

THE HONORABLE GERALD W.
HOCKER and STEVEN
WASHINGTON,

V.

Defendants Below,
Appellees.

C.A. No. 2026-1021

Decided: September 21, 2026

Upon appeal from the Court of Chancery. **AFFIRMED.**

Patricia A. Davis, Esquire and Emily V. Burton, Esquire, STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware; OF COUNSEL: Donald B. Verrilli, Jr., Esquire (*argued*), Ginger D. Anders, Esquire, Brandon H. Thomas, Esquire MUNGER, TOLLES & OLSON LLP, *for Defendant Below, Appellees The Honorable Anthony J. Albence and State of Delaware Department of Elections.*

SEITZ, Chief Justice:

In this expedited appeal, two candidates in the November 2026 general election filed suit in the Court of Chancery challenging the constitutionality of the permanent absentee voting statute. They alleged that the statute impermissibly expanded the categories of absentee voters enumerated in the Delaware Constitution by permitting ineligible voters to vote absentee in a general election. They also alleged that the Department of Elections did not adequately monitor the eligibility of permanent absentee voters, leading to another constitutional violation.

On cross-motions for summary judgment, the Court of Chancery found that the statute “neither expands the circumstances qualifying an elector to vote absentee, nor permits an elector to vote absentee if he or she is able to appear in person.”¹ Rather, the statute limits the constitutional categories of Delaware voters permitted to register as permanent absentee voters. The court also held that the plaintiffs’ facial challenge failed because “[e]ven imperfect procedures for policing permanent absentee voters’ continued eligibility do not render ‘every application’ of the Permanent-Absentee Statute unconstitutional.”² We agree and affirm.

¹ *Hocker v. Albence*, 2026 WL 2620305, at *1 (Del. Ch. Sept. 4, 2026) [hereinafter Op.].

² *Id.* at *8 (citing *Sierra v. Dep’t of Servs. for Child., Youth & their Fams.*, 238 A.3d 142, 156 (Del. 2020)).

I.

A.

Article V, Section 4A of the Delaware Constitution authorizes absentee voting.

It provides:

The General Assembly shall enact general laws providing that any qualified elector of this State, duly registered, who shall be unable to appear to cast a ballot at any general election at the regular polling place of the election district in which the qualified elector is registered, because of being in the public service of the United States or of this State, because of being a spouse or dependent when residing with or accompanying the qualified elector who is in the public service of the United States or of this State, because of the nature of the qualified elector's business or occupation, because of the qualified elector's sickness or physical disability, because of the qualified elector's absence from the district while on vacation, or because of the qualified elector's religious tenets or teachings, may cast a ballot at such general election to be counted in such election district.

As the constitution directs, the General Assembly enacted legislation implementing absentee voting.³ Under the absentee voting statute, an elector – more commonly known as a voter – may vote by absentee ballot if the voter falls into one of the groups listed above in the Delaware Constitution.⁴ To vote absentee, a voter obtains an absentee ballot from the Department by submitting a form that identifies the applicant, the general election for which an absentee ballot is needed, and the

³ 15 *Del. C.* Ch. 55.

⁴ 15 *Del. C.* § 5502(1)–(8).

reason or reasons specified in the constitution that the voter cannot appear in person at the voter's regular polling place.⁵

For some of the enumerated categories, the General Assembly determined that an absentee voter need not reapply each year. Instead, the absentee voter may remain on the absentee rolls if and until the condition resolves. Enacted in 2010 and amended in 2012, the so-called permanent absentee statute, 15 *Del. C.* § 5503(k) allows a subset of absentee voters to apply for permanent absentee status – voters who cannot appear at the polling place due to qualifying public service, membership in the Armed Forces, illness or physical disability, an occupation providing constant care to a relative who needs it, or if authorized to vote absentee by federal law.⁶

Once registered as a permanent absentee voter, the Department will “automatically send an absentee ballot to each person in permanent absentee status for each election in which the person is entitled to vote.”⁷ The statute requires the permanent absentee voter to “keep the Department informed of changes in address, changes in name or changes in the reason that the person has listed for voting by absentee ballot.”⁸ As the Court of Chancery observed, the adjective “permanent”

⁵ 15 *Del. C.* § 5503(k); *see also* Ex. A (Absentee Ballot Request Form).

