IN THE COURT OF APPEALS
APPEAL FROM THE COURT OF CLAIMS
HON. CYNTHIA D. STEPHENS

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, CHARLES ROBINSON, GERARD MCMURRAN, JIM PEDERSEN,

Plaintiffs [Appellee],

v.

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, and DANA NESSEL, in her official capacity as the Michigan Attorney General,

Defendants,

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES,

Intervenor-Defendants [Appellant].

Brief on Appeal – Appellee

ORAL ARGUMENT NOT REQUESTED

COA No. 354993

Trial Ct No. 2020-000108-MM

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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STATEMENT OF JURISDICTION

Pursuant to Michigan Court Rule 7.212, Intervenor-Defendants' Statement of Jurisdiction is complete and correct.

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STATEMENT OF QUESTIONS PRESENTED

First Question: Do the purported representatives from the Michigan Senate and Legislature represent the entire Michigan Legislature, such that they are the appropriate parties to protect any injury suffered by the Michigan Legislature as a whole? The Court of Claims did not directly address this question.

Second Question: Do the purported representatives from the Michigan Senate and Legislature have standing to challenge the Court of Claims opinion on appeal, absent any evidence that they are authorized to represent the entire Michigan Legislature? The Court of Claims did not directly address this question.

Third Question: Did the Court of Claims determine that the ballot receipt deadline and voter assistance ban violate the Michigan Constitution on their face, and therefore apply the incorrect standard in assessing the constitutionality of the statutes under an as-applied standard?

The Court of Claims answered: No

Fourth Question: Are the ballot receipt deadline and voter assistance ban unconstitutional as applied to the November election, given the effects of the COVID-19 pandemic on the election and significant mail delays in Michigan?

The Court of Claims answered: Yes

Fifth Question: Did the Court of Claims correctly determine that Plaintiffs were entitled to injunctive relief?

The Court of Claims answered: Yes

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INTRODUCTION

After considering substantial evidence, the Court of Claims issued narrow relief on Plaintiffs' as-applied challenges to the ballot receipt deadline and the voter assistance ban. Specifically, the Court ordered that, for the November election only, "[a]ll ballots postmarked no later than one day before the election, i.e., November 2, 2020, and received before the deadline for certifying election results, are eligible and to be counted." Appellant's App'x at 3. The Court determined that "the unrefuted documentary evidence concerning the effects of the pandemic and mail delays" led it to conclude that the "statutory ballot receipt deadline is, as applied, an impermissible restriction on the self-executing right to vote." Appellant's App'x at 11. The Court also found that "[t]he very real risk of receiving an absent voter ballot in an untimely fashion increases the risk that voters" without family members able to assist them may not be able to return their absentee ballots. Appellant's App'x at 15. Accordingly, the Court ordered that voter assistance be allowed from 5:01 p.m. on the Friday before election day through election day because that is the time during which county clerks are not required to provide assistance to voters. Appellant's App'x at 2.

On October 1, 2020, representatives from the Michigan Senate and Legislature filed a claim of appeal. Appellant's App'x at 31. The Legislators' application for appeal suffers from multiple, fundamental flaws. Because the Legislators have never established that they represent the institutional interests of the Michigan Legislature, nor that the Michigan Legislature has suffered any institutional harms, their interest in the case is nothing more than a generalized grievance shared by the public writ large. As this Court held in dismissing an application for leave to appeal from a pro se litigant just last week, that generalized grievance is not sufficient to support standing to appeal. Nor are the Legislators correct that the Court of Claims applied the wrong standards of review in determining that the ballot receipt deadline and voter assistance ban are unconstitutional,

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as applied to the November 3, 2020 election ("November election"). Finally, the Court of Claims properly considered the permanent injunction factors, finding that Plaintiffs had demonstrated Plaintiffs and their members are at risk of disenfranchisement due to ballot receipt deadline and voter assistance ban during the November election. For these reasons and those that follow, Plaintiffs respectfully request that this Court deny the Legislators' appeal.

BACKGROUND

I. Procedural Background

On June 2, 2020, the Michigan Alliance for Retired Americans, the Detroit/Downriver chapter of the A. Philip Randolph Institute, Charles Robinson, Gerard McMurran, and Jim Pedersen (collectively, "Plaintiffs") filed a complaint against Secretary of State Jocelyn Benson and Attorney General Dana Nessel (collectively, "Defendants"), in their official capacities. See generally Appellee's App'x at 1-39. Plaintiffs Robinson, McCuran, and Pederson are individuals who stand to be harmed directly by the challenged laws (collectively, "Individual Plaintiffs"). Individual Plaintiffs are Michigan voters above the age of 60; they all are members of the Michigan Alliance for Retired Americans. Appellee's App'x at 8-9. Plaintiffs also include two nonprofit organizations: the Michigan Alliance for Retired Americans (the "Alliance") and the Downriver/Detroit Chapter of the A. Philip Randolph Institute ("APRI"), both dedicated to promoting the franchise and ensuring the full constitutional rights of their members. The Alliance has over 200,000 members in Michigan, composed of retirees from 23 public and private sector unions, community organizations, and individual activists. Appellee's App'x at 6-7. Some of its members are disabled, and many are elderly. Appellee's App'x at 6. Because all of the Alliance's members are of an age that place them at heightened risk of complications from COVID-19, its members are overwhelmingly likely to vote absentee this year. Appellee's App'x at 7. APRI is a senior constituency group with the mission of continuing to fight for human equality and economic

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justice to seek structural changes through the American democratic process. Appellee's App'x at 8. APRI works to educate voters about their voting options, to encourage voters to cast their ballots, and to provide assistance to help members of the Detroit/Downriver community vote, both in person and through absentee ballots. Appellee's App'x at 8.

The Complaint raised several facial and as-applied challenges to three restrictions on absentee voting: (1) Michigan's failure to provide prepaid postage for ballots, (2) Michigan laws prohibiting most individuals, with few limited exceptions, from assisting voters in returning their absentee ballots (voter assistance ban), and (3) Michigan law's requirement that absentee ballots be received, not merely postmarked, by election day to be counted (ballot receipt deadline). See generally Appellee's App'x at 1-39.

In the month that followed, two sets of entities filed motions to intervene: (1) parties purporting to represent the Michigan Senate and Michigan House of Representatives ("Legislators"), see generally Appellee's App'x at 61-79; and (2) the Republican National Committee and Michigan Republican Party. The Court of Claims initially denied both motions but invited the Republican committees and the Legislators to participate as amici curiae. See Appellee's App'x at 80-85.

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At the time Plaintiffs' Complaint was filed, *League of Women Voters of Michigan v Michigan Secretary of State* was pending in this Court. That case sought mandamus relief based on a *facial* challenge to the ballot receipt deadline and postage requirement *only*. On July 14, this Court issued its decision (*LWV* decision), which, consistent with the case presented to it, focused solely on the facial validity of the receipt deadline and postage requirement. No. 353654, 2020 WL 3980216 (Mich Ct App, July 14, 2020) ("*LWV*").

On August 17, after the *LWV* decision and in response to an order from the Court of Claims, Plaintiffs amended their complaint and filed a supplemental brief in support of their request for preliminary injunction, focusing on their as-applied challenges only. Appellant's App'x at 83-128; Appellee's App'x at 40-60. Defendants filed a response and motion for summary disposition on August 31. See generally Appellee's App'x at 103-125, 126-150. Plaintiffs filed a cross-motion for summary disposition on September 1. See generally Appellee's App'x at 151-171.

