STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

v

No. 20-000207-MZ

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

HON. CHRISTOPHER MURRAY

Defendant.

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,

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.

Dean G. Greenblatt (P54139)
Attorney for Plaintiff Michigan Open Carry & Lambert
4190 Telegraph Road, Suite 3500
Bloomfield Hills, Michigan 48302
248.644.7520
dgg@mnsi.net

Steven W. Dulan (P54914)
Attorney for Plaintiff MI Coalition for Responsible Gun Owners
1750 E. Grand River Ave, Ste 101
East Lansing, Michigan 48823
517.333.7132
swdulan@stevenwdulan.com

Terry L. Johnson (P70773)
Co-Counsel for Michigan Open Carry
613 Abbott Street, Suite 100
Detroit, Michigan 48226
313.421.6193
Terryljohnson00@gmail.com

Ann Sherman (P67762)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorney for Defendants
PO Box 30736
Lansing, Michigan 48909
517.335.7659
shermana@michigan.gov

James J. Makowski (P62115)
Attorney for Plaintiff Michigan Gun Owners
6528 Schaefer Road
Dearborn, Michigan 48126
313.434.3900
jmakowski@makowskilegal.com

Robert Davis, *In Pro Per*
180 Eason
Highland Park, Michigan 48203
313.523.7118
Davisrobert854@gmail.com

_____/

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' 10/22/2020 MOTION FOR DECLARATORY AND EMERGENCY INJUNCTIVE RELIEF IN CASE NO. 20-000208

ORAL ARGUMENT REQUESTED

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Deputy Solicitor General
Heather S. Meingast (P55439)
Adam R. de Bear (P80242)
Assistant Attorneys General
Attorneys for Defendants
PO Box 30736
Lansing, Michigan 48909
517.335.7659

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INTRODUCTION

Make no mistake. This *is* a voting rights case. It is about protecting the vote for *all* Michigan citizens who want to exercise their right to vote in person on November 3, 2020. At this point in Michigan history, recent dramatic and widely publicized incidents involving firearms 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 open carry for Michigan's upcoming general election, 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's large decentralized system. This ensures that when Michigan voters go to the polls, they have a refuge, free from fear and intimidation—whether they be a new citizen, a harried parent with small children in tow, a person with a history of gun violence, an 18-year-old first-time voter, or an elderly or disabled person who is anxious about being able to flee from an active shooter. And unlike Mr. Lambert—who can simply leave his firearm in the car until he is done voting and whose need for self-protection is greatly diminished by the fact that no other voter is permitted to open carry in or near the polls on that day—these voters do not have a simple alternative. Voters who fear firearms might actually lose their right to vote, contrary to established caselaw that recognizes a state's interest in providing "an island of calm in which voters can peacefully contemplate their choices," and in creating a reasonable buffer zone so the voter is free from intimidation.

Plaintiffs—who discussed the Second and First Amendments but raised no claims as to them—question whether the Secretary has the authority to do this through her Directive, and whether the Legislature's delegation of authority to her is constitutional. The answer to both of these questions is yes. Here, in light of recent events, reports of voter apprehension, and the weighty interest of protecting the vote, 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. And in doing so, she implemented a narrow election-day ban that is consonant with the reasonable, constitutional limits the Legislature placed on the authority it delegated to her. Plaintiffs' request for declaratory judgment and immediate injunctive relief should be denied, as should their request for a permanent injunction.

COUNTER-STATEMENT OF FACTS

A. 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.

(Ex A, Directive, p. 1) (emphasis 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.*

B. 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." (Ex B, Affidavit of Special Agent Richard J. Trask II, *United States v Fox*, Case No. 1:20-mj-00416-SJB). 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.*

[1] Although 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.

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, as well, 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.

Voter apprehension runs the gamut. Some have a history of gun violence (see Ex C, Guzman dec, ¶ 6; Ex D, Hachem dec, ¶ 7; Ex E, Al Ghoul dec, ¶¶ 5, 7.) Some have to bring their children to the polls in order to vote. (See Ex F, Hawili dec, ¶¶ 3-7; Ex G, Almouswi dec, ¶¶ 4-7.) Others have fears because of age or disability. (See Ex E, Al Ghoul dec, ¶¶ 8-9.) And some are just plain afraid. (See Ex H, Afra dec, ¶¶ 3-5; Ex I, Agha dec, ¶¶ 3-5; Ex J, Wheeler dec, ¶¶ 5-10.) Even some who are gun owners or getting concealed pistol permits have concerns about firearms at the polls. (Ex K, Dannison dec, ¶¶ 4, 5; Ex L, Reed dec, ¶¶ 5, 7.) Many expressed heightened fears based on the current political climate and recent Michigan events involving firearms. (Ex M, Nestor dec, ¶ 8; Ex N, Timmer dec, ¶¶ 8, 10; Ex J, Wheeler dec, ¶ 10; Ex U, Maturen dec, ¶¶ 8, 9.)

