



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 MENNELLA and
THE HONORABLE GERALD W.
HOCKER,

Plaintiffs-Below/Appellees.

No. 120, 2024

On Appeal from a Decision of the
Superior Court of the State of Delaware

C.A. No. S23C-03-014 MHC

**BRIEF OF AMICI CURIAE COMMUNITY LEGAL AID SOCIETY, INC.
AND THE ARC OF DELAWARE IN SUPPORT OF APPELLANT AND
THE REVERSAL OF THE DECISION BELOW**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF <i>AMICI CURIAE</i> 'S INTEREST	1
ARGUMENT	6
I. The Delaware Early Voting Statute and Permanent Absentee Voting Statute Are Presumptively Valid and an Express or Necessary Constitutional Prohibition to the Statutes Has Not Been Shown by Clear and Convincing Evidence.	6
II. <i>15 Del. C.</i> §5402, Delaware's Early Voting Statute, Does Not Violate Article V, Section 1 of the Delaware Constitution.....	9
A. Section 1 Does Not State or Necessarily Imply that All Voting Must Occur on the Election Day.	9
B. Construing Section 1 as Requiring that All Voting in the Election Must Occur on Election Day Is Illogical and Inconsistent with Other Sections of Article V.....	11
1. The Requirement that the Election Be Held on a Given Date Cannot Mean that All Steps in the Election Process Must Occur on that Date.....	12
2. Other Provisions of Article V Allow Voting on Days Other than on Election Day Without Any Modification or Reference to the Supposed Prohibition in Section 1.	13
3. Section 1 Empowers the General Assembly to Establish by Statute the "Means, Methods and Instruments of Voting" Without Limitation and the General Assembly Is Not Prohibited by this Section from Establishing Means or Methods that Improve Voter Participation.	14
III. <i>15 Del. C.</i> §5503(k) Does Not Violate Article V, Section 4A.....	18

A.	Neither the Grammar nor the Literal Language of Section 4A Requires that Someone Permanently Disabled Re-Establish at each Election their Eligibility to Vote by Absentee Ballot.	19
1.	The Literal Language Does Not Require that a Person Must Establish Their Disability for Each Election.	19
2.	The Correct Grammatical Analysis Shows that a Qualified Person May Register to Vote by Absentee Ballot for so Long as They Are Qualified to Vote by Absentee Ballot.	19
B.	The Statute Does Not Permit a Person who Is Temporarily Entitled to Vote by Absentee Ballot to Use an Absentee Ballot in Subsequent Years when They No Longer Qualify for Such Voting.	21
C.	The Court Found the Statute Unconstitutional “As Applied” Without Any Record that the Statute Was Being Misused as the Court Hypothesized Was Possible.	22
	CONCLUSION.	23

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TABLE OF AUTHORITIES

Page(s)

CASES

Albence v. Higgin,
295 A.3d 1065 (Del. 2022).....6, 7

Donald J. Trump for President, Inc. v. Way,
492 F. Supp. 3d 354 (D.N.J. 2020).....10

Foster v. Love,
522 U.S. 67 (1997).....10, 12

Lyons v. Sec’y of Commonwealth,
192 N.E.3d 1078 (Mass. 2022).....6

Mennella v. Albence,
No. S23C-03-014 MHC, 2024 WL 758606 (Del. Super. Feb. 23,
2024)*passim*

Millsaps v. Thompson,
259 F.3d 535 (6th Cir. 2001)10

*Sierra v. Dep’t of Servs. for Child., Youth &
their Fams.*, 238 A.3d 142 (Del. 2020).....22

Voting Integrity Project, Inc. v. Bomer,
199 F.3d 773 (5th Cir. 2000), *cert. denied*, 530 U.S. 1230 (2000)10

Voting Integrity Project, Inc. v. Keisling,
259 F.3d 1169 (9th Cir. 2001) *cert. denied sub nom., Decker v.
Bradbury*, 535 U.S. 986 (2002)10

STATUTES

15 *Del. C.* § 101A16

15 *Del C.* §54029

15 *Del. C.* § 5503(k).....8, 18, 21

15 *Del. C.* §5503(k)(3) and (4)21

2 U.S.C. § 7.....	9, 10
2 U.S.C. § 8.....	12
RULES	
Supreme Court Rule 28.....	1
OTHER AUTHORITIES	
<i>Any</i> , Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/any	20
Cecilia Rouse et al., <i>The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being</i> , The White House (Aug. 16, 2021) https://www.whitehouse.gov/cea/written-materials/2021/08/16/the-importance-of-protecting-voting-rights-for-voter-turnout-and-economic-well-being/	16
CLASI, <i>2022 Delaware General Election Accessibility Report</i> (May 2023) http://www.declasi.org/wp-content/uploads/2023/05/2022-Delaware-General-Election-Accessibility-Report-05-04-2023RS.pdf	3
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Delaware Constitution of 1831 Article IV Section 1(amended)	9
Delaware Constitution Article I Section 3.....	16
Delaware Constitution of 1897	<i>passim</i>
Delaware Constitution of 1831	9, 10
Delaware Constitution Article V Section 1	<i>passim</i>
<i>Delaware Constitutional Debates</i> , Vol 2 (1897).....	9

