

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

ROBERT DAVIS,

Plaintiff-Appellant,

v.

Court of Appeals Case No. 354622

JOCELYN BENSON,
in her official capacity as the duly elected
SECRETARY OF STATE,

Court of Claims Case No. 20-000099-MM

Defendant-Appellee.

Robert Davis
Plaintiff In Pro Per
180 Eason
Highland Park, Michigan 48203
(313) 523-7118
davisrobert854@gmail.com

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
PO Box 30736
Lansing, Michigan 48909
(517) 294-1837
(517) 335-7659
grille@michigan.gov
meingasth@michigan.gov
Attorneys for Defendant

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Larry J. Saylor (P28165)
Wendolyn Wrosch Richards (P67776)
Ashley N. Higginson (P83992)
Erika L. Giroux (P81998)
150 West Jefferson Ave., Suite 2500
Detroit, Michigan 48226
(313) 963-6420
saylor@millercanfield.com
richards@millercanfield.com
higginson@millercanfield.com
giroux@millercanfield.com

OF COUNSEL:
THE BRENNAN CENTER FOR JUSTICE
Myrna Pérez (NY Bar No. 4874095)*
Eliza Sweren-Becker (NY Bar No. 5424403)*
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8329
perezm@brennan.law.nyu.edu
sweren-beckere@brennan.law.nyu.edu
**Not admitted to practice in Michigan*

*Attorneys for Proposed Amicus Curiae
The Brennan Center for Justice*

**THE BRENNAN CENTER FOR JUSTICE'S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF THE SECRETARY OF STATE**

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Pursuant to MCR 7.212(H)(1), the Brennan Center for Justice at New York University School of Law (“the Brennan Center”) moves for leave to file an *amicus curiae* brief. In support of this motion, the Brennan Center states as follows:

1. The Brennan Center is a nonprofit, nonpartisan public policy and law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of U.S. Supreme Court Justice William J. Brennan, Jr. to American law and society. Through its Voting Rights and Elections Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to reform voting and registration systems, combat vote suppression, and restore voting rights to those disenfranchised by criminal convictions in their past. The Brennan Center advocates for election administration reforms, litigates voting rights cases, and conducts empirical and qualitative research on issues related to election law and administration.

2. The Brennan Center has engaged in extensive efforts to ensure that elections throughout the country this year are free, fair, accessible, secure, *and safe* given the difficult and unprecedented challenges created by the novel coronavirus (“COVID-19”). The Brennan Center’s election administration and voting rights experts have identified mail voting, including absentee voting, as essential to ensuring that every American can cast a ballot that counts during the pandemic without risking their health or the health of their loved ones.

3. The Brennan Center has an interest in ensuring that state election officials can and do take affirmative steps to promote universal access to mail ballots during the COVID-19 pandemic.

4. The Brennan Center has an institutional and programmatic interest in promoting voting rights and voting accessibility, both in Michigan and nationwide. In pursuing these

interests, the Brennan Center has invested considerable resources in various forms of advocacy to promote universal access to mail ballots.

5. As set forth in the attached proposed amicus brief, the issues before the Court are of critical concern to the Brennan Center. If the Court were to reverse the judgment of the Court of Claims and conclude that the Secretary of State lacks authority to coordinate and oversee the mailing of absentee ballot applications to Michigan registered voters, this would frustrate the Brennan Center’s extensive plans for promoting free, fair, accessible, secure, and safe elections during the COVID-19 pandemic, both in Michigan and nationwide.

6. The Secretary of State’s actions further the aims of no-reason, absentee voting permitted under the Michigan Constitution—a provision that must be “liberally construed in favor of voters’ rights in order to effectuate its purposes”¹—and are particularly appropriate during the current COVID-19 pandemic.

7. The mailing of absentee ballot applications is consistent with the Michigan Constitution and statutes, furthers an active and engaged democracy, and seeks to encourage the ease of voter participation without disturbing the integrity or purity of any state election. If the Secretary of State’s efforts are invalidated or enjoined, the Brennan Center would have to divert significant resources from other advocacy projects to invest in additional efforts to ensure that every Michigan voter is able to cast a ballot that counts during the pandemic without risking their health or the health of their loved ones.

8. Due to the importance of the issues presented in this case, the Brennan Center submitted an amicus brief in the Court of Claims below.

¹ Mich Const 1963, art 2, sec 4(1).

9. The Brennan Center respectfully asks this Court to grant leave to file an amicus brief addressing these important issues before this Court as well.

WHEREFORE, the Brennan Center respectfully requests that the Court grant its request to participate as amicus curiae and accept the attached proposed brief for filing.

Respectfully submitted,

By: /s/Larry J. Saylor

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Larry J. Saylor (P28165)

Wendolyn Wrosch Richards (P67776)

Ashley N. Higginson (P83992)

Erika L. Giroux (P81998)

150 West Jefferson Ave., Suite 2500

Detroit, Michigan 48226

(313) 963-6420

saylor@millercanfield.com

richards@millercanfield.com

higginson@millercanfield.com

giroux@millercanfield.com

OF COUNSEL:

THE BRENNAN CENTER FOR JUSTICE

Myrna Pérez (NY Bar No. 4874095)*

Eliza Sweren-Becker (NY Bar No. 5424403)*

120 Broadway, Suite 1750

New York, NY 10271

(646) 292-8329

perezm@brennan.law.nyu.edu

sweren-beckere@brennan.law.nyu.edu

**Not admitted to practice in Michigan*

Attorneys for Proposed Amicus Curiae

The Brennan Center for Justice

Dated: September 4, 2020

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davisrobert854@gmail.com

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Heather S. Meingast (P55439)
Assistant Attorneys General
PO Box 30736
Lansing, Michigan 48909
(517) 294-1837
(517) 335-7659
grille@michigan.gov
meingasth@michigan.gov
Attorneys for Defendant