II. Plaintiffs presented undisputed evidence regarding the effects of the pandemic on the November election.

Plaintiffs presented undisputed evidence to the Court of Claims that the coronavirus pandemic will pose significant health risks to Michiganders in the November election. Dr. Joseph Eisenberg, professor of epidemiology at the University of Michigan, explained that "COVID-19 will continue to be a threat in November and beyond," polling places create a "high-risk" for spreading the coronavirus, and "[r]emoving barriers to voting absentee is consistent with the current public health guidelines to minimize COVID-19 transmission." Appellee's App'x at 180, 186, 188, 189 (Eisenberg Aff ¶¶ 2, 19, 28, 34). Citing the health risks posed by the pandemic, Michigan's Governor and the Secretary have encouraged citizens to vote absentee in the May 5, 2020 local election, Appellee's App'x at 225-26, August 4, 2020 primary ("August primary"), Appellee's App'x at 228-29, and the November election. Appellee's App'x at 247. Plaintiffs and their members are at particular risk of becoming seriously ill if they contract COVID-19, given that Plaintiffs members are elderly, and are therefore overwhelmingly likely to vote by absentee ballot this November. Appellee's App'x at 420, 427 (Hunter Aff ¶¶ 9-10 and Long Aff ¶ 5).

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Consistent with the guidance from the government, since the start of the pandemic Michiganders have turned to their newly-enshrined constitutional right to vote absentee—passed by a supermajority of the electorate as part of Proposal 3 in 2018—in record breaking numbers.

For the March 10, 2020 Presidential Primary, nearly one million Michiganders requested absentee ballots—a 97 percent increase compared to 2016. Appellee's App'x at 243. In the May 5 local elections, 99 percent of voters cast absentee ballots. Appellee's App'x at 247. And of the approximately 2.5 million people who voted in the August primary, nearly 1.6 million voted absentee (66 percent), surpassing Michigan's prior record of 1.27 million absentee ballots sent in the 2016 general election. Appellee's App'x at 250.

The Secretary expects the number of absentee ballots cast in the November election to double or triple previous records. Appellee's App'x at 406; see also Appellee's App'x at 256 (Mayer Aff) (finding uptick in absentee voting in Michigan "virtually certain to reach historically high levels" in November election). Plaintiffs themselves, and their members, will overwhelmingly vote by absentee ballot this November. Appellee's App'x at 420, 427 (Hunter Aff ¶¶ 9-10 and Long Aff ¶ 5).

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III. Plaintiffs presented undisputed evidence regarding the effects of mail delays on the November election.

Under Michigan's election day receipt deadline, an absentee ballot will be thrown out if received even a minute after the ballot receipt deadline, yet voters may request absentee ballots up until 5 p.m. on the Friday before Election Day. MCL 168.759(1). Plaintiffs presented undisputed evidence to the Court of Claims that recent mail delays in Michigan will affect Michiganders' ability to vote and have their vote counted in the November election under this law.

Plaintiffs presented evidence that mail delivery began to slow in Michigan in April, when the United States Postal Service ("USPS") announced mail would only be delivered every other day in Detroit and other metro areas due to coronavirus-related staffing shortages. Appellee's App'x at 284-85, 288. In July, USPS announced "major operational changes" "that could slow down mail delivery" even further. Appellee's App'x at 291; see also Appellee's App'x at 303

(Stroman Aff ¶ 19). Data shows that reduction in USPS sorting capacity in the Detroit area is the third highest reduction in the country. Appellee's App'x at 349. Indeed, a week before the August primary, USPS General Counsel Thomas J. Marshall warned the Secretary that Michigan laws related to the timeline for voters to request and cast mail-in ballots are "incompatible" with USPS's delivery standards. Appellee's App'x at 351-52. Thus, "there is a significant risk that . . . ballots may be *requested in a manner that is consistent with [Michigan's] election rules and returned promptly*, and yet not be returned in time to be counted." Appellee's App'x at 352. USPS's Office of the Inspector General also singled Michigan out as one of the states with ballot request and receipt deadlines that put voters at "high risk" of disenfranchisement. Appellee's App'x at 326-42 (Stroman Aff, attach Ex B).

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The Secretary herself warned voters one week before the August primary that if they put their ballots in the mail, they may not be delivered in time, encouraging voters to instead submit their ballots directly through drop boxes. Appellee's App'x at 354-55 (Ex 18). Ultimately, evidence shows that more than 10,000 absentee ballots were rejected in the August primary, and preliminary data shows that at least 6,405 of those were not counted because of the ballot receipt deadline. Appellee's App'x at 176. One of those ballots belonged to Cathy Williamson. In Ms. Williamson's affidavit, she explained that she is a registered Michigan voter who has resided in Canada since 2014 and typically hand delivers her ballots to Wyandotte, Michigan. Appellee's App'x at 358 (Williamson Aff ¶ 2). However, due to border closures in light of the pandemic, Ms. Williamson had to rely on the mail to return her ballot. Appellee's App'x at 358 (Williamson Aff ¶ 3). Although she mailed her ballot 11 days before Election Day, it was routed through Illinois before arriving at the clerk's office three days after the Election. Appellee's App'x at 358-59 (Williamson Aff ¶¶ 4-5). The fact that more than 400,000 absentee ballots in Michigan were issued

but never returned begs the question of how many *more* voters simply did not receive or could not return their ballots on time (including voters who may have heard the Secretary's warning in the final week before Election Day and, out of fears of exposing themselves to coronavirus, gave up on attempting to exercise their right to vote). Appellee's App'x at 249-53.

Plaintiffs submitted an affidavit from former Deputy Postmaster General Ronald Stroman, who served as USPS's second-highest ranking official until June, which explained that the August primary revealed "a system that was overwhelmed by both the impact of the coronavirus and the volume of absentee ballots requested and returned." Appellee's App'x at 300 (Stroman Aff ¶ 11). According to Mr. Stroman, in the current circumstances, "it is nearly impossible for a voter who lawfully requests an absentee ballot within one week of an election to receive the ballot in the mail, complete it and have that ballot delivered by a mail carrier to their clerk's office by Election Day." Appellee's App'x at 301-302 (Stroman Aff at ¶¶ 15-16). During the August primary, the Secretary's own data show that 75,091 absentee ballot requests were received by clerks *within* one week of Election Day. Appellee's App'x 354-55, 365-66. Considering Mr. Stroman's expert opinion, it is likely that many of these voters may have been disenfranchised by the ballot receipt deadline. Ultimately, Mr. Stroman and the Secretary agree that, without relief that includes extending the ballot receipt deadline, "tens of thousands" of Michigan voters will likely be disenfranchised in the November election. Appellee's App'x at 300-01 (Stroman Aff ¶¶ 12, 14); Appellee's App'x at 111, 114 (Defendants' 8/31/20 Response at 6, 19); Appellee's App'x at 176.

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IV. Plaintiffs presented undisputed evidence regarding the challenges that the voter assistance ban imposes on voters during the pandemic.

