

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

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

Court of Appeals
No.

Plaintiffs,

v

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

Defendant.

**PLAINTIFFS' PRELIMINARY HEARING BRIEF
IN SUPPORT OF COMPLAINT FOR MANDAMUS AND
MOTION FOR EXPEDITED CONSIDERATION**

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

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

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

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

*Not admitted in Michigan, *pro hac*
vice motion to be filed

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this mandamus action pursuant to MCL 600.4401(1), MCR 3.305(A)(1), and MCR 7.203(C)(2).

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STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

Question 1: Does Const 1963, art 2, § 4(1)(g) (“the Absentee Voting Clause”), which gives voters the right to “submit” an absentee ballot “by mail” at any time in the 40 days up to and including election day, require that absentee ballots be counted if they were sent by the voter in the 40 days up to and including election day?

Plaintiffs’ Answer: Yes.

Question 2: Do Michigan’s Purity of Elections Clause, Free Speech and Assembly Clauses, Equal Protection Clause, and Right to Vote Clause independently require that absentee ballots be counted if sent by election day because the received-by-election-day deadline improperly treats similarly situated citizens differently and imposes a severe burden on the right to vote?

Plaintiffs’ Answer: Yes.

Question 3: Do the Absentee Voting Clause and MCL 168.761(1) together require that election officials (1) transmit absentee ballots on the 40th day prior to an election to qualified voters who submitted an application before that date, (2) “immediately” provide absentee ballots to qualified voters who submit an application within 40 days of the election, and (3) allow for in-person absentee voting beginning on the 40th day before the election?

Plaintiffs’ Answer: Yes.

Questions 4: Do Article 2, § 4(1)(a) and § 4(1)(g) of the Michigan Constitution require that voters be provided with postage for returning absentee ballots?

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Question 5:

Is a writ of mandamus directing the Secretary of State to ensure compliance with the above constitutional and statutory requirements appropriate and necessary to provide Plaintiffs relief?

Plaintiffs' Answer: Yes.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Const 1963, art 1, § 2

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Const 1963, art 1, § 3

The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

Const 1963, art 1, § 5

Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

Const 1963, art 2, § 4

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

(a) The right, once registered, to vote a secret ballot in all elections.

...

(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

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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.

MCL 168.761

(1) If the clerk of a city or township receives an application for an absent voter ballot from a person registered to vote in that city or township and if the signature on the application agrees with the signature for the person contained in the qualified voter file or on the registration card as required in subsection (2), the clerk immediately upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerk, shall forward by mail, postage prepaid, or shall deliver personally 1 of the ballots or set of ballots if there is more than 1 kind of ballot to be voted to the applicant. Subject to the identification requirement in subsection (6), absent voter ballots may be delivered to an applicant in person at the office of the clerk.

...

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(3) Subject to the identification requirement in subsection (6) and except as otherwise provided in this subsection, a person may apply in person at the clerk's office before 8 p.m. on election day to vote as an absent voter. Only an individual who is not a registered elector, or an individual who is not registered to vote in the city or township in which he or she is registering to vote, and who registers to vote on election day in person with the clerk of the city or township in which the individual resides may apply for and complete an absent voter ballot in person at the clerk's office on election day. In addition, the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. The applicant shall receive his or her absent voter ballot and vote the ballot in the clerk's office. All other absent voter ballots, except ballots delivered pursuant to an emergency absent voter ballot application under section 759b,1 must be mailed or delivered to the registration address of the applicant unless the application requests delivery to an address outside the city or township or to a hospital or similar institution, in which case the absent voter ballots must be mailed or delivered to the address given in the application. However, a clerk may mail or deliver an absent voter ballot, upon request of the absent voter, to a post office box if the post office box is where the absent voter normally receives personal mail and the absent voter does not receive mail at his or her registration address.

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INTRODUCTION

In November 2018, the people of Michigan voted to enshrine a constitutional right in this State to vote by absentee ballot. By an overwhelming margin, the people passed a constitutional amendment giving every voter the right to submit an absentee ballot—by mail or in person, at the voter’s choosing—at any point in the 40 days preceding an election. The amendment is expressly self-executing and, by its terms, must be liberally construed in favor of voters’ rights to effectuate its purposes.

Yet Michigan’s statutes governing absentee voting have not been updated to comply with this new constitutional command. In particular, Michigan election officials continue to enforce a century-old requirement that absentee ballots must be rejected if they arrive at the clerk’s office after election day, even if they were mailed on or before election day. This received-by-election-day deadline patently violates multiple constitutional provisions, including the new Absentee Voting Clause giving voters the absolute right to submit their ballots by mail in the 40 days leading up to election night. Michigan election officials have independently been violating the constitutional amendment by refusing to provide voters absentee ballots starting on the 40th day before the election.

The stakes for democracy in Michigan could not be higher. Even before COVID-19 struck Michigan, voting by mail was set to play an unprecedented role in this year’s elections, and its role will be magnified exponentially given the

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personal and public health risks of voting in person at a polling place. Millions of Michigan voters will likely attempt to vote by absentee ballot in November. Plaintiffs seek a writ of mandamus to compel the Secretary of State to perform her clear state constitutional duties in the administration of absentee ballot voting in Michigan, to protect the fundamental rights of the Plaintiffs and over 7 million Michigan voters.

The Court should expedite consideration of this case given the rapidly approaching August primaries and November elections. The Michigan Supreme Court has declared that election-related cases should be considered expeditiously. In light of COVID-19 and the expected uptick in absentee voting, expeditious consideration is especially paramount here to ensure that the rules governing absentee ballot are settled before the elections take place, and to ensure that Defendants can begin taking steps to comply with the rules.

