

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

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

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

Plaintiffs,

v.

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

Defendants.

ROBERT DAVIS,

Plaintiff,

v.

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

Defendant.

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

ORAL ARGUMENT REQUESTED

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

PROOF OF SERVICE

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JURISDICTIONAL STATEMENT

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

COUNTER-STATEMENT OF QUESTIONS INVOLVED

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

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

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

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

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

A. THE PARTIES:

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

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

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

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

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

B. PROCEDURAL AND FACTUAL HISTORY:

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

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

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

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

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

ARGUMENTS

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

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

A. STANDARD OF REVIEW

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

B. ISSUE PRESERVATION

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

C. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ *Supra* note 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. STANDARD OF REVIEW

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

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

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

B. ISSUE PRESERVATION

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

C. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

2. The Appellees have demonstrated irreparable harm.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. APPELLANTS RAISE ISSUES BEYOND THE SCOPE OF APPEAL.

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

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

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

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

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

REQUEST FOR RELIEF

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

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Respectfully submitted,

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APPENDIX DESIGNATION

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

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

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

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

HON. CHRISTOPHER MURRAY

Plaintiffs,

v.

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

Defendants.

ROBERT DAVIS,

Plaintiff,

v.

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

Defendant.

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PROOF OF SERVICE

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

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

Respectfully submitted,

Dated: October 29, 2020

/s/ Dean G. Greenblatt