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<https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/delaware.html>2

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<https://www.ncsl.org/elections-and-campaigns/table-3-states-with-permanent-absentee-voting-lists>5

STATEMENT OF *AMICI CURIAE*'S INTEREST

The mission of the Community Legal Aid Society, Inc. (“CLASI”) is to combat injustice through civil legal advocacy on behalf of vulnerable and underserved Delawareans including people with disabilities. CLASI is designated by the Governor as the Protection and Advocacy agency in Delaware, and one of its projects is the Disabilities Law Program, which provides advocacy services to Delaware residents with physical or mental disabilities.

The Arc of the United States is the world’s largest national community-based organization of and for people with intellectual and developmental disabilities. The Arc of Delaware (“The Arc”) was organized in 1953 as an affiliated chapter of the national network. The Arc advocates for policies, services and funding to promote and protect the civil rights of Delawareans with intellectual and developmental disabilities.

Pursuant to Supreme Court Rule 28, The Arc and CLASI submit this brief because early voting and multiyear qualification for absentee ballots are important processes to allow persons with disabilities to participate in the voting process. A recent nationwide study reports that 74% of voters with disabilities voted with a mail ballot or early in-person voting in 2020. *See Lisa Schur & Douglas Kruse, Disability and Voting Accessibility in the 2020 Elections: Final Report on Survey Results Submitted to the Election Assistance Commission, U.S. Election Assistance*

Commission 1 (Feb. 16, 2021) (“Schur and Kruse 2021 Report”).¹ There are over 200,000 adults with disabilities in Delaware. *Disability Impacts Delaware*, CDC (May 12, 2023).² And these numbers are expected to increase with the aging of the population. See Danielle Root & Mia Ives-Rublee, *Enhancing Accessibility in U.S. Elections*, Center for American Progress 13 (July 2021) (“CAP Report”).³

Persons with disabilities confront multiple challenges to their ability to vote including difficulty accessing polling places, unavailable accessible transportation, difficulty completing the forms necessary to register to vote and qualify for absentee voting, lacking access to online processes for absentee ballots and needing assistance from a third person who can help them apply for absentee ballots. Schur and Kruse 2021 Report at 5–9 and CAP Report at 4–11. These difficulties cause a lower percentage of persons with disabilities to actually vote compared to persons who are not disabled. See Schur and Kruse 2021 Report at 1. Restrictions on mail and early voting serve to increase the burden on persons with disabilities. See CAP Report at 3–4, 9, 12. Changes in the law to permit early voting and absentee voting appear to cause increased voter participation among persons with disabilities. See Lisa Schur

¹https://www.eac.gov/sites/default/files/voters/Disability_and_voting_accessibility_in_the_2020_elections_final_report_on_survey_results.pdf

²<https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/delaware.html>

³<https://www.americanprogress.org/wp-content/uploads/sites/2/2021/07/AccessibilityElections-report.pdf>.

et al., *Disability and Voter Turnout in the 2022 Elections: Supplemental Analysis of Census Voter Turnout Data*, U.S. Election Assistance Commission (2023) (“Schur 2022 Report Supplement”).⁴

Early voting substantially enhances the ability of persons with disabilities to vote. In its 2022 General Election Accessibility Report, CLASI documented accessibility barriers at many of Delaware’s polling places.⁵ Even for accessible locations, other barriers exist including lack of public transportation, the possibility of long lines and the lack of third person assistance. Schur and Kruse 2021 Report at Table 8. The ten days of Early Voting alleviate many of these problems. Unlike assigned polling places on Election Day, early voting affords a choice of locations and a choice of days to vote, making it easier to schedule transportation and obtain assistance in voting from friends or family. Early voting locations are less likely to have the long lines encountered on Election Day. Almost all States now permit early voting for varying periods of time. *See Early In-Person Voting*, National Conference of State Legislatures (Mar. 12, 2024).⁶ The CAP Report stresses that “[p]riority

⁴ https://www.eac.gov/sites/default/files/2023-07/EAC_2023_Rutgers_Report_Supplement_FINAL.pdf.

