STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellees,

v

SECRETARY OF STATE and ATTORNEY GENERAL,

Defendants,

and

SENATE and HOUSE OF REPRESENTATIVES,

Intervening Defendants-Appellants,

and

REPUBLIC NATIONAL COMMITTEE and MICHIGAN REPUBLICAN PARTY,

Proposed Intervening Defendants.

FOR PUBLICATION
October 16, 2020
9:00 a.m.

No. 354993
Court of Claims
LC No. 20-000108-MM

Before: CAMERON, P.J., and BOONSTRA, and GADOLA, JJ.

CAMERON, P.J.

Intervening defendants, the Senate and the House of Representatives (collectively, "the Legislature"), appeal by right a September 30, 2020 opinion and order of the Court of Claims, which granted declaratory and injunctive relief in favor of plaintiffs with respect to the receipt deadline for absentee ballots and ballot-handling restrictions that limit who may lawfully possess another voter's ballot. For the reasons stated in this opinion, we reverse.

I. FACTS AND PROCEDURE

In June 2020, plaintiffs filed a complaint against defendant Secretary of State ("Secretary") and defendant Attorney General, seeking declaratory and injunctive relief related to the handling and counting of absent voter ballots for the 2020 general election.[1] Plaintiffs later filed an amended complaint, asserting facial and as-applied challenges to the constitutionality of three laws: (1) a deadline requiring that ballots submitted by absent voters must be received by election officials before polls close at 8:00 p.m. on election day in order to be counted; (2) a ballot-handling provision that restricts who, other than the voter, may possess, solicit, or deliver an absent voter's ballot; and (3) a requirement that voters who choose to submit their ballot by mail must first affix the necessary postage to their envelope to ensure delivery. In relevant part, plaintiffs alleged that these laws, in combination with the anticipated delay in the delivery of mail due to the COVID-19 pandemic, impose unconstitutional burdens on plaintiffs' right to vote absentee in violation of Const 1963 art 1, § 2. Plaintiffs urged the Court of Claims to declare these laws unconstitutional and suspend the enforcement of these election laws for the 2020 general election. Plaintiffs further asked the court to order that all absent voter ballots postmarked before election day and received within 14 days of election day must be counted, to suspend the ballot-handling restrictions, and to require that Michigan provide prepaid postage to all voters who requested an absentee ballot.

Plaintiffs later requested that the Court of Claims issue a preliminary injunction, and the Court of Claims did so in part. Thereafter, plaintiffs and defendants filed competing motions for summary disposition. Ultimately, the Court of Claims granted partial relief to plaintiffs, concluding that plaintiffs had established two as-applied constitutional violations of plaintiffs' right to vote absentee in the 2020 general election. The Court of Claims issued an order enjoining the operation of two election laws: the deadline for mail-in absent voter ballots and the restriction limiting who can lawfully possess, solicit, and deliver another person's ballots. The Court of Claims ordered that mail-in ballots received after the polls closed on election night would now be eligible to be counted up to 14 days later, provided that "the ballot is postmarked before election day" and received by the clerk within 14 days of the election.[2] The Court of Claims also suspended

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[1] Plaintiffs' original complaint requested preliminary and permanent injunctive relief. The Court later entered the following scheduling order: "IT IS HEREBY ORDERED: that oral argument on Plaintiff's request for Declaratory and Injunctive relief is scheduled for Wednesday, July 08, 2020 at 11:00 a.m. via Zoom. Plaintiffs' brief shall be filed by Friday, June 26, 2020 at 12:00p.m. Defendants' response is due by Friday, July 03, 2020 at 12:00p.m. No replies are permitted." Thereafter, plaintiffs filed a brief entitled "BRIEF IN SUPPORT OF PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF IN COMPLIANCE WITH THE COURT'S 6/19/20 SCHEDULING ORDER," in support of their demand for preliminary injunctive relief. In defendants' response, defendants noted that plaintiffs had not moved for a preliminary injunction before the trial court issued its scheduling order.

[2] The Court of Claims held in relevant part: "[c]onsistent with MCL 168.822, the timely postmarked ballot must be received by the clerk's office no later than 14 days after the election has occurred, so as not to interfere with the board of county canvassers' duty to certify election results by the fourteenth day after the election."

the ballot-handling restrictions regarding third parties possessing and delivering absentee ballots as long as the third party's conduct occurs from 5:01 p.m. on the Friday before the 2020 general election until polls close, so long as the absent voter gives his or her approval. The Court of Claims rejected plaintiffs' final claim that the State was constitutionally required to provide pre-paid postage for absent voters to use after completing their ballots and granted summary disposition in favor of defendants with respect to this claim only.

After defendants elected not to appeal, the Legislature, which had appeared as amicus in the Court of Claims proceedings, successfully intervened and filed the instant appeal. The Republican National Committee and the Michigan Republican Party appear on appeal as amici.[3]

II. LEGAL BACKGROUND

Michigan law formerly required voters to designate one of six reasons to support a request to vote absentee. In November 2018, Michigan voters approved Proposal 3, which bestowed a constitutional right to "no-reason" absentee voting to all Michigan voters. Const 1963, art 2, § 4(1)(g) now provides that Michigan voters shall have the right "to vote an absent voter ballot without giving a reason . . . ." The Legislature then enacted 2018 PA 603, which amended the Michigan Election Law accordingly.

Under Michigan Election Law, registered voters may apply for an absentee ballot by completing an application to receive an absentee ballot. The application from an already-registered voter must be made before "4 p.m. on the day before the election." MCL 168.761(3). An unregistered voter, however, may apply for an absentee ballot as late as "before 8 p.m. on election day" provided that he or she does so in person at the clerk's office. MCL 168.761(3). Notably, if a voter applies for an absentee ballot after 5:00 p.m. on the Friday before an election, "[t]he clerk of a city or township shall not send by first-class mail an absent voter ballot . . . ." MCL 168.759(2). The Secretary has issued instructions to clerks to transmit a ballot to a voter by mail only where adequate time exists for the voter to receive the ballot by mail, vote, and return the ballot before 8:00 p.m. on election day.

By law, an absent voter ballot contains the following instructions to the voter: (1) read the voting instructions; (2) after voting, place the ballot in the secrecy sleeve or fold it to conceal the votes; (3) place the ballot in the return envelope and seal it; (4) sign and date the envelope and, if assistance in voting was required, mark that on the envelope; and (5) use one of four methods to deliver the return envelope to the clerk. MCL 168.764a.