Plaintiffs presented undisputed evidence to the Court of Claims the voter assistance ban imposes a significant burden on Michigan voters, including Plaintiffs themselves. Due to the pandemic, and notwithstanding USPS's operational difficulties, many voters will have no real

option but to attempt to exercise their right to vote through mail-in voting. Michigan law strictly limits who can deliver a voter's sealed absentee ballot to their local clerk, allowing only election and postal workers and members of a voter's household or immediate family to handle or return an absentee ballot on a voter's behalf. See MCL 168.932(f), 168.764a. Any other person who offers to assist a voter, or who provides such assistance, is guilty of a felony, *id.* 168.932(f), punishable by up to four years imprisonment and a $5,000 fine, *id.* 750.503.

Many voters, however, either live in single-adult households, or do not have family or household members who are willing and able to deliver their ballots, and thus are foreclosed from obtaining assistance from third parties altogether. Appellee's App'x at 414 (Foster Aff ¶¶ 4-5), 420 (Hunter Aff ¶¶ 9-10), 427-28 (Long Aff ¶¶ 5-6). Plaintiffs submitted an affidavit from Mary Vanheck, a home health aide, who would submit ballots on behalf of her home-bound clients, if she were permitted to do so by law. Appellee's App'x at 522 (Vanheck Aff ¶ 6). Enjoining the voter assistance ban ensures that home-bound, elderly, and disabled voters are at a lessened risk of disenfranchisement, which includes many of Plaintiffs' members. Appellee's App'x at 420 (Hunter Aff ¶¶ 9-10), 427-28 (Long Aff ¶¶ 5-6). One of those members is Judy Foster, who is unable to vote in person or deliver her ballot in person due to health conditions, particularly during the COVID-19 pandemic. Appellee's App'x at 414 (Foster Aff ¶¶ 4-5). Ms. Foster's husband typically hand-delivers their ballots after having troubles with mailing their ballots in the past. Appellee's App'x at 414 (Foster Aff ¶¶ 4-5). If Ms. Foster's husband were unable to deliver their ballots, for instance if he were to contract COVID-19, Ms. Foster would want to call upon friends for assistance. Appellee's App'x at 414 (Foster Aff ¶ 5).

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Plaintiffs also submitted testimony and an affidavit from Gwendolyn Babb, a Michigan voter who lives in a single-family home with her son. She cannot drive due to a physical disability

and is at risk of severe illness due to COVID-19 because of her age and underlying health conditions. Appellee's App'x at 433 (Babb Aff ¶ 3). Ms. Babb is on the permanent absentee voter list. Appellant's App'x at 150. Ms. Babb was disenfranchised during the presidential primary in March because her ballot arrived the day of the election and her family members were unable to assist her in returning her ballot because they were at work. Appellee's App'x at 434 (Babb Aff ¶ 7). During the August primary, Ms. Babb's ballot did not arrive until a week before election day. Appellee's App'x at 434 (Babb Aff ¶ 9). Ms. Babb's mail had not been delivered for three days prior, so she did not trust that her ballot would be delivered to the clerk's office on time if she placed it in the mail. Appellee's App'x at 434 (Babb Aff ¶ 9). Ms. Babb's daughter had a day off work, and was able to take Ms. Babb's ballot to the clerk's office. Appellee's App'x at 434 (Babb Aff ¶ 10). Without her daughter's assistance, Ms. Babb would have been unable to vote in the August primary by no fault of her own. Ms. Babb is uncomfortable getting in a car with a non-family member due to her health conditions, but would entrust her neighbors to return her ballot during the November election if it arrives too late for Ms. Babb to return it via the mail. Appellee's App'x at 434-35 (Babb Aff ¶¶ 12, 14). Ms. Babb's family members cannot always be available due to their work obligations, and Ms. Babb is concerned that she may be disenfranchised in the November election through no fault of her own. Appellee's App'x at 435 (Babb Aff ¶ 14).

Plaintiffs submitted an affidavit from Dr. Kenneth Mayer, who explained that "the risks of COVID-19 infection most certainly will factor into a voter's perception of the costs of voting and reduce the feasibility of the in-person option" and "voters concerned about the risk of infection will be more likely to return their ballots using third-party assistance if permitted." Appellee's App'x at 266 (Mayer Aff). Assistance from county or township clerks is impractical because they are required to provide such assistance only until 5 p.m. the Friday before Election Day, MCL

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168.764b(4) - (5); thus voters cannot rely on that assistance when they need it most: in the last few days before the election when mail carries the greatest risk of disenfranchisement. See generally Appellee's App'x at 432-35 (Babb Aff). The voter assistance ban erects yet another barrier to absentee voting for those who need assistance returning their ballots, but do not have an immediate family member or a household member to assist them. These burdens are especially pronounced for voters who are elderly, reside in assisted living facilities, live far away, have limited access to mail or transportation, are in college, or are immunocompromised during the pandemic. Appellee's App'x at 433 (Babb Aff ¶ 3); 414 (Foster Aff) ¶¶ 4-5; 442-43 (Smith Aff ¶¶16-18); 522 (Vanheck Aff ¶¶ 2-5). This includes Plaintiffs' members, many of whom are elderly and disabled. Appellee's App'x at 420 (Hunter Aff ¶¶ 9-10); 427-28 (Long Aff ¶¶ 5-6).

Plaintiffs also presented evidence showing that there is no credible basis for concluding that the ban is useful or necessary in preventing voter fraud. Dr. Michael Herron, professor of government at Dartmouth College, not only found no evidence of voter fraud in Michigan related to absentee ballot assistance from 2012 to 2020, but also analyzed voter fraud during the same period in Arizona, Montana, and Wisconsin, three states that allowed third parties to assist voters in returning their absentee ballots. Appellee's App'x at 504 (Herron Aff ¶ 164). Both Arizona and Montana changed their laws during that time period to prohibit third parties from voter assistance. Appellee's App'x at 505 (Herron Aff ¶ 165). But Dr. Herron found no evidence linking voter assistance with fraud, and notably, found "no evidence that newly imposed restrictions [in Arizona and Montana] on voter assistance lessened or in any way affected rates of voter fraud." Appellee's App'x at 504-05 (Herron Aff at ¶¶ 164-65).

V. The Court of Claims determined that the undisputed evidence showed that the ballot receipt deadline and voter assistance ban unduly burdens the right to vote absentee, as applied to the November election.

The Court of Claims reviewed more than 500 pages of "unrefuted documentary evidence,"

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detailing the effects of the ongoing pandemic in Michigan, the surge in absentee voting in Michigan, and the impact of mail delays on Michigan's elections. That evidence included four expert reports, eight voter and organizational affidavits, official government documents, and news reports. After considering the evidence, the Court of Claims issued narrow relief on Plaintiffs' as-applied challenges to the ballot receipt deadline and the voter assistance ban. *See generally* Appellant's App'x at 1-22. Specifically, the Court of Claims ordered that, for the November election only, "[a]ll ballots postmarked no later than one day before the election, i.e., November 2, 2020, and received before the deadline for certifying election results, are eligible and to be counted." Appellant's App'x at 3. The Court of Claims determined that Plaintiffs presented "unrefuted documentary evidence concerning the effects of the pandemic and mail delays," leading it to conclude that the "statutory ballot receipt deadline is, as applied, an impermissible restriction on the self-executing right to vote." Appellant's App'x at 11.

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The Court of Claims found that "the evidence presented in this case reveals that the pandemic's effect on the mail system has outright removed, or effectively removed, the right to choose to submit an absent voter ballot by mail." Appellant's App'x at 13. That finding "distinguishes this matter from League of Women Voters," in which this Court did not find "rare" mail delays to be a burden on Michigan voters' right to choose to submit their absentee ballots by mail. Appellant's App'x at 13 (quoting *LWV* at 10).

