

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
(Sawyer, P.J., and Gleicher and Riordan, JJ.)

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

Supreme Court Case No. _____

COA Case No. 353654

Plaintiffs,

v

SECRETARY OF STATE,

Defendant.

PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

R. Stanton Jones*
Elisabeth S. Theodore*
Daniel F. Jacobson*
Kolya D. 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

* *Pro hac vice* motions forthcoming

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED ..	ix
ORDER APPEALED FROM AND BASIS OF JURISDICTION	1
INTRODUCTION	1
QUESTIONS PRESENTED FOR REVIEW	4
STATEMENT OF FACTS AND PROCEEDINGS BELOW	4
A. Constitutional and Statutory Background.....	4
B. The Importance of Paper Mail to Absentee Voting	6
C. The Consequences of the Antiquated Received-By Deadline.....	8
D. The Impact of the COVID-19 Pandemic	12
E. Proceedings Below	13
GROUNDS FOR GRANTING THE APPLICATION	17
STANDARD OF REVIEW	19
ARGUMENT.....	21
I. The Statutory Requirement That Absentee Ballots Be Received by 8 PM on Election Day Violates the Michigan Constitution	21
A. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(g), the Michigan Constitution’s Absentee Voting Clause	21
1. The Plain Text of the Absentee Voting Clause Requires Counting Absentee Ballots Mailed by Election Day	21
2. The Decision Below Disregards and Contravenes the Clear and Unambiguous Text of the Absentee Voting Clause	28
3. Ballots Mailed by Election Day Include Ballots Postmarked by Election Day or Received the Day After the Election.....	36
4. This Court Need Not Address the Deadline for Receipt of Absentee Ballots But Has Remedial Discretion To Do So	37

B. The Received-By Deadline Violates Const 1963, Art 2, § 4,
the Michigan Constitution’s Purity of Elections Clause39

C. The Received-By Deadline Violates Const 1963, Art 1, §§ 3, 5,
the Michigan Constitution’s Free Speech and Assembly Clauses.....41

D. The Received-By Deadline Violates Const 1963, Art 1, § 2,
the Michigan Constitution’s Equal Protection Clause44

E. The Received-By Deadline Violates Const 1963, Art 2, § 4(1)(a),
the Michigan Constitution’s Right to Vote Clause45

II. The Other Conditions for Mandamus Relief Are Satisfied46

CONCLUSION AND RELIEF SOUGHT49

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10),</i> 396 Mich 465; 242 NW2d 3 (1976)	42
<i>Am States Ins Co v State Dep't of Treasury,</i> 220 Mich App 586; 560 NW2d 644 (1996).....	44
<i>Attorney General v Bd of State Canvassers,</i> 318 Mich App 242, 248; 896 NW2d 485 (2016).....	20, 38, 46, 47
<i>Barrow v City of Detroit Election Comm,</i> 301 Mich App 404; 836 NW2d 498 (2013).....	48
<i>Bostock v Clayton Co,</i> 140 S Ct 1731; ___ L Ed 2d ___ (2020).....	25, 35, 36
<i>Citizens Protecting Michigan's Constitution v Secretary of State,</i> 280 Mich App 273; 761 NW2d 210 (2008).....	38, 46, 47
<i>Citizens Protecting Michigan's Constitution v Secretary of State,</i> 324 Mich App 561; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018)	14, 20, 46, 48
<i>Citizens Protecting Michigan's Constitution v Secretary of State,</i> 503 Mich 42; 921 NW2d 247 (2018)	18, 25
<i>Deneweth v State Treasurer,</i> 32 Mich App 439; 189 NW2d 10 (1971).....	20
<i>Elliott v Secretary of State,</i> 295 Mich 245; 294 NW 171 (1940)	48
<i>Falk v State Bar of Michigan,</i> 411 Mich 63; 305 NW2d 201 (1981)	41
<i>Gray v Sanders,</i> 372 US 368; 83 S Ct 801; 9 L Ed 2d 821 (1963).....	32

Hertel v Racing Comm’n, Dep’t of Agriculture,
68 Mich App 191; 242 NW2d 526 (1976).....20

Honigman Miller Schwartz & Cohn LLP v. Detroit,
__ Mich __, __; __ NW2d __ (2020) (Docket No. 157522) (Mich.
May 18, 2020).....24

House of Representatives v Governor,
943 NW2d 365 (2020)12

Kyser v Township,
486 Mich 514; 786 NW2d 543 (2010)20

Maynard v Bd of Dist Canvassers,
84 Mich 228; 47 NW 756 (1890) 39, 40, 41

McGirt v Oklahoma,
No 18-9526, 2020 WL 3848063 (US July 9, 2020).....35

McNeil v Charlevoix Co,
275 Mich App 686; 741 NW2d 27 (2007), aff’d, 484 Mich 69, 772
NW2d 18 (2009)24

Mich State UAW Cmty Action Program Council v Secretary of State,
387 Mich 506; 198 NW2d 385 (1972)18

People v. Perryman,
432 Mich 235; 439 NW2d 243 (1989)24

People v Smith,
502 Mich 624; 918 NW2d 718 (2018)44

In re Request for Advisory Opinion Regarding Constitutionality of
2005 PA 71, 479 Mich 1; 740 NW2d 444 (2007).....43

Rusha v Dep’t of Corrections,
307 Mich App 300; 859 NW2d 735 (2014), lv den 498 Mich 860
(2015)22, 35

Saad v Citizens Ins Co of Am,
227 Mich App 649; 576 NW2d 438 (1998).....36

Socialist Workers Party v Secretary of State,
412 Mich 571; 317 NW2d 1 (1982)39, 40

Stand Up for Democracy v Secretary of State,
492 Mich 588; 822 NW2d 159 (2012) 19, 20, 47

Teasel v. Dep’t of Mental Health,
419 Mich 390; 355 NW2d 75 (1984)48

Thompson v Secretary of State,
192 Mich 512; 159 NW 65 (1916)22

Wolverine Golf Club v Hare,
24 Mich App 711, 730; 180 NW2d 820 (1970), aff’d 384 Mich 466
(1971) 26, 27, 35

Wolverine Golf Club v Secretary of State,
384 Mich 461; 185 NW2d 392 (1971) 20, 26, 27, 48

Woodland v Mich Citizens Lobby,
423 Mich 188; 378 NW2d 337 (1985)41

Constitutional Provisions, Statutes, and Rules

Const 1963, art 1, § 2.....44

Const 1963, art 1, § 3.....41

Const 1963, art 1, § 5.....41

Const 1963, art 2, § 4.....*passim*

1929 CL 31416

1948 CL 180.86

Alaska Stat § 15.20.081(e).....37

Cal Elec Code § 30237

Iowa Code Ann. § 53.17(2).....37

Iowa Code Ann. § 53.17(3).....37

MCL

168.21	47
168.31(1)(b).....	3, 4, 46
168.759(1)	5
168.759(2)	5
168.759a(6).....	22, 23
168.759a(13).....	22, 23
168.759a(16).....	36
168.759b	6
168.761(1)	5
168.761(3)	5
168.764a	6, 22, 23, 31
168.764b(1)	6
168.765(4)	6
168.813(1)	38, 43
168.822	43
168.822(1)	38
168.931(m)	22, 23
168.932(i).....	22, 23
205.735a(7)(a)	36
211.44b	36
Md Code Regs. § 33.11.03.08(B).....	37
NC Gen Stat Ann § 163A-1310(b)(2)(b).....	37
ND Cent Code Ann. § 16.1-07-09.....	37
NY Elec Law § 8-412(1).....	37
Tex Elec Code § 86.007(a)(2)	37
Utah Code § 20A-3-306(2)(b).....	37
W Va Code § 3-3-5(g)	37
Wash Rev Code § 29A.40.091(4)	37

MCR

7.216(A)(7)38

7.305(B)(1)17

7.305(B)(2)17

7.305(B)(3)18

7.305(B)(5)(a).....19

7.316(A)(7).....21, 38

Other Authorities

73 Am. Jur. 2d Statutes § 14123

Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations*12

Citizens Research Council of Michigan, *The Long Ballot in Michigan* (1984)8

Clark, *A Crippled U.S. Postal Service Could Throw a Wrench in November Election*, The Detroit News (May 5, 2020).....13

