

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN ALLIANCE FOR RETIRED
AMERICANS, et al.,

Plaintiffs,

v

JOCELYN BENSON, et al.,

Defendants.

OPINION AND ORDER

Case No. 20-000108-MM

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiffs' request for preliminary injunctive relief on three issues: restrictions on ballot assistance, the requirement that voters affix postage to their mailed absentee ballots, and the limitation that only ballots received by 8 p.m. Election Day be tallied. Plaintiff's have argued that due to current circumstances including the impact of the novel Coronavirus these election procedures are unconstitutional. For reasons articulated later in this opinion the court orders as follows:

1. This court enjoins MCL 168.932(f) in this election from 5:00 p.m. Friday October 30, 2020 until the close of the polls on November 3, 2020, in so far as it limits the class of persons who may render an absent voter assistance. As a result, a voter casting an absent voter ballot in the November 2020 general election may select any individual the voter chooses to render assistance in returning an absent voter ballot, but only for the limited time period when assistance from the clerk is not required, i.e., between 5:01 p.m. on the Friday before the election and the close of polls on Election Day.

2. Enforcement of the ballot receipt deadlines in MCL 168.759b and MCL 168.764a as they relate to the date and time by which absentee ballots must be received by the clerk in order to be tallied, is enjoined for this election only. All ballots postmarked no later than one day before election day, i.e., November 2, 2020, and received by the deadline for certifying election results, are eligible to be counted in the same manner as all provisional ballots
3. Finally, plaintiffs have not met the burden of demonstrating a substantial likelihood of success on their challenge to the requirement that absentee voters supply their own return postage, and injunctive relief with respect to that issue is DENIED.

I. BACKGROUND

Plaintiffs' request for injunctive relief concerns three provisions of Michigan Election Law that pertain to absent voter ballots: (1) a ballot receipt deadline; (2) a limitation on who can help a voter return an absent voter ballot; and (3) a requirement that absentee voters supply their own return postage. Plaintiffs presented both facial and as applied arguments. This Court held a hearing on plaintiff's initial request for injunctive relief on July 8, 2020. No witnesses were called. Prior to the release of this Court's ruling on that motion the Court of Appeals issued its opinion in *League of Women Voters of Mich v Sec'y of State (League of Women Voters I)*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073). That case concerned, as written, constitutional challenges to several statutory provisions at issue in this case. The August primary was held. Plaintiffs filed a renewed prayer for injunctive relief following supplemental briefing and documentary evidence regarding the August 2020 primary election, and this Court held a hearing on plaintiffs' request for relief on September 3, 2020. Plaintiffs presented witness testimony at the hearing to supplement their various affidavits and documentary evidence. Counsel for defendants did not challenge the documentary evidence at the hearing and conceded

that the affidavits and documentary evidence provide an evidentiary record from which this Court can make findings for purposes of resolving plaintiffs' request for injunctive relief.

With respect to that documentary evidence, the unrefuted affidavits and documents compel the conclusion that, in light of delays attributable to the COVID-19 pandemic, mail delivery has become significantly compromised, and the risk for disenfranchisement when a voter returns an absent voter ballot by mail is very real. Plaintiffs have produced documentary evidence that there have been significant mail delays since the onset of the pandemic, particularly in Detroit, despite a decrease in the volume of mail being processed during the same time. Furthermore, plaintiffs' documentary evidence revealed that, due to "major operational changes" with the Postal Service—such as elimination of overtime hours—mail delivery could be slowed down even further, particularly with what figures to be an event that increases strain on the system, such as a large increase in mail volume associated with mailing absentee ballots in advance of the November 2020 general election. For these and similar reasons, the Secretary of State issued public warnings to voters the week before the August 2020 primary and urged voters to *not* use the United States Postal Service to return absent voter ballots, given the risk that completed ballots would not arrive in time to be counted.