⁶ 15 *Del. C.* § 5503(k).

⁷ *Id.*

⁸ *Id.* § 5503(k)(4).

attached to absentee voting is a misnomer.⁹ The Department cancels permanent absentee status:

upon the return of an absentee ballot or other correspondence sent by first-class mail as undeliverable, the person's death or disqualification, the cancellation of the person's voter registration, the receipt of a written request from the person, or receipt of written notification that the reason that the person has stated for voting by absentee ballot is no longer valid.¹⁰

As an administrative matter, the Department notifies each permanent absentee voter by letter before each election cycle of the absentee voting eligibility requirements and their legal obligation to inform the Department of any change in eligibility.¹¹ The letter includes an absentee voter registration form.¹² If the letter is returned undeliverable, the voter is removed from the permanent absentee list.¹³ The Department also cancels permanent absentee status once they are informed of the death of the voter.¹⁴ Further, each permanent absentee ballot has an oath printed on

⁹ Op. at *1.

¹⁰ 15 *Del. C.* § 5503(k)(3).

¹¹ App. to Opening Br. at A75 ¶ 14 [hereinafter A_] (Aff. of Anthony J. Albence).

¹² A83 (Letter to Permanent Absentee Voters).

¹³ A75 ¶ 15.

¹⁴ Oral Argument at 26:04–22 (“The Bureau of Vital Statistics provides the Department of Elections lists on a regular basis of who has died in the State. And the Department cross references that list with the list of permanent absentee voters and crosses off the people who have died.”).

the ballot. The voter must affirm under penalty of perjury that they are eligible to vote absentee in that election for the reasons permitted by the constitution.¹⁵

B.

The immediate controversy is not the Judicial Branch’s first foray into recent voting-related disputes. In 2020, the Court of Chancery, in *Republican State Committee v. Department of Elections*, denied the plaintiff’s motion for a preliminary injunction seeking to enjoin the use of mail-in ballots in that year’s general election.¹⁶ The court held that, although the Delaware Constitution did not include a pandemic in its list of permitted reasons for absentee voting, the 2020 vote by mail statute was nonetheless authorized by the constitution’s emergency powers provision.¹⁷ The plaintiff did not appeal.

In 2022, the General Assembly enacted and the Governor signed into law two voting-related statutes. The first allowed for same day voter registration up to and including the day of the general election.¹⁸ The second allowed all voters to cast

¹⁵ Ex. A (requiring the elector to “affirm, under penalty of perjury, that [the elector] cannot go to [their] polling place on election day for the reason that [they] marked”). *See also* A77 ¶ 21.

¹⁶ 250 A.3d 911, 913 (Del. Ch. 2020).

¹⁷ *Id.* at 918–22.

¹⁸ Del. H.B. 25, 151st Gen. Assem. (2022), *invalidated by Albence v. Higgin*, 295 A.3d 1065 (Del. 2022).

ballots by mail even if they were able to appear in person at a polling place.¹⁹ In a thorough opinion addressing constitutional challenges to the legislation, this Court in *Albence v. Higgin* found both statutes unconstitutional.²⁰ We held that the same day registration statute “effectively eliminated the rights – explicitly granted in Section 4 – of interested persons to appeal” from registration-list disputes and would “undermine Section 4’s provisions allowing for the correction of voter registrations ‘at any time prior to the day of holding the election.’”²¹ We also held that the vote by mail statute ran “counter to a time-honored understanding shared by our courts, the General Assembly, and the Department, that the General Assembly is not free to limit or enlarge upon the categories of citizens specifically enumerated in Section 4A who need not vote in person in general elections.”²²

Next up was the Superior Court’s decision in *Mennella v. Albence*.²³ In *Mennella*, the Superior Court held that the permanent absentee statute and early voting statute were unconstitutional.²⁴ Specific to the permanent absentee voting

¹⁹ Del. S.B. 320, 151st Gen. Assem. (2022), *invalidated by Higgin*, 295 A.3d 1065 (Del. 2022).

