

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE REPUBLICAN STATE)
COMMITTEE OF DELAWARE,)
and JOHN FOLTZ and PAULA)
MANOLAKOS,)

Plaintiffs,)

v.)

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

Defendants.)

C.A. No. 20-_____

VERIFIED COMPLAINT

Plaintiffs The Republican State Committee of Delaware (the “RSC”), John Foltz, and Paula Manolakos, by and through their undersigned counsel, upon knowledge with regard to themselves and their own acts and upon information and belief as to all other matters, hereby bring this action for injunctive relief and judgment against the State of Delaware Department of Elections and its Commissioner, Anthony J. Albence (together, the “Defendants”), declaring House Bill 346 (“HB 346”), which provides for universal voting by mail in the upcoming general election, unconstitutional. In support hereof, Plaintiffs state as follows:

Nature of the Case

1. Plaintiffs bring this action for a permanent injunction and declaratory judgment that HB 346 creates a universal “vote by mail” system for the upcoming November 3, 2020, general election that impermissibly expands the enumerated and exhaustive grounds for voting via absentee mail ballot enshrined in Article V, § 4A of Delaware’s Constitution. Voters falling into the enumerated categories may affirmatively request and, upon receipt, vote by absentee ballot. The new voting procedure introduced by HB 346, and signed into law by Governor Carney in July, upsets established constitutional means for voting absentee by flooding all registered voters with unsolicited applications to receive a voting by mail ballot, allowing any voter for any reason (or no reason at all), to vote by mail.

2. “The legislative hand is free except as the constitution restrains.” *Op. of Justices*, 295 A.2d 718, 720 (Del. 1972) (citing *Collison v. State*, 39 Del. 460, 486, 2 A.2d 97, 108 (1938)). In enacting HB 326, the Delaware General Assembly violated the constraints imposed on it by Art. V, § 4A, of the Delaware Constitution. The General Assembly simply disregarded those constraints as “impracticable.” HB 346 at 1(13). The purported authority for implementing its “vote by mail” system is Article XVII, § 1 of the Delaware Constitution, which authorizes the General Assembly to adopt emergency legislation “in order to insure continuity of State and local governmental operations in periods of emergency”—the emergency, here, being

the COVID-19 pandemic. However, notwithstanding the severity of the impact of the pandemic on social life, “vote by mail” hardly is necessary “to insure continuity of . . . governmental operations” at this time. First, all regular polling places will be open for in-person voting on November 3, 2020. Second, the Delaware Constitution already permits those sick or with physical disability to vote absentee – and the State previously announced that it would interpret this language to include any voter who has an at-risk condition or is caring for an at-risk person.¹ In the absence of a threat to the “continuity of ... governmental operations[,]” the General Assembly’s invocation of Article XVII, § 1 of the Delaware Constitution was improper and the enactment of HB 326 exceeded its constitutional authority.

3. The Supreme Court of the State of Delaware previously has held:

We are of the opinion that by expressly including certain classifications, the drafters of § 4A impliedly excluded all other classifications. It is beyond the power of the Legislature, in our opinion, to either limit or enlarge upon the § 4A absentee voter classifications specified in the Constitution for general elections.

¹ Governor Carney’s Sixth and Fifteenth Modifications of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat specifically permitted the use of the election of “sick or physically disabled” as a “reason if a voter is asymptomatic of COVID-19 infection and otherwise abiding by CDC and DPH guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19, and who herself or himself freely chooses to use such qualification to vote by absentee ballot.”

Op. of Justices, 295 A.2d at 722 (Daniel F. Wolcott, CJ). The Court should reach the same result here and enjoin the HB 346 “vote by mail” system as contrary to the Delaware Constitution and therefore prohibited as a matter of law. From a practical standpoint, the “vote by mail” system is rife with potential problems and pitfalls, as evidenced by the 5.2% rejection rate of ballots mailed in for the Delaware presidential primary. Nor is it necessary to protect against COVID-19 and to ensure the continuing functioning of the state government, as those “sick or physically disabled” or affected by COVID-19 already are permitted to cast their vote absentee by mail under pre-HB 346 constitutional authority.

4. Permitting HB 346 to stand and universal vote by mail to proceed would cause irreparable harm to Plaintiffs and other RSC members. Plaintiffs and members of the RSC rely on the Delaware legislature to enact and amend election laws that ensure that every voter has one vote and that vote gets counted. Yet in enacting HB 346, the General Assembly impinged upon the clear and enumerated exceptions to in-person voting contained in the Delaware Constitution at Art. V, § 4A, designed to ensure the integrity of the electoral process.² In so doing, they threaten to disenfranchise eligible voters due to, *inter alia*, untimely delivery of mail,

² See, e.g., *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 763 (Del. Ch. 2017) (“Viewed as a whole, the evolution of the Delaware Constitution from 1776 until 1897 evidences consistent concern for the integrity of the electoral process ...”).

ballots being rejected for non-compliance, and permitting ballots to be returned in another voter's name. Plaintiffs and the members of the RSC will face serious and irreparable harm if the November general election is not conducted in accordance with the mandates of the Delaware Constitution.

