

**STATE OF MICHIGAN
IN THE SUPREME COURT**

MICHIGAN OPEN CARRY, INC., and
KENNETH HERMAN,

Plaintiffs-Appellants,

Supreme Court No. 155204

Court of Appeals No. 329418

Circuit Court No. 15-104373-CZ (Genesee County)

vs.

CLIO AREA SCHOOLS, FLETCHER
SPEARS, III, and KATRINA MITCHELL,

Defendants-Appellees.

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**DEFENDANTS-APPELLEES' BRIEF OPPOSING
APPLICATION FOR LEAVE TO APPEAL**

Oral Argument Requested

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**STATEMENT IDENTIFYING OPINION APPEALED,
INTRODUCTION, AND RELIEF SOUGHT**

Plaintiffs—open carry gun advocates¹—filed a lawsuit seeking a declaratory judgment that would allow them to openly carry guns in schools operated by the Clio Area School District. Plaintiffs argue that the School District is preempted by state law from regulating firearms in school buildings. Defendants contend that state law allows school districts to regulate the possession of guns on school property.

Defendants filed their motion for summary disposition, which the trial court denied. Instead, the trial court granted Plaintiffs' request for declaratory relief, holding that state law preempts the School District from regulating the possession of firearms in the classroom. The end result being: people could openly carry guns into schools operated by the Clio Area School District.

Clio Area Schools appealed. The Court of Appeals issued its published Opinion in *Michigan Open Carry v Clio Area School District*, No 329418, ___ Mich App ___, ___ NW2d ___ (Dec 15, 2016)(**Exhibit A.**) The Court of Appeals reversed the trial court and held that state law did not preempt a school district from banning firearms in the classroom. The Court of Appeal's decision was correct.

¹ As an example of open carry advocacy, days ago several open carry advocates carried carbines into the Dearborn Police station while wearing masks and body armor. *See, e.g.,*

<http://www.freep.com/story/news/local/michigan/wayne/2017/02/06/dearborn-police-station-gun-rifle/97544076/> (last accessed on February 2, 2017).

The legislature has expressly considered the issue of firearm preemption. MCL 123.1102 provides that a “local unit of government” cannot regulate the possession of firearms. MCL 123.1101(a) then defines the phrase “local unit of government” as meaning *only* “a city, village, township, or county.” When deliberately considering the issue of firearm preemption, the legislature did not include school districts in MCL 123.1101(a). *Expressio unius est exclusio alterius*; had the legislature wanted to include school districts in the above definition, it certainly could have and it certainly knew how to, but it did not.

Despite the above, Plaintiff implored the lower courts—and now this Court—to use field preemption to contradict and broaden a plain and unambiguous statute that expressly considered the issue of preemption. Field preemption has no place in this scenario because the legislative intent is clear from the text of the statute. After questioning the applicability of field preemption in the face of a plain and unambiguous statute, the Court of Appeals, nonetheless, went through the four factors articulated in *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), and held that field preemption—if applicable—did not apply to the School District’s Policy. The Court of Appeal’s conclusion was correct.

The issue resolved by the Court of Appeals was both legal and practical. If a principal sees an individual approach or enter a school with a gun, what is he to do? The administrator, or for that matter any faculty member, will declare a lockdown,

call the police and seek to protect the students. In such case, education stops, the children are frightened, and a dangerous confrontation with authority may ensue. *See., e.g.,* fn 1. Guns are not allowed in State or Federal Court buildings or in various government agencies for a reason.² It defies common sense that Court employees would be afforded more protection than defenseless children attending school. The Court of Appeals' Opinion was legally correct and Plaintiffs have not demonstrated any proper ground for appeal to this Court and their application should be denied.

² Other governmental bodies regulate the possession of firearms. For example, pursuant to Administrative Order 2001-1, the Supreme Court has prohibited all “weapons . . . in any courtroom, office, or other space used for official court business. . . .”