STATEMENT OF FACTS AND PROCEEDINGS

A. Constitutional and Statutory Background

In the November 2018 general election, by a margin of 67% to 33%, Michigan voters adopted Proposal 3, which enacted the state constitutional voting rights now set forth in Article 2, § 4 of the Michigan Constitution.

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As relevant to this case, Proposal 3 contained three key provisions. First, it created an unqualified, unconditional state constitutional right for registered voters to vote in all elections:

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

(a) The right, once registered, to vote a secret ballot in all elections.

Const 1963, art 2, § 4(1)(a).

Second, Proposal 3 created an unqualified, unconditional state constitutional right for registered voters to vote in all elections by absentee ballot. Specifically, the Michigan Constitution now provides all voters the right:

to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent ballot is applied for, received, and submitted in person or by mail.

Id., art 2, § 4(1)(g) (the “Absentee Voting Clause”).

Third, Proposal 3 provided that these rights “shall be self-executing” and “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” *Id.*, art 2, § 4(1).

Virtually all of Michigan’s statutory election laws and procedures pre-date Proposal 3 and have not been updated since its passage. By statute, Michigan voters can apply for an absentee voter ballot any time during the 75 days prior to an election

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and up until 8 PM on election day. See MCL 168.759(1), (2); MCL 168.761(3). The clerk of the voter's city or township is responsible for issuing absentee ballots, and the statute provides that such ballots shall not issue except upon application. *Id.* If a city or township clerk receives an absentee ballot application during the 75-day period and verifies its signature, the clerk "immediately . . . shall . . . mail or deliver personally" the absentee ballot to the voter. MCL 168.761(1). Absentee ballots cannot be emailed to voters.

Michigan's election code also sets statutory deadlines for delivery and submission of absentee ballots. Three of those deadlines are relevant here. First, city and township clerks can send an absentee ballot by first class mail to a registered voter until 5 PM on the Friday before an election. MCL 168.759(1). In other words, a voter can submit an application for an absentee ballot on the Friday before election day, and the clerk can put the voter's ballot in the mail up until 5 PM that day, such that the voter likely would not receive the ballot until at least Monday or Tuesday the next week (with Tuesday being election day).

Second, clerks are permitted to issue absentee ballots to registered voters in person until 4 PM on the day before an election. MCL 168.759(1). Absentee ballots issued in person on the day before election day must be voted at that time and cannot be taken away to be voted and mailed. See *id.* Only voters who register on election

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day and desire to vote that day can apply for, receive, and vote an absentee ballot on election day, and they can only do so in the clerk's office. See MCL 168.761(3).¹

Third, since at least 1929, Michigan election law has required that, for an absentee ballot to be counted, it must be received by the city or township clerk or an assistant to them before the polls close at 8 PM on election day. See MCL 168.759b; MCL 168.764a; MCL 168.765(4); 1948 CL 180.8; 1929 CL 3141.² This “received-by-election-day” deadline applies irrespective of when a voter applied for her absentee ballot, when the clerk approved the voter's application and sent the absentee ballot to the voter, when the voter received the ballot, or when the voter mailed the completed ballot. Envelopes containing absentee ballots received by local clerks after the polls close must be marked with the date and time of receipt and retained unopened. See MCL 168.765(4).

B. The Importance of Paper Mail to Absentee Voting

Michigan election law does not require local clerks to provide voters an option to ask for an absentee ballot application by electronic means, or to return the application by electronic means. And while many local clerks voluntarily provide

¹ There is an exception allowing clerks to issue absentee ballots on election day to registered voters who become physically disabled or are absent due to family sickness or death. See MCL 168.759b.

² Some of the absentee voting procedures for military and overseas voters are different than here described, but the election day 8 PM ballot receipt rule applies to their ballots.

electronic delivery and return options for absentee ballot applications under guidance issued by Secretary Benson, see Michigan Department of State, *Election Officials' Manual*, ch 6, p 2, practices are inconsistent across the state.

Moreover, the absentee voting process cannot be digitized entirely. While clerks may lawfully send applications electronically, Michigan law prohibits them from sending the actual ballot electronically, and similarly requires voters to physically return the ballot, either by mail or in person. In addition, even when tech-savvy local clerks have adopted procedures to accept applications via email, they face another hurdle: Michigan's digital divide. Nearly 1.6 million Michigan citizens, many of them in rural areas, poor, and/or minorities, have no broadband Internet access. See, e.g., Khalid, *America's Digital Divide Is Even More Urgent During the Pandemic*, Quartz (April 9, 2020). As a result, Michigan absentee voters are all partially or completely dependent on the costs and vicissitudes of United States Postal Service (USPS) mail to exercise their state constitutional right to vote an absentee ballot.

But much has changed about postal mail since 1929, when the Michigan legislature first passed the 8 PM election day ballot receipt requirement. Back then, mail within a city or township was processed locally, and next day delivery and twice daily deliveries were common in residential areas. See *The United States Postal Service: An American History* (2020), p 27. Today, all mail goes from a local post

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office to a regional sorting facility and from there to a local post office for delivery. There are five such regional facilities serving Michigan: Pontiac, Grand Rapids, Traverse City, and Marquette, Michigan, and Green Bay, Wisconsin.

In modern-day Michigan, absentee ballots are sent and returned by first class mail, for which the USPS indicates an “estimated delivery time” of 1 to 3 business days, see USPS.com, FAQ’s, *What Are the Types of First Class Mail?*, but the USPS “does not guarantee the delivery of First Class mail . . . within a specified time.” USPS, Domestic Mail Manual 133.2.1. Private sources indicate that the 1-3 day estimated delivery time is in fact a 1-3 day *average*, see Smallbusiness.chron.com, *How Long Does It Take for First Class Mail to Arrive?*, which means delivery could take more than 3 business days. Therefore, no Michigan absentee voter knows how long their application or their completed absentee ballot will take to be delivered to their local clerk.

