STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT DAVIS,

Plaintiff-Appellee,
v

JOCELYN BENSON,

Defendant-Appellant,

CONSOLIDATED WITH

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

Plaintiffs-Appellees,
v

JOCELYN BENSON and DANA NESSEL,

Defendants-Appellants,

COL JOE GASPER,

Defendant.
_____/

Michigan Supreme Court No.____

Court of Appeals No. 355265

Court of Claims No. 20-000207-MZ

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

Expedited relief requested – Relief requested no later than 10:00 a.m. on Monday, November 2

Michigan Supreme Court No. ____

Court of Appeals No. 355266

Court of Claims No. 20-000208-MM

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

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STATEMENT OF JURISDICTION

On October 29, 2020, the Court of Appeals issued two orders denying Defendants' applications for leave in *Davis* and *Lambert*, leaving standing the Court of Claims' issuance of a preliminary injunction barring the Secretary of State from enforcing her October 16, 2020 Directive. This Court has jurisdiction over this interlocutory emergency appeal pursuant to MCL 600.215(3) and MCR 7303(B)(1). The orders appealed are attached as Exhibit A. The Court of Appeals' Appendices, in three volumes, are also appended to this application.

STATEMENT OF QUESTIONS PRESENTED

1. In a handful of statutes such as the enabling statute here, the Legislature has given state officials the choice whether to issue instructions or promulgate rules. The Secretary of State exercised that authority in response to current events by issuing a narrow Directive that banned open carry in polling places, clerks' offices, and AV counting boards, consonant with state law, which does not clearly allow open carry anywhere, let alone in and around polling locations. Did the Court of Appeals err in denying the Secretary and the Attorney General's application for leave to appeal where the Court of Claims wrongly concluded that the Secretary was required to issue her Directive as a rule under the Administrative Procedures Act and that the rule was not in accordance with Michigan law?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

2. The test for injunctive relief is well established. Notwithstanding Plaintiffs' inability to demonstrate a substantial likelihood of success on the merits, they also cannot show irreparable harm where they have no right to open carry in the restricted locations on Election Day, and the balance of harms weighs in favor of the Secretary ensuring that no Michigan citizen is disturbed, intimidated, or deterred from voting on November 3, 2020. Did the Court of Appeals err in denying the application where the Court of Claims wrongly enjoined the Directive?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

1963 Const, art 2, § 4

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

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

***

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

***

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

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

1963 Const, art 5, § 3

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

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

1963 Const, art 5, § 9

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

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

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

***

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

***

Section 21 of Michigan Election Law, MCL 168.21

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

Section 31 of Michigan Election Law, MCL 168.31

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

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

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

***

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

(a) Determining the validity of registration of a circulator or individual signing a petition.

(b) Determining the genuineness of the signature of a circulator or individual signing a petition, including digitized signatures.

(c) Proper designation of the place of registration of a circulator or individual signing a petition.

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

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

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

(b) An official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300, or an enhanced official state personal identification card issued under the enhanced driver license and enhanced official state personal identification card act, 2008 PA 23, MCL 28.301 to 28.308.

Section 654 of Michigan Election Law, MCL 168.654

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

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

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

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

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

Section 678 of Michigan Election Law, MCL 168.678

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

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

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

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

(a) The election day precinct returns.
(b) The corresponding absent voter counting board returns.

(c) A total of each election day precinct return and each corresponding absent voter counting board return.

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

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

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

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

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

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

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

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

Section 5o of the Firearms Act, MCL 28.425o

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

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

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

(c) A sports arena or stadium.

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

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

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

(g) A hospital.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) An individual who is licensed under this act and who is a court officer.

(k) An individual who is licensed under this act and who is a peace officer.

(6) An individual who violates this section is responsible for a state civil infraction or guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), the individual is responsible for a state civil infraction and may be fined not more than $500.00. The court shall order the individual's license to carry a concealed pistol suspended for 6 months.

(b) For a second violation, the individual is guilty of a misdemeanor punishable by a fine of not more than $1,000.00. The court shall order the individual's license to carry a concealed pistol revoked.

(c) For a third or subsequent violation, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both. The court shall order the individual's license to carry a concealed pistol revoked.

Section 234d of the Penal Code, MCL 750.234d

(1) Except as provided in subsection (2), a person shall not possess a firearm on the premises of any of the following:

(a) A depository financial institution or a subsidiary or affiliate of a depository financial institution.

(b) A church or other house of religious worship.

(c) A court.

(d) A theatre.

(e) A sports arena.

(f) A day care center.

(g) A hospital.

(h) An establishment licensed under the Michigan liquor control act, Act No. 8 of the Public Acts of the Extra Session of 1933, being sections 436.1 to 436.58 of the Michigan Compiled Laws.

(2) This section does not apply to any of the following:

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

(b) A peace officer.

(c) A person licensed by this state or another state to carry a concealed weapon.
(d) A person who possesses a firearm on the premises of an entity described in subsection (1) if that possession is with the permission of the owner or an agent of the owner of that entity.

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

Section 237a of the Penal Code, MCL 750.237a

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

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

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

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

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

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

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

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

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

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

(a) Imprisonment for not more than 93 days.

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

(c) A fine of not more than $2,000.00.

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

(a) An individual employed by or contracted by a school if the possession of that weapon is to provide security services for the school.

(b) A peace officer.

(c) An individual licensed by this state or another state to carry a concealed weapon.

(d) An individual who possesses a weapon provided by a school or a school's instructor on school property for purposes of providing or receiving instruction in the use of that weapon.

(e) An individual who possesses a firearm on school property if that possession is with the permission of the school's principal or an agent of the school designated by the school's principal or the school board.

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(6) As used in this section:

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(b) "School" means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12.

(c) "School property" means a building, playing field, or property used for school purposes to impart instruction to children or used for functions and events sponsored by a school, except a building used primarily for adult education or college extension courses.

(d) "Weapon" includes, but is not limited to, a pneumatic gun.

(e) "Weapon free school zone" means school property and a vehicle used by a school to transport students to or from school property.