QUESTION PRESENTED

MCL 123.1101(a) and .1102 provide that “[a city, village, township, or county] 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 pistols. . . .” The legislature did not include school districts (one of the largest bodies of government) in the above statute. Did the Court of Appeals err when it declined Plaintiff-Appellant’s offer to rewrite the above unambiguous statutes to include school districts?

FACTS

1. THE PARTIES

Plaintiff, Michigan Open Carry, Inc., is an entity whose stated purpose is “[t]o educate and desensitize the public and members of the law enforcement community about the legality of the open carry of a handgun in public.”³ Michigan Open Carry’s “methods” include “informal gatherings in public places throughout the state while open carrying our handguns.”⁴ For several years now, Michigan Open Carry has publicized its goal to file a lawsuit against a public school district because it believes that guns should be allowed in schools and because most schools prohibit the possession of weapons on school property.

Plaintiff, Kenneth Herman, has a child attending school at Edgerton Elementary School. He has stated his belief that it is legal and acceptable to carry firearms into an elementary school, irrespective of the resulting panic and disruption of the educational environment for hundreds of children.

Defendant, Clio Area Schools, is a Michigan Public School District authorized by the Michigan legislature to make policies pursuant to the Revised School Code. *See, e.g.,* MCL 380.1 *et seq.* Defendant, Fletcher Spears, is the Superintendent of Clio Area Schools. Defendant, Katrina Mitchell, is the Principal

³ *See* <http://www.michiganopencarry.org/about>

⁴ *Id.*

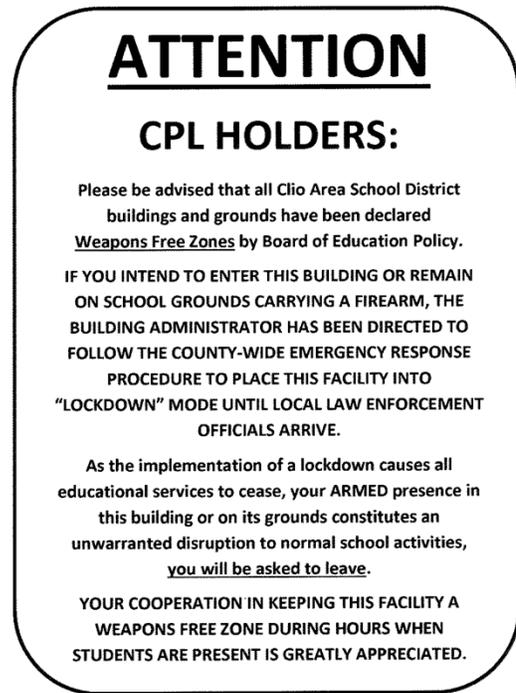
of Edgerton Elementary School.

2. CLIO AREA SCHOOLS' POLICY REGARDING FIREARMS

Clio Area Schools' Board of Education promulgated Policy 7217, which provides:

The Board of Education prohibits visitors from possessing, storing, making, or using a weapon in any setting that is under the control and supervision of the Board for the purpose of school activities approved and authorized by the Board including, but not limited to, property leased, owned, or contracted for by the Board, a school-sponsored event, or in a Board-owned vehicle.

Under the Policy, “[t]he term ‘weapon’ . . . include[s], but [is] not limited to, firearms, guns of any type, including air and gas-powered guns, (whether loaded or unloaded), knives, razors, clubs, electric weapons, metallic knuckles, martial arts weapons, ammunition, and explosives.” The Policy then sets forth exceptions to the above prohibition. When this lawsuit was filed, the School District posted the following signs on its doors regarding its weapons policy:



Likewise, the Michigan Department of Education has determined that, if a firearm is observed at school, it is an emergency situation similar to a tornado or earthquake and a lockdown is necessary.⁵

3. THE LOWER COURT'S OPINION AND RELATED LITIGATION

On August 10, 2015, the trial court ruled upon Defendants' Motion for Summary Disposition. The trial court did not issue a written opinion; rather, it ruled from the bench, holding that *Capital Area District Library v Michigan Open Carry, Inc*, 298 Mich App 220 (2013), preempts school districts from regulating the

⁵http://www.michigan.gov/documents/safeschools/MI_Ready_Schools_Emergency_Planning_Toolkit_370277_7.pdf(last accessed on 2/8/2017.)

possession of firearms.