Cooley, *Constitutional Limitations* (7th ed)22

Detroit Today, *Absentee Ballots Cast In Michigan Primary Could Reach Close to a Million*, WDET (March 10, 2020)9

Gray, *Huge Michigan Voter Turnout Could Turn into National Embarrassment*, Detroit Free Press (January 14, 2020).....10

Hicks, *Coronavirus Continues to Disrupt Mail Service in Parts of Michigan*, MLive (May 6, 2020).....12

Hicks, *Mail Service Slows in Michigan as Coronavirus Hits Postal Workers*, Gov’t Tech (April 7, 2020)12

Khalid, *America’s Digital Divide Is Even More Urgent During the Pandemic*, Quartz (April 9, 2020)6

Letter of Thomas J. Marshall, General Counsel and Executive Vice President of U.S. Postal Service, May 29, 20207, 8

Lexico, Synonyms for *Submit* (Oxford Dictionary).....25

Scalia & Garner, *Reading Law, The Interpretation of Legal Texts*
(2012)25

Send, Black's Law Dictionary (11th ed).....25

The United States Postal Service: An American History (2020)7

White, *Absentee Voters Can Vote Again If Favorite Candidate Is Out*,
Associated Press (March 3, 2020)9

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 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 168.21

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.

MCL 168.31

(1) The secretary of state shall do all of the following:

...

(b) Advise and direct local election officials as to the proper methods of conducting elections.

MCL 168.764a

The following instructions for an absent voter shall be included with each ballot or set of ballots furnished an absent voter:

INSTRUCTIONS FOR ABSENT VOTERS

Step 1. Enclosed you will find voting instructions as to the method of voting. Read these carefully and then vote the ballot.

Step 2. After voting a ballot, place the ballot in the secrecy sleeve, if any. If a secrecy sleeve is not provided, refold the ballot to conceal your votes.

Step 3. Place the ballot or ballots in the return envelope and securely seal the envelope.

Step 4. Sign and date the return envelope in the place designated. Your signature must appear on the return envelope or the ballot will not be counted. If you are disabled or otherwise unable to mark the ballot and required assistance in voting your absent voter ballot, have the person who assisted you complete the section on the return envelope entitled "TO BE COMPLETED ONLY IF VOTER IS ASSISTED IN VOTING BY ANOTHER PERSON".

Step 5. Deliver the return envelope by 1 of the following methods:

(a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.

(b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk.

(c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver a ballot to the clerk for the voter.

(d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide

assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pickup the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. All persons authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials.

Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted

MCL 168.759a

(6) Upon the request of an absent uniformed services voter or overseas voter, the clerk of a county, city, township, or village shall electronically transmit an absent voter ballot to the voter. The voter shall print the absent voter ballot and return the voted ballot by mail to the appropriate clerk.

...

(13) An absent uniformed services voter or an overseas voter may use the federal write-in absentee ballot, in accordance with the provisions of the uniformed and overseas citizens absentee voting act, at a regular election or special election to vote for a local, state, or federal office or on a ballot question. An absent uniformed services voter or an overseas voter who uses the federal write-in absentee ballot shall return his or her voted federal write-in absentee ballot by mail to the appropriate clerk. . . .

MCL 168.822

(1) The board of county canvassers shall then proceed without delay to canvass the returns of votes cast for all candidates for offices voted for and all questions voted on at the election, according to the precinct returns filed with the probate judge or presiding probate judge by the several city and township clerks, or in case of local elections according to the precinct

returns filed with the county clerk, and must conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election.

MCL 168.931

(1) A person who violates 1 or more of the following subdivisions is guilty of a misdemeanor:

...

(m) A person shall not participate in a meeting or a portion of a meeting of more than 2 persons, other than the person's immediate family, at which an absent voter ballot is voted.

MCL 168.932

A person who violates 1 or more of the following subdivisions is guilty of a felony:

...

(i) A person shall not plan or organize a meeting at which absent voter ballots are to be voted.

ORDER APPEALED FROM AND BASIS OF JURISDICTION

Plaintiffs seek leave to appeal the Court of Appeals’ July 14, 2020 decision denying Plaintiffs’ request for a writ of mandamus to the Defendant Secretary of State. This Court has jurisdiction under MCR 7.303(B)(1) and 7.305(C)(2)(a).

INTRODUCTION

This case concerns a statutory deadline for absentee ballots that, if allowed to stand, will disenfranchise tens of thousands of Michigan voters in this year’s general election. While the stakes are high, a simple proposition resolves this case: The deadline at issue violates the plain text of the Michigan Constitution, and the cardinal rule of constitutional interpretation is that the plain text controls.

In 2018, the people of Michigan voted to enshrine a state constitutional right to vote by absentee ballot, and to submit the ballot by mail. By a wide margin, the people amended the Michigan Constitution to give every Michigan voter the right to “vote” an absentee ballot—*i.e.*, to fill out an absentee ballot—“during the forty (40) days before an election,” and the right “to choose” to “submit” the absentee ballot “in person or by mail.” Const 1963, art 2, § 4(1)(g) (the “Absentee Voting Clause”). The clear and unambiguous text of the Absentee Voting Clause gives voters the right to complete and mail an absentee ballot at any point in the 40 days before an election. The Clause is expressly self-executing and, by its terms, must be “liberally construed in favor of voters’ rights.” Const 1963, art 2, § 4(1).

Despite this new constitutional guarantee, Michigan election officials continue to enforce a century-old statutory requirement that absentee ballots must be rejected if they arrive at the clerk's office after 8 PM on election day, even if they were completed and mailed "during the forty (40) days before an election." This received-by-election-day deadline patently violates the plain text of the newly adopted Absentee Voting Clause.

Yet in a sharply divided 2–1 decision with three separate opinions, the Court of Appeals upheld the received-by deadline. Disregarding the plain text of the Absentee Voting Clause, the lead opinion relied on extratextual sources—including a "ballot summary"—to try to divine what voters really intended in enacting the Clause. Op 7. As the dissent correctly observed, "the notion that a ballot summary trumps the words of the Constitution boggles the mind." Dissent 6. The judiciary's task, the dissent explained, is "not to mindlessly enforce a deadline solely because the Legislature selected it," but rather to determine whether "the statutory deadline conflicts with the exercise of a constitutional right." *Id.* at 7. And as the dissent concluded, "[o]n its face, a deadline preventing properly cast absentee ballots from being counted destroys the rights the people adopted in ratifying [the Absentee Voting Clause]." *Id.* at 8.

In sum, the dissent declared: "This case should be easy." *Id.* at 5. "Because voters have a right to vote by mail if they mail their ballots to the clerk during the

40 days before an election, they have the right to have their votes counted when those votes arrive in the clerk's office." *Id.*

The stakes for democracy in Michigan could not be higher. Even before COVID-19, voting by mail was set to play an unprecedented role in this year's elections, and its role will be magnified exponentially given the personal and public health risks of voting in person at a polling place this year. Millions of Michigan voters will likely attempt to vote by absentee ballot in November, and it is imperative that absentee ballots mailed on or before election day be counted, as the Michigan Constitution clearly requires. If the decision below is allowed to stand, the received-by deadline will unconstitutionally disenfranchise roughly 41,000 to 64,000 Michigan voters in November's general election.

This Court's intervention is urgently needed to compel the Secretary of State to perform her clear legal duty to "direct local election officials" to comply with Michigan law, MCL 168.31(1)(b), which includes counting absentee ballots mailed by election day. Plaintiffs respectfully request that this Court immediately grant leave to appeal, reverse the Court of Appeals' decision, and hold that the statutory received-by-election-day deadline for absentee ballots violates the Michigan Constitution.¹

¹ Plaintiffs' Complaint also challenged two other aspects of Michigan's absentee voting system related to processing applications and issuing absentee ballots, and

QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Did the Court of Appeals err in holding that the statutory received-by deadline for absentee ballots does not violate the Michigan Constitution?

Plaintiffs’ Answer: Yes.

2. Given the mandate under MCL 168.31(1)(b) that the Secretary of State “shall . . . direct local election officials as to the proper methods of conducting elections,” is a writ of mandamus ordering the Secretary to direct local clerks to comply with this constitutional requirement warranted?

