UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

v

CITY OF ANN ARBOR and JACQUELINE BEAUDRY, ANN ARBOR CITY CLERK,

Defendants,

and

SECRETARY OF STATE RUTH JOHNSON,

Proposed Intervenor-Defendant.
_____/

No. 2:14-cv-11296

HON. LAWRENCE P. ZATKOFF

MAG. R. STEVEN WHALEN

SECRETARY OF STATE'S MOTION TO INTERVENE

****IMMEDIATE CONSIDERATION REQUESTED****

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SECRETARY OF STATE RUTH JOHNSON'S MOTION TO INTERVENE UNDER FED. R. CIV. P. 24

Secretary of State Ruth Johnson moves for leave to intervene under Fed. R. Civ. P. 24 and states as follows:

1. The Secretary of State has a substantial interest relating to the subject matter of the present action—that is, the administration of elections and the process by which ballots are counted in the State of Michigan;

2. The Secretary of State is so situated that the continuance of the proceedings in this action and the granting of the relief requested by the Plaintiff in this action may impair or impede the ability of the Secretary of State to protect those interests;

3. The interests of the Secretary of State are not adequately represented by any of the existing parties to this action;

4. The claim and defenses of the Secretary of State have questions of law that are common to this action;

5. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties;

6. Counsel for the Secretary of State sought concurrence for her intervention on July 11, 2014. Defendant City of Ann Arbor concurs in

the intervention request. Concurrence could not be obtained from Plaintiff's attorney who requested to review the pleadings before responding; and

7. In accordance with Fed. R. Civ. P. 24(c), this Motion is accompanied by a Brief in Response to Plaintiff's Motion for Additional Injunctive Relief stating the claim or defense for which intervention is sought.

For these reasons, and the reasons stated more fully in the accompanying brief and pleadings, the Secretary of State respectfully requests that this Honorable Court grant her motion to intervene and allow her to intervene as a party defendant and exercise all of the rights of a party in this action.

Respectfully submitted,

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Dated: July 11, 2014

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BRIEF IN SUPPORT OF SECRETARY OF STATE'S MOTION TO INTERVENE

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BRIEF IN SUPPORT OF SECRETARY OF STATE'S MOTION TO INTERVENE UNDER FED. R. CIV. P. 24

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Dated: July 11, 2014

CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether this Court should grant the Secretary of State's motion to intervene because the requirements of Fed. R. Civ. P. 24 are satisfied?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Statutes

Constitutional Provisions

STATEMENT OF FACTS

The Secretary of State adopts and incorporates by reference the facts as summarized and contained in the City of Ann Arbor and Ann Arbor City Clerk's Brief in Response to Plaintiff's Post-Judgment Motion for Additional Injunctive Relief. (R. 32, Brief in Response to Post-Judgment Motion, pp. 2-8, 7/9/14, Page ID## 331-336.)

ARGUMENT

I. The Court should grant the Secretary of State's motion to intervene because the requirements of Fed. R. Civ. P. 24 are satisfied.

Fed. R. Civ. P. 24 allows for intervention as of right and permissive intervention. "Rule 24 is to be construed liberally with all doubts resolved in favor of permitting intervention." *United States v. Marsten Apts.,* 175 F.R.D. 265, 267 (E.D. Mich. 1997)(quotation and citation omitted). "Rule 24 is broadly construed in favor of potential intervenors." *Purnell v. Akron,* 925 F.2d 941, 950 (6th Cir. 1991)(citation omitted). Under Fed. R. Civ. P. 24(a)(2), "[o]n timely motion, the court must permit anyone to intervene who…claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that

interest." The burden to demonstrate that the present parties do not adequately represent the movant's interest is "minimal." *Grubbs v. Norris,* 870 F.2d 343, 347 (6th Cir. 1989). Alternatively, under Fed. R. Civ. P. 24(b)(1)(B), "[o]n timely motion, the court may permit anyone to intervene who…has a claim or defense that shares with the main action a common question of law or fact."

A. The Secretary of State is entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2).

To intervene as of right, an applicant needs to show that: "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011)(citation omitted).

This motion is timely. "[I]n determining whether an intervention is timely, a court will consider the following factors: (1) the point to which the suit has progressed; (2) the purpose for which the intervention is sought; (3) the length of time preceding the application during which the proposed intervenor should have known of his interest in the case; (4) the prejudice to the original parties due to the intervenor's failure, after he or

she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances mitigating against or in favor of intervention." *Grubbs,* 870 F.2d at 345.

Plaintiff filed his motion for a post-judgment permanent injunction on Monday, July 7, 2014, in which he first challenged the authority of the Secretary of State to issue instructions to local clerks and urged this Court to invalidate the returned ballots of voters. The Court entered a scheduling order on Tuesday, July 8, 2014 setting responses for the motion to be due on July 10, 2014. The Secretary of State's motion—along with a proposed responsive pleading—is being filed on July 11, 2014, less than 4 days after Plaintiff filed his motion. The Court has not yet decided Plaintiff's motion. Given the rapid progression of the events, and the short time periods involved, the issues raised have not progressed very far and the Secretary has sought intervention immediately upon learning of the arguments being raised.

The Secretary of State's purpose in intervening is to defend her authority over Michigan elections and to protect the interests of voters in Ward 3, whose votes Plaintiff advocates discarding. These are issues introduced into this matter by the Plaintiff himself, and it was the

introduction of those issues that gives rise to the interests of the Secretary of State.

Further, there is no prejudice to any of the original parties as a result of the Secretary of State entering at this stage. Plaintiff's brief already includes arguments about the Secretary of State's power to issue direction in this matter—indeed, his brief makes a direct attack on her powers. The City Clerk's brief includes a survey of applicable law, but takes no position on whether the Secretary of State's position should be adopted. Both parties' briefs thus already include arguments pertaining to the Secretary of State, and they will be neither surprised nor disadvantaged by the entrance of the Secretary of State as a party.

Finally, the unusual circumstances of the ballot printing error, the open question of how to handle returned ballots, and the arguments attacking the Secretary of State's authority over election matters all militate in favor of allowing the Secretary's intervention. As a result, the Secretary of State's motion now is timely filed.

Next, the Secretary of State has a substantial legal interest in the case. Plaintiff's motion for a permanent injunction includes a direct attack on the authority of the Secretary of State to issue direction to local clerks without formally promulgating rules. (R. 29, Brief in Support of

Plaintiff's Motion, ID# 311-313.) Plaintiff's motion thus raised a significant issue of state constitutional and statutory law.

The Secretary of State is an elected single executive heading the Department of State, which is a principal Department of the State of Michigan. Const. 1963, art V, §§2, 3. Under Michigan Election Law, 1954 PA 116, as amended, Mich. Comp. Laws 168.1 *et seq*., the Secretary of State is the Chief Election Officer of the State of Michigan and "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." Mich. Comp. Laws 168.21. Also, the Secretary of State is required by law to "issue instructions" and "advise and direct local election officials as to the proper methods of conducting elections." Mich. Comp. Laws 168.31(1)(a), (b). The Director of Elections, Christopher Thomas, is authorized to act at the Secretary's behest "with respect to the supervision and administration of the election laws." Mich. Comp. Laws 168.32. Plaintiff's motion for permanent injunction is a direct attack on the Secretary's authority under this act, and so the Secretary of State now has a substantial legal interest in the outcome of this case.