The Parties

5. The Republican State Committee of Delaware is an unincorporated political association under Title 15 of the Delaware Code with its principal place of business in the State of Delaware.

6. John Foltz and Paula Manolakos are residents of the State of Delaware and registered to vote in the State of Delaware.

7. The Delaware Department of Elections is a department of the State of Delaware.

8. Anthony J. Albence is the Commissioner of Elections for the State of Delaware.

Jurisdiction

9. This Court has jurisdiction pursuant to 10 *Del. C.* § 341, which gives the Court of Chancery jurisdiction “to hear and determine all matters and causes in equity,” and 10 *Del. C.* §§ 6501 and 6509.

10. This Court also has jurisdiction under the “clean-up doctrine” to the degree that any of the claims herein are not deemed equitable in nature.

Background

The Delaware Constitution Governs and Specifically Enumerates the Grounds for Absentee Voting in General Elections

11. Under the Delaware Constitution, the reasons for which a voter may vote by absentee ballot in a general election are strictly limited and the list is exhaustive. *See* Del. Const. Art. V, § 4A; *Op. of Justices*, 295 A.2d at 722. The Delaware Constitution specifically permits registered voters to vote absentee

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.

Del. Const. Art. V, § 4A; *see also* 15 Del. C. § 5502. Except for the reasons set forth in the Delaware Constitution, persons intending to vote in a general election must vote in person at a polling place on election day.

In Passing HB 346, the General Assembly Impermissibly Sought to Amend the Constitution

12. HB 346 was passed by the General Assembly on June 12, 2020, and signed by Governor John Carney shortly thereafter, on July 1, 2020. A copy of HB 346 is attached as **Exhibit A**. HB 346 suspends the Delaware Constitution's requirement that voting occur in person and upends its limitations on absentee voting

by allowing any voter, for *any* reason, to “vote by mail” in the upcoming November 3, 2020 general election rather than in person.

13. The Delaware Constitution directs that the General Assembly “prescribe the means, methods and instruments of voting so as to best secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.” Del. Const. Art. V, § 1. The “vote by mail” system advanced by the General Assembly does the opposite: It threatens to disenfranchise many voters and threatens the integrity of the election system.

14. In passing HB 346, the General Assembly found that compliance with Article V, § 4A, would be “impracticable” and that, consequently, it was not bound thereby:

... due to the highly contagious nature of COVID-19 and the need to protect the electors and polling workers ..., voting by mail is necessary and proper for insuring the continuity of governmental operations, and to conform to the requirements of Article V, § 4A would be impracticable.

HB 346 at 1(13).

15. Instead, the Assembly’s stated authority for passing HB 346 is another provision of the Delaware Constitution that states, in relevant part:

The General Assembly, *in order to insure continuity of State and local governmental operations* in periods of emergency resulting from enemy attack, terrorism, disease,

accident, or other natural or man-made disaster, shall have the power and the immediate duty . . . to adopt such other measures as may be necessary and proper *for insuring the continuity of governmental operations*. In the exercise of the powers conferred by this section, the General Assembly shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the General Assembly to do so would be impracticable or would cause undue delay.

Del. Const. Art. XVII, § 1(*emphasis* added).

16. HB 346 does not expound on how “vote by mail” allegedly is necessary “for insuring the continuity of governmental operations.” That assessment clearly is contradicted by the fact that the State of Delaware intends to conduct the general election with all regular polling places open for voting. And even without the “vote by mail” system created by HB 346, many voters will still be able to vote absentee. As already noted, the Delaware Supreme Court has held this list to be exhaustive. It clearly permits those with health concerns and those at-risk from the COVID-19 virus as well as their caregivers to vote by mailing an absentee ballot.

The Universal Voting by Mail Envisioned by HB 346 Also Has Numerous Practical Problems that Result in Voter Disenfranchisement

17. HB 346’s proposed “vote by mail” system threatens the integrity of election results with problems arising from untimely delivery of mail and ballots being rejected for non-compliance with the required standards. Other states’ experiments with universal vote by mail elections illustrate this point. For example, NBC News reports that in the recent New York state primary election held in June

2020, twenty-one percent of absentee ballots received in New York City were rejected for various reasons. *See* Jane C. Timm, NBC News, “1 in 5 mail ballots rejected in botched NYC primary.” (**Exhibit B**). Similarly, National Public Radio (NPR) has reported on the large number of absentee ballots rejected in 2020 presidential primaries. *See* Pam Fessler and Elena Moore, NPR, “Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected For Tardiness.” (**Exhibit C**). In a study conducted by CBS, three (3%) of test ballots mailed still had not been delivered to the addressed post office box one week later. *See* CBS News, “Vote by mail experiment reveals potential problems within postal voting system ahead of November election.” (**Exhibit D**).

