

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

LEAGUE OF WOMEN VOTERS OF
MICHIGAN, DEBORAH BUNKLEY,
ELIZABETH CUSHMAN, AND SUSAN
SMITH,

Court of Appeals
No.

Plaintiffs,

v

JOCELYN BENSON, in her official
capacity as Michigan Secretary of
State,

Defendant.

COMPLAINT FOR MANDAMUS

EXPEDITED CONSIDERATION REQUESTED

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NOW COME the League of Women Voters of Michigan, Deborah Bunkley, Elizabeth Cushman, and Susan Smith (collectively, “Plaintiffs”), by and through their undersigned attorneys, and for their Mandamus Complaint against Jocelyn Benson in her official capacity as Michigan Secretary of State, state as follows:

INTRODUCTION

1. In November 2018, the people of Michigan voted to enshrine a constitutional right in this State to vote by absentee ballot. By an overwhelming margin, the people passed a constitutional amendment giving every voter the right to submit an absentee ballot—by mail or in person, at the voter’s choosing—at any point in the 40 days preceding an election. The amendment is expressly self-executing and, by its terms, must be liberally construed in favor of voters’ rights in order to effectuate its purposes.

2. Yet Michigan’s statutes governing absentee voting have not been updated to comply with this new constitutional command. In particular, Michigan election officials continue to enforce a century-old requirement that absentee ballots must be rejected if they arrive at the clerk’s office after election day, even if they were mailed on or before election day. This received-by-election-day deadline patently violates, among other constitutional provisions, the constitutional amendment giving voters the absolute right to submit their ballots by mail in the 40 days leading up to election night. Michigan election officials have also been

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violating the constitutional amendment by refusing to provide voters absentee ballots immediately at the 40th day before the election.

3. Even before COVID-19 struck Michigan, voting by mail was set to play an unprecedented role in this year's elections, and its role will be magnified exponentially given the personal and public health risks of voting in person at a polling place. Michigan's absentee ballot voting process is simply not ready to meet its biggest test ever in the 2020 primary and general elections, when Michigan voters by the millions will attempt to vote by absentee ballot. This Complaint is an action for mandamus to compel the Secretary of State to perform her clear state constitutional duties in the administration of absentee ballot voting in Michigan, to protect the fundamental rights of the Plaintiffs and over 7 million Michigan voters.

PARTIES

4. Plaintiff League of Women Voters of Michigan ("League") is a nonpartisan community-based statewide organization with headquarters in Lansing, Michigan. The League was formed in April 1919 after women gained suffrage in November 1918. The League is affiliated with the League of Women Voters of the United States, which was founded in 1920. The League encourages its members and the people of Michigan to exercise their right to vote, including by absentee ballot, and to participate in all aspects of the democratic process, as protected by the federal Constitution, the Michigan Constitution, and federal and state laws. The mission of

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the League is to empower voters and defend democracy by promoting political responsibility through informed and active participation in government and to act on selected governmental issues. The League impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process, for example by supporting ballot proposals such as 2018 Proposals 2 and 3. Currently, the League has over 2,420 members throughout the state each of whom, upon information and belief, is a registered voter in Michigan and many of whom regularly vote by absentee ballot. The League has members in almost every county in the State. They include Republicans, Democrats, and independents. League members dedicate substantial time, effort, and resources on behalf of the League to voter education and civic engagement activities, including voter registration, non-partisan voter guides, and urging voters to vote by absentee ballot and educating them on how to do so. That education includes informing voters about the law requiring absentee ballots be returned by 8 PM on election day. The League's and its members' missions of educating about and encouraging absentee voting are harmed by the state constitutional and statutory violations detailed in this Complaint which divert League resources from other aspects of its mission. The League has organizational and associational standing to represent its members who wish to vote by absentee ballot.

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5. Plaintiff Deborah Bunkley is a registered voter residing in Hamtramck who regularly votes by absentee ballot and who desires to do so in future elections. She has a clear state constitutional right to vote and to vote by absentee ballot. She is a League member who participates in the activities described in paragraph 4.

6. Plaintiff Elizabeth Cushman is a registered voter residing in Dearborn who regularly votes by absentee ballot and who desires to do so in future elections. She has a clear state constitutional right to vote and to vote by absentee ballot. She is a League member who participates in the activities described in paragraph 4.

7. Plaintiff Susan Smith is a registered voter residing in Ypsilanti who regularly votes by absentee ballot and who desires to do so in future elections. She has a clear state constitutional right to vote and to vote by absentee ballot. She is a League member who participates in the activities described in paragraph 4.

8. Defendant Jocelyn Benson is the Michigan Secretary of State, a state officer, and Michigan's "chief election officer" who "shall have supervisory control over local election officials." MCL § 168.21. Secretary Benson has the exclusive power to "direct local election officials as to the proper methods of conducting elections." MCL § 168.31(1)(b); *see also id* § 168.509n. Secretary Benson is also solely responsible for "[e]stablish[ing] a curriculum for comprehensive training and accreditation of all county, city, township, and village officials who are responsible for conducting elections." MCL § 168.31(1)(j). Secretary Benson took an oath of

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office to support the Michigan Constitution, *see* Const 1963 Art 11, §1, and has a clear legal duty to enforce the Michigan Constitution regarding elections requiring no exercise of judgment or discretion. She is sued in her official capacity.

