STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM MICHIGAN COURT OF APPEALS' (PUBLISHED OPINION)[1]
REVERSING THE GENESEE COUNTY CIRCUIT COURT ORDER GRANTING
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
JUDGE ARCHIE L. HAYMAN

MICHIGAN OPEN CARRY [MOC], INC; and
KENNETH HERMAN,
Plaintiffs-Appellants,

Supreme Court Case No. 155204
Court of Appeals Case No. 329418
Lower Court Case No. 2015-104373-CZ
Genesee County Circuit Court

CLIO AREA SCHOOL DISTRICT [CASD]; and
FLETCHER SPEARS, III; and,
KATRINA MITCHELL,
Defendants-Appellees.
_____/

PLAINTIFFS-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

**** This appeal involves interpretation of a constitutional or statutory provision ****

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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[1] *Michigan Open Carry [MOC], Inc. & Herman v Clio Area School District [CASD], et al*, 318 Mich App 356; 897 NW2d 748 (2016)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutions, Statutes and other Authorities

Rules

Other Authorities

SUPPLEMENTAL STATEMENT OF QUESTION PRESENTED

I. WHETHER, IN LIGHT OF MCL 123.1102, IT IS NECESSARY TO CONSIDER THE FACTORS SET FORTH IN *PEOPLE v LLEWELLYN*, 401 MICH 314 (1977), IN ORDER TO DETERMINE WHETHER THE SCHOOL DISTRICTS'S POLICIES ARE PREEMPTED?

The Court of Appeals answered "YES"

Plaintiff-Appellants answer "YES"

Defendant-Appellees position regarding this question is unknown.

II. IF SO, WHETHER THE COURT OF APPEALS PROPERLY ANALYZED THE LLEWELLYN FACTORS?

Plaintiff-Appellants contend the answer should be "NO".

Defendant-Appellees position regarding this question is "YES".

III. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE SCHOOL DISTRICT POLICIES ARE NOT PREEMPTED?

Plaintiff-Appellants contend the answer is "NO"

Defendant-Appellees position regarding this question is "YES"

STATEMENT OF FACTS

Overview

This appeal involves plenary review of the court of appeals' published opinion[2] (Apx 1a - 11a), interpreting the preemption doctrine regarding firearms regulations. The court of appeals reversed the Genesee County Circuit Court order (Apx 12a), granting injunctive relief to Plaintiffs-Appellants, Michigan Open Carry, Inc. [MOC] and Kenneth Herman, and prohibiting Defendant-Appellee, Clio Area School District [CASD], from enforcing its weapons policy (Apx 12a - 34a).[3]

Parties.

Plaintiff-Appellant, Michigan Open Carry, Inc. [MOC], is a Michigan not-for-profit advocacy organization (Apx 43a). MOC supports the lawful carry of holstered handguns; 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 (Apx 43a-44a).

Plaintiff-Appellant, Kenneth Herman,[4] is a local resident whose daughter attended - at the time the underlying matter was brought before the trial court - Edgerton Elementary

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[2] *Michigan Open Carry [MOC], Inc. & Herman v Clio Area School District [CASD], et al*, 318 Mich App 356; 897 NW2d 748 (2016) (Apx 1a - 11a).

[3] All documents attached hereto were considered by the court below, or are properly part of the record on appeal. *Coburn v Coburn*, 230 Mich App 118; 583 NW2d 490, *rev'd on other grounds*, 459 Mich 874; 585 NW2d 302 (1998).

Copies of the constitutional, statutory or court rule provisions are included in the appendix, pursuant to MCR 7.212(C)(7).

[4] Plaintiffs-Appellants Michigan Open Carry [MOC] and Herman, collectively, are referred to "MOC" is this brief.

School within the Clio Area School District (Apx 44a - 45a). Mr. Herman is licensed by the State to carry a concealed weapon (Apx 45a).

Defendant-Appellee, Clio Area School District [CASD], is a school district [MCL 380.6] (Apx 44a); a non-ordinance making local unit of government [MCL 169.209(8)] (Apx 57a); and a quasi-municipal corporation that is subject to the Constitution and laws of the state. *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220, 232; 826 NW2d 736, 743 (2012), citing *Attorney General of State of Mich v Lowrey*, 131 Mich 639, 644; 92 N.W. 289 (Mich 1902); *Detroit Sch Dist Bd of Ed v Mich Bell Tel Co*, 51 Mich App 488, 494–495, 215 NW2d 704 (1974) (a school district - a quasi-municipal corporation - is a state agency that is subject to the Constitution and laws of the state). Const 1963, art 7, § 22 (the power to adopt resolutions and ordinances relating to municipal concerns is subject to the Constitution and law)(Apx 56a).[5]

Procedural and Factual History

The CASD implemented Policy 7217 [weapons] (Apx 41a-42a), prohibiting Mr. Herman and others from possessing a weapon in any setting under the control or sponsored by CASD (Apx 41a).[6] The CASD's weapons' policy prohibited Mr. Herman from possessing an openly carried pistol while attending school functions (Apx 4a).

The CASD threatened Mr. Herman with criminal prosecution for trespass for violating of its weapons policy (Apx 47a). Mr. Herman's daughter was singled-out by CASD

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[5] The remaining Defendants-Appellees are employees of CASD whom are engaged in the enforcement of CASD's policies (See Apx 44a, Verified Complaint).

[6] The weapons policy was revised by CASD on February 11, 2016 (Apx 58a-59a), after Plaintiff has filed its brief in the Court of Appeals. The court of appeals utilized the revised version in its analysis.

employees for ridicule and contempt because of his political position on firearm rights, in general, and CASD's policy, in particular (Apx 46a). On March 5, 2015, MOC and Mr. Herman filed suit in the Genesee County Circuit Court for declaratory relief, claiming that the CASD policy was unlawful because it interfered with lawful firearm possession (Apx 48a).

Initially, the CASD Board of Education publicly acknowledged that openly carried pistols by licensed individuals on school property is lawful (CASD Resolution #955 (Apx 62a). On March 24, 2015, the Board passed a resolution acknowledging the law and urging, "lawmakers to amend applicable Michigan law to prohibit an individual from openly carrying a firearm on school property and to prohibit an individual who is licensed to carry a concealed pistol from carrying a pistol unconcealed on school property." (Id).

On July 6, 2015, the CASD responded to MOC's Complaint by filing its Motion for Summary Disposition and Declaratory Judgment (Apx *65a-73a). CASD's motion did not specify a court rule upon which relief was sought (Id). MOC filed a response to CASD's motion (Plaintiffs' Response and Opposition to Defendants' Motion for Summary Disposition and Declaratory Judgment (Apx 74a-87a). The CASD's motion was heard on August 10, 2015 (Apx 14a-34a).

The circuit court denied CASD's motion for summary disposition, and granted MOC and Mr. Herman's request for declaratory relief (Apx 12a-13a). The circuit court entered an order (for the reasons stated on the record), on September 7, 2015 (Apx 12a-13a). The Order incorporated the transcript of Proceedings of August 10, 2015. (Apx 14a-34a).

The Circuit Court found that the holding in Capital Area District Library directly controlled the case because facts of that case and this case are virtually identical; and the legal

holdings in that case directly apply to this case; moreover, the court was bound by the published decision of the Michigan Court of Appeals in Capital Area District Library (Apx 31a-32a).

> [T]he facts of that case and this case are virtually identical; and the legal holdings in that case directly apply to this case. The Michigan Legislature, the body responsible for passing laws in this state, has decided, for whatever reason, not to completely ban the possession of openly carried firearms on school property. Defendant, Clio Area School District, which is a quasi-municipal corporation, has decided to take it upon itself to completely ban the possession of firearms on school property. This Court is bound by the published decision of the Michigan Court of Appeals in Capital Area District Library vs. Michigan Open Carry, which specifically held that Michigan – held that the Michigan Legislature has occupied the field of firearm regulation to such an extent that State law preempts a quasi-municipal corporation's attempts to regulate in that same field.
>
> Accordingly, Clio Area School District's firearms ban, while likely smart and well-intentioned, is not allowed under current law. Only the Michigan Legislature can completely ban the possession of firearms on school property; and, as of yet, the Michigan Legislature as not fit – or seen fit to impose that ban. Because of this, Defendants' motion for summary disposition under (C)(8) should be denied because Plaintiffs have indeed stated a claim on which this Court can grant relief.