Plaintiffs presented affidavit evidence that many voters were in fact deprived of having their absent voter ballot tallied in the Augusts primary. Plaintiffs presented unrefuted evidence that thousands of voters' absentee ballots were not counted due to having been received after Election Day in the most recent August 2020 primary election. Affidavits and testimony detailed that despite voters requesting absent ballots weeks in advance of the primary, their actual ballot arrived as late as Election Day. The late receipt made it virtually impossible to return the ballot

by mail in time to be counted. Furthermore, plaintiffs have produced evidence of instances where voters' completed ballots were sent well in advance of the receipt deadline for the August 2020 primary election, but where the ballots were not counted because, as a result of mail delays, they were not received on time. In one instance, a ballot that was destined for the clerk's office in Wyandotte, Michigan, was routed out of state, to Illinois, before being delivered (late) to its intended address in Michigan. These ballots were just some of the over 6,400 otherwise valid ballots that were rejected for having been received after the election day receipt deadline.

The general counsel for the United States Postal Service acknowledged that the law in this state, namely the ballot receipt deadline, posed a significant risk of disenfranchisement because of current mail processing. Given the documented increase in absent ballot requests, the risks of disenfranchisement are projected to rise with respect to the November 2020 general election.

The risks of disenfranchisement are even greater when the Court considers the documentary evidence submitted by plaintiffs regarding individuals who are immunocompromised and/or who live alone and are without ready access to someone who can help return an absent voter ballot under MCL 168.932(f). While city and township clerks are required to assist voters, upon request, the requirement to provide assistance ends at 5:00 p.m. on the Friday before election day. See MCL 168.764a; MCL 168.764b (4). The cutoff time for rendering assistance has a particularly harsh effect in light of the mail delays noted above, i.e., if an absent voter ballot is received after the 5:00 p.m. assistance cutoff deadline, the voter is not guaranteed help from the clerk.

One of the issues in this case concerns evidence—or lack thereof—of voter fraud and threats to election integrity associated with absent voter ballots. Plaintiffs produced largely

unrefuted expert testimony and documentary materials from Dr. Michael C. Herron, who concluded that literature on voter fraud consistently concluded that incidences of fraud were “rare.” In addition, he concluded that there was “no evidence of significant voter fraud in [Michigan] associated with absentee voting and voter assistance.” Nor were there significant incidences of fraud reported with the May 2020 election, in which nearly all ballots were cast by mail or at a ballot drop-box.

A. BALLOT RECEIPT DEADLINE

With the approval of Proposal 3 in 2018, this state’s electorate enshrined in the Michigan Constitution the right “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.” Const 1963, art 2, § 4. Provisions of the Michigan Election Law, which pre-date the approval of Proposal 3, require that, in order to be valid, an absent voter ballot must be returned to the clerk before polls close at 8:00 p.m. on election day. MCL 168.759b; MCL 168.764a. See also *Lantz v Southfield City Clerk*, 245 Mich App 621; 628 NW2d 583 (2001). “An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.” See MCL 168.764a. Absent voter ballots may be returned by either: (a) depositing the ballot (with postage) in the United States Mail or another public postal service or common carrier; or (b) delivering the absent voter ballot to the office of the clerk, the clerk, or to an authorized assistant of the clerk. *Id.* See also MCL 168.932(f).

Plaintiffs argue that the ballot receipt deadline is constitutionally infirm for a number of reasons. They argue that absent voter ballots should be counted if they are postmarked before or on, but received after, election day. In support, plaintiffs note that provisional ballots are counted

after election day, see MCL 168.523a; MCL 168.813, and that a board of county canvassers is not required to certify its election results until 14 days after election day, see MCL 168.822(2).

B. VOTER ASSISTANCE BAN

The next point of contention in this case concerns what has been referred to as the “voter assistance ban.” In essence, the voter assistance ban restricts the pool of individuals who can render assistance to a voter who chooses to return an absent voter ballot. MCL 168.932(f) contains a list of those who can return, solicit to return, or agree to return an absent voter ballot to the appropriate clerk. That list is limited to:

[1] a person whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment;

[2] a clerk or assistant of the clerk;

[3] a member of the immediate family^[1] of the absent voter including father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild; or

[4] a person residing in the absent voter’s household[.] [MCL 168.932(f).]

A violation of the restrictions regarding the return of absent voter ballots constitutes a felony. See MCL 168.932.

