

**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  
**SECRETARY OF STATE,**

Hon. CYNTHIA STEPHENS

Defendant.

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**[6/16/2020] THE BRENNAN CENTER FOR JUSTICE PROPOSED  
AMICUS CURIAE BRIEF IN SUPPORT OF THE SECRETARY OF STATE**

## DESCRIPTION OF AMICUS CURIAE AND STATEMENT OF INTEREST<sup>1</sup>

*Amicus Curiae* the Brennan Center for Justice at New York University School of Law (“the Brennan Center”) is a nonprofit, nonpartisan public policy and law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of U.S. Supreme Court Justice William J. Brennan, Jr. to American law and society. Through its Voting Rights and Elections Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to reform voting and registration systems, combat vote suppression, and restore voting rights to those disenfranchised by criminal convictions in their past. The Brennan Center advocates for election administration reforms, litigates voting rights cases, and conducts empirical and qualitative research on issues related to election law and administration.

The Brennan Center has engaged in extensive efforts to ensure that elections throughout the country this year are free, fair, accessible, secure, *and safe* given the difficult and unprecedented challenges created by the novel coronavirus (“COVID-19”). The Brennan Center’s election administration and voting rights experts have identified mail voting, including absentee voting,<sup>2</sup> as essential to ensuring that every American can cast a ballot that counts during the pandemic without risking their health or the health of their loved ones. The Brennan Center has an interest in ensuring that state election officials can and do take affirmative steps to promote universal access to vote-by-mail options during the COVID-19 pandemic.

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<sup>1</sup> No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law.

<sup>2</sup> This brief focuses on absentee voting, as that is the subject Plaintiff’s complaint. But the Brennan Center’s interest in vote-by-mail extends beyond absentee voting to include all mail voting opportunities that provide a means to stay safe while exercising one’s right to vote.

The Brennan Center has an institutional and programmatic interest in promoting voting rights and voting accessibility, both in Michigan and nationwide. In pursuing these interests, the Brennan Center has invested considerable resources in various forms of advocacy to promote universal access to vote-by-mail. This advocacy has included numerous publications<sup>3</sup> and Congressional testimony.<sup>4</sup> The Brennan Center has also made the case for universal access to vote-by-mail during the COVID-19 pandemic to media outlets,<sup>5</sup> and experts from the Brennan Center have presented about the importance of universal vote-by-mail to both national and Michigan-based grassroots groups. For example, members of the Brennan Center's Voting Rights and Elections Program presented on the importance of access to vote-by-mail to a coalition of Michigan grassroots groups on May 21, 2020, and very recently to a nationwide virtual conference of the Anti-Defamation League on June 7, 2020. The Brennan Center also

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<sup>3</sup> Wendy R. Weiser & Max Feldman, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CENTER (Mar. 16, 2020), <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus>; REPORT: ESTIMATED COSTS OF COVID-19 RESILIENCY MEASURES, BRENNAN CENTER (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>; *Preparing Your State for an Election Under Pandemic Conditions*, BRENNAN CENTER (June 9, 2020), <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t3>.

<sup>4</sup> *The Impact of COVID-19 on Voting Rights and Election Administration: Ensuring Safe and Fair Elections: Hearing Before the Subcomm. on Elections of the House Comm. on Admin.*, Testimony of Lawrence Norden, 116th Cong. (June 4, 2020).

<sup>5</sup> Linda Qiu & Nick Corasaniti, *Can Michigan Mail Absentee Forms? Yes. Can Trump Withhold Funds? Unlikely.*, NEW YORK TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/us/politics/trump-mail-in-voting-absentee-ballots.html>; Adrianna Rodriguez, *Coronavirus Questions: 10 Things We Still Urgently Want to Know about COVID-19 in the Next 100 Days*, USA TODAY (May 27, 2020), <https://www.usatoday.com/story/news/health/2020/05/27/coronavirus-covid-19-pandemic-10-questions-answers-us-death-toll-100-k/5229575002/>; Joan Biskupic, *Legal Battles over Voter Roll Purges Heat Up as Mail-in Ballot Fight Continues*, CNN (May 28, 2020), <https://www.cnn.com/2020/05/28/politics/voter-roll-purges-lawsuits-vote-by-mail/index.html>.

currently represents the League of Women Voters of Michigan and the City of Detroit in litigation about voter roll purge practices.