Order Denying Defendants' Motion for Summary Disposition and Granting Plaintiffs Declaratory Relief, dated September 7, 2015; Transcript pp 18 to 19. (Apx 31a-32a).

The CASD appealed the decision of the circuit court to the Court of Appeals (Apx 112a-134a*). MOC filed its responsive Brief on December 16, 2015 (Apx 135a-255a). The CASD amended their Policy in February 2016 (Apx 58a-59a).[7] The amended policy added some, but

[7] Neither party submitted the amended policy to the appellate court.

not all, existing exemptions in MCL 28.425o (Apx 259a-260a).[8]

The Court of Appeals heard oral arguments on December 13, 2016. A published opinion was issued two days later, on December 15, 2016 [*Michigan Open Carry Inc v Clio Area Sch Dist* [*CADL*], 318 Mich App 356; 897 NW2d 748, 750 (2016)] (**Apx 1A**). The appeals court reversed the decision of the circuit court and held that Michigan Law "does not preempt the CASD policies banning the possession of firearms in schools and at school-sponsored events." *Id* at 358.

The court of appeals first addressed plaintiffs' contention that because the CASD weapons policy directly contradicted MCL 28.425o (addressing the right of concealed pistol license holders to carry a concealed pistol on school property in certain circumstances), the

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[8] Prior to the February 2016 revision, CASD's weapons policy (Apx 41a-42a) lacked exemptions for:

- Parking areas (MCL 28.425o(4));
- Retired federal law enforcement officers (MCL 28.425o(5)(a));
- Retired corrections officers of a county sheriff's department (MCL 28.425o(5)(d));
- Probation officers and absconder recovery unit members of the department of corrections (MCL 28.425o(5)(h)(i));
- Retired parole, probation, or corrections officers, or retired absconder recovery unit members, of the department of corrections (MCL 28.425o(h)(ii));
- Court officers (MCL 28.425o(5)(j)).

(Apx 41a).

After the 2016 revision, CASD's policy still lacks exemptions for:

- Retired corrections officers of a county sheriff's department (MCL 28.425o(5)(d));
- Probation officers and absconder recovery unit members of the department of corrections (MCL 28.425o(5)(h)(i));
- Retired parole, probation, or corrections officers, or retired absconder recovery unit members, of the department of corrections (MCL 28.425o(h)(ii)).

(Apx 58a).

"policy banning weapons is expressly preempted." 318 Mich App at 365. The court stated that it had "resolved this very issue in the companion case" of *Mich Gun Owners, Inc. v Ann Arbor Pub Sch*, 318 Mich App 338, 347, 897 NW2d 768 (2016). *CASD*, 318 Mich App at 365.

Referencing *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), the court opined "[t]he close connection between district libraries and the cities or counties that established them informed CADL's analysis of the *Llewellyn* factors." Id at 367-68. "The distinct differences between local units of government and school districts likewise influence[d] [its] calculus and [its] conclusion that CADL [did] not govern this case." *Id.*

The court noted that the "CASD's firearms policy is consistent with state law permitting school districts to make their schools 'gun free zones.' For this reason, CADL [was] readily distinguishable from the current action." *Id* at 366. The court noted that the circuit court "committed clear legal error by accepting plaintiffs' claim that state law preempts school district policies against the possession of firearms" without performing a *Llewellyn* analysis. *Id* at 368. The court further found that an "application of the *Llewellyn* factors counsel[ed] against a finding of field preemption." *Id*.

The appeals court then analyzed the four *Llewellyn* guidelines.[9] The first *Llewellyn* guideline asked whether the state law cited as preemptive "expressly provide[d] that the state's authority to regulate in a specified area of the law is to be exclusive [citation omitted]." *Id*. The court found that "no such provision exist[ed]." *Id* at 368. Moreover, "MCL 123.1102 did "not include schools or school districts in its list of "local units of government," despite that for many other purposes, the Legislature ha[d] explicitly identified school districts as "local units of

[9] *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977).

government." " *CASD*, 318 Mich App at 368–69.

The second Llewellyn guideline required the court to consider legislative history. The court concluded that this guideline did not support preemption. *Id* at 369. The appeals court acknowledged that it had previously considered the House Legislative Analysis in the CADL case (reciting that MCL 123.1102 "was designed to address the 'proliferation of local regulation regarding firearm ownership, sale, and possession' and the 'concern that continued local authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances.' " *CADL*, 298 Mich App at 236; 826 NW2d 736]. This time, the appeals court found the "fragment of legislative history *useless*, as it [spoke] to ordinances and local units of government rather than to schools." *Id* (emphasis added). *Michigan Open Carry*, 318 Mich App at 369.

The third *Llewellyn* guideline concerned "the pervasiveness of the state regulatory scheme." The Court agreed that firearms were "indeed pervasively regulated in Michigan," given the "panoply" of firearms laws it had reviewed. That "fact, standing alone," did not compel the court to infer preemption because the "pervasiveness of the state regulatory scheme [was] not generally sufficient by itself to infer pre-emption;" it was but "a factor which should be considered as evidence of pre-emption." 318 Mich App at 371. Moreover, the "relevant segments of a multifaceted statutory framework evince[d] the Legislature's intent to prohibit weapons in schools." *Id*.

The court noted, "26 different laws specifically referenc[ed] "weapon free school zones" and that these four words "telegraph[ed] an unmistakable objective regarding guns and schools." The court found it "hard to imagine a more straightforward expression of legislative will." *Id*.

The field preemption analysis did not permit the court "to ignore [the] statutory language simply because there [were] many statutes regulating firearms." *Id*. "To the contrary, the pervasiveness of the Legislature's use of the phrase "weapon free school zones" presse[ed] against the preemption of a district policy affirming that its schools [would] remain "weapon-free." *Id*.

Llewellyn's fourth guideline asked whether "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*. at 324 [257 N.W.2d 902]. The court stated that because the Legislature had "never expressly reserved to itself the ability to regulate firearms in schools," its evaluation of this factor required it to weigh policy choices. CASD, 318 Mich App at 371.

The court rejected that claim that a "patchwork" of differing school policies would create "confusion" and would "burden" the police and the public, finding "no merit in this argument." *Id* at 372. "The Legislature ha[d] broadly empowered school districts to '[p]rovid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity,' . . .while recognizing that different school districts would employ different methods and strategies to accomplish this goal." *Id* at 372 (citation omitted).

"Most parents of school-age children send those children to schools located within a single school district. Most parents easily learn and adapt to the policies and procedures applicable to their children's schools and district." *Id*. The court could "discern no possibility of meaningful "confusion" or burdening of law enforcement." *Id*. Rather, the "policy ensure[d] that the learning environment remain[ed] uninterrupted by the invocation of emergency

procedures that would surely be required each and every time a weapon [was] openly carried by a citizen into a school building." *Id*.

The appeals court did agree with the circuit court's conclusion that the decision in *Davis*[10] (holding that local school boards have inherent power to define disciplinable acts and manage student behavior) was not applicable to this case. The court noted that there was "no precedent establishing a school district's inherent power to direct the behavior of nonstudent citizens." *Id* at 373-74.

On January 26, 2017, MOC & Herman filed a timely application for leave to appeal to this Court. On December 20, 2017, this Court issued an order directing the parties to file supplemental briefs within 42 days of the date of the order addressing: (1) whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted; (2) if so whether the Court of Appeals properly analyzed the Llewellyn factors; and (3) whether the Court of Appeals correctly held that the school district's policies are not preempted.

[10] *Davis v Hillsdale Community School Dist*, 226 Mich App 375, 382; 573 N.W.2d 77 (1997) (citations and quotations omitted).

ARGUMENT

LEGAL FRAMEWORK /OVERVIEW

Relevant Statutes

The Firearms and Ammunition Act, MCL 123.1101, *et seq*, prohibits local units of government from enacting, enforcing, or regulating firearms ("An Act to prohibit local units of government from imposing certain restrictions on the ownership, registration, purchase, sale, transfer, transportation, or possession of . . . firearms") (Apx 256a).

