

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MUHITH MAHMOOD,

Plaintiff-Appellant,

V

CITY OF HAMTRAMCK and WAYNE COUNTY  
BOARD OF CANVASSERS,

Defendants-Appellees,

and

ADAM ALHARBI,

Intervening Defendant-Appellee.

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UNPUBLISHED

March 27, 2026

8:34 AM

No. 378814

Wayne Circuit Court

LC No. 25-018688-CZ

Before: BORRELLO, P.J., and O’BRIEN and WALLACE, JJ.

PER CURIAM.

Plaintiff, Muhith Mahmood, appeals as of right the trial court’s order denying his request for a writ of mandamus or, alternatively, injunctive relief. Plaintiff sought to compel the governmental defendants to count 37 absentee ballots. We find that the trial court erred by declining to grant a writ of mandamus. As a result, we reverse the trial court’s order and remand for further proceedings consistent with this opinion.

**I. BACKGROUND**

The underlying facts are not disputed and are described by the trial court as follows:

On November 4, 2025 the City of Hamtramck held an election for mayor and 3 City Council positions. Voters could vote by absentee ballot or in-person on election day. The candidates for mayor were Adam Alharbi and Muhith Mahmood. According to testimony of the Hamtramck City Clerk before the Wayne County Board of Canvassers, on November 4, the Hamtramck City Clerk delivered 990 sealed return envelopes containing absentee ballots to the 5 Absentee Voter

Counting Boards (AVCBs) (1 AVCB for each precinct), so that the AVCBs could open the envelopes and tabulate the ballots. On the evening of November 4, the AVCBs returned of [sic] the 990 return envelopes to the Clerk's office for secure storage as required by law. The Clerk, believing that all the envelopes were empty, stored them in her office. In the unofficial results for Mayor reported by the Clerk on Election Night, Alharbi received 2,009 votes and Mahmood received 1,998 votes.

On the day after the election, November 5, the Clerk, as required by law, sent all the election materials to the Wayne County Board of Canvassers for canvassing and declaration of the official results. On that same date, the Clerk also discovered that there was a 37-ballot discrepancy between the number of return envelopes delivered to the AVCBs and the number of ballots the AVCBs reported as tabulated.

The Clerk discovered that the cause of the discrepancy was that 37 ballots got overlooked and were never counted. Although the envelopes for the 37 ballots had been opened, the ballots were not removed and consequently not tabulated. Those envelopes were then comingled with envelopes of ballots that were properly tabulated. The Clerk placed the 37 ballots in a secure container, sealed it, and delivered it to the Board of Canvassers. The Clerk informed the Board of Canvassers that only certain election staff members had access to the ballots while they were stored in her office.

However, the City Clerk later learned that several individuals (none of whom were authorized election staff) had entered her office while the ballots were stored there. With this new information, the Clerk informed the Board that she could no longer vouch for the chain of custody and had to rescind her previous statement that only election officials had access to the Clerk's office. After hearing testimony from the Clerk, the Board declined to tabulate the 37 ballots. Plaintiff's challenger, Adam Alharbi, was certified as the winner of the election on November 18, 2025. A subsequent recount indicated that Alharbi won by 11 votes. On November 24, 2025, following certification of the election results and the recount, plaintiff filed a verified complaint for mandamus, declaratory judgment, and injunctive relief and a motion for writ of mandamus or, alternatively, preliminary injunction. Alharbi's subsequent motion to intervene as a party defendant was granted.

The trial court denied plaintiff's motion. The court focused its analysis on plaintiff's request for a writ of mandamus and the requirement of a clear legal duty. The court rejected plaintiff's argument that, with MCL 168.765a(4) providing a clear legal duty to tabulate the 37 votes, mandamus was an appropriate remedy. The court explained that this statutory provision allows for the tabulation of absentee ballots but only in accordance with applicable laws. And because the City Clerk could not confirm the integrity of the 37 ballots, MCL 168.823 afforded the Board of Canvassers with the discretion to decline to tabulate the ballots, which was fatal to the claim for a writ of mandamus.

The court also rejected plaintiff's argument that the 37 votes should be recast. The court noted that plaintiff failed to cite any authority from Michigan that would allow for such a remedy. The court also disagreed with plaintiff's position that the voters' constitutional rights to vote were

violated. The trial court recognized that statutory requirements are to be given full effect, even if it results in the disfranchisement of voters.