In the absentee voting process, these consecutive 3-day wait times add up. If a voter and clerk both use mail throughout the absentee ballot process (as some voters must), there are at least five times where mail processing and delivery occur: (1) when the voter requests an application from the clerk by mail; (2) when the clerk mails an application to the voter; (3) when the voter mails the application back to clerk; (4) when the clerk mails a blank absentee ballot to the voter; and (5) when the voter mails the completed ballot back to the clerk.

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If the average mail processing and delivery time is 3 days, these five steps will take at least 15 days of the 40-day pre-election absentee ballot voting period expressly guaranteed by the Michigan Constitution. Added to these two weeks or more of delivery time are (1) the time to process an application and mail a ballot in the clerk's office, and (2) the time a voter needs to complete one of the longest ballots in the country. See Citizens Research Council of Michigan, *The Long Ballot in Michigan* (1984), p 1.

C. The Consequences of Michigan's Antiquated Absentee Voting Deadlines

The lengthy delivery times for mail delivery, in conjunction with the time it takes for clerks to process absentee ballot applications, mean that voters who request an absentee ballot in the week before an election are highly unlikely to be able to return it by mail so that it is received by their local clerk by 8 PM on election day. Indeed, as mentioned, clerks are permitted by statute to mail a voter's absentee ballot until 5 PM on the Friday before the election. If a clerk mails a voter a blank ballot on that Friday, however, the voter likely will not receive it until Monday or Tuesday of the next week, at which point it will be too late for the voter to mail the ballot back and have it arrive at the clerk's office by 8 PM on Tuesday. Moreover, many voters wait until close to the deadline for requesting an absentee ballot to submit

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their request. In the March 2020 presidential primary, for example, more than 150,000 voters requested an absentee ballot in the week before the election.³

These postal service and application-processing delays have consequences. Based on publicly available records from the Department of State, the received-by deadline has resulted in the rejection of tens of thousands of absentee ballots—just since the passage of the Absentee Voting Clause. That number will grow significantly in the upcoming August and November elections as more people seek to vote by mail. Secretary Benson, local clerks, and private groups such as Plaintiff the League of Women Voters of Michigan are undertaking public education efforts relating to the Absentee Voting Clause, and more voters fear being in a polling place as a result of the COVID-19 pandemic.

For example, in the May 5, 2020 elections, for the first time ever, the Secretary of State mailed an absentee ballot application with prepaid return postage to every eligible voter. As a result, turnout doubled as voters cast absentee ballots at a 99% rate. See Michigan Department of State, *Record-Breaking Turnout for May 5 Election Demonstrates Michigan Voter Commitment to Democracy* (May 6, 2020).

³ Compare White, *Absentee Voters Can Vote Again If Favorite Candidate Is Out*, Associated Press (March 3, 2020) (stating that 812,000 absentee ballots had been requested as of March 3, 2020), with Detroit Today, *Absentee Ballots Cast In Michigan Primary Could Reach Close to a Million*, WDET (March 10, 2020), (stating that 970,000 absentee ballots had been requested as of March 10, 2020).

Unfortunately, according to the Secretary of State's data, 1.75% of those absentee ballots were not counted because they were received after election day.

On May 19, 2020, Secretary Benson announced that she would again mail absentee ballot applications to all registered voters for the August and November, 2020 elections. See Michigan Department of State, "*Benson: All Voters Receiving Applications to Vote by Mail*" (May 19, 2020).

Michigan voters are increasingly eager to exercise their right to vote. Statistics show that turnout in Michigan general elections in non-presidential years has increased sharply, from 3,188,956 in 2014, to 4,341,340 in 2018, a 36% increase and a record turnout in a gubernatorial election. Turnout in Michigan general elections has also increased in presidential election years, from 4,780,701 in 2012, to 4,874,619 in 2016, to a projected return turnout of 5.3 to 6 million in 2020. See Gray, *Huge Michigan Voter Turnout Could Turn into National Embarrassment*, Detroit Free Press (January 14, 2020). Voter enthusiasm is at unprecedented levels for the 2020 elections. See Livengood, *Richard Czuba: Keeping an Eye on Voter Motivation in 2020*, Crain's Detroit Business (December 15, 2019).

The combination of higher turnout and a higher rate of absentee voting will lead to record levels of uncounted absentee ballots in 2020 and future elections due to the received-by deadline. For example, even if only 5.3 million voters turn out in the November 2020 election, and even if only 45% of them vote by absentee ballot,

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then there will be 2,385,000 absentee ballots cast. If 1.75% of those ballots are not counted because they are received beyond the received-by deadline (the rate in May, 2020), 41,738 absentee ballots will not be counted, each representing one of the 41,738 voters who will be disenfranchised. This table details the number of disenfranchised voters at two turnout levels and five absentee voter rates:

<u>Turnout</u>	<u>Absentee Voting Rate</u>	<u>Absentee Voters</u>	<u>Uncounted Rate Due to Received-By Deadline</u>	<u>Uncounted Absentee Votes Due to Received -by Deadline</u>
5,300,000	45%	2,385,000	1.75%	41,738
5,300,000	50%	2,650,000	1.75%	46,375
5,300,000	55%	2,915,000	1.75%	51,013
5,300,000	60%	3,180,000	1.75%	55,650
5,300,000	65%	3,445,000	1.75%	60,288
5,600,000	45%	2,520,000	1.75%	44,100
5,600,000	50%	2,800,000	1.75%	49,000
5,600,000	55%	3,080,000	1.75%	53,900
5,600,000	60%	3,360,000	1.75%	58,800
5,600,000	65%	3,640,000	1.75%	63,700

Absentee ballots that are not counted due to the received-by deadline are sufficient to sway statewide election results. For example, the margin in the 1990 gubernatorial election was only 17,595 votes. The margin in the 2002 attorney general race was only 5,200 votes. The margin in the 2016 presidential election was

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only 10,704 votes. If the received-by deadline remains in effect, every plausible estimate of the number of voters who will be disenfranchised due to the deadline in November 2020 easily surpasses that margin.

