

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL HIGGIN and MICHAEL MENNELLA,)	
)	
<i>Plaintiffs,</i>)	C.A. No. _____
v.)	
)	
THE HONORABLE ANTHONY J. ALBENCE, in his official capacity as State Election Commissioner, and STATE OF DELAWARE DEPARTMENT OF ELECTIONS,)	
)	
<i>Defendants.</i>)	
)	

VERIFIED COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs Michael Higgin (“Mr. Higgin”) and Michal Mennella (“Mr. Mennella”) (together, “Plaintiffs”), by and through their undersigned counsel, hereby bring 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”), alleging as follows:

1. Recently, the Delaware General Assembly passed, and the Governor signed, new laws permitting mail-in ballots. These laws directly conflict with and violate the Delaware Constitution because they expand the administration of the

general election beyond its constitutionally designated day in violation of Art. V, § 1 of the Delaware Constitution.

2. These new Delaware statutes further conflict with the Delaware Constitution because they allow for remote voting, that is, voting at a time and place other than as provided in Art. V, § 1 of the Delaware Constitution and for reasons beyond those permitted in Art. V, § 4A. *See Republican State Comm. v. State*, 250 A.3d 911 (2020) (“... absent some other authority, Article V, § 4A prohibits the General Assembly from allowing general absentee voting...”).

3. The General Assembly also passed and the Governor recently signed laws that would allow a person to register to vote on the same day as the General Election is held and applies to the General Election occurring on November 8, 2022. *See 15 Del. C. § 2036-2038*. These laws violate Art. V, § 4 of the Delaware Constitution, which prohibits potential electors from registering to vote “less than ten days before“ the general election.

4. These new laws, now part of an amended Part IV of Title 15 of the Delaware Code, and designated Chapter 56A, impermissibly provide electors a new and unrestricted right to vote by mail and to register to vote on the same day as the general election, and would, if permitted to stay in place, apply to the General Election scheduled to take place on November 8, 2022. These laws are unconstitutional and cannot stand.

5. When a Delaware statute conflicts with the Constitution of Delaware, the Constitution controls. *See, e.g., 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.”); *In re Opinion of Justices*, 575 A.2d 1186, 1188 (1990) (“... when an amendment to the Delaware Constitution conflicts with a pre-existing statute, the amendment to the Constitution is controlling.”); *Evans v. State*, 872 A.2d 539, 553 (2005) (“[I]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.”) (citing *Marbury v. Madison*, 5 U.S. 37 (1803)).

6. Delaware’s new laws, establishing mail-in voting and same-day registration, and Defendants’ implementation and enforcement of those laws harms Plaintiff Mennella as a voter because it dilutes his vote by allowing persons to vote in a manner contrary to the provisions of the Delaware Constitution. Furthermore, Mr. Mennella is harmed as to the same-day-registration provisions, because such provision requires him to violate the oath he must take as an inspector of elections, with respect to his duties under the Delaware Constitution.

7. Delaware’s new laws on mail-in voting and same-day registration harm Plaintiff Higgin because they dilute his vote, and as a candidate, deprive him of the opportunity to utilize the full amount of time before the election to reach out to as many voters as possible until election day. Moreover, the implementation

and enforcement of these laws prevent him from identifying those who may vote so he can best use his resources to provide them with information about his platform and candidacy. Finally, Mr. Higgin is entitled to a fair election, guaranteed by the Delaware Constitution, and votes made and tabulated in violation of the Delaware Constitution are unlawful on their face. By definition, what is unlawful is unfair.

8. Each of these laws in in derogation not only of the plain language of the Delaware Constitution but also of the intent of its terms which require the General Assembly to enact voting laws “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. Both of these laws must be found unconstitutional.

Jurisdiction and Venue

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

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

11. 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

12. Plaintiff Michael Higgin is a resident of Bear, Delaware, a registered voter, and a filed-candidate for State Representative in District 15 for the November 8, 2022 General Election. Mr. Higgin has a direct interest in assuring that the election is conducted in a manner that is fair and lawful, and in accordance with the Delaware Constitution.

13. Plaintiff Michael Mennella is a registered voter and resident of Newark, Delaware. As a registered voter, he has an interest in assuring that any election in which he votes is conducted in a manner that is fair and in accordance with the law. Mr. Mennella plans to vote in the 2022 Delaware General Election and other future elections.

14. Additionally, Mr. Mennella has served as an inspector of elections for the Delaware Department of Elections in at least 8 elections during the last 5 to 6 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 Primary and General Elections and at other future elections.

