

**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: _____

**EMERGENCY MOTION FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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****EXPEDITED CONSIDERATION REQUESTED****
****ORAL ARGUMENT REQUESTED****

Plaintiffs Thomas Lambert, Michigan Open Carry, Inc., Michigan Gun Owners, Inc., and Michigan Coalition for Responsible Gun Owners, Inc. (collectively, “Plaintiffs”), by and through their respective attorneys, moves this Court, to set a hearing on an emergency basis, pursuant to MCR 3.310, and applicable law for entry of a preliminary injunction against Defendants Joycelyn Benson, in her official capacity as Secretary of State for the State of Michigan; Dana Nessel, in her official capacity as Michigan’s Attorney General; and, Col. Joe Gasper, in his official capacity as Director of the Michigan State Police (collectively, “Defendants”). Specifically, Plaintiffs seek an order enjoining Defendants, and any law enforcement officers and prosecuting attorneys from either directly or indirectly:

- 1) Enforcing Secretary of State Joycelyn Bensons pronouncement titled “Open Carry of Firearms at Polling Places on Election Day Prohibited”, and any purported prohibitions contained within the document or any similar subsequent prohibition;

In support of this Motion, Plaintiffs rely upon and incorporates its Verified Complaint for Declaratory and Emergency Injunctive Relief and the accompanying Brief in Support of this Motion. Because there are only legal questions at issue, Plaintiffs respectfully request that this Court consolidate the preliminary injunction hearing with the trial on the merits and rule on the merits in accordance with MCR 3.310(A)(2).

Expedited consideration of this motion is necessary because the relief requested will be of limited effect before the motion is briefed under the usual briefing schedule, Plaintiffs will suffer irreparable harm that will be unable to remedy through injunctive relief if delayed.

WHEREFORE, Plaintiffs respectfully request that Court grant their Motion for immediate consideration, schedule a expedited hearing on Plaintiffs’ motion for issue a preliminary injunction pending a decision on the merits of Plaintiffs’ claims in this matter.

A proposed Order is tendered herewith as Tab 1 for the convenience of the Court.

Dated: October 22, 2020

Respectfully submitted,

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Emergency Motion for Declaratory
and Injunctive Relief
Proposed Order

TAB 1

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

THOMAS LAMBERT, an individual;)
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MICHIGAN GUN OWNERS,)
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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: _____

ORDER RE: MOTION FOR HEARING ON PRELIMINARY INJUNCTION

At a session of Court held in the City of Lansing, Michigan on this ____ day of October,
2020

PRESENT: HONORABLE _____

This matter having come before this court pursuant to Plaintiffs' Verified Complaint,
Plaintiffs' Motion for Emergency Preliminary Injunction, and Brief in Support thereof, and the
Court being fully advised in the premises;

NOW, THEREFORE:

IT IS ORDERED THAT Defendants, shall appear for a hearing on October _____, 2020, at _____ or as soon thereafter as counsel may be heard why a preliminary injunction should not enter according to the terms and conditions as set forth in Plaintiffs' motion.

The court will supply instructions for the parties to appear remotely via electronic means.

IT IS SO ORDERED

Judge of the Court of Claims

**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,)
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COL JOE GASPER,)
in his official capacity as Director of the)
Michigan State Police)

Defendants.)

Case No. _____

Honorable: _____

**BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR
HEARING ON DECLARATORY
AND INJUNCTIVE RELIEF**

****EXPEDITED CONSIDERATION REQUESTED****

INTRODUCTION

Citing a concern that all Michigan citizens can freely exercise their fundamental right to vote without fear of threats, intimidation or harassment, Michigan’s Secretary of State, Joycelyn Benson issued a three-page public pronouncement banning the possession of firearms carried in certain ways and in certain locations on Election Day, November 3, 2020 (“Pronouncement”). The Pronouncement does not identify the legal basis for its issuance. Nevertheless, Michigan’s Attorney General and Director of State Police have pledged to enforce the ban.

