STATE OF MICHIGAN

COURT OF APPEALS

GREG FLEMING, WILLIAM SUSICK and EDWARD F. COOK,

Plaintiffs-Appellants,

and

MAX FELLSMAN,

Plaintiff,

v

MACOMB COUNTY CLERK,

Defendant-Appellee.

UNPUBLISHED
June 26, 2008

No. 279966
Macomb Circuit Court
LC No. 2006-004256-AW

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

PER CURIAM.

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

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

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

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

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

Accordingly, on October 5, 2006, the county clerk mailed 49,234 absent voter ballot applications to Macomb County voters over the age of 60 who had not otherwise been sent an

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

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

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

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

absent voter ballot application from their city, village, or township clerk. In a press release, Sabaugh claimed that the mailing resulted in the casting of "at least 7,700 additional votes" in the November 2006 general election.[6]

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

On appeal, plaintiffs challenge the trial court's order granting defendant's motion for summary disposition and dismissing plaintiffs' claims. We review the trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). We also review de novo questions of law, including underlying issues of constitutional and statutory construction. *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 6; 732 NW2d 458 (2007).

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

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

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws

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

> to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

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

The Legislature enacted the Michigan Election Law pursuant to its constitutional grant of authority. Under the Michigan Election Law, the county clerk, the chief judge of the county probate court, and the county treasurer serve as the board of election commissioners for that county. MCL 168.23(1). Pursuant to *Secretary of State v Berrien Co Bd of Election Comm'rs*, 373 Mich 526, 530-531; 129 NW2d 864 (1964), the county clerk and the county board of election commissioners must follow the directions provided by the Secretary of State in her role as Michigan's chief election officer. The county board of commissioners has no expressly authorized role in elections. Instead, the board's roles include "pass[ing] ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county . . . ." MCL 46.11(j). The board also has a duty to "[r]epresent the county and have the care and management of the property and business of the county if other provisions are not made." MCL 46.11(l).

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

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

A qualified absent voter is permitted to apply for an absent voter ballot pursuant to MCL 168.759. For both primary and general elections, "[t]he elector shall apply in person or by mail with the clerk of the township, city, or village in which the elector is registered."

MCL 168.759(1)-(2). MCL 168.759(3) provides that an application for an absent voter ballot may be made in the following three ways:

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

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

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

When interpreting the Michigan Election Law to determine whether the county clerk is authorized to mail absent voter ballot applications, we may not "'impose different policy choices than those selected by the Legislature.'" *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999), quoting *People v McIntire*, 232 Mich App 71, 119; 591 NW2d 231 (1998) (YOUNG, J., dissenting). Our primary goal is to ascertain and give effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), mod 468 Mich 1216 (2003). When a statute's language is unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). We may only look beyond the statute to determine the Legislature's intent when the statutory language is ambiguous. *Id.*

The legal maxim *expressio unius est exclusio alterius*, i.e., "[t]he expression of one thing is the exclusion of another," "is a rule of construction that is a product of logic and common sense." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74 & n 8; 711 NW2d 340 (2006). This well-recognized maxim of statutory construction "expresses the learning of common experience that when people say one thing they do not mean something else." *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. The maxim is "safely" used when a statute creates rights or duties "not in accordance with" the common law. *Feld, supra* at 362 (citation omitted).

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

In *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007), this Court applied a plain reading of the statute and the legal maxim *expressio unius est exclusio alterius* to determine that

MCL 168.759 prohibits a city clerk from mailing unsolicited absent voter ballot applications.[7] It stated:

> MCL 168.759(5) provides, in relevant part, that "[t]he clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request." This subsection clearly addresses the distribution of applications for absent voter ballots. Under a plain reading, this subsection establishes two duties for city clerks. First, the clerk must have applications for absent voter ballots available in the clerk's office at all times. Second, the clerk "shall" provide an application to anyone upon verbal or written request.
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> "'The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.'" *Presnell v Wayne* [*Co*] *Bd of Co Rd Comm'rs*, 105 Mich App 362, 368; 306 NW2d 516 (1981), quoting 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276, p 327. Or as our Supreme Court has stated, "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Sittler v Michigan College of Mining & Tech Bd of Control*, 333 Mich 681, 687; 53 NW2d 681 (1952) (citations and punctuation omitted). As such, "[p]ublic officers have and can exercise only such powers as are conferred on them by law. . . ." *Id.* (citations and punctuation omitted).
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> Applying this rule to MCL 168.759, it is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute. Nor have appellants cited any other statute that confers this power on the city clerk.
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> As for whether the mass mailing of unsolicited ballot applications is implicitly authorized by statute, we conclude that it is not. First, a power is necessarily implied if it is essential to the exercise of authority that is expressly

