STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs,

v

SECRETARY OF STATE,

Defendant.

FOR PUBLICATION
July 14, 2020
9:00 a.m.

No. 353654

Before: SAWYER, P.J., and GLEICHER and RIORDAN, JJ.

SAWYER, P.J.

Plaintiffs filed this complaint for mandamus seeking an order of this Court directing defendant to implement certain procedures regarding the processing of absentee ballots. After reviewing the parties' briefs and hearing oral argument, we are not persuaded that plaintiffs are entitled to relief and we deny the writ for mandamus.

Plaintiff League of Women Voters of Michigan is a statewide organization with an interest in voting rights. The individual plaintiffs are League members and registered voters residing in Michigan. Defendant Secretary of State ("defendant") is "the chief election officer of the state" with "supervisory control over local election officials in the performance of their duties under the provisions of" the Michigan Election Law, MCL 168.1 *et seq*. MCL 168.21. Defendant shall "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b).

In November 2018, Michigan voters approved Proposal 3, which granted all Michigan voters the constitutional right to vote by absentee ballot without stating a reason.[1] That right was

[1] Prior to the passage of Proposal 3 in 2018, state election law required voters to indicate one of six reasons for voting by absentee ballot. MCL 168.759.

incorporated into Const 1963, art 2, § 4, pertaining to the place and manner of elections. Const 1963, art 2, § 4, as amended, states in relevant part as follows:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
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> (a) The right, once registered, to vote a secret ballot in all elections.
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> * * *
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> (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.
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> * * *
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> 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.
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> (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. . . .

In light of the voters' approval of Proposal 3 and the amendments to Const 1963, art 2, § 4, the Michigan Legislature enacted 2018 PA 603, which amended certain provisions of the Michigan Election Law.[2] Plaintiffs contend that some provisions pertaining to absentee voting have not been amended to conform with the amendments to Const 1963, art 2, § 4. Plaintiffs filed a three-count

[2] We note that it appears that the Legislature is continuing to consider these issues. See, e.g., HB 5807, which, if passed as introduced, would address some of the issues presented in this case.

complaint for mandamus challenging the statutory requirement that absentee ballots be received by 8:00 p.m. on election day and the statutory requirement that voters pay the postage to return an absentee ballot. Plaintiffs also allege that the received-by deadline violates the purity of elections clause set forth in Const 1963, art 2, § 4, the free speech and assembly clauses set forth in Const 1963, art 1, §§ 3 and 5, the right to equal protection set forth in Const 1963, art 1, § 2, and the right to vote set forth in Const 1963, art 2, § 4(1)(a). Further, plaintiffs allege that some city and township clerks fail to adhere to the requirement set forth in MCL 168.761(1) that the clerk "immediately" upon receipt of an absent voter application mail an absentee ballot to the voter and fail to adhere to the requirement set forth in Const 1963, art 2, § 4(1)(g) guaranteeing voters the right to vote by absentee ballot in the 40 days before an election.

"[M]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018). "To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that: (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014), lv den 498 Mich 853 (2015). "A clear legal right is a right clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 249; 896 NW2d 485 (2016). "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016) (quotation marks and citation omitted). A writ of mandamus is inappropriate if the act sought to be performed involves judgment or the exercise of discretion. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248; 829 NW2d 335 (2013). The plaintiff has the burden of demonstrating entitlement "to the extraordinary remedy of a writ of mandamus." *Citizens Protecting Michigan's Constitution*, 324 Mich App at 584.

The most significant issue presented in this case is Count I of plaintiffs' complaint, whether the statutory requirement that absentee ballots be received by the local election clerk by 8 p.m. on election day violates Const 1963, art 2, § 4. We conclude that it does not. But, before analyzing this question, we must address plaintiffs' position that defendant has conceded that the "received by" rule is unconstitutional. We read defendant's brief as agreeing with plaintiffs that the "received by election day" requirement does violate Const 1963, art 2, § 4, but with some reservations. After advancing a construction of Proposal 3 that largely agrees with plaintiffs' position on this point, defendant then states:

> The larger issue, and arguably the highest hurdle to this construction of § 4(1)(g), is the absence of language regarding when an AV ballot voted by mail by election day must be received by an election official in order to be counted. This silence could be viewed as evidence that the construction advanced above is faulty. The better interpretation, however, is that the drafters left space within the Constitution in which the Legislature can act through supplemental legislation. But the Legislature has not yet done so, and the only recourse at this time is to consult existing statutory provisions for guidance. [Defendant's brief, p 15.]

Moreover, at oral argument, defendant's attorney certainly seemed to take a position that agreed with plaintiffs that the "received by election day" requirement violates the Constitution as amended by Proposal 3. But we do not view such a concession by defendant as resolving the issue.

We recognize the ability, indeed the desirability, of parties in a lawsuit to resolve their differences amongst themselves without the unnecessary intervention of the courts. But it is one thing for parties in a particular action to reach an agreement that only affects those parties in that action. It is yet another thing to allow parties to reach an agreement that would affect the entire state by means of an agreement as to the proper interpretation of a statute or the Constitution as will be applied generally. This, ultimately, is the province of the courts. Indeed, as Chief Justice Marshall wrote long ago in *Marbury v Madison*, 5 US 137, 177 (1803), "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."

Chief Justice Marshall expounded on this in further detail:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
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> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
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> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
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> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
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> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. [5 US at 176-177.]

While Chief Justice Marshall was addressing a case of Congress exceeding the limits of its powers in enacting legislation, we find guidance here where we are faced with the powers of an executive branch official exercising executive power. That is, we posit that, just as a legislative body cannot legitimately enact a statute that is repugnant to the Constitution, nor can an executive branch official effectively declare a properly enacted law to be void by simply conceding the point in litigation. To vest such power in an official, it would effectively grant such official the power to amend the Constitution itself. And, just as Chief Justice Marshall rejected the ability of a legislative body amending the Constitution by an ordinary act, we must reject the ability of an executive branch official to do the same.[3] When a dispute arises regarding whether a properly enacted statute violates the Constitution, that dispute must be resolved by the courts, not by a single individual within the executive branch.[4]

For these reasons, to the extent that defendant concedes that the existing statutory scheme violates the Michigan Constitution in light of Proposal 3, we reject the idea that this resolves this dispute or is binding on this Court. While we give the Secretary's position due consideration, we are not bound by it. Rather, we must now continue to our own analysis regarding whether the existing "received by election day" rule is now contrary to Const 1963, art 2, § 4. We conclude that it is not.

Plaintiffs allege that the statutory requirement that absentee ballots be received by 8:00 p.m. on election day violates Const 1963, art 2, § 4(1)(g), which guarantees voters the right to vote by absentee ballot "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." Plaintiffs assert that the provision requires that any absentee ballot submitted by mail in the 40 days before an

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[3] This is not to say that neither the Legislature nor the executive branch have a role to play in interpreting the Constitution. It is certainly contemplated that the Legislature would consider the Constitution whenever it enacts a statute and reject those that it finds to be repugnant to the Constitution. That is, we would expect the Legislature to exercise constitutional self-restraint. Similarly, we would think it a duty of a Governor to reject (i.e., veto) a bill passed by the Legislature if the Governor is convinced that the bill violates the Constitution.

[4] There is, of course, a role for the Legislature and the Governor to play in resolving such a dispute if they choose to do so by repealing or amending the statute at issue. But if such action is taken, while it would resolve the dispute, it would not resolve the question of the constitutionality of the prior enactment. And, more importantly to the present dispute, it is not dependent on the actions of a single member of the executive branch.

election must be counted even if it is received after 8:00 p.m. on election day. Plaintiffs rely on the self-executing provision of Const 1963, art 2, § 4, which states, in relevant part:

> 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.

Plaintiffs contend that self-executing constitutional provisions are judicially enforceable without further legislation. Defendant argues that plaintiffs have not demonstrated a clear legal right to the performance of the act sought, but also argues that declining to count ballots received after the 8:00 p.m. on election day deadline appears to violate Const 1963, art 2, § 4.

The 8:00 p.m. received-by deadline set forth in MCL 168.764a[5] states, in relevant part, as follows:

> The following instructions for an absent voter shall be included with each ballot or set of ballots furnished an absent voter:
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> * * *
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> 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 168.720 provides that polls close at 8:00 p.m. The question presented is whether the amended language in Const 1963, art 2, § 4(1)(g) renders the 8:00 p.m. received-by deadline unconstitutional. In interpreting constitutional provisions, this Court applies two rules of interpretation. *Makowski v Governor*, 495 Mich 465, 472, 473; 852 NW2d 61 (2014). "First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Id*. (quotation marks and

[5] Although plaintiffs argue that the 8:00 p.m. received-by deadline contravenes Const 1963, art 2, § 4, they do not identify the specific statutory language that they assert is unconstitutional. It appears that plaintiffs challenge the language set forth in MCL 168.764a, the provision providing general instructions for absentee voters. MCL 168.759b also requires that absentee ballots "be returned to the clerk in time to be delivered to the polls prior to 8 p.m. on election day," but that provision pertains to emergency absentee voter applications submitted after the absentee voter application deadline because of physical disability or a voter's absence from the city or township because of sickness or death in his or her family. It does not appear that plaintiffs challenge that provision because they made no mention of it in their brief. For all practical purposes, however, plaintiffs' arguments would apply to either provision.

citation omitted).[6] "Words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re Burnett Estate*, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). Every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Second, the interpretation should consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Id*. (quotation marks and citation omitted).