JURISDICTION

9. This Court has jurisdiction over this mandamus action pursuant to MCL § 600.4401(1), MCR 3.305(A)(1), and MCR 7.203(C)(2).

10. “Mandamus actions may be brought” to “challenge on constitutional grounds ... legislative enactments which affect the duties of a state officer.” *Hertel v Racing Comm’n, Dep’t of Agriculture*, 68 Mich App 191, 198; 242 NW2d 526, (1976). This Court may issue mandamus to invalidate such a statute and compel the state officer to comply with the relevant constitutional provisions. *See id.*; *Deneweth v State Treasurer*, 32 Mich App 439, 442; 189 NW2d 10 (1971).

NECESSITY FOR EXPEDITED CONSIDERATION AND IMMEDIATE ACTION

11. There is an urgent need for the Court to render an expedited decision in this case involving the state constitutional rights of voters in the fast approaching August 4, 2020 primary and November 3, 2020 general elections.

12. The Michigan Supreme Court has declared that election-related cases should be considered expeditiously. *See Scott v Director of Elections*, 490 Mich 888, 889; 804 NW2d 119 (2011). It is especially imperative that this case be decided on an expedited basis in light of the COVID-19 pandemic. Because absentee voting

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may provide the only safe way for millions of Michiganders to cast their ballots in this year's remaining elections, it is essential that Michigan's procedures for absentee voting comply with all statutory and constitutional requirements.

13. MCR 7.213(C)(4) also mandates that election-related cases be given precedence on this Court's calendar.

FACTUAL ALLEGATIONS

2018 Proposal 3

14. In the November 2018 general election, by a margin of 67% to 33%, Michigan voters adopted 2018 Proposal 3, which created several state constitutional voting rights now set forth in Article 2, § 4 of the Michigan Constitution.

15. Proposal 3 created an unqualified, unconditional state constitutional right for registered voters to vote in all elections:

Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(a) The right, once registered, to vote a secret ballot in all elections.

Const 1963, art 2, § 4(1)(a).

16. Proposal 3 also created an unqualified, unconditional state constitutional right for registered voters to vote in all elections by absentee ballot. Specifically, the Michigan Constitution now provides all voters the right:

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to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent ballot is applied for, received, and submitted in person or by mail.

Id., art 2, § 4(1)(g).

17. Proposal 3 further provided that these rights “shall be self-executing” and “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” *Id.*, art 2, § 4(1).

Absentee Voting Under Michigan Election Law

18. Virtually all of Michigan election laws and procedures regarding absentee voting predate Proposal 3 and have not been updated to meet its more robust constitutional protections.

19. By statute, Michigan voters can apply for an absentee voter ballot any time during the 75 days prior to an election and up until 8 PM on election day. *See* MCL §§ 168.759(1), (2); 168.761(3). Absentee ballots are not issued except upon application. *Id.*

20. Upon receipt of an absentee ballot application during the 75-day period and verification of its signature, a city or township clerk “immediately . . . shall . . . mail or deliver personally” the absentee ballot to the voter. MCL § 168.761(1). Absentee ballots cannot be emailed to voters. The overwhelming majority of absentee ballots are sent to voters by regular mail.

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21. City and township clerks can mail an absentee ballot by first class mail to a registered voter until 5 PM on the Friday before an election. MCL § 168.759(1). In other words, a voter can submit an application for an absentee ballot on the Friday before election day, and the clerk can put the voter's ballot in the mail up until 5 PM that day, such that the voter likely would not receive the ballot until at least Monday or Tuesday the next week (with Tuesday being election day).

22. Clerks are also permitted to issue absentee ballots to registered voters in person until 4 PM on the day before an election. MCL § 168.759(1). Absentee ballots issued in person on the day before election day must be voted at that time and cannot be taken away to be voted and mailed. *See id.*

23. Only voters who register on election day and desire to vote that day can apply for, receive, and vote an absentee ballot on election day, and can only do so in the clerk's office. *See* MCL § 168.761(3).¹

24. Since at least 1929, Michigan election law has required that in order for an absentee ballot to be counted, it must be received by the city or township clerk or an assistant to them before the polls close at 8 PM on election day. *See* MCL §§ 168.759b, 168.764a Step 6, 168.765(4); Compiled Laws of 1948 § 180.8;

¹ There is an exception allowing clerks to issue absentee ballots on election day to registered voters who become physically disabled or are absent due to family sickness or death. *See* MCL § 168.759b.

Compiled of Laws of 1929 § 3141.² This “received-by-election-day” deadline applies irrespective of when a voter applied for her absentee ballot, when the clerk approved the voter’s application and sent the absentee ballot to the voter, when the voter received the ballot, or when the voter mailed the completed ballot.

25. Envelopes containing absentee ballots received by local clerks after the polls close must be marked with date and time of receipt and retained unopened. *See* MCL § 168.765(4).

