STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

No. 20-000099-MM

v

HON. CYNTHIA STEPHENS

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

Defendant.

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DEFENDANT JOCELYN BENSON'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

ORAL ARGUMENT REQUESTED

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Dated: June 11, 2020

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CONSTITUTIONAL PROVISION INVOLVED

Const 1963, art 2, § 4 Place and manner of elections.

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

* * *

(g) 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. During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein.

* * *

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall 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. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

INTRODUCTION

Plaintiff Robert Davis has filed this complaint and motion for declaratory judgment against the Michigan Secretary of State to enjoin the mailing of absentee voter applications. Plaintiff Davis contends that the "unsolicited" mailing of applications by the Secretary of State violates the purity of elections clause under article 2, §4 of the Constitution, and the separation of powers clause under article 3, §2 of the Constitution. Yet, neither Davis' complaint nor his motion demonstrate how the Secretary's action was in any way unlawful. Instead, he relies on inapt analogies to distinguishable cases that were decided before the Michigan Constitution was amended to guarantee the right to vote absentee, were heavily fact-dependent, and involved different officials with different legal authorities. Further, his concerns that his—or anyone's—ballot and the elections results may be invalidated are unfounded and without support in law. For the reasons that follow, Robert Davis has failed to demonstrate that he is entitled to a declaratory judgment or injunctive relief.

COUNTER-STATEMENT OF FACTS

Jocelyn Benson is the elected Secretary of State for the State of Michigan. (Cmplt., ¶2).[1] Plaintiff Robert Davis agrees that "every effort shall be made to increase voter turnout in every election," and that "in light of the current Coronavirus (COVID-19) pandemic," he believes that "every registered voter in the

[1] Defendant does not concede that the allegations of the complaint are accurate and complete but will rely on them only for purposes of responding to this motion.

State of Michigan shall have the right to vote by mail and every lawful effort to allow voters to exercise this most precious right in this regard shall be taken." (Cmplt., ¶7). Nonetheless, he challenges the authority of the Secretary of State to mail absent voter applications to registered voters in Michigan. (Cmplt., ¶8).

Plaintiff Davis alleges that he received an unsolicited absent voter application through the mail on May 27, 2020. (Cmplt., ¶15). Davis also alleges that he wants to vote by mail in the August and November elections, and that he intends to use the application mailed to him by the Secretary of State. (Cmplt., ¶20). But Davis alleges that he is "concerned" whether local clerks can or will legally accept an application mailed by the Secretary of State because he believes the Michigan Election Law does not explicitly authorize such a mailing. (Cmplt., ¶21). Davis alleges that his local clerk has previously not accepted applications that were not issued by that local clerk's office. (Cmplt., ¶22). Davis admits that he has not been told by anyone in his local clerk's office that they will not accept the applications mailed by the Secretary of State. (Cmplt., ¶23-24). Davis also alleges that he is "concerned" that the mailing of absent voter applications could lead to a legal challenge regarding the validity of state elections through *quo warranto* action. (Cmplt., ¶49-53). Finally, Davis alleges that he is "concerned" that the Secretary of State's mailing of applications may lead to the President of the United States withholding federal funds from the State of Michigan. (Cmplt., ¶54-55).

Plaintiff Davis seeks a declaratory judgment that the Secretary of State lacks legal authority to mail unsolicited absent voter applications, that such mailing

constitutes a violation of the "purity of elections clause" of article 2, §4 of the Constitution, and that local clerks are *required to accept* absent voter applications provided by the Secretary of State. (Cmplt., p 14). Davis also requests that this Court enjoin the Secretary from mailing unsolicited absent voter applications to voters in Michigan. (Cmplt., p 14).

ARGUMENT

I. The Secretary of State's mailing of absent voter applications is not unlawful and there is no reason to enjoin such mailing by the Secretary.

The entirety of Plaintiff Davis' claims rests on his conclusion that the Secretary of State's action in mailing absent voter applications was unlawful. But that conclusion is erroneous and based on an incorrect interpretation of two cases from the Michigan Court of Appeals.

First, Davis cites to *Taylor v Currie*, 277 Mich App 85 (2007). In *Taylor*, the Court of Appeals held that city clerks such as Currie had "no powers concerning the distribution of ballot applications other than those granted in the statute," and that the statute did not grant to city clerks the power to mail unsolicited applications. *Taylor*, 277 Mich App at 95. The Court of Appeals took specific notice that Currie had included with the applications a cover letter signed by her and referring to herself as "the City Clerk and Chairperson of the Election Commission." *Id*. at 88. Currie was also a candidate for re-election that year. *Id.* The Court concluded that the mailing of applications and the cover letter, "amounts to propaganda at the city's expense[.]" *Id*. at 97. The Court of Appeals concluded specifically that "MCL

168.759(5) does not permit a **city clerk** to mail absent voter ballot applications without having received a verbal or written request." *Id.* (Emphasis added). The Court of Appeals also upheld attorney fees for contempt after Currie mailed the applications despite the trial court having entered an injunction. *Id.* at 89-90, 97-98.

Second, in *Fleming v Macomb County Clerk*, the Court of Appeals held that county clerks do not have the authority to mail unsolicited absent voter applications. *Fleming v Macomb County Clerk*, unpublished per curiam opinion of the Court of Appeals, issued June 26, 2008 (Docket No. 279966), p 16. (Copy attached as Exhibit A). In *Fleming*, the county clerk mailed applications only to voters age 60 and over, a group that was alleged to favor voting for Democratic candidates. (Ex A, p 3). The county clerk was running in that same election as the Democratic candidate for Secretary of State. *Id.* The Court of Appeals held the county clerk lacked statutory or constitutional authority to mail absent voter applications "to targeted individuals." *Id.*, p 7.

Plaintiff Davis appears to conclude that because local clerks were barred, under different circumstances, from mailing absent ballot applications then *no one* can mail applications in any circumstance. This is not a correct inference to draw, and these two cases are distinguishable on several bases discussed in the following sections.

A. The Secretary of State has broader authority under the Michigan Election Law than a local city, township, or county clerk.

First, the Court in *Taylor* observed that municipal officers have only such powers as they are expressly granted by statute or by sovereign authority or those necessarily implied from those granted. *Taylor*, 277 Mich App at 94. But the Secretary of State is not a municipal officer—she is a constitutional officer and has different powers under the Michigan Election Law.