⁵ <http://www.declasi.org/wp-content/uploads/2023/05/2022-Delaware-General-Election-Accessibility-Report-05-04-2023RS.pdf>

⁶ <https://www.ncsl.org/elections-and-campaigns/early-in-person-voting>

should be given to extended early-voting periods” as an important policy for increasing the ability of persons with disabilities to vote. CAP Report at 19.

Requiring persons with disabilities to complete paperwork for each election in order to obtain an absentee ballot will materially increase their voting difficulty. A substantial percentage of persons with disabilities rely upon absentee voting in order to vote. Schur 2022 Report Supplement at 8. The application process can be very difficult for them. If by mail, it requires the ability to fill out forms and provide necessary documentation. They often need the assistance of a third person to complete the process. The online process requires access to a computer and the internet, which persons with disabilities often lack or are unable to use, particularly those who are in nursing homes or other institutions. More than seven million eligible voters with disabilities do not use the internet and people with disabilities are less likely than those without disabilities to use computers or have access to a printer. *Disability, the Voting Process, and the Digital Divide*, U.S. Election Assistance Commission 5 (July 26, 2022).⁷

A person is not required to separately register to vote for each election. Requiring an absentee voting application for each election is a disproportionate

⁷https://www.eac.gov/sites/default/files/electionofficials/accessibility/Disability_the_Voting_Process_and_the_Digital_Divide_EAC_FINAL.pdf. See also CAP Report at 12.

burden on persons with disabilities and is unnecessary. The disabilities at issue here usually outlast a single election. At present, approximately twenty states allow multiyear qualification for absentee voting. *See Table 3: States With Permanent Absentee Voting Lists*, National Conference of State Legislatures (Feb. 6, 2024).⁸

As the CAP Report states:

The rising tide of anti-voting efforts being witnessed across the country is deeply worrisome for all Americans but is especially so for disabled voters who will be among those excessively burdened. More than 360 anti-voting bills have been introduced in states, many of which would place *substantial restrictions on vote by mail, early voting and registration access...[D]isabled voters, who more often rely on flexible voting and registration options, will be unfairly disadvantaged.*

CAP Report at 22 (emphasis added).

The Superior Court's invalidation of early voting and the imposition of a requirement that an application for absentee voting must occur separately for each election renders it more difficult for persons with disabilities to vote and, as demonstrated *infra*, is not mandated by the Delaware Constitution. For these reasons, CLASI and The Arc submit this amicus brief and urge that the decision of the Superior Court be reversed.

⁸ <https://www.ncsl.org/elections-and-campaigns/table-3-states-with-permanent-absentee-voting-lists>

ARGUMENT

I. The Delaware Early Voting Statute and Permanent Absentee Voting Statute Are Presumptively Valid and an Express or Necessary Constitutional Prohibition to the Statutes Has Not Been Shown by Clear and Convincing Evidence.

The Plaintiffs-Below, Mr. Mennella and Senator Hocker (the “Plaintiffs”) allege that Section 1 of Article V of the Delaware Constitution (“Section 1”) prohibits early voting and that Section 4A of Article V (“Section 4A”) prohibits qualification for absentee voting from being established for more than one election at a time. However, it is a fundamental principle that “[c]onstitutional prohibitions to legislative action must be shown by ‘clear and convincing evidence’” and that “[a]ll reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation.” *Albence v. Higgin*, 295 A.3d 1065, 1088–89 (Del. 2022). The Plaintiffs cannot possibly meet that standard here for multiple reasons.

First, Section 1 was expressly adopted for the purpose of replicating the federal statute establishing the date for “elections.” *Infra* at 9–11. That federal statute has been interpreted by every federal court to address the issue as not prohibiting state laws providing for early voting. *Infra* at 10. There is no reason—much less a clear and convincing reason—to interpret the parallel Delaware election provision differently. *See Lyons v. Sec’y of Commonwealth*, 192 N.E.3d 1078,

1095–96 (Mass. 2022) (interpreting the Massachusetts constitution consistently with the federal decisions).

Second, neither Section 1 nor Section 4A contains the prohibitions that Plaintiffs allege. It is another fundamental principle that “the legislative power [of a State] is as broad and ample in its omnipotence as sovereignty itself, except in so far as it may be curtailed by constitutional restrictions *express or necessarily implied.*” *Albence*, 295 A.3d at 1088 (emphasis added). Neither of these sections expressly, or by necessary implication, prohibits either early voting or qualifying for an absentee ballot for more than one election at a time.