Step Five in the above instructions provides four methods of delivering completed absent voter ballots to the clerk. First, voters may deposit ballots in "the United States mail or with another public postal service, express mail service, parcel post service, or common carrier." MCL 168.764a, Step 5(a). Voters who choose to use the United States mail or a delivery service must "[p]lace the necessary postage upon the return envelope . . . ." MCL 168.764a, Step 5(a). Second, a voter may deliver the completed absentee ballot in person. MCL 168.764a, Step 5(b). Third, a

[3] *Michigan Alliance for Retired Americans v Secretary of State*, unpublished order of the Court of Appeals, issued October 9, 2020 (Docket No. 354993).

voter may mail or deliver his or her ballot through "a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household." MCL 168.764a, Step 5(c). But a person who is not a member of a voter's immediate family or who does not reside in the voter's household is prohibited from possessing another person's ballot; indeed, to do so subjects the person to prosecution for a 5-year felony. MCL 168.764a; MCL 168.761; MCL 168.932(f); MCL 168.935. The fourth and final method is that a voter, who is unable to return his or her absent voter ballot by any of the other authorized methods, may "request by telephone that the clerk who issued the ballot provide assistance in returning the ballot." MCL 168.764a, Step 5(d). When the proper request is made before "5 p.m. on the Friday immediately preceding the election," the clerk's office is required to pick up and deliver the absent voter ballot.[4] MCL 168.764a, Step 5(d). See also MCL 168.764b(4)(c). When the request occurs after 5:00 p.m. on the Friday immediately preceding the election, the clerk may—but is not duty bound—to pick up and deliver the absent voter ballot.[5]

Notably, if an absent voter's ballot is returned to the clerk's office in an unauthorized manner, the ballot will not be "invalidated solely because the delivery to the clerk was not in compliance" with the statutes. MCL 168.764b(7). Rather, the ballot will be processed as a challenged ballot. MCL 168.764b(7). Completed ballots must be received by the clerk "before the close of the polls on election day."[6] MCL 168.764a, Step 6. Furthermore, MCL 168.759b provides in relevant part that "[t]o be valid, ballots must be returned to the clerk in time to be delivered to the polls prior to 8 p.m. on election day." Ballots not received by 8:00 p.m. on election day are not counted. MCL 168.764a, Step 6 ("An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.").

[4] The pertinent sentence reads, "The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pickup the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered." Therefore, under the plain language of the statute, a voter need only call the clerk before 5 p.m. on the Friday immediately preceding the election to trigger the clerk's duty to provide ballot-delivery service for eligible absent voters.

[5] The clerk's obligations found in MCL 168.764b(4) and (5) are essentially same except that MCL 168.764b(4) reduces the clerk's responsibility to provide ballot-delivery services from a "shall" to "may" if the request for assistance is made after 5:00 p.m. on the Friday immediately preceding the election. Although not particularly relevant to this appeal, MCL 168.764(4) also removes the restriction that, during this narrow window, election officials may provide ballot-delivery services for absent voters even if the ballot is outside of the jurisdictional limits in which the absent voter is registered.

[6] The polls close at 8:00 p.m. MCL 168.720.

III. ANALYSIS

A. STANDING

Plaintiffs argue that the Legislature does not having standing to file an appeal in this matter. We disagree.

Whether a party has standing is a question of law subject to review de novo. *Groves v Dept of Corr*, 295 Mich App 1, 4; 811 NW2d 563 (2011). In *League of Women Voters of Mich v Secretary of State (League I)*, ___ Mich App ___, ___; ___ NW2d ___ (Docket Nos. 350938, 351073, issued January 27, 2020), slip op at 6, lv pending, this Court observed as follows:

> [T]his Court has jurisdiction over appeals by right "filed by an aggrieved party." MCR 7.203. *Black's Law Dictionary* (11th ed) defines "aggrieved party" as "a party entitled to a remedy; esp. a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm'n*, 475 Mich 286, 291; 715 NW2d 846 (2006).
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> " 'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.' " *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (citations omitted).

Furthermore, our Supreme Court has ruled in pertinent part that "a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins Co*, 475 Mich at 291-292. Therefore, the appellate litigant also must show a "concrete and particularized injury." *Id*.

Here, plaintiffs argue that the Legislature has not met its heavy burden of establishing that it has standing on appeal. In so arguing, however, plaintiffs overlook the Legislature's interests given that the Legislature is "an entity that certainly has an interest in defending its own work." *League II*, ___ Mich ___, ___; 948 NW2d 70 (Docket No. 161671, issued September 11, 2020), slip op at 7 n 4 (MCCORMACK, C.J., dissenting). This is particularly the case here given that the Legislature is defending the constitutionality of several of its statutes, as well as the manner in which future elections are to be conducted in this State. The Legislature—which is a body that is subject to these election procedures and as elected officials of the citizens of this State—undoubtedly has a significant interest in the instant appeal. Indeed, it is difficult to envision interests that would assure more sincere and vigorous advocacy.

Although plaintiffs oppose the Legislature's standing on the basis of *League I*, we conclude that case is distinguishable. The Legislature in *League I* sought to pursue—as a plaintiff—a declaratory judgment to enforce particular legislation; in doing so, the Legislature was "plainly

challenging the actions of members of the Executive Branch." *League I*, ___ Mich App at ___; slip op at 4, 8. In this case, however, the Legislature sought to intervene after defendants, constitutional officers within the Executive Branch, declined to appeal the Court of Claims's decision. The Legislature, as elected representatives of the citizens of Michigan, is essentially taking the place of defendants in this case to ensure an actual controversy with robust contrary arguments. Indeed, the Court of Claims initially denied the Legislature's motion to intervene and only permitted intervention after the Executive Branch abdicated its role in this litigation. As noted by this Court in *League of Women Voters of Mich v Secretary of State (League II)*, ___ Mich App ___, ___; ___ NW2d ___ (issued July 14, 2020, Docket No. 353654), slip op at 5,

> just as a legislative body cannot legitimately enact a statute that is repugnant to the Constitution, nor can an executive branch official effectively declare a properly enacted law to be void by simply conceding the point in litigation. To vest such power in an official, it would effectively grant such official the power to amend the Constitution itself.

For these reasons, we conclude that the Legislature has standing to appeal in this matter.

Amici also challenge plaintiffs' standing to bring suit, arguing that plaintiffs have not shown a special injury. However, plaintiffs in this action include the Michigan Alliance for Retired Persons ("MARP"), which is a nonprofit corporation with over 200,000 members, many of whom are elderly and/or disabled, and the Detroit/Downriver Chapter of the A. Philip Randolph Institute, the senior constituency group of the AFL-CIO. The individual plaintiffs, Charles Robinson, Gerard McMurran, and Jim Pederson, are all members of MARP, are over the age of 61, and are retired union members. Given the exigent circumstances here and given that plaintiffs have asserted their members' status as elderly or disabled individuals—some of whom have underlying health conditions that make them more vulnerable to COVID-19—we assume without deciding that plaintiffs have standing. See *House of Representatives v Governor*, ___ Mich App ___, ___; __ NW2d ___ (Docket No. 353655, issued August 21, 2020), slip op at 9 ("In light of this highly expedited appeal, we shall proceed on the assumption that the Legislature had standing to file suit against the Governor for declaratory relief."), rev'd on other grounds by *House of Representatives v Governor*, ___ Mich ___ (Docket No. 161917, entered October 12, 2020).