Section 2 of the Firearms and Ammunition Act, MCL 123.1102

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

INTRODUCTION

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

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

Plaintiffs question whether the Secretary has the authority to ensure this refuge through the Directive, rather than as a rule promulgated under the Administrative Procedures Act. The answer is yes, and the Court of Appeals erred twice: first, by denying the application for leave (which is itself inexplicable given the importance of this question); and second, by effectively rendering an opinion the court said it was not going to render—and rendering one that was incorrect. The Court of Appeals "clarif[ied]" that "the Michigan Legislature has given the Executive Branch important and necessary tools to prevent voter intimidation" through statutes that criminalize the brandishing of a firearm and prohibit voter intimidation. (Ex. A, Court of Appeals' 10/29/2020 Orders Denying Application for Leave). But in doing so, the Court of Appeals missed a crucial point: voter intimidation is broader than simply waving a gun in a voter's face. As the declarants below confirmed, the mere presence of a visible firearm can be a

deterrent both to approaching the polls and to casting one's ballot in an "island of calm" free from disruption and discomfort, which the U.S. Supreme Court has recognized as vitally important and worthy of protection.

What is more, by not formally taking the applications in *Davis* or *Lambert*, the Court of Appeals perpetuated the three critical errors of the Court of Claims.

First, the court below misunderstood the statutory authority of the Secretary of State. The court casts aside the "permissive statutory power" exception, holding that the Secretary cannot utilize that exception if her instructions involve a weighty issue of public policy. But that limitation is not found anywhere in the APA or the plain language of the enabling statute, MCL 168.31(1). And indeed, caselaw belies this new and unsupported judicial exception by showing that, where the Legislature allows a state official the choice between issuing instructions and promulgating rules, it is often in matters of great weight and public importance. Here, in light of recent events and reports of voter apprehension, coupled with the need to act swiftly, the Secretary opted to exercise the choice the Legislature gave her to issue instructions rather than promulgate rules.

Second, the court missed the significance of MCL 168.31(2), which unlike MCL 168.31(1) upon which the Secretary relied, expressly mandates that the Secretary must promulgate rules in certain enumerated areas. The *requirement* to promulgate rules found in MCL 168.31(2) underscores the Secretary's *permissive* authority under MCL 168.31(1). And it negates the court's conclusion that because the Secretary could issue any election-related matters as an instruction, the exception would therefore swallow the rule. (Defs Appx, Vol 3, p 561.)

Third, although the Court of Claims began by acknowledging the lack of an affirmative right to open carry (*id.*, p 558) ("As far as the Court can discern, there is no affirmative statutory

provision 'granting' the right to open carry a firearm"), in the next breath it stated just the opposite, concluding that "[i]f the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, *has declared it can be carried*," (*id*., p 563) (emphasis added). Because the court was right the first time—there is no right to open carry in Michigan law—the faulty premise that there is such a right led the court to determine that the Directive is "inconsistent with . . . state law." (*Id*., p 560). This fundamental error pervades the court's review below.

As a result, Plaintiffs have not met the factors for a preliminary injunction. They have not shown a substantial likelihood of success on the merits, they cannot show irreparable harm absent a right to open carry, the Secretary cannot fulfill her duty to ensure a free and fair election, and the public will suffer without the Directive, as many might be deprived of their right to vote in person. Accordingly, the Court of Appeals erred in not granting Secretary Benson and Attorney General Nessel's application for leave to appeal, because the trial court's decision was outside the range of principled outcome and was an abuse of discretion.

STATEMENT OF FACTS AND PROCEEDINGS

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

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

> Within 100 feet of a polling place, clerk's office(s), or absent voter counting board
>
> • **The open carry of a firearm is prohibited in a polling place, in any hallway used by voters to enter or exit, or within 100 feet of any entrance to a building in which a polling place is located.** A person may leave a firearm inside a vehicle parked within 100 feet of the building when visiting these locations if otherwise permitted by law to possess the firearm within the vehicle.

> • Concealed carry of a firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so.
>
> • Election inspectors should contact law enforcement immediately if these prohibitions are violated. The prohibition on open carry does not apply to law enforcement officers acting in the course of their duties.

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

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

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

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

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

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

The need for the Directive became clear to the Secretary only recently. Earlier this year, Michigan experienced several demonstrations related to the Governor's executive orders regarding the Covid-19 pandemic. Most rallies were held without incident and were attended by

numerous citizens engaged in the open carry of firearms.[1] But state and federal law enforcement authorities recently disclosed a plot to kidnap the Governor. In the course of that investigation, it was learned that militia members "discussed plans for assaulting the Michigan State Capitol, countering law enforcement first responders, and using 'Molotov cocktails' to destroy police vehicles." (Defs Appx, Vol 2, p 273.) There were also discussions of "armed protests" at the State Capitol in which one militia member stated: "When the time comes there will be no need to try and strike fear through presence. The fear will be manifested through bullets." *Id.*

In the aftermath of these events, and in light of the general rhetoric surrounding the national election, numerous clerks and local officials contacted the Secretary expressing concern over the presence of firearms at the polls. Voters, too, have contacted the Secretary and the Attorney General's office, expressing fear of seeing someone with a visible firearm in or near the polls on election day. It was apparent from these contacts that recent events in Michigan were creating or fueling this concern. Concerns over firearms at the polls are borne out by recent polling, where 73% of Michigan voters say open carry near polling places should be banned.[2]

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

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

[2] See https://www.detroitnews.com/story/news/politics/2020/10/29/ban-guns-michigan-state-capitol-open-carry-polling-places-poll/6059976002/, (last accessed October 29, 2020).

the police rather than go into the polling location, which she says could prevent her from voting. (*Id*., ¶ 9.)