Due to Michigan Election Law and the Digital Divide, Electronic Access to the Absentee Voter System Is No Substitute for the Regular Mail

26. Certain parts of the absentee ballot process cannot use electronic delivery and return, such as sending an absentee ballot to a voter and the voter returning it. However, the absentee ballot *application* procedure could employ electronic delivery and return, thereby assisting Michigan’s over 7 million registered voters in the exercise of their state constitutional rights.

27. Unfortunately, even though we are 20 years into the 21st Century and every local clerk is accessible by email, Michigan election law does not mandate that all local clerks provide the option for a voter to ask for an absentee ballot application by electronic means, or to return the application by electronic means.

² Some of the absentee voting procedures for military and overseas voters are different than here described but the election day 8 PM ballot receipt rule applies to their ballots.

28. While local clerks voluntarily provide electronic delivery and return options for absentee ballot applications under guidance by Secretary Benson, *see* Michigan Department of State, *Election Officials' Manual*, Ch 6, p 2, practices are inconsistent across the state.

29. But even where local clerks provide such options, another hurdle exists: Michigan's digital divide. Nearly 1.6 million Michigan citizens, many of them in rural areas, poor, and/or racial minorities, have no broadband Internet access. *See, e.g.,* Khalid, *America's digital divide is even more urgent during the pandemic*, Quartz (April 9, 2020).

30. For all these reasons, Michigan absentee voters are all partially or completely dependent on the costs and vicissitudes of regular mail to exercise their state constitutional right to vote an absentee ballot.

Regular Mail in the Absentee Ballot Process

31. If a voter and clerk both use mail throughout the absentee ballot process, there are at least five times where mail processing and delivery occur: (1) when the voter requests an application from the clerk by mail; (2) when the clerk mails an application to the voter; (3) when the voter mails the application back to clerk; (4) when the clerk mails a blank absentee ballot to the voter; and (5) when the voter mails the completed ballot back to the clerk. The voter must provide the postage for steps 1, 3, and 5.

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32. When the 8 PM election day ballot receipt requirement was established in 1929, mail within a city or township was processed locally, and next day delivery and twice daily deliveries were common in residential areas. *See United States Postal Service (USPS), An American History (2020), p 27.*

33. Such prompt processing and frequent delivery no longer occur. Now, all mail goes from a local post office to a regional sorting facility and from there to a local post office for delivery. There are five such regional facilities serving Michigan: Pontiac, Grand Rapids, Traverse City, and Marquette, Michigan, and Green Bay, Wisconsin.

34. Absentee ballots are sent and returned by first class mail, for which the USPS indicates an “estimated delivery time” of 1 to 3 business days, *see USPS.com, FAQ’s, What are the Types of First Class Mail?*, but the USPS “does not guarantee the delivery of First Class mail. . . within a specified time.” USPS, Domestic Mail Manual 133.2.1. Private sources indicate that the 1-3 day estimated delivery time is in fact a 1-3 day *average*, *see Smallbusiness.chron.com, How long does it take for first class mail to arrive?*, which means delivery could take more than 3 business days. Therefore, no Michigan absentee voter knows how long their application or their completed absentee ballot will take to be delivered to their local clerk.

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35. If the average mail processing and delivery time is 3 days, the five steps described in Paragraph 31 alone will take at least 15 days of the 40-day pre-election absentee ballot voting period expressly guaranteed by the Michigan Constitution.

36. Added to these two weeks or more of delivery time are the time to process an application and mail a ballot in the clerk's office, and the time a voter needs to complete one of the longest ballots in the country. *See* Citizen's Research Council of Michigan, *The Long Ballot in Michigan* (1984), p 1.

37. Taken together, a voter who requests an absentee ballot two weeks before an election has a significant risk of the completed ballot arriving late at the clerk's office and not being counted.

38. Moreover, many voters wait until close to the deadline for requesting an absentee ballot to submit their request. In the March 2020 presidential primary, more than 150,000 voters requested an absentee ballot in the week before the election.³

39. The lengthy delivery times for mail delivery, in conjunction with the time it takes for clerks to process absentee ballot applications, mean that voters who request an absentee ballot in the week before an election are highly unlikely to be

³ Compare White, *Absentee voters can vote again if favorite candidate is out*, Associated Press (March 3, 2020) (stating that 812,000 absentee ballots had been requested as of March 3, 2020), with Detroit Today, *Absentee Ballots Cast In Michigan Primary Could Reach Close to a Million*, WDET (March 10, 2020) (stating that 970,000 absentee ballots had been requested as of March 10, 2020).

able to return it by mail so that it is received by their local clerk by 8 PM on election day. As mentioned, clerks can mail a voter's absentee ballot until 5 PM on the Friday before the election. If a clerk mails a voter a blank ballot on that Friday, the voter likely will not receive it until Monday or Tuesday of the next week, at which point it will be too late for the voter to mail the ballot back and have it arrive at the clerk's office by 8 PM on Tuesday.

Disenfranchisement Due to the Received-By-Election-Day Deadline

40. The received-by rule has been disenfranchising voters for a century. Tens of thousands of absentee ballots have not been counted since the passage of Proposal 3 alone.

