



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 / Appellants,)

v.)

MICHAEL HIGGIN and MICHAEL)
MENNELLA,)

Plaintiffs/Appellees/
Cross-Appellants.)

No. 342, 2022

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

C.A. Nos. 2022-0641-NAC and
2022-0644-NAC

DELAWARE DEPARTMENT OF)
ELECTIONS, and ANTHONY J.)
ALBENCE, State Election)
Commissioner,)

Defendants/Appellants,)

v.)

AYONNE "NICK" MILES,)
PAUL J. FALKOWSKI, and)
NANCY M. SMITH,)

Plaintiffs/Appellees.)

APPELLEE/CROSS APPELLANTS' REPLY BRIEF

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Dated: October 4, 2022

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CROSS-APPELLANTS
MICHAEL HIGGIN AND MICHAEL MENNELLA’S
REPLY

I. THE SAME-DAY REGISTRATION STATUTE CONFLICTS WITH THE DELAWARE CONSTITUTION.

A. Question Presented

Did the Chancery Court err when it ruled there was no express deadline in the Delaware Constitution for voter registration to end prior to the General Election?

B. Scope of Review

This Court “reviews the Court of Chancery’s decision to grant summary judgment *de novo*.” *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020). This Court also “reviews *de novo* questions of law, including questions of statutory interpretation and constitutional law” *Del. Solid Waste Auth. v. Del. Dep’t of Nat. Res. & Envtl. Control*, 250 A.3d 94, 105 (Del. 2021). Interpreting the Delaware Constitution “begin[s] with the text of the Constitution.” *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017). The text “means what it plainly says, no matter what the effect may be. To give it a different meaning would be ... judicial legislation.” *State ex rel. Southerland v. Hart*, 129 A. 691, 694 (Del. 1925). Importantly, and “[o]bviously, no presumption springing from theory may be permitted to override the clear meaning of the written document from which it is drawn.” *Du Pont v. Du Pont*, 85 A.2d 724, 728 (Del. 1951). When interpreting the constitution, “[t]he ruling must come from the interrelationship of concepts set forth

in the Constitution, the language of the Constitution, and the prior case law that has construed the Constitution.” *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 747 (Del. 1982) “[W]henever avoidable, no constitutional provision should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result.” *Op. of Justices*, 225 A.2d 481, 484 (Del. 1966).

C. Merits of Argument

1. Defendants’ argument that the Same-Day Registration Statute is valid under the Constitution ignores the plain language of the Delaware Constitution and judicial precedent.

Anthony Albence and the Delaware Department of Elections (“Defendants”) assert that Cross-Appellants Higgin and Mennella (collectively, “Plaintiffs”) “[s]electively focus” on certain language in the Constitution to “distort[] the plain text of the provisions.” Defendants’ Answering Brief (“AB”), 35. However, the only distorted reading of the Delaware Constitution is a reading that allows for voter registration within 10 days of a General Election.

Article V, Section 4 of the Delaware Constitution provides for the registration of voters, and the time period for the registration:

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*.

Del. Const. Art. V, § 4 (emphasis added). The first paragraph of Section 4 makes voter registration mandatory to vote. Del. Const. Art. V, § 4, para. 1 (“no person shall vote at such General Election whose name does not at that time appear in said list of registered voters”). The second paragraph deals with the time period in which voter registration is to take place. *Id.* at para. 2. The third paragraph of Section 4 describes the policy for granting and refusing registration. *Id.* at para. 3. These paragraphs set the framework for voter registration in Delaware, and therefore, when voter registration may occur. When considered in light of the historical registration practices outlined in Plaintiffs’ Opening Brief, and alongside the remainder of Article V, Section 4 can only be interpreted to mean that all registration must stop at least ten days before the General Election.

Indeed, all judicial precedent from the Delaware courts is in accordance with Plaintiffs’ interpretation of the Delaware Constitution. In *State v. Lyons*, the court recognized that “the *Constitution* had carefully prescribed for uniform laws for the registration of voters with proper provisions for determining that prospective voters

duly possess the necessary and prescribed qualifications.” 5 A.2d 495, 502 (1939) (emphasis in the original). The court continued,

It was provided that all questions of the qualifications of voters should be determined before election day and that on that day, beyond the fact of the identity of the persons, the sole ground of challenge should be the violation of *Article 5, Sec. 3*, as above set out.

Id. In *State ex rel. Walker v. Harrington*, the Delaware Supreme Court confirmed the *Lyons* court ruling. The Court explained that this section of the Constitution prescribes “uniform laws for registration of voters for the purpose of determining that prospective voters duly possess the necessary and prescribed qualifications” and it requires “that all questions of the qualifications of voters should be determined before election day.” 30 A.2d 688, 691 (Del. 1943). In both *Harrington* and *Lyons*, the court determined that registration had to occur *before* election day.