18. Lest one think that such obstacles to having votes properly cast and recorded will not present in Delaware, the State’s recent experience with its July, 2020, presidential primary demonstrates that they do. For that election, all voters were permitted to vote by absentee ballot for any reason.³ In an email dated August 7, 2020 (attached hereto as **Exhibit E**), the Commissioner of Elections reported that 59,165 ballots were returned to the Department and that, of those, 3,090, or 5.2%,

³ Plaintiffs did not challenge the expanded use of absentee balloting in the presidential primary or school board elections in July 2020, and are not challenging the vote by mail system as created for the upcoming primary election this September because the Delaware Constitution’s limitations on absentee balloting apply only to the general election. *Op. of Justices*, 295 A.2d at 720.

were rejected and not counted. The reasons for not being counted included the following:

Received after deadline	1,669
No signature	273
Incomplete	89
Voter deceased	52

Put another way, in the recent Delaware presidential primary, 5.2% of voters who thought they had cast their votes in the primary by mail had their votes rejected. In a close statewide or local election, 5.2% of the vote might easily change the outcome of the election.

19. Under the procedures established by the Department in connection with HB 346, the Department will be virtually unable to determine if a vote by mail request comes from the actual registered voter or someone else. The only information a voter is required to provide the Department is their birthdate – something which is part of the publicly-available voter rolls (as well as many other sources).

20. Moreover, Plaintiffs are aware of many instances associated with the Presidential Primary, conducted on July 7, 2020, where multiple ballot requests for different voters were sent to the same address because the Department of Elections records include voters who, for a variety of reasons, no longer reside at their registered address. In other instances, absentee ballot requests were mailed to voters with forms already filled out in another name. *See* Affidavits attached as **Exhibit F**.

21. For all of the foregoing reasons, HB 346 is contrary to the Delaware Constitution, not properly adopted under the Delaware Constitution, and the procedures set forth therein should be enjoined by the Court.

COUNT I
Permanent Injunction

22. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

23. By letter sent to all registered voters dated July 17, 2020, the Department of Elections informed voters that they may vote by mail and will be sent vote by mail applications for the General Election. See **Exhibit F**.

24. HB 346 violates the Delaware Constitution and threatens the integrity of the general election – and, most importantly, is not necessary for the continuance of government operations.

25. An injunction should issue enjoining Defendants from proceeding with the November 3, 2020, general election in accordance with HB 346.

26. Plaintiffs lack an adequate remedy at law.

27. Plaintiffs will be irreparably harmed in the absence of injunctive relief.

COUNT II
Declaratory Judgment

28. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

23. Plaintiffs seek a declaratory judgment pursuant to 10 Del. C. §§ 6501 and 6509 regarding issues of fact and concerning the HB 346, specifically, that (a) in enacting HB 346, the General Assembly exceeded its constitutional authority, (b) the General Assembly impermissibly used Del. Const. Art. XVII, § 1 as a work around of the constraints on absentee voting requirements contained in Del. Const. Art. V, § 4A, and (c) the provisions of HB 346 concerning vote by mail are not “measures ... necessary and proper for insuring the continuity of governmental operations” contemplated by Del. Const. Art. XVII, § 1. The determination of these issues between Plaintiffs and Defendants entails an actual controversy in that this controversy involves the rights or other legal relations of the parties with regard to HB 346; the claim of right or other legal interest is asserted against Defendants, who have an interest in contesting the claim; the controversy is between parties whose interests are real and adverse; and the issues involved in the controversy are ripe for judicial determination.

PRAYER FOR RELIEF

For all the reasons set forth herein, Plaintiffs pray that this Court for entry of an order:

- (i) Issuing a permanent injunction enjoining Defendants from mailing out “vote by mail” ballots or otherwise informing voters

that they may vote absentee except for the specific reasons established by the Delaware Constitution;

- (ii) Declaring that in enacting HB 346, the General Assembly exceeded its constitutional authority, (b) the General Assembly impermissibly used Del. Const. Art. XVII, § 1 as a work around of the constraints on absentee voting requirements contained in Del. Const. Art. V, § 4A, and (c) the provisions of HB 346 concerning vote by mail are not “measures ... necessary and proper for insuring the continuity of governmental operations” contemplated by Del. Const. Art. XVII, § 1; and
- (iii) Awarding Plaintiffs such other and further relief as the Court deems just and proper under the circumstances.

Dated: August 19, 2020
Wilmington, Delaware

Respectfully submitted,

KLEIN LLC

/s/ Julia B. Klein _____

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