B. DECLARATORY RELIEF

The Legislature argues that the Court of Claims erred by granting summary disposition in favor of plaintiffs on its declaratory action. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition in an action seeking declaratory relief. *League I*, ___ Mich App at ___; slip op at 6. The constitutionality of a statute presents a question of law to which this Court applies a de novo standard of review. *GMAC LLC v Treasury Dep't,* 286 Mich App 365, 372; 781 NW2d 310 (2009).

The Legislature first argues that the Court of Claims should have analyzed plaintiffs' declaratory claims as a facial attack on the election laws because plaintiffs' allegations do not amount to an as-applied challenge. An "as-applied" challenge "considers the specific application

of a facially valid law to individual facts," while a "facial" constitutional challenge considers the plain language of the challenged provision (i.e., on its face). *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (citation omitted). In other words, a facial challenge is a claim that the law is "invalid *in toto*—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In contrast, "[a]n as-applied challenge, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (internal quotation marks and citation omitted).

Frequently, as here, litigants describe their challenges as both facial and as-applied challenges. This is unsurprising given that elements of the two can overlap. See *Citizens United v Federal Election Comm*, 558 US 310, 331; 130 S Ct 876, 893; 175 L Ed 2d 753 (2010) (stating that "the distinction between facial and as-applied challenges is not so well defined . . . ."). However, as a general rule, substance prevails over the particular wording used in a complaint. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2002). Thus, a litigant's labels are not what matter.

In *John Doe No 1 v Reed*, 561 US 186, 194; 130 S Ct 2811, 2817; 177 L Ed 2d 493 (2010), the Supreme Court examined whether a claim was a facial challenge or an as-applied challenge. In analyzing the issue, the *Reed* Court examined the substance of the plaintiffs' claim, which contained elements of a facial challenge because it was not limited to the plaintiffs' specific case, but also reflected an as-applied challenge because it did not seek to strike the challenged statute in its entirety. *Id.* The *Reed* Court then examined the plaintiffs' requested relief: an injunction barring the Secretary of State "from making referendum petitions available to the public." *Id*. The *Reed* Court declared that the label attached to the claim was not dispositive; rather, the Court held that the deciding factor was that the relief sought by the plaintiffs would "reach beyond the particular circumstances of these plaintiffs." *Id*. The *Reed* Court ruled that the plaintiffs must "satisfy our standards for a facial challenge to the extent of that reach." *Id.* (citing *United States v Stevens*, 559 US 460, 472-473; 130 S Ct 1577, 1587; 176 L Ed 2d 435 (2010)).

On casual inspection, plaintiffs' allegations appear to be as-applied challenges because they reference plaintiffs' particular vulnerability given the facts—COVID-19 and an alleged mail slowdown—as infringements on their right to vote only in the November 2020 general election. A reading of plaintiffs' request for relief, however, brings into focus the breadth of their requests, which are not confined only to plaintiffs. Specifically, the relief sought by plaintiffs would apply to *all* Michigan voters who choose to cast their ballots by mail —not just to the elderly and disabled members of plaintiffs' organizations. Therefore, the ballot deadline relief extends well beyond the circumstances of the individual plaintiffs and their organizations and would reach all Michigan voters who, for whatever reason, would benefit from more time in which to mail their ballot. Furthermore, lifting the restrictions and criminal penalties concerning who may handle absent voter ballots would apply to all Michigan voters as long as the conduct in question occurs after 5:00 p.m. on the Friday before the election. While plaintiffs' challenge arises only in relation to a specific fact-pattern—the November 3, 2020 election during the COVID-19 pandemic and slow mail delivery—the relief plaintiffs seek applies to every Michigan absent voter. Therefore, the

substance of plaintiffs' amended complaint is a facial challenge of the relevant statutes, and the Court of Claims erred by failing to analyze the claims accordingly.[7]

That said, we must next consider whether plaintiffs were entitled to summary disposition on their declaratory action. As already stated, plaintiffs alleged that the ballot receipt deadline required by MCL 168.759b and MCL 168.764a and the ballot-handling restrictions required by MCL 168.932(f) violate Const 1963, art 2, § 4(1)(g), which guarantees voters the right to vote by absentee ballot without giving a reason "during the forty (40) days before an election" and the right "to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Importantly, because Const 1963, art 2, § 4 is a self-executing constitutional provision, the legislature is not permitted to impose additional undue obligations. *Durant v Dep't of Ed*, 186 Mich App 83, 98; 463 NW2d 461 (1990).

The guiding framework for an examination of the constitutionality of a statute begins with the presumption that statutes are constitutional, and "courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the act would be valid." *In re Request for Advisory Opinion*, 479 Mich at 11 (quotation marks, citation, brackets, and footnotes omitted).

With regard to plaintiffs' arguments concerning the ballot-receipt deadline, we need not analyze this point. In this Court's divided opinion in *League II*, this Court held that the 8:00 p.m. ballot-receipt deadline survives a facial challenge and does not violate Const 1963, art 2, § 4. *League II*, ___ Mich App at ___; slip op at 14-16. We are not only bound by that holding, but we fully agree with it. MCR 7.215(J)(1).

Although this Court in *League II* did not address the statutory provisions that provide ballot-handling restrictions, we conclude that MCL 168.932(f) also survives a facial challenge. As noted in *League II*,

> In [*In re Request for Advisory Opinion*, 479 Mich at 35] . . . , our Supreme Court held that "the Michigan Constitution does not compel that every election regulation be reviewed under strict scrutiny." The Court recognized that in *Burdick*

[7] We reject plaintiffs' argument that the fact that the changes would apply only to the November 2020 election removes this case from a facial analysis. Because the relief would extend to all Michigan absent voters—not just plaintiffs—in the November 2020 election, it does not survive the *Reed* analysis. Plaintiffs also contend that, even if the relief extends beyond their circumstances, reversal still is not required because courts often invalidate laws facially on the basis of their impact on certain communities and subgroups. For example, plaintiffs cite *Crawford v Marion Cty Election Bd*, 553 US 181; 128 S Ct 1610; 170 L Ed 2d 574 (2008), where the Court considered a law's impact on identifiable subgroups for whom the burden may be most severe. For the reasons already explained, however, we conclude that the relief plaintiffs seek is not tailored to a subgroup or subgroups. Instead, the relief plaintiffs seek would apply to all absent voters.

> *v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992), the United States Supreme Court "rejected the notion that every election law must be evaluated under strict scrutiny analysis." *Id*. at 20-21. The Court stated that the *Burdick* Court "recognized that 'to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.' " *Id*. at 21, quoting *Burdick*, 504 US at 433. [*League II*, ___ Mich App at ___; slip op at 14.]