Plaintiffs and defendant interpret the first sentence of Const 1963, art 2, § 4(1)(g), as requiring that ballots mailed by election day be counted. The provision guarantees voters "[t]he 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." Thus, it grants voters the right to vote by absentee ballot without giving a reason in the 40 days before an election *and* the right to choose whether to submit the ballot in person or by mail. But we do not share plaintiff's view that these two clauses, when read together, render the "received by" rule unconstitutional.

We turn first to addressing Justice Cooley's directive that we consider what the "great mass of the people" would understand Proposal 3 to mean when they adopted it. There are two primary sources to guide us. First, the summary "statement of purpose" that actually appeared on the ballot and, second, the actual language of the constitutional amendment. We turn first to the ballot summary.

Const 1963, art 12, § 2, states that a ballot used to amend the constitution by petition of registered voters "shall contain a statement of the purpose of the proposed amendment . . . ." The ballot at issue provided the following statement regarding Proposal 3's purpose:

Proposal 18-3

A proposal to authorize automatic and Election Day voter registration, no-reason absentee voting, and straight ticket voting; and add current legal requirements for military and overseas voting and postelection audits to the Michigan Constitution

This proposed constitutional amendment would allow a United States citizen who is qualified to vote in Michigan to:

- Become automatically registered to vote when applying for, updating or renewing a driver's license or state-issued personal identification card, unless the person declines.

[6] The principle of looking to the meaning that "reasonable minds, the great mass of the people themselves, would give it" is deeply rooted in Michigan jurisprudence, going back to a treatise by Justice Cooley. See Cooley's Const Lim (6th ed), p 81.

- Simultaneously register to vote with proof of residency and obtain a ballot during the 2-week period prior to an election, up to and including Election Day.

- Obtain an absent voter ballot without providing a reason.

- Cast a straight-ticket vote for all candidates of a particular political party when voting in a partisan general election.

Should this proposal be adopted?

[ ] YES

[ ] NO[7]

Only the third bullet point addresses absentee voting. And that bullet point only addresses the right to vote by absentee ballot without providing a reason.[8] Not only does it not address a deadline by which the absentee ballot must be received by the election clerk, it does not even address creating a right to submit that ballot by mail. Accordingly, a voter whose knowledge of the proposal was limited to reading the "statement of purpose" that appeared on the ballot would not have understood it to have a created a constitutional right to vote that ballot by mail, much less when it must be received by.

Of course, a more conscientious voter who took the time to read the entire proposed language of the proposed constitutional amendment would understand that it incorporated provisions regarding absentee voting beyond not having to provide a reason for doing so. But this, too, falls short of creating an expectation or understanding by the voters that they could mail the ballot on election day and have it counted even though it would be received after election day. The language of the amendment itself is devoid of any provision regarding when the ballot must be mailed by or when it must be received. Those issues are simply unaddressed. But the amendment is not completely devoid of references to when the local election officials must accept those ballots:

> (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

[7] Official Ballot Wording Approved by Board of State Canvassers, September 7, 2018 <https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-3_632053_7.pdf> accessed June 18, 2020).

[8] Similarly, that is the only portion of the absentee voting rules that appear in the bold-faced header in the ballot language.

> 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. [Emphasis added.]

While the emphasized language does not create any specific deadline by which ballots must be received, it is suggestive that election officials are only obligated to be available during regular business hours, plus some additional hours on the weekend immediately preceding the election. While this would not necessarily preclude a belief that ballots mailed on or before election day but received after the polls closed would not be counted, it would suggest to voters that there would be some limitations on when election officials would be obligated to accept, and therefore count, ballots. And it certainly does not create an expectation that a ballot can be mailed on election day and have it counted.

In short, while the language of the amendment itself would not necessarily disabuse a voter of the belief that an absentee ballot mailed on election day but received thereafter would nevertheless be counted, nor does the language create a belief that it would. Thus, we cannot conclude that "the great mass of people" understood that the amendment it was voting on demands the deadline for casting an absentee ballot be based upon the time it is mailed rather than the time that it is received.

We similarly reject the argument that the statutory requirement that an absentee ballot be received by the election officials before the close of the polls on election day impairs the right of a voter to choose to submit their absentee ballot by mail. They certainly possess that right. And, while Proposal 3 creates a 40-day period during which a voter has the ability to receive and cast an absentee ballot, 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.[9] We acknowledge that it does affect when an absentee voter must mail their ballot so that it arrives by the deadline. But the fact that a voter must act sooner when they choose to mail in their ballot rather than deliver it does not deprive them of the choice; rather, it merely affects how and when that choice must be exercised.

Moreover, any deadline has an arbitrary nature to it and different policy considerations behind it. Even plaintiffs' suggestion that we rule that ballots postmarked on or before election day must be counted if received by election officials within the six-day period following election day, while having a valid policy consideration behind it,[10] is also ultimately arbitrary. Additionally, any deadline by which a ballot must be received creates the possibility that some

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[9] One of the issues presented in this case, which will be addressed infra, deals with an allegation that not all local elections clerks make absentee ballots available at the beginning of the 40-day period. This, however, presents a different question.

[10] The six-day deadline coincides with the date by which local clerks must determine whether to count any provisional ballots. MCL 168.813. A provisional ballot is one cast on election day by a voter who does not appear on the registration rolls for the polling place at which the voter appears and it must thereafter be determined if the voter was, in fact, eligible to vote. MCL 168.523a.

votes will not be counted. Articles in the media occasionally appear about letters that are delivered years, even decades, after they are mailed.[11] While these are extreme, and undoubtedly rare, examples, they point out that when choosing to submit an absentee ballot by mail, one assumes the risk that the ballot will not arrive by the deadline (any deadline), or even arrive at all.

Certainly, the later the deadline to be received by, the greater the likelihood is that a ballot will arrive in time to be counted. But ultimately any deadline carries with it the possibility that voters will be disenfranchised as their ballots will arrive too late to be counted.[12] Obviously, though, there must be a deadline—at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision. And we follow the view that courts should typically defer to the Legislature in making policy decisions. There are many competing considerations—what deadline gives a fair opportunity for all persons to vote on an equal basis, what deadline allows for votes to be counted in a timely manner (and what is considered timely), what other deadlines in the process may need to be changed as well, to name just a few. These are considerations best resolved by reflective legislative consideration, not by judicial fiat.[13] The courts' role is limited to ensuring that the deadline chosen by the Legislature does not effectively preclude the ability of a voter to submit their absentee ballot at any point during the 40 days before an election.[14]

Plaintiffs argue that the provision in Proposal 3 that grants the right to vote by absentee ballot without providing a reason and to submit that ballot by mail, and to do so anytime during the 40 days before an election, requires that a voter be able to mark that ballot and deposit it in the mail anytime during that 40-day period, including on election day. Again, the relevant passage reads: "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." § 4(1)(g). While this provision does not define the word "vote," plaintiffs looks to a number of sections within the election statute that

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[11] See, e.g., "Long-lost letter: Postal Service delivers 81-year-old Christmas card to Billings woman", Billings Gazette, May 27, 2019. <https://billingsgazette.com/news/local/long-lost-letter-postal-service-delivers-81-year-old-christmas-card-to-billings-woman/article_4fac4ebd-88d1-5768-85f6-c7f9c5fe452a.html> accessed June 18, 2020. And, actually, in this case the letter never was actually delivered to the intended recipient or their heir as the article indicates that it was returned to sender (or, actually, the sender's heir, as the sender had died 50 years previously).

[12] For that matter, even in-person voting carries a deadline—to present oneself by the time the polls close. There are likely cases where a voter arrives after the polls close, for whatever reason, and is unable to cast their ballot.

[13] Plaintiffs assert that it is "manageable" to implement a "sent-by-election-day deadline" rather than a "received-by-election-day deadline," even pointing to eleven states that do so. This would certainly be relevant to the Legislature if it chooses to address this issue. But it does not compel this Court to grant plaintiffs' requested relief.

[14] For example, if the Legislature were to set the deadline 45 days before the election, such a provision would clearly violate § 4(1)(g).

use the word "vote" in a context that suggests a meaning of marking a ballot.[15] Plaintiffs argue that to interpret the word "vote" in § 4(1)(g) as requiring the delivery of the ballot to election officials would render these statutes "nonsensical" and "metaphysically impossible" because the context of the use of the word "vote" in those statutes requires it to mean "marking a ballot" or similar usage. We are not persuaded by plaintiffs' argument.