15. Defendant 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). Defendant 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). Under the new law, Defendant Albence must “promulgate rules relating to logic and accuracy testing of mail ballot tabulating machines” and establish an online system for electors to track their application for a mail-in ballot. *See* 15 *Del. C.* §§ 5620A and 5621A.

16. 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.* Specifically, the Department of Elections will create both the application for voting by mail and the mail-in ballots, as well as distribute the two documents. *See* 15 *Del. C.* §§ 4503, 5604A, 5605A.

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).

17. Defendants, together and with those under their control and supervision, are responsible for administration and enforcement of Delaware's vote by mail and voter registration laws.

Delaware's Existing Election Laws

18. The Delaware Constitution requires the General Election to be held on one specific day. Del. Const. Art. V, § 1.

19. 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.

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

20. The Delaware Constitution of 1897 (the "Delaware Constitution")—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.

21. The Delaware Constitution 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

22. 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.

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

24. The Delaware Courts have held that this list is exhaustive. *See Opinion of the Justices*, 295 A.2d 718, 722 (Del. 1972).

25. Art. V, § 4 of the Delaware Constitution provides for the registration of voters, days for registration, and for application to strike names from the voter list.

Section 4. The General Assembly shall enact uniform laws for the registration of voters in this State entitled to vote under this Article, which registration shall be conclusive evidence to the election officers of the right of every person so registered to vote at any General Election while his or her name shall remain on the list of registered voters, and who is not at the time disqualified under the provisions of Section 3 of this Article; and no person shall vote at such General

Election whose name does not at that time appear in said list of registered voters.

There shall be at least two registration days in a period commencing not more than one hundred and twenty days, nor less than sixty days before, and *ending* not more than twenty days, *nor less than ten days before, each General Election*, on which registration days persons whose names are not on the list of registered voters established by law for such election, may apply for registration, and on which registration days applications may be made to strike from the said registration list names of persons on said list who are not eligible to vote at such election; provided, however, that such registration may be corrected as hereinafter provided at any *time prior to the day of holding the election*.

(Emphasis added.)

27. As stated by the Delaware Supreme Court in *State ex rel. Walker v. Harrington*, 30 A.2d 688, 691 (Del. 1943):

The Constitution, by Section 4 of Article V, has prescribed for uniform laws for registration of voters for the purpose of determining that prospective voters duly possess the necessary and prescribed qualifications. This section provides that all questions of the qualifications of voters should be determined *before election day*, and on that day, beyond the fact of the identity of the persons, the sole ground of challenge should be the violation of said Section 3 of Article V.

(Emphasis added.)

28. The Delaware Constitution requires the General Assembly to enact laws regarding voter registration in accord with the Constitution.

Delaware's New Vote-by-Mail Law

29. The Delaware General Assembly recently passed, and the Governor signed, legislation that will permit voters to cast ballots by mail.

30. The law specifies that:

A qualified, duly registered elector wishing to vote by mail must do all of the following:

- (1) Complete a handwritten or electronic application to vote by mail.
- (2) Sign and date the application.
- (3) Mail, deliver, or cause to be mailed or delivered, the completed application to the Department by the deadline provided by the Department.

See 15 Del. C. § 5604A.

31. The elector must sign the following oath on the ballot:

I do solemnly swear (affirm) that to the best of my knowledge I am eligible to vote in the State of Delaware and that my voting address is as it appears on the label on this envelope. I also do solemnly swear (affirm) under penalty of perjury that I have not received or accepted, or offered to receive or accept, any money or other item of value as compensation, inducement, or reward for the giving or withholding of a vote at this election, nor that I am acting under duress or threat of duress or harm.

See 15 Del. C. § 5606A.

32. No other qualifications or requirements for electors are listed in the statute for an elector to vote by mail.

33. Electors who vote by mail can mail the ballot back to the Department of Elections, deliver it to the Department of Elections, or place it in a secure drop-box. *See 15 Del. C. § 5608.*

34. The ballots must arrive at the Department of Elections “before the polls close on the day of the election.” *See 15 Del. C. § 5609.*

35. There is no specification in the law how early a ballot may be received, but election judges may begin counting ballot envelopes 30 days before the day of the election. *See 15 Del. C. § 5611A.*

36. Election judges tally any mail votes that were written-in at that time. *See 15 Del. C. § 5611A.*

Delaware’s New Same-Day Registration Law

37. The new same day registration law provides, in relevant part, “... the last date to register for any ... general election shall be the day of that election.” *15 Del. C. § 2056*

38. The law refers to registrations that happen at the polling locations and by mail. *15 Del. C. § 2036*

39. Further, the law provides that “...the Department [of Elections] may process registration applications that change a registrant’s address or name until the day of ...[the] general election.” *15 Del. C. § 2038*

Inspector of Elections

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

41. The inspector of elections also hears and decides challenges to voter eligibility. 15 *Del. C.* § 4937(c).

42. 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).