Finally, the existing parties will not adequately represent the Secretary of State's interests. The Plaintiff has taken a position plainly

contrary to the Secretary of State's authority, and the City Clerk has stated that they are not taking a position and instead seek guidance from the Court. The Secretary of State should be permitted to advocate for her own constitutional and statutory authority, and on behalf of the interests of the voters at stake. While Plaintiff might argue that the City Clerk has already recited the Secretary of State's position, whether interests are adequately represented is to be construed in favor of intervention and, "[a]lthough a would-be intervenor is said to shoulder the burden with respect to establishing that its interest is not adequately protected by the existing parties to the action, this burden is minimal because it is sufficient that the movant[] prove that representation may be inadequate." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). "One is not required to show that the representation will in fact be inadequate," and "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Id.* This burden is "minimal." *Id.* For the reasons already stated, this burden has been met here.

B. The Secretary of State is entitled to permissive intervention under Fed. R. Civ. P. 24(b)(1)(b) or 24(b)(2).

Alternatively, if this Court decides that the Secretary of State is not entitled to intervene as of right, the Secretary requests that this Court grant permissive intervention. A trial court may grant permissive intervention under Rule 24(b)(1)(B) if the motion is timely and if the applicant's claim or defense have questions of law or fact in common with the main action. *Purnell,* 924 F.2d at 950. The court also considers whether the intervention will unduly delay or prejudice the rights of the original parties. For the reasons already argued above, these standards have been met regarding the Secretary of State.

In addition, the Secretary of State also urges intervention under Rule 24(b)(2), which provides that, on timely motion, the court may permit a state governmental officer to intervene if a party's claim or defense is based on a statute or executive order administered by the officer or an order or requirement issued under the statute or executive order. Again, Plaintiff has challenged the Secretary of State's authority to give direction to local election officials under Mich. Comp. Laws 168.21 and Mich. Comp. Laws 168.31. Plaintiff's argument is therefore based upon a statute administered by the Secretary of State or a requirement issued under the

statute. Permissive intervention should be granted to the Secretary of State.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Secretary of State Ruth Johnson respectfully request that the Court grant her Motion to Intervene under Fed. R. Civ. P. 24.

Respectfully submitted,

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Dated: July 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record, as well as via US Mail to all non-ECF participants.

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JOHNSON'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR ADDITIONAL INJUNCTIVE RELIEF

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INTERVENING DEFENDANT SECRETARY OF STATE RUTH JOHNSON'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR ADDITIONAL INJUNCTIVE RELIEF

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Dated: July 11, 2014

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether this Court should abstain from ruling on this matter where there are substantial issues of state law involving the authority of the Secretary of State to issue direction and guidance to the local clerks and there are ongoing efforts to establish coherent state policy?

2. Is Dascola's claim ripe where: (a) efforts are underway to contact the absentee voters who were sent replacement ballots and (b) where the ballots in question may not determine the outcome, and thus Dascola cannot show that he has yet been injured?

3. Whether voters who returned a ballot that was defective through a printing error should be disenfranchised based on Plaintiff's assumption of what voters might otherwise have done in the absence of a printing error?

4. Whether under Michigan law, the Secretary of State has the authority to issue direction and guidance to the local clerks without promulgating formal rules?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Statutes

Other

STATEMENT OF FACTS

The State of Michigan has a decentralized voting system, with over 1,500 local jurisdictions administering local, state and federal elections. This dispute arises out of an election for city council in ward 3 of the city of Ann Arbor, Washtenaw County. The Washtenaw Board of County Election Commissioners is responsible for preparing and printing ballots for the upcoming August primary election. (Exhibit A, Affidavit of Christopher Thomas, ¶8.) Prior to printing, the Board is required to submit proof copies of each style of ballot used in the county to the Secretary of State and to each candidate whose name appears on the ballot. (Exhibit A, ¶8; MCL 168.565.) The candidates have two business days in which to notify the Board of any corrections. (Exhibit A, ¶8.) In addition, the Secretary of State reviews the ballot proofs for uniformity of appearance and compliance with the technical Ballot Production Standards to ensure that the ballots are capable of being read by the tabulation equipment. (Exhibit A, ¶8.) After the period for review expires and any corrections are made, the Board of County Election Commissioners may proceed with ballot printing. (Exhibit A, ¶8). By law, if the name of a candidate is omitted from the ballot, the Board shall have the ballots re-printed. (Exhibit A, ¶9; MCL 168.712.)

On June 27, 2014, Director of Election Christopher Thomas, in charge of elections for over 30 years in this state, was advised that the name of a candidate for councilmember of the 3rd Ward, City of Ann Arbor, had been omitted from the August primary ballot. (Exhibit A, ¶10.) On June 30, 2014, Director Thomas participated in a telephone conference between Bureau of Elections staff and election officials from the City of Ann Arbor and Washtenaw County. (Exhibit A, ¶11.) In that conference, Director Thomas was advised that as a result of a correction to an error in another jurisdiction, the County's ballot printing vendor had reverted to an earlier ballot proof that had been prepared before this Court's Order requiring Mr. Dascola's name to be printed on the ballot. (Exhibit A, ¶11(b).) That error was not discovered until after approximately 400 absent voter ballots had been issued. (Exhibit A, ¶11(c).) Replacement ballots have been issued. (Exhibit A, ¶11(d-f).) The replacement ballots were issued on June 30, 2014 and were accompanied by a letter from the Ann Arbor Clerk explaining the error and urging voters to return only the replacement ballot if they had not yet voted, or to vote on the replacement ballot and return it to the city clerk. (Exhibit A, ¶12.)

Director Thomas issued a letter to the Ann Arbor City Clerk on June 30, 2014, in which he directed her to count original ballots for the 3rd

Ward council seat if an absent voter's corrected ballot was not received before the close of polls on August 5, 2014. (Exhibit A, ¶13.)

It is Director Thomas's position that, to the maximum extent possible, every valid vote must be counted. (Exhibit A, ¶14.) Because each absent voter that received the original ballot will also receive a corrected ballot, every voter will have the opportunity to review the replacement ballot and determine whether they wish to revise their vote in light of Mr. Dascola's name appearing there. (Exhibit A, ¶14.) An unknown number of voters may consciously decide not to return a corrected ballot, and their failure to do so must be recognized as a conscious decision to have their original ballot be counted. (Exhibit A, ¶14.) The Bureau of Elections has emphasized to the Ann Arbor City Clerk that every attempt should be made to encourage voters to return a corrected ballot, including contacting voters by telephone. (Exhibit A, ¶17.). That process is underway. As of this date, Director Thomas has been advised that all but 18 replacement ballots have been returned by the voters, and only four (4) absentee voters remain to be contacted. (Exhibit 1, ¶ 18).

The Bureau of Elections will also issue additional instructions to the Ann Arbor Clerk providing procedures to be used to count absent voter

ballots. (Exhibit A, ¶18.) Those instructions provide that a voter who returns only a replacement ballot shall be counted in the normal manner. (Exhibit A, ¶18(a).) A voter who returns both the original ballot and the replacement ballot shall have only the replacement ballot tabulated. (Exhibit A, ¶18(b).) And a voter who returns only the original ballot shall have his or her ballot segregated and duplicated in accordance with established procedures following the close of polls on Election Day, done in such a way as to be capable of retrieval and examination after the election. (Exhibit A, ¶18(c); ¶19.)

ARGUMENT

I. The doctrine of abstention counsels against federal court determination of difficult questions of state law bearing on public policy whose importance transcend the case at bar, and where federal review would disrupt state efforts to establish policy. This Court should abstain from deciding the substantial state issues and allow state efforts in developing policy to continue.

Abstention involves "careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action.'" *Quackenbush v. Allstate Ins Co*, 517 U.S. 706, 728; 116 S. Ct. 1712; 135 L. Ed. 2d 1 (1996) (citing *Burford v. Sun Oil Co*, 319 U.S. 315, 334; 63 S. Ct. 1098; 87 L. Ed. 1424 (1943)). Under the facts of this case, this Court should abstain from exercising its jurisdiction

because the case meets the requirements of the *Burford* abstention doctrine.