MCL 168.21 provides, "The 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." The statute does not define what is meant by "chief election officer," but the language suggests that the Secretary's authority is superior to that of local clerks. The Court of Appeals in *Fleming* recognized that county clerks must follow the directions provided by the Secretary of State in her role as Michigan's chief election officer. (Ex A, p 8).

Further, the role of chief election officer is provided separately from the Secretary's supervisory role over the clerks. MCL 168.21. It is an oft-recited maxim of statutory construction that courts must give effect to every word, phrase, and clause and avoid interpretations that would render any part of a statute surplusage or nugatory. See *Wyandotte Elec Supply Co v Elec Tech Sys,* 499 Mich 127, 140 (2016); *People v Cunningham,* 496 Mich 145, 154 (2014); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002); *Stowers v Wolodzko*, 386 Mich 119, 133 (1971). In *Scott v Budd Co*, 380 Mich 29, 37 (1968), the Michigan Supreme Court held that it would not impart a nugatory meaning to words in a statute if the

words are susceptible to being made effective. So, "chief election officer" cannot be interpreted to be merely a redundant expression of the Secretary's supervisory role. Instead, the plain language of the words "chief election officer" impart an executive authority over and above any other election official in the state.

Also, the Michigan Election Law provides for broader and more general authority than the specific duties for local clerks identified by the Court of Appeals in *Taylor* and *Fleming*. In *Taylor,* the Court looked at MCL 168.759(5) and its fairly limited direction that the clerk "shall have absent voter applications forms available in the clerk's office at all times and shall furnish an absent voter ballot application upon a verbal or written request." *Taylor*, 277 Mich App at 94. Similarly, the Court in *Fleming* observed that county clerks have limited authority, are subject to the directions of the Secretary of State and have a limited administrative role in absent voter ballot applications. (Ex A, p 7-8, 16). In contrast, the Michigan Election Law describes the Secretary of State's duties broadly and generally.

For example, MCL 168.31(1)(b) provides that the Secretary of State "shall do all of the following," including "advise and direct local election officials as to the proper methods of conducting elections." As an initial matter, the language of the statute does not limit the duties of the Secretary to only the delineated acts, and instead simply identifies some specific tasks that the Secretary "shall" do. But more significantly, the statute does not specify the "proper methods" and thereby imbues the Secretary with authority to make decisions and determinations about those methods, provided they are not otherwise contradicted or prohibited elsewhere in

the statute. This is a very different kind of authority than the limited authority possessed by local clerks. The Michigan Election Law does not expressly prohibit the mailing of absent voter applications by the Secretary of State, and so that action is consistent with the broad authority granted to her.

Also, MCL 168.31(1)(e) provides that the Secretary has the authority to "prescribe and require uniform forms, notices, and supplies the Secretary considers advisable for use in the conduct of elections and registrations." Again, the Secretary is given discretion to devise forms and "supplies" that she considers "advisable" for use in the conduct of elections. This authority readily includes the ability to prescribe and supply absent voter ballot applications.

Lastly, both *Taylor* and *Fleming* were decided before the people adopted Proposal 18-3, which amended article 2, § 4 of the Constitution to, in part, include the following language about the right to vote absentee:

> **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.** During that time, election officials authorized to issue absent voter ballots shall be available in at least one (1) location to issue and receive absent voter ballots during the election officials' regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election. Those election officials shall have the authority to make absent voter ballots available for voting in person at additional times and places beyond what is required herein.

Const 1963, art 2, §4(1)(g)(emphasis added). The addition of this new constitutional right also affected the authority and duties of the Secretary of State. The mailing of absent voter ballot applications is not only consistent with MCL 168.31 to provide "supplies" for the administration of absent voting by every registered voter, but also effectuates the constitutional right of each citizen to choose whether they want to apply for an absent voter ballot. It is worth emphasizing that the Secretary has mailed only *applications* to vote absentee; it is still up to the voter whether they choose to fill out and return that application by mail or in person in order to receive a ballot. The adoption of Proposal 18-3 means that every registered voter in the state is now eligible to vote absentee, and so providing them with applications is neither contrary to law nor inconsistent with the authority of the Secretary of State as the chief election officer.

B. The Secretary of State mailed absent voter applications to all registered voters, not selected groups among voters.

The Court of Appeals in *Fleming* made specific note that the county clerk mailed applications only to voters age 60 and over, a group that was alleged to favor voting for Democratic candidates (including the county clerk). (Ex A, p 2-3). At the time, voters over 60 and those who would otherwise be unable to go to their polling places were the only voters eligible to vote absentee. By choosing to mail applications only to the voters over 60 and not, for example, those who had previously requested to vote absentee, there was the suggestion that the county clerk was favoring a subset of voters that historically had favored the clerk's political party. (Ex A, p 3).

That is not so in this case. Because of the adoption of Proposal 18-3, every registered voter is now eligible to vote absentee, and the Secretary of State is mailing applications to *every registered voter*.[2] Every voter, regardless of party or voting preference, will receive an application. There can be no inference of favoritism or electioneering. Rather than some nefarious effort to manipulate the outcome of elections, distributing applications to every registered voter is exactly the kind of fair and even-handed action required by the purity of elections clause.

C. The Secretary of State is not on the ballot this year, and so there is no self-interest involved in mailing absent voter applications.

In both *Taylor* and *Fleming*, the Courts noticed that the clerk taking the action was up for election when they chose to mail applications. *Taylor,* 277 Mich App at 88; (Ex A, p 3). But the Secretary of State initiated this action in a cycle in which she is *not* up for election. This eliminates the appearance of self-interest that tainted the actions of the local clerks in *Taylor* and *Fleming*.

D. Neither *Taylor* nor *Fleming* addressed actions taken by a Secretary of State attempting to conduct an election during the COVID-19 pandemic.