Section 1 prescribes the time of “elections,” not voting, and expressly provides that the General Assembly may prescribe “the means, methods, and instruments of voting.” It does not provide that all voting must occur on election day. *Infra* at 9–11. Section 4A makes no reference whatsoever to the process by which a person is to qualify for absentee voting, leaving that procedure to be established in the statute the General Assembly is directed by Section 4A to adopt. There is nothing in Section 4A that expressly requires that a person must separately qualify for each election. *Infra* at 19. And the Superior Court’s interpretation of the phrase “any election” as meaning voters may only qualify for a single election is flatly inconsistent with the dictionary meaning of the word “any.” “Any election”

is not singular term, rather it is a synonym for “every” and “all” elections. *Infra* at 20.

Nor is there any necessary implication that either prohibition exists. The interpretation of Section 1 advanced by Plaintiffs is inconsistent with other provisions of the Delaware Constitution and is illogical. *Infra* at 11–17. Nor is there any necessary implication that Section 4A is violated by 15 *Del. C.* § 5503(k). The Superior Court’s conclusion that this statute permits persons not authorized by Section 4A to vote by absentee ballot ignores the very terms of that statute (1) limiting absentee voting to certain of the categories set forth in Section 4A, (2) requiring a voter to notify the Department of Elections if the voter no longer qualifies under one of those categories and (3) requiring the Department of Elections to no longer allow that person to absentee vote if so notified. *Infra* at 21–22.

II. 15 Del. C. §5402, Delaware’s Early Voting Statute, Does Not Violate Article V, Section 1 of the Delaware Constitution.

A. Section 1 Does Not State or Necessarily Imply that All Voting Must Occur on the Election Day.

Section 1 states in part that “[t]he general election shall be held biennially on the Tuesday next after the first Monday in the month of November.” This section may only be interpreted to prohibit voting on any day other than election day if that prohibition is expressly set forth in Section 1 or exists as a *necessary* implication demonstrated by clear and convincing evidence. Neither exists here.

Section 1 certainly does not state that all voting must occur on the election day or that the General Assembly may not provide for voting on days other than the election day. If such a mandate or prohibition were to exist, it must be expressly provided or necessarily flow from the provisions of the Constitution.

This provision of Section 1 was an amendment to the Delaware Constitution of 1831 “making it conform to the time that was fixed by Act of Congress for elections pertaining to Federal offices.” *Delaware Constitutional Debates*, Vol 2 at 1171 (1897), see attached **Exhibit A**. The Constitution of 1897 continued the provision that had been in the Constitution of 1831, as amended.⁹ The federal

⁹ SEC. 1. All elections for Governor, Senators, Representatives, Sheriffs and Coroners shall be held on the Tuesday next after the first Monday in the month of November of the year in which they are to be held, and be by ballot. *Del. Const.*, 1831, Art. IV, Section 1(amended).

statute, 2 U.S.C. § 7, “was originally enacted in 1872.” *Foster v. Love*, 522 U.S. 67, 69 (1997). That federal statute currently provides that “[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.” 2 U.S.C.A. § 7 (West).

Every federal court that has addressed the issue has rejected claims that State laws allowing early voting violate the federal statute designating the election day as a single day. See *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1174–75 (9th Cir. 2001) *cert. denied sub nom.*, *Decker v. Bradbury*, 535 U.S. 986 (2002) (Oregon); *Millsaps v. Thompson*, 259 F.3d 535, 545–47 (6th Cir. 2001) (Tennessee); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775–77 (5th Cir. 2000), *cert. denied*, 530 U.S. 1230 (2000) (Texas); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 366–69 (D.N.J. 2020) (New Jersey). There is no reason the parallel Delaware provision meant to conform to the federal statute should be interpreted differently. In each of these cases the courts confronted and rejected the same argument made here, viz. that designating an election day means that all voting in the election must occur on that election day.

The case law and dictionaries extant when Section 1 and its predecessor in the Constitution of 1831 were adopted, cited in Appellants’ Opening Brief at 5, 23–27,

show that the term “election” does not mean “the only day on which votes may be cast.” Thus, Section 1’s establishment of the date for general elections does not necessarily imply that Section 1 thereby set a date before which voting could not be permitted. However, as next demonstrated, even if the federal precedent did not exist, the interpretation of Section 1 urged by Plaintiffs is illogical and inconsistent with other provisions of the Delaware Constitution.

B. Construing Section 1 as Requiring that All Voting in the Election Must Occur on Election Day Is Illogical and Inconsistent with Other Sections of Article V.