This appeal followed.<sup>1</sup>

## II. STANDARD OF REVIEW

A trial court’s grant or denial of a writ of mandamus is reviewed for an abuse of discretion. *Sakorafos v Lyon Twp*, 349 Mich App 176, 185; 27 NW3d 329 (2023). “A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes.” *Wolfenbarger v Wright*, 336 Mich App 1, 14; 969 NW2d 518 (2021). When a trial court makes an error of law, it also necessarily commits an abuse of its discretion. *Danhoff v Fahim*, 513 Mich 427, 442; 15 NW3d 262 (2024). However, “[w]hether a defendant has a clear legal duty to act, which is required to warrant mandamus, is a question of law that this Court reviews de novo.” *Sakorafos*, 349 Mich App at 185.

## III. MANDAMUS

A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ “has a clear legal right to the performance of the duty sought to be compelled,” (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. [*Southfield Ed Ass’n v Bd of Ed of Southfield Pub Schs*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (citation omitted).]

### A. CONST 1963, ART 2

Article 2 of Michigan’s 1963 Constitution addresses elections in Michigan. In 2018, the people of this state voted to amend the Constitution, which amendments included adding the following language at Const 1963, art 2, § 4:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(a) The right, once registered, to vote a secret ballot in all elections. [*Promote the Vote v Secretary of State*, 333 Mich App 93, 100-101; 958 NW2d 861 (2020).]

In 2022, the above language of § 4(1)(a) was modified to read: “The fundamental right to vote, including but not limited to the right, once registered, to vote a secret ballot in all elections.” Additionally, the following language was added after that sentence: “No person shall . . . use any

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<sup>1</sup> After appealing as of right, plaintiff moved in the Supreme Court for a bypass. The Supreme Court denied the request and ordered this Court to “expedite its consideration of this case.” *In re Disenfranchised Hamtramck Voters*, \_\_\_ Mich \_\_\_ (January 15, 2026) (Docket No. 169465).

means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.” Const 1963, art 2, § 4(1)(a). While case law prior to 2022 supports the assertion that Michigan’s higher courts have long recognized the right to vote as a fundamental right,<sup>2</sup> that fundamental right is now explicitly enshrined in Article 2 of Michigan’s 1963 Constitution.

Under Const 1963, art 2, § 4(1)(a), “Any Michigan citizen or citizens shall have standing to bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by this part (a) of subsection (4)(1) on behalf of themselves.”

The Michigan Constitution also clarifies that it is the ministerial, clerical, and nondiscretionary duty of a board of canvassers to certify election results by including returns and corrected returns from absent voter counting boards.<sup>3</sup>

## B. MICHIGAN ELECTION LAW

We now turn to the statutory authority relevant to this matter, MCL 168.1, *et seq.* (the Michigan Election Law).

As plaintiff argues, MCL 168.765a(4) mandates the counting of absentee ballots:

In a city or township that uses absent voter counting boards under this section, the absent voter ballots must be counted in the manner provided in this section and, except as otherwise provided in section 764d, absent voter ballots must not be delivered to the polling places.

The Legislature has made it clear that mistakes made by election officials must not result in the rejection of a ballot cast by an eligible voter unless the ballot is otherwise ineligible:

A ballot cast by an eligible elector must not be rejected or otherwise not counted in a canvass, recount, or court order altering the certification of a canvassing board on the grounds that an election official failed to comply with a directive set forth in this act unless that ballot is otherwise ineligible under this act or federal law. [MCL 168.814].

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<sup>2</sup> See, for example, *Grano v Ortisi*, 86 Mich App 482, 492; 272 NW2d 693 (1978), citing *Carter v Bullock*, 405 US 134; 92 S Ct 849; 31 L Ed 2d 92 (1972).

<sup>3</sup> Article 2, § 7(3) of Michigan’s 1963 Constitution provides:

It shall be the ministerial, clerical, and nondiscretionary duty of a board of canvassers, and each individual member thereof, to certify election results based solely on (1) certified statements of votes from counties; or (2) in the case of boards of canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns.