Others who will be present at the polls, clerks' offices, and AV counting boards—poll challengers, poll watchers, poll workers, poll chairpersons, and clerks—have also expressed concern regarding the prospect of armed individuals at the polls. (See Ex O, Springer dec, ¶¶ 5-8; Ex P, Kessler dec, ¶¶ 4-7; Ex Q, Bowman dec, ¶¶ 8-10; Ex R, Kelly dec, ¶¶ 6-7; Ex S, Bunkley dec, ¶ 6; Ex T, Manley dec, ¶ 10); Ex V, Johnson dec, ¶ ¶ 4-9; Ex W, Swope dec.)

C. Plaintiffs file suit.

On October 22, Plaintiffs brought the instant lawsuit against Secretary Benson, Attorney General Dana Nessel, and Michigan State Police[2] Director Joe Gasper in their official capacities, challenging the Secretary's recent prohibition on the open carry of firearms in and within 100 feet of polling places, clerk offices, and absent voter (AV) counting boards. Despite considerable discussion about the right to bear arms, Plaintiffs 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) (Complaint.) They request 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 and without lawful authorization; and money damages. (Complaint, Prayer for Relief.) Plaintiffs also filed a motion for declaratory and emergency injunctive relief. (Pl's Mtn & Br for Dec & Emer Relief, p 2.)

Earlier in the day, a related lawsuit was filed in this Court. See *Davis v Benson*, Case No. 20-000208. On October 23, this Court 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 parties' arguments.

ARGUMENT

I. Plaintiffs are not entitled to the requested declaratory judgment because the Secretary's Directive was not an ultra vires act.

Plaintiffs cannot succeed on their argument that the Secretary failed to comply with any of the statutory requirements—filing, notice or governor's certificate—of the Administrative

[2] As a law enforcement agency, the Michigan State Police expresses no position on the merits of this case but stands ready to comply with the Court's order.

Procedures Act, because those requirements 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 an instruction.

A. The Secretary's Directive is a proper instruction under the terms of her delegated authority from the Legislature.

Plaintiffs argue in Count I that the Secretary acted ultra vires in issuing the directive without first promulgating it as a rule under the Administrative Procedures Act (APA), MCL 24.201, *et seq*. This same argument is raised by plaintiff Davis in the consolidated case. Secretary Benson fully addressed the APA argument in the brief filed contemporaneously in that case. To avoid repetition, Defendants incorporate that argument as if fully set forth herein, and only briefly address the claim here.

1. The Secretary has authority to supervise polling places, absent voter counting boards, clerks' offices, and election inspectors through instructions.

Under § 21 of the Michigan Election Law, MCL 168.1 *et seq*, the Legislature made the Secretary the "chief election officer" with "supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. To exercise her authority, the Legislature provided in § 31 that the Secretary "shall do *all* of the following . . . (a). . . *issue instructions and promulgate rules* . . . for the conduct of elections," and "advise and direct local 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).

The Secretary's authority extends to all local election officials and to the places in which they perform their duties on Election Day. Specifically, the Secretary exercises supervisory control over polling places and absent voter counting boards as unique locations within her jurisdiction. See MCL 168.662(1), 168.765a(1), 168.654. She also exercises control over local clerks and their offices, which now function as polling places on Election Day. (See Const 1963, art 2, § 4(1)(f); MCL 168.497(2); Ex W, Clerk Swope dec, ¶ 7.)

Further, the Secretary has ultimate supervisory authority over election inspectors who supervise polling places and AV counting boards on Election Day. MCL 168.674(1), 168.765a(1), (4). 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). Under §§ 21 and 31, the Secretary has authority to provide instructions for inspectors on maintaining peace, regularity, and order at polling places. Such instructions provide the source for the "lawfulness" of any command given by an election inspector, as long as the command does not violate any other applicable law—and, for the reasons explained below, a command to enforce the Secretary's Directive would not violate any statutory or constitutional provision relating to firearms.

2. The Directive, as an instruction for the conduct of elections, was not required to be promulgated as a rule.

As explained fully in the *Davis* brief, the Directive is specifically excepted from the definition of a "rule" under MCL 24.207(j)—the "permissive power" exception. Plaintiffs are therefore wrong to claim that the Secretary's Directive is not exempted from compliance with the APA. (Complaint, ¶ 33.)

The "permissive statutory power" exception applies 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). Here, the statutory authorization for the Secretary's Directive is grounded in § 31. MCL 168.31(1)(a)-(b). 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. 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.

For example, in *Michigan Trucking Association v Michigan Public Service Commission*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was invalid because it was not promulgated as a rule under the APA. 225 Mich App 424, 430-430 (1997). The statute at issue provided, at the time, that the PSC "will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article." MCL 479.43 (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. In reaching this conclusion, the Court emphasized that the statute "directly and explicitly authorize[d] the PSC to implement, either by rule or order," the safety rating system. *Id*., citing MCL 479.43. See also *Pyke v Department of Social Services*, 182 Mich App 619 (1990) (concluding that permissive statutory power exclusion applied); *By Lo Oil Co v Department of Treasury*, 267 Mich App 19 (2005) (same).

As in *Michigan Trucking*, because the Legislature has not tied 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.