This case is nearly identical to *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, # 329632, which was appealed on October 12, 2015. In that case, the Washtenaw County Circuit Court held that public schools do have the legal authority to regulate the possession of firearms at school and field preemption does not apply.

The Court of Appeals considered the Ann Arbor and Clio cases at the same time. In both cases, the Court of Appeals held that school districts have the legal authority to regulate the possession of firearms at school. The decision in *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, No 329632, ___ Mich App___; ___NW2d___ (Dec 15, 2016), is attached as **Exhibit B**.

LAW AND ANALYSIS

1. THERE IS NO SECOND AMENDMENT RIGHT TO CARRY GUNS IN A SCHOOL BUILDING

While not argued by Plaintiffs on appeal, it should be noted that there is no constitutional right to possess firearms in certain buildings—such as courts and schools. The United States Supreme Court has unequivocally stated that the right to carry and bear arms under the Second Amendment is not unlimited. *District of Columbia v Heller*, 554 US 570, 626-627, 128 S Ct 2783, 171 L Ed 2d 637 (2008). Specifically, the Supreme Court stated in *Heller* that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally

ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [(*Id*)(emphasis added)]

Notably, the Supreme Court clarified in an accompanying footnote that, in providing these examples: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id* at 627 n. 26, 128 S Ct 2783. The Michigan Court of Appeals has cited *Heller* approvingly in this regard. *See People v Deroche*, 299 Mich App 301, 306-07, 829 NW2d 891, 895 (2013).

2. THE MICHIGAN LEGISLATURE HAS GRANTED SCHOOL DISTRICT’S THE ABILITY TO CREATE AND ENFORCE “GUN FREE ZONES”

The Michigan legislature has authorized Clio Area Schools to enact Policies to safeguard school children. Specifically, the Revised School Code, MCL 380.11a(3)(b), expressly obligates school districts to “[p]rovid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while enroute to or from school or a school sponsored activity.” The School Code then clarifies that a school district “may exercise a power implied or incident to a power expressly stated in this act” and “may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district.” Additionally, both the Michigan and Federal legislatures have declared that school districts are generally “gun free zones.” *See, e.g.*, 18 USC 922(q)(2)(A) and MCL 750.237a(4). Reading the above the statutes together, the School District has broad authority to

adopt policies to safeguard students—which includes policies relating to the possession of firearms in school buildings.

3. THE MICHIGAN LEGISLATURE PROVIDED THAT PREEMPTION DOES NOT APPLY TO SCHOOL DISTRICTS

MCL 123.1102 provides:

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 or other firearms, 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.

MCL 123.1101(a) defines the phrase “local unit of government” as meaning “a city, village, township, or county,” but not a public school district. As is plain, the legislature did not include school districts within this definition, and that decision has meaning.

Statutory interpretation is a question of law, which this Court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). As this Court has repeatedly instructed, the fundamental obligation when interpreting statutes is “to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.” *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). And, beyond the necessity for legal citation, if the statute is unambiguous, judicial construction is neither required nor permitted. In other words, “[b]ecause the proper role of the judiciary is to interpret and not write the law,

courts simply lack authority to venture beyond the unambiguous text of a statute.” *Id* (emphasis added); *see also Paige v City of Sterling Heights*, 476 Mich 495 (2006).