With these statutory provisions in mind, we note that the facts of the present case are comparable to the facts of *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193; 452 NW2d 471 (1989). In that decision, a judicial candidate's wife, Irene Gracey, delivered absentee ballots to the clerk's office on behalf of up to a maximum of 17 voters, in violation of Michigan law.<sup>4</sup> *Gracey*, 182 Mich App at 198. While the chain of custody of those 17 ballots was broken by Gracey's actions, there was no evidence indicating that she tampered with the ballots. As a result, this Court held that

[m]erely showing that the ballots were picked up and delivered by Mrs. Gracey in violation of § 759b and Step 5 of the instructions in § 764a did not, by virtue of § 764b(4), necessarily invalidate those ballots, but merely subjected them to the challenged voter procedures of § 745. [*Id.* at 203.]

The *Gracey* Court further held that “[a] timely cast absentee voter ballot is not to be invalidated solely because the delivery to the clerk was not in compliance with § 764a or § 764b, although such ballot shall be deemed to be challenged and shall be marked and processed as provided in § 745.” *Id.* at 209, citing MCL 768.764b(4).

As noted in *Gracey*, the Michigan Election Law contains procedures for challenging a ballot, which allow the ballot to be marked in such a manner that it can be identified in the event of a contested election while simultaneously keeping the name of the voter confidential:

Whenever at any election the ballot of any person who has been challenged as an unqualified voter and who has taken the oath provided by law in such case to be taken shall be received by the inspectors of election, said inspectors shall cause to be plainly endorsed on said ballot, with pencil, before depositing the same in the ballot box, the number corresponding to the number placed after such voter's name on the poll lists without opening the same: Provided, That in case a ballot shall be so folded, defaced, printed or prepared that such number cannot be legibly and permanently written on the back thereof, said inspectors shall refuse to accept such ballot. [MCL 168.745.]

To prevent the identification of said ballot, except as hereinafter provided for in case of a contested election, the inspectors of election shall cause to be securely attached to said ballot, with mucilage or other adhesive substance, a slip or piece of blank paper of the same color and appearance, as nearly as may be, as the paper of the ballot, in such manner as to cover and wholly conceal said endorsement but not to injure or deface the same; and if any inspector or other officer of an election shall afterward expose said endorsement or remove the said slip of paper covering the same, or attempt to identify the ballot of any voter, or

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<sup>4</sup> Gracey's actions violated Michigan law because “she was not a ‘member of the immediate family of the voter’ within the degrees of consanguinity or legal relationship stated in step 5(c) of the instructions for absent voters set forth in § 764a of the Elections Law.” *Gracey*, 182 Mich App at 198.

suffer the same to be done by any other person, he shall, on conviction thereof, be deemed guilty of a misdemeanor. [MCL 168.746.]

In case of a contested election, on the trial thereof before any court of competent jurisdiction, it shall be competent for either party to the cause to have produced in court the ballot boxes, ballots and poll books used at the election out of which the cause has arisen, and to introduce evidence proving or tending to prove that any person named on such poll lists was an unqualified voter at the election aforesaid, and that the ballot of such person was received. On such trial, the correspondence of the number endorsed on a ballot as herein provided with the number of the ballot placed opposite the name of any person on the poll lists shall be received as prima facie proof that such ballot was cast by such person: Provided, That the ballot of no person shall be inspected or identified under the provisions of this chapter unless such person shall consent thereto in writing, or unless such person has been convicted of falsely swearing in such ballot, or unless the fact that such person was an unqualified elector at the time of casting such ballot has been determined. [MCL 168.747.]

Pursuant to *Gracey*, evidence demonstrating that the ballots were stored in an unsecured room overnight in violation of the procedures of the Michigan Election Law did not necessarily invalidate those ballots, “but merely subjected them to the challenged voter procedures of § 745.” *Gracey*, 182 Mich App at 203.

Returning to the present case, the trial court ultimately found that defendant had the discretion to decline to count the 37 ballots pursuant to MCL 168.823(3), which states as follows:

The board of county canvassers shall correct obvious mathematical errors in the tallies and returns. The board of county canvassers may, if necessary for a proper determination, summon the election inspectors before them, and require them to count any ballots that the election inspectors failed to count, to make correct returns in case, in the judgment of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. In the alternative to summoning the election inspectors before them, the board of county canvassers may designate staff members from the county clerk’s office to count any ballots that the election inspectors failed to count, to make correct returns in case, in the judgment of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. [MCL 168.823(3).]