As discussed above, the Secretary of State is the chief election officer in Michigan and has also been delegated broad authority to determine the proper method of conducting elections. MCL 168.31. Her authority to do so must be considered to be at its zenith when she is acting to ensure that elections are

[2] The only exceptions are citizens who are on a permanent absent voter list, or who would otherwise already receive an application from their local clerk.

conducted fairly, legally, and safely. The ongoing occurrence of a pandemic makes absentee voting the safest—and, therefore, perhaps the most appropriate and "proper"—method of conducting an election, both for voters and for election workers. See MCL 168.31(1)(b). Mailing applications to registered voters will reduce the number of voters arriving at polling places, which will—by necessity—reduce or eliminate contact among voters in line to vote, and between voters and election workers on election day. Although Secretary Benson maintains that she would have the authority to mail applications even outside of this pandemic, the ongoing threat of COVID-19 further justifies her action as chief election officer to ensure the orderly and safe conducting of 2020 elections.

E. *Taylor's* interpretation of the Michigan Election Law is inapplicable here and should be limited to its facts.

Alternatively, the *Taylor* Court's reading of MCL 168.759 to strictly limit the manner in which absent voter applications can be made available by local clerks was applicable only in the specific context of that case and is no longer relevant under the state's new constitutional framework. The court broadly applied the statutory canon of interpretation *expressio unius est exclusio alterius* to find that because clerks *shall* make absent voter ballot applications available at clerk's office and because they *shall* make them available upon a voter's request, clerks were implicitly prohibited from sending applications to voters who did not request them.

Expressio unius is only one tool used to interpret statutes, not the sole dispositive method of interpreting them. Statutes must be interpreted to "ascertain and give effect to the intent of the legislature." *People v Webb*, 458 Mich 265, 274

(1998). The Michigan Election Law must also be interpreted in light of the Michigan Constitution. Article 2, §4 now provides that all registered voters, who are "qualified to vote in Michigan", have the right "to vote an absent voter ballot without giving a reason[.]" This language must be "liberally construed in favor of voters' rights in order to effectuate its purposes." In interpreting statutes, *expressio unius* is a tool "to ascertain the intent of the Legislature. It does not automatically lead to results." *Luttrell v Dep't of Corr*, 421 Mich 93, 107 (1984). It is also a "recognized rule of statutory interpretation" to "not construe a statute so as to achieve an absurd or unreasonable result." *Id*. See also *Rogers v Wcisel*, 312 Mich App 79, 87 (2015) (courts must also construe statutes reasonably, "keeping in mind the purpose of the act, and to avoid absurd results.").

Interpreting MCL 168.759 to limit clerks' ability to distribute absent voter ballot applications would achieve absurd and unreasonable results. The statute specifically requires clerks to make applications available in specified circumstances, but it cannot be reasonably read to implicitly prohibit distribution *in any other case*. Under such a reading, clerks would likewise be prohibited from posting links to applications for an absent voter ballot online, or from distributing absent voter ballot applications to civic groups, libraries, schools, and community organizations. Such a limitation would be particularly absurd and unreasonable given the fact clerks widely distribute other materials—such as voter registration applications and voter information—and that absent voter ballot applications are widely available online. Also, absent voter applications are already widely

distributed by members of the public, civic groups, political parties—essentially, everyone *except* election officials.

More broadly, a restrictive reading of statutes within the Election Law as setting limits on the voter services that clerks can provide instead of minimum requirements is inconsistent with the reality of election administration. Clerks regularly exceed minimum requirements in providing services to voters. Applying *expressio unius* to "automatically" produce such restrictive results (contrary to the Supreme Court's guidance) would likewise prohibit the following activities: clerks giving public notice of the days and hours the clerk will be at the clerk's office for registration on the internet, not just on paper (MCL 168.498, "clerk … shall give public notice of the days and hours that the clerk will be at the clerk's office or other designated place for the purpose of receiving registrations ... by publication of the notice in a *newspaper* published or of general circulation … and, if considered advisable by the township or city clerk, by posting written or *printed notices* in at least 2 of the most conspicuous places in each election precinct") (emphasis added); Sending newly registered voters a letter congratulating them on registering, explaining how to vote, and encouraging them to vote, in addition to just sending their voter identification card (MCL 168.499, "clerk shall forward by first-class mail the *voter identification card* to the elector") (emphasis added); Providing *more than* 2 voter information displays at precincts or providing voter information displays at clerks' offices, not just precincts (MCL 168.688a, "clerk shall provide to each precinct 2 voter information displays"); Affirmatively providing voter information

displays in alternate formats such as braille, without waiting for a voter to affirmatively request one (MCL 168.688a, "*If requested by an elector*, the city or township clerk shall have an available means to provide information contained in the voter information displays in an alternative format") (emphasis added); Ensuring the flag is displayed at *and* in each polling place (MCL 168.669, "The election inspectors shall ensure that the flag is displayed at *or* in each polling place") (emphasis added); Making a file of applications for precinct election inspector available online or outside of regular business hours, not just at the clerk's office from 9 to 5 (MCL 168.677, "clerk shall maintain a file of applications … and make the applications available for public inspection at the clerk's office during normal business hours"); Instructing election inspectors on etiquette and crowd management techniques even if not specifically required by law (MCL 168.683, "clerk shall instruct and demonstrate the manner in which the duties of election inspectors are *required by law* to be performed") (emphasis added); instructing election inspectors to place lights and hand sanitizer in voting booths, or anything other than a pencil (MCL 168.724, "shall place in the booths the *pencils* to be used for marking ballots") (emphasis added); calling or e-mailing a voter who has spoiled his or her ballot to inform the voter that the ballot has been spoiled and new ballot is on the way, not just mailing the new ballot (MCL 168.765b, "clerk shall issue the elector a new absent voter ballot"). There are countless other examples in this vein. *Expressio unius* should not be broadly applied when it would create such an unreasonable result.

Within the specific context of the *Taylor* case, the court expressly indicated that its interpretation of the statute to limit application distribution was directly tied to the "sound public policy behind Michigan's election law," to safeguard the purity of elections. *Taylor,* 277 Mich. App. at 96. Specifically in that case, as discussed elsewhere in this brief, the court was concerned that the action of the clerk to distribute additional applications to only *certain* additional voters (not *all* voters), would interfere with the purity of elections by advantaging some voters in their ability to participate in the election relative to other voters. In the current context, regardless of the canons of interpretation used, the statute must be interpreted in this specific context – where all voters have the right to vote absentee (which was not yet the case in *Taylor*), and where applications are sent to all registered voters. The mailing of absent voter applications does not violate the Constitution's purity of elections clause.