> A local unit of government shall not . . . 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 . . . firearms, except as otherwise provided by federal law or a law of this state.

MCL 123.1102 (Apx 256a).[11]

A "local unit of government" as used in the act is defined as "a city, village, township or county." MCL §123.1101(b) (Apx 256a). This definition subsumes all constitutionally

[11] This act does not prohibit a local unit of government from doing any of the following:

> (a) Prohibiting or regulating conduct with a pistol, other firearm, or pneumatic gun that is a criminal offense under state law.
>
> (b) Prohibiting or regulating the transportation, carrying, or possession of pistols, other firearms, or pneumatic guns by employees of that local unit of government in the course of their employment with that local unit of government.
>
> ***
>
> (d) Prohibiting an individual from pointing, waving about, or displaying a pneumatic gun in a threatening manner with the intent to induce fear in another individual.

MCL 123.1103 (Apx 256a).

recognized forms of local government that maintain power to enact ordinances with civil or criminal penalties. *Id*. Const 1963, art VII (Apx 52a-56a).

MCL 28.425c (Apx 258a), provides, in part:

> (3) Subject to section 5o [MCL 28.425o(5)] 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

MCL 28.425c(3)(a),(b) provides that a concealed pistol licensee may carry a concealed pistol concealed "on or about his or her person" anywhere in this state and carry a concealed, or non- concealed pistol in a vehicle anywhere in this state (Apx 258a).

MCL 28.425o, (Apx 259a), provides in part:

> (1) Subject to subsection (5), an individual licensed under this act to carry a concealed pistol . . . 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.
>
> * * *
>
> (4) As used in subsection (1), "premises" does not include parking areas of the places identified under subsection (1).

MCL 28.425o(1)(a) prohibits the carrying of a "concealed weapon" at a school or school property (Apx *). The statute, however, specifically provides an exception for a concealed pistol licensee 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, or within the parking areas of a school or school property. *Id* (Apx 259a).

MCL 750.237a (Apx 265a), provides, in part:

> (4) Except as provided in subsection (5), an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor.
>
> * * *
>
> (5) Subsection (4) does not apply to any of the following:
>
> * * *
>
> (c) An individual licensed by this state or another state to carry a concealed weapon.

MCL 750.237a(4) prohibits possession of a firearm within a "weapon free school zone" (Apx 265a). An exemption from this prohibition, however, is provided for "an individual who is licensed by this state or another state to carry a concealed weapon." MCL 750.237a(5)(c) (Apx 265a).

18 USC 922(q)(2)(A)-(B)(i)-(ii) (Apx 276a), provides in part:

> (2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.
>
> (B) Subparagraph (A) does not apply to the possession of a firearm--
>
> (i) on private property not part of school grounds;

> (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

18 USC 922(q)(2)(A) restricts knowingly possessing a firearm in a school zone. An exception exists for an individual licensed to do so by the State in which the school zone is located. 18 USC 922(q)(2)(B)(ii). (Apx 276a).

Reading the statutes in *pari materia,* an individual who is licensed by this state to carry a concealed weapon may not carry a concealed firearm onto a school or school property, except those who are in a parking area or in a vehicle and picking up or dropping off the student from school. MCL 28.425o(1)(a); MCL 28.425o(4); MCL 750.237a(4)(a); MCL 750.237a(5)(c); 18 USC 922(q)(2)(A), (B). (Apx 259a; 265a; 276a, respectively).

An individual who is in possession of a firearm that is not concealed, (i.e. openly carried), is not prohibited from possessing that firearm at a school, or on school property, if that individual is licensed by this state to carry a concealed weapon. MCL 28.425c(3)(b) MCL 28.425o(1)(a); MCL 28.425o(4); MCL 750.237a(4)(a); MCL 750.237a(5)(c); 18 USC 922(q)(2)(A), (B) (Apx 258a, 259a; 265a; 276a, respectively).

The concealed-carry exception of parking areas or picking up or dropping off a student does not act as a limitation to those who are openly-carrying elsewhere at a school or on school property. MCL 28.425o(1)(a); MCL 28.425o(4); MCL 750.237a(4)(a); MCL 750.237a(5)(c); 18 USC 922(q)(2)(A), (B). (Apx 258a, 259a; 265a; 276a, respectively).

Historical Background and Legal Challenges

The People of the State of Michigan have constitutionally vested power in the Legislature to enact laws. 1963 Const, art VII (Apx 52a). The Michigan Constitution authorizes four forms of local government - Counties, *Id*, § 1 (Apx 53a); Townships, *Id*, § 17(Apx 54a); Cities and Villages, *Id*, § 21(Apx 55a). These four forms of local governments may enact local ordinances. *Id*, § 22 (Apx 56a).

A statute is a law passed by a legislative body. *Black's Law Dictionary*, 7th ed, p 1420. An ordinance is a municipal regulation. *Id*. at 1125. Municipal governments can pass ordinances on matters that the state government allows to be regulated at the local level. *Id*.

> [Ordinances] may be a governmental exercise of the power to control the conduct of the public – establishing rules which must be complied with, or prohibiting certain actions or conduct. In any event, it is the determination of the sovereign power of the state as delegated to the municipality. It is a legislative enactment, within its sphere, as much as an act of the state legislature.

Id, citing 1 Judith O'Gallagher, Municipal Ordinances § 1A.01, at 3 (2d ed, 1998).

In 1990, the Legislature identified a problem with firearms regulations - it expressed concern that local ordinances regarding firearm ownership, sale and possession would result in the establishment of a patchwork of ordinances. House Leg. Analysis, Second Analysis, 1-3-91 (emphasis added). (Apx 261a - 264a). The primary purpose of House Bill 5437 - subsequently codified at MCL §123.1101, *et seq* [The Firearms and Ammunition Act, PA 319 of 1990, (effective March 28, 1991)] - was to "*provide uniformity of firearm laws in Michigan*." House Leg. Analysis, Second Analysis, 1-3-91 (emphasis added). (Apx 263a).

In passing the Firearms and Ammunition Act, the Legislature sought to address "fears that enactment of several gun control ordinances [would] make it hard for [law enforcement]

officers to enforce the laws and that gun enthusiasts [would be] unfairly prosecuted for not knowing the laws and the areas to which they apply." House Leg. Analysis, Second Analysis, 1-3-91 (Apx 261a).

The Firearms and Ammunition Act of 1990, MCL 123.1101, *et seq*, specifically prohibits local units of government from enacting, enforcing, or regulating firearms ("An Act to prohibit local units of government from imposing certain restrictions on the ownership, registration, purchase, sale, transfer, transportation, or possession of . . . firearms") (Apx 256a). The Act is a statutory preemption law intended by the State to provide uniformity of firearm laws in Michigan. MCL 123.1101, *et seq* (Apx 256a); House Leg. Analysis, Second Analysis, 1-3-91 (Apx 260a - 263a)

Since the enactment of the Firearms and Ammunition Act of 1990, litigation has challenged several governmental entities – with and without ordinance-making authority - who seek to ban the presence of firearms.

Michigan Coalition of Responsible Gun Owners [MCRGO], Inc, v Ferndale (2003).

The first challenge to the application of the Firearms and Ammunition Act arose in *Michigan Coalition of Responsible Gun Owners[MCRGO], Inc, v City of Ferndale*, 256 Mich App 401; 662 NW2d 864 (2003), cert denied, 469 Mich 880; 668 NW2d 147 (2003). In *MCRGO*, the City passed an ordinance prohibiting carrying of firearms within the city's library and other municipal buildings. 256 Mich App at 402. The court of appeals, in *MCRGO*, held that the city was precluded from enacting and enforcing ordinances that made local public buildings gun-free zones. *Id*.

The *MCRGO* Court, held that "a municipal ordinance is preempted by state law if: (i) the statute completely occupies the field that ordinance attempts to regulate, or (ii) the ordinance directly conflicts with a state statute." *Id*. at 407. "[W]ith respect to whether the state statutory scheme preempts a municipal ordinance by completely occupying the field of regulation that the municipality seeks to enter, in *Llewellyn*, this Court set forth four guidelines. *Id*. at 408-09

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.
>
> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.
>
> However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted.