41. That number will grow significantly due to public education about the absentee ballot option by Secretary Benson, local clerks, and private groups such as the League, and also due to voters' fear of being in a polling place as a result of the COVID-19 pandemic.

42. For example, in the May 5, 2020 elections for the first time ever the Secretary of State mailed an absentee ballot application with prepaid return postage to every eligible voter. See Michigan Department of State, *Secretary of State to Mail Absent Voter Ballot Applications to All May 5 Voters* (March 23, 2020), <https://www.michigan.gov/sos/0,4670,7-127--522761--EM,00.html>. As a result, turnout doubled as voters cast absentee ballots at a 99% rate. See Michigan

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Department of State, *Record-Breaking Turnout for May 5 Election Demonstrates Michigan Voter Commitment to Democracy* (May 6, 2020), <https://www.michigan.gov/sos/0,4670,7-127-93094-528236--,00.html>.

Unfortunately, 1.75% of those absentee ballots were not counted because of the received-by deadline.

43. On May 19 Secretary Benson announced that she would again mail absentee ballot applications to all registered voters for the August and November, 2020 elections. See Michigan Department of State, *Benson: All Voters Receiving Applications to Vote by Mail* (May 19, 2020),

<https://www.michigan.gov/sos/0,4670,7-127-93094-529536--,00.html>. While that is good news for all Michigan voters, increased absentee voting means that tens of thousands of additional absentee ballots will go uncounted because of the received-by deadline.

44. Turnout in Michigan general elections in non-presidential years has increased sharply, from 3,188,956 in 2014 to 4,341,340 in 2018, a 36% increase and a record turnout in a gubernatorial election.

45. Turnout in Michigan general elections has also been increasing in presidential election years, from 4,780,701 in 2012 to 4,874,619 in 2016 to a projected return turnout of 5.3 to 6 million in 2020. See Gray, *Huge Michigan Voter Turnout Could Turn into National Embarrassment*, Detroit Free Press (January 14,

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2020). Voter enthusiasm is at unprecedented levels for the 2020 elections. *See* Livengood, *Richard Czuba: Keeping an Eye on Voter Motivation in 2020*, Crain's Detroit Business (December 15, 2019).

46. The combination of higher turnout and a higher rate of absentee voting will lead to record levels of uncounted absentee ballots in 2020 and future elections due to the received-by deadline. For example, even if only 5.3 million voters turn out in the November 2020 election, and even if only 45% of them vote by absentee ballot, then there will be 2,385,000 absentee ballots cast. If 1.75% of those ballots are not counted because they are received beyond the received-by deadline (the rate in May, 2020) 41,738 absentee ballots will not be counted, each representing one of the 41,738 voters who will be disenfranchised. This table details the number of disenfranchised voters at two turnout levels and five absentee voter rates:

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<u>Turnout</u>	<u>Absentee Voting Rate</u>	<u>Absentee Voters</u>	<u>Uncounted Rate Due to Received-By Deadline</u>	<u>Uncounted Absentee Votes Due to Received-by Deadline</u>
5,300,000	45%	2,385,000	1.75%	41,738
5,300,000	50%	2,650,000	1.75%	46,375
5,300,000	55%	2,915,000	1.75%	51,013
5,300,000	60%	3,180,000	1.75%	55,650
5,300,000	65%	3,445,000	1.75%	60,288
5,600,000	45%	2,520,000	1.75%	44,100
5,600,000	50%	2,800,000	1.75%	49,000
5,600,000	55%	3,080,000	1.75%	53,900
5,600,000	60%	3,360,000	1.75%	58,800
5,600,000	65%	3,640,000	1.75%	63,700

47. Uncounted absentee ballots due to the received-by deadline are sufficient in number to change statewide election results. For example, the margin in the 1990 gubernatorial election was only 17,595 votes. The margin in the 2002 attorney general race was only 5,200 votes.

48. The margin in the 2016 presidential election was only 10,704 votes. If the received-by deadline remains in effect, every plausible estimate of the number of voters who will be disenfranchised due to the deadline in November 2020 easily surpasses that margin.

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***Failure to Make Ballots Available Immediately
Within 40 Days of Election Day***

49. The Michigan Constitution now guarantees every registered voter the right to cast an absentee ballot “during the forty (40) days before an election.” Const 1963, art 2, § 4(1)(g).

50. Michigan law also requires clerks to send absentee ballots to voters “immediately upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerk.” MCL § 168.761(1).

51. Together, these constitutional and statutory provisions require election officials to “immediately” transmit absentee ballots on the 40th day prior to an election to qualified voters who submitted an application before that date, and to “immediately” provide absentee ballots to qualified voters who submit an application within 40 days of the election.

52. Numerous election officials across the State have disregarded these requirements. For instance, in the March 2020 presidential primary, Meridian Township waited until 25 days before the election to begin mailing absentee ballots to voters.⁴ Sterling Heights did not start mailing absentee ballots until eight days

⁴ Sweet, *UPDATE: Meridian Township Clerk Election Issues Have Been Corrected*, WILX10 (March 6, 2020).

into the 40-day period, and Macomb Township and Kentwood waited until six days into the 40-day period.⁵

53. Some clerks have also ignored the constitutional requirement that voters have the option to cast an absentee ballot in person at any point within 40 days prior to the election. On information and belief, for the March 2020 presidential primary, Farmington Hills and Shelby Township did not begin allowing residents to cast absentee ballots in person at the clerk's office until over a week into the 40-day pre-election period.

