MICHIGAN ELECTION LAW SURVEY

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I. INTRODUCTION

This *Survey* period was unlike any other in recent memory for election observers in Michigan and nationwide. Election officials successfully carried out primary and general elections during the COVID–19 pandemic where the presidency, a U.S. Senate seat, all fifteen U.S. House seats, all Michigan House of Representative seats, and numerous local offices and proposals were on the ballot. On top of this, election-related litigation dominated the trial and appellate courts during the *Survey* period. Some litigation dealt with challenges to election procedures while other litigation challenged the results of the 2020 presidential election. Aside from one decision, this Article does not address those cases. Instead, we focus on several decisions from the *Survey* period impacting election procedures that transcend the unique 2020 political environment. These decisions will be particularly relevant and important at the statewide and local levels as the 2022 election season begins.

II. DECISIONS OF THE MICHIGAN COURT OF APPEALS AND MICHIGAN SUPREME COURT

A. The Secretary of State's Authority to Send Absentee Voter Ballot Applications to Registered Voters under a 2018 Constitutional Amendment

Davis v. Secretary of State[1] involved the ability of the Secretary of State to mail unsolicited absent-voter ballot applications to registered Michigan voters.

In November 2018, Michigan voters approved Proposition No. 18-3 ("Proposal 3").[2] Proposal 3, in part, amended the Michigan Constitution to allow registered voters to vote by absentee ballot without giving a reason.[3] Leading into the 2020 primary and general elections, Secretary of State Benson mailed absent-voter ballot applications to registered voters along with a letter that encouraged absentee voting from home because of the COVID–19 pandemic.[4] Importantly, Secretary Benson only mailed absent-voter ballot *applications*—not actual ballots.[5] Additionally, Secretary Benson did not mail absent-voter ballot applications to voters in municipalities where election officials were already sending applications to registered voters.[6]

Robert Davis, a Michigan voter, received such an absent-voter ballot application.[7] Davis sued Secretary Benson in the court of claims.[8] Davis alleged that Secretary Benson did not have the authority under the Michigan Election Law or the Michigan Constitution to mail unsolicited absent-voter ballot applications to registered Michigan voters.[9] Davis further argued that Secretary Benson's actions in sending unsolicited absent-voter ballot applications violated the Michigan Constitution's separation of powers requirement. He asked for a declaratory judgment and an injunction preventing Secretary Benson from mailing unsolicited absent-voter ballot applications.[10] After answering the complaint, Secretary Benson moved for summary disposition. The court of claims

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1. 333 Mich. App. 588, 963 N.W.2d. 653, *leave to appeal denied*, 506 Mich. 1040, 951 N.W.2d 911 (2020).
2. *Id.* at 591, 963 N.W.2d at 655; *see also* MICH. CONST. art. 2, § 4.
3. *Davis*, 333 Mich. App. at 591, 963 N.W.2d at 655.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 591–92, 963 N.W.2d at 655–56.
8. *Id.*
9. *Id.*
10. *Id.*

held that Secretary Benson possessed the authority to send the absent-voter ballot applications, granted summary disposition, and dismissed the consolidated cases.[11]

In upholding the court of claims' decision, the court of appeals first analyzed the Secretary of State's powers under the constitution and the Michigan Election Law. The court of appeals noted under the Michigan Constitution, "[a]ll political power is inherent in the people[,]" and that the people exercised this power by amending the constitution through Proposal 3.[12] The Michigan Constitution also provides that "[t]he head of each principal department shall be a single executive unless otherwise provided in this constitution or by law."[13] That section of the Michigan Constitution further provides that "single executives heading principal departments shall include a secretary of state," and that as a single executive heading a principal department, the Secretary of State had to "perform duties prescribed by law."[14]

The court of appeals then analyzed how the Michigan Election Law defined the role of the Secretary of State.[15] Under the Michigan Election Law, the Secretary of State is the chief elections officer "and has supervisory authority over local election officials performing their duties."[16] Looking at MCL § 168.31, the court of appeals observed that the Secretary of State must perform specific tasks, including: promulgating rules under the Administrative Procedures Act to conduct elections and registrations; advising and directing local election officials; and prescribing uniform forms, notices, and supplies for conducting elections and registrations.[17]

The court of appeals further observed that MCL § 168.31 requires local election officials to follow the Secretary of State's instructions while conducting elections.[18]

Beyond the constitutional and statutory text, the court of appeals reached this conclusion by relying on *Elliot v. Secretary of State*. In *Elliot*, the Michigan Supreme Court held that "everything reasonably necessary to be done by election officials to accomplish the purpose of the amendment is fairly within its purview."[19] The court of appeals also relied

11. *Id.* at 592, 963 N.W.2d at 656. The court of claims consolidated Davis's case with two similar cases.

12. *Id.* at 595, 963 N.W.2d at 657.

13. *Id.* at 597, 963 N.W.2d at 658 (citing MICH. CONST. art. 5, § 9).

14. *Id.*

15. *Id.*

16. *Id.* (citing MICH. COMP. LAWS § 168.21 and case law).

17. *Id.* at 597–98, 963 N.W.2d 653, 658.

18. *Id.* at 598, 963 N.W.2d 653, 658–59.

19. Elliot v. Sec'y of State, 295 Mich. 245, 249, 294 N.W. 171, 173 (1940).

on MCL § 168.759.[20] That statute provides that voters *may* apply for an absent-voter ballot application through a written request signed by the voter; on an absent-voter ballot application form provided for that purpose by a local clerk; or on a federal postcard application.[21] The application must be signed.[22]

In examining Secretary Benson's actions, the court of appeals observed that MCL § 168.759 does not mention the Secretary of State and the statute did not place any restrictions on the Secretary of State's broad powers under MCL § 168.21 or MCL § 168.31.[23]

The court of appeals held that the Secretary of State's conduct in mailing absent-voter ballot applications "fell within her [broad] authority as [Michigan's] chief election officer" and "her constitutional obligation to liberally construe Const. 1963, art. 2, § 4(1) to effectuate its purposes" under *Elliot*.[24] The court of appeals noted that while MCL § 168.31(1)(e) was not necessarily applicable because the Secretary of State did not actually prescribe any particular forms to local election officials, that statute and "the Secretary of State's role as chief elections officer, evidences that the Legislature granted the Secretary a broad measure of discretion in conducting and supervising elections."[25] According to the court of appeals, such inherent authority and discretion "certainly includes providing voters information and absent-voter ballot applications that substantially comply with the form prescribed by the Legislature in MCL 168.759(5)."[26]

The court of appeals rejected Davis's reliance on *Taylor v. Currie*.[27] Unlike the defendant-clerk in *Taylor*, the court of appeals reasoned that Secretary Benson was not a candidate in the election and by mailing the absent-voter ballot applications, she did not target a subset of voters whom she believed would be absentee voters.[28] The *Taylor* court also focused on the fact that the clerk was essentially distributing, "in her official capacity, what amounts to propaganda at the city's expense[.]"[29]

Judge Meter issued a partial dissent arguing that a textual, plain reading of the statute precluded the Secretary of State from distributing

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20. *Davis*, 333 Mich. App. at 598, 963 N.W.2d at 659.
21. *Id.*
22. *Id.* at 598–99, 963 N.W. 2d at 659.
23. *Id.* at 600, 963 N.W. 2d at 660.
24. *Id.* at 602, 963 N.W.2d at 661.
25. *Id.* at 601–03, 963 N.W.2d. at 660–61.
26. *Id.* at 602–03, 963 N.W.2d at 661.
27. *Id.*; *see also* Taylor v. Currie, 277 Mich. App. 85, 743 N.W.2d 571 (2001).
28. *Davis*, 333 Mich. App. at 600–01, 963 N.W.2d at 660.
29. *Id.*

absent-voter ballot applications.[30] As Judge Meter read the statute, it did not empower the Secretary of State to distribute unsolicited absent-voter ballot applications.[31] Rather, the statute only empowered local clerks to distribute absent-voter applications.[32] Judge Meter also read the statute as requiring the voter to make an affirmative written request for absent voter ballot applications.[33]

The majority responded to Judge Meter by noting that the statutory text of MCL § 168.759(3) appeared to be permissive in its use of the word "may," which did not preclude other means of obtaining absent-voter ballot applications.[34] The majority further noted that MCL § 168.759(3) merely directed how a voter could obtain absent voter applications and did not purport to direct or control election officials.[35]

B. Candidate Forms and Ballot Challenges

1. What Qualifies as Failing to Strictly Comply with the Michigan Election Law?

Affidavits of Identity ("AOI") have been pitfalls for many candidates. In *Stumbo v. Roe*,[36] the court of appeals provided some clarity on what precisely constitutes a fatal defect on an AOI requiring a candidate to be removed from the ballot.

Heather Roe served as an Ypsilanti Township Trustee.[37] On March 2, 2020, Roe filed paperwork to run as an incumbent for the office of Ypsilanti Township Trustee.[38] On April 21, 2020, Roe withdrew as a trustee candidate and filed to run as a candidate for Ypsilanti Township Clerk.[39]

Under MCL § 168.558(1) and (2), a candidate filing a nominating petition or a filing fee instead of a nominating petition must file an AOI.[40] AOIs must contain information to establish candidates' identity, including the candidate's name, address, and other similar information that can help

30. *Id.* at 607, 963 N.W.2d at 663 (Meter, J., dissenting).
31. *Id.*
32. *Id.*
33. *Id.* at 608, 963 N.W.2d at 663–64.
34. *Id.* at 604, 963 N.W.2d at 661–62.
35. *Id.*
36. *See* Stumbo v. Roe, 332 Mich. App. 479, 957 N.W.2d 830, *leave to appeal denied*, 505 Mich. 1127, 943 N.W.2d 647 (2020).
37. *Id.* at 483, 957 N.W.2d at 833.
38. *Id.*
39. *Id.*
40. MICH. COMP. LAWS § 168.558(1)–(2).

establish the candidate's identity.[41] The Secretary of State provides a form used by candidates that includes a space for the candidate's signature.[42] Immediately to the right of the signature space is another space for candidates to record the date they signed the AOI.[43] Finally, the AOI form also provides a space for a notary to attest to the identity of the candidate signing the AOI.[44]

Roe signed her AOI on April 20, 2020, and it was notarized by Brent W. Royal on "the 21st day of April, 2020."[45] Roe submitted her application to the township clerk, who accepted it for filing and qualified Roe as a candidate for Ypsilanti Township Clerk.[46]

Brenda Stumbo, the Ypsilanti Township Supervisor, and Larry Doe, the Ypsilanti Township Treasurer, sued in the Washtenaw County Circuit Court to disqualify Roe from appearing as a candidate for Ypsilanti Township Clerk.[47] Stumbo and Doe alleged that Roe filed a facially improper AOI because the signature date was different from the notarization date.[48] The trial court agreed and removed Roe from the ballot.[49] Roe appealed.[50]

The court of appeals began its opinion by noting that candidates for office must strictly comply with the Michigan Election Law and that the failure to supply a facially proper AOI is a basis to disqualify a candidate from appearing on the ballot.[51] Next, the court of appeals looked to the statutory text. MCL § 168.558(2) sets forth the required contents of an AOI.[52] These include:

> [T]he candidate's name and residential address; a statement that the candidate is a citizen of the United States; the title of the office sought; a statement that the candidate meets the constitutional and statutory qualifications for the office sought; other information that may be required to satisfy the officer as to the identity of the

41. *Stumbo*, 332 Mich. App. at 483, 957 N.W.2d at 833.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 483–84, 957 N.W.2d at 833.
46. *Id.*
47. *Id.* at 484, 957 N.W.2d at 833.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 481, 957 N.W.2d at 832 (citing Stand Up for Democracy v. Sec'y of State, 492 Mich. 588, 594, 600–08, 619, 620, 637, 640–41, 822 N.W.2d 159 (2012) and Berry v. Garrett, 316 Mich. App. 37, 43–45, 890 N.W.2d 882 (2016)).
52. *Id.* at 485, 957 N.W.2d at 834.