Second, the plain language of MCL 168.31 shows that the Secretary has a choice between issuing instructions and promulgating rules. Like the statute in *Michigan Trucking*, the enabling statute for the Secretary 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 itself contemplates two different acts that the Secretary "shall do": either (1) issue instructions, or (2) promulgate rules. Thus, § 31 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 an instruction—the Directive.

This interpretation avoids rendering nugatory the word "instruction" in § 31(a). See, e.g., *Hanay v Dep't of Transp*, 497 Mich 45, 57 (2014) (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."). And it is consistent with the structure of § 31, which only mandates that the Secretary promulgate rules in a certain area—petition signature gathering. MCL 168.32(2).

And ***third***, the Legislature provided permissive grants of authority when agencies may need to act quickly. 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 grant of

permissive power makes sense since, when providing for the civil defense of the State, an agency or officer must be able to act quickly without the deliberate procedures required in the APA.

In enacting § 31, the Legislature similarly 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" separate from her authority to promulgate rules.

For all these reasons, the Secretary's Directive was properly issued as an instruction and was not required to have been promulgated as a rule.

B. The Legislature's delegation of authority to the Secretary does not violate separation-of-powers principles because it contains reasonable standards and durational limits, and the Secretary's exercise of that authority here was narrow and time-limited.

Plaintiffs fare no better in arguing that the Legislature's delegation of authority to the Secretary through MCL 168.678 violates article 3, § 2 of the Michigan Constitution. The statute at issue easily satisfies Michigan's non-delegation test.

The Michigan Constitution provides for the separation of powers among the three branches of government. Const 1963, art 3, § 2. But Michigan courts have never interpreted the separation of powers doctrine as meaning there can never be any overlapping of functions between branches. See *Soap & Detergent Ass'n v Nat Resources Comm*, 415 Mich 728, 752 (1982) ("[W]hile art 3, § 2, of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate"), citing *People v Piasecki*, 333 Mich 122, 146 (1952); *In re Southard*, 298 Mich 75, 83 (1941).

The separation-of-powers doctrine "ha[s] led to the constitutional discipline that is described as the nondelegation doctrine." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8 (2003). While the legislative power—the power "to make, alter, and amend laws"—sits with the

Legislature, *Harsha v City of Detroit*, 261 Mich 586, 590 (1933), both the U.S. Supreme Court and the Michigan Supreme Court "ha[ve] recognized that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches," *Taylor,* 468 Mich at 8 (internal quotes omitted).

The Michigan doctrine of non-delegation has been expressed in terms of a "standards test." *Westervelt v Natural Resources Comm*, 402 Mich 412, 437 (1978) (Williams, J., lead opinion); *id.* at 454 (Ryan, J., concurring). One of the seminal cases in Michigan, *Blue Cross & Blue Shield of Mich v Milliken*, outlined the test as a three-part analysis:

> (1) the act must be read as a whole;
>
> (2) the act carries a presumption of constitutionality; and
>
> (3) the standards must be as reasonably precise as the subject matter requires or permits. [422 Mich 1, 51-52 (1985).]

As a part of this inquiry, "[t]he preciseness required of the standards will depend on the complexity of the subject." *Id.* See also *State Conservation Department v Seaman*, 396 Mich 299, 309 (1976) (outlining the same three-part test). And Michigan law has been clear that the "Legislature does not delegate or abdicate its power to an administrative agency if the challenged legislation *contains standards as reasonably precise* as the subject matter requires or permits." *Westervelt*, 402 Mich at 438 (internal quotes and ellipses omitted, emphasis added) (Williams, J., lead opinion), *id.* at 454 (Ryan, J., concurring).

Plaintiffs perhaps attempt to capitalize on nearness in time to the Michigan Supreme Court's answer to the certified question posed by the federal court in *In re Certified Question.* There, the Michigan Supreme Court held that Michigan's longstanding emergency powers law, the Emergency Powers of the Governor Act, was an illegal delegation because it did not contain

sufficient standards and, notably, no durational limit. *In re Certified Question*, ___ Mich ___ (2020) (Docket No. 161492); slip op at 35-36. (Ex X.)

But the statute that Plaintiffs challenge here, MCL 168.678, suffers no such infirmities. It states: "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."

Sufficient standards are contained within this plain language. *First*, the statute applies only to election inspectors, and by extension, to the Secretary who possesses supervisory authority over them. *Second*, it applies only to "polling place[s]" and AV counting boards, and only to those locations "during any primary or election" and while the votes are being canvassed. *Third*, it gives election inspectors a relatively narrow set of delegated tasks—"maintaining peace, regularity and order" and "enforc[ing] obedience" to their lawful commands in polling places during primaries or elections or during the canvass. The fact that it is limited to one day, November 3, 2020, is a significant durational limit that itself distinguishes it from the statute at issue in *In re Certified Question*. (Ex X.) And the delegated authority is as specific as possible given the unknown circumstances that could arise during an election.

In sum, the Secretary has both statutory and constitutional authority to issue instructions for the conduct of an election and to supervise election inspectors as they exercise their authority. She was within her permissive authority to do so by issuing instructions rather than promulgating a rule. (Given both the recent climate in Michigan and the proximity of the election, that was the only practical option.) She was not required to engage in rulemaking in order to address the immediate concerns over the presence of firearms at the places in which the state conducts elections. Nor does her delegated authority violate separation-of-powers principles.

