

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
(Sawyer, P.J., and Gleicher and Riordan, JJ.)

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

Supreme Court Case No. 161671
COA Case No. 353654

Plaintiffs,

v

SECRETARY OF STATE,

Defendant.

PLAINTIFFS' UNOPPOSED MOTION FOR RECONSIDERATION

R. Stanton Jones*
Elisabeth S. Theodore*
Daniel F. Jacobson*
Kolya D. Glick*
Samuel F. Callahan*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

Theresa J. Lee*
Dale E. Ho*
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 549-2500
tlee@aclu.org

Mark Brewer (P35661)
Goodman Acker, P.C.
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Daniel S. Korobkin (P72842)
Sharon Dolente (P67771)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org
sdolente@aclumich.org

* *Pro hac vice* motions forthcoming

INTRODUCTION

Pursuant to MCR 7.311(G), Plaintiffs-Appellants respectfully request that this Court reconsider its denial of Plaintiffs' Application for Leave to Appeal in light of startling new factual information about the consequences of enforcing Michigan's "received-by-election-day" deadline for absentee ballots. Defendant-Appellee the Secretary of State concurs with the relief requested in this motion; concurs with immediate consideration of this motion; and concurs with expedited briefing, argument, and decision of this appeal if leave to appeal is granted.

Since this Court's July 31 denial of leave to appeal, the United States Postal Service (USPS) has formally advised Secretary Benson that Michigan's received-by deadline is "incompatible" and "incongruous" with USPS's current mail delivery standards, and that the deadline creates a "significant risk" that many Michigan voters' absentee ballots will be rejected. USPS's letter warns that to ensure their absentee votes are counted in November, Michigan voters will need to send their ballot applications more than two full weeks before election day, and then send their completed ballots at least one full week before election day, even though the Michigan Constitution gives all voters the right to request and submit by mail absentee ballots until election day. The letter confirms that Michigan's statutory received-by deadline, combined with USPS's delivery standards, violates

the constitutionally guaranteed 40-day window for mail-in voting—a window that Michigan voters enacted by an overwhelming majority in 2018.

A recently announced cost-cutting overhaul of USPS threatens to slow mail delivery even further between now and November, inevitably resulting in the rejection of even more absentee ballots that were timely requested and submitted by mail. And data from Michigan’s August 2020 primary election confirms that, even if mail delivery times do not worsen, enforcement of the received-by deadline will disenfranchise a vast number of Michigan voters in the general election.

These developments powerfully underscore the urgent need for this Court’s review. Given USPS’s direct statements that Michigan’s received-by deadline is “incompatible” with USPS practices and risks disenfranchising many voters, the public interest in resolving the constitutionality of the deadline before November is paramount, the jurisprudential importance of this case could not be greater, and the injustice to Michigan voters from enforcement of the received-by deadline is undeniable. MCR 7.305(B). But regardless of the ultimate merits of this case, the fractured Court of Appeals decision below should not be the last word on whether, in the face of a recent constitutional amendment unequivocally enshrining the right to vote by mail during the 40 days leading up to the election, it is constitutional to disenfranchise a massive number of voters who exercise their constitutional right

to request, receive, and submit their ballot by mail, in full compliance with Michigan's highest law.

This Court should reconsider its July 31 Order and should grant leave to appeal. Plaintiffs respectfully request that the Court set this case for expedited briefing and argument so that the constitutionality of Michigan's statutory absentee ballot deadline can be resolved in time for the November 2020 general election.

BACKGROUND

This case concerns Michigan's statutory deadline requiring election officials to reject absentee ballots that are not received by 8 PM on election day, even if they were completed and submitted by mail before election day.

On May 22, 2020, Plaintiffs filed this action in the Court of Appeals seeking a writ of mandamus ordering the Secretary of State to direct local election officials to count absentee ballots mailed by election day. Plaintiffs contend that the statutory received-by deadline violates the Michigan Constitution, including the plain text of Const 1963, art 2, § 4(1)(g) (the "Absentee Voting Clause"). The Absentee Voting Clause gives every Michigan voter the right to "vote" an absentee ballot "during the forty (40) days before an election," and the right "to choose" to "submit" the absentee ballot "in person or by mail." Const 1963, art 2, § 4(1)(g). Plaintiffs also contend the received-by deadline violates Michigan's Purity of Elections Clause, Equal Protection Clause, and Freedom of Speech Clause.

On July 14, the Court of Appeals, in a 2–1 decision with three separate opinions, rejected Plaintiffs’ constitutional challenges to the received-by deadline and on this basis refused to issue a writ of mandamus. Ex. A.

