

Lambert et al. v. Benson et al.

Open Carry in Polling Places

HISTORY

On Friday, October 16, 2020 just two weeks before the 2020 General Election, Michigan Secretary of State Jocelyn Benson issued a directive to the state's clerks banning the open carry of firearms in polling places. The order was not promulgated per the Administrative Procedures Act and lacked statutory authority. Benson indicated the blanket ban on open carry was necessary to protect against voter intimidation despite the state already having existing laws prohibiting voter intimidation and brandishing of firearms. Benson was assisted in drafting the order by Michigan Attorney General Dana Nessel.

In the days that immediately followed, the Michigan Association of Chiefs of Police as well as numerous county sheriffs and local law enforcement agencies stated they would not enforce the ban. Consequently, Nessel indicated the Michigan State Police would enforce it.

On Thursday, October 22, 2020, three state firearm organizations: the Michigan Coalition for Responsible Gun Owners, Michigan Open Carry, Inc., and Michigan Gun Owners along with Tom Lambert, the recent past-president of Michigan Open Carry, Inc. [PLAINTIFFS] filed suit against Benson, Nessel, and the director of the Michigan State Police [DEFENDANTS] in the Michigan Court of Claims. The suit was consolidated with a similar suit filed the same day by Robert Davis of Highland Park against Benson.

The Plaintiffs' case was funded voluntarily through donations from individual gun owners. The Defendants' case was funded involuntarily by Michigan taxpayers. A number of organizations including the Michigan United Conservation Clubs and the National Rifle Association indicated support for the Plaintiffs through press releases. The ACLU and NAACP indicated their support for the Defendants as did several Democratic attorneys general from other states.

On Tuesday, October 27, 2020, the Michigan Court of Claims, after oral arguments, ruled in favor of the Plaintiffs, granting a preliminary injunction and enjoining enforcement of the directive.

On Thursday, October 29, 2020, the Michigan Court of Appeals denied Defendants' leave to appeal. Defendants immediately appealed to the Michigan Supreme Court requesting a decision by 10 a.m. on Monday, November 2, 2020. The Michigan Supreme Court rejected the appeal through silence.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT DAVIS,

Plaintiff-Appellee,

v

JOCELYN BENSON,

Defendant-Appellant,

CONSOLIDATED WITH

THOMAS LAMBERT, MICHIGAN OPEN
CARRY INC, MICHIGAN GUN OWNERS, and
MICHIGAN COALITION FOR RESPONSIBLE
GUN OWNERS,

Plaintiffs-Appellees,

v

JOCELYN BENSON and DANA NESSEL,

Defendants-Appellants,

COL JOE GASPER,

Defendant.

Court of Appeals No. NEW FILING

Court of Claims No. 20-000207-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

Expedited relief requested under MCR 7.205(F) – Relief requested by 5 p.m. on Thursday, October 29

Court of Claims No. 20-000208-MM

**APPELLANTS SECRETARY OF STATE JOCELYN BENSON AND ATTORNEY
GENERAL DANA NESSEL'S EMERGENCY APPLICATION
FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	iv
Statement of Jurisdiction.....	viii
Statement of Questions Presented.....	ix
Constitutional Provisions, Statutes, Rules Involved.....	x
Introduction.....	1
Statement of Facts and Proceedings	3
1. The Secretary of State issues a Directive regarding open carry.	3
2. The Directive is responsive to recent events in Michigan and to reports of voter apprehension.	4
3. Two lawsuits are filed and the Court of Claims rules that the Directive is unlawful and enjoins its enforcement.	10
Standard of Review.....	12
Argument	12
I. The Court of Claims erred in declaring the Secretary’s Directive unlawful where it did not have to be promulgated as a rule and is in accordance with applicable law.....	12
A. Issue Preservation	12
B. Analysis.....	12
1. The Legislature delegated the task of conducting elections in Michigan to the Secretary of State and gave her broad authority to instruct the election officials under her supervisory control.....	12
a. The Secretary has supervisory authority over polling places, absent voter counting board, and election inspectors.	13
b. The Secretary has supervisory authority over clerk offices functioning as polling places on Election Day.	15
c. The Secretary is authorized to issue instructions to curb disturbances and protect against voter intimidation.....	15

2.	The Directive was not required to be promulgated as a rule under the APA.....	18
a.	The “permissive power” exception.....	19
b.	With respect to the conduct of elections, the Legislature has vested the Secretary with power that need not be tied to the APA.....	20
c.	MCL 168.31’s plain language underscores that the Secretary was not restricted to rulemaking.	22
d.	The decision below provides no support for its rule that the Legislature may only give agencies power to act outside the APA when that grant is specific rather than general.....	25
e.	Permissive statutory power provides agencies with necessary flexibility.	27
3.	The Directive is in accordance with law.....	28
a.	The Directive does not deprive CPL holders of any rights to concealed carry under the Firearms Act.	28
b.	The Legislature has not created a statutory right to open carry.	29
c.	The Legislature has not preempted the Secretary from issuing instructions regulating the open carry of firearms at polling places.	32
d.	The Directive is a presumptively lawful regulatory measure that does not violate the Second Amendment.....	32
i.	The Secretary’s Directive serves an objective that is significant, substantial, and important—namely, preventing voter intimidation.....	33
ii.	The fit between the prohibition and the Secretary’s Directive is more than reasonable.....	34
e.	The Secretary’s Directive is defensible under both federal and state free-speech protections.	36
II.	Plaintiffs have not met the grounds for injunctive relief.	38
A.	Plaintiffs have not demonstrated a substantial likelihood of success on the merits.....	38

B.	Plaintiffs have not demonstrated irreparable harm.	39
C.	The balance of harms weighs heavily in the Secretary’s favor.	40
Conclusion and Relief Requested		44

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Adams v Cleveland-Cliffs Iron Co.</i> , 237 Mich App 51 (1999)	32
<i>Aikens v State Dep’t of Conservation</i> , 387 Mich 495 (1972)	24
<i>Am Fedn of State, Co & Mun Employees, AFL-CIO v Dept of Mental Health</i> , 452 Mich 1 (1996).....	18
<i>By Lo Oil Co v Department of Treasury</i> , 267 Mich App 19 (2005).....	21, 25
<i>Cf. Burdick v Takushi</i> , 504 US 428 (1992).....	16
<i>Chesney v City of Jackson</i> , 171 F Supp 3d 605 (ED Mich, 2016).....	33
<i>City of Detroit v Qualls</i> , 434 Mich 340 (1990).....	30
<i>Crookston v Johnson</i> , 841 F3d 396 (CA 6 2016)	18
<i>D.C. v Heller</i> , 554 US 570 (2008)	<i>passim</i>
<i>Davis v City of Detroit Fin Review Team</i> , 296 Mich App 568 (2012)	12
<i>Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Servs</i> , 431 Mich 172 (1988).....	19, 21, 22, 25
<i>Hammel v Speaker of House of Representatives</i> , 297 Mich App 641 (2012).....	38
<i>Hanay v Dep’t of Transp</i> , 497 Mich 45 (2014)	23
<i>Hare v Berrien Co Bd of Election Commr’s</i> , 373 Mich 526 (1964).....	13
<i>Hinderer v Dep’t of Social Servs</i> , 95 Mich App 716 (1980)	19
<i>In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71</i> , 479 Mich 1 (2007).....	37
<i>Int’l Union v Michigan</i> , 211 Mich App 20 (1995).....	38
<i>Kampf v Kampf</i> , 237 Mich App 377 (1999)	33
<i>McCahan v Brennan</i> , 492 Mich 730 (2012)	31
<i>Michigan Gun Owners, Inc v Ann Arbor Public Schools</i> , 502 Mich 704 (2005).....	32
<i>Michigan Trucking Ass’n v Mich Pub Serv Comm’n</i> , 225 Mich 424 (1997)	<i>passim</i>

<i>Miller v Fabius Tp Bd, St Joseph Co</i> , 366 Mich 250 (1962)	30
<i>People ex rel Dougherty v Holschuh</i> , 235 Mich 272 (1926)	34
<i>People v Cunningham</i> , 496 Mich 145 (2014)	25
<i>People v Deroche</i> , 299 Mich App 301 (2013)	33
<i>Pyke v Department of Social Services</i> , 182 Mich App 619 (1990)	20, 21
<i>Rental Property Owners Ass’n of Kent Co v City of Grand Rapids</i> , 455 Mich 246 (1997)	31
<i>Shuler v Michigan Physicians Mut Liab Co</i> , 260 Mich App 492 (2004)	12
<i>Tyler v Hillsdale Cty Sheriff’s Dept</i> , 837 F3d 678 (CA 6, 2016)	33, 34
<i>Wade v Univ of Michigan</i> , 320 Mich App 1 (2017)	32
<i>Wells v Kent County Bd of Election Commr’s</i> , 382 Mich 112 (1969)	17

Statutes

MCL 141.1569	27
MCL 168.1	13
MCL 168.21	13, 14, 16
MCL 168.31(1)(a)	<i>passim</i>
MCL 168.31(2)	24, 26
MCL 168.497(2)	15
MCL 168.654	14
MCL 168.662(1)	14, 36
MCL 168.674(1)	14
MCL 168.678	11, 14, 16
MCL 168.765a(1)	14
MCL 168.765a(4)	36
MCL 168.794c	26
MCL 168.795a(8)	24

MCL 168.797b.....	26
MCL 168.932(1)(a).....	16
MCL 24.207	18, 19, 21, 22
MCL 28.421	28
MCL 28.425c(3)	28
MCL 28.425o.....	11
MCL 28.425o(1).....	29
MCL 28.425o,.....	28
MCL 30.310.....	27
MCL 400.24.....	20, 21
MCL 479.43.....	20
MCL 600.308(2)(c).....	viii
MCL 600.309	viii
MCL 750.170.....	16
MCL 750.234d.....	11, 29, 30
MCL 750.234d(2)(d).....	30
MCL 750.237a(1)	29, 30
MCL 750.237a(5)(e).....	30
Other Authorities	
1993 PA 352	23
Rules	
MCR 7.203(B)(1).....	viii
MCR 7.205(A)	viii

Constitutional Provisions

Const 1963, art 2, § 4(1)	15
Const 1963, art 2, § 4(2)	13, 17
Const 1963, art 5, § 3	13
Const 1963, art 5, § 9	13

STATEMENT OF JURISDICTION

On October 27, 2020, the Court of Claims issued a preliminary injunction barring the Secretary of State from enforcing her October 16, 2020 directive. This Court has jurisdiction pursuant to MCL 600.308(2)(c) and MCL 600.309, because Defendants-Appellants appeal by leave an interlocutory order from the Court of Claims. This Court also has jurisdiction pursuant to MCR 7.203(B)(1) and the appeal is timely filed under MCR 7.205(A). The order appealed, which granted Plaintiffs' motion for preliminary injunction, was entered on October 27, 2020, and is attached as Defs Appx, Vol 3, pp 552, 565.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Claims err in holding that the Secretary was required to issue her Directive as a rule under the Administrative Procedures Act, and if so, is the rule in accordance with Michigan law?

Appellants' answer: Yes.

Appellees' answer: No.

Trial court's answer: No.

2. Did the Court of Claims err in holding that Plaintiffs met the factors for injunctive relief?

Appellants' answer: Yes.

Appellees' answer: No.

Trial court's answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

1963 Const, art 2, § 4

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(a) The right, once registered, to vote a secret ballot in all elections.

(f) The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies. Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and 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. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

1963 Const, art 5, § 3

The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the

governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

1963 Const, art 5, § 9

Single executives heading principal departments and the chief executive officers of principal departments headed by boards or commissions shall keep their offices at the seat of government except as otherwise provided by law, superintend them in person and perform duties prescribed by law.

Section 7 of the Administrative Procedures Act of 1969 (APA) MCL 24.207

“Rule” means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

Section 21 of Michigan Election Law, MCL 168.21

The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.

Section 31 of Michigan Election Law, MCL 168.31

(1) The secretary of state shall do all of the following:

(a) Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.

(b) Advise and direct local election officials as to the proper methods of conducting elections.

(2) Pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the secretary of state shall promulgate rules establishing uniform standards for state and local nominating, recall, and ballot question petition signatures. The standards for petition signatures may include, but need not be limited to, standards for all of the following:

- (a) Determining the validity of registration of a circulator or individual signing a petition.
- (b) Determining the genuineness of the signature of a circulator or individual signing a petition, including digitized signatures.
- (c) Proper designation of the place of registration of a circulator or individual signing a petition.

Section 497(2) of Michigan Election Law, MCL 168.497(2)

An individual who is not registered to vote but possesses the qualifications of an elector as provided in section 492 or an individual who is not registered to vote in the city or township in which he or she is registering to vote may apply for registration in person at the city or township clerk's office of the city or township in which he or she resides from the fourteenth day before an election and continuing through the day of the election. An individual who applies to register to vote under this subsection must provide to the city or township clerk proof of residency in that city or township. For purposes of this subsection, "proof of residency" includes, subject to subsection (3), any of the following:

- (a) An operator's or chauffeur's license issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or an enhanced driver license issued under the enhanced driver license and enhanced official state personal identification act, 2008 PA 23, MCL 28.301 to 28.308.
- (b) An official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300, or an enhanced official state personal identification card issued under the enhanced driver license and enhanced official state personal identification card act, 2008 PA 23, MCL 28.301 to 28.308.

Section 654 of Michigan Election Law, MCL 168.654

The words "election precinct" as used in this act shall mean a political subdivision, the area of which is embraced in its entirety within the confines of a city, ward, township or village, and for which not more than 1 polling place is provided for all qualified and registered electors residing therein. When not divided according to law into 2 or more election precincts, each organized city, ward, township and village shall be an election precinct.

Section 662(1) of Michigan Election Law, MCL 168.662(1)

The legislative body in each city, village, and township shall designate and prescribe the place or places of holding an election for a city, village, or township election, and shall provide a suitable polling place in or for each precinct located in the city, village, or township for use at each election. Except as otherwise provided in this section, school buildings, fire stations, police stations, and other publicly owned or controlled buildings shall be used as polling places. If it is not possible or convenient to use a publicly owned or controlled building as a polling place, the legislative body of the city, township, or village may use as a polling place a building owned or controlled by an organization that is exempt from federal income tax as provided by section 501(c) other than 501(c)(4), (5), or (6) of the internal revenue code of 1986, or any successor statute. The legislative body of a city, township, or village shall not designate as a polling place a building that is owned by a person who is a sponsor of a political committee or independent committee. A city, township, or village shall not use as a polling place a building that does not meet the requirements of this section. As used in this subsection, "sponsor of a political committee or independent committee" means a person who is described as being a sponsor under section 24(3) of the Michigan campaign finance act, 1976 PA 388, MCL 169.224, and includes a subsidiary of a corporation or a local of a labor organization, if the corporation or labor organization is considered a sponsor under section 24(3) of the Michigan campaign finance act, 1976 PA 388, MCL 169.224.

Section 674(1) of Michigan Election Law, MCL 168.674(1)

Notwithstanding any other provision of law to the contrary and subject to this section, the city and township board of election commissioners, at least 21 days but not more than 40 days before each election, but in no case less than 5 days before the date set for holding schools of instruction, shall appoint for each election precinct at least 3 election inspectors and as many more as in its opinion is required for the efficient, speedy, and proper conduct of the election. The board of election commissioners may appoint as election inspector an individual on the list submitted by a major political party under section 673a who is qualified to serve under section 677. An appointment of an election inspector under this section is void if a properly completed application for that election inspector is not on file in the clerk's office as prescribed in section 677.

Section 678 of Michigan Election Law, MCL 168.678

Each board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election and during the canvass of the votes after the poll is closed.

Section 765a(1) and (4) of Michigan Election Law, MCL 168.765a(1) and (4)

(1) Subject to section 764d, if a city or township decides to use absent voter counting boards, the board of election commissioners of that city or township shall establish an absent voter counting board for each election day precinct in that city or township. The

ballot form of an absent voter counting board must correspond to the ballot form of the election day precinct for which it is established. After the polls close on election day, the county, city, or township clerk responsible for producing the accumulation report of the election results submitted by the boards of precinct election inspectors shall format the accumulation report to clearly indicate all of the following:

- (a) The election day precinct returns.
- (b) The corresponding absent voter counting board returns.
- (c) A total of each election day precinct return and each corresponding absent voter counting board return.

(4) In a city or township that uses absent voter counting boards under this section, absent voter ballots must be counted in the manner provided in this section and, except as otherwise provided in section 764d, absent voter ballots must not be delivered to the polling places. Subject to section 764d, the board of election commissioners shall provide a place for each absent voter counting board to count the absent voter ballots. Section 662 applies to the designation and prescribing of the absent voter counting place or places in which the absent voter counting board performs its duties under this section, except the location may be in a different jurisdiction if the county provides a tabulator for use at a central absent voter counting board location in that county. The places must be designated as absent voter counting places. Except as otherwise provided in this section, laws relating to paper ballot precincts, including laws relating to the appointment of election inspectors, apply to absent voter counting places. The provisions of this section relating to placing of absent voter ballots on electronic voting systems apply. More than 1 absent voter counting board may be located in 1 building.

Section 932(a) of Michigan Election Law, MCL 168.932(a)

A person who violates 1 or more of the following subdivisions is guilty of a felony:

- (a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

Section 5c(3) of the Firearms Act, MCL 28.425c(3)

Subject to section 5o and except as otherwise provided by law, a license to carry a concealed pistol issued by the county clerk authorizes the licensee to do all of the following:

- (a) Carry a pistol concealed on or about his or her person anywhere in this state.

(b) Carry a pistol in a vehicle, whether concealed or not concealed, anywhere in this state.

Section 5o of the Firearms Act, MCL 28.425o

(1) Subject to subsection (5), an individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(h), shall not carry a concealed pistol on the premises of any of the following:

(a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school. As used in this section, "school" and "school property" mean those terms as defined in section 237a of the Michigan penal code, 1931 PA 328, MCL 750.237a.

(b) A public or private child care center or day care center, public or private child caring institution, or public or private child placing agency.

(c) A sports arena or stadium.

(d) A bar or tavern licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, where the primary source of income of the business is the sale of alcoholic liquor by the glass and consumed on the premises. This subdivision does not apply to an owner or employee of the business. The Michigan liquor control commission shall develop and make available to holders of licenses under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, an appropriate sign stating that "This establishment prohibits patrons from carrying concealed weapons". The owner or operator of an establishment licensed under the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1101 to 436.2303, may post the sign developed under this subdivision.

(e) Any property or facility owned or operated by a church, synagogue, mosque, temple, or other place of worship, unless the presiding official or officials of the church, synagogue, mosque, temple, or other place of worship permit the carrying of concealed pistol on that property or facility.

(f) An entertainment facility with a seating capacity of 2,500 or more individuals that the individual knows or should know has a seating capacity of 2,500 or more individuals or that has a sign above each public entrance stating in letters not less than 1-inch high a seating capacity of 2,500 or more individuals.

(g) A hospital.

(h) A dormitory or classroom of a community college, college, or university.

(4) As used in subsection (1), "premises" does not include parking areas of the places identified under subsection (1).

(5) Subsections (1) and (2) do not apply to any of the following:

(a) An individual licensed under this act who is a retired police officer, retired law enforcement officer, or retired federal law enforcement officer.

(b) An individual who is licensed under this act and who is employed or contracted by an entity described under subsection (1) to provide security services and is required by his or her employer or the terms of a contract to carry a concealed firearm on the premises of the employing or contracting entity.

(c) An individual who is licensed as a private investigator or private detective under the professional investigator licensure act, 1965 PA 285, MCL 338.821 to 338.851.

(d) An individual who is licensed under this act and who is a corrections officer of a county sheriff's department or who is licensed under this act and is a retired corrections officer of a county sheriff's department, if that individual has received county sheriff approved weapons training.

(e) An individual who is licensed under this act and who is a motor carrier officer or capitol security officer of the department of state police.

(f) An individual who is licensed under this act and who is a member of a sheriff's posse.

(g) An individual who is licensed under this act and who is an auxiliary officer or reserve officer of a police or sheriff's department.

(h) An individual who is licensed under this act and who is any of the following:

(i) A parole, probation, or corrections officer, or absconder recovery unit member, of the department of corrections, if that individual has obtained a Michigan department of corrections weapons permit.

(ii) A retired parole, probation, or corrections officer, or retired absconder recovery unit member, of the department of corrections, if that individual has obtained a Michigan department of corrections weapons permit.

(i) A state court judge or state court retired judge who is licensed under this act.

- (j) An individual who is licensed under this act and who is a court officer.
- (k) An individual who is licensed under this act and who is a peace officer.
- (6) An individual who violates this section is responsible for a state civil infraction or guilty of a crime as follows:
 - (a) Except as provided in subdivisions (b) and (c), the individual is responsible for a state civil infraction and may be fined not more than \$500.00. The court shall order the individual's license to carry a concealed pistol suspended for 6 months.
 - (b) For a second violation, the individual is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00. The court shall order the individual's license to carry a concealed pistol revoked.
 - (c) For a third or subsequent violation, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both. The court shall order the individual's license to carry a concealed pistol revoked.

Section 234d of the Penal Code, MCL 750.234d

- (1) Except as provided in subsection (2), a person shall not possess a firearm on the premises of any of the following:
 - (a) A depository financial institution or a subsidiary or affiliate of a depository financial institution.
 - (b) A church or other house of religious worship.
 - (c) A court.
 - (d) A theatre.
 - (e) A sports arena.
 - (f) A day care center.
 - (g) A hospital.
 - (h) An establishment licensed under the Michigan liquor control act, Act No. 8 of the Public Acts of the Extra Session of 1933, being sections 436.1 to 436.58 of the Michigan Compiled Laws.
- (2) This section does not apply to any of the following:

(a) A person who owns, or is employed by or contracted by, an entity described in subsection (1) if the possession of that firearm is to provide security services for that entity.

(b) A peace officer.

(c) A person licensed by this state or another state to carry a concealed weapon.

(d) A person who possesses a firearm on the premises of an entity described in subsection (1) if that possession is with the permission of the owner or an agent of the owner of that entity.

(3) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$100.00, or both.

Section 237a of the Penal Code, MCL 750.237a

(1) An individual who engages in conduct proscribed under section 224, 224a, 224b, 224c, 224e, 226, 227, 227a, 227f, 234a, 234b, or 234c, or who engages in conduct proscribed under section 223(2) for a second or subsequent time, in a weapon free school zone is guilty of a felony punishable by 1 or more of the following:

(a) Imprisonment for not more than the maximum term of imprisonment authorized for the section violated.

(b) Community service for not more than 150 hours.

(c) A fine of not more than 3 times the maximum fine authorized for the section violated.

(2) An individual who engages in conduct proscribed under section 223(1), 224d, 227c, 227d, 231c, 232a(1) or (4), 233, 234, 234e, 234f, 235, 236, or 237, or who engages in conduct proscribed under section 223(2) for the first time, in a weapon free school zone is guilty of a misdemeanor punishable by 1 or more of the following:

(a) Imprisonment for not more than the maximum term of imprisonment authorized for the section violated or 93 days, whichever is greater.

(b) Community service for not more than 100 hours.

(c) A fine of not more than \$2,000.00 or the maximum fine authorized for the section violated, whichever is greater.

(3) Subsections (1) and (2) do not apply to conduct proscribed under a section enumerated in those subsections to the extent that the proscribed conduct is otherwise exempted or authorized under this chapter.

(4) Except as provided in subsection (5), an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor punishable by 1 or more of the following:

- (a) Imprisonment for not more than 93 days.
- (b) Community service for not more than 100 hours.
- (c) A fine of not more than \$2,000.00.

(5) Subsection (4) does not apply to any of the following:

- (a) An individual employed by or contracted by a school if the possession of that weapon is to provide security services for the school.
- (b) A peace officer.
- (c) An individual licensed by this state or another state to carry a concealed weapon.
- (d) An individual who possesses a weapon provided by a school or a school's instructor on school property for purposes of providing or receiving instruction in the use of that weapon.
- (e) An individual who possesses a firearm on school property if that possession is with the permission of the school's principal or an agent of the school designated by the school's principal or the school board.

(6) As used in this section:

- (b) "School" means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12.
- (c) "School property" means a building, playing field, or property used for school purposes to impart instruction to children or used for functions and events sponsored by a school, except a building used primarily for adult education or college extension courses.
- (d) "Weapon" includes, but is not limited to, a pneumatic gun.
- (e) "Weapon free school zone" means school property and a vehicle used by a school to transport students to or from school property.

Section 2 of the Firearms and Ammunition Act, MCL 123.1102

A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state:

INTRODUCTION

Make no mistake. This is a voting rights case. On November 3rd, millions of Michigan citizens of diverse ages, ethnicities, and life circumstances plan to exercise their most important right—the right to vote. Each one of them has the right to vote in person—and the Secretary must ensure that right for all. The decision below does not adequately protect that right.

Recent dramatic and widely publicized incidents involving firearms—including an alleged plot of armed militiamen to kidnap the Governor—have instilled fear in many Michigan citizens. Secretary of State Jocelyn Benson responded to these events by exercising her permissive authority to issue a Directive that narrowly bans the open carry of firearms for Michigan’s upcoming general election, for just this one day and for this small zone around voting areas, making sure that Michigan’s already-existing ban on open carry in *some* polling places becomes, at least for *this* election, a uniform ban throughout Michigan. This ensures that when Michigan voters go to the polls, they *all* have a refuge, free from fear and intimidation.

Plaintiffs question whether the Secretary has the authority to ensure this refuge through her Directive, rather than a rule promulgated under the Administrative Procedures Act. The answer is yes, and the Court of Claims erred in ruling otherwise. The court’s analysis suffers from three critical errors.

First, the court misstates the statutory authority of the Secretary of State. The court casts aside the statutory “permissive authority” exception, holding that the Secretary cannot utilize that exception if her instructions involve a weighty issue of public policy. But that limitation cannot be found anywhere in the APA or the plain language of the enabling statute, MCL 168.31. And indeed, caselaw belies this new and unsupported judicial exception by showing that, where the Legislature allows a state official the choice between issuing instructions and promulgating rules, it is often in matters of great weight and public importance. Here, in light of recent events and

reports of voter apprehension, coupled with the need to act swiftly, the Secretary opted to exercise the choice the Legislature gave her to issue instructions rather than promulgate rules.

Second, the court missed the significance of subsection 2 of § 31, which expressly mandates that in certain enumerated areas, the Secretary must promulgate rules. Subsection 2 underscores the Secretary’s authority here, and it negates the court’s conclusion that because the Secretary could issue any election-related matters as an instruction, the exception would therefore swallow the rule. (Defs Appx, Vol 3, p 561.)

Third, the court begins by acknowledging the lack of an affirmative right to open carry (*id.*, p 558) (“As far as the Court can discern, there is no affirmative statutory provision ‘granting’ the right to open carry a firearm”), but then in the next breath states just the opposite, concluding that “[i]f the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, *has declared it can be carried*,” (*id.*, p 563) (emphasis added). Because the court was right the first time—there is no right to open carry in Michigan law—the faulty premise that there is such a right led the court to determine that the Directive is “inconsistent with . . . state law.” (*Id.*, p 560). This fundamental error pervades the court’s review below.

As a result, Plaintiffs have not met the factors for a preliminary injunction. They have not shown a substantial likelihood of success on the merits, they cannot show irreparable harm absent a right to open carry, the Secretary cannot fulfill her duty to ensure a free and fair election, and the public will suffer without the Directive, as many might be deprived of their right to vote in person. This Court should reverse the decision of the Court of Claims.

STATEMENT OF FACTS AND PROCEEDINGS

1. The Secretary of State issues a Directive regarding open carry.

On October 16, 2020, the Secretary of State issued a directive to all local election officials regarding the open carry of firearms on Election Day in polling places, absent voter counting boards, and clerk offices. Specifically, the Secretary directed the following:

Within 100 feet of a polling place, clerk's office(s), or absent voter counting board

- **The open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located.** A person may leave a firearm inside a vehicle parked within 100 feet of the building when visiting these locations if otherwise permitted by law to possess the firearm within the vehicle.

- Concealed carry of a firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so.

- Election inspectors should contact law enforcement immediately if these prohibitions are violated. The prohibition on open carry does not apply to law enforcement officers acting in the course of their duties.

(Defs Appx, Vol 2, p 312) (emphasis of bold and underscore in original.) The Secretary stated the following in support of her decision to issue this directive:

The presence of firearms at the polling place, clerk's office(s), or absent voter counting board may cause disruption, fear, or intimidation for voters, election workers, and others present. Absent clear standards, there is potential for confusion and uneven application of legal requirements for Michigan's 1,600 election officials, 30,000 election inspectors, 8 million registered voters, and thousands of challengers and poll watchers on Election Day.

Id. And she identified the source of her authority for issuing the directive:

As Michigan's chief election officer with supervisory control over local election officials in the performance of their duties, the Secretary of State issues the following directions to clarify that the open carry of firearms on Election Day in polling places, clerk's office(s), and absent voter counting boards is prohibited; to provide additional guidance to election workers if they encounter individuals with firearms at or near polling places, and to secure the full and free exercise of the right to vote.

Id. (emphasis in original.) The directive requires officials to post signage at building entrances advising of the prohibition and advises officials to contact law enforcement for assistance in enforcing this directive. *Id.*

2. The Directive is responsive to recent events in Michigan and to reports of voter apprehension.

The need for the Directive became clear to the Secretary only recently. Earlier this year, Michigan experienced several demonstrations related to the Governor’s executive orders regarding the Covid-19 pandemic. Most rallies were held without incident and were attended by numerous citizens engaged in the open carry of firearms.¹ But state and federal law enforcement authorities recently disclosed a plot to kidnap the Governor. In the course of that investigation, it was learned that militia members “discussed plans for assaulting the Michigan State Capitol, countering law enforcement first responders, and using ‘Molotov cocktails’ to destroy police vehicles.” (Defs Appx, Vol 2, p 273.) There were also discussions of “armed protests” at the State Capitol in which one militia member stated: “When the time comes there will be no need to try and strike fear through presence. The fear will be manifested through bullets.” *Id.*

In the aftermath of these events, and in light of the general rhetoric surrounding the national election, numerous clerks and local officials contacted the Secretary expressing concern over the presence of firearms at the polls. Voters, too, have contacted the Secretary and the Attorney General’s office, expressing fear of seeing someone with a visible firearm in or near the polls on election day. It was apparent from these contacts that recent events in Michigan were creating or fueling this concern.

¹ One protest included armed citizens congregating inside the Capitol. See *Michigan Protestors storm state Capitol in fight over coronavirus rules: ‘Men with rifles yelling at us,’* available at <https://www.foxnews.com/us/michigan-lansing-coronavirus-protest-capitol-guns-rifles>.

