. State*, 68 A.2d 888 (Del. 1996).

the future tense, and does not support eligibility to vote in the future, presumed or otherwise.

Appellees suggest that §5503(k) does not address who may vote absentee, but, rather, the manner in which voters may establish their eligibility to do so. Even if the Court were to accept that premise, the only eligibility the voter established is for the election for which the application was originally made. The claim of eligibility is in the present tense, and that is the election for which they have certified. Eligibility beyond that election has no certification. And while Appellees argue the Constitution is silent on how voters should be required to establish their eligibility, the way the statute provides for them to do so, that is, claim eligibility in the present tense for one of the criteria established in the Constitution at a past moment in time, does not conform to the requirements established by the Constitution to vote absentee. In fact, compliance of the Permanent Absentee Statute with the Constitution is impossible because no person can aver that they are eligible to vote on an absentee basis in the future. Placing them on the permanent absentee list and not requiring certainty as to their eligibility before they are provided a ballot in future elections is extra-constitutional.

Appellees claim that similarities between general registration to vote (15 *Del. C. § 1101*) and registration to vote absentee demonstrate the validity of the statute. However, the difference between having someone on the regular voter rolls and the

permanent absentee voter list is significant. The Department sends a ballot to vote in the election to those on the permanent absentee list; those on the general registration list must attend their polling location and vote in person.

The law requires that the Department shall cancel a person's permanent absentee status upon the occurrence of any of a number of reasons, however, most of the occurrences of those reasons are not known to the Department so cancellation does not actually occur. The Department will continue to mail a ballot unless it is aware of that occurrence. So, while Appellees claim being placed on the list is not permanent, the truth is that it is indefinite, and it is indefinite, not because the elector's status has not changed, but because the Department is unaware of any change in status. By putting the responsibility on the voter, they are forfeiting their duty to administer the elections.

The legislature can and has made decisions about the means and methods by which someone might vote absentee. One may complete an application online, print an application from the Department's website and mail it to the office, go to a county election office and fill out the application to vote absentee, or request an application be sent to them and complete it and send it back. All of these practices legitimately establish ways an elector may request an absentee ballot and certify that they are entitled to receive it.

There is another constitutional impediment to the legality of 15 *Del. C.* §5503(k). The statute creates a voting scheme in which, as to future elections, there is no need to identify, and certify to, a particular category specified in Article V Section 4A that establishes an elector's eligibility to vote absentee. Such a scheme renders the exercise of voting by that elector in future elections essentially a “no excuse” absentee ballot – the very type of absentee voting this Court struck down in *Higgin*. For that reason alone, the statute must be struck as invalid.

The fact that other states have voting laws that differ from Delaware is not persuasive. As the court noted in *Higgin*,⁹ Delaware has its own history. We have longstanding acceptance that absentee voting is the exception to the strong preference for voting in person at your assigned polling location. Delaware will not simply follow a path because other states have chosen a different way to allow for absentee voting.

One need not imagine hypothetical or imaginary cases in order to determine the statute is facially invalid. One does not have to imagine that the Department is sending an election ballot to someone that they do not know is eligible to vote absentee, if at all. That is precisely what is happening. That is precisely the practice the Department is defending. That is precisely what the Department is required to

⁹ *Higgin*, 295 A.3d at 1094.

do under the specific language of the statute. That is precisely why the statute is unconstitutional.

II. THE APPELLANTS DO NOT ALLEGE FRAUD, BUT DO CONTEND THAT THE STATUTORY SCHEME OF 15 *Del. C.* 5503(k) DOES NOT MEET THE CONSTITUTIONAL DIRECTIVE THAT THE LAWS THE GENERAL ASSEMBLY IS AUTHORIZED TO PASS ACT TO “BEST...PRESERVE THE...PURITY OF ELECTIONS, AND PREVENT FRAUD.”¹⁰

In their second argument, Appellees claim that Appellants assert that there has been fraudulent abuse of the system. They further assert that Appellants have presented no evidence to support those assertions. They claim that Appellants’ challenge “boils down to the contention that some voters might violate Section 5503(k) by continuing to aver eligibility even when they are not.

The argument that Appellants allege fraud has occurred is flat-out incorrect, and a mischaracterization of what Appellants have contended. In fact, Appellants have made no such assertions. Appellees spend a great deal of time arguing about the merits of any fraud Appellants supposedly allege, but Appellants do not allege that fraud has occurred. Appellees’ argument that the evidence to support such an allegation is lacking is accurate, simply because Appellants don’t make a claim of fraud and presented no such evidence. This is not a claim that the statute in question is unconstitutional because fraud is being committed.

What Appellants have represented is that there are ineligible and deceased individuals on the permanent absentee voter list, upon comparison with records at

¹⁰ Del. Const. Art. V, § 1.

the Social Security Administration and the United States Postal Service. The sole basis upon which the comparison of the permanent absentee list to the Postal Service and Social Security office was made was to display that the Department of Elections had no clue whether the person to whom they were mailing a ballot was eligible or not, or even deceased or not. The individuals on the Permanent Absentee List were going to receive a ballot from the Department regardless, because their very presence on the list demonstrated that the Department was unaware of their status. The fatal flaw in this statute is that the Department is making an assumption about eligibility, not determining there is eligibility. The Department seems to concede there are ineligible voters on the list. Indeed, in argument in the Court of Chancery, the State conceded there are likely ineligible individuals on the Permanent Absentee List as “humans make mistakes”.

Appellants do challenge the statute as violative of Article V, Section 1 of the Constitution, a provision no less applicable to this matter than Section 4A. Appellees argue that the provisions of Section 1 have never been used to invalidate a statute. In response, Appellants suggest that this makes this an issue of first impression. In this challenge, part of Appellants’ argument is that the statute does not meet, on its face, the provision in the Constitution in Article V, Section 1 that the legislature exercises its authority in such a way as to secure the purity of elections and prevent fraud. Sending ballots to people the Department does not even know are dead or

alive is not only not the best way to preserve the purity of the election or prevent fraud. Under any standard, it is no way to do so. Indeed, the practice may not create fraud, but it certainly does not best prevent fraud.

Appellees contend that there has been no voting scheme determined to be unconstitutional because the General Assembly failed to take all possible precautions against fraud. Perhaps, but there are simply no precautions being taken when the Department is blindly sending a ballot to someone they do not know is eligible to vote or even alive.

Whether a court has ever invalidated a statute based on that provision does not make it impossible or inappropriate for this Court to consider that section in determining whether the statute in question is constitutional. While the term “best” may imply that there is a judgment determination to be made, it is very clear that, if on the face of the statute, it requires the Department of Elections to send ballots to people they do not know are eligible to vote absentee, that requirement *per se* violates the objective of preserving the purity of elections and preventing fraud.

CONCLUSION

The Department of Elections has no idea which electors on the permanent absentee list are or are not qualified to vote absentee, and yet is handing out ballots without knowing their actual status. Such a practice would never be tolerated at a polling location of this state. This “presumption” the State claims is legitimate swallows the history that clearly establishes absentee voting is to be the exception, and gives less scrutiny to those voting absentee than those voting in person. One does not receive a ballot before credentials are established at the polling location. Yet, one receives a ballot, if listed as a permanent absentee voter, before any credentials have been established. This statutory scheme is drastically opposed to our clear historical preference that one should vote in person at their assigned polling location as well as the Constitutional limits on the General Assembly in enacting laws related to voting that they preserve the purity of elections and prevent fraud. And, finally, the statutory scheme essentially creates no excuse absentee voting by those on the permanent absentee list because no certification or averment as to eligibility is required to secure a ballot.

Dated: September 15, 2026

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