Plaintiffs argue that the voter assistance ban runs afoul of a number of provisions of this state’s constitution. Alternatively, they argue that the ban is contrary to the federal Voting Rights Act and that the ban is thus preempted by the federal statute.

¹ The term “immediate family” is further defined in MCL 168.2(*l*) to mean “individual’s father, mother, son, daughter, brother, sister, and spouse and a relative of any degree residing in the same household as that individual.”

C. POSTAGE REQUIREMENT

As it concerns the return of absent voter ballots, plaintiffs point out that MCL 168.764a requires voters to supply their own postage if they wish to return their absentee ballots by mail. See MCL 168.764a. Plaintiffs, who refer to this as the “postage requirement,” contend that the statute imposes an unnecessary monetary cost on voting at a time when many voters in this state are suffering from the economic effects of COVID-19. Plaintiffs ask the Court to enjoin the postage requirement, which would effectively require the state to supply return postage for those who wish to submit their absent voter ballots by mail. Plaintiffs argue that the postage requirement contained in MCL 168.764a is constitutionally infirm because it adds additional burdens to the self-executing right to return an absent voter ballot by mail contained in Const 1963, art 2, § 4. They also argue that the postage requirement imposes an unconstitutional burden on the right to vote absentee, in violation of Const 1963 art 1, § 2.

II. PRELIMINARY INJUNCTIVE RELIEF

This matter is before the Court on plaintiff’s request for preliminary injunctive relief. A preliminary injunction is an extraordinary form of equitable relief “that has the objective of maintaining the status quo pending a final hearing concerning the parties’ rights.” *Slis v State*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 351211; 351212), slip op at 12. In weighing whether to grant this form of relief, the Court must consider:

- (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction;
- (2) whether the applicant is likely to prevail on the merits;
- (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and
- (4) whether the public interest will be harmed if a preliminary injunction is issued. [*Id.*]

The proponent of preliminary injunctive relief bears the burden of demonstrating the necessity of the relief sought. *Id.*

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs challenge the pertinent statutes on a variety of constitutional grounds. Any evaluation of plaintiffs' ability to succeed on the merits of their challenges must begin with the presumption that the challenged statutes are constitutional, as well as with the notion that the Court must construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Council of Orgs & Others for Ed About Parochiaid v State*, 326 Mich App 124, 139; 931 NW2d 65 (2018). "The power to declare a statute unconstitutional must be exercised with extreme caution [,]" and this Court must indulge every reasonable presumption in favor of the validity of the challenged statutes. *Id.* "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that [a statute] violates some provision of the Constitution that a court will refuse to sustain its validity." *Id.* at 139-140 (citation and quotation marks omitted). See also *League of Women Voters of Mich v Sec'y of State (League of Women Voters I)*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 10. Based on the arguments presented and the repeated references to the ongoing COVID-19 pandemic, plaintiffs are raising facial and as-applied challenges to the statutes at issue. An as-applied challenge "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (citation and quotation marks omitted). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016) (citation and quotation marks omitted).

Plaintiffs also assert facial challenges to the statutes. A party asserting a facial challenge is confronted with a difficult task, as she "must establish that no set of circumstances exists under

which [the challenged provision] would be valid. . . .” *Bonner*, 495 Mich at 223. The Court of Appeals recently issued a published decision that conclusively resolves plaintiffs’ facial challenge to the ballot receipt deadline. See *League of Women Voters of Mich v Sec’y of State (League of Women Voters II)*, __ Mich App __; __ NW2d __ (2020) (Docket No. 353654) (opinion by SAWYER, J.). As a result, plaintiffs are unable to demonstrate any likelihood of success on the merits of their facial challenge to the ballot receipt deadline, and no additional discussion of the issue is warranted in this opinion and order. The Court also concludes that plaintiffs are unlikely to succeed on the merits of their facial challenge to the voter assistance ban and to the postage requirement. The bulk of this Court’s discussion will focus on the as-applied challenges as a result.