Some voters are afraid of guns because they have a history of experiencing gun violence. Rosemary Guzman, for example, lost her cousin to a violent shooting about a month ago. (Defs Appx, Vol 2, p 335, ¶ 6.) That, coupled with the plot to kidnap the Governor, has made her more afraid of guns than she ever was before. (*Id.*, ¶ 7.) Guzman says that if she was approaching the polls to cast her vote and saw someone with a firearm, she would probably turn around and call the police rather than go into the polling location, which she says could prevent her from voting. (*Id.*, ¶ 9.)

Some have an additional fear that bringing their children to the polls will place them in danger. Mouhana Hawili plans to vote in person and will need to bring her five children (two of them toddlers) to the polls with her when she votes. (Defs Appx, Vol 2, pp 342, ¶¶ 3, 4.) The plot to kidnap the Governor has made her concerned about open carry at or near her precinct, and she says if she saw a gun at the polls she would not get out of her car. (*Id.*, ¶¶ 5-7.) Afrah Almouswi likewise plans to vote in person because English is her second language and she would rather go to the local poll where she has people assisting her in the process of voting. (Defs Appx, Vol 2, p 344, ¶ 4.) But since she is a mom with four kids, two of whom are babies, she will have to bring them to the polls with her when she votes. (*Id.*, ¶ 5.) Firearms at the polls cause her to be concerned for the safety of herself and her children since she is an Iraqi American who fled the war in Iraq and firearms remind her of the war zone. She says this fear is heightened “given how emotional this election season has been and because of the recent plot to kidnap the Governor.” (*Id.*, ¶ 6.) She does not want to lose her right to vote but says that visibly armed people could scare her and her kids from waiting in line or going into her polling location. (*Id.*, ¶ 7.) Farah Afra has similar concerns, since she will both be voting in person and also assisting some immigrant women by dropping them at the polling locations so they can vote.

(Defs Appx, Vol 2, pp 346, ¶¶ 3, 4.) She is concerned that firearms pose a risk to her personal safety and that of the women she is assisting. (*Id.*, ¶ 7.)

Some voters have particular fears because of age, health, or disability. Rabha Al Ghoul plans to vote in person on November 3 because she does not understand or trust the absentee ballot process. (Defs Appx, Vol 2 pp 340, ¶ 8.) She says she has been voting at the polls since she became a citizen. (*Id.*, ¶ 8.) But this year she is especially worried that she would not be able to escape gunfire having just had major surgery on her leg. (*Id.*, ¶ 9.)

Some are just plain scared. Hayat Agha, a new naturalized citizen, wants to experience her right to vote in person on November 3rd but says she “feel[s] terrified” when she sees firearms. (Defs Appx, Vol 2, p 348, ¶¶ 3, 5.) Laura Wheeler wants to be able to vote and not feel that she is “in the middle of a potential shootout.” (Defs Appx, Vol 2, p 350, ¶ 5.) Hussein Hachem respects people’s right to carry arms but feels very uncomfortable and unsafe voting while someone is carrying a visible firearm his polling precinct. (Defs Appx, Vol 2, p 338, ¶ 6.) He left a war-torn country where he observed voter suppression and unfair elections, and now wants his wife and family to “feel safe and comfortable, not intimidated, while exercising their right to vote.” (*Id.*, ¶¶ 7, 8.) Solange Nestor is opposed to anyone carrying a gun at a polling place because she fears for her safety and says the sight of someone carrying a gun while she is voting would make her feel both unsafe and uncomfortable. (Defs Appx, Vol 2, p 359, ¶¶ 5-7.)

For many voters, these concerns are heightened because of recent events and the political climate. Dave Maturen is a former State Representative elected as a Republican to the 63rd House district, the Kalamazoo County Commission, and Brady Township as a trustee. (Defs Appx, Vol 2, p 382, ¶ 3.) He supports the Secretary of State’s Directive banning open carry at polling places, and states that if he had not already voted his AV ballot, open carry would make

him concerned about his physical safety and the physical safety of those around him at a polling site. (*Id.*, ¶¶ 6, 8.) He notes the threats made against the Governor and elected officials statewide, the heated rhetoric and hatred during this year’s elections, and he believes “there is potential for angry people to become frustrated at polling places.” (*Id.*, ¶ 9.) “Adding a weapon, such as a gun, to this environment could possibly lead to violence,” he says; “we need to lower the temperature—not raise it by permitting open carry at polling places.” (*Id.*, ¶¶ 10 11.)

Nestor shares these concerns, noting that “people are very angry about politics right now,” and that “guns in this atmosphere creates an environment for intimidation and violence.” (Defs Appx, Vol 2, p 359, ¶ 8.) Al Ghoul, who is already afraid of guns since she experienced a war zone for a decade in her home country of Lebanon, says that the plot to kidnap the Governor has made her even more afraid of guns. (Defs Appx, Vol 2, p 340, ¶¶ 5, 7.) And Jeff Timmer believes the Secretary of State’s decision to ban guns at polling places “was wise given the extreme rhetoric we are seeing daily on the news and in social media, and the extreme actions taken we are seeing by some with different political viewpoints.” (Defs Appx, Vol 2, p 362, ¶10.) He is “concerned about the recent phenomenon of political extremists bringing guns to social protests, and into government buildings like the State Capitol in Lansing,” along with the threat against the Governor. (*Id.*, ¶ 8.) “Given the passions displayed about this upcoming election, guns at polling places only serve to heighten the possibility for violence, intimidate voters, stop people from voting, [and] disrupt the flow of the election and the counting of ballots,” he says. (*Id.*, ¶ 10.)

Even gun owners are among those who support the Directive. Nathan Dannison, a pastor, is in the process of getting a concealed pistol license. (Defs Appx, Vol 2, p 353, ¶ 4.) Yet he supports the Directive because he believes allowing firearms at the polls will “discourage

regular Americans from voting” and would make him “less likely to participate in the democratic process in person or bring my children to the polling site.” (*Id.*, ¶ 5.) Gary Reed, another gun owner and former executive director of Michigan Republican Party and former elected Delta Township Trustee, (Defs Appx, Vol 2, p 356, ¶ 5), says that, while he is working the polls this election as a poll worker, he will be very intimidated if he sees someone walking around with a gun. (*Id.*, ¶¶ 3, 4, 7.) He recalls seeing armed gunmen at the Michigan Legislature in the Capitol building, which was “very concerning for public safety reasons.” (*Id.*, ¶ 10.)

Poll challengers, poll observers, poll workers, and clerks share these concerns—and they are instrumental to a fair and smooth election. Bradford Springer and Richard Kessler will both be at the polls as poll challengers. (Defs Appx, Vol 2, p 365, ¶ 5; p 369, ¶ 4.) Springer says that “[i]n light of the recent plot to kidnap Governor Whitmer and our President telling people to guard the polls,” he is very nervous to approach the polling location or inside the polling location when individuals with visible firearms are present. His says this might escalate to a level where it is a risk to his personal safety. (Defs Appx, Vol 2, p 365, ¶ 8.) Kessler is similarly concerned for his safety, as he is “afraid that someone might use the firearm and I might be injured or killed.” (Defs Appx, Vol 2, p 369, ¶ 6.) He says this fear is heightened given how emotional this election season has been and because of the recent plot to kidnap the Governor. (*Id.*, ¶ 7.)

Poll watchers Julia Kelly and Kenneth Manley likewise speak out. Kelly says that if she were to arrive at a precinct and there was someone outside with a visible firearm, she would feel “very afraid” and probably would not get out of her car. (Defs Appx, Vol 2, p 374, ¶ 7.) Manley believes that “[p]ermitting non-law enforcement persons to carry guns at a polling place limits a free and fair voting experience because it makes it uncomfortable and worrisome for voters, polling staff and poll watchers.” (Defs Appx, Vol 2, p 379, ¶ 10.) And he believes that a polling

place is naturally a place where people have different views, so introducing guns into that already emotionally charged environment creates a greater likelihood of violence. (*Id.*, ¶ 12.)

Poll workers feel similarly. Paula Bowman believes she will be “worrying about someone sitting six feet away from me with a gun rather than having my complete focus on my job.” (Defs Appx, Vol 2, p 371, ¶ 8.) She also expressed concern that now, with the COVID-19 pandemic, she as a poll worker, “cannot see expressions—whether the person is smiling or is angry,” so allowing people with guns makes her feel that her safety is compromised. (*Id.*, ¶10.) Deborah Bunkley, another experienced poll worker, expects this election to be “trying” and says if she sees someone with a gun, she is going to be worried unless she knows them. (Defs Appx, Vol 2, p 376, ¶ 6.) Regina Johnson, who supervises poll workers, believes that an altercation over open carry could put her in harm’s way because it would be her responsibility to address it. (Defs Appx, Vol 2, p 384, ¶¶ 4, 6.) She recounts experiences where partisan challengers have confronted voters and “things get confrontational.” She believes that allowing open and carry in such an environment is “asking for trouble.” (*Id.*, ¶ 10.) She is also concerned about poll workers’ safety and voters’ safety “from a shooting or an accidental shooting.” (*Id.*, ¶ 9.)

Last but not least, firearms at the polls and at clerks’ offices also affects clerks. Chris Swope, Lansing’s elected City Clerk, has been overseeing elections for the City of Lansing and supervising numerous election officials since 2006. (Defs Appx, Vol 2, p 387, ¶¶ 2, 3.) He says he “has concerns over the presence of firearms at all of these election-related locations” and that his election workers have also expressed the same concerns to him during trainings and on other occasions. (*Id.*, ¶ 8.) “As election officials, we are trained to implement the election laws. My workers are not trained in the status of Michigan’s firearm laws and where people may or may

not open carry a firearm.” (*Id.*, ¶ 9.) He explains that because voters have different views and sensitivities to firearms, his workers have also expressed concern over the difficulty in determining when a person possessing a visible firearm may be intimidating other voters. (*Id.*, ¶11.) “This uncertainty,” he says, “can make it difficult for myself and my election workers to ensure that elections run securely and without unnecessary delays or disruption if we are having to address the presence of firearms at polling locations.” (*Id.* at Vol 2, p 388, ¶ 12.) He believes that the Secretary’s Directive helps address those concerns by uniformly prohibiting the open carry of firearms in all polling places, clerks’ offices, and counting boards. (*Id.*)

3. Two lawsuits are filed and the Court of Claims rules that the Directive is unlawful and enjoins its enforcement.

Plaintiff Robert Davis filed his complaint on October 22 in the Court of Claims, seeking a declaratory judgment that the Secretary’s October 16 Directive was not properly promulgated in accordance with the APA, and therefore that it is void and unenforceable. He also sought to enjoin the Secretary from enforcing the Directive. Finally, he sought a broad declaratory judgment that all written directives the Secretary issues to local clerks and election officials constitute rules that must be promulgated in accordance with the APA. Davis filed an emergency motion and brief for declaratory judgment. (Defs Appx, Vol 1, pp 11-28.)

Later that day, a second related lawsuit, *Lambert, et al v Benson, et al*, Case No. 20-000208, was filed in the same court, this time against Secretary Benson, Attorney General Dana Nessel, and Michigan State Police² Director Joe Gasper in their official capacities. The lawsuit also challenged the Secretary’s Directive, and Despite considerable discussion about the right to bear arms and the loss of First Amendment expression, raise only two claims: that the

² The Michigan State Police expresses no position on the merits of this case and is not involved in this appeal. But it stands ready to fully comply with this Court's decision.

Secretary's issuance of the directive was an *ultra vires* act (Count I); and that MCL 168.678 violates separation-of-powers principles (Count II) (*Id.*, pp 180-185.) Plaintiffs requested a preliminary and permanent injunction enjoining Defendants from engaging in any acts to promote or enforce the ban on Election Day; a declaratory judgment that the Directive is void and without lawful authorization; and money damages. (*Id.*, p 185, Prayer for Relief.) Plaintiffs also filed a motion for declaratory and emergency injunctive relief. (*Id.*, pp 214-216.)

On October 23, the Court of Claims entered an order consolidating the two cases and directing the State Defendants to respond to the motions filed in each case by 5 p.m. on October 26, 2020. (10/23/2020 Order.) In that order, the Court requested that the parties address the “impact, if any, of statutory provisions like MCL 28.425o and 750.234d” on the APA argument. On October 27, the Court of Claims held oral argument on both cases. That same afternoon, the court issued its opinion holding that, because the directive has the force and effect of law, is of general applicability, and covers a substantive matter, plaintiffs have established a substantial likelihood that the Directive had to be promulgated as a rule under the APA. (Defs Appx, Vol 3, p 557.) The Court also held that the Directive was law, as it appears to be partially inconsistent with state law. (*Id.*, p 558.) Because, although there does not appear to be an affirmative statutory provision “granting” the right to open carry a firearm, that issue “need not be decided” because if the Secretary wanted to place additional restrictions on where people can open carry a firearm beyond those currently contained in statute, she would have to have done so by complying with the APA. (*Id.*, pp 559-560.)

Defendants Secretary Benson and Attorney General Nessel timely appeal the Court's injunction and request expedited relief under MCR 7.205(F) of this time sensitive election case.

STANDARD OF REVIEW

This Court reviews for abuse of discretion the trial court's decision to grant or deny declaratory relief. *Shuler v Michigan Physicians Mut Liab Co*, 260 Mich App 492, 509 (2004), citing *Allstate Ins Co v Hayes*, 442 Mich 56, 75 (1993). The grant or denial of a preliminary injunction is within the sound discretion of the trial court, and this Court also reviews that decision for an abuse of that discretion. *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 612 (2012).

ARGUMENT

I. The Court of Claims erred in declaring the Secretary's Directive unlawful where it did not have to be promulgated as a rule and is in accordance with applicable law.

A. Issue Preservation

Defendants preserved this argument in their separate responses to both the emergency motion and brief in *Davis*, and the motion and brief for declaratory and emergency relief in *Lambert*.

B. Analysis

The requirements of the APA do not apply to the Directive at issue here. The Legislature has given the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued the instruction here in accordance with law. The Court of Claims erred.

1. The Legislature delegated the task of conducting elections in Michigan to the Secretary of State and gave her broad authority to instruct the election officials under her supervisory control.

The source of the Secretary's authority to temporarily prohibit open carry at certain locations on November 3, 2020 is found in MCL 168.31(1)(a). But to fully understand the Legislature's delegation of authority to the Secretary in that enabling statute, it is important to first understand her broad statutory and constitutional authority over elections.

Under the Michigan Constitution, the Legislature “shall enact laws to regulate the time, place and manner of all . . . elections[.]” Const 1963, art 2, § 4(2). Consistent with that mandate, the Legislature enacted the Michigan Election Law (“the Election Law”), MCL 168.1 *et seq.* And the Legislature delegated the task of conducting proper elections to the Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9.

Section 21 of the Election Law makes the Secretary the “chief election officer” and she “shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21. Further, under § 31, the Secretary “shall do all of the following”: “(a). . . *issue instructions* and promulgate rules . . . for the conduct of elections . . . in accordance with *the laws of this state*,” and “(b) [a]dvice and direct local election officials as to *the proper methods of conducting elections*.” MCL 168.31(1)(a)-(b) (emphasis added).

These sections provide the Secretary with broad authority to issue instructions for the proper conduct of elections and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See *Hare v Berrien Co Bd of Election Commr’s*, 373 Mich 526, 531 (1964) (local election board had “duty to follow” the Secretary of State’s “instructions” under MCL 168.31).

The Secretary’s authority under these sections extends to all local election officials and to the places in which they perform their duties on Election Day.

a. The Secretary has supervisory authority over polling places, absent voter counting board, and election inspectors.

The Secretary exercises supervisory control over polling places and absent voter (AV) counting boards. The Election Law defines an “election precinct” as “a *political subdivision*, the area of which is embraced in its entirety within the confines of a city, ward, township or village, and for which not more than 1 polling place is provided for all qualified and registered electors

residing therein[.]” MCL 168.654 (emphasis added). Polling places and AV counting boards are established within election precincts. Section 662 provides that each city and township “shall provide a suitable polling place in or for each precinct located in the city . . . or township for use at each election.” MCL 168.662(1). Similarly, in a jurisdiction using an AV counting board to process ballots, “that city or township shall establish an absent voter counting board for each election day precinct in that city or township.” MCL 168.765a(1). Thus, polling places and AV counting boards function within an election precinct under the Secretary’s supervision.

The Secretary also has ultimate supervisory authority over election inspectors.³ Election inspectors have supervisory authority over polling places and AV counting boards on Election Day. Section 678 provides that “[e]ach board of election inspectors shall possess full authority *to maintain peace, regularity and order* at its polling place, and *to enforce obedience to their lawful commands* during any . . . election[.]” MCL 168.678 (emphasis added). In turn, under § 21, the Secretary can direct election inspectors in the proper conduct of an election in their polling places and AV counting boards. And the Secretary’s authority to direct inspectors includes providing instructions on maintaining peace, regularity, and order at polling places. MCL 168.21, 168.31(1)(a)-(b). Such instructions provide the source for the “lawfulness” of any command given by an election inspector. In this way, the Secretary supervises and controls polling places and AV counting boards.

³ For Election Day, the city or township election commissioners must appoint at least three election inspectors to each election precinct or as many as are needed “for the efficient, speedy, and proper conduct of the election.” MCL 168.674(1). This is true for the AV counting boards in each precinct as well, and the inspectors appointed to AV counting boards have the same authority as inspectors at in-person voting precincts. MCL 168.765a(1), (4).

b. The Secretary has supervisory authority over clerk offices functioning as polling places on Election Day.

In November 2018, Michigan voters amended the Constitution to enshrine within its numerous voting rights through passage of Proposition No. 18-3. See Const 1963, art 2, § 4(1). One such opportunity was the right to register to vote beginning on the fourteenth day before the election and continuing through Election Day by applying in person before the clerk of the city or township in which the person resides. *Id.*, § 4(1)(f). See also MCL 168.497(2). Voters who register under this provision are “immediately eligible to receive a regular or absent voter ballot.” *Id.*, § 4(1)(f). After registering, a voter may either request an absent voter ballot from the clerk and vote it in the office, or vote in-person at the voter’s designated polling location, similar to voters who are voting in person at their polling locations. (See Ex W, Clerk Swope dec, ¶ 7, explaining that the clerks’ offices are functioning as polling places since voters can register and vote an absent voter ballot at the same time.)

As a result of this amendment, clerk offices function as polling places on Election Day. But clerks are not under the supervision of election inspectors; rather, city and township clerks are under the direct supervision and control of the Secretary.

c. The Secretary is authorized to issue instructions to curb disturbances and protect against voter intimidation.

The Secretary’s duty to ensure the proper conduct of elections is particularly true with respect to Election Day. Indeed, the Secretary has dedicated a whole chapter in the Election Officials’ Manual to “Election Day Issues.”⁴ Some of these instructions touch on safety and security issues. For example, the Secretary has provided guidance to officials regarding what to

⁴ See Election Officials’ Manual, Chapter 11, Election Day Issues, October 2020, available at https://www.michigan.gov/documents/sos/XI_Election_Day_Issues_266009_7.pdf.

do if a polling location must be evacuated or power outages occur.⁵ Other instructions address prohibited behavior in the polls, such as electioneering (including limitations and prohibitions on the display of certain articles of clothing) or certain use of electronic devices (including cameras, phones, and recording equipment).⁶ Another chapter of the Manual prohibits individuals from being in possession of or having access to cellular telephones or other devices while in an AV counting board.⁷ The Secretary's authority to issue instructions to promote safety and security on Election Day, including instructions to curb the potential for disturbances and voter intimidation, is clearly provided for by statute and by the Constitution.

The Secretary's authority to issue instructions to curb disturbances and voter intimidation is provided for by statute. See MCL 168.21, 168.31, 168.678. It is also plainly within the Secretary's authority to take note of conduct prohibited by law from occurring at an election, and to issue instructions directed at forestalling possible incidents to maintain peace and order. For example, a person shall not "make or excite any disturbance . . . at any election . . . where citizens are peaceably and lawfully assembled[.]" MCL 750.170. And a person shall not intimidate a voter "by means of . . . menace . . . either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state." MCL 168.932(1)(a).

Further, the Constitution permits, if not requires, the Secretary to curb voter disturbances and prevent voter intimidation. The U.S. Supreme Court has observed that states have an obligation to safeguard their citizens' constitutional right to vote. *Cf. Burdick v Takushi*, 504 US

⁵ *Id.*, p 4.

⁶ *Id.*, pp 26, 39-40.

⁷ See Election Officials' Manual, Chapter 8, Absent Voter Ballot Election Day Processing, October 2020, p. 3, available at https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf.

428, 433 (1992). Here, that obligation ultimately falls to the Secretary under §§ 21 and 31 of the Election Law and was underscored in 2018 when Michigan voters decided that all qualified electors “shall have” the “right . . . to vote a secret ballot in all elections,” art 2, § 4(1)(a), and, as described above, the right to same-day registration and voting, art 2, § 4(1)(f). The People provided that these rights are to be “liberally construed in favor of voters’ rights in order to effectuate its purposes.” Art 2, § 4(1). As the “chief election officer,” the Secretary has a duty to promote the right to vote now set forth in article 2, § 4(1) of the Constitution, and to ensure that all voters can exercise that right in a fair and equal manner under article 2, § 4(2).

The Michigan Court of Appeals recently confirmed this authority, observing that “[a]s chief elections officer, with constitutional authority to ‘perform duties prescribed by law,’ the Secretary of State ha[s] the inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established by Proposal 3[.]” *Davis v Sec’y of State*, ___ Mich App ___, (2020) (Docket No. 354622); slip op at 8 (citation omitted) (Defs Appx, Vol , p3 505).

Finally, all election laws must be construed in context with the People’s mandate that laws be enacted “to preserve the purity of elections.” Const 1963, art 2, § 4(2). “The phrase ‘purity of elections’ . . . 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 (2003) (cleaned up) (emphasis added.) See also *Wells v Kent County Bd of Election Commr’s*, 382 Mich 112, 118-121 (1969). The Legislature’s delegation of authority to the Secretary under §§ 21 and 31 includes a duty of the Secretary to ensure that all Michigan voters can exercise their rights under the law in a fair and equal manner.

Notably, the Secretary of State's authority to issue instructions to curb disturbances and voter intimidation has been upheld before. As noted above, the use of video cameras, cell phones, cameras, televisions and recording equipment in the polls is limited.⁸ A prior version of these instructions was challenged on First Amendment grounds by a voter who wished to use his cell phone to take a "ballot selfie" but was banned from doing so under the instructions in place at that time. See *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016). In staying the preliminary injunction issued in that case, the Sixth Circuit spoke favorably of the Secretary's instructions: "The State's policy advances several serious governmental interests: preserving the privacy of other voters, *avoiding delays and distractions at the polls*, preventing vote buying, and *preventing voter intimidation*." *Id.* at 400 (emphasis added). While the state later agreed to allow a limited opportunity to take a "ballot selfie," the case supports the Secretary's authority to issue instructions to forestall disturbances and intimidation at polling places, thereby ensuring that the right to vote remains paramount in these places.

The Secretary is thus well within her authority to issue instructions to curb disturbances, ensure evenhandedness across polling locations, and to protect *all* voters from intimidation on Election Day.

2. The Directive was not required to be promulgated as a rule under the APA.

Under the APA, "rule" is defined as "(1) 'an agency regulation, statement, standard, policy, ruling, or instruction of general applicability,' (2) 'that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency[.]' " *Am Fed'n of State, Co & Mun Employees, AFL-CIO v Dept of*

⁸ See Election Officials' Manual, Chapter 11, Election Day Issues, October 2020, pp 39-40, available at https://www.michigan.gov/documents/sos/XI_Election_Day_Issues_266009_7.pdf.

Mental Health, 452 Mich 1, 8 (1996), quoting MCL 24.207. Plaintiffs’ complaints fail as a matter of law because the Secretary’s Directive is specifically excluded from the definition of “rule” under the APA. This is because the Directive falls under the “permissive statutory power” exclusion under MCL 24.207(j).

a. The “permissive power” exception applies.

Michigan courts have applied the “permissive statutory power” exception, MCL 24.207(j), in situations where “explicit or implicit authorization for the actions in question have been found.” *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Servs*, 431 Mich 172, 187-188 (1988); see also *Hinderer v Dep’t of Social Servs*, 95 Mich App 716, 727 (1980) (“[I]f an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption.”).

As noted above, the statutory authorization for the Secretary’s Directive is found in § 31 of the Election Law, which requires the Secretary to “*issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections . . . in accordance with the laws of this state*” and “[a]dvise and *direct local election officials* as to the proper methods of conducting elections.” MCL 168.31(1)(a)-(b) (emphasis added). And there are three reasons why the Secretary’s statutory power falls within the APA’s permissive power: *first*, the enabling statute gives the Secretary discretion to either issue instructions *or* promulgate rules under the APA; *second*, the plain language of MCL 168.31 shows that the Secretary has a choice between these two vehicles; and *third*, the Legislature has provided permissive grants of authority when agencies may need to act quickly.

b. With respect to the conduct of elections, the Legislature has vested the Secretary with power that need not be tied to the APA.

The permissive power exception applies to statutory grants of authority that do not require an agency to be bound to the requirements of the APA. To understand why, a review of case law interpreting MCL 24.207(j) is helpful.

Michigan courts have repeatedly recognized that, when the permissive power exception applies, the agency need not proceed by APA rulemaking. For example, in *Michigan Trucking Ass'n v Mich Pub Serv Comm'n*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was “invalid because it [was] essentially a rule that was not properly promulgated pursuant to the rule-making procedures set forth in” the APA. 225 Mich App 424, 429 (1997). The statute, MCL 479.43, provided:⁹

The public service commission, in cooperation with the department of state police, will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article. [Emphasis added.]

This Court rejected plaintiffs’ argument, finding that the order was issued in “an exercise of permissive statutory power,” and was therefore “exempted from formal adoption and promulgation under the APA.” *Id.* at 430. The Court emphasized that the statute [MCL 479.43] “directly and explicitly authorize[d] the PSC to implement, either by rule or order,” the safety rating system. *Id.*

Similarly, in *Pyke v Department of Social Services*, the plaintiff challenged the department’s failure to promulgate an agency policy regarding eligibility of general assistance benefits. 182 Mich App 619, 622, 629 (1990).¹⁰ The statute at issue provided in relevant part:

⁹ MCL 479.43 was repealed by the Legislature in 2014 PA 493.

¹⁰ See also *Ann Arbor Transp Auth v Michigan Dep’t of Transp*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002, (Docket No. 232163)) (Defs Appx, Vol 1, pp 143-145) (reviewing a statute that “directly and explicitly authorize[d] defendant to define

“The state department *shall establish* eligibility and financial standards for all forms of general public relief and burial.” *Id.* at 629-630, citing MCL 400.24 (emphasis added).

The Court ultimately held that the challenged policy was “excepted from the rule-making requirements of the APA” under MCL 24.207(j) because it “contain[ed] direct, explicit legislative authorization for the state department to establish eligibility and financial standards for all forms of general public relief.” *Id.* at 631. In other words, “the eligibility of applicants . . . follow[ed] from the Legislature’s explicit grant of statutory power to establish such standards.” *Id.* The Court also noted that, unlike other statutes,¹¹ there was no provision in MCL 400.24 that “expressly require[d] that rules . . . [for the eligibility of general assistance benefits] be promulgated pursuant to the requirements of the APA.” *Id.* at 632.

A comparison of *Detroit Base Coalition* and *By Lo Oil* further illustrates this point. In *Detroit Base Coalition*, the Michigan Supreme Court found that a program bulletin attempting to implement a mandatory telephone hearing policy did not constitute an exercise of permissive statutory authority because “[t]he only relevant statutory provision *mandate[d]* that the department conduct hearings *pursuant to promulgated rules*.” 431 Mich at 188 (emphasis added). Conversely, in *By Lo Oil Co v Department of Treasury*, this Court addressed whether an administrative revenue bulletin should have been promulgated as a rule. The Court determined that the statute under which the agency acted “explicitly required [the agency] to ‘prescribe’ the invoice . . . and *did not mandate the department to do so pursuant to the procedural*

‘eligible operating expenses,’ ” but did not “expressly require defendant to promulgate the definition of eligible operating expenses before implementing it”).

¹¹ For example, the Court compared the statute at issue with MCL 400.9, which provides that “[p]ursuant to the . . . [APA], the director shall promulgate rules for the conduct of hearings within the state department.” *Pyke*, 182 Mich App at 631-632.

requirements of the APA,” thus the “permissive statutory power” exclusion applied. 267 Mich App 19, 47 (2005) (emphasis added).

The rule from these cases is straightforward. If an enabling statute requires an agency to promulgate rules under the APA, then the APA applies. But if an enabling statute grants an agency authority that is not tied to the APA, then MCL 24.207(j) relieves the agency from the APA’s rule promulgating procedures. Here, in the enabling statute, MCL 168.31(1)(a)-(b), the Legislature provided an option for the Secretary. And because the Legislature did not link the Secretary’s authority to issue instructions and advise local election officials to the APA, the Directive was not subject to the APA’s rulemaking procedures.

c. MCL 168.31’s plain language underscores that the Secretary was not restricted to rulemaking.

It is also plain from § 31’s language that with respect to the conduct of elections, the Secretary is not restricted to the requirements of the APA. Like the statutes in *Michigan Trucking*, *Pyke*, and *By Lo*, the enabling statute for the Secretary of State provides permissive statutory power: “The secretary of state shall . . . *issue instructions and promulgate rules pursuant to the [APA]* . . . for the conduct of elections[.]” MCL 168.31(1)(a) (emphasis added).

While the use of “shall” connotes mandatory action, the statutory language then contemplates two different acts that the Secretary “shall do”—either (1) issue instructions, or (2) promulgate rules. Notably, the verbs have meaning: the Legislature did not require that the Secretary “issue rules” or “promulgate instructions.” If the Legislature had intended the Secretary promulgate instructions, it would have written the statute differently. Thus, unlike *Detroit Base Coalition*, 431 Mich at 188, the statute does not mandate that the Secretary promulgate rules for the conduct of elections. Rather, the Secretary, in her discretion, can *either* issue instructions *or* promulgate rules. MCL 168.31(1)(a). Here, the Secretary issued instructions—the Directive.

The question in this case closely parallels that in *Michigan Trucking*, and this Court should follow that decision in reversing the decision below and upholding the directive. First, recall the language of the statute authorizing agency action in *Michigan Trucking*: “The public service commission, in cooperation with the department of state police, will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article.” 1993 PA 352, eff. Jan. 13, 1994 (formerly codified at MCL 479.43, repealed 2014 PA 493, eff. Apr. 1, 2015) (emphasis added). And here, the Secretary relies on MCL 168.31(1)(a), which requires the Secretary to “*issue instructions and promulgate rules* pursuant to the [APA.]”