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[7] The plaintiff, a candidate for Detroit City Council, alleged that the defendant city clerk planned to improperly mail 150,000 unsolicited applications. The trial court determined that the city clerk was precluded from mailing such unsolicited applications and issued a preliminary injunction to prevent the mailings. *Taylor*, *supra* at 89. The city clerk disregarded the preliminary injunction and mailed the applications. *Id.* at 89-90. As a result, the city clerk was convicted of criminal contempt. *Id.* at 90. At the conclusion of the trial court proceedings, the trial court entered a permanent injunction precluding the mailing of unsolicited absent voter ballot applications. *Id.* at 93.

> granted. *Conlin v Scio Twp*, 262 Mich App 379, 385; 686 NW2d 16 (2004). The authority expressly granted in MCL 168.759(5) is that the clerk must have applications for absent voter ballots available in the clerk's office at all times and that the clerk "shall" provide an application to anyone upon verbal or written request. The mass mailing of unsolicited ballot applications is not essential to the clerk's either making ballot applications available in the clerk's office or to providing them upon request. Second, on the basis of the maxim *expressio unius est exclusio alterius*, (the expression of one thing is the exclusion of another), *Feld*[, *supra* at 362] (opinion by RILEY, C.J.), we read the statute to preclude mass mailings when it specifically states that the clerk shall provide the applications upon written or verbal request. "[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v Harris Co*, 529 US 576, 583; 120 S Ct 1655; 146 L Ed 2d 621 (2000) (citation and punctuation omitted). Accordingly, we conclude that MCL 168.759(5) does not implicitly permit the city clerk to mail absent voter ballot applications without having received a verbal or written request. [*Taylor*, *supra* at 94-96.]

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

Accordingly, the county clerk lacks the implied authority to distribute absent voter ballot applications. As noted in *Taylor*, *supra* at 94, a local government officer possesses those powers "necessarily to be implied" from those expressly granted. "Powers implied by general delegations of authority must be 'essential or indispensable to the accomplishment of the objects and purposes of the municipality.'" *Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 634; 502 NW2d 638 (1993), quoting 5 McQuillin, Municipal Corporations (rev 3d ed), § 15.20, p 102. None of the statutorily-defined duties described earlier relate to increasing voter turnout or making the election process less onerous for voters. In fact, none of the county clerk's statutorily-defined duties require direct contact with voters. Mailing absent voter ballot applications is not related to, let alone essential to, a county clerk's duty to distribute election information and materials to local clerks, to prepare and distribute official ballots to voting precincts, or to distribute absent voter ballots to local clerks before an election. Accordingly, a county clerk lacks both express and implied statutory authority to mail unsolicited ballot applications.

Further, the board cannot confer on the county clerk the authority to conduct such a mailing. Like the county clerk, the board has only those powers expressly granted to it by the constitution and by statute and those powers necessarily implied from the powers expressly granted. *Conlin*, *supra* at 385. We must liberally construe the powers granted to local governments to include those powers "fairly implied and not prohibited by th[e] constitution." *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 221; 591 NW2d 52 (1998), quoting Const 1963, art 7, § 34.

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

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

The board's resolution concerns voting in a statewide election and, therefore, does not "relate to county affairs" or "the care and management of the business of the county." Furthermore, the resolution contravenes MCL 168.759. A municipal government may not prohibit acts that are authorized by state law or, conversely, authorize acts that are prohibited by state law. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997); *Conlin*, *supra* at 385; *Frens Orchard, Inc v Dayton Twp Bd*, 253 Mich App 129, 136-137; 654 NW2d 346 (2002). As noted earlier, the Michigan Election Law neither expressly nor impliedly authorizes county clerks to mail unsolicited absent voter ballot applications to qualified voters. Further, the Michigan Election Law does not permit county boards of commissioners to play any role in the election process. Accordingly, the board lacked the authority to authorize the county clerk to take an action not allowed by statute.