Indeed, although "the right to vote is an implicit fundamental political right that is preservative of all rights," that right is not absolute. *Promote the Vote v Secretary of State*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 353977, issued July 20, 2020) (quotation marks and citations omitted), slip op at 13. "[S]tates have a compelling interest in preserving the integrity of their election processes[.]" *In re Request for Advisory Opinion*, 479 Mich at 19. "In order to protect that compelling interest, a state may enact generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process[.]" *Id*. at 19-20 (quotation marks and citation omitted). Our Supreme Court has described the *Burdick* test as balancing between protecting the citizens' right to vote and protecting against fraudulent voting. *Id*. at 35. It has commented as follows regarding application of the *Burdick* test:

> [T]he first step in determining whether an election law contravenes the constitution is to determine the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state. The United States Supreme Court has stressed that each inquiry is fact and circumstance specific, because "[n]o bright line separates permissible election-related regulation from unconstitutional infringements[.]" [*In re Request for Advisory Opinion*, 479 Mich at 21-22 (citation omitted)].

In this case, the Legislature argues that the ballot-handling restrictions are intended to combat voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters . . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v Marion Cty Election Bd*, 553 US 181, 196; 128 S Ct 1610, 1619; 170 L Ed 2d 574 (2008).

Indeed, designing adjustments to our election integrity laws is the responsibility of our elected policy makers, not the judiciary. See Const 1963, art 2, § 4(2) ("[T]he legislature shall enact laws to regulate the time, place and manner of all . . . elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."). To be sure, the pandemic has caused considerable change in our lives, but election officials have taken considerable steps to alleviate the potential effects by making no-reason absent voting easier for the 2020 election. For instance, after Proposal 3, municipalities across Michigan now have installed more than 700 ballot drop boxes available for absent voters who do not want to use the mail to deliver their ballot, and

the Secretary has reported that there will be more than 1,000 drop boxes available by election day.[8] Additionally, satellite election centers embedded in some communities allow eligible persons to register to vote, receive a ballot, vote, and drop-off their completed ballot all on-site.[9] Our legislature has addressed the expected increase of absent-voter ballots by empowering clerks to begin processing absent-voter ballots earlier in an effort to provide a final vote tally after polls close for the 2020 election. MCL 168.765a(8). While plaintiffs may view these efforts as inadequate first steps, there is no reason to believe that these specific efforts are constitutionally required, even in the midst of a pandemic. Instead, they reflect the proper "exercise of discretion, the marshaling and allocation of resources, and the confrontation of thorny policy issues," that the people have reserved exclusively for our Legislative and Executive branches to exercise. *League II*, ___ Mich App at ___; slip op at 5 (RIORDAN, J., concurring). Imposing limits on whether third parties can possess or collect ballots simply reflects a policy decision by a duly elected legislature, where the Constitution places responsibility to regulate and preserve the purity of elections.

Although record evidence before the Court of Claims supported that voter fraud is very rare, our Supreme Court has ruled that "there is no requirement that the Legislature 'prove' that significant in-person voter fraud exists before it may permissibly act to prevent it." *In re Request for Advisory Opinion*, 479 Mich at 26. Even so, the Secretary acknowledges in its brief on appeal that voter fraud has occurred in the past in relation to voter assistance and that "[t]he challenged statutes . . . were amended in 1995 because investigations by election officials revealed abuse of that process." Indeed, until 1995, the statutes permitted any registered voter to return another voter's completed absentee ballot, but that "led to abuse by campaign workers who were eager to 'assist' absentee voters." *People v Pinkney*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2009 (Docket Nos. 282144; 286992), unpub op at 15 (citing House Legislative Analysis, HB 4242, October 17, 1995). In sum, we conclude that MCL 168.932(f)'s restrictions are reasonable and nondiscriminatory and that the restrictions are warranted to further an important regulatory interest: protecting against voter fraud.

However, the State's interest in protecting against voter fraud must be balanced against the voter's interest in the right to vote. The Court of Claims concluded that because the clerk's office was not *required* to pick up and deliver ballots after 5:00 p.m. on the Friday immediately preceding the election, there was an unacceptable risk that during this brief time before the election that some home-bound absent voters would be disenfranchised by a voter fraud provision that limits who the voters may entrust to possess and deliver their ballots. Thus, the question before this Court is whether the requirement that clerks provide voter assistance only until 5:00 p.m. on the Friday before an election, in addition to the COVID-19 pandemic and the asserted delivery slowdown at the United States Postal Service ("USPS"), imposes an unconstitutional burden on the right to vote

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[8] Bridge Michigan, *Absentee ballot drop boxes boom in Michigan, despite controversy elsewhere*, October 5, 2020 <https://www.bridgemi.com/michigan-government/absentee-ballot-drop-boxes-boom-michigan-despite-controversy-elsewhere?amp > (accessed October 15, 2020).

[9] Warikoo, Niraj, *Detroit prepares for historic election with early voting options*, October 9, 2020 <https://www.freep.com/story/news/local/michigan/detroit/2020/10/09/city-early-voting-satellite-centers-drop-off-boxes/3597687001/ > (accessed October 15, 2020).

absentee. We conclude that it does not. First, even with the 5:00 p.m. limit, voters are not deprived of the choice to vote absentee; they retain all the options of delivering their ballot in person to the clerk, using one of over 1,000 drop boxes in the state, using community satellite voter centers, if available, or relying on any family member or household resident to do so.[10] Additionally, as pointed out by defendants, the clerk is required to assist voters with returning their ballots if the voters request such assistance before 5:00 p.m. on the Friday before an election, and may continue to provide door-to-door delivery service for qualified absent voters after that time. See MCL 168.764b(5) (providing that, under certain circumstances, the clerk may make arrangements to collect a ballot from a voter personally or by an authorized assistant). In furtherance of this effort, a clerk may appoint assistants to accept delivery of absentee ballots at any location within the city or township. MCL 168.764b(3).[11] That option, which has not been suspended during the pandemic, further mitigates the burden on voters who need assistance. Amici additionally point out that local clerks may provide "curbside voting," where registered voters can vote in their cars at the polling place on election day. Given those varied options, we cannot conclude that the ballot-handling restrictions impermissibly burden the right to vote absentee. On balance, the ballot-handling restrictions pass constitutional muster given the State's strong interest in preventing fraud.

Furthermore, even if plaintiffs' claims could be considered an as-applied challenge, those claims do not survive. In light of the COVID-19 pandemic, the Court of Claims concluded that returning the ballot by mail is the "only realistic option" for those with underlying health conditions who wish to vote absentee. That finding is unsupported given additional ballot delivery options available to absentee voters. Additionally, as pointed out by amici, the pandemic and resulting USPS mail delivery slowdowns are not attributable to the State. Although those factors may complicate plaintiffs' voting process, they do not automatically amount to a loss of the right to vote absentee. The letter from USPS General Counsel Thomas J. Marshall, which indicated that the law creates an "incongruity" and a "mismatch" between mail delivery standards and deadlines for casting mail-in ballots in Michigan, is not dispositive. The cited incongruity is not dependent on the COVID-19 pandemic or the USPS slowdown; Marshall's conclusion was on the basis of the USPS ideal delivery rates rather than those experienced during COVID-19. The fact that the Legislature drafted the statutes without accounting for USPS deadlines does not mean the statutes are unconstitutional as applied. Where plaintiffs retain other options for delivering their completed ballots, they have not lost their constitutional right to vote absentee.