II. Plaintiffs have not met the grounds for a preliminary injunction.

Plaintiffs request a preliminary injunction ordering the Secretary, the Attorney General and the MSP from engaging in any acts to promote or enforce any ban on the lawful possession and carry of firearms on Election Day. (Complaint, ¶ 49., WHEREFORE Clause 2.) To begin, this request is overbroad, as it extends beyond the reach of the Secretary's Directive, which bans open carry only in and around polling places, clerks' offices, and AV counting boards. They also request a permanent injunction with the same scope. (*Id*., WHEREFORE Clause 3.) Plaintiffs have not met the grounds for either.

As addressed above, they are not likely to succeed on the merits of their ultra vires and separation-of-powers claims. And while they argue that the risk of harm to them outweighs any harm to Defendants and that an injunction would simply preserve the status quo ((Pl's Br for Dec & Emer Relief, p 12), they fail to address harm to other voters in terms of possible vote disenfranchisement.

"To obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Hammel v Speaker of House of Representatives,* 297 Mich App 641, 648 (2012) (internal quotations omitted). Under this four-part test, this Court must determine: "(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." *Id.* (internal quotations omitted).

A. Plaintiffs cannot demonstrate a likelihood of success on the merits.

As explained above, Plaintiffs cannot demonstrate likelihood of success on the merits of their APA and non-delegation claims. The Secretary notes that constitutional challenges to the Directive, though not raised in this action, would fail in any event. Finally, per this Court's October 23, 2020 order, the Secretary further explains that her Directive is consistent with Michigan firearms laws.

1. The Secretary's Directive would withstand a challenge based on the Second Amendment and Michigan firearms laws.

Plaintiffs' complaint and motion wrongly assume both a constitutional right to open carry and a right under Michigan statutory law to open carry in any location where the Legislature has not expressly criminalized it. Even if such rights existed, the Secretary's interest in protecting the fundamental right to vote without intimidation outweighs any perceived right to bear arms.

a. The fundamental right to cast one's vote without intimidation is time-honored and tested, and the polling place and surrounding buffer zone have been upheld as a refuge for this protected activity.

At heart, this is a voting rights case, so it makes sense that the starting place for analysis is an understanding of the strength of the protections afforded voters to be free from intimidation—and even from discomfort.

The right to vote is of paramount importance in this State and this nation. Surprisingly, the right is not explicitly enumerated in the U.S. Constitution. See, e.g., *Bush v Gore*, 531 US 98, 104 (2000). Nevertheless, the Supreme Court has routinely ruled that the right to vote is a fundamental right. See, e.g, *Reynolds v Sims*, 377 US 533, 555 (1964). Moreover, it is a "fundamental political right" that is "preservative of all rights." *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1, 101 (1973), citing *Yick Wo v Hopkins*, 118 US 356, 370 (1886). Indeed, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v*

Sanders, 376 US 1, 17 (1964). And that is why "*[n]o 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).

Michigan citizens have gone a step further than the U.S. Constitution by ensconcing the right to vote in the state Constitution, which now provides that: "Every citizen of the United States who is an elector qualified to vote in Michigan shall have . . . [t]he right, once registered, to vote a secret ballot in all elections." Const 1963, art 2, § 4(1)(a). With these protections understood, other rights and perceived rights can be analyzed.

b. The Directive would survive any challenge based on the Second Amendment to the U.S. Constitution.

The Second Amendment provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const, Am II. Article 1, § 6 of the state Constitution, which is Michigan's equivalent to the Second Amendment, states, "Every person has a right to keep and bear arms for the defense of himself and the state." Our state courts have explained that the Second Amendment is fully applicable to the states through the Fourteenth Amendment." *People v Deroche,* 299 Mich App 301, 305 (2013) (internal citations omitted). Therefore, our courts review Second Amendment challenges within the parameters of the U.S. Supreme Court's interpretation of the Second Amendment. *Id.*

The U.S. Supreme Court has held that it guarantees "the right of law-abiding, responsible citizens to use arms in defense *of hearth and home*." *D.C. v Heller*, 554 US 570, 635 (2008) (emphasis added). Michigan courts have adopted this language. *Deroche*, 299 Mich App at 306, quoting *Heller*; *People v Wilder*, 306 Mich App 546, 554-555 (2014) (same).

But the High Court has explained that the Second Amendment has limitations: it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id* at 626,—that is, it is "not unlimited," *id.* at 595; Accord *Deroche*, 299 Mich App at 306. Tellingly, the U.S. Supreme Court has never recognized a right to bear arms that extends outside the home. Neither have our state courts or the Sixth Circuit. See *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."). See also *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 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) ("[T]his Court concludes, in accordance with the uniform weight of authority in cases decided within this circuit, that the Second Amendment right posited by Plaintiff here—*i.e.,* the right to openly carry a firearm outside the home—was not clearly established at the time of the incident giving rise to this suit"); *Deffert v Moe*, 111 F Supp 3d 797, 812 (WD Mich, 2015) (same).

