



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL MENNELLA,)
)
)
 Plaintiff,)
 v.)
)
 THE HONORABLE ANTHONY J.)
 ALBENCE, in his official capacity as)
 State Election Commissioner, and STATE)
 OF DELAWARE DEPARTMENT OF)
 ELECTIONS,)
)
 Defendants.)

C.A. No. _____

VERIFIED COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff Michael Mennella (“Plaintiff”), by and through his undersigned counsel, hereby brings this action for declaratory and permanent injunctive relief against Defendants The Honorable Anthony J. Albence, in his official capacity as the State Election Commissioner, and the State of Delaware Department of Elections (together, “Defendants”) for the following reasons:

1. Delaware statutes requiring early voting conflict with and violate the Constitution of Delaware because they expand the administration of the general election beyond its constitutionally designated day. Del. Const. Art. V, § 1.
2. Delaware’s statutes providing for permanent absentee voting status conflict with and violate the Constitution of Delaware because they bestow absentee

voting eligibility indefinitely, without consideration of the applicant's eligibility at each subsequent election, as the Constitution requires. Del. Const. Art. V, § 4A.

3. When a Delaware statute conflicts with the Constitution of Delaware, the Constitution controls. *State ex rel. Southerland v. Hart*, 33 Del. 15, 21, 129 A. 691, 694 (1925) (“Nor can there be any doubt that if there is a conflict between the Constitution and the statute the former must control.”).

4. Delaware statutes and Defendants' enforcement of them harm Plaintiff Mennella because they require him to violate the oath he must take as an inspector of elections, his duties, and the Constitution of Delaware, and risk severe penalties and even prison time.

Jurisdiction and Venue

5. This Court has subject-matter jurisdiction under 10 *Del. C.* § 341 because Plaintiff seeks equitable relief in the form of a permanent injunction.

6. This Court also has jurisdiction to issue a declaratory judgment under 10 *Del. C.* §§ 6501, *et seq.*

7. Venue is proper in this Court and the Court has personal jurisdiction over Defendants because Commissioner Albence is a State of Delaware employee, and the Department of Elections is a state agency.

Parties

8. Plaintiff Michael Mennella is a registered voter and resident of Newark, Delaware. Mr. Mennella has served as an inspector of elections for the Delaware Department of Elections in at least eight elections during the last five to six years. In his role as inspector of elections, Mr. Mennella is responsible for overseeing the election at his assigned polling place and administering the election in accordance with the Delaware Constitution, statutes, and other laws. Mr. Mennella plans to serve as an inspector of elections at the 2022 General Election and at other future elections.

9. Defendant Commissioner Albence is the State Election Commissioner for Delaware. Commissioner Albence's duties include "general supervision over the county directors, deputy county directors, and other employees of the Department of Elections in carrying out their respective duties and responsibilities." 15 *Del. C.* § 302(12). Commissioner Albence is also responsible for "supply[ing] necessary instruction and assistance to the Department [of Elections] and all registration and election officers in order to insure uniform operation of this title throughout the State." 15 *Del. C.* § 302(7). Commissioner Albence must "designate locations" for early voting, 15 *Del. C.* § 5402, and "determine whether early voting occurs by voting machine or paper ballot," 15 *Del. C.* § 5406.

10. Defendant State of Delaware Department of Elections (the “Department of Elections”) is a state administrative agency. *See* 15 *Del. C.* § 201. The Department of Elections consists of the State Board of Elections¹ and staff. 15 *Del. C.* § 101(6). The Department of Elections, “under the direction of the Board of Elections, shall administer the election laws of this State as defined in [Title 15]” of the Delaware Code. *Id.*

11. Defendants, together and with those under their control and supervision, are responsible for administration and enforcement of Delaware’s early voting and absentee voting laws.

Delaware Law

Early Voting

12. The Delaware Constitution requires the general election to be held on one specific day.

13. The Delaware Constitution of 1831, as amended January 30, 1855, provided:

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.