²⁰ 295 A.3d 1065 (Del. 2022).

²¹ *Id.* at 1069 (quoting DEL. CONST. art. V, § 4).

²² *Id.* Our decision did not come as a surprise. The General Assembly was aware of the shaky constitutional foundation for the legislation. *Id.* at 1083 n.108.

²³ 2024 WL 758606 (Del. Super. Ct. Feb. 23, 2024), *rev’d and vacated*, 320 A.3d 212 (Del. 2024).

²⁴ *Id.* at *7–10.

statute, the Superior Court reasoned that the Delaware Constitution “limits absentee voting to only such general election where the voter cannot cast a ballot in person for a constitutionally enumerated reason.”²⁵ According to the court, “[b]y granting indefinite absentee voting to those who are unable to vote in a single election, Delaware’s Permanent Absentee Voting Statute impermissibly extend[ed] beyond the limited authority granted to the General Assembly by our Constitution.”²⁶

On appeal, this Court reversed.²⁷ We found that neither plaintiff had standing to pursue their constitutional claims.²⁸

C.

Turning to this case, on August 5, 2026, Senator Gerald W. Hocker, a candidate for reelection to the Delaware State Senate in the November 2026 general election, filed a complaint in the Court of Chancery against State Election Commissioner Anthony J. Albence and the Department of Elections. Steven Washington, also a candidate for office in the 2026 general election, joined later as a plaintiff. The plaintiffs alleged that the permanent absentee voting statute violates Article V, Section 4A of the Delaware Constitution by expanding the enumerated

²⁵ *Id.* at *9.

²⁶ *Id.*

²⁷ *Albence v. Mennella*, 320 A.3d 212, 216 (Del. 2024).

²⁸ *Id.* at 222–24.

absentee voters to include voters no longer eligible to vote absentee.²⁹ They also claimed that the statute’s verification scheme violated Article V, Section 1 of the Delaware Constitution by failing to best guard against the risk of “fraud, corruption, and intimidation.”³⁰ The plaintiffs sought a declaration from the court that the permanent absentee voting statute was unconstitutional and an injunction prohibiting permanent absentee voter registration and counting votes from many permanent absentee voters in the November 2026 general election.³¹

Following expedited consideration of cross-motions for summary judgment, the Court of Chancery granted the defendants’ motion.³² First, the court recognized that Article V, Section 4A of the Delaware Constitution requires the General Assembly to enact absentee voting laws but does not dictate how the General Assembly should best regulate absentee voting.³³ The General Assembly could,

²⁹ A137 (Pls.’ Opening Br. in Support of Pls.’ Mot. For Summ. J.).

³⁰ A201–02 (Pls.’ Answering Br. in Opposition of Def.’s Mot. For Summ. J.).

³¹ The parties stipulated that the plaintiffs would not “prevent votes cast by permanent absentee voters from being counted in the 2026 primary election,” “restrict the authority or obligation of the Department of Elections to send absentee ballots to vote in the 2026 general election to either voters entitled to vote under the Uniformed and Overseas Citizens Absentee Voting Act or to voters who have applied to vote on an absentee basis since the conclusion of the 2024 general election,” or “invalidate or prevent votes cast by these voters from being counted in the 2026 general election.” *See Hocker v. Albence*, C.A. No. 2026-1021 D.I. 10 ¶¶ 1–2.

³² Op. at *9.

³³ *Id.* at *2.

therefore, regulate the absentee voting process as it sees fit, limited by Section 4A's enumerated absentee voting categories.

The court also held that, rather than expand the groups allowed to vote absentee by the constitution, the permanent absentee voting statute narrowed absentee voting eligibility to a subset of those set forth in the constitution.³⁴ Further, the court was unpersuaded by the Superior Court's *Mennella* decision. Although the Court of Chancery agreed with *Mennella* that "Article V, Section 4A authorizes absentee voting only when an elector is unable to appear in person at the polling place for a qualifying reason," the court disagreed that the statute authorized absentee voters who are no longer eligible to do so.³⁵ As the court explained:

Mennella II reasoned that the Permanent-Absentee Statute contravenes Article V, Section 4A by "allowing 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." Plaintiffs adopt this argument as well. But contrary to Plaintiffs' position, the Permanent-Absentee Statute *prohibits* a voter with permanent status from voting by absentee ballot if he or she is no longer eligible to do so. The statute requires "persons in permanent absentee status to keep the Department informed of changes in the reason that the person has listed for voting by absentee ballot," and mandates that "the Department shall cancel a person's permanent absentee status upon receipt of written notification that the

³⁴ *Id.* at *7.