Despite the above canons of statutory interpretation, Plaintiffs want this Court to rewrite MCL 123.1101(a) to include school districts. However, the above statutes expressly apply only to cities, villages, townships, and counties. The legislature did not include “school districts” in the above definition. It is hard to suggest that this was an oversight. School districts are one of the largest and most pervasive forms of government. There are more than 600 school districts in Michigan and, for most people, it is the level of government that they have the most interaction with. “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute[.]” *People v Monaco*, 474 Mich 48, 58, 710 NW2d 46 (2006) (quotation marks and citation omitted). The rules governing statutory construction also forbid this Court from deducing that the Legislature “mistakenly utilized one word or phrase instead of another.” *Chaney v Dep't of Transp*, 447 Mich 145, 165, 523 NW2d 762 (1994). The above conclusion is supported under the legal maxim *expressio unius est exclusio alterius*. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74, 711 NW2d 340 (2006). This maxim means “the expression of one thing is the exclusion of another.” *Id.* at 74 n. 8, 711 NW2d 340. Had the legislature wanted to include school districts in MCL 123.1101(a), it certainly could have, but it did not. Based on the above, this is a

simple case. The above statutes are clear and unambiguous, and this should end the inquiry. Leave to Appeal should be denied.

4. THE JUDICIAL DOCTRINE OF FIELD PREEMPTION CANNOT ALTER THE LEGISLATURE’S EXPRESS WILL AS SET FORTH IN MCL 123.1101(A)

Field preemption is a question of legislative intent. See *Walsh v River Rouge*, 385 Mich 623, 639, 189 NW2d 318 (1971). Application of the doctrine requires a Court to examine sources and values outside the statutory text to divine whether the Legislature intended to occupy a field of regulation. But this Court has repeatedly emphasized that the Legislature’s intent in drafting an unambiguous statute is to be gleaned only from the words contained in the text. “[C]ourts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature.” *Pohutski v City of Allen Park*, 465 Mich 675, 683, 641 NW2d 219 (2002). This commitment to the statutory text is not merely a matter of history or prudence; instead, it constitutes a bedrock principle of separation of powers. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406–407, 738 NW2d 664 (2007); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758–759, 641 NW2d 567 (2002). Simply put, the “judicial role precludes imposing different policy choices than those selected by the Legislature....” *Robertson*, 465 Mich at 759, 641 NW2d 567 (quotation marks and citation omitted).

In cases such as this—where there is an express statute addressing preemption—field preemption should not be used to alter plain and unambiguous statutory language. As such, field preemption should not be used to alter the express legislative intent found in this case.

5. IF THE FRAMEWORK SET FORTH IN *PEOPLE V LLEWELLYN* APPLIED TO THIS CASE, THE COURT OF APPEALS PROPERLY APPLIED IT IN FINDING THAT THERE WAS NO FIELD PREEMPTION

Preemption under Michigan law derives from Const. 1963, art. 7, § 22, which declares:

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. *Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.* No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]

In *People v Llewellyn*, 401 Mich 314, 323–324, 257 NW2d 902 (1977), this Court articulated a field-preemption analysis that considers four factors: (1) whether state law expressly preempts any further lawmaking, (2) whether preemption should be implied based on a court's examination of legislative history, (3) whether preemption may be implied from the “pervasiveness of [a] state regulatory scheme,” and (4) whether “the nature of the regulated subject matter ... demand[s] exclusive state

regulation to achieve the uniformity necessary to serve the state's purpose or interest.”

The first *Llewellyn* factor asks whether the state law cited as preemptive “expressly provides that the state’s authority to regulate in a specified area of the law is to be exclusive[.]” *Llewellyn*, 401 Mich at 323. In this case, no such provision exists. It bears repeating that the statute on which plaintiffs rely does not reference schools or school districts in its list of “local units of government,” despite that for many other purposes, the Legislature has explicitly identified school districts as “local units of government.” See, e.g., MCL 550.1951 (including “school districts” within the definition of “local unit of government” in an act providing that certain entities are subject to the patient’s right to independent review act); MCL 286.942(g) (including “school district[s]” within the definition of “local unit of government” for purposes of the Rural Development Fund Act); and MCL 123.381 (including “school district[s]” within the definition of “local unit of government” in an act concerning the construction of water and waste supply systems). As such, this factor supports Defendants.

