STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT DAVIS,
Plaintiff-Appellant,

v

JOCELYN BENSON, in her official capacity as the duly elected Michigan Secretary of State,
Defendant-Appellee.

Court of Appeals No. 354622
Court of Claims No. 20-99-MM
HON. CYNTHIA STEPHENS

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APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court err by granting Appellee Secretary of State's motion for summary judgment pursuant to MCR 2.116(C)(8) and (C)(10)?

Appellant Answers:	YES
Appellee Answers:	NO
Trial Court Answers:	NO

II. Does the Appellee Secretary of State have the statutory legal authority under Michigan Election Law to mail unsolicited absentee voter applications to registered voters?

Appellant Answers:	NO
Appellee Answers:	YES
Trial Court Answers:	YES

III. Does Mich.Const. 1963, art. 2, §4, as amended by Proposal 3 in 2018, authorize the Appellee Secretary of State to mail unsolicited absentee voter applications to registered voters?

Appellant Answers:	NO
Appellee Answers:	YES
Trial Court Answers:	YES

STATEMENT OF QUESTIONS PRESENTED (Cont.)

IV. Did Mich.Const. 1963, art. 2, §4, as amended by Proposal 3 in 2018, amend and/or alter the process set forth under MCL §168.759 for a registered voter to be mailed and/or provided with an absentee voter application?

Appellant Answers:	NO
Appellee Answers:	YES
Trial Court Answers:	YES

STATEMENT OF APPELLATE JURISDICTION

Pursuant to MCR 7.203(A)(1) and MCR 7.204, Appellant Robert Davis timely filed an appeal of right from the trial court's August 25, 2020 Opinion and Order granting Appellee Secretary of State's motion for summary judgment pursuant to MCR 2.116(C)(8) and (C)(10). (**See August 25, 2020 Opinion and Order attached as Exhibit A**).

This Court has jurisdiction of an appeal of right filed by an aggrieved party from "[a] final judgment or order of the circuit court" as defined in MCR 7.202(6), MCR 7.203(A)(1), or from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule," MCR 7.203(A)(2). MCR 7.202(6)(a)(i) defines a final order in a civil case as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties."

The trial court's August 25, 2020 Opinion and Order (**Exhibit A**) is a "final order" that Appellant could appeal as of right under MCR 7.203(A)(1). Thus, this Court has jurisdiction over Appellant's instant appeal.

STATEMENT OF FACTS/PROCEDURAL POSTURE OF CASE

On May 28, 2020, Plaintiff-Appellant Robert Davis ("**Appellant" or "Appellant Davis"**) filed a two-count verified complaint with the Michigan Court of Claims along with an Emergency Motion for Declaratory Judgment seeking for the trial court to declare that the Appellee Secretary of State's actions of unilaterally mailing "unsolicited" absentee voter ballot applications to registered voters in the State of Michigan violate Michigan Election, the Purity of Elections provision of the Michigan Constitution of 1963, and violate the Separation Clause of the Michigan Constitution of 1963. (**See Appellant's verified complaint as Exhibit B and Appellant's Emergency Motion for Declaratory Judgment as Exhibit C**).

On May 27, 2020, Appellant, as a registered voter of the state of Michigan, received at his home, through the U.S. postal mail, an unsolicited absentee voter ballot application from the Appellee Secretary of State. (See ¶ 15 of Plaintiff's Verified Complaint; see also **Exhibit D**).

Although the news media initially reported that the Appellee Secretary of State was mailing "unsolicited" absentee voter ballot

applications to all registered voters of the State of Michigan, it has since been discovered and determined that the Secretary of State did **not** mail "unsolicited" absentee voter ballot applications to registered voters in the City of Detroit. (**See ¶18 of Appellant's Verified Complaint; and see "Unsolicited" Absentee Voter Ballot Applications Mailed By Detroit City Clerk Janice Winfrey and City of Detroit Department of Elections To Registered Voters of City of Detroit attached as Exhibit E; see also Email from Assistant Attorney General Heather Meingast attached as Exhibit F**).