Even assuming conduct falls within Second Amendment protections, the level of scrutiny to be applied where 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.

To begin, *Heller* already recognized the government's power to restrict the "carrying of firearms in sensitive places such as schools and government buildings." 554 US at 626. Surely polling places and other election-related locations, including the 100-foot zone around these places, are sensitive places where citizens are engaged in the "weighty civil act" of casting a vote. See *Minnesota Voters All v Mansky,* 138 S Ct 1876, 1886-1887 (2018) (internal quotation omitted) (considering polling places as "special enclave[s], subject to greater restriction."). It is for this reason that courts around the country have upheld protections in and around polling places.[3] Polling places are nonpublic forums where restrictions need only be "reasonable in light of the purpose served by the forum." *Id*. at 1885.

[3] Six states have expressly prohibited guns in polling places by statute. See Georgia, Ga Code Ann §§ 21-2-413(i); 16-11-127(b)(7), (e);Washington D.C., DC Code § 7-2509.07(a)(5); Texas, Tx Penal Code § 46.03(a)(2); Arizona, AZ St § 13-3102(A)(11); California, CA Election Code § 18544(a); Florida, Fla St § 790.06(12)(a)(6); Louisiana, LRS 18: § 461.7(C)(3), (D). Ohio bans carrying firearms into schools, churches, and government facilities (there are exceptions to each category), the state's most common polling places. Ohio Revised Code Section 2923.16. South Carolina prohibits a person holding a permit to carry a concealed weapon from taking it into any "polling place on election days." South Carolina Annotated Code Section 23-31-215(M).

Here, the prohibition on open carry is eminently reasonable given the profound activity that is occurring at the polling place—the exercise of a "fundamental political right" that is "preservative of all rights." *Rodriguez*, 411 US at 101, quoting *Yick Wo*, 118 US at 370).

As to the 100-foot buffer zone around these places, courts have routinely held 100-foot buffer zones to be constitutional even under strict scrutiny where the curtailing of strongly protected political speech—at the core the First Amendment—was at issue. E.g., *Burson v Freeman*, 504 US 191, 197-98, 206 (1992) (plurality opinion) (upholding a 100-foot "campaign-free-zone" around polling places, noting that "some restricted zone is necessary to serve the States' compelling interests in preventing voter intimidation and election fraud."); *Mansky*, 138 S Ct at 1887 (recognizing states' interest in providing "an island of calm in which voters can peacefully contemplate their choices.") Both *Burson* and *Mansky* focused on protecting the vote and emphasized the voter intimidation, confusion, and general disorder that have plagued polling places in the past. *Mansky*, 138 S Ct at 1880 (discussing *Burson*). And *Burson* recognized that "[v]oter intimidation and election fraud . . . are difficult to detect." 504 US at 208. See Ex Q, Bowman dec, ¶ 10 & Ex W, Swope dec, ¶¶ 11, 12 (expressing this very concern.)

The Secretary is obligated both to provide an "island of calm" for voters and to ensure that they are free from intimidation in and around polling places. (Indeed, 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).) There is no provision in Michigan's Election Law, the Penal Code, or the Firearms Act that expressly permits or prohibits the open carry of firearms in polling locations, AV counting boards, or clerk offices. And while the Legislature has preempted the enactment of other

firearms regulations, that preemption applies only to local units of government—not to state government. See MCL 123.1101(b), 123.1102.

In *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, the Michigan Supreme Court determined that school districts were not expressly preempted from adopting firearms policies because they were not included in the list of local governments that were barred from doing so. 502 Mich 695, 704 (2018). 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 705. See also *Wade v Univ of Michigan*, 320 Mich App 1, 15-22 (2017) (holding that university's ordinance prohibiting firearms was not preempted).

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 previously—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.

And the Secretary was fully justified in concluding that the presence of armed individuals at our polling places and clerk offices is likely to increase the chance of disturbances at both and present a very high risk that some voters will be deterred from casting their votes, or will lack the necessary "island of calm" to be able to concentrate on their ballot. (See Ex C, Guzman dec, ¶ 9; Ex F, Hawili dec, ¶¶ 5-7; Ex G, Almouswi dec, ¶ 7.) Michigan communities vary in the degree to which the presence of firearms in public is tolerated. But on Election Day, every voter in every jurisdiction is entitled to cast their ballot free from fear, intimidation, or discomfort. Poll challengers, poll watchers, poll workers, poll chairpersons, and clerks, too, are entitled to

perform their duties in an orderly and secure environment, free from fear or intimidation. (See Ex O, Springer dec, ¶¶ 5-8; Ex P, Kessler dec, ¶¶ 4-7; Ex Q, Bowman dec, ¶¶ 8-10; Ex R, Kelly dec, ¶¶ 6-7; Ex S, Bunkley dec, ¶ 6; Ex T, Manley dec, ¶ 10; Ex V, Johnson dec, ¶¶ 5, 6; Ex W, Swope dec, ¶¶ 6, 9, 12.) A fair and accurate election cannot be conducted without the thousands of men and women who staff our polling places, clerk offices, and AV counting boards on Election Day. Avoiding intimidation at and near the polls is thus a state interest of the highest order.