Some have an additional fear that bringing their children to the polls will place them in danger. Mouhana Hawili plans to vote in person and will need to bring her five children (two of them toddlers) to the polls with her when she votes. (Defs Appx, Vol 2, pp 342, ¶¶ 3, 4.) The plot to kidnap the Governor has made her concerned about open carry at or near her precinct, and she says if she saw a gun at the polls she would not get out of her car. (*Id*., ¶¶ 5-7.) Afrah Almouswi likewise plans to vote in person because English is her second language and she would rather go to the local poll where she has people assisting her in the process of voting. (Defs Appx, Vol 2, p 344, ¶ 4.) But since she is a mom with four kids, two of whom are babies, she will have to bring them to the polls with her when she votes. (*Id.*, ¶ 5.) Firearms at the polls cause her to be concerned for the safety of herself and her children since she is an Iraqi American who fled the war in Iraq and firearms remind her of the war zone. She says this fear is heightened "given how emotional this election season has been and because of the recent plot to kidnap the Governor." (*Id.*, ¶ 6.) She does not want to lose her right to vote but says that visibly armed people could scare her and her kids from waiting in line or going into her polling location. (*Id*., ¶ 7.) Farah Afra has similar concerns, since she will both be voting in person and also assisting some immigrant women by dropping them at the polling locations so they can vote. (Defs Appx, Vol 2, pp 346, ¶ ¶ 3, 4.) She is concerned that firearms pose a risk to her personal safety and that of the women she is assisting. (*Id.*, ¶ 7.)

Some voters have particular fears because of age, health, or disability. Rabha Al Ghoul plans to vote in person on November 3 because she does not understand or trust the absentee ballot process. (Defs Appx, Vol 2 pp 340, ¶ 8.) She says she has been voting at the polls since

she became a citizen. (*Id*., ¶ 8.) But this year she is especially worried that she would not be able to escape gunfire having just had major surgery on her leg. (*Id*., ¶ 9.)

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

For many voters, these concerns are heightened because of recent events and the political climate. Dave Maturen is a former State Representative elected as a Republican to the 63rd House district, the Kalamazoo County Commission, and Brady Township as a trustee. (Defs Appx, Vol 2, p 382, ¶ 3.) He supports the Secretary of State's Directive banning open carry at polling places, and states that if he had not already voted his AV ballot, open carry would make him concerned about his physical safety and the physical safety of those around him at a polling site. (*Id*, ¶¶ 6, 8.) He notes the threats made against the Governor and elected officials statewide, the heated rhetoric and hatred during this year's elections, and he believes "there is potential for angry people to become frustrated at polling places." (*Id*., ¶ 9.) "Adding a weapon,

such as a gun, to this environment could possibly lead to violence," he says; "we need to lower the temperature—not raise it by permitting open carry at polling places." (*Id.*, ¶¶ 10 11.)

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

Even gun owners are among those who support the Directive. Nathan Dannison, a pastor, is in the process of getting a concealed pistol license. (Defs Appx, Vol 2, p 353, ¶ 4.) Yet he supports the Directive because he believes allowing firearms at the polls will "discourage regular Americans from voting" and would make him "less likely to participate in the democratic process in person or bring my children to the polling site." (*Id.*, ¶ 5.) Gary Reed, another gun owner and former executive director of Michigan Republican Party and former elected Delta Township Trustee, (Defs Appx, Vol 2, p 356, ¶ 5), says that, while he is working the polls this

election as a poll worker, he will be very intimidated if he sees someone walking around with a gun. (*Id*., ¶¶ 3, 4, 7.) He recalls seeing armed gunmen at the Michigan Legislature in the Capitol building, which was "very concerning for public safety reasons." (*Id.*, ¶ 10.)

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

Poll watchers Julia Kelly and Kenneth Manley likewise speak out. Kelly says that if she were to arrive at a precinct and there was someone outside with a visible firearm, she would feel "very afraid" and probably would not get out of her car. (Defs Appx, Vol 2, p 374, ¶ 7.) Manley believes that "[p]ermitting non-law enforcement persons to carry guns at a polling place limits a free and fair voting experience because it makes it uncomfortable and worrisome for voters, polling staff and poll watchers." (Defs Appx, Vol 2, p 379, ¶ 10.) And he believes that a polling place is naturally a place where people have different views, so introducing guns into that already emotionally charged environment creates a greater likelihood of violence. (*Id.*, ¶ 12.)

Poll workers feel similarly. Paula Bowman believes she will be "worrying about someone sitting six feet away from me with a gun rather than having my complete focus on my

job." (Defs Appx, Vol 2, p 371, ¶ 8.) She also expressed concern that, because people will be wearing masks due to the Covid-19 pandemic, she will unable to see expression and will not know whether a person is smiling or is angry—an uncertainty that compromises her safety. (*Id.*, ¶ 10.) Deborah Bunkley, another experienced poll worker, expects this election to be "trying" and says if she sees someone with a gun, she is going to be worried unless she knows them. (Defs Appx, Vol 2, p 376, ¶ 6.) Regina Johnson, who supervises poll workers, believes that an altercation over open carry could put her in harm's way because it would be her responsibility to address it. (Defs Appx, Vol 2, p 384, ¶¶ 4, 6.) She recounts experiences where partisan challengers have confronted voters and "things get confrontational." She believes that allowing open and carry in such an environment is "asking for trouble." (*Id*., ¶ 10.) She is also concerned about poll workers' safety and voters' safety "from a shooting or an accidental shooting." (*Id*., ¶ 9.)

Last but not least, firearms at the polls and at clerks' offices also affects clerks. Chris Swope, Lansing's elected City Clerk, has been overseeing elections for the City of Lansing and supervising numerous election officials since 2006. (Defs Appx, Vol 2, p 387, ¶¶ 2, 3.) He says he "has concerns over the presence of firearms at all of these election-related locations" and that his election workers have also expressed the same concerns to him during trainings and on other occasions. (*Id*., ¶ 8.) "As election officials, we are trained to implement the election laws. My workers are not trained in the status of Michigan's firearm laws and where people may or may not open carry a firearm." (*Id.*, ¶ 9.) He explains that because voters have different views and sensitivities to firearms, his workers have also expressed concern over the difficulty in determining when a person possessing a visible firearm may be intimidating other voters. (*Id.*, ¶11.) "This uncertainty," he says, "can make it difficult for myself and my election workers to

ensure that elections run securely and without unnecessary delays or disruption if we are having to address the presence of firearms at polling locations." (*Id.* at Vol 2, p 388, ¶ 12.) He believes that the Secretary's Directive helps address those concerns by uniformly prohibiting the open carry of firearms in all polling places, clerks' offices, and counting boards. (*Id.*)