The Supreme Court has explained that *Burford* abstention is appropriate where timely and adequate state-court review is available and: (1) a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 361; 109 S. Ct. 2506; 105 L. Ed. 2d 298 (1989) (quotation omitted); see also *Ada-Cascade Watch Co v. Cascade Resource Recovery, Inc*, 720 F.2d 897, 903 (6th Cir. 1983) (stating that *Burford* enunciated two factors which justify abstention: the presence of a complex state regulatory scheme which would be disrupted by federal review, or the existence of a state-created forum with specialized competence in the particular area).

Burford abstention is appropriate here, where the requested relief is injunctive, see *Quackenbush*, 517 U.S. at 718-719, and where federal interference would disrupt coordinated administration by the election

authorities in Michigan. The State of Michigan must be able to establish a coherent policy whereby - election officials can conduct the August 5 primary election. In *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980), the Fifth Circuit held that, while the failure to count votes adequately could, in the abstract, easily sound like a constitutional issue, federal law must:

> recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events, despite non-discriminatory laws, may result in the dilution an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.
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> * * *
>
> **If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss. [Constitutional law does] not authorize federal courts to be state election monitors.**

Gazmza, 619 F.2d at 453-454. Similar arguments weigh against federal court intervention here in the matter of counting ballots in light of a printing error. Plaintiff's motion for additional injunctive relief involves aunique state election issue, i.e., whether an erroneous ballot should be counted where a voter has failed to return a corrected replacement ballot.

Another important state election issue that has been raised is whether the Secretary of State, a constitutional officer, has authority to issue direction and guidance to the local clerks on an election administration matter without promulgating formal rules. Because federal intervention at this stage potentially interferes with the review and litigation of these important state election matters, this Court should abstain under *Burford*.

II. Efforts are underway to contact every voter who was sent a replacement ballot. These efforts have already proven to be successful. The Court should decline to rule on Dascola's claims that he has suffered an injury due to a printing error because these claimsare not yet ripe.

To avoid premature adjudication, courts "require[] that the 'injury in fact be certainly impending.'" *Déjà vu of Nashville v. Metro Gov't of Nashville & Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001)(internal citations omitted). "The ripeness inquiry arises most clearly when litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

In this case, as described by the Ann Arbor City Clerk, there will likely be fewer than 10 ballots in question by the time of the election. (R. 32, Defendant Beaudry's Response, Pg. ID#334.) This is a fraction of the

number of ballots originally sent out, and an even smaller fraction of the anticipated turnout of 3,000. (See R. 32, Pg. ID# 334-335.) It is far from certain that these 10 absentee ballots will be outcome determinative, and Plaintiff cannot establish that he has yet been injured as a result of the ballot printing error. Further, even if the ultimate margin is less than 10 votes, it is far from clear than any of the 10 ballots at issue here would have voted for Mr. Dascola where they declined to submit a replacement ballot despite the extensive efforts undertaken by the local officials to alert voters to the error and encourage return of replacement ballots.

Further, it is entirely possible that the results of the election will determine that the ballots in question are not determinative and determination of these issues will be unnecessary. Because Plaintiff cannot show that he has been harmed, the matter is not yet ripe for review by this court. The Court should deny Plaintiff's request for additional injunctive relief in these circumstances.

III. Courts have long held that errors in ballot printing should not disenfranchise voters so long as election workers act in good faith. Plaintiff is seeking an injunction that would result in the disenfranchisement of voters. This Court should not grant Plaintiff such an injunction.

Mistakes in the printing of ballots are regrettably not a new phenomenon, and courts have been historically reluctant to invalidate

voter ballots based on printing errors. As the Ann Arbor City Clerk correctly pointed out, the Michigan Supreme Court held in *Ott v. Brissette*, 137 Mich. 717, 719-720; 100 N.W. 906 (1904) that a ballot that misprinted the name of a candidate could not be discounted or counted in favor of the candidate. The Court held that, "neither boards of election nor the courts can enter into evidence to determine that votes for different names were in fact intended to be for but one person." *Brissette*, 137 Mich. at 719. The plaintiff there—much as Mr. Dascola does here—argued that he had nothing to do with the printing error and that he should not be deprived of votes by the action—whether by fraud or error—of those whose duty it was to print the ballot. *Brissette*, 137 Mich. at 719. Notably, the Court in *Brissette* made reference in dicta that, under the plaintiff's argument, it would follow that:

> [I]f his name had not been printed upon the ballots at all, still the ballots should be counted for him…This would assume that everyone who voted the [plaintiff's party] would have voted for the relator. It would assume- -which is unusual- -that every member of the relator's party would have voted for him. We must assume, in order to sustain relator's right to office, that every one of the 12 men who voted…would have voted for [plaintiff]. A voter might now [plaintiff], and be unwilling to vote for him, but an elector might be willing to vote for any other man, and, though not knowing [him], might vote for him. Courts cannot assume, under such circumstances, that such votes would have been cast for relator.

Brissette, 137 Mich. at 719. Similarly, Plaintiff Dascola here would seek to have this Court assume that any of the voters who cast original ballots but did not return corrected ballots would have voted for him. On that basis, he urges that such ballots be ignored and any votes for his competitors be discounted. But that is contrary to the reasoning expressed by the Supreme Court in *Brissette*.

The holding in *Brissette* is consistent with the approach taken by other courts when faced with challenges to the validity of ballots based upon mistakes by election officials. McCrary on Elections (4th Ed.), § 227 provides: "Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials, should not be permitted to disfranchise a district."

The Michigan Supreme Court echoed this principle in *Rutter v. Handy #1 Fractional School District Board*, 359 Mich. 461; 102 N.W.2d 192 (1960). There, the Court confronted a controversy over whether an election had even been properly held, and—citing to *Miller v. Miller*, 266 Mich. 127; 253 N.W. 241 (1934)—the Court concluded that procedural defects did not justify invalidating the election:

> We have consistently held, as we did in *Carnes*, that irregularities by officials or their failure to comply with statutes' directory provisions will not be held to invalidate an

> election without a showing that any elector was thereby deprived of his right to vote or in any way misled or prejudiced or that the result was thereby affected or changed. *Rosenbrock v. School District No.* 3, 344 Mich 335; *Richey v. Monroe County Board of Education* , 346 Mich 156; *Connine v. Smith* , 190 Mich 631; *Attorney General, ex rel. Miller, v. Miller* , 266 Mich 127 (106 ALR 387); *Thompson v. Cihak* , 254 Mich 641; *Adsit v. Secretary of State*, 84 Mich 420 (11 LRA 534). Here 60 of the 66 eligible voters voted. If the remaining 6 had voted adversely, the result would not have been changed. No fraud or deception is shown or claimed. Under such circumstances and the decisions in the above cited cases the election must be upheld and the transfer held lawful.

If procedural questions over the propriety of even calling an election are not enough to disregard the results of an election, then it is even less viable here where the only alleged issue is a printing error—since corrected—on some of the ballots.

Finally, in *Stamos v. Genesee County Board of Canvassers*, 46 Mich. App. 636; 208 N.W.2d 551 (1973), the Michigan Court of Appeals addressed a situation refusing to enjoin the county board of canvassers from opening, reviewing, or counting absentee ballots where those ballots were delivered to the precinct late due to extraordinary weather. The Court of Appeals issued a clear statement on its reasoning:

> **The overwhelming weight of authority holds that an election official's failure to comply with statutory provisions governing election procedures will not, absent an unequivocal legislative expression to the contrary, be held to deny effect to ballots lawfully cast**

> **by the voters.** The relatively minor procedural irregularity in this case should not invalidate the 22 absentee ballots challenged by plaintiff.