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[10] In view of those other options, voters are not compelled to deliver their ballot in person, which likely would be found unconstitutional as a severe burden. See generally *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 502 n 1; 688 NW2d 847 (2004) (noting that to require a candidate for a federal position in public office to file her petition in person would be violative of the United States Constitution).

[11] That section provides in relevant part: "The clerk of a city or township may appoint the number of assistants necessary to accept delivery of absent voter ballots at any location in the city or township. An appointment as assistant to accept delivery of absent voter ballots must be for 1 election only. An assistant appointed to receive ballots at a location other than the office of the clerk must be furnished credentials of authority by the clerk . . . . "

C. INJUNCTIVE RELIEF

The Legislature next challenges the Court of Claims's entry of the preliminary and permanent injunctions. This Court reviews for an abuse of discretion a trial court's decision to grant injunctive relief. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007); *Schadewald v Brule*, 225 Mich App 26, 39, 570 NW2d 788 (1997). "A court abuses its discretion when a decision falls outside the range of reasonable and principled outcomes." *House of Representatives*, ___ Mich App at ___; slip op at 20.

The Legislature first argues that the Court of Claims's "preliminary injunction analysis was deeply flawed" and that this Court should reverse the September 18, 2020 opinion and order. However, we conclude that this argument is moot. "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998). In this case, the Court of Claims granted plaintiffs' request for a preliminary injunction in its September 18, 2020 opinion and order. Thereafter, on September 30, 2020, the Court of Claims granted a permanent injunction. Because a permanent injunction was entered after the Court of Claims held "a final hearing regarding the parties' rights," the Legislature's challenge to the preliminary injunction is moot and need not be addressed. See *id*. Nonetheless, we have briefly considered the argument and conclude that the Court of Claims abused its discretion by entering the preliminary injunction given plaintiffs' failure to establish a likelihood of success on the merits and plaintiffs' failure to establish irreparable harm. See *Michigan AFSCME Council 25 v Woodhaven-Brownstown School District (On Remand)*, 293 Mich App 143, 148; 809 NW2d 444 (2011) (citation omitted).

The Legislature also challenges the Court of Claims's entry of the permanent injunction. In the September 30, 2020 opinion and order, the Court of Claims concluded that it was proper to grant a permanent injunction. In doing so, the Court of Claims addressed some of the factors required to be considered before a permanent injunction can be entered and "incorporated its reasoning from the September 18, 2020 opinion and order that . . . the ballot receipt deadline and the voter assistance ban violate art 2, § 4." The Court of Claims further incorporated into its September 30, 2020 "opinion and order the narrow injunctive relief granted in the Court's September 18, 2020 opinion and order." "It is beyond reasonable dispute that a trial court has the authority, and, in appropriate cases, the duty, to enter permanent injunctive relief against a constitutional violation." *Michigan Coalition of State Employee Unions v Michigan Civil Serv Comm*, 465 Mich 212, 219; 634 NW2d 692 (2001) (emphasis omitted). Because the Court of Claims erred by concluding that a constitutional violation existed, it necessarily follows that the Court of Claims abused its discretion by entering the permanent injunction.

We reverse and remand for the immediate entry of summary disposition in favor of defendants. This opinion has immediate effect. MCR 7.215(F). We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Mark T. Boonstra
/s/ Michael F. Gadola

STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellees,

v

SECRETARY OF STATE and ATTORNEY GENERAL,

Defendants,

and

SENATE and HOUSE OF REPRESENTATIVES,

Intervening Defendants-Appellants,

and

REPUBLIC NATIONAL COMMITTEE and MICHIGAN REPUBLICAN PARTY,

Proposed Intervening Defendants.

FOR PUBLICATION
October 16, 2020

No. 354993
Court of Claims
LC No. 20-000108-MM

Before: CAMERON, P.J., and BOONSTRA, and GADOLA, JJ.

BOONSTRA, J. (*concurring*).

I fully concur in the opinion of the Court. I write separately to underscore that judicial overreach is just as pernicious as executive overreach. The judicial overreach in this case requires that we reverse the Court of Claims, vacate its order granting summary disposition in favor of plaintiffs as well as its preliminary and permanent injunctions, and remand with instructions to immediately enter an order granting summary disposition in favor of defendants.

I INTRODUCTION

The genius of our Founding Fathers in establishing a system of three separate and co-equal branches of government was in recognizing that it is the checks and balances of such a system that serve to preserve our liberty. As I recently observed in *Slis v State of Michigan*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 351211, 351212), lv den ___ Mich ___; 948 NW2d 82 (2020) (BOONSTRA, J., concurring), that preservation of liberty "is why legislatures enact laws, and why it is up to the executive to sign them (or not). And it is why the judiciary defers to the legislature on matters of public policy." Without question, such a system creates certain inefficiencies in government. After all, it would be much easier if a benevolent dictator could simply rule by decree without having to endure the inconvenience of others' input. But those inefficiencies are there by design; they are the natural and intended consequence of our system of checks and balances. And those inefficiencies are therefore the price we willingly pay so that we may live under the banner of freedom in the United States of America.

The tensions between the branches of government and have existed since our nation's founding, and the relative power of any given branch has ebbed and flowed over time. Sometimes it is the executive branch that engages in governmental overreach. See, e.g., *Slis*, __ Mich App at __, slip op at 23 (lead opinion) (affirming preliminary injunction of emergency rules banning the sale of flavored nicotine vapor products) and __, slip op at 32 (BOONSTRA, J., concurring) ("As the adage goes, 'give them an inch and they'll take a mile.' Amidst the COVID-19 pandemic, that adage has new meaning. It even applies to vaping."). And sometimes the legislature is perhaps unwittingly complicit in executive overreach. See *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, __ Mich __, __; __ NW2d __ (2020) (issued October 2, 2020, Docket No. 161492) (holding that the Emergency Powers of the Governor Act of 1945, MCL 10.31 et seq., "is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution," and accordingly that "the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law").

Alexander Hamilton once said that the judicial branch of government, lacking "influence over either the sword or the purse," was "the weakest of the three" branches of government. *Federalist 78*. He continued:

> [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . .." [*Id*.]