On June 11, 2020, the trial court entered an order setting a hearing on Appellant's Emergency Motion for Declaratory Judgment for June 16, 2020 and consolidating The Davis Court of Claims Case with two (2) other cases against the Secretary of State, which sought injunctive release seeking to enjoin the Appellee Secretary of State from mailing "unsolicited" absentee voter ballot applications to registered voters.

On June 16, 2020, the trial court heard arguments on Appellant's Emergency Motion for Declaratory Judgment along with the two (2) consolidated cases seeking the issuance of a preliminary injunction.

Later that same day, the trial court entered a "post-hearing" order inviting the parties "to provide the court with any Motions, briefs and Supplemental Prayers for Relief on the Declaratory Relief issues on or before Friday, June 26, 2020" and requiring "Responsive papers shall be due on or before Tuesday, June 30, 2020."

On June 18, 2020, the trial court entered an Order DENYING injunctive relief in the two (2) consolidated cases of *Cooper-Keel v Benson*, 20-91-MM; and *Black v Benson*, 20-96-MZ. Notably, in footnote 1 of Defendant Judge Stephens Opinion and Order in the consolidated matters of *Cooper-Keel and Black v Benson*, Defendant Judge Stephens properly noted that the opinion and order did **not** address Plaintiff Davis' pending motion for declaratory relief. (**See Trial Court's June 18, 2020 Opinion and Order in the consolidated cases of *Cooper-Keel and Black v Benson* attached as Exhibit G**).

In accordance with the trial court's June 16, 2020 Order, on June 26, 2020, the Appellee Secretary of State filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). On July 13, 2020, Appellant timely filed a response in opposition to the Appellee Secretary of State's motion for summary disposition. In Appellant's

response in opposition to the Secretary of State's motion for disposition, Appellant requested the trial court to grant summary disposition in favor of the Appellant pursuant to MCR 2.116(I)(2).

However, after briefing concluded in The Davis Court of Claims Case was completed, on July 14, 2020 this Court issued a "published" opinion in the case of *League* of *Women Voters of Michigan v Secretary of State*, ___ Mich.App.___; ___ NW2d____ (2020), issued July 14, 2020 (Docket No.353654). Accordingly, on July 16, 2020, in accordance with the stipulated order entered into by Appellant and Appellee Secretary of State, Appellant filed Supplemental Authority in Support of Plaintiff's Response in Opposition to the Secretary of State's motion for summary disposition.

Despite the urgency expressed by the parties for the expedited adjudication of The Davis Court of Claims Case, as of August 14, 2020, the trial court had not entered an order adjudicating Appellant's pending emergency motion for declaratory judgment nor the Appellee Secretary of State's pending motion for summary disposition. Since the trial court had failed to properly adjudicate Appellant's and Appellee's motions in an expeditious fashion, on August 20, 2020, Appellant filed

an original action in the Court of Appeals for a writ of superintending control. See *In Re Davis*, Court of Appeals Docket No. 354572.

Seemingly, in response to Appellant's complaint for superintending control, on August 25, 2020, the trial court issued its opinion and order granting Appellee Secretary of State's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). This appeal then ensued.

ARGUMENT

TRIAL COURT ERRED BY GRANTING APPELLEE SECRETARY OF STATE'S MOTION FOR SUMMARY DISPOSITION.

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) may be granted only when a claim is unenforceable as a matter of law and no factual development could lead to the claim's enforceability. *Id.* at 119. The trial court decides a motion under MCR 2.116(C)(8) on the pleadings. *Id.* at 119-120. On review, factual allegations of the nonmoving party are accepted as true, and facts are taken in the light most favorable to that party. *Id.* at 119.

With respect to a motion for summary disposition under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion.

> Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 120 (citations omitted).]

B. LAW AND LEGAL ANALYSIS

Neither Michigan Election Law nor the Michigan Constitution authorize the Appellee Secretary of State to send and/or mail **unsolicited** absentee voter **applications** to registered voters. MCL §168.759 of Michigan Election Law, "clearly addresses the distribution of applications for absent voter ballots." *Taylor v Currie*, 277 Mich.App. 85, 97; 743 NW2d 571 (2007).