3. Two lawsuits are filed, and the Court of Claims enjoins enforcement of the Secretary's Directive.

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

Later that day, a second related lawsuit, *Lambert, et al v Benson, et al*, Case No. 20-000208, was filed in the same court, this time against Secretary Benson, Attorney General Dana Nessel, and Michigan State Police[3] Director Joe Gasper in their official capacities. The lawsuit also challenged the Secretary's Directive, and Despite considerable discussion about the right to bear arms and the loss of First Amendment expression, raise only two claims: that the Secretary's issuance of the directive was an *ultra vires* act (Count I); and that MCL 168.678 violates separation-of-powers principles (Count II) (*Id.*, pp 180-185.) Plaintiffs requested a preliminary and permanent injunction enjoining Defendants from engaging in any acts to promote or enforce the ban on Election Day; a declaratory judgment that the Directive is void

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

and without lawful authorization; and money damages. (*Id*., p 185, Prayer for Relief.) Plaintiffs also filed a motion for declaratory and emergency injunctive relief. (*Id*., pp 214-216.)

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

4. The Court of Appeals denies Defendants' application for leave to appeal.

On October 28, Defendants Benson and Nessel appealed the trial court's issuance of the injunction. On October 29, the Court of Appeals issued two orders denying Defendants' application for leave to appeal, leaving the Court of Claims' injunction standing.

Defendants Secretary Benson and Attorney General Nessel timely appeal the Court of Appeals' decisions affirming the injunction and request expedited relief in this time-sensitive election case.

ARGUMENT

I. The Court of Appeals erred in denying Defendants' application for leave because the Court of Claims incorrectly concluded that the Secretary's Directive is unlawful where it did not have to be promulgated as a rule and is in accordance with applicable law.

A. Preservation of Issue

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

B. Standard of Review

The interpretation of the Administrative Procedures Act and other statutes involved here are issues of statutory interpretation reviewed de novo. *In re MCI Telecommunications Complaint,* 460 Mich 396, 413 164 (1999).

C. Analysis

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

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

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

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

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

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

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

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

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

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

The Secretary also has ultimate supervisory authority over election inspectors.[4] Election inspectors have supervisory authority over polling places and AV counting boards on Election Day. Section 678 provides that "[e]ach board of election inspectors shall possess full authority *to maintain peace, regularity and order* at its polling place, and *to enforce obedience to their lawful commands* during any . . . election[.]" MCL 168.678 (emphasis added). In turn, under § 21, the Secretary can direct election inspectors in the proper conduct of an election in their polling places and AV counting boards. And the Secretary's authority to direct inspectors includes providing instructions on maintaining peace, regularity, and order at polling places. MCL 168.21, 168.31(1)(a)-(b). Such instructions provide the source for the "lawfulness" of any command given by an election inspector. In this way, the Secretary supervises and controls polling places and AV counting boards.

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

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

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

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

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

The Secretary's duty to ensure the proper conduct of elections is particularly true with respect to Election Day. Indeed, the Secretary has dedicated a whole chapter in the Election Officials' Manual to "Election Day Issues."[5] Some of these instructions touch on safety and security issues. For example, the Secretary has provided guidance to officials regarding what to

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

do if a polling location must be evacuated or power outages occur.[6] Other instructions address prohibited behavior in the polls, such as electioneering (including limitations and prohibitions on the display of certain articles of clothing) or certain use of electronic devices (including cameras, phones, and recording equipment).[7] Another chapter of the Manual prohibits individuals from being in possession of or having access to cellular telephones or other devices while in an AV counting board.[8] The Secretary's authority to issue instructions to promote safety and security on Election Day, including instructions to curb the potential for disturbances and voter intimidation, is clearly provided for by statute and by the Constitution.

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

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

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[6] *Id*., p 4.
[7] *Id*., pp 26, 39-40.
[8] See Election Officials' Manual, Chapter 8, Absent Voter Ballot Election Day Processing, October 2020, p. 3, available at https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf.

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

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

Finally, all election laws must be construed in context with the People's mandate that laws be enacted "to preserve the purity of elections." Const 1963, art 2, § 4(2). "The phrase 'purity of elections' . . . unmistakably requires *fairness and evenhandedness* in the election laws of this state." *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 692–693 (2003) (cleaned up) (emphasis added.) See also *Wells v Kent County Bd of Election Commr's*, 382 Mich 112, 118-121 (1969). The Legislature's delegation of authority to the Secretary under §§ 21 and 31 includes a duty of the Secretary to ensure that all Michigan voters can exercise their rights under the law in a fair and equal manner.

Notably, the Secretary of State's authority to issue instructions to curb disturbances and voter intimidation has been upheld before. As noted above, the use of video cameras, cell phones, cameras, televisions and recording equipment in the polls is limited.[9] A prior version of these instructions was challenged on First Amendment grounds by a voter who wished to use his cell phone to take a "ballot selfie" but was banned from doing so under the instructions in place at that time. See *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016). In staying the preliminary injunction issued in that case, the Sixth Circuit spoke favorably of the Secretary's instructions: "The State's policy advances several serious governmental interests: preserving the privacy of other voters, *avoiding delays and distractions at the polls*, preventing vote buying, and *preventing voter intimidation*." *Id*. at 400 (emphasis added). While the state later agreed to allow a limited opportunity to take a "ballot selfie," the case supports the Secretary's authority to issue instructions to forestall disturbances and intimidation at polling places, thereby ensuring that the right to vote remains paramount in these places.

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

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

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

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

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

a. The "permissive power" exception applies.