In order to show that Section 1 prohibits early voting, the Plaintiffs necessarily must establish that Section 1 requires that all voting take place on the election day. Yet, neither the Plaintiffs nor the Superior Court offered any interpretation of Section 1 to support this conclusion, other than to assert it is so. *Mennella v. Albence*, No. S23C-03-014 MHC, 2024 WL 758606, at *6–7 (Del. Super. Feb. 23, 2024) (“Opinion”). Besides being inconsistent with the meaning of the word “election” as indicated supra, that interpretation is illogical and inconsistent with other provisions of the Constitution. It is certainly not an interpretation that is necessary or compelling, as it has been rejected by every federal court.

1. **The Requirement that the Election Be Held on a Given Date Cannot Mean that All Steps in the Election Process Must Occur on that Date.**

The Plaintiffs' conclusion that all voting must occur on election day rests on an implicit, yet wholly irrational proposition that requiring an election be held on a given day means that everything involved in an "election" must occur *only* on that day, so that all voting must occur only on that day. However, an election involves the "*combined actions of voters and officials* meant to make a final selection of an officeholder (subject only to the possibility of a later run-off, see 2 U.S.C. § 8)." *Foster*, 522 U.S. at 71 (emphasis added). An election is a multistep process that necessarily includes voting, the closing of the polls and the counting of the vote. The idea that the entire "election"—all elements of an election—must only occur on the designated election day defies common sense. And the Delaware Constitution expressly recognizes that not all elements of the election process must occur on the designated election day. Section 6 of Article 5 expressly provides that the votes are to be counted after the election day. Thus, the Constitution clearly does not intend that all elements of an election—voting, closing the polls and counting the vote—occur only on election day.

Plaintiffs may argue that they do not mean that Section 1 requires all elements occur on election day, but only one of the elements—voting. But this contention simply renders Plaintiffs' interpretation more incredible. There is nothing in the text

of Section 1 or the word “election” to support the conclusion that some elements of an election must only occur on election day, i.e. voting, but others need not, i.e. counting the vote. It is an interpretation unanchored to any word or text in the Constitution.

2. Other Provisions of Article V Allow Voting on Days Other than on Election Day Without Any Modification or Reference to the Supposed Prohibition in Section 1.

Interpreting Section 1 as requiring that voting occur only on election day also is inconsistent with Section 4A, which requires the General Assembly to provide for absentee voting in certain circumstances. To be practical, absentee voting clearly anticipates that the ballot may be executed, mailed and received—that it may be voted—before the election day. Consequently, the Constitution clearly does not anticipate that all voting must occur on election day.

In the Superior Court the Plaintiffs argued that Section 4A is merely an exception to their claimed prohibition in Section 1 that all voting must occur on election day. But if Section 1 requires all voting to occur on election day and prohibits any voting before that day, as Plaintiffs contend, then Section 4A would need to speak to the issue of when absentee ballots may be voted in order to create such an exception. Otherwise, the supposed requirement in Section 1 that all voting occur on election day would mandate that absentee ballots must be received on and

only on election day.¹⁰ At a minimum, the drafters would have needed to include some cross-reference between the two sections to reconcile their inconsistency, such as providing in Section 1 that the election shall be held on the designated day except as provided in Section 4A or providing in Section 4A that notwithstanding Section 1 absentee voting is permitted on other days. None of that was done. Section 4A is silent on when absentee ballots may be “voted” and there are no cross-references. And the reason none of it was done is because Section 1 does not require all voting to occur on election day and, consequently, Section 4A does not need to create an exception to that non-existent rule.

3. **Section 1 Empowers the General Assembly to Establish by Statute the “Means, Methods and Instruments of Voting” Without Limitation and the General Assembly Is Not Prohibited by this Section from Establishing Means or Methods that Improve Voter Participation.**

Section 1 also provides that “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.” It is nonsensical that Constitutional

¹⁰ If Section 1 requires all voting to occur on election day, the silence in Section 4A about when absentee ballots may be “voted” would mean that all absentee ballots must be received (or must be mailed, depending on what constitutes the “voting” of the absentee ballot) on election day to comply with Section 1 because there is nothing in Section 4A providing for a different rule. This absurd result is avoided because Section 1 does *not* require all voting to occur on election day.

drafters would provide an express grant of power in Section 1, but not limit that power, if it were to be limited, by express language either in the grant itself or somewhere in Section 1. Rather, Plaintiffs propose the drafters intended that limitation to be *unexpressed* and only *inferred* from the setting of a date for the election. This interpretation is beneath plausible, much less clear and convincing.

In order to invalidate early voting, the Superior Court held that this grant of authority only empowers the General Assembly to specify the means of voting if the means selected serve one of the enunciated purposes. Opinion at *7–8. The court then concluded that early voting does not serve any of these enunciated purposes. *Id.* In other words, the court concluded that seeking to improve voter turnout is not a permitted objective in setting the means, methods or instruments of voting. This interpretation is as wrong as it is surprising from a policy perspective.