> candidate; and the manner in which the candidate wishes to have his or her name appear on the ballot.[53]
>
> MCL § 168.588(4) also requires that the AOI contain:
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> [A] statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act . . . have been filed or paid [] and a statement that the candidate acknowledges that making a false statement in the [AOI] is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both.[54]

Lastly, MCL § 168.558(4) requires that an election officer not certify a candidate who submits an AOI containing a "false statement with regard to any information or statement required[.]"[55]

The parties did not dispute the date Roe signed her AOI differed from the notarization date. The question for the court of appeals was whether Roe's affidavit was still facially proper despite that defect.[56]

The court of appeals found that Roe's AOI was "strictly compliant with the requirements of MCL 168.558" because Roe provided all the required and requested identification information and statements.[57] Writing for the majority, Judge Boonstra noted that "MCL 168.558 contains no express requirement that the affidavit be signed by the candidate" or that it be notarized.[58] The court of appeals, however, found the signature and notarization requirements were implicit in MCL § 168.558 because the statute required candidates to file an "affidavit."[59] Under Michigan law, an affidavit must be signed in the presence of a notary and the notary must attest to the identity of the affiant.[60] Thus, there was no question that Roe signed her AOI and that it was facially complaint with Michigan law because the notary attested that Roe signed her AOI in front of him on April 21, 2020.[61]

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53. *Id.* at 485, 957 N.W.2d at 834 (citing MICH. COMP. LAWS § 168.558(2)).
54. *Id.* at 486, 957 N.W.2d at 834 (citing MICH. COMP. LAWS § 168.558(4) (internal citations omitted)).
55. *Id.* (citing MICH. COMP. LAWS § 168.558(4))
56. *Id.*
57. *Id.* at 486–87, 957 N.W.2d at 834–35.
58. *Id.* at 487, 957 N.W.2d at 835.
59. *Id.*
60. *Id.*
61. *Id.*

Further, the court of appeals found the trial court erred in concluding that Roe's AOI was fatally defective because her signature date and notarization date were different.[62] This was because MCL § 168.558 "neither expressly nor implicitly" requires a candidate to date their affidavit.[63] Rather, the Secretary of State added that requirement under her power to prescribe uniform forms pursuant to MCL § 168.31.[64] The court of appeals held that the Secretary of State's instructions do not have the force of law and that the instructions on the form AOI themselves stated that the affidavit was not completed until it had been signed and notarized with no mention of dating.[65] What is more, as the court of appeals observed, "MCL 55.285 does not require a notary to attest to the accuracy of the date affixed to the writing by the affiant."[66]

Accordingly, the court of appeals reversed the trial court, vacated the May 29, 2020 order removing Roe from the ballot, and remanded the matter to the trial court for entry of an order directing that Roe's candidacy be certified.[67]

Judge Markey dissented from the majority opinion, noting that the court of appeals appeared to rely on extrinsic evidence—Roe's declaration—to explain away the defect.[68] Because the dates did not match up, it appeared to Judge Markey that Roe signed the affidavit the day before the notary signed it, in contravention of the presence requirement of MCL § 55.285(5) that the majority found implicit in MCL § 168.558.[69]

2. Can a Candidate Be Removed from the Ballot if They Make a False Certification?

Burton-Harris v. Wayne County Clerk[70] was another AOI lawsuit dealing with a challenge to a candidate's ability to appear on the ballot but with far more procedural complexities.

On May 18, 2020, Kym Worthy, the incumbent Wayne County Prosecutor, filed an AOI to run for Wayne County Prosecutor in the 2020 election.[71] Worthy's AOI attested that at the time she signed it, "all

62. *Id.* at 489, 957 N.W.2d at 836.
63. *Id.* at 488, 957 N.W.2d at 835.
64. *Id.*
65. *Id.* at 489, 957 N.W.2d at 836.
66. *Id.* at 488–89, 957 N.W.2d at 835–36.
67. *Id.* at 489–90, 957 N.W.2d at 836.
68. *Id.* at 490, 957 N.W.2d at 836 (Markey, J., dissenting).
69. *Id.* at 492–93, 957 N.W.2d at 837–38.
70. No. 353999, 2021 WL 1845800 (Mich. Ct. App. May 7, 2021), *judgment vacated in part*, *appeal denied in part*, 966 N.W.2d 349 (Mich. 2021).
71. *Id.* at *1.

statements, reports, late filing fees, and fines due from [her] or any Candidate Committee" supporting her election were filed or paid.[72]

Victoria Burton-Harris was also a candidate for Wayne County Prosecutor.[73] On June 2, 2020, Burton-Harris submitted a letter to the Wayne County Clerk and the Wayne County Election Commission. Burton-Harris claimed Worthy owed reports, which Worthy never filed.[74] Specifically, Burton-Harris claimed that after "Worthy was last elected in 2016, she was required to file a postelection statement under MCL 168.848" before taking office but never did.[75] According to Burton-Harris, that missing filing made Worthy's AOI false and the Wayne County Clerk and Wayne County Election Commission should not have certified her as a candidate.[76]

The Wayne County Clerk responded that a facial review of Worth's AOI "determined that all sections deemed mandatory by the Michigan Campaign Finance Act have been complied with and the requirements of MCL 168.558(2) have been met."[77] The Clerk then advised that it did not have the power to investigate "the truth or falsity of a candidate's affirmation" in their AOI.[78]

On June 5, 2020, the Wayne County Clerk certified Worthy as a candidate for Wayne County Prosecutor and thereafter the Wayne County Election Commission approved the printing of the August 2020 primary ballots with Worthy appearing as a candidate on the ballots.[79] Burton-Harris immediately sued in the Wayne County Circuit Court and filed an emergency motion to remove Worthy's name from the ballot.[80] Robert Davis, a Wayne County resident and registered voter, filed an emergency motion to intervene.[81] Davis was concerned that Burton-Harris would not appeal an adverse ruling.[82] Davis's motion to intervene was denied by the trial court, which also denied Burton-Harris's emergency motion.[83]

As a threshold issue, the court of appeals found that the case was moot because the August 2020 primary and November 2020 general elections took place with Worthy appearing on both ballots.[84] The court of appeals

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at *2.

still decided to consider the issues because "the strict time constraints involved in elections create a reasonable expectation that the issues involved in this appeal could recur yet escape judicial review[.]"[85]

The court of appeals also addressed the denial of Davis's motion to intervene.[86] While the court's intervention analysis is not central to its ultimate ruling, the court's discussion there bears some consideration.[87] The court of appeals spent time discussing the liberal standards for allowing intervention and the "special nature" of election cases and how ordinary citizens have standing to enforce the law in election cases.[88]

Nonetheless, the court of appeals upheld the trial court's denial of Davis's motion to intervene both on the basis of his interests being adequately represented by Burton-Harris and on the basis of laches.[89] The court of appeals reasoned that Davis waited too long when he filed his motion to intervene on June 11, 2020, six days after Burton-Harris filed the lawsuit and when absent voter ballots were due to local clerks by June 18, 2020 for distribution by June 20, 2020.[90] The court of appeals also found Davis's intervention would have delayed the trial court's consideration of the issues.[91]

Turning to the ultimate issue, the court of appeals next examined Davis's challenge to the trial court's denial of a writ of mandamus removing Worthy from the ballot.[92] The trial court denied mandamus relief finding that the defendants did not have a clear legal duty to remove Worthy from the ballot and that the act of removing Worthy from the ballot was not a ministerial action.[93]

In its analysis, the court of appeals first looked at the statutory text of MCL § 168.558(4).[94] Of importance is the requirement that candidates whose AOIs contain false statements cannot be certified as candidates.[95] The court of appeals also examined MCL § 168.567.[96] That section states that "[t]he boards of election commissioners shall correct such errors as may be found in said ballots, and a copy of such corrected ballots shall be sent to the secretary of state by the county clerk."[97]

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85. *Id.* (collecting cases).
86. *Id.*
87. *Id.*
88. *Id.* at *3–5.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at *5.
93. *Id.*
94. *Id.* at *6.
95. *Id.*
96. *Id.*
97. *Id.* (citing MICH. COMP. LAWS § 168.657).

Next, the court of appeals analyzed two previous AOI cases involving the removal of candidates.[98] The first case, *Berry v. Garrett*,[99] involved the plaintiff seeking a writ of mandamus excluding two candidates from a primary election ballot because their AOIs did not include a precinct number as the previous iteration of MCL § 168.558(2) required.[100] The court of appeals reversed the trial court's denial of mandamus and agreed "with the plaintiff that MCL 168.558(4) imposed a clear legal duty not to certify the name of a candidate who failed to comply with statutory requirements."[101] The court of appeals in *Berry* further held that because the defendants failed to perform their duty when initially certifying candidates, the defendants had a clear legal duty to correct the errors in the ballots.[102]

The next case was *Bsharah v. Wayne County Clerk*,[103] which the court of appeals observed involved a "remarkably similar claim of error."[104] In *Bsharah*, which was decided after *Berry*, the plaintiff alleged that an incumbent state representative submitted an AOI with a false statement because she had outstanding filing fees.[105] The court of appeals in *Bsharah* held "that a county clerk did not have a clear legal duty to look beyond the face of an AOI to determine the truthfulness of a candidate's statements."[106]

The trial court in *Burton-Harris* relied on *Bsharah* to deny the request for a writ of mandamus.[107] However, the court of appeals observed that the trial court did not consider that since *Bsharah* was decided, the Legislature amended MCL § 168.558(4) to add the requirement that "an officer shall not certify to the board of election commissioners the name of a candidate . . . who executes an affidavit of identity that contains a false statement[.]"[108] According to the court of appeals, the addition of this language:

> [U]ndercuts the *Bsharah* Court's conclusion that a county clerk's duty is limited to determining whether the necessary statements

98. *Id.*
99. *Id.* (citing Berry v. Garrett, 316 Mich. App. 37, 42, 890 N.W.2d 882 (2016)).
100. *Id.* at *7 (citing *Berry*, 316 Mich. App. at 40, 890 N.W.2d. at 884).
101. *Id.* (citing *Berry*, 316 Mich. App. at 44, 890 N.W.2d at 887).
102. *Id.*
103. *Id.* (citing Bsharah v. Wayne Cnty. Clerk, No. 344081, 2018 WL 2725727 (Mich. Ct. App. June 6, 2018)).
104. *Id.*
105. *Id.* (citing *Bsharah*, 2018 WL 2725727, at *1).
106. *Id.* (citing *Bsharah*, 2018 WL 2725727, at *4–6).
107. *Id.*
108. *Id.* (quoting MICH. COMP. LAWS § 168.558(4)).