On July 31, this Court denied Plaintiffs’ application for leave to appeal. Ex. B. In dissent, three Justices explained that, even if the decision below were correct, the case was “at least significant enough to demand full consideration” given “the importance that absentee voting will have on the upcoming general election.” *Id.*

REASONS FOR GRANTING RECONSIDERATION

Major factual developments since this Court’s July 31 Order denying leave to appeal have heightened the profoundly urgent need for this Court’s review.

A. There Have Been Material Factual Developments Since July 31

First, on August 13 news outlets published a recent letter from USPS’s General Counsel to Secretary Benson, warning that “under our reading of Michigan’s election laws, certain deadlines for requesting and casting mail-in ballots are *incongruous* with the Postal Service’s delivery standards.” Ex. C at 1 (emphasis added).¹ USPS “strongly recommends” that, to ensure absentee ballots arrive by Michigan’s received-by deadline, voters should: (1) “submit their ballot

¹ *E.g.*, Burke & LeBlanc, *Postal Service: Michigan Deadlines for Mail-In Voting Might Disqualify Some Ballots*, Detroit News (August 13, 2020) <<https://www.detroitnews.com/story/news/local/michigan/2020/08/13/postal-service-warns-michigan-state-deadlines-mail-in-voting/3358162001>>.

request ... so that it is received by their election officials at least 15 days before Election Day at minimum, and preferably long before that time”; and (2) “mail their ballots no later than Tuesday, October 27,” a full week before the election. *Id.* at 1-2. USPS made these recommendations based on its estimated transit time for First-Class Mail (2-5 days) and Marketing Mail (3-10 days). *Id.* at 1.

After setting forth this “recommended timeframe” for requesting and mailing in ballots, USPS’s letter again emphasizes that “certain state-law requirements and deadlines appear to be *incompatible* with the Postal Service’s delivery standards and the recommended timeframe.” Ex. C at 2 (emphasis added). The letter explains that the received-by deadline creates a “significant risk” that many Michigan voters will have their absentee ballots rejected. *Id.*

USPS further warned Secretary Benson that it “cannot adjust its delivery standards to accommodate the requirements of state election law,” and for that reason “asks that election officials keep the Postal Service’s delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail.” *Id.*

USPS sent a similar letter to Pennsylvania’s Secretary of State, which prompted Pennsylvania election officials to withdraw their opposition to a pending lawsuit challenging the constitutionality of Pennsylvania’s analogous received-by

deadline. Ex. D. The state election officials there described USPS’s announcement as “a significant change to the outlook for voting by mail in the general election,” *id.* at 3, which, in tandem with the state’s received-by deadline, “makes the threat to [the] right to vote unmistakably clear and complete,” *id.* at 6.

Second, since July 31, news outlets have reported a massive USPS cost-cutting overhaul that has significantly slowed mail delivery in some places, including Michigan. The overhaul—which includes cutting overtime, prohibiting extra trips to ensure on-time delivery, and removing mail-sorting machines—has “already delayed mail delivery by as much as a week in some places.”²

The cutbacks include “a new decision to decommission 10 percent of the Postal Service’s sorting machines,” which has “sparked widespread concern the slowdowns will only worsen.”³ As explained in Plaintiffs’ Application, all mail goes from local post offices to regional sorting facilities, and from there back to a local post office for delivery. Of the facilities with the sharpest reductions in mail sorting capacity, the USPS sorting facility in Pontiac, Michigan ranks third in the nation, with an estimated reduction in capacity of 394,000 mail pieces per hour.⁴

² Cox et al, *Postal Service Warns 46 States Their Voters Could Be Disenfranchised By Delayed Mail-In Ballots*, Washington Post (August 14, 2020) <https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html>.

³ *Id.*

⁴ *Id.*

Pontiac's sorting facility is the largest of its kind in the nation and distributes a significant portion of all mail sent in Michigan.⁵

Finally, recent data from Michigan's August 4 primary election confirms the dire situation reflected in USPS's recent letter, and demonstrates that the received-by deadline could determine the outcome of the general election. By way of example, in Sterling Heights 165 absentee ballots arrived nearly a week after election day—exceeding the margin of victory in one of the primary races by nearly 2 to 1.⁶ These issues will only multiply for the general election if USPS's recently announced cutbacks increase the delays in mail service between now and November 3.

B. These Developments Heighten the Need for this Court's Review

The recent developments described above materially impact the analysis under the factors governing this Court's decision whether to grant leave to appeal. *See* MCR 7.305(B). The need for this Court's review is now greater than ever.

First, the "significant public interest" in deciding the constitutionality of the received-by deadline, MCR 7.305(B)(2), is even more acute now than on July 31.