First, the General Assembly has the power of full sovereignty, and it does not need any grant of power to create early voting. The power of the General Assembly is only constrained if the Constitution prohibits it. *Supra* at 7. The setting of a day for the election does not prohibit early voting, as explained above, therefore the scope of this grant of authority is not determinative of whether early voting is permitted.

Second, early voting promotes “the freedom and purity of elections.” Facilitating the means by which persons may vote substantially aids in a voter’s “freedom” to vote. Conversely, undue and unreasonable restrictions on the ability to vote diminish that freedom. See Cecilia Rouse et al., *The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being*, The White House (Aug. 16, 2021) (measuring the efficacy of the Voting Rights Act in securing the freedom to vote by its effect on voter turnout).¹¹ The purity of an election surely is a concept that considers whether the election is a legitimate expression of the “will of the people.” The lower the turnout, the more suspect the election is as a democratic expression; and the greater the turnout the more reliable an expression it is. James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, U. Chi. L. Rev. Online (June 26, 2020).¹² Indeed, consistent with Delaware Constitution Article I Section 3 (“[a]ll elections shall be free and equal.”), the General Assembly expressly stated that its objective in adopting the election laws is to establish “free and equal” elections, which is itself an indispensable aspect of free and pure elections. 15 *Del. C.* § 101A.

¹¹ <https://www.whitehouse.gov/cea/written-materials/2021/08/16/the-importance-of-protecting-voting-rights-for-voter-turnout-and-economic-well-being/>

¹² https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1982&context=journal_articles

Third, the objectives set forth in this grant of authority clearly are not the only factors that the General Assembly may consider in establishing the means, methods and instrumentalities of voting. For example, there are a host of principles derived from the United States Constitution and federal law that must be considered by the General Assembly when it sets the means and methods of voting. Surely addressing these objectives are permitted by the Delaware Constitution even if not enunciated in Section 1. And there are a host of small, practical objectives that must be considered in structuring the election process, such as the location of polling places or the hours for voting. Surely the Delaware Constitution does not prohibit the General Assembly from considering those practical considerations in selecting polling places or hours of voting, even if those practical considerations do not come within one of the enunciated objectives. In short, it is both legally and practically necessary for the General Assembly to consider objectives potentially in addition to those expressly enunciated in Section 1.

III. 15 Del. C. §5503(k) Does Not Violate Article V, Section 4A.

The Superior Court held that 15 Del. C. § 5503(k) violates Section 4A based upon two flawed lines of argument, although the court did not separately address or distinguish between the two points. First, the court held that Section 4A requires that those who qualify to vote by absentee ballot must establish their entitlement to do so for each election, separately, and are not entitled to establish an entitlement to vote by absentee ballot for multiple elections. Opinion at *8–9. The court reached this conclusion primarily on the basis of a flawed grammatical analysis of Section 4A. Applying the correct grammatical analysis leads to the opposite conclusion, that qualifying for absentee ballots for multiple elections is permitted by Section 4A. *Infra* at 19–20. Moreover, there is no language in Section 4A that expressly or by necessary implication prohibits qualification for multiple elections. *Infra* at 19–20.

Second, the court concluded that Section 5503(k) allows persons who do not qualify for absentee ballots under Section 4A to nonetheless obtain absentee ballots. Opinion at *8–9. However, there is nothing in the language of the statute itself that allows such an occurrence. *Infra* at 21–22. Rather, the court reached its conclusion based on a hypothetical that the Department of Elections does not, or will not, adequately enforce the statutory absentee ballot requirements. The hypothetical involves an “as applied” challenge to the conduct of the Department, not a facial

challenge to the statute itself, and the appropriate remedy to such challenge would not be the invalidation of the statute itself. *Infra* at 22–23.

A. Neither the Grammar nor the Literal Language of Section 4A Requires that Someone Permanently Disabled Re-Establish at each Election their Eligibility to Vote by Absentee Ballot.

1. The Literal Language Does Not Require that a Person Must Establish Their Disability for Each Election.

While Section 4A requires the General Assembly to adopt statutes allowing certain persons to vote by absentee ballot, the Section is completely silent as to the process by which those qualifications for absentee ballots are to be established. That process is left for the General Assembly to determine in the statutes it is mandated to create. There is certainly nothing in Section 4A that requires that the process be limited to one election at a time. Indeed, the categories for which absentee voting is required by Section 4A include those that usually would exist for more than a single year, such as for physical disability or military service. There is nothing in Section 4A that compels the conclusion that the General Assembly is prohibited from allowing multi-election qualification.