There is no dispute in this matter that the returns were incomplete. Amici curiae, American Civil Liberties Union Fund of Michigan, Promote the Vote Fund, and the League of Women Voters of Michigan Education Fund, argue that, pursuant to MCL 168.823(3), the Board of Canvassers was required to take one of the two actions mandated therein. The first option was that the board summon the election inspectors before them, require them to count any ballots that the election inspectors failed to count, to make correct returns, and canvass the votes from the corrected returns.

The alternative option was that the board designate staff members from the county clerk's office to count any ballots that the election inspectors failed to count, to make correct returns, and canvass the votes from the corrected returns. MCL 168.823(3) states that the board of county canvasser "may" take such actions in their "judgment," which language typically denotes *discretionary* conduct. See *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 631; 838 NW2d 183 (2013). However, amici essentially argue that, reading the statute as a whole, it is clear that the discretion granted to the board is to choose one of the two options, i.e., it may choose the first option or it may choose the alternative option.

Plaintiff argues that MCL 168.823 must be read in concert with the Michigan Constitution, the relevant case law, and the Michigan Election Law. We agree. Again, the Michigan Constitution states that "[n]o person shall . . . use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1). Intervening defendant would have us ignore that provision and determine that the people who entered the office in which the ballots were stored, who were not elections officials, effectively denied 37 voters their fundamental right to vote.

When considering the mandates contained in Const 1963, art 2, § 4(1) and MCL 168.814, in light of the other constitutional rights described above, the Michigan Election Law, as well as the relevant case law, we find that the statutory mandate requiring the canvassing board to determine whether a ballot is ineligible under the law requires more than simply receiving testimony from the clerk indicating that several individuals who were not election officials entered the room where the ballots were stored. While there may be circumstances in which the law provides no remedy as it pertains to irregularity in an election, see *Hanlin v Saugatuck Twp*, 299 Mich App 233, 243-244; 829 NW2d 335 (2013), the present case does not present such a circumstance because the Michigan Election Law provides a process for these votes to be deemed to be challenged, marked, and processed pursuant to MCL 168.745. *Gracey*, 182 Mich App at 209.

Returning to *Southfield Ed Ass'n*, 320 Mich at 378, we find that plaintiff and the 37 voters who cast their ballots had a clear legal right to have them appropriately considered under the Michigan Election Law and defendant had a clear legal duty to perform the acts required by that law. The act of so marking the ballots as challenged pursuant to *Gracey* is ministerial and does not involve discretion or judgment. Finally, no other legal or equitable remedy exists that might achieve the same result. Thus, the trial court abused its discretion by failing to grant the writ of mandamus and failing to order the Board of Canvassers to have the 37 ballots subjected to the challenged voter procedures of MCL 168.745 as required by *Gracey*.

Because we have determined that the trial court erred by failing to grant mandamus relief for the reasons stated above, we need not address the other issues presented by plaintiff.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Randy J. Wallace

**STATE OF MICHIGAN**  
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MUHITH MAHMOOD,

Plaintiff-Appellant,

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CITY OF HAMTRAMCK and WAYNE COUNTY  
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Before: BORRELLO, P.J., and O’BRIEN and WALLACE, JJ.

O’BRIEN, J. (*dissenting*).

Plaintiff asked the trial court to issue a writ of mandamus “order[ing] the tabulation of the 37 ballots” that were not counted as described by the majority. The trial court denied this request, concluding that the Wayne County Board of Canvassers had discretion whether to tabulate the 37 ballots, making a writ of mandamus improper. The majority concludes that “the trial court abused its discretion by failing to grant the writ of mandamus.” I disagree and therefore dissent.

A writ of mandamus is an extraordinary remedy, and the party seeking such a writ must establish that

(1) the party seeking the writ “has a clear legal right to the performance of the duty sought to be compelled,” (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. [*Southfield Ed Ass’n v Bd of Ed of Southfield Pub Schs*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (citation omitted).]

Plaintiff is asking for a writ of mandamus ordering the Wayne County Board of Canvassers to tabulate the 37 uncounted ballots, so plaintiff must establish that the board of county canvassers had a clear legal duty to perform this act.

In plaintiff's complaint, he relied on MCL 168.765a(4) to support the existence of this duty.<sup>1</sup> That subsection states, in pertinent part:

In a city or township that uses absent voter counting boards under this section, the absent voter ballots must be counted in the manner provided in this section and, except as otherwise provided in section 764d, absent voter ballots must not be delivered to the polling places. [MCL 168.765a(4).]