³⁵ *Id.*

reason that the person has stated for voting by absentee ballot is no longer valid.”³⁶

The court also observed that the Department’s permanent absentee procedure was consistent with the general voter registration process, where “a citizen submits an application attesting to his or her eligibility to vote and receives ‘permanent’ voter status thereafter.”³⁷ In either case, the court observed, a voter can lose permanent status if their mail is returned as undeliverable.³⁸

Finally, the Court of Chancery ruled that the Department’s means of overseeing permanent absentee eligibility in each general election did not render the statute unconstitutional. As the court noted, the plaintiffs brought only a facial challenge to the legislation.³⁹ Under settled law, when legislation is challenged facially as opposed to as applied, the law must be unconstitutional in every possible application. Here, according to the court, at least some permanent absentee voters were qualified to vote absentee in each election. And the Department’s verification practices left eligible absentee voters on the permanent absentee rolls.⁴⁰

³⁶ *Id.* (citation modified).

³⁷ *Id.* (quoting 15 *Del. C.* § 1101).

³⁸ *Id.*

³⁹ *Id.* at *8.

⁴⁰ *Id.*

D.

On appeal, the plaintiffs renew the argument that the permanent absentee voter statute expands permanent absentee eligibility beyond that permitted by Article V, Section 4A of the Delaware Constitution. They claim that the statute “allows an individual to vote in multiple elections, over multiple years, who, on a single occasion and for a temporary or transitional reason, avers he or she is eligible to vote absentee.”⁴¹ The plaintiffs repeat the Superior Court’s reasoning in *Mennella*, claiming that the constitution “uses both a mandatory term and requires that only a voter who ‘shall’ be unable to appear may vote absentee, and singular terms, ‘may cast a ballot at such general election.’”⁴² Under their interpretation, the Delaware Constitution requires the Department to recertify each permanent absentee voter’s eligibility in each subsequent election. They argue that when the General Assembly presumed continued eligibility by sending a ballot automatically, it impermissibly expanded the pool of voters who may cast absentee ballots.⁴³

Finally, the plaintiffs argue that by “failing to require that the Department assure the eligibility of an absentee voter at each election, the General Assembly has acted in contravention of the Constitutional mandate that any such laws be enacted

⁴¹ Opening Br. 3.

⁴² *Id.* (quoting DEL. CONST. art. V, § 4A).

⁴³ *Id.*

‘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.’”⁴⁴

On appeal, with no factual disputes raised by the parties, we review constitutional issues *de novo*.⁴⁵ It is settled that “[e]nactments of the Delaware General Assembly are presumed to be constitutional.”⁴⁶ Thus, a plaintiff attacking a statute on constitutional grounds “has the burden of rebutting this presumption of validity”⁴⁷ by “clear and convincing evidence.”⁴⁸ In matters that are “fairly debatable,” we defer to the judgment of the General Assembly.⁴⁹ In other words, “[a]ll reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation.”⁵⁰

⁴⁴ *Id.* at 4. (quoting DEL. CONST. art. V, § 1).

⁴⁵ *Birney v. Del. Dept. of Homeland Sec.*, -- A.3d --, 2026 WL 2640486, at *5 (Del. 2026) (citing *In re COVID-Related Restrictions on Religious Servs.*, 326 A.3d 626, 638 (Del. 2024)).

⁴⁶ *Higgin*, 295 A.3d at 1088 (quoting *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008)).

⁴⁷ *Id.* (quoting *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997)).

⁴⁸ *Id.* at 1089 (quoting *Sierra*, 238 A.3d at 156).

⁴⁹ *Id.* (quoting *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001)).