> were made. Under the unambiguous language of the amended statute, the Clerk's duty is clear—if a candidate's AOI contains a false statement, the Clerk cannot certify that candidate's name to the Election Commission.[109]

The court of appeals was not persuaded by the defendants' arguments that the Legislature failed to enact express statutory authority to investigate the veracity of a candidate's statements in their AOI because the argument ignored the narrow scope of the relief sought.[110] Burton-Harris did not ask for an investigation—she did the investigation herself. Rather, she only asked the court to declare that Worthy made a false statement in her AOI and that the court order the defendants to remove Worthy from the ballot as a candidate.[111] The court of appeals found both of these actions would be purely ministerial under the Michigan Election Law in light of *Berry* and another case, *Barrow v. Detroit Election Commission*,[112] which held that the inclusion of a name on a ballot was ministerial in nature.[113]

Despite agreeing that Worthy's AOI contained a false statement and that she should not have been certified as a candidate, the court of appeals ultimately upheld the trial court's denial of mandamus relief due to laches.[114] The court of appeals reasoned that Burton-Harris could have challenged Worthy's AOI any time after Worthy filed it on March 18, 2020, but instead waited until the day before ballot printing was set to begin and the same day that Burton-Harris learned that the Wayne County Clerk's certified candidate list included Worthy and that the Wayne County Election Commission voted to print the ballots with the names certified by the Clerk.[115] While a mandamus action would not have been ripe before June 5, 2020, according to the court of appeals, Burton-Harris could have pursued a declaratory judgment that Worthy made a false statement in her AOI rendering her ineligible for ballot certification under MCL 168.558(4) any time after Worthy submitted her AOI. Because Burton-Harris waited until the day before ballot printing began, the court of appeals found that the defendants would have been prejudiced because

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109. *Id.*
110. *Id.* at *8.
111. *Id.*
112. 301 Mich. App. 404, 836 N.W.2d 498 (2013).
113. *Burton-Harris*, 2018 WL 2725727, at *8 (citing *Barrow*, 301 Mich. App. at 412, 836 N.W.2d at 504 (2013)).
114. *Id.*
115. *Id.* at *8.

their ability to prepare primary election ballots within the time required by the Michigan Election Law would have been impaired.[116]

Finally, as to the declaratory judgment claim, the court of appeals summarily dismissed the claim of error there finding that it could "reasonably infer that the trial court's application of laches extended to plaintiff's declaratory judgment count."[117]

On July 30, 2021, the Wayne County Clerk filed an application for leave to appeal to the Michigan Supreme Court.[118] Instead of granting the application, the Michigan Supreme Court vacated Parts II, IV, and V of the judgment of the court of appeals.[119] Part II dealt with the mootness analysis, Part IV addressed the mandamus analysis, and Part V addressed the declaratory judgment analysis.[120] This was because the trial court denied Davis's motion to intervene and the court of appeals upheld that decision and Davis never filed a separate motion to intervene in the court of appeals.[121] Accordingly, Davis was never actually a party to the case and lacked appellate standing to challenge the trial court's denial of Burton-Harris' mandamus and declaratory relief claims.[122] In sum, the court of appeals should never have considered these issues. Rather, the only issue properly before the court of appeals was "whether the trial court abused its discretion by denying Davis's motion to intervene."[123] Thus, the Michigan Supreme Court also vacated Part II of the court of appeals' opinion finding that Davis had appellate standing.[124]

3. Does the Strict Compliance Requirement Extend to Forms Issued by the Secretary of State?

Nykoriak v. Napoleon[125] was another AOI case addressing whether a candidate could be disqualified from the ballot if their AOI contained all the information required under the Michigan Election Law.

The plaintiff, T.P. Nykoriak, was a Democratic candidate for Wayne County Sheriff and sought to disqualify the incumbent, Benny Napoleon, from the Democratic primary ballot alleging that Napoleon submitted a

116. *Id.*
117. *Id.* at *9.
118. Burton-Harris v. Wayne Cnty. Clerk, 966 N.W.2d 349 (Mich. 2021) (mem.).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. 334 Mich. App. 370, 964 N.W.2d 895(2020), *leave to appeal denied*, 954 N.W.2d 824 (Mich. 2021) (mem.).

defective AOI because it was not properly notarized.[126] Nykoriak filed suit in the Wayne County Circuit Court against the Wayne County Clerk and the Wayne County Board of Election Commissions seeking to compel them to reject Napoleon's allegedly defective AOI and disqualify him from the ballot.[127] Napoleon was also a defendant to the lawsuit.[128] The defendants all argued that Napoleon's AOI was not defective and that Nykoriak's lawsuit was barred by laches.[129] The trial court agreed with the defendants and denied Nykoriak's complaint and related motions, and the court of appeals affirmed in a published opinion.[130]

On appeal and before the trial court, Nykoriak argued that Napoleon's AOI was facially defective because it did not include a notary signature and date of notarization as MCL § 55.285 required.[131] In rejecting these arguments, the court of appeals first noted that the parties did not dispute that strict compliance with the Michigan Election Law, including MCL § 168.558, which governs the mandatory contents of AOIs, is required.[132] Additionally, the parties did not dispute that MCL § 168.558 required notarization, as that term is defined by Michigan Law on Notarial Acts. [133]

Having established those threshold matters, the court of appeals held that Napoleon's AOI was facially compliant with Michigan law.[134] The AOI contained the notary's signature, the notary's name, the county of the notary's commission, the expiration date of the notary's commission, the county the notary acted in, and the date the notarial act was performed, which was everything required by statute.[135] The court of appeals explained that even though some of these requirements were not filled in on the spaces provided for on the AOI form, they were still present on the form rendering it facially compliant and that "[t]o conclude otherwise would elevate form over substance."[136] Accordingly, the defendants "did not have a clear legal duty to remove Napoleon's name from the ballot" and the circuit court did not err when it denied Nykoriak's request for a writ of mandamus.[137]

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126. *Id.* at 372–73, 964 N.W.2d at 897–98.
127. *Id.*
128. *Id.* at 372, 964 N.W.2d 895 at 897.
129. *Id.* at 372–73, 964 N.W.2d at 897–98.
130. *Id.*, 964 N.W.2d at 898.
131. *Id.* at 380, 964 N.W.2d at 902.
132. *Id.* at 377, 964 N.W.2d at 900.
133. *Id.*
134. *Id.*
135. *Id.* at 381–82, 964 N.W.2d at 902–03.
136. *Id.*
137. *Id.*

The court of appeals also considered the parties' arguments regarding the application of laches, even though the court noted that it did not need to do so considering Nykoriak's challenge to the denial of a writ of mandamus failed.[138] The court of appeals noted that despite Nykoriak challenging Napoleon's AOI with the Clerk and the Election Commission, he waited to initiate his lawsuit until *after* the ballot printing was completed and the ballots were delivered to the clerks.[139] Thus, laches would have applied to bar his claim, too, even if it had merit.[140]

4. Can a Candidate's Nominating Petition List a Business Address Rather than a Residential Address?

Christenson v. Secretary of State[141] dealt with a challenge to a candidate's ability to appear on the ballot when his nominating petition listed his business rather than residential address.

The plaintiff, B.D. Christenson, sought to run as a non-incumbent circuit court judicial candidate in Genesee County.[142] Christenson lived in Grand Blanc and had a law practice in Flint, both in Genesee County.[143] Christenson formed a candidate committee with its registered address at Christenson's law office.[144]

The Michigan Election Law requires judicial candidates "to file nominating petitions 'containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the judicial circuit.'"[145] Under MCL § 168.544c, a nominating petition form must include a nonpartisan judicial candidate's name and address.[146]

Before beginning to gather signatures for his nominating petitions, Christenson "sent an e-mail to the Secretary of State requesting confirmation regarding the accuracy of his nominating petitions."[147] After not receiving a response, he followed up two days later and this time asked whether the Secretary of State required any corrections to the nominating petitions.[148] The Secretary of State's office responded and told Christenson that his nominating petitions "contained accurate information."[149]

138. *Id.* at 382, 964 N.W.2d at 903.
139. *Id.* at 383, 964 N.W.2d at 903–04.
140. *Id.* at 382, 964 N.W.2d at 903.
141. 336 Mich. App. 411, 970 N.W.2d 417 (2021).
142. *Id.* at 414, 970 N.W.2d at 419.
143. *Id.*
144. *Id.*
145. *Id.* (quoting MICH. COMP. LAWS § 168.413(1)).
146. *Id.* (citing MICH. COMP. LAWS § 168.544c).
147. *Id.*
148. *Id.*
149. *Id.*

Christenson then began to collect signatures on his nominating petitions, which he submitted to the Secretary of State on March 5, 2020.[150] "Two months later, an opponent seeking the same office filed a challenge to" Christenson's nominating petitions with the Board of State Canvassers.[151] The challenger claimed that Christenson's nominating petitions were defective because Christenson listed his business and candidate committee address on the nominating petitions rather than his residential address where he was registered to vote.[152] Christenson argued that MCL § 168.544c(1) did not require him to list his residential address on the nominating petitions.[153]

The Bureau of Elections then issued a staff report on May 26, 2020 "recommending that the Board [of State Canvassers] conclude that [Christenson's] nominating petitions were insufficient because [Christenson]" erroneously provided his business address and not his residential address.[154] On May 29, 2020, the Board held a meeting to determine the sufficiency of nominating petitions filed by candidates for the August 2020 primary election.[155] Christenson appeared at the hearing and argued that his nominating petitions complied with the plain meaning of MCL § 168.544(c)(1).[156] He also contended that the challenge against his nominating petitions was untimely because it was filed long after the April 28, 2020 deadline for submitting challenges to nominating petitions.[157] Ultimately, the Board agreed with the staff report recommendation and concluded that Christenson's nominating petitions were insufficient and determined that Christenson could not be certified as a candidate for the August 2020 primary election.[158]

Christenson made these same arguments in a complaint for a writ of mandamus in the Genesee County Circuit Court.[159] The circuit court transferred the case to the court of claims.[160] The court of claims granted Christenson's request for a writ of mandamus in a June 10, 2020 opinion and order.[161] The court of claims explained that because the statute used the terms "address" and "street address" and because Christenson