Stamos, 46 Mich. App. at 646. (Emphasis added). Here, the irregularity concerns a ballot printing mistake, and that mistake has since been corrected and every possible effort—including direct contact with voters—is being taken to ensure that voters are apprised of the error and how to correct it. Just as in *Stamos*, injunctive relief invalidating those ballots in this case is not appropriate.

Other states have similarly been loathe to invalidate ballots or elections based on printing errors. In *Schafer v. Ort*, 202 Ind. 622, 177 N.E. 438 (Ind. App. 1931), the Supreme Court of Indiana declined to invalidate an election where a candidate's name had been erroneously omitted and another name inserted in its place. The plaintiff in that case raised a similar argument to the Plaintiff here, and claimed that the ballots were not legally cast. *Schafer,* 177 N.E. at 440. The Court approved of the election board's attempt to correct the mistake by crossing off the erroneous name and writing in the plaintiff's name, noting that, "[t]he action of the election board in striking out the name of Blume and writing in the name of Schafer on the ballots appears to have been in good faith, and was doubtless the simplest and best, and possibly the only,

action they could have taken to make the election possible." *Schafer,* 177 N.E. at 440.

IV. The Secretary of State, a constitutional officer, has authority to issue instructions and to advise and direct local elections officials. Plaintiff's arguments that under Michigan law, the Secretary must do so through promulgated rules is incorrect as a matter of law and should not be relied upon by this Court.

The Michigan Legislature has granted the Secretary of State, a constitutional officer, the authority to instruct and advise local elections officials in the conduct of elections. *Elliott v. Secretary of State*, 295 Mich. 245, 249; 294 N.W. 171 (1940). Mich. Comp. Laws 168.21 provides that the Secretary of State shall be the chief election officer of the state and "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." In addition, Mich. Comp. Laws 168.31(1)(b) provides that the Secretary of State shall "advise and direct local election officials as to the proper methods of conducting elections." This authority is separated from Mich. Comp. Laws 168.31(1)(a), which provides that the Secretary of State shall "issue instructions and promulgate rules pursuant to [the APA]."

Plaintiff offers no case authority for his belief that the Secretary of State can only issue advice or direction to local officials through

promulgated rules. Further, his argument is untenable in light of the practical realities of elections. Plaintiff cannot seriously maintain that, on Election Day, the Secretary of State would be powerless to offer advice or direction on how to conduct the election without first going through the entirety formal rule promulgation, including public comment?

Plaintiff's reference to *Bryanton v. Johnson*, 902 F. Supp. 2d 983 (E.D. Mich. 2012) is inapt. Without re-litigating the issues raised in that case, it suffices to quote the court's decision in that case as it illuminates the scope of the decision:

> [Section 31] does not create an open season for [the Secretary] **to write new laws**, and then say they are not new laws, and even though significant in content, avoid the MAPA.

Bryanton, 902 F. Supp. 2d at 1002-1003. The court went on to conclude that Section 31 did not give the Secretary authority to change ballot application requirements that were "specifically provided by law." *Bryanton*, 902 F. Supp. 2d at 1003. That is decidedly not the case here.

There is no specific statutory language dictating form here, nor is there any expression that the Legislature sought to limit the Secretary's authority in this regard. To the contrary, the Legislature has provided how ballots are to be handled and counted, and it does not address the situation presented here. See Mich. Comp. Laws 168.764b-769. The

election is underway and the Secretary is providing direction to the local officials on how best to proceed in light of particular developments arising in this election. That is precisely her authority and her duty as provided by law.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Proposed Intervening Defendant Secretary of State Ruth Johnson respectfully requests that this Honorable Court deny Plaintiff's motion for additional injunctive relief, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

Bill Schuette
Attorney General

s/Erik A. Grill
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Dated: July 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record, as well as via US Mail to all non-ECF participants.

s/Erik A. Grill
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

v

CITY OF ANN ARBOR and JACQUELINE BEAUDRY, ANN ARBOR CITY CLERK,

Defendants,

and

SECRETARY OF STATE RUTH JOHNSON,

Proposed Intervenor-Defendant.
_____/

No. 2:14-cv-11296

HON. LAWRENCE P. ZATKOFF

MAG. R. STEVEN WHALEN

EXHIBIT LIST

1. Affidavit of Christopher M. Thomas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

v

CITY OF ANN ARBOR and JACQUELINE BEAUDRY, ANN ARBOR CITY CLERK,

Defendants,

and

SECRETARY OF STATE RUTH JOHNSON,

Proposed Intervenor-Defendant.
_____/

No. 2:14-cv-11296

HON. LAWRENCE P. ZATKOFF

MAG. R. STEVEN WHALEN

EXHIBIT 1

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and
JACQUELINE BEAUDRY,
ANN ARBOR CITY CLERK,

Defendants.

_____/

Affidavit of Christopher M. Thomas

Christopher M. Thomas, being first duly sworn, deposes and says as follows:

1. I bring this affidavit in support of the Secretary of State's position on the issues presently pending before this Court.

2. I have been employed by the Secretary of State as Director of Elections since June 21, 1981 and in such capacity serve as Director of the Bureau of Elections and Secretary to the Board of State Canvassers. MCL 168.32.

3. I am personally knowledgeable about provisions of Michigan Election Law and procedures of the Bureau of Elections that govern the processes for printing and issuing ballots as well as canvassing votes.

4. Under the Michigan Election Law, 1954 PA 116, as amended, MCL 168.1 *et seq.*, the Secretary of State is the Chief Election Officer of this State and "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21.

5. The Secretary of State is required by law to "issue instructions" and "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(a), (b).

6. The Director of Elections is authorized to act at the Secretary's behest "with respect to the supervision and administration of the election laws." MCL 168.32.

7. Two state court cases hold that County Boards of Election Commissioners and County Clerks are obligated by law to comply with instructions given by the Secretary of State, and by extension, their rationale equally applies to city election officials. See *Secretary of State v Berrien Co Bd of Election Comm'rs*, 373 Mich 526, 530-531 (1964); *Fleming v Macomb County Clerk* (unpublished), 2008 Mich App LEXIS 1325 (June 26, 2008).[1]

8. The Washtenaw Board of County Election Commissioners is responsible for preparing and printing ballots for the August primary election. MCL 168.559. Prior to printing, the Board of County Election Commissioners is required to submit proof copies of each style of ballot used in the county to the Secretary of State and to each candidate whose name appears on the ballot. MCL 168.565. The candidates are allotted two business days in which to review the ballot proofs and notify the Board of County Election Commissioners of any corrections. Id. In addition, the Secretary of State reviews the ballot proofs for uniformity of appearance and compliance with the technical Ballot Production Standards to ensure that ballots are capable of being read

[1] Attached as Exhibit 1.

by the optical scan tabulation equipment and AutoMARK Voter Assist Terminals, and if necessary, may require the Board of County Election Commissioners to make corrections. MCL 168.567. After the expiration of the period for review of the ballots and after any necessary corrections are made, the Board of County Election Commissioners may proceed with ballot printing.

9. Under MCL 168.712, "[i]f the name of any candidate regularly certified to the board of election commissioners is omitted from the ballots, or if it is found that a mistake has been made in the printing of the name of any candidate on the ballot, the board of election commissioners shall have the ballots reprinted with the candidate's name on the ballots."