II. The mailing of absent voter applications does not violate the Constitution's purity of elections clause.

Count I of Plaintiff Davis' complaint alleges that the Secretary's mailing of absent ballot applications violates the "purity of elections" clause of Const1963, art 2, §4. The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts:

> [F]irst, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596 (1982), quoting *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123 (1969). The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party*, *supra* at 598.

Taylor, 277 Mich App at 96-97. Davis' complaint does not challenge any enactment by the Legislature, and so his challenge presumably centers on the second concept—fairness and evenhandedness. But nothing in either the complaint or this motion identifies anything unfair or uneven in the Secretary's action. Again, the Secretary is mailing applications to *all* registered voters. This action is fair and even-handed and gives no advantage to any party or candidate.

Instead, Davis cites to the *Taylor* and *Fleming* decisions and apparently such mailing must necessarily violate the purity of elections. But neither opinion extends their holdings to that extent—in fact, neither opinion even *mentions* the Secretary of State. Davis offers no other support or authority for this claim. The lack of any substantive legal analysis in either the complaint or motion demonstrating a violation of the purity of elections clause should be fatal to Davis' claims.

Nonetheless, for the reasons already stated above, *Taylor* and *Fleming* are distinguishable from the situation at hand, and neither compels the conclusion that the Secretary of State is precluded from mailing applications to all registered voters. Moreover, the "purity of elections" clause is located in the same section of the state constitution as the amended language granting the right to vote absentee without a reason. See Const 1963, art 2, §4(1)(g); Const 1963, art 2, §4(2). There is no reason that §4(2) should be interpreted in a way that prohibits the Secretary of State from mailing applications to all registered voters so they can avail themselves of the right recently granted to them under §4(1)(g). Pointedly, the language of the

Constitution expressly states that §4(1), "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." The Secretary of State's mailing of applications effectuates the purpose of §4(1)(g) and promotes voters' rights. To interpret §4(2) in such a way as to prohibit actions that support rights guaranteed by §4(1) would be contrary to the language and intent of Proposal 18-3, and would frustrate the will of the people when they adopted the amendment.

III. The mailing of absent voter applications does not violate the Constitution's separation of powers clause.

Count II of the complaint alleges that the Secretary's mailing of absent ballot applications violates the separation of powers under article 3, § 2 of the Constitution.[3] While not explicitly stated in either the complaint or this motion, Davis appears to argue that by mailing absent voter ballot applications, the Secretary—as an executive branch official—has exercised some kind of legislative power. (Cmplt., p 15-20, ¶58-84; Brief, p 14-19). In other words, because Davis contends that the Michigan Election Law does not expressly grant authority for mailing applications to the Secretary, her action in doing so must be an exercise of legislative power. Davis' argument is in error, however, and his claim is invalid.

First, for all the reasons set forth earlier in this brief, the Secretary *does* have authority to mail absent voter ballot applications. Accordingly, there is no need for any inquiry into whether her actions invade the legislative power.

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[3] Although the complaint refers to the "separation clause," it does not actually cite to article 3, §2. However, this is the appropriate constitutional provision when addressing a claim under the separation of powers. See e.g. *Soap & Detergent Ass'n v Natural Resources Comm'n*, 415 Mich 728, 751-753 (1982).

Second, if an executive officer exceeds their authority, that does not require the conclusion that they are exercising the powers of another branch. Davis offers no authority for the proposition that an action taken by an executive official—even in the absence of explicit authority—necessarily violates the separation of powers. To do so would mean that any overstep by any executive official would rise to a constitutional violation. Again, Davis' failure to support his conclusions with clear legal authority should be fatal to his claims.

Lastly, the separation of powers is violated only in particular circumstances. As described by the Michigan Supreme Court in *Soap & Detergent Ass'n*:

> The doctrine of separation of powers is generally attributed to Montesquieu who pinpointed the fault with the vesting of both legislative and executive functions in one branch of the government.
>
> "When the legislative and executive powers are united in the same person or body . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." (Emphasis added.)
>
> Madison, in The Federalist No. 47, clarifies Montesquieu, explaining that he did not mean there could be no overlapping of functions between branches, or no control over the acts of the other. Rather, "[his] meaning . . . can amount to no more than this, that **where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted**." The Federalist No. 47 (J. Madison).
>
> **These principles have been adopted in Michigan.**

Soap & Detergent Ass'n, 415 Mich at 751-752 (Emphasis added). And in *Makowski v Governor*, the Supreme Court again held that, "[t]he true meaning of the separation of powers doctrine is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either

of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." 495 Mich 465, 482-483 (2014), quoting *Local 321, State, Co & Muni Workers of America v City of Dearborn*, 311 Mich 674, 677 (1945).

Here, Davis has failed to even allege—much less demonstrate—that the Secretary of State has exercised *whole power* of the legislative branch in any respect. In fact, there is nothing in the mailing of applications that even suggests the exercise of legislative power, as that activity is not traditionally something that legislatures do. To the extent that the complaint and brief can be read to argue that the Secretary has somehow written her own laws, that argument also fails because the Secretary has done nothing of the sort. The power she exercised is derived from existing constitutional and statutory authority. Davis has failed to state a claim for a violation of the separation of powers clause under article 3, §2 of the Constitution.

IV. The authority for mailing applications has no effect on the validity of any applications submitted by registered voters.

Davis alleges in his complaint and this motion that his claims are based in part on his fear that a third party might later challenge the legality of an election based upon "material fraud or error" because the application was unlawfully mailed to him. Davis cites to no authority invalidating election results based upon the mailing of absent voter ballot applications. Even the *Taylor* and *Fleming* opinions did nothing to impugn the election results, or the legitimacy of absent ballots received by voters resulting from the challenged mailings.

There is good reason for the lack of cases invalidating ballots based on challenged mailings—the applications are just that: applications. Citizens will only

receive a *ballot* if they are registered voters, fill out the application completely—including the certification—and return it to their local clerk. MCL 168.759. A person making a false statement on the application is guilty of a misdemeanor. *Id.* Once the actual absent voter ballot is received, the voter must again sign the ballot and attest that they are a registered elector and personally marked the ballot. MCL 168.761(4). Making a false statement on the ballot is also a misdemeanor. *Id.* Consequently, there is no basis to invalidate election results where the voters are lawfully registered, correctly fill out the application, and return the ballots in the manner required. There is no "material fraud or error" where registered voters return valid ballots.