MCGRO, 256 Mich App at 408-09, citing *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977).

The court, in *MCRGO*, held that MCL 123.1102 "specifically prohibits local units of government from enacting and enforcing any ordinances or regulations pertaining to the

transportation and possession of firearms." 256 Mich App at 418. The court concluded that MCL 123.1102, consequently, "preempts any ordinance or regulation of a local unit of government concerning those areas." *Id*.

Subsequent to the decision in *MCRGO v Ferndale*, 256 Mich App 401, other forms of local authorities lacking constitutional or statutory authority to create ordinances, including a district library,[12] school districts,[13] and a convention and arena authority[14] attempted to create barriers to the lawful possession of firearms.[15] These barriers are not considered ordinances, but,

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[12] *Capital Area Dist. Library [CADL] v Michigan Open Carry, Inc [MOC]*, 298 Mich App 220; 826 NW2d 736 (2012), lv denied, 495 Mich 898; 839 NW2d 198 (2013).

[13] *Michigan Open Carry [MOC], Inc. & Herman v Clio Area School District [CASD], et al*, 318 Mich App 356; 897 NW2d 748 (2016) (Apx 1a-11a) and *Michigan Gun Owners [MGO] v Ann Arbor Pub Sch*, 318 Mich App 338; 897 NW2d 768 (2016) (companion case).

[14] Kent County, in *Michigan Open Carry [MOC] Inc, and Michigan Gun Owners [MGO] Inc, v Grand Rapids-Kent County Convention Arena Authority [GR-KC CCA], et.al*, unpublished opinion of the Kent Circuit Court, issued June 30, 2017 (Docket No. 16-06073 CZ); application pending Court of Appeals Docket No. 339070 (Apx 340a-350a).

[15] Another example is the Wayne County Airport Authority [WCAA]. The WCAA is a statutory creation of the Aeronautics Code, MCL 259.110. (Apx 307a). Airport authorities are granted ordinance-making powers. MCL 259.116(1)(m) (Apx 308a). An airport authority, however, is "a political subdivision and instrumentality of the local government that owns the airport and shall be considered a public agency of the local government for purposes of state and federal law." MCL 259.110(1) (Apx 307a)

The WCAA bans possession of firearms in any area of the airport, and its recreational park (Crosswinds Marsh), with certain exceptions that are not coincident with state law. WCAA Airport Ordinance § 11.5 (Apx 335a); § 20.12 (Apx 341a).

The WCAA has been responsive to requests to remove preempted firearm bans by amending its ordinance prohibiting firearm possession by concealed pistol licensees and at Crosswinds Marsh. *Compare* WCAA Airport Ordinance 20.12 "Firearms" (March, 2013) (A Person shall not, at any time, bring into or upon Crosswinds Marsh property or have in their possession, nor discharge… a … revolver, pistol, shotgun, rifle, air rifle, air gun, or any gun, rifle, firearm or any other weapon") (Apx 325a) *with* WCAA Airport Ordinance 20.12 "Firearms" (revised March, 2017) ("A Person shall not discharge …" WCAA Ordinances, March

rather, are called "policy," CASD Policy 7217; (Apx 41a-42a; 58a-59a) Van Andel Arena policies images compilation (Apx 290a-304a); or, "code of conduct," (CADL SER 103 Code of Conduct (Apx 305a-306a). These local authorities do not possess ordinance-making powers and lack independent lawful ability to enforce the policies or codes. The entities consequently, threaten enforcement of the policies through reports of criminal trespass, pursuant to MCL 750.552 (Apx 344a) [CAA case, Verified Complaint at 4, para. 20 (Apx 348a)].

Capital Area Dist. Library [CADL] v Michigan Open Carry, Inc [MOC] (2012).

In response to library patrons occasionally carrying pistols into the downtown branch of the library, the (Lansing) Capital Area District Library [CADL] board instituted a "Code of Conduct" which banned all weapons from library premises (Apx 305a - 306a) *Capital Area Dist. Library [CADL] v Michigan Open Carry, Inc [MOC]*, 298 Mich App 220; 826 NW2d 736 (2012), lv denied, 495 Mich 898; 839 NW2d 198 (2013).

The library, thereafter, sought cooperation of the Lansing Police Department in ejecting possessors of firearms from library property. The police refused to comply with the library's requests. The library sought injunctive relief from the Ingham Circuit Court in barring patrons who possessed firearms from entering library property. *Id.*

The circuit court granted the injunction, which was appealed to the Michigan Court of Appeals. The appeals court, in *CADL*, concluded that a district library did not fall under the Firearms and Ammunition Act's statutory definition of a local unit of government. *Id* at 231.

2017 (Apx 341a) [Undersigned counsel is unaware of any pending litigation regarding the WCAA's firearm ordinances].

The district library, therefore, was not expressly preempted from enacting its code of conduct. *Id*.

The CADL Court was guided by the decision in *MCRGO v Ferndale*, 256 Mich App 401, and the *Llewellyn* analysis contained within, 298 Mich App at 233. Even though the library was not expressly preempted from enacting its code of conduct, the court held that "state law preempts CADL's weapons policy because the Legislature, *through its statutory scheme* in the field of firearm regulation, *has completely occupied the field* that CADL's weapons policy attempts to regulate." *Id* at 240 (emphasis added).

Michigan Open Carry [MOC] Inc, and Michigan Gun Owners [MGO] Inc, v Grand Rapids-Kent County Convention Arena Authority (2016).

Another challenge was recently filed in Kent County, in *Michigan Open Carry [MOC] Inc, and Michigan Gun Owners [MGO] Inc, v Grand Rapids-Kent County Convention Arena Authority [GR-KC CCA], et.al*, unpublished opinion of the Kent Circuit Court, issued June 30, 2017 (Docket No. 16-06073 CZ); application pending Court of Appeals Docket No. 339070 (Apx 345a - 350a).

Members of Michigan Open Carry and Michigan Gun Owners (who were visibly armed with pistols) were ejected from the DeVos Place, in Grand Rapids, while tending an exhibition booth at the 2016 Women's Expo designed to inform attendees of their options to possess and carry firearms in self-defense. Verified Complaint at 3 (Apx 343a).

The Grand Rapids-Kent County Convention Arena Authority [GR-KC CAA] is a quasi-governmental authority and owns the facility. CAA Second Amended Opinion and Order at 2 (Apx 440a). The CAA implemented a "rule" that weapons were banned from all CAA properties, and that the concealed carrying of firearms was prohibited at all times. CAA Second

Amended Opinion and Order at 2 (Apx 440a); Grand Rapids-Kent County Convention Arena Authority Compilation of Policies (Apx 290a - 304a).

Michigan Open Carry and Michigan Gun Owners filed a complaint for declaratory judgment claiming that state law preempted the CAA rule. MOC and MGO v CAA and SMG, Verified Complaint at 4 (Apx 348a). Citing to the Court of Appeals opinion in *CADL*, 298 Mich App 220, as binding precedent, the Grand Rapids Circuit Court held that "CAA's rules regarding the possession of firearms are declared contrary to Michigan law, and thus, unenforceable as written." CAA Second Amended Opinion and Order at 3 (Apx 441a). The GR-KC CAA has appealed the decision; the case is pending in the Court of Appeals under Docket No. 339070 (Apx *).

Wade v University of Michigan (2017)

The University of Michigan implemented a firearm ordinance that severely restricted the possession of firearms on or transported through its campuses. *Wade v Univ of Michigan*, 320 Mich App 1, 21; ___NW2d ___ (2017), application held in abeyance [pending the decisions in this case (Docket No. 155196) and *Michigan Gun Owners, Inc. v. Ann Arbor Public Schools* (Docket No. 155196)], ___Mich ___; 904 NW2d 422 (2017) (mem); See, University of Michigan Ordinance (Apx 351a - 355a).

Wade challenged the legality of the ordinance. The Court of Appeals, in a 2-1 opinion, held that the university was not preempted from enacting the firearm ordinance, because "the Legislature clearly limited the reach of MCL 123.1102 to firearm regulations enacted by cities, villages, townships, and counties . . . [and] [t]he University is not similarly situated to these

entities; rather, it is a state-level, not a lower-level or inferior-level, governmental entity." 320 Mich App at 21.