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

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

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

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

Michigan courts have repeatedly recognized that, when the permissive power exception applies, the agency need not proceed by APA rulemaking. For example, in *Michigan Trucking Ass'n v Mich Pub Serv Comm'n*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was "invalid because it [was] essentially a rule that was not properly promulgated pursuant to the rule-making procedures set forth in" the APA. 225 Mich App 424, 429 (1997). The statute, MCL 479.43, provided:[10]

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

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

Similarly, in *Pyke v Department of Social Services*, the plaintiff challenged the department's failure to promulgate an agency policy regarding eligibility of general assistance benefits. 182 Mich App 619, 622, 629 (1990).[11] The statute at issue provided in relevant part:

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[10] MCL 479.43 was repealed by the Legislature in 2014 PA 493.

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

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

The Court of Appeals ultimately held that the challenged policy was "excepted from the rule-making requirements of the APA" under MCL 24.207(j) because it "contain[ed] direct, explicit legislative authorization for the state department to establish eligibility and financial standards for all forms of general public relief." *Id*. at 631. In other words, "the eligibility of applicants . . . follow[ed] from the Legislature's explicit grant of statutory power to establish such standards." *Id*. The Court also noted that, unlike other statutes,[12] there was no provision in MCL 400.24 that "expressly require[d] that rules . . . [for the eligibility of general assistance benefits] be promulgated pursuant to the requirements of the APA." *Id*. at 632.

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

'eligible operating expenses,' " but did not "expressly require defendant to promulgate the definition of eligible operating expenses before implementing it").

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

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

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

ii. MCL 168.31's plain language underscores that the Secretary was not restricted to rulemaking.

It is also plain from § 31's language that with respect to the conduct of elections, the Secretary is not restricted to the requirements of the APA. Like the statutes in *Michigan Trucking*, *Pyke*, and *By Lo*, the enabling statute for the Secretary of State provides permissive statutory power: "The secretary of state shall . . . *issue instructions* and *promulgate rules pursuant to the [APA]* . . . for the conduct of elections[.]" MCL 168.31(1)(a) (emphasis added). While the use of "shall" connotes mandatory action, the statutory language then contemplates two different acts that the Secretary "shall do"—either (1) issue instructions, or (2) promulgate rules. Notably, the verbs have meaning: the Legislature did not require that the Secretary "issue rules" or "promulgate instructions." If the Legislature had intended the Secretary promulgate instructions, it would have written the statute differently. Thus, unlike *Detroit Base Coalition*, 431 Mich at 188, the statute does not mandate that the Secretary promulgate rules for the conduct of elections. Rather, the Secretary, in her discretion, can *either* issue instructions *or* promulgate rules. MCL 168.31(1)(a). Here, the Secretary issued instructions—the Directive.

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

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

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

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

(2014) (explaining that courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."). The plain language of § 31 plainly contemplates that both "issuing instructions" and "promulgating rules" are separate functions that the Secretary "shall do."[13] Accepting the plaintiffs' arguments would mean reading the Legislature's chosen language—"issue instructions and promulgate rules"—to have the *identical* meaning as if the Legislature had simply said "promulgate rules." When the Legislature granted the Secretary the authority to issue instructions, we must presume, and the court below should have presumed, that the Legislature intended to grant her some authority beyond the authority to promulgate rules.[14] Instead, the court below effectively read "issue instructions" out of the statute and held that the Secretary only has the power to make rules.

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

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

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

rules with respect to the conduct of elections. Section 31(2)'s explicit requirement that the Secretary must promulgate rules under *certain* circumstances makes no sense if § 31(1)(a) is misread to require the Secretary to promulgate rules under *any* circumstances. It does make sense, however, if the Legislature recognized that, in § 31(1)(a), it was granting the Secretary two different mechanisms of action, but then in § 31(2), decided to exclude one of those mechanisms in certain areas. For these reasons, a ruling in Plaintiffs' favor would leave the term "instructions" as found in MCL 168.31(1)(a) "without any practical or effective meaning." See, e.g., *People v Cunningham*, 496 Mich 145, 156 (2014).[15]

iii. Permissive statutory power provides agencies with necessary flexibility.

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

For example, MCL 30.310 empowers the director of the Michigan State Police "*to issue orders* and promulgate rules and regulations for the purpose of administration and preparation of a *plan of civil defense for this state*[.]" (Emphasis added). This particular grant of permissive power makes sense considering that when providing for the civil defense of the state, an agency or officer may have to be able to act quickly without the deliberate procedures required in the APA. Similarly, MCL 141.1569 empowers the state financial authority to "*issue bulletins or* promulgate rules as necessary to carry out the purposes of [the Local Financial Stability and

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

Choice Act].” (emphasis added). Given the possibility of a quickly fluctuating financial environment and the potential need for quick action to ensure financial stability, this grant of authority similarly makes sense. Accordingly, the Legislature provided these agencies with the ability to take prompt action when the circumstances required.

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

The Legislature, recognizing that virtually all aspects of an election are time sensitive and that the Secretary has roughly 1,600 clerks to supervise in the conducting of elections, likewise provided the Secretary with flexibility when it enacted § 31 of the Election Law.

As events continue to unfold in Michigan and nationally, they underscore that the Secretary has needed—and wisely exercised—this flexibility. Just this month the United States Department of Homeland Security (“DHS) prepared a Homeland Threat Assessment. In that Assessment, DHS explained that domestic violent extremists “might target events related to the 2020 Presidential campaigns, the election itself, election results, or the post-election period.”[16] DHS further concluded that the most likely “polling places, and voter registration events, would be the “most likely flashpoints for potential violence” by these extremists include “polling places” and “voter registration events.” Such a recent assessment by DHS—a federal department dedicated to, among other things, protecting the homeland from domestic violent extremists—

[16] See Homeland Threat Assessment < https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf> (last accessed October 29, 2020), p 17-18.

underscores why the Legislature did not intend to require the Secretary to have to promulgate rules touching on the conduct of elections.

b. The decision below made several key errors, which the Court of Appeals' denial of the application perpetuated.