MILLER, CANFIELD, PADDOCK AND
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Larry J. Saylor (P28165)
Wendolyn Wrosch Richards (P67776)
Ashley N. Higginson (P83992)
Erika L. Giroux (P81998)
150 West Jefferson Ave., Suite 2500
Detroit, Michigan 48226
(313) 963-6420
saylor@millercanfield.com
richards@millercanfield.com
higginson@millercanfield.com
giroux@millercanfield.com

OF COUNSEL:
THE BRENNAN CENTER FOR JUSTICE
Myrna Pérez (NY Bar No. 4874095)*
Eliza Sweren-Becker (NY Bar No. 5424403)*
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8329
perezm@brennan.law.nyu.edu
sweren-beckere@brennan.law.nyu.edu
**Not admitted to practice in Michigan*

*Attorneys for Proposed Amicus Curiae
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DESCRIPTION OF AMICUS CURIAE AND STATEMENT OF INTEREST

Amicus Curiae the Brennan Center for Justice at New York University School of Law (“the Brennan Center”) is a nonprofit, nonpartisan public policy and law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of U.S. Supreme Court Justice William J. Brennan, Jr. to American law and society. Through its Voting Rights and Elections Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to reform voting and registration systems, combat vote suppression, and restore voting rights to those disenfranchised by criminal convictions in their past. The Brennan Center advocates for election administration reforms, litigates voting rights cases, and conducts empirical and qualitative research on issues related to election law and administration.

The Brennan Center has engaged in extensive efforts to ensure that elections throughout the country this year are free, fair, accessible, secure, *and safe* given the difficult and unprecedented challenges created by the novel coronavirus (“COVID-19”). The Brennan Center’s election administration and voting rights experts have identified mail voting, including absentee voting,¹ as essential to ensuring that every American can cast a ballot that counts during the pandemic without risking their health or the health of their loved ones. The Brennan Center has an interest in ensuring that state election officials can and do take affirmative steps to promote universal access to vote-by-mail options during the COVID-19 pandemic.

The Brennan Center has an institutional and programmatic interest in promoting voting rights and voting accessibility, both in Michigan and nationwide. In pursuing these interests, the

¹ This brief focuses on absentee voting, as that is the subject Plaintiff’s complaint. But the Brennan Center’s interest in vote-by-mail extends beyond absentee voting to include all mail voting opportunities that provide a means to stay safe while exercising one’s right to vote.

Brennan Center has invested considerable resources in various forms of advocacy to promote universal access to vote-by-mail. This advocacy has included numerous publications² and Congressional testimony.³ The Brennan Center has also made the case to media outlets for universal access to vote-by-mail during the COVID-19 pandemic,⁴ and experts from the Brennan Center have presented about the importance of universal vote-by-mail to both national and Michigan-based grassroots groups. For example, members of the Brennan Center's Voting Rights and Elections Program presented on the importance of access to vote-by-mail to a coalition of Michigan grassroots groups on May 21, 2020, and to a virtual symposium hosted by Duke Law School on July 27, 2020.

² Wendy R. Weiser & Max Feldman, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CENTER (Mar. 16, 2020), <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus>; Lawrence Norden, et al., *Estimated Costs of Covid-19 Resiliency Measures*, BRENNAN CENTER (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures> (last updated April 18, 2020); *Preparing Your State for an Election Under Pandemic Conditions*, BRENNAN CENTER, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions> (last updated September 1, 2020).

³ *The Impact of COVID-19 on Voting Rights & Election Admin: Ensuring Safe & Fair Elections: Hearing Before the Subcomm on Elections of the House Comm on Admin*, Testimony of Lawrence Norden, 116th Cong. (June 4, 2020).

⁴ Linda Qiu & Nick Corasaniti, *Can Michigan Mail Absentee Forms? Yes. Can Trump Withhold Funds? Unlikely.*, NY TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/us/politics/trump-mail-in-voting-absentee-ballots.html>; Adrianna Rodriguez, *Coronavirus Questions: 10 Things We Still Urgently Want to Know about COVID-19 in the Next 100 Days*, USA TODAY (May 27, 2020), <https://www.usatoday.com/story/news/health/2020/05/27/coronavirus-covid-19-pandemic-10questions-answers-us-death-toll-100-k/5229575002/>; Joan Biskupic, *Legal Battles over Voter Roll Purges Heat Up as Mail-in Ballot Fight Continues*, CNN (May 28, 2020), <https://www.cnn.com/2020/05/28/politics/voter-roll-purges-lawsuits-vote-by-mail/index.html>.

The Brennan Center also recently represented the League of Women Voters of Michigan and the City of Detroit in litigation about voter roll purge practices, and filed an *amicus curiae* brief in this case before the Court of Claims.

Putting a halt to the Secretary of State’s mailing of ballot applications to Michigan registered voters would frustrate the Brennan Center’s extensive efforts to promote free, fair, accessible, secure, and safe elections during the COVID-19 pandemic, both in Michigan and nationwide. If the Secretary of State’s actions are invalidated or enjoined, the Brennan Center would have to divert significant resources from other advocacy projects to invest in additional efforts to ensure that every Michigan voter is able to cast a ballot that counts during the pandemic without risking their health or the health of their loved ones.