The Legislature meant what it said in passing § 31 when it authorized the Secretary to take action through two different means: instructions and rules. And just as the public service commission in *Michigan Trucking* was not required to go through APA procedures when it chose to issue an order instead of making a rule, the Secretary here was not required to go through APA procedures when she chose to issue an instruction instead of making a rule.

Any attempt to distinguish *Michigan Trucking* because the agency action at issue was significant or weighty or implicates the substantial rights of members of the public is also misplaced. In that case, this Court upheld a safety rating system that motor carriers would be required to abide by or face negative consequences, and this Court recognized that “it is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers” 225 Mich App at 430.

Another plain-language point is apparent: if the Court were to interpret § 31(a) of the Election Law as requiring the Directive to be promulgated as a rule, it would also render nugatory the word “instruction,” see, e.g., *Hanay v Dep’t of Transp*, 497 Mich 45, 57

(2014) (explaining that courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.”). The plain language of § 31 plainly contemplates that both “issuing instructions” and “promulgating rules” are separate functions that the Secretary “shall do.”¹² Accepting the plaintiffs’ arguments would mean reading the Legislature’s chosen language—“issue instructions and promulgate rules”—to have the *identical* meaning as if the Legislature had simply said “promulgate rules.” When the Legislature granted the Secretary the authority to issue instructions, we must presume, and the court below should have presumed, that the Legislature intended to grant her some authority beyond the authority to promulgate rules.¹³ Instead, the court below effectively read “issue instructions” out of the statute and held that the Secretary only has the power to make rules.

The error in the Court of Claims’ interpretation is only highlighted by the fact that § 31(1)(a) is “[s]ubject to subsection (2)[.]” MCL 168.31(1)(a). Specifically, subsection 31(2) *requires* the secretary to promulgate rules under the APA in certain enumerated areas—namely “establishing uniform standards for state and local nominating, recall, and ballot question petition signatures.” MCL 168.31(2). The fact that the Secretary *must* promulgate rules in certain areas, and that the conduct of elections is not specifically mentioned as one of those areas, shows that she may exercise discretion as to whether to issue instructions or promulgate

¹² The statute’s use of the word “and” does not require a different result. See, e.g., *Aikens v State Dep’t of Conservation*, 387 Mich 495, 500 (1972) (internal quotations and citation omitted) (explaining that the “strict meaning [of the words “and” and “or”] is more readily departed from than that of other words, and [the words can be] read in place of the other in deference to the meaning of the context”).

¹³ The Legislature’s intent to give the separate power to instruct is demonstrated by the language in section 795a of the Election Law, which provides that the Secretary “shall *instruct* local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a *and the rules promulgated* pursuant to sections 794 to 799a.” MCL 168.795a(8) (emphasis added).

rules with respect to the conduct of elections. Section 31(2)'s explicit requirement that the Secretary must promulgate rules under *certain* circumstances makes no sense if § 31(1)(a) is misread to require the Secretary to promulgate rules under *any* circumstances. It does make sense, however, if the Legislature recognized that, in § 31(1)(a), it was granting the Secretary two different mechanisms of action, but then in § 31(2), decided to exclude one of those mechanisms in certain areas. For these reasons, a ruling in Plaintiffs' favor would leave the term "instructions" as found in MCL 168.31(1)(a) "without any practical or effective meaning." See, e.g., *People v Cunningham*, 496 Mich 145, 156 (2014).¹⁴

d. The decision below provides no support for its rule that the Legislature may only give agencies power to act outside the APA when that grant is specific rather than general.

The Court of Claims found a distinction between the cases cited by the Secretary (*Detroit Base Coalition*, *Michigan Trucking*, and *By Lo*) by pointing out that in those cases the Legislature granted the agency authority to do a single specific action outside the strictures of the APA, while § 31(1)(a) gives the Secretary broad authority to issue instructions "for the conduct of elections and registrations in accordance with the laws of this state." But the court cited no authority to support the holding that this distinction is significant, or that the Legislature lacks the power to give agencies broad discretion to act. The Legislature has that power: it provided 17 other exceptions in § 7(a) through (i) and (k) through (r), not all of which are as specific as the examples in the cases the court below considered. Where the Legislature was able to provide broad exemptions from APA strictures in the rest of the exceptions in § 7, there is no reason to hold that the Legislature could not also grant a broad exemption in § 7(j).

¹⁴ Additionally, a contrary interpretation would raise questions as to what the Secretary can do when "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections" under § 31(1)(b).

The court below also clearly erred in declaring that the exception asserted by the Secretary was so broad as to swallow the rule, such that the Secretary “would *never* have to issue APA promulgated rules for *any* election related matters.” (Defs Appx, Vol 3, p 561.) To the contrary, and per the Legislature’s explicit command, the Secretary *must* promulgate rules “establishing uniform standards for state and local nominating, recall, and ballot question petition signatures.” MCL 168.31(2). And in MCL 168.794c, the Legislature specified that the Secretary must promulgate rules under the APA “to implement the provisions of [MCL 168.]794 to 799a,” which relate to voting machines. And again in MCL 168.797b, the Legislature required the Secretary to “promulgate rules pursuant to the [APA] governing the tabulation of ballots, certification of results, delivery of ballots and certified results, and sealing of devices and ballot boxes after the polls are closed.” Evidently, the Legislature knows how to require the Secretary to comply with the APA where it wishes to do so. And because it knows how to do so, the Court of Claim’s conclusion that the power claimed by the Secretary under the exception “swallows the rule” is simply mistaken. By specifying circumstances in which the Secretary could not exercise power outside the APA, which do not include the circumstances in this case, the Legislature’s broader grant of authority to the Secretary to act outside the APA applies in this case.

Further, the Court of Claims’ logic *itself* proves too much—though that court mistakenly held that the Secretary’s argument would allow the exception to swallow the rule, under the holding below, the rule swallows the exception. The court below was troubled by its mistaken belief that, under the Secretary’s argument, she could always act outside the APA, but failed to consider that, under the holding below, the Secretary could *never* act outside the APA, in spite of the Legislature’s explicit grant of authority to act without promulgating rules.

e. Permissive statutory power provides agencies with necessary flexibility.

Ultimately, in enacting § 31, the Legislature recognized that the Secretary’s duties with respect to the conduct of elections require flexibility—which rulemaking does not typically allow—and thus expressly provided her the authority to “issue instructions.” Other statutory provisions that give agencies permissive statutory power to take action outside of the APA’s rulemaking requirements exist in areas that similarly require quick action.

For example, MCL 30.310 empowers the director of the Michigan State Police “*to issue orders and promulgate rules and regulations for the purpose of administration and preparation of a plan of civil defense for this state[.]*” (Emphasis added). This particular grant of permissive power makes sense considering that when providing for the civil defense of the state, an agency or officer may have to be able to act quickly without the deliberate procedures required in the APA. Similarly, MCL 141.1569 empowers the state financial authority to “*issue bulletins or promulgate rules as necessary to carry out the purposes of [the Local Financial Stability and Choice Act].*” (emphasis added). Given the possibility of a quickly fluctuating financial environment and the potential need for quick action to ensure financial stability, this grant of authority similarly makes sense. Accordingly, the Legislature provided these agencies with the ability to take prompt action when the circumstances required.

And again, the parallel with *Michigan Trucking* is significant. In that case, this Court understood that “subjecting the safety rating system to the formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute.” 225 Mich App at 430.

The Legislature, recognizing that virtually all aspects of an election are time sensitive and that the Secretary has roughly 1,600 clerks to supervise in the conducting of elections, likewise

provided the Secretary with flexibility when it enacted § 31 of the Election Law. In sum, rule promulgation was not required, and the Directive was lawfully issued.

3. The Directive is in accordance with law.

MCL 168.31(1)(a) requires that the Secretary's instructions are "in accordance with the laws of this state." Contrary to the lower court's opinion, the Secretary's directive easily satisfies this requirement.

In particular, the Directive, which prohibits the open carry of firearms in polling places and within 100 feet of the entrance of any polling place, is in accordance with the laws of this State for five reasons: (1) it does not deprive concealed pistol license holders (or "CPL holders") of any rights to concealed carry under the Firearms Act; (2) the Legislature has not created a right to open carry; (3) the Legislature did not preempt the Secretary from issuing instructions regulating the open carry firearms in polling places; (4) it is a "presumptively lawful regulatory measure" that does not violate the Second Amendment; and (5) it is consistent with both state and federal free speech protections.

a. The Directive does not deprive CPL holders of any rights to concealed carry under the Firearms Act.

Notwithstanding the lack of Second Amendment precedent conferring a right to bear arms outside of the home, there is a statutory right to do so in Michigan. But it is specifically a right to carry concealed. And a quick review of the Directive shows that it does not prohibit anything that the Firearms Act expressly permits.

The Firearms Act, MCL 28.421 *et seq*, regulates the concealed carrying of certain firearms. To this end, the Firearms Act, subject to the exceptions set forth in MCL 28.425o, provides that an individual with a license issued under the Act is authorized to (a) "[c]arry a pistol concealed on or about his or her person anywhere in this state" or (b) "[c]arry a pistol in a

vehicle, whether concealed or not concealed, anywhere in this state.” MCL 28.425c(3). And those exceptions set forth in MCL 28.425o prohibit the carrying of concealed weapons in schools or on school property, in childcare centers, in sports arenas or stadiums, in bars, in places of worship, in hospitals, in large entertainment facilities, and in certain areas within institutions of higher education. See MCL 28.425o(1). But apart from MCL 28.425c(3)(b) (emphasis added), which authorizes a license-holder to “[c]arry a pistol *in a vehicle, whether concealed or not concealed*,” the Firearms Act does not specifically authorize the open carrying of firearms.

Critically, the plain language of the Directive does not touch on the statutory right of concealed carry—it prohibits only open carry. Thus, the Directive has no impact on, and is fully consistent with, the rights of licensed owners of firearms who wish to exercise concealed-carry rights according to the terms of their licenses and the Firearms Act.

b. The Legislature has not created a statutory right to open carry.

The lower court’s error with respect to the supposed right to open carry is readily apparent. Specifically, in its opinion and order, the lower court concluded that

[i]f the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places *where the Legislature*, our policy-making branch of government, *has declared [firearms] can be carried.*” [Defs Appx, Vol 3, p 563 (emphasis added).]

Respectfully, the court is wrong—the Legislature has not so declared.

Contrary to the lower court’s conclusion, the Legislature has not *authorized* the open carry of firearms. Instead, Michigan’s Penal Code *criminalizes* open carry in certain sensitive areas. For example, MCL 750.234d provides that a “person shall not possess a firearm on the premises” of a bank, “church or other house of religious worship,” “court,” theatre, sports arena, day care, hospital, or bar. In addition, MCL 750.237a(1)-(4) criminalizes the possession of any firearm in a “school” or on “school property.” Both laws exempt a person who has express

permission from the owner or an agent of the owner of the premises or the school principal or the school board, to possess a firearm on the premises. MCL 750.234d(2)(d), 750.237a(5)(e).¹⁵

Critically, while the Michigan Penal Code does criminalize open carry if it occurs in certain enumerated premises such as banks, places of worship, courts, and theatres, MCL 750.234d,¹⁶ and in “weapon free school zone[s]” such as schools and school transport vehicles, MCL 750.237a(1), the Michigan Legislature’s silence on polling places (and presumably everywhere else not named in § 234d) does not confer an affirmative statutory right to individuals to open carry firearms in all places not named. To the contrary, the fact that the Legislature has created the statutory right to open carry *in a vehicle*, see MCL 28.425c(3)(b), but has not done so in other areas shows that when the Legislature wishes to confer a statutory right to open carry, it knows how to do so.

What is more, Michigan law generally rejects the creation of statutory rights by negative implication. Indeed, in other contexts, courts have rejected analogous arguments that the Legislature, by forbidding certain conduct, created a positive statutory right to engage in similar conduct not forbidden under the statute. See *Miller v Fabius Tp Bd, St Joseph Co*, 366 Mich 250, 256-257 (1962) (upholding a challenged ordinance because the municipality had not forbidden “what the legislature has *expressly* licensed, authorized, or required”); *City of Detroit v Qualls*, 434 Mich 340, 362-363 (1990) (upholding a city ordinance relating to the storage of fireworks that was stricter than the state statute on the same subject, and “reject[ing] the rationale employed by the dissent that that which the Legislature does not prohibit, it impliedly permits”);

¹⁵ There are other exemptions for hired security and peace officers. See MCL 750.234d(2), 750.237a(5).

¹⁶ This section of the penal code expressly exempts individuals with licenses issued under the Firearms Act. MCL 750.234d(2)(c).

Rental Property Owners Ass’n of Kent Co v City of Grand Rapids, 455 Mich 246, 261 (1997) (declining to strike down a city nuisance abatement ordinance that provided different and greater provisions for nuisance abatement than those provided in the state nuisance abatement statute). And in this context, see the nonbinding but persuasive and compelling concurrence in *Michigan Gun Owners, Inc. v Ann Arbor Public Schools*, 502 Mich 695, 711-722 (2018) (Viviano, J., & Bernstein, J., concurring) (indicating that they would have rejected an argument from the plaintiffs that the Legislature in banning open carry in some circumstances is creating a right to it in other circumstances.) See also 2019-2020, OAG No. 7311, issued May 11, 2020 (where the Attorney General discussed open carry as “a concept” that “does not provide the unfettered right to bring firearms into any public space”).

Simply put, as the Michigan Supreme Court has recognized, a “legislature legislates by legislating, not by doing nothing, not by keeping silent.” *McCahan v Brennan*, 492 Mich 730, 749 (2012) (quotation marks and citation omitted). And with respect to a right to open carry, the Legislature has not created it generally. The Legislature’s inaction is significant. See, e.g., *Zivotofsky ex rel. Zivotofsky v Kerry*, 576 US 1, 10 (2015) (explaining that “in absence of either a [legislative] grant or denial of authority,” legislative inaction may “invite the exercise of executive power”).

Ultimately, the Secretary’s Directive does not infringe any statutory right to open carry because it does not forbid the open carrying of firearms at any location where the Legislature has said that open carry is allowed.¹⁷ And for this reason, the Directive is consistent with the laws of this State.

¹⁷ As noted above, the Directive specifically recognizes the statutory right to open carry in a vehicle, even within 100 feet of a polling place. (Defs Appx, Vol 2, p 313.)

c. The Legislature has not preempted the Secretary from issuing instructions regulating the open carry of firearms at polling places.

In *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, the Michigan Supreme Court determined that school districts were not expressly preempted from adopting firearms policies because they were not included in the list of local governmental units that were barred from doing so. 502 Mich at 704. The Court further determined that implied preemption did not preclude districts from adopting policies because the Legislature's incomplete listing of local governments demonstrated that the Legislature did not intend to occupy the field of firearms regulation. *Id.* at 708. See also *Wade v Univ of Michigan*, 320 Mich App 1, 15-22 (2017) (holding that university's ordinance prohibiting firearms was not preempted). Accordingly, if not preempted by the Legislature, the school districts' firearms policies would apply to prevent individuals from carrying firearms on school property.¹⁸

The same is true here. Under the reasoning in *Michigan Gun Owners, Inc*, the Secretary is not precluded from issuing an instruction regulating the open carry of firearms, so long as she has the authority to do so. And, as explained above—she does. The Secretary possesses both statutory and constitutional authority to issue instructions to prevent disturbances and voter intimidation at the places where an election is held.

d. The Directive is a presumptively lawful regulatory measure that does not violate the Second Amendment.

The U.S. Supreme Court has explained that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,”

¹⁸ To this end, as property owners, a school district with a policy prohibiting the carrying of firearms on school grounds could enforce the policy through criminal trespass laws. See, e.g., *Adams v Cleveland-Cliffs Iron Co.*, 237 Mich App 51, 58-59 (1999) (explaining that “the possessory right to real property includes the right to exclude others from one’s property, and a violation of that right gives rise to an action for trespass”).

D.C. v Heller, 554 US 570, 626 (2008)—that is, it is “not unlimited,” *id.* at 595; accord *People v Deroche*, 299 Mich App 301, 306 (2013). And it has described “laws forbidding the carrying of firearms in *sensitive places*” as “presumptively lawful regulatory measures[.]” *Heller*, 554 US at 626–627 n 26 (emphasis added).

Critically for this case, neither the Supreme Court, the Sixth Circuit, nor our state courts have recognized an unrestricted constitutional right to open carry outside of one’s home. See, e.g., *Kampf v Kampf*, 237 Mich App 377, 383 (1999) (“[T]he Michigan Constitution does not protect the right to bear arms in the context of sport or recreation.”); *Tyler v Hillsdale Cty Sheriff’s Dept*, 837 F3d 678, 690 (CA 6, 2016) (en banc) (noting that although “[t]he Supreme Court has not fleshed out the extent of the right protected by the Second Amendment,” it has nevertheless “recognized the government’s power to restrict the ‘carrying of firearms in sensitive places[.]’”), quoting *Heller*, 554 US at 626; *Chesney v City of Jackson*, 171 F Supp 3d 605, 622 (ED Mich, 2016) (recognizing that, at the time the lawsuit was filed, “the right to openly carry a firearm outside the home . . . was not clearly established”).

Even assuming the Second Amendment applies at all, the appropriate level of scrutiny where, as here, the right at issue is not the right to possess a handgun in one’s home for self-defense, would be intermediate scrutiny. See *Deroche*, 299 Mich App at 310; *Tyler*, 837 F3d at 690. Under that standard, “the government bears the burden of establishing that there is a reasonable fit between the asserted substantial or important governmental objective and the burden placed on the individual.” *Deroche*, 200 Mich App at 310.

i. The Secretary’s Directive serves an objective that is significant, substantial, and important—namely, preventing voter intimidation.

The Directive easily passes muster under intermediate scrutiny. Looking to the first part of the test, the Secretary has strong justifications for regulating the exercise of any Second

Amendment rights in and around polling places, AV counting boards and clerk offices on election day—namely, avoiding voter intimidation. The Supreme Court has recognized that this interest is a compelling one. See *Mansky*, 138 S Ct at 1886-1887 (acknowledging Minnesota’s interest in providing its voters “an island of calm in which [they] can peacefully contemplate their choices” and noting that “[t]he State may reasonably decide that the interior of the polling place should reflect that distinction”); *Burson*, 504 US at 208 (noting that the “interest in securing the right to vote freely and effectively” is “compelling” and that “[v]oter intimidation . . . is difficult to detect”).

In other words, the Secretary has a right and a duty to do everything within her power to protect the right to vote in Michigan, see *Davis v Secy of State*, ___ Mich App ___ (2020) (Docket No. 354622); slip op at 8-9, (Defs Appx, Vol 3, pp 505-506), including taking steps to maintain peaceful and orderly elections in all communities. And she is exercising her executive power to enforce MCL 168.932(a), the Legislature’s prohibition against voter intimidation, when she does so. See *People ex rel Dougherty v Holschuh*, 235 Mich 272, 275 (1926).)

ii. The fit between the prohibition and the Secretary’s Directive is more than reasonable.

The second part of the intermediate scrutiny test is met as well. The Secretary’s Directive is wholly proportional to the goal of protecting the vote and forestalling any voter intimidation, confusion, or disorder that would dissuade someone from voting or from freely casting their vote, or from performing their duties. See, e.g., *Tyler*, 837 F3d at 693 (explaining that the fit only needs to be a “reasonable” one; not a “perfect” one). This is true for several reasons.

First, the Directive is narrow. Indeed, it is significant for what it does *not* ban. It does not ban concealed carry on election day. It does not ban open carry on any day other than the

upcoming Election Day. And it does not ban peaceful open carry anywhere other than in the polling place, a clerk's office, or at AV ballot counting boards or the 100-foot buffer zone around these locations. It does not even ban peaceful open carry 101 feet or more from these areas. These limitations demonstrate that the ban is no broader than it needs to be to protect voting.

Second, the Directive is both temporary and responsive. It is in place only for this election. And as discussed above, it is in response to recent events in our state. While Michigan was earlier the site of mostly peaceful demonstrations, the disturbing news of the plan to kidnap the Governor and to potentially harm other public officials made it clear to the Secretary that there is a real potential that people will appear at the polls armed for reasons other than "as a means of pronouncing their viewpoint on the Second Amendment." (Defs Appx, Vol 1, p 179, ¶ 21.) See generally (Defs Appx, Vol 2, Trask Aff, pp 317-331.) Both the Secretary and the Attorney General were contacted by numerous clerks and local officials expressing concern over the presence of firearms at the polls.

It is not difficult to imagine that Michigan voters might find it difficult to enjoy "an island of calm" in which to "peacefully contemplate their choices," *Mansky*, 138 S Ct at 1887, if they are making those choices side-by-side a voter with a visible firearm. Nor is it beyond the pale to imagine that some voters might be completely deterred from even entering the polls if they see an armed individual within 100 feet of the polling place. While the presence of firearms might comfort some, that same presence instills discomfort and even fear in others. (See generally Defs Appx, Vol 2, pp 335-388.)

Third, the directive ensures the equal treatment of the different types of polling places throughout the state. In Michigan, polling places and AV counting boards are often located on property where the Legislature has prohibited open carry. As a general matter, polling places

must be located in “publicly owned or controlled buildings,” but may be located in buildings owned or operated by tax-exempt 501(c) organizations. See MCL 168.662(1) (location of polling places); MCL 168.765a(4) (location for holding absent voter counting board). Churches and other 501(c)(3) nonprofit charitable organizations are frequently used as polling places and to hold AV counting boards, in addition to schools and other publicly owned or controlled buildings such as city or township halls, community centers, fire stations, courts, etc.

Because schools and churches, and some government buildings such as courts remain protected from open carry, the Secretary’s instructions were necessary to address locations in other government buildings, with the goal of ensuring uniformity of treatment of voters and election workers at *all* polling locations, AV counting boards, and clerk offices. Since the law already generally prohibits the open carry of firearms on church or school property, and other private, nonprofits can exclude firearms from their properties, the Secretary’s instructions as to these locations simply confirm the status quo.¹⁹

Finally, the Secretary has done nothing different here than the Michigan Supreme Court did in issuing its Administrative Order 2001-3, without referencing a statutory source of authority, to prohibit firearms, including concealed carry, in the Michigan Supreme Court and its facilities, including the Hall of Justice.

In short, the Directive would easily survive a challenge based on the Second Amendment.

e. The Secretary’s Directive is defensible under both federal and state free-speech protections.

Plaintiffs assert that their open carry in and around the polls is an expression of their viewpoint on the Second Amendment. (Defs Appx, Vol 1, p 221.) They explain that some of

¹⁹ Additionally, the Directive’s geographic limitations are identical to those limitations set forth by the Legislature in MCL 168.744.

their open carriers affix their “I Voted” sticker on their holster at the polling place. They then take a picture of the holstered pistol and post it on social media as a form of expression. (Defs Appx, Vol 1, pp 221, 234.)

As an initial matter, Plaintiffs do not support their claimed desire to express themselves by declaration or otherwise. Moreover, Plaintiffs obviously could affix their “I Voted” sticker to their holster outside 100 feet of the polls, and then take photographs. So, even assuming that display of an “I Voted” sticker on one’s firearm is expression sufficient to invoke some degree of First Amendment protection, the Directive does not purport to prohibit such expression, or any other form of expression relating to Second Amendment issues. Rather, it only restricts the location at which such expression may take place. Accordingly, strict scrutiny need not be applied, and the Directive survives as a reasonable time, place, and manner restriction. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 20-21 (2007) (noting that not every election regulation must be evaluated under strict scrutiny).

Even if strict scrutiny did apply, the Directive would still survive. The U.S. Supreme Court has already ruled that the content-based prohibition of certain speech within a polling place and within the immediate 100 feet surrounding polling places can survive strict scrutiny as it is narrowly drawn to advance the compelling interests of preventing voter intimidation and election fraud. *Burson*, 504 US at 206; *see also id.* at 214-16 (Scalia, J., concurring in judgment) (concluding that strict scrutiny does not apply in such locations). It follows that if the regulation of electioneering speech in polling places and in the 100-foot perimeter surrounding polling places can survive strict scrutiny, the Secretary’s Directive prohibiting whatever “expression,” if any, that may arise from the open carry of firearms would likewise survive scrutiny. In fact, in light of the safety concerns that firearms present, and Michigan’s recent history with firearms at

the state Capitol and a plot to kidnap Michigan's Governor, the Secretary's Directive would have an easier time surviving strict scrutiny than the speech-related prohibitions at issue in *Burson*.

II. Plaintiffs have not met the grounds for injunctive relief.

Plaintiffs have not met any of the grounds for preliminary injunctive relief.²⁰ The court below erred in enjoining the Directive.

"To obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 648 (2012) (internal quotations omitted).

Under this four-part test, this Court must determine: "(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." *Id.* (internal quotations omitted).

A. Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

Based on the analysis in Argument I above, Plaintiffs do not have a substantial likelihood of success on the merits. See *Int'l Union v Michigan*, 211 Mich App 20, 25 (1995) (noting that plaintiffs must show a *substantial* likelihood of success on the merits).

²⁰ Defendants note that Plaintiffs' request is overbroad, as it extends beyond the reach of the Secretary's Directive, which bans open carry only in and around polling places, clerk offices, and AV counting boards. (Defs Appx, Vol 1, p 9, 185.) They also request a permanent injunction with the same scope, which should be denied for the reasons set forth in this brief. (Defs Appx, Vol 1, p 185.)

B. Plaintiffs have not demonstrated irreparable harm.

Plaintiffs identify their harm as the loss of the ability to open carry in and within 100 feet of the polling places, clerk offices, and AV counting boards on Election Day, and flowing from that, the right to use their firearms to express themselves with regard to voting. Given the lack of an affirmative right to open carry in Michigan—which the lower court below plainly acknowledges (Defs Appx, Vol 3, p 558) (“As far as the Court can discern, there is no affirmative statutory provision ‘granting’ the right to open carry a firearm”)—the court’s contrary statement later in the opinion is puzzling, (See Defs Appx, Vol 3, p 563) (“If the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, *has declared it can be carried.*”). This later statement is unsupported by law, inconsistent with its earlier pronouncement, and cannot support a finding of irreparable harm based simply on inability to open carry.

Plaintiffs also assert that their risk of harm is voter disenfranchisement on Election Day. (Defs Appx, Vo 1, 230-231.) But they need not choose between voting and open carry. Firearms are not a necessary component of voting, and Plaintiffs make no factual showing whatsoever regarding any claimed need to defend themselves at the polls. (*Id.* at 230) (referring to plaintiffs’ “fundamental right to self-protection”). Those who wish to open carry in other locations can simply leave their firearm in the car or at home, go into the polls to vote—where their need for self-defense is severely diminished by the fact that no other voters, election workers, or poll watchers or challengers can be openly armed—and come back out to their car or home and get their firearm. And if they wanted to express themselves through their weapon and the vehicle of voting, they can simply return to their car or home and display their “I Voted” sticker on their weapon, similar to their ability to electioneer or display a ballot selfie beyond the

100-foot zone. The temporary inability to do that during the act of voting or within the 100-foot buffer zone is not irreparable harm.

Accordingly, the harm to Plaintiffs, if any, would be minimal. They are still free to vote, not prohibited (at least by the challenged Directive) from openly carrying a firearm on any day other than this upcoming Election Day or at any locations other than polling places, clerk offices, and AV counting boards. And they can exercise their First Amendment rights with respect to firearms outside of 100-foot buffer zone.

For all these reasons, the Secretary's Directive was properly issued as an instruction and was not required to have been promulgated as a rule.

C. The balance of harms weighs heavily in the Secretary's favor.

The lower court's sparse public-interest analysis concluded that an injunction would cause "little harm to the public interest put forth by defendant, that being the right of voters to be free from intimidation or harassment from those carrying a firearm," because state statutes already prohibit concealed carry in certain places that are used as polling places, and because state laws already make voter intimidation a crime—with or without a firearm. (Defs Appx, Vol 3, pp 564-565.) But there are three serious omissions in this analysis—with disastrous results for voting rights.

First, precisely because state law prevents concealed carry only in some places, voters will be subject to laws that are not evenhanded—voters at some polling locations are likely to be less comfortable and more intimidated than voters at other locations. The Directive closes that gap by providing uniformity.

Second, although voter intimidation is already a crime, it requires the intent to intimidate. The court fails to acknowledge that even if an individual does not intend to intimidate, the mere

presence of their visible firearm can be discomforting and deterring to other voters. See *Burson*, US at 208 (noting that voter intimidation is difficult to detect).

Third, given that the court acknowledged that there appears to be no right to open carry in Michigan (Defs Appx, Vol 3, p 563), it is inconceivable that a non-right to open carry could outweigh the real possibility of voter discomfort, intimidation, and ultimately, possible deterrence, at this particular time in Michigan's history where gun-related events have instilled fear in many Michiganders. Every voter has the right to cast their vote in person, free from fear and discomfort. And the Secretary has a duty to protect that right by ensuring evenhandedness in voting, freedom from intimidation (which takes many forms, not just that of brandishing a weapon, and which can deter voters from even approaching the polls), and a space where *every* voter has an "island of calm," *Mansky*, 138 S Ct at 1887, free from the specter of fear that an armed individual will be casting a vote alongside them.

"*No right* is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Id.* (emphasis added). The right to vote is so important that the People of Michigan recently enshrined it in the Constitution via an initiative petition and explained that the constitutional guarantees "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." Const 1963, art 2, § 4(1)(a).²¹ In other words, the People of this State have decided that the holding of free and fair elections is uniquely important.

But recent events in Michigan potentially jeopardize a free and fair election as never before, because many voters have heightened reasonable fears of firearms and gun violence.

²¹ See also *Official Text of Proposal 18-3*, https://www.michigan.gov/documents/sos/Full_Text_-_PTV_635256_7.pdf.

Following the tumultuous plot to kidnap the Governor, both the Secretary and the Attorney General heard from a number of clerks, poll watchers, and voters expressing apprehension and discomfort. Plaintiffs make light of this apprehension, referring disparagingly to the declarants in this case during oral argument by stating, “This case isn’t about the fragile state of mind of 21 voters and what the Secretary envisions is the appropriate level of wokeness.”²² But voters’ concerns should be taken seriously, because they could have a serious impact on the election.