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

The court below also clearly erred in declaring that the exception asserted by the Secretary was so broad as to swallow the rule, such that the Secretary "would *never* have to issue APA promulgated rules for *any* election related matters." (Defs Appx, Vol 3, p 561.) To the contrary, and per the Legislature's explicit command, the Secretary *must* promulgate rules "establishing uniform standards for state and local nominating, recall, and ballot question petition signatures." MCL 168.31(2). And in MCL 168.794c, the Legislature specified that the Secretary must promulgate rules under the APA "to implement the provisions of [MCL 168.]794 to 799a," which relate to voting machines. And again in MCL 168.797b, the Legislature required the Secretary to "promulgate rules pursuant to the [APA] governing the tabulation of

ballots, certification of results, delivery of ballots and certified results, and sealing of devices and ballot boxes after the polls are closed." Evidently, the Legislature knows how to require the Secretary to comply with the APA where it wishes to do so. And because it knows how to do so, the Court of Claim's conclusion that the power claimed by the Secretary under the exception "swallows the rule" is simply mistaken. By specifying circumstances in which the Secretary could not exercise power outside the APA, which do not include the circumstances in this case, the Legislature's broader grant of authority to the Secretary to act outside the APA applies in this case.

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

In sum, rule promulgation was not required, the Court of Claims erred in concluding otherwise, and the Court of Appeals erred by not granting Defendants' application for leave to appeal.

3. The Directive is in accordance with law.

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

In particular, the Directive, which prohibits the open carry of firearms in polling places and within 100 feet of the entrance of any polling place, is in accordance with the laws of this State for five reasons: (1) it does not deprive concealed pistol license holders (or "CPL holders")

of any rights to concealed carry under the Firearms Act; (2) the Legislature has not created a right to open carry; (3) the Legislature did not preempt the Secretary from issuing instructions regulating the open carry firearms in polling places; (4) it is a "presumptively lawful regulatory measure" that does not violate the Second Amendment; and (5) it is consistent with both state and federal free speech protections.

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

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

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

Critically, the plain language of the Directive does not touch on the statutory right of concealed carry—it prohibits only open carry. Thus, the Directive has no impact on, and is fully

consistent with, the rights of licensed owners of firearms who wish to exercise concealed-carry rights according to the terms of their licenses and the Firearms Act.

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

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

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

Respectfully, the Court of Claims was wrong—the Legislature has not so declared. And the Court of Appeals erred in denying Defendants' application for leave to appeal.

Contrary to the Court of Claims' conclusion, the Legislature has not *authorized* the open carry of firearms. Instead, Michigan's Penal Code *criminalizes* open carry in certain sensitive areas. For example, MCL 750.234d provides that a "person shall not possess a firearm on the premises" of a bank, "church or other house of religious worship," "court," theatre, sports arena, day care, hospital, or bar. In addition, MCL 750.237a(1)-(4) criminalizes the possession of any firearm in a "school" or on "school property." Both laws exempt a person who has express permission from the owner or an agent of the owner of the premises or the school principal or the school board, to possess a firearm on the premises. MCL 750.234d(2)(d), 750.237a(5)(e).[17]

Critically, while the Michigan Penal Code does criminalize open carry if it occurs in certain enumerated premises such as banks, places of worship, courts, and theatres, MCL 750.234d,[18] and in "weapon free school zone[s]" such as schools and school transport vehicles,

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

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

MCL 750.237a(1), the Michigan Legislature's silence on polling places (and presumably everywhere else not named in § 234d) does not confer an affirmative statutory right to individuals to open carry firearms in all places not named. To the contrary, the fact that the Legislature has created the statutory right to open carry *in a vehicle*, see MCL 28.425c(3)(b), but has not done so in other areas shows that when the Legislature wishes to confer a statutory right to open carry, it knows how to do so.

What is more, Michigan law generally rejects the creation of statutory rights by negative implication. Indeed, in other contexts, courts have rejected analogous arguments that the Legislature, by forbidding certain conduct, created a positive statutory right to engage in similar conduct not forbidden under the statute. See *Miller v Fabius Tp Bd, St Joseph Co*, 366 Mich 250, 256-257 (1962) (upholding a challenged ordinance because the municipality had not forbidden "what the legislature has *expressly* licensed, authorized, or required"); *City of Detroit v Qualls*, 434 Mich 340, 362-363 (1990) (upholding a city ordinance relating to the storage of fireworks that was stricter than the state statute on the same subject, and "reject[ing] the rationale employed by the dissent that that which the Legislature does not prohibit, it impliedly permits"); *Rental Property Owners Ass'n of Kent Co v City of Grand Rapids*, 455 Mich 246, 261 (1997) (declining to strike down a city nuisance abatement ordinance that provided different and greater provisions for nuisance abatement than those provided in the state nuisance abatement statute). And in this context, see this Court's nonbinding but persuasive and compelling concurrences in *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 711-722 (2018) (Viviano, J., & Bernstein, J., concurring) (indicating that they would have rejected an argument from the plaintiffs that the Legislature in banning open carry in some circumstances is creating a right to it in other circumstances.) See also 2019-2020, OAG No. 7311, issued May 11, 2020

(where the Attorney General discussed open carry as "a concept" that "does not provide the unfettered right to bring firearms into any public space").

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

Ultimately, the Secretary's Directive does not infringe any statutory right to open carry because it does not forbid the open carrying of firearms at any location where the Legislature has said that open carry is allowed.[19] And for this reason, the Directive is consistent with the laws of this State.

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

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

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

school districts' firearms policies would apply to prevent individuals from carrying firearms on school property.[20]

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

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

The U.S. Supreme Court has explained that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *D.C. v Heller*, 554 US 570, 626 (2008)—that is, it is "not unlimited," *id.* at 595; accord *People v Deroche*, 299 Mich App 301, 306 (2013). And it has described "laws forbidding the carrying of firearms in *sensitive places*" as "presumptively lawful regulatory measures[.]" *Heller*, 554 US at 626–627 n 26 (emphasis added).

Critically for this case, neither the U.S. Supreme Court, the Sixth Circuit, nor our state courts have recognized an unrestricted constitutional right to open carry outside of one's home. See, e.g., *Kampf v Kampf*, 237 Mich App 377, 383 (1999) ("[T]he Michigan Constitution does not protect the right to bear arms in the context of sport or recreation."); *Tyler v Hillsdale Cty Sheriff's Dept*, 837 F3d 678, 690 (CA 6, 2016) (en banc) (noting that although "[t]he Supreme Court has not fleshed out the extent of the right protected by the Second Amendment," it has

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

nevertheless "recognized the government's power to restrict the 'carrying of firearms in sensitive places[.]"), quoting *Heller*, 554 US at 626; *Chesney v City of Jackson*, 171 F Supp 3d 605, 622 (ED Mich, 2016) (recognizing that, at the time the lawsuit was filed, "the right to openly carry a firearm outside the home . . . was not clearly established").