The second *Llewellyn* factor requires courts to consider legislative history. In this case, Plaintiffs only pointed to the House Legislative Analysis 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 authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances.” *CADL*, 298 Mich App at 236. This fragment of legislative history is of questionable utility because it speaks to ordinances and local units of government rather than to schools (who enact policies, not ordinances). As is explained below, school districts, which operate in confined buildings, are quite unique from large geographic municipalities such as counties or townships. As no other legislative history was presented by Plaintiffs, the Court of Appeals properly held that this factor does not support preemption.

The third *Llewellyn* factor concerns “the pervasiveness of the state regulatory scheme.” The Court of Appeals correctly noted that firearms are indeed pervasively regulated in Michigan. *Llewellyn*, 401 Mich at 323. However, this fact, standing alone, does not result in a finding of field preemption. “While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of preemption.” *Llewellyn*, 401 Mich at 324. Here, 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. Among the statutes regulating firearms compiled by the legislative service bureau are 26 different laws specifically referencing “weapon free school zones.” As the Court of Appeals correctly held, these four words telegraph an unmistakable objective

regarding guns and schools; indeed, it is difficult to imagine a more straightforward expression of legislative will. The Legislature contemplated that this repeatedly invoked phrase would be interpreted to mean exactly what it says—no weapons are allowed in schools. The pervasiveness of the Legislature’s use of the phrase “weapon free school zones” presses against the preemption of a district policy affirming that its schools will remain “weapon-free.”

Llewellyn’s fourth factor asks 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. Plaintiffs argue that a “patchwork” of differing school policies will create “confusion” and will “burden” the police and the public. This argument is mistaken. Counties, townships and cities are intersected by roads and cover large geographic territories. It is commonplace for a person to drive down I-96 and cross through Oakland County, Livingston County, Ingham County, and a dozen townships and cities. If the possession of firearms in this setting was changing every few miles, where having a gun would go from legal to illegal, that could certainly present confusion for the police and public. A school building, however, is much different, and is more akin to a business. Most parents of school-age children send 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. And, under State law, the firearm can be left in the

vehicle while dropping off and picking up children. MCL 750.237a. Additionally, the Legislature has 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 enroute to or from school or a school sponsored activity.” The Legislature recognized that different school districts would employ different methods and strategies to accomplish this goal. In this scenario—school buildings—there is little possibility of meaningful “confusion” or burdening of law enforcement. This is quite similar to local businesses. One business may allow guns; another business may say no guns are allowed in its store. This sort of distinction creates no confusion amongst the public or law enforcement.

6. PLAINTIFF’S ANALOGY TO THE CADL CASE IS MISPLACED

The *CADL* case—which plaintiffs rely upon—addressed whether a city and county could create a library that could regulate firearms. Again, MCL 123.1101(a) defined the phrase “local unit of government” as meaning “a city, village, township, or county,” the Court of Appeals properly held that a city and county could not create an entity that could regulate guns when neither entity had the authority to do so pursuant to MCL 123.1101a. That same logic does not apply to school districts because school districts are educational institutions and are not created by cities, townships, villages or counties, nor are school districts listed in MCL 123.1101(a).

Furthermore, in *CADL*, the library only had statutory authority to “[a]dopt

bylaws and regulations ... governing the board and the district library.” School Districts, however, have a very specific statutory mandate 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.” MCL 123.1102(emphasis added.) This is exactly what Clio Area Schools has done in this case.

Based on the above, Clio Area Schools has acted within its express statutory authority when it “provided for the safety and welfare” of students by determining that guns should not be in its schools. The School District has been entrusted with educating and caring for the pupils in its charge, and it has done just that.

RELIEF REQUESTED

As Plaintiffs have not demonstrated any proper ground for appeal, leave to appeal should be denied.

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