The Court of Claims also held that "[t]he very real risk of receiving an absent voter ballot in an untimely fashion increases the risk that voters" without family members able to assist them may not be able to return their absentee ballots. Appellant's App'x at 15. Accordingly, the Court of Claims ordered that voter assistance be allowed from 5:01 p.m. on the Friday before election day through election day because that is the time during which county clerks are not required to

provide assistance to voters. Appellant's App'x at 2.

VI. Legislators filed this claim of appeal one month prior to the November election.

After the Court of Claims enjoined the ballot receipt deadline and voter assistance ban during the November election, Defendants announced that they did not intend to file an appeal because, after "carefully consider[ing] the Court's opinion," they "determined, in their Executive capacities, that it was not in the best interests of the State or the people of Michigan to appeal the Court's preliminary injunction." Appellee's App'x at 681 (State Defendants' Response to Plaintiffs' 9/1/20 Motion for Summary Disposition at 1).

On September 21, 2020, the Legislators filed a renewed motion to intervene for appellate purposes. See generally Appellee's App'x at 690-703. The Court granted the Legislators' request to permissively intervene. See generally Appellant's App'x at 23-30. The Court also granted Plaintiffs' motion for summary disposition, issuing permanent injunctive and declaratory relief with respect to the voter assistance ban and ballot receipt deadline, incorporating its holding and rationale from the Court of Claims September 18, 2020 opinion (collectively, "the Court of Claims Opinions"). See generally Appellant's App'x at 23-30. The Legislators filed this notice of appeal on October 1, 2020, only one month from the impending November election.

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STANDARD

A trial court's decision to grant or deny injunctive relief is reviewed for abuse of discretion. *Schadewald v Brule*, 225 Mich App 26, 39; 570 NW2d 788 (1997). The Court of Claims' underlying conclusions of law and decision on summary disposition are reviewed de novo, see *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 281; 761 NW2d 761 (2008); *Promote the Vote v Benson*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 353977), 2020 WL 4198031, at *8, citing *Ellison v Dep't of State*, 320 Mich App 169, 175, 906 NW2d 221 (2017). The Court of Claims' findings of fact will only be set aside on appeal if clearly erroneous. See

MCR 2.613; *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 266; 314 NW2d 578 (1981) ("A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made.").

ARGUMENT

I. The Legislators do not have standing to appeal.

"[A] litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins Co v Oakland Co Rd Com'n*, 475 Mich 286, 291; 715 NW2d 846 (2006). *See also* MCR 7.203(A) ("The court has jurisdiction of an appeal of right filed by *an aggrieved party*.") (emphasis added). This is no less true of intervenors than parties. *Va House of Delegates v Bethune-Hill*, 139 S. Ct. 1945, 1951; 204 L ED 2d 305 (2019) ("[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing."). Here, the Legislators cannot meet this requirement.

As an initial matter, while it is true that the Legislators purport to represent the Michigan Legislature, it is unclear what authority they rely on in doing so. Plaintiffs are unaware of any Senate or House rules permitting legal action on behalf of each chamber without formal authorization. Notably, the House and Senate have previously passed resolutions authorizing representative legislators to intervene in specific lawsuits on behalf of the entire Legislature. See S Res 6, January 23, 2019 (Michigan Senate authorizing intervention in federal redistricting case), available at http://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/Senate /pdf/2019-SAR-0006.pdf, and H.R. Com. Res. 17, February 5, 2019 (Michigan House concurrently authorizing action in federal redistricting case), available at http://www.legislature.mi.gov/documents/2019-2020/resolutionadopted/House/pdf/2019-HAR-0017.pdf. Plaintiffs have not been able to locate any similar resolution here.

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In any event, even if the Legislators *do* represent the interests of the State, the Legislature does not have standing to appeal. Earlier this year, this Court held that the Legislature does not have standing to defend the constitutionality of an election statute because it did not demonstrate "a special interest . . . that differs from the citizenry at large." *League of Women Voters of Mich v Secretary of State*, --- NW2d ---, 2020 WL 423319, at *5 (Mich Ct App, Jan 27, 2020). So too here. "[I]t is the role of the courts, not the Legislature, to determine whether [a statute] is constitutional. A legal ruling regarding the constitutionality of [statutory] provisions will not deprive the Legislature of personal and legally cognizable authority that is peculiar to those chambers alone." *Id.* at 7; see also *Dodak v State Admin Bd*, 441 Mich 547, 555; 495 NW2d 539 (1993) ("Courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government.").

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Thus, after the statutory provisions at issue in this case were enacted, legislators' "special interest as lawmakers has ceased." *Id.* at 557 (quoting *Killeen v Wayne Co Rd Comm'n*, 137 Mich App 178, 189; 357 NW2d 851 (1984)); see also *Raines v Baird*, 521 US 811, 829; 117 S Ct 2312; 138 L Ed 2d 849 (1997) (holding that legislators lacked standing when not authorized to represent body); *Bethune Hill*, 139 S Ct at 1953 ("This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage."); *Democratic Nat'l Comm v Bostelmann*, Nos 20-2835, 20-2844 (CA 7, Sep 29, 2020) (holding neither state legislature nor political committee intervenors had standing to appeal absent participation of state defendant; finding that legislatures lack standing to challenge judicial determinations like the one at issue here because "[t]he interest at stake . . . is not the power to legislate but the validity of rules established by legislation.") (attached, Appellant's App'x at 708); *Kerr v Hickenlooper*, 824 F3d 1207, 1214-15 (CA 10, 2016)

("[I]ndividual legislators may not support standing by alleging only an institutional injury"); *Newdow v US Cong*, 313 F3d 495, 499 (CA 9, 2002) ("[A]t least as to individual legislators, there is no standing unless their own institutional position, as opposed to their position as a member of the body politic, is affected.").

And as former Governor Rick Snyder explained when he vetoed House Bill 6553, which would have entitled the Legislature to intervene in any case challenging the constitutionality of a State law, the executive branch "is responsible for managing the litigation position of the State as an entity," and allowing the Legislature to intervene to defend laws "would serve only to complicate the management of that litigation." See Veto Message from the Governor, *2018 Journal of the House Addenda 3028-29* (Mich. Dec. 28, 2018); see also Mich. Const. Art. 3 § 2 (making clear that the legislature is not permitted to act in an executive function). Thus, the party that does have a personal, particularized stake in the outcome of this litigation is the Attorney General, who is vested with the authority to enforce the ballot receipt deadline and voter assistance ban, as well as to defend challenges to Michigan's laws. Mich. Comp. Laws §§ 14.28, 14.29. But the Attorney General has chosen not to appeal, and in her absence, the Legislators lack standing to maintain this litigation.

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II. The Court of Claims applied the correct standard in determining that the ballot receipt deadline and voter assistance ban violated the Michigan Constitution, as-applied to the November election.