D. Defendant's Failure to Ensure That Ballots Are Available Immediately Within 40 Days of Election Day

The disenfranchisement caused by the received-by deadline is exacerbated by the failure of election officials to comply with constitutional and statutory provisions requiring the timely processing of absentee ballot applications. As noted, the Michigan Constitution now guarantees every registered voter the right to cast an absentee ballot “during the forty (40) days before an election.” Const 1963, art 2, § 4(1)(g). Michigan law also requires clerks to send absentee ballots to voters “immediately upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerk.” MCL 168.761(1). Together, these constitutional and statutory provisions require election officials to “immediately” transmit absentee ballots on the 40th day prior to an election to qualified voters who submitted an application before that date, and to “immediately” provide absentee ballots to qualified voters who submit an application within 40 days of the election.

Numerous election officials across the state have disregarded these requirements. For instance, in the March 2020 presidential primary, Meridian Township waited until 25 days before the election to begin mailing absentee ballots

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to voters.⁴ Sterling Heights did not start mailing absentee ballots until eight days into the 40-day period, and Macomb Township and Kentwood waited until six days into the 40-day period.⁵ Moreover, some clerks have also ignored the constitutional requirement that voters have the option to cast an absentee ballot in person at any point within 40 days prior to the election. For the March 2020 presidential primary, Farmington Hills and Shelby Township did not begin allowing residents to cast absentee ballots in person at the clerk's office until over a week into the 40-day pre-election period.

E. The Impact of the COVID-19 Pandemic

“We are in the midst of a global pandemic arising from the novel coronavirus (‘COVID-19’). No one could deny that it has produced unparalleled and exceptional circumstances affecting every aspect of life as we have known it.” *Cameron v Bouchard*, No. 20-10949, 2020 WL 2569868, at *1 (ED Mich May 21, 2020). One result of the pandemic is that the number of people who will vote by mail, and whose absentee ballots will not be counted because of the received-by deadline, will increase.

⁴ Sweet, *UPDATE: Meridian Township Clerk Election Issues Have Been Corrected*, WILX10 (March 6, 2020).

⁵ Mauger, *Voting Advocates: Some Clerks Failing to Send Absentee Ballots Quickly Enough*, Detroit News (February 5, 2020).

On March 10, 2020, shortly after the first COVID-19 cases were diagnosed within Michigan's borders, Governor Gretchen Whitmer declared a state of emergency.⁶ Since then, the virus has taken a massive toll on the state. As of May 20, 2020, there were 53,009 confirmed cases of COVID-19 in the State of Michigan, resulting in 4,825 deaths.⁷ According to tracking by Johns Hopkins University, Michigan ranks seventh in the nation for number of COVID-19 cases, and fourth in the nation for number of deaths.⁸

Dr. Robert Redfield, the director of the Centers for Disease Control and Prevention (CDC), has stated that "most likely" there will be a second wave of mass infection in the fall, as the November general election draws near. Dr. Redfield explained that a second wave will require states to "aggressively re-embrace some of the mitigation strategies that we have determined had impact, particularly social distancing."⁹ Polling places are the type of crowded environments that, according to public-health officials, promote the transmission of COVID-19. Indeed, the CDC

⁶ Executive Order No. 2020-4.

⁷ See Michigan.gov, *Where We Stand with COVID-19* <<https://www.michigan.gov/coronavirus>>.

⁸ See Johns Hopkins University, *COVID-19 Dashboard by the Center for Systems Science and Engineering* <<https://coronavirus.jhu.edu/map.html>>.

⁹ Gander, *CDC Director Says There May Be Another Coronavirus Wave in Late Fall and a 'Substantial Portion of Americans' Will Be Susceptible*, Newsweek (April 1, 2020).

has encouraged the adoption of “voting methods that minimize direct contact with other people and reduce crowd size,” including mail-in voting and early voting.¹⁰

As demonstrated by the May 5, 2020 elections, given the risks posed by the COVID-19 pandemic, many more Michigan citizens than usual will seek to vote by absentee ballot—rather than in person at a polling place—in the upcoming primary and general elections.

The unprecedented number of absentee ballot applications will place enormous strain on local clerks, causing delays in processing applications and sending voters their ballots. These delays will be compounded by delays in mail delivery. The COVID-19 pandemic has already increased mail delivery times in Michigan, promising yet another hurdle for Michigan’s absentee voting system and making it all the more likely that votes will be discarded for failure to arrive by election day. See Hicks, *Mail Service Slows in Michigan as Coronavirus Hits Postal Workers*, Gov’t Tech (April 7, 2020).

LEGAL STANDARD

This Court may issue a writ of mandamus if “(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant

¹⁰ See Center for Disease Control and Prevention, *Recommendations for Election Polling Locations* <<https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>>.

has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.” *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (internal quotation marks omitted). “This Court may also ‘enter any judgment or order or grant further or different relief as the case may require.’” *Id.*, quoting MCR 7.216(A)(7).

“Mandamus actions may be brought” to, among other things, “challenge on constitutional grounds . . . legislative enactments which affect the duties of a state officer.” *Hertel v Racing Comm’n, Dep’t of Agriculture*, 68 Mich App 191, 198; 242 NW2d 526 (1976). This Court may issue mandamus to invalidate such a statute and compel the state officer to comply with the relevant constitutional provisions. See *id.*; *Deneweth v State Treasurer*, 32 Mich App 439, 442; 189 NW2d 10 (1971).