Many are apprehensive about seeing firearms at polls on November 3rd. For some, it is because they have a history of gun violence (Defs Appx, Vol 2, p 335, ¶¶ 6; Vol 2, p 338, ¶ 7; Vol 2, p 340, ¶¶ 5, 7.) For others, it is a special concern for safety because they have to bring their children to the polls in order to vote. (Defs Appx, Vol 2, p 342, ¶¶ 3-7; Vol 2, 343, ¶¶ 4-7.) Mouhana Hawili, for example, will need to bring her five children (two of them toddlers) to the polls with her when she votes. (Defs Appx, p 342, ¶¶ 3, 4.) But the plot to kidnap the Governor has made her concerned about open carry at or near her precinct, and she says if she saw a gun at the polls she would not get out of her car. (*Id.*, p 342, ¶¶ 3-7.) Afrah Almouswi likewise does not want to lose her right to vote but says that visibly armed people could scare her and her kids from waiting in line or going into her polling location. (Defs Appx, p 344, ¶ 4-7.) Some voters, such as Rabha Al Ghoul, who just had leg surgery, fear that age or disability would be an impediment to fleeing from an active shooter. (Vol 2, p 340, ¶¶ 8-9.)

And some are just plain afraid. (Defs Appx, Vol 2, p 346, ¶¶ 3-5; Vol 2, p 348, ¶¶ 3-5; Vol 2, p 350, ¶¶ 5-10.) Even some who are gun owners or getting concealed pistol permits have concerns about firearms at the polls. (Defs Appx, Vol 2, p 353, ¶¶ 4, 5; Vol 2, p 356, ¶¶ 5, 7.) Gary Reed, former executive director of the Michigan Republican Party and former elected Delta

²² See <https://www.youtube.com/watch?v=ktW6WKEXpts> at 26:55 to 27:02.

Township Trustee, is a gun owner, but he says he will be very intimidated if he sees someone walking around with a gun while he is at the polls On November 3rd as a poll worker. (Defs Appx, Vol 2, p 356, ¶¶ 3, 4, 5, 7.) Many others expressed heightened fears based on the current political climate and recent Michigan events involving firearms. (Defs Appx, Vol 2, p 359, ¶ 8; Vol 2, p 362, ¶¶ 8, 10; Vol. 2, p 350, ¶ 10; Vol 2, p 382, ¶¶ 8, 9.)

Poll challengers, poll watchers, poll workers, poll chairpersons, and clerks—the election machinery—have also expressed concern regarding the prospect of armed individuals at the polls. (Defs Appx, Vol 2, p 365, ¶¶ 5-8; Vol 2, p 369, ¶¶ 4-7; Vol 2, p 371, ¶¶ 8-0; Vol 2, p 374, ¶¶ 6-7; Vol 2, p 376, ¶ 6; Vol 2, p 379, ¶ 10; Vol 2, p 379, ¶¶ 4-9; Vol 2, p 387, ¶¶ 8-11.) Poll challenger Richard Kessler says his fear of being injured or killed by a firearm is heightened given how emotional this election season has been and because of the recent plot to kidnap the Governor. (Defs Appx, Vol 2, p 369, ¶ 7.) Poll watcher Julia Kelly says that if she were to arrive at a precinct and there was someone outside with a visible firearm, she would feel “very afraid” and probably would not get out of her car. (Defs Appx, Vol 2, p 374, ¶ 7. Regina Johnson, who supervises poll workers, believes that an altercation over open carry could put her in harm’s way because it would be her responsibility to address it. (Defs Appx, Vol 2, p 384, ¶¶ 4, 6.) Poll worker Paula Bowman expresses a novel concern related to the COVID-19 pandemic: that she will not be able to “see expressions—whether the person is smiling or is angry,” which could compromise her safety. (Defs Appx, Vol 2, p 371, ¶¶ 8, 10.)

Finally, Chris Swope, Lansing’s elected City Clerk, says many of his election workers have expressed concerns over the presence of firearms. (Defs Appx, Vol 2, p 387, ¶ 2, 3, 8.) He explains that because voters have different views and sensitivities to firearms, his workers are

unsure how to determine when a person possessing a visible firearm may be intimidating other voters. (*Id.*, p 387, ¶ 11.) “

As these declarations demonstrate, a preliminary injunction would harm the public’s interest in protecting the right to vote more than the absence of an injunction would affect Plaintiffs since there is no express right to open carry (Defs Appx, Vol 3, p 558); no self-defense justification where all are prohibited from open carry in the designated locations; and where there is no recognized right to engage in firearms-related expression within the 100-foot buffer zone of a polling place, AV counting board, or clerk’s office. For this reason alone, this Court should reverse the Court of Claims’ erroneous decision.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Court of Claims erred in enjoining enforcement of the Directive. This Court should reverse and vacate the injunction and give its opinion immediate effect under MCR 7.215(F)(2).

Respectfully submitted,

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Dated: October 28, 2020

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

THOMAS LAMBERT, an individual;
MICHIGAN OPEN CARRY, INC.,
a Michigan not-for-profit corporation;
MICHIGAN GUN OWNERS,
a Michigan not-for-profit corporation; and,
**MICHIGAN COALITION FOR
RESPONSIBLE GUN OWNERS**,
a Michigan not-for-profit corporation

Plaintiffs,

v.

JOYCELYN BENSON, in her
official capacity as Michigan Secretary of State
DANA NESSEL, in her official capacity
as Michigan Attorney General; and,
COL JOE GASPER,
in his official capacity as Director of the
Michigan State Police

Defendants.

Case No. _____

Honorable: _____

**VERIFIED COMPLAINT FOR
DECLARATORY AND EMERGENCY
INJUNCTIVE RELIEF**

**There is no other pending or resolved civil action
arising out of the transaction or occurrence alleged in
the complaint (MCR 1.109(D)(2)(a))**

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_____ /

**VERIFIED COMPLAINT FOR DECLARATORY
AND EMERGENCY INJUNCTIVE RELIEF**

Plaintiffs Thomas Lambert; Michigan Open Carry, Inc.; Michigan Gun Owners; Michigan Coalition for Responsible Gun Owners (collectively “Plaintiffs”), through counsel, bring this Complaint for Declaratory and Emergency Injunctive Relief against Defendants Joycelyn Benson, in her official capacity as Michigan Secretary of State; Dana Nessel, in her official capacity as Michigan Attorney General; and, Col Joe Gasper, in his official capacity as Director of the Michigan State Police (collectively, “Defendants”) and state as follows:

INTRODUCTION

1. Michigan has a comprehensive scheme of firearm regulation. There are restrictions on the types of firearms that may be possessed; restrictions on where and under what conditions they may be transported and possessed; and, restrictions on the people who may carry them. The interplay between some statutes make openly-carried firearms the only available option for some of those wishing to carry a firearm for self-protection. Michigan statutes permit the carry of firearms in locations that serve as polling locations on Election Day.

2. Citing a concern that all Michigan citizens should freely exercise their fundamental right to vote without fear of threats, intimidation or harassment, Defendant Secretary of State, Joycelyn Benson issued a three-page public pronouncement on October 16, 2020, banning the possession of firearms carried in certain ways and in certain locations on Election Day, November 3, 2020. (See **Exhibit 1**)¹. The effect of the pronouncement directly conflicts with Michigan’s statutory scheme; makes an unsupported correlation between mere possession of a firearm and voter intimidation; and, is conjured without any legal basis or authorization under Michigan law. The Secretary of State has identified her pronouncement as a “regulation”.

¹ See also at https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf

3. In a memorandum issued the same day as the Secretary of State's pronouncement, Defendant Attorney General Dana Nessel has signaled her intention to enforce what she identified as the Secretary of State's "directive". (See **EXHIBIT 2**) In a The Detroit News article published October 19, 2020, the Director of Michigan Association of Chiefs of Police is quoted as saying that the open carry ban at polling places is not based in law and that there's nothing in the law that gives police the authority to enforce the Secretary of State's edict. But, the Wayne County Sheriff has come to the opposite conclusion and says in the same article that people found to be in violation of the directive "will be asked to leave" and "if you refuse to leave, then you will be arrested". (See **EXHIBIT 3**)²

4. The Secretary of State's pronouncement has created a Hobson's choice for those wishing to exercise both their 2nd Amendment right to self-protection and their fundamental right to vote. Under the pronouncement and associated threat of arrest, one must choose one right or the other, but not both. If one wishes to vote, one must surrender their 2nd Amendment and Mich. Const. 1963, Art. I, § 6 rights. If one wishes to exercise the right of self-protection, one must surrender their right to vote. The practical effect of the pronouncement is to disenfranchise 2nd Amendment and Mich. Const. 1963, Art. I, § 6-supporting voters.

5. Plaintiffs seek a judicial declaration that the Secretary of State's pronouncement, regulation, directive, or edict is an *ultra vires* act. Further, Plaintiffs seek a judicial declaration that the Secretary of State's pronouncement is in violation of Michigan law, an *ultra vires* act, and void. Plaintiffs also seek injunctive relief with immediate consideration thereof.

6. Plaintiffs seek a preliminary injunction to prevent the Michigan Secretary of State, the Michigan Attorney General, and the Director of the Michigan State Police, their employees and agents,

² <https://www.detroitnews.com/story/news/politics/2020/10/19/michigan-police-chiefs-leader-open-carry-ban-polls-not-based-law/3713235001/>

law enforcement officers and prosecutors from engaging in any acts to promote or enforce any ban on the possession of firearms carried in any lawful manner on Election Day.

PARTIES

7. Plaintiff Thomas Lambert (hereafter “Lambert”) is a resident of the State of Michigan. Lambert desires to openly carry a lawfully-possessed pistol in a holster at and near his polling place on Election Day.

8. Plaintiff Michigan Open Carry, Inc. [hereinafter “MOC”] is a Michigan not-for-profit advocacy organization created under the Nonprofit Corporation Act of 1982 that supports the lawful carry of handguns. MOC provides written material for the use of its members, municipalities, and law enforcement that outlines the laws associated with open carrying of handguns, and offers seminars on the topic. MOC has a presence in Michigan, and represents the interests of its member(s) having an actual case or controversy and interest in this matter and in preventing reoccurrence of the same issue as raised in this complaint.

9. Plaintiff Michigan Gun Owners, Inc. [hereinafter “MGO”] is a Michigan nonprofit organization created under the Michigan Nonprofit Corporation Act (Act 162 of 1982). MGO’s goals include educating the public on safe responsible gun ownership and preserving and defending the right to keep and bear arms as guaranteed by the Bill of Rights and Article I, section 6 of Michigan’s Constitution. MGO has a presence in Michigan and represents the interests of its member(s) having a case or controversy and interests in preventing reoccurrence.

10. Plaintiff Michigan Coalition for Responsible Gun Owners. [hereinafter “MCRGO”] is a Michigan nonprofit organization created under the Michigan Nonprofit Corporation Act (Act 162 of 1982). MCRGO’s goals include promoting the responsible, legal ownership and usage of firearms through education and legislative action; seeking civil betterments and social improvements by

promoting sportsmanship and hunter safety education; and, protecting and defending the right of our citizens to own, keep and bear arms as guaranteed by Article I, Section 6 of the Michigan Constitution and the Second amendment to the U.S. Constitution. MCRGO has a presence in Michigan and represents the interests of its member(s) having a case or controversy and interests in preventing reoccurrence.

11. Defendant Joycelyn Benson is the Secretary of State of the State of Michigan, an office created under Mich. Const. 1963 Art. V, § 3. Plaintiffs sue her in her official capacity only.

12. Defendant Dana Nessel is the Attorney General of the State of Michigan, an office created under Mich. Const. 1963 Art. V, § 3. Plaintiffs sue her in her official capacity only.

13. Defendant Col. Joe Gasper is the Director of the Michigan State Police. Plaintiffs sue him in his official capacity only.

JURISDICTION

14. MCL 600.6419 establishes exclusive jurisdiction over statutory and constitutional claims for equitable relief in the Court of Claims.

15. Plaintiffs' claims arise out of the rights granted under Mich. Const. 1963, Art. I, § 6, and MCL 24.201 et.seq.

16. Although this Complaint involves claims and issues surrounding Election Day on November 3, 2020, it also arises out of claims and issues that are of public significance and are likely to recur in the future and yet evade judicial review.

17. This Court has jurisdiction pursuant to MCR 2.605(A).

18. An actual and justiciable controversy exists between the parties.

19. A present adjudication of the controversy is necessary to guide the Plaintiffs' future conduct and preserve legal rights.

20. Declaratory relief will avoid a multiplicity of actions at law and will avoid potential conflicts between the parties.

FACTS

21. Plaintiffs in this case include individuals and firearm rights organizations that represent many thousands of members who choose to openly carry firearms into polling places on Election Day as a means of pronouncing their viewpoint on the Second Amendment. Indeed, Plaintiff Michigan Open Carry, Inc. was incorporated with a stated mission to educate the public and all law enforcement agencies on the right to open carry a firearm and to promote its practice.³ This was not a popular viewpoint in this state when Michigan Open Carry, Inc. was incorporated in 2009. It is also a common practice for open carriers to vote and affix an “I Voted” sticker on their holster at the polling place. The open carrier then takes a picture of their stickered holstered pistol and posts the pictures on social media as a form of political expression and viewpoint-based speech. (See **Exhibit 4**)⁴

22. On October 16, 2020, seventeen days before the general election, Michigan’s Secretary of State, Joycelyn Benson, issued a three-page public pronouncement titled “Open Carry of Firearms at Polling Places on Election Day Prohibited” (Exhibit 1). The pronouncement declares *ipse dixit*, that “[t]he presence of firearms at the polling place, clerk’s office(s), or absent voter counting board may cause disruption, fear, or intimidation for voters, election workers, and others present”⁵ and that “[t]he open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located”. Also banned are firearms in clerk’s offices, spaces occupied by voter counting boards and hallways used to gain entry to polls. The pronouncement orders “[e]lection inspectors must post signage providing notice of this

³ <https://miopencarry.org/about>

⁴ Also see <https://www.facebook.com/groups/MichiganOpenCarry/permalink/2028110873893519/>; <https://www.facebook.com/MichiganOpenCarry/posts/10156271059711234>; <https://www.facebook.com/MichiganOpenCarry/posts/10153506407146234>; and,

regulation inside the room containing the polling place and at the building entrance. Notice may also be posted at 100 feet at the discretion of the local clerk.”⁶

23. Defendant Attorney General Dana Nessel has pledged to support enforcement of the firearm ban and contemporaneously issued a memorandum to the Michigan State Police, Michigan Association of Police Chiefs, Michigan Sheriffs Association and Prosecuting Attorneys Association of Michigan acknowledging that “[t]he Secretary of State has issued a directive under the authority granted her by MCL 168.21 and MCL 168.31, that prohibits the open carry of firearms inside a polling location, a clerk’s office, or an absent voter counting board, or within 100 feet of a polling location, a clerk’s office, or an absent voter counting board.” (See Exhibit 3)

24. The office of the Secretary of State is a constitutionally created elected office within the executive branch of state government.

25. Nowhere within Michigan’s constitution is the office of the Secretary of State empowered to issue directives regarding the time, place or manner of elections. Indeed, those powers are specifically limited to the Legislature as specified in Mich. Const. Art. II, § 4(2).

COUNT I

ULTRA VIRES ACT

26. Plaintiffs incorporate the preceding paragraphs by reference.

27. The office of the Secretary of State is a constitutionally created elected office within the executive branch of state government⁷

<https://www.facebook.com/MichiganOpenCarry/posts/10152888447136234> as exemplars

⁵ The pronouncement references no support for these suppositions.

⁶ Note that the Secretary of State, herself, has identified the firearm prohibition as a “regulation”.

⁷ Mich. Const. Art. V, §3

28. Michigan law provides, “The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.”⁸

29. The Secretary of State’s duties as to elections are explained MCL §168.31.

30. Michigan law requires that the Secretary of State “issue instructions and promulgate rules pursuant to the Administrative Procedures Act of 1969 (“APA”), 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.”⁹

31. Unless exempted, the APA applies to any “Agency” of the state.

32. This includes a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action.¹⁰

33. The Secretary of State is not exempted from compliance with the APA.

34. Under the APA, “Rule” “means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.”¹¹

35. An agency shall not proceed with the processing of a rule outlined in this chapter unless the Office of Regulatory Reinvention (“ORR”) has approved the request for rule-making.

36. The ORR is not required to approve a request for rule-making and shall do so only after it has indicated in its response to the request for rule-making submitted by an agency that there are appropriate and necessary policy and legal bases for approving the request for rule-making.¹²

⁸ MCL §168.21

⁹ MCL §168.31(1)(a)

¹⁰ MCL §24.203(2)

¹¹ MCL §24.207

¹² MCL §24.239(3)

37. An agency must publish a notice of public hearing on any proposed rule and may not do so until submitting a proposed rule to the committee and receiving a grant of approval by the committee.

38. That committee must then deliver a copy of the proposed rule to members of the standing committees of the senate and house of representatives that deal with the subject matter of the proposed rule.¹³

39. Before the adoption of a rule, an agency, or the office, shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments.

40. The notice must be given within the time prescribed by any applicable statute, or if none, in the manner prescribed in section 42 of the APA.¹⁴

41. If the Rule was adopted under emergency provisions of the APA, the Secretary of State did not comply with the filing requirements, the notice requirements, or the requirement for the governor's certificate concurring in the finding of emergency.

42. The issuance of the Secretary of State's October 16th pronouncement failed to comply with any of the statutory requirements of the APA.

43. The Secretary's pronouncement is not law and is an *ultra vires* act.

44. The Secretary's pronouncement does not override existing Michigan law.

45. The APA provides that the court "shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following: (a) in violation of the constitution or a statute. (b) in excess of the statutory authority or jurisdiction of the agency. (c) made upon unlawful procedure resulting in material prejudice to a party. (d) not supported by competent, material and substantial evidence on the whole record. (e) arbitrary,

¹³ MCL §24.239a. Notably, this statute requires the executive branch to involve the legislature in the rule-making process.

¹⁴ MCL §24.241

capricious or clearly an abuse or unwarranted exercise of discretion. (f) affected by other substantial and material error of law.”¹⁵

46. For the reasons herein, the pronouncement is an ultra vires act and void.

47. Even if void, the effect of the pronouncement has a chilling effect on the fundamental rights of open carriers and invites the court’s intervention.

48. If not void for lack of authority, the regulation or directive is a “Rule” under Michigan’s APA.

49. The Rule is issued without regard to any of the requirements of the APA and is, thus, void.

WHEREFORE, Plaintiffs respectfully request that this honorable court enter judgment in favor of Plaintiffs, issue an order declaring the October 16, 2020 pronouncement of Michigan’s Secretary of State, and any similar edict, regulation, directive and/or pronouncement void as a matter of law.

Plaintiffs also respectfully request that this honorable court to grant expedited relief and hearing on Plaintiffs’ request for the issuance of a preliminary injunction ordering the Michigan Secretary of State, the Michigan Attorney General, and the Director of the Michigan State Police, their employees and agents, law enforcement officers and prosecutors from engaging in any acts to promote or enforce any ban on the lawful possession and carry of firearms carried on Election Day. Plaintiffs also respectfully request such other relief as may be proper including such costs and fees authorized by law.

¹⁵ MCL §24.306(1)

COUNT II

CONSTITUTIONAL VIOLATION OF MICHIGAN'S SEPARATION OF POWERS

50. Plaintiffs incorporate the preceding paragraphs by reference.

51. Michigan's constitution places all powers to regulate the time, place and manner of an election, to preserve the purity of the election, or to guard against abuses of the elective franchise solely within the legislative branch.

52. MCL §168.678 states that: "Each board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any election."

53. As relied upon by the Secretary of State:

- i. This statute contains no limitation on such a power to "maintain peace".
- ii. Adoption of regulations of the type here challenged can be unilaterally exercised in perpetuity for every election until she decides a new or different regulation is required or desired.
- iii. Not even the words "reasonable" or "necessary," are present though neither of which could supply genuine guidance to the SOS as to how to exercise the delegated authority nor constrained her actions in any meaningful manner.
- iv. SOS's powers are of indefinite duration, and no standards govern the SOS's exercise of powers.

54. Accordingly, MCL §168.678 constituted an unlawful delegation of legislative power to the executive and was unconstitutional under Mich. Const. 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch.

WHEREFORE, Plaintiffs respectfully request that this honorable court enter judgment in favor of Plaintiffs, issue an order declaring the October 16, 2020 pronouncement of Michigan's Secretary of State, and any similar edicts, regulation, directive and/or pronouncement void as a matter of law. Plaintiffs also respectfully request that this honorable court to grant expedited relief and hearing on Plaintiffs' request for the issuance of a preliminary injunction ordering the Michigan Secretary of State, the Michigan Attorney General, and the Director of the Michigan State Police, their employees and agents, law enforcement officers and prosecutors from engaging in any acts to promote or enforce any ban on the lawful possession and carry of firearms carried on Election Day. Plaintiffs also respectfully request such other relief as may be proper including such costs and fees authorized by law.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request:

- (1) That this Court grant Plaintiffs' request for an emergency hearing on their request for a Preliminary Injunction; and, issue a Preliminary and Permanent Injunction restraining and enjoining Defendants, their agents, servants and employees, representatives and those people in active concert or participation with them, directly or indirectly, from engaging in any acts to promote or enforce any ban on the lawful possession and carry of firearms carried on Election Day.
- (2) That this Court issue its judgment declaring that the Secretary of State's pronouncement, edict, regulation and/or directive is void as a matter of law and without lawful authorization.
- (3) That after trial in this action, a permanent injunction be issued to the same effect as the preliminary injunction requested above;
- (4) That Plaintiffs be granted as relief money damages, including exemplary and/or punitive damages, lost profits, all other appropriate damages, as well as all interest, costs, and disbursements of this action, including reasonable attorneys' fees and such other relief as this Court may deem just and proper.

VERIFICATION

“I declare under the penalties of perjury that this Verified Complaint for Declaratory and Emergency Injunctive Relief has been examined by me and that its contents are true to the best of my information, knowledge and belief.”

/s/ Dean G. Greenblatt

/s/

Dated: October 22, 2020

Respectfully submitted,

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STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 16, 2020

Open Carry of Firearms at Polling Places on Election Day Prohibited

In Michigan, an individual's ability to carry a firearm depends on several factors, such as whether he or she is licensed to carry a concealed weapon or is exempt from licensure; the location; whether the weapon is concealed or openly carried; and other circumstances.

The presence of firearms at the polling place, clerk's office(s), or absent voter counting board may cause disruption, fear, or intimidation for voters, election workers, and others present. Absent clear standards, there is potential for confusion and uneven application of legal requirements for Michigan's 1,600 election officials, 30,000 election inspectors, 8 million registered voters, and thousands of challengers and poll watchers on Election Day.

As Michigan's chief election officer with supervisory control over local election officials in the performance of their duties, the Secretary of State issues the following directions to clarify that the open carry of firearms on Election Day in polling places, clerk's office(s), and absent voter counting boards is prohibited; to provide additional guidance to election workers if they encounter individuals with firearms at or near polling places, and to secure the full and free exercise of the right to vote. The Secretary of State is coordinating with the Attorney General and state and local law enforcement to ensure uniform enforcement of these requirements.

Within 100 feet of a polling place, clerk's office(s), or absent voter counting board

- **The open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located.** A person may leave a firearm inside a vehicle parked within 100 feet of the building when visiting these locations if otherwise permitted by law to possess the firearm within the vehicle.
- Concealed carry of a firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so.
- Election inspectors should contact law enforcement immediately if these prohibitions are violated. The prohibition on open carry does not apply to law enforcement officers acting in the course of their duties.

Outside 100 feet of a polling place, clerk's office(s), or absent voter counting board

- Outside of 100 feet of a polling place, if any person is acting in a way that would tend to intimidate, hinder or impede voters on the way to the polls, election inspectors should immediately contact law enforcement.

Signage and Contacting Law Enforcement

- Election inspectors must post signage providing notice of this regulation inside the room containing the polling place and at the building entrance. Notice may also be posted at 100 feet at the discretion of the local clerk.
- Clerks should contact local police departments and county sheriffs in advance of election day to establish points of contact for enforcing this or any other election day regulations.

Required signage:

NOTICE

THE OPEN CARRYING OF A FIREARM IS PROHIBITED IN A POLLING PLACE, INSIDE ANY HALLWAY USED BY VOTERS TO ENTER OR EXIT A POLLING PLACE, AND WITHIN 100 FEET OF AN ENTRANCE TO A BUILDING CONTAINING A POLLING PLACE ON ELECTION DAY. OUTSIDE OF 100 FEET, NO PERSON CAN ACT IN A WAY THAT WOULD TEND TO INTIMIDATE, HINDER OR IMPEDE VOTERS ON THEIR WAY TO THE POLLING PLACE. THESE PROHIBITIONS ALSO APPLY TO AN ELECTION CLERK'S OFFICE OR ABSENT VOTER COUNTING BOARD ON ELECTION DAY.

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

THOMAS LAMBERT, an individual;
MICHIGAN OPEN CARRY, INC.,
a Michigan not-for-profit corporation;
MICHIGAN GUN OWNERS,
a Michigan not-for-profit corporation; and,
**MICHIGAN COALITION FOR
RESPONSIBLE GUN OWNERS**,
a Michigan not-for-profit corporation

Court of Appeals No. 355266
Court of Claims No. 20-000208-MM

Plaintiffs,

v.

JOCELYN BENSON, in her
official capacity as Michigan Secretary of State
DANA NESSEL, in her official capacity
as Michigan Attorney General; and,
COL JOE GASPER,
in his official capacity as Director of the
Michigan State Police

Defendants.

ROBERT DAVIS,

Plaintiff,

v.

JOCELYN BENSON, in her official capacity
as the duly elected Michigan Secretary of State

Defendant.

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**APPELLEES' ANSWER TO
APPELLANTS' EMERGENCY APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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

PROOF OF SERVICE

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT	v
COUNTER-STATEMENT OF QUESTIONS INVOLVED.....	vi
CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED	vi
INTRODUCTION	1
STATEMENT OF FACTS	3
A. THE PARTIES.....	3
B. PROCEDURAL AND FACTUAL HISTORY	4
ARGUMENTS.....	5
I. THE PRONOUNCEMENT IS AN <i>ULTRA VIRES</i> ACT BECAUSE IT FAILED TO COMPLY WITH THE APA	5
A. STANDARD OF REVIEW	5
B. ISSUE PRESERVATION	6
C. DISCUSSION.....	6
1. The Pronouncement is a “rule” subject to the requirements of the APA.....	8
2. The “permissive power” exception does not apply to the Pronouncement	10
3. The Pronouncement is invalid for noncompliance with the requirements of the APA.	12
II. THE COURT OF CLAIMS DID NOT ABUSE ITS DISCRETION IN ORDERING THAT THE PRONOUNCEMENT BE ENJOINED	13
A. STANDARD OF REVIEW	13
B. ISSUE PRESERVATION	14
C. DISCUSSION.....	14
1. The Appellees have demonstrated a substantial likelihood of success on the merits.....	16
2. The Appellees have demonstrated irreparable harm.....	17
3. The balance of equity results in Appellee’s favor	21
III. APPELLANTS RAISE ISSUES BEYOND THE SCOPE OF APPEAL	22
REQUEST FOR RELIEF	23
APPENDIX DESIGNATION.....	following 23
PROOF OF SERVICE	following Appendix Designation

INDEX OF AUTHORITIES

Cases

<i>AFSCME v Dep't of Mental Health</i> , 452 Mich 1, 550 NW2d 190 (1996)	7
<i>Allstate Ins Co v Hayes</i> , 442 Mich 56, (1993)	12
<i>Buck v Thomas Cooley Law School</i> , 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006)	14
<i>Builders Ass'n v Detroit</i> , 295 Mich 272 (1940)	16, 19
<i>City of Detroit v Qualls</i> , 434 Mich. 340, (1990)	17
<i>Davis v City of Detroit Fin Review Team</i> , 296 Mich App 568, (2012)	12
<i>Delta County v Michigan Dep't of Nat. Res.</i> , 118 Mich App 458; 325 NW2d 455 (1982)	8
<i>Faircloth v Family Indep Agency</i> , 232 Mich App 391; 591 NW2d 314 (1998)	7
<i>Int'l Union v Michigan</i> , 211 Mich App 20; 535 NW2d 210 (1995)	14
<i>Jordan v Dep't of Corrections</i> , 165 Mich App 20; 418 NW2d 914 (1987)	8
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372, 388 (2006)	13
<i>Michigan Gun Owners, Inc. v Ann Arbor Public Schools</i> , 502 Mich 695	15, 18
<i>Miller v. Fabius Twp Bd</i> , 366 Mich 250 (1962)	16, 17
<i>National Amusement Co. v Johnson</i> , 270 Mich 613 (1935)	16, 19
<i>Nat'l Waterworks, Inc. v. Int'l Fidelity & Surety, Ltd.</i> , 275 Mich. App. 256 (2007)	13
<i>People v Babcock</i> , 469 Mich 247 (2003)	13
<i>Pharris v Secretary of State</i> , 117 Mich App 202; 323 NW2d 652 (1982)	12
<i>Pyke v Department of Social Services</i> , 182 Mich App 619 (1990)	10
<i>Rental Property Owners Ass'n of Kent Co v City of Grand Rapids</i> , 455 Mich. 246 (1997)	18
<i>Shuler v Michigan Physicians Mut Liab Co</i> , 260 Mich App 492 (2004)	12
<i>Slis v State of Michigan</i> , __ Mich App __, __; __ NW2d __ (2020)	14

Statutes

MCL 24.201 et.seq.	<i>passim</i>
MCL 24.207	6
MCL 24.207(j)	6, 10
MCL 24.243	12
MCL 24.245	12
MCL 28.425o(1)(e)	4
MCL 123.1101(b)	16
MCL 168.31	6, 11
MCL 168.31(1)(a)	6, 9, 10, 11
MCL 168.31(1)(b)	10
MCL 750.234d	8
MCL 750.234d(1)(b)	4, 19
MCL 750.234e	9
MCL 750.237a	8, 17
MCL123.1101(b)	16

Other Authorities

2002 OAG No. 7113	8
2020 OAG No. 7311	8
Michigan Judicial Institute, Page 1-19, Appeals & Opinions Benchbook - Second Ed.	13

JURISDICTIONAL STATEMENT

Appellees stipulate that this Court has jurisdiction to decide this emergency application for leave to appeal for the reasons stated in Appellants Secretary of State and Attorney General's Emergency Application for Leave to Appeal. (Appts' App. Lv. Apl., pg viii)

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether the Pronouncement is an *ultra vires* act for failure to comply with the requirements of the Administrative Procedures Act.

Trial Court's Answer:	Yes
Appellee's Answer:	Yes
Appellant's Answer:	No

II. Whether the Court of Claims abused its discretion in granting a preliminary injunction enjoining the Pronouncement.

Trial Court's Answer:	No
Appellee's Answer:	No
Appellant's Answer:	Yes

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Due to the extraordinary time restraint imposed upon Appellees to respond to Appellants' Appeal, Appellees rely upon and incorporate the list of constitutional provisions, statutes, and rules involved of Appellants by reference herein (Appts' Appl. Lv. Apl. pp x - xx).