Impact of the COVID-19 Pandemic on the Upcoming 2020 Elections

54. The disenfranchisement already caused by Michigan's antiquated system of absentee voting could substantially increase in the context of the current public health crisis resulting from the COVID-19 pandemic.

55. On March 10, 2020, shortly after the first COVID-19 cases were diagnosed within Michigan's borders, Governor Gretchen Whitmer declared a state of emergency.⁶

⁵ Mauger, *Voting Advocates: Some Clerks Failing to Send Absentee Ballots Quickly Enough*, Detroit News (February 5, 2020).

⁶ Executive Order No 2020-4, <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-04.pdf>

56. The virus has taken a massive toll on the State. As of May 15, 2020, there were 50,079 confirmed cases of COVID-19 in the State of Michigan.⁷ The State has reported 4,825 deaths resulting from those cases.⁸

57. According to tracking by Johns Hopkins University, Michigan ranks seventh in the nation for the highest number of COVID-19 cases, and fourth in the nation for number of deaths.⁹

58. Dr. Robert Redfield, the Director of the Centers for Disease Control and Prevention (CDC), has stated that “most likely” there will be a second wave of mass infection in the fall, as the November general election draws near. Dr. Redfield explained that a second wave will require states to “aggressively re-embrace some of the mitigation strategies that we have determined had impact, particularly social distancing.”¹⁰

59. Polling places can be crowded environments that, according to public-health officials, promote the transmission of COVID-19. Indeed, the CDC has

⁷ See <https://www.michigan.gov/coronavirus>.

⁸ *Id.*

⁹ See <https://coronavirus.jhu.edu/map.html>.

¹⁰ Gander, *CDC Director Says There May be Another Coronavirus Wave in Late Fall and a ‘Substantial Portion of Americans’ Will be Susceptible*, Newsweek (April 1, 2020) <https://www.newsweek.com/cdc-director-coronavirus-wave-late-fall-substantial-portion-americans-will-susceptible-1495401>.

encouraged the adoption of “voting methods that minimize direct contact with other people and reduce crowd size,” including mail-in voting and early voting.¹¹

60. As demonstrated by the May 5, 2020 elections, given the risks posed by the COVID-19 pandemic, many more Michigan citizens than usual will seek to vote by absentee ballot—rather than in person at a polling place—in the upcoming primary and general elections.

61. The unprecedented number of absentee ballot applications will place enormous strain on local clerks, causing delays in processing applications and sending voters their ballots. These delays will be compounded by delays in mail delivery. The COVID-19 pandemic has already increased mail delivery times in Michigan, promising yet another hurdle for Michigan’s absentee voting system and making it all the more likely that votes will be discarded for failure to arrive by election day. *See Hicks, Mail Service Slows in Michigan as Coronavirus Hits Postal Workers*, Gov’t Tech (April 7, 2020).

¹¹ *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

COUNT I – MANDAMUS

The Statutory Requirement that Absentee Ballots Be Received by 8 PM on Election Day Violates the Michigan Constitution

A. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(g), the Michigan Constitution’s Absentee Voting Clause

62. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

63. Article 2, § 4(1)(g) of the Michigan Constitution (the “Absentee Voting Clause”) provides, in relevant part, that “[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights: ... (g) to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether an absent ballot is applied for, received, and submitted in person or by mail.”

64. The Absentee Voting Clause, adopted overwhelmingly by the people of Michigan in 2018, grants registered voters the unqualified right to submit an absentee ballot—by mail—at any time during the 40 days preceding an election.

65. The 2018 constitutional amendment that added the Absentee Voting Clause and other voting-rights protections states that “[a]ll rights set forth in this subsection shall be self-executing, and that its protections “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” Const 1963, art 2, § 4(1). Self-executing constitutional provisions are judicially enforceable

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without “further legislation.” *Rusha v Dep’t of Corrections*, 307 Mich App 300, 308; 859 NW2d 735 (2014), *lv denied*, 498 Mich 860; 865 NW2d 28 (2015). And “[i]t is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.” *Wolverine Golf Club v Hare*, 384 Mich App 461, 466; 185 NW2d 392 (1971).

66. On its face, the century-old statutory requirement that absentee ballots be received by the clerk by 8 PM on election day violates the Absentee Voting Clause. This received-by deadline results in the rejection of absentee ballots that voters submit “during the forty (40) days preceding an election.” For instance, a voter who mails her completed ballot the day before election day will have her ballot rejected if it arrives at the clerk’s office two days later. The received-by deadline thus facially denies voters their express constitutional right “to choose” to submit their absentee ballots “by mail” at any time within 40 days of election day.

67. Secretary Benson has a clear legal duty to direct local clerks to count absentee ballots submitted by mail if they are *sent* by the voter at any point in the 40 days up to and including election day. This includes all ballots postmarked or marked with other official information from the USPS that validates the voter mailed the ballot by election day and all ballots received by the relevant clerk’s office the day after election day regardless of postmark, since any mail received via the USPS must have been sent at least a day earlier.