We reject 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 by plaintiffs. "Vote" has many different meanings, both as a noun and a verb.[16] But, more to the point, even accepting plaintiffs' argument that "vote" means something akin to "marking the absentee ballot," it does not change the outcome. Voting is not the single act of marking a ballot, but the entire process.[17] Indeed, ultimately plaintiffs' argument is self-defeating. If we accept plaintiffs' argument that the plain text employs "the commonsense meaning that a person 'votes' an absentee ballot when she fills it out,"[18] then we would necessarily have to conclude that all that is guaranteed under Proposal 3 is the right to fill out an absentee ballot, not to have it counted. Such a conclusion would be absurd. Accordingly, "vote" must refer to the entire process of voting, which in the context of absentee voting starts with requesting an application to apply for an absentee ballot and continues to the delivery of the completed ballot to the appropriate election officials.

This then brings us back to our previous discussion. There must be a deadline for the submission of the completed ballot to election officials. And the deadline under existing law does not effectively preclude a voter from completing the process of voting by absentee ballot during the 40 days before the election.[19]

We turn next to plaintiffs' argument that the statutory requirement that absentee ballots be received by the close of the polls, even if previously constitutional, became unconstitutional because "the legislature may not act to impose additional obligations on a self-executing

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[15] See MCL 168.764a, MCL 168.759a(6), MCL 168.759a(13), MCL 168.932(i), and MCL 168.931(m).

[16] See, e.g., Merriam-Webster's Collegiate Dictionary (11th ed.), which provides over a dozen different definitions, none of which specifically refer to "marking a ballot" or similar language. The closest are "the act or process of voting" and "a method of voting."

[17] See the definition referred to in the previous footnote.

[18] Plaintiffs' brief, p 20.

[19] As a side note, there is an inherent flaw in plaintiffs' argument that ballots must be counted if mailed on election day, even if received thereafter. The plain text of § 4(1)(g) guarantees the right "to vote an absent voter ballot . . . during the forty (40) days *before* an election . . ." (emphasis added). Even if we were to accept plaintiffs' constrained definition of "vote" and the argument that that definition compels the counting of ballots received after the polls close, that would require that the mailed-in ballots would have to have been postmarked the day *before* election day, but not those postmarked *on* election day. That is, § 4(1)(g) by its terms does not guarantee a right to vote by absentee ballot *on* election day, only during the 40 days *before* election day.

constitutional provision." *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). In that case, the Michigan Supreme Court found violative of the state constitution a statutory provision that initiative petitions must be submitted at least ten days before the start of a legislative session. The Court, 384 Mich at 466, reasoned that:

> As pointed out by Judge Lesinski in the opinion below (1970), 24 Mich App 711, 725:
>
> "It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. *Soutar v. St. Clair County Election Commission* (1952), 334 Mich 258; *Hamilton v. Secretary of State* (1924), 227 Mich 111, 125:
>
> " ' "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." ' "
>
> Whether we view the ten-day filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same—the requirement restricts the utilization of the initiative petition and lacks any current reason for so doing.

While Proposal 3, by its express terms, is self-executing, we reject plaintiffs' argument that that precludes the Legislature from applying a deadline by which absentee ballots must be received. As already discussed at length, a deadline is necessary. Indeed, even plaintiffs tacitly admit the necessity of a deadline by proposing a deadline of their own. And while the drafters of Proposal 3 could easily have included a deadline by which ballots must be received, they did not do so. Certainly, the drafters would have been aware of the existing requirement that ballots be received by the close of polls on election day, yet chose not to include a provision altering this deadline in their proposal. Presumably, the drafters were content to leave this decision to the Legislature. Indeed, § 4(2) provides that "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections . . . and to provide for a system of voter registration and absentee voting."

Thus, the question under *Wolverine Golf Club* becomes whether the current deadline curtails or places an undue burden on voters from voting absentee, or submitting their absentee ballot by mail. We conclude that it does not. While a voter may submit their absentee ballot by mail, they are not required to do so. They may personally deliver the ballot in person to the city or township clerk, they may have an immediate family member deliver the ballot, or request the local clerk to pick up the ballot. MCL 168.764a. And, of course, a voter may still mail in their ballot, though with the need to do so sufficiently in advance of election day to ensure the likelihood that it will be delivered by election day. And a voter is provided with a 40-day period in which to do so.

Plaintiffs next argue that the received-by deadline violates the purity of elections clause set forth in Const 1963, art 2, § 4(2). We disagree. The purity of elections clause states that "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." Const 1963, art 2, § 4(2). "The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm*, 305 Mich App 649, 676; 854 NW2d 489 (2014) (quotation marks and citation omitted).

> The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm. [*Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007), lv den 483 Mich 907 (2009) (quotation marks and citations omitted).]

Plaintiffs argue that the received-by deadline violates the purity of elections clause because it permits two similarly situated individuals to mail their absentee ballots on the same day, but because of differences in mail-processing speeds, one voter's ballot may be timely received and counted and the other voter's ballot may not be timely received and, accordingly, not counted. Plaintiffs also assert that enforcing the received-by deadline results in an impermissible differentiation between absentee voters whose ballots are not counted because they were not received by 8:00 p.m. on election day and voters whose ballots are counted because the voters were standing in line to vote at the polls at 8:00 p.m. when the polls closed. MCL 168.720 provides that "[e]very qualified elector present and in line at the polls at the hour prescribed for the closing therefore shall be allowed to vote." Further, plaintiffs argue that the received-by deadline subverts "the will of the voters who adopted Proposal 3," and that the purity of elections clause requires that ballots mailed by election day be counted. (Plaintiffs' brief, pp 29-30.)

Defendant correctly argues that the received-by deadline is facially nondiscriminatory and applies equally to all voters who choose to submit absentee ballots by mail. Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absentee ballots. That determination was a policy decision and the purity of elections provision grants the Legislature the authority to provide for a system of absentee voting. Plaintiffs essentially ask this Court to implement a policy different from that chosen by the Legislature. Because the purity of elections clause requires the Legislature to make policy determinations, this Court does not have the authority to do so. Moreover, mandamus relief is inappropriate if the act sought to be performed involves judgment or the exercise of discretion. *Hanlin*, 299 Mich App at 248.

Plaintiffs next contend that the received-by deadline violates the free speech and assembly clauses[20] set forth in Const 1963, art 1, §§ 3 and 5, the right to equal protection set forth in Const 1963, art 1, § 2, and the right to vote set forth in Const 1963, art 2, § 4(1)(a). Const 1963, art 1, § 3, guarantees the people of Michigan "the right peaceably to assemble, to consult for the common

[20] Plaintiffs fail to articulate how the received-by deadline implicates the constitutional right to peaceably assemble.

good, to instruct their representatives and to petition the government for redress of grievances." Const 1963, art 1, § 5, provides that "[e]very 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 1, § 2, states that "[n]o 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." Finally, Const 1963, art 2, § 4(1)(a), guarantees Michigan citizens "[t]he right, once registered, to vote a secret ballot in all elections."

Plaintiffs contend that the received-by deadline is facially unconstitutional because not counting an absentee voter's ballot denies the voter his or her right to vote and to free speech. They argue that the deadline particularly burdens the speech of late-deciding voters. They also argue that ballots mailed on the same day could be delivered to the city or township clerk on different days, resulting in some ballots being counted and others not being counted solely because of differing mail delivery times in violation of voters' equal protection rights.

Plaintiffs assert that laws that severely burden protected political expression or differentiate between individuals with respect to fundamental rights are subject to strict scrutiny. In *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 35; 740 NW2d 444 (2007), however, our Supreme Court held that "the Michigan Constitution does not compel that every election regulation be reviewed under strict scrutiny." The Court recognized that in *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992), the United States Supreme Court "rejected the notion that every election law must be evaluated under strict scrutiny analysis." *Id*. at 20-21. The Court stated that the *Burdick* Court "recognized that 'to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *Id*. at 21, quoting *Burdick*, 504 US at 433. Accordingly, the Court "adopt[ed] the 'flexible test' articulated in *Burdick* when resolving an equal protection challenge to an election law under the Michigan Constitution." *Id*. at 35. This Court has also applied the "flexible test" in the context of a first amendment challenge to an election law. See *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 681-683; 662 NW2d 804 (2003), lv den 469 Mich 946 (2003).

A statute is presumed constitutional, and the burden of proving otherwise rests with the party challenging the statute's constitutionality. *In re Request for Advisory Opinion*, 479 Mich at 11. "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the act would be valid." *Id*. (quotation marks, citations, brackets, and footnotes omitted). "[S]tates have a compelling interest in preserving the integrity of their election processes[.]" *Id*. at 19. "In order to protect that compelling interest, a state may enact generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process[.]" *Id*. at 19-20 (quotation marks and citation omitted).

> In sum, while a citizen's right to vote is fundamental, this right is not unfettered. It competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve

> the purity of elections and to guard against abuses of the elective franchise, including ensuring that lawful voters not have their votes diluted. *Id*. at 20.