INTRODUCTION

The rule of law should reign supreme in the State of Michigan. While emotions may rise and fall from election cycle to election cycle, the law of the land must stand until the People of the State of Michigan change those laws through the appropriate steps and observing proper checks and balances. Here, the Secretary of State, Jocelyn Benson, is attempting to sidestep proper checks and balances and disregard the will of the people on this most sacred day, Election Day. Secretary of State Jocelyn Benson not only lacks the legal authority to pronounce a directive that directly conflicts with Michigan law, but is also attempting to unilaterally change long-standing laws that are entrenched in tradition and legal precedent. Secretary Benson failed to follow procedures mandated under the Administrative Procedures Act (hereinafter, “APA”) thus removing the input of various voices from the process she now claims to want to protect. Should voters want changes regarding conditions at the polls, there is a procedure to allow all voices to be heard. Secretary Benson and others are instead using arguments that are grounded not on law but rather speculation, fear, and panic.

The Court of Claims correctly ruled that it is a legal question whether an agency policy is invalid because it was not promulgated as a rule under the APA, and that the plaintiffs were correct as a matter of law. However, Secretary Benson (et al), with Appellants Secretary of State Jocelyn Benson and Attorney General Dana Nessel’s Emergency Application for Leave to Appeal (Hereinafter “Application”) is still attempting to suppress the voters’ voices, and our systems of checks and balances, with a unilateral edict that makes her voice the only one that matters on this subject. In fact, at the time of this submission to the Court, the enjoined Pronouncement is still prominently displayed on Secretary Benson’s website.

Furthermore, Secretary Benson is now inserting arguments within the Appeal that were not raised by Appellees in the original Complaint, such as the First and Second Amendment of the

Constitution of the United States, and Article 1, Section 6 of the Michigan Constitution. This is clearly an effort order to distract attention from the procedural malfeasance that Secretary Benson has engaged in.

This case is about two issues only: First, whether an agency policy is invalid because it was not promulgated through the APA as required by statute. Second, whether Secretary Benson has violated the separation of powers required by the Michigan Constitution in attempting to usurp the police power in addition to performing the administrative functions of her office which were delegated to her by the legislature in Mich. Const. art II, § 4.

This appeal is about whether the lower court was correct and within the bounds of its discretion in issuing an injunction restraining the defendants from altering Michigan law unilaterally, and with short notice.

The Amicus Briefs that have come in from other Secretaries of State are not relevant to the issues before the Court because they are not grounded in Michigan Law, which is clear and undisputed. Should Secretary Benson desire a change in the way voting is done in this State, she should follow the procedures that Michigan law requires which are meant to ensure that checks and balances are honored and all the peoples' voices are heard when deciding a perennially contentious public policy issue.

Furthermore, the Appellants' own words at a press conference held on October 28, 2020, reveals they don't really believe that the Pronouncement is of vital importance, even if it were properly enacted and enforceable.¹ At approximately 21 minutes and 15 seconds into the cited recording, in response to a question regarding the Pronouncement that is the subject of this appeal, Attorney General Nessel states: "Irrespective of the outcome in that case, the fact is we know that the polls will be safe and secure... We are not expecting to have any problems at the polls. This was merely an additional precaution that the Secretary decided to take..." At approximately 26:50, she adds: "I don't foresee there being a problem

¹ <https://www.facebook.com/GovGretchenWhitmer/videos/410913286967609>

with us enforcing the law and really just making sure, of course, that everyone is safe. The important thing to remember is we have such broad-based laws on the books to protect voters, so these are laws that have been on the books for many, many years. You cannot threaten someone at the polls. You cannot harass someone. You cannot intimidate someone at the polls.” At approximately 33:57, Secretary of State Nessel admits: “Voter intimidation of any kind is illegal under State and Federal law.”

Essentially, Appellants refer to existing law regarding behavior to reassure voters that they will be safe even if the Pronouncement is ultimately struck down. We are pleased to learn that Appellants and Appellees apparently agree on this important issue, at least.

STATEMENT OF FACTS

A. THE PARTIES:

On October 16, 2020, seventeen days before the general election, Appellant Michigan’s Secretary of State, Joycelyn Benson, issued the Pronouncement titled “Open Carry of Firearms at Polling Places on Election Day Prohibited” (Defs Appx, Vol 2, pp 313-315). The Pronouncement² declares *ipse dixit*, that “[t]he presence of firearms at the polling place, clerk’s office(s), or absent voter counting board may cause disruption, fear, or intimidation for voters, election workers, and others present” and that “[t]he open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located”. Also banned are firearms in clerk’s offices, spaces occupied by voter counting boards and hallways used to gain entry to polls. The Pronouncement orders “[e]lection inspectors [to] post signage providing notice of this regulation inside the room containing the polling place and at the building entrance. Notice may also be posted at 100 feet at the discretion of the local clerk.” *Id.*

² The terms “Pronouncement”, “directive”, “Rule”, “order”, and “regulation” are used synonymously throughout this Answer.

Appellee Thomas Lambert is a resident of the State of Michigan. Lambert desires to openly carry a lawfully-possessed pistol in a holster at and near his polling place on Election Day. Because his polling place is a church, Michigan law forbids Mr. Lambert from carrying his pistol concealed at that location. However, the statute that forbids carrying concealed (MCL 28.425o(1)(e)) does not apply to open carry and, the statute that forbids possession (MCL 750.234d(1)(b)) does not apply to Mr. Lambert because he possesses a concealed pistol license.

Appellees Michigan Open Carry, Inc., Michigan Gun Owners, and Michigan Coalition for Responsible Gun Owners are all non-profit Michigan corporations representing their members, similarly situated, and having a case or controversy and interests in preventing reoccurrence of the claims presented below.

Appellant Michigan Attorney General Dana Nessel and Defendant Director of the Michigan State Police Col. Joe Gasper are also named in the Complaint because, in light of the fact that many local authorities have stated publicly that they will decline to enforce the Pronouncement, they would be tasked with its enforcement.

B. PROCEDURAL AND FACTUAL HISTORY:

On October 16, 2020, Appellant Michigan Secretary of State Jocelyn Benson, (“SoS”) implemented her directive prohibiting the open carry of a firearm in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located. (Appellants’ Appx., Vol 1, pp 65-67) The directive directly conflicts with Michigan’s statutory scheme where it prohibits Appellees and others from lawfully possessing any firearm in those settings identified in the SoS’s directive where concealed carry is prohibited and open carry is permitted. As a result of this directive and the threats by Appellants to ban every open carrier from the polls on Election

Day, Appellees are subject to either disenfranchisement or barred from legally possessing a firearm altogether.

On October 22, 2020, Appellees brought their suit for declaratory and emergency injunctive relief (Appellants' Appx., Vol 1, pp 173-213) in an effort to conclusively establish that the SoS directive was unlawful as it affects lawful firearm possession. The Court of Claims consolidated Appellees case with another case filed the same day.

On October 26, 2020, Appellants responded by filing their Response in Opposition. (Defs Appx, Vol 2, pp 263-308) Appellees filed their Reply Brief on October 27, 2020. (Defs Appx, Vol 3, pp 517-551)

Oral argument was heard by J. Christopher Murray, Court of Claims, on October 27, 2020, and his Opinion and Order Granting In Part Plaintiffs' Emergency Motion for Preliminary Injunction is now the subject of the instant appeal. (Defs Appx, Vol 3, pp 552-565)

ARGUMENTS

I. THE PRONOUNCEMENT IS AN *ULTRA VIRES* ACT BECAUSE IT FAILED TO COMPLY WITH THE APA.

The Court of Claims correctly interpreted the Michigan Election Law and Administrative Procedures Act to determine that the Pronouncement is a "rule" and there was no exception to the requirement that SoS comply with the APA. Appellee's arguments that the Court of Claims was incorrect in its interpretation are unconvincing.

A. STANDARD OF REVIEW

Although Appellees have objected to Appellants attempted late insertion of a corrected Standard of Review, Appellees agree with the language contained in it regarding the applicable standards.

B. ISSUE PRESERVATION

The Court of Claims directly held that the Pronouncement is a “rule” that “was required to be promulgated through the procedures of the APA” and that the “permissive power” exception to the APA did not apply. (*Opinion*, pp. 8, 9)

C. DISCUSSION

At the Court of Claims, the Appellants attempted to defeat Appellees’ claim that the Pronouncement is an ultra vires act by misconstruing statutory language to establish greater authority than granted to them by the Michigan Legislature. The Appellants argue that pursuant to MCL 168.31, the Michigan Legislature provides an alternative to promulgating rules under the APA, which alternative they claim is a permissive power to take plenary action unilaterally and without procedural process. In order to achieve unbound authority, the Defendants manipulate and do harm to the plain language of the statute and ignore the express direction of the Michigan Legislature.

The Appellants rely on the language of MCL 168.31 and 24.207(j) to support their interpretation of their own authority. However, under the plain reading of the relevant statutes, not only is the Pronouncement a “Rule” under the APA, but the Appellants also incorrectly rely on the “permissive power” exception to avoid the APA because the Michigan Legislature:

MCL 168.31(1)(a) provides: “Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.”

Pursuant to MCL 24.207, a “rule” is defined as

an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following: (j) A decision by an agency to exercise

or not to exercise a permissive statutory power, although private rights or interests are affected.

“An agency must utilize formal APA rulemaking when establishing policies that ‘do not merely interpret or explain the statute or rules from which the agency derives its authority,’ but rather “establish the substantive standards implementing the program.” (*Opinion*, p. 5 (citing *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-04; 591 NW2d 314 (1998)) “[I]n order to reflect the APA’s preference for *policy determinations* pursuant to rules, the definition of ‘rule’ is to be broadly construed, while the exceptions are to be narrowly construed.” *AFSCME v Dep’t of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) (emphasis added). “[T]he label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA.” *Id.* at 9. “Instead, courts must examine the ‘actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule,’ for “an agency may not circumvent APA procedural requirements by adopting a guideline in lieu of a rule.”” (*Opinion*, p. 6 (citing *AFSCME*, 452 Mich at 9))

The Court of Claims correctly addressed this issue. It first determined that the Pronouncement is indeed a “rule” as defined by the APA. The Court of Claims further determined the exception to compliance relied upon by the Appellants, the “permissive power” exception did not apply. Because the SoS was required to comply with the APA in promulgating the Pronouncement, the Court of Claims held that the Appellee’s had a substantial likelihood of success on the merits, which is the standard for the first factor for a preliminary injunction. (See *supra* Section II)

1. The Pronouncement is a “rule” subject to the requirements of the APA.

The Court of Claims did not err in concluding that the Pronouncement is a rule as defined by the APA. As the Court of Claims correctly determined, the Pronouncement carries “the force and effect of the law, is of general applicability, and covers a substantive matter.” (*Opinion*, p. 6)

Substantively, the Pronouncement attempts to regulate where a resident may openly carry a

firearm, across the entire state. (*Opinion*, p. 6 (citing see *Delta County v Michigan Dep't of Natural Resources*, 118 Mich App 458, 468; 325 NW2d 455 (1982)) The Court of Claims also observed that “the directive is written in the form of a prohibition, and strongly suggests state and local law enforcement have the power to, and will, enforce the prohibitions within the directive” and as such strongly suggests the directive is in fact a rule. (*Opinion* pp 6-7, Defs Appx, Vol 3, pp 557-8).

The Court of Claims further found the “directive does not merely provide guidance to local election officials on existing state law, as it appears to be partially inconsistent with state law. Specifically, the directive applies to individuals within 100 feet of any polling place, even if those polling places are not an area designated as off-limits to open carry under state statute.” (*Opinion* pg 7; Defs Appx, Vol 3, pg 558).

Moreover, because the Pronouncement conflicts with state law, it is a “rule” requiring promulgation under the APA. (*Opinion*, p. 8 (citing *Jordan v Dep't of Corrections*, 165 Mich App 20, 27; 418 NW2d 914 (1987)) In Michigan, persons who are lawfully permitted to own firearms are recognized as having the right to openly carry firearms. The Michigan Attorney General has frequently recognized the right. See 2020 OAG No. 7311; 2002 OAG No. 7113. Further, there are certain places that the Michigan Legislature has expressly prohibited for open-carriers,³ which indicates not only that that the Legislature found a need to restrict an otherwise clear right to openly carry firearms, but this is an area in which creating further prohibitions is tantamount to enacting law.

The conduct that the Pronouncement aimed to ban is also already proscribed by existing state law.⁴ Appellants attempt to cast open carrying as a breach of peace. Open carry of a firearm is certainly not a breach of the peace. There is no law or decision that open carry is a breach of the peace, and,

³ See MCL 750.237a ,750.234d, and MCL 28.425o. Reading the statutes *in pari materia* provides an individual who is licensed by this state to carry a concealed weapon and in possession of a firearm that is not concealed, (i.e. openly carried), is not prohibited from possessing that firearm at a school or a church. This leaves open carry by a concealed pistol licensee the only legal option for those wishing to exercise their right to self-protection with a firearm in those locations.

⁴ *Supra* note 1.

unsurprisingly, Appellants cite none. Brandishing a firearm may be a breach of the peace depending on the conduct of the individual but is never dependent solely upon the perception of others present. Similarly, MCL 750.234e requires more than just another's concern, fear, paranoia or political temperament. It requires brandishing be "willfully and knowingly." MCL 750.234e. The Pronouncement, on the other hand, requires only that the firearm be present to trigger a "breach of peace", which is well short of any definition of breach of the peace by brandishing or intimidation.

Appellants also raise additional, unconvincing arguments. Appellants argue that the plain language of MCL 168.31(1)(a) provides two alternatives for the Secretary of State to take action with respect to elections: rules, which do require compliance with APA, and instructions, which are not required to comply with APA. (*Application*, p. 22) In support, the Defendants lean on the difference between "promulgating" rules and "issuing" instructions and conclude that "promulgating instructions" is so absurd that there would have to be two distinct meanings. *Id.* On the contrary, the Defendants' urged construction of the statute is absurd.

Appellants suggest that construing both rules and instructions to be bound by the procedures of the APA render the term "instruction" nugatory, (*Application*, p. 2); however, their own interpretation does far worse harm. The Appellants' construction would render the requirement to comply with the APA nugatory. Under the Appellants' preferred scheme, SoS would need not comply with the APA at any time so long as it only issues instructions, which in this case apparently includes burdening fundamental rights. See *supra* Section I.C.2. Although Appellees did not raise this issue in their Complaint, Appellants have effectively raised this in their Response brief. By no means should "rendering nugatory the word 'instruction'" do more harm than rendering nugatory the requirement to comply with the APA. The results of Appellants' interpretation of the statutory language are clearly absurd.

Thus, the Court of Claims correctly concluded that “a directive that is inconsistent with the law is not a directive but a rule requiring promulgation under the APA.” (*Opinion*, p. 8) It is conceded that SoS did not comply with the APA in promulgating the Pronouncement. The failure to comply with the APA makes the Pronouncement invalid.

2. The “permissive power” exception does not apply to the Pronouncement.

The Appellants rely heavily on their assertion that the Pronouncement is otherwise permitted under the “permissive power” exception described under MCL 24.207(j). However, as correctly determined by the Court of Claims, that exception does not apply.

The Court of Claims squarely addressed the exception within MCL 24.207(j), including the Appellant’s reliance on MCL 168.31(1)(a) and MCL 168.31(1)(b). The Court of Claims found that the power granted to defendant under MCL 168.31(1)(a) does not apply because MCL 168.31(1)(a) expressly requires that any instruction for the conduct of elections be “in accordance with the laws of this state.” The directive, as it applies to the “open carry” of firearms, is at least partially inconsistent with, not in accordance with, state law. The directive is therefore not “in accordance with state law,” as MCL 168.31(1)(a) requires it to be and therefore that statutory authority appears to not fall within the exception to rule-making under MCL 24.207(j). MCL 168.31(1)(b), which grants the Secretary of State authority to “[a]dvise and direct local election officials as to the *proper method* of conducting elections” pertain to “methods” not substantive rules. It provides no authority either to support non-compliance with the APA. The Court of Claims also extensively reviewed the case law, finding that the materials cited by Appellants did not support application of the “permissive power” exception. (*Opinion* pp 9-11; *Defs Appx*, Vol 3, pg 560-562)

Notably, in the second case cited by Appellants, *Pyke v Department of Social Services*, 182 Mich App 619, 632 (1990) (*Application*, pp. 20-21), the court found the challenged policy to be excepted because the legislature authorized the actions; importantly, that conclusion was predicated on the fact that the relevant

statute did not “expressly require[] that [its] rules be promulgated pursuant to the requirements of the APA.” In this case however, the Secretary of State is expressly required to comply with the APA. As such, the Appellants’ argument fails because the Michigan Legislature did expressly require the Secretary of States’ instructions and rules to comply with the APA.

Appellants argue that the Court of Claims erred in pointing out an important distinction between the Pronouncement and the Appellants’ cited case law. (*Application*, p. 25). In support of their position, Appellants attempt to point to a lack of authority for the Court of Claims’ conclusion, also offering no authority to the contrary. *Id.* Further, highlighting the difference of other statutory exclusion, i.e. all of the other exceptions under MCL 168.31, see *Id.*, do not in any way impact the application of a single exclusion.

As the Court of Claim correctly notes, if MCL 168.31(a) was “sufficient to constitute an explicit or implicit grant of authority to be excepted from the rule-making process of the APA, then defendant would *never* have to issue APA promulgated rules for *any* election related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw.” (*Opinion*, p. 10 (citing see, e.g., *AFSCME, AFL-CIO*, 452 Mich at 12)) Appellants attempt to counter this conclusion by pointing to other statutes where the Legislature was more precise; again, this argument is unconvincing because it does not address the actual statute at issue. Lastly, Appellants make a last-ditch effort to turn the tables to state that the Court of Claim’s interpretation would result with the “rule swallow[ing] the exception”, which is just re-flavoring the Appellants’ argument that the interpretation “would also render nugatory the word ‘instruction.’” (*Application*, pp. 23-34)

The Court of Claims presented clear logic as to why the “permissive power” exception is inapplicable. The Appellants are unable to present any convincing counters to the Court of Claims’ logic, which is sound and correct. As such, the Court of Claims properly held that the “permissive power” exception did not apply to the Pronouncement.

3. The Pronouncement is invalid for noncompliance with the requirements of the APA.

“[A] rule not promulgated under the APA is invalid. Additionally, separate statutory authority requires that the secretary “issue instructions and promulgate rules pursuant to the administrative procedures act ... for the conduct of elections and registrations in accordance with the laws of this state.” MCL 168.31(1)(a). There is no dispute that defendant must abide by the APA.” (*Opinion*, pp. 4-5 (citing MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982)) Further, there is no dispute that the SoS is an agency.

Because the SoS, an agency, promulgated the Pronouncement, a “rule” as defined by the APA, but failed to comply with the requirements of the APA and no exception to compliance with the APA applied, the Pronouncement is invalid.

II. THE COURT OF CLAIMS DID NOT ABUSE ITS DISCRETION IN ORDERING THE PRONOUNCEMENT ENJOINED

The Court of Claims had the discretion to order a preliminary injunction enjoining the Pronouncement. The Court of Claims properly considered each factor, and the result of its proper exercise of discretion was maintenance of the status quo. As such, the Court of Claim’s decision to order a preliminary injunction should not be disturbed.

A. STANDARD OF REVIEW

This Court reviews for abuse of discretion the trial Court's decision to grant or deny declaratory relief. *Shuler v Michigan Physicians Mut Liab Co*, 260 Mich App 492, 509 (2004), citing *Allstate Ins Co v Hayes*, 442 Mich 56, 75 (1993). The grant or denial of a preliminary injunction is within the sound discretion of the trial Court, and this Court also reviews that decision for an abuse of that discretion. *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 612 (2012).

“At its core, an abuse of discretion standard acknowledges that there will be circumstances in

which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *People v Babcock*, 469 Mich 247, 269 (2003). “An abuse of discretion occurs . . . when the trial Court chooses an outcome falling outside this principled range of outcomes.” *Id.* See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006) (adopts the *Babcock* Court’s articulation of the abuse of discretion standard as the “default standard”); Michigan Judicial Institute, Page 1-19, Appeals & Opinions Benchbook - Second Edition Section 1.6.

B. ISSUE PRESERVATION

The Court of Claims directly addressed the factors it must consider in ordering a preliminary injunction throughout the entire *Opinion*. (*Opinion*, pp. 3-14)

C. DISCUSSION

Initially, it is important to note that Appellants failed to apply the proper standard of review in their analysis of the Court of Claims’ decision to issue a preliminary injunction enjoining the Pronouncement. Appellants never bothered to define any principled range of outcomes or elaborate how the decision of the Court of Claims falls outside a “principled range of outcomes.” The brief never even mentions the word “principled” or identifies the standard of review regarding the principled range of outcomes standard. The Appellants merely allege abuse occurred but this is not consistent with the appellate lenses through which this Court must faithfully view the Court of Claims opinion.

It is axiomatic that the Court of Appeals does not take up matters un-briefed. This Court will not address issues that are insufficiently briefed. *Nat’l Waterworks, Inc. v. Int’l Fidelity & Surety, Ltd.*, 275 Mich. App. 256, 265, 739 N.W.2d 121 (2007). The Attorney General’s office, perhaps the largest law firm in the state, does not need the Court of Appeals to supplement its brief in this regard. Nor should Appellants be permitted to address this material shortcoming in any supplemental pleading. Here Appellants did not brief the correct standard, did not apply the correct standard, and did not identify how

the decision of the Court of Claims falls outside any of the various principled outcomes. The Appellants have only weakly attempted to meet a stripped-down version of the standard of review on appeal. This nominal effort is insufficient to carry their burden.

Although the Appellants failed to apply the appropriate standard of review to the Court of Appeals decision, Appellees do not make the same error. In *Slis v State of Michigan*, __ Mich App __, __; __ NW2d __ (2020), slip op at 12, the Court of Appeals outlined the four factors a court must consider in determining whether a preliminary injunction should be entered:

Four factors must be taken into consideration by a Court when determining if it should grant the extraordinary remedy of a preliminary injunction to an applicant: (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction; (2) whether the applicant is likely to prevail on the merits; (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and (4) whether the public interest will be harmed if a preliminary injunction is issued.

“Though [appellants] do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits.” (*Opinion*, p. 4 (citing *Int’l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995)) “The ultimate purpose of a preliminary injunction is to preserve the status quo that existed prior to the challenged action to allow the judiciary an opportunity to peacefully resolve the dispute.” (*Opinion*, p. 3 (citing *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006))

A review of the Court of Claim opinion demonstrates that it carefully addressed each of the factors for a preliminary injunction, and the decision of the Court of Claims regarding the preliminary injunction falls within the principled range of outcomes.

1. The Appellees have demonstrated a substantial likelihood of success on the merits.

As described above, and in the Court of Claims *Opinion*, Appellees sufficiently demonstrated a substantial likelihood of success on the merits. Because the SoS, an agency, promulgated the

Pronouncement, a “rule” as defined by the APA, but failed to comply with the requirements of the APA and no exception to compliance with the APA applied, the Pronouncement is invalid. Appellees need not establish at this time that it will indeed succeed on the merits, but merely that they have a substantial likelihood of success on the merits.

Nothing in the Court of Claims’ analysis falls outside the principled range of outcomes. The Court of Claims did not abuse its discretion.

2. The Appellees have demonstrated irreparable harm.

The Court of Claims observed that in the absence of a preliminary injunction, plaintiffs will be irreparably harmed. If the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, has declared it can be carried. To allow an unlawful directive to displace a valid statutory provision would irreparably harm those that the statute benefits, here plaintiffs. (*Opinion*, pg 12; Defs Appx, Vol 3, pg 563).

It is apparent that the directive conflicts with Michigan’s existing regulatory scheme. The Court of Claims correctly concluded that Appellants’ desired rule would conflict with state law that regulates where and how firearms may and may not be carried. *Opinion* at p 12

There are three forms of preemption: Express, Implied Field, and Implied Conflict (or conflict). *Michigan Gun Owners, Inc. v Ann Arbor Public Schools*, 502 Mich 695, 704-710. Defendants conflate these three forms and misapply relevant case law. Contrary to what Appellants would have this court believe, a holding that a lesser rule is not preempted by State law under one form of preemption is not a foreclosure of all other forms. No Michigan court has held this, leading courts to analyze each form separately as the Michigan Supreme Court did in *Michigan Gun Owners*.

Appellees agree that express preemption does not apply as MCL 123.1101(b) does not enumerate the Secretary of State in the definition of “local unit of government,” to which the statute applies.

Appellees also agree that implied field preemption does not apply as the Michigan Supreme Court has held that the field of firearm regulation is not sufficiently occupied insofar as entities that are not enumerated in MCL123.1101(b) are concerned. *Id.* at 708.

It is the third form, *implied conflict*, that Appellees assert. Conflict preemption occurs when the State permits something that a lesser entity prohibits or vice-versa. *Miller v. Fabius Twp Bd*, 366 Mich 250, 257 (1962). The State may permit an act either expressly, such as statutorily declaring that an individual has the right to engage in an activity, or implicitly, by providing for a statutory prohibition but then expressly exempting certain individuals. *Builders Ass’n v Detroit*, 295 Mich 272 (1940) (unanimously decided); *National Amusement Co. v Johnson*, 270 Mich 613 (1935) (unanimously decided).

In *Builders Ass’n*, a State statute prohibited the transaction of business on Sunday, except for those who observe the Sabbath on the seventh day of the week, while a Detroit ordinance contained the same prohibition with no similar exception. *Builders Ass’n*, 295 Mich at 275. The Michigan Supreme Court unanimously held that the local ordinance prohibited that which State law permitted—by exemption—rendering the local ordinance in conflict with State law and therefore void. *Id.* at 276, 277. In *National Amusement Co.* a State statute prohibited endurance contests, including walkathons, except in accordance with the statute, while a Grand Rapids ordinance prohibited such contests outright without exception. *National Amusement Co.*, 270 Mich. at 614, 615. The Michigan Supreme Court unanimously held here too that the local ordinance prohibited that which State law permitted—by exemption—rendering the local ordinance in conflict with State law and therefore void. *Id.* at 617.

Here, Appellants have repeatedly acknowledged that portions of the Penal Code criminalize open carry subject to certain exceptions expressly provided in statute. “Michigan’s Penal Code *criminalizes* open carry in certain sensitive areas.” (Appellant Brief at 29) (emphasis in original). “Michigan Penal

Code does criminalize open carry if it occurs in certain enumerated premises such as banks, places of worship, and theatres, MCL 750.234d.” *Id.* at 30. Appellants then coyly hide in a footnote, but agree nonetheless, that the statute provides an express exemption for CPL holders to this prohibition. *Id.* at 30 n 16. In short, both sides agree that MCL 750.234d and MCL 750.237a criminally prohibit open carry in certain places while expressly exempting—permitting—certain individuals⁵. Therefore, Appellants’ open carry decree, to the extent it would otherwise be lawful, would still be void where it conflicts with the Penal Code’s firearm provisions.

In the face of this clear precedent, Appellants’ legal interpretation is curious. Citing *Miller*, 366 Mich at 256-257, Defendants claim that courts have rejected the above precedent. This is far from the truth and ignores the fact that the Michigan Supreme Court expressly distinguished *Miller* from the above by noting the State statute in question in *Miller* was entirely prohibitory and provided no exceptions. “The ordinance and the statute timewise are not in conflict and, therefore, the case of *National Amusement Company* . . . does not apply.” *Id.* at 259. In *Miller*, both the relevant state statute and challenged local ordinance were purely prohibitory in nature. One banned conduct and the other banned the same conduct but to a greater extent (no water skiing beyond 1 hour before sunset vs. no water skiing after 4pm). Neither the statute nor ordinance provided for any exemptions leading the *Miller* court to distinguish the cases.

Every other case cited by Appellants suffers from the same defect; each case pertains to a wholly prohibitory statute with no exceptions. *City of Detroit v Qualls*, 434 Mich. 340, 363 (1990) (holding that a State statute prohibiting the storage of an “unreasonable” amount of fireworks, without exception, did not conflict with a local ordinance specifying a certain amount); and *Rental Property Owners Ass’n of Kent Co v City of Grand Rapids*, 455 Mich. 246, 260 (1997) (holding that a State nuisance abatement

⁵ So too does the Office of the Michigan Attorney General. See 2001-2002, OAG 7113, issued June 28, 2002 by former Attorney General Granholm.

statute that allowed, but did not require, local governments to maintain an action for equitable relief, without exception, did not conflict with a local nuisance abatement ordinance). Appellants also cite *Michigan Gun Owners, Inc*, even though the court expressly stated that it “declin[ed] to reach [the conflict preemption] argument.” *Michigan Gun Owners, Inc.*, 502 Mich at 708. In short, Appellants’ cited cases in no way suggest that courts have gone in a different direction, but rather just the opposite.

This distinction, while bulldozed over by Appellants, makes sense too. As Justice Markman recently put it rejecting Appellants’ argument:

When a statute prohibits conduct and then excludes some class of persons from that prohibition, the only logical conclusion is that such class of persons is permitted to engage in the otherwise prohibited conduct. This is not an issue in which we look to precedent, but to the premises by which reasonable meaning is given to the law, to the premises by which the people are communicated their rights and responsibilities. As a matter of rudimentary logic, if something is explicitly not prohibited, it is permitted. I can imagine the question on a middle-school worksheet: the opposite of "not prohibited" is? Answer: permitted. It is quite that simple.

Michigan Gun Owners, Inc., 502 Mich at 748.

Lastly, Appellants also suggest that since the Penal Code does not specifically enumerate polling locations, that, to any extent that the above would otherwise preempt them, it doesn’t when churches and schools act as polling locations. Appellant’s problem here is that, in order to reach this outcome, said churches and schools would have to lose their characterization as such while acting as a polling location, meaning that the Penal Code and Firearms Act would no longer regulate firearms in these locations at all; i.e. the result would be less, not more, regulation on firearms in these sensitive places.

In summary, Appellees do not claim that the Legislature has permitted open carry in certain areas by prohibiting it in others, nor do Appellees claim that the Legislature has permitted open carry by doing nothing. Appellees instead point to longstanding and controlling precedent affirming that the Legislature has legislated to permit individuals, such as CPL holders such as Appellee Lambert, to openly carry a holstered pistol in certain areas by expressly exempting such individuals from the Penal

Code's limitations⁶, just as in *Builders Ass'n* and *National Amusement Co.*. The Court of Claims, too, correctly made this distinction.

Nothing in the Court of Claims' analysis falls outside the principled range of outcomes. The Court of Claims did not abuse its discretion.