Because there are no legal grounds to invalidate election results based on alleged legal defects in the mailing of absent voter ballot applications, Davis does not require a declaratory judgment to guide his future conduct.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Secretary Benson respectfully requests that this Honorable Court enter an order denying Plaintiff Robert Davis' motion for declaratory judgment, and enter an order dismissing the complaint in its entirety and with prejudice, together with any other relief that the Court finds appropriate under the circumstances.

Respectfully submitted,

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Dated: June 11, 2020

PROOF OF SERVICE

Lisa S. Albro certifies that on the 11th day of June, 2020, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via electronic email at davisrobert854@gmail.com.

/s/Lisa S. Albro
Lisa S. Albro

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

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

Defendant.

No. 20-000099-MM

HON. CYNTHIA STEPHENS

DEFENDANT JOCELYN BENSON'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

EXHIBIT A

Fleming v. Macomb County Clerk

Court of Appeals of Michigan

June 26, 2008, Decided

No. 279966

Reporter
2008 Mich. App. LEXIS 1325 *; 2008 WL 2553266

GREG FLEMING, WILLIAM SUSICK and EDWARD F. COOK, Plaintiffs-Appellants, and MAX FELLSMAN, Plaintiff, v MACOMB COUNTY CLERK, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Macomb Circuit Court. LC No. 2006-004256-AW.

Disposition: Reversed. We direct the trial court to grant summary disposition in plaintiffs' favor and to grant plaintiffs' request for injunctive relief. We do not retain jurisdiction.

Judges: Before: Owens, P.J., and Meter and Schuette, JJ.

Opinion

PER CURIAM.

Plaintiffs Greg Fleming, William Susick, and Edward F. Cook appeal as of right from the trial court's July 30, 2007, order granting summary disposition in favor of defendant Macomb County Clerk (county clerk). The trial court dismissed plaintiffs' claims for declaratory and injunctive relief and permitted the county clerk to mail unsolicited absent voter ballot applications to county residents over the age of 60 living in communities in which the local city, township, or village clerk did not mail unsolicited applications. We reverse. [1]

On September 21, 2006, the Macomb County Board of Commissioners (the board) passed a resolution authorizing the county clerk, Carmella Sabaugh, [2] to mail absent voter ballot applications for the November 2006 general election to "Macomb County registered voters age 60 and over." The resolution limited the mailing list by eliminating those registered voters who lived in communities in which the city, township, or village clerk automatically mailed applications to voters over the age of 60. [3] Notably, the board authorized Sabaugh to mail the applications in her *official capacity* as county clerk and to spend approximately $ 13,000 to prepare and mail the applications.

Sabaugh strongly encouraged the board to pass this resolution **[*3]** and presented several policy arguments

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[1] We wish to make clear that we fully support the right of citizens to vote, encourage qualified voters to exercise this right, and do not discourage lawful means to increase voter turnout. However, for the reasons stated in this opinion, defendant's actions are neither statutorily nor constitutionally authorized and, therefore, the trial court erred when it failed to enjoin her from **[*2]** doing them.

[2] Sabaugh, in her official capacity as Macomb County Clerk, is the defendant in this case. We will refer to her interchangeably as "Sabaugh" and as "the county clerk" in this opinion.

[3] Sabaugh informed the board that the local clerks in ten Macomb County communities automatically sent absent voter ballot applications to registered voters over the age of 60, but the local clerks in the remaining 13 communities did not automatically mail these applications.

to support her position. [4] Coincidentally, Sabaugh, a Democrat, was running against Republican Terri Lynn Land for Secretary of State in the November 2006 election. According to press reports at the time, Republicans in Macomb County began questioning Sabaugh's motives, claiming that Macomb County senior citizens tend to vote Democratic and noting that "[t]he timing [was] suspect." [5]

Shortly after the resolution was passed, plaintiffs filed suit seeking to prevent the mass mailing of absent voter ballot applications, alleging violations of the Michigan Election Law, MCL 168.1 *et seq.*, and requesting injunctions to prevent the county clerk from mailing the unsolicited applications. Plaintiffs also alleged that the proposed mailings violated the Equal Protection clause of the Fourteenth Amendment and the purity of elections clause of the Michigan Constitution, and diluted the votes of other Michigan voters. They specifically requested a preliminary injunction to prevent the county clerk from mailing applications for absent voter ballots for the November 2006 election, which the trial court denied.

Accordingly, on October 5, 2006, the county clerk mailed 49,234 absent voter ballot applications to Macomb County voters over the age of 60 who had not otherwise been sent an absent voter ballot **[*5]** application from their city, village, or township clerk. In a press release, Sabaugh claimed that the mailing resulted in the casting of "at least 7,700 additional votes" in the November 2006 general election. [6]

The parties filed cross-motions for summary disposition to address the question whether Sabaugh was authorized to mail the unsolicited absent voter ballot applications in her official capacity as county clerk. When the trial court issued its opinion in July 2007, it noted that although the November 2006 general election had occurred nearly a year earlier, it would still address the issue on the merits because the issue was of continuing public interest and was capable of repetition yet evading review. In particular, the court noted that the board likely would continue to pass resolutions allowing the county clerk to mail unsolicited absent voter ballot applications before similar elections, leading to future scenarios in which plaintiffs would again have insufficient advance notice to pursue to its conclusion the question whether the **[*6]** county clerk had the authority to mail these applications before the mailing and election would occur. Although the trial court noted that the Michigan Election Law was silent regarding whether the county clerk was authorized to mail unsolicited absent voter ballot applications to voters age 60 and older, it determined that the county clerk was properly authorized by board resolution to conduct the mailing. The trial court also rejected plaintiffs' claims that the mailing violated the "purity of elections" clause of the Michigan Constitution or the Equal Protection clause of the Fourteenth Amendment or that it diluted the vote of other Michigan voters.

On appeal, plaintiffs challenge the trial court's order granting defendant's motion for summary disposition and dismissing plaintiffs' claims. We review the trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich. 322, 332; 628 N.W.2d 33 (2001). We also review de novo questions of law, including underlying issues of constitutional and statutory construction. *In re Petition by Wayne Co Treasurer*, 478 Mich. 1, 6; 732 N.W.2d 458 (2007).