ARGUMENT

I. The Statutory Requirement That Absentee Ballots Be Received by 8 PM on Election Day Violates the Michigan Constitution

A. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(g), the Michigan Constitution’s Absentee Voting Clause

In November 2018, the people of Michigan voted by an overwhelming margin to amend Michigan’s Constitution to afford every voter an unqualified right to vote by absentee ballot in the 40 days leading up to an election. The Absentee Voting Clause provides, in relevant part, that “[e]very citizen of the United States who is an

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elector qualified to vote in Michigan shall have the following rights: . . . (g) to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether an absent ballot is applied for, received, and submitted in person or by mail.” Const 1963, art 2, § 4(1)(g).

The constitutional amendment that added the Absentee Voting Clause further provides that “[a]ll rights set forth in this subsection shall be self-executing,” and that its protections “shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” Const 1963, art 2, § 4. Self-executing constitutional provisions are judicially enforceable without “further legislation.” *Rusha v Dep’t of Corrections*, 307 Mich App 300, 308; 859 NW2d 735 (2014), lv den 498 Mich 860; 865 NW2d 28 (2015).

The Absentee Voting Clause accordingly gives all Michigan registered voters self-executing, enforceable rights “to vote an absentee ballot” during the 40 days before an election, and “to choose” to “submit[]” the voted ballot “by mail.” To “submit” a ballot means to *send* the ballot under the plain meaning of the term. See Lexico, Synonyms for *Submit* <<https://www.lexico.com/synonym/submit>> (Oxford Dictionary listing “send in” as a synonym for “submit”). The Absentee Voting Clause thus gives Michigan voters the unqualified right to send a completed absentee ballot, by mail if they choose, at any point in the 40 days up to and including election day. The Clause unambiguously affords this right, and the constitutional

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requirement that the Clause “shall be liberally construed in favor of voters’ rights” would foreclose any effort by Defendant or others to offer an alternative, more restrictive interpretation of the provision.

On its face, the century-old statutory requirement that absentee ballots be received by the clerk by 8 PM on election day abridges this constitutional right, because it provides for the rejection of ballots submitted “during the forty (40) days preceding an election.” For instance, if voter completes and mails her absentee ballot on the day before election day, the ballot will not be counted if it arrives at the clerk’s office two days later. The received-by deadline facially restricts the explicit constitutional right of voters “to choose” to submit their absentee ballots “by mail” at any time within 40 days of the election.

“It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.” *Wolverine Golf Club v Hare*, 384 Mich App 461, 466; 185 NW2d 392 (1971). Rather, “legislation supplementary to self-executing constitutional provisions must be in harmony with the spirit of the Constitution, and its object to further the exercise of [the] constitutional right and make it more available.” *League of Women Voters of Mich v Sec’y of State*, -- NW2d --; 2020 WL 423319, at *9 (Mich Ct App, January 27, 2020) (internal quotation marks omitted). The statutory received-by deadline does not “further the exercise of” the constitutional right to vote by absentee ballot and

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“make it more available.” *Id.* It does the opposite, abridging this express right provided by the Absentee Voting Clause.

While any violation of a self-executing constitutional provision cannot stand, it bears emphasis that the impact of this violation will be massive. As described, based on the percentage of absentee ballots rejected due to the received-by declined in the May 2020 primary, it is likely that between 41,738 and 63,700 absentee ballots will be rejected on this basis in the November 2020 general election. *Supra* at 11. Given the time required for mail delivery and for clerks to process applications, compliance with the received-by deadline will be impossible for many voters who request an absentee ballot in the week before the election even though they have done so before the application deadline. Indeed, clerks can mail voters their blank ballots until 5 PM on the Friday before the election. But if a clerk mails a voter a blank ballot that Friday, the voter likely will not receive it until Monday or Tuesday of the next week, at which point it will be too late for the voter to mail the ballot back and have it arrive at the clerk’s office by 8 PM on Tuesday. These voters and tens of thousands of others who mail their ballots on or close to election day will be denied their express constitutional right to “vote an absent voter ballot without giving a reason” in the 40 days before an election and “to choose whether an absent ballot is applied for, received, and submitted in person or by mail.”

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In short, the Absentee Voting Clause requires the counting of absentee ballots submitted by mail at any point in *the 40 days up to and including election day*, and Secretary Benson has a clear legal duty to direct local clerks to comply with this constitutional requirement. Absentee ballots submitted within 40 days of the election include all ballots postmarked by election day or marked with other official information from USPS that validates the voter mailed the ballot by election day, as well as all ballots received by the relevant clerk's office the day after election day, since any mail received via USPS must have been sent at least a day earlier.

B. The Received-By Deadline Violates Const 1963, Art 2, § 4, the Michigan Constitution's Purity of Elections Clause

The received-by deadline also violates the Purity of Elections Clause of Article 2, § 4(2) of the Michigan Constitution. The Purity of Elections Clause provides, in relevant part, that “[t]he legislature shall enact laws to preserve the purity of elections” and “to guard against abuses of the elective franchise.”

The Michigan Supreme Court has held that the Purity of Elections Clause demands “fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party v Sec’y of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). It requires that “every elector’s franchise [be] of equal value to every other elector,” such that “every elector has an equal voice in the choice of those who shall represent the people.” *Maynard v Bd of Dist Canvassers*, 84 Mich 228, 240–241; 47 NW 756 (1890). The Clause prohibits the legislature from “subvert[ing] the will of the people

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as expressed through the ballot,” and mandates that “the majority or plurality of votes cast for any person or measure must prevail.” *Id.* at 239, 244.