Plaintiffs’ Answer: Yes.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

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.

As relevant here, Proposal 3 had three key provisions. First, it conferred upon “[e]very” Michigan voter “[t]he right, once registered, to vote a secret ballot in all elections.” Const 1963, art 2, § 4(1)(a) (the “Right to Vote Clause”).

payment of postage. See Compl ¶¶ 98–113 (Counts II and III), Prayer for Relief ¶¶ D2–D4 (App 66a–71a). Plaintiffs are not pursuing those claims on appeal.

Second, Proposal 3 created an unqualified right for voters to cast absentee ballots, and to do so by mail. The Absentee Voting Clause established the right:

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

Id., art 2, § 4(1)(g).

Third, Proposal 3 mandated that each of 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).

Michigan’s statutory deadlines for requesting, distributing, and submitting absentee ballots pre-date Proposal 3 and have not been updated since its passage. By statute, voters can apply for an absentee ballot during the 75 days prior to an election and up until 8 PM on election day. MCL 168.759(1), (2); MCL 168.761(3). If a local clerk verifies the voter’s registration and signature, the clerk must immediately “mail” or “deliver personally” an absentee ballot to the voter. MCL 168.761(1). Absentee ballots cannot be emailed to voters. Clerks can send absentee ballots to voters by first-class mail until 5 PM on the Friday before an election. MCL 168.759(1).

Voters then must submit their completed absentee ballots by mail or in person. Key here, since at least 1929, Michigan election law has required that local election officials must reject absentee ballots that are not received by 8 PM

on election day. MCL 168.759b; MCL 168.764a; MCL 168.764b(1); MCL 168.765(4); 1948 CL 180.8; 1929 CL 3141.² Envelopes containing absentee ballots received by local clerks after this 8 PM deadline must be marked with the date and time of receipt and retained unopened. MCL 168.765(4).

B. The Importance of Paper Mail to Absentee Voting

Paper mail plays a central role in Michigan's absentee voting system. Although clerks may lawfully send and receive *applications* for absentee ballots electronically, Michigan law prohibits clerks from sending the actual *ballots* electronically, and voters similarly are required to physically return their ballots. In addition, even though clerks may accept applications via email, there is another hurdle: Michigan's digital divide. Nearly 1.6 million Michigan citizens, many of them in rural areas, poor, or minorities, have no Internet access. See, e.g., Khalid, *America's Digital Divide Is Even More Urgent During the Pandemic*, Quartz (April 9, 2020) (App 76a–81a). As a result, Michigan absentee voters are partially or completely dependent on the vicissitudes of United States Postal Service (USPS) mail to exercise their state constitutional right to vote an absentee ballot.

Much has changed about postal mail since 1929, when the Legislature first enacted the received-by-election-day deadline. Back then, mail within a city or

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

township was processed locally, and next-day delivery and twice-daily deliveries were common in residential areas. *The United States Postal Service: An American History* (2020), p 27 (App 85a). Today, all mail goes from a local post office to a regional sorting facility, and from there back 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, and “[m]ost domestic First-Class Mail is delivered in 2-5 days.” Letter of Thomas J. Marshall, General Counsel and Executive Vice President of U.S. Postal Service (“Marshall Letter”), May 29, 2020 (App 86a).³ *“However, the Postal Service cannot guarantee a specific delivery date or alter standards to comport with individual state election laws.”* *Id.* (emphasis in original).

In the absentee voting process, these delivery times add up. If a voter and clerk both use mail throughout the process, mail processing and delivery will occur at least five times: (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 the 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.

³ Available at <<https://about.usps.com/newsroom/national-releases/2020/2020-05-29-marshall-to-election-officials-re-election-mail.pdf>>.

If the average mail processing and delivery time is 3 days, these five steps will take, on average, at least 15 days of the 40-day absentee ballot voting period guaranteed by the Michigan Constitution’s Absentee Voting Clause. And USPS has recently instructed both election officials and voters to budget a full week for mail to be delivered: “for election materials (such as blank ballots) sent to voters, the Postal Service . . . recommends that state or local election officials . . . allow 1 week for delivery to voters,” and “voters should mail their return ballots at least 1 week prior to the due date established by state law.” Marshall Letter, *supra* (App 87a). Added to the two weeks or more needed for round-trip mail delivery are (1) the time for clerks to process a voter’s application and mail a ballot to the voter, and (2) the time the voter needs to complete one of the longest ballots in the country. Citizens Research Council of Michigan, *The Long Ballot in Michigan* (1984), p 1 (App 89a).

C. The Consequences of the Antiquated Received-By Deadline

The lengthy 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 absentee ballots to voters until 5 PM on the Friday before the election. If a clerk mails a voter a blank

ballot on 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. Moreover, many voters wait until close to the deadline for requesting an absentee ballot to submit their application. In the March 2020 presidential primary, for example, more than 150,000 voters requested an absentee ballot in the week before the election.⁴

The received-by-election-day deadline has in fact resulted in the rejection of tens of thousands of absentee ballots since the passage of the Absentee Voting Clause. For example, according to publicly available information from the Secretary of State, 1.75% of returned absentee ballots were not counted in the May 2020 primary because they were received after election day. See Email from T. Williams to S. Dolente (May 13, 2020) (showing that 3,307 absentee ballots were rejected for arriving too late out of 188,139 total absentee ballots returned) (App 155a–158a).

The number of ballots rejected as a result of the received-by-election-day deadline will be enormous in this year's upcoming elections, for two principal reasons. First, a significant percentage of voters will vote by mail, including

⁴ Compare White, *Absentee Voters Can Vote Again If Favorite Candidate Is Out*, Associated Press (March 3, 2020) (App 93a) (812,000 absentee ballots had been requested as of March 2, 2020), with Detroit Today, *Absentee Ballots Cast In Michigan Primary Could Reach Close to a Million*, WDET (March 10, 2020) (App 95a) (970,000 absentee ballots had been requested as of March 10, 2020).

because of the health risks of voting in person due to COVID-19. Second, total voter turnout in November will be massive. Turnout in recent Michigan general elections has increased sharply. Turnout increased from 3,188,956 in 2014 to 4,341,340 in 2018—a 36% increase. In presidential election years, turnout increased from 4,780,701 in 2012 to 4,874,619 in 2016, and it is projected to increase to 5.3 to 6 million in 2020. Gray, *Huge Michigan Voter Turnout Could Turn into National Embarrassment*, Detroit Free Press (January 14, 2020) (App 100a–102a). Voter enthusiasm is at unprecedented levels for the 2020 elections.

The combination of higher turnout overall 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-election-day deadline. For example, even if only 5.3 million voters turn out in the November 2020 general election, and even if only 45% of them vote by absentee ballot, there still 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 the May 2020 elections), 41,738 absentee ballots will not be counted. The following table details the number of disenfranchised voters at two overall 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 go uncounted due to the received-by deadline are sufficient to sway statewide election results. For instance, 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 only 10,704 votes. If the received-by deadline remains in effect, every plausible estimate of the number of Michigan voters who will be disenfranchised due to the deadline in November 2020 easily surpasses those margins.

D. The Impact of the COVID-19 Pandemic

The COVID-19 pandemic has altered nearly every aspect of American life, and “[u]ntil a vaccine for COVID-19 is invented, our society will be living with the risk of the spread of this disease.” *House of Representatives v Governor*, 943 NW2d 365, 368–369 (2020) (Clement, J., concurring). One result of the pandemic is an increase in the number of people who will vote by mail because of the risks to their health and lives if they have to vote at a crowded polling location. The CDC has encouraged “voting methods that minimize direct contact with other people and reduce crowd size,” including voting by mail and early voting.⁵

The unprecedented number of absentee ballot applications will place an 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 pandemic has already increased mail delivery times in Michigan, promising yet another hurdle for Michigan’s absentee voting system and increasing the likelihood that voters’ absentee ballots 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) (App 131a–132a); Hicks, *Coronavirus Continues to Disrupt Mail Service in Parts of Michigan*, MLive (May 6, 2020)

⁵ See Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations* <<https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>> (App 128a).