The trial court improperly granted defendant's **[*7]** motion for summary disposition and denied plaintiffs' motion for the same. Defendant lacked statutory or constitutionally-granted authority to mail unsolicited absent voter ballot applications. Further, by conducting the mailing, defendant violated the purity of elections clause of the Michigan Constitution. Because we find that these mass mailings are illegal and unconstitutional, we hold that defendant, in her official capacity, may not mail unsolicited absent voter ballot

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[4] To support her position, defendant notes that private groups, including the Democratic and Republican parties, send absent voter ballot applications to their supporters. Yet she fails to note that the entities she identifies that mail absent voter ballot applications are *private* entities. Conversely, defendant is a public official acting in her *public* capacity with *public* money to send unsolicited absent voter ballot applications to only a portion of qualified absent voters in Macomb County. In this appeal, we do not address the question whether private groups may mail absent voter ballot applications to their members, and defendant's attempt to invite comparison between her actions and those of private groups is unavailing.

[5] Presumably, these opponents of the county **[*4]** clerk's actions were concerned that defendant was using public money to make voting easier for a demographic that was inclined to support her campaign for Secretary of State and the campaigns of other members of her political party, but not facilitate voting for other demographics.

[6] The parties stipulated that Sabaugh made this claim. However, the lower court record does not include any evidence to support Sabaugh's claim.

applications to targeted individuals in the future.

Const 1963, art 2, § 4 provides for the Legislature's control over elections, in relevant part, as follows:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The 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.

The duties of a county clerk or a county board of commissioners (supervisors) "shall be provided by law" pursuant to Const 1963, art 7, §§ 4, **[*8]** 8.

The Legislature enacted the Michigan Election Law pursuant to its constitutional grant of authority. Under the Michigan Election Law, the county clerk, the chief judge of the county probate court, and the county treasurer serve as the board of election commissioners for that county. MCL 168.23(1). Pursuant to *Secretary of State v Berrien Co Bd of Election Comm'rs*, 373 Mich. 526, 530-531; 129 N.W.2d 864 (1964), the county clerk and the county board of election commissioners must follow the directions provided by the Secretary of State in her role as Michigan's chief election officer. The county board of commissioners has no expressly authorized role in elections. Instead, the board's roles include "pass[ing] ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county . . . ." MCL 46.11(j). The board also has a duty to "[r]epresent the county and have the care and management of the property and business of the county if other provisions are not made." MCL 46.11(l).

The Michigan Election Law addresses the circumstances under which a voter is entitled **[*9]** to an absent voter ballot. MCL 168.758(1) defines an "absent voter" as follows:

> For the purposes of this act, "absent voter" means a qualified and registered elector who meets 1 or more of the following requirements:
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> (a) On account of physical disability, cannot without another's assistance attend the polls on the day of an election.
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> (b) On account of the tenets of his or her religion, cannot attend the polls on the day of election.
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> (c) Cannot attend the polls on the day of an election in the precinct in which he or she resides because of being an election precinct inspector in another precinct.
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> (d) Is 60 years of age or older.
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> (e) Is absent or expects to be absent from the township or city in which he or she resides during the entire period the polls are open for voting on the day of an election.
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> (f) Cannot attend the polls on election day because of being confined in jail awaiting arraignment or trial.

A qualified absent voter is permitted to apply for an absent voter ballot pursuant to MCL 168.759. For both primary and general elections, "[t]he elector shall apply in person or by mail with the clerk of the township, city, or village in which the elector is registered." MCL 168.759(1)-(2). **[*10]** MCL 168.759(3) provides that an application for an absent voter ballot may be made in the following three ways:

> (a) By a written request signed by the voter stating the statutory grounds for making the application.
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> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city, township, or village.
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> (c) On a federal postcard application.

Finally, MCL 168.759(5) requires, in pertinent part,

> The clerk of the city, township, or village shall have absent voter ballot 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. . . .

When interpreting the Michigan Election Law to determine whether the county clerk is authorized to mail absent voter ballot applications, we may not "'impose different policy choices than those selected by the Legislature.'" *People v McIntire*, 461 Mich. 147, 152; 599 N.W.2d 102 (1999), quoting *People v McIntire*, 232 Mich. App. 71, 119; 591 N.W.2d 231 (1998) (YOUNG, J., dissenting). Our primary goal is to ascertain and give effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich. 344, 347; 656 N.W.2d 175 (2003), **[*11]** mod 468 Mich. 1216 (2003). When a statute's language is unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written. *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 402; 605 N.W.2d 300 (2000). We may only look beyond the statute to determine the Legislature's intent when the statutory language is ambiguous. *Id.*

The legal maxim *expressio unius est exclusio alterius*, i.e., "[t]he expression of one thing is the exclusion of another," "is a rule of construction that is a product of logic and common sense." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich. 66, 74 & n 8; 711 N.W.2d 340 (2006). This well-recognized maxim of statutory construction "expresses the learning of common experience that when people say one thing they do not mean something else." *Feld v Robert & Charles Beauty Salon*, 435 Mich. 352, 362; 459 N.W.2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. The maxim is "safely" used when a statute creates rights or duties "not in accordance with" the common law. *Feld*, *supra* at 362 (citation omitted).

> "When what is expressed in a statute is creative, and not in a proceeding according to the **[*12]** course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions that mode must be followed and none other, and such parties only may act." [*Feld*, *supra* at 362-363 (citation omitted).]

In *Taylor v Currie*, 277 Mich. App. 85; 743 N.W.2d 571 (2007), this Court applied a plain reading of the statute and the legal maxim *expressio unius est exclusio alterius* to determine that MCL 168.759 prohibits a city clerk from mailing unsolicited absent voter ballot applications. [7] It stated:

> MCL 168.759(5) provides, in relevant part, that "[t]he clerk of the city, township, or village shall have absent voter ballot 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." This subsection clearly addresses the distribution of applications for absent voter ballots. Under a plain reading, this subsection establishes two duties for city clerks. First, the clerk must have applications for absent voter ballots available in the clerk's office **[*13]** at all times. Second, the clerk "shall" provide an application to anyone upon verbal or written request.