3. The balance of equity results in Appellee's favor.

Finally, the Court of Claims considered whether the entry of a preliminary injunction would harm the public interest, and who would be harmed more in the absence of an injunction. As recognized in the preceding section, "to not enjoin a directive that is very likely unlawful would allow a single state officer to circumvent (and essentially amend) a valid and enforceable state law on the same subject. "The Court found that this is "not in the public interest, which expects its public officials to follow the rule of law." (*Opinion*, pg 13; Defs Appx, Vol 3, pg 564), The public interest requires that the Secretary of State recognize and apply the correct rule of law. "Entry of an injunction would also cause little harm to the public interest put forth by defendant, that being the right of voters to be free from intimidation or harassment from those carrying a firearm." *Id.*

This holds true because, as noted, state law already prohibits the open carry of firearms in some locations used as polling places, such as a church, MCL 750.234d(1)(b), and prohibits carrying a concealed weapon in schools or places of worship. MCL 28.425o." In other words, "enjoining defendant's directive regarding open carry will not harm the public interest in ensuring intimidation free voting, as state laws—laws passed by the Legislature and signed by the Governor—already provide law enforcement with the tools to stop those whose goal it would be to intimidate voters, whether with or without a firearm." (*Opinion*, pp 13-14; Defs Appx, Vol 3, pp 564-565).

Nothing in the Court of Claims' analysis falls outside the principled range of outcomes. The

⁶ See MCL 750.234d(2)(a)-(d) and MCL 750.237a(5)(a)-(f).

Court of Claims did not abuse its discretion. Further, the Court of Appeals should avoid second-guessing the Court of Claims discretion or substitute another outcome it may prefer.

As such, the decision of the Court of Claims should be affirmed.

III. APPELLANTS RAISE ISSUES BEYOND THE SCOPE OF APPEAL.

Both the First and Secondment Amendments to the United States Constitution are raised throughout Appellants' appeal (*Application*, pp 32-38). However, neither constitutional right was argued as a basis for relief in Plaintiffs' Complaint, Emergency Motion for Declaratory and Injunctive Relief, or during oral argument.

Before conducting a review of the merits, it is important to recognize that this case is not about whether it is a good idea to openly carry a firearm at a polling place, or whether the Second Amendment to the US Constitution prevents the Secretary of State's October 16, 2020 directive . . . Resolution of these motions rises and falls based solely on a consideration of the four factors governing the issuance of a preliminary injunction, and the law surrounding the Administrative Procedures Act. (*Opinion*, p. 2)

Constitutional standards are irrelevant to the relevant issues of Plaintiffs' Complaint, Motion, or the Court of Claims Opinion.

Further, the Application spends a considerable amount of space discussing its supervisory authority and its past issuing of instructions. However, the proposition that the SoS has supervisory authority "does not address the legal issue of whether the [Pronouncement] must meet the requirements of the APA. In the same vein, defendant's statement that she 'has issued instructions balancing constitutional rights before' also does not address the legal issues presented." (*Opinion*, p. 8)

Moreover, Appellants and Amici direct the court to review the reasons why the Pronouncement is, in their view, important. As stated by the Court of Claims: "No party in this proceeding is questioning the importance of voting, especially intimidation-free voting. But again, that principal does not alter the Court's APA analysis." (*Opinion*, pp. 8-9)

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated in this responsive brief on appeal, Appellees Lambert, MOC, MGO and MCRGO respectfully request this Honorable Court uphold the Opinion and Order of the Court of Claims granting in-part injunctive relief to Appellees. Appellees respectfully request that Appellants be assessed and ordered to pay the legal costs and expenses of Appellees.

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Respectfully submitted,

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APPENDIX DESIGNATION

Due to the extraordinary time restraint imposed upon Appellees to respond to Appellants' Appeal, Appellees rely upon and incorporate the Appendix of Appellants by reference herein.

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

THOMAS LAMBERT, an individual;
MICHIGAN OPEN CARRY, INC.,
a Michigan not-for-profit corporation;
MICHIGAN GUN OWNERS,
a Michigan not-for-profit corporation; and,
**MICHIGAN COALITION FOR
RESPONSIBLE GUN OWNERS**,
a Michigan not-for-profit corporation

Court of Appeals No. 355266
Court of Claims No. 20-000208-MM

HON. CHRISTOPHER MURRAY

Plaintiffs,

v.

JOCELYN BENSON, in her
official capacity as Michigan Secretary of State
DANA NESSEL, in her official capacity
as Michigan Attorney General; and,
COL JOE GASPER,
in his official capacity as Director of the
Michigan State Police

Defendants.

ROBERT DAVIS,

Plaintiff,

v.

JOCELYN BENSON, in her official capacity
as the duly elected Michigan Secretary of State

Defendant.

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PROOF OF SERVICE

I hereby certify that on October 29, 2020, I served the following documents upon counsel of record and *in pro per* party at their respective email addresses provided herein and by e-filing:

1. **APPELLEES' ANSWER TO APPELLANTS SECRETARY OF STATE JOCELYN BENSON AND ATTORNEY GENERAL DANA NESSEL'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL; and,**
2. **PROOF OF SERVICE**

Respectfully submitted,

Dated: October 29, 2020

/s/ Dean G. Greenblatt

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

No. 20-000207-MZ

JOCELYN BENSON, in her official capacity as the
duly elected Michigan Secretary of State,

HON. CHRISTOPHER MURRAY

Defendant.

THOMAS LAMBERT, an individual; MICHIGAN
OPEN CARRY INC., a Michigan not-for-profit
corporation; MICHIGAN GUN OWNERS, a
Michigan not-for-profit corporation; and MICHIGAN
COALITION FOR RESPONSIBLE GUN OWNERS,
a Michigan not-for-profit corporation,

No. 20-000208-MM

HON. CHRISTOPHER MURRAY

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as
Michigan Secretary of State, DANA NESSEL, in her
official capacity as Michigan Attorney General; and
COL JOE GASPER, in his official capacity as
Director of the Michigan State Police,

Defendants.

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**STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' 10/22/2020
MOTION FOR DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF IN CASE
NO. 20-000208**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities	iii
Introduction	1
Counter-Statement of Facts	2
A. The Secretary of State issues a Directive regarding open carry.	2
B. The Directive is responsive to recent events in Michigan and to reports of voter apprehension.	3
C. Plaintiffs file suit	5
Argument	5
I. Plaintiffs are not entitled to the requested declaratory judgment because the Secretary’s Directive was not an ultra vires act.	5
A. The Secretary’s Directive is a proper instruction under the terms of her delegated authority from the Legislature.	6
1. The Secretary has authority to supervise polling places, absent voter counting boards, clerks’ offices, and election inspectors through instructions.	6
2. The Directive, as an instruction for the conduct of elections, was not required to be promulgated as a rule.	7
B. The Legislature’s delegation of authority to the Secretary does not violate separation-of-powers principles because it contains reasonable standards and durational limits, and the Secretary’s exercise of that authority here was narrow and time-limited.	10
II. Plaintiffs have not met the grounds for a preliminary injunction.	13
A. Plaintiffs cannot demonstrate a likelihood of success on the merits.	14
1. The Secretary’s Directive would withstand a challenge based on the Second Amendment and Michigan firearms laws.	14
a. The fundamental right to cast one’s vote without intimidation is time-honored and tested, and the polling	

	place and surrounding buffer zone have been upheld as a refuge for this protected activity.	14
b.	The Directive would survive any challenge based on the Second Amendment to the U.S. Constitution.	15
i.	The Secretary’s Directive serves an objective that is significant, substantial, and important—namely, preventing voter intimidation.....	17
ii.	The fit between the prohibition and the Secretary’s Directive is more than reasonable.	20
c.	The Directive does not conflict with Michigan’s statutory law regulating the possession of firearms.	23
i.	The Directive does not conflict with the statutory right to concealed carry.....	23
ii.	There is no general statutory right to open carry under Michigan law.	24
d.	The Secretary’s Directive is defensible under both federal and state First Amendment protections.....	27
B.	Plaintiffs cannot show an irreparable injury absent an injunction.	29
C.	The balance of harms and the public interest weigh against granting the injunction.	30
III.	Plaintiffs have not met the grounds for a permanent injunction.	37
	Conclusion and Relief Requested	38

INDEX OF AUTHORITIES

Cases	<u>Page</u>
<i>Adams v Cleveland-Cliffs Iron Co.</i> , 237 Mich App 51 (1999)	25
<i>Blue Cross & Blue Shield of Mich v Milliken</i> , 422 Mich 1 (1985).....	11
<i>Burson v Freeman</i> , 504 US 191 (1992)	18, 22, 28
<i>Bush v Gore</i> , 531 US 98 (2000).....	14
<i>By Lo Oil Co v Department of Treasury</i> , 267 Mich App 19 (2005).....	8
<i>Chesney v City of Jackson</i> , 171 F Supp 3d 605 (ED Mich, 2016).....	16, 27, 29
<i>City of Detroit v Qualls</i> , 434 Mich 340 (1990).....	26
<i>Crookston v Johnson</i> , 841 F3d 396 (CA 6, 2016)	29
<i>D.C. v Heller</i> , 554 US 570 (2008)	15, 16, 17, 29
<i>Deffert v Moe</i> , 111 F Supp 3d 797 (WD Mich, 2015)	16
<i>Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Srvs</i> , 431 Mich 172 (1988).....	8
<i>Dressler v Rice</i> , 739 Fed Appx 814 (CA 6, 2018).....	25
<i>Hammel v Speaker of House of Representatives</i> , 297 Mich App 641 (2012).....	13
<i>Hanay v Dep’t of Transp</i> , 497 Mich 45 (2014)	9
<i>Hare v Berrien Co Bd of Election Commr’s</i> , 373 Mich 526 (1964).....	6
<i>Harsha v City of Detroit</i> , 261 Mich 586 (1933)	11
<i>In re Southard</i> , 298 Mich 75 (1941)	10
<i>Kampf v Kampf</i> , 237 Mich App 377 (1999)	16
<i>Kernan v Homestead Dev Co</i> , 232 Mich App 503 (1998).....	37
<i>McCahan v Brennan</i> , 492 Mich 730 (2012)	26
<i>Michigan Gun Owners, Inc v Ann Arbor Public Schools</i> , 502 Mich 695 (2018).....	19, 25, 26

<i>Michigan Trucking Association v Michigan Public Service Commission</i> , 225 Mich App 424 (1997).....	8
<i>Miller v Fabius Tp Bd, St Joseph Co</i> , 366 Mich 250 (1962).....	26
<i>Minnesota Voters All v Mansky</i> , 138 S Ct 1876 (2018).....	17, 18, 21, 22
<i>People ex rel Dougherty v Holschuh</i> , 235 Mich 272 (1926)	18
<i>People v Deroche</i> , 299 Mich App 301 (2013).....	15, 16, 27
<i>People v Piasecki</i> , 333 Mich 122 (1952).....	10
<i>People v Wilder</i> , 306 Mich App 546 (2014).....	15, 27
<i>Pyke v Department of Social Services</i> , 182 Mich App 619 (1990)	8
<i>Rental Property Owners Ass’n of Kent Co v City of Grand Rapids</i> , 455 Mich 246 (1997)	26
<i>Reynolds v Sims</i> , 377 US 533 (1964).....	14
<i>San Antonio Indep Sch Dist v Rodriguez</i> , 411 US 1 (1973)	14, 18
<i>Soap & Detergent Ass’n v Nat Resources Comm</i> , 415 Mich 728 (1982).....	10
<i>State Conservation Department v Seaman</i> , 396 Mich 299 (1976)	11
<i>Taylor v Smithkline Beecham Corp</i> , 468 Mich 1 (2003)	10
<i>Tyler v Hillsdale Cty Sheriff’s Dept</i> , 837 F3d 678 (CA 6, 2016)	16, 28
<i>Wade v Univ of Michigan</i> , 320 Mich App 1 (2017)	19
<i>Wesberry v Sanders</i> , 376 US 1 (1964).....	15
<i>Westervelt v Natural Resources Comm</i> , 402 Mich 412 (1978)	11
<i>Yick Wo v Hopkins</i> , 118 US 356 (1886)	14

Statutes

MCL 123.1101(b)	19
MCL 123.1102.....	19
MCL 168.1	6
MCL 168.21	6

MCL 168.31(1)(a).....	6, 8, 9
MCL 168.32(2)	9
MCL 168.497(2)	7
MCL 168.654.....	7
MCL 168.662(1)	7, 22
MCL 168.674(1)	7
MCL 168.678.....	5, 7, 10, 12
MCL 168.765a(1)	7
MCL 168.765a(4)	22
MCL 24.201	6
MCL 24.207(j)	7
MCL 28.421	24
MCL 28.425c(3)	24
MCL 28.425o(1)	24, 25
MCL 28.425o,.....	24
MCL 479.43	8
MCL 750.234d.....	24, 25
MCL 750.234d(2)(d).....	25
MCL 750.237a(1)	24, 25
MCL 750.237a(5)(c)	25
MCL 750.237a(5)(e)	25

Constitutional Provisions

Const 1963, art 2, § 4(1)(a)	15, 31
Const 1963, art 2, § 4(1)(f)	7
Const 1963, art 2, § 4(2)	20

Const 1963, art 3, § 2	10
U.S. Const, Am II. Article 1, § 6	15

INTRODUCTION

Make no mistake. This *is* a voting rights case. It is about protecting the vote for *all* Michigan citizens who want to exercise their right to vote in person on November 3, 2020. At this point in Michigan history, recent dramatic and widely publicized incidents involving firearms have instilled fear in many Michigan citizens. Secretary of State Jocelyn Benson responded to these events by exercising her permissive authority to issue a Directive that narrowly bans open carry for Michigan’s upcoming general election, making sure that Michigan’s already-existing ban on open carry in *some* polling places becomes, at least for *this* election, a uniform ban throughout Michigan’s large decentralized system. This ensures that when Michigan voters go to the polls, they have a refuge, free from fear and intimidation—whether they be a new citizen, a harried parent with small children in tow, a person with a history of gun violence, an 18-year-old first-time voter, or an elderly or disabled person who is anxious about being able to flee from an active shooter. And unlike Mr. Lambert—who can simply leave his firearm in the car until he is done voting and whose need for self-protection is greatly diminished by the fact that no other voter is permitted to open carry in or near the polls on that day—these voters do not have a simple alternative. Voters who fear firearms might actually lose their right to vote, contrary to established caselaw that recognizes a state’s interest in providing “an island of calm in which voters can peacefully contemplate their choices,” and in creating a reasonable buffer zone so the voter is free from intimidation.

Plaintiffs—who discussed the Second and First Amendments but raised no claims as to them—question whether the Secretary has the authority to do this through her Directive, and whether the Legislature’s delegation of authority to her is constitutional. The answer to both of these questions is yes. Here, in light of recent events, reports of voter apprehension, and the weighty interest of protecting the vote, coupled with the need to act swiftly, the Secretary opted

to exercise the choice the Legislature gave her to issue instructions rather than promulgate rules. And in doing so, she implemented a narrow election-day ban that is consonant with the reasonable, constitutional limits the Legislature placed on the authority it delegated to her. Plaintiffs' request for declaratory judgment and immediate injunctive relief should be denied, as should their request for a permanent injunction.

COUNTER-STATEMENT OF FACTS

A. The Secretary of State issues a Directive regarding open carry.

On October 16, 2020, the Secretary of State issued a directive to all local election officials regarding the open carry of firearms on Election Day in polling places, absent voter counting boards, and clerk offices. Specifically, the Secretary directed the following:

Within 100 feet of a polling place, clerk's office(s), or absent voter counting board

- **The open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located.** A person may leave a firearm inside a vehicle parked within 100 feet of the building when visiting these locations if otherwise permitted by law to possess the firearm within the vehicle.
- Concealed carry of a firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so.
- Election inspectors should contact law enforcement immediately if these prohibitions are violated. The prohibition on open carry does not apply to law enforcement officers acting in the course of their duties.

(Ex A, Directive, p. 1) (emphasis in original.) The Secretary stated the following in support of her decision to issue this directive:

The presence of firearms at the polling place, clerk's office(s), or absent voter counting board may cause disruption, fear, or intimidation for voters, election workers, and others present. Absent clear standards, there is potential for confusion and uneven application of legal requirements for Michigan's 1,600 election officials, 30,000 election inspectors, 8 million registered voters, and thousands of challengers and poll watchers on Election Day.

Id. And she identified the source of her authority for issuing the directive:

As Michigan’s chief election officer with supervisory control over local election officials in the performance of their duties, the Secretary of State issues the following directions to clarify that the open carry of firearms on Election Day in polling places, clerk’s office(s), and absent voter counting boards is prohibited; to provide additional guidance to election workers if they encounter individuals with firearms at or near polling places, and to secure the full and free exercise of the right to vote.

Id. (emphasis in original.) The directive requires officials to post signage at building entrances advising of the prohibition and advises officials to contact law enforcement for assistance in enforcing this directive. *Id.*

B. The Directive is responsive to recent events in Michigan and to reports of voter apprehension.

The need for the Directive became clear to the Secretary only recently. Earlier this year, Michigan experienced several demonstrations related to the Governor’s executive orders regarding the Covid-19 pandemic. Most rallies were held without incident and were attended by numerous citizens engaged in the open carry of firearms.¹ But state and federal law enforcement authorities recently disclosed a plot to kidnap the Governor. In the course of that investigation, it was learned that militia members “discussed plans for assaulting the Michigan State Capitol, countering law enforcement first responders, and using ‘Molotov cocktails’ to destroy police vehicles.” (Ex B, Affidavit of Special Agent Richard J. Trask II, *United States v Fox*, Case No. 1:20-mj-00416-SJB). There were also discussions of “armed protests” at the State Capitol in which one militia member stated: “When the time comes there will be no need to try and strike fear through presence. The fear will be manifested through bullets.” *Id.*

¹ Although one protest included armed citizens congregating inside the Capitol. See *Michigan Protestors storm state Capitol in fight over coronavirus rules: ‘Men with rifles yelling at us,’* available at <https://www.foxnews.com/us/michigan-lansing-coronavirus-protest-capitol-guns-rifles>.

In the aftermath of these events, and in light of the general rhetoric surrounding the national election, numerous clerks and local officials contacted the Secretary expressing concern over the presence of firearms at the polls. Voters, as well, have contacted the Secretary and the Attorney General’s office, expressing fear of seeing someone with a visible firearm in or near the polls on election day.

Voter apprehension runs the gamut. Some have a history of gun violence (see Ex C, Guzman dec, ¶ 6; Ex D, Hachem dec, ¶ 7; Ex E, Al Ghouli dec, ¶¶ 5, 7.) Some have to bring their children to the polls in order to vote. (See Ex F, Hawili dec, ¶¶ 3-7; Ex G, Almouswi dec, ¶¶ 4-7.) Others have fears because of age or disability. (See Ex E, Al Ghouli dec, ¶¶ 8-9.) And some are just plain afraid. (See Ex H, Afra dec, ¶¶ 3-5; Ex I, Agha dec, ¶¶ 3-5; Ex J, Wheeler dec, ¶¶ 5-10.) Even some who are gun owners or getting concealed pistol permits have concerns about firearms at the polls. (Ex K, Dannison dec, ¶¶ 4, 5; Ex L, Reed dec, ¶¶ 5, 7.) Many expressed heightened fears based on the current political climate and recent Michigan events involving firearms. (Ex M, Nestor dec, ¶ 8; Ex N, Timmer dec, ¶¶ 8, 10; Ex J, Wheeler dec, ¶ 10; Ex U, Maturen dec, ¶¶ 8, 9.)

Others who will be present at the polls, clerks’ offices, and AV counting boards—poll challengers, poll watchers, poll workers, poll chairpersons, and clerks—have also expressed concern regarding the prospect of armed individuals at the polls. (See Ex O, Springer dec, ¶¶ 5-8; Ex P, Kessler dec, ¶¶ 4-7; Ex Q, Bowman dec, ¶¶ 8-10; Ex R, Kelly dec, ¶¶ 6-7; Ex S, Bunkley dec, ¶ 6; Ex T, Manley dec, ¶ 10); Ex V, Johnson dec, ¶¶ 4-9; Ex W, Swope dec.)

C. Plaintiffs file suit.

On October 22, Plaintiffs brought the instant lawsuit against Secretary Benson, Attorney General Dana Nessel, and Michigan State Police² Director Joe Gasper in their official capacities, challenging the Secretary's recent prohibition on the open carry of firearms in and within 100 feet of polling places, clerk offices, and absent voter (AV) counting boards. Despite considerable discussion about the right to bear arms, Plaintiffs raise only two claims: that the Secretary's issuance of the directive was an *ultra vires* act (Count I); and that MCL 168.678 violates separation-of-powers principles (Count II) (Complaint.) They request a preliminary and permanent injunction enjoining Defendants from engaging in any acts to promote or enforce the ban on Election Day; a declaratory judgment that the Directive is void and without lawful authorization; and money damages. (Complaint, Prayer for Relief.) Plaintiffs also filed a motion for declaratory and emergency injunctive relief. (Pl's Mtn & Br for Dec & Emer Relief, p 2.)

Earlier in the day, a related lawsuit was filed in this Court. See *Davis v Benson*, Case No. 20-000208. On October 23, this Court entered an order consolidating the two cases and directing the State Defendants to respond to the motions filed in each case by 5 p.m. on October 26, 2020. (10/23/2020 Order.) In that order, the Court requested that the parties address the "impact, if any, of statutory provisions like MCL 28.425o and 750.234d" on the parties' arguments.

ARGUMENT

I. Plaintiffs are not entitled to the requested declaratory judgment because the Secretary's Directive was not an *ultra vires* act.

Plaintiffs cannot succeed on their argument that the Secretary failed to comply with any of the statutory requirements—filing, notice or governor's certificate—of the Administrative

² As a law enforcement agency, the Michigan State Police expresses no position on the merits of this case but stands ready to comply with the Court's order.

Procedures Act, because those requirements do not apply to the Directive at issue here. The Legislature has given the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued an instruction.

A. The Secretary’s Directive is a proper instruction under the terms of her delegated authority from the Legislature.

Plaintiffs argue in Count I that the Secretary acted ultra vires in issuing the directive without first promulgating it as a rule under the Administrative Procedures Act (APA), MCL 24.201, *et seq.* This same argument is raised by plaintiff Davis in the consolidated case.

Secretary Benson fully addressed the APA argument in the brief filed contemporaneously in that case. To avoid repetition, Defendants incorporate that argument as if fully set forth herein, and only briefly address the claim here.

1. The Secretary has authority to supervise polling places, absent voter counting boards, clerks’ offices, and election inspectors through instructions.

Under § 21 of the Michigan Election Law, MCL 168.1 *et seq.*, the Legislature made the Secretary the “chief election officer” with “supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21. To exercise her authority, the Legislature provided in § 31 that the Secretary “shall do *all* of the following . . .

(a). . . *issue instructions and promulgate rules . . . for the conduct of elections,*” and “advise and direct local officials as to the proper methods of conducting elections.” MCL 168.31(1)(a)-(b) (emphasis added). These sections provide the Secretary with broad authority to issue instructions for the proper conduct of elections, and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See *Hare v Berrien Co Bd of Election Commr’s*, 373 Mich 526, 531 (1964).

The Secretary’s authority extends to all local election officials and to the places in which they perform their duties on Election Day. Specifically, the Secretary exercises supervisory control over polling places and absent voter counting boards as unique locations within her jurisdiction. See MCL 168.662(1), 168.765a(1), 168.654. She also exercises control over local clerks and their offices, which now function as polling places on Election Day. (See Const 1963, art 2, § 4(1)(f); MCL 168.497(2); Ex W, Clerk Swope dec, ¶ 7.)

Further, the Secretary has ultimate supervisory authority over election inspectors who supervise polling places and AV counting boards on Election Day. MCL 168.674(1), 168.765a(1), (4). Section 678 provides that “[e]ach board of election inspectors shall possess full authority *to maintain peace, regularity and order* at its polling place, and *to enforce obedience to their lawful commands* during any . . . election[.]” MCL 168.678 (emphasis added). Under §§ 21 and 31, the Secretary has authority to provide instructions for inspectors on maintaining peace, regularity, and order at polling places. Such instructions provide the source for the “lawfulness” of any command given by an election inspector, as long as the command does not violate any other applicable law—and, for the reasons explained below, a command to enforce the Secretary’s Directive would not violate any statutory or constitutional provision relating to firearms.

2. The Directive, as an instruction for the conduct of elections, was not required to be promulgated as a rule.

As explained fully in the *Davis* brief, the Directive is specifically excepted from the definition of a “rule” under MCL 24.207(j)—the “permissive power” exception. Plaintiffs are therefore wrong to claim that the Secretary’s Directive is not exempted from compliance with the APA. (Complaint, ¶ 33.)

The “permissive statutory power” exception applies where “explicit or implicit authorization for the actions in question have been found.” *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Servs*, 431 Mich 172, 187-188 (1988). Here, the statutory authorization for the Secretary’s Directive is grounded in § 31. MCL 168.31(1)(a)-(b). And there are three reasons why the Secretary’s statutory power falls within the APA’s permissive power:

First, the enabling statute gives the Secretary discretion to either issue instructions or promulgate rules under the APA. The permissive power exception applies to statutory grants of authority that do not require an agency to be bound to the requirements of the APA.

For example, in *Michigan Trucking Association v Michigan Public Service Commission*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was invalid because it was not promulgated as a rule under the APA. 225 Mich App 424, 430-430 (1997). The statute at issue provided, at the time, that the PSC “will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article.” MCL 479.43 (emphasis added). The Court of Appeals rejected plaintiffs’ argument, finding that the order was issued in “an exercise of permissive statutory power,” and was therefore “exempted from formal adoption and promulgation under the APA.” *Id.* at 430. In reaching this conclusion, the Court emphasized that the statute “directly and explicitly authorize[d] the PSC to implement, either by rule or order,” the safety rating system. *Id.*, citing MCL 479.43. See also *Pyke v Department of Social Services*, 182 Mich App 619 (1990) (concluding that permissive statutory power exclusion applied); *By Lo Oil Co v Department of Treasury*, 267 Mich App 19 (2005) (same).

As in *Michigan Trucking*, because the Legislature has not tied the Secretary’s authority to issue instructions and advise local election officials to the APA, the Directive was not subject to the APA’s rulemaking procedures.

Second, the plain language of MCL 168.31 shows that the Secretary has a choice between issuing instructions and promulgating rules. Like the statute in *Michigan Trucking*, the enabling statute for the Secretary provides permissive statutory power: “The secretary of state shall . . . *issue instructions and promulgate rules pursuant to the [APA]* . . . for the conduct of elections[.]” MCL 168.31(1)(a) (emphasis added). While the use of “shall” connotes mandatory action, the statutory language itself contemplates two different acts that the Secretary “shall do”: either (1) issue instructions, or (2) promulgate rules. Thus, § 31 does not mandate that the Secretary promulgate rules for the conduct of elections. Rather, the Secretary, in her discretion, can *either* issue instructions *or* promulgate rules. MCL 168.31(1)(a). Here, the Secretary issued an instruction—the Directive.

This interpretation avoids rendering nugatory the word “instruction” in § 31(a). See, e.g., *Hanay v Dep’t of Transp*, 497 Mich 45, 57 (2014) (courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.”). And it is consistent with the structure of § 31, which only mandates that the Secretary promulgate rules in a certain area—petition signature gathering. MCL 168.32(2).

And **third**, the Legislature provided permissive grants of authority when agencies may need to act quickly. For example, MCL 30.310 empowers the director of the Michigan State Police “*to issue orders and promulgate rules and regulations for the purpose of administration and preparation of a plan of civil defense for this state[.]*” (Emphasis added). This grant of

permissive power makes sense since, when providing for the civil defense of the State, an agency or officer must be able to act quickly without the deliberate procedures required in the APA.

In enacting § 31, the Legislature similarly recognized that the Secretary’s duties with respect to the conduct of elections require flexibility—which rulemaking does not typically allow—and thus expressly provided her the authority to “issue instructions” separate from her authority to promulgate rules.

For all these reasons, the Secretary’s Directive was properly issued as an instruction and was not required to have been promulgated as a rule.

B. The Legislature’s delegation of authority to the Secretary does not violate separation-of-powers principles because it contains reasonable standards and durational limits, and the Secretary’s exercise of that authority here was narrow and time-limited.

Plaintiffs fare no better in arguing that the Legislature’s delegation of authority to the Secretary through MCL 168.678 violates article 3, § 2 of the Michigan Constitution. The statute at issue easily satisfies Michigan’s non-delegation test.

The Michigan Constitution provides for the separation of powers among the three branches of government. Const 1963, art 3, § 2. But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. See *Soap & Detergent Ass’n v Nat Resources Comm*, 415 Mich 728, 752 (1982) (“[W]hile art 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate”), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation-of-powers doctrine “ha[s] led to the constitutional discipline that is described as the nondelegation doctrine.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power—the power “to make, alter, and amend laws”—sits with the

Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and the Michigan Supreme Court “ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches,” *Taylor*, 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a “standards test.” *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id.* at 454 (Ryan, J., concurring). One of the seminal cases in Michigan, *Blue Cross & Blue Shield of Mich v Milliken*, outlined the test as a three-part analysis:

- (1) the act must be read as a whole;
- (2) the act carries a presumption of constitutionality; and
- (3) the standards must be as reasonably precise as the subject matter requires or permits. [422 Mich 1, 51-52 (1985).]

As a part of this inquiry, “[t]he preciseness required of the standards will depend on the complexity of the subject.” *Id.* See also *State Conservation Department v Seaman*, 396 Mich 299, 309 (1976) (outlining the same three-part test). And Michigan law has been clear that the “Legislature does not delegate or abdicate its power to an administrative agency if the challenged legislation *contains standards as reasonably precise* as the subject matter requires or permits.” *Westervelt*, 402 Mich at 438 (internal quotes and ellipses omitted, emphasis added) (Williams, J., lead opinion), *id.* at 454 (Ryan, J., concurring).

Plaintiffs perhaps attempt to capitalize on nearness in time to the Michigan Supreme Court’s answer to the certified question posed by the federal court in *In re Certified Question*. There, the Michigan Supreme Court held that Michigan’s longstanding emergency powers law, the Emergency Powers of the Governor Act, was an illegal delegation because it did not contain

sufficient standards and, notably, no durational limit. *In re Certified Question*, ___ Mich ___ (2020) (Docket No. 161492); slip op at 35-36. (Ex X.)

But the statute that Plaintiffs challenge here, MCL 168.678, suffers no such infirmities. It states: “Each board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election and during the canvass of the votes after the poll is closed.”