Putting a halt to the Secretary of State's mailing of ballot applications to all Michigan registered voters would frustrate the Brennan Center's extensive efforts to promote free, fair, accessible, secure, and safe elections during the COVID-19 pandemic, both in Michigan and nationwide. If the Secretary of State's actions are invalidated or enjoined, the Brennan Center would have to divert significant resources from other advocacy projects to invest in additional efforts to ensure that every Michigan voter is able to cast a ballot that counts during the pandemic without risking their health or the health of their loved ones.

## INTRODUCTION

On November 7, 2018, "Promote the Vote" was the rallying cry as Michigan voters resoundingly decided, by more than a 2-to-1 margin, to embed no-reason absentee voting into Article 2, Section 4(1)(g) of the Michigan Constitution with the hope that voting would be less time-consuming and easier for everyone in the state.<sup>6</sup> Although Plaintiff laudably wants to ensure the integrity of state elections, they nonetheless misconstrue the Michigan Election Law to limit the authority conferred upon the Michigan Secretary of State.<sup>7</sup> Plaintiff advocates for a position that would improperly undermine voting rights and add unnecessary obstacles and burdens to voting absentee.

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<sup>6</sup> As amended November 6, 2018 by Proposal No. 18-3 ("Proposition 3"), Mich Const 1963, art 2, sec 4(1)(g) provides: "Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights: \* \* \* The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. . . ."

<sup>7</sup> The Brennan Center is aware of other, related actions pending in this Court, including *Black v. Secretary of State*, Case No. 20-000096, presenting substantially similar legal claims and issues.

Under the Michigan Election Law, the Secretary of State is the “chief election officer” of Michigan and has broad supervisory authority over the state’s elections. Secretary Benson’s action furthers the aims of no-reason absentee voting permitted under the Michigan Constitution—a provision that must be “liberally construed in favor of voters’ rights in order to effectuate its purposes”<sup>8</sup>—and is particularly appropriate during the current COVID-19 pandemic. The mailing of absentee ballot applications is consistent with the Michigan Constitution and statutes, furthers an active and engaged democracy, and seeks to encourage the ease of voter participation without disturbing the integrity or purity of any state election. Statutes regulating the conduct of municipal clerks, addressed in prior litigation before the constitutional amendment was enacted and implemented, do not apply to the Secretary of State and do not limit her authority to provide all qualified and registered voters with an application for an absentee ballot. The Brennan Center for Justice respectfully urges the Court to uphold Secretary Benson’s actions, deny Plaintiff’s motion for declaratory judgment, and dismiss Plaintiff’s complaint as a matter of law.

## **ARGUMENT**

### **I. PUBLIC POLICY STRONGLY FAVORS AFFIRMATIVELY SENDING ABSENTEE BALLOT APPLICATIONS TO ALL VOTERS.**

*Amicus Curiae* the Brennan Center has consistently maintained that affirmatively sending mail ballot applications to all voters is strong public policy and critical to administering a free, fair, accessible, and safe election, particularly during the present pandemic conditions. The Brennan Center has advocated for this policy in a variety of forums in recent months, including

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<sup>8</sup> Mich Const 1963, art 2, sec 4(1).

Brennan Center publications and reports,<sup>9</sup> op-ed columns, Congressional testimony,<sup>10</sup> and presentations to national and Michigan grassroots groups.

The Brennan Center believes public policy strongly favors the Secretary of State's practice of affirmatively sending out mail ballot applications for at least four reasons. First, it provides good customer service at a time when voters need affirmative indications that their government cares about them. Second, it helps election officials confirm voter addresses, which is extremely important from an election security and voting rights perspective when actual ballots are mailed out. Third, it allows election officials to better plan for the processing of absentee ballot applications by encouraging more voters to submit their applications early. And fourth, it provides needed voter education.