The dissent, in *Wade*, argued that the majority failed to adhere to the established precedent from *CADL*, 298 Mich App 220, that "state law preempts CADL's weapons policy because the Legislature, *through its statutory scheme* in the field of firearm regulation, *has completely occupied the field* that CADL's weapons policy attempts to regulate." *Wade*, 320 Mich App at 25 (Sawyer, J, dissenting).

Michigan Gun Owners [MGO] v Ann Arbor Public Schools (2016)

In the companion case of *Michigan Gun Owners [MGO] v Ann Arbor Pub Sch*, 318 Mich App 338; 897 NW2d 768 (2016), as in this case, the court of appeals held that field preemption did not apply to school districts who attempted to regulate firearms. Both decisions, however, ignored the precedent established in *CADL*, 298 Mich App 220, that the State *through its statutory scheme* in the field of firearm regulation, *has completely occupied the field* that CADL's weapons policy attempts to regulate, and have severely eroded the foundation for challenging public entities who attempt to regulate firearms.

I. IN LIGHT OF MCL 123.1102, IT IS STILL NECESSARY TO CONSIDER THE FACTORS SET FORTH IN PEOPLE v *LLEWELLYN*, 401 MICH 314 (1977), TO DETERMINE WHETHER THE SCHOOL DISTRICT'S POLICIES ARE PREEMPTED

A. STANDARD OF REVIEW

Constitutional and statutory questions are reviewed de novo. *People v. Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011).

B DISCUSSION

The question presented by this Court could be interpreted in two different ways: First, "if

MCL 123.1102 applies to school districts, do we need to even look at *Llewellyn*?" Or, second, "if MCL 123.1102 does not apply to school districts, should a *Llewellyn* analysis be conducted?" The answer to both questions is "Yes" because *Llewellyn* is the cornerstone that applies to every preemption case, regardless of whether the preemption is express or implied.

As an initial matter, because this case "entails regulation by a lower-level governmental entity in an area that is regulated by the state, it is not a statutory-interpretation case." *CADL*, 298 Mich App at 232–33, n 2. Rather the proper analysis is that of preemption because "[s]uch a simplistic analysis [of statutory-interpretation] would render the doctrine of field preemption a nullity, which it is not." *Id*.

Moreover, *Llewellyn* contains four guidelines when analyzing whether the state has preempted a field of regulation that a lesser unit of government seeks to enter. *Llewellyn*, 401 Mich at 322. The first guideline states, "where the state law *expressly* provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted." *Id* at 323 (emphasis added), citing *Noey v City of Saginaw*, 271 Mich 595, 261 NW 88 (1935).

The first guideline contemplates and incorporates express preemption; consequently, application of the *Llewellyn* preemption analysis is appropriate regardless of the specific language of the statute. 401 Mich at 322. To ignore the *Llewellyn* analysis would eviscerate the entire doctrine of statutory preemption, whether express or field preemption, in this State.

MOC concedes that the plain language of MCL §123.1101(b) (Apx 256a) does not expressly include "district libraries", "school districts", or other forms of governmental authority without ordinance-making authority. The definition of a "local unit of government," contained

within MCL 123.1102, however, lists all constitutionally authorized ordinance-making units of government and coincides with the stated legislative intent of the firearms preemption statute to limit a patchwork of conflicting local ordinances and to create a uniform state law regarding the regulation of firearms (Apx 256a). A school district does not possess statutory authority to enact local ordinances; the legislature, therefore, would not need to list a school district as a unit of government in MCL 123.1102 (Apx 256a).

It is unlikely that an end-run around of the preemption statute by local units of government without ordinance-making power was anticipated by the Legislature, or anyone else; there would have been no need, consequently, to include school districts in the definition of local units of government. Allowing a school district, but not a statutorily defined local unit of government to impose firearm restrictions would lead to absurd results and defeat the stated intent of the legislature in enacting the Firearms and Ammunitions Act.

"It is patently absurd to conclude that the Legislature intended to preempt an entire field of regulation, yet it only applies to some, but not all, governmental entities." *Wade v Univ of Michigan*, 320 Mich App 1, 25; ____ NW2d ____ (2017) (Sawyer, J, dissenting). "[I]f certain governmental entities are allowed to impose their own regulations, then . . . the Legislature's interest in establishing uniformity is defeated." *Id*.

It is axiomatic that a *Llewellyn* analysis is required when assessing the preemption doctrine because neither the stated intent of the Firearms and Ammunition Act, nor the legislative history, demonstrates a legislative intent to *waive* the sovereign power of the State to subordinate units (or quasi-units) of government.

Llewellyn serves as a dam that holds back the potential for hundreds of cases to flood the

courts in the event that the Legislature fails to anticipate and incorporate every possible variation in its enactment of a preemption statute.[16] If the specific language of the Firearm and Ammunition Act precludes a *Llewellyn* analysis, then local ordinances, such as CASD's weapons policy - that directly contravenes State law - are permissible and not subject to judicial review.

II. THE COURT OF APPEALS FAILED TO PROPERLY ANALYZE THE *LLEWELLYN* FACTORS.

A. STANDARD OF REVIEW

Constitutional and statutory questions are reviewed de novo. *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011).

B DISCUSSION

A state statutory scheme preempts regulation by a lower-level governmental entity when either of two conditions exist: "(1) the local regulation directly conflicts with the state statutory scheme or (2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter, 'even where there is no direct conflict between the two schemes of regulation.' " *CADL*, 298 Mich App at 233, citing *Llewellyn*, 401 Mich at 322; *see Ter Beek v City of Wyoming*, 297 Mich App 446; 823 NW2d 864 (2014).

In *Llewellyn*, 401 Mich at 322, this Court set forth four guidelines when analyzing "the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter." 401 Mich at 322. (1) "where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted" (2) "preemption of a field of regulation may be implied upon

[16] This Court, in *Llewellyn*, addressed local municipal restrictions on First Amendment grounds; however the analysis is equally applicable to local restrictions on Second Amendment liberties.

an examination of legislative history" (3) "the pervasiveness of the state regulatory scheme may support a finding of preemption" (4) "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest."

"[W]here the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld." *CADL*, 298 Mich App at 232, citing *MCRGO*; 256 Mich App at 414, citing *Llewellyn*, 401 Mich at 322. However, where "the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted." *Id*.

(1) the local regulation directly conflicts with the state statutory scheme

MCL 28.425o(5) lists nine so-called concealed pistol free zones (Apx 259a - 260a). Certain individuals are exempt from the restrictions on carrying weapons into eight of the concealed pistol free zones. *Id.* (Apx 260a).

The court of appeals first sought to analyze whether CASD's policy[17] directly contradicts state law *CASD*, 318 Mich App at 363. The court found that the CASD policy "does not expressly reference MCL 28.425o." *Id* at 365. Moreover, the CASD policy did "provide exceptions to its ban consistent with the statute." *Id.* The court of appeals could "discern no conflict between the district policy and statute in this case." *Id.* at 366.

[17] CASD updated their policy in February of 2016 after Plaintiffs filed their brief with the Court of Appeals the month previous. The update appears to attempt to bring the policy in line with tate law, however the end result still falls short. The revised February 2016 policy appears to be the version the court of appeals analyzed, even though it was never presented to the court by either party. (Apx 58a - 59a).

The analysis from the court of appeals is in clear error. Both the CASD policy presented in the lower court record (Apx 41a - 42) and, as amended in February 2016 (Apx 58a - 59a) incorporated some of the exceptions found in MCL 28.425o. (Apx 259a - 260a). However, both policies are missing numerous exemptions.[18]

The CASD policy directly contravenes state law because it lacks the state statutory exemptions (Apx 259a - 260a). The policies also contain other conflicts with state law including a clause invoking federal law[19] to extend their zone "1,000 feet from the boundary of any school property", which was entirely omitted from the court of appeals' reference to the policy. A

[18] Prior to the February 2016 revision(Apx 41a - 42a), CASD's weapons policy lacked exemptions for:

- Parking areas (MCL 28.425o(4));
- Retired federal law enforcement officers (MCL 28.425o(5)(a));
- Retired corrections officers of a county sheriff's department (MCL 28.425o(5)(d));
- Probation officers and absconder recovery unit members of the department of corrections (MCL 28.425o(5)(h)(i));
- Retired parole, probation, or corrections officers, or retired absconder recovery unit members, of the department of corrections (MCL 28.425o(h)(ii));
- Court officers (MCL 28.425o(5)(j)).