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. (Ex Y.) This includes taking steps to maintain peaceful and orderly elections in all communities. The declarations submitted to this Court (Exs C-W) confirm what common sense already dictates: that the open carrying of firearms at the polls poses a high risk of intimidating voters, poll workers, and others, and thus threatens Michigan citizens' right to vote. Therefore, to preserve the purity of elections, it is well within the Secretary's authority to regulate, in a temporary and limited manner, the open carry of firearms in places under her supervisory control. See Const 1963, art 2, § 4(2).

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. 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." (Complaint, ¶21.) See generally (Ex B, Aff of Special Agent Richard J. Trask II.) And the Secretary was contacted by numerous clerks and local officials expressing concern over the presence of firearms at the polls. Voters, as well, have contacted the Secretary and the Attorney General's office expressing their fear of seeing someone with a visible firearm in or near the polls on Election Day. (See Ex D, Hachem dec, ¶ 7; Ex E, Al Ghoul dec, ¶¶5, 7; Ex H, Al Ghoul dec, ¶¶ 8-9; Ex H, Afra dec, ¶¶ 3-5; Ex I, Agha dec, ¶¶ 3-5; Ex J, Wheeler dec, ¶¶ 5-10.) And some have even indicated that, were it to occur, they might not enter the polling place and would be unable to cast their vote. (Ex C, Guzman dec, ¶ 6; Ex G, Almouswi dec, ¶¶ 4-7; Ex F, Hawili dec, ¶¶ 3-7.) Poll watchers, too, have expressed fear of entering or remaining at the polls if visibly armed individuals are present. (Ex T, Manley dec, ¶ 10.) At least one poll watcher indicated that she might not even get out of her car if she saw an armed individual near the polling place. (Ex R, Kelly dec, ¶ 7.)

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. This might be particularly true for a busy parent with small children in tow (Ex F, Hawili dec, ¶¶ 3, 4; Ex G, Almouswi dec, ¶ 5), a voter who has suffered loss as a result of a firearm, (Ex C, Guzman dec, ¶¶ 6, 9) or an elderly or disabled person who fears they might not be able to flee from an active shooter (Ex E, Al Ghoul dec, ¶ 9.) Voting is a fundamental right that must extend to all.

Third, the Directive is consistent with related laws and authority. For example, Michigan Election law already protects the polling place and the 100-foot zone for purposes of electioneering, see MCL 168.744, even though it intrudes on political speech protected by the First Amendment. See generally *Burson*, 504 US at 206-211 (plurality opinion); *Id*. at 214-216 (Scalia, J., concurring in judgment). Just as Michigan can protect those spaces for the voter by determining that voting at a polling place is a "time for choosing, not campaigning[,]" and thus restrict electioneering, *Mansky*, 138 S Ct at 1887, the Secretary, exercising her supervisory authority over elections—delegated to her by the Legislature—can likewise protect them for the voter through a limited prohibition on firearms this November 3rd.

Fourth, 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, the Secretary's instructions were principally 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.

Finally, the Secretary has done nothing different here than the Michigan Supreme 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. In so doing, neither the judicial branch nor the Secretary has violated the separation of powers.

In short, the Directive would survive a challenge based on the Second Amendment.

c. The Directive does not conflict with Michigan's statutory law regulating the possession of firearms.

The Directive is fully consistent with the statutory rights of both concealed pistol license holders and open carriers.

i. The Directive does not conflict with the statutory right to concealed carry.

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.

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.

ii. There is no general statutory right to open carry under Michigan law.

No Michigan law explicitly authorizes 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 if the person 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).[4] Further, concealed pistol license holders are not subject to criminal prosecution for open carry on these premises. MCL 28.425o(1)(e); 750.237a(5)(c).

However, if a local school district has adopted a policy banning possession of firearms on school property, including by concealed pistol license holders, that policy will apply to preclude anyone from carrying firearms on school property. See *Michigan Gun Owners,* 502 Mich at 707-708. Similarly, private property owners have the authority to prohibit the possession or open carrying of a firearm on their property that is enforceable 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"); *Dressler v Rice,* 739 Fed Appx 814, 821-822 (CA 6, 2018).

And 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,[5] and in "weapon free school zone[s]" such as schools and school transport vehicles, 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* but has not done so in other areas lends support to the argument that no such right exists.

[4] There are other exemptions for hired security and peace officers. See MCL 750.234d(2), 750.237a(5).
[5] This section of the penal code expressly exempts individuals with licenses issued under the Firearms Act. MCL 750.234d(2)(c).

In other contexts, courts have rejected similar 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 the nonbinding but persuasive and compelling concurrence in *Michigan Gun Owners, Inc*, 502 Mich at 711-722 (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 the Michigan Supreme 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 so-called right to open carry, the Legislature has done nothing.