#### **A. Good Service Provision**

The COVID-19 pandemic has created significant chaos in voters' lives. In Michigan and across the country, voters have lost jobs, seen schedules change, adapted to working from home, and managed their own childcare after schools and summer programs shut down. During all of this confusion and upset, voters have dealt with changing voter registration deadlines, new procedures for voting, and even rescheduled elections. In Michigan, this will be the first major

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<sup>9</sup> Wendy R. Weiser & Max Feldman, *How to Protect the 2020 Vote from the Coronavirus*, BRENNAN CENTER (Mar. 16, 2020), <https://www.brennancenter.org/our-work/policy-solutions/how-protect-2020-vote-coronavirus>; REPORT: ESTIMATED COSTS OF COVID-19 RESILIENCY MEASURES, BRENNAN CENTER (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>; *Preparing Your State for an Election Under Pandemic Conditions*, BRENNAN CENTER (June 9, 2020), <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t3>.

<sup>10</sup> *The Impact of COVID-19 on Voting Rights and Election Administration: Ensuring Safe and Fair Elections: Hearing Before the Subcomm. on Elections of the House Comm. on Admin.*, Testimony of Lawrence Norden, 116th Cong. (June 4, 2020).

general election since the 2018 passage of Proposition 3 in which all voters will have the choice to vote absentee.

Managing this level of disruption and change is not easy. To provide voter access amidst this process, election officials should do everything possible to minimize the difficulty of accessing the ballot box. Affirmatively mailing absentee ballot applications to all voters means voters do not have to be informed or reminded of the need for an absentee voter application as a condition of receiving an absentee ballot or search for the proper form of application. Moreover, by pre-populating each recipient's application form with the address of the appropriate local clerk based on that individual's registered address, the Secretary of State decreased the likelihood that a voter would submit the application to the wrong official or commit some other transmittal error. The challenged practice removes a number of tasks and potential confusion points for voters during a period when time and emotional resources are in short supply and stress and information overload are high for Michiganders. Plaintiff's position is diametrically opposed to the concept of a responsive government.

#### **B. Voter Address Confirmation**

Maintaining accurate voter address information is a challenge for any state election administrator, but it is particularly important this year. Due to the passage of Proposition 3 and the COVID-19 pandemic, Michigan will likely see a surge in absentee voting in this year's elections. By sending absentee ballot applications to all registered voters now, election officials can confirm and, as needed, update the databases of voter addresses. Accurate and up-to-date addresses are important to ensure that absentee ballots are received by voters in time to be

returned and counted.<sup>11</sup> Accurate and up-to-date voter rolls also minimize the opportunities that anti-voter activists have to claim voter fraud.

In the face of the public health threat advanced by COVID-19, and the increase in absentee voting expected after the 2018 amendment to the Michigan Constitution, it is prudent for the Secretary of State to encourage all registered voters to submit applications for absentee ballots now—as opposed to 30 days before the election. This will give local clerks ample time to verify voter eligibility per statutory requirements. It also ensures that those voters who are entitled to vote absentee will be able to do so and will not receive ballots late, as many did during the March 2020 primary, even before the true impact of COVID-19.<sup>12</sup>

### **C. Smoothing Out the Pre-Deadline Surge in Applications**

Under Michigan Election Law, any registered voter who wants to have an absentee voter application mailed to them has until 5:00 pm the Friday before Election Day to submit their absentee ballot application. MCL 168.759(1). However, Michigan requires all actual absentee ballots to be *received* on or before Election Day. If the majority of voters request their absentee ballots be mailed to them at or near the deadline, Michigan election officials will face a serious election administration problem that will require them to process requests and mail out a huge number of absentee ballots in a very short amount of time, or risk disenfranchising thousands of voters. This problem will be compounded by the fact that this is the first major general election where all Michigan voters are eligible to vote absentee following the passage of Proposition 3.

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<sup>11</sup> Michigan law does not allow late-arriving ballots that are postmarked by Election Day to be counted. See *Preparing Your State for an Election Under Pandemic Conditions*, BRENNAN CENTER (June 9, 2020), <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t3>.