INTRODUCTION

On November 7, 2018, “Promote the Vote” was the rallying cry as Michigan voters resoundingly decided, by more than a 2-to-1 margin, to embed no-reason absentee voting into Article 2, Section 4(1)(g) of the Michigan Constitution with the hope that voting would be less time-consuming and easier for everyone in the state.⁵ Plaintiff misconstrues the Michigan Election Law to advocate for positions that would improperly undermine voting rights and add unnecessary obstacles and burdens to voting absentee.

Under the Michigan Election Law, the Secretary of State is the “chief election officer” of Michigan and has broad supervisory authority over the state’s elections. Secretary Benson’s

⁵ As amended November 6, 2018 by Proposal No. 18-3 (“Proposition 3”), Mich Const 1963, art 2, sec 4(1)(g) provides: “Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights: * * * The 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. . . .”

action furthers the aims of no-reason absentee voting permitted under the Michigan Constitution—a provision that must be “liberally construed in favor of voters’ rights in order to effectuate its purposes”—and is particularly appropriate during the current COVID-19 pandemic.⁶ The mailing of absentee ballot applications is consistent with the Michigan Constitution and statutes, furthers an active and engaged democracy, and seeks to encourage the ease of voter participation without disturbing the integrity or purity of any state election. Statutes regulating the conduct of municipal clerks, addressed in prior litigation before the constitutional amendment was enacted and implemented, do not apply to the Secretary of State and do not limit her authority to provide qualified and registered voters with an application for an absentee ballot. The Brennan Center for Justice respectfully urges the Court to uphold Secretary Benson’s actions and affirm the judgment of the Court of Claims.

ARGUMENT

I. PUBLIC POLICY STRONGLY FAVORS AFFIRMATIVELY SENDING ABSENTEE BALLOT APPLICATIONS TO ALL VOTERS.

Amicus Curiae the Brennan Center has consistently maintained that affirmatively sending mail ballot applications to all voters is strong public policy and critical to administering a free, fair, accessible, and safe election, particularly during the present pandemic conditions. The Brennan Center has advocated for this policy in a variety of forums in recent months, including Brennan Center publications and reports,⁷ op-ed columns, Congressional testimony,⁸ and presentations to national and Michigan grassroots groups.

⁶ Mich Const 1963, art 2, sec 4(1).

⁷ Wendy R. Weiser & Max Feldman, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CENTER (Mar. 16, 2020), <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus>; Lawrence Norden, et al., *Estimated Costs of Covid-19 Resiliency Measures*, BRENNAN CENTER (Mar. 19, 2020),
Continued on next page.

The Brennan Center believes public policy strongly favors the Secretary of State's practice of affirmatively sending out mail ballot applications for at least five reasons. First, it provides good customer service at a time when voters need affirmative indications that their government cares about them. Second, it helps election officials confirm voter addresses, which is extremely important from an election security and voting rights perspective when actual ballots are mailed out. Third, it allows election officials to better plan for the processing of absentee ballot applications by encouraging more voters to submit their applications early. Fourth, it provides needed voter education. And fifth, as the results of the August 2020 primary demonstrate, it increases civic engagement and voter participation.

A. Good Service Provision

The COVID-19 pandemic has created significant chaos in voters' lives. In Michigan and across the country, voters have lost jobs, seen schedules change, adapted to working from home, and managed their own childcare after schools and summer programs shut down. During all of this confusion and upset, voters have dealt with changing voter registration deadlines, new procedures for voting, and even rescheduled elections. In Michigan, November marks the first major general election since the 2018 passage of Proposition 3 in which all voters will have the choice to vote absentee.

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<https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures> (last updated April 18, 2020); *Preparing Your State for an Election Under Pandemic Conditions*, BRENNAN CENTER, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions> (last updated July 21, 2020).

⁸ *The Impact of COVID-19 on Voting Rights & Election Admin: Ensuring Safe & Fair Elections: Hearing Before the Subcomm on Elections of the House Comm on Admin*, Testimony of Lawrence Norden, 116th Cong. (June 4, 2020).

Managing this level of disruption and change is not easy. To provide voter access amidst this process, election officials should do everything possible to minimize the difficulty of accessing the ballot box. Affirmatively mailing absentee ballot applications to voters to allow them to request an absentee ballot for both the August and November elections has meant that voters do not have to be informed or reminded of the need for an absentee voter application as a condition of receiving an absentee ballot or search for the proper form of application. The challenged practice thus removed a number of tasks and potential confusion points for voters during a period when time and emotional resources are in short supply and stress and information overload are high for Michiganders. Plaintiff's position is diametrically opposed to the concept of a responsive government.

B. Voter Address Confirmation

Maintaining accurate voter address information is a challenge for any state election administrator, but it is particularly important this year. Due to the passage of Proposition 3 and the COVID-19 pandemic, Michigan has already seen (and will almost certainly continue to see) a surge in absentee voting in this year's elections. By sending absentee ballot applications to all registered voters prior to the election cycle beginning in earnest, election officials can confirm and, as needed, update the databases of voter addresses. Accurate and up-to-date addresses are important to ensure that absentee ballots are received by voters in time to be returned and counted. Accurate and up-to-date voter rolls also minimize the opportunities that anti-voter activists have to claim voter fraud.