On its face, the received-by deadline violates the Purity of Elections Clause. Under the received-by deadline, two similarly situated individuals could timely request absentee ballots on the same day, or timely mail back their completed absentee ballots on the same day, but inherent variation in mail-delivery schedules or application-processing speeds could result in one individual having her vote counted while the other does not. That differential treatment between similarly situated voters—disenfranchising some but not others for reasons outside of the voters’ control—is the antithesis of “fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party*, 412 Mich at 598.

The received-by deadline also violates the Purity of Elections Clause because it “subvert[s] the will of the people as expressed through the ballot.” *Maynard*, 84 Mich at 238–245. Not only does it subvert the will of the voters who adopted Proposal 3 in 2018, but as described, the number of uncounted absentee ballots due to the received-by deadline in this year’s remaining elections will exceed the margin of victory in several recent statewide elections. Thus, enforcement of the received-by deadline does not just disenfranchise individual voters, but also potentially prevents the candidate who received “the majority or plurality of votes cast” from prevailing. *Id.*

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Secretary Benson has a clear legal duty not to enforce a statute that violates the Purity of Elections Clause’s mandate to treat all voters equally, to avoid disenfranchising voters through no fault of their own, and to ensure that the will of the people prevails. Those duties clearly require Secretary Benson to direct local clerks to count all absentee ballots that voters send on or before election day.

C. The Received-By Deadline Violates Const 1963, Art 1, §§ 3, 5, the Michigan Constitution’s Free Speech and Assembly Clauses

The received-by deadline also violates the Free Speech and Assembly Clauses of the Michigan Constitution. Article 1, § 3 provides: “The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.” Article 1, § 5 provides: “Every person may freely speak, write, express and publish his views on all subjects, . . . and no law shall be enacted to restrain or abridge the liberty of speech or of the press.” The Michigan Supreme Court has held that these clauses “may afford broader free expression and petition protections against government infringements” than “the federal constitution’s Bill of Rights.” *Woodland v Mich Citizens Lobby*, 423 Mich 188, 202; 378 NW2d 337 (1985).

The Michigan Constitution’s free speech and assembly provisions protect the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote. See *Maynard*, 84 Mich at 239–240 (“It is the constitutional right of every elector, in voting for any person

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to represent him in the legislature, to express his will by his ballot.”); *id.* at 240 (“every elector expresses his wish by ballot”); *id.* (“What is the meaning of the word ‘vote?’ . . . It means, according to Worcester, ‘suffrage, voice, or opinion of a person in some matter which is commonly to be determined by a majority of voices or opinions of persons who are empowered to give them; the wish of an individual in regard to any question, measure, or choice, expressed by word of mouth, by ballot, or otherwise; that by which the will, preference, or opinion of a person is expressed; a ballot.’”). Voting for a candidate of one’s choice is core political speech and expressive conduct protected by the Michigan Constitution.

On its face, the received-by deadline violates Michigan voters’ rights of political speech and expression. Many voters who timely request absentee ballots in compliance with Michigan law and who send their completed ballots on or before election day will, through no fault of their own, have their ballots discarded. These voters will be denied the ability to express their views through their absentee ballots, and thus will be denied the right to engage in core political speech.

The received-by deadline especially burdens the speech of undecided and late-deciding voters. Many voters are undecided about who they wish to vote for and will not decide until on or very close to election day. In an effort to ensure that their votes are counted, these undecided voters may be forced to commit to voting for a candidate or ballot measure that they otherwise would not have voted for—in other

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words, to commit to the content of their political expression without all the information that they need to make an informed decision. That harm, too, renders enforcement of the received-by deadline unconstitutional.

Laws that severely burden protected political expression are subject to strict scrutiny under the Michigan Constitution. See *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 494; 242 NW2d 3 (1976) (“Political expression must be afforded the broadest protection . . .”). Under strict scrutiny, “the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). The state does not have a legitimate interest, let alone a compelling one, in justifying the inevitable stifling of protected political speech that results from enforcement of the received-by deadline. Nor is the received-by deadline narrowly tailored to serve any such interest, given the availability of a sent-by-election-day deadline, which is used in at least 11 states that allow voting by mail.¹¹

¹¹ Alas Stat § 15.20.081(e); Cal Elec Code § 302; Iowa Code Ann. § 53.17(2), (3); Md Code Regs. § 33.11.03.08(B); NY Elec Law § 8-412(1); NC Gen Stat Ann § 163A-1310(b)(2)(b); ND Cent Code Ann. § 16.1-07-09; Tex Elec Code § 86.007(a)(2); Utah Code § 20A-3-306(2)(b); Wash Rev Code § 29A.40.091(4); W Va Code § 3-3-5(g).

This unconstitutional burdening of protected political expression would not occur if all ballots sent on or before election day were counted. Secretary Benson accordingly has a clear legal duty to direct local clerks to count such ballots.

D. The Received-By Deadline Violates Const 1963, Art 1, § 2, the Michigan Constitution's Equal Protection Clause

The received-by deadline also violates the Equal Protection Clause in Article 1, § 2 of the Michigan Constitution. It provides, in relevant part: “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.”