<sup>12</sup> See, e.g., Christiana Ford, *Absentee Ballot Delays Causing Concern*, WILX 10 (Feb. 20, 2020), <https://www.wilx.com/content/news/Absentee-ballot-delays-in-Meridian-Township-causing-concern-568055631.html>



Indeed, an indication of the increased demand can be seen by absentee voting in the March 2020 presidential primary—pre-COVID-19—which jumped by 20% compared to absentee voters in the primary four years ago.<sup>13</sup>

Affirmatively sending absentee ballot applications to all registered voters will allow Michigan election officials to smooth out over time the number of applications that must be processed and verified. If voters receive applications now, many will likely choose to return their applications sooner, rather than at the pre-Election Day deadline. This will give election officials more time to process applications and avoid a deadline crunch.

#### **D. Voter Education**

Finally, in a time of general confusion and changes in election procedures, affirmatively sending absentee ballot applications to voters serves as a useful form of voter education. The absentee ballot applications will give election officials a valuable opportunity to inform voters of election dates and deadlines. Voter education about deadlines and dates will be even more important this year due to the general confusion created by COVID-19 and the fact that this is the first major general election where all Michigan voters will have the option of voting absentee.

Social science research has confirmed that any “touch” between election officials and voters is valuable in helping voters learn about important dates and deadlines.<sup>14</sup> This form of

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<sup>13</sup> See Malachi Barrett, *Michigan Clerks Prepare for the Worst as Coronavirus Looms over 2020 Elections*, M LIVE (June 9, 2020),

<https://www.mlive.com/public-interest/2020/06/michigan-clerks-prepare-for-the-worst-as-coronavirus-looms-over-2020-elections.html>.

<sup>14</sup> Emma Fernandez, *Reducing the Turnout Gap in San Francisco*, SAN FRANCISCO ELECTIONS COMMISSION (May 2019),

<https://sfgov.org/electionscommission/sites/default/files/Documents/meetings/2019/2019-08-21->  
*Continued on next page.*

voter education in turn helps increase voter turnout and civic participation.<sup>15</sup> Affirmative outreach such as sending out absentee ballot applications can be particularly helpful for promoting voter turnout in rural or remote areas without consistent access to government services, minority communities, and low-income communities.<sup>16</sup>

## **II. THE SECRETARY’S ACTIONS ARE CONSISTENT WITH THE MICHIGAN CONSTITUTION AND ELECTION LAW.**

### **A. The Secretary of State Has Broad Constitutional and Statutory Authority to Mail Absent Voter Applications to All Registered Voters.**

The Secretary of State has broad authority under Michigan statutes and constitutional law to administer elections and issue necessary rules. Proposition 3’s creation of a constitutional right to vote absentee only strengthened this authority. The cases on which Plaintiff relies to argue that this broad authority is limited in the area of absentee ballot applications are easily distinguishable from the facts of this case.

#### **1. The Michigan Election Law grants the Secretary of State broad authority over election administration and specifically absentee ballot applications.**

The Michigan Election Law assigns to the Secretary of State ultimate responsibility for administering elections in the state. 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.”). This responsibility requires the

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[commission/2019\\_08\\_21\\_Elections\\_Comm\\_Item5\\_Reducing\\_the\\_Voter\\_Turnout\\_Gap\\_in\\_San\\_Francisco\\_Emma%20Fernandez.pdf](#).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; Bernard L. Fraga, *The Turnout Gap Between Whites and Racial Minorities is Larger than you Think – and Hard to Change*, WASH. POST (Sep. 25, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard-to-change/?utm\\_term=.28dae494c677](https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard-to-change/?utm_term=.28dae494c677).

Secretary of State to fulfill a wide array of duties. For example, the Secretary is, among other responsibilities, entrusted to promulgate rules for how elections and registrations will be conducted (MCL 168.31(a)), to advise and direct local elections officials on how to properly conduct elections (MCL 168.31(b)), and to prescribe and require uniform forms, notices, and supplies that she considers advisable for use (MCL 168.31(e)). In short, the Secretary has authority over local clerks on all matters relating to state elections.