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68. The disenfranchisement that will result from enforcement of the received-by deadline, in violation of the Absentee Voter Clause, will be enormous in magnitude. As explained, the time required for mail delivery, in conjunction with the time it takes for clerks to process absentee ballot applications, mean that voters who request an absentee ballot in the week before an election are highly unlikely to be able to return it by mail so that it is received by 8 PM on election day. Indeed, clerks can mail voters their blank ballots until 5 PM on the Friday before the election. If a clerk mails a voter a blank ballot on that Friday, the voter likely will not receive it until Monday or Tuesday of the next week, at which point it will be too late for the voter to mail the ballot back and have it arrive at the clerk's office by 8 PM on Tuesday. These voters and thousands of others who mail their ballots on or close to election day will be denied their express constitutional right to "vote an absent voter ballot without giving a reason" in the 40 days before an election and "to choose whether an absent ballot is applied for, received, and submitted in person or by mail."

B. The Received-By Deadline Violates Const 1963, Art 2, § 4(2), the Michigan Constitution's Purity of Elections Clause

69. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

70. Article 2, § 4(2) of the Michigan Constitution contains a Purity of Elections Clause, which provides in relevant part that "[t]he legislature shall enact

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laws to preserve the purity of elections” and “to guard against abuses of the elective franchise.”

71. The Purity of Elections Clause demands “fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party v Sec’y of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). Specifically, it requires that “every elector’s franchise [be] of equal value to every other elector,” such that “every elector has an equal voice in the choice of those who shall represent the people.” *Maynard v Bd of Dist Canvassers*, 84 Mich 228, 240-41; 47 NW 756 (1890). The Clause prohibits the legislature from “subvert[ing] the will of the people as expressed through the ballot,” and mandates that “the majority or plurality of votes cast for any person or measure must prevail.” *Id.* at 239, 244.

72. On its face, the received-by deadline violates the Purity of Elections Clause. Under the received-by deadline, two similarly situated individuals could timely request absentee ballots on the same day, or timely mail back their completed absentee ballots on the same day, but inherent variation in mail-delivery schedules or application-processing speeds could result in one individual having her vote counted while the other does not. That differential treatment between similarly situated voters—disenfranchising some but not others for reasons outside of the voters’ control—is the antithesis of “fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party*, 412 Mich at 598.

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73. The received-by deadline also violates the Purity of Elections Clause because it “subvert[s] the will of the people as expressed through the ballot.” *Maynard*, 84 Mich at 242. Not only does it subvert the will of the voters who adopted Proposal 3 in 2018, but as described, the number of uncounted absentee ballots due to the received-by deadline in this year’s remaining elections will exceed the margin of victory in several recent statewide elections. Thus, enforcement of the received-by deadline does not just disenfranchise individual voters, but also potentially prevents “the candidate who received “the majority or plurality of votes cast” from prevailing. *Id.*

74. Secretary Benson has a clear legal duty not to enforce a statute that violates the Purity of Elections Clause’s mandate to treat all voters equally, to avoid disenfranchising voters through no fault of their own, and to ensure that the will of the people prevails. Those duties clearly require Secretary Benson to direct local clerks to count all absentee ballots that voters sent on or before election day.

C. The Received-By Deadline Violates Const 1963, Art 1, §§ 3, 5, the Michigan Constitution’s Free Speech and Assembly Clauses

75. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

76. Article 1, § 3 of the Michigan Constitution provides: “The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.”

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77. Article 1, § 5 of the Michigan Constitution provides: “Every person may freely speak, write, express and publish his views on all subjects, . . . and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”

78. The Michigan Supreme Court has held that these state constitutional provisions “may afford broader free expression and petition protections against government infringements” than “the federal constitution’s Bill of Rights.” *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 202; 378 NW2d 337 (1985).

79. The Michigan Constitution’s freedom of speech and assembly provisions protect the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote. Voting for a candidate of one’s choice is core political speech and expressive conduct protected by the Michigan Constitution.

80. On its face, the received-by deadline violates Michigan voters’ rights of political speech and expression. Many voters who timely request absentee ballots in compliance with Michigan law and who send their completed ballots on or before election day will, through no fault of their own, have their ballots discarded. These voters will be denied the ability to express their views through their absentee ballots, and thus will be denied the right to engage in core political speech.

81. The received-by deadline especially burdens the speech of undecided and late-deciding voters. Many voters are undecided about who they wish to vote

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for and will not decide until on or very close to election day. In an effort to ensure that their votes are counted, these undecided voters may be forced to commit to voting for a candidate or ballot measure that they otherwise would not have voted for—in other words, to commit to the content of their political expression without all the information that they need to make an informed decision. That harm, too, renders enforcement of the received-by deadline unconstitutional.

82. The state does not have a legitimate interest, let alone a compelling one, justifying the inevitable stifling of protected political speech that results from enforcement of the received-by deadline. Nor is the received-by deadline narrowly tailored to any such interest, given the availability of a sent-by-election-day deadline, which is used in at least 11 states that allow voting by mail.¹²

83. This unlawful burdening of political expression would not occur if all ballots sent on or before election day were counted. Secretary Benson has a clear legal duty to direct local clerks to count such ballots.