Laws that differentiate between individuals with respect to a “fundamental right,” which includes all rights that have their “source, explicitly or implicitly,” in the Constitution, are subject to strict scrutiny. *Am States Ins Co v State Dep't of Treasury*, 220 Mich App 586, 594; 560 NW2d 644 (1996). As discussed further below, the Michigan Constitution now establishes an explicit state constitutional right to vote. See Const 1963, art 2, § 4(1)(a). Even before Article 2, § 4(1)(a) established a constitutional right to vote, Michigan courts repeatedly recognized that voting is a fundamental right. *Anderson v City of Detroit*, 54 Mich App 496, 499 n 1; 221 NW2d 168 (1974) (“Fundamental interests include the right to vote and travel”), lv den 400 Mich 826 (1977); see also *People v Smith*, 502 Mich 624, 638;

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918 NW2d 718 (2018) (“[T]he right to vote is an implicit fundamental political right that is preservative of all rights.” (quotation marks omitted)).

The received-by deadline is subject to strict scrutiny because it differentiates between and classifies individuals with respect to their fundamental interest in voting, imposing a severe burden on certain voters through no fault of their own. Due to disparate mail delivery times throughout Michigan, one absentee voter’s ballot may reach her local clerk in 1 day while another Michigan voter’s ballot mailed on the same day may take 3 or more days to be delivered. Indeed, absentee voters who are next-door neighbors and who mail their ballots from the same mailbox or post office on the same day may have their ballots delivered to the local clerk on different days, with one ballot being counted and the other not.

The arbitrary, differential treatment of similarly situated voters fails strict scrutiny. The state has no legitimate interest, let alone a compelling one, in imposing a deadline that will necessarily and arbitrarily disenfranchise a large number of Michigan voters through no fault of their own. And even if the state had such an interest, the received-by deadline is not necessary to further it. Counting all ballots sent on or before election day achieves the same interest in uniformity or orderliness that the state might claim. As mentioned, at least eleven states that allow voting by mail consider mailed ballots timely if postmarked on election day or the day prior,

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showing that this sent-by-election-day rule is manageable and imposes no significant administrative burden.

Enforcement of the received-by deadline causes another form of impermissible differentiation. Voters who are in line at a polling place at 8 PM on election day are permitted to vote after 8 PM. MCL 168.720. If the line is long enough, these voters may not actually vote until the day after election day, yet their vote counts. But by operation of the received-by deadline, many similarly situated absentee voters who mail their ballots to the clerk by election day will be disenfranchised.

This disparate treatment of voters in line at 8 PM on election day and absentee voters who mail their ballots by election day is not justified by any legitimate state interest and thus violates the Michigan Constitution's equal protection guarantee under any standard of review.

These unlawful differentiations would not occur if all ballots sent on or before election day were counted. Secretary Benson accordingly has a clear legal duty to direct local clerks to count such ballots.

E. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(a), the Michigan Constitution's Right to Vote

Article 2, § 4(1)(a) of the Michigan Constitution establishes "[t]he right, once registered, to vote a secret ballot in all elections." On its face, the received-by deadline violates this constitutional right to vote. As explained, application of the

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received-by deadline will ensure that a large number of registered Michigan voters who comply with all statutory deadlines will not be able to vote, in clear violation of their constitutional right to do so. Secretary Benson thus has a clear legal duty to direct local clerks to count absentee ballots sent on or before election day.

II. The Failure to Immediately Process Absentee-Ballot Applications Within 40 Days of Elections Violates Const 1963, Art 2, § 4(1)(g), the Michigan Constitution’s Absent Voting Clause, and Violates MCL 168.761(1)

Separate from the received-by deadline, the failure to immediately process absentee-ballot applications within 40 days of the election also violates clear legal duties created by the Absentee Voting Clause and by state statute.

As described, the Absentee Voting Clause explicitly guarantees the self-executing right to vote by absentee ballot during the 40 days before an election, and this right must be liberally construed in favor of voters. Const 1963, art 2, § 4(1)(g). And Section 761 of Michigan’s Election Law provides, in relevant part, that “the clerk *immediately* upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerk, shall forward by mail, postage prepaid, or shall deliver personally 1 of the ballots or set of ballots if there is more than 1 kind of ballot to be voted to the applicant.” MCL 168.761(1) (emphasis added).

In tandem with the unqualified constitutional right to vote by absentee ballot in the 40 days before an election, MCL 168.761(1) by its plain terms requires

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issuance of ballots “immediately” on the 40th day before the election to all voters who have applied for absentee ballots more than 40 days before an election. For all voters who apply for absentee ballots in the 40-day period before an election, the Absentee Voting Clause and MCL 168.761(1) likewise require that ballots be issued “immediately” upon receipt of the application.

As explained, in prior elections, absentee ballots have not been made immediately available to voters in the 40 days leading up to elections. For example, in the March 2020 presidential primary, Meridian Township waited until 25 days before the election to begin mailing absentee ballots to voters. *Supra* at 13. Moreover, some election clerks in prior elections have not permitted voters to cast their properly requested absentee ballots in person within 40 days of the election, which the Absentee Voting Clause expressly requires. *Supra* at 13.

Secretary Benson therefore has a clear legal duty to ensure that local clerks comply with the 40-day voting period in Absentee Voting Clause and the immediacy requirement within MCL 168.761(1), and to ensure that local clerks (1) issue ballots immediately on the 40th day preceding the election to all who have requested ballots up until that date, (2) process and issue ballots immediately going forward to all voters who request ballots within 40 days of the election; and (3) allow in-person voting during the 40 days preceding the election.

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III. Requiring Absentee Voters to Pay Postage on Absentee Ballots Violates the Michigan Constitution

Requiring absentee voters to pay the postage to return their absentee ballots independently violates clear legal duties created by the Michigan Constitution.