¹ The State Board of Elections is the “body of individuals appointed by the Governor and confirmed by the Senate to serve or who otherwise serve as the State Board of Elections in accordance with Chapter 2 of [Title 15], and are, as such, vested with the responsibility and power to see to the administration of the election laws of this State as more particularly defined in [Title 15].” 15 *Del. C.* § 101(2).

See State ex rel. Morford v. Tatnall, 41 Del. 273, 291, 21 A.2d 185, 192 (1941).

14. The Delaware Constitution of 1897—the version presently in effect—provides, “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[.]” Del. Const. Art. V, § 1.

15. In 2019, the Delaware General Assembly passed, and the Governor signed, legislation that will permit voters to cast ballots in person during at least the ten (10) days before the general election day, starting in 2022. HB 38, 150th Gen. Assemb., Reg. Sess. (2019-2020); 15 *Del. C.* § 5402, *et seq.* (effective Jan. 1, 2022) (“Early Voting Laws”).

Permanent Absentee Voting Status

16. The Constitution of Delaware allows for absentee voting, with strict restriction. 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

17. The Constitution further requires the General Assembly to enact laws that allow voting by absentee ballot in accordance with the Constitution. Del. Const. Art. V, § 4A.

18. Delaware statutes provide an exhaustive list of reasons for which a registrant qualifies to vote by absentee ballot. *See* 15 *Del. C.* § 5502.

19. 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)

20. The Department of Elections “shall automatically send an absentee ballot to each person in permanent absentee status for each election in which the person is entitled to vote.” 15 *Del. C.* § 5503(k).

21. Delaware law does 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.

22. 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.” Emphasis added.

23. 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 is no longer valid. 15 *Del. C.* § 5503(k)(3).

24. Delaware law states that a registrant in “permanent absentee status” “shall keep the Department [of Elections] informed of changes in address, changes

in name or changes in the reason that the person has listed for voting by absentee ballot.” 15 *Del. C.* § 5503(k)(4).

25. As required by law, 15 *Del. C.* § 5503(k)(5), Delaware posts the list of permanent absentee voters on its web site.²

26. As of February 11, 2022, there were approximately 23,000 registrants on the permanent absentee voter list. *See id.*

27. On information and belief, as of February 11, 2022, Delaware’s permanent absentee voter list includes registrants who are potentially deceased, according to the Social Security Death Index (“SSDI”) and published obituaries. One of the potentially deceased registrant’s reported date of death is 2010. Other potentially deceased registrants are reported as deceased between one and ten years ago. Defendants should confirm whether these registrants are in fact deceased.

Inspector of Elections

28. The “inspector of elections” is an “election officer” appointed by the Department of Elections. 15 *Del. C.* § 4702; 15 *Del. C.* § 101(9).

29. The inspector of elections is charged with arriving at the polling place before opening of the polls and preparing the polling place for the conduct of the

² See https://elections.delaware.gov/reports/pdfs/statewide_abs_permanent.pdf (last visited Feb. 23, 2022).

elections. 15 *Del. C.* § 4912. The inspector of elections then proclaims that the election is open. 15 *Del. C.* § 4931.

30. During the conduct of the elections, the inspector of elections may “[c]ommand the peace,” 15 *Del. C.* § 4946(a)(1), and “[p]reserve order and enforce obedience to their lawful commands at and around the place of election during the time of any election and counting of votes,” 15 *Del. C.* § 4946(b)(1).

31. The inspector of elections “shall only admit to a voting machine a person whose name appears on the poll list, who is authorized to vote by the department of elections or who is authorized to vote by court order.” 15 *Del. C.* § 4938.

32. The inspector of elections also hears voter challenges. The inspector of elections “shall hear each challenge before the person being challenged enters a voting machine. Once the Inspector decides the challenge, the matter is decided and the challenged person will be either permitted to vote or not permitted to vote depending on the decision.” 15 *Del. C.* § 7557(d)(5).