In the face of the public health threat advanced by COVID-19, and the increase in absentee voting after the 2018 amendment to the Michigan Constitution, it was highly prudent for the Secretary of State to encourage registered voters to submit applications for absentee

ballots as early as possible—as opposed to mere days before the election. This practice has given local clerks ample time to verify voter eligibility per statutory requirements. It also helps to ensure that those voters who are entitled to vote absentee will be able to do so and will not receive ballots for the general election late, as many did during the March 2020 primary, even before the true impact of COVID-19.⁹

C. Smoothing Out the Pre-Deadline Surge in Applications

Under Michigan Election Law, any registered voter who wants to have an absentee voter application mailed to them has until 5:00 pm the Friday before Election Day to submit their absentee ballot application. MCL 168.759(1). However, Michigan requires all actual absentee ballots to be *received* on or before Election Day.¹⁰ If the majority of voters would have requested their absentee ballots be mailed to them at or near the deadline, Michigan election officials would have faced a serious election administration problem in processing requests and mailing out a huge number of absentee ballots in a very short amount of time, or risking disenfranchisement of thousands of voters. This problem would have been compounded by the fact that this is the first major general election where all Michigan voters are eligible to vote absentee following the passage of Proposition 3.

Affirmatively sending absentee ballot applications to registered voters instead allows Michigan election officials to smooth out the number of applications that must be processed and verified over time. If voters receive applications weeks or months in advance, many will likely

⁹ See, e.g., Christiana Ford, Absentee Ballot Delays Causing Concern, WILX 10 (Feb. 20, 2020), <https://www.wilx.com/content/news/Absentee-ballot-delays-in-Meridian-Township-causing-concern-568055631.html>.

¹⁰ Michigan law does not allow late-arriving ballots that are postmarked by Election Day to be counted. See *League of Women Voters of Michigan v Secretary of State*, ___ Mich App ___; ___ NW2d ___; 2020 WL 3980216 (July 14, 2020), app den, 946 NW2d 307 (2020).

choose to return their applications sooner, rather than at the pre-Election Day deadline. This gives election officials more time to process applications and avoid a deadline crunch.

D. Voter Education

Further, in a time of general confusion and changes in election procedures, affirmatively sending absentee ballot applications to voters serves as a useful form of voter education. The absentee ballot applications will give election officials a valuable opportunity to inform voters of election dates and deadlines. Voter education about deadlines and dates is even more important this year due to the general confusion created by COVID-19 and the fact that this is the first major general election where all Michigan voters will have the option of voting absentee.

Social science research has confirmed that any “touch” between election officials and voters is valuable in helping voters learn about important dates and deadlines.¹¹ This form of voter education in turn helps increase voter turnout and civic participation.¹² Affirmative outreach such as sending out absentee ballot applications can be particularly helpful for promoting voter turnout in rural or remote areas without consistent access to government services, minority communities, and low-income communities.¹³

¹¹ Emma Fernandez, *Reducing the Turnout Gap in San Francisco*, San Francisco Elections Commission (May 2019), https://sfgov.org/electionscommission/sites/default/files/Documents/meetings/2019/2019-08-21-commission/2019_08_21_Elections_Comm_Item5_Reducing_the_Voter_Turnout_Gap_in_San_Francisco_Emma%20Fernandez.pdf.

¹² *Id.*

¹³ *Id.*; Bernard L. Fraga, *The Turnout Gap Between Whites and Racial Minorities is Larger Than You Think – and Hard to Change*, WASH. POST (September 25, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard-to-change/?utm_term=.28dae494c677.

E. Civic Engagement and Voter Turnout

Finally, affirmatively sending absent voter applications to registered voters has the benefit of increasing civic engagement and participation among Michigan's residents. In particular, receiving an absentee ballot application in the mail makes clear to registered voters that they have the ability to vote absentee and provides them with an easy and convenient method of applying for a ballot, thereby increasing the likelihood that they will actually participate in the election. The results of Michigan's August 2020 primary election bear out this prediction: the absentee ballot applications mailed at the Secretary's advice and direction advised voters that they were eligible to vote and to request an absentee ballot for both the August 2020 primary and the November 2020 general election. Voter participation in the August primary—amounting to more than 2.5 million votes—set historical records, in terms of both the number of votes cast overall and the number of absentee ballots cast.¹⁴

Specifically, voter participation in the August 2020 primary exceeded the August 2018 primary by approximately 300,000 votes (13%) and the August 2016 primary by approximately 1.1 million votes (79%).¹⁵ Voter turnout in nearly every county in the state of Michigan (81 of 83) exceeded both the August 2016 and August 2018 primaries. The August 2020 primary also saw a record number of votes cast by absentee ballot—more than 1.6 million, surpassing the

¹⁴ *Safe, Accessible, Secure Primary Proves Successful Elections Possible During Pandemic*, MICH SEC'Y OF STATE (August 6, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-535890--,00.html.

¹⁵ *Id.*; Julie Mack, *Turnout for Michigan's August Primary Shatters Records. What Does that Mean for November?*, M LIVE (August 6, 2020), <https://www.mlive.com/public-interest/2020/08/turnout-for-michigans-august-primary-shatters-records-what-does-the-mean-for-november.html>.

November 2016 presidential election by approximately 300,000 votes.¹⁶ These numbers demonstrate that the impact of mailing absentee voter applications on civic engagement is real and significant.

II. THE SECRETARY’S ACTIONS ARE CONSISTENT WITH THE MICHIGAN CONSTITUTION AND ELECTION LAW.

A. The Secretary of State Has Broad Constitutional and Statutory Authority to Mail Absent Voter Applications to Registered Voters.