The Secretary has the statutory duty and authority to “issue instructions and promulgate rules pursuant to the administrative procedures act of 1969 for the conduct of elections and registrations in accordance with the laws of this state”; “[a]dvice and direct local election officials as to the proper methods of conducting elections”; “[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots,” among other specifications; and “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations,” among other duties. MCL 168.31. This broad authority includes a specific power over the absentee ballot application form and the manner in which it is distributed. By law, the Secretary is tasked with ensuring its uniformity, confirming that its contents conform to applicable law, and supplying all local clerks with sufficient copies so that anyone who wants an absentee ballot may ask for one. See, e.g., MCL 168.665 (forms, stationery, and supplies to be provided by the Secretary of State to local clerks); MCL 168.759c (“For a presidential primary, the secretary of state shall revise the absent voter ballot application form described in section 759...”).

Uniformly mailing an application for an absentee ballot to all residents guarantees that the applications that are submitted to local clerks are uniform and do not deviate from the

requirements of state law. Further, the authority to “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations” provides the Secretary the power to provide a neutral form to all citizens. Given the Secretary’s statutory authority over applications and elections in general, it would be improper to construe, as Plaintiff asserts, that MCL 168.759 prohibits her from mailing registered voters applications for absentee ballots. Further, because Section 759 of the Election Law does not mention the Secretary of State at all, it cannot be construed to limit her existing broad statutory authority.

**2. Proposition 3 expanded the Secretary of State’s pre-existing broad constitutional authority over absentee voting.**

From a constitutional perspective, reading MCL 168.759(5) in the manner Plaintiff seeks completely ignores and undermines a constitutional amendment enacted by Michigan voters precisely to make it easier to vote absentee. Proposition 3 explicitly created a new constitutional right to vote absentee.<sup>17</sup> Furthermore, it established that this new constitutional right should be “liberally construed in favor of voters’ rights in order to effectuate its purposes.”<sup>18</sup> Proposition 3 created a constitutional imperative on state election officials to protect and promote the right to vote absentee. Election statutes such as MCL 168.759 must be interpreted in light of this new constitutional imperative. And while Proposition 3 did not explicitly grant the Secretary of State any new authority through its absentee ballot provision, her existing status as the “chief election

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<sup>17</sup> Mich Const 1963, art 2, sec 4(1)(g) now states: “Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights: \* \* \* The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. . . .”

<sup>18</sup> Mich Const 1963, art 2, sec 4(1).

officer of the state” should grant her a degree of deference and flexibility to enforce and protect this new constitutional right that is supposed to be “liberally construed.”

MCL 168.759 should also be liberally construed in favor of voters seeking to vote absentee under the constitution’s “purity of elections” clause. If MCL 168.759 were interpreted to block the Secretary of State’s ability to provide a uniform application for absentee ballots to all registered voters in the State of Michigan, it would ultimately make it easier for some voters to obtain absentee ballots than others: Those with transportation issues may not be able to visit a local clerk to request an absentee ballot in person, and those without a computer or reliable internet access would be unable to obtain an application online. Unless every registered voter receives an application by mail, the process by which voters obtain absentee ballots is inherently inequitable and the “purity” of the election process is in question. “The phrase ‘purity of elections’ is one of large dimensions. It has no single, precise meaning.” *Wells v Kent Co Bd of Election Com’rs*, 382 Mich 112, 123; 168 NW2d 222 (1969). It is clear, however, that it demands “fairness and evenhandedness in the election laws of the state.” *Socialist Workers Party v Secy of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). Nothing could be fairer or more evenhanded than providing all registered Michigan voters—regardless of age, race, ethnicity, gender identity, sexual orientation or political affiliation—with the same opportunity to apply for an absentee ballot.