Finally, in *Appeal of Brown*, 49 A.2d 618 (Del. 1946), the Delaware Supreme Court confronted the question of when registration may occur under the Constitution of Delaware. Defendants fail to address the direct statements in that case, Defendants’ AB, 39-40, yet the holding in the case is directly on point with the present challenge. This Court held that Mr. Brown had a “constitutional right” to register to vote “on one of the days fixed by law, to the registration officers of his election district, and no one of these days can, *by constitutional provision*, be more than one hundred and twenty days before the General Election.” *Appeal of Brown*, 49 A.2d at 619 (emphasis added). Such a holding is just as applicable *after* 120 days

as it is *before*. Defendants fail to distinguish *Appeal of Brown*, which establishes that the dates for registration are fixed by the Delaware Constitution. In fact, Defendants fail to provide any judicial precedent to support their interpretation.

While Defendants are dismissive of the cited precedent, Plaintiffs have brought to the Court's attention all relevant case law discussing the section of the Constitution at issue, and have advised of the significance of the authorities to the matter. It would be improper to know of relevant case law and not bring it to the Court's attention. Defendants' dismissal of the cases Plaintiffs cite as *dicta* fall flat without any contrary authority supporting their position. *See* Defendants' AB, 39.

Under the new statutes changing the deadlines by which a voter must be registered to vote, Delaware residents can register and vote on the actual date of any state election. The new statute provides, in relevant part, "[t]he last date to register for any ... general election shall be the day of that election," and sets forth the process to register to vote at the polling place on election day. 15 Del. C. § 2036. 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. § 2039.

These new laws are in direct violation of Article V, Section 4 of the Delaware Constitution. The Constitution specifies that the time period to register to vote before "each General Election" must end not "less than ten days before" the election.

Del. Const. Art. V, § 4. There is an express deadline in the language – ten days before the election. The reference to prior registrants correcting their registration further confirms the deadline. The same section also addresses prior registrants and provides that, on those same days on which someone may register to vote, “...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 any time prior to the day of holding the election.” Del. Const. Art. V, § 4 (emphasis added). Reading an express deadline in Section 4 is not a distortion of the language, but rather a logical reading of the unambiguous text.

Defendants attempt to earmark the deadline only for “registration taking place during the minimum two-registration day period.” Defendants’ AB, 36. But in fact, the Chancery Court and Defendants misunderstand what language the term “such registration” references. *Id.* The term references the registration of those individuals whose eligibility to vote may be challenged, and allows them to correct any deficiency at any time prior to the day of the election. Even those already registered cannot change their registration on Election Day by the express language of the Constitution. Given that the language is express and unambiguous, there is no need to look for any implied meaning.

Defendants make much ado about other registration laws in an attempt to distract the Court from the issue at hand. Defendants' Answering Brief is sprinkled with red herring fallacies that are irrelevant to the legal issue in this case. For example, Defendants insinuate that Plaintiffs undercut their argument because they do not challenge other statutes regarding registration that may or may not conform with the Delaware Constitution. *See* Defendants' AB, 37. Defendants suggest that this Court should not review the validity of this statute because to do so might "generate[] constitutional issues", presumably regarding those other statutes. *Id.* That argument, frankly, defies logic.¹ The constitutionality of the Same-Day Registration Statute comes down to whether the statute comports to the Delaware Constitution – whether another statute is constitutional is not relevant to this inquiry.

Additionally, Defendants cite to other ways to register in Delaware, as if their existence is relevant to the Delaware Constitution's deadline. When discussing registering when applying for a driver's license, Defendants attempt to distinguish between the controlling National Voter Registration Act requirements by pointing out that those requirements apply only to registrations for federal elections. Defendants' AB, 37. But, as Plaintiffs pointed out in their Opening Brief, p. 61,

¹ The one case Defendants cite in support of their proposition does not suggest refraining from review of a matter before the Court. That case simply says that a court should "strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities." *Richardson v. Wile*, 535 A. 2d 1346, 1350 (Del. 1988) (cited on Defendants' AB, 37).

federal law requiring Delaware and most other states to provide for voter registration at motor vehicle offices does not affect a state deadline for accepting registrations. *See* 52 U.S.C., 52 U.S.C. §§ 20504(a)(1) and 20507(a)(1)(A). No Delaware law, including the constitution, can override federal law with respect to when registration can begin, but the federal law specifically defers to state law on when it can end the time period during which it will accept registrations. *Id.*

Furthermore, Defendants argue that there are a “myriad other ways eligible individuals may register to vote, none of which are time restricted,” presumably referring to registering at other state agencies. Defendants’ AB, 38. But these “myriad” of laws are again, not relevant. If they are law in Delaware, the Constitution sets the deadline, and that is, for new registrations, 10 days before the general election. *See* Del. Const. Art. V, § 4. As Delaware laws, they would be subject to the Delaware Constitution, just as the Same-Day Registration Statutes are.