1. PLAINTIFFS’ AS-APPLIED CHALLENGE TO THE BALLOT RECEIPT DEADLINE

Plaintiffs argue that the ballot receipt deadline is unconstitutional as-applied in light of the ongoing COVID-19 pandemic. On this point, the Court agrees, and finds that the case, based on the unrefuted evidence presented, is distinguishable from *League of Women Voters II* and that the holding in that case does not dictate the outcome here. Thus, the Court is not concluding that plaintiffs will succeed in their attempts to invalidate the ballot receipt deadline in toto; rather, the Court’s holding is that, as applied to plaintiffs under the facts and evidence presented in this case, the ballot receipt deadline violates plaintiffs’ constitutional rights guaranteed by art 2, § 4.

Plaintiffs correctly note that the right to vote by absent voter ballot is self-executing, and that the right to vote by absent voter ballot, like all rights enshrined in art 2, § 4, “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” Const 1963, art 2, § 4(1). Legislation may supplement self-executing constitutional provisions; however, legislation “must not curtail the rights reserve or exceed the limitations specified” in a self-executing constitutional provision. *League of Women Voters I*, __ Mich App at __, slip op at 11. The Legislature has a

constitutional obligation to implement this state’s election laws and to “enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.” Art 2, § 4. Legislation enacted pursuant to this constitutional mandate may not, however, “create unnecessary burdens which tend to restrict the constitutional rights” enshrined in art 2, § 4. See *League of Women Voters I*, __ Mich App at __, slip op at 12.

In light of the unrefuted documentary evidence concerning the effects of the pandemic and mail delays, the Court concludes that the statutory ballot receipt deadline is, as applied, an impermissible restriction on the self-executing right to vote by absent voter ballot and to choose to return such a ballot by mail. See *id.* at 11 (explaining that legislation supplementary to a self-executing constitutional provision must “further” the exercise of the self-executing right and must “make it more available”). The evidence in this case stands uncontroverted and establishes that the mail system is currently fraught with delays and uncertainty in light of the COVID-19 pandemic. Notably, the United States Office of the Inspector General released a report that specifically identified Michigan as a state with statutes placing voters at a “high risk” of disenfranchisement. In addition, Ronald A. Stroman, the former Deputy Postmaster General, provided information regarding the significance, and prevalence, of mail delays in this state. These risks are not merely hypothetical, because over 6,400 otherwise valid absent voter ballots were rejected in the August 2020 primary election because they were received after the statutory deadline. The number of ballots rejected, as pointed out by plaintiffs’ documentary evidence, increased, as did the rate at which absent voter ballots were rejected. The evidence supports a

finding of fact that under the current circumstances, enforcement of the deadline for ballot receipt has led, and is likely to lead, to significant instances of failure to count absent ballots.

Indeed, the evidence demonstrates that, under the present circumstances, a voter's right to cast an absent voter ballot by mail in the 40 days before the November 2020 general election is severely restricted, and at times outright eliminated. Even for those voters who are fortunate enough to receive their absent voter ballots in advance of the election, mail delays and the COVID-19 pandemic stack the deck against successfully casting an absent voter ballot by mail in a timely manner. For those with underlying health risks and who prefer not to cast a vote in person, returning the ballot by mail is the only realistic option. Where the current state of affairs has riddled that option with uncertainty after uncertainty, the Court concludes that the 8:00 p.m. ballot receipt deadline unnecessarily curtails the self-executing right to vote by absent voter ballot and to return that ballot by mail. See *League of Women Voters I*, __ Mich App at __, slip op at 12, (rejecting as unconstitutional a statute that "is both unnecessary for effective administration of" a self-executing constitutional right and "restrictive" of that right).

Stated otherwise, a ballot receipt deadline might very well operate as a permissible restriction on the right to cast an absent voter ballot when there is some modicum of certainty that the (normally reliable) United States Postal Service will be able to: (1) deliver the voter's ballot to the voter before the election and in time for the voter to act on the ballot; and (2) deliver a completed ballot by the statutory deadline, should the voter place the completed ballot in the mail at a reasonable time. Here, unfortunately, that critical element of certainty is missing, and voters know neither whether their ballot will be received (by them) on time or delivered to the clerk's office on time. As a result, applying the strict, 8:00 p.m. ballot receipt deadline on absent voter

ballots imposes too great a restriction for the upcoming general election. Some flexibility must be built into the deadline in order to account for the significant inability of mail to arrive on what would typically be a reliable, predictable schedule. That flexibility will be outlined in § II. C. of this opinion.