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

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

The Directive easily passes muster under intermediate scrutiny. Looking to the first part of the test, the Secretary has strong justifications for regulating the exercise of any Second Amendment rights in and around polling places, AV counting boards and clerk offices on election day—namely, avoiding voter intimidation. The U.S. Supreme Court has recognized that this interest is a compelling one. See *Mansky*, 138 S Ct at 1886-1887 (acknowledging Minnesota's interest in providing its voters "an island of calm in which [they] can peacefully contemplate their choices" and noting that "[t]he State may reasonably decide that the interior of the polling place should reflect that distinction"); *Burson*, 504 US at 208 (noting that the "interest in securing the right to vote freely and effectively" is "compelling" and that "[v]oter intimidation . . . is difficult to detect").

In other words, the Secretary has a right and a duty to do everything within her power to protect the right to vote in Michigan, see *Davis v Secy of State*, ___ Mich App ___ (2020)

(Docket No. 354622); slip op at 8-9, (Defs Appx, Vol 3, pp 505-506), including taking steps to maintain peaceful and orderly elections in all communities. And she is exercising her executive power to enforce MCL 168.932(a), the Legislature's prohibition against voter intimidation, when she does so. See *People ex rel Dougherty v Holschuh*, 235 Mich 272, 275 (1926).)

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

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

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

Second, the Directive is both temporary and responsive. It is in place only for this election. And as discussed above, it is in response to recent events in our state. While Michigan was earlier the site of mostly peaceful demonstrations, the disturbing news of the plan to kidnap the Governor and to potentially harm other public officials made it clear to the Secretary that there is a real potential that people will appear at the polls armed for reasons other than "as a means of pronouncing their viewpoint on the Second Amendment." (Defs Appx, Vol 1, p 179,

¶ 21; see generally (Defs Appx, Vol 2, Trask Aff, pp 317-331.) Both the Secretary and the Attorney General were contacted by numerous clerks and local officials expressing concern over the presence of firearms at the polls.

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

Third, the directive ensures the equal treatment of the different types of polling places throughout the state. In Michigan, polling places and AV counting boards are often located on property where the Legislature has prohibited open carry. As a general matter, polling places must be located in "publicly owned or controlled buildings," but may be located in buildings owned or operated by tax-exempt 501(c) organizations. See MCL 168.662(1) (location of polling places); MCL 168.765a(4) (location for holding absent voter counting board). Churches and other 501(c)(3) nonprofit charitable organizations are frequently used as polling places and to hold AV counting boards, in addition to schools and other publicly owned or controlled buildings such as city or township halls, community centers, fire stations, courts, etc.

Because schools and churches, and some government buildings such as courts remain protected from open carry, the Secretary's instructions were necessary to address locations in other government buildings, with the goal of ensuring uniformity of treatment of voters and election workers at *all* polling locations, AV counting boards, and clerk offices. Since the law

already generally prohibits the open carry of firearms on church or school property, and other private, nonprofits can exclude firearms from their properties, the Secretary's instructions as to these locations simply confirm the status quo. [21]

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

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

Plaintiffs assert that their open carry in and around the polls is an expression of their viewpoint on the Second Amendment. (Defs Appx, Vol 1, p 221.) They explain that some of their open carriers affix their "I Voted" sticker on their holster at the polling place. They then take a picture of the holstered pistol and post it on social media as a form of expression. (Defs Appx, Vol 1, pp 221, 234.)

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

[21] Additionally, the Directive's geographic limitations are identical to those limitations set forth by the Legislature in MCL 168.744.

Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich 1, 20-21 (2007) (noting that not every election regulation need be evaluated under strict scrutiny).

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

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

A. Preservation of Issue

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

B. Standard of Review

This Court reviews a trial court's grant or denial of an injunction for abuse of discretion. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28 (2008), citing *Michigan Coalition of State Employee Unions v Civil Service Comm,* 465 Mich 212, 217 (2001).

There is an abuse of discretion when the trial court's decision falls outside the range of principled outcomes. *Id.*, citing *Maldonado v Ford Motor Co.,* 476 Mich 372, 388 (2006).

C. Analysis

The test for a preliminary injunction is whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34 (2008).

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

Based on the analysis in Argument I above, Plaintiffs do not have a substantial likelihood of success on the merits.

2. Plaintiffs have not demonstrated irreparable harm.

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

pronouncement, and cannot support a finding of irreparable harm based simply on inability to open carry.

Plaintiffs also assert that their risk of harm is voter disenfranchisement on Election Day. (Defs Appx, Vo 1, 230-231.) But they need not choose between voting and open carry. Firearms are not a necessary component of voting, and Plaintiffs make no factual showing whatsoever regarding any claimed need to defend themselves at the polls. (*Id.* at 230) (referring to plaintiffs' "fundamental right to self-protection"). Those who wish to open carry in other locations can simply leave their firearm in the car or at home, go into the polls to vote—where their need for self-defense is severely diminished by the fact that no other voters, election workers, or poll watchers or challengers can be openly armed—and come back out to their car or home and get their firearm. And if they wanted to express themselves through their weapon and the vehicle of voting, they can simply return to their car or home and display their "I Voted" sticker on their weapon, similar to their ability to electioneer or display a ballot selfie beyond the 100-foot zone. The temporary inability to do that during the act of voting or within the 100-foot buffer zone is not irreparable harm.

Accordingly, the harm to Plaintiffs, if any, would be minimal. They are still free to vote, not prohibited (at least by the challenged Directive) from openly carrying a firearm on any day other than this upcoming Election Day or at any locations other than polling places, clerk offices, and AV counting boards. And they can exercise their First Amendment rights with respect to firearms outside of 100-foot buffer zone. Finally, the extent they assert that they need their guns for self-defense, that need, at least in and around the polls, is greatly reduced by the fact that the Directive does not allow others to open carry in those locations.