D. The Received-By Deadline Violates Const 1963, Art 1, § 2, the Michigan Constitution’s Equal Protection Clause

84. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

¹² AK Stat § 15.20.081(e); Cal Elec Code § 302; Iowa Code Ann § 53.17(2), (3); Md Code Regs § 33.11.03.08(B); NY Elec Law § 8-412(1); NC Gen Stat Ann § 163A-1310(b)(2)(b); ND Cent Code Ann § 16.1-07-09; Tex Elec Code § 86.007(a)(2); Utah Code § 20A-3-306(2)(b); Wash Rev Code § 29A.40.091(4); West Va Code § 3-3-5(g).

85. Article 1, § 2 of the Michigan Constitution provides, in relevant part: “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.”

86. Laws that differentiate between individuals with respect to a “fundamental right,” which includes all rights that have their “source, explicitly or implicitly,” in the Constitution, are subject to strict scrutiny. *Am. States Ins. Co. v. State Dep’t of Treasury*, 220 Mich App 586, 594; 560 NW2d 644, 649 (1996). Under strict scrutiny, “the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

87. Even before Article 2, § 4(1)(a) established a constitutional right to vote, Michigan courts repeatedly recognized that voting is a fundamental interest. *Anderson v City of Detroit*, 54 Mich App 496, 499 n 1; 221 NW2d 168 (1974), *lv denied*, 400 Mich 826 (1977) (“Fundamental interests include the right to vote and travel”); *see also People v. Smith*, 502 Mich 624, 638; 918 NW2d 718 (2018) (“[T]he right to vote is an implicit fundamental political right that is preservative of all rights.” (quotation marks omitted)). Legislative classifications that affect voting rights are therefore subject to strict scrutiny. *Anderson*, 54 Mich App at 499 n 1.

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88. The received-by deadline is subject to strict scrutiny because it differentiates between and classifies individuals with respect to their fundamental interest in voting. Due to disparate mail delivery times throughout Michigan, one absentee voter's ballot may reach her local clerk in 1 day while another Michigan voter's ballot mailed on the same day may take 3 or more days to be delivered. Indeed, absentee voters who are next-door neighbors and who mail their ballots from the same mailbox or post office on the same day may have their ballots delivered to the local clerk on different days, with one ballot being counted and the other not.

89. The arbitrary, differential treatment of similarly situated voters fails strict scrutiny. The State has no legitimate interest, let alone a compelling one, in imposing a deadline that will necessarily and arbitrarily disenfranchise a large number of Michigan voters through no fault of their own. And even if the State had such an interest, the received-by deadline is not necessary to further it. Counting all ballots sent on or before election day achieves the same interest in uniformity or orderliness that the State might claim.

90. At least eleven states that allow voting by mail consider mailed ballots timely if postmarked on election day or the day prior, showing that this sent-by-election-day rule is manageable and imposes no significant administrative burden.¹³

¹³ AK Stat § 15.20.081(e); Cal Elec Code § 302; Iowa Code Ann § 53.17(2), (3); Md Code Regs § 33.11.03.08(B); NY Elec Law § 8-412(1); NC Gen Stat Ann § 163A-1310(b)(2)(b);

91. Enforcement of the received-by deadline causes another form of impermissible differentiation. Voters who are in line at a polling place at 8 PM on election day are permitted to vote after 8 PM. MCL 168.720. If the line is long enough, these voters may not actually vote until the day after election day, yet their vote counts. But by operation of the received-by deadline, many similarly situated absentee voters who mail their ballots to the clerk by election day will be disenfranchised.

92. This disparate treatment of voters in line at 8 PM on election day and absentee voters who mail their ballots by election day is not justified by any legitimate state interest and thus violates the Michigan Constitution's equal protection guarantee under any standard of review.

93. These unlawful differentiations would not occur if all ballots sent on or before election day were counted. Secretary Benson has a clear legal duty to direct local clerks to count such absentee ballots.

E. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(a), the Michigan Constitution's Right to Vote Clause

94. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

ND Cent Code Ann § 16.1-07-09; Tex Elec Code § 86.007(a)(2); Utah Code § 20A-3-306 (2)(b); Wash Rev Code § 29A.40.091(4); West Va Code § 3-3-5(g).

95. Article 1, § 4(1)(a) of the Michigan Constitution establishes “[t]he right, once registered, to vote a secret ballot in all elections.”

96. On its face, the received-by deadline violates this constitutional right to vote. As explained, application of the received-by deadline will ensure that a large number of registered Michigan voters who comply with all statutory deadlines will not be able to vote, in clear violation of their constitutional right to do so.

97. Secretary Benson has a clear legal duty to direct local clerks to count absentee ballots sent on or before election day.

COUNT II – MANDAMUS

The Failure to Immediately Process Absentee-Ballot Applications Within 40 Days of Elections Violates Const 1963, Art 2, § 4(1)(g), the Michigan Constitution’s Absentee Voting Clause, and MCL § 168.761(1)

98. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

99. Article 2, § 4(1)(g) of the Michigan Constitution establishes “[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.”