(App 133a–142a); see also Clark, *A Crippled U.S. Postal Service Could Throw a Wrench in November Election*, *The Detroit News* (May 5, 2020) (App 143a–144a).

E. Proceedings Below

On May 22, 2020, Plaintiffs—the League of Women Voters of Michigan and three individual Michigan voters—filed this action in the Court of Appeals seeking a writ of mandamus ordering the Secretary of State to direct local election officials to count absentee ballots mailed by election day. Compl. (App 35a–72a). On June 3, 2020, the Court of Appeals ordered that “the parties shall proceed to a full hearing on the merits in the same manner as an appeal of right.” Order (App 159a). The court also granted Plaintiffs’ motion to expedite, ordered the parties’ merits briefs to be filed June 5, 12, and 16, and set oral argument for June 18. *Id.* The court’s order further set a deadline of June 9 for any motions to intervene. *Id.* No motions to intervene were filed.

On July 14, 2020, the Court of Appeals, in a 2–1 decision with three separate opinions, rejected Plaintiffs’ constitutional challenges to the received-by deadline and on this basis refused to issue a writ of mandamus. App 1a–34a.⁶

The lead opinion acknowledged that “[m]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties,” but

⁶ The lead opinion, concurrence, and dissent are reproduced in the appendix. All citations in this brief to the lead opinion (“Op”), the concurrence, and the dissent are to the page number within each opinion, rather than the appendix page number.

concluded that the statutory received-by deadline “does not” violate any provision of the Michigan Constitution. Op 3, quoting *Citizens Protecting Michigan’s Constitution v Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018), *aff’d* 503 Mich 42 (2018).

The lead opinion rejected Plaintiffs’ claim that the Absentee Voting Clause “requir[es] that ballots mailed by election day be counted.” Op 7. Rather than focus on the Clause’s text, the lead opinion relied on Proposal 3’s “summary ‘statement of purpose.’” *Id.* The lead opinion stressed that this “ballot summary” “only addresses the right to vote by absentee ballot without providing a reason”; it “does . . . not address a deadline by which the absentee ballot must be received by the election clerk,” or “even address creating a right to submit that ballot by mail.” *Id.* at 7–8.

Upon finally turning to the actual constitutional text, the lead opinion acknowledged that the Absentee Voting Clause gives voters the right to “vote” an absentee ballot at any time in the 40 days before an election. Op 11. But the lead opinion interpreted the term “vote” in the Clause to have a different meaning than under every Michigan statute concerning absentee voting. While every Michigan statute uses the verb “vote” to mean filling out an absentee ballot, the lead opinion held that a citizen “votes” an absentee ballot for purposes of the Absentee Voting Clause throughout the entire period from when the citizen requests an application

to when the completed ballot is delivered to election officials. *Id.* The lead opinion “reject[ed] the idea that the word ‘vote’ must necessarily be given the exact same meaning under both § 4(1)(g) and the various statutory provisions.” *Id.*

The lead opinion nonetheless recognized that voters “certainly possess th[e] right” “to choose to submit their absentee ballot by mail” during the “40-day period.” Op. 9. But according to the lead opinion, “that does not mean that a requirement that a ballot must be received by the time the polls close impairs a voter’s ability to mail in their absentee ballot,” only that “a voter must act sooner” if she wants her ballot to be counted. *Id.* In the lead opinion’s view, if a voter chooses to exercise her right to submit her absentee ballot by mail, she “assumes the risk” that the ballot will arrive after the deadline and not be counted. *Id.* at 10.

The lead opinion also rejected Plaintiffs’ claims that the received-by deadline violates the Michigan Constitution’s Purity of Elections Clause, Free Speech and Assembly Clauses, Equal Protection Clause, and Right to Vote Clause, reasoning that the received-by deadline is a “policy decision” and purportedly “does not impose a severe restriction on the right to vote” because “a voter is not required to mail his or her absentee ballot.” Op 13–15.

Judge Riordan concurred. He stated that he “agree[d] with the majority in that [the Absentee Voting Clause] requires ballots postmarked by election day to be counted, but that it does not render unconstitutional the 8 p.m. received-by

deadline set forth in MCL 168.764a.” Concurrence 1. Judge Riordan expressed the view that, “[c]onceptually,” voting is not a “right” but instead a “civic duty” that need not be “effortless.” *Id.* at 3 n 2. And Judge Riordan found “no evidence that the purpose of the [Absentee Voting Clause] was to create an unfettered and absolute right to absentee voting.” *Id.* at 3.

Judge Gleicher dissented, stating that the majority’s interpretation of the Absentee Voting Clause “contravenes the language of the Constitution and the intent of the voters.” Dissent 2. In the dissent’s view, “[t]his case should be easy.” *Id.* at 5. “Because voters have a right to vote by mail if they mail their ballots to the clerk during the 40 days before an election, they have the right to have their votes counted when those votes arrive in the clerk’s office.” *Id.*

The dissent rejected the majority’s “smorgasbord” of rationales for concluding otherwise. *Id.* at 3. Recognizing the text of the Constitution as the judicial touchstone, the dissent criticized the lead opinion’s “astonishing” reliance on a “ballot summary” rather than “the plain language of the constitutional text the people overwhelmingly approved,” particularly when the constitutional text at issue is “not ambiguous.” *Id.* at 6. “[T]he notion that a ballot summary trumps the words of the Constitution boggles the mind.” *Id.* The dissent further criticized the majority for “assiduously ignor[ing]” the express constitutional command that the Absentee Voting Clause “shall be liberally construed in favor of voters’ rights in

order to effectuate its purposes.” *Id.* at 5. “Rather than engaging with the actual words the people added to our Constitution,” the dissent lamented, the majority “instead confer[red] ‘deadlines’ with constitutional magnitude,” including the deadline at issue here, which will result in “disenfranchising thousands of voters who conduct themselves in strict conformity with all voting rules.” *Id.* at 6.

The dissent would have “grant[ed] the motion for mandamus and order[ed] the Secretary to instruct the clerks that timely mailed absent voter ballots that arrive after the close of the polls and before the date of the canvass must be counted.” Dissent 10. Because the dissent found the Absentee Voting Clause “dispositive,” the dissent took “no position” on Plaintiffs’ other constitutional challenges to the received-by deadline. *Id.* at 10 n 8.

GROUND FOR GRANTING THE APPLICATION

Leave to appeal is warranted here for four independent reasons. First, this appeal “involves a substantial question about the validity of a legislative act,” MCR 7.305(B)(1)—namely, the statutory deadline requiring rejection of absentee ballots received after 8 PM on election day. The dissent below alone demonstrates that the question of the validity of this statutory deadline is “substantial.”

Second, there is an overwhelming “public interest” in ensuring that the rules used for the November 2020 general election and all elections thereafter comport with the Michigan Constitution. MCR 7.305(B)(2). There is an even stronger

interest in ensuring that a violation of the Michigan Constitution does not disenfranchise tens of thousands of Michigan voters who choose to vote by mail, particularly in the midst of a global pandemic. “The right to vote has always received a preferred place in our constitutional system,” and “[t]he importance of this right can hardly be overemphasized.” *Mich State UAW Cmty Action Program Council v Secretary of State*, 387 Mich 506, 514; 198 NW2d 385 (1972). “Voting achieves this sacred place in our democratic pantheon because every vote matters.” Dissent 4. But under the received-by deadline challenged here, roughly 41,000 to 64,000 absentee ballots will be discarded in the November 2020 general election, even though they were properly mailed by election day. The public interest in this case is underscored by the fact that the Court of Appeals expedited the appeal, leaving sufficient time for this Court to decide this case before the general election.

Third, this case presents “legal principle[s] of major significance to the state’s jurisprudence.” MCR 7.305(B)(3). “[T]here is no more constitutionally significant event than when the wielders of all political power . . . choose to exercise their extraordinary authority to directly approve or disapprove of an amendment’ to our state’s Constitution.” Dissent 4, quoting *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018). In 2018, the people of Michigan voted by an overwhelming margin to do just that. They amended the Michigan Constitution to enshrine an express right to

vote by absentee ballot and to choose to submit the absentee ballot by mail during the 40 days before an election. The proper interpretation of the newly adopted Absentee Voting Clause is profoundly important to Michigan jurisprudence.