In so concluding, the Court agrees with plaintiffs that the unrefuted factual record in this case, as well as the as-applied nature of the challenge before the Court, distinguishes this matter from *League of Women Voters II* and that the holding in that case does not bind the Court on the issue presented here. Most notably, the lead opinion in *League of Women Voters II* discounted many of the risks of ballots arriving exceptionally late as “extreme, and undoubtedly rare” and concluded that delayed mail was simply one of the risks that the voter must assume when he or she decides to return an absent voter ballot. See *League of Women Voters II*, __ Mich App at __, slip op at 10 (opinion by SAWYER, J.). Here, however, the uncontroverted data presented by plaintiffs convinces the Court that the incidences in which ballots are not received in time—either by the voter or by the pertinent clerk’s office—cannot be cast aside as “rare.” As acknowledged by *League of Women Voters II*, voters “certainly possess” the right to choose to submit an absent voter ballot by mail. *Id.* at 9. The evidence presented in this case reveals that the pandemic’s effect on the mail system has outright removed, or effectively removed, the right to choose to submit an absent voter ballot by mail. Thus, the facts of this case show that a voter cannot remove the risks associated with mail delivery by, as characterized by the *League of Women Voters II*, simply acting “sooner when they choose to mail in their ballot,” nor can the facts and circumstances of this case be dismissed by characterizing mail issues as merely affecting “how and when” the choice to vote by mail is made. Cf. *id.* Instead, the facts of this case show that the choice to return a ballot by mail has been effectively removed from the voter. That is, unlike non-

pandemic instances where it can generally be assumed that mail will arrive and that it will arrive on time, a voter cannot simply choose to act sooner and avoid the effects of mail delays, particularly when those delays are of such a magnitude that they remove the choice altogether. Delayed mail is not the only risk involved during the pandemic. The health risks of COVID-19, which have been well-documented and which need not bear repeating here, also weigh on voters. For many, that risk presented by the pandemic is simply too great. Nor is it one that should be encountered, given that the Constitution guarantees the right to return the absent voter ballot by mail. Thus, on the unrefuted evidence presented in this case, the Court concludes that the *League of Women Voters II* decision does not control the as-applied challenge presented to the Court in the instant matter.

In light of the above, plaintiffs have demonstrated a substantial likelihood of success on their assertion that the ballot receipt deadline contained in MCL 168.759b is unconstitutional as applied in this case.

2. VOTER ASSISTANCE BAN

Plaintiffs have also demonstrated a substantial likelihood of success on their challenge to the statutory voter assistance ban. Article 2, § 4 grants voters the right to return an absent voter ballot in-person, should they choose to do so. MCL 168.932(f) contains a limited list of individuals who can assist a voter in returning an absent voter ballot. In general, and at a time without COVID-19, the limited list of individuals who are eligible to provide assistance would likely not rise to the level of an unnecessary burden tending to restrict the self-executing constitutional right to vote by absent voter ballot. However, the record in this case convinces the Court that plaintiffs have a strong likelihood of succeeding on their claim that the list of individuals enumerated in

MCL 168.932(f), under the narrow circumstance noted in this opinion, cannot pass constitutional muster.

Pertinent to this issue, MCL 168.932(f) provides that voters casting an absent voter ballot may choose from “immediate family” members or another person residing in the voter’s household to return an absent voter ballot. Plaintiffs’ documentary evidence points out that many home-bound individuals live alone and have no family members living nearby. Perhaps in recognition of the same, the statute contains a fail-safe option for such individuals, as MCL 168.932(f) permits a clerk or assistant of the clerk to help an absent voter return an absentee ballot. This fail-safe option ends, however, at 5:00 p.m. on the Friday before the Election, and the clerk is not required to provide assistance after that time. See MCL 168.764b. Thus, in the days leading up to the election, and at a time when assistance might be most needed, the absent voter is most in danger of being left without assistance.