But in recent years (or decades), the judicial branch has often also overreached. Too often, those who have been unsuccessful in advancing their political agenda through the political process, i.e., through the legislative and executive branches, have turned to the judiciary to achieve their political ends. And too often they have found judges who are induced, under the cloak of a robe,

to impose policy preferences by judicial fiat. But policymaking under the guise of judicial decision-making is simply tyranny by another name. See *Morrison*, 487 US at 712 (SCALIA, J., dissenting) (stating that judicial forays into policymaking result in a government that is "not only not the government of laws that the Constitution established; it's not a government of laws at all."). Courts are not mini-legislatures and judges are not policymakers. See, e.g., *Kyser v Township*, 486 Mich 514, 536; 786 NW2d 543 (2010) (noting that "policy-making is at the core of the legislative function"); *Myers v Portage*, 304 Mich App 637, 644; 848 NW2d 200 (2014) ("[M]aking public policy is the province of the Legislature, not the courts."); see also *Morrison v Olson*, 487 US 654, 697; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (Scalia, J., dissenting), quoting Part the First, art XXXX, Massachusetts Const 1780 ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

II. PROCEDURAL BACKGROUND

A. LEAGUE OF WOMEN VOTERS

Recently, in a sister case to this one, this Court considered a complaint for mandamus, in which the plaintiffs[1] alleged that the statutory requirement that absentee ballots be received by the local election clerk by 8 p.m. on election day[2] (the ballot receipt deadline) violated Const. 1963, art. 2, § 4, as amended by the passage of Proposal 3[3] in November 2018. See *League of Women Voters of Mich v Secretary of State (League II)*,[4] ___ Mich App ___ (2020) (Docket No. 353654), lv den ___ Mich ___; 946 NW2d 307 (2020), recon den ___ Mich ___; 948 NW2d 70 (2020).

I note that while the complaint in *League II* did make brief reference to the ballot receipt deadline as "facially den[ying] voters their express constitutional right 'to choose' to submit their absentee ballots 'by mail' at any time within 40 days of election day," that complaint also cited the COVID-19 pandemic as the reason why expedited relief was necessary. It stated:

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[1] The plaintiffs in that case were the League of Women Voters of Michigan and three individuals who were League members and registered Michigan voters.

[2] This requirement is set forth in MCL 168.764a; MCL 168.764b.

[3] See Proposition No. 18-3 (2018). Proposal 3 granted all Michigan votes the constitutional right to vote by absentee ballot without stating a reason. Before the passage of Proposal 3, the right was a statutory one, provided that certain conditions were met. Specifically, before the passage of Proposal 3 and the subsequent enactment of 2018 PA 603, MCL 168.759 provided six grounds for requesting an absentee ballot: (1) being absent from the community on election day; (2) being physically unable to attend the polls without the assistance of another; (3) because of the tenets of the voter's religion; (4) serving as an election inspector in a different precinct; (5) being 60 years of age or older; or (6) being confined to jail awaiting arraignment or trial.

[4] I use the "*League II*" nomenclature for purposes of consistency with the opinion of the Court. The parties and the Court of Claims sometimes refer to that decision as "*LWV*."

> Even before COVID-19 struck Michigan, voting by mail was set to play an unprecedented role in this year's elections, and its role will be magnified exponentially given the personal and public health risks of voting in person at a polling place. Michigan's absentee ballot voting process is simply not ready to meet its biggest test ever in the 2020 primary and general elections, when Michigan voters by the millions will attempt to vote by absentee ballot. This Complaint is an action for mandamus to compel the Secretary of State to perform her clear state constitutional duties in the administration of absentee ballot voting in Michigan, to protect the fundamental rights of the Plaintiffs and over 7 million Michigan voters.

This Court in *League II* denied the complaint for mandamus, notwithstanding the fact that the defendant Secretary of State concurred with plaintiffs that the ballot receipt deadline was unconstitutional. *League II*, __ Mich App at __, slip op at 13. Our Supreme Court denied leave to appeal, and denied reconsideration of that denial, with Justice VIVIANO observing that "this lawsuit appears to be a friendly scrimmage brought to obtain a binding result that both sides desire. Nearly from the start, the defendant Secretary of State has agreed with plaintiffs that the deadline must be struck down as unconstitutional." *League II*, __ Mich at __; 948 NW2d at 70 (VIVIANO, J., concurring) (footnote omitted). He further observed, "This is not the way the judiciary works. In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will 'not sit as self-directed boards of legal inquiry and research . . . .' " *Id.* at __; 948 NW2d at 71 (citations omitted).

B. PROCEEDINGS IN THE COURT OF CLAIMS

Although we briefly outline the procedural history of this case in the opinion of the Court, it is worthy of some further explication here because, in my judgment, a full description of the manner in which this case proceeded in the Court of Claims serves to highlight my concerns about judicial overreach. In doing so, I reserve judgment about how that overreach occurred, reiterate my great respect for all concerned, and cast aspersions on no one; my focus instead is on how and why the process did not in my judgment serve us or our judicial system well.

On June 2, 2020, i.e., 11 days after *League II* was filed in this Court but before *League II* was decided, plaintiffs filed this action in the Court of Claims, seeking injunctive and declaratory relief, again claiming (as was claimed in *League II*) that the ballot receipt deadline was unconstitutional, and additionally claiming that aspects of MCL 168.932(f) (the ballot-handling restrictions) were unconstitutional.[5] Like the complaint for mandamus in *League II*, plaintiffs'

[5] In pertinent part, MCL 168.932(f) prohibits persons from attempting to influence how an absent vote should vote, and limits those third persons who may return an absent voter ballot to mail carriers and "member[s] of the immediate family of the absent voter including father-in-law-, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild, or a person residing in the absent voter's household." *Id.* The reason for enacting these ballot-handling restrictions was described by the House Legislative Analysis Section in its

complaint in this case expressed concerns about the impact upon voting of COVID-19:

> Even in ordinary times, it would be reasonable to expect the shift toward absentee voting to continue in Michigan. But these are not ordinary times. Over the past few months, life in the United States has changed rapidly as the result of a highly infectious, novel coronavirus, which as of the date of this filing, has infected over 1.85 million and killed over 107,000 people across the country. The pandemic has hit Michigan particularly hard, infecting Michiganders from Detroit to the Upper Peninsula. To date, there have been over 57,500 confirmed cases of coronavirus in Michigan, and over 5,500 deaths from the respiratory illness it causes, COVID-19.

Plaintiffs original complaint in this case did not specifically characterize its claims as presenting "facial" or "as-applied" constitutional challenges. But it did state:

> The ballot receipt deadline thus, *on its face*, denies voters their self-executing right "to choose" to submit their absentee ballots "by mail" at any time within 40 days of Election Day. (emphasis added).

Moreover, it argued that "In the face of the continuing pandemic, Michigan must take steps now to protect the fundamental voting rights of *all Michiganders*." (emphasis added). Further, it claimed, "With the primary and general elections fast approaching, the time to act is now, to prevent *widespread disenfranchisement* and effectuate the will of the voters so that *all* will have a safe and meaningful opportunity to participate in Michigan's elections." (Emphasis added). It continued, "Flatly rejecting *all* absentee ballots that arrive after 8 p.m. on Election Day, *disenfranchises Michigan voters*-many of whom also lack reasonable access to safe, in-person voting options during the pandemic-for reasons entirely beyond their control." (Emphasis added).