The Court of Appeals' deeply fractured decision highlights the importance of the legal principles at stake here. As the dissent detailed at length, the majority ignored and contravened the Clause's plain text, violating the cardinal rule of interpretation—the plain text controls. The majority's reliance on speculation and extratextual sources to rationalize an interpretation at odds with the text was not only wrong but will create confusion in future constitutional cases. The other constitutional issues in this case—purity of elections, free speech and assembly, equal protection, and the right to vote—are likewise weighty.

Fourth, the Court of Appeals' decision “is clearly erroneous and will cause material injustice,” as explained above and further below. MCR 7.305(B)(5)(a).

For these reasons, this Court should grant leave to appeal, hold that the statutory received-by-election-day deadline violates the Michigan Constitution, and order the Secretary of State to direct local election officials that absentee ballots mailed by election day must be counted.

STANDARD OF REVIEW

This Court “review[s] for abuse of discretion a court's decision to issue or deny a writ of mandamus.” *Stand Up for Democracy v Secretary of State*, 492

Mich 588, 598; 822 NW2d 159 (2012). This case, however, centers on “a question of [constitutional] interpretation, which [this Court] review[s] de novo.” *Id.*; see also *Kyser v Township*, 486 Mich 514, 519; 786 NW2d 543 (2010) (questions of constitutional and statutory interpretation are reviewed de novo). The standard of review thus is de novo.

A writ of mandamus is warranted if the plaintiff “has a clear legal right to the performance of the specific duty sought to be compelled and . . . the defendant has a clear legal duty to perform the act.” *Id.* at 618; see also *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248, 255; 896 NW2d 485 (2016) (plaintiff also must show that “the act is ministerial” and that “no other legal remedy exists that would achieve the same result” (quotation marks omitted)).

“Mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties.” *Citizens Protecting Michigan’s Constitution*, 324 Mich App at 583. And “[m]andamus actions may be brought” to “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). The Court may grant mandamus to invalidate a statute and compel officials to comply with the Constitution. *Id.*; *Deneweth v State Treasurer*, 32 Mich App 439, 442; 189 NW2d 10 (1971); *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). This Court also

may “enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require.” MCR 7.316(A)(7).

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

1. The Plain Text of the Absentee Voting Clause Requires Counting Absentee Ballots Mailed by Election Day

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 elector qualified to vote in Michigan shall have: (g) 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 an absent ballot is applied for, received, and submitted in person or by mail.” Const 1963, art 2, § 4(1)(g).

The constitutional amendment adding the Absentee Voting Clause further mandates 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. A self-executing constitutional provision “supplies a sufficient rule, by means of which the right may be enjoyed

and protected.” *Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916), quoting Cooley, *Constitutional Limitations* (7th ed), p 121. Self-executing constitutional provisions thus are judicially enforceable without “further legislation.” *Rusha v Dep’t of Corrections*, 307 Mich App 300, 309; 859 NW2d 735 (2014), lv den 498 Mich 860 (2015).

The Absentee Voting Clause accordingly gives all registered Michigan 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 vote” an absentee ballot means to *fill out* the absentee ballot. Numerous provisions of Michigan election law confirm this commonsense understanding:

- MCL 168.764a requires that the following instructions be given to all absent voters: “Step 2. *After voting a ballot, place the ballot in the secrecy sleeve . . .* Step 3. Place the ballot or ballots in the return envelope . . . Step 5. Deliver the return envelope [to election officials].”
- MCL 168.759a(6) provides that, if election officials electronically transmit a ballot to a military or overseas voter, “[t]he voter shall print the absent voter ballot and return *the voted ballot* by mail to the appropriate clerk.”
- MCL 168.759a(13) provides: “An absent uniformed services voter or an overseas voter who uses the federal write-in absentee ballot shall return his or her *voted* federal write-in absentee ballot by mail to the . . . clerk.”
- MCL 168.932(i) makes it a crime to “plan or organize a meeting at which absent voter ballots *are to be voted*.”
- MCL 168.931(m) makes it a crime to “participate in a meeting or a portion of a meeting of more than 2 persons, other than the person’s immediate family, at which an absent voter ballot *is voted*.”

The plain text of these statutes unequivocally establishes that a citizen “votes” an absentee ballot when she fills it out, not when it is received by election officials. The statutes would all be nonsensical (or worse) if an absentee ballot were not “voted” until it is received by election officials. It would be metaphysically impossible under MCL 168.764a for a voter to place an absentee ballot in the secrecy sleeve “*after* voting [the] ballot,” if the voter does not “vote” the ballot until it is delivered in the secrecy sleeve to election officials. The same problems would attach under MCL 168.759a(6) & (13). And if a ballot were not “voted” until received by clerks, it would be perfectly legal under MCL 168.932(i) and MCL 168.931(m) to organize meetings at which groups of people fill out their ballots together, so long as they do not deliver the ballots to election officials at the meetings. The plain text of these Michigan statutes employ the commonsense meaning that a person “votes” an absentee ballot when she fills it out.

The verb “vote” must have the same meaning under the Absentee Voting Clause. “[C]ourts should not, except for strong and powerful reasons, give words or phrases used in a statute meanings different from those in which they are used in the Constitution,” especially where the provisions concern the “same subject.” 73 Am. Jur. 2d Statutes § 141. This Court has long held that provisions “relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and

containing no reference one to the other.” *People v. Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989); accord *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007) (similar), aff’d, 484 Mich 69, 772 NW2d 18 (2009); *Honigman Miller Schwartz & Cohn LLP v. Detroit*, __ Mich __, __; __ NW2d __ (2020) (Docket No. 157522) (Mich. May 18, 2020) (Viviano, J., concurring); slip op at 4 (“words are presumed to have the same meaning throughout a text”).

Here, the statutes cited above and the Absentee Voting Clause concern the same subject matter—the casting of absentee ballots—and the statutes and constitutional provision operate in conjunction with one another. The Absentee Voting Clause was adopted against the backdrop of this array of statutes that all use the verb “to vote” an absentee ballot in a specific, consistent manner. To vote an absentee ballot under the Absentee Voting Clause necessarily means the same thing it does under the rest of Michigan election law—to fill out the ballot. See *Perryman*, 432 Mich at 240 (interpreting the term “charged” in newly enacted statute based on the meaning of that term under “then-contemporary statutes . . . in existence at the time the [new] statute was passed”).

The Absentee Voting Clause thus guarantees every Michigan voter the right to fill out an absentee ballot in the 40 days preceding an election, and the Clause further affords every voter the right “to choose” to “submit[]” the completed ballot by mail. To “submit” a ballot means to *send* the ballot under the term’s plain

meaning. See Lexico, Synonyms for *Submit* (App 145a–146a) (Oxford Dictionary listing “send in” as a synonym for “submit”);⁷ *Black’s Law Dictionary* (11th ed) (defining “send” as “to deposit (a writing or notice) in the mail”).

Accordingly, the plain text of the Absentee Voting Clause guarantees every Michigan voter the self-executing right to fill out an absentee ballot and “to choose” to send the completed ballot “by mail” at any point in the 40 days before an election. And “what the text itself says” must control. Scalia & Garner, *Reading Law, The Interpretation of Legal Texts* (2012), p 57. As Justice Gorsuch recently emphasized, “[o]nly the written word is the law, and all persons are entitled to its benefit.” *Bostock v Clayton Co*, 140 S Ct 1731, 1737; ___ L Ed 2d ___ (2020); see also *Citizens Protecting Michigan’s Constitution*, 503 Mich at 106 (“plain meaning of the [constitutional] text” controls).

On its face, the century-old statutory requirement that absentee ballots be received by the clerk by 8 PM on election day violates this constitutional right. The deadline requires the rejection of ballots “vote[d]” and “submitted” “during the forty (40) days before an election.” For instance, if a voter fills out 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

⁷ Available at <<https://www.lexico.com/synonym/submit>>.

restricts the constitutional right of all voters to vote and submit their absentee ballot by mail at any time within 40 days of the election.