That said, it is not even necessary to reach this weightier determination of whether there is a statutory right to open carry in Michigan because, even if there is, Michigan courts have held

that there are "constitutionally acceptable categorical regulations of gun possession." *Wilder,* 307 Mich App at 555, citing *Deroche,* 299 Mich App at 307-308. And for the same reasons the Directive passes muster under the Second Amendment to the U.S. Constitution and article 1, § 6 of Michigan's Constitution, it likewise passes muster under Michigan's statutory scheme. The Directive is justified by the need to protect voters as well as election workers from intimidation and discomfort, particularly at this time when Michigan has experienced unrest and voters are likely to be uneasy and even deterred by the presence of firearms at polling places. And the narrow one-day ban on open carry only is a reasonable fit that is proportional to the significant interest the Secretary seeks to protect.

d. The Secretary's Directive is defensible under both federal and state First Amendment protections.

Plaintiffs assert that their open carry in and around the polls is an expression of their viewpoint on the Second Amendment. (Pls' Brf in Supp of Emer Mot, p 2.) 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. (Complaint, ¶ 21 & Ex 4; Pls' Brf in Supp of Emerg Mot, p 2.)

The open carry of firearms, without more, is not "sufficiently imbued with elements of communication" necessary to implicate the First Amendment. See *Chesney*, 171 F Supp 3d at 617 (rejecting the argument that plaintiff had demonstrated an intent to convey a particularized message based on open carrying a firearm in a Michigan Secretary of State branch office, and explaining that, even if he had, "the circumstances surrounding [his] visit to the Secretary of State office do not give rise to a significant likelihood that this message would be understood by others in the [branch] office.").

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 would easily survive as a reasonable time, place, and manner restriction.

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. It follows that if the regulation of speech in polling places and in the 100-foot perimeter surrounding polling places can survive strict scrutiny, the Secretary's Directive prohibiting the open carry of firearms would likewise survive scrutiny. After all, "what is true for the First Amendment is true for the Second." *Tyler*, 837 F3d at 711 (Sutton, J., concurring). 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*.

Notably, the Secretary has for many years placed restrictions on otherwise protected political speech, which is at the core of First Amendment, by broadly limiting the use of video

cameras, cell phones, cameras, televisions and recording equipment in the polls.[6] 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." *Crookston*, 841 F3d at 400. While the state later agreed to allow a very limited opportunity to take a "ballot selfie," in recognition of the modern times we live in, the case supports the Secretary's authority to weigh competing constitutional interests as the "chief election officer" charged with enforcing the state's election laws, and to ensure that, at and near polling places, the right to vote remains paramount.

B. Plaintiffs cannot show an irreparable injury absent an injunction.

Here, given the unsettled nature of the Second Amendment's protections, Plaintiffs cannot demonstrate that they have a right to bear arms outside of their home under the Second Amendment. See, e.g., *Chesney,* 171 F. Supp. 3d at 622. And as set forth above, they cannot demonstrate that they have an unfettered right to open carry in Michigan—especially not in "sensitive places" like polling locations and other places related to the act of voting. Again, since *Heller*, it has been well-understood, that "[l]ike most rights," the right to bear arms is not "unlimited[,]" nor is it the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 US at 635. To the contrary, the U.S.

[6] 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.

Supreme Court acknowledged in *Heller* that it regards "laws forbidding the carrying of firearms in sensitive places" as "presumptively lawful regulatory measures[.]" *Id*.

Accordingly, because Plaintiffs cannot establish such a right—either statutory or constitutional, they cannot demonstrate that they will suffer any harm—let alone irreparable harm—without an injunction. Even if such a right existed, the directive would not create irreparable harm because Plaintiffs could 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.

Plaintiffs also assert that their risk of harm is voter disenfranchisement on Election Day. (Pls' Brf Supp of Emer Mot, pp 11-12.) But if they wanted to express themselves through their weapon and the vehicle of voting, they could simply step outside the 100-foot buffer zone 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.

C. The balance of harms and the public interest weigh against granting the injunction.

The public interest would be significantly harmed if this Court were to grant Plaintiffs' motion for a preliminary injunction because an injunction would potentially rob many registered Michigan voters of the chance to vote.

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).[7] In other words, the People of this State have decided that the holding of free and fair elections is uniquely important. If the Court grants the extraordinary relief of a preliminary injunction and disregards the Secretary's decision-making that the visible presence of firearms would have a chilling effect on the right to vote, it will be undermining the will of the voters who amended this State's constitution.

Recent events in Michigan have heightened fears of firearms and gun violence. During the weeks 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.

Some voters are afraid of guns because they have a history of gun violence. Rosemary Guzman, for example, lost her cousin to a violent shooting about a month ago. (Ex C, Guzman dec, ¶ 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 she saw someone with a firearm, she would probably turn around and call the police rather than go into the polling location, which she says could prevent her from voting. (*Id*., ¶ 9.)

Some have an additional fear of firearms at the polls—the presence of their children, whom they will have to bring along to the polls. Mouhana Hawili, for example, is a mom who 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. (Ex F, Hawili dec, ¶¶ 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

[7] See also *Official Text of Proposal 18-3*, https://www.michigan.gov/documents/sos/Full_Text_-_PTV_635256_7.pdf.