On June 15, 2020, and notwithstanding that plaintiffs had not yet filed a motion for preliminary injunction,[6] the Court of Claims issued an order directing defendants to file a "reply

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analysis of HB 4242 of 1995 (which ultimately was adopted as PA 1995, No 261 and codified as MCL 168.932(f)), as follows:

> Election officials say the current system is subject to abuse by campaign workers eager to "assist" voters. Without strict limits on who can handle absentee ballots, it is difficult to track their safe return and it is difficult to enforce laws against soliciting the return of absentee ballots, coercion and intimidation in filling out ballots, and tampering. Election officials have recommended stricter control over who can handle an absentee ballot and stiffer penalties for violations as a means of enhancing the integrity of the process. [See House Legislative Analysis, HB 4242 (issued October 17, 1995), p 1.]

[6] MCR 3.310(A)(1) provides that "[e]xcept as otherwise provided by statute or these rules, an injunction may not be granted before a hearing on a motion for a preliminary injunction or on an order to show cause why a preliminary injunction should not be issued." MCR 3.310(A)(3) provides that "[a] motion for a preliminary injunction must be filed and noticed for hearing in

brief" to plaintiffs' complaint[7] by June 18, 2020, and scheduling a "hearing for the Preliminary Injunction" to occur on June 22, 2020.[8] The Court of Claims denied motions to intervene filed by the Michigan House of Representatives and the Michigan Senate (collectively, the Legislature), and by the Republican National Committee and Michigan Republican Party, but granted them amici status.[9] It then held oral argument on plaintiffs' injunctive relief request on July 8, 2020. It did so despite defendants'[10] expressed confusion in light of the fact that plaintiffs had not yet filed a motion for injunctive relief (and instead had only filed a complaint that included a prayer for such relief).[11]

On July 14, 2020, this Court issued its opinion in *League II*, and the Court of Claims therefore ordered the parties to file supplemental briefs "in light of the release of" that decision. In their supplemental brief, defendants argued that "the *LWV* decision forecloses granting injunctive relief here on the duplicate claims," and that "based on the *LWV* decisions, only Plaintiffs' request for injunctive relief regarding the absent voter ballot delivery statutes appears to be a live issue before the Court." The Legislature concurred in that assessment. Plaintiffs, however, argued for the first time that *League II* presented purely a "facial" constitutional challenge, whereas plaintiffs in this case were presenting both "facial" and "as-applied" constitutional challenges.

On August 8, 2020, the Court of Claims issued an order that mistakenly referred to a pending "Motion for Preliminary Injunction," and then stated, "The plaintiffs have raised both a facial and as applied challenge to several election statutes." It suggested that the experience of the just-completed August 2020 primary election "may or may not affect the nature of the as-applied

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compliance with the rules governing other motions unless the court orders otherwise on a showing of good cause."

[7] Upon the filing of a complaint, a defendant generally is obliged to file either an answer to the complaint, MCR 2.110, or a motion for summary disposition, MCR 2.116. The Michigan Court Rules do not provide for the filing of a brief in response to a complaint.

[8] On June 19, 2020, the Court of Claims rescheduled the hearing for July 8, 2020, and ordered that plaintiffs file a brief by June 26, 2020, and that defendants file a response brief by July 3, 2020.

[9] The Legislature filed a motion for reconsideration of the Court of Claims' denial of their motion to intervene. The Court of Claims denied the motion for reconsideration. The Republican National Committee and the Michigan Republican Party filed an application for leave to appeal the Court of Claims' denial of their motion to intervene. This Court denied that motion. Our Supreme Court denied a further application for leave to appeal to that Court; a motion for reconsideration is now pending.

[10] Named as defendants were the Secretary of State and Attorney General of Michigan.

[11] Indeed, defendants contended that plaintiffs were not entitled to preliminary injunctive relief in part because they had yet moved for such relief. They also argued that plaintiff's request for preliminary injunctive relief should be denied on the merits.

arguments," and invited the parties to "augment their pleadings."[12]

Plaintiffs then filed an amended complaint that for the first time expressly alleged (as their original complaint had not) that they were presenting both facial and as-applied constitutional challenges. Plaintiffs contemporaneously filed a "Renewed Motion for Preliminary Injunction" (which, given the lack of any prior motion, apparently served to supplement the prior prayer for injunctive relief contained in plaintiffs' complaint), as well as a supplemental brief in support of their request for preliminary injunction, now arguing that the ballot receipt deadline was unconstitutional "as applied to the upcoming November 3, 2020 election." In response, defendants observed that "*[i]n response to the Court's suggestion in its order*, Plaintiffs' Amended Complaint makes clear that Plaintiffs are alleging facial and 'as-applied to the November election' claims." (emphasis added). Defendants nonetheless argued that this Court's ruling in *League II* "precludes Plaintiffs' facial and as-applied arguments under article 2, § 4." Further, they stated:

> Plaintiffs' as-applied claims appear to be indistinguishable from the facial claim raised in *LWV*. The facial challenge rejected by the *LWV* Court was also based on different treatment in mail service for voters. If the Court determines that to be the case, it would mean that Plaintiffs' as-applied claims are likewise precluded by the decision in *LWV*.[13]

On August 31, 2020, defendants filed a motion for summary disposition. Other than by a generic incorporation of the arguments of the above-mentioned brief, they did not in any fashion address the constitutionality of the ballot receipt deadline. They argued that the ballot-handling restrictions were constitutional. Plaintiffs filed a cross-motion for summary disposition- on both issues.

On September 18, 2020, the Court of Claims issued an opinion and order that described our holding in *League II* as addressing a "facial" constitutional challenge and as conclusively resolving plaintiffs' facial challenge to the ballot receipt deadline. Consistent with plaintiffs' newly-taken position (as well as defendants' own invitation in their preliminary injunction briefing), the Court of Claims then construed plaintiffs' challenge to the ballot receipt deadline in this case as an "as-applied" challenge, and held that "the ballot receipt deadline is unconstitutional as-applied in light of the ongoing COVID-19 pandemic." The Court of Claims further held that ballot-handling restrictions of MCL 168.932(f) "create[] an unnecessary burden that tends to unduly restrict the rights enshrined in art 2, §4," that the statute therefore was "unconstitutional as applied" to the several days preceding election day, and that during that time an absentee voter must be allowed "to seek assistance from a third party of their choosing." The Court of Claims issued a preliminary injunction accordingly.

On September 21, 2020, the Legislature filed an emergency renewed motion to intervene,

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[12] I note that defendants had not yet answered plaintiffs' complaint and therefore had not yet filed any "pleadings." MCR 2.110(A).