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 415, 970 N.W.2d at 419.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*, 970 N.W.2d at 420.
160. *Id.*
161. *Id.*

provided an address or street address that belonged to him or with which he was associated, he complied with the requirements of the Michigan Election Law.[162] "The plain language of the statute" did not leave any room to conclude that "address" and "street address" were subject to a qualifier like "residential."[163] According to the court of claims, if the Legislature intended for nominating petitions to require a residential address, the Legislature could have explicitly done so.[164] The court of claims also rejected the argument that MCL § 168.544c(1) required a residential address to verify that the candidate is qualified to seek office in a particular district or county.[165] The Affidavit of Identity and Affidavit of Constitutional Qualification processes already require a candidate to provide a "residential" address.[166] The Secretary of State and Board of State Canvassers appealed.[167]

The court of appeals, affirming the court of claims, examined the plain language of MCL § 168.544c(1) and found nothing ambiguous about its language.[168] Specifically, the court of appeals held that MCL § 168.544c(1) did not specify nor require that the address identified in the heading of a nominating petition be the candidate's residential address.[169] In reaching this conclusion, the court of appeals also looked to the certification of the circulator portion of nominating petitions, which must include the circulator's residential address.[170] This explicit differentiation between what is required of the candidate versus the circulator meant that the Legislature knew how to require a residential address but chose not to do so for candidates.[171] The court of appeals also examined other portions of the Michigan Election Law that explicitly require residential addresses, such as MCL § 168.558(2) (affidavit of identity requirements) to reach this conclusion.[172]

162. *Id.* at 416, 970 N.W.2d at 420.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 417, 970 N.W.2d at 421.
168. *Id.* at 421, 970 N.W.2d at 423.
169. *Id.*
170. *Id.* at 422, 970 N.W.2d at 423–24.
171. *Id.* at 422–23, 970 N.W.2d at 423–24.
172. *Id.* at 422, 970 N.W.2d at 424.

C. City Charter Amendments by Ballot Initiatives and the Duties of the Governor and Local Clerks

Warren City Council v. Buffa[173] addressed the interplay between the Michigan Election Law's requirement that a local clerk must certify a ballot question's wording to the county clerk by a certain deadline and the Home Rule City Act's separate requirement that the governor must approve amendments to city charters.[174]

On June 30, 2020, the Warren City Council approved ballot proposal language that would amend the Warren City Charter by reducing the mayor's term limit from five terms to three.[175] Mayor Jim Fouts vetoed the approved resolution on July 2, 2020.[176] On July 14, 2020, the city council overrode Mayor Fouts' veto.[177] On July 20, 2020, the Warren City Clerk, Sonja Buffa, certified the June 30, 2020 resolution as a "true and correct copy of the resolution adopted . . . on June 30, 2020."[178]

On July 21, 2020, pursuant to MCL § 117.22 of the Home Rule City Act, the Warren City Council sent the ballot proposal to Governor Gretchen Whitmer's Chief Legal Counsel and asked Governor Whitmer to approve the charter amendment.[179] An Assistant Attorney General reviewed the amendment and, on August 6, 2020, recommended that Governor Whitmer approve it.[180] Governor Whitmer approved the amendment by letter dated August 12, 2020, which was emailed to Buffa on August 13, 2020.[181] Prior to receiving the approval, an attorney for the Warren City Council forwarded the ballot language to the Macomb County Clerk's Office.[182]

Relevant here were two deadlines. First, pursuant to MCL § 168.464a(2), ballot wording had to be certified to the proper local clerk by "4:00 p.m. on the twelfth Tuesday before the election," which was August 11, 2020.[183] Second, under that same section, municipal clerks had

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173. 333 Mich. App. 422, 960 N.W.2d 166, *leave to appeal denied*, 506 Mich. 889, 947 N.W.2d 689 (2020).

174. *Id.*

175. *Id.* at 426, 960 N.W.2d at 168.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 426–27, 960 N.W.2d at 168–69. MCL § 117.22 requires that "[e]very amendment to a city charter . . . before its submission to the electors . . . shall be transmitted to the governor of the state. If he shall approve it, he shall sign it . . . ." *See* MICH. COMP. LAWS. § 117.22.

180. *Id.* at 427, 960 N.W.2d at 169.

181. *Id.*

182. *Id.*

183. *Id.*

to certify the ballot wording to the county clerk at least eighty-two days before the November 3, 2020 election, which was August 13, 2020.[184]

Buffa refused to certify the ballot language to the Macomb City Clerk.[185] Before the trial court and on appeal, Buffa argued that MCL § 117.22 required Governor Whitmer to approve the charter amendment by 4:00 p.m. on August 11, 2020.[186] Buffa argued that because Governor Whitmer did not approve the amendment until after that date, the requirement that the ballot language be certified to Buffa by 4:00 p.m. on August 11, 2020 was not satisfied.[187] According to Buffa, this meant that her duty to certify the language to the Macomb County Clerk on or before August 13, 2020 never arose.[188] The trial court agreed with Buffa and denied a writ of mandamus compelling Buffa to immediately certify the ballot language.[189] The Warren City Council appealed.[190]

In overturning the trial court, the court of appeals framed the issue on appeal as one of statutory interpretation focusing on "the interaction between MCL 168.646a(2) and MCL 117.22," and made three significant holdings.[191]

First, the court of appeals held that a governor's approval under MCL § 117.22 of the Home Rule City Act is not a certification to the local clerk by 4:00 p.m. on the twelfth Tuesday before the election that the Michigan Election Law requires.[192] This was because the statutes contain no reference to each other and MCL § 117.22 does not require the governor to transmit her approval to a particular official. Nor did MCL § 117.22 indicate that the governor's approval amounts to certification to a local clerk under MCL § 168.646(a)(2). Finally, MCL § 168.646(a)(2) did not speak of a local clerk receiving anything "from the governor or otherwise refer to the approval process of MCL § 117.22."[193] In sum, the court of appeals found "a clear indication that our Legislature did not intend for the governor's approval to stand as a prerequisite to the local clerk's act of certifying ballot language to the county clerk under MCL 168.646a(2)."[194]

Second, the court of appeals found that nothing in the plain language of either statute implied "that the governor's approval under MCL 117.22"

184. *Id.* at 427–28, 960 N.W.2d at 169.
185. *Id.*
186. *Id.* at 428, 960 N.W.2d at 170.
187. *Id.*
188. *Id.*, 960 N.W.2d at 169–70.
189. *Id.*, 960 N.W.2d at 170.
190. *Id.*
191. *Id.* at 429, 960 N.W.2d at 170.
192. *Id.* at 422, 430, 960 N.W.2d at 170.
193. *Id.* at 430, 960 N.W.2d at 170–71.
194. *Id.*

was "the 'certification' contemplated by MCL 168.646a(2)."[195] This is because the statutes used different terms, with MCL § 117.22 referring to the governor's "approval" while MCL § 168.646a(2) spoke of "certification."[196]

Third, the court of appeals found that while MCL § 168.646a(2) set forth specific deadlines by which certain acts had to be completed, MCL § 117.22 only required that the governor's approval be received before the proposal was submitted to the electors.[197] The trial court's reading of the statute created a conflict with the plain text by requiring the governor's approval to come *before* the clerk certified the language when the statute contained no such requirement.[198] Because Governor Whitmer transmitted her approval well in advance of the November General Election, that requirement was satisfied.[199]

The court of appeals also rejected Buffa's argument that it should read the governor's approval under MCL § 117.22 as the certification to the local clerk as contemplated by MCL § 168.646a(2).[200] Buffa advanced this argument relying on the *in pari materia* rule of statutory construction.[201] That rule requires statutes relating to the same subject or sharing a common purpose "be read together as one, even if they contain no reference to each other and were enacted at different times."[202]

The court of appeals rejected this argument because it found that the two statutes did not share a common purpose because MCL § 117.22 related "solely to the procedure for amending a city charter," while MCL § 168.646a encompassed any ballot question of a political subdivision.[203] Stated differently, while both statutes generally related to ballot questions, MCL § 168.646a encompassed any ballot question, while MCL § 117.22 concerned only a narrow category of ballot questions seeking to amend a city charter.

The court of appeals then found that the ballot language was certified to Buffa no later than July 20, 2020 when the Warren City Council overrode Mayor Fouts' veto of the resolution.[204] The court of appeals further clarified that MCL § 168.646a(2) required "the ballot language be

195. *Id.*
196. *Id.*
197. *Id.* at 431, 960 N.W.2d at 171.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 431–33, 960 N.W.2d at 171–72.
203. *Id.* at 432, 960 N.W.2d 171.
204. *Id.* at 433, 960 N.W.2d at 172.

certified *to* Buffa and not *by* Buffa."[205] Thus, the first deadline—that the language be certified to the local clerk by August 11—was met and the circuit court erred in holding otherwise.[206]

Next, the court of appeals examined whether the Warren City Council met the requirements "necessary to obtain a writ of mandamus compelling Buffa to act" and found that the Warren City Council met all the requirements for mandamus relief and that the circuit court abused its discretion in declining to issue a writ of mandamus.[207]

The court of appeals did, however, reject the Warren City Council's request for a declaratory ruling that MCL § 168.646a(2)'s requirement that the ballot language be certified to the county clerk was satisfied upon the Warren City Council's submission of the proposal to the County Clerk on August 10, 2020.[208] The court of appeals first noted that the issue was not preserved and that in any event, MCL § 168.646a(2) clearly required the local clerk to certify the ballot language and that it did not contemplate that requirement being satisfied in any other way.[209]

D. Constitutional Challenge to Statutes and Policies Following the Passage of Proposal 3

Promote the Vote v. Secretary of State[210] concerned a consolidated appeal that two advocacy groups—Promote the Vote ("PTV") (Docket No. 353977) and Priorities USA and Rise, Inc. (collectively, "PUSA") (Docket No. 354096)—filed challenging legislative enactments and certain policies of the Secretary of State following the passage of Proposal 3.

1. Constitutional and Statutory Background

By way of background, in 2018 Michigan voters approved Proposal 3, which amended Article 2, Section 4 of the Michigan Constitution to provide for, in relevant part:

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205. *Id.* (emphases in original).
206. *Id.* at 434, 960 N.W.2d at 172.
207. *Id.* at 434–35, 960 N.W.2d. at 172–73.
208. *Id.* at 436, 960 N.W.2d at 174.
209. *Id.*
210. 333 Mich. App. 93, 958 N.W.2d 861, *appeal denied*, 506 Mich. 888, 946 N.W.2d 782 (2020), *and appeal denied sub nom.* Priorities USA v. Sec'y of State, 506 Mich. 888, 946 N.W.2d 785 (2020).