The section of the Michigan Election Law, MCL 168.1, *et seq.*, in which this subsection appears addresses absent voter counting boards, and the above subsection imposes a duty on such boards, not the board of county canvassers.

The majority relies heavily on MCL 168.814, which states:

A ballot cast by an eligible elector must not be rejected or otherwise not counted in a canvass, recount, or court order altering the certification of a canvassing board on the grounds that an election official failed to comply with a directive set forth in this act unless that ballot is otherwise ineligible under this act or federal law.

This section has never been cited by plaintiff or amicus who filed in support of plaintiff. Regardless, the majority emphasizes the final portion of this provision, effectively reasoning that a ballot must be counted in a canvass “unless that ballot is otherwise ineligible under this act.” I do not believe this section is relevant, however, because it only applies if a ballot is not canvassed “on the grounds that an election official failed to comply with a directive set forth in this act.”

It is true that the 37 uncounted ballots were not stored in compliance with MCL 168.810a—titled, “Safeguarding of election materials”—but the problem with the 37 uncounted ballots is not solely that they were stored in an unsecured location. The bigger issue is that the city clerk confirmed that unauthorized individuals were in the clerk's office and, while there, had access to the unsecured ballots, so the clerk could no longer confirm the integrity of the ballots. In other words, the ballots were not “merely” stored in an unsecured location in violation of MCL 168.810a, but the clerk confirmed that unauthorized individuals had access to the unsecured ballots. This confirmed unauthorized access to the 37 uncounted ballots provided a basis for not counting the ballots beyond the fact that the city clerk failed to properly store them as required by the Michigan Election Law.<sup>2</sup>

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<sup>1</sup> Plaintiff does not rely on this statute in his brief on appeal but cites it in his reply brief.

<sup>2</sup> I do not find this Court's opinion in *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193; 452 NW2d 471 (1989), particularly helpful to resolving this case. The procedural history of that

This brings us to the basis for the trial court’s ruling—MCL 168.823. The court reasoned that Subsection (3) of this statute provided the Board of Canvassers discretion to act how it did. MCL 168.823(3) provides, in relevant part:

The board of county canvassers shall correct obvious mathematical errors in the tallies and returns. The board of county canvassers *may*, if necessary for a proper determination, summon the election inspectors before them, and require them to count any ballots that the election inspectors failed to count, to make correct returns in case, in the *judgment* of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. In the alternative to summoning the election inspectors before them, the board of county canvassers *may* designate staff members from the county clerk’s office to count any ballots that the election inspectors failed to count, to make correct returns in case, in the *judgment* of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. [Emphasis added.]

This subsection provided a means by which the board of county canvassers could have tabulated the 37 uncounted ballots. But, as the emphasized portions demonstrate, aside from correcting any obvious mathematical errors, the procedures in MCL 168.823(3) are discretionary. See *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 631; 838 NW2d 183 (2013) (explaining that it is well-established that the use of the words “may” and “judgment” denote discretionary conduct). It follows that the Wayne County Board of Canvassers had discretion to tabulate the 37 uncounted ballots “if necessary for a proper determination,” but the decision to do so was left to “the judgment of the board of county canvassers.” MCL 168.823(3). A writ of mandamus cannot lie if the act requested to be performed “involve[s] discretion or judgment,” *Southfield Ed Ass’n*, 320 Mich App at 378, so MCL 168.823(3) cannot form the basis for a writ of mandamus ordering the Wayne County Board of Canvassers to tabulate the 37 uncounted ballots.

In plaintiff’s brief on appeal, he grounds his duty argument entirely in Const 1963, art 2, § 4(1). Plaintiff emphasizes in particular Const 1963, art 2, § 4(1)(a)’s language that all citizens who are electors qualified to vote in Michigan shall have “[t]he fundamental right to vote,” and Const 1963, art 2, § 4(1)(h)’s language extending this right “to vote an absent voter ballot.” This

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case is a quagmire, but at bottom, the contested absentee ballots were counted as part of a recount, and the plaintiff was seeking to have the Wayne County Board of Canvassers certify the results of the recount, while the intervenor was seeking to have the contested absentee ballots thrown out because they were not properly delivered to the clerk. *Id.* at 199-201. This Court explained that the absentee ballots being improperly delivered to the clerk did not invalidate them but merely subjected them to challenge pursuant to MCL 168.745. *Id.* at 203, 209. I do not understand anyone in this case to be arguing that the 37 uncounted ballots should be rejected or are otherwise invalid. The question, as I understand it, is whether the Wayne County Board of Canvassers had a duty to tabulate the 37 uncounted ballots as requested by plaintiff in his writ of mandamus.

