

Deadline for Absentee Voter Ballots Held to be Constitutional by Michigan Court of Appeals

July 29, 2020

The Michigan Court of Appeals has upheld the constitutionality of the statutory deadline—imposed by the Michigan Election Law—requiring that absentee voter ("AV") ballots be received by 8 p.m. on Election Day to be validly counted. The court also upheld in the July 14, 2020, opinion the statutory requirement that voters pay the postage to return an AV ballot. In *League of Women Voters of Michigan, Deborah Bunkley, Elizabeth Cushman, and Susan Smith, v. Secretary of State*, the plaintiffs asserted that the statutory "received by" deadline for AV ballots imposed by the Michigan Election Law violates the Michigan Constitution of 1963, as amended by the passage of Proposal 3 in 2018.

Proposal 3 amended Article II, Section 4 of the Michigan Constitution to allow for no-reason absentee voting, and gave absentee voters the choice to vote by mail. The constitutional amendments also provide that a registered voter may vote absentee at any time during the 40 days prior to an election. The Legislature amended certain provisions of the Michigan Election Law in response to the passage of Proposal 3, while leaving the pre-existing 8 p.m. Election Day "received by" deadline intact.

The plaintiffs claimed that the Legislature's failure to amend the "received by" statutory deadline to conform to Proposal 3's constitutional amendments resulted in an unconstitutional deadline for receipt of AV ballots—the plaintiffs sought to compel election officials to accept mail-in AV ballots postmarked on or before Election Day for up to six days following Election Day.

The Court of Appeals upheld the "received by" deadline, reasoning that Proposal 3's constitutional amendments did not explicitly address a deadline by which an AV ballot must be received by an election clerk. Rather, the constitutional amendments suggested that "there would be some limitations on when election officials would be obligated to accept, and therefore count, ballots." The Court also found that the "received by" deadline does not impose a severe restriction on the right to vote, particularly when considering that a voter is "not required to mail his or her absentee ballot," and can instead deliver the ballot in person to the city or township clerk. The Court noted that "at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision. And we follow the view that courts should typically defer to the Legislature in making policy decisions."

On July 20, 2020, the plaintiffs filed an application for leave to appeal the Court of Appeals' decision with the Michigan Supreme Court.

If you have any questions about the Michigan Election Law, please contact your Miller Canfield attorney or the authors listed on this e-alert.