'"The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.'" *Presnell v Wayne* [*Co*] *Bd of Co Rd Comm'rs*, 105 Mich. App. 362, 368; 306 N.W.2d 516 (1981), quoting 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276, p 327. Or 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).

Applying this rule to MCL 168.759, it is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the **[*14]** statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute. Nor have appellants cited any other statute that confers this power on the city clerk.

As for whether the mass mailing of unsolicited ballot applications is implicitly authorized by statute, we conclude that it is not. First, a power is necessarily implied if it is essential to the exercise of authority that is expressly granted. *Conlin v Scio Twp*, 262 Mich. App. 379, 385; 686 N.W.2d 16 (2004). The authority expressly granted in MCL 168.759(5) is that the clerk must have applications for absent voter ballots available in the clerk's office at all times and that the clerk "shall" provide an application to anyone upon verbal or written request. The mass mailing of unsolicited ballot applications is not essential to the clerk's either making ballot applications available in the clerk's office or to providing them upon request. Second, on the basis of the maxim *expressio unius est*

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[7] The plaintiff, a candidate for Detroit City Council, alleged that the defendant city clerk planned to improperly mail 150,000 unsolicited applications. The trial court determined that the city clerk was precluded from mailing such unsolicited applications and issued a preliminary injunction to prevent the mailings. *Taylor*, *supra* at 89. The city clerk disregarded the preliminary injunction and mailed the applications. *Id.* at 89-90. As a result, the city clerk was convicted of criminal contempt. *Id.* at 90. At the conclusion of the trial court proceedings, the trial court entered a permanent injunction precluding the mailing of unsolicited absent voter ballot **[*16]** applications. *Id.* at 93.

> *exclusio alterius*, (the expression of one thing is the exclusion of another), *Feld*[, *supra* at 362] (opinion by RILEY, C.J.), we read the statute to preclude mass mailings when it **[*15]** specifically states that the clerk shall provide the applications upon written or verbal request. "[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). Accordingly, we conclude that MCL 168.759(5) does not implicitly permit the city clerk to mail absent voter ballot applications without having received a verbal or written request. [*Taylor*, *supra* at 94-96.]

Because it is a published opinion, *Taylor* has precedential value and we are bound by its holding. MCR 7.215(C)(2). Accordingly, the necessary outcome of this case is relatively straightforward. A county clerk, like a city clerk, has no express statutory authority under the Michigan Election Law to mail or otherwise distribute unsolicited absent voter ballot applications. See *Taylor*, *supra*. The Michigan Election Law does not even expressly authorize a county clerk to mail such applications upon request or to keep the applications on hand in her office for interested voters. Instead, the county clerk's statutory role during the election process is as an intermediary; she receives information from the Secretary of State and distributes it to city, village, and township clerks. See MCL 168.647, 653a, 709. The county clerk, in her role as a county election commissioner, prepares and distributes the official ballots used in precincts around the county, including the official absent voter ballots. See MCL 168.668a, 689-691, 709, 713-714. In relation to the absent voter process, the county clerk has express authority to safeguard and distribute the absent voter ballots **[*17]** to local clerks in advance of an election, MCL 168.715-717, but no statute expressly allows a county clerk to deliver a ballot directly to a voter or to deliver absent voter ballot applications.

Accordingly, the county clerk lacks the implied authority to distribute absent voter ballot applications. As noted in *Taylor*, *supra* at 94, a local government officer possesses those powers "necessarily to be implied" from those expressly granted. "Powers implied by general delegations of authority must be 'essential or indispensable to the accomplishment of the objects and purposes of the municipality.'" *Lansing v Edward Rose Realty, Inc*, 442 Mich. 626, 634; 502 N.W.2d 638 (1993), quoting 5 McQuillin, Municipal Corporations (rev 3d ed), § 15.20, p 102. None of the statutorily-defined duties described earlier relate to increasing voter turnout or making the election process less onerous for voters. In fact, none of the county clerk's statutorily-defined duties require direct contact with voters. Mailing absent voter ballot applications is not related to, let alone essential to, a county clerk's duty to distribute election information and materials to local clerks, to prepare and distribute official **[*18]** ballots to voting precincts, or to distribute absent voter ballots to local clerks before an election. Accordingly, a county clerk lacks both express and implied statutory authority to mail unsolicited ballot applications.

Further, the board cannot confer on the county clerk the authority to conduct such a mailing. Like the county clerk, the board has only those powers expressly granted to it by the constitution and by statute and those powers necessarily implied from the powers expressly granted. *Conlin*, *supra* at 385. We must liberally construe the powers granted to local governments to include those powers "fairly implied and not prohibited by th[e] constitution." *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich. App. 202, 221; 591 N.W.2d 52 (1998), quoting Const 1963, art 7, § 34.

The Legislature granted the following relevant powers to county boards of commissioners:

> (j) By majority vote of the members of the county board of commissioners elected and serving, pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county, and pursuant to [MCL 46.10b] **[*19]** provide suitable sanctions for the violation of those ordinances. . . .
> * * *
> (l) Represent the county and have the care and management of the property and business of the county if other provisions are not made. [MCL 46.11]

The board's resolution concerns voting in a statewide election and, therefore, does not "relate to county affairs" or "the care and management of the business of the county." Furthermore, the resolution contravenes MCL 168.759. A municipal government may not prohibit acts that are authorized by state law or, conversely, authorize acts that are prohibited by state law. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich. 246, 262; 566 N.W.2d 514 (1997); *Conlin*, *supra* at 385; *Frens Orchard, Inc v Dayton Twp Bd*, 253 Mich.

App. 129, 136-137; 654 N.W.2d 346 (2002). As noted earlier, the Michigan Election Law neither expressly nor impliedly authorizes county clerks to mail unsolicited absent voter ballot applications to qualified voters. Further, the Michigan Election Law does not permit county boards of commissioners to play any role in the election process. Accordingly, the board lacked the authority to authorize the county clerk to take an action not allowed **[*20]** by statute.

Plaintiffs also argue that defendant violated the "purity of elections" clause. Because this Court's ruling in *Taylor* also controls with regard to this issue, we agree.

> The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: "first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" The phrase "purity of elections" does not have a single precise meaning. However, "it unmistakably requires . . . fairness and evenhandedness in the election laws of this state." [*McDonald v Grand Traverse Co Election Comm*, 255 Mich. App. 674, 692-693; 662 N.W.2d 804 (2003) (internal citations omitted).]