As the Court of Claims correctly recognized, the Secretary of State has broad authority under the Michigan Constitution and Election Law to administer elections and issue necessary rules. (See Op & Order Granting Summary Disposition at 3-5.) Proposition 3’s creation of a constitutional right to vote absentee only strengthened this authority. The cases on which Plaintiff relies are inapposite and easily distinguishable from the facts of this case.

1. The Michigan Election Law grants the Secretary of State broad authority over election administration and specifically absentee ballot applications.

By statute, Michigan’s Legislature has assigned to the Secretary of State ultimate responsibility for administering elections in the state: under the Michigan Election Law, “[t]he secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21. This responsibility requires the Secretary of State to fulfill a wide array of duties. For example, the Secretary has the statutory duty and authority to “issue instructions and promulgate rules pursuant to the administrative procedures act of 1969 for the conduct of

¹⁶ *Safe, Accessible, Secure Primary Proves Successful Elections Possible During Pandemic*, MICH SEC’Y OF STATE (August 6, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-535890--00.html; Cassidy Johncox, *Michigan Sees Record Voter Turnout, Absentee Voting in Aug. 2020 Primary Election*, CLICKONDETROIT (August 6, 2020), <https://www.clickondetroit.com/decision-2020/08/06/michigan-sees-record-voter-turnout-absentee-voting-in-aug-2020-primary-election/>.

elections and registrations in accordance with the laws of this state”; “[a]dvice and direct local election officials as to the proper methods of conducting elections”; “[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots,” among other specifications; and “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations,” among other duties. MCL 168.31. (See also Op & Order re Summ Disp at 3-4; expounding statutory duties of the Secretary.)

This broad authority includes a specific power over the absentee ballot application form and the manner in which it is distributed. As the Court of Claims correctly recognized, the authority to “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations” provides the Secretary the power to provide a neutral form to all citizens. MCL 168.31(1)(e). (See also Op & Order Granting Summary Disposition at 5: “Here, defendant sent supplies to registered voters which she considers advisable for conducting an election during the midst of a global pandemic by mailing out absent voter ballot applications.”) Additionally, overseeing and coordinating the mailing of absentee voter applications fits neatly within the Secretary’s statutory duty to provide advice and direction on the proper methods of conducting elections. See MCL 168.31(1)(b). (See also Op & Order Granting Summary Disposition at 5: “[A]ll [the Secretary] has done here [is] provided direction for conducting an election during an unprecedent[ed] global pandemic involving a highly contagious respiratory virus.”). Further, by law, the Secretary is tasked with providing a uniform absentee voter application, confirming that its contents conform to applicable law, and supplying all local clerks with sufficient copies so that anyone who wants an

absentee ballot may ask for one. See, e.g., MCL 168.665 (forms, stationery, and supplies to be provided by the Secretary of State to local clerks); MCL 168.759c (“For a presidential primary, the secretary of state shall revise the absent voter ballot application form described in section 759...”). Mailing an application for an absentee ballot ensures that the applications that are submitted to local clerks do not deviate from the requirements of state law.

Similarly, in *Hare v Berrien County Board of Election Commissioners*, 373 Mich 526, 530; 129 NW2d 864 (1964), the Supreme Court relied upon a prior version of MCL 168.31—which likewise gave the Secretary the specific authority to “prescribe and require such uniform forms, notices and supplies as he shall deem advisable for use in the conduct of elections and registrations”—in granting a writ of mandamus to compel the printing of ballots in accordance with the Secretary’s instructions. The Court thus affirmed the Secretary’s discretion in carrying out their statutory duties. See *id.* The same reasoning is applicable here: the Legislature has charged the Secretary with the duty and authority to prescribe such forms as she “considers advisable”—authority that she has exercised by distributing a uniform absentee voter application form in a neutral manner to registered voters within the State. (See Op & Order re Summary Disposition at 4.)

2. *Proposition 3 expanded the Secretary of State’s pre-existing broad constitutional authority over absentee voting.*

Michigan voters’ adoption of the “promote the vote” Proposition 3 in November 2018 provides further support for the Secretary’s exercise of discretion and authority to mail absentee voter applications. Proposition 3 explicitly created a new constitutional right to vote absentee.¹⁷

¹⁷ Mich Const 1963, art 2, sec 4(1)(g) now states: “Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights: * * * The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days
Continued on next page.

Furthermore, it established that this new constitutional right should be “liberally construed in favor of voters’ rights in order to effectuate its purposes.”¹⁸ Proposition 3 created a constitutional imperative on state election officials to protect and promote the right to vote absentee. Election statutes must be interpreted in light of this new constitutional imperative. While Proposition 3 did not explicitly grant the Secretary of State any new authority, the power to coordinate and oversee the mailing of absentee ballot applications to registered voters fits comfortably within her existing status as the “chief election officer of the state,” which under the amendment must be “liberally construed.”

The Secretary’s actions in overseeing and coordinating the mailing of absentee ballot applications to registered voters are also consistent with the “purity of elections” clause now found in Article 2, Section 4, of the Michigan Constitution. Analogously, in *Elliott v Secretary of State*, 295 Mich 245, 249; 294 NW 171 (1940), the Supreme Court compelled the rotation of names of candidates for the office of Supreme Court Justice on the nonpartisan ballot. Relying on the “purity of elections” clause now found in article 2, section 4, of the Michigan Constitution,¹⁹ the Court held that “everything reasonably necessary to be done by election officials to accomplish the purpose of the amendment is fairly within its purview,” and “it is the clear duty of election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the

Continued from previous page.

before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. . . .”