As described, Article 2, § 4(1)(a) establishes “[t]he right, once registered, to vote a secret ballot in all elections.” On its face, a requirement to pay for postage to turn an absentee ballot infringes Michigan voters’ unconditional right to vote without payment of any costs to do so. The requirement to pay postage to return absentee ballots likewise clearly contravenes the Absentee Ballot Clause’s guarantee that “[e]very” Michigan voter may “choose” to vote an absentee ballot “by mail.” Const 1963, art 2, § 4(1)(g) (emphasis added). Voters cannot choose to vote an absentee ballot by mail if they cannot afford or otherwise do not have access to postage. Particularly given that both of these state constitutional provisions must be “liberally construed in favor of voters’ rights,” Const 1963, art 2, § 4, it is clear that they prohibit a requirement that voters pay for postage to return an absentee ballot.

Secretary Benson thus has a clear legal duty to direct local clerks to provide postage for voters to return their absentee ballots.

IV. The Other Conditions for Mandamus Relief Are Satisfied

For the reasons stated above, Plaintiffs have clear state constitutional and statutory rights to the relief sought in their Complaint. And Secretary Benson has clear legal duties to ensure compliance with the constitutional and statutory

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provisions at issue in this case. Secretary Benson “has supervisory control over local election officials in the performance of their duties,” MCL 168.21, and is mandated by statute to “direct local election officials as to the proper methods of conducting elections,” MCL 168.31(b).

All other conditions for mandamus relief are satisfied. Secretary Benson’s compliance with her legal duties is ministerial in that it will involve no “exercise of discretion or judgment.” *Citizens Protecting Michigan’s Constitution v Sec’y of State*, 280 Mich App 273, 291–292; 761 NW2d 210 (2008). The relevant inquiry is whether the state officer would need to exercise judgment after this Court has interpreted the relevant constitutional or statutory requirements. *Id.* at 292. Here, directing local election officials to count ballots that were mailed by a specific date (Count I), to send ballots to voters on specified dates (Count II), to allow citizens to vote in person on specified dates (Count II), and to provide postage for return absentee ballots (Count III) are all actions that require “no exercise of discretion.” *Bd of State Canvassers*, 318 Mich App at 254.

Finally, Plaintiffs have no adequate legal remedy other than mandamus “to achieve the same result.” *Id.* at 254–255. The only way to ensure statewide compliance with the constitutional and statutory provisions at issue in this case is for this Court to direct the Secretary of State to comply with those provisions.

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V. The Court Should Expedite Consideration of this Matter

This Court should also grant Plaintiffs' simultaneously-filed motion to expedite these proceedings. There is an urgent need for the Court to render an expedited decision in this case involving the state constitutional rights of voters in the fast approaching August 4, 2020 primary and November 3, 2020 general elections.

The Michigan Supreme Court has declared that election-related cases should be considered expeditiously. See *Scott v Director of Elections*, 490 Mich 888, 889; 804 NW2d 119 (2011). It is especially imperative that this case be decided on an expedited basis in light of the COVID-19 pandemic. Because absentee voting may provide the only safe way for millions of Michiganders to cast their ballots in this year's remaining elections, it is essential that Michigan's procedures for absentee voting comply with all statutory and constitutional requirements.

MCR 7.213(C)(4) also mandates that election-related cases be given precedence on this Court's calendar.

CONCLUSION AND RELIEF SOUGHT

Numerous state constitutional provisions, including the Absentee Voting Clause enacted by the people of Michigan in 2018, require that absentee ballots be counted if they are sent by the voter on or before election day. The Absentee Ballot Clause, in conjunction with the statutory requirement that absentee ballots

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“immediately” be made available, requires that voters who requested an absentee ballot more than 40 days before an election be sent the ballot on the 40th day before the election, and that voters who request an absentee ballot thereafter be sent one within 24 hours. And the Right to Vote and Absentee Ballot Clauses require that postage be provided for voters to return absentee ballots. These requirements are clear and the Secretary has a duty to ensure compliance with them. And there can be no dispute that resolving this matter is time-sensitive given the upcoming elections, in which mail voting will play an unprecedented role in Michigan’s democracy.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Expedite proceedings;
- B. Order Defendant to show cause why a Writ of Mandamus should not issue;
- C. Declare that Defendant has a clear legal duty to enforce the Michigan constitutional and statutory rights of absentee voters as set forth in the Complaint;
- D. Issue a Writ of Mandamus ordering the Defendant to administer and enforce Michigan election law relating to absentee voting in compliance with the Michigan Constitution, by compelling Defendant to:
 1. Require that absentee ballots from all voters, including military and overseas voters, be counted if: (a) the ballot is postmarked or marked with other

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official information from the USPS that validates the voter mailed the ballot on or before election day, and is received in the relevant clerk's office no later than six days after the day of the election; or (b) if the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is received in the relevant clerk's office no later than the day after the election. A "postmark" shall be any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day.

2. Enforce the 40-day availability of ballots provision of Const 1963, art 2, § 4(1)(g), by directing local clerks to: (a) mail absentee ballots on the 40th day before the election, for voters who submitted absentee ballot applications prior to that day; (b) mail absentee ballots within 24 hours of a voter submitting an application for an absentee ballot within the 40 days prior to the election; and (c) allow for in-person absentee voting beginning on the 40th day before an election;

3. Declare that "immediately" in MCL 168.761(1) means within 24 hours, and direct local clerks to: (a) mail absentee ballots on the 40th day before the election, for voters who submitted absentee ballot applications prior to that day; (b) mail absentee ballots within 24 hours of a voter submitting an application for an absentee ballot within the 40 days prior to the election; and (c) allow for in-person absentee voting beginning on the 40th day before an election.

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4. Require local clerks to provide postage for a voter to return an absentee ballot;

E. Retain jurisdiction; and

F. Award such other relief as is equitable and just.

Respectfully submitted,

/s/ Mark Brewer

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

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

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

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

* Not admitted in Michigan, *pro hac vice* motion to be filed.

Attorneys for Plaintiffs

Dated: May 22, 2020

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