### **3. Plaintiff relies on case law that is easily distinguishable.**

Plaintiff relies primarily on two inapposite, readily distinguishable cases to support their argument that the Secretary of State lacks the authority to send unsolicited absentee ballot applications to voters: *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007) and *Fleming v*

*Macomb County Clerk*, No. 279966, 2008 WL 2553266 (Mich Ct App, June 26, 2008).<sup>19</sup> These two cases do not apply here because they do not address the Secretary of State’s authority at all. Both cases, instead, focus on the scope of a local clerk’s authority. They are predicated on the principle of Michigan law that “a court cannot infer a power the Legislature has not specifically provided for a municipality.” *McIntosh v City of Muskegon*, 88 Mich App 30, 32; 276 NW2d 510 (1979).

By its plain language, MCL 168.759(5), the provision interpreted in *Taylor* and *Fleming*, is directed to local clerks: “The *clerk* of a city or township shall have absent voter ballot application forms available in the clerk’s office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.” MCL 168.759(5) (emphasis added). MCL 168.759(5) simply does not speak to the Secretary of State’s duties and authority. Indeed, the Secretary of State is a constitutional officer, and thus has far broader inherent authority than the local clerks in *Taylor* and *Fleming*. See Mich Const 1963, art 5, sec 3, 21. By statute, the Secretary has also been appointed the state’s chief election officer and given “supervisory control over local election officials in the performance of their duties.” MCL 168.21. If the voter requests an application in a certain manner, MCL 168.79(5) requires the local clerk to carry out the ministerial function of furnishing the application to the voter. MCL 168.759(5), however, does nothing to limit the broad grant of authority to the Secretary of State in the Michigan Election Law.

Further, MCL 168.759(5) should not be read as proscriptive or restrictive. Rather, the provision is a directive to city clerks to ensure that absentee ballot applications are available to

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<sup>19</sup> *Fleming* is unpublished and non-precedential. MCR 7.215(C)(1) provides: “An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority.”

anyone when requested. Although *Taylor* and *Fleming* relied on the *expressio unius* canon of construction, *i.e.*, the “expression of one thing is the exclusion of another,” *expressio unius* is but one of many principles of statutory construction in Michigan law. The “primary goal” when interpreting a statute is to discern and give effect to the Legislature’s intent. *DeBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 200 (2000) (citation omitted). “Each word and phrase in a statute ‘must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense.’” *Honigman Miller Schwartz and Cohn LLP v City of Detroit*, \_\_\_ Mich \_\_\_, 2020 WL 2530162, at \*6 (Mich, May 18, 2020) (quoting *Sweatt v Dept of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003)).<sup>20</sup>

Were MCL 168.759(5) really so narrow as to limit anyone other than the city clerk from providing applications for absentee ballots, and then only upon request, the provision would swallow other parts of the Michigan Election Law whole. There would be no point to provide for other ways to make an application for an absent voter ballot in the statute (MCL 168.759(3)(a), (c)), nor would there be any reason to include directions regarding the printing and distribution of applications by other persons (MCL 168.759(7)). Truly, the only sensible interpretation of MCL 168.759 (especially given the expansive constitutionality for no-reason absentee voting) is that, at the very least, city clerks in Michigan must have applications available in their offices and also provide them upon request. This is not optional. But this

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<sup>20</sup> See also *Hanson v Mecosta Co Road Com’rs*, 465 Mich 492, 504; 638 NW2d 326 (2002); *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000), overruled in part on other grounds, 469 Mich 642; 677 NW2d 813 (2004) (interpretations that rewrite statutes must be rejected); *In re Forfeiture of Bail Bond*, 496 Mich 320, 328; 852 NW2d 747 (2014) (“[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.”); MCL 8.3a (words and phrases in statutes must be construed according to the common usage of the language, but technical words and phrases are given their “peculiar and appropriate” meaning).

directive does not prohibit anyone (including the Secretary of State) from also making these applications available in other ways.