Even if the Legislators had standing to appeal, the Legislators' assertion that the Court of Claims erred in construing Plaintiffs' claims as as-applied challenges is nonsensical. A facial constitutional challenge is one that claims that "no set of circumstances exists under which the Act would be valid." *Paragon Prop Co v City of Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996); *Council of Orgs & Others for Educ About Parochiaid v State*, 326 Mich App 124, 149; 931 NW2d 65 (2018) ("[I]f even one factual scenario exists under which the statute could be applied in

harmony" then a law cannot be declared facially unconstitutional); *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) ("The party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . .'"); *Paragon*, 452 Mich at 577 (noting that facial challenges "attack the very existence or enactment" of the challenged law); *Vill. of Hoffman Ests v Flipside, Hoffman Estates, Inc*, 455 US 489, 495 n.5; 102 S Ct 1186; 71 L ED 2d 362 (1982) (explaining a facial challenge as one claiming a law is "invalid in toto—and therefore incapable of any valid application.") (citing *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974)).

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The Court of Claims did not grant facial relief on any of Plaintiffs claims—in fact, the Court expressed skepticism that facial relief would be appropriate. Appellant's App'x at 10 ("[P]laintiffs are unable to demonstrate any likelihood of success on the merits of their facial challenge to the ballot receipt deadline. . . . The Court also concludes that plaintiffs are unlikely to succeed on the merits of their facial challenge to the voter assistance ban and to the postage requirement."). Instead, it conducted a specific factual analysis and granted relief limited to this November's election and the conditions created by a once-in-a-century global pandemic. Appellant's App'x at 10 ("Thus, the Court is not concluding that plaintiffs will succeed in their attempts to invalidate the ballot receipt deadline in toto; rather, the Court's holding is . . . as applied to plaintiffs under the facts and evidence presented in this case.").

This analysis—applying a legal framework to the operation of the challenged laws within a specific and unique factual context—is a textbook as-applied analysis. Indeed, courts across the country have conducted similar analyses of laws as-applied to the COVID-19 pandemic. See, e.g., *Esshaki v Whitmer*, 813 F App'x 170, 173 (CA 6, 2020) (finding ballot-access provisions

unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *People First of Alabama v Merrill*, No. 20-CV-00619, 2020 WL 5814455, at *64 (ND Ala, Sept. 30, 2020) (enjoining Alabama voter ID requirement and ban on curbside voting as applied to plaintiffs, their members, and other voters who were similarly situated to plaintiffs during the COVID-19 pandemic); *id.* at *52 ("[T]he present challenge is as applied."); *Harding v Edwards*, 20-cv-00495, ECF No. 88 (MDLA, Sept 16, 2020) (ordering that certain voters be allowed to vote absentee for this election as a result of the pandemic and extended early voting for this election); *Thomas v Andino*, No. 20-cv-01552, ECF No. 65 (DSC, May 25, 2020) (enjoining witness requirement and election day receipt deadline for plaintiffs and all South Carolinians as-applied to June 2020 primaries during COVID-19 pandemic).[1]

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The thrust of the Legislators' argument is that the Court of Claims was required to conduct a facial analysis because it issued relief that extends beyond just Plaintiffs and their members. This assertion is an unduly rigid and narrow way of defining as-applied relief. As the U.S. Court of Appeals for the Sixth Circuit has explained,

> "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. In fact, a claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications."

[1] Although the district court in *Thomas v. Andino* stayed its order enjoining the enforcement of the witness requirement and election day receipt deadline, it did so because the South Carolina General Assembly suspended those requirements for the November election. No. 20-cv-01552, ECF No. 178 (DSC Sept. 18, 2020). The court's order does not undermine the merits of its decision to enjoin the enforcement of those provisions as-applied to the November election.

Green Party of Tennessee v Hargett, 791 F3d 684, 691-92 (CA 6, 2015) (citing *Citizens United v Fed Election Comm'n*, 558 US 310, 331; 130 S Ct 876; 175 L Ed 2d 753 (2010)). Here, the law is not struck in all its applications, but rather only as-applied to the upcoming election in light of the pandemic and mail delays. The law then goes back into effect. Nothing could be further from a facial challenge.

The cases cited by the Legislature do not compel a different conclusion. In *John Doe v Reed*, the U.S. Supreme Court held that, to the extent that plaintiffs claimed relief "beyond the particular circumstances of the plaintiffs," plaintiffs must "satisfy [the] standards for a facial challenge to the extent of that reach." 561 US 186, 194; 130 S Ct 2811; 177 L Ed 2d 493 (2010) (citing *United States v Stevens*, 559 US 460, 472-3; 130 S Ct 1577; 176 L Ed 2d 435 (2010)) (emphasis added). But there, the plaintiffs were challenging the state's public records law insofar as it required disclosure of the names and addresses of referendum petitions. *Id.* at 191. The Court applied the facial challenge standard to the Plaintiffs' claims, despite that they only challenged the law's application in one context—referendum petitions—because the claims sought relief that would have applied to all who initiate a referendum petition, including in future elections. *Id.* at 194. In contrast, here, the relief granted by the Court of Claims does not permanently strike the law from one categorical application. Instead, it enjoins the application of the laws in a *single instance* because of the very unique circumstances that will be present in that instance. The injunction does not reach beyond Plaintiffs' particular circumstances, but is instead exactly tailored for them—the burden on their right to vote absentee by mail in the November election stemming from COVID-19 and USPS delays.[2]

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[2] The other cases the Legislators cite in support of this argument are easily distinguished. See *Green Party of Tenn v Hargett*, 791 F3d 684, 692 (CA 6, 2015) (plaintiffs' challenge was facial

To the extent that the Court finds the injunction reaches beyond Plaintiffs' circumstances (it does not), that still does not require reversal of the Court of Claims' order because even clear facial challenges asserting unconstitutional burdens on the right to vote do not require showing that no set of circumstances exists under which the challenged laws would be valid. When courts review facial challenges asserting that statutes unduly burden the right to vote, they do not look to whether the law burdens every voter's right to vote in every election. The opposite—courts often invalidate laws facially on the basis of their impact on certain communities. For instance, in response to the facial challenge in *Crawford v. Marion County Election Board*, a majority of the U.S. Supreme Court agreed that courts should consider the impact a law has on identifiable subgroups for whom the burden may be most severe. 553 US 181, 199-203 (2004) (plurality opinion). Even Justice Scalia noted in dissent that "[a] voter-by-voter examination of the burdens of voting regulations would prove especially disruptive." *Id.* at 208 (Scalia, J., dissenting). Lower courts have followed *Crawford*'s lead. See, e.g., *Pub Integrity All, In. v City of Tucson*, 836 F3d 1019, 1024 n.2 (CA 9, 2016) (en banc); *Ohio State Conf of NAACP v Husted*, 768 F3d 524, 544 (CA 6, 2014), vacated on other grounds 2014 WL 10384647 (CA 6, Oct 1, 2014). So did the Court of Claims. See, e.g., Appellants' App'x at 15-16 (finding the voter assistance ban unconstitutional based on the burden it imposes on subgroups, like "residents in an assisted living facility" and

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challenge in effect, although it was styled as an as-applied challenge, because the relief plaintiffs sought "would strip the statutes of each and every application they have"); *Ctr for Individual Freedom v Madigan*, 697 F3d 464, 475-76 (CA7, 2012) (holding plaintiffs had not "laid the foundation" for an as-applied change because, unlike here, plaintiffs did not "challenge the applicability of the law to itself" and those similarly situated).

"prospective absentee voters who simply wish to take their time in weighing which candidates to vote for").[3]

Ultimately, Plaintiffs agree that "the label is not what matters." Br at 19. What matters is that the challenged laws will place an unconstitutional burden on Plaintiffs in light of their particular circumstances: voters in the 2020 General Election facing the uniquely challenging barriers to voting posed by COVID-19 and delayed USPS delivery. The Court of Claims applied the correct standard in its determination that the ballot receipt deadline and voter assistance ban violate the Michigan Constitution as-applied to these set of circumstances, and these circumstances only.

