

Political Processes During a Pandemic

How COVID-19 Has Changed and Will Change Michigan's Elections

By Douglas Mains and Kevin Blair

COVID-19 has likely forever altered how Michiganders pursue their lives and livelihoods. A society already trending away from physical interaction and in-person encounters in favor of greater reliance on technology to work and interact remotely will probably see the pace of that transition hastened by the pandemic. Elections and political campaigns may follow a similar paradigm shift as the process of going door-to-door collecting petition signatures or waiting in line to cast a ballot in a crowded polling place may become antiquated notions in a time of technological innovation and changing consumer expectations.

To date, Governor Gretchen Whitmer has issued more than 120 executive orders related to COVID-19.¹ While currently being scaled back, the thesis underpinning these orders has been that, to minimize transmission of the coronavirus, residents should shelter in their homes and avoid personal contact as much as possible. These restrictions have created some tension with various provisions of the Michigan Election Law,² which assume or demand a degree of direct personal interaction and have, therefore, proven impracticable while residents are largely cloistered in their homes.

The current pandemic and resulting emergency and disaster declarations have had a significant impact on Michigan's 2020 election cycle. This article highlights those effects and related legal issues and briefly explores if these changes may be harbingers of electoral evolution to come.

Mailing of absent voter ballot applications

Michigan law requires individuals to apply to receive an absent voter ballot,³ which they can do in three ways: through

a written request, by filing an absent voter ballot application, or on a federal postcard application.⁴

The issue of whether a clerk can mail unsolicited ballot applications has twice been addressed by the Court of Appeals. In *Taylor v Currie*,⁵ the Court found that a city clerk “has no powers concerning the distribution of ballot applications other than those that are expressly granted in the [Michigan Election Law]”⁶ and that “the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute.”⁷ The Court also found that the power to mail unsolicited ballot applications was not implicitly authorized by law.⁸

The Court addressed a similar situation in *Fleming v Macomb County Clerk*,⁹ where it ruled that “[a] county clerk, like a city clerk, has no express statutory authority under the Michigan Election Law to mail or otherwise distribute unsolicited absent voter ballot applications.”¹⁰ The Court also held that a county clerk was not impliedly authorized to mail unsolicited ballot applications.¹¹

Of the governor's executive orders, the most significant in terms of election matters is Executive Order 2020-27 (COVID-19), which mandated that May 5 elections be “conducted to the greatest extent possible by absent voter ballots issued and submitted without in-person interaction.” To this end, the order authorized the secretary of state to assist local clerks with the “mailing of absent voter ballot applications...to each registered voter within any jurisdiction conducting a May 5, 2020 election...”

While clerks are prohibited from mailing unsolicited ballot applications, under the Emergency Management Act,¹² the governor has the authority to “[s]uspend a regulatory statute...prescribing the procedures for conduct of state business,

At a Glance

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The current pandemic and resulting emergency and disaster declarations have had a significant impact on Michigan's 2020 election cycle.

Recent coronavirus-related challenges related to absent voter ballot applications and ballot access provisions for candidates and initiatives will, at least in some cases, likely prove to be precursors to permanent changes.



when strict compliance... would prevent, hinder, or delay necessary action in coping with [a] disaster or emergency.”¹³ Thus, in order to accomplish the order’s purpose, the governor temporarily suspended strict compliance with the portions of the Michigan Election Law that the Court of Appeals previously interpreted as prohibiting the unsolicited issuance of ballot applications.¹⁴

While the governor only authorized absent voter ballot applications to be mailed to voters for May elections, Secretary of State Jocelyn Benson recently announced that ballot applications would also be mailed to each registered voter for the upcoming August and November elections.¹⁵

This policy is being challenged,¹⁶ and litigation will ultimately determine the secretary’s authority to undertake this action, particularly given the holdings in *Taylor* and *Fleming*. However, as the chief election officer¹⁷ of Michigan, the secretary of state exercises “supervisory control over local election officials”¹⁸ and has authority to “prescribe and require uniform forms, notices, and supplies [she] considers advisable for use in the conduct of elections.”¹⁹ These provisions arguably give her much broader authority than the clerks in either *Taylor* or *Fleming*.

Importantly, those cases were decided before adoption of Proposal 3 of 2018. The voters who adopted that constitutional amendment intended that it would be “liberally construed in favor of voters’ rights in order to effectuate its purposes.”²⁰ As the purpose of the amendment was clearly to remove barriers to make absentee voting more pervasive, one could argue that the secretary now has implicit authority to disseminate ballot applications.

Michigan voters have recently demonstrated a proclivity for reducing perceived impediments to voting. That nearly 67 percent of electors approved ingrain concepts such as no-reason absentee voting in the state’s constitution suggests that voters would likely support measures that further encourage absentee voting.²¹ The 2020 election cycle will likely be a test run; with society emphasizing greater convenience and expediency in all manner of activity as well as the record turnout for the May 2020 elections, it seems highly probable that processes implemented during this pandemic could result in lasting change.²²

Mailing of absent voter ballots

Some have argued that Michigan should directly mail ballots to all electors, joining 17 states that automatically mail ballots to registered voters for certain elections that are allowed to be conducted entirely by mail.²³ However, the state may not have the lawful authority to do so. Under the rationale of *Taylor* and *Fleming*, clerks seemingly have no express authority to automatically mail ballots, as the Michigan Election Law makes clear that absentee ballots are to be provided to electors only “[i]f the clerk of a city or township receives an application for an absent voter ballot from a person registered to vote in that city or township...”²⁴

Additionally, Michigan voters have the right “to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.”²⁵ This language seems to suggest that electors now have three specific rights concerning absent voter ballots: (1) “the right to choose whether

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the...ballot is applied for...in person or by mail”; (2) “the right to choose whether the...ballot is...received...in person or by mail”; and (3) “the right to choose whether the...ballot is...submitted in person or by mail.”²⁶

Sending each registered voter an unsolicited ballot arguably infringes upon voters’ right to “choose whether the absent voter ballot is...received...in person or by mail.” Thus, if Michigan is to join the handful of states that have allowed ballots to be directly mailed to electors, it may take a constitutional amendment to do so.