[13] Yet, defendants did an about-face in the concluding paragraph of their brief, there requesting that the Court of Claims "consider granting [preliminary injunctive] relief as to the absent voter ballot receipt deadline statutes if not precluded from doing by the Court's decision in *LWV*."

to enable them to file an interlocutory appeal of the Court of Claims' preliminary injunction order. On September 28, 2020, plaintiffs filed a brief opposing that motion, and defendants, noting that they had decided not to appeal the Court of Claims' preliminary injunction order, concurred in the renewed motion to intervene.

On September 25, 2020, defendants responded to plaintiffs' motion for summary disposition, and requested, in light of the likelihood of an appeal of the Court of Claims' preliminary injunction order or its order denying intervention, that the Court of Claims hold the parties' motions for summary disposition in abeyance until any such appeal is resolved;[14] alternatively, they requested the denial of plaintiffs' motion for summary disposition.

On September 30, 2020, the Court of Claims issued an opinion and order that incorporated the reasoning of its September 18, 2020 preliminary injunction opinion and order. Holding that "as applied under the current circumstances and on the record before this Court, the ballot receipt deadline and the voter assistance ban violate art 2, § 4," the Court of Claims granted summary disposition in favor of plaintiffs as to both the ballot receipt deadline and the ballot-handling restrictions, effectively granting a permanent injunction. It also granted the Legislature's renewed motion to intervene. This appeal then ensued.

III. ANALYSIS

I agree entirely with the opinion of the Court that plaintiffs raise a facial, not an as-applied, constitutional challenge in this case. I will not repeat the rationale (with which I concur), but would instead additionally observe that in the face of an adverse decision on the constitutional issue raised in *League II* with respect to the ballot receipt deadline, plaintiffs in this case embarked on a creative effort to dodge the effect of that decision, and took advantage of proceedings that featured:

- Expedited briefing on a "motion" that had never been filed
- Oral argument on a "motion" that had never been filed
- A reframing of plaintiffs' arguments to sidestep the adverse decision in *League II*
- The "augmentation" of plaintiffs' complaint to conform to those reframed arguments
- Errors on the merits as described in the opinion of the Court

To quote Justice VIVIANO, "This is not the way the judiciary works." *League II*, __ Mich

[14] I note that appeals of preliminary injunction orders or orders denying intervention, which are not "final orders," may proceed only upon the granting of an application for leave to appeal, whereas an appeal from an order granting summary disposition may proceed by right. MCR 7.202; MCR 7.203.

at __ (VIVIANO, J., concurring). The judiciary's role is to decide actual controversies. Particularly in an era of excessive politicization, the judiciary should not be hijacked to achieve political ends outside of the legislative process. And the judiciary, which cannot "function both as an advocate and as an adjudicator," *In re Knight*, __ Mich App __, ___; ___ NW2d ___ (2020) (Docket No. 346554), slip op at 3, should not allow itself to be hijacked. The constitution is not suspended or transformed even in times of a pandemic, and judges do not somehow become authorized in a pandemic to rewrite statutes or to displace the decisions made by the policymaking branches of government.

IV. COROLLARY

Because this matter has been expedited and time is of the essence, circumstances do not permit us to fully examine the question of whether plaintiffs have standing to bring this action for injunctive and declaratory relief.[15] We consequently have properly assumed for purposes of our decision that plaintiffs do have standing. I believe, however, that the question is a significant one, and that, if circumstances permitted us to fully examine the question, it might lead to the conclusion that plaintiffs lack standing. And I believe that conclusion may follow from our conclusion that plaintiffs' constitutional challenge is a facial one.

Our Supreme Court has held that "[w]here a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 N.W.2d 686 (2010). The statutory scheme here does not imply that the Legislature intended to confer standing on plaintiffs. The pertinent question, therefore, is whether plaintiffs have a "special injury or right, or substantial interest, that will be detrimentally affected in a manner *different from the citizenry at large*." *Id*. (emphasis added).

It seems to me that, in bringing a facial challenge, it could plausibly be argued that plaintiffs necessarily are not asserting a "special injury or right, or substantial interest, that will be detrimentally affected in a manner *different from the citizenry at large*." Rather, they are asserting the *same* injury, right, or interest as that of the citizenry at large—being subject to a law that is incapable of any valid, constitutional application. See *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In that event, absent some exception, plaintiffs would not have standing. An exception to the standing requirement has been recognized for certain forms of vagueness and overbreadth challenges in the context of the regulation of free speech, see, e.g., *Michigan Up & Out of Poverty Now Coalition v State of Michigan*, 210 Mich App 162, 170; 533 NW2d 339 (1995). But here, although Count IV of plaintiffs' complaint does allege a violation of the right to free speech under Const 1963, art 1, § 5, plaintiffs have not alleged that the challenged statutes "sweep too broadly, covering a substantial amount of protected free speech," or that they

[15] The parties have not raised or addressed this issue on appeal. The Republican National Committee and the Michigan Republican Party do argue in their amicus brief that plaintiffs lack standing, although their argument does not track what I outline here.

create an "unreasonable risk of censorship by vesting "unbridled discretion in a government official over whether to permit or deny expressive activity." *Id*., citing *Lakewood v Plain Dealer Publishing Co*, 486 US 750, 755-756; 108 S Ct 2138; 100 L Ed 2d 771 (1988). And if plaintiffs have not adequately alleged an exception to the standing requirement, then they would not seem to have standing to bring this action in its current form.

That would not mean, however, that plaintiffs (or anyone else in the citizenry at large) would have no recourse. This Court has held:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505–506; 688 NW2d 847 (2004). See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) ("[I]n the absence of a statute to the contrary, . . . a private person . . . *may enforce by mandamus* a public right or duty relating to elections without showing a special interest distinct from the interest of the public." [Quotation marks omitted.]). The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing *to seek mandamus relief*. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282; 761 NW2d 210 (permitting a ballot question committee to challenge a petition). [*Protect MI Constitution v Secretary of State*, 297 Mich App 553, 566-567; 824 NW2d 299 (2012), rev'd on other gds, 492 Mich 860 (2012) (emphasis added).]

See also *League II*, __ Mich App at __ , slip op at 2, citing *Citizens Protecting Michigan's Constitution v. Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018), aff'd 503 Mich 42; 921 NW2d 247 (2018) (" '[M]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties.' ").

In other words, the plaintiffs in *League II* pursued the proper remedy in an election case, i.e., mandamus. Plaintiffs in this case did not seek mandamus. As a result, they may lack standing. Nonetheless, because the circumstances of this appeal do not permit our full consideration of the standing issue, and the parties have not developed the arguments on appeal, it is not properly before us to decide at this juncture.

V. CONCLUSION

For the reasons stated in the opinion of the Court and for these additional reasons, I concur in our determination to reverse the Court of Claims, to vacate its order granting summary disposition in favor of plaintiffs as well as its preliminary and permanent injunctions, and to remand with instructions to immediately enter an order granting summary disposition in favor of defendants.

/s/ Mark T. Boonstra