> (a) The right, once registered, to vote a secret ballot in all elections.
>
> . . .
>
> (d) The right to be automatically registered to vote as a result of conducting business with the secretary of state regarding a driver's license or personal identification card, unless the person declines such registration.
>
> (e) The right to register to vote for an election by mailing a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications.
>
> (f) The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies. Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.[211]

Following the 2018 general election, the Legislature enacted 2018 PA 603, which amended MCL § 168.497. The amended version of MCL § 168.497 provided as follows:

- Qualified voters could apply for registration at an appropriate clerk's office during regular business hours or by mail or online until the fifteenth day before an election;[212]

- Qualified voters could for apply registration *in person* at an appropriate clerk's office "from the fourteenth day before an election and continuing through the day of the election." Such individuals would have to provide "proof of residency,"

211. *Id.* at 100–02, 958 N.W.2d at 866–67.
212. MICH. COMP. LAWS § 168.497(1).

which the Legislature defined as a driver's license or a state identification card.[213] If such a voter did not have a driver's license or state identification card, they could provide a current utility bill, a current bank statement, or a current paycheck, current government check, or other government document.[214]

- If a person registered to vote within fourteen days of an election and they did not have appropriate identification for election purposes as defined by MCL § 168.2(k), those individuals could register to vote by signing an affidavit indicating that they did not have identification for election purposes and by providing a current utility bill; a current bank statement; or a current paycheck, government check, or other government document.[215]

Under MCL § 168.497(5), if an individual registered to vote within fourteen days of an election and registered to vote under subsections (3) or (4) of MCL § 168.479—meaning they did not have a driver's license or state identification card and had to rely on one of the alternative methods of establishing proof of their residency—such an individual would be issued a challenged ballot.[216]

Also, following passage of Proposal 3, the Secretary of State began to automatically register to vote those individuals who "conducted business" with the Department by applying for a driver's license or personal identification card if they were at least seventeen-and-a-half years old.[217] This was referred to as the AVR Policy.[218]

2. Litigation at the Court of Claims

Both groups filed lawsuits before the court of claims. PTV and PUSA argued that MCL § 168.497's definition of proof-of-residency and its requirement that one category of voters be issued a challenged ballot unduly burdened the self-executing provisions in Article 2, Section 4 of the Michigan Constitution.[219] Both groups also argued that the Legislature's proof-of-residency definition violated the Equal Protection

213. MICH. COMP. LAWS § 168.497(2).
214. MICH. COMP. LAWS § 168.497(3).
215. MICH. COMP. LAWS § 168.497(4).
216. *Id.* at 102–07, 958 N.W.2d at 868–70.
217. *Id.* at 107–08, 958 N.W.2d at 870–71.
218. *Id.*
219. *Id.* at 108, 958 N.W.2d at 871.

Clause of the Michigan Constitution by burdening the right to vote and by treating similarly situated voters differently; that is, those voters who registered to vote within the fourteen-day period but who could not show proof of residency with a current Michigan driver's license or personal identification card were issued a challenged ballot.[220] PUSA also argued that the Secretary of State's AVR Policy burdened and curtailed the right found in Article 2, Section 4(1)(d) of the Michigan Constitution.[221]

The Legislature moved to intervene in the lawsuits, which the court of claims consolidated. All parties moved for summary disposition and PUSA also moved for a preliminary injunction.[222] The court of claims issued an opinion and order granting the Legislature's and the Secretary of State's motions for summary disposition, denying PTV's motion for summary disposition, and denying PUSA's motion for a preliminary injunction.[223]

The court of claims first rejected the argument that the requirements found in the amended version of MCL § 168.497 were unconstitutional because they unduly restricted the new rights recognized in the Michigan Constitution. The court of claims held that while the Legislature may not enact laws that *impose additional burdens* on self-executing provisions, it may enact laws that *supplement* those self-executing provisions. Because the new constitutional amendment did not define "proof of residency" and residence was essential for voting, the court of claims found that the Legislature properly supplemented the new constitutional provision when it defined "proof of residency."[224]

Additionally, the court of claims rejected the argument that the Legislature's definition of "proof of residency" in MCL § 168.497 placed a severe burden on the constitutional right to register to vote in the fourteen-day period.[225] While the court of claims did find that the statute burdened some voters by requiring them to bring some form of proof of residency to an election office or polling place, the court of claims held that this was a reasonable, nondiscriminatory restriction given the wide variety of documents that were acceptable.[226] The court of claims also relied on the fact that if a voter did not have an acceptable type of proof of residency in the form of a driver's license or personal identification card,

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220. *Id.* at 108–09, 958 N.W.2d at 871.

221. *Id.*

222. *Id.* at 109, 958 N.W.2d at 871. In the interest of space, we do not repeat the arguments made by the parties during summary disposition briefing. However, the majority opinion does an excellent job of summarizing those arguments.

223. *Id.* at 113, 958 N.W.2d. at 873.

224. *Id.*

225. *Id.* at 114, 958 N.W.2d at 874.

226. *Id.*

they could vote with a challenged ballot that was counted in the same manner as other ballots as long as the voter later produced an acceptable type of proof of residency.[227]

The court of claims also rejected the argument that the AVR policy unduly burdened rights found in Article 2, Section 4 of the Michigan Constitution because it was essentially a restatement of the law and was consistent with the right of qualified voters to be automatically registered to vote when applying for or renewing a drivers' license or identification card.[228]

Moving onto PUSA's argument that younger voters would be most harmed by MCL §168.497, the court of claims rejected that argument for several reasons. First, because PUSA pursued a facial challenge, the court could not focus on the effects of the law on a discrete population.[229] Rather, it had to look to the entire voting population.[230] Second, according to the court, the argument overlooked the broad range of acceptable documents under the statute and that registration could take place over the internet.[231] Third, the argument failed to recognize the ability of young voters to understand and follow voter registration procedures.[232]

The court of claims also "rejected the argument that the requirement in MCL 168.497(5) that challenged ballots be issued to those who register to vote in the 14-day period without providing a current Michigan driver's license or personal identification card" violated the Equal Protection Clause "because it denied those voters the right to a secret ballot."[233] It determined "that challenged ballots were treated the same as any other ballot on election day."[234]

3. Litigation at the Court of Appeals

At the court of appeals, the parties raised several claims of error. PTV argued "that the court of claims erred by concluding that there is no constitutional right to vote; that MCL 168.497 impermissibly imposed additional obligations on the self-executing provisions" of Article 2, Sections 4(1)(a) and 4(1)(f) of the Michigan Constitution; and that the

227. *Id.*
228. *Id.* at 113–14, 958 N.W.2d at 873.
229. *Id.* at 114–15, 958 N.W.2d at 874.
230. *Id.*
231. *Id.* at 115, 958 N.W.2d at 874.
232. *Id.*
233. *Id.*
234. *Id.*

requirement of certain voters receiving a challenged ballot "was burdensome, unconstitutional, and served no legitimate state interest."[235]

Likewise, PUSA argued that the court of claims erred "by concluding that MCL 168.497 did not violate the self-executing provisions" of Article 1 Section 2 and Article 2, Section 4 of the Michigan Constitution; "that the AVR Policy did not violate the self-executing provision of" Article 2, Section 4 of the Michigan Constitution; and that PUSA was not "entitled to a preliminary injunction."[236] The court of appeals disagreed and affirmed the court of claims[237] with Judge Krause writing a separate opinion, concurring in part, and dissenting in part.[238]

a. The Right to Vote

The court of appeals first analyzed the arguments that PTV and PUSA put forth to show that Article 2, Section 4(1)(a) of the Michigan Constitution provides a constitutional right to vote. The majority rejected this argument, finding that "this section does not provide that an individual has an absolute constitutional right to vote; the individual must first be a qualified elector who has registered to vote."[239] Thus, according to the court of appeals, "[a]lthough the Michigan Constitution now expressly provides for the right to vote, certain requirements must be met before an individual can exercise his or her fundamental political right to vote."[240] The court of appeals also held that the court of claims "recognized the constitutionally protected status of the right to vote" in its opinion.[241] Accordingly, the court of claims did not commit reversible error.[242]

b. Self-Executing Constitutional Provisions

Next, the court of appeals addressed PTV's and PUSA's arguments that the "Legislature's definition of 'proof of residency' in MCL § 168.497 and the requirement in MCL 168.497(5) that a challenged ballot be issued to anyone who registers to vote in the 14-day period without providing a current Michigan driver's license or personal identification card unduly burden the rights" found in Article 2, Section 4(1)(f) of the Michigan

235. *Id.* at 116, 958 N.W.2d at 875.
236. *Id.*, 958 N.W.2d at 875.
237. *Id.* at 139, 958 N.W.2d at 886.
238. *Id.* at 138-39, 958 N.W.2d at 886.
239. *Id.* at 120, 958 N.W.2d at 876–77.
240. *Id.*
241. *Id.*, 958 N.W.2d at 877.
242. *Id.*

Constitution.[243] Both groups argued that because the rights in Article 2, Section 4(1) were self-executing, the statutory amendments were unconstitutional.[244] PUSA also argued that the AVR policy burdened the rights in Article 2, Section 4(1)(d).[245] The court of appeals rejected these arguments.[246]

As to the proof of residency requirements, the court of appeals held that the Legislature's definition of "proof of residency" did not unduly burden the right to register to vote within the fourteen-day period in MCL § 168.497.[247] Rather, the definition was a "proper supplement" to Article 2, Section 4(1)(f) because the Legislature's definition allowed a person to register to vote in the fourteen-day period with a "broad array of common, ordinary types of documents that are available to persons of all voting ages."[248] The court of appeals also noted that Article 2, Section 4(1)(f) requires an individual to provide proof of residency when registering to vote in the fourteen-day period and so, the proof of residency requirements in the Michigan Election Law merely defined what documents were acceptable to fulfill that constitutional requirement.[249]

Next, the court of appeals rejected the argument that MCL § 168.497(5), which required election officials to issue a challenged ballot to anyone who registered to vote in the fourteen-day period without providing a current Michigan driver's license or personal identification card, unduly burdened the rights in Article 2, Sections 4(1)(a) and (f).[250] The court of appeals found that a "challenged ballot" was not a third type of ballot.[251] Rather, it was still a regular ballot or an absent-voter ballot that was marked with a number corresponding to the voter's poll list number. That mark was also later concealed.[252] Moreover, the court of appeals also held that a challenged ballot was still a secret ballot because the mark on a challenged ballot—either before or after it is concealed—did not indicate to anyone how the voter actually voted.[253] Thus, MCL § 168.497(5) did not violate the right to a secret ballot under Article 2, Section 4(1)(a).[254]

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243. *Id.* at 120, 958 N.W.2d at 877.
244. *Id.*
245. *Id.*
246. *Id.* at 121, 958 N.W.2d at 877.
247. *Id.* at 122–23, 958 N.W.2d at 878.
248. *Id.* at 122–24, 958 N.W.2d at 877–79.
249. *Id.*
250. *Id.* at 124–26, 958 N.W.2d at 879–80.
251. *Id.* at 125, 958 N.W.2d at 879.
252. *Id.*
253. *Id.* at 125–26, 958 N.W.2d at 879.
254. *Id.* at 125, 958 N.W.2d at 879.

