

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

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

Plaintiffs,

v.

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

Defendants.

Case No. \_\_\_\_\_

Honorable: \_\_\_\_\_

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

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

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

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

**INTRODUCTION**

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

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

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<sup>1</sup> See also at [https://www.michigan.gov/documents/sos/BOE\\_Open\\_Carry\\_Polling\\_Place\\_Instructions\\_10\\_16\\_2020\\_705274\\_7.pdf](https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf)

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

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

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

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

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

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

## **PARTIES**

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

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

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

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

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

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

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

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

### **JURISDICTION**

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

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

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

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

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

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

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

## FACTS

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

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

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<sup>3</sup> <https://miopencarry.org/about>

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

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

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

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

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

## **COUNT I**

### **ULTRA VIRES ACT**

26. Plaintiffs incorporate the preceding paragraphs by reference.

27. The office of the Secretary of State is a constitutionally created elected office within the executive branch of state government<sup>7</sup>

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

<sup>5</sup> The pronouncement references no support for these suppositions.

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

<sup>7</sup> Mich. Const. Art. V, §3

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

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

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

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

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

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

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

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

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

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<sup>8</sup> MCL §168.21

<sup>9</sup> MCL §168.31(1)(a)

<sup>10</sup> MCL §24.203(2)

<sup>11</sup> MCL §24.207

<sup>12</sup> MCL §24.239(3)

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

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

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

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

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

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

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

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

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

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

<sup>14</sup> MCL §24.241

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

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

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

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

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

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

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

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<sup>15</sup> MCL §24.306(1)

## COUNT II

### CONSTITUTIONAL VIOLATION OF MICHIGAN'S SEPARATION OF POWERS

50. Plaintiffs incorporate the preceding paragraphs by reference.

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

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

53. As relied upon by the Secretary of State:

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

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

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

### **REQUEST FOR RELIEF**

**WHEREFORE**, Plaintiffs request:

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

**VERIFICATION**

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

/s/ Dean G. Greenblatt

/s/

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Dated: October 22, 2020

Respectfully submitted,

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