, MCL §168.759(3) provides:

> (3) **An application for an absent voter ballot under this section may be made in any of the following ways:**
> (a) By a written request signed by the voter.
>
> (b) **On an absent voter ballot application form *provided for that purpose by the clerk of the city or township.***
>
> (c) On a federal postcard application. [emphasis supplied].

MCL §168.759(4) further provides, in relevant part that "[a]n applicant for an absent voter ballot shall sign the application. **A clerk**

or assistant clerk *shall not deliver an absent voter ballot to an applicant who does not sign the application*." (emphasis supplied).

MCL §168.759(5) governs the issuance and delivery of an absentee voter application to a registered voter. states, in relevant part: "[***t]he clerk of the city, township, or village*** shall have absent voter application forms available in the office of the clerk at all times **and shall furnish an absent voter ballot application form *to anyone upon a verbal or written request***." (emphasis supplied).

The clear and unambiguous language of MCL §168.759(5) makes it clear that an absentee voter application can only be delivered to a registered voter "***upon a verbal or written request***" **from the individual registered voter**. See MCL §168.759(5). As this Court recently explained in *League of Women Voters v Secretary of State*, ____ Mich.App.____; ____NW2d____ (2020), issued July 14, 2020 (Docket No.353654), *lv denied* ____Mich.____ (2020) issued July 31, 2020 (SC Docket No. 161671):

> 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*, ___Mich.App. at ____, slip op at p 11.]

This Court's holding in *League of Women Voters, supra*, makes it abundantly clear that "absentee voting ***starts with [a registered voter] requesting an application to apply for an absentee ballot***." *Id.* (emphasis supplied). In the case at bar, Appellant did **not** request, either verbally or in writing, for the Appellee Secretary of State to mail and/or send him an absentee voter application. (**See "Unsolicited" Absentee voter application Appellant received from the Appellee Secretary of State attached as Exhibit D**). MCL §168.759(5) simply **does not authorize** the mailing of ***unsolicited*** absentee voter **applications** to registered voters. As this Court so noted in League of Women Voters, supra, "absentee voting ***starts with [a registered voter] requesting an application to apply for an absentee ballot***." *Id.* (emphasis supplied). Thus, without a verbal or written request from a registered voter, the Appellee Secretary of State lacked any legal authority to mail unsolicited absentee voter applications to Appellant and other registered voters. *Id.*; see also MCL §168.759(5).

The trial court's August 25, 2020 opinion and order clearly ignored the well-established principles of statutory construction. "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent. ...'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576; 101 S Ct 2524; 69 L Ed2d 246 (1981). "It is axiomatic that statutory language expresses legislative intent." *Mich. Dept. of Transp. v Tomkins*, 481 Mich. 184, ____; 749 NW2d 716, 720 (2008). "Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary." *Wilcoxon v City of Detroit Election Commission*, 301 Mich.App. 619, ___; 838 NW2d 183, 190 (2013) (citations omitted). "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.'" *In re Certified Question* (*Kenneth Henes Special Projects Procurement v. Continental Biomass*), 468 Mich. 109, 113, 659 N.W.2d 597 (2003), quoting *Coleman v. Gurwin*, 443 Mich. 59, 65, 503 N.W.2d 435 (1993). "An overarching rule of statutory construction is that this Court must enforce clear and unambiguous

statutory provisions as written." *United States Fidelity & Guaranty Co. v. Mich. Catastrophic Claims Ass'n* (On Rehearing), 484 Mich. 1, 12, 795 N.W.2d 101 (2009) (USF & G) (quotation marks and citation omitted).

The trial court engaged in the forbidden practice of "legislating from the bench." "It is not [this Court's] role to rewrite the law or substitute our own policy judgment in the face of the text of the statute, or 'to create an ambiguity where none exists in order to reach a desired result. . . .'" *People v Harris*, 499 Mich 332, 356; 885 NW2d 832 (2016), quoting *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). Courts may not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature." *DiBenedetto v. West Shore Hosp*., 461 Mich. 394, 405, 605 N.W.2d 300 (2000).