Again, in ordinary times, the statute likely poses no constitutional issue. These are not, however, ordinary times. As noted, there are documented instances in this case of absentee voters who received their absent voter ballot shortly before the August 2020 election, despite a timely request for such a ballot. As noted, a voter is only guaranteed to receive help from the clerk if the voter makes a request before 5:00 p.m. on the Friday before Election Day. The very real risk of receiving an absent voter ballot in an untimely fashion increases the risk that voters who are otherwise without a statutorily enumerated person to help return their ballot will not be able to take advantage of the fail-safe option of receiving assistance from the clerk. One can think of residents in an assisted living facility, the access to which has been extremely limited during the pandemic, who might fall into this category. Additionally, prospective absentee voters who simply wish to

take their time in weighing which candidates to vote for run the risk of missing out on the clerk-supplied assistance. Such individuals might be hesitant, or unable, to receive assistance from family members or household members due to health concerns associated with the COVID-19 pandemic. Or the health risks inherent with COVID-19 might prevent such a voter from returning a ballot in-person. Therefore, and under the current circumstances, the Court is convinced that the time deadline imposed on the fail-safe option of seeking assistance from the clerk risks leaving too many voters without the opportunity of receiving assistance in returning their ballots. Under the facts of this case, and as applied, MCL 168.932(f)'s voter assistance ban creates an unnecessary burden that tends to unduly restrict the rights enshrined in art 2, § 4.

Accordingly, and under the facts presented, the Court agrees plaintiffs have demonstrated a substantial likelihood of success on the merits of their assertion that MCL 168.932(f) unduly restricts the right guaranteed by art 2, § 4, but only during the time between 5:01 p.m. on the Friday before the election and Election Day. It is during this timeframe when the statute's fail-safe option is unavailable and during which the voter might find himself or herself in most need of assistance. Where no justification has been given for ending the fail-safe option in the days before the election, the Court concludes plaintiffs have a substantial likelihood of succeeding on the merits of their claim that the restrictions in MCL 168.932(f) are both unnecessary for the administration of absentee voting and restrictive of the self-executing right contained in art 2, § 4 under the present circumstances. See *League of Women Voters I*, __ Mich App at __, slip op at 12 (declaring as unconstitutional statutes that unnecessarily restrict self-executing constitutional rights). As will be discussed in § II. C. of this opinion, this constitutional violation will be remedied by permitting, but only during the specified timeframe, an absentee voter to seek assistance from a third party of their choosing.

Plaintiffs' likelihood of success on this matter is not affected by the amici's concerns about election integrity. The documentary evidence in this case reveals that the incidences of voter fraud and absentee ballot fraud are minimal and that the fears of the same are largely exaggerated. Moreover, there is little evidence to suggest that fraud would increase with a larger pool of persons eligible to assist absentee voters. Nor, for that matter, is there a compelling case to be made on this record that a voter's neighbor, who otherwise would not be able to help her return a ballot, would be more likely to induce fraud than an individual who is approved to render assistance by MCL 168.932(f), such as a voter's brother-in-law. Furthermore, as plaintiffs point out, the remaining provisions of MCL 168.932 already prohibit interference with the absentee voting process and are much more tailored to that purpose than the voter assistance ban. The fraud-fighting role of the voter assistance ban is debatable, at best. As explained in *League of Women Voters of Mich I*, ___ Mich App at ___, slip op at 11, legislation supplementary to a self-executing constitutional provision such as art 2, § 4 "must be in harmony with the spirit of the Constitution, and its object to *further the exercise of constitutional right and make it more available*, and such law must not curtail the rights reserved or exceed the limitations specified." (Citation and quotation marks omitted; emphasis added). Under the circumstances and timeframe identified in this case, the voter assistance ban curtails the self-executing rights set forth in art 2, § 4 in a way that cannot survive constitutional scrutiny.