Sufficient standards are contained within this plain language. *First*, the statute applies only to election inspectors, and by extension, to the Secretary who possesses supervisory authority over them. *Second*, it applies only to “polling place[s]” and AV counting boards, and only to those locations “during any primary or election” and while the votes are being canvassed. *Third*, it gives election inspectors a relatively narrow set of delegated tasks—“maintaining peace, regularity and order” and “enforc[ing] obedience” to their lawful commands in polling places during primaries or elections or during the canvass. The fact that it is limited to one day, November 3, 2020, is a significant durational limit that itself distinguishes it from the statute at issue in *In re Certified Question*. (Ex X.) And the delegated authority is as specific as possible given the unknown circumstances that could arise during an election.

In sum, the Secretary has both statutory and constitutional authority to issue instructions for the conduct of an election and to supervise election inspectors as they exercise their authority. She was within her permissive authority to do so by issuing instructions rather than promulgating a rule. (Given both the recent climate in Michigan and the proximity of the election, that was the only practical option.) She was not required to engage in rulemaking in order to address the immediate concerns over the presence of firearms at the places in which the state conducts elections. Nor does her delegated authority violate separation-of-powers principles.

II. Plaintiffs have not met the grounds for a preliminary injunction.

Plaintiffs request a preliminary injunction ordering the Secretary, the Attorney General and the MSP from engaging in any acts to promote or enforce any ban on the lawful possession and carry of firearms on Election Day. (Complaint, ¶ 49., WHEREFORE Clause 2.) To begin, this request is overbroad, as it extends beyond the reach of the Secretary’s Directive, which bans open carry only in and around polling places, clerks’ offices, and AV counting boards. They also request a permanent injunction with the same scope. (*Id.*, WHEREFORE Clause 3.) Plaintiffs have not met the grounds for either.

As addressed above, they are not likely to succeed on the merits of their ultra vires and separation-of-powers claims. And while they argue that the risk of harm to them outweighs any harm to Defendants and that an injunction would simply preserve the status quo ((Pl’s Br for Dec & Emer Relief, p 12), they fail to address harm to other voters in terms of possible vote disenfranchisement.

“To obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction.” *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 648 (2012) (internal quotations omitted). Under this four-part test, this Court must determine: “(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.” *Id.* (internal quotations omitted).

A. Plaintiffs cannot demonstrate a likelihood of success on the merits.

As explained above, Plaintiffs cannot demonstrate likelihood of success on the merits of their APA and non-delegation claims. The Secretary notes that constitutional challenges to the Directive, though not raised in this action, would fail in any event. Finally, per this Court's October 23, 2020 order, the Secretary further explains that her Directive is consistent with Michigan firearms laws.

1. The Secretary's Directive would withstand a challenge based on the Second Amendment and Michigan firearms laws.

Plaintiffs' complaint and motion wrongly assume both a constitutional right to open carry and a right under Michigan statutory law to open carry in any location where the Legislature has not expressly criminalized it. Even if such rights existed, the Secretary's interest in protecting the fundamental right to vote without intimidation outweighs any perceived right to bear arms.

a. The fundamental right to cast one's vote without intimidation is time-honored and tested, and the polling place and surrounding buffer zone have been upheld as a refuge for this protected activity.

At heart, this is a voting rights case, so it makes sense that the starting place for analysis is an understanding of the strength of the protections afforded voters to be free from intimidation—and even from discomfort.

The right to vote is of paramount importance in this State and this nation. Surprisingly, the right is not explicitly enumerated in the U.S. Constitution. See, e.g., *Bush v Gore*, 531 US 98, 104 (2000). Nevertheless, the Supreme Court has routinely ruled that the right to vote is a fundamental right. See, e.g., *Reynolds v Sims*, 377 US 533, 555 (1964). Moreover, it is a “fundamental political right” that is “preservative of all rights.” *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1, 101 (1973), citing *Yick Wo v Hopkins*, 118 US 356, 370 (1886). Indeed, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v*

Sanders, 376 US 1, 17 (1964). And that is why “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Id.* (emphasis added).

Michigan citizens have gone a step further than the U.S. Constitution by ensconcing the right to vote in the state Constitution, which now provides that: “Every citizen of the United States who is an elector qualified to vote in Michigan shall have . . . [t]he right, once registered, to vote a secret ballot in all elections.” Const 1963, art 2, § 4(1)(a). With these protections understood, other rights and perceived rights can be analyzed.

b. The Directive would survive any challenge based on the Second Amendment to the U.S. Constitution.

The Second Amendment provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const, Am II. Article 1, § 6 of the state Constitution, which is Michigan’s equivalent to the Second Amendment, states, “Every person has a right to keep and bear arms for the defense of himself and the state.” Our state courts have explained that the Second Amendment is fully applicable to the states through the Fourteenth Amendment.” *People v Deroche*, 299 Mich App 301, 305 (2013) (internal citations omitted). Therefore, our courts review Second Amendment challenges within the parameters of the U.S. Supreme Court’s interpretation of the Second Amendment. *Id.*

The U.S. Supreme Court has held that it guarantees “the right of law-abiding, responsible citizens to use arms in defense of *hearth and home*.” *D.C. v Heller*, 554 US 570, 635 (2008) (emphasis added). Michigan courts have adopted this language. *Deroche*, 299 Mich App at 306, quoting *Heller*; *People v Wilder*, 306 Mich App 546, 554-555 (2014) (same).

But the High Court has explained that the Second Amendment has limitations: it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” *id* at 626,—that is, it is “not unlimited,” *id.* at 595; Accord *Deroche*, 299 Mich App at 306. Tellingly, the U.S. Supreme Court has never recognized a right to bear arms that extends outside the home. Neither have our state courts or the Sixth Circuit. See *Kampf v Kampf*, 237 Mich App 377, 383 (1999) (“[T]he Michigan Constitution does not protect the right to bear arms in the context of sport or recreation.”). See also *Tyler v Hillsdale Cty Sheriff’s Dept*, 837 F3d 678, 690 (CA 6, 2016) (en banc) (noting that although “[t]he Supreme Court has not fleshed out the extent of the right protected by the Second Amendment,” it has nevertheless “recognized the government’s power to restrict the ‘carrying of firearms in sensitive places[.]’”), quoting *Heller*, 554 US at 626; *Chesney v City of Jackson*, 171 F Supp 3d 605, 622 (ED Mich, 2016) (“[T]his Court concludes, in accordance with the uniform weight of authority in cases decided within this circuit, that the Second Amendment right posited by Plaintiff here—*i.e.*, the right to openly carry a firearm outside the home—was not clearly established at the time of the incident giving rise to this suit”); *Deffert v Moe*, 111 F Supp 3d 797, 812 (WD Mich, 2015) (same).

Even assuming conduct falls within Second Amendment protections, the level of scrutiny to be applied where the right at issue is not the right to possess a handgun in one’s home for self-defense, would be intermediate scrutiny. See *Deroche*, 299 Mich App at 310; *Tyler*, 837 F3d at 690. Under that standard, “the government bears the burden of establishing that there is a reasonable fit between the asserted substantial or important governmental objective and the burden placed on the individual.” *Deroche*, 200 Mich App at 310.

i. The Secretary’s Directive serves an objective that is significant, substantial, and important—namely, preventing voter intimidation.

The Directive easily passes muster under intermediate scrutiny. Looking to the first part of the test, the Secretary has strong justifications for regulating the exercise of any Second Amendment rights in and around polling places, AV counting boards and clerk offices on election day—namely, avoiding voter intimidation.

To begin, *Heller* already recognized the government’s power to restrict the “carrying of firearms in sensitive places such as schools and government buildings.” 554 US at 626. Surely polling places and other election-related locations, including the 100-foot zone around these places, are sensitive places where citizens are engaged in the “weighty civil act” of casting a vote. See *Minnesota Voters All v Mansky*, 138 S Ct 1876, 1886-1887 (2018) (internal quotation omitted) (considering polling places as “special enclave[s], subject to greater restriction.”). It is for this reason that courts around the country have upheld protections in and around polling places.³ Polling places are nonpublic forums where restrictions need only be “reasonable in light of the purpose served by the forum.” *Id.* at 1885.

³ Six states have expressly prohibited guns in polling places by statute. See Georgia, Ga Code Ann §§ 21-2-413(i); 16-11-127(b)(7), (e); Washington D.C., DC Code § 7-2509.07(a)(5); Texas, Tx Penal Code § 46.03(a)(2); Arizona, AZ St § 13-3102(A)(11); California, CA Election Code § 18544(a); Florida, Fla St § 790.06(12)(a)(6); Louisiana, LRS 18: § 461.7(C)(3), (D). Ohio bans carrying firearms into schools, churches, and government facilities (there are exceptions to each category), the state’s most common polling places. Ohio Revised Code Section 2923.16. South Carolina prohibits a person holding a permit to carry a concealed weapon from taking it into any “polling place on election days.” South Carolina Annotated Code Section 23-31-215(M).

Here, the prohibition on open carry is eminently reasonable given the profound activity that is occurring at the polling place—the exercise of a “fundamental political right” that is “preservative of all rights.” *Rodriguez*, 411 US at 101, quoting *Yick Wo*, 118 US at 370).

As to the 100-foot buffer zone around these places, courts have routinely held 100-foot buffer zones to be constitutional even under strict scrutiny where the curtailing of strongly protected political speech—at the core the First Amendment—was at issue. E.g., *Burson v Freeman*, 504 US 191, 197-98, 206 (1992) (plurality opinion) (upholding a 100-foot “campaign-free-zone” around polling places, noting that “some restricted zone is necessary to serve the States’ compelling interests in preventing voter intimidation and election fraud.”); *Mansky*, 138 S Ct at 1887 (recognizing states’ interest in providing “an island of calm in which voters can peacefully contemplate their choices.”) Both *Burson* and *Mansky* focused on protecting the vote and emphasized the voter intimidation, confusion, and general disorder that have plagued polling places in the past. *Mansky*, 138 S Ct at 1880 (discussing *Burson*). And *Burson* recognized that “[v]oter intimidation and election fraud . . . are difficult to detect.” 504 US at 208. See Ex Q, Bowman dec, ¶ 10 & Ex W, Swope dec, ¶¶ 11, 12 (expressing this very concern.)

The Secretary is obligated both to provide an “island of calm” for voters and to ensure that they are free from intimidation in and around polling places. (Indeed, she is exercising her executive power to enforce MCL 168.932(a), the Legislature’s prohibition against voter intimidation, when she does so. See *People ex rel Dougherty v Holschuh*, 235 Mich 272, 275 (1926).) There is no provision in Michigan’s Election Law, the Penal Code, or the Firearms Act that expressly permits or prohibits the open carry of firearms in polling locations, AV counting boards, or clerk offices. And while the Legislature has preempted the enactment of other

firearms regulations, that preemption applies only to local units of government—not to state government. See MCL 123.1101(b), 123.1102.

In *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, the Michigan Supreme Court determined that school districts were not expressly preempted from adopting firearms policies because they were not included in the list of local governments that were barred from doing so. 502 Mich 695, 704 (2018). The court further determined that implied preemption did not preclude districts from adopting policies because the Legislature’s incomplete listing of local governments demonstrated that the Legislature did not intend to occupy the field of firearms regulation. *Id.* at 705. See also *Wade v Univ of Michigan*, 320 Mich App 1, 15-22 (2017) (holding that university’s ordinance prohibiting firearms was not preempted).

The same is true here. Under the reasoning in *Michigan Gun Owners, Inc*, the Secretary is not precluded from issuing an instruction regulating the open carry of firearms, so long as she has the authority to do so. And, as explained previously—she does. The Secretary possesses both statutory and constitutional authority to issue instructions to prevent disturbances and voter intimidation at the places where an election is held.

And the Secretary was fully justified in concluding that the presence of armed individuals at our polling places and clerk offices is likely to increase the chance of disturbances at both and present a very high risk that some voters will be deterred from casting their votes, or will lack the necessary “island of calm” to be able to concentrate on their ballot. (See Ex C, Guzman dec, ¶ 9; Ex F, Hawili dec, ¶¶ 5-7; Ex G, Almouswi dec, ¶ 7.) Michigan communities vary in the degree to which the presence of firearms in public is tolerated. But on Election Day, every voter in every jurisdiction is entitled to cast their ballot free from fear, intimidation, or discomfort. Poll challengers, poll watchers, poll workers, poll chairpersons, and clerks, too, are entitled to

perform their duties in an orderly and secure environment, free from fear or intimidation. (See Ex O, Springer dec, ¶¶ 5-8; Ex P, Kessler dec, ¶¶ 4-7; Ex Q, Bowman dec, ¶¶ 8-10; Ex R, Kelly dec, ¶¶ 6-7; Ex S, Bunkley dec, ¶ 6; Ex T, Manley dec, ¶ 10; Ex V, Johnson dec, ¶¶ 5, 6; Ex W, Swope dec, ¶¶ 6, 9, 12.) A fair and accurate election cannot be conducted without the thousands of men and women who staff our polling places, clerk offices, and AV counting boards on Election Day. Avoiding intimidation at and near the polls is thus a state interest of the highest order.

The Secretary has a right and a duty to do everything within her power to protect the right to vote in Michigan. *See Davis v Secy of State*, ___ Mich App ___ (2020) (Docket No. 354622); slip op at 8-9. (Ex Y.) This includes taking steps to maintain peaceful and orderly elections in all communities. The declarations submitted to this Court (Exs C-W) confirm what common sense already dictates: that the open carrying of firearms at the polls poses a high risk of intimidating voters, poll workers, and others, and thus threatens Michigan citizens' right to vote. Therefore, to preserve the purity of elections, it is well within the Secretary's authority to regulate, in a temporary and limited manner, the open carry of firearms in places under her supervisory control. See Const 1963, art 2, § 4(2).

ii. The fit between the prohibition and the Secretary's Directive is more than reasonable.

The second part of the intermediate scrutiny test is met as well. The Secretary's Directive is wholly proportional to the goal of protecting the vote and forestalling any voter intimidation, confusion, or disorder that would dissuade someone from voting or from freely casting their vote, or from performing their duties. This is true for several reasons.

First, the Directive is narrow. Indeed, it is significant for what it does *not* ban. It does not ban concealed carry on election day. It does not ban open carry on any day other than the

upcoming Election Day. And it does not ban peaceful open carry anywhere other than in the polling place, a clerk's office, or at AV ballot counting boards or the 100-foot buffer zone around these locations. It does not even ban peaceful open carry 101 feet or more from these areas. These limitations demonstrate that the ban is no broader than it needs to be to protect voting.

Second, the Directive is both temporary and responsive. It is in place only for this election. And as discussed above, it is in response to recent events in our state. While Michigan was earlier the site of mostly peaceful demonstrations, the disturbing news of the plan to kidnap the Governor and to potentially harm other public officials made it clear to the Secretary that there is a real potential that people will appear at the polls armed for reasons other than "as a means of pronouncing their viewpoint on the Second Amendment." (Complaint, ¶21.) See generally (Ex B, Aff of Special Agent Richard J. Trask II.) And the Secretary was contacted by numerous clerks and local officials expressing concern over the presence of firearms at the polls. Voters, as well, have contacted the Secretary and the Attorney General's office expressing their fear of seeing someone with a visible firearm in or near the polls on Election Day. (See Ex D, Hachem dec, ¶ 7; Ex E, Al Ghoul dec, ¶¶5, 7; Ex H, Al Ghoul dec, ¶¶ 8-9; Ex H, Afra dec, ¶¶ 3-5; Ex I, Agha dec, ¶¶ 3-5; Ex J, Wheeler dec, ¶¶ 5-10.) And some have even indicated that, were it to occur, they might not enter the polling place and would be unable to cast their vote. (Ex C, Guzman dec, ¶ 6; Ex G, Almouswi dec, ¶¶ 4-7; Ex F, Hawili dec, ¶¶ 3-7.) Poll watchers, too, have expressed fear of entering or remaining at the polls if visibly armed individuals are present. (Ex T, Manley dec, ¶ 10.) At least one poll watcher indicated that she might not even get out of her car if she saw an armed individual near the polling place. (Ex R, Kelly dec, ¶ 7.)

It is not difficult to imagine that Michigan voters might find it difficult to enjoy "an island of calm" in which to "peacefully contemplate their choices," *Mansky*, 138 S Ct at 1887, if

they are making those choices side-by-side a voter with a visible firearm. Nor is it beyond the pale to imagine that some voters might be completely deterred from even entering the polls if they see an armed individual within 100 feet of the polling place. While the presence of firearms might comfort some, that same presence instills discomfort and even fear in others. This might be particularly true for a busy parent with small children in tow (Ex F, Hawili dec, ¶¶ 3, 4; Ex G, Almouswi dec, ¶ 5), a voter who has suffered loss as a result of a firearm, (Ex C, Guzman dec, ¶¶ 6, 9) or an elderly or disabled person who fears they might not be able to flee from an active shooter (Ex E, Al Ghoul dec, ¶ 9.) Voting is a fundamental right that must extend to all.

Third, the Directive is consistent with related laws and authority. For example, Michigan Election law already protects the polling place and the 100-foot zone for purposes of electioneering, see MCL 168.744, even though it intrudes on political speech protected by the First Amendment. See generally *Burson*, 504 US at 206-211 (plurality opinion); *Id.* at 214-216 (Scalia, J., concurring in judgment). Just as Michigan can protect those spaces for the voter by determining that voting at a polling place is a “time for choosing, not campaigning[.]” and thus restrict electioneering, *Mansky*, 138 S Ct at 1887, the Secretary, exercising her supervisory authority over elections—delegated to her by the Legislature—can likewise protect them for the voter through a limited prohibition on firearms this November 3rd.

Fourth, the directive ensures the equal treatment of the different types of polling places throughout the state. In Michigan, polling places and AV counting boards are often located on property where the Legislature has prohibited open carry. As a general matter, polling places must be located in “publicly owned or controlled buildings,” but may be located in buildings owned or operated by tax-exempt 501(c) organizations. See MCL 168.662(1) (location of polling places); MCL 168.765a(4) (location for holding absent voter counting board). Churches

and other 501(c)(3) nonprofit charitable organizations are frequently used as polling places and to hold AV counting boards, in addition to schools and other publicly owned or controlled buildings such as city or township halls, community centers, fire stations, courts, etc.

Because schools and churches, and some government buildings such as courts remain protected, the Secretary's instructions were principally necessary to address locations in other government buildings, with the goal of ensuring uniformity of treatment of voters and election workers at *all* polling locations, AV counting boards, and clerk offices. Since the law already generally prohibits the open carry of firearms on church or school property, and other private, nonprofits can exclude firearms from their properties, the Secretary's instructions as to these locations simply confirm the status quo.

Finally, the Secretary has done nothing different here than the Michigan Supreme Court did in issuing its Administrative Order 2001-3, without referencing a statutory source of authority, to prohibit firearms, including concealed carry, in the Michigan Supreme Court and its facilities, including the Hall of Justice. In so doing, neither the judicial branch nor the Secretary has violated the separation of powers.

In short, the Directive would survive a challenge based on the Second Amendment.

c. The Directive does not conflict with Michigan's statutory law regulating the possession of firearms.

The Directive is fully consistent with the statutory rights of both concealed pistol license holders and open carriers.

i. The Directive does not conflict with the statutory right to concealed carry.

Notwithstanding the lack of Second Amendment precedent conferring a right to bear arms outside of the home, there is a statutory right to do so in Michigan. But it is specifically a right to carry concealed.

The Firearms Act, MCL 28.421 *et seq*, regulates the concealed carrying of certain firearms. To this end, the Firearms Act, subject to the exceptions set forth in MCL 28.425o, provides that an individual with a license issued under the Act is authorized to (a) “[c]arry a pistol concealed on or about his or her person anywhere in this state” or (b) “[c]arry a pistol in a vehicle, whether concealed or not concealed, anywhere in this state.” MCL 28.425c(3). And those exceptions set forth in MCL 28.425o prohibit the carrying of concealed weapons in schools or on school property, in childcare centers, in sports arenas or stadiums, in bars, in places of worship, in hospitals, in large entertainment facilities, and in certain areas within institutions of higher education. See MCL 28.425o(1). But apart from MCL 28.425c(3)(b) (emphasis added), which authorizes a license-holder to “[c]arry a pistol *in a vehicle, whether concealed or not concealed*,” the Firearms Act does not specifically authorize the open carrying of firearms.

Critically, the plain language of the Directive does not touch on the statutory right of concealed carry—it prohibits only open carry. Thus, the Directive has no impact on, and is fully consistent with, the rights of licensed owners of firearms who wish to exercise concealed-carry rights according to the terms of their licenses and the Firearms Act.

ii. There is no general statutory right to open carry under Michigan law.

No Michigan law explicitly authorizes the open carry of firearms. Instead, Michigan’s Penal Code criminalizes open carry in certain sensitive areas. For example, MCL 750.234d provides that a “person shall not possess a firearm on the premises” of a bank, “church or other house of religious worship,” “court”, theatre, sports arena, day care, hospital, or bar. In addition, MCL 750.237a(1)-(4) criminalizes the possession of any firearm in a “school” or on “school property.” Both laws exempt a person if the person has express permission from the owner or an agent of the owner of the premises or the school principal or the school board, to possess a

firearm on the premises. MCL 750.234d(2)(d), 750.237a(5)(e).⁴ Further, concealed pistol license holders are not subject to criminal prosecution for open carry on these premises. MCL 28.425o(1)(e); 750.237a(5)(c).

However, if a local school district has adopted a policy banning possession of firearms on school property, including by concealed pistol license holders, that policy will apply to preclude anyone from carrying firearms on school property. See *Michigan Gun Owners*, 502 Mich at 707-708. Similarly, private property owners have the authority to prohibit the possession or open carrying of a firearm on their property that is enforceable through criminal trespass laws. See, e.g., *Adams v Cleveland-Cliffs Iron Co.*, 237 Mich App 51, 58-59 (1999) (explaining that “the possessory right to real property includes the right to exclude others from one’s property, and a violation of that right gives rise to an action for trespass”); *Dressler v Rice*, 739 Fed Appx 814, 821-822 (CA 6, 2018).

And while the Michigan Penal Code does criminalize open carry if it occurs in certain enumerated premises such as banks, places of worship, courts, and theatres, MCL 750.234d,⁵ and in “weapon free school zone[s]” such as schools and school transport vehicles, MCL 750.237a(1), the Michigan Legislature’s silence on polling places (and presumably everywhere else not named in § 234d) does not confer an affirmative statutory right to individuals to open carry firearms in all places not named. To the contrary, the fact that the Legislature has created the statutory right to open carry *in a vehicle* but has not done so in other areas lends support to the argument that no such right exists.

⁴ There are other exemptions for hired security and peace officers. See MCL 750.234d(2), 750.237a(5).

⁵ This section of the penal code expressly exempts individuals with licenses issued under the Firearms Act. MCL 750.234d(2)(c).

In other contexts, courts have rejected similar arguments that the Legislature, by forbidding certain conduct, created a positive statutory right to engage in similar conduct not forbidden under the statute. See *Miller v Fabius Tp Bd, St Joseph Co*, 366 Mich 250, 256-257 (1962) (upholding a challenged ordinance because the municipality had not forbidden “what the legislature has *expressly* licensed, authorized, or required”); *City of Detroit v Qualls*, 434 Mich 340, 362-363 (1990) (upholding a city ordinance relating to the storage of fireworks that was stricter than the state statute on the same subject, and “reject[ing] the rationale employed by the dissent that that which the Legislature does not prohibit, it impliedly permits”); *Rental Property Owners Ass’n of Kent Co v City of Grand Rapids*, 455 Mich 246, 261 (1997) (declining to strike down a city nuisance abatement ordinance that provided different and greater provisions for nuisance abatement than those provided in the state nuisance abatement statute). And in this context, see the nonbinding but persuasive and compelling concurrence in *Michigan Gun Owners, Inc*, 502 Mich at 711-722 (Viviano, J., & Bernstein, J., concurring) (indicating that they would have rejected an argument from the plaintiffs that the Legislature in banning open carry in some circumstances is creating a right to it in other circumstances.) See also 2019-2020, OAG No. 7311, issued May 11, 2020 (where the Attorney General discussed open carry as “a concept” that “does not provide the unfettered right to bring firearms into any public space”).

Simply put, as the Michigan Supreme Court has recognized, a “legislature legislates by legislating, not by doing nothing, not by keeping silent.” *McCahan v Brennan*, 492 Mich 730, 749 (2012) (quotation marks and citation omitted). And with respect to a so-called right to open carry, the Legislature has done nothing.

That said, it is not even necessary to reach this weightier determination of whether there is a statutory right to open carry in Michigan because, even if there is, Michigan courts have held

that there are “constitutionally acceptable categorical regulations of gun possession.” *Wilder*, 307 Mich App at 555, citing *Deroche*, 299 Mich App at 307-308. And for the same reasons the Directive passes muster under the Second Amendment to the U.S. Constitution and article 1, § 6 of Michigan’s Constitution, it likewise passes muster under Michigan’s statutory scheme. The Directive is justified by the need to protect voters as well as election workers from intimidation and discomfort, particularly at this time when Michigan has experienced unrest and voters are likely to be uneasy and even deterred by the presence of firearms at polling places. And the narrow one-day ban on open carry only is a reasonable fit that is proportional to the significant interest the Secretary seeks to protect.

d. The Secretary’s Directive is defensible under both federal and state First Amendment protections.

Plaintiffs assert that their open carry in and around the polls is an expression of their viewpoint on the Second Amendment. (Pls’ Brf in Supp of Emer Mot, p 2.) They explain that some of their open carriers affix their “I Voted” sticker on their holster at the polling place. They then take a picture of the holstered pistol and post it on social media as a form of expression. (Complaint, ¶ 21 & Ex 4; Pls’ Brf in Supp of Emerg Mot, p 2.)

The open carry of firearms, without more, is not “sufficiently imbued with elements of communication” necessary to implicate the First Amendment. See *Chesney*, 171 F Supp 3d at 617 (rejecting the argument that plaintiff had demonstrated an intent to convey a particularized message based on open carrying a firearm in a Michigan Secretary of State branch office, and explaining that, even if he had, “the circumstances surrounding [his] visit to the Secretary of State office do not give rise to a significant likelihood that this message would be understood by others in the [branch] office.”).

As an initial matter, Plaintiffs do not support their claimed desire to express themselves by declaration or otherwise. Moreover, Plaintiffs obviously could affix their “I Voted” sticker to their holster outside 100 feet of the polls, and then take photographs. So, even assuming that display of an “I Voted” sticker on one’s firearm is expression sufficient to invoke some degree of First Amendment protection, the Directive does not purport to prohibit such expression, or any other form of expression relating to Second Amendment issues. Rather, it only restricts the location at which such expression may take place. Accordingly, strict scrutiny need not be applied, and the Directive would easily survive as a reasonable time, place, and manner restriction.

Even if strict scrutiny did apply, the Directive would still survive. The U.S. Supreme Court has already ruled that the content based prohibition of certain speech within a polling place and within the immediate 100 feet surrounding polling places can survive strict scrutiny as it is narrowly drawn to advance the compelling interests of preventing voter intimidation and election fraud. *Burson*, 504 US at 206. It follows that if the regulation of speech in polling places and in the 100-foot perimeter surrounding polling places can survive strict scrutiny, the Secretary’s Directive prohibiting the open carry of firearms would likewise survive scrutiny. After all, “what is true for the First Amendment is true for the Second.” *Tyler*, 837 F3d at 711 (Sutton, J., concurring). In fact, in light of the safety concerns that firearms present, and Michigan’s recent history with firearms at the state Capitol and a plot to kidnap Michigan’s Governor, the Secretary’s Directive would have an easier time surviving strict scrutiny than the speech-related prohibitions at issue in *Burson*.

Notably, the Secretary has for many years placed restrictions on otherwise protected political speech, which is at the core of First Amendment, by broadly limiting the use of video

cameras, cell phones, cameras, televisions and recording equipment in the polls.⁶ A prior version of these instructions was challenged on First Amendment grounds by a voter who wished to use his cell phone to take a “ballot selfie” but was banned from doing so under the instructions in place at that time. See *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016). In staying the preliminary injunction issued in that case, the Sixth Circuit spoke favorably of the Secretary’s instructions: “The State’s policy advances several serious governmental interests: preserving the privacy of other voters, avoiding delays and distractions at the polls, preventing vote buying, and preventing voter intimidation.” *Crookston*, 841 F3d at 400. While the state later agreed to allow a very limited opportunity to take a “ballot selfie,” in recognition of the modern times we live in, the case supports the Secretary’s authority to weigh competing constitutional interests as the “chief election officer” charged with enforcing the state’s election laws, and to ensure that, at and near polling places, the right to vote remains paramount.

B. Plaintiffs cannot show an irreparable injury absent an injunction.

Here, given the unsettled nature of the Second Amendment’s protections, Plaintiffs cannot demonstrate that they have a right to bear arms outside of their home under the Second Amendment. See, e.g., *Chesney*, 171 F. Supp. 3d at 622. And as set forth above, they cannot demonstrate that they have an unfettered right to open carry in Michigan—especially not in “sensitive places” like polling locations and other places related to the act of voting. Again, since *Heller*, it has been well-understood, that “[l]ike most rights,” the right to bear arms is not “unlimited[,]” nor is it the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 US at 635. To the contrary, the U.S.

⁶ See Election Officials’ Manual, Chapter 11, Election Day Issues, October 2020, pp 39-40, available at https://www.michigan.gov/documents/sos/XI_Election_Day_Issues_266009_7.pdf.

Supreme Court acknowledged in *Heller* that it regards “laws forbidding the carrying of firearms in sensitive places” as “presumptively lawful regulatory measures[.]” *Id.*

Accordingly, because Plaintiffs cannot establish such a right—either statutory or constitutional, they cannot demonstrate that they will suffer any harm—let alone irreparable harm—without an injunction. Even if such a right existed, the directive would not create irreparable harm because Plaintiffs could simply leave their firearm in the car or at home, go into the polls to vote—where their need for self-defense is severely diminished by the fact that no other voters, election workers, or poll watchers or challengers can be openly armed—and come back out to their car or home and get their firearm.

Plaintiffs also assert that their risk of harm is voter disenfranchisement on Election Day. (Pls’ Brf Supp of Emer Mot, pp 11-12.) But if they wanted to express themselves through their weapon and the vehicle of voting, they could simply step outside the 100-foot buffer zone and display their “I Voted” sticker on their weapon, similar to their ability to electioneer or display a ballot selfie beyond the 100-foot zone. The temporary inability to do that during the act of voting or within the 100-foot buffer zone is not irreparable harm.

C. The balance of harms and the public interest weigh against granting the injunction.

The public interest would be significantly harmed if this Court were to grant Plaintiffs’ motion for a preliminary injunction because an injunction would potentially rob many registered Michigan voters of the chance to vote.