fundamental right to vote, plaintiff rightly observes, includes the right to have that vote counted. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 47; 740 NW2d 444 (2007) (CAVANAGH, J., dissenting) (“The fundamental right to vote encompasses the right to actually have those votes counted”); *Reynolds v Sims*, 377 US 533, 554; 84 S Ct 1362; 12 L Ed 2d 506 (1964). After citing these principles, plaintiff concludes, without further explanation, that “defendants had a duty to count” the 37 uncounted ballots.

The broad principles on which plaintiff relies do not compel the conclusion that the Wayne County Board of Canvassers had a clear legal duty to tabulate the 37 uncounted ballots whose integrity the clerk could not confirm. “Within the meaning of the rule of mandamus, a ‘clear, legal right’ is one 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.” *Warren City Council v Fouts*, 345 Mich App 105, 124; 4 NW3d 79 (2022) (quotation marks and citation omitted). It is simply not inferable as a matter of law that a person’s right to have their vote counted imposed a clear legal duty on the Wayne County Board of Canvassers, in particular, to tabulate the uncounted ballots.

In summary, after reviewing all of the laws cited by the parties and the majority, I am not persuaded that the Wayne County Board of Canvassers had a clear legal duty to tabulate the 37 uncounted ballots as plaintiff requested in his writ of mandamus.<sup>3</sup> The problem as I see it is not that the clerk failed to store the ballots in compliance with the Michigan Election Law but that unauthorized individuals were confirmed to have had access to the unsecured ballots, as a result of which the clerk could not confirm the integrity of the uncounted ballots.<sup>4</sup> In situations like this, the ballots may still be tabulated, but only at the discretion of the board of county canvassers under MCL 168.823(3). That statute, by its terms, leaves the exercise of this ability “in the judgment of the board of county canvassers,” so it cannot be the basis for a writ of mandamus. See *Southfield Ed Ass’n*, 320 Mich App at 378 (explaining that a clear legal duty must “not involve discretion or

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<sup>3</sup> The majority does not reach plaintiff’s arguments that the trial court erred by failing to grant plaintiff a declaratory judgment or injunctive relief, so I do not reach those issues either.

<sup>4</sup> The fact that the clerk cannot confirm the integrity of the 37 uncounted ballots is a problem, and I do not believe that the ballot-challenge procedures under MCL 168.745—which the majority orders the 37 uncounted ballots be subjected to—sufficiently address the issue. When a ballot is challenged, the basis for the challenge is whether the person was “an unqualified voter,” MCL 168.745, and such a challenge is resolved if it is determined that the voter was qualified to vote in the election, MCL 168.748.

judgment’).<sup>5</sup> I therefore agree with the trial court that the Wayne County Board of Canvassers did not have a clear legal duty to tabulate the 37 uncounted ballots, so I would affirm.<sup>6</sup>

/s/ Colleen A. O’Brien

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<sup>5</sup> Plaintiff and amicus correctly observe that the Wayne County Board of Canvassers could have ensured the integrity of the 37 uncounted ballots before tabulating them by, for instance, identifying and contacting all 37 voters and having them verify their ballots and the marks thereon. I do not believe the existence of this possibility took away the Wayne County Board of Canvassers’ discretion under MCL 168.823(3), however.

<sup>6</sup> Intervening-defendant spends much of his brief on appeal discussing statutes and caselaw concerning recounts, and the majority rightly ignores this discussion because plaintiff has repeatedly disavowed any suggestion that he is requesting a recount. That said, MCL 168.871 (the statute that governs the eligibility of ballots in the event of a recount) does create somewhat of an oddity if the 37 uncounted ballots are counted. Under MCL 168.871(1), only ballots that were properly stored are generally eligible to be recounted. The proper-storage requirement can be waived if a sufficient explanation is provided, but such an explanation must provide “that the security of the ballots is otherwise preserved.” MCL 168.871(2). The security of the 37 uncounted ballots was clearly not preserved, so if plaintiff was requesting a recount, those ballots would seemingly be ineligible under MCL 168.871(2).