¹⁸ Mich Const 1963, art 2, sec 4(1).

¹⁹ As amended by Proposal 3 in 2018, Mich Const 1963, art 2, sec. 4(2) states in relevant part: “[T]he legislature shall enact laws . . . 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.”

purity of elections.” *Id.* at 249-50 (emphases added). The Court thus directed the Secretary of State to rotate names on the ballot to ensure no one name received any advantage, without any express authority in the law to revise the ballot. Similarly here, Michigan’s chief election official has the duty to ensure nonpartisan, neutral access to the constitutional right to vote absentee for all citizens, including authority to oversee and coordinate the mailing of absentee voter applications to registered voters. “The phrase ‘purity of elections’ is one of large dimensions. It has no single, precise meaning.” *Wells v Kent Co Bd of Election Comm’rs*, 382 Mich 112, 123; 168 NW2d 222 (1969). It is clear, however, that it demands “fairness and evenhandedness in the election laws of the state.” *Socialist Workers Party v Sec’y of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). Nothing could be fairer or more evenhanded than trying to provide registered Michigan voters—regardless of age, race, ethnicity, gender identity, sexual orientation or political affiliation—with an opportunity to apply for an absentee ballot.

Plaintiff’s reliance on this Court’s opinion in *League of Women Voters of Michigan v Sec’y of State*, ___ Mich App ___, ___NW2d ___, 2020 WL 3980216 (July 14, 2020), *app den*, 946 NW2d 307 (Mich 2020), to defeat the Secretary’s actions is unavailing. As the Court of Claims correctly found, “[t]he case simply did not address, nor was the issue before the *League of Women Voters* panel, whether defendant had authority to mail absent voter ballot applications.” (Op & Order re Summ Disp at 9.) Rather, the Court in that case addressed the constitutionality of three issues: (1) the statutory requirement that absentee ballots be “received by” 8:00 P.M. on Election Day; (2) the failure of local clerks to process applications within 40 days; and (3) the requirement that voters pay return postage on an absentee ballot. *League of Women Voters*, 2020 WL 3980216, pp *2, *12-*13. In determining whether the 8:00 P.M. statutory deadline ran afoul of the plain meaning of the Michigan Constitution, as amended by

Proposition 3, the Court identified the following as the “relevant passage” of the amendment: “The 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.” *Id.* at p *8 (quoting Mich Const 1963, art 2, sec 4(1)(g)).

The Court rejected the plaintiffs’ argument “the use of the word ‘vote’ ... requires it to mean ‘marking a ballot’ or similar usage,” instead concluding that:

We reject the idea that the word “vote” must necessarily be given the exact same meaning under both § 4(1)(g) and the various statutory provisions cited by plaintiffs. “Vote” has many different meanings, both as a noun and a verb. But, more to the point, even accepting plaintiffs’ argument that “vote” means something akin to “marking the absentee ballot,” it does not change the outcome. Voting is not the single act of marking a ballot, but the entire process. Indeed, ultimately plaintiffs’ argument is self-defeating. If we accept plaintiffs’ argument that the plain text employs “the commonsense meaning that a person ‘votes’ an absentee ballot when she fills it out,” then we would necessarily have to conclude that all that is guaranteed under Proposal 3 is the right to fill out an absentee ballot, not to have it counted. Such a conclusion would be absurd. Accordingly, “vote” must refer to the entire process of voting, which in the context of absentee voting starts with requesting an application to apply for an absentee ballot and continues to the delivery of the completed ballot to the appropriate election officials.

League of Women Voters, 2020 WL 3980216, p *8 (emphasis added). Thus, since “vot[ing]” encompasses a broader process than the mere act of marking a ballot, the Court rejected the plaintiffs’ argument that Proposition 3 gave voters the right to “be able to mark that [absentee] ballot and deposit it in the mail anytime during that [constitutional] 40-day period, including on election day,” and have it counted. *Id.* Contrary to Plaintiff’s assertions in his brief, nowhere in the *League of Women Voters* opinion did the Court offer any construction of MCL 168.759, let alone reach a holding on the question of whether the Secretary of State may engage in affirmative mailings of absentee voter applications. Further, the fact that the absentee voting

process *may* start with a voter requesting a ballot does not mean that is the only way the process can begin, and nothing about the act of affirmatively mailing absent voter applications is at all inconsistent with the Court’s conclusion in *League of Women Voters* that the term “vote,” as used in article 2, section 4(1)(g) of the Michigan Constitution, means “the entire process of voting.” See 2020 WL 3980216, p *8.

3. *Nothing in MCL 168.759 precludes the Secretary from mailing absentee ballot applications to registered voters.*

Plaintiff invokes MCL 168.759(5)—a provision of the Michigan Election Law directed to local clerks—but that subsection simply does not speak to the question of the Secretary of State’s power and authority. Rather, by its plain language, MCL 168.759(5) speaks only to the duties of local clerks: “The *clerk* of a city or township shall have absent voter ballot application forms available in the *clerk’s* office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.” MCL 168.759(5) (emphases added). MCL 168.759(5) is completely silent on the Secretary of State’s duties and authority.