2. The Correct Grammatical Analysis Shows that a Qualified Person May Register to Vote by Absentee Ballot for so Long as They Are Qualified to Vote by Absentee Ballot.

The Superior Court held:

Section 4A allows the General Assembly to enact laws that permit qualified registered voters, “who shall be unable to appear to cast his or

her ballot at *any general election*” to “cast a ballot at such general election to be counted in such election district”. (emphasis added). To preserve the sense of Article V, Section 4A, it only makes sense that “such” refers to the nearest reasonable antecedent “any general election.”

Opinion at *9 (emphasis in original).

Relying upon its “grammatical analysis,” the Superior Court concluded that Section 4A requires that an individual establish their qualification for an absentee ballot at each election separately. *Id.* In doing so, the court treats the phrase “at any election” as meaning at one election, but that is a misapplication of the word “any.” The phrase “any election” is plural and not singular because “any” means “unmeasured or unlimited in amount, number, or extent.” Merriam-Webster Dictionary.¹³ Its synonyms include “every” and “all”. *Id.* Thus, when Section 4A states that the General Assembly must establish laws permitting certain persons to vote by absentee ballot “at any general election,” recognizing the normal meaning of the term shows that Section 4A required the General Assembly to provide for absentee voting at all and every election at which a voter qualified for absentee voting and that could be multiple elections, not necessarily a single election.

¹³ <https://www.merriam-webster.com/dictionary/any>

B. The Statute Does Not Permit a Person who Is Temporarily Entitled to Vote by Absentee Ballot to Use an Absentee Ballot in Subsequent Years when They No Longer Qualify for Such Voting.

The Superior Court also appears to invalidate Section 5503(k) on the grounds that it “impermissibly extends [absentee voting] beyond the limited authority granted to the General Assembly by our Constitution” because it “would allow a voter who may be unable to appear at an upcoming election because of a temporary illness, such as the flu, to check a box on a form and automatically receive absentee ballots in all future general elections regardless of whether or not that voter is still ill at the time of those future elections.” Opinion at *9. Superior Court’s analysis disregards that this hypothetical could occur only if Section 5503(k) were violated.

There is nothing in Section 5503(k) that would permit a person not qualified to vote by absentee ballot to do so or to remain on the permanent absentee voter list without a valid qualifying condition. Rather, the persons who may qualify for absentee voting are limited to certain of the categories set forth in Section 4A. In addition, the statute expressly requires that the voter notify the Department of Elections of “changes in the reason that the person has listed for voting by absentee ballot,” and requires that “[t]he Department shall cancel a person’s permanent absentee status upon...receipt of written notification that the reason that the person has stated for voting by absentee ballot is no longer valid.” 15 *Del. C.* §5503(k)(3) and (4). Thus, the statute does not violate Section 4A by permitting the voter to

receive absentee ballots when the voter's qualification for absentee voting no longer exists.

C. The Court Found the Statute Unconstitutional “As Applied” Without Any Record that the Statute Was Being Misused as the Court Hypothesized Was Possible.

After mistakenly concluding that the statute permits unqualified voters to use absentee voting, the court continues by posing the following hypothetical:

At each future election the Department of Elections requires no further affirmation that the voter is still in a situation that would require them to cast an absentee ballot. In the words of Defendants' Counsel “you are not making any sort of statement regarding permanent absentee voting when you return the absentee ballot ... if you're absentee, you are absentee.

Opinion at *9.

This contention constitutes a hypothetical “as applied” challenge to the conduct of the Department, but not a facial challenge the validity of the statute. In order to succeed on a facial challenge the Plaintiff must establish that the statute is not valid under any circumstances. *Sierra v. Dep't of Servs. for Child., Youth & Their Fams.*, 238 A.3d 142, 156 (Del. 2020). As noted above, there is nothing in this statute that is invalid under any circumstance, and certainly nothing that could sustain the invalidation of the entire statute.

In addition, this case was resolved on a motion to dismiss without any record having been made that (1) any number, much less any significant number of absentee

voters are no longer qualified to vote by absentee ballot and (2) the Department of Elections has not properly enforced the statute so as to permit this circumstance to occur. There is no basis to conclude that either has occurred.

CONCLUSION

The decision of the Superior Court should be reversed.

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Dated: April 25, 2024

EXHIBIT A

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DEBATES AND PROCEEDINGS

of the

CONSTITUTIONAL
CONVENTION

of the

STATE OF DELAWARE

Reported by Charles G. Guyer and Edmond C. Hardesty, Esqs.,
Stenographers to the United States Courts and
Courts of Delaware.