III. The ballot receipt deadline will unconstitutionally burden the right to vote absentee by mail in the November election.

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Analyzed as an as-applied challenge, the Court of Claims reached the right result. The Michigan Constitution grants Michiganders the right to "vote an absent[ee] voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). Because this right is self-executing, it cannot be unduly burdened or curtailed, *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971), nor can additional obligations be imposed, *Soutar v St Clair Cnty Election Comm'n*, 334 Mich 258, 265; 54 NW2d 425 (1952).

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[3] The U.S. Supreme Court has also walked back the "no set of circumstances" standard first articulated in *United States v Salerno*, 418 US 739, 745 (1987), even in the context of clear and unqualified facial challenges. The Supreme Court has recognized that "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *City of Chicago v Morales*, 527 US 41, 55 n.22 (1999) (plurality opinion) (emphasis added). Instead, the Court "has repeatedly considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid." *Doe v City of Albuquerque*, 667 F3d 1111, 1124 (CA 10, 2012) (collecting cases).

Instead, any statute concerning the right must "further [its] exercise . . . and make it *more available*." *Wolverine Golf Club v Hare*, 24 Mich App 711, 730; 180 NW2d 820 (1970) (citation omitted) (emphasis added).

A. The Court of Claims correctly determined that the ballot receipt deadline is unconstitutional as-applied to the November election.

The Court of Claims held that "[i]n light of the unrefuted documentary evidence concerning the effects of the pandemic and mail delays . . . the statutory ballot receipt deadline is, as applied, an impermissible restriction on the self-executing right to vote by absent voter ballot and to choose to return such a ballot by mail." Appellant's App'x at 11. The Court of Claims found that enforcing the ballot receipt deadline during the pandemic imposed burdens on "those with underlying health risks and who prefer not to cast a vote in person." Appellant's App'x at 12. For such voters, like Plaintiffs and their members, the Court of Claims found that "returning their ballot by mail is the only realistic option." Appellant's App'x at 12. Considering the undisputed evidence about mail delays in Michigan, the risk that mail delays will impact the November election is not "merely hypothetical" and "voters know neither whether their ballot will be received (by them) on time or delivered to the clerk's office on time." Appellant's App'x at 11-12.

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The Court of Claims' holding is consistent with other courts that have recognized that election day ballot receipt deadlines unduly burden voters. See, e.g., *Pennsylvania Democratic Party et al v Boockvar, et al*, No. 133-MM-2020 at 36-37 (Pa. Sept. 17, 2020) (enjoining Pennsylvania's election day receipt deadline for this election, recognizing the "unprecedented numbers" of absentee ballots, the fact that "that the timeline built into the Election Code cannot be met by the USPS's current delivery standards," and concluding, "[w]hile [those deadlines] may be feasible under normal conditions, it will unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters") (attached, Appellant's

App'x at 746); *Democratic Nat'l Comm v Bostelmann*, 451 F Supp 3d 952, 983 (WD Wis, 2020) (enjoining Wisconsin's election day receipt deadline for this election, recognizing the significant risk that Wisconsin voters who make a good-faith effort to comply with the state's absentee ballot deadlines will find themselves disenfranchised).

The Court of Claims' holding is not only consistent with other courts, it is also well supported by the record.[4] On that point, the Legislators do not disagree. Instead of contesting the Court of Claims' finding that Michigan has experienced significant mail delays that will impact the November election, the Legislators argue that the Court of Claims was required to consider the delivery times and reliability of other common carriers (like UPS or FedEx), and that failure amounts to reversable error. This argument fails for a multitude of reasons.

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First, the Legislators' narrow reading of the Court of Claims' Order is inconsistent with the Court's determination that the "mail system," in general, is delayed in Michigan. Appellant's App'x at 11, 13; see also Appellee's App'x at 704-05 (documenting FedEx delays in Michigan). Moreover, this argument does not undermine the Court's determination that Plaintiffs, their members, and all Michigan voters are at risk of disenfranchisement due in part to USPS delays.

[4] The Court specifically pointed to the USPS Office of Inspector General's management alert, Appellant's App'x at 11 (attached, Appellee's App'x at 326-342), the affidavit of former Deputy Postmaster General Ronald Stroman, Appellant's App'x at 11 (attached, Appellee's App'x at 295-342), a letter from the general counsel of the United States Postal Service, Appellant's App'x at 5 (attached, Appellee's App'x at 351-52), the Secretary's data establishing that thousands of ballots were rejected for being late in the August primary, Appellant's App'x at 11 (attached, Appellee's App'x at 176), analysis of ballot rejection rates in Dr. Kenneth Mayer's expert report, Appellant's App'x at 11 (attached, Appellee's App'x at 255-82), expert testimony and documentary materials from Dr. Michael Herron concluding that there is "no evidence of significant voter fraud in [Michigan] associated with absentee voting," Appellant's App'x at 6 (attached, Appellee's App'x at 445-519), as well as voter affidavits and testimony, e.g., Appellant's App'x at 4-5 (attached, Appellee's App'x at 357-363). The Court also pointed to the Secretary's own public statements, warning voters to not use the United States Postal Service to return absentee voter ballots in the August primary, given the risk that completed ballots would not arrive in time due to mail delays. Appellant's App'x at 4 (attached, Appellee's App'x at 354-55).

That some voter *may* not be disenfranchised if she utilizes a common carrier to deliver her ballot (a completely unsupported assertion by the Legislators) does not lessen the constitutional violation that occurs when another voter *is in fact* disenfranchised by the USPS's delays. The focus of the inquiry is on how affected voters' "ability to cast a ballot is impeded by [the State's] statutory scheme." *Ohio State Conf of NAACP v Husted*, 768 F3d 524, 541 (CA 6, 2014); see also *Obama for Am v Husted*, 697 F3d 423, 433 (CA 6, 2012) (holding burden of challenged voting practice was not "slight" even though it did not "absolutely prohibit early voters from voting"); *Guare v State*, 167 NH 658, 665; 117 A3d 731 (2015) (holding that confusing language on voter registration form imposed at least an unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added). Plaintiffs needed only to demonstrate that the ballot receipt deadline *burdens* their right to vote absentee by mail, not that the ballot receipt deadline makes voting by mail literally impossible for Plaintiffs and their members. See *Perez-Guzman v Gracia*, 346 F3d 229, 241 (CA 1, 2003) (holding that a burden on the right to vote need not be "insuperable" before it can be deemed severe). Finally, there is no evidence that deliver services like FedEx or UPS even reach all of Michigan, much less that voters are likely to incur the necessary time and expense to use such to send ballots. Indeed, there is no evidence that FedEx or UPS even have better delivery timing than the USPS (to the contrary, there is evidence that FedEx experienced significant delays in June 2020, and had to turn to USPS for assistance, Appellee's App'x at 704-05, or that these companies are equipped to take on the burden of timely delivering potentially millions of ballots. Given the undisputed evidence of USPS delays, including the USPS's own statements regarding the potential for its services risk of disenfranchising Michigan voters, Appellee's App'x at 351-52, the ballot receipt deadline makes Plaintiffs' and other Michiganders' right to vote absentee by mail far less available during the COVID-19 pandemic.