Our Supreme Court articulated the *Burdick* test as follows:

> [T]he first step in determining whether an election law contravenes the constitution is to determine the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. [*Id.* at 21-22.]

Moreover, the Court recognized that every election regulation "imposes to some degree a burden on an elector." *Id*. at 22.

In *In re Request for Advisory Opinion*, 479 Mich at 36, the Court held that the requirement that a voter provide photo identification before being provided a ballot did "not impose a severe burden on the right to vote" and imposed "only a reasonable, nondiscriminatory restriction" that furthered the state's "compelling regulatory interest in preventing voter fraud," and enforced the purity of elections provision set forth in Const 1963, art 2, § 4. Similarly, the received-by deadline for absentee ballots does not impose a severe restriction on the right to vote and is a reasonable, nondiscriminatory provision that "protect[s] the integrity and reliability of the electoral process." See *Anderson v Celebrezze*, 460 US 780, 788 n 9; 103 S Ct 1564; 75 L Ed 2d 547 (1983). This is particularly true considering that a voter is not required to mail his or her absentee ballot. Rather, the voter or an immediate family member may deliver the ballot in person to the city or township clerk, or, if requested, the clerk must pick up the ballot or send an election assistant to pick up the ballot. MCL 168.764a. Accordingly, the received-by deadline is not unconstitutional.

Plaintiffs next argue that the failure of local clerks to immediately process absentee-ballot applications within 40 days of an election violates Const 1963, art 2, § 4(1)(g). Initially, we note that the concept that a local clerk must "immediately" issue an absentee ballot is found in the provisions of MCL 168.761(1), which provides that a clerk must immediately forward a ballot upon receipt of the application or, if ballots are not yet available, as soon as the ballots are received. Defendant states in her brief that she has, in fact, advised local clerks to issue ballots within 24 hours of receipt of the application. While 24 hours is not literally "immediately" upon receipt, neither is it feasible, as defendant points out, to actually issue a ballot immediately upon receipt of the application as the application must be verified and the ballot prepared for mailing, as well as the fact that there may be a backlog of requests that must be processed.

Plaintiffs allege that in the March 2020 Presidential primary, some 402 townships failed to start mailing absentee ballots by the beginning of the 40-day period. They also refer to "some election clerks" in "prior elections" did not permit voters to cast their absentee ballots within the 40-day period. Even accepting these factual allegations as true, we fail to see what mandamus relief this Court can provide in the instant action. The Secretary asserts that she has discharged her legal duty to, in essence, direct local clerks to comply with the law. Given the lack of evidence

to the contrary, we accept the Secretary at her word. If a local election clerk has ignored or otherwise failed to comply with the Secretary's directions and the law, it would require a mandamus action against those clerks to force their compliance. But none of those clerks are before us, so we cannot at this time grant relief.

Finally, plaintiffs argue that requiring absentee voters to pay the return postage to mail an absentee ballot violates "[t]he right, once registered, to vote a secret ballot in all elections," set forth in Const 1963, art 2, § 4(1)(a), and the right to choose whether to submit an absentee ballot by mail set forth in Const 1963, art 2, § 4(1)(g).

Applying the *Burdick* test previously discussed, requiring absentee voters to pay for return postage does not impose a severe restriction on the right to vote. Rather, it is a reasonable, minimal, and nondiscriminatory restriction. Notably, Const 1963, art 2, § 4(1)(g), provides voters the right *to choose* to submit an absentee ballot by mail. It does not require that voters be permitted to submit absentee ballots at no cost. Every election regulation "imposes to some degree a burden on an elector." *In re Request for Advisory Opinion*, 479 Mich at 22. Considering the various options for submitting an absentee ballot, the requirement that a voter pay return postage is minimal.[21] To the extent that the cost of return postage may pose a financial hardship, the voter or an immediate family member may deliver the ballot in person, or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. MCL 168.764a.

For these reasons, we conclude that plaintiffs have failed to establish their entitlement to mandamus relief and the complaint for a writ of mandamus is denied. Defendant may tax costs.

/s/ David H. Sawyer

[21] Indeed, even the voter who chooses to vote in person will likely bear the cost of transportation to the polling place, except for those who live within walking distance.

STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs,

v

SECRETARY OF STATE,

Defendant.

FOR PUBLICATION
July 14, 2020

No. 353654

Before: SAWYER, P.J., and GLEICHER and RIORDAN, JJ.

RIORDAN, J. (*concurring*).

I concur with the majority. I write separately to further explain that although it is within the province of this Court to grant the extraordinary remedy of mandamus relief when merited, to do so in this instance would be an abuse of discretion. *LeRoux v Secretary of State*, 465 Mich 594, 606; 640 NW2d 849 (2002); *O'Connell v Dir of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016); *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016).

COUNT I

I agree with the majority in that Const 1963, art 2, § 4(1)(g) 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. If an absentee voter ballot is not received before the close of the polls on election day, even pursuant to Proposal 3, which was overwhelmingly approved by Michigan voters in 2018, the ballot cannot be counted regardless of the date displayed in the postmark. *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001).

This conclusion is consistent with the objective of constitutional interpretation which is to determine the text's original meaning to the ratifiers, here the people of the State of Michigan, at the time of ratification. *Citizens Protecting Michigan's Constitution v Secy of State*, 503 Mich 42, 61; 921 NW2d 247 (2018). Therefore, the issue in this matter must be interpreted using the common understanding of the people at the time of ratification—a pursuit which involves applying the ordinary meaning of each term used at the time of ratification, unless technical, legal terms are

used. *Paquin v City of St Ignace*, 504 Mich 124, 129-130; 934 NW2d 650 (2019). Also applicable in this case is a secondary rule of state constitutional interpretation which requires that "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 406; 185 NW2d 9 (1971).

There is no issue that the people, by a very large majority, voted for and chose the option of voting by mail. Nor is there any dispute that "voting" is a process which necessarily includes having one's vote counted. See *Reynolds v Sims*, 377 US 533, 554; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (the fundamental right to vote encompasses the right to have those votes actually counted); *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964); *Kramer v Union Free School Dist No 15*, 395 US 621, 626; 89 S Ct 1886; 23 L Ed 2d 583 (1969). However, the right to vote is not absolute and limitations placed upon it are not *per se* unconstitutional. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16, 20; 740 NW2d 444 (2007) (a citizen's right to vote is fundamental, but is not unfettered; it competes with the state's compelling interest in preserving the integrity of its elections and the Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise).

Article 2, § 4 provides for a registered voter "[t]he right . . . to vote an absent voter ballot without 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." (Emphasis added). The parties submit no evidence whatsoever to support their notion that when the voters adopted the amendment in 2018, that they did so with the common understanding that the right to vote was absolute regardless of its timing, or even that it encompassed a right to have absentee ballots counted after the statutory received-by deadline of 8 p.m. on election day. *Michigan United Conservation Clubs v Secy of State*, 464 Mich 359, 376–77; 630 NW2d 297 (2001) (YOUNG, J., concurring) ("Those who suggest that the meaning to be given a provision of our constitution varies from a natural reading of the constitutional text bear the burden of providing the evidence that the ratifiers subscribed to such an alternative construction. Otherwise, the constitution becomes no more than a Rorschach exercise in which judges project and impose their personal views of what the constitution should have said.").[1] There is no evidence that the voters were unaware of the existing received-by deadline, or that they were unaware that the right to vote has

[1] To ascertain the common understanding of the constitutional provision, the Court may also consider the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished by it, but the process of ascertaining the understanding of the framers should not be confused with the process of ascertaining the understanding of the ratifiers. *Traverse City School Dist*, 384 Mich at 405. The ballot summary of Proposal 3 provides a statement of purpose regarding the drafters' intent, and offers some insight into the circumstances surrounding the referendum. However, it does not necessarily reflect the intent of the ratifiers, and thus, it is not particularly helpful in discerning their common understanding in relation to the received-by deadline. Nor is it within the province of the judicial branch to insert that purpose now.

never been recognized as completely unfettered by this Court—or by any higher court, or by any controlling authority or political branches of government anywhere in this state or this country.[2]

In the absence of any evidence that the ratifiers intended to expand the right to vote beyond its historically understood and accepted bounds and transform it into an absolute right, I cannot conclude that the existing received-by deadline is unconstitutional by virtue of the adopted language in Proposal 3, particularly when our rules of construction dictate otherwise. *Traverse City Sch Dist*, 384 Mich at 406 ("wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does"). Even the most liberal construction of the provision does not compel a different result where there is no evidence that the purpose of the provision was to create an unfettered and absolute right to absentee voting. Art 2, § 4(1) (stating that the provisions in the subsection "shall be liberally construed in favor of voters' rights *in order to effectuate its purposes*" (emphasis added)).