After the update, CASD's policy (Apx 58a - 59a) still lacks exemptions for:

- Retired corrections officers of a county sheriff's department (MCL 28.425o(5)(d));
- Probation officers and absconder recovery unit members of the department of corrections (MCL 28.425o(5)(h)(i));
- Retired parole, probation, or corrections officers, or retired absconder recovery unit members, of the department of corrections (MCL 28.425o(h)(ii)).

[19] Prior to 2016, CASD's policy invoked state law to justify its 1,000-foot extension. The policy was changed, presumably, to invoke federal law because such an extension does not exist - nor has it ever existed - in state law.

Notwithstanding, in *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014), this Court found a similar invocation of federal law by a local authority conflicted with state law and, consequently, was preempted by state law. *Id.*

1,000 foot extension of the Weapon Free School Zone is in direct conflict with state statutes which do not recognize such an extension (Apx 265a - 266a).

The court of appeals ignored the statutory maxim of analyzing MCL 28.425o and MCL 750.237a *in pari materia*. In construction of a particular statute, or in the interpretation of its provisions, "all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

> Statutes in *pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose.

Both MCL 28.425o(1)(a) (Apx 259a), and MCL 750.237a(5)(c) (Apx 265a), address the possession of weapons in a "Weapon Free School Zone" by an individual who is licensed to carry a concealed weapon. Not only do both of the statutes relate to the same subject - weapons possession - MCL 28.425o(1)(a) specifically references MCL 750.237a.

> (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.

MCL 28.425o(1)(a). (Apx 259a).

MCL 750.237a(4), in general, prohibits all forms of possession of a weapon (i.e. whether "open", "concealed", or otherwise) in a "weapon free school zone." *Id.* (Apx 265a). MCL 750.237a(4), however, is subject to MCL 750.237a(5), which explicitly exempts numerous

classes of persons from its prohibitions, including "[a]n individual licensed by this state or another state to carry a concealed weapon." MCL 750.237a(5)(c) (Apx 265a).

MCL 28.425o(1)(a) prohibits persons from carrying of a concealed weapon onto school property, except when in one's vehicle while picking up or dropping off their child. *Id.* (Apx 259a). Similar to MCL 750.237a(4), MCL 28.425o(1)(a) contains further exemptions, such as parking areas, MCL 28.425o(4), and those with "exempt" licenses, MCL 28.425o(5). (Apx 259a - 260a).

The statutes, when read in *pari materia*, permit not only the possession of concealed firearms by certain enumerated classes of individuals who are licensed to carry a concealed weapon, but also the possession of non-concealed firearms (i.e. open-carry) on school property, by an individual who is licensed to carry a concealed weapon. MCL 28.425c(3)(a), (b) MCL 28.425o(1)(a) MCL 750.237a(4) (Apx 258a; 259a; 265a, respectively).

CASD's weapons' policy does not adequately address all permissible means of possessing a concealed firearm on school property, that are allowed under state law, nor does it address any permissible means of possessing an unconcealed firearm on school property, as allowed under state law (Apx 259a - 260a). CASD's weapons' policy impermissibly prohibits conduct that state law permits - the policy, consequently is void. *Walsh v City of River Rouge*, 385 Mich 623, 636; 189 NW2d 318 (1971) (city ordinance prohibiting what state statute permits is void).

A state statute preempts regulation by an inferior unit of government when the local regulation directly conflicts with the statute. *USA Cash # 1, Inc v City of Saginaw*, 285 Mich

App 262, 267; 776 NW2d 346 (2009). A direct conflict exists between a local regulation and a state statute when the local regulation prohibits what the statute permits. *Id.*

CASD's weapon's policy not only prohibits the conduct which state laws permits [MCL 28.425c(3)(a), (b) (Apx 258a), it expresses its contempt for *any* law that could contradict the school's policy:[20] "This prohibition applies regardless of whether the visitor is otherwise authorized by law to possess the weapon, including if the visitor holds a concealed weapons permit." (Apx 59a)

The weapons policy is in direct conflict with the several state statutes. This Court, therefore, may determine that additional analysis of *Llewellyn* factors unnecessary,[21] as there is state law explicitly regulating the field in question, i.e. the possession of firearms on school property, thus allowing the question to be resolved solely on a direct conflict analysis.

(2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter

In this case, and in the companion case, the court of appeals applied its own interpretation of the *Llewellyn* factors regarding firearm regulation preemption, and created conflicting opinions. Contrary to the decision in *CADL*, 298 Mich App 220, which held that field preemption applies to firearms regulation, in the instant cases, the court of appeals determined that "application of the *Llewellyn* factors counsels against a finding of field preemption." *CASD,* 318 Mich App at 368

[20] This paragraph was added to CADS's policy in 2016, and was also included in the Court of Appeals' decision (Apx 59a).

[21] *CADL,* 298 Mich App 220, and *MCRGO*, 256 Mich App 401, involved a district library and municipal library, respectively. While the field of firearms is heavily regulated, no state law explicitly regulates the possession of firearms in a library, unlike the statutes that regulate possession of weapons on school property.

First Llewellyn *guideline: municipal regulation is preempted where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive*

The court of appeals obviously confused Plaintiffs-Appellant's field preemption arguments with statutory preemption. In both the instant case and in the companion case of *Michigan Gun Owners*, the court of appeals erroneously determined that that the nucleus of the gun-rights organizations' claims involved statutory preemption. *CASD*, 318 Mich App at 368; Mich Gun Owners, 318 Mich App at 350-355, at *5

The *Michigan Open Carry* court determined that "plaintiffs asserted that the CASD policy contradicted and therefore was preempted by MCL 123.1102." 318 Mich App at 361. Further, the Court of Appeals determined that the holding in *CADL*, 298 Mich App 220, "rested on a judgment that district libraries are so closely akin to the local units of government listed in MCL 123.1101(b) that the same regulatory scheme should apply." *Id*. at 366. "It bears repeating that the statute on which plaintiffs [MCL 123.1102] rely does not reference schools or school districts as 'local units of government'. *Id* at 368.

These determinations, however, are clearly in error. Michigan Open Carry did not claim that the school's firearm regulation was statutorily preempted (Apx 148a). Moreover, the Court in CADL specifically held that statutory preemption did not apply to the library's firearm regulation. *CADL* 298 Mich App at 231 ("Thus, as a district library, CADL is not expressly barred by MCL 123.1102 from imposing firearms regulations.").

At no time, in the court of appeals, did Michigan Open Carry did refer to MCL §123.1102 to support the concept that the school district's firearm regulations were statutorily preempted (Brief on Appeal, p 8) (Apx 149a). "It is also likely that CASD would not be

expressly barred from imposing their firearm regulation if it did not directly conflict with state statutes." *Id.* at p 8 (emphasis in original). See *CADL* 298 Mich App at 231 (district library not expressly barred from imposing firearms regulations).

The court of appeals, however, sought to expand the statutory preemption analysis by finding that school districts are not "local units of government" as defined in MCL §123.1102 or otherwise, but are effectively equal in stature with the State. *Michigan Open Carry,* 318 Mich App at 367 ("the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include '[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity.'").

> "School districts are not formed, organized or operated by cities, villages, townships or counties, but exist independently of those bodies. 'Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education.' Const. 1963, art 8, § 3. While a district library enjoys a general ability to 'supervise and control' its property, MCL 397.182(1)(f), the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include '[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity.'"

Michigan Open Carry, 318 Mich App at 367.

The same points were addressed by the court in *CADL*, 298 Mich App at 232, except that court came to a very different conclusion. In court in *CADL*, noted, "a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state." *Id*.

> Nevertheless, a quasi-municipal corporation such as a district library remains subject to the Constitution and the laws of this state. See Detroit Sch. Dist. Bd. of Ed. v Mich Bell Tel. Co., 51

> Mich App 488, 494-495, 215 NW2d 704 (1974) (explaining that **a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state**); *Lowrey*, 131 Mich at 644, 92 N.W. 289 ("The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and whatever we may think of the right of the district to administer in a local way the affairs of the district, under the Constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as may from time to time be passed...."); see also generally Llewellyn, 401 Mich at 321, 257 NW2d 902.