A Court's "judicial role 'precludes imposing different policy choices than those selected by the Legislature....'" *Robertson v. DaimlerChrysler Corp*., 465 Mich. 732, 759, 641 N.W.2d 567 (2002), quoting *People v. Sobczak-Obetts*, 463 Mich. 687, 694-695, 625 N.W.2d 764 (2001). "Whether or not a statute is productive of injustice, inconvenience, is

unnecessary, or otherwise, are questions with which courts ... have no concern." *Voorhies v. Recorder's Court Judge*, 220 Mich. 155, 157; 189 N.W. 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature ... had full knowledge of the provisions ... and we have no right to enter the legislative field and, upon assumption of unintentional omission ..., supply what we may think might well have been incorporated." *Reichert v. People's State Bank*, 265 Mich. 668, 672, 252 N.W. 484 (1934).

Moreover, "[w]hen the Legislature fails to address a concern in the statute with a specific provision, **the courts cannot insert a provision simply because it would have been wise of the Legislature to do so**. . . ." *Menard Inc v Dep't of Treas,* 302 Mich App 467, 472; 838 NW2d 736 (2013). This is precisely what the trial court did by ruling the Appellee Secretary of State had the legal authority to mail unsolicited absentee ballot applications to the Appellant and other registered voters. There is not a single provision within the Michigan Election Law that authorizes the Appellee Secretary of State to mail unsolicited absentee voter applications to registered voters. Moreover, and perhaps more importantly, the Michigan Election Law grants

exclusive authority to the local city, township, and village clerks to process and issue absentee voter applications and absentee ballots. *See* MCL §§168.759, 168.759a, 168.765, 168.769.

The Department of State is one of the principal departments in the executive branch of state government. *See* MCL §16.104(1). Article 5 of the Michigan Constitution of 1963 delineates the executive branch of government in Michigan. Mich.Const. 1963, art. 5, §3 provides, in relevant part, that "[t]he single executives heading principal departments shall include a ***secretary of state***, a state treasurer and an attorney general." (emphasis supplied). Mich.Const. 1963, art. 5, §9 provides, in relevant part, that the "[s]ingle executives heading principal departments…shall…***perform duties prescribed by law***." (emphasis supplied).

The powers and duties of the Appellee Secretary of State are set forth in MCL §§168. 21 and 168.31 of Michigan Election Law. Although the Appellee Secretary of State is "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" Michigan Election Law, notably, however, the Legislature did **not** empower or grant the

Appellee Secretary of State with the statutory authority to mail ***"unsolicited"*** absentee voter **applications** to registered voters. As our Supreme Court has stated, "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Sittler v. Michigan College of Mining & Tech. Bd. of Control,* 333 Mich. 681, 687, 53 N.W.2d 681 (1952) (citations and punctuation omitted). As such, "**[p]ublic officers have and can exercise only such powers as are conferred on them by law**...." *Id.* (citations and punctuation omitted) (emphasis supplied).

Although Appellee Secretary of State's intentions, in light of the COVID-19 pandemic, were well-intended, they are nonetheless **unlawful!** MCL §168.759(5), "clearly addresses the distribution of applications for absent voter ballots." *Taylor*, 277 Mich.App. at 97. MCL §168.759(5) provides, in relevant part, that "[***t]he clerk of the city, township, or village*** shall have absent voter application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form ***to anyone upon a verbal or written request***." (emphasis supplied). MCL §168.759 of Michigan

Election Law is the only provision in Michigan Election Law that governs the furnishing of absentee voter applications to registered voters. The plain reading of MCL §168.759(5) of Michigan Election Law clearly does **not** authorize the Appellee Secretary of State to mass mail ***"unsolicited"*** absentee voter ballot applications to registered voters.