Candidate signature gathering

Candidates seeking to run for office in Michigan must submit a specified number of signatures, thereby demonstrating at least a modicum of support.²⁷ As Judge Terrence Berg has observed, “[c]andidates typically gather these signatures door to door, or in high-traffic public places...”²⁸ In a recent federal lawsuit, Eric Eshaki, an attorney seeking the Republican nomination for Michigan’s 11th Congressional District, challenged these signature thresholds and associated filing deadlines as applied to him and similarly situated candidates impacted by the pandemic and related stay-at-home orders. According to Eshaki, the strict enforcement of these provisions under the circumstances violated his constitutional rights to freedom of speech and association, equal protection, and due process.²⁹

The district court agreed, granting Eshaki’s request for a preliminary injunction and crafting three remedies: lowering signature requirements by 50 percent; extending the submission deadline until May 8, 2020; and ordering the state to adopt regulations allowing for the collection and submission of signatures in digital form.³⁰

The state appealed the order to the Sixth Circuit, which found that the district court correctly concluded that enforcement of the statutes was unconstitutional as applied, but that the court impermissibly engaged in a “plenary re-writing of the State’s ballot-access provisions” when “federal courts have no authority to dictate to the States precisely how they should conduct their elections.”³¹ Consequently, the Sixth Circuit upheld the portion of the injunction “that enjoins the State from enforcing the state’s...ballot-access provisions under the present circumstances...” but stayed “the portion...compelling the State to adopt the district court’s revisions...”³² In response to this ruling, the secretary of state announced accommodations that closely followed those fashioned by the district court, but only made them applicable to certain candidates, including those who established a candidate committee under the Michigan Campaign Finance Act³³ by March 10, 2020.³⁴

Subsequently, the district court issued another order in response to a claim filed by Shakira Hawkins, a candidate for the Wayne County Circuit Court.³⁵ As of March 10, 2020, Hawkins had collected approximately 3,000 signatures but

had not established her campaign committee, making the state’s accommodations inapplicable to her.³⁶ The court further “enjoin[ed] the State from excluding candidates from the accommodations offered by the State based on the March 10th deadline because [it] is not narrowly tailored to accomplish a compelling state interest.”³⁷

Given the unique circumstances and the “as applied” nature of the challenges brought in these cases, it seems unlikely that the rulings will have long-term ramifications on nominating petition procedures. However, the secretary of state’s decision to allow signatures collected via electronic means is one change that might be implemented in a wholesale manner.

Initiative petition signature gathering

To place a proposed law on the ballot through the initiative process, petitions must be submitted that are signed by a number of electors equal to at least 8 percent of the total number of votes cast in the last gubernatorial election.³⁸ The petitions must be filed “at least 160 days before the election at which the proposed law would appear on the ballot...”³⁹ Persons seeking to propose laws on the November 2020 ballot were required to submit slightly more than 340,000 signatures by May 27, 2020.⁴⁰ At least two entities, Fair and Equal Michigan and SawariMedia, LLC, allege that they have been aggrieved by the state’s enforcement of these requirements as a result of the pandemic.

SawariMedia and several voters filed suit against Gov. Whitmer and others in federal court, alleging that the state’s strict enforcement of ballot access provisions for initiative petitions placed a “severe and impermissible burden on its First Amendment rights.”⁴¹

Fair and Equal Michigan and two state legislators filed a similar complaint in the Michigan Court of Claims, challenging the ballot access provisions on state constitutional grounds and asking the court for declaratory and injunctive relief, including relief that extended statutory submission deadlines, allowed signatures gathered more than 180 days before submission to be counted, and reduced the number of required signatures.⁴²

Judge Cynthia Stephens denied the bulk of Fair and Equal Michigan’s requests for relief, but enjoined enforcement of the statutory requirement that only signatures gathered within 180 days of submission are valid, at least for a period of 69 days, which was the amount of time that the stay-at-home orders were in place.⁴³

Conversely, Judge Matthew Leitman granted SawariMedia’s request for injunctive relief, finding that the stay-at-home orders severely burdened SawariMedia’s First Amendment rights.⁴⁴ The district court also found that applying the signature requirements for initiative petitions under the current circumstances was not narrowly tailored to achieve a compelling interest.⁴⁵ Consequently, the court ordered the secretary of state

to choose its “own adjustments” to these provisions, as it had done in response to the *Esshaki* case.⁴⁶

As with the rulings related to nominating petitions, the unique circumstances of the pandemic and the “as applied” nature of the challenges may preclude any ruling in either case from having a long-term impact on the initiative petition process.

Conclusion

As society grapples with changes to our everyday lives as a result of the pandemic, recent challenges related to election and ballot access processes will, at least in some cases, likely prove to be precursors to permanent changes—especially as society largely becomes more dispersed and driven by expediency. If 2020 elections are conducted predominantly through the mail without any major irregularities or interruptions, this may well push Michigan toward enacting more permanent remote voting protocols. Likewise, if efforts to electronically obtain signatures on petitions are similarly productive and reliable, candidates and campaigns may well push for reforms allowing greater reliance on remote circulation. In any case, the pandemic has exposed areas of election law that are inconsistent with changing attitudes and inclinations among citizens and, likely, will lead to changes in the way we vote for and support candidates. ■

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