In 2018, the voters adopted the referendum *as written*. At that time, the drafters could have included an alternative received-by deadline in the ballot initiative but, from the plain language of the referendum, decided not to. Since the time of the referendum's passage, the political process has had every opportunity to supplement the amendment that was passed. Eighteen months after the referendum, a bill was introduced in the Legislature to address some of these issues, but nothing further has been done to enact the legislation advocated by plaintiffs, and seemingly, by defendant.[3] While the Legislature may yet act to address these issues in advance of the general election, this Court cannot command it do so. As we have previously stated:

> [w]e cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch. As has been long recognized, when a court confronts a constitutional challenge it must determine the controversy stripped of

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[2] Conceptually, voting has evolved from a political right or privilege, to a natural right, and now to a civic duty. See *Yick Wo v Hopkins*, 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886) (the right to vote is "a privilege merely conceded by society"); *Wesberry*, 376 US at 17 (decided in 1964 and stating that persons qualified to vote have a constitutional right to have their vote counted); *Russell v Lundergan-Grimes*, 784 F3d 1037, 1052 (CA 6, 2015), citing *Crawford v Marion Cnty Election Bd*, 553 US 181, 203; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (plurality opinion) for the proposition that citizens cannot demand as a constitutional entitlement an environment in which fulfilling the civic duty of voting is effortless. To the extent that "the right to vote" is a legal term of art, the case law at the time of ratification does not support an interpretation that the right to vote is unfettered, much less the right to vote absentee is unfettered. *In re Request for Advisory Opinion*, 479 Mich at 20; *McDonald v Bd of Election Com'rs of Chicago*, 394 US 802, 807; 89 S Ct 1404; 22 L Ed 2d 739 (1969).

[3] As the majority notes, 2020 HB 5807, introduced May 20, 2020, would address some of the issues raised.

> all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics. [*Hammel v Speaker of House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012), quoting *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999).]

Nor can we short-circuit the political process and disregard the separation of powers by "revis[ing], amend[ing], deconstruct[ing], or ignor[ing]" the existing statutory received-by deadline[4] merely because the parties agree it should be so. This Court must determine *independently* the meaning of constitutional terms, and it is not bound by the interpretation of another branch of government—let alone by a stipulation of the parties who brought this case and controversy before us. *Council of Organizations & Others for Ed about Parochiaid v Governor of Michigan*, 216 Mich App 126, 131; 548 NW2d 909 (1996) (this Court is not bound by another branch's interpretation of constitutional provisions, but must determine independently the meaning of constitutional terms); *Mack v City of Detroit*, 467 Mich 186, 209; 649 NW2d 47 (2002) ("[N]o one can seriously question the right of this Court to set forth the law as clearly as it can, irrespective whether the parties assist the Court in fulfilling its constitutional function. The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions.").

The statutory received-by deadline is presumed constitutional, and the burden of proving otherwise rests with the party challenging the statute's constitutionality. *In re Request for Advisory Opinion*, 479 Mich at 11. At first glance, it is difficult to discern which party carries the burden in this case, as it seems that defendant concedes the issue and leaves it to this Court to select a new received-by deadline. However, it ultimately is plaintiffs' burden to show that the existing received-by deadline poses a severe infringement on the right to vote—and it is a burden that they have failed to meet. *Id.* at 36.

Plaintiffs recite a parade of horribles that may result from our refusal to grant mandamus relief. However, those outcomes are speculative, and as such, are insufficient to carry their burden. See *Purcell v Gonzalez*, 549 US 1, 6; 127 S Ct 5; 166 L Ed 2d 1 (2006) (STEVENS, J., concurring) (stating that it was prudent to allow an election to proceed without enjoining certain statutory provisions where factual issues remained unresolved because, given the importance of the constitutional issues, the matter should be resolved on the "basis of historical facts rather than speculation"). Moreover, this Court cannot, and this concurrence certainly does not, rest its decision on whether or not mandamus relief might impact the outcome of the upcoming presidential election. To do so would serve a number of evils and would be an abdication of our duty as an independent judiciary. Assuming we know the minds of the voters,[5] which is an impossibility, and disregarding the other important issues on the upcoming ballots in this state,

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[4] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008).

[5] One would need to assume that absentee voters are predisposed to vote for one candidate or another. But see Thompson et al, *Universal vote-by-mail has no impact on partisan turnout or vote share*, 117 PNAS 25 (2020) (contrary to popular claims, empirical evidence indicates that voting-by-mail does not favor any party over another).

this Court cannot put its heavy thumb on the delicate scales of democracy. To do so would usurp the role of the Legislature, supplant the will of the electorate when it adopted Proposal 3 as written, and dilute the votes that comply with the constitutionally mandated received-by statute. *In re Request for Advisory Opinion*, 479 Mich at 43 (the right to vote enshrined in Art 2, § 4 includes the assurance that one's vote will not be diluted by votes cast illegitimately). Doing so also would place this Court above the co-equal branches of our state government, and would delegitimize the election on a national scale by debasing the legitimate votes cast in our sister states. *Reynolds*, 377 US at 555, (stating that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

This Court is not unaware, or unsympathetic to the very real and serious plight of voters during the ongoing COVID-19 pandemic. Voters cannot be expected to exercise their right to vote at their own peril—or to risk the health of their fellow community members in order to have their votes counted. However, the method of addressing these issues requires the exercise of discretion, the marshaling and allocation of resources, and the confrontation of thorny policy issues—tasks which are appropriately performed by the Legislature. The people of this state, in their right to self-governance, tasked the Legislature with the constitutional duty "to 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*." Art 2, § 4(2) (emphasis added). For this Court to appropriate that task would be an improper infringement, and would jeopardize the people's right to self-governance. We must leave the issue in the capable hands of the Legislature and the Executive which have the constitutional authority, resources, and access to the best practices throughout the country from which to craft solutions.[6] Therefore, I agree with the

[6] It appears the Legislature has already taken steps to address many issues surrounding the upcoming general election. In addition to 2020 HB 5807, discussed earlier, the Legislature is also considering 2020 SB 909 which proposes to eliminate in-person voting at precincts and convert elections entirely to mail-in voting, 2020 SB 756 which proposes to allow clerks additional shifts of workers to count absentee ballots, and SB 757 which proposes to permit clerks to preprocess absentee ballots ahead of Election Day.

In addition, the Legislature may look to the best practices of other states. Five states conduct elections entirely by mail. Oregon began doing so in 2000, Washington in 2005, Utah in 2013, Colorado in 2014, and Hawaii more recently in the 2020 primary. See Colo Rev Stat 1-5-401; Haw Rev Stat 11-101; Or Rev Stat 254.465; Utah Code 20A-3a; Wash Rev Code 29A 40-010. Washington D.C. plus 29 states, including Michigan, permit "no-excuse" absentee voting in federal elections; 16 states permit "excuse-only" absentee voting, and most states statutorily require absentee ballots to be received by Election Day. National Conference of State Legislatures (NCSL), *All-Mail Elections (aka Vote-By-Mail)*, <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx> (accessed July 6, 2020).

Notably, Colorado, which has a received-by deadline of 7 p.m. on election day, has been hailed as the model for voting by mail. To be counted, all envelopes containing absentee voter ballots must be in the hands of the designated election official or an election judge for the local

majority opinion that mandamus relief is not warranted. *McLeod v State Bd of Canvassers*, 304 Mich 120, 125; 7 NW2d 240 (1942) (mandamus should not issue where the party seeking it has an adequate remedy at law); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008) (the party seeking a writ of mandamus must establish that it (1) has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result).

COUNT II

I agree with the majority opinion that mandamus relief is inappropriate regarding plaintiffs' allegation that, by their estimate, roughly one-third of all local clerks have failed to immediately process absentee-ballot applications within 40 days of an election in violation of MCL 168.761(1).

"Michigan's elections system is administered by 1,603 county and local election officials making it one of the most decentralized elections systems in the nation."[7] There is nothing in the record identifying which clerks this Court should direct defendant to instruct, and it is not our job to seek out that information or substantiate plaintiffs' allegations. That burden lies with plaintiffs, *In re Request for Advisory Opinion*, 479 Mich at 11, and it requires more specificity than a rough estimate of the number of possible offenders. See *Natl Bank of Detroit v State Land Office Bd*, 300 Mich 240, 250; 1 NW2d 525 (1942) ("Where none but specific relief will do justice, specific

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government not later than 7 p.m. on election day. Colo Rev Stat 1- 7.5- 107(4)(b)(II); Leonhardt, *An Election Day Success*, New York Times (July 1, 2020) (discussing Colorado's model approach to voting by mail).