10. On June 27, 2014, I was advised that the name of a candidate who is seeking nomination to the office of Councilmember, 3rd Ward, City of Ann Arbor, was omitted from the ballot.

11. On June 30, 2014, a telephone conference was convened involving me, Bureau of Elections (Bureau) staff, election officials from the City of Ann Arbor and Washtenaw County and the Ann Arbor city attorney. During this call, the Bureau of Elections requested reports from election officials representing Washtenaw County and Ann Arbor on what transpired and what actions had been taken to correct the ballot omission. I was advised that:

(a) Washtenaw County prepared a ballot proof listing all of the candidates seeking nomination to the office of City Councilmember, 3rd Ward, City of Ann Arbor, including Robert Dascola, and provided copies of these proof ballots to each of the candidates.

(b) When correcting a ballot error affecting a different jurisdiction (Ypsilanti), the County's vendor reverted to the older ballot proof that was prepared before this Court ordered that Mr. Dascola's name be included on the ballot.

(c) The error was not discovered until after approximately 400 absent voter ballots had been issued for voters in the City of Ann Arbor, 3rd Ward;

(d) Washtenaw County ordered that corrected ballots be printed and delivered to the City of Ann Arbor; and

(e) The City of Ann Arbor issued replacement ballots to all of the affected absent voters that day via US Mail; and

(f) Working together, the County and City found a proper remedy and executed it within short order after the error was discovered.

12. The replacement ballots issued on June 30, 2014 were accompanied by a letter from the Ann Arbor Clerk explaining that an error affecting the office of Councilmember, 3rd Ward, City of Ann Arbor occurred in printing the original ballot; that the error had been corrected on the enclosed replacement ballot; and urging the voter to (a) return only the replacement ballot if the original had not yet been voted and returned, or (b) vote the replacement ballot and return it to the City Clerk.

13. I issued a letter to Jacqueline Beaudry, Clerk of the City of Ann Arbor, dated June 30, 2014, which directed her to count the original ballot for the office of Councilmember, 3rd Ward, if an absent voter's replacement ballot was not returned before the close of polls on Election Day, 8:00 p.m. on August 5, 2014.

14. My June 30, 2014 instruction was based on two essential principles.

(a) First, and most importantly, a voter should not be disenfranchised due to the ballot printing error of an election official. Voters rightly assume that ballots issued to them will not be discounted due to an election official's error. The fact that

some Ward 3 voters may, through no fault of their own, cast an incorrect ballot cannot automatically result in their disenfranchisement.

(b) Second, the ballot printing defect is cured upon the voter's receipt of a corrected ballot. Considering that each of the absent voters who received the original erroneous ballot has been sent a corrected replacement ballot, every voter will have an opportunity to review the replacement ballot and determine whether they desire to change their vote in the race for Ann Arbor City Councilmember, 3rd Ward. An unknown number of affected voters may consciously decline to submit a replacement ballot. Because every affected voter will be afforded an opportunity to cast a replacement ballot, a voter's failure to do so must be recognized as the voter's deliberate choice to have their original selection in the 3rd Ward stand.

With these principles in mind, the Bureau has directed the City of Ann Arbor to count the votes cast on the original ballots issued to absent voters who neglect to return the corrected replacement ballot.

15. This directive is aimed at ensuring that to the maximum extent possible, every valid vote is counted. On the contrary, the Plaintiff puts forth an argument centered on the candidate's rights which is designed to maximize every vote for the candidate, even at the cost of disenfranchising some voters.

16. Under MCL 168.803(2), a vote is recorded as valid if the voter makes a mark (other than a stray mark) in the predefined area of the ballot beside a candidate's name.

17. Additionally, the Bureau has emphasized that every attempt should be made to encourage the affected voters to vote and return the replacement ballot, and urged Washtenaw County and Ann Arbor election officials to personally contact voters who have already returned

the original ballot by telephone to communicate the importance of returning the replacement ballot.

18. On July 11, 2014, I was advised that of the 49 original ballots returned to the Ann Arbor Clerk thus far, only 18 of those absent voters have not yet returned the replacement ballots. Of those 18 absent voters, the Ann Arbor Clerk's office has successfully contacted all but 4 of them to apprise them of the situation. Thus, as of today, it appears that there may be as few as 4 original ballots remaining by Election Day.

19. I am prepared to issue additional detailed instructions to the Ann Arbor Clerk regarding the procedures to be used for counting absent voter ballots affected by the 3rd Ward printing error. It is my intention to issue instructions that provide:

(a) An absent voter who returns only a replacement ballot shall have his or her ballot tabulated in accordance with the usual procedure.

(b) An absent voter who returns both the original ballot and the replacement ballot shall have only the replacement ballot tabulated.

(c) An absent voter who returns only the original ballot shall have his or her ballot duplicated in accordance with established procedures,[2] following the close of polls on Election Day. The original ballot shall be retained and marked "1," with the duplicated ballot marked "DUP 1 – WARD 3," and so on. The ballots are duplicated by at least two precinct workers of different

---

[2] R 168.785. The ballot duplication procedure is used when the computer program that tabulates ballots will not recognize the original ballot. In this instance, the tabulator is programmed for three candidate positions in the 3rd Ward; therefore, the tabulator will not accept a ballot with only two voting positions activated (due to the omission of Mr. Dascola's name from the original ballot).

political parties in a reader/checker process, with one worker calling out the valid votes and another worker recording the votes on the duplicate ballot. Each duplicated ballot is reviewed for accuracy and then tabulated, while the corresponding original ballots are preserved in a special envelope marked "Original ballots for which duplicates were made and tabulated," which is sealed into a ballot container on Election Night.

20. By marking the ballots affected by the 3rd Ward printing error in this manner, the original and duplicated ballots are capable of retrieval and examination after the August 5, 2014 election.

21. This affidavit is based on personal knowledge. If called as a witness, I can testify competently to the facts stated in this affidavit.

Christopher M. Thomas

Subscribed and sworn to before me

on July 11, 2014

KRISTI L DOUGAN
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF KENT
My Commission Expires Aug 20, 2014
Acting in the County of Ingham

EXHIBIT 1

GREG FLEMING, WILLIAM SUSICK and EDWARD F. COOK, Plaintiffs-Appellants, and MAX FELLSMAN, Plaintiff, v MACOMB COUNTY CLERK, Defendant-Appellee.

No. 279966

COURT OF APPEALS OF MICHIGAN

2008 Mich. App. LEXIS 1325

June 26, 2008, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: [*1]
Macomb Circuit Court. LC No. 2006-004256-AW.

DISPOSITION: Reversed. We direct the trial court to grant summary disposition in plaintiffs' favor and to grant plaintiffs' request for injunctive relief. We do not retain jurisdiction.

JUDGES: Before: Owens, P.J., and Meter and Schuette, JJ.

OPINION

PER CURIAM.

Plaintiffs Greg Fleming, William Susick, and Edward F. Cook appeal as of right from the trial court's July 30, 2007, order granting summary disposition in favor of defendant Macomb County Clerk (county clerk). The trial court dismissed plaintiffs' claims for declaratory and injunctive relief and permitted the county clerk to mail unsolicited absent voter ballot applications to county residents over the age of 60 living in communities in which the local city, township, or village clerk did not mail unsolicited applications. We reverse. [1]

1 We wish to make clear that we fully support the right of citizens to vote, encourage qualified voters to exercise this right, and do not discourage lawful means to increase voter turnout. However, for the reasons stated in this opinion, defendant's actions are neither statutorily nor constitutionally authorized and, therefore, the trial court erred when it failed to enjoin her from [*2] doing them.