Indeed, a more recent published Court of Appeals decision held that even a city clerk has implied authority to distribute absent voter applications in ways not expressly authorized by MCL 168.759. In *Barrow v Detroit Election Commission*, 305 Mich App 649, 678-82; 854 NW2d 489 (2014), the court held that “statutes recognize the clerk’s authority to receive absentee ballots and applications for absentee ballots at locations other than the clerk’s office.... Although MCL 168.761 permits delivery of absentee ballots at the clerk’s office to voters who apply in person, it does not proscribe in-person delivery at other locations. Read as a whole, the statutory scheme permits the use of satellite locations.” Similarly, the Attorney General opined in Opinion No. 5527 (August 2, 1979) that while MCL 168.759 provides that the clerk “shall furnish an application form to anyone upon request” (emphasis added), “the statute does not preclude the clerk from furnishing more than one form if requested.” The Attorney General thus concluded, “school election officials or election officials of municipalities conducting elections for them shall furnish applications for absentee ballots...”

Analogously, in *Elliott v Secretary of State*, 295 Mich 245, 249; 294 NW 171(1940), the Supreme Court compelled the rotation of names of candidates for the office of Supreme Court Justice on the nonpartisan ballot. Relying on the “purity of elections” clause now found in article 2, section 4, of the Michigan Constitution,<sup>21</sup> the Court held that “everything reasonably necessary to be done by election officials to accomplish the purpose of the amendment is fairly

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<sup>21</sup> As amended by Proposal 3 in 2018, Mich Const 1963, art 2, sec. 4(2) states in relevant part: “[T]he legislature shall enact laws ... to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.”



within its purview,” and “it is the clear duty of election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the purity of elections.” *Id.* at 249-50 (emphases added). The Court thus directed the Secretary of State to rotate names on the ballot to ensure no one name received any advantage, without any express authority in the law to revise the ballot. Similarly here, Michigan’s chief election official has the duty to ensure nonpartisan, neutral access to the constitutional right to vote absentee for all citizens, including authority to mail absentee voter applications to registered voters.

**B. MCL 168.759(7) Allows Any Person—Necessarily Including the Secretary of State—to Distribute Absent Voter Applications.**

Finally, MCL 168.759(7) unambiguously allows any “person” to “print[] and distribute[] absent voter ballot applications,” so long as certain formal requirements are met (*e.g.*, that the application contains the statutory warning and instructions). That section provides: “A person who prints and distributes absent voter ballot applications shall print on the application the warning, certificate of authorized registered elector returning absent voter ballot application, and instructions required by this section.” On the plain and ordinary meaning of the statute, the Secretary of State is a “person.” Reinforcing the plain meaning of MCL 168.759(7), MCL 168.759(8) criminalizes false statements, forged signatures and improper return of applications—not the mere distribution of applications. That section provides:

A person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor. A person who forges a signature on an absent voter ballot application is guilty of a felony. A person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor.

Plaintiff's argument ignores that applications for an absentee ballot are easily accessible and available online, including from local clerks' offices without written application,<sup>22</sup> and are widely distributed by political parties and other persons.<sup>23</sup> The applications distributed to all registered voters by the Secretary of State are accompanied by the instructions mandated by MCL 168.759, and do not include any electioneering or "propaganda." Plaintiff would have every person in Michigan authorized to distribute applications except the State's chief election official. Plaintiff's interpretation is illogical, contrary to the purpose and language of the Michigan Constitution and Michigan Election Law, and should be rejected as a matter of law.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons discussed herein and the motion and brief filed by the Secretary of State, the Court should deny Plaintiff's motions for declaratory judgment and dismiss the complaint with prejudice pursuant to MCR 2.116(C)(8).

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<sup>22</sup> See, e.g. <https://www.cityofdearborn.org/services/clerk/election-information>.

<sup>23</sup> See, e.g., <https://www.vote.org/absentee-ballot/michigan/> and [https://www.theoaklandpress.com/news/michigan-political-party-mailers-are-confusing-some-absentee-voters/article\\_4572fd78-5cc5-11ea-910f-177721d2b4be.html](https://www.theoaklandpress.com/news/michigan-political-party-mailers-are-confusing-some-absentee-voters/article_4572fd78-5cc5-11ea-910f-177721d2b4be.html)

Respectfully submitted,

By:/s/ Larry J. Saylor \_\_\_\_\_

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