

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

ROBERT DAVIS,

Plaintiff,

v.

Case No. 20-000099-MM

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

Hon. Cynthia Diane Stephens

Defendant.

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**Motion for Admission Pro Hac Vice Pending*

**BRIEF OF PROSPECTIVE *AMICUS CURIAE* COUNT MI VOTE d/b/a VOTERS NOT
POLITICIANS IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR
DECLARATORY JUDGMENT**

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QUESTION PRESENTED

Is the Secretary of State, the state's chief election officer, empowered to provide registered voters with absentee ballot applications in order to effectuate their constitutional right to vote by absentee ballot?

VNP's Answer: Yes.

INTEREST OF PROPOSED *AMICUS CURIAE*¹

COUNT MI VOTE d/b/a Voters Not Politicians (“VNP”) is a 501(c)(4) organization dedicated to engaging Michigan citizens in effective actions to strengthen our democracy. VNP sponsored Proposal 2, adopted by the voters in the general election of 2018. The adoption of that proposal amended Michigan’s Constitution to create a new independent citizens redistricting commission with responsibility for drawing the boundaries of Michigan’s state legislative and congressional election districts, and to thereby remedy the abuses associated with the practice of partisan gerrymandering. VNP is a strong proponent of the people’s right to engage in the initiative and referendum process and promotes, as part of its organizational platform, inclusive and accessible voting systems and policies. In particular, VNP advocates for increased access to absentee voting. VNP has an interest in ensuring that Michigan voters’ constitutional right to vote absentee—a right that the voters adopted by a landslide vote in November 2018—is broadly effectuated by streamlining the process of obtaining an absentee ballot, including the Secretary of State’s actions to facilitate the opportunity for all voters to receive absentee ballot applications. Plaintiff’s lawsuit, if successful, would undermine the voters’ constitutional right to vote by absentee ballot and would likewise undermine the right of Michiganders to govern by initiative. VNP has a keen interest in avoiding that outcome.

¹ No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made any such monetary contribution.

VNP submits this brief in the *Davis* case, but understands that other cases have been filed with overlapping claims. In the interest of judicial economy, VNP files this brief just once, but its arguments apply to all related cases.

ARGUMENT

I. The Secretary Has the Power to Mail Absentee Ballot Applications to Effectuate Voters' Constitutional Right to Cast an Absentee Ballot.

The Secretary is empowered to mail voters absentee ballot applications to effectuate voters' constitutional right to cast absentee ballots. In November 2018, Michigan's voters adopted Proposal 3, which amended the Constitution to provide, *inter alia*, "the right . . . to vote an absent voter ballot without giving any reason . . . and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). The amendment provided that these constitutional rights were "self-executing" and "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." *Id.* § 4(1)(h). Moreover, the amendment states that it does not "prevent the legislature from *expanding* voters' rights beyond" its provisions, and it retained the legislature's power to enact laws to regulate the voting process, *id.* § (4)(2) (emphasis added). Prior to this amendment, absentee ballots were only available to those over the age of 60, the disabled, poll workers, and those who signed an affidavit attesting that they would be out of town on Election Day.

The Secretary is Michigan's "chief election officer." MCL 168.21. Among her duties and powers, she has "supervisory control over local election officials," *id.*, and the authority to "prescribe and require uniform forms, notices, and supplies [that she] considers advisable for use in the conduct of elections." MCL 168.31(1)(e). Voters, in turn, are empowered to request an absentee ballot through either a form provided by their local clerk, a federal postcard, or otherwise "[b]y a written request signed by the voter." MCL 168.759(3). As the state's chief election officer, the Secretary is statutorily authorized to supply voters with application forms to aid them in submitting a written request for an absentee ballot—now their constitutional right—and to thereby encourage their use of a uniform application form.

But even if these provisions do not explicitly contemplate the power to directly provide voters with absentee ballot applications, when taken together with the Secretary's role as the state's chief election officer, they necessarily imply that she has the power to do so. "A power is 'necessarily implied' if it is essential to the exercise of authority that is expressly granted." *Conlin v Scio Twp.*, 262 Mich App 379, 385; 686 NW2d 16, 21 (2004). Voters are not required to use any particular form to request an absentee ballot—indeed a handwritten letter to their city clerk requesting a ballot, so long as it is signed, satisfies MCL 168.759(3)(a). See e.g., *Priorities USA v Nessel*, No. 19-13341, 2020 WL 2615766, at *3 (E.D. Mich. May 22, 2020) (noting that voters can either send a signed, written request or use an absentee ballot application form). While such a homemade written request is permissible and must be accepted under Michigan law, the Secretary has the express power to prescribe "uniform forms . . . and supplies . . . advisable for use in the conduct of elections." MCL 168.31(1)(e). The Secretary is plainly empowered to determine (sensibly) that it is advisable to maximize the use of the uniform application form. In order to effectuate that determination—to encourage voters to use the uniform form rather than a homemade writing—it is essential that the Secretary be empowered to actually *provide* the uniform application form to voters. That is especially so now, given that all voters newly possess a constitutional right to vote absentee, and the presence of an ongoing pandemic that has ballooned interest in voting absentee. It would make little sense to conclude that the Secretary has the express power to create and encourage the use of uniform forms and supplies, but has no power to provide voters those uniform forms and supplies "for use in the conduct of elections." MCL 168.31(1)(e). Her express power to do the former necessarily implies her power to do the latter.