In *Taylor*, *supra* at 97, this Court found that the city clerk's mass mailing of absent voter ballot applications violated the purity of elections clause. [8] The *Taylor* Court reasoned that the city clerk had distributed "propaganda" in her official capacity and at the city's expense. *Id.* There was no indication in *Taylor*, *supra* at 85, that the absent voter ballot applications **[*21]** were designed in such a manner that they would have skewed an applicant's vote one way or another. Therefore, the *Taylor* Court's ruling appears to imply that even apparently neutral applications sent by a city clerk in her official capacity constitute improper propaganda material. Although we recognize that we are bound by the *Taylor* Court's holding, we question whether the distribution of absent voter ballot applications that apparently do not favor particular candidates or political parties constitute "what amounts to propaganda at the city's expense." *Taylor*, *supra* at 97. *Random House Webster's College Dictionary* (1997) defines "propaganda" as "information or ideas methodically spread to promote or injure a cause, movement, nation, etc." We fail to see how public mailings of apparently neutral absent voter ballot applications methodically promote anything besides the mere act of voting. However, we are compelled by *Taylor* to find that the neutrally-designed absent voter ballot applications constitute propaganda and, therefore, violate the purity of elections clause of our constitution. [9]

Regardless, we also conclude that the purity of elections

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[8] The Court's opinion regarding this violation of the purity of elections clause, in its entirety, **[*22]** is as follows:

> This interpretation of MCL 168.759 is consistent with the sound public policy behind Michigan's election law, which, as stated in the preamble, was enacted, in part, "to provide for the purity of elections; to guard against the abuse of the elective franchise." This is in keeping with the Michigan Constitution, which provides that "[t]he legislature shall enact laws to preserve the purity of elections . . . ." Const 1963, art 2, § 4. The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: "first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v Secretary of State*, 412 Mich. 571, 596; 317 N.W.2d 1 (1982), quoting *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich. 112, 123; 168 N.W.2d 222 (1969). The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party*, *supra* at 598.
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> The city clerk, who is an elected official, has the role of neutral **[*23]** arbiter or referee. As a requirement of that office, the city clerk must take and subscribe an oath or affirmation stating:
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> > I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of [city clerk] according to the best of my ability. [Const 1963, art 11, § 1.]
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> To construe MCL 168.759 to permit Currie to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution. MCL 168.759(5) does not permit a city clerk to mail absent voter ballot applications without having received a verbal or written request. Accordingly, we conclude that the trial court did not err in granting injunctive relief on this basis. [*Taylor*, *supra* at 96-97.]

[9] We also note that permitting absent voter ballot mailings to only a select category of eligible absent voters could encourage a public official to target public funds to mail applications to voter groups likely to support her candidacy or her party's candidates for office.

[*24] has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state. Although MCL 168.758(1) lists six categories of voters eligible to vote by absent voter ballot, the county clerk's mailing of absent voter ballot applications to only one of the six eligible groups means that the county clerk used public funds to make it easier for one group (voters 60 and older) to vote without providing a similar advantage to other categories of eligible absent voters. Not only is this fundamentally unfair, but the county clerk's actions hinder the evenhanded application of election laws by failing to provide this benefit to all eligible absent voters. Accordingly, the clerk's actions violate the purity of elections clause and, therefore, are unconstitutional.

Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public **[*25]** in general in order to establish standing in an election case. *Helmkamp v Livonia City Council*, 160 Mich. App. 442, 445; 408 N.W.2d 470 (1987). "[T]he right to vote is an implicit fundamental political right that is preservative of all rights." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 16; 740 N.W.2d 444 (2007) (internal quotations omitted). Although the right to vote is constitutionally protected, our Supreme Court has noted that the "equal right to vote is not absolute." [10] *Id.* (internal quotations omitted). Instead, the Legislature must "preserve the purity of elections" and "guard against abuses of the elective franchise." Const 1963, art 2, § 4. Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury. See *Helmkamp*, *supra*.

We disagree with defendant's contention that plaintiffs' challenge is moot and does not **[*26]** fall within the "capable of repetition yet evading review" exception. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. We will review a moot issue only if it is publicly significant and is likely to recur, yet is likely to evade judicial review." *Attorney Gen v Michigan Pub Service Comm*, 269 Mich. App. 473, 485; 713 N.W.2d 290 (2005). Defendant noted that several city clerks within the county automatically mail absent voter ballot applications to voters over age 60 on a continual basis, and defendant will likely seek to mail unsolicited absent voter ballot applications for future elections. As in this case, there is no guarantee that potential future plaintiffs will have adequate notice to pursue the matter to its conclusion before another election. Therefore, we agree with the trial court's conclusion that this issue is capable of repetition yet evades review.

We also note that the law of the case doctrine does not preclude the trial court or this Court from reviewing the case because this Court's earlier opinion regarding this case merely concerns the trial court's failure to grant plaintiffs' motion for a preliminary injunction. **[*27]** In *Fleming v Macomb Co Clerk*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273502), this Court determined that plaintiffs' challenge based on the trial court's failure to award a *preliminary* injunction was moot because the applications to vote by absent voter ballot in the 2006 general election had already been mailed and the election had already occurred. The Court recognized, however, that plaintiffs' claims for permanent relief were still pending in the trial court at that time and that those claims could proceed to trial. *Id.* The Court found that the issue related to the *preliminary* injunction was not capable of repetition yet evading review at that time because there was no indication that the county clerk intended to mail more absent voter ballot applications while the trial court proceedings were pending. [11]

Reversed. We direct the trial **[*28]** court to grant summary disposition in plaintiffs' favor and to grant plaintiffs' request for injunctive relief. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Patrick M. Meter

/s/ Bill Schuette

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[10] For example, a state can impose residency requirements on voters. *Carrington v Rash*, 380 U.S. 89, 91; 85 S. Ct. 775; 13 L. Ed. 2d 675 (1965).

[11] Because we conclude that defendant's actions were neither constitutional nor statutorily authorized, we will not consider appellant's contentions that the county clerk's decision to mail unsolicited absent voter ballot applications violated the Equal Protection clause or resulted in vote dilution.

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