FACTS

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 expressing their viewpoint on the Second Amendment. Indeed, Plaintiff Michigan Open Carry, Inc. (“MOC”) 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.¹ This was not a popular viewpoint in this state when MOC was incorporated in 2009. However, now it is also a common practice for open carriers after leaving the polls to affix an “I Voted” sticker on their holster. The open carrier then posts a picture of their stickered holstered pistol on social media as a form of political expression and viewpoint-based speech. (See **Exhibit 1**)²

On October 16, 2020, seventeen days before the general election, Michigan’s Secretary of State, Joycelyn Benson, issued the Pronouncement titled “Open Carry of Firearms at Polling Places on Election Day Prohibited” (See **Exhibit 2**)³. 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”⁴ 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

¹ <https://miopencarry.org/about>.

² 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, <https://www.facebook.com/MichiganOpenCarry/posts/10152888447136234> as exemplars

³ See also at https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf.

⁴ The pronouncement references no support for these suppositions.

to gain entry to polls. The Pronouncement orders “[e]lection inspectors [to] post signage providing notice of this regulation inside the room containing the polling place and at the building entrance. Notice may also be posted at 100 feet at the discretion of the local clerk.”⁵

Defendant Attorney General Dana Nessel 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.”⁶ (See **Exhibit 3**) As reported by The Detroit News, Wayne County Sheriff Benny Napoleon has threatened to arrest people found to be in violation of the ban if they refuse to leave [polling places].⁷ (See **Exhibit 4**).

The office of the Secretary of State is a constitutionally created elected office within the executive branch of state government.⁸ 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. Rather, those powers are specifically limited to the Legislature.

“Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.” Mich. Const. Art. II, § 4(2)

⁵ Note that the Secretary of State, herself, has identified the firearm prohibition as a “regulation”.

⁶ Note that the Attorney General has identified the firearm prohibition as a “directive”.

⁷ <https://www.detroitnews.com/story/news/politics/2020/10/19/michigan-police-chiefs-leader-open-carry-ban-polls-not-based-law/3713235001/>

⁸ Mich. Const. Art. V, § 3.

On one hand, in Michigan, the use or display of a firearm to intimidate is already unlawful under Michigan Law. Anyone convicted of “brandishing” a firearm in public faces imprisonment.⁹ “Brandish” means to point, wave about, or display in a threatening manner with the intent to induce fear in another person.¹⁰ Further, voter intimidation is already unlawful under the Michigan Election Law, , MCL 168.1 et seq. So, the Pronouncement is designed to go beyond that which is already criminalized. On the other hand, concealed pistol licensees are expressly permitted to carry firearms anywhere in the State that is not otherwise prohibited under law.¹¹ Polling places, clerk’s offices and spaces for the counting of ballots are not listed as so-called pistol restricted zones under Michigan’s Firearms Act¹² or the Penal Code¹³.

ARGUMENT

The Pronouncement is not law. The Pronouncement does not override existing Michigan law. For reasons explained in this Brief, the Pronouncement is an *ultra vires* act and void. However, 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. If not void for lack of constitutional or statutory authority, the regulation or directive appears to be a “Rule”¹⁴ under Michigan’s Administrative Procedures Act¹⁵ (“APA”). However, the Pronouncement was issued without regard to, or compliance with, any of the requirements of the APA and is therefore void. The APA specifically provides for court intervention in such circumstances.¹⁶

⁹ MCL 750.234e

¹⁰ MCL 750.222

¹¹ MCL 28.425c(3)

¹² MCL 28.425o

¹³ MCL 750.234d

¹⁴ MCL 24.207

¹⁵ MCL 24.201 et. seq.

¹⁶ MCL §24.306(1)

Plaintiffs seek an expedited hearing on, and move the court for 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, 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.

I. PENDING DECLARATORY JUDGMENT, THE COURT SHOULD MAINTAIN STATUS QUO OF PARTIES

Plaintiffs request the Court to determine whether the Pronouncement is valid and enforceable. Pending the determination by the Court of that issue, it