CADL 298 Mich App at 232 (emphasis added).

The court of appeals erred when it converted the field preemption argument to an express preemption argument. 318 Mich App at 368.

> The first *Llewellyn* factor asks whether the state law cited as preemptive 'expressly provides that the state's authority to regulate in a specified are of the law is to be exclusive.' As we have stated, no such provision exists [Id].

The court of appeals erred when it used a reverse-determination that school districts are no longer local units of government to assist in the discharge the first *Llewellyn* guideline. *Id.*

Second Llewellyn *guideline: field preemption may be implied upon an examination of legislative history*

The court of appeals erred when it held, contrary to established precedent validating the legislative history,[22] that "this fragment of legislative history [was] useless, as it [spoke] to ordinances and local units of government rather than to schools." *CASD*, 318 Mich App at 369.

> The second *Llewellyn* factor requires us to consider legislative history. Plaintiffs point to the House Legislative Analysis we cited in *CADL*, reciting that MCL 123.1102 "was designed to address the 'proliferation of local regulation regarding firearm ownership, sale, and possession' and the 'concern that continued local

[22] The referenced House Legislative Analysis is attached (Apx 261a - 264a).

> authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances' We find this fragment of legislative history useless, as it speaks to ordinances and local units of government rather than to schools. As no other legislative history has been presented to us, we conclude that this factor does not support preemption.

This *ipse dixit* conclusion stands in stark contrast to the *CADL* Court, which found that "legislative history supports a finding that the purpose of the statute would only be served by leaving it to the state to regulate firearm possession in all buildings established by local units of government." *CADL*, 298 Mich App at 237. The court of appeals erred in reversing the determination in *CADL* and declining to address properly the legislative history and determine the intent of the legislature as a factor in field preemption.

Third Llewellyn *guideline: the pervasiveness of the state regulatory scheme*

The Court in *Michigan Open Carry* acknowledged that "[f]irearms are indeed pervasively regulated in Michigan." 318 Mich App at 369. Rather than concede that this factor weighed in favor of field preemption of the school district's regulation, as *Llewellyn* requires, the court pronounced that "relevant segments of a multifaceted statutory framework evince the Legislature's intent to prohibit weapons in schools, rather than to rein in a district's ability to control the possession of weapons on its campuses." *Id*. at 371. The court found it "hard to imagine a more straightforward expression of legislative will." *Id*.

To support this conclusion, the court referenced "26 different laws specifically referencing 'weapon free school zones.'"[23] *Id*. The court then erroneously concluded that "the

[23] The appeal court claimed the existence of "26 different laws specifically referencing 'weapon free school zones.'" Despite diligent efforts, undersigned counsel's search of the same terms resulted in Westlaw resulted in the term being mentioned 29 times (Westlaw Search Term Result, Apx 356a - 362a); but only in only 8 statutes - 3 of which concern the sentencing

pervasiveness of the Legislature's use of the phrase 'weapon free school zones' presses against the preemption of a district policy." *Id*. The court of appeals, inexplicably, used this guideline to find that the state intended local units of government to regulate firearms rather than to acknowledge that the factor weighs in favor of field preemption. *Id*.

The appeal court claimed the existence of "26 different laws specifically referencing 'weapon free school zones.'" Despite diligent efforts, undersigned counsel's search of the same terms resulted in Westlaw resulted in the term being mentioned 29 times (Westlaw Search Term Result, Apx 356a - 362a); but only in only 8 statutes - 3 of which concern the sentencing guidelines (See, Statutes containing term 'weapon free school zone' Apx 363a - 359a). The remaining citations are referenced in either the editorial "cross reference" or in the annotations to the statutes (See Statutes containing term in editorial information or annotations, Apx 360a - 438a).

Fourth Llewellyn *guideline: "exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest."*

The court of appeals stated that because the Legislature had "never expressly reserved to itself the ability to regulate firearms in schools," its evaluation of this factor required it to weigh policy choices. *CASD*, 318 Mich App at 371 The court rejected that claim that a "patchwork" of differing school policies would create "confusion" and would "burden" the police and the public, finding "no merit in this argument." *Id* at 372.

"The Legislature ha[d] broadly empowered school districts to '[p]rovid[e] for the safety

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guidelines (See, Statutes containing term 'weapon free school zone' Apx 363a - 359a). The remaining citations are either referenced in the editorial "cross reference" or in the annotations to the statutes (See Statutes containing term in editorial information or annotations, Apx 360a - 438a).

and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity,' . . .while recognizing that different school districts would employ different methods and strategies to accomplish this goal." *Id* at 372 (citation omitted).

"Most parents of school-age children send those children to schools located within a single school district. Most parents easily learn and adapt to the policies and procedures applicable to their children's schools and district." *Id*. The court could "discern no possibility of meaningful "confusion" or burdening of law enforcement." *Id*. Rather, the "policy ensure[d] that the learning environment remain[ed] uninterrupted by the invocation of emergency procedures that would surely be required each and every time a weapon [was] openly carried by a citizen into a school building." *Id.* at 372.

The court's analysis neglected to address those areas of concern presented in the which recognized the "fear that the enactment of several gun control ordinances will make it hard for officers to enforce the laws and that gun enthusiasts will be unfairly prosecuted." House Legislative Analysis, Second Analysis at p 1 (Apx 261a - 264). The Legislature understood circumstances where multiple school districts may occupy the same property; a single law enforcement agency may be responsible for policing multiple school districts; or when parents travel to other school districts for such events as sporting competitions or similar inter-district activities.

The appeals court ignored binding precedent from the CADL decision that the state has completely occupied the field of firearm regulations.

The appeals court noted "40 years have passed since our Supreme Court's decision in *Llewellyn*, the Supreme Court's views regarding the propriety of judicial reliance on legislative history have changed considerably." *CASD*, 318 Mich App at 374, n 6. The court of appeals

apparently felt that *Llewellyn* was no longer suitable precedent.

The *Michigan Open Carry* analysis, however, "fails to acknowledge the fact that *Llewellyn* is binding precedent, which [ ] [ ] an intermediate court may not choose to disregard or rebuff." *CADL*, 298 Mich App at 251 n 2. "It is a tautology to say that because the Legislature did not expressly include [schools] in its definition of local units of government as set forth in MCL 123.1101(a), it must have specifically intended not to occupy the field of gun regulation when it comes to the presence of guns in [schools]. *Id*.

The crux of the *Michigan Open Carry* opinion is inconsistent with established law, but is consistent with the previous reasoning of the dissenting judge in the *CADL* decision.[24] The majority in *CADL* addressed the dissent, as follows.

> With all due respect to our learned colleague in dissent, her analysis fails to acknowledge the fact that *Llewellyn* is binding precedent, which we as an intermediate court may not choose to disregard or rebuff. As such, the dissent avoids the required application and analysis of field preemption. It is a tautology to say that because the Legislature did not expressly include district libraries in its definition of local units of government as set forth in MCL 123.1101(a), it must have specifically intended not to occupy the field of gun regulation when it comes to the presence of guns in district libraries. While cases often rise and fall on the plain language of a statute, because this matter entails regulation by a lower-level governmental entity in an area that is regulated by the state, it is not a statutory-interpretation case. Such a simplistic analysis would render the doctrine of field preemption a nullity, which it is not.

CADL, 298 Mich App at 220, n 2.

The court, in *CADL*, held that "the Legislature, through its statutory scheme in the field of firearm regulation, *has completely occupied* the field [of firearm regulation.]" 298 Mich App

[24] The dissenting judge from *CADL* participated in the *MOC* decision. *CADL* at 241; *CASD* at 356

at 240 (emphasis added). The decision, in *CADL*, consequently, has precedential effect under the rule of stare decisis. MCR 7.215(C)(2) (Apx 434a).

MCR 7.215(C)(2) provides:

> A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

(Apx 434a).