33. As further provided by Delaware law, the inspector of elections is authorized to oversee the conduct of the election at his or her polling place. This duty includes making determinations with respect to voter eligibility, as necessary and in accordance with Delaware law.

34. “Before opening the election, the inspector, judges, clerks and any other appointed election officers shall subscribe to the following oath:

I do solemnly swear (or affirm) that in the election to be held on the day of A. D. I will not knowingly or willfully receive or consent to the receiving of the vote of any alien, and also that **I will not receive or consent to the receiving of the vote of any person whom I shall believe not entitled to vote**, unless my associates shall adjudge such person to be entitled to vote. That I will not receive or reject, nor concur in receiving or rejecting any vote through partiality or under bias, and that **I will determine every matter that shall come before me and perform every act and duty by law required of me, touching the election, truly, faithfully and impartially, according to the best of my skill and judgment**; that I will cause the ballots that shall be taken at such election to be fully read and ascertained, and a true statement thereof to be made, according to the best of my knowledge and ability; that I have not received, nor will I receive directly or indirectly from or through any candidate to be voted for at such election, or any other person, any money, pay or other valuable thing or reward; that I have not been promised, or in any manner been led to believe that I will at any time directly or indirectly receive any money, pay or other valuable thing or reward from such candidate or other person other than that provided by law and if I shall discover any partiality, unfairness or corruption in the conduct of the election, I shall disclose the same the Department of Elections that is conducting the election and to the Attorney General to the end that the subject may be investigated, so help me God (or so I solemnly affirm).”

15 *Del. C.* § 4904 (emphasis added).

35. “Whoever, being an inspector of election, wilfully neglects or when called on wilfully declines to exercise the powers conferred on that inspector of election to preserve order shall be deemed to have knowingly and wilfully violated that inspector of election’s official duty.” 15 *Del. C.* § 5140.

36. “Whoever, being an election officer of whom any duty is required in this title, is guilty of any wilful neglect of such duty or of any corrupt or fraudulent conduct or practice in the execution of the same shall be deemed to have knowingly and wilfully violated that election officer’s own official duty.” 15 *Del. C.* § 5133.

37. “Whoever, being an election officer, wilfully:

- (1) Excludes any vote duly tendered, knowing that the person offering the same is lawfully entitled to vote at such election; or
- (2) Receives a vote from any person who has been duly challenged in relation to such person’s right to vote at such election without exacting from such person such oath or other proof of qualification as may be required by law; or
- (3) Omits to challenge any person offering to vote whom that election officer knows or suspects not to be entitled to vote and who has not been challenged by any other person;

shall be deemed to have violated that election officer’s own official duty.”

15 *Del. C.* § 5130.

38. “Whoever, being a clerk of the peace, an official, or other individual as designated in this title, wilfully violates this title in the performance of any duty imposed upon him or her for the violation of which no other punishment is provided by law, shall be fined not less than \$300 nor more than \$500 and may be imprisoned not more than 3 years.” 15 *Del. C.* § 5126.

39. “Whoever, having been appointed an inspector or judge of election in any election district, refuses to serve shall be fined \$50.” 15 *Del. C.* § 5112.

Michael Mennella

40. Plaintiff Michael Mennella has served as an inspector of elections in at least eight Delaware elections during the last five to six years.

41. Mr. Mennella has received training from the Delaware Department of Elections to perform his duty as an inspector.

42. Mr. Mennella is compensated for his service as an inspector by the Delaware Department of Elections.

43. Before each election at which he has served, Mr. Mennella administers the required oath to others required to take it. Mr. Mennella then takes the required oath himself. *See 15 Del. C. § 4904.*

44. As inspector of elections, Mr. Mennella has made determinations about voter eligibility and will be required to make the same determinations at future elections.