Commencing December 1, 1896,
Dover, Delaware

VOLUME II

Published by the Supreme Court
State of Delaware
1958

MILFORD CHRONICLE PUBLISHING COMPANY
MILFORD, DELAWARE

CHAIRMAN MOORE: The question now recurs on the first amendment, and that amendment is to insert the words, "one dollar" in lieu of the words "fifty cents".

JOHN P. DONAHOE: I call for the yeas and nays.

CHAIRMAN MOORE: The Secretary will please call the roll.

Whereupon the Secretary called the roll with the following result:

Yeas: Messrs. Bradford, Biggs, Burris, Cannon, Cavender, Clark, Cooch, Cooper, Dasey, Ellegood, Gilchrist, Hearne, Horsey, Hering, Johnson, Moore, Murray, Pratt, Richards, Saulsbury, Smithers, Spruance and Wright.

Nays: Messrs. Carlisle, Donahoe, Martin, Orr, and Sapp.

Absent: Messrs. Evans and Harman.

Whereupon the Chair announced the result of the vote as follows:

Yeas, 23; Nays, 5. And declared the motion carried.

WILLIAM C. SPRUANCE: Mr. Chairman, I move that lines nineteen, twenty and twenty-one be adopted as amended.

DAVID S. CLARK: I second the motion.

WILLIAM C. SPRUANCE: I ask that the Secretary read the same.

CHAIRMAN MOORE: The Secretary will read the nineteenth, twentieth and twenty-first lines as amended.

Whereupon the Secretary read the nineteenth, twentieth and twenty-first lines as amended as follows:

"Voters shall be registered upon personal application only, and each voter shall, at the time of his registration, pay a registration fee of one dollar."

CHAIRMAN MOORE: The question is on the adoption of the nineteenth, twentieth and twenty-first lines as amended.

Motion put and carried.

WILLIAM C. SPRUANCE: Mr. Chairman, that disposes of all of that section 3.

I move that the second report of the Committee on Elections as amended be adopted.

JOSHUA A. ELLEGOOD: I second the motion.

EZEKIEL W. COOPER: Don't you wish to add other amendments to the second report?

WILLIAM C. SPRUANCE: No. That is all complete.

EZEKIEL W. COOPER: You made a third report in regular Convention.

WILLIAM C. SPRUANCE: That third report has already been reported for consideration, and we will take that up next.

CHAIRMAN MOORE: The question is on the adoption of the second report of the Committee on Elections as amended.

Motion put and carried.

WILLIAM C. SPRUANCE: Mr. Chairman, I move the adoption of the first section of the third report of the Committee on Elections.

CHARLES F. RICHARDS: I second the motion.

WILLIAM C. SPRUANCE: I ask that the Secretary read the first section.

CHAIRMAN MOORE: The Secretary will please read the first section.

Whereupon the Secretary read the first section of the third report of the Committee on Elections:

Substitute for the first and second paragraphs of section 1 of said article the following:

"Section 1. The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot, but the Legislature may by law prescribe the means, methods and instruments of voting 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."

WILLIAM C. SPRUANCE: Mr. Chairman, by looking at that article in the Constitution you will find that both of those two paragraphs, the first and second paragraphs of that section that are in brackets, that indicates that they were amendments to this Constitution of 1831. They were not in the Constitution of 1831. That is to say, the phraseology in the first paragraph has been changed, the material difference being in fixing the different time of the election, making it conform to the time that was fixed by Act of Congress for elections pertaining to Federal offices. The second paragraph in brackets is entirely new to the Committee and the Committee seem to think that the matter was so that it did not require any change at all. Therefore we adopted entirely the language of the second paragraph.

As to the changes that are desired in the first paragraph: You may remember that a day or two ago when we were talking about the matter and when we wanted some name to indicate this election that we commonly call "general election" by, we were reminded that the words, "general election" do not appear in this Constitution. In our statute, they do appear constantly, and it is always referred to in our statute as the "general election".

We all, the other day in discussing as to what elections this matter of registration should apply, were obliged to anticipate our present action, and we used the words, I think, "general biennial election". That was necessary for us to indicate what we meant, and we are now coming back again, and we are now naming in this part of the Constitution where it is not named at all. General election, everybody understands what that is. But we add another name,

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 MENNELLA and
THE HONORABLE GERALD W.
HOCKER,

Plaintiffs-Below/Appellees.

No. 120, 2024

On Appeal from a Decision of the
Superior Court of the State of
Delaware

C.A. No. S23C-03-014 MHC

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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,935 words, which were counted by Microsoft Word 2016.

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