Plaintiff contends that the Secretary lacks the authority to mail absentee ballot applications to voters because MCL 168.759(5) provides that “[t]he clerk of a city or township shall have absent voter ballot application forms available at all times and shall furnish an absent voter application form to anyone upon a verbal or written request.” MCL 168.759(5); *see* Mot. at 9. For support, Plaintiff cites two cases in which the Court of Appeals concluded that by expressly providing the manner in which absentee ballots could be sought from clerks—by verbal or written request—the statute precluded the clerks from mailing unsolicited applications to voters. *See Taylor v Currie*, 277 Mich App 85, 94-96; 743 NW2d 571, 577-78 (2007); *Fleming v Macomb Cty. Clerk*, 2008 WL 2553266, at *4 (Unpublished, Michigan Court of Appeals No. 279966, *rel’d* June 26, 2008). Plaintiff’s position is without merit.

First, MCL 168.759(5) speaks to the duties of the city and township clerks, not the Secretary of State. Indeed, the *Fleming* court specifically noted that local officials “must follow the directions provided by the Secretary of State in her role as Michigan’s chief election officer.” 2008 WL 2553266, at *2, in concluding that the clerk’s role was circumscribed. Nothing in MCL 168.759(5), or the cases interpreting it, precludes the Secretary from mailing voters absentee ballot applications. Neither case considered the express or implied powers of the Secretary of State. And neither case interpreted the statute in light of Proposal 3—an amendment that postdated the *Taylor* and *Fleming* decisions and fundamentally altered the power of the legislature to regulate absentee voting. Moreover, imagine if Plaintiff were correct. Under Plaintiff’s view of the law, the Secretary is violating the law by merely making a PDF of the absentee ballot application available on her website. *See* Sec’y of State, Absentee Ballot Application, https://www.michigan.gov/documents/sos/AVApp_535884_7.pdf (last visited June 10, 2020). Nothing in the statute expressly says the Secretary can do that. But it makes zero

sense to contend that the state’s chief election officer cannot distribute election forms and supplies to the voting public. That is especially so given that these are publicly available application forms that *anyone* is free to distribute as they wish. It cannot be the law that the only people prohibited from distributing absentee ballot applications are the state’s election officers.

Second, the relevant statutes must be read to permit the Secretary to distribute absentee ballot applications to voters because this is the only reading that advances Michigan voters’ constitutional right to cast absentee ballots. The 2018 amendment provides a “self-executing” right to vote by absentee ballot, requires that its provisions must “be liberally construed in favor of voters’ rights to effectuate its purposes,” and only permits the legislature to “expand” the rights set forth in the amendment, Const 1963, art 2, § 4(1)(h).² Any statute bearing on absentee voting therefore must not be interpreted in a manner that would limit or burden the constitutional right to cast absentee ballots. “It is settled law that the Legislature may not act to impose additional obligations on a self-executing constitutional provision.” *League of Women Voters of Mich. v Sec’y of State*, __ Mich App __; __ NW2d __; 2020 WL 423319, at *9 (No. 350938, *rel’d* January 27, 2020). Likewise, “legislation supplementary to self-executing constitutional provisions ‘must be in harmony with the spirit of the Constitution, and its object to further the exercise of [the] constitutional right and make it more available, and such law must not curtail the rights reserved, or exceed the limitations specified.’” *Id.*, quoting *Wolverine Golf Club v Hare*, 24 Mich App 711, 730; 180 NW2d 820, 829 (1970). Statutes affecting self-executing constitutional rights may “provid[e] a more specific and *convenient* remedy and facilitat[e] the

² The amendment expressly provides that it is self-executing, and so no further examination on that issue is necessary. *See Wolverine Golf Club v Hare*, 24 Mich App 711, 727; 180 NW2d 820, 827 (1970) (noting that the question of whether a provision is self-executing turns on the intention of the drafters, and even legislative history will suffice to show an express intention of self-execution).

carrying into effect or execution of the rights secured.” *Wolverine Golf Club*, 24 Mich App at 730; 180 NW2d at 829 (emphasis added). A statute that places an “undue burden” on a self-executing constitutional right is impermissible. *Rush v Dep’t of Corrections*, 307 Mich App 300, 308; 859 NW2d 735, 740 (2014). As a result, “[a]ny statute which is both unnecessary for the effective administration of the [absentee voting] process and restrictive of the [absentee voting] right is unreasonable and thus unconstitutional.” *Wolverine Golf Club*, 24 Mich App at 735; 180 NW2d at 831.