In arguing to the contrary, Plaintiff relies primarily on a case that, like MCL 168.759(5), does not address the Secretary of State’s authority at all: *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007). *Taylor* addressed only the propriety of unsolicited mailings of absent voter applications by a city clerk who was up for re-election and included a personal, signed letter with the application, which this Court termed “propaganda.” *Id.* at 97. *Taylor* was also informed by the principle that “a court cannot infer a power the Legislature has not specifically provided for a municipality”—a principle that is inapposite to the authority of a constitutional officer like the Secretary of State. *McIntosh v City of Muskegon*, 88 Mich App 30, 32; 276 NW2d 510 (1979). As the Court of Claims correctly concluded, then, *Taylor* is not determinative in this case, because “the actors at issue—the Secretary of State versus a local election official—are different,

and those actors possess different authority that compels a different outcome.” (Op & Order re Summ Disp at 7.)

Indeed, as a constitutional officer, the Secretary of State has far broader inherent authority than the local clerk in *Taylor*. See Mich Const 1963, art 5, sec 3, 21. By statute, the Secretary has also been appointed the state’s chief election officer and given “supervisory control over local election officials in the performance of their duties.” MCL 168.21. All that MCL 168.759(5) does is require one of these “local election officials,” *i.e.*, the city clerk, to carry out the ministerial function of furnishing the absentee ballot application to the voter if the voter requests an application in a certain manner. MCL 168.759(5), however, does nothing to limit the broad grant of authority to the Secretary of State in the Michigan Election Law. (See also Op & Order re Summ Disp at 7-8: “The issue in *Taylor* concerned the authority of a municipal officer under a statute that does not implicate the Secretary of State.”)

Further, MCL 168.759(5) should not be read as proscriptive or restrictive. Rather, the provision is a directive that, at the very least, city clerks in Michigan must have applications available in their offices and also provide them upon request. This much is not optional. But, when read in conjunction with Proposition 3 and Michigan Election Law, MCL 168.759(5) does not prohibit anyone (including the Secretary of State and local clerks) from also making these applications available in other ways. See Attorney Gen Op No. 5527 (August 2, 1979) (opining that MCL 168.759 “does not preclude the clerk from furnishing more than one form if requested” and concluding that “school election officials or election officials of municipalities conducting elections for them shall furnish applications for absentee ballots...”).

Indeed, a more recent published Court of Appeals decision held that even a city clerk has implied authority to distribute absent voter applications in ways not expressly authorized by

MCL 168.759. In *Barrow v Detroit Election Commission*, 305 Mich App 649, 678-82; 854 NW2d 489 (2014), the court held that “statutes recognize the clerk’s authority to receive absentee ballots and applications for absentee ballots at locations other than the clerk’s office.... Although MCL 168.761 permits delivery of absentee ballots at the clerk’s office to voters who apply in person, it does not proscribe in-person delivery at other locations. Read as a whole, the statutory scheme permits the use of satellite locations.” See also *Fleming v Macomb Co Clerk*, No. 279966, 2008 WL 2553266, p *6 (Mich Ct App, June 26, 2008) (noting that “[w]e fail to see how public mailings of apparently neutral absent voter ballot applications methodically promote anything besides the mere act of voting.”). Here, the Secretary merely ensured that every Michigan voter was provided an opportunity to receive an absentee voter ballot application. Such a neutral procedure is in accordance with the law and within the significant discretionary powers of the Secretary.

B. MCL 168.759 Allows Any Person—Necessarily Including the Secretary of State—to Distribute Absent Voter Applications Using a Variety of Proper Written Forms.

Finally, MCL 168.759(7) unambiguously allows any “person” to “print[] and distribute[] absent voter ballot applications,” so long as certain formal requirements are met (*e.g.*, that the application contains the statutory warning and instructions). That section provides: “A person who prints and distributes absent voter ballot applications shall print on the application the warning, certificate of authorized registered elector returning absent voter ballot application, and instructions required by this section.” On the plain and ordinary meaning of the statute, the Secretary of State is a “person.” Additionally, yet another subsection of the statute clearly authorizes a voter to apply for an absentee ballot in several different ways, namely, “[b]y a written request signed by the voter,” “[o]n an absent voter ballot application form provided for

that purpose by the clerk of the city or township,” and “[o]n a federal postcard application.” MCL 168.759(3). There can be no reasonable doubt that the absentee ballot application forms mailed by the Secretary constitute “a written request [to be] signed by the voter,” and are therefore permissible under the statute. Further, reinforcing the plain meaning of this section, MCL 168.759(8) criminalizes only false statements, forged signatures and improper return of applications—not the mere distribution of applications. Thus, when read together, these provisions clearly show that *any* person, including the Secretary of State, may distribute absentee ballot applications that comply with the formal statutory requirements.

Reading these provisions together only highlights the infirmities in the statutory interpretation argument advanced by Plaintiff: Were MCL 168.759(5) really so narrow as to limit anyone other than the city clerk from providing applications for absentee ballots, and then only upon request, there would be no point in the statute providing other ways for voters to apply for an absent voter ballot (MCL 168.759(3)(a), (c)), nor would there be any reason to include directions regarding the printing and distribution of applications by other persons (MCL 168.759(7)). See *TOMRA of N Am, Inc v Dep’t of Treasury*, ___ Mich ___; ___ NW2d ___; 2020 WL 3261606, at *6 (June 16, 2020) (“Indeed, we must always read the text as a whole, in view of its structure and of the physical and logical relation of its many parts. This is because context is a primary determinant of meaning, and for an interpretation that seeks the ordinary meaning of the statute, it is the narrower context drawn from neighboring provisions within a statute that is most appropriate to consider.”) (internal quotation marks omitted).