3. LIKELIHOOD OF SUCCESS ON THE POSTAGE REQUIREMENT

While plaintiffs have demonstrated the requisite likelihood of success on the two aforementioned challenges, the Court finds that they are unlikely to succeed on their challenge to the postage requirement contained in MCL 168.764a. Judge Sawyer's opinion in *League of Women Voters* concluded that "requiring absentee voters to pay for return postage does not impose

a severe restriction on the right to vote.” *League of Women Voters II*, __ Mich App at __, slip op at 16 (opinion by SAWYER, J.). Rather, the postage requirement:

is a reasonable, minimal, and nondiscriminatory restriction. Notably, Const. 1963, art. 2, § 4(1)(g), provides voters the right to choose to submit an absentee ballot by mail. It does not require that voters be permitted to submit absentee ballots at no cost. Every election regulation “imposes to some degree a burden on an elector.” [*In re Request for Advisory Opinion Re Constitutionality of 2005 PA 71*, 479 Mich 1, 22; 740 NW2d 444 (2007)]. Considering the various options for submitting an absentee ballot, the requirement that a voter pay return postage is minimal. To the extent that the cost of return postage may pose a financial hardship, the voter or an immediate family member may deliver the ballot in person, or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. [*League of Women Voters II*, __ Mich App at __, slip op at 16.]

The above analysis convinces the Court that plaintiff is unlikely to succeed on either of its constitutional challenges to the postage requirement in this case. Unlike their as-applied challenge to the ballot receipt deadline, plaintiffs’ documentary evidence concerning the postage requirement does not compel a different result than was reached in *League of Women Voters II*. Indeed, as noted by the *League of Women Voters II* opinion, the burden imposed is only slight, and it is not of the ilk that would curtail the self-executing rights established in art 2, § 4. The documentary evidence presented thus far does not convince the Court that the burden is anything other than what it was described in *League of Women Voters II*. Nor is the Court convinced that plaintiffs have any likelihood of succeeding under the *Anderson-Burdick*² framework. See *In re Request for Advisory Opinion*, 479 Mich at 22. As a result, the Court need not address the remaining factors for injunctive relief in order to conclude that preliminary injunctive relief is not warranted with respect to plaintiffs’ claims regarding the postage requirement.

² See *Anderson v Celebrezze*, 460 US 780, 788-789; 103 S Ct 1564; 75 L Ed 2d 547 (1992), and *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

B. REMAINING FACTORS FOR INJUNCTIVE RELIEF

As it concerns the remaining factors for injunctive relief, the Court will focus only on the two issues where plaintiff has established a substantial likelihood of success on the merits—the as-applied challenges to the ballot receipt deadline and to the voter assistance ban.

Turning first to irreparable harm, the Court concludes that this “indispensable” factor weighs in favor of granting injunctive relief. See *Pontiac Fire Fighters Union Local 376*, 482 Mich 1, 9; 753 NW2d 595 (2008). That is, given the record evidence detailing an increase in the number and percentage of absent voter ballots that have been rejected solely for being received after the statutory deadline and in light of the other evidence of record, plaintiffs are able to demonstrate a “particularized showing of irreparable harm,” arising from the denial of the right to vote by absent voter ballot as guaranteed by art 2, § 4, rather than a mere apprehension of future injury. See *id.* See also *Garner v Mich State Univ*, 186 Mich App 750, 764; 462 NW2d 832 (1990) (explaining that the loss of a constitutional right “constitutes an irreparable harm which cannot be adequately remedied by an action at law.”).

Balancing the harms and the public interest weigh in favor of injunctive relief as well. Undoubtedly, the public is benefited from preserving and furthering the right to vote. The Court finds that the relief granted in this opinion can be accomplished without imposing a meaningful inconvenience to the state. Allowing third parties to assist voters during the narrow window of time granted by this opinion does not, on the record before this Court, undermine or affect the state’s interest in preserving election integrity. So long as they are postmarked at the appropriate time—the same does not impose a significant burden on the state. The state already has a mechanism in place to do this very thing with respect to overseas and military voters. See MCL 168.759a(16). Election results need not be certified until 14 days after the election. See

MCL 168.822. Hence, so long as ballots are properly postmarked—see discussion in § II. C. of this opinion—the state can count eligible ballots received up until the 14-day certification deadline without encountering any other statutory difficulties.