During the COVID-19 pandemic, most states are creating solutions to address the same issues raised by the parties in this lawsuit, and other democratic countries have conducted elections with mixed results. See e.g., Mays, *Vernon Town Meeting Goes Digital, Includes Drive-Up Vote*, NBC Connecticut News (March 25, 2020), available online at <https://www.nbcconnecticut.com/news/local/vernon-town-meeting-goes-digital-includes-drive-up-vote/2245233/> (discussing 55 votes cast by residents regarding town lease payments); The Economist, Why voting online is not the way to hold an election in a pandemic, <https://www.economist.com/international/2020/04/27/why-voting-online-is-not-the-way-to-hold-an-election-in-a-pandemic> (posted April 28, 2020) (accessed July 6, 2020); Amy Gunia, Time, *South Korea Is Voting in the Middle of Coronavirus. Here's What U.S. Could Learn About Its Efforts to Protect Voters*, Time, <https://time.com/5818931/south-korea-elections-coronavirus/> (posted April 13, 2020) (accessed July 6, 2020); Ishaan Tharoor, Washington Post, *Coronavirus Kills Its First Democracy*, (March 31, 2020). Additionally, the Legislature could choose to adopt the same received-by deadline that it employs for uniformed services and overseas voters. MCL 168.795a(16). See also the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 USC 203.

[7] Election Officials Manual, February 2019, Chapter 1, Structure of Michigan's Election System, p 1 <www.michigan.gov/documents/sos/I_Structure_of_MI_Elections_System_265982_7.pdf> (accessed July 6, 2020).

relief should be granted if practicable. And where a right is single and specific it usually is practicable."). Thus, mandamus relief is not appropriate here.

COUNT III

I agree with the majority opinion that prepaid return postage for absentee ballots is not required under our state constitution.[8] However, I do not find particularly persuasive defendant's argument that a voter's minimal burden of paying postage is outweighed by the state's important interest in its finances and that defendant suffers from reduced resources due to the economic downturn resulting from the pandemic. Defendant requested and received $12 million in federal funds for election administration under the Help America Vote Act (HAVA) plus $2.4 million in matching state funds and used some portion of that money to prepay postage for absentee ballots in the May 5, 2020 primary election.[9] Defendant also requested and received an additional $11.3 million under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and $2.3 million in matching state funds for election administration costs associated with the pandemic.[10] I am unaware of any federal or state statute that prohibits defendant from allocating a portion of those funds for prepaid postage. Rather, defendant suggests that her failure to include the expense of prepaid return postage in her funding requests now precludes her from allocating money for this expenditure.[11]

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[8] Although plaintiffs argue that MCL 168.761(1) compels local clerks to immediately process absentee ballot applications, see Count II, *supra*, this statute is not cited in their argument regarding prepaid postage even though it directs clerks to forward absentee ballots "by mail, postage prepaid," or by personal delivery under certain circumstances. Plaintiffs raise the issue of prepaid postage only as a constitutional challenge under Article 2, § 4, and thus, this Court considers only the constitutional dimension of this issue.

[9] See U.S. Election Assistance Commission, 2020 HAVA Funds, <https://www.eac.gov/payments-and-grants/2020-hava-funds> (accessed July 7, 2020); Executive Order No. 2020-27 (permitting the Secretary of State to "assist local clerks, county clerks, and election administrators with: the mailing of absent voter ballot applications with a postage-prepaid, pre-addressed return envelope to each registered voter within any jurisdiction conducting a May 5, 2020 election; the preparation of postage-prepaid absent voter ballot return envelopes;" and other measures); Secretary of State, *Secretary of State to mail absent voter ballot applications to all May 5 voters*, <https://www.michigan.gov/sos/0,4670,7-127-93094-522761--,00.html> (posted March 23, 2020) (accessed July 7, 2020).

[10] See U.S. Election Assistance Commission, 2020 CARES Act Grants FAQ <https://www.eac.gov/payments-and-grants/2020-cares-act-grants> (accessed July 7, 2020).

[11] The parties have not estimated the total cost for providing prepaid postage. However, it seems the United States Postal Service offers some reasonably affordable packages. See United States Postal Service, *Facilitating the Processing and Delivery of Return Ballots from Voters Using Prepaid Postage*, <https://about.usps.com/gov-services/election-mail/prepaid-reply-mail-info.htm> (accessed July 7, 2020). Additionally, a number of precincts already provide return postage for absentee ballots. See The Detroit News, *One of Michigan's largest cities makes*

Although I do find defendant's argument persuasive, I nonetheless agree with the majority's conclusion that requiring voters to supply their own stamps is not a severe restriction when there is no requirement that absentee voters mail their ballots. Instead the voter or an immediate family member may deliver the ballot in person or, if requested, the city or township clerk must pick up the ballot or send an election assistant to pick up the ballot. MCL 168.764a. In light of these options, I cannot conclude that plaintiff is entitled to mandamus relief on this issue.

Accordingly, I concur with the majority.

/s/ Michael J. Riordan

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absentee voting easier for November, <https://www.detroitnews.com/story/news/politics/2020/06/28/sterling-heights-absentee-voting-easier/3263222001/> (posted June 28, 2020) (accessed July 7, 2020) (discussing Sterling Height's decision to provide prepaid postage and Detroit's longstanding policy of doing the same).

STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs,

v

SECRETARY OF STATE,

Defendant.

FOR PUBLICATION
July 14, 2020

No. 353654

Before: SAWYER, P.J., and GLEICHER and RIORDAN, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

"All political power is inherent in the people." Const 1963, art 1, § 1. Before November 2018, Michigan's Constitution afforded the people only rudimentary protection of their right to exercise their political power as voters. Article 2 contained 10 sections describing the formal prerequisites for voting and delineating the procedural framework governing elections. But our Constitution lacked an affirmative declaration of specific voting rights.

That changed when the people overwhelmingly approved Proposal 3, a constitutional amendment establishing the following substantive voting rights:

- To vote a secret ballot;
- To vote an absent voter ballot without giving a reason;
- To vote an absent voter ballot during the forty (40) days before an election;
- To apply for and receive an absent voter ballot in person or by mail; and
- To submit an absent voter ballot in person or by mail.

Here are the relevant words the people approved:

> (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. [Const 1963, art 2, § 4.]

My colleagues hold that despite the clear and unambiguous language of Proposal 3 establishing a right to vote by mail, an absent voter who mails her ballot has no constitutional right to have that ballot counted if the ballot arrives after election day. This holding contravenes the language of the Constitution and the intent of the voters. I respectfully dissent.

I

The central issue presented is whether Article 2, § 4 compels the Secretary of State to count mailed ballots that arrive after 8 p.m. on election day. A trio of Michigan laws enacted before Proposal 3's passage, read together, prevent the Secretary of State from counting absent voter ballots that arrive in the clerk's office after the close of the polls. MCL 168.764b(1) states: "An absent voter ballot must be delivered to the clerk only as authorized in the instructions for an absent voter provided in section 764a." MCL 168.764a sets out step-by-step "instructions for an absent voter." "Step 6" provides: "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 an authorized assistant of the clerk after the close of the polls on election day will not be counted." And MCL 168.765 instructs: "If a marked absent voter ballot is received by the clerk after the close of the polls, the clerk shall plainly mark the envelope with the time and date of receipt and shall file the envelope in his or her office." MCL 168.765(4).[1] Plaintiffs contend that this statutory framework cannot be reconciled with the right to vote by mail enshrined in Article 2, § 4. They seek an order of mandamus compelling the Secretary of State to count properly voted, timely mailed absent voter ballots regardless of when they arrive in the clerk's office.

My colleagues find no conflict between these existing election laws and the constitutional guarantee of a right to vote by mail. The lead opinion declares that despite full compliance with all absentee voting rules, absentee voters must simply "assume[] the risk" that a mailed ballot won't arrive in time to be counted. Specifically acknowledging that voters now have the right to "submit" their ballots by mail, the lead opinion illogically terminates the right at that moment, negating the constitutional language the people approved.

[1] MCL 168.765a(6), as enacted by 2020 PA 95, effective June 23, 2020, requires that absent voter ballots received by the clerk *before* the close of the polls must be delivered "to the absent voter counting boards" established pursuant to the same public act.

A

City and township election clerks are authorized to mail absent voter ballots to voters until 5 p.m. on the Friday before a Tuesday election. MCL 168.759(1). Evidence presented to this Court substantiates that most first-class mail is delivered within two to five days. Assume a voter's timely application for an absent voter ballot arrives at the clerk's office on the Thursday or Friday before an election, and that the clerk mails the ballot on Friday.[2] A ballot mailed to a voter on a Friday is unlikely to land in the voter's hands before the following Monday. Assume further that the voter immediately fills in the ballot and places it in the mail. That ballot will not arrive in the clerk's office until after election day. And depending on the efficiencies of the United States Postal Service, even ballots mailed to the clerk on the Thursday, Friday or Saturday before an election may not arrive until *after* election day. These scenarios are not far-fetched. According to data supplied by the Secretary of State, during the May 2020 primary election, 3,307 absentee ballots (1.75% of those cast) arrived too late to be counted.[3] Voters who followed all the rules were nevertheless disenfranchised.