The court of appeals summarily rejected the plaintiffs' argument that the Secretary of State's AVR Policy burdened the right of every qualified voter in Michigan to be automatically registered to vote as a result of conducting business with the Secretary of State regarding a driver's license or personal identification card.[255] The AVR policy, which allowed individuals who were seventeen-and-a-half or older to be automatically registered to vote as a result of conducting business with the Secretary of State regarding a driver's license or personal identification card, was consistent with MCL § 168.492. This policy allowed individuals who were seventeen-an-a-half or older to register to vote. Accordingly, the court of appeals found these arguments to be "without merit."[256]

c. Equal Protection Claims

The court of appeals also rejected PTV's and PUSA's Equal Protection Clause claims brought under the Michigan Constitution. Specifically, PUSA argued that MCL § 168.497(5) violated the Equal Protection Clause of the Michigan Constitution because it treated similarly situated voters differently.[257] PUSA argued that even through Article 2, Section 4(1)(f) guarantees that all individuals who register to vote in the fourteen-day period shall receive a regular or absent-voter ballot, under MCL § 168.497(5) only those who submit a current Michigan driver's license or personal identification card as their proof of residency receive a regular or absent-voter ballot.[258] The court of appeals found that the basis of this argument was that a challenged ballot did not constitute a regular or absent-voter ballot.[259] Because the court of appeals already found that a challenged ballot did not differ from a regular or absentee voter ballot, it held that MCL § 168.497(5) did not treat similarly situated voters differently and rejected this argument.[260]

The court of appeals next addressed PUSA's argument that the Legislature's definition of "proof of residency" severely burdened the right to vote by disenfranchising eligible voters and that strict scrutiny should apply to the definition.[261] The court of appeals declined to adopt strict scrutiny, which would require the proof of residency definition to be narrowly tailored to advance a compelling state interest.[262] Instead, the

255. *Id.* at 126–27, 958 N.W.2d at 880.
256. *Id.*
257. *Id.* at 128, 958 N.W.2d at 881.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 129, 958 N.W.2d at 881.

court of appeals applied the "more flexible standard" found in *Burdick v. Takushi*,[263] which looks to the extent that a challenge statute or regulation burdens First and Fourteenth Amendment rights. Where those rights are subject to "severe" restrictions, the regulation must be narrowly tailored. However, when a state election law imposes only a reasonable, non-discriminatory restriction on First and Fourteenth Amendment rights, the state's interest will usually be a sufficient justification.[264]

Relying this framework, the court of appeals found that the "Legislature's definition of 'proof of residency' did not impose a severe burden on the right to vote."[265] The court of appeals first noted that the Legislature's definition allows individuals to provide proof of residency with a broad array of documents available to all individuals.[266] The court of appeals was also not swayed by PUSA's presentation of evidence that there were individuals who were qualified to vote and who could not provide proof of residency under MCL § 168.497 in the fourteen-day period leading up to the March 2020 presidential primary.[267] This was because the court of appeals found that an individual can register to vote in several ways, such as mailing a completed voter registration application on or before the fifteenth day before the election.[268] Thus, the Legislature's definition of proof of residency was reasonable, nondiscriminatory, and did not violate equal protection of the law.[269] Finally, the court of appeals also rejected PTV's argument that the issuance of challenged ballots resulted in long lines at polling places, which burdened the right to vote. The court of appeals found that such a burden was not severe and was merely an "inconvenience."[270]

d. Judge Krause's Partial Dissent

In a partial concurrence and partial dissent, Judge Krause agreed with the majority's conclusion but believed that the issues presented in the case were much simpler and more straightforward than the majority believed and that the discussions provided by the majority were unnecessary or based on outdated law.[271]

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263. 504 U.S. 428, 433 (1992).
264. *Promote the Vote*, 333 Mich. App. at 129–31, 958 N.W.2d at 881–82 (citing *Burdick*, 504 U.S. at 433–34).
265. *Id.* at 132, 958 N.W.2d at 883.
266. *Id.* at 130–31, 958 N.W.2d at 882.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 136–37, 958 N.W.2d at 885.
271. *Id.* at 139–40, 958 N.W.2d at 886–87 (Krause, J., dissenting).

In examining the amended text of Article 2, Section 4, Judge Krause agreed that there was still no absolute right to vote in Michigan and that the Legislature was not absolutely precluded from imposing regulations on voting or registration.[272] But, according to Judge Krause, the significance of Proposal 3 was that the Legislature's power to impose such restrictions was "severely curtailed," and that the court of claims and the majority failed to appreciate that the "historic deference given to the Legislature in this context is no longer appropriate or permissible."[273]

Judge Krause also concurred with the majority's conclusion as to the Secretary of State's AVR Policy, but for different reasons.[274] Namely, Judge Krause analyzed PTV's and PUSA's argument that the court should hold that the phrase "as a result of conducting business" in Article 2, Section 4(1)(d) to mean "an *eventual* consequence of *having ever* had any transaction with the Secretary of State."[275] Stated differently, the Secretary of State, under the plaintiff's theory, would have to affirmatively register any one to vote who had turned seventeen-and-a-half. Judge Krause rejected this construction as inconsistent with the text and the Secretary of State's interpretation and noted that there is a right to *not* vote and hence a right to not be registered to vote.[276]

However, Judge Krause would have found that the Legislature's proof of residency definition in MCL § 168.497 was unconstitutional on its face because the types of documents it required converted a proof of residency requirement into a "proof of identity" requirement.[277] Judge Krause reached this conclusion by noting that "proof of residency" has a "well-established legal meaning" in Michigan.[278] Such proofs historically included deeds, delivery of mail, by oath, or even appearing in person stating where they lived. Judge Krause also found that the Secretary of State accepted numerous forms of documents as proof of residency, none of which required a photograph.[279] Thus, according to Judge Krause, the Legislature impermissibly substituted the proof of residency requirement for a proof of identity requirement.[280]

Finally, Judge Krause disagreed with the majority's characterization that the types of documents listed MCL §§ 168.497(3)(a)–(c) and (4)(a)–(c) were available to persons of all voting ages and that the consequence

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272. *Id.* at 140, 958 N.W.2d at 887.
273. *Id.* at 143, 958 N.W.2d at 889.
274. *Id.* at 143–44, 958 N.W.2d at 889.
275. *Id.* at 144, 958 N.W.2d at 889 (emphasis in original).
276. *Id.* at 144–45, 958 N.W.2d at 889–90.
277. *Id.* at 146–48, 958 N.W.2d at 890–91.
278. *Id.* at 146, 958 N.W.2d at 890.
279. *Id.*
280. *Id.* at 148–49, 958 N.W.2d at 891–92.

of requiring such types of documents would be potential "disenfranchisement of persons based on economic status."[281] Judge Krause also took issue with the undefined phrase "current," and also noted that issuing a challenged ballot to a class of voters as a matter of course violated their rights.[282]

E. Challenges to Statutory Amendments to Michigan's Initiative Petition Process

League of Women Voters of Michigan v. Secretary of State[283] involved a challenge to changes made to Michigan's ballot initiative laws by 2018 PA 608. Observers will note that the dispute over the changes 2018 PA 608 instituted has a rather convoluted procedural background. On December 29, 2020, the Michigan Supreme Court issued an opinion vacating a court of appeals' opinion in a prior iteration of this dispute.[284] The matter was then re-filed in 2021 and re-litigated through the court of claims and court of appeals. On October 29, 2021, the court of appeals issued an opinion that held unconstitutional the pre-circulation affidavit requirement and the limit on the amount of petition signatures that could be obtained from each congressional district and held as constitutional the circulator checkbox requirement.[285] On January 24, 2022, the Michigan Supreme Court issued its long awaited opinion regarding the constitutionality of 2018 PA 608.[286] In the interest of space, the authors will only address in detail the 2022 Michigan Supreme Court opinion.

1. Statutory Background

In 2018, the Michigan Legislature passed 2018 PA 608, which made three changes to the Michigan Election Law as it related to ballot initiative efforts:

- The Legislature required that no more than 15% of the signatures gathered from a single congressional district could

281. *Id.*
282. *Id.*
283. No. 163711, 2022 WL 211736 (Mich. Jan. 24, 2022).
284. League of Women Voters of Mich. v. Sec'y of State, 506 Mich. 561, 957 N.W.2d 731 (2020).
285. League of Women Voters of Mich. v. Sec'y of State, No. 163711, 2021 WL 5048187 (Mich. Ct. App. Oct. 29, 2021).
286. *League of Women Voters*, No. 163711, 2022 WL 211736, at *1.

be counted when determining whether petition sponsors submitted sufficient signatures;

- The Legislature required that petitions include checkboxes "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer;" and,

- The Legislature required that paid signature gatherers file an affidavit with the Secretary of State indicating that they are a paid signature gatherer *before* circulating the petition.[287]

In January 2019, at the request of the Secretary of State, the Attorney General issued an opinion finding that all three statutory changes violated the Michigan and Federal Constitutions.[288] As a result, the Secretary of State decided that she would not enforce these new statutory provisions.[289]

2. Prior Litigation

Following the Attorney General's opinion, a group of similar, but different, plaintiffs filed a lawsuit in the court of claims challenging the constitutionality of 2018 PA 608. Those plaintiffs sought a declaratory judgment essentially confirming the Attorney General's opinion.[290] There were many issues unique to the original iteration of *League of Women Voters* that, in the interest of space, we do not discuss nor repeat here. As noted, the Michigan Supreme Court eventually vacated the lower court's decisions and remanded the cases to the court of claims for dismissal.[291] This was because the lead plaintiff in that case abandoned its ballot initiative as a result of the COVID–19 pandemic, which made the case moot and no other party had standing to pursue the case.[292]

3. Litigation at the Court of Claims

After the Michigan Supreme Court vacated the lower-court rulings in the first iteration of *League of Women Voters*, a group of plaintiffs filed another complaint in the court of claims on February 8, 2021 that again

287. *Id.* at *6 (citing MICH. COMP. LAW §§ 168.471, .477, .482(7), and .482(a)).
288. *Id.* (citing OAG, 2019–2020, No. 7310).
289. *League of Women Voters*, 506 Mich. 561, 573, 957 N.W.2d 731, 736 (2020).
290. *Id.* at 572, 957 N.W.2d at 736.
291. *League of Women Voters*, No. 163711, 2022 WL 211736, at *6 (citing *League of Women Voters*, 506 Mich. at 571, 957 N.W.2d at 736).
292. *Id.*

challenged of the constitutionality of 2018 PA 608.[293] The Attorney General intervened to defend the statute and the Legislature participated as amici.[294] In a July 12, 2021 opinion, the court of claims held that the 15% geographic limit in MCL § 168.471 and the checkbox requirement in MCL § 168.482(7) were unconstitutional, but that the paid circulator affidavit requirement in MCL § 168.482a was constitutional.[295]