"[O]nce a court reaches the conclusion that field preemption applies, then it applies to all units of government that attempt to invade the Legislature's regulation of that field." *Wade*, 320 Mich App at 25 (Sawyer J., dissenting). "Indeed, the entire concept of field preemption is that it demands "exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*.

The "decision in *CADL* [298 Mich App at 240] compels the conclusion that the Legislature has preempted the regulation of the field of firearm possession and that that decision applies to *all* units of government in Michigan subject to being preempted by state law." *Id* (emphasis added).

> Is is patently absurd to conclude that the Legislature intended to preempt an entire field of regulation, yet it only applies to some, but not all, governmental entities. That is, if certain governmental entities are allowed to impose their own regulations, then the field is not actually preempted and the Legislature's interest in establishing uniformity is defeated. [*Id*].

In summary, the court of appeals failed to analyze properly the *Llewellyn* factors and disregarded clearly established precedent - that the Legislature had preempted the regulation of the field of firearm possession. The recent court of appeals' decisions are incompatible with this

state's field preemption jurisprudence. The reasoning of the court in *CASD* and *Michigan Gun Owners* in the application of the *Llewellyn* guidelines is impossible to reconcile with the decision of the court in *CADL*, 298 Mich App 220.

The opinion in *CADL* is faithful to *Llewellyn* and its progeny; the other two opinions, however, eviscerate the *Llewellyn* analysis. The most obvious logical disconnect is that *CADL* held that the Legislature has completely occupied the field of firearm regulation, 298 Mich App at 240, and the *CASD* court now holds the polar opposite.

Moreover, the court violated the requirements of MCR 7.215(J)(1) and (3), by not convening a special panel, nor conducting a poll of judges, as is required in cases where decisions conflict with precedential published decisions. MCR 7.215(J)(1), (3) (Apx 436a). The court of appeals, consequently, committed clear error and this Court should reverse the decision of the court of appeals, and affirm the decision of the district court.

III. THE COURT OF APPEALS ERRED IN ITS DECISION THAT THE SCHOOL DISTRICT WEAPONS POLICIES ARE NOT PREEMPTED?

A. STANDARD OF REVIEW

Constitutional and statutory questions are reviewed de novo. *People v. Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011).

B DISCUSSION

The *Michigan Open Carry* court analysis is flawed with four significant errors. First, the court of appeals failed to identify, or address, the circumstances where the CASD policy directly conflicts with MCL §28.425o (Apx 259a - 260a). Michigan Law expressly permits retired corrections officers of a county sheriff's department; probation officers and members of the department of corrections absconder recovery unit retired parole, probation, or corrections

officers, and retired absconder recovery unit members to carry concealed firearms onto school property (MCL 425o(5)(a), (d), and (h) (Apx 259a - 260a). CASD's current policy has no exception for these law enforcement officers (Apx 58a - 59a). CASD's policy forbids what state law expressly permits. *Llewellyn* at 322 n 4.

Michigan Law expressly permits concealed pistol licensees to carry concealed pistols "anywhere in the state" without an exception for CASD's policy's 1000' boundary zone extending beyond CASD's school property (CASD Policy 7217). (Apx 58a - 59a). Indeed, this provision effectively creates a moving 2000' diameter weapon free school zone around all of CASD's school busses as they trundle down the streets of Clio.

The CASD policy conflicted with numerous state statutes before its February 2016 revisions. Many conflicts remain. The court of appeals did not consider or address that the concealed pistol free zones listed in MCL 28.425o does not apply to the openly carried pistols of concealed pistol licensees (Apx 259a - 260a). State Law recognizes the rights of concealed pistol licensees to open- carry pistols on school property MCL 28.425c(3)(b) (Apx 258a).

Second, the court of appeals improperly ignored the precedential effect of the decision in *CADL*, 298 Mich App at 240. Moreover, the court of appeals did not convene a conflict panel as required by the Court Rules. MCR 7.215(C)(2); MCR 7.215(J)(1),(3). (Apx 434a, 437a). In so doing, the appeals court violated the Court Rules and exceeded its own power to overrule the holding of the published opinion in *CADL*, 298 Mich App at 240, that the State occupies the field of firearm regulation to the exclusion of lesser units of government. MCR 7.215(C)(2); MCR 7.215(J)(1),(3). (Apx 434a, 437a).

Third, the court of appeals either misconstrued or misrepresented the Plaintiffs-Appellants briefed arguments by asserting that relief was sought on an express preemption theory, rather than a field preemption theory (Apx 7a). "*More* specifically, plaintiffs asserted that the CASD policy contradicted and therefore was preempted by MCL 123.1102." *Michigan Open Carry*, 318 Mich App at 361 (Apx 5a-6a). To the contrary, Plaintiffs have consistently argued that the CASD policy was field-preempted, not expressly preempted.

Fourth, the *Llewellyn* factor analysis employed by the court of appeals suffers from flawed reasoning. The court found that the Legislative Analysis of the Firearms and Ammunition Act's bills was a useless "fragment of legislative history" despite the court's earlier determination of an affirmative legislative intent to preempt in the *CADL* [298 Mich App at 240] case. *CASD*, 318 Mich App at 369.

The court found that the mere mention of the term "weapon free school zone" within other statutes, gives the court complete discretion to dictate a legislative intent to ban firearms in schools (*Id* at 371). The court, however, conducted no exercise to determine the import of the statutes that mention the term.

The appeal court claimed the existence of "26 different laws specifically referencing 'weapon free school zones.'" Despite diligent efforts, undersigned counsel's search of the same terms resulted in Westlaw resulted in the term being mentioned 29 times (Westlaw Search Term Result, Apx 356a - 362a); but only in only 8 statutes - 3 of which concern the sentencing guidelines (See, Statutes containing term 'weapon free school zone' Apx 363a - 359a). The remaining citations are referenced either in the editorial "cross reference" or in the annotations to

the statutes (See Statutes containing term in editorial information or annotations, Apx 360a - 438a).

Finally, the court determined, without addressing the stated concerns within the Legislative Analysis, that the fourth *Llewellyn* guideline weighed in favor of finding no preemption because parents can figure it out for themselves what rules apply, ignoring other confusing situations. *Id* at 372.

This, of course, is contrary to the determination in *CADL*, 298 Mich App at 240, and the stated intent for enactment of the Firearms and Ammunition Act (Apx 261, House Legislative Analysis, Second Analysis at p 1).

The flawed reasoning and decision of the court of appeals in this case, and in *Michigan Gun Owners, Inc.* was in error, which warrants review and/or reversal.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated in its application for leave to appeal and this supplemental brief, Plaintiff-Appellants, Michigan Open Carry and Kenneth Herman, respectfully request that this Honorable Court peremptorily reverse the decision of the Michigan Court of Appeals, and affirm the judgment of the circuit court, or, in the alternate, grant leave to appeal and/or or grant oral argument on these issues as they are of great import into interpretation of Michigan's jurisprudence on preemption.

Respectfully Submitted,

/s/ Dean G. Greenblatt
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Dated: January 31, 2018

PROOF OF SERVICE

I hereby certify that on JANUARY 31, 2018, I served the following documents upon counsel of record at the addresses provided herein by e-filing:

1. **PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL; and,**
2. **PROOF OF SERVICE**

Respectfully submitted,

Dated: January 31, 2018 /s/ Dean G. Greenblatt

INDEX TO APPELLANT'S APPENDICES

Description of Document	Apx Page Nos.
CADL Library Code of Conduct - SER 103	305a - 306a
MCL 259.110	307a
MCL 259.116	308a - 310a
Wayne Co. Airport Authority Ordinance (Mar. 2013) [Excerpt]	311a - 328a
Wayne Co. Airport Authority Ordinance (Mar. 2017) [Excerpt]	329a - 343a
MCL 750.522	344a
MOC & MGO v GR-KC CAA - Verified Complaint Kent Co. Case No. 16-06073-CZ	345a - 350a
Regents of U of M Ordinance (rev 2016)	351a - 355a
Westlaw search - "weapons free school zone"	356a - 362a
Statutes containing "weapon free school zone"	363a - 395a
Statutes with editorial/annotation references "weapon free school zone"	360a - 432a
MCR 7.215	433a - 438a
MOC & MGO v GR-KC CAA – Second Amended Opinion and Order	439a - 441