The received-by deadline violates the Absentee Voting Clause in another, related way. Many voters—likely tens of thousands or more in a presidential general election—will not receive their absentee ballot until several days or fewer before election day. These voters cannot “choose” to submit their absentee ballots “by mail,” because doing so would risk that the ballot will arrive after election day. The only option for such voters to ensure that their ballots are counted is to submit the ballot in person. The received-by deadline thus denies many voters “the right to choose whether the absent voter ballot is . . . submitted in person or by mail,” contrary to the plain text of the Absentee Voting Clause.

“It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.” *Wolverine Golf Club*, 384 Mich at 466 (quotation marks omitted). Supplemental legislation 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.” *Wolverine Golf Club v Hare*, 24 Mich App 711, 730; 180 NW2d 820 (1970) (quotation marks omitted), aff’d 384 Mich 466. In *Wolverine Golf Club*, this Court affirmed a writ of mandamus striking down as unconstitutional a law requiring initiative petitions to be filed 10 days prior to a

legislative session. 384 Mich at 463–467. The Court held that the deadline, which pre-dated the 1963 Constitution, was unconstitutional under the self-executing terms of the new 1963 Constitution. *Id.* at 466.

Here, as in *Wolverine Golf Club*, even were the received-by deadline constitutional before 2018, it now conflicts with the plain terms of the newly adopted Absentee Voting Clause. Rather than “further the exercise of” the new constitutional right and “make it more available,” *Wolverine Golf Club*, 24 Mich App at 730 (quotation marks omitted), the received-by deadline does the opposite.

As the dissent below explained, “[t]his case should be easy.” Dissent 5. “The words at issue here are not ambiguous.” *Id.* at 6. “Because voters have a right to vote by mail if they mail their ballots to the clerk during the 40 days before an election, they have the right to have their votes counted when those votes arrive in the clerk’s office.” *Id.* at 5. The received-by deadline violates that constitutional right.

While any violation of a self-executing constitutional provision cannot stand, the impact of this violation will be massive. Between 41,000 and 64,000 absentee ballots likely will be rejected due to the received-by deadline 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 four days 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 under the Absentee Voting Clause 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." The decision of the court below facilitating this mass disenfranchisement presents an issue of enormous public import that cries out for this Court's review and reversal.

2. The Decision Below Disregards and Contravenes the Clear and Unambiguous Text of the Absentee Voting Clause

In holding that the Absentee Voting Clause does not require counting absentee ballots mailed by election day, the Court of Appeals "violat[ed] the first principle of constitutional interpretation." Dissent 6. "Rather than engaging the text" of the Absentee Voting Clause, *id.*, the majority turned to extratextual sources to guess what voters supposedly intended in adopting the constitutional amendment. The lead opinion relied on a "ballot summary" that offered a high-

level, generalized overview of the contents of Proposal 3. Op 6. That ballot summary, the lead opinion stressed, did not “address a deadline by which the absentee ballot must be received by the election clerk,” and did not “even address creating a right to submit the ballot by mail.” *Id.* at 8–9. From this, the lead opinion speculated that the “great mass” of voters would not have believed that the Absentee Voting Clause created a right to mail an absentee ballot by a particular date, no matter the text of the actual constitutional amendment itself. *Id.*

“[T]he notion that a ballot summary trumps the words of the Constitution boggles the mind.” Dissent 6. As the dissent explained, the lead opinion made “no effort to explain why [the court] should regard a ballot summary as a tool for depriving citizens of specifically enumerated rights they voted to approve.” *Id.* “Ballot summaries cannot displace or override enacted words.” *Id.* Indeed, the ballot summary’s nine-word bullet-point concerning the Absentee Voting Clause did not mention voting by mail at all, but no one could seriously dispute that the Absentee Voting Clause enshrines a right to submit an absentee ballot “by mail,” even though the ballot summary does not mention it. The same is true of the right to vote and submit an absentee ballot at any point during the 40 days before an election, which likewise is expressly enumerated in the constitutional text.

The majority’s guesswork as to voters’ understanding was not limited to the ballot summary. Rather than focus on the sentence of the Absentee Voting Clause

enumerating the right to vote by mail during the 40 days before the election, the majority looked to a different sentence of the Clause altogether, which specifies that “election officials . . . shall be available in at least one (1) location to issue and receive absent voter ballots during . . . regularly scheduled business hours and for at least eight (8) hours during the Saturday and/or Sunday immediately prior to the election the election.” Op 8. The majority speculated that this sentence “would suggest to voters” that there are “some limitations on when election officials would be obligated to accept, and therefore count, ballots.” *Id.*

The sentence on which the majority focused, however, relates only to *in-person* absentee voting—not voting by mail. The very next sentence of the Clause makes that exceedingly clear. It states: “*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*,” *i.e.*, beyond what is required in the previous sentence. The sentence on which the majority relied has nothing to do with election officials’ receipt of absentee ballots in the mail. In any event, speculation as to what one sentence “suggest[s] to voters” cannot override the express terms of a different sentence that expressly enumerates specific rights.

The majority did not address the relevant text of the Absentee Voting Clause until eleven pages into the lead opinion, and even then, it dedicated less than a page to the analysis. The majority’s scant textual analysis is deeply flawed. The

majority acknowledged that the numerous statutes discussed above clearly use the word “vote” an absentee ballot to mean filling out the ballot, but the majority “reject[ed] the idea that the word ‘vote’ must necessarily be given the exact same meaning under both § 4(1)(g) and the various statutory provisions cited plaintiffs.” Op 11. According to the majority, while to “vote” an absentee ballot means filling out the ballot under every relevant Michigan statute, to “vote” an absentee ballot means something entirely different under the Absentee Voting Clause, namely “the entire of process of voting, which in the context of absentee voting starts with requesting an application to apply for an absentee ballots and continues to the delivery of the completed ballots to the appropriate elections officials.” *Id.*

The majority thus violated the bedrock rule that the same term must be accorded the same meaning across different provisions of law concerning the same subject matter, *supra* at 23–24, and the majority provided no authority for its deviation from this interpretive principle. The majority asserted that the word “vote” has “many different meanings, both as a noun and a verb,” Op 11, but both the Absentee Voting Clause and all of the statutes discussed above use “vote” as a verb, and all of the statutes accord that verb the same meaning—to fill out a ballot. What’s more, one of those statutes defines “voting” to mean filling out a ballot for purposes of instructions that are given to every absentee voter in Michigan. MCL 168.764a. By interpreting the verb “vote” in the Absentee Voting Clause to mean

something different from the understanding that will be held by all absentee voters who review their instructions, the majority creates a recipe for mass confusion.

Even setting aside these other statutes, the majority's interpretation of the word "vote" in the Clause is manifestly incorrect. The majority cited no authority—no dictionary, case, or anything else—that defines the verb "vote" as continuing through whenever a ballot is delivered to election officials. For good reason. It is *the voter*, not any election official, who *votes*. Consider a married couple, Hannah and Bob, who fill out their absentee ballots together on a Monday and then drop their ballots off together in the same mailbox at the same time later that day. But based on "the vicissitudes of the United States Postal Service," Dissent 8 n 7, Hannah's ballot arrives at the clerk's office on Thursday and Bob's ballot arrives on Friday. Nobody would suggest that Hannah voted on Thursday and Bob voted on Friday. They both voted on Monday. Yet under the majority's interpretation, Bob was continually "voting" for at least five straight days from Monday to Friday. The majority's interpretation defies common sense.

The majority reasoned that, if to "vote" an absentee ballot means only to complete it, "all that is guaranteed under Proposal 3 is the right to fill out an absentee ballot, not to have it counted." Op 11. Not so. The right to "vote" and "submit" an absentee ballot "necessarily embodies" the right to have the ballot counted. Dissent 5; see *Gray v Sanders*, 372 US 368, 380; 83 S Ct 801; 9 L Ed 2d

821 (1963) (“the right to have one’s vote counted has the same dignity as the right to put a ballot in a box” (quotation marks omitted)). The Absentee Voting Clause specifies when an absentee ballot may be voted and submitted—“during the forty (40) before an election.” If a ballot is timely voted and submitted during that period, it must be counted.