⁵ Moutzalias, *A Look Inside the Nation's Busiest U.S. Postal Service Canceling Facility During the Holiday Season*, MLive (April 3, 2019) <https://www.mlive.com/news/detroit/2015/12/a_look_inside_the_nations_larg.html>.

⁶ Hall, *165 Absentee Ballots Showed Up in Sterling Heights Nearly a Week After Election*, Detroit Free Press (August 13, 2020) <<https://www.freep.com/story/news/local/michigan/macomb/2020/08/13/sterling-heights-absentee-ballots-election/3346928001>>.

USPS's recent letter, its cost-cutting overhaul and ensuing slowdowns, and data from the recent primary remove any doubt that the received-by deadline will result in the disenfranchisement of tens of thousands of Michigan voters in November, with serious potential to change the outcome of one or more races.

This is no speculation. USPS has directly stated that the received-by deadline is unworkable and will likely lead to mass disenfranchisement of Michigan voters. USPS has made clear that large numbers of absentee ballots requested, completed, and submitted by mail in full compliance with Michigan law will not be counted. USPS has accordingly urged state election officials to instruct Michigan voters to request their absentee ballots by mail at least *15 days* before the election, even though Michigan law permits voters to request absentee ballots until election day and permits local clerks to mail blank ballots to voters until four days before the election. USPS has also recommended instructing Michigan voters that they must mail their complete absentee ballots *a full week* before election day, even though the Michigan Constitution expressly gives “[e]very voter” the right “to vote an absent voter ballot without giving a reason, during the forty (40) days before an election,” and “to choose” to submit the ballot “by mail.”

In other words, USPS has confirmed that, because of the received-by deadline, Michigan voters cannot request and submit absentee ballots by mail during the 40 days before the election, as the Absentee Voting Clause expressly

states. Rather, voters must request their ballots during the period between the 40th and 15th day before the election, and they must mail their ballots during the period between the 40th and 7th day before the election, drastically reducing the number of days that the Michigan Constitution guarantees. Voters who wish to request an absentee ballot less than 15 days before the election cannot “choose” to do so “by mail,” and voters who wish to submit their completed absentee ballots less than seven days before the election cannot “choose” to do so “by mail.”

Given these facts, there is now an overwhelming interest in having this Court, rather than the fractured 2–1 decision below, provide the last word on the constitutionality of the received-by deadline, and to do so based on the latest factual information concerning the consequences of enforcing the deadline.

Second, these recent developments crystallize the irreconcilable conflict between the statutory received-by deadline and the Absentee Voting Clause, heightening the significance of this legal issue “to the state’s jurisprudence,” MCR 7.305(B)(3), and cementing that the decision below was “clearly erroneous,” MCR 7.305(B)(5). In 2018, the people of Michigan exercised their “extraordinary authority,” *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018), to adopt a constitutional provision guaranteeing the right to choose to vote by mail during a 40-day period leading up to an election. The developments described above confirm, beyond any doubt, that

voters cannot choose to vote their ballots for at least the full week before election day—almost a fifth of the guaranteed 40-day period—lest their votes be discarded.

USPS's letter and the recent operational changes also make clearer that the received-by deadline violates the Purity of Elections Clause and Equal Protection Clause. It is now plain that there will be wildly disparate treatment of similarly situated voters based on the vicissitudes of mail service and operations. Voters will be arbitrarily disenfranchised based on where their ballots happen to lie in the stack of mail piled up in USPS offices in Michigan. That is not constitutional.

Third, it is now beyond dispute that the irreconcilable conflict between the received-by deadline and the plain text of the Absentee Voting Clause will cause “manifest injustice.” MCR 7.305(B)(5). It will disenfranchise tens of thousands of qualified Michigan voters and potentially change the outcome of some races.

CONCLUSION

Plaintiffs respectfully request that this Court reconsider its July 31 Order; grant the Application for leave to appeal; and expedite the submission, hearing, and decision of this appeal on the merits. The Secretary concurs with reconsideration and also with expedited treatment of this appeal if leave is granted. The parties respectfully request that the Court adopt a schedule that permits a decision by September 19, 2020, the date on which ballots under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) must be finalized.

Respectfully submitted,

/s/ Mark Brewer

Mark Brewer (P35561)
Goodman Acker, P.C.
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

R. Stanton Jones*
Elisabeth S. Theodore*
Daniel F. Jacobson*
Kolya D. Glick*
Samuel F. Callahan*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

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Attorneys for Plaintiffs

Daniel S. Korobkin (P72842)
Sharon Dolente (P67771)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org
sdolente@aclumich.org

Theresa J. Lee*
Dale E. Ho*
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 549-2500
tlee@aclu.org

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