⁵⁰ *Id.* (alteration in original) (quoting *Hoover*, 958 A.2d at 821).

II.

We start with what is not in dispute.⁵¹ Article V, Section 4A of the Delaware Constitution restricts absentee voting to specific categories of voters. Also, the permanent absentee voter statute does not deviate from those categories. The statute allows only a subset of eligible voters to vote absentee under the Delaware Constitution to secure permanent absentee voter status.

Instead, the plaintiffs contend, as they did in the Court of Chancery, that the permanent absentee voter statute implicitly “expands” the categories of eligible absentee voters beyond what the Delaware Constitution permits because it “allows electors, whom the Department does not know are eligible, to vote absentee and they do so based on a presumption of continued eligibility.”⁵² As explained next, the plaintiffs’ arguments fail for multiple reasons.

A.

The plaintiffs lean heavily on *Higgin*, where we held that the General Assembly cannot, by statute, expand the categories of voters permitted to vote absentee beyond those stated in the Delaware Constitution.⁵³ What the plaintiffs

⁵¹ Relying on *Mennella*, the Court of Chancery found that both plaintiffs had standing to pursue their constitutional claims. Op. at *5 n.2. The defendants have not contested standing on appeal.

⁵² Reply Br. 4.

⁵³ 295 A.3d at 1069.

miss, however, is that the permanent absentee voting statute does not *permit* absentee voting by voters unqualified to vote absentee under the Delaware Constitution.

As the Court of Chancery found, “permanent” absentee voting is a misnomer because the statute does not guarantee “permanent” status.⁵⁴ Instead, the statute “*prohibits* a voter with permanent status from voting by absentee ballot if he or she is no longer eligible to do so.”⁵⁵ Under the statute, the permanent absentee voter must “keep the Department informed of changes in . . . the reason that the person has listed for voting by absentee ballot.”⁵⁶

In practice, the Department has verification procedures to monitor changes in absentee voter status. As explained above, before each election, the Department sends a letter to all permanent absentee voters to remind them of eligibility requirements and their legal obligation to inform the Department of any change that would render them ineligible to vote absentee under the statute.⁵⁷ That letter is accompanied by a new absentee ballot application. Anyone whose letter is returned undeliverable has their name removed from the list of permanent absentee voters.⁵⁸

⁵⁴ Op. at *7.

⁵⁵ *Id.*

⁵⁶ 15 *Del. C.* § 5503(k)(4).

⁵⁷ A83.

⁵⁸ *Id.*

The Department also removes deceased voters from the rolls. And each permanent absentee voter must attest to their continuing eligibility on every absentee ballot they submit.⁵⁹

As the Court of Chancery recognized, in many ways the permanent absentee voting procedures mirror the statutory procedures for the permanent Delaware voter registration process. Under both procedures, a citizen applies under penalty of perjury and attests to their eligibility. The Department keeps a list of qualified voters who stay on the list until the Department is notified of changes or becomes aware of changes. By registering to vote, a citizen receives “permanent” voter status – they do not register again for each subsequent general election.⁶⁰ Like the permanent absentee voting statute, the voter registration statutes do not *permit* voters who no longer qualify to vote to cast votes in future elections.

The plaintiffs’ argument rests on a faulty premise – that the permanent absentee voting statute allows voters, who no longer qualify as absentee voters, to

⁵⁹ See A77 ¶ 21 (Aff. of Anthony J. Albence).

⁶⁰ Compare 15 Del. C. § 1101(a), with 15 Del. C. § 5503(k)(5) (both directing the Department to maintain a list of individuals); 15 Del. C. §§ 1702–1705, 1707, and 15 Del. C. § 2014(d)–(h), with 15 Del. C. § 5503(k)(3) (both requiring the Department to remove voters from the registration list or cancel permanent absentee status upon returned mail or verification of ineligibility); 15 Del. C. § 1101(b), with 15 Del. C. § 5503(k)(4) (both requiring that voters notify the Department of a change in eligibility); 15 Del. C. § 304, with 15 Del. C. § 5503(k)(5) (both mandating public disclosure of the eligible voter and permanent absentee lists).

vote absentee indefinitely in a general election. The statute as written regulates permanent absentee voting but does not permit permanent absentee voting by Delawareans ineligible to vote absentee. Thus, the statute does not expand the categories of absentee voters beyond those permitted by the Delaware Constitution to those ineligible to vote absentee.

B.

Next, the plaintiffs contend that, under the Delaware Constitution, the Department cannot “presume” a voter’s permanent absentee qualifications for all general elections by automatically mailing ballots to them.⁶¹ The argument goes as follows. Article V, Section 4A of the Delaware Constitution states that voters “who shall be unable to appear . . . may cast a ballot at such general election.”⁶² The word “shall” is a “term of certainty” which means that an absentee voter must be unable to appear in person in all general elections.⁶³ Further, Section 4A has only singular terms – “a ballot” and “such general election.” As the plaintiffs argue, presuming continuing eligibility for future elections violates Section 4A by allowing ineligible voters to vote absentee in future elections.⁶⁴

⁶¹ Opening Br. 14.

⁶² DEL. CONST. art. V, § 4A.

⁶³ Opening Br. 4, 14; Reply Br. 5–6.

⁶⁴ Opening Br. 3, 11.

The word “shall” and references to “a ballot” and “such election” (meaning one general election), refer to a voter’s eligibility to vote absentee in a general election. In other words, absentee voters must qualify for absentee status in all general elections. Although permanent absentee voters automatically receive an absentee ballot, as explained above, the statute does not permit ineligible voters to vote absentee in any election. On the contrary, the Department takes steps to ensure that only qualified permanent absentee voters vote absentee in general elections.

Along the same lines, the plaintiffs invoke Article V, Section 1 of the Delaware Constitution. It states:

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 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.⁶⁵

According to the plaintiffs, the permanent absentee voting statute conflicts with Section 1 because the statute does not measure up to the plaintiffs’ vision of what is needed to ensure compliance with constitutional voting requirements. Section 1, however, leaves it to the General Assembly to “prescribe the means,

⁶⁵ DEL. CONST. art. V, § 1.

methods, and instruments of voting so as best to secure” the “purity of elections.”⁶⁶ It does not dictate any specific regulatory scheme.⁶⁷

III.

At bottom, the plaintiffs have lost sight of the mountain they must climb to succeed on a facial constitutional challenge to legislation.⁶⁸ For a facial challenge, “the presumption of constitutionality is at its highest point.”⁶⁹ In contrast to an “as-applied” statutory challenge, where the plaintiff must demonstrate “that a statute or regulation is not valid in the particular circumstances of the case,” for a facial challenge, the plaintiff must show “that a statute or regulation is not valid under any set of circumstances.”⁷⁰

Here, the statute as written is consistent with the Delaware Constitution. And it can be applied consistently with the Delaware Constitution. Although the plaintiffs are dissatisfied with the Department’s enforcement mechanisms for

⁶⁶ *Id.*

⁶⁷ The plaintiffs also rely on *State ex rel. Smith v. Carey*, where this Court stated that the General Assembly should “take all possible precaution against fraudulent abuse of the [absentee voting] privilege.” 112 A.2d 26, 28 (Del. 1955). Elections should be secure from “fraudulent abuse.” But the “means, methods, and instruments” to protect against “fraudulent abuse” are delegated to the legislative judgment of the General Assembly.

⁶⁸ Oral Argument at 6:32–57 (“I’m trying to make it a facial challenge because I do believe the statute, by its own terms, violates both the explicit language I talked about already and the implicit history [of the Delaware Constitution.]”).

⁶⁹ *Birney*, 2026 WL 2640486, at *14.

⁷⁰ *Del. Bd. of Med. Licensure & Discipline v. Grossinger*, 224 A.3d 939, 956 (Del. 2020).

permanent absentee voting, as the Court of Chancery held, “[e]ven imperfect procedures for policing permanent absentee voters’ continued eligibility do not render ‘every application’ of the Permanent-Absentee Statute unconstitutional.”⁷¹

The permanent absentee voting provision does not violate the Delaware Constitution. The judgment of the Court of Chancery is affirmed.

⁷¹ Op. at *8 (citing *Sierra*, 238 A.3d at 156).