The majority also misconstrued the text of the Absentee Voting Clause giving every voter “the right *to choose* whether the absent voter ballot is . . . submitted in person or by mail.” Const 1963, art 2, § 4(1)(g) (emphasis added). Despite recognizing that the received-by deadline forces voters wishing to submit their absentee ballots by mail to “act sooner” than those who submit their ballots in person, the majority reasoned that this disparate treatment “merely affects how and when” voters may choose whether to vote either in person or by mail. Op 9. But the plain text of Absentee Voting Clause establishes independent and “coequal” rights to vote in person and to vote by mail. Dissent 9. That is the very point of giving voters the unqualified right “to choose” either option. Just as the Legislature could not prohibit in-person absentee voting on the 5th through 40th days before an election on the grounds that mail voting is an option during that time, the Legislature cannot preclude voting by mail in the days immediately before the election because in-person voting remains available.

Even if there were any ambiguity in the text of the Absentee Voting Clause (and there is not), the constitutional mandate that the Clause “shall be liberally construed in favor of voters’ rights” resolves it. Const 1963, art 2, § 4. The majority “assiduously ignored” this interpretive command. Dissent 5. The lead opinion did not address it at all. Instead, at every turn, the lead opinion interpreted the Absentee Voting Clause *against* voters’ rights, relying on extratextual sources, interpreting the terms “vote” and “choose” in restrictive ways, and violating the canon that the same term must have the same meaning across different provisions of law, with the result being to restrict the right to vote by mail. The majority interpreted the Absentee Voting Clause in favor of disenfranchisement rather than “in favor of voters’ rights,” as the Constitution requires.

Judge Riordan’s concurrence does not offer any reason to deny voters the express rights guaranteed by the plain text of the Absentee Voting Clause. Contrary to the commands of the Michigan Constitution, Judge Riordan posited that voting is a “civic duty” and not a “right,” and that exercising this purported duty need not be “effortless.” Concurrence 3 n 2. He found “no evidence that the purpose of the [Absentee Voting Clause] was to create an unfettered and absolute right to absentee voting.” *Id.* at 3. That statement is confounding given that the Clause’s plain text explicitly created “[*t*]he right, once registered, to vote an absent voter ballot without giving a reason,” as well as “[*t*]he right . . . to vote a secret

ballot in all elections.” Const 1963, art 2, §§ 4(1)(a), (g) (emphases added). “It is hard to imagine plainer or more direct language.” Dissent 8.

The remainder of Judge Riordan’s analysis emphasized that the Legislature could change the received-by deadline, and expressed his preference for the Legislature rather than the courts to address the issue. Concurrence 3. But this ignores that the Absentee Voting Clause is a *self-executing* constitutional provision that, by definition, does not require “further legislation.” *Rusha*, 307 Mich App at 309. It confers direct rights on citizens that courts can and must enforce.⁸

In the end, both the lead opinion and the concurrence elevated their views of the true “purpose” of the Absentee Voting Clause above its clear and unambiguous text, based on assumptions, speculation, and extratextual sources. As the U.S. Supreme Court has emphasized, “Judges are not free to overlook plain [text] on the strength of nothing more than suppositions about intentions or guesswork about expectations.” *Bostock*, 140 S Ct at 1754; accord *McGirt v Oklahoma*, No 18-9526, 2020 WL 3848063, at *11 (US July 9, 2020) (similar). “The people are entitled to rely on the law as written, without fearing that courts might disregard its

⁸ Because the Absentee Voting Clause is self-executing, Judge Riordan was incorrect that it is “plaintiffs’ burden to show that the existing received-by deadline poses a *severe infringement* on the right to vote.” Concurrence 4 (emphasis added). The standard for whether legislation violates a self-executing constitutional right is whether it “curtails” or places “undue burdens” on the right. *Wolverine Golf Club*, 24 Mich App at 725; see also *supra* at 26.

plain terms based on some extratextual consideration.” *Bostock*, 140 S Ct at 1749.

The majority grievously deviated from that principle here.

3. Ballots Mailed by Election Day Include Ballots Postmarked by Election Day or Received the Day After the Election

As explained above, the Absentee Voting Clause gives voters the right to complete and mail their absentee ballots at any point in the 40 days up to and including election day. This right necessarily encompasses (1) absentee ballots postmarked by election day and (2) absentee ballots that have no postmark, a postmark with no date, or an illegible postmark but which the relevant clerk’s office receives via USPS no later than the day after election day.

First, ballots mailed by election day include all ballots postmarked by USPS by election day. USPS’s official policy is that all election mail, including voted absentee ballots, must be postmarked no matter the type of return envelope used.⁹ And Michigan already relies on postmarks to count absentee ballots of military and overseas voters, see MCL 168.759a(16), and in a variety of other settings as well, including tax returns and court filings. See, e.g., MCL 211.44b (using “the date of a United States postal service postmark” for “determining the date [of] payment of the tax”); MCL 205.735a(7)(a) (similar); *Saad v Citizens Ins Co of Am*, 227 Mich

⁹ See USPS, Your 2020 Official Election Mail Kit 600, p 26, <<https://about.usps.com/kits/kit600.pdf>>; see also FAQs, USPS.com <https://about.usps.com/postal-bulletin/2020/pb22546/html/cover_009.htm>.

App 649, 652; 576 NW2d 438, 440 (1998) (affirming rule that “calculate[d] the filing deadline from the postmark on the notice”).¹⁰

Second, for any ballots for which a postmark is missing, undated, or illegible, the ballot necessarily was sent by election day if it arrives at the clerk’s office by the day after election day. It is undisputed that any mail delivered by USPS the day after election day must have been mailed by election day. All ballots sent by voters to election officials via USPS “*must* be sent by First-Class Mail,” App 86a, and same-day delivery of First-Class Mail does not exist, since First-Class Mail must be sent by a local post office to a regional sorting facility, and then back to the post office, before delivery. Compl ¶¶ 33, 67 (App 46a, 57a).

4. This Court Need Not Address the Deadline for Receipt of Absentee Ballots But Has Remedial Discretion To Do So

This Court may simply hold that the Absentee Voting Clause requires counting absentee ballots postmarked by election day, without ordering a new deadline for receipt of such ballots. If the Court does so, an existing Michigan statute already sets an outer deadline for the receipt and counting of ballots.

¹⁰ Eleven states currently use postmarks to count absentee ballots based on the date sent, and one of those states (West Virginia) also counts any absentee ballots that arrive by mail the day after election day. Alaska 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).

Specifically, MCL 168.822(1) requires counties to complete their canvasses by 14 days after the election. Thus, absent a new deadline ordered by the Court or adopted through new legislation, any absentee ballot postmarked by election day must be received by 14 days after election day in order to be counted pursuant to MCL 168.822(1). For clarity, if the Court does not order a new deadline, the Court should affirm that, absent new legislation, absentee ballots postmarked by election day must be counted if they are received within 14 days after election day.

Nevertheless, this Court has discretion to set an earlier deadline in fashioning relief for the constitutional violation here. Under MCR 7.316(A)(7), this Court may “enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require.” See also, e.g., *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273, 291–292; 761 NW2d 210 (2008) (relying on analogous Court of Appeals rule, MCR 7.216(A)(7), in granting mandamus relief); *Attorney General v Bd of State Canvassers*, 318 Mich App at 248–249 (same). For instance, the parties agreed below that a receipt deadline of six days after election day could be appropriate, because that is the date by which clerks must determine whether to count provisional ballots. MCL 168.813(1).

In short, this Court need not order a receipt deadline given that MCL 168.822(1) already imposes one, but this Court has discretion to do so.

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, Const 1963, art 2 § 4(2) of the Michigan Constitution. The Purity of Elections Clause demands “fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party v Secretary 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, 240–242; 47 NW 756 (1890). The Clause also prohibits the legislature from “subvert[ing] the will of the people 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 differences in mail-delivery schedules or application-processing speeds could result in one individual having her vote counted while the other’s is 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 242. Not only does the deadline subvert the will of the voters who adopted Proposal 3 in 2018, but, as described, the sheer number of absentee ballots that will go uncounted due to the received-by deadline in this year's remaining elections will exceed the margin of victory in several recent statewide elections. Thus, the received-by deadline may prevent candidates who received “the majority or plurality of votes cast” from prevailing. *Id.* at 239.