Plaintiff’s argument ignores that applications for an absentee ballot are easily accessible and available online, including from local clerks’ offices without written application,²⁰ and are

²⁰ See, e.g., <https://www.cityofdearborn.org/services/clerk/election-information>.

widely distributed by political parties and other persons.²¹ The applications distributed to registered voters by the Secretary of State are accompanied by the instructions mandated by MCL 168.759, and do not include any electioneering or “propaganda.” Plaintiff would have every person in Michigan authorized to distribute applications except the State’s chief election official. Plaintiff’s interpretation is illogical, contrary to the purpose and language of the Michigan Constitution and Michigan Election Law, and should be rejected as a matter of law.

III. GRANTING PLAINTIFF’S REQUEST WOULD SOW UNNECESSARY CHAOS AND IMPOSE UNWORKABLE AND IMMENSE ADMINISTRATIVE BURDENS

Plaintiff’s brief also makes no attempt to address the immense practical consequences, turmoil, and disenfranchisement that would inevitably follow from the relief he seeks. Specifically, Plaintiff asks this Court to enter a declaratory judgment that the Secretary of State “lacked the statutory and/or constitutional legal authority to mail unsolicited absentee voter applications to the Plaintiff-Appellant and to other registered voters in the State of Michigan.” (See Pl’s Brief at 27.) But what of the millions of voters expecting to receive an absentee ballot for the November election, after affirmatively checking that option and submitting to their local clerk the form they received in the mail months ago?

Registered voters submitted more than 1.6 million absentee ballots for the August 2020 primary; that number is only expected to grow in November.²² Requiring local clerks to go back through their records to verify the precise methodology through which each ballot was requested

²¹ See, e.g., <https://www.vote.org/absentee-ballot/michigan/> and Mark Cavitt, *Michigan Political Party Mailers Are Confusing Some Absentee Voters*, OAKLAND PRESS (March 2, 2020) https://www.theoaklandpress.com/news/michigan-political-party-mailers-are-confusing-some-absentee-voters/article_4572fd78-5cc5-11ea-910f-177721d2b4be.html.

²² *Safe, Accessible, Secure Primary Proves Successful Elections Possible During Pandemic*, MICH SEC’Y OF STATE (August 6, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-535890--,00.html.

in order to figure out which voters requested ballots using the form they received in the mail, invalidate all of those requests, and then inform the voters they have to resubmit an application would be chaotic and unworkable for local clerks. That is particularly true when clerks are already dealing with recruiting poll workers and preparing to mail and coordinate receipt of absentee ballots for what is predicted to be record-setting voter turnout during the November general election.²³ Plaintiff's brief is silent on how clerks are to deal with this enormous administrative burden. Further, in the event that clerks lack the resources to identify every single voter who requested a ballot using the Secretary's form, notify these voters, and assist them in submitting a new request, the relief Plaintiff seeks would essentially disenfranchise every single one of those voters in the November presidential election. See *Reynolds v Sims*, 377 US 533, 554 (1964) (“[A]ll qualified voters have a constitutionally protected right to vote and to have their votes counted.”) (internal citation omitted); *Chiafalo v Washington*, Oral Argument Tr at 33:11-16, No. 19-465 (US, May 13, 2020) (Kavanaugh, J.) (“I want to follow up on ... what I might call the avoid chaos principle of judging, which suggests that if it's a close call or a tiebreaker, that we shouldn't facilitate or create chaos.”).

In short, the rule for which Plaintiff advocates would sow chaos among voters and local clerks, impose massive uncertainty and administrative burdens, and risk potentially disenfranchising hundreds of thousands of voters in the November general election. Plaintiff's request should be denied and the judgment of the Court of Claims affirmed.

²³ Julie Mack, *Turnout for Michigan's August Primary Shatters Records. What Does that Mean for November?*, M LIVE (August 6, 2020), <https://www.mlive.com/public-interest/2020/08/turnout-for-michigans-august-primary-shatters-records-what-does-the-mean-for-november.html>.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed herein and those in the brief filed by the Secretary of State, the Court should affirm the judgment of the Court of Claims in full.

Respectfully submitted,

By: /s/Larry J. Saylor

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Larry J. Saylor (P28165)

Wendolyn Wrosch Richards (P67776)

Ashley N. Higginson (P83992)

Erika L. Giroux (P81998)

150 West Jefferson Ave., Suite 2500

Detroit, Michigan 48226

(313) 963-6420

saylor@millercanfield.com

richards@millercanfield.com

higginson@millercanfield.com

giroux@millercanfield.com

OF COUNSEL:

THE BRENNAN CENTER FOR JUSTICE

Myrna Pérez (NY Bar No. 4874095)*

Eliza Sweren-Becker (NY Bar No. 5424403)*

120 Broadway, Suite 1750

New York, NY 10271

(646) 292-8329

perez@brennan.law.nyu.edu

sweren-beckere@brennan.law.nyu.edu

**Not admitted to practice in Michigan*

Attorneys for Proposed Amicus Curiae

The Brennan Center for Justice

Dated: September 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system which will send notification of such filing to Plaintiff *in pro per* and all attorneys of record.

/s/Margaret J. Grainger

Miller, Canfield, Paddock and Stone, PLC

150 West Jefferson, Suite 2500

Detroit, MI 48226

(313) 963-6420

grainger@millercanfield.com

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