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For that reason, the ballot receipt deadline impermissibly "unduly burden[s]" the right to vote absentee by mail. See *Hare*, 384 Mich at 466.

B. The Legislators' attempts to undermine the Court of Claims' holding fail.

The Legislators argue that the ballot receipt deadline does not impermissibly burden the right to absentee by mail because, even a self-executing right—like the right to vote absentee by mail—may be regulated in a manner that does not violate that right. Br at 23. Specifically, the Legislators argue that Section 41(1)(g), particularly when considered in context with the Michigan Constitution's delegation of the power to regulate rights to the Legislature, is consistent with the imposition of the deadline on the right to vote absentee by mail. *Id.* But that argument requires the Court to misread the Court of Claims' order and disregard the circumstances in which the ballot receipt deadline would be applied in the November election.

First, the Court of Claims did not go as far as to hold that the right to vote absentee by mail may *never* be limited by the ballot receipt deadline (and Plaintiffs do not disagree). Instead, the Court of Claims found the ballot receipt deadline, specifically in the context of the upcoming election, restricts too much. Such a reading of the Court of Claims' order is both consistent with this Court's precedent holding that, under normal circumstances, the ballot receipt deadline does not violate the right to vote absentee because ballots arrive late in "extreme, and undoubtably rare" circumstances. *LWV* at 10. That reading is also compelled by the fact that the Court of Claims' order itself imposed a deadline.

Second, the Court of Claims properly considered the current circumstances in holding that the ballot receipt deadline, as applied to the November election, unconstitutionally burdens the right to vote absentee by mail. As noted, this Court has held that, under normal circumstances, the ballot receipt deadline does not violate the right to vote absentee. *LWV* at 10. But the circumstances of the November election will not be normal. And the Court of Claims determined that the number

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of ballots likely to arrive late "cannot be set aside as 'rare'" given Michigan's mail delays. Because of those same circumstances, the other options available to voters do not render the ballot receipt deadline. While, generally, voters have more options to submit their ballots, *id.* at 16, for those with health risks, "mail is the only realistic option" to cast an absentee ballot this November, given that the "health risks of COVID may prevent voters from submitting their ballots in person." Appellant's App'x at 12, 14. The "pandemic's effect on the mail system has outright removed, or effectively removed, the right to choose to submit an absentee ballot by mail." Appellant's App'x at 13.

Third, the Legislators suggest that the ballot receipt deadline cannot be unduly burdensome because it is an exercise of the Legislature's ability to regulate the right to vote absentee by mail, and it assists with election administration. See Br at 24. Specifically, the Legislators note that the ballot receipt deadline provides "clear instructions" and is "unambiguous." Br at 24. They also note that it ensures that "all tallied voters were actually cast prior to the close of polls." *Id.* But the deadline imposed by the Court of Claims has exactly the same characteristics. The Court of Claims ordered that the Secretary shall count ballots received within 14 days of election day if they are postmarked by November 2, 2020. That deadline is clear, unambiguous, and—by excluding ballots that are not postmarked on or before *the day before the election*—ensures that ballots cast after the close of polls are not counted.

Fourth, the Legislators' unsupported claims of widespread voter fraud provide no justification for the severe limits that the ballot receipt deadline places on voters' access to voting by absentee ballot. The Court of Claims found no evidence of voter fraud associated with absentee voting by mail. Appellant's App'x at 5 ("One of the issues in this case concerns evidence—or lack thereof—of voter fraud and threats to election integrity associated with absent voter ballots.").

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Courts have held time and again that generic and unsupported assertions of voter fraud are insufficient to overcome burden imposed by voting restrictions. See, e.g, *Ne Ohio Coal for the Homeless v Husted*, 837 F3d 612, 633 (CA 6, 2016) (rejecting argument that fraud prevention "ma[de] it 'necessary to burden' the plaintiffs' voting rights); *League of Women Voters of NC v North Carolina*, 769 F3d 224, 246 (CA 4, 2014) (same).

Finally, the Legislators' arguments regarding the supposed lack of evidence to support the Court of Claims conclusions fall flat. First, the Legislators argue that Plaintiffs have not presented evidence that their own ballots would not be received by the deadline. As explained, *infra* at V, Plaintiffs have demonstrated that the ballot receipt deadline puts Plaintiffs and their members at risk of disenfranchisement. Second, Plaintiffs submitted voluminous evidence in support of their claims—that the individual Plaintiffs did not present oral testimony at the injunction hearing is immaterial; such testimony is not required to grant injunctive relief. *Campau v McMath*, 185 Mich App 724, 728; 463 NW2d 186 (1990) ("If a party's entitlement to the injunction can be established in a particular case by argument, brief, affidavits or other forms of nontestamentary evidence, the trial court need not take testimony at the hearing.") (Emphasis added).[5] And third, the Legislators accuse the Court of Claims of ignoring their supplemental authority, which they believe shows that USPS mail delays will not impact the November election. The Court of Claims was not required to list every piece of submitted evidence in its opinion. The lack of reference to the Legislators' supplemental evidence simply shows that the Court of Claims did not find it compelling or worth mentioning.

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[5] *Ctr for Individual Freedom*, 697 F3d at 475-476, a federal appellate court decision about Illinois campaign finance disclosure requirements, does not stand for a contrary proposition. There, Plaintiffs did not engage in the activity that was subject to the challenged regulation, so "it would be impossible for this court to fashion a [tailored] remedy." *Id.* at 475. By contrast, Plaintiffs obviously engage in the at-issue activity here—voting in the November election.

IV. The Court of Claims correctly determined that the voter assistance ban is unconstitutional as-applied to the November election.

Given the risk that voters will receive absentee ballots late due to mail delays, the Court of Claims concluded that the voter assistance ban erects yet another barrier to absentee voting for those who need assistance returning their ballots, but do not have an immediate family member or a household member to assist them.[6] Specifically, the Court of Claims found "many home-bound individuals live alone and have no family members living nearby." Appellant's App'x at 15. In addition, some individuals "might be hesitant, or unable, to receive assistance from family members of household members due to health concerns associated with the COVID-19 pandemic" and similarly "might prevent such voter from returning a ballot in person." Appellant's App'x at 16. "[P]erhaps in recognition of the same," Michigan law provides a fail-safe option for such individuals that permits a clerk or assistant of the clerk to help an absentee voter return an absentee ballot. Appellant's App'x at 15 (citing MCL 168.932(f)). However, a voter is only guaranteed to receive help from the clerk if he voter makes a request before 5:00 on the Friday before election day. Thus, the Court of Claims concluded that, absent voters are most in danger of being left without needed assistance the weekend prior to the election. Appellant's App'x at 15. This finding was well supported by the evidence.[7]

The Court of Claims also correctly rejected the State's fraud prevention interests as justification for the voter assistance ban, finding that "the fraud fighting role of the voter assistance

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[6] This Court did not consider the constitutionality of the voter assistance ban in its *LWV* decision, and thus, the *LWV* decision does not impact this claim.
[7] The Court specifically pointed to Plaintiffs' documentary evidence that the voter assistance ban impacts home-bound individuals who live alone and have no family members nearby, Appellant's App'x at 15 (attached, Appellee's App'x at 522), and considered evidence that some of Plaintiffs members need assistance voting and returning their ballots (Appellee's App'x at 420, 427 (Hunter Aff ¶¶ 9-10 and Long Aff ¶ 5)). The Court also referenced Dr. Herron's expert report, which concluded that there is no credible basis for concluding that the ban is useful or necessary in preventing voter fraud. Appellant's App'x at 17 (attached, Appellee's App'x at 445- 519).