Plaintiffs assert that Michigan's current election laws unconstitutionally constrain the Secretary of State from counting properly mailed absentee ballots that arrive after the close of the polls on election day. They seek an order of mandamus compelling the Secretary to perform her clear legal duty to direct the counting of such votes. The lead opinion lays out a smorgasbord of reasons for rejecting plaintiffs' arguments, all boiling down to one fundamentally incorrect premise: that Article 2, § 4 allows voters the right to "cast" their ballots by mail, to "submit" their ballots by mail, and to "mail" their ballots, but does not grant them the right to have their votes *counted*.

[2] MCL 168.761(1) provides that upon receipt of a valid application for an absent voter ballot, "the clerk immediately" must mail the absent voter ballot. The Election Officials' Manual published by the Michigan Bureau of Elections states: "A request for an absentee ballot must be processed immediately. It is recommended that the ballot be issued within 24 hours of the receipt of the application." Available at <https://www.michigan.gov/documents/sos/VI_Michigans_Absentee_Voting_Process_265992_7.pdf>, p 5.

[3] Plaintiffs' proofs reveal that in the March 2020 primary election, more than 150,000 voters requested an absentee ballot during the week before the election. The number of absentee voters increased substantially in the May 2020 election, undoubtedly due in part to the Covid-19 crisis and voters' fear of infection from standing in voting lines. Failing to count even a relatively small number of late-arriving absentee ballots can make all the difference. President Trump's margin in the 2016 presidential election was only 10,704 votes in Michigan. If 45% of eligible voters vote by absentee ballot in November 2020 and 1.75% of those votes are not counted because they arrived after the close of the polls on election day, more than 41,000 absent voters will be disenfranchised.

B

"[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. *Citizens Protecting Mich's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018) (cleaned up).[4] In ascertaining the meaning of an amendment's words, we are guided by "the rule of 'common understanding' " described by Justice COOLEY. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). The words the voters selected and approved, Justice COOLEY instructed, point the truest course to constitutional meaning. *Id*. Ultimately, " '[t]he intent to be arrived at is that of the people[.]' " *Id*., quoting Cooley, Constitutional Limitations (7th ed), p 81. We locate meaning "by applying each term's plain meaning at the time of ratification." *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67-68; 748 NW2d 524 (2008).

The words added by Proposal 3 are not difficult to parse. Voters now have the right to "vote" by mail. What did the voters understand voting by mail to mean? By enlarging the right to vote to include voting by a mailed ballot, the people dictated that the votes of absent voters would be *counted*. A right to vote by mail is a hollow right indeed if one's mailed vote is thrown in a wastebasket or placed in a file. See MCL 168.765.

"The right to vote has always received a preferred place in our constitutional system. The importance of this right can hardly be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens." *Mich State UAW Community Action Program Council v Secretary of State*, 387 Mich 506, 514; 198 NW2d 385 (1972). The meaning of the phrase "to vote" is deeply engrafted in our state and federal jurisprudence. Voting encompasses more than merely checking boxes on a form or pulling levers in a booth. "To vote" means to express a personal political preference *and to have that preference counted*. Voting is "a fundamental political right because [it is] preservative of all rights." *Yick Wo v Hopkins*, 118 US 356, 370-371; 6 S Ct 1064; 30 L Ed 220 (1886). Voting achieves this sacred place in our democratic pantheon because every vote matters. And that was the common understanding of the people who added specific language establishing specific voting rights to Article 2.

A court may discern constitutional meaning by reviewing the existing legal framework surrounding a new provision. See *People v Nutt*, 469 Mich 565, 567; 677 NW2d 1 (2004). Even a cursory review of the preexisting law surrounding voting confirms that the common understanding of the term "to vote" necessarily incorporates the right to have one's vote counted. Long ago, our own Justice COOLEY recognized in a concurring statement the "right" of "the electors . . . to have their votes counted and allowed in the general result." *People ex rel Dickinson v Sackett*, 14 Mich 320, 331 (1866) (COOLEY, J., concurring). One hundred years ago, our Supreme Court endeavored to protect "the constitutional right of every voter to vote for every officer to be

[4] This opinion uses the new parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

elected and to have his vote so counted as to have equal value and potentiality with the vote of every other elector who votes." *Wattles v Upjohn*, 211 Mich 514, 533-534; 179 NW 335 (1920).

The United States Supreme Court has consistently acknowledged that "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." *Gray v Sanders*, 372 US 368, 380; 83 S Ct 801; 9 L Ed 2d 821 (1963) (cleaned up). In *Reynolds v Sims*, 377 US 533, 555; 84 S Ct 1362; 12 L Ed 2d 506 (1964), a foundational voting rights case, the Supreme Court again highlighted the indisputable principle that "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." (Cleaned up.) More recently, in *Wisconsin v City of New York*, 517 US 1, 12; 116 S Ct 1091; 134 L Ed 2d 167 (1996), the Supreme Court again referenced the "fundamental right . . . to have one's vote counted."

But we do not need to consult the caselaw to discern the meaning of "to vote." We stand in long lines at polling places, too often in inclement weather and sometimes sacrificing our wages and our health, because we know that "all political power is inherent in the people." We vote to make a difference in our national, state or local governance, or to demonstrate our satisfaction with the status quo. We vote to select our leaders, to directly enact or repeal our laws, or to change our Constitution. We vote because we understand that voting is the key to a healthy democracy, that voting empowers "we the people." We vote because we have taken to heart that every vote counts.

The people who amended our Constitution in 2018 understood that the right to vote necessarily embodies the right to have one's vote counted. "The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Lake Co v Rollins*, 130 US 662, 671; 9 S Ct 651; 32 L Ed 1060 (1889). And any possible doubt about what the people intended by empowering mailed voting is dispelled by subsection (g) of Article 2, § 4, assiduously ignored by my colleagues, instructing that "[t]his subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes."

II

Const 1963, art 2, § 4, as amended, grants registered voters the right "to vote an absent voter ballot without giving a reason during the forty (40) days before an election." The amendment additionally grants to registered voters "the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." These are simple words. We do not need a dictionary to understand any of them. In everyday parlance, the amendment says that registered voters can apply for and receive their ballots through the mail. After filling out their ballots, voters can mail their ballots back to the clerk.

This case should be easy. 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. This interpretation squares with the historical and legal meaning of voting. It corresponds with the voters' intent.

Remarkably, in the middle of its meandering analysis of Article 2, § 4 the lead opinion essentially acknowledges that I am right. As to the voters' right to "submit" a ballot by mail, the lead opinion opines: "They certainly possess that right." The lead opinion declaims that it "would

be absurd" to believe that "all that is guaranteed under Proposal 3 is the right to fill out an absentee ballot, not to have it counted;" the concurrence agrees that voting "necessarily includes" counting cast ballots. The lead opinion even goes so far as to say that any vote-counting deadline "chosen by the Legislature" may not "effectively preclude the ability of a voter to submit their absentee ballot at any point during the 40 days before an election." I wholeheartedly agree with these propositions. And yet the lead opinion manages to talk itself into the "absurd" position it emphatically disdains. My colleague accomplishes this extraordinary turn-around by violating the first principle of constitutional interpretation. Rather than engaging the text, my colleague endeavors to read out of Article 2, § 4 the actual words ratified by the people. Instead, the lead opinion divines constitutional meaning from a "ballot summary."

The ballot summary at the heart of the lead opinion's "common understanding" analysis was approved by the Board of State Canvassers. According to the lead opinion, it does not "address" the right by vote by mail or the deadline for counting votes, omissions that the lead opinion somehow construes as proof that there is *no* right to vote by mail and that the people could not have cared less about "deadlines." In the lead opinion's view, the ballot summary "suggest[s] to voters that there would be some limitations on when election officials would be obligated to accept, and therefore count, ballots." This is an astonishing proposition for two reasons.

First, the lead opinion does not explain why it finds constitutional meaning in a "ballot summary" rather than the plain language of the constitutional text the people overwhelmingly approved. Unless the constitutional language under consideration is ambiguous or susceptible to many different interpretations, courts are forbidden from considering extraneous evidentiary sources. See *Nat'l Pride At Work, Inc*, 481 Mich at 80 ("When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited."). The words at issue here are not ambiguous, and the ballot summary is utterly irrelevant. "Our obligation is to give the words of our Constitution a reasonable interpretation consistent with the plain meaning understood by the ratifiers. Text that may require reasonable effort to parse is not for that reason ambiguous." *Co Rd Ass'n of Mich v Governor*, 474 Mich 11, 17; 705 NW2d 680 (2005) (cleaned up).

Second, the notion that a ballot summary trumps the words of the Constitution boggles the mind. The lead opinion makes no effort to explain why we should regard a ballot summary as a tool for depriving citizens of specifically enumerated rights they voted to approve. Ballot summaries cannot displace or override enacted words. And make no mistake, the rights to vote absentee and to vote by mail are specifically enumerated and easily understood.