4. Litigation at the Court of Appeals

All parties to the court of claims case appealed the July 12, 2021 opinion, which the court of appeals consolidated.[296] The plaintiffs also filed an application in the Michigan Supreme Court to bypass the court of appeals. The Attorney General, as an intervening defendant, did not join in the plaintiff's bypass application. The Michigan Supreme Court denied the bypass application, but directed the court of appeals to expedite the appeal.[297] On October 29, 2021, the court of appeals issued an opinion holding that the 15% geographic limitation in MCL § 168.47 was unconstitutional and that the related requirement in MCL § 168.482(4) that petitions must include language in the heading identifying the congressional district where it was circulated was likewise unconstitutional.[298] As to the checkbox requirement found in MCL § 168.482, the court of appeals reversed the court of claims and found that the checkbox requirement was constitutional.[299] Finally, as to the affidavit requirement in MCL § 168.482a, the court of appeals also reversed the court of claims and found that the affidavit requirement imposed an undue burden on free speech rights.[300]

5. Litigation at the Michigan Supreme Court

On November 2, 2021, the plaintiffs filed an application for leave to appeal the court of appeals' decision and sought a ruling that the checkbox requirement in MCL 168.482(7) was unconstitutional.[301] The plaintiffs also requested immediate consideration, expedited briefing, and a decision

293. *Id.* at *7.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*

by December 31, 2021.[302] On November 15, 2021, the Attorney General applied for leave to appeal and asked the Michigan Supreme Court to reverse the court of appeals' rulings with respect to the 15% geographic limit in MCL § 168.471 and the affidavit requirement in MCL § 168.482a.[303] The Secretary of State also applied for leave to appeal, but only asked that the Michigan Supreme Court apply any decision prospectively because of the fact that there were several petitions already in circulation.[304]

a. The 15% Geographic Distribution Requirement—Referendums and Initiatives

As noted, one of the changes instituted by 2018 PA 608 was the requirement that no more than 15% of the signatures gathered from a single congressional district could be counted when determining whether petition sponsors submitted sufficient signatures. This requirement applied both to petitions seeking to approve legislation that the Legislature already passed (referenda) and to propose new laws (initiatives) and to petitions seeking to amend the Michigan Constitution.[305]

Writing for the majority, Justice Cavanagh began the court's opinion by noting that Article 2, Section 9 of the Michigan Constitution, providing for the power of initiative and referendum, and Article 12, Section 2 of the Michigan Constitution, providing for constitutional amendments by petition, were both self-executing.[306] This meant that "the [L]egislature may not act to impose additional obligations" on such self-executing provisions.[307] The court's "inquiry, therefore, must be concerned with whether a particular law constitutes an 'undue burden' on voters' exercise of their direct-democracy rights."[308]

With this in mind, despite the fact that the Michigan Constitution required the Legislature to "implement the provisions" of Article 2, Section 9, the court found that "[t]he Legislature's power and duty to 'implement' [] [did] not support an ability to enact the 15% geographic-distribution requirement."[309] This was because a plain meaning of the word implement "carrie[d] the connotation that some *received* set of rules

302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at *8 (citing MICH. COMP. LAWS §§ 168.471 and .477).
306. *Id.*
307. *Id.* (quoting Wolverine Golf Club v. Sec'y of State, 384 Mich. 461, 466, 185 N.W.2d 392, 395 (1971)).
308. *Id.* at *11.
309. *Id.* at *9.

is being carried out, not that a new set of rules is to be created."[310] Stated differently, Article 2, Section 9 envisioned "a limited role for the Legislature" in the process.[311] That the Legislature's role was meant to be limited was reinforced by Article 2, Section 9's requirement that the referendums must be invoked in a "manner prescribed by law" within ninety days of the adjournment of the legislative session at which the law was enacted.[312] This is because during the constitutional convention that adopted the 1963 Michigan Constitution, the committee on style and drafting distinguished between "prescribed by law" and "provided by law."[313] The committee intended that "provided by law" was to be used when the Legislature was entrusted with the entire job of implementation.[314] Where only details, as opposed to overall planning, were left to the Legislature, the committee used "prescribed by law."[315] In sum, the text of Article 2, Section 9 "empowers the Legislature only to adopt rules that further the principles already set forth in [Article 2, Section 9]—which has no geographic-distribution requirement."[316]

The court then examined "several valid rules for direct-democracy petitions—deadlines, type-size requirements, and the like—that are not set out in the [Michigan] Constitution."[317] The court examined the history of direct-democracy in Michigan and noted that many of those details—"deadlines, type sizes, requirements of form, and so on"—were "written directly into" the 1908 Michigan Constitution.[318] At the constitutional convention adopting the 1963 Michigan Constitution currently in place, that language was eliminated because it was "of a purely statutory character."[319] Thus, when Article 2, Section 9 directed the Legislature to "implement" its provisions, the Legislature was merely charged to "prescribe the sorts of details that had previously been written directly into the [Michigan] Constitution[.]"[320] Stated differently, these sorts of details "that were formerly provided in the [Michigan] Constitution of 1908" were the "clearest examples of legislation that the Legislature can adopt to 'implement; direct democracy[.]"[321]

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310. *Id.* (emphasis in original).
311. *Id.*
312. *Id.* (emphasis omitted).
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at *9–10.
318. *Id.*
319. *Id.* at *10 (citing 2 Official Record, Constitutional Convention 1961, p. 3367).
320. *Id.*
321. *Id.* at *11.

Against this backdrop, the court found that the 15% geographic requirement did not "merely fill in necessary details, but rather add[ed] a substantive obligation."[322] The court noted that the main reason for a minimum signature threshold was to ensure that referendums and initiatives had a minimum level of support and the people of Michigan chose a *statewide* minimum number without a geographic cap.[323] The court also found that the 15% cap would make it more difficult and expensive for petition sponsors to gather the required signatures in the time required by the Michigan Election Law and that the related enforcement of the signature cap would nullify certain voters' signatures if they were obtained after the 15% cap for the district had been reached.[324] This consequence would impact voters in the most densely populated parts of Michigan and would directly contradict the statewide minimum-signature threshold necessary to change Michigan laws.[325] Quoting the court of appeals, the Michigan Supreme Court noted that the 15% geographic threshold would have actually *reduced* speech during an election cycle while "restrict[ing] the powers of direct democracy that the people reserved to themselves."[326] In sum, the 15% requirement went "beyond formulating the process by which initiative petitioned legislation shall reach the [L]egislature or the electorate . . . and instead imposes an additional substantive requirement that does not advance any of the express constitutional requirements."[327] Thus, the 15% geographic distribution requirement in 2018 PA 608 was unconstitutional.[328]

b. The 15% Geographic Distribution Requirement—Constitutional Amendments

The Michigan Supreme Court also held that the 15% geographic requirement for constitutional amendments was unconstitutional.[329] This was because the text of Article 12, Section 2, which provides for the ability for citizens to amend the constitution, used the same "prescribe by law" language with respect to the form petitions and how they were to be signed and circulated that Article 2, Section 9 used.[330] As the court previously

322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at *12 (quoting Wolverine Golf Club v. Hare, 384 Mich. 461, 466, 185 N.W.2d 392, 395 (1971)).
328. *Id.*
329. *Id.* at *14.
330. *Id.* at *12.

noted, the drafters of the 1963 constitution used this "prescribe by law" language when "only the details were left to the [L]egislature and not the over-all planning."[331] Adding a requirement that signatures had to be geographically distributed in a certain manner was more than a "mere detail."[332] Rather, the requirement "limit[ed] *from whom* [signatures] may be gathered," and thus constituted "a limitation of a substantive right."[333] Thus, the "15% requirement exceed[ed] the Legislature's authority to regulate a self-executing constitutional process by imposing a substantive requirement that does not advance the express constitutional requirement[.]"[334]

The court made clear that the Legislature did have a role to play in implementing Article 12, Section 2. In doing so, the court again looked to the 1908 Michigan Constitution to determine the proper scope of the Legislature's authority here.[335] The 1908 Michigan Constitution, which allowed citizens to initiate constitutional amendments, outlined the required content of petition forms; the Secretary of State's duties after petitions were submitted; and the election process for submitting proposed amendments to the electorate, among others.[336] This section was also further expanded by a constitutional amendment in 1913.[337] The Michigan Supreme Court upheld these "procedural rules, regulations, and limitations" and found that the provisions in the 1908 constitution were self-executing.[338] The court found this history guided the constitutional convention in 1961 in drafting Article 12, Section 2 and that the framers "affirmatively introduced a role for the Legislature to play—prescribing by law the form of initiative petitions and how the petitions must be signed and circulated," but that this role was limited by the "prescribed by law" language, signifying that "only the details were left to the [L]egislature."[339] The court also noted that the drafters of the 1963 Michigan Constitution rejected two different geographic distribution caps for citizen initiated constitutional amendments.[340]

Thus, because the constitutional text did not provide for such a distribution requirement and because similar distribution requirements were rejected at the constitutional conversation, the 15% geographic-

331. *Id.*
332. *Id.*
333. *Id.* at *12 (emphasis in original).
334. *Id.* at *14.
335. *Id.* at *13.
336. *Id.*
337. *Id.*
338. *Id.* (quoting Hamilton v. Deland, 221 Mich. 541, 544, 191 N.W. 829, 830 (1923)).
339. *Id.*
340. *Id.*

distribution requirement went "beyond the Legislature's power under [Article 12, Section 2] to prescribe the 'form' of petitions and the 'manner' of their signing and circulation," was unduly burdensome, and unconstitutional.[341]

c. The Checkbox and Paid-Circulator Affidavit Requirements

The plaintiffs in *League of Women Voters* also challenged the checkbox and paid-circulator affidavit requirements based on federal constitutional law. The court began this portion of the opinion by noting that the U.S. Supreme Court previously held that petition circulation is protected by the First Amendment as "core political speech" because it involves electors expressing a desire for political change and a discussion of the merits of that change.[342] Thus, laws and regulations that directly or severely burden political speech are subject to strict scrutiny.[343] The court also noted that a plurality of the U.S. Supreme Court recently held that compelled disclosure requirements were reviewed using the exacting scrutiny standard.[344] Under the exacting scrutiny standard, the governmental interest justifying the compelled disclosure requirements must be sufficiently important and must also reflect the seriousness of the burden on First Amendment rights.[345] Nonetheless, the U.S. Supreme Court also previously held that states still have "considerable leeway" in the laws and regulations they pass to protect the integrity of the initiative process.[346] Finally, when a statute or regulation does not impose a severe burden on core political speech or the law or regulation merely deals with the mechanics of the electoral process, courts usually apply the more flexible *Anderson-Burdick* test.[347] That test requires a court to "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."[348]

Turning first to the checkbox requirement, the court found "somewhat instructive" the U.S. Supreme Court's decision in *Buckley v. American Constitutional Law Foundation*, where the U.S. Supreme Court struck down as unconstitutional a Colorado law requiring petition circulators to