ban is debatable, at best" and that several other Michigan laws already protect against absentee ballot fraud.[8] Appellant's App'x at 17. Indeed, the Legislators' purported interest in preventing fraud does not grant the State limitless authority to restrict the right to vote, particularly when those restrictions are redundant and provide no material protection against fraud. See *Bay Cnty Democratic Party v Land*, 347 F Supp 2d 404, 437 (ED Mich, 2004). The Court's finding is consistent with other courts who have found that speculative concerns regarding fraud prevention does not justify burdening the right to vote. See *Ne Ohio Coal for the Homeless*, 837 F3d at 633 (rejecting argument that fraud prevention "ma[de] it 'necessary to burden' the plaintiffs' voting rights); *League of Women Voters of NC*, 769 F3d at 246 (same). While Defendants and amici asserted that the voter assistance ban was necessary to prevent fraud, no one identified any instances of voter fraud caused by third-party ballot delivery. To the contrary, Plaintiffs presented an expert report and testimony of Dr. Michael Herron, who concluded that there is "no evidence of significant fraud in Michigan associated with absentee voting and voter assistance." Appellant's App'x at 504 (Herron Aff) ¶ 163.

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The Legislators argue that the voter assistance ban does not limit voters' ability to turn their ballots in by mail or in person, without explaining how the option to turn ballots in by mail or in person will remedy the risk of disenfranchisement recognized by the Court of Claims for home-bound voters who receive their ballots too late to submit them by mail. The Legislators also argue, again, that Plaintiffs have not demonstrated that Plaintiffs or their members will require assistance. But as explained, *infra* at V, Plaintiffs have demonstrated that their members are at risk of disenfranchisement if they are unable to receive assistance prior to election day. Finally, the Legislators mischaracterize the testimony of Gwendolyn Babb. Ms. Babb asserted that if her ballot

[8] See MCL 168.759(8), 168.932(e), 168.932(g), 168.932(a), 168.931(1)(a), (b), and 168.931(2).

arrives too late to return it by mail for the November election, she will need to have someone take it to the clerks office for her. Appellant's App'x at 157. However, her children work and have children of their own, therefore, it is possible that her family members will be unavailable and unable to deliver her ballot to the clerks' office. Appellant's App'x at 161-64; see also Appellee's App'x at 435 (Babb Aff at ¶ 14). Given that Ms. Babb is unable to leave her home without assistance, the voter assistance ban would completely disenfranchise her—indeed, it did so for the March presidential primary. Appellee's App'x at 434 (Babb Aff at ¶ 7).

V. The Court of Claims' injunction analysis was correct.

The Legislators' final attempts to undermine the Court of Claims' decision asks the Court to overlook the substance of the Court of Claims' reasoning, apply an invented standard of review, and rewrite the factual record. Each of those attempts fails.

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The Legislators suggest that the Court of Claims erred by incorporating its detailed analysis of the factors favoring preliminary injunction into its opinion and order granting a permanent one. Br at 31. But the Court has previously found this exact argument meritless—and the Legislators cite no authority in support of their claim. See *Wiggins v City of Burton*, 291 Mich App 532, 559; 805 NW2d 517 (2011) ("Plaintiffs' claim that the court improperly analyzed their request according to the standards for a preliminary injunction rather than a permanent injunction lacks merit."). Moreover, even if the Court of Claims had not analyzed all of the permanent injunction factors (which it has), "the list of factors to be considered" is not "intended to be exhaustive." *Greeley v Twp. of Mullett*, No. 299941, 301460, 2012 WL 468278, at *2 (Mich Ct App, Feb 14, 2012). A court need not even consider "each element" in "every analysis." *Id.*

Regardless, the Court of Claims' grant of permanent injunctive relief certainly does not amount to abuse of discretion. In the preliminary injunction order, the Court of Claims carefully evaluated the evidence and held that Plaintiffs are likely to be disenfranchised solely because their

ballots were received after the statutory deadline demonstrated irreparable harm to Plaintiffs. Appellant's App'x at 19. Consistent with this Court's holding that the loss of a constitutional right unquestionably "constitutes an irreparable harm which cannot be adequately remedied by an action at law," *Garner v Mich State Univ*, 186 Mich App 750, 764; 462 NW2d 832 (1990), the Court of Claims' preliminary injunction order held that the balance of the harms and the public interest weighed in favor of "further the right to vote." *Id.* The parties made essentially the same arguments and relied on the same evidence in their motions regarding the permanent injunction, and the Court of Claims' decision incorporated the same evidence and reasoning as the preliminary injunction order, but applied the relevant permanent injunction factors. Appellant's App'x at 26 ("Having reviewed the parties' summary disposition briefing, the Court sees no reason to revisit its holding and it will grant summary disposition to plaintiffs . . . in a manner that is consistent with the Court's prior opinion and order."); *id.* ("[T]he Court incorporates its reasoning from the September 18, 2020 opinion and order . . . ."). The Court of Claims also explicitly held that [irreparable harm], "no other remedy is available to protect that right, that the hardship to defendants is minimal, and that the public interest supports issuance of injunctive relief." Appellant's App'x at 27.

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The Legislators' only critiques of the actual substance of the Court of Claims' decision rely on a misreading of both the Court of Claims' holdings and the undisputed evidence record before it. First, the Legislators argue that Plaintiffs did not show that they themselves were at risk of an imminent injury. Br at 30. The Legislators characterize Plaintiffs' evidence regarding the thousands of voters who were disenfranchised because of the challenged laws during the primary election, and the likelihood thousands more will be disenfranchised in the November election, as concerning only third parties. Although that evidence certainly suggests that the challenged laws will injure Michigan voters other than Plaintiffs, Michigan voters and Plaintiffs are not mutually

exclusive: Plaintiffs (or their members) *are* Michigan voters. What is more, that argument completely disregards the harm Plaintiffs APRI and the Alliance will suffer absente injunctive relief. Plaintiffs demonstrated that that the challenged laws hampers APRI and the Alliance's efforts to turnout voters by forcing them to divert resources away from their turnout efforts and towards efforts to assist Michiganders in navigating the burdens the challenged laws impose. Appellee's App'x at 58-59, 423 (Hunter Aff ¶ 20), 427-28 (Long Aff ¶ 8).

Second, the Legislators claim that the Court of Claims failed to balance the state's interest in election integrity. This, too, is entirely untrue. The Court of Claims *did* consider election integrity in its analysis of the injunction factors, and found that "[a]llowing third parties to assist voters during the narrow window of time granted by the opinion does not, on the record before this Court, undermine or affect the state's interest in preserving election integrity." Appellant's App'x at 19.

Because Plaintiffs demonstrated a "particularized showing of irreparable harm," relief addressing that harm does not "impos[e] a meaningful inconvenience to the state," and the public is "[u]undoubtedly . . . benefited from preserving and furthering the right to vote," the Court of Claims correctly found the injunction factors satisfied. Appellees' App'x at 19.

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CONCLUSION

For the above-mentioned reasons, as well as those contained in the Court's order, the Court should deny the Legislators' claim of appeal.

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Respectfully submitted,

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