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

> The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: "first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" The phrase "purity of elections" does not have a single precise meaning. However, "it unmistakably requires . . . fairness and evenhandedness in the election laws of this state." [*McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 692-693; 662 NW2d 804 (2003) (internal citations omitted).]

In *Taylor*, *supra* at 97, this Court found that the city clerk's mass mailing of absent voter ballot applications violated the purity of elections clause.[8] The *Taylor* Court reasoned that the city clerk had distributed "propaganda" in her official capacity and at the city's expense. *Id.* There was no indication in *Taylor*, *supra* at 85, that the absent voter ballot applications were designed in such a manner that they would have skewed an applicant's vote one way or another. Therefore, the *Taylor* Court's ruling appears to imply that even apparently neutral applications sent by a city clerk in her official capacity constitute improper propaganda material. Although we recognize that we are bound by the *Taylor* Court's holding, we question whether the distribution of absent voter ballot applications that apparently do not favor particular candidates or political parties constitute "what amounts to propaganda at the city's expense." *Taylor*, *supra*

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

> This interpretation of MCL 168.759 is consistent with the sound public policy behind Michigan's election law, which, as stated in the preamble, was enacted, in part, "to provide for the purity of elections; to guard against the abuse of the elective franchise." This is in keeping with the Michigan Constitution, which provides that "[t]he legislature shall enact laws to preserve the purity of elections . . . ." Const 1963, art 2, § 4. The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts: "first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596; 317 NW2d 1 (1982), quoting *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969). The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party*, *supra* at 598.
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> The city clerk, who is an elected official, has the role of neutral arbiter or referee. As a requirement of that office, the city clerk must take and subscribe an oath or affirmation stating:
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> > I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of [city clerk] according to the best of my ability. [Const 1963, art 11, § 1.]
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> To construe MCL 168.759 to permit Currie to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution. MCL 168.759(5) does not permit a city clerk to mail absent voter ballot applications without having received a verbal or written request. Accordingly, we conclude that the trial court did not err in granting injunctive relief on this basis. [*Taylor*, *supra* at 96-97.]

at 97. *Random House Webster's College Dictionary* (1997) defines "propaganda" as "information or ideas methodically spread to promote or injure a cause, movement, nation, etc." We fail to see how public mailings of apparently neutral absent voter ballot applications methodically promote anything besides the mere act of voting. However, we are compelled by *Taylor* to find that the neutrally-designed absent voter ballot applications constitute propaganda and, therefore, violate the purity of elections clause of our constitution.[9]

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

Defendant contends that even if the mass mailing violated state law or the constitution, plaintiffs are not entitled to relief because they failed to show any injury or harm. However, plaintiffs are not required to show a substantial injury distinct from that suffered by the public in general in order to establish standing in an election case. *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987). "[T]he right to vote is an implicit fundamental political right that is preservative of all rights." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007) (internal quotations omitted). Although the right to vote is constitutionally protected, our Supreme Court has noted that the "equal right to vote is not absolute."[10] *Id.* (internal quotations omitted). Instead, the Legislature must "preserve the purity of elections" and "guard against abuses of the elective franchise." Const 1963, art 2, § 4. Defendant's actions undermined the constitutional right of the public to participate in fair, evenhanded elections and, therefore, constituted an injury. Consequently, plaintiffs had standing to bring a cause of action to remedy this injury. See *Helmkamp, supra*.

We disagree with defendant's contention that plaintiffs' challenge is moot and does not fall within the "capable of repetition yet evading review" exception. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. We will review a moot issue only if it is publicly significant and is likely to recur, yet is likely to evade judicial review."

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

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

Attorney Gen v Michigan Pub Service Comm, 269 Mich App 473, 485; 713 NW2d 290 (2005). Defendant noted that several city clerks within the county automatically mail absent voter ballot applications to voters over age 60 on a continual basis, and defendant will likely seek to mail unsolicited absent voter ballot applications for future elections. As in this case, there is no guarantee that potential future plaintiffs will have adequate notice to pursue the matter to its conclusion before another election. Therefore, we agree with the trial court's conclusion that this issue is capable of repetition yet evades review.

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

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

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette

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