45. As inspector of elections, Mr. Mennella has directed others to perform their duties in accordance with the laws of Delaware and will be required to do the same at future elections.

46. Mr. Mennella plans to serve as an inspector of elections in the 2022 General Election and in other future elections.

COUNT I
Violation of Article V, Section 1 of the Constitution of Delaware

47. Delaware’s Early Voting Laws conflict with and violate the Constitution of Delaware because they expand the administration of the general election beyond its constitutionally designated day.

48. The Constitution of Delaware provides,

[T]he 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.

49. Early voting is neither a “mean[], method[], [or] instrument[] of voting,” as those terms are used in the Constitution of Delaware. Del. Const. Art. V, § 1.

50. Nor are Delaware’s Early Voting Laws intended to “secure secrecy and the independence of the voter, preserve the freedom and purity of elections [or] prevent fraud, corruption and intimidation thereat.” Del. Const. Art. V, § 1.

51. Upon information and belief, Defendants plan to enforce Delaware’s Early Voting Laws at the 2022 General Election.

52. Delaware statutes and Defendants’ actions harm Mr. Mennella because they force him to violate his oath, his duties, and the Constitution of Delaware. *See* 15 Del. C. § 4904.

53. Mr. Mennella is harmed because he must choose between enforcing Delaware statutes and enforcing the Delaware Constitution.

54. Delaware statutes and Defendants' actions also harm Mr. Mennella because they require him to train and direct those under his supervision to violate Delaware's Constitution and violate their respective oaths and duties.

55. Mr. Mennella may face severe penalties and even prison time if he violates Delaware law or his duties as an inspector of elections.

56. Plaintiff is entitled to relief under Article V, Section 1 of the Delaware Constitution, but has no adequate remedy at law.

COUNT II

Violation of Article V, Section 4A of the Constitution of Delaware

57. Article V, Section 4A of the Constitution of Delaware—which authorizes absentee voting—concerns eligibility for *each* general election. It provides that a registered and qualified elector “may cast **a** ballot at **such general election** to be counted in such election district.” (emphasis added).

58. Delaware's statutes providing for permanent absentee status conflict with and violate the Constitution of Delaware because they grant eligibility to vote by absentee ballot indefinitely, and without consideration of the applicant's eligibility at each subsequent election, as required by the Constitution.

59. Defendants are enforcing Delaware's permanent absentee voting laws.

60. Delaware statutes and Defendants' actions harm Mr. Mennella because they force him to violate his oath, his duties, and the Constitution of Delaware. *See 15 Del. C. § 4904.*

61. Mr. Mennella is harmed because he must choose between enforcing Delaware statutes and enforcing the Delaware Constitution.

62. Delaware statutes and Defendants' actions also harm Mr. Mennella because they require him to train and direct those under his supervision to violate Delaware's Constitution and violate their respective oaths and duties.

63. Mr. Mennella may face severe penalties and even prison time if he violates Delaware law or his duties as an inspector of elections.

64. Plaintiff is entitled to relief under Article V, Section 1 of the Delaware Constitution, but has no adequate remedy at law.

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment as follows:

A. Declare Delaware statutes allowing early voting, *15 Del. C. § 5402, et seq.*, violate the Constitution of Delaware, Del. Const. Art. V, § 1;

B. Declare Delaware statutes allowing permanent absentee voting status, *15 Del. C. § 5503(k)*, violate the Constitution of Delaware, Del. Const. Art. V, § 4A;

C. Enjoin Defendants from enforcing Delaware statutes allowing early voting, 15 *Del. C.* § 5402, *et seq.*;

D. Enjoin Defendants from enforcing Delaware statutes allowing permanent absentee voting status, 15 *Del. C.* § 5503(k);

E. Award Plaintiff his reasonable attorney's fees, expenses, and costs;
and,

F. Award any other relief the Court deems just and proper.

Dated: February 24, 2022

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