On September 21, 2006, the Macomb County Board of Commissioners (the board) passed a resolution authorizing the county clerk, Carmella Sabaugh, [2] to mail absent voter ballot applications for the November 2006 general election to "Macomb County registered voters age 60 and over." The resolution limited the mailing list by eliminating those registered voters who lived in communities in which the city, township, or village clerk automatically mailed applications to voters over the age of 60. [3] Notably, the board authorized Sabaugh to mail the applications in her *official capacity* as county clerk and to spend approximately $ 13,000 to prepare and mail the applications.

2 Sabaugh, in her official capacity as Macomb County Clerk, is the defendant in this case. We will refer to her interchangeably as "Sabaugh" and as "the county clerk" in this opinion.

3 Sabaugh informed the board that the local

clerks in ten Macomb County communities automatically sent absent voter ballot applications to registered voters over the age of 60, but the local clerks in the remaining 13 communities did not automatically mail these applications.

Sabaugh strongly encouraged the board to pass this resolution [*3] and presented several policy arguments to support her position. [4] Coincidentally, Sabaugh, a Democrat, was running against Republican Terri Lynn Land for Secretary of State in the November 2006 election. According to press reports at the time, Republicans in Macomb County began questioning Sabaugh's motives, claiming that Macomb County senior citizens tend to vote Democratic and noting that "[t]he timing [was] suspect." [5]

4 To support her position, defendant notes that private groups, including the Democratic and Republican parties, send absent voter ballot applications to their supporters. Yet she fails to note that the entities she identifies that mail absent voter ballot applications are *private* entities. Conversely, defendant is a public official acting in her *public* capacity with *public* money to send unsolicited absent voter ballot applications to only a portion of qualified absent voters in Macomb County. In this appeal, we do not address the question whether private groups may mail absent voter ballot applications to their members, and defendant's attempt to invite comparison between her actions and those of private groups is unavailing.

5 Presumably, these opponents of the county [*4] clerk's actions were concerned that defendant was using public money to make voting easier for a demographic that was inclined to support her campaign for Secretary of State and the campaigns of other members of her political party, but not facilitate voting for other demographics.

Shortly after the resolution was passed, plaintiffs filed suit seeking to prevent the mass mailing of absent voter ballot applications, alleging violations of the Michigan Election Law, *MCL 168.1 et seq.*, and requesting injunctions to prevent the county clerk from mailing the unsolicited applications. Plaintiffs also alleged that the proposed mailings violated the Equal Protection clause of the Fourteenth Amendment and the purity of elections clause of the Michigan Constitution, and diluted the votes of other Michigan voters. They specifically requested a preliminary injunction to prevent the county clerk from mailing applications for absent voter ballots for the November 2006 election, which the trial court denied.

Accordingly, on October 5, 2006, the county clerk mailed 49,234 absent voter ballot applications to Macomb County voters over the age of 60 who had not otherwise been sent an absent voter ballot [*5] application from their city, village, or township clerk. In a press release, Sabaugh claimed that the mailing resulted in the casting of "at least 7,700 additional votes" in the November 2006 general election. [6]

6 The parties stipulated that Sabaugh made this claim. However, the lower court record does not include any evidence to support Sabaugh's claim.

The parties filed cross-motions for summary disposition to address the question whether Sabaugh was authorized to mail the unsolicited absent voter ballot applications in her official capacity as county clerk. When the trial court issued its opinion in July 2007, it noted that although the November 2006 general election had occurred nearly a year earlier, it would still address the issue on the merits because the issue was of continuing public interest and was capable of repetition yet evading review. In particular, the court noted that the board likely would continue to pass resolutions allowing the county clerk to mail unsolicited absent voter ballot applications before similar elections, leading to future scenarios in which plaintiffs would again have insufficient advance notice to pursue to its conclusion the question whether the [*6] county clerk had the authority to mail these applications before the mailing and election would occur. Although the trial court noted that the Michigan Election Law was silent regarding whether the county clerk was authorized to mail unsolicited absent voter ballot applications to voters age 60 and older, it determined that the county clerk was properly authorized by board resolution to conduct the mailing. The trial court also rejected plaintiffs' claims that the mailing violated the "purity of elections" clause of the Michigan Constitution or the Equal Protection clause of the Fourteenth Amendment or that it diluted the vote of other Michigan voters.

On appeal, plaintiffs challenge the trial court's order granting defendant's motion for summary disposition and

dismissing plaintiffs' claims. We review the trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc, 464 Mich. 322, 332; 628 N.W.2d 33 (2001)*. We also review de novo questions of law, including underlying issues of constitutional and statutory construction. *In re Petition by Wayne Co Treasurer, 478 Mich. 1, 6; 732 N.W.2d 458 (2007)*.

The trial court improperly granted defendant's [*7] motion for summary disposition and denied plaintiffs' motion for the same. Defendant lacked statutory or constitutionally-granted authority to mail unsolicited absent voter ballot applications. Further, by conducting the mailing, defendant violated the purity of elections clause of the Michigan Constitution. Because we find that these mass mailings are illegal and unconstitutional, we hold that defendant, in her official capacity, may not mail unsolicited absent voter ballot applications to targeted individuals in the future.

Const 1963, art 2, § 4 provides for the Legislature's control over elections, in relevant part, as follows:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

The duties of a county clerk or a county board of commissioners (supervisors) "shall be provided by law" pursuant to *Const 1963, art 7, §§ 4*, [*8] *8*.

The Legislature enacted the Michigan Election Law pursuant to its constitutional grant of authority. Under the Michigan Election Law, the county clerk, the chief judge of the county probate court, and the county treasurer serve as the board of election commissioners for that county. *MCL 168.23(1)*. Pursuant to *Secretary of State v Berrien Co Bd of Election Comm'rs, 373 Mich. 526, 530-531; 129 N.W.2d 864 (1964)*, the county clerk and the county board of election commissioners must follow the directions provided by the Secretary of State in her role as Michigan's chief election officer. The county board of commissioners has no expressly authorized role in elections. Instead, the board's roles include "pass[ing] ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county . . . ." *MCL 46.11(j)*. The board also has a duty to "[r]epresent the county and have the care and management of the property and business of the county if other provisions are not made." *MCL 46.11(l)*.

The Michigan Election Law addresses the circumstances under which a voter is entitled [*9] to an absent voter ballot. *MCL 168.758(1)* defines an "absent voter" as follows:

> For the purposes of this act, "absent voter" means a qualified and registered elector who meets 1 or more of the following requirements:
>
> (a) On account of physical disability, cannot without another's assistance attend the polls on the day of an election.
>
> (b) On account of the tenets of his or her religion, cannot attend the polls on the day of election.
>
> (c) Cannot attend the polls on the day of an election in the precinct in which he or she resides because of being an election precinct inspector in another precinct.
>
> (d) Is 60 years of age or older.
>
> (e) Is absent or expects to be absent from the township or city in which he or she resides during the entire period the polls are open for voting on the day of an election.

> (f) Cannot attend the polls on election day because of being confined in jail awaiting arraignment or trial.

A qualified absent voter is permitted to apply for an absent voter ballot pursuant to *MCL 168.759*. For both primary and general elections, "[t]he elector shall apply in person or by mail with the clerk of the township, city, or village in which the elector is registered." *MCL 168.759(1)-(2)*. [*10] *MCL 168.759(3)* provides that an application for an absent voter ballot may be made in the following three ways:

> (a) By a written request signed by the voter stating the statutory grounds for making the application.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city, township, or village.
>
> (c) On a federal postcard application.

Finally, *MCL 168.759(5)* requires, in pertinent part,

> The clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request. . .