Next, stating the obvious, the lead opinion declares that the voters "certainly possess" the right to "*submit* their absentee ballot[s] by mail," (emphasis added), as well as "to receive and cast" their ballots during the 40 days before an election. The lead opinion defines "the entire process of voting" as beginning by "requesting an application to apply for an absentee ballot" but ending with "the delivery of the completed ballot to the appropriate election officials." In an abrupt analytical shift, the lead opinion announces that *counting* an absent voter's vote is constitutionally irrelevant. And so it must be to justify upholding a deadline disenfranchising thousands of voters who conduct themselves in strict conformity with all voting rules.

Rather than engaging with the actual words the people added to our Constitution, my colleagues instead confer "deadlines" with constitutional magnitude, elevating their importance to

that of the right to vote itself. "[T]here must be a deadline—at some point, the ballots must be counted and a winner declared," the lead opinion inveighs. That deadline is up to the Legislature, we are admonished, and "[t]he courts' role is limited to ensuring that the deadline chosen by the Legislature does not effectively preclude the ability of a voter to submit their absentee ballot at any point during the 40 days before an election." Instead of critically examining the legality of the deadline at the heart of this case, my colleagues suggest that voters just forgo exercising their right to vote by mail if they want their votes counted, and content themselves with the knowledge that the Legislature is working on it.

Of course there must be a "deadline" for counting votes. And there *is* a deadline that permits the Secretary to count absentee ballots mailed before election day but arriving after. MCL 168.842(1) requires the board of state canvassers to "complete the canvass and announce their determination" of the result of a general election "not later than the fortieth day after the election." The canvass deadline for primary elections is 20 days. MCL 168.581. The Secretary has offered no reason that the canvass deadlines should not correspond to the deadline for counting timely mailed absentee ballots.[5]

Our task is not to mindlessly enforce a deadline solely because the Legislature selected it. Rather, we must evaluate whether the Secretary is empowered to enforce a deadline that prevents counting a substantial number of properly mailed ballots, thereby contravening Article 2, § 4. The lead opinion spills considerable ink in its paean to judicial review and the concurrence scolds on the same subject,[6] yet both conveniently forget the central lesson of *Marbury v Madison*, 5 US 137; 2 L Ed 60 (1803): "a statute apparently governing a dispute cannot be applied by judges . . . when such an application of the statute would conflict with the Constitution." *Younger v Harris*, 401 US 37, 52; 91 S Ct 746; 27 L Ed 2d 669 (1971). This case is about whether statutory deadlines stand in the way of the exercise of fundamental constitutional rights. If the statutory deadline conflicts with the exercise of a constitutional right, the Secretary has a duty as a constitutional officer to refrain from enforcing the deadline.

The concurring opinion argues that "there is no evidence that the purpose of the [amendment] was to create an unfettered and absolute right to absentee voting." This is a peculiar statement, given that the amendment manifestly *does* create an explicit right for registered voters

[5] It also bears mention that Michigan has a statutory "mailbox rule" applicable to overseas and "uniformed services" votes that operates to extend the deadline for counting absent voter ballots that arrive after the polls close if the clerk failed to "transmit" the ballot more than 45 days before an election. See MCL 168.759a(16).

[6] Reaffirming that this Court is not bound by a concession made by the Secretary's counsel at argument does not require a review of *Marbury v Madison*, 5 US 137; 2 L Ed 60 (1803). And despite counsel's concession corresponding to my position, if the Secretary intended to throw in the towel and admit defeat she would not have actively pursued a defense in this case. Undoubtedly the Secretary and her counsel were aware of Court's holding in *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001), an absentee voter ballot that does not reach the clerk before the close of the polls on election day "cannot be counted irrespective of the date displayed in the postmark." Capitulation was not an option.

to vote by mail during the 40 days before an election. Here are the unambiguously stated rights the people ratified: "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." It is hard to imagine plainer or more direct language.

Because the right is not "absolute" or "unfettered," the concurrence propounds, it is up to the Legislature to determine its boundaries. Platitudes aside, the pertinent inquiry focuses on whether a statute or regulation burdens the constitutionally protected right to vote by mail. While the Legislature may enact laws regulating voting, the laws may not prevent a voter from voting, "or unnecessarily . . . hinder or impair his privilege." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 17; 740 NW2d 444 (2007) (cleaned up). "[T]he Legislature may regulate, but cannot *destroy*, the enjoyment of the elective franchise." *Id.* at 18 (cleaned up, emphasis in original). On its face, a deadline preventing properly cast absentee ballots from being counted destroys the rights the people adopted in ratifying Proposal 3.

When considering a voting regulation challenge under the Due Process or Equal Protection Clauses of the federal Constitution, a court must "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Crawford v Marion Co Election Bd*, 553 US 181, 190; 128 S Ct 1610; 170 L Ed 2d 574 (2008) (cleaned up). Here, plaintiffs' claims rest on a more straightforward argument: the deadline directly violates Michigan's Constitution because it requires the rejection of properly cast ballots. My colleagues ignore this argument and instead recite that the deadline does not "severe[ly] infringe" or "effectively preclude" the right to vote. Although I disagree with these conclusions, placing them in a cognizable legal framework mandates consideration of whether the state has come forward with some reason that the election-day deadline for counting mailed ballots is necessary to "preserve the purity of elections" or to "guard against abuses of the electoral franchise." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 17-18. The state has not done so here—and neither have the lead opinion nor the concurrence. What is the plausible basis for a deadline that disenfranchises thousands of voters who cast absentee ballots in perfect concordance with all the rules? Proclaiming "there must be a deadline" hardly qualifies as a justification for the actual deadline under consideration. Simply put, neither of my colleagues have put forward a single state interest served by failing to count ballots that arrive the day after an election, or the day after that.

The lead opinion's discourse on a voter's "choice" is equally ill founded. Despite recognizing that Michigan voters now have a constitutional right to vote by mail, the lead opinion reduces the right to a quotidian choice. "[W]hen choosing to submit an absentee ballot by mail," the lead opinion lectures, "one assumes the risk that the ballot will not arrive by the deadline."[7] I am unaware of any legal principle supporting that a constitutional right may be dimmed or ignored

[7] Ironically, the lead opinion adopts this rule after recounting the story of a letter that remained undelivered to the intended recipient for 81 years. Apparently, the lead opinion has no quarrel with the notion that voters must meekly surrender their constitutional rights to the vicissitudes of the United States Postal Service.

simply because there is an alternate method available for exercising it. We assume the risk that a route we choose to drive may have potholes, or that the bag of potatoes we select at the grocery may include some rotten ones. Constitutional rights are not a game of "gotcha," penalizing with a possible forfeit those who exercise them properly. Citizens may now vote by mail. They may also vote in person. The two rights are constitutionally coequal. Just as the Legislature may not unnecessarily burden one, it may not unnecessarily burden the other.

Moreover, the amendment approved by the people provides that "[a]ll rights set forth in this subsection shall be self-executing." Const 1963, art 2, § 4(1). A self-executing constitutional provision " 'supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]' " *Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916), quoting Cooley, Constitutional Limitations (7th ed), p 121. This means that "[l]egislation is not imperatively necessary to give it effect." *Hamilton v Deland*, 227 Mich 111, 115; 198 NW 843 (1924). While legislation "in aid" of a constitutional provision or designed to "better protect" the provision may be enacted, " 'all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' " *Id*. at 116-117, quoting Cooley, Constitutional Limitations (7th ed), p 122. Legislation that "curtail[s]" or places "undue burdens" on a self-executing constitutional right is prohibited. *Wolverine Golf Club v Hare*, 24 Mich App 711, 725; 180 NW2d 820 (1970), aff'd *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971).

The provisions added to Const 1963, art 2 clearly grant voters a specific right to vote by mail, and declare the right to be self-executing. The right to vote by mail and to have one's vote counted are not abstract concepts requiring further legislative explication or definition. Accordingly, legislation is not required to accomplish the will of the people, and legislation that "curtails" or unduly burdens the right cannot be enforced.

III

"The primary purpose of the writ of mandamus is to enforce duties created by law[.]" *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 667; 425 NW2d 80 (1988). A writ may issue "if the plaintiffs prove they have a clear legal right to the performance of [a] specific duty" and "that the defendant has a clear legal duty to perform" a specific act. *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999) (cleaned up). Those requirements are met here.

"[A] clear legal right is . . . founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 519; 866 NW2d 817 (2014) (cleaned up). As discussed above, an absent voter's right to have her vote counted is readily inferable as a matter of law. Indeed, as the lead opinion concedes, it would be "absurd" to think otherwise. Absent voters who meet the requirements for voting, follow the rules, and mail their ballots before the deadline have a constitutional right to have their votes counted. Lest there be any doubt, Article 2, § 4 itself provides: "This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes." The Secretary, too, is bound by this commandment.

I would grant the motion for mandamus and order 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.[8]

/s/ Elizabeth L. Gleicher

[8] I take no position on the additional issues raised by plaintiffs, as the first constitutional issue they raise is dispositive. I concur with the lead opinion in result only that the Constitution does not require local clerks to provide return postage for absent voter ballots.