The Court is not convinced that defendants’ concerns about the timing of injunctive relief, and its proximity to the November 2020 election, weigh against granting the requested injunctions. As the Court noted in its previous order, it is cognizant of the warning in *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972), about administrative difficulties and the need to allow election officials time to comply with the mechanics of election-related changes. However, the Court concludes that, unlike in *New Democratic Coalition*, the relief granted here would not “seriously strain the election machinery [or] endanger the election process.” *Id.* Cf. *Purcell v Gonzalez*, 549 US 1, 4-5; 127 S Ct 5; 166 L Ed 2d 1 (2006) (recognizing that, as an election looms closer, the risk that a court order will sow confusion before an election grows). Here, injunctive relief regarding the voter assistance ban does not require the state to do anything differently. Injunctive relief requiring officials to accept ballots that are postmarked in time, but received later, merely requires the state to resort to a process that is already employed in certain circumstances. Furthermore, officials will have nearly 50 days after the issuance of this opinion and order to prepare for an election. Defendants’ briefing has even conceded that the Secretary of State “believes that there is sufficient time to draft guidance to local election officials that would adequately instruct officials with respect to reviewing postmarks for timeliness and resolving any disputes, as well as providing for a specific timeline for transmitting results to the boards of county canvassers.” As a result, the Court concludes there is sufficient time to implement the remedy afforded by this opinion in a manner that will not affect the smooth operation of the November 3, 2020 general election.

C. REMEDY FOR CONSTITUTIONAL VIOLATIONS

For the reasons stated above, plaintiffs are entitled to injunctive relief on their claims that, as applied, the ballot receipt deadline and the voter assistance ban unnecessarily burden and restrict their self-executing constitutional right to vote by absent voter ballot. Those constitutional violations can be remedied by enjoining the enforcement of the statutes at issue as follows.

As it concerns the ballot receipt deadline, the Court’s analysis is informed by the nature of the right guaranteed by art 2, § 4(1)(g), which grants the right to vote an absent voter ballot “during the forty (40) days *before* an election” (Emphasis added). Hence, so long as an absent voter ballot is postmarked *before* election day—in the case of the upcoming general election the latest available date would be November 2, 2020—it is eligible to be counted. See *League of Women Voters II*, __ Mich App at __, slip op at 11 n 19 (opinion by SAWYER, J.) (noting that the right guaranteed by art 2, § 4(1)(g) is the right to vote by absent voter ballot in the 40-day period *before* an election). Consistent with MCL 168.822, the timely postmarked ballot must be received by the clerk’s office no later than 14 days after the election has occurred, so as not to interfere with the board of county canvassers’ duty to certify election results by the fourteenth day after the election. Additionally, the Court draws on the ability of the Secretary of State to extend the ballot receipt deadline for uniformed services voters and overseas voters under MCL 168.759a(16) as support for this conclusion.

Therefore, and for the avoidance of doubt, an absent voter ballot that is postmarked by no later than November 2, 2020, and received within 14 days after the election, is eligible to be counted.

As it concerns the voter assistance ban, MCL 168.932(f) is unconstitutional as applied to only a narrow timeframe: the time between 5:01 p.m. on the Friday before the election and Election Day, i.e., when the clerk or an assistant is not required to assist a voter who wishes to cast an absent voter ballot. During this timeframe, and only during this timeframe, a voter may select any third party of his or her choosing to render assistance in returning an absent voter ballot. Any penalties and prohibitions that would otherwise apply to the mere act of helping a voter return an absent voter ballot,³ including those found in MCL 168.932 and MCL 168.935, will be enjoined from applying during this specified timeframe only.


Therefore, and for the avoidance of doubt, the injunctive relief granted with respect to the voter assistance ban runs from 5:01 p.m. on Friday, October 30, 2020, through the close of polls, on Election Day, November 3, 2020.

III. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' request for preliminary injunctive relief is GRANTED as specified in this opinion and order.

This is not a final order and it does not resolve the last pending claim or close the case.

September 18, 2020


Cynthia Diane Stephens
Judge, Court of Claims

³ The relief granted by this opinion does not prevent the operation of penalties for fraud or other acts prohibited by this state's election law. Rather, the grant of injunctive relief applies only to allow voters to select a third party of their choosing during the narrow timeframe identified herein.