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

The Court of Claims' sparse public-interest analysis concluded that an injunction would cause "little harm to the public interest put forth by defendant, that being the right of voters to be free from intimidation or harassment from those carrying a firearm," because state statutes already prohibit concealed carry in certain places that are used as polling places, and because state laws already make voter intimidation a crime—with or without a firearm. (Defs Appx, Vol 3, pp 564-565.) Although purporting to deny Defendants' application, the Court of Claims "clarify[ied" the same point. (Ex. A, Court of Claims 10/29/2020 Order.) There are three serious omissions in this analysis—with disastrous results for voting rights.

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

Second, although voter intimidation is already a crime, it requires the intent to intimidate. The court fails to acknowledge that even if an individual does not intend to intimidate, the mere presence of their visible firearm can be discomforting and deterring to other voters. See *Burson*, US at 208 (noting that voter intimidation is difficult to detect).

Third, given that the court acknowledged that there appears to be no right to open carry in Michigan (Defs Appx, Vol 3, p 563), it is inconceivable that a non-right to open carry could outweigh the real possibility of voter discomfort, intimidation, and ultimately, possible deterrence, at this particular time in Michigan's history where gun-related events have instilled fear in many Michiganders. Every voter has the right to cast their vote in person, free from fear and discomfort. And the Secretary has a duty to protect that right by ensuring evenhandedness in voting, freedom from intimidation (which takes many forms, not just that of brandishing a

weapon, and which can deter voters from even approaching the polls), and a space where *every* voter has an "island of calm," *Mansky*, 138 S Ct at 1887, free from the specter of fear that an armed individual will be casting a vote alongside them.

"*No right* is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Id.* (emphasis added). The right to vote is so important that the People of Michigan recently enshrined it in the Constitution via an initiative petition and explained that the constitutional guarantees "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." Const 1963, art 2, § 4(1)(a).[22] In other words, the People of this State have decided that the holding of free and fair elections is uniquely important.

But recent events in Michigan potentially jeopardize a free and fair election as never before, because many voters have heightened reasonable fears of firearms and gun violence. Following the tumultuous plot to kidnap the Governor, both the Secretary and the Attorney General heard from a number of clerks, poll watchers, and voters expressing apprehension and discomfort. Plaintiffs have made light of this apprehension, referring disparagingly to the declarants in this case during oral argument in the Court of Claims by stating, "This case isn't about the fragile state of mind of 21 voters and what the Secretary envisions is the appropriate level of wokeness."[23] But voters' concerns *should* be taken seriously, because they could have a serious impact on the election.

Many are apprehensive about seeing firearms at polls on November 3rd. For some, it is because they have a history of gun violence (Defs Appx, Vol 2, p 335, ¶ 6; Vol 2, p 338, ¶ 7; Vol

[22] See also *Official Text of Proposal 18-3*, https://www.michigan.gov/documents/sos/Full_Text_-_PTV_635256_7.pdf.
[23] See https://www.youtube.com/watch?v=ktW6WKEXPts at 26:55 to 27:02.

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

Some voters are just plain afraid. (Defs Appx, Vol 2, p 346, ¶¶ 3-5; Vol 2, p 348, ¶¶ 3-5; Vol 2, p 350, ¶¶ 5-10.) Even some who are gun owners or getting concealed pistol permits have concerns about firearms at the polls. (Defs Appx, Vol 2, p 353, ¶¶ 4, 5; Vol 2, p 356, ¶¶ 5, 7.) Gary Reed, former executive director of the Michigan Republican Party and former elected Delta Township Trustee, is a gun owner, but he says he will be very intimidated if he sees someone walking around with a gun while he is at the polls on November 3rd as a poll worker. (Defs Appx, Vol 2, p 356, ¶¶ 3, 4, 5, 7.) Many others have expressed heightened fears based on the current political climate and recent Michigan events involving firearms. (Defs Appx, Vol 2, p 359, ¶ 8; Vol 2, p 362, ¶¶ 8, 10; Vol. 2, p 350, ¶ 10; Vol 2, p 382, ¶¶ 8, 9.)

Poll challengers, poll watchers, poll workers, poll chairpersons, and clerks—the election machinery—have also expressed concern about the prospect of armed individuals at the polls. (Defs Appx, Vol 2, p 365, ¶¶ 5-8; Vol 2, p 369, ¶¶ 4-7; Vol 2, p 371, ¶¶ 8-0; Vol 2, p 374, ¶¶ 6-7; Vol 2, p 376, ¶ 6; Vol 2, p 379, ¶ 10; Vol 2, p 379, ¶ ¶ 4-9; Vol 2, p 387, ¶¶ 8-11.) Poll

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

Finally, Chris Swope, Lansing's elected City Clerk, says many of his election workers have expressed concerns over the presence of firearms. (Defs Appx, Vol 2, p 387, ¶ 2, 3, 8.) He explains that because voters have different views and sensitivities to firearms, his workers are unsure how to determine when a person possessing a visible firearm may be intimidating other voters. (*Id.*, p 387, ¶ 11.) "

As these declarations demonstrate, a preliminary injunction would harm the public's interest in protecting the right to vote more than the absence of an injunction would affect Plaintiffs since there is no express right to open carry (Defs Appx, Vol 3, p 558). For this reason alone, the injunction is outside range of principled outcomes. The Court of Claims abused its discretion, and the Court of Appeals erred in denying Defendants' application for leave to appeal.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Court of Appeals erred in denying Defendants' application for leave to appeal. And the Court of Claims (1) erred as a matter of law in determining that the Secretary's Directive had to be promulgated as a rule under the APA, and (2) abused its discretion in enjoining the Secretary's directive banning open carry at polling places, clerks' offices, and absent voter counting boards on Election Day.

Defendants Secretary of State Jocelyn Benson and Attorney General Dana Nessel respectfully request that this Court hold that the Directive is lawful and enforceable.

Respectfully submitted,

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