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. (Ex G, Almouswi dec, ¶ 4.) She is a mom with four kids, two of whom are babies, and she will have to bring them to the polls with her when she votes. (*Id.*, ¶ 5.) But firearms at the polls cause her to be concerned for the safety of herself and her children, especially 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. (Ex H, Afra dec, ¶ ¶ 3, 4.) She is concerned that firearms pose a risk to her personal safety and those 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 absent ballot process. (Ex E, Al Ghoul dec, ¶ 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 run away if a firearm came near her, 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. (Ex I, Agha dec, ¶¶ 3, 5.) Laura Wheeler wants to be able to vote and not feel that she is "in the middle of a potential shootout." (Ex J, Wheeler dec, ¶ 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. (Ex D, Hachem dec, ¶ 6.) He left a war-torn

country where he observed voter suppression and unfair elections, and says he 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 that the sight of someone carrying a gun while she is voting would make her feel both unsafe and uncomfortable. (Ex M, Nestor dec, ¶¶ 5, 6, 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. (Ex U, Maturen dec, ¶ 3.) He supports the Secretary of State's Directive banning open carry at polling places, and says 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*., dec, ¶¶ 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." (Ex M, Nestor dec, ¶ 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. (Ex E, Al Ghoul dec, ¶¶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." (Ex N, Timmer dec, ¶ 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. (Ex K, Dannison dec, ¶ 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, (Ex L, Reed dec, ¶ 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. (Ex O, Springer dec, ¶ 5; Ex P, Kessler dec, ¶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. (Ex O, Springer dec, ¶ 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." (Ex P, Kessler dec, ¶ 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. (Ex R, Kelly dec, ¶ 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." (Ex T, Manley dec, ¶ 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." (Ex Q, Bowman dec, ¶¶ 8.) She also expressed concern that now, with the COVID-19 pandemic, she as a poll worker, "cannot see expressions—whether the person is smiling or is angry," so allowing people with guns makes her feel that her safety is compromised. (*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. (Ex S, Bunkley dec, ¶ 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. (Ex V, Johnson dec, ¶¶ 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. (Ex W, Swope dec, ¶ 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.*, ¶ 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.*)

Without question, a preliminary injunction would harm the public's interest in protecting the right to vote more than the absence of an injunction would harm any Second or First Amendment right Plaintiffs may have to openly carry firearms outside their home or engage in firearms-related expression within the 100-foot buffer zone of a polling place, AV counting board, or clerk's office. For this reason alone, this Court should deny Plaintiffs' motion for preliminary injunction.

III. Plaintiffs have not met the grounds for a permanent injunction.

In determining whether a permanent injunction is appropriate, our appellate courts suggest a review of the following seven factors: (1) "the nature of the interest to be protected[;]" (2) "the relative adequacy to the plaintiff of injunction and of other remedies[;]" (3) "any unreasonable delay by the plaintiff in bringing suit[;]" (4) "any related misconduct on the part of the plaintiff[;]" (5) "the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied[;]" (6) "the interests of third persons and of the public[;]" and (7) "the practicability of framing and enforcing the order or judgment." *Kernan v Homestead Dev Co,* 232 Mich App 503 (1998). Here, factors 1, 5, 6, and 7 weigh heavily in the Secretary's favor and compel the denial of a permanent injunction.

As discussed above, 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, clerks' offices, and AV counting boards. And they can exercise their First Amendment rights with respect to firearms by stepping just over the 100-foot buffer zone. Conversely, many registered voters are likely to be deterred from voting if an injunction does not issue, or will be required to cast their vote under the specter of fear that an armed individual will be casting a vote alongside them—deprived of the "island of calm" the U.S. Supreme Court has recognized as so important to the voting process.

Finally, on a practical level, yet another change to voting instructions would be disruptive and confusing to voters, clerks, and election workers alike. This Court should deny Plaintiffs' request for a permanent injunction.

CONCLUSION AND RELIEF REQUESTED

The Secretary had authority to issue the directive, the delegated authority under which she acted does not violate separation-of-powers principles, and the extraordinary remedy of injunctive relief is not appropriate. Plaintiffs are not likely to succeed on the merits, there is no irreparable harm to Plaintiffs if an injunction does not issue, and voters at large are harmed if open carry is allowed in and near polling locations, clerks' offices, and AV counting boards.

WHEREFORE, Defendants Benson, Nessel, and Gasper respectfully request that this Court deny Plaintiffs' request for declaratory judgment and emergency injunctive relief because the grounds for such relief are not met. Plaintiffs also request that this Court deny Plaintiffs' request for a permanent injunction and dismiss all claims against them.

Respectfully submitted,

Dana Nessel
Attorney General

/s/Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General
Heather S. Meingast (P55439)
Adam R. de Bear (P80242)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659

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PROOF OF SERVICE

Lisa S. Albro certifies that on October 26, 2020, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via electronic mail at:

Dean G. Greenblatt: dgg@mnsi.net,
Terry L. Johnson: Terryljohnson00@gmail.com
James J. Makowski: jmakowski@makowskilegal.com
Steven W. Dulan: swdulan@stevenwdulan.com
Robert Davis, davisrobert854@gmail.com

/s/Lisa S. Albro
Lisa S. Albro