When interpreting the Michigan Election Law to determine whether the county clerk is authorized to mail absent voter ballot applications, we may not "'impose different policy choices than those selected by the Legislature.'" *People v McIntire, 461 Mich. 147, 152; 599 N.W.2d 102 (1999)*, quoting *People v McIntire, 232 Mich. App. 71, 119; 591 N.W.2d 231 (1998)* (YOUNG, J., dissenting). Our primary goal is to ascertain and give effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc, 467 Mich. 344, 347; 656 N.W.2d 175 (2003)*, [*11] mod *468 Mich. 1216 (2003)*. When a statute's language is unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written. *DiBenedetto v West Shore Hosp, 461 Mich. 394, 402; 605 N.W.2d 300 (2000)*. We may only look beyond the statute to determine the Legislature's intent when the statutory language is ambiguous. *Id.*

The legal maxim *expressio unius est exclusio alterius*, i.e., "[t]he expression of one thing is the exclusion of another," "is a rule of construction that is a product of logic and common sense." *Hoerstman Gen Contracting, Inc v Hahn, 474 Mich. 66, 74 &* n 8; *711 N.W.2d 340 (2006)*. This well-recognized maxim of statutory construction "expresses the learning of common experience that when people say one thing they do not mean something else." *Feld v Robert & Charles Beauty Salon, 435 Mich. 352, 362; 459 N.W.2d 279 (1990)*, quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. The maxim is "safely" used when a statute creates rights or duties "not in accordance with" the common law. *Feld, supra at 362* (citation omitted).

> "When what is expressed in a statute is creative, and not in a proceeding according to the [*12] course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions that mode must be followed and none other, and such parties only may act." [*Feld, supra at 362-363* (citation omitted).]

In *Taylor v Currie, 277 Mich. App. 85; 743 N.W.2d 571 (2007)*, this Court applied a plain reading of the statute and the legal maxim *expressio unius est exclusio alterius* to determine that *MCL 168.759* prohibits a city clerk from mailing unsolicited absent voter ballot applications. [7] It stated:

> *MCL 168.759(5)* provides, in relevant part, that "[t]he clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request." This subsection clearly addresses the

distribution of applications for absent voter ballots. Under a plain reading, this subsection establishes two duties for city clerks. First, the clerk must have applications for absent voter ballots available in the clerk's office [*13] at all times. Second, the clerk "shall" provide an application to anyone upon verbal or written request.

"'The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.'" *Presnell v Wayne [Co] Bd of Co Rd Comm'rs, 105 Mich. App. 362, 368; 306 N.W.2d 516 (1981)*, quoting *56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276*, p 327. Or as our Supreme Court has stated, "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Sittler v Michigan College of Mining & Tech Bd of Control, 333 Mich. 681, 687; 53 N.W.2d 681 (1952)* (citations and punctuation omitted). As such, "[p]ublic officers have and can exercise only such powers as are conferred on them by law. . . ." *Id.* (citations and punctuation omitted).

Applying this rule to *MCL 168.759*, it is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the [*14] statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute. Nor have appellants cited any other statute that confers this power on the city clerk.

As for whether the mass mailing of unsolicited ballot applications is implicitly authorized by statute, we conclude that it is not. First, a power is necessarily implied if it is essential to the exercise of authority that is expressly granted. *Conlin v Scio Twp, 262 Mich. App. 379, 385; 686 N.W.2d 16 (2004)*. The authority expressly granted in *MCL 168.759(5)* is that the clerk must have applications for absent voter ballots available in the clerk's office at all times and that the clerk "shall" provide an application to anyone upon verbal or written request. The mass mailing of unsolicited ballot applications is not essential to the clerk's either making ballot applications available in the clerk's office or to providing them upon request. Second, on the basis of the maxim *expressio unius est exclusio alterius*, (the expression of one thing is the exclusion of another), *Feld*[, *supra at 362*] (opinion by RILEY, C.J.), we read the statute to preclude mass mailings when it [*15] specifically states that the clerk shall provide the applications upon written or verbal request. "[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v Harris Co, 529 U.S. 576, 583; 120 S. Ct. 1655; 146 L. Ed. 2d 621 (2000)* (citation and punctuation omitted). Accordingly, we conclude that *MCL 168.759(5)* does not implicitly permit the city clerk to mail absent voter ballot applications without having received a verbal or written request. [*Taylor, supra at 94-96.*]

7 The plaintiff, a candidate for Detroit City Council, alleged that the defendant city clerk planned to improperly mail 150,000 unsolicited applications. The trial court determined that the city clerk was precluded from mailing such unsolicited applications and issued a preliminary injunction to prevent the mailings. *Taylor, supra at 89*. The city clerk disregarded the preliminary injunction and mailed the applications. *Id. at 89-90*. As a result, the city clerk was convicted of criminal contempt. *Id. at 90*. At the conclusion of the trial court proceedings, the trial court entered a permanent injunction precluding the mailing of unsolicited absent voter ballot [*16] applications.

Id. at 93.

Because it is a published opinion, *Taylor* has precedential value and we are bound by its holding. *MCR 7.215(C)(2)*. Accordingly, the necessary outcome of this case is relatively straightforward. A county clerk, like a city clerk, has no express statutory authority under the Michigan Election Law to mail or otherwise distribute unsolicited absent voter ballot applications. See *Taylor, supra.* The Michigan Election Law does not even expressly authorize a county clerk to mail such applications upon request or to keep the applications on hand in her office for interested voters. Instead, the county clerk's statutory role during the election process is as an intermediary; she receives information from the Secretary of State and distributes it to city, village, and township clerks. See *MCL 168.647*, 653a, 709. The county clerk, in her role as a county election commissioner, prepares and distributes the official ballots used in precincts around the county, including the official absent voter ballots. See *MCL 168.668a*, 689-691, 709, 713-714. In relation to the absent voter process, the county clerk has express authority to safeguard and distribute the absent voter ballots [*17] to local clerks in advance of an election, *MCL 168.715-717*, but no statute expressly allows a county clerk to deliver a ballot directly to a voter or to deliver absent voter ballot applications.

Accordingly, the county clerk lacks the implied authority to distribute absent voter ballot applications. As noted in *Taylor, supra at 94*, a local government officer possesses those powers "necessarily to be implied" from those expressly granted. "Powers implied by general delegations of authority must be 'essential or indispensable to the accomplishment of the objects and purposes of the municipality.'" *Lansing v Edward Rose Realty, Inc, 442 Mich. 626, 634; 502 N.W.2d 638 (1993)*, quoting 5 McQuillin, Municipal Corporations (rev 3d ed), § 15.20, p 102. None of the statutorily-defined duties described earlier relate to increasing voter turnout or making the election process less onerous for voters. In fact, none of the county clerk's statutorily-defined duties require direct contact with voters. Mailing absent voter ballot applications is not related to, let alone essential to, a county clerk's duty to distribute election information and materials to local clerks, to prepare and distribute official [*18] ballots to voting precincts, or to distribute absent voter ballots to local clerks before an election. Accordingly, a county clerk lacks both express and implied statutory authority to mail unsolicited ballot applications.

Further, the board cannot confer on the county clerk the authority to conduct such a mailing. Like the county clerk, the board has only those powers expressly granted to it by the constitution and by statute and those powers necessarily implied from the powers expressly granted. *Conlin, supra at 385*. We must liberally construe the powers granted to local governments to include those powers "fairly implied and not prohibited by th[e] constitution." *Saginaw Co v John Sexton Corp of Michigan, 232 Mich. App. 202, 221; 591 N.W.2d 52 (1998)*, quoting *Const 1963, art 7, § 34*.