341. *Id.* at *14.
342. *Id.* at *15.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*

wear badges stating their names and whether they are paid or volunteer circulators.[349] Both the U.S. Supreme Court and Tenth Circuit Court of Appeals (which upheld the district court's ruling that the statute was unconstitutional) were concerned that the requirement forced circulators to reveal their names at the time they were delivering the political messages.[350] The reaction to their message could have been the most intense at that time, which was exactly when they would want anonymity.[351]

The court noted that the checkbox requirement in MCL § 168.482(7) was similar to the badge requirement in *Buckley* in that it required the petition circulator to reveal their status as paid or volunteer circulator at the same time they were delivering their political message.[352] Thus, it was subject to exacting-scrutiny, rather than strict scrutiny review and the court had to determine whether it was "substantially related" to a sufficiently important governmental interest.[353]

However, the court ultimately rejected the argument that the checkbox requirement was analogous to the name badge in *Buckley*.[354] The court noted that the U.S. Supreme Court limited its review in *Buckley* to the Colorado statute's requirement that circulators had to reveal their names.[355] MCL § 168.482(7) did not require circulators to provide their name or other identifying information; they merely had to disclose whether they were paid or volunteers.[356] There was thus no risk to harassment in the heat of the moment as there would be if a circulator had to reveal their name. The court also noted that the plaintiffs provided no support for their argument that the checkbox requirement would negatively impact signature-gathering companies from hiring paid circulators.[357] The court also dismissed the plaintiff's argument that the checkbox's size and placement would discourage electors from signing a petition or cause hostility towards paid circulators.[358]

Finally, the court found that Michigan had a sufficient interest in creating the checkbox requirement and the checkbox requirement bore a

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349. *Id.* (citing Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 199 (1999).
350. *Id.* at *16.
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*

substantial relationship to that interest.[359] That was because "transparency in the political process, especially transparency that permits voters to follow the money, is a compelling state interest."[360] The court also found relevant and persuasive the fact that MCL § 168.482(7) did not require the disclosure of personal or demographic information.[361] Thus, the court held the checkbox requirement in MCL § 168.482(7) was constitutional.[362]

With respect to the affidavit requirement, the court noted that the affidavit requirement "is a prerequisite to circulation of a petition that *is* a 'step removed from the communicative aspects of petitioning'" and it thus did not burden core political speech.[363] Accordingly, the court applied the more flexible *Anderson-Burdick* test.[364] Nonetheless, even under this more lenient test, the court still found that the affidavit requirement in MCL § 168.482a was unconstitutional and affirmed the court of appeals in that respect, though it rejected some of the court of appeals' analysis.[365]

In beginning this portion of the opinion, Justice Cavanagh noted that the affidavit requirement only applied to paid signature gatherers and thus imposed "additional hurdles on causes furthered by groups who might rely on professional petition circulators."[366] The court was also persuaded that because signature gathering operates on short timeframes, the requirement that the circulators—who may not live in the state—have to file affidavits *before* they can begin gathering signatures would hinder the ability to obtain valid signatures and was thus "a substantial burden and precondition on one's ability to engage in political speech."[367] The court also rejected the argument that the affidavit requirement promoted greater transparency because it did nothing to provide information to the signer of a petition and it was not immediately clear that the information in the affidavit would be made available to the public.[368] According to the court, further undercutting the transparency argument in favor of the affidavit requirement was the fact that ballot question petitions already had to include information about the proponent of the petition under the Michigan Campaign Finance Act.[369] The Attorney General's argument that the affidavit requirement was related to the state's interest in verifying

359. *Id.* at *17.
360. *Id.* (internal quotations omitted).
361. *Id.*
362. *Id.*
363. *Id.* at *18.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* (citing MICH. COMP. LAWS § 169.247(1)).

campaign-finance reporting did not hold up either because, as the court pointed out, MCL § 168.482a did not require the circulator to disclose by whom they are employed or paid by.[370] Neither did the argument that the affidavit allowed the state to locate paid circulators because MCL § 168.482a did not require any identifying information.[371] Thus, the affidavit requirement was unconstitutional because "when weighing the burdens on First Amendment rights with the state's asserted interest . . . the burden eclipse[d] the nominal interest."[372]

d. Prospective Application

Generally speaking, "judicial decisions are to be given complete retroactive effect."[373] Nonetheless, if "injustice might result from full retroactivity," the court can adopt a flexible approach of giving holdings limited retroactive or prospective effect.[374] The Secretary of State urged the court to give its decision prospective effect because the Secretary of State never enforced the 15% requirement; only began enforcing the affidavit requirement on July 12, 2021, when the court of claims upheld it as constitutional; and only began enforcing the checkbox requirement on October 29, 2021.[375] Because the court upheld the lower courts' rulings as to the unconstitutionality of the 15% geographic limit and the affidavit requirement, the court only had to consider whether to give prospective effect to its ruling upholding the constitutionality of the checkbox requirement.[376] The Secretary of State informed the court that two petitions that were then circulating did not contain the required checkbox and that another petition that received preliminary approval from the Board of State Canvassers did contain a checkbox.[377]

In determining whether to grant retroactive effect to a decision, the court had to utilize a test to first determine the "threshold question" of whether its decision established a new principle of law.[378] If it did, the court then had to weigh three factors: "(1) the purpose to be served by the

370. *Id.* at *19.
371. *Id.*
372. *Id.*
373. *Id.* at *20 (quoting Hyde v. Univ. of Mich. Bd. Of Regents, 426 Mich. 223, 240, 393 N.W.2d 847, 854 (1986)).
374. *Id.* at *20 (quoting Lindsey v. Harper Hosp., 455 Mich. 56, 68, 564 N.W.2d 861, 866 (1997)).
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*

new rule, (2) the extent of the reliance on the old rule, and (3) the effect of retroactivity on the administration of justice."[379]

In answering the threshold question, the court needed to determine whether its decision amounted "to a new rule of law" in that it either overruled established precedent or was an issue of first impression.[380] The court found that the issues presented in *League of Women Voters* were "issue[s] of first impression that [have] been subject to vigorous debate essentially since 2018 PA 608 was enacted" and that the threshold question had been satisfied.[381] In weighing the factors outlined above, the court noted that giving this rule prospective effect would deprive voters who have already signed petitions without checkboxes of the information provided therein.[382] However, the two other factors outweighed the consideration in the first factor. This was because until the court of appeals' decision on October 29, 2021, every other court that considered the checkbox requirement held that it was unconstitutional.[383] Additionally, the court had an interest in avoiding a disruption in the administration of justice because giving the decision retroactive effect would lead to litigation over the validity of signatures that were already gathered.[384] Giving retroactive effect would also lead to the recirculation of petitions and make signature gathering more difficult as electors who had already signed the petition may be confused about why they are being asked to sign again and refuse to do so.[385] Accordingly, the court found that the test for prospective-only application was met, and that the decision did not apply to signatures gathered before January 24, 2022.[386]

e. Justice Zahra's Partial Concurrence and Partial Dissent

Justice Zahra, in a partial concurrence and partial dissent joined by Justice Viviano, agreed that the 15% geographic requirement was unconstitutional as applied to initiatives and referendums.[387] However, Justice Zahra would have found the 15% geographic requirement constitutional with respect to the constitutional amendment process because this "conclusion [was] consistent with the ratifiers' common understanding of [Article 12, Section 2]—that voter-initiated

379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.* at *21.
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* at *22 (Zahra, J. dissenting in part, concurring in part).

constitutional amendments are reserved for substantial matters worthy of constitutional elevation rather than routine policy matters normally addressed through legislation[.]"[388] Thus, according to Justice Zahra, "it should be more difficult to amend the [Michigan] Constitution than to propose, approve, or reject legislation," and this view did not conflict with the self-executing nature of Article 12, Section 2.[389]

Additionally, while Justice Zahra concurred that the checkbox requirement was constitutional, he dissented from the majority's holding that the affidavit requirement was facially unconstitutional.[390] Justice Zahra believed that the affidavit requirement imposed a "minor burden" on petition circulators, did not prevent petition circulators, and did not chill or deter paid circulators.[391] Moreover, Justice Zahra believed that the affidavit requirement served an important state interest in "preserving the integrity of the electoral process by detecting and deterring fraud, as well as assisting in the discovery of invalid signatures."[392] Finally, Justice Zahra agreed with the holding to give the decision prospective effect.[393]

f. Justice Bernstein's Partial Concurrence and Partial Dissent

Justice Bernstein concurred with the majority opinion "in large part," but believed that the checkbox requirement was also unconstitutional.[394] While Justice Bernstein agreed with the majority that any burden imposed by the checkbox requirement was minimal, he disagreed that "the strength of the governmental interest is sufficient to overcome even the minimal burden imposed by the checkbox requirement."[395] Justice Bernstein believed that the state "[did] not even attempt to assert with any specificity an important governmental interest advanced by [the checkbox requirement], other than 'generally stated interests in transparency and accountability.'"[396] According to Justice Bernstein, a checkbox telling voters whether the circulator was paid or a volunteer would not permit voters to "follow the money."[397] Thus, according to Justice Bernstein, "the

388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.* at *40–41.
392. *Id.* at *23.
393. *Id.*
394. *Id.* at *42 (Bernstein, J. dissenting in part, concurring in part).
395. *Id.*
396. *Id.*
397. *Id.*

state's failure to justify even that minimal burden renders the checkbox requirement unconstitutional."[398]

g. Justice Clement's Partial Concurrence and Partial Dissent

Justice Clement wrote separately to state her agreement with the court's analysis as to the unconstitutionality of the 15% geographic requirement as well as the court's decision that the checkbox requirement was constitutional.[399] However, Justice Clement dissented from the majority's opinion as to the affidavit requirement for the reasons stated in Justice Zahra's dissent.[400] Justice Clement also dissented from the majority's decision to give its opinion prospective-only effect.[401] This was because none of the petition sponsors had submitted petitions, so if the court gave the decision retroactive effect, the petition sponsors would have had time to adjust to the decision.[402] Justice Clement also casted doubt on whether the court could even issue prospective-only effect opinions because such opinions would be essentially "an exercise of the legislative power to determine what the law shall be for all *future* cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to *the case at hand*."[403]

III. CONCLUSION

The *Survey* period saw many election-related questions answered but left many questions unanswered. The *Survey* period also saw the court of appeals issue a published opinion affirming that election officials can disqualify candidates for providing false certifications on their Affidavits of Identity only to have that decision vacated because the appealing party lacked standing. The court of appeals also upheld various statutes the Legislature passed in the wake of Proposal 3 that appeared to be at odds with the text and purpose of the constitutional amendments Proposal 3 implemented. Readers can expect that the next *Survey* period will provide additional, significant litigation and decisions, particularly considering the 2022 elections.

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398. *Id.* at *43.
399. *Id.* (Clement, J. dissenting in part, concurring in part).
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* (quoting Devillers v. Auto Club Ins. Ass'n, 473 Mich. 562, 587 n.57, 702 N.W.2d 539, 554 (2005)) (emphasis omitted).