43. 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.

44. 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).

45. 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.

46. “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).

47. “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.

48. “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.

49. “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.

50. “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.

51. “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. ID

Michael Mennella

52. Mr. Mennella, a citizen of the State of Delaware and registered voter, has also served as an inspector of elections in at least eight Delaware elections during the last five to six years.

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

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

55. 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.

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

57. 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.

58. Mr. Mennella plans to exercise his right to vote, and to serve as an inspector of elections in the 2022 general election and in other future elections.

COUNT I

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

59. Plaintiffs incorporate the paragraphs above as if set out in full herein.

60. Delaware's new vote by mail law enacts a *de facto* general absentee voting system, which is prohibited by Article V, § 4A. *See Republican State Comm. v. State*, 250 A.3d 911, 918 (2020).

61. Delaware Constitution Art. V, § 4A provides a list of reasons for which a registered voter may submit a ballot prior to election day to be counted in an election.

62. Delaware's new vote by mail law does not require the elector to assert or claim any of the bases upon which an elector is permitted under the Delaware Constitution to vote in some manner not at the polling place in their election district on election day. *See 15 Del. C. §§ 5604A and 5606A.*

63. Delaware's new vote by mail law is in violation of the Delaware Constitution, and renders Art. V, Section 4A superfluous, as it ignores the requirements an elector must meet to vote remotely.

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

64. Plaintiffs incorporate the paragraphs above as if set out in full herein.

65. Delaware's mail-in voting laws conflict with and violate the Constitution of Delaware because they expand the administration of the general election beyond its constitutionally designated day. *See* Del. Const. Art. V, § 1.

66. Upon information and belief, Defendants plan to enforce Delaware's mail-in-voting law at the 2022 General Election.

67. Indeed, ballots will be received and tabulated as early as 30 days prior to election day, as any write-in votes will be tallied by the election judges during their review. *See* 15 *Del. C.* § 5611A.

68. Such a process is directly contrary to the Delaware Constitution's requirement that the election happen on a specific Tuesday in November, as stipulated in Del. Const. Art. V, § 1.

69. There is no question that mail in voting affects the outcome of elections. In 2020, when the General Assembly passed a temporary law to permit mail in voting due to the COVID pandemic, in at least 10 races, the machine vote tally went in favor of the candidate who ultimately lost the election after mail in votes were counted.

70. Delaware statutes and Defendants' actions harm Mr. Mennella and Mr. Higgin because they dilute their votes and those of their supporters, in the case

of Mr. Higgin. Further, with respect to Mr. Higgin, his efforts to conduct his campaign are hampered because he cannot identify who is eligible to vote and reach them with information about his candidacy and platform, and with respect to Mr. Mennella, forces him to violate his oath, his duties, and the Delaware Constitution. *See 15 Del. C. § 4904.*

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

72. 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.

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

74. Plaintiffs have no adequate remedy at law.

COUNT III
Violation of Article V, Section 4 of the Delaware Constitution

75. Plaintiffs incorporate the paragraphs above as if set out in full herein.

76. Under the Same Day Registration Law, Delaware residents can register and then, vote on the actual date of any state election.

77. The Same Day Registration Law is in direct violation of Article V, Section 4 of the Delaware Constitution, which provides strict guidelines on the dates that Delaware residents may be registered as voters for state elections.

78. The Delaware Constitution specifies that the time period to register to vote before “each general Election” must end not “less than ten days before” the elections. Del. Const. Art. V, § 4.

79. The new law allows electors to register at their polling place on the “day of the election.” 15 Del C. § 2036

80. The new law also requires the Department of elections to accept mail applications on the “day of the election”. 15 Del. C. § 2036

81. The new statutes allowing potential electors to both register to vote and vote on Election Day violate Art. V, § 4 of the Delaware Constitution.

Prayer for Relief

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

A. Declare Delaware statutes allowing mail-in voting, 15 *Del. C.* § 5601, *et seq.*, violate the Delaware Constitution;

B. Declare Delaware’s same-day registration laws violate the Delaware Constitution;

C. Enjoin Defendants from enforcing Delaware statutes allowing mail-in voting, 15 *Del. C.* § 5601, *et seq.*;

D. Enjoin Defendants from enforcing Delaware statutes allowing same-day registration.

E. Award Plaintiffs their reasonable attorneys' fees, expenses, and costs;

and

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

Dated: July 20, 2022

BRADY LEGAL GROUP LLC

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(Motion *pro hac vice* to be filed as to Mr. Mennella only)

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