The Legislature granted the following relevant powers to county boards of commissioners:

> (j) By majority vote of the members of the county board of commissioners elected and serving, pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county, and pursuant to [*MCL 46.10b*] [*19] provide suitable sanctions for the violation of those ordinances. . . .
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> * * *
>
> (l) Represent the county and have the care and management of the property and business of the county if other provisions are not made. [*MCL 46.11*]

The board's resolution concerns voting in a statewide election and, therefore, does not "relate to county affairs" or "the care and management of the business of the county." Furthermore, the resolution contravenes *MCL 168.759*. A municipal government may not prohibit acts that are authorized by state law or, conversely, authorize acts that are prohibited by state law. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids, 455 Mich. 246, 262; 566 N.W.2d 514 (1997)*; *Conlin, supra at 385*; *Frens Orchard, Inc v Dayton Twp Bd, 253 Mich. App. 129, 136-137; 654 N.W.2d 346 (2002)*. As noted earlier, the Michigan Election Law neither expressly nor impliedly authorizes county clerks to mail unsolicited absent voter ballot applications to qualified voters. Further, the Michigan Election Law does not permit county boards of

commissioners to play any role in the election process. Accordingly, the board lacked the authority to authorize the county clerk to take an action not allowed [*20] by statute.

Plaintiffs also argue that defendant violated the "purity of elections" clause. Because this Court's ruling in *Taylor* also controls with regard to this issue, we agree.

> 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.'" 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." [*McDonald v Grand Traverse Co Election Comm, 255 Mich. App. 674, 692-693; 662 N.W.2d 804 (2003)* (internal citations omitted).]

In *Taylor, supra at 97*, this Court found that the city clerk's mass mailing of absent voter ballot applications violated the purity of elections clause. [8] The *Taylor* Court reasoned that the city clerk had distributed "propaganda" in her official capacity and at the city's expense. *Id.* There was no indication in *Taylor, supra at 85*, that the absent voter ballot applications [*21] were designed in such a manner that they would have skewed an applicant's vote one way or another. Therefore, the *Taylor* Court's ruling appears to imply that even apparently neutral applications sent by a city clerk in her official capacity constitute improper propaganda material. Although we recognize that we are bound by the *Taylor* Court's holding, we question whether the distribution of absent voter ballot applications that apparently do not favor particular candidates or political parties constitute "what amounts to propaganda at the city's expense." *Taylor, supra at 97. Random House Webster's College Dictionary* (1997) defines "propaganda" as "information or ideas methodically spread to promote or injure a cause, movement, nation, etc." We fail to see how public mailings of apparently neutral absent voter ballot applications methodically promote anything besides the mere act of voting. However, we are compelled by *Taylor* to find that the neutrally-designed absent voter ballot applications constitute propaganda and, therefore, violate the purity of elections clause of our constitution. [9]

8 The Court's opinion regarding this violation of the purity of elections clause, in its entirety, [*22] is as follows:

> This interpretation of *MCL 168.759* is consistent with the sound public policy behind Michigan's election law, which, as stated in the preamble, was enacted, in part, "to provide for the purity of elections; to guard against the abuse of the elective franchise." This is in keeping with the Michigan Constitution, which provides that "[t]he legislature shall enact laws to preserve the purity of elections . . . ." *Const 1963, art 2, § 4.* 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.'" *Socialist Workers Party v Secretary of State, 412 Mich. 571, 596; 317 N.W.2d 1 (1982)*, quoting *Wells v Kent Co Bd of Election Comm'rs, 382 Mich. 112, 123; 168 N.W.2d 222 (1969).* The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party, supra at 598.*
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> The city clerk, who is an elected official, has the role of neutral [*23] arbiter or referee. As a requirement of that office, the city clerk must take and subscribe

an oath or affirmation stating:

> I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of [city clerk] according to the best of my ability. [*Const 1963, art 11, § 1.*]

To construe *MCL 168.759* to permit Currie to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution. *MCL 168.759(5)* does not permit a city clerk to mail absent voter ballot applications without having received a verbal or written request. Accordingly, we conclude that the trial court did not err in granting injunctive relief on this basis. [*Taylor, supra at 96-97.*]

9 We also note that permitting absent voter ballot mailings to only a select category of eligible absent voters could encourage a public official to target public funds to mail applications to voter groups likely to support her candidacy or her party's candidates for office.

Regardless, we also conclude that the purity of elections [*24] has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state. Although *MCL 168.758(1)* lists six categories of voters eligible to vote by absent voter ballot, the county clerk's mailing of absent voter ballot applications to only one of the six eligible groups means that the county clerk used public funds to make it easier for one group (voters 60 and older) to vote without providing a similar advantage to other categories of eligible absent voters. Not only is this fundamentally unfair, but the county clerk's actions hinder the evenhanded application of election laws by failing to provide this benefit to all eligible absent voters. Accordingly, the clerk's actions violate the purity of elections clause and, therefore, are unconstitutional.

Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public [*25] in general in order to establish standing in an election case. *Helmkamp v Livonia City Council, 160 Mich. App. 442, 445; 408 N.W.2d 470 (1987).* "[T]he right to vote is an implicit fundamental political right that is preservative of all rights." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich. 1, 16; 740 N.W.2d 444 (2007)* (internal quotations omitted). Although the right to vote is constitutionally protected, our Supreme Court has noted that the "equal right to vote is not absolute." [10] *Id.* (internal quotations omitted). Instead, the Legislature must "preserve the purity of elections" and "guard against abuses of the elective franchise." *Const 1963, art 2, § 4.* Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury. See *Helmkamp, supra.*

10 For example, a state can impose residency requirements on voters. *Carrington v Rash, 380 U.S. 89, 91; 85 S. Ct. 775; 13 L. Ed. 2d 675 (1965).*

We disagree with defendant's contention that plaintiffs' challenge is moot and does not [*26] fall within the "capable of repetition yet evading review" exception. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. We will review a moot issue only if it is publicly significant and is likely to recur, yet is likely to evade judicial review." *Attorney Gen v Michigan Pub Service Comm, 269 Mich. App. 473, 485; 713 N.W.2d 290 (2005).* Defendant noted that several city clerks within the county automatically

mail absent voter ballot applications to voters over age 60 on a continual basis, and defendant will likely seek to mail unsolicited absent voter ballot applications for future elections. As in this case, there is no guarantee that potential future plaintiffs will have adequate notice to pursue the matter to its conclusion before another election. Therefore, we agree with the trial court's conclusion that this issue is capable of repetition yet evades review.

We also note that the law of the case doctrine does not preclude the trial court or this Court from reviewing the case because this Court's earlier opinion regarding this case merely concerns the trial court's failure to grant plaintiffs' motion for a preliminary injunction. [*27] In *Fleming v Macomb Co Clerk*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273502), this Court determined that plaintiffs' challenge based on the trial court's failure to award a *preliminary* injunction was moot because the applications to vote by absent voter ballot in the 2006 general election had already been mailed and the election had already occurred. The Court recognized, however, that plaintiffs' claims for permanent relief were still pending in the trial court at that time and that those claims could proceed to trial. *Id.* The Court found that the issue related to the *preliminary* injunction was not capable of repetition yet evading review at that time because there was no indication that the county clerk intended to mail more absent voter ballot applications while the trial court proceedings were pending. [11]

11 Because we conclude that defendant's actions were neither constitutional nor statutorily authorized, we will not consider appellant's contentions that the county clerk's decision to mail unsolicited absent voter ballot applications violated the Equal Protection clause or resulted in vote dilution.

Reversed. We direct the trial [*28] court to grant summary disposition in plaintiffs' favor and to grant plaintiffs' request for injunctive relief. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Patrick M. Meter

/s/ Bill Schuette