In rejecting Plaintiffs' Purity of Elections Clause claim, the lead opinion ignored the Clause's requirement that legislation may not “subvert the will of the people.” *Id.* at 242. While the lead opinion briefly discussed the Purity of Elections Clause's independent requirement of “fairness and evenhandedness,” it brushed aside concerns that the received-by deadline arbitrarily treats similarly situated voters differently, on the theory that such differential treatment represents a “policy decision” by the Legislature. Op 13. But the Legislature cannot make “policy decisions” that treat citizens unevenly and unfairly with respect to voting.

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. This 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 voters’ right to participate in the political process, to express political views, 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 to represent him in the legislature, to express his will by his ballot.”); *id.* at 240 (“every elector expresses his wish by ballot”); *Falk v State Bar of Michigan*, 411 Mich 63, 136; 305 NW2d 201 (1981) (a statute intrudes on the right to “political expression” where it “precludes voting in one party’s primary”). 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 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 political viewpoints through their 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 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 . . .”). Here, the State does not have a legitimate interest, let alone a compelling one, in the inevitable stifling of protected political speech that results from enforcement of the received-by deadline. As the dissent explained, neither the Secretary, the lead opinion, nor the concurrence has identified any “reason” or “plausible basis for a deadline that disenfranchises thousands of voters who cast absentee ballots in perfect concordance with all the rules.” Dissent 8. “Proclaiming ‘there must be a

deadline’ hardly qualifies as a justification for the actual deadline under consideration.” *Id.* That is especially true when election officials do not need to determine whether to count provisional ballots until six days after the election, MCL 168.813(1), and the deadline for canvassing ballots is 14 days after the election, MCL 168.822. Indeed, neither the lead opinion nor the concurrence “put forward a single state interest served by failing to count ballots that arrive the day after an election, or the day after that.” *Id.*

The Court of Appeals erroneously relied on *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1; 740 NW2d 444 (2007), to hold that strict scrutiny does not apply to Plaintiffs’ free speech challenge. Op 14-15. To begin, *In re Request for Advisory Opinion* did not involve any free speech claim. Regardless, in applying a lower form of scrutiny to the state’s voter identification law, the Court there stressed that “[t]he ‘right to vote’ is not expressly enumerated in either our state or the federal constitution.” 479 Mich at 16. That premise no longer holds because the 2018 constitutional amendments “expressly enumerate[]” a right to vote in Article 2, § 4(1)(a). And contrary to the Court of Appeals’ determination, disenfranchising tens of thousands of Michigan voters who timely mail their absentee ballots on or before election day “does . . . impose a severe restriction on the right to vote.” Op 15.

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 Const 1963, art 1, § 2. Laws that differentiate between individuals with respect to a “fundamental right,” which includes all rights that have their “source” 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). The Michigan Constitution now establishes an explicit state constitutional right to vote. Const 1963, art 2, § 4(1)(a). Even before then, this Court held that “the right to vote is an implicit fundamental political right that is preservative of all rights.” *People v Smith*, 502 Mich 624, 638; 918 NW2d 718 (2018) (quotation marks omitted).

The received-by deadline is subject to strict scrutiny because it differentiates between and classifies individuals with respect to their fundamental right to vote, 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 one day while another Michigan voter’s ballot mailed on the same day may take three 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. Under the

received-by deadline, “voters must meekly surrender their constitutional rights to the vicissitudes of the United States Postal Service.” Dissent 8 n 7.

The arbitrary, differential treatment of similarly situated voters fails strict scrutiny. Below, the Secretary did not even attempt to identify any legitimate state 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 narrowly tailored to advance it. Counting all ballots mailed on or before election day achieves the same interest in uniformity or orderliness that the State might claim. As mentioned *supra* at 37 n 10, numerous states count mailed ballots if postmarked on election day or the day prior, showing that this sent-by-election-day deadline is manageable and imposes no significant administrative burden.

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

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 received-by deadline will ensure that a large number of registered Michigan voters who comply with all statutory deadlines will not have their votes counted, severely burdening their constitutional right to vote. In denying Plaintiffs’ claim

under the Right to Vote Clause, the lead opinion below provided no analysis, and the concurrence did not even mention the claim.

II. The Other Conditions for Mandamus Relief Are Satisfied

The Secretary conceded below that if the Michigan Constitution requires counting ballots mailed by election day, then the Secretary has a “clear legal duty” to direct clerks to comply with this requirement. For good reason. The Court assesses the existence of a clear legal duty *after* the Court has interpreted the relevant constitutional and statutory provisions. See *Citizens Protecting Michigan’s Constitution*, 280 Mich App at 284; *Attorney General v Bd of State Canvassers*, 318 Mich App at 251–254 (interpreting the term “aggrieved” using traditional tools of statutory interpretation, and holding that Board of State Canvassers had a clear legal duty in light of the Court’s interpretation); see also *Citizens Protecting Michigan’s Constitution*, 324 Mich App at 584 (“A clear legal right has been defined as a right . . . which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.” (quotation marks omitted)).

Under Michigan law, the Secretary has a clear legal duty to direct local clerks to comply with the legal requirements for elections. By statute, the “secretary of state *shall* . . . direct local election officials as to the proper methods of conducting elections.” MCL 168.31(1)(b) (emphasis added); see also

MCL 168.21 (the Secretary “shall have supervisory control over local election officials in the performance of their duties”). This Court has long held that the term “shall” in election laws mandates strict compliance. See *Stand Up for Democracy*, 492 Mich at 601–602. Thus, if this Court holds that Michigan law requires counting absentee ballots mailed on or before election day, the Secretary has a clear legal duty to “direct” local clerks to comply with that requirement and count such ballots.

The Secretary’s compliance with her legal duties is also “ministerial.” *Citizens Protecting Michigan’s Constitution*, 280 Mich App at 291–292. As with the analysis of whether a clear legal duty exists, the relevant inquiry is whether the state officer would need to exercise judgment *after* this Court has interpreted the relevant constitutional or statutory requirement. *Id.* at 292. Here, once this Court holds that the Michigan Constitution requires counting ballots mailed by election day, the Secretary need not exercise any discretion to direct local election officials to count such ballots. See *Attorney General v 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 legal remedy to ensure statewide compliance with the Michigan Constitution, in time for the November general election, is a writ of mandamus ordering the Secretary to comply. See,

e.g., *Wolverine Golf Club*, 384 Mich at 464 (rejecting the argument that “a suit for a declaratory judgment would have been a more appropriate form of action than a suit for mandamus” challenging election deadline); *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 411–412; 836 NW2d 498 (2013) (holding mandamus was “proper method of raising . . . legal challenge” to candidacy residence requirements when the election was quickly approaching); see also *Citizens Protecting Michigan’s Constitution*, 324 Mich App at 583 (“[M]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties.”); *Teasel v. Dep’t of Mental Health*, 419 Mich 390, 415 n 13; 355 NW2d 75 (1984) (“Mandamus is the traditional remedy for compelling performance of legal duties by public officials.”).

This Court’s decision in *Elliott v Secretary of State*, 295 Mich 245, 249; 294 NW 171 (1940), demonstrates the propriety of mandamus here. In *Elliot*, the plaintiff asserted that a particular election practice was no longer lawful in light of a constitutional amendment adopted the year before. This Court interpreted the constitutional amendment and held that, given the Secretary of State’s duty to instruct local officials on the “proper method of conducting elections,” mandamus was appropriate to compel the Secretary to direct local officials to comply with the amendment. *Id.* at 249. Mandamus likewise is warranted here to compel the

Secretary to direct local clerks to comply with the constitutional amendment adopted by the people of Michigan less than two years ago.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Plaintiffs respectfully request that this Court immediately grant leave to appeal, reverse the Court of Appeals' decision, declare that the statutory received-by-election-day deadline for absentee ballots violates the Michigan Constitution, and issue a writ of mandamus ordering the Secretary to direct local election officials that absentee ballots must be counted if: (a) the ballot is postmarked or marked with other official information from the USPS that validates the voter mailed the ballot on or before election day; 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.

Respectfully submitted,

/s/ Mark Brewer

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 D. Glick*
Samuel F. Callahan*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
stanton.jones@arnoldporter.com

* Motions for admission *pro hac vice*
forthcoming

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

Attorneys for Plaintiffs

Dated: July 20, 2020