"[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris Co.,* 529 U.S. 576, 583, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (citation and punctuation omitted). And as this Court correctly instructed in *Taylor*, "on the basis of the maxim expressio *unius est exclusio alterius*, (the expression of one thing is the exclusion of another), *Feld v. Robert & Charles Beauty Salon*, 435 Mich. 352, 362, 459 N.W.2d 279 (1990) (opinion by RILEY, C.J.), we read the statute **to preclude mass mailings when it specifically states that *the clerk shall provide the applications upon written or verbal request***." *Taylor*, 277 Mich.App. at ____; 743 NW2d at 578 (emphasis supplied).

Appellant is unaware of, and the trial court and Appellee Secretary of State have failed to cite, any provision within Michigan Election Law that ***explicitly*** authorizes the Appellee Secretary of State

to mass mail ***"unsolicited"*** absentee voter ballot applications to registered voters.

2018 Proposal 3 Amendment to art. 2, §4 of Michigan Constitution of 1963 Does NOT Authorize Appellee Secretary of State to Mail Unsolicited Absentee Voter Applications To Registered Voters.

Similarly, the trial court's attempt to enlarge the scope of the 2018 Proposal 3 amendment to art. 2, §4 of the Michigan Constitution of 1963 cannot be affirmed. The trial court's attempt to legitimize Appellee Secretary of State's unlawful actions by misinterpreting the 2018 Proposal 3, which amended art 2, §4 of the Michigan Constitution of 1963, further illustrates the trial court's desperate attempt to engage in the forbidden practice of "legislating from the bench."

In interpreting constitutional provisions, this Court applies two rules of interpretation. *Makowski v Governor*, 495 Mich 465, 472, 473; 852 NW2d 61 (2014). "First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Id.* (quotation marks and citation omitted). "Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re*

Burnett Estate, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). Every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Second, the interpretation should consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Id.* (quotation marks and citation omitted).

Again, the relevant constitutional passage reads: "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." § 4(1)(g). As noted by this Court in *League of Women Voters, supra*, "[w]hile this provision does not define the word 'vote,' …… [v]oting is not the single act of marking a ballot, but the entire process." *Id.*, slip op at p 10. "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." *Id.* (emphasis supplied).

Contrary to the trial court's erroneous holding, art. 2, §4 does **not** in any way grants the Appellee Secretary of State additional legal authority to mail unsolicited absentee voter applications to registered voters. Rather, art. 2, §4, as amended, reinforces the process by which a registered voter must follow to be issued an absentee voter application. This Court's holding in *League of Women Voters, supra*, makes it clear that the process of voting by absentee ballot "***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***." *Id.* (emphasis supplied). MCL §168.759(5) provides the process a voter must follow to be issued an absentee voter application and notably, it does not include, mentions or names the Appellee Secretary of State.

Again, the trial court attempted to read words into the constitutional amendment that are simply not there. Such a strained reading of the clear language of art. 2, 4, as amended by the 2018

Proposal 3, would violate the established rules for interpreting constitutional provisions. *League of Women Voters*, slip op at pp 6-13.

The fact that the trial court consciously chose to ignore the plain meaning of the constitution and the controlling statute is further illustrated by the fact that it chose to "distinguish" *League of Women Voters* on the ***spurious*** ground that "[t]he [*League of Women Voters*] 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". The fact is, *League of Women Voters* interpreted the very statute at issue here - MCL 168.759 - and concluded as it had to, that, "voting" "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***." *Id.* (emphasis supplied).

Accordingly, all this Court needs to do in this case is reaffirm its holding in *League of Women Voters*.

CONCLUSION/PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant Robert Davis prays that this Honorable Court REVERSES and VACATES the trial court's August 25, 2020 opinion and order; enter a JUDGMENT in favor of the Plaintiff-Appellant declaring the Appellee 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; and pursuant to MCR 7.216(A), grant any other relief this Court deems necessary and appropriate.

Dated: August 28, 2020

Respectfully submitted,

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PROOF OF SERVICE

Robert Davis certifies that on August 28, 2020, he served a copy of the foregoing document(s) via the Court's MiFile Electronic Case Filing System, which will electronically serve the registered attorneys of record.

Dated: August 28, 2020

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