The right to vote is so important that the People of Michigan recently enshrined it in the Constitution via an initiative petition and explained that the constitutional guarantees “shall be liberally construed in favor of voters' rights in order to effectuate its purposes.” Const 1963, art

2, § 4(1)(a).⁷ In other words, the People of this State have decided that the holding of free and fair elections is uniquely important. If the Court grants the extraordinary relief of a preliminary injunction and disregards the Secretary's decision-making that the visible presence of firearms would have a chilling effect on the right to vote, it will be undermining the will of the voters who amended this State's constitution.

Recent events in Michigan have heightened fears of firearms and gun violence. During the weeks following the tumultuous plot to kidnap the Governor, both the Secretary and the Attorney General heard from a number of clerks, poll watchers, and voters expressing apprehension and discomfort.

Some voters are afraid of guns because they have a history of gun violence. Rosemary Guzman, for example, lost her cousin to a violent shooting about a month ago. (Ex C, Guzman dec, ¶ 6.) That, coupled with the plot to kidnap the Governor, has made her more afraid of guns than she ever was before. (*Id.*, ¶ 7.) Guzman says that if she was approaching the polls to cast her vote and she saw someone with a firearm, she would probably turn around and call the police rather than go into the polling location, which she says could prevent her from voting. (*Id.*, ¶ 9.)

Some have an additional fear of firearms at the polls—the presence of their children, whom they will have to bring along to the polls. Mouhana Hawili, for example, is a mom who plans to vote in person and will need to bring her five children (two of them toddlers) to the polls with her when she votes. (Ex F, Hawili dec, ¶¶ 3, 4.) The plot to kidnap the Governor has made her concerned about open carry at or near her precinct, and she says if she saw a gun at the polls she would not get out of her car. (*Id.*, ¶¶ 5-7.) Afrah Almouswi likewise plans to vote in person

⁷ See also *Official Text of Proposal 18-3*, https://www.michigan.gov/documents/sos/Full_Text_-_PTV_635256_7.pdf.

because English is her second language and she would rather go to the local poll where she has people assisting her in the process of voting. (Ex G, Almouswi dec, ¶ 4.) She is a mom with four kids, two of whom are babies, and she will have to bring them to the polls with her when she votes. (*Id.*, ¶ 5.) But firearms at the polls cause her to be concerned for the safety of herself and her children, especially since she is an Iraqi American who fled the war in Iraq, and firearms remind her of the war zone. She says this fear is heightened “given how emotional this election season has been and because of the recent plot to kidnap the Governor.” (*Id.*, ¶ 6.) She does not want to lose her right to vote but says that visibly armed people could scare her and her kids from waiting in line or going into her polling location. (*Id.*, ¶ 7.) Farah Afra has similar concerns, since she will both be voting in person and also assisting some immigrant women by dropping them at the polling locations so they can vote. (Ex H, Afra dec, ¶¶ 3, 4.) She is concerned that firearms pose a risk to her personal safety and those she is assisting. (*Id.*, ¶ 7.)

Some voters have particular fears because of age, health, or disability. Rabha Al Ghoul plans to vote in person on November 3 because she does not understand or trust the absent ballot process. (Ex E, Al Ghoul dec, ¶ 8.) She says she has been voting at the polls since she became a citizen. (*Id.*, ¶ 8.) But this year she is especially worried that she would not be able to run away if a firearm came near her, having just had major surgery on her leg. (*Id.*, ¶ 9.)

Some are just plain scared. Hayat Agha, a new naturalized citizen, wants to experience her right to vote in person on November 3rd but says she “feel[s] terrified” when she sees firearms. (Ex I, Agha dec, ¶¶ 3, 5.) Laura Wheeler wants to be able to vote and not feel that she is “in the middle of a potential shootout.” (Ex J, Wheeler dec, ¶ 5.) Hussein Hachem respects people’s right to carry arms but feels very uncomfortable and unsafe voting while someone is carrying a visible firearm his polling precinct. (Ex D, Hachem dec, ¶ 6.) He left a war-torn

country where he observed voter suppression and unfair elections, and says he wants his wife and family to “feel safe and comfortable, not intimidated, while exercising their right to vote.” (*Id.*, ¶¶ 7, 8.) Solange Nestor is opposed to anyone carrying a gun at a polling place because she fears for her safety and says that the sight of someone carrying a gun while she is voting would make her feel both unsafe and uncomfortable. (Ex M, Nestor dec, ¶¶ 5, 6, 7.)

For many voters, these concerns are heightened because of recent events and the political climate. Dave Maturen is a former State Representative elected as a Republican to the 63rd House district, the Kalamazoo County Commission, and Brady Township as a trustee. (Ex U, Maturen dec, ¶ 3.) He supports the Secretary of State’s Directive banning open carry at polling places, and says that if he had not already voted his AV ballot, open carry would make him concerned about his physical safety and the physical safety of those around him at a polling site. (*Id.*, ¶¶ 6, 8.) He notes the threats made against the Governor and elected officials statewide, the heated rhetoric and hatred during this year’s elections, and he believes “there is potential for angry people to become frustrated at polling places.” (*Id.*, ¶ 9.) “Adding a weapon, such as a gun, to this environment could possibly lead to violence,” he says; “we need to lower the temperature—not raise it by permitting open carry at polling places.” (*Id.*, dec, ¶¶ 10 11.) Nestor shares these concerns, noting that “people are very angry about politics right now,” and that “guns in this atmosphere creates an environment for intimidation and violence.” (Ex M, Nestor dec, ¶ 8.) Al Ghoul, who is already afraid of guns since she experienced a war zone for a decade in her home country of Lebanon, says that the plot to kidnap the Governor has made her even more afraid of guns. (Ex E, Al Ghoul dec, ¶¶ 5, 7.) And Jeff Timmer believes the Secretary of State’s decision to ban guns at polling places “was wise given the extreme rhetoric we are seeing daily on the news and in social media, and the extreme actions taken we are seeing by

some with different political viewpoints.” (Ex N, Timmer dec, ¶ 10.) He is “concerned about the recent phenomenon of political extremists bringing guns to social protests, and into government buildings like the State Capitol in Lansing,” along with the threat against the Governor. (*Id.*, ¶ 8.) “Given the passions displayed about this upcoming election, guns at polling places only serve to heighten the possibility for violence, intimidate voters, stop people from voting, [and] disrupt the flow of the election and the counting of ballots,” he says. (*Id.*, ¶ 10.)

Even gun owners are among those who support the Directive. Nathan Dannison, a pastor, is in the process of getting a concealed pistol license. (Ex K, Dannison dec, ¶ 4.) Yet he supports the Directive because he believes allowing firearms at the polls will “discourage regular Americans from voting” and would make him “less likely to participate in the democratic process in person or bring my children to the polling site.” (*Id.*, ¶ 5.) Gary Reed, another gun owner and former executive director of Michigan Republican Party and former elected Delta Township Trustee, (Ex L, Reed dec, ¶ 5), says that, while he is working the polls this election as a poll worker, he will be very intimidated if he sees someone walking around with a gun. (*Id.*, ¶¶ 3, 4, 7.) He recalls seeing armed gunmen at the Michigan Legislature in the Capitol building, which was “very concerning for public safety reasons.” (*Id.*, ¶ 10.)

Poll challengers, poll observers, poll workers, and clerks share these concerns—and they are instrumental to a fair and smooth election. Bradford Springer and Richard Kessler will both be at the polls as poll challengers. (Ex O, Springer dec, ¶ 5; Ex P, Kessler dec, ¶4.) Springer says that “[i]n light of the recent plot to kidnap Governor Whitmer and our President telling people to guard the polls,” he is very nervous to approach the polling location or inside the polling location when individuals with visible firearms are present. He says this might escalate to a level where it is a risk to his personal safety. (Ex O, Springer dec, ¶ 8.) Kessler is similarly

concerned for his safety, as he is “afraid that someone might use the firearm and I might be injured or killed.” (Ex P, Kessler dec, ¶ 6.) He says this fear is heightened given how emotional this election season has been and because of the recent plot to kidnap the Governor. (*Id.*, ¶7.)

Poll watchers Julia Kelly and Kenneth Manley likewise speak out. Kelly says that if she were to arrive at a precinct and there was someone outside with a visible firearm, she would feel “very afraid” and probably would not get out of her car. (Ex R, Kelly dec, ¶ 7.) Manley believes that “[p]ermitting non-law enforcement persons to carry guns at a polling place limits a free and fair voting experience because it makes it uncomfortable and worrisome for voters, polling staff and poll watchers.” (Ex T, Manley dec, ¶ 10.) And he believes that a polling place is naturally a place where people have different views, so introducing guns into that already emotionally charged environment creates a greater likelihood of violence. (*Id.*, ¶ 12.)

Poll workers feel similarly. Paula Bowman believes she will be “worrying about someone sitting six feet away from me with a gun rather than having my complete focus on my job.” (Ex Q, Bowman dec, ¶¶ 8.) She also expressed concern that now, with the COVID-19 pandemic, she as a poll worker, “cannot see expressions—whether the person is smiling or is angry,” so allowing people with guns makes her feel that her safety is compromised. (*Id.*, ¶10.) Deborah Bunkley, another experienced poll worker, expects this election to be “trying” and says if she sees someone with a gun, she is going to be worried unless she knows them. (Ex S, Bunkley dec, ¶ 6.) Regina Johnson, who supervises poll workers, believes that an altercation over open carry could put her in harm’s way because it would be her responsibility to address it. (Ex V, Johnson dec, ¶¶ 4, 6.) She recounts experiences where partisan challengers have confronted voters and “things get confrontational.” She believes that allowing open and carry in

such an environment is “asking for trouble.” (*Id.*, ¶ 10.) She is also concerned about poll workers’ safety and voters’ safety “from a shooting or an accidental shooting.” (*Id.*, ¶ 9.)

Last but not least, firearms at the polls and at clerks’ offices also affects clerks. Chris Swope, Lansing’s elected City Clerk, has been overseeing elections for the City of Lansing and supervising numerous election officials since 2006. (Ex W, Swope dec, ¶ 2, 3.) He says he “has concerns over the presence of firearms at all of these election-related locations” and that his election workers have also expressed the same concerns to him during trainings and on other occasions. (*Id.*, ¶ 8.) “As election officials, we are trained to implement the election laws. My workers are not trained in the status of Michigan’s firearm laws and where people may or may not open carry a firearm.” (*Id.*, ¶ 9.) He explains that because voters have different views and sensitivities to firearms, his workers have also expressed concern over the difficulty in determining when a person possessing a visible firearm may be intimidating other voters. (*Id.*, ¶ 11.) “This uncertainty,” he says, “can make it difficult for myself and my election workers to ensure that elections run securely and without unnecessary delays or disruption if we are having to address the presence of firearms at polling locations.” (*Id.*, ¶ 12.) He believes that the Secretary’s Directive helps address those concerns by uniformly prohibiting the open carry of firearms in all polling places, clerks’ offices, and counting boards. (*Id.*)

Without question, a preliminary injunction would harm the public’s interest in protecting the right to vote more than the absence of an injunction would harm any Second or First Amendment right Plaintiffs may have to openly carry firearms outside their home or engage in firearms-related expression within the 100-foot buffer zone of a polling place, AV counting board, or clerk’s office. For this reason alone, this Court should deny Plaintiffs’ motion for preliminary injunction.

III. Plaintiffs have not met the grounds for a permanent injunction.

In determining whether a permanent injunction is appropriate, our appellate courts suggest a review of the following seven factors: (1) “the nature of the interest to be protected[;]” (2) “the relative adequacy to the plaintiff of injunction and of other remedies[;]” (3) “any unreasonable delay by the plaintiff in bringing suit[;]” (4) “any related misconduct on the part of the plaintiff[;]” (5) “the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied[;]” (6) “the interests of third persons and of the public[;]” and (7) “the practicability of framing and enforcing the order or judgment.” *Kernan v Homestead Dev Co*, 232 Mich App 503 (1998). Here, factors 1, 5, 6, and 7 weigh heavily in the Secretary’s favor and compel the denial of a permanent injunction.

As discussed above, the harm to Plaintiffs, if any, would be minimal. They are still free to vote, not prohibited (at least by the challenged Directive) from openly carrying a firearm on any day other than this upcoming Election Day or at any locations other than polling places, clerks’ offices, and AV counting boards. And they can exercise their First Amendment rights with respect to firearms by stepping just over the 100-foot buffer zone. Conversely, many registered voters are likely to be deterred from voting if an injunction does not issue, or will be required to cast their vote under the specter of fear that an armed individual will be casting a vote alongside them—deprived of the “island of calm” the U.S. Supreme Court has recognized as so important to the voting process.

Finally, on a practical level, yet another change to voting instructions would be disruptive and confusing to voters, clerks, and election workers alike. This Court should deny Plaintiffs’ request for a permanent injunction.

CONCLUSION AND RELIEF REQUESTED

The Secretary had authority to issue the directive, the delegated authority under which she acted does not violate separation-of-powers principles, and the extraordinary remedy of injunctive relief is not appropriate. Plaintiffs are not likely to succeed on the merits, there is no irreparable harm to Plaintiffs if an injunction does not issue, and voters at large are harmed if open carry is allowed in and near polling locations, clerks' offices, and AV counting boards.

WHEREFORE, Defendants Benson, Nessel, and Gasper respectfully request that this Court deny Plaintiffs' request for declaratory judgment and emergency injunctive relief because the grounds for such relief are not met. Plaintiffs also request that this Court deny Plaintiffs' request for a permanent injunction and dismiss all claims against them.

Respectfully submitted,

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Dated: October 26, 2020

PROOF OF SERVICE

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STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

OPINION AND ORDER GRANTING IN
PART PLAINTIFFS' EMERGENCY
MOTION FOR PRELIMINARY
INJUNCTION

v

Case No. 20-000207-MZ

JOCELYN BENSON, in her official capacity as
Michigan Secretary of State,

Hon. Christopher M. Murray

Defendant.

_____/

THOMAS LAMBERT, MICHIGAN OPEN
CARRY INC, MICHIGAN GUN OWNERS, INC,
and MICHIGAN COALITION FOR
RESPONSIBLE GUN OWNERS, INC,

Plaintiffs,

v

Case No. 20-000208-MM

JOCELYN BENSON, in her official capacity as
Michigan Secretary of State, DANA NESSEL, in
her official capacity as Michigan Attorney General,
and COL JOE GASPER, in his official capacity as
Michigan State Police Director,

Hon. Christopher M. Murray

Defendants.

_____/

Plaintiffs have filed emergency motions for preliminary injunction and declaratory judgment on October 22, 2020 and October 23, 2020. Defendants responded to both motions on October 26, 2020 and plaintiffs filed replies on October 27, 2020.¹ Oral argument was held on October 27, 2020. For the reasons outlined below, the motions will be granted in part.

Before conducting a review of the merits, it is important to recognize that this case is not about whether it is a good idea to openly carry a firearm at a polling place, or whether the Second Amendment to the US Constitution prevents the Secretary of State's October 16, 2020 directive. After all, the Court's duty is not to act as an overseer of the Department of State, nor is it to impose its view on the wisdom of openly carrying firearms at polling places or other election locations. Besides the fact that the Court has no interest in either one of those matters, more importantly its constitutional role is properly limited to only declaring what the law is, not what it should be. See *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). Resolution of these motions rises and falls based solely on a consideration of the four factors governing the issuance of a preliminary injunction, and the law surrounding the Administrative Procedures Act. The Court now turns to those issues.

I. BACKGROUND

These two consolidated lawsuits challenge an October 16, 2020 written directive² from defendant directing local election officials across the state to prohibit "the open carry of firearms on election day in polling places, clerk's office(s), and absent voter counting boards." More

¹ The Court appreciates the timeliness and thoroughness of the briefs.

² When referring to the directive throughout this opinion, the Court is only referencing and addressing the prohibition on the open carry of firearms. No other provisions of the directive are addressed in this opinion.

specifically, the directive states that this prohibition extends not only to inside the specified locations, but also to anyone within 100 feet of those locations (on-duty law enforcement officers are exempted). Additionally, the directive states that “[c]arrying a concealed firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so.” According to the directive, defendant “is coordinating with the Attorney General and state and local law enforcement to ensure uniform enforcement of these requirements.”

Plaintiffs in both cases argue that the directive is unlawful because it is a “rule” as defined in the Administrative Procedures Act,³ MCL 24.207, and as such can only be effective when it is promulgated through the APA process. Plaintiffs in Docket No. 20-000208 also argue that MCL 168.678, which provides “each board of election inspectors” with the power to “maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during an election,” is an unconstitutional delegation of legislative power to the executive.

II. ANALYSIS

As noted, plaintiffs in both cases seek the extraordinary remedy of a preliminary injunction. The ultimate purpose of a preliminary injunction is to preserve the status quo that existed prior to the challenged action to allow the judiciary an opportunity to peacefully resolve the dispute. *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006) (the Court defined the status quo as “ ‘the last actual, peaceable, noncontested status which preceded the pending

³ MCL 24.201 *et. seq.*

controversy.’ ”), quoting *Psychological Servs of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985).

In *Slis v State of Michigan*, __ Mich App __, __; __ NW2d __ (2020), slip op at 12, the Court of Appeals outlined the four factors a court must consider in determining whether a preliminary injunction should be entered:

Four factors must be taken into consideration by a court when determining if it should grant the extraordinary remedy of a preliminary injunction to an applicant: (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction; (2) whether the applicant is likely to prevail on the merits; (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and (4) whether the public interest will be harmed if a preliminary injunction is issued.

The party requesting “injunctive relief has the burden of establishing that a preliminary injunction should be issued . . .” MCR 3.310(A)(4). The Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs⁴ do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int’l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

⁴ Although not challenged, the Court doubts that plaintiff Davis has standing. He has not alleged he openly carries a firearm or even owns a firearm. It is thus unclear how he meets the “actual controversy” requirement of MCR 2.605. Although he does cite *Slis* for the proposition that he has standing under the APA, that decision applied MCL 24.264, which gives businesses standing to challenge certain rules. *Slis*, slip op at 14. The Court need not decide that issue, however, because the plaintiffs in Docket No. 20-000208 (particularly plaintiff Lambert) have made the necessary allegations to show standing under MCR 2.605.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS

Turning to the merits, the main issue as the Court sees it is the allegation that the directive violates the APA because it is a rule that was not promulgated through the act's procedures. And, a rule not promulgated under the APA is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982). No party disputes that the Department of State is an agency for purposes of the APA, MCL 24.203. Additionally, separate statutory authority *requires* that the secretary "issue instructions and promulgate rules pursuant to the administrative procedures act ... for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a). There is no dispute that defendant must abide by the APA.

As to whether the directive is a rule that needed to be approved through the APA process, an administrative rule is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency" MCL 24.207. An agency must utilize formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for *policy determinations* pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) (emphasis added). It is a legal question whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002). And, as noted earlier, the Court need not determine as a final matter whether

plaintiffs are correct as a matter of law. Instead, the standard is whether plaintiffs have shown a substantial likelihood of success on the merits. *Int'l Union*, 211 Mich App at 25.

It is also important to recognize that “the label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA.” *AFSCME*, 452 Mich at 9. Instead, courts must examine the “actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule,” for “an agency may not circumvent APA procedural requirements by adopting a guideline in lieu of a rule.” *Id.*

Here, because the directive has the force and effect of law, is of general applicability, and covers a substantive matter, plaintiffs have established a substantial likelihood that the directive had to be promulgated as a rule under the APA. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 654; 770 NW2d 915 (2009). The directive itself covers a substantive policy area—where a resident can openly carry a firearm—and applies to every resident of this state. See *Delta County v Michigan Dep't of Natural Resources*, 118 Mich App 458, 468; 325 NW2d 455 (1982) (“The ‘stipulations’ did affect the rights and practices of the public. The rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies.”); *Palozolo v Dep't of Social Services*, 189 Mich App 530, 534; 473 NW2d 765 (1991) (“the policy deprives ... an entire class of people benefits to which they would otherwise be eligible on the basis of an internal policy of the agency without the benefit of the protection afforded by the rule-making requirements.”).

Additionally, the directive is written in the form of a prohibition, and strongly suggests state and local law enforcement have the power to, and will, enforce the prohibitions within the directive. That fact also strongly suggests the directive is a rule. *Delta County*, 118 Mich App at

468 (“Clearly, then, these guidelines were binding. Therefore, they effectively were rules under the guise of guidelines and policies.”); *Spear v Michigan Rehabilitation Services, Inc*, 202 Mich App 1, 5; 507 NW2d 761 (1993); *Jordan v Dep’t of Corrections*, 165 Mich App 20, 25-26; 418 NW2d 914 (1987).

Also supporting plaintiffs’ position is that the directive does not merely provide guidance to local election officials on existing state law, as it appears to be partially inconsistent with state law. Specifically, the directive applies to individuals within 100 feet of any polling place, even if those polling places are not an area designated as off-limits to open carry under state statute. MCL 750.234d. As far as the Court can discern, there is no affirmative statutory provision “granting” the right to open carry a firearm. See *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 714 n 6; 918 NW2d 756 (2018) (VIVIANO, J., concurring). But that does not mean the right to open carry does not exist in some form, see *id.*; US Const, Am II, and the more important point is that the only relevant prohibitions on doing so are contained within MCL 750.234d(1)(a)-(h).⁵ Just this year the Attorney General recognized this exact same point. See 2020 OAG No. 7311 (“In Michigan, the concept of ‘open carry’ does not provide the unfettered right to bring firearms into any public space. Numerous restrictions already exist on openly carrying firearms in public places. See e.g., MCL 750.234d [listing various premises, such as a court, church, and hospital, where ‘a person shall not possess a firearm’].” See, also, 2002 OAG No. 7113 (“The carrying of firearms in public is also restricted by the Michigan Penal Code, 1931 PA 328, MCL 750.1 et. seq.”). However, whether there is a formally recognized right to open carry is not the

⁵ MCL 28.425o contains prohibitions (and exceptions to the prohibitions) regarding the carrying of a concealed weapon, but the directive does not speak to concealed weapons at polling places.

dispositive point, and need not be decided. What is important for APA purposes is that even if defendant can place additional restrictions on where people can open carry a firearm beyond those contained in statute,⁶ it must be done through compliance with the APA.

A directive that is inconsistent with the law is not a directive but a rule requiring promulgation under the APA. *Jordan v Dep't of Corrections*, 165 Mich App at 27 (“A policy directive cannot be considered an ‘interpretive statement’ of a rule if it is in fact inconsistent with the rule or contains provisions which go beyond the scope of the rule.”). And, compliance with the APA is no mere procedural nicety. Instead, our appellate courts have repeatedly emphasized the importance of the democratic principles embodied in the APA, which requires notice and an opportunity to be heard on the subject under consideration. See *AFSCME*, 452 Mich at 14-15. Thus, the directive is a rule which defendant intends to have enforced as a law, and was required to be promulgated through the procedures of the APA. Defendant’s failure to do so makes it a substantial likelihood that plaintiffs will prevail on the merits.

For several reasons the responses submitted by defendant do not alter this conclusion. First, that defendant has supervisory responsibilities over the administration of elections is undisputed. But that proposition does not address the legal issue of whether the directive must meet the requirements of the APA. In the same vein, defendant’s statement that she “has issued instructions balancing constitutional rights before” also does not address the legal issue presented. Compliance with the APA does not involve a question of balancing constitutional rights, but instead requires application of statutory provisions and the cases applying those provisions. The

⁶ Which, of course, may raise additional separation of powers issues.

same holds true for defendant's recitation on the importance of voting. No party in this proceeding is questioning the importance of voting, especially intimidation-free voting. But again, that principle does not alter the Court's APA analysis.

Second, the exception within MCL 24.207(j) to what constitutes a "rule," does not apply to the directive. MCL 24.207(j) does contain an exception to the statute's definition of "rule" that applies to "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." Here, defendant relies upon two specific statutory provisions that she argues gives her "permissive statutory power" that allows the directive to be issued without following the normal APA process: (1) MCL 168.31(1)(a), noted earlier, which states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections and registrations in accordance with the laws of this state," and (2) MCL 168.31(1)(b), which grants the Secretary of State authority to "[a]dvice and direct local election officials as to the proper method of conducting elections."

The power granted to defendant under MCL 168.31(1)(a) does not allow the directive to fall within the exception in MCL 24.207(j), because MCL 168.31(1)(a) requires that any instruction for the conduct of elections be "in accordance with the laws of this state." The directive, as it applies to the "open carry" of firearms, is at least partially inconsistent with, not in accordance with, state law. As noted earlier, the directive prohibits the open carry of firearms "in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located." The only exception is for on-duty law enforcement officers. But MCL 750.234d(1)(a)-(h) already contains a list of locations where a

person cannot possess a firearm, and *all* polling places are not included in that list.⁷ Thus, the directive is arguably not “in accordance with state law,” as MCL 168.31(1)(a) requires it to be, and therefore that statutory authority appears to not fall within the exception to rule-making under MCL 24.207(j).

Caselaw applying MCL 24.207(j) also does not support application of the exception based on the statutory language contained in either MCL 168.31(1)(a) or (b). The main problem is that the language within MCL 168.31(1)(a) is too general to support application of the exception. After all, MCL 168.31(1)(a) simply states that the secretary shall “issue instructions and promulgate rules pursuant to the” APA “for the conduct of elections.” If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the rule-making process of the APA, then defendant would *never* have to issue APA promulgated rules for *any* election related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME, AFL-CIO*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—must still adhere to the APA if that implementation takes the form of a rule. See *id.* (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision “must be promulgated as a rule.”); *Spear*, 202 Mich App at 5 (holding that while the agency’s “decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule

⁷ It is possible that some locations listed in the statute may be used as polling places, and if that is the case the directive is merely duplicative of the statute.

under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act.”). Here, assuming defendant had discretion under her statutory authority to limit firearms at polling places, the implementation of that discretionary decision is not exempt from the APA’s rulemaking procedures.

Furthermore, the caselaw relied on by defendant in arguing for a different conclusion are easily distinguishable, or lend support for the Court’s conclusion, see e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep’t of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass’n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In those cases, the pertinent agency’s enabling statute expressly or impliedly authorized the *specific action* later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking or other means. See *Detroit Base Coalition*, 428 Mich at 187-188 (“The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found.”). Here, MCL 168.31(1)(a)-(b) provide generalized authority to defendant, but they lack specificity with respect to the action taken (firearm regulation), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition*, *Mich Trucking Ass’n* and *By Lo Oil Co*.⁸ Indeed, defendant has failed to

⁸ Defendant also places reliance on the conclusions of the majority in *Pyke v Dep’t of Social Services*, 182 Mich App 619; 453 NW2d 274 (1990). But Judge SHEPHARD’s dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo*, 189 Mich App at 533-534 & n. 1. The *Pyke* Court’s view on MCL 24.207(j) is irrelevant.

specify how the general discretionary authority under MCL 168.31(1)(a)-(b) applies to the regulation of firearms at polling places.

B. WHETHER PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Because the directive in all likelihood was unlawfully issued, it is not difficult to conclude that, in the absence of a preliminary injunction, plaintiffs will be irreparably harmed. If the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, has declared it can be carried.⁹ To allow an unlawful directive to displace a valid statutory provision would irreparably harm those that the statute benefits, here plaintiffs. *Consumers Power Co v PSC*, 415 Mich 134, 155; 327 NW2d 875 (1982) (“The circuit court may, however, provide relief from an erroneous order of the commission. And, where statutory or administrative procedures inadequately protect the substantive rights of the utility, the circuit court can, in the exercise of its equity powers, provide a remedy to avoid irreparable harm to the substantive rights of the utility.”).

C. BALANCE OF THE HARMS

Finally, the Court is required to consider whether the entry of a preliminary injunction would harm the public interest, and who would be harmed more in the absence of an injunction—plaintiffs or defendant. These considerations are related, and will be considered together. *Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1009 (CA 6, 2006).

⁹ Though plaintiffs in Docket No. 20-000208 have raised the right to bear arms provision of the Second Amendment to the United States Constitution, the Court can resolve these issues without the need to address any constitutional issue.

As recognized in the preceding section, to not enjoin a directive that is very likely unlawful would allow a single state officer to circumvent (and essentially amend) a valid and enforceable state law on the same subject. This is certainly not in the public interest, which expects its public officials to follow the rule of law. See, e.g., *Johnson v Heckler*, 604 F Supp 1070, 1075 (ND Ill, 1985) (“Second, the public interest requires that the Secretary of State recognize and apply the correct rule of law.”). It would also significantly undermine the rule of law, as it would subvert the primary purpose of the APA process—precluding unfettered action by the executive branch by allowing an opportunity for the public to provide input into agency rule-making that affects the general public, as does the directive. See *AFSCME*, 452 Mich at 15 (“Indeed, the APA is a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people.”).

Entry of an injunction would also cause little harm to the public interest put forth by defendant, that being the right of voters to be free from intimidation or harassment from those carrying a firearm. This holds true because, as noted, state law already prohibits the open carry of firearms in some locations used as polling places, such as a church, MCL 750.234d(1)(b), and prohibits carrying a concealed weapon in schools or places of worship. MCL 28.425o. Just as importantly, *voter intimidation is already a crime*, see MCL 768.744(1) and MCL 768.932a, as is intimidation accomplished through use of a firearm. MCL 750.234e; MCL 750.222.¹⁰ In other words, enjoining defendant’s directive regarding open carry will not harm the public interest in ensuring intimidation free voting, as state laws—laws passed by the Legislature and signed by the

¹⁰ Although nothing was submitted to establish any actual concern for voter intimidation by those carrying a weapon—either for the upcoming election or in prior ones—the Court recognizes that proof is not always necessary on such matters, and that prevention of voter intimidation is a legitimate area of state concern. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 43; 740 NW2d 444 (2007).

Governor—already provide law enforcement with the tools to stop those whose goal it would be to intimidate voters, whether with or without a firearm.

Finally, although defendant has not raised a laches defense, the Court notes that the eleventh-hour implementation of the directive does not foreclose a judicial decision. First, the main cause for the lateness of these lawsuits was that the directive was issued less than three weeks prior to the election. Although it is understandable why defendant chose to act now, it is nonetheless true that defendant could have taken these steps months ago—perhaps prior to the August primaries—rather than 17 days before the election. Second, because this decision allows the status quo that existed on October 16, 2020 to remain in place, there will be little confusion amongst voters or local election officials, as all prior elections were administered without the additional firearm guidance contained in the directive. Third, because these motions were decided in less than a week from their filing, there is some (though certainly not a lot) time to obtain appellate review of this decision.

III. CONCLUSION

For these reasons, plaintiffs’ motions for preliminary injunction are GRANTED in part, and defendant’s October 17, 2020 directive is ENJOINED to the extent it prohibits the open-carry of firearms in places not prohibited by MCL 750.234d or concealed weapons by MCL 28.425o.

IT IS SO ORDERED.

Date: October 27, 2020


Christopher M. Murray
Judge, Court of Claims