100. The rights created by the Absentee Voting Clause are “self-executing,” and its protections “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” Const 1963, art 2, § 4(1).

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101. Section 168.761(1) of Michigan’s Election Law provides, in relevant part, that “the clerk immediately upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerk, shall forward by mail, postage prepaid, or shall deliver personally 1 of the ballots or set of ballots if there is more than 1 kind of ballot to be voted to the applicant.” MCL § 168.761(1).

102. In tandem with the unqualified constitutional right to vote by absentee ballots in the 40 days before an election, MCL § 168.761(1) by its plain terms requires, for all voters who have applied for absentee ballots more than 40 days before an election, that those ballots be issued “immediately” on the 40th day before the election.

103. The Absentee Voting Clause and MCL § 168.761(1) likewise require, for all voters who apply for absentee ballots in the 40-day period before an election, that ballots be issued “immediately” upon receipt of the application.

104. As explained, in prior elections, absentee ballots have not been made immediately available to voters in the 40 days leading up to elections. For example, in the March 2020 presidential primary, Meridian Township waited until 25 days before the election to begin mailing absentee ballots to voters.

105. Moreover, on information and belief, some election clerks in prior elections have not permitted voters to cast their properly requested absentee ballots

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in person within 40 days of the election, which the Absentee Voting Clause expressly requires.

106. Secretary Benson has a clear legal duty to ensure compliance by local clerks with the 40-day voting period in Absentee Voting Clause and the immediacy requirement within MCL § 168.761(1).

COUNT III – MANDAMUS

Requiring Absentee Voters to Pay the Postage to Return Their Absentee Ballots Violates Const 1963, Art 2, §§ 4(1)(a) and (g)

107. Plaintiffs hereby incorporate by reference all foregoing paragraphs as if they were fully set forth herein.

108. Requiring absentee voters to pay the postage to return their absentee ballots violates Article 2, §§ 4(1)(a) and (g) of the Michigan Constitution, which create an unconditional right to vote without payment of any costs to do so.

The Conditions for Mandamus Relief are Satisfied

109. Plaintiffs hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

110. Plaintiffs have clear state constitutional and statutory rights to the administration of Michigan election law as set forth in this Complaint.

111. Secretary Benson has clear legal duties to ensure compliance with the constitutional and statutory provisions at issue in this case. Secretary Benson “has supervisory control over local election officials in the performance of their duties,”

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MCL § 168.21, and is mandated by statute to “direct local election officials as to the proper methods of conducting elections,” MCL § 168.31(b).

112. Secretary Benson’s compliance with her legal duties is ministerial in that it will involve no “exercise of discretion or judgment.” *Citizens Protecting Michigan's Constitution v. Sec’y of State*, 280 Mich App 273, 291-92; 761 NW2d 210 (2008). Directing local clerks to provide postage to return absentee ballots (Count III), to send ballots to voters on specified dates (Count II), to allow citizens to vote in person on specified dates (Count II), and to count ballots that were mailed by a specific date (Count I) are all actions that require “no exercise of discretion.” *Bd. of State Canvassers*, 318 Mich App at 254.

113. Plaintiffs have no other adequate remedy in law or equity except by mandamus in this Court.

CONCLUSION AND RELIEF SOUGHT

Wherefore, Plaintiffs pray that this Court:

- A. Expedite proceedings;
- B. Order Defendant to show cause why a Writ of Mandamus should not issue;
- C. Declare that Defendant has a clear legal duty to enforce the Michigan constitutional and statutory rights of absentee voters as set forth in this prayer for relief;

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D. Issue a Writ of Mandamus ordering Defendant to administer and enforce Michigan election law relating to absentee voting in compliance with the Michigan Constitution, by compelling Defendant to:

1. Require that absentee ballots from all voters, including military and overseas voters, be counted if: (a) the ballot is postmarked or marked with other official information from the USPS that validates the voter mailed the ballot on or before election day and is received in the relevant clerk's office no later than six days after the day of the election; or (b) if the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is received in the relevant clerk's office no later than the day after the election. A "postmark" shall be any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day.

2. Enforce the 40-day availability of ballots provision of Const 1963, art 2, § 4(1)(g), by directing local clerks to: (a) mail absentee ballots on the 40th day before the election, for voters who submitted absentee ballot applications prior to that day; (b) mail absentee ballots within 24 hours of a voter submitting an application for an absentee ballot within the 40 days prior to the election; and (c) allow for in-person absentee voting beginning on the 40th day before an election;

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3. Declare that “immediately” in MCL § 168.761(1) means within 24 hours, and direct local clerks to: (a) mail absentee ballots on the 40th day before the election, for voters who submitted absentee ballot applications prior to that day; (b) mail absentee ballots within 24 hours of a voter submitting an application for an absentee ballot within the 40 days prior to the election; and (c) allow for in-person absentee voting beginning on the 40th day before an election.

4. Require local clerks to provide postage for a voter to return an absentee ballot;

E. Retain jurisdiction; and

F. Award such other relief as is equitable and just.

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Dated: May 22, 2020

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Respectfully submitted,

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