Section 168.759(5)’s limitation—as interpreted by the *Taylor* and *Fleming* courts—on the ability of city and township clerks to mail absentee ballot applications to voters cannot be extended to the Secretary of State. That interpretation, advanced by Plaintiff here, would raise serious doubts about the constitutionality of the statute in light of the 2018 amendment providing voters a constitutional right to cast an absentee ballot. “When there are two possible interpretations of a statute, by one of which it would be constitutional and by the other it would be constitutionally suspect, it is our duty to adopt the one that will save the statute.” *People v. Nyx*, 479 Mich 112, 124; 734 NW2d 548, 556 (2007). “Moreover, ‘[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.’” *Id.*, quoting *United States v Jin Fuey Moy*, 241 US 394, 401; 36 S Ct 658; 60 LEd 1061 (1916).

The statutory interpretation advanced by Plaintiff—that the Secretary of State is prohibited from sending voters absentee ballot applications—would be an unreasonable restriction on the right of voters to cast absentee ballots, would make absentee voting *less* available and *less* convenient, and would curtail and unduly burden the right of voters to cast an absentee ballot. Such a statutory construction would not be in “harmony with the spirit of the

Constitution,” *Wolverine Golf Club*, 24 Mich App at 730, 180 NW2d at 829, but would instead directly contravene the Constitution’s requirement that the amendment “be liberally construed in favor of voters’ rights in order to effectuate its purposes,” Const 1963, art 2, § 4(1)(h).³

The most textually reasonable interpretation of the Secretary’s powers as chief election officer is that she is empowered to mail applications to all registered voters and thereby encourage use of uniform forms and supplies advisable for the conduct of elections. MCL 168.31(1)(e). This not only best accords with the statutes, but it best accords with the Constitution. The contrary interpretation advanced by Plaintiff—that it is unlawful for the Secretary of State to provide voters with the applications that effectuate their right to vote by absentee ballot—would unnecessarily raise doubts as to the constitutionality of MCL 168.759 in light of the voters’ constitutional right to cast absentee ballots and the legislature’s limited power to expand, not restrict, that right.⁴

Michigan’s voters have a constitutional right to cast an absentee ballot without facing undue and unreasonable hurdles. The Secretary has the power to effectuate that right by providing voters the applications they need to exercise their rights.

³ Moreover, the *Taylor* and *Fleming* decisions are no longer good law even with respect to the authority of the city and county clerks to mail voters absentee ballots because both decisions predate the 2018 constitutional amendment. If voters had had a constitutional right to cast absentee ballots at the time those cases were decided, the courts would have been required to interpret the relevant statutes in light of that constitutional right. Regardless, these cases certainly have no bearing on the power of the Secretary of State to effectuate the constitutional right of voters to cast absentee ballots.

⁴ Because the Secretary’s decision to mail all voters absentee ballot applications is within her statutory authority and consistent with the absentee ballot statute and the Constitution, Plaintiff’s contention that the Secretary has violated the separation of powers limitation by usurping the power of the legislature is misplaced.

II. The Secretary’s Decision to Mail All Registered Voters Absentee Ballot Applications Complies with the Purity of Elections Clause.

The Secretary’s decision to mail all registered voters absentee ballot applications complies with the Purity of Elections Clause. The Purity of Elections Clause “requires . . . fairness and evenhandedness in the election laws of this state.” *Socialist Workers Party v Sec’y of State*, 412 Mich 571, 598; 317 NW2d 1, 11 (1982). Because the Secretary is mailing *all* registered voters absentee ballot applications, the Secretary is necessarily taking fair and evenhanded action. Doing so is entirely consistent with the Purity of Elections Clause.

Plaintiff contends that his city clerk has in the past rejected absentee ballot applications that did not originate from her office, and so worries that his application might be rejected. Mot. at 6-7. His concern is misplaced. The city clerk has no power to decline to fulfill a written absentee ballot request, regardless of its particular form. *See* MCL 168.759(3)(a). Moreover, Plaintiff’s concern that his city clerk might reject the absentee ballot application provided by the Secretary is particularly misplaced because the Secretary supervises his city clerk and could simply order the clerk to accept the application in accordance with her supervisor authority under MCL 168.21. Finally, Plaintiff’s concern that losing candidates might contest the results of elections if all voters are sent absentee ballots is misplaced because, as explained above, the Secretary’s actions comply with Michigan law and further voters’ express constitutional right to cast absentee ballots.

* * *

In Michigan, “[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection.” Const 1963, art 1, § 1. Michigan voters vindicated this first principle of the Michigan Constitution in November 2018 by guaranteeing their right to vote by absentee ballot. The wisdom of the voters’ choice is underscored by the current COVID-

19 pandemic, which renders absentee voting the safest option for many and in the public interest for all. It makes no sense, as Plaintiff requests, for the Court to adopt the crabbed reading of Michigan law advanced by Plaintiff when such a reading is inconsistent with the Secretary's role as chief election officer and would seriously undermine—to the point of rendering the statute unconstitutional—voters' rights to cast ballots by absentee ballot. The Secretary is implementing Michigan law by mailing voters absentee ballots, not violating it.

CONCLUSION

For the foregoing reasons, Plaintiff's emergency motion for declaratory judgment should be denied.

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