The Constitution specifies that the time period to register to vote before “each General Election” must end not “less than ten days before” the election. Del. Const. Art. V, § 4. Yet the new statutes allow electors to register at their polling place on the “day of the election.” 15 Del. C. § 2036. A comparison of these two laws demonstrates that the new statutes are in violation of the Delaware Constitution.²

² Defendants attempt to characterize Plaintiffs’ argument as a policy argument against Same-Day Registration, rather than the rule of law argument that it really is. Defendants suggest that Plaintiffs ask the Court to make a policy determination that

2. The 1925 Amendments to Article V, Section 4 Do Not Extinguish the Deadline for Registration.

Defendants claim that the 1925 Amendment changed Article V, Section 4 in such a way that it permitted same day registration, which Defendants acknowledge was not permitted in the prior language. However, the language in Section 4 after the 1925 Amendment provides for precisely the same result – using the word “ending” rather than “completed” still sets a deadline.

Defendants then further attempt to obfuscate the issue in a chart where they put language from the second paragraph of Article V, Section 4 as it was before and after the 1925 amendment. In that chart, in the section containing language from the constitution before the 1925 Amendment, Defendants highlight the word “completed” with bold font. However, in the section containing language in the constitution after the 1925 Amendment, Defendants do not place the word “ending” in bold. Those terms are equivalent and intended to have equivalent impact – the registration of new voters must end 10 days before the General Election.

registration should stop 10 days before the election so the Department of Elections can “prepare and confirm registration records and prevent fraud.” Defendants’ AB, 43. In fact, Plaintiffs do not. While Plaintiffs (and the case law Plaintiffs cite) suggested those reasons may logically be behind the policy decision to stop registration at 10 days before the election, that policy decision was made by the legislature when it adopted Article V, Section 4. If the legislature wants to change the policy, it needs to amend the constitution. Plaintiffs do not strive to change or even comment on the public policy surrounding voter registration – they only seek to uphold the Delaware Constitution.

The 1925 amendment did, as contended by Defendants, eliminate the original requirement that voter registration begin no earlier than 120 days before the election. It did not, however, eliminate the requirement that such registration end no later than 10 days before the election. As addressed earlier, the only amendment to the language regarding the deadline to register was to change the word “completed” to “ending” – equivalent terms that have equivalent meanings. The 1925 Amendment thus effects no substantive change in the time for registration fixed by the Delaware Constitution.

3. Interpreting Article V, Section 4 to Apply Only to Registrations Accomplished Within the Time Frames Described Produces an Unequal, Nonuniform, and Irrational Result.

Defendants do not address Plaintiffs’ argument that the Court of Chancery’s interpretation of the law creates two classes of registrants, and would result in inequity. But no constitutional provision should be construed “to produce an irrational result.” *Op. of Justices*, 225 A.2d 481, 484 (Del. 1966). The court’s interpretation does precisely that, constituting an independent ground for reversal.

The Court of Chancery found that Section 4’s provision that “such registration may be corrected as hereinafter provided at any time prior to the day of holding the election,” Del. Const. Art. V, § 4, “does not ... foreclose the possibility of same-day registration.” *Op.* at 44. The court concluded that the phrase “such registration’

refers to registrations described in the immediately preceding passage and is silent as to registrations occurring on the day of the general election.” Op. at 45. The court saw the two time periods (Election Day versus between 60-120 and 10-20 days before Election Day, as specified in the Constitution) as separate periods of time, under separate regulations. Accordingly, those who register in the period listed in the Delaware Constitution can not correct their registration on Election Day, but those who register any other time, including on Election Day, can. Op. at 45.

The Constitution of Delaware promises “free and equal” elections, Del. Const. Art. I, § 3, and to that end, requires “uniform” voter registration laws,” Del. Const. Art. V, § 5, para. 1. But the scheme that results from the Court of Chancery’s interpretation is not “uniform” and not all Delawareans are “treated alike.” *State ex rel. Morford v. Tatnall*, 21 A.2d 185, 189 (Del. 1941). “[U]nreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.” *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Here, the “reasonable result” is the one that treats all Delawareans alike.

CONCLUSION

The recently passed voter registration deadline laws conflict with the Delaware Constitution and must be declared invalid. For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the Court of Chancery's ruling and strike the same-day registration statutes, preventing their implementation in this or any future elections.

Dated: October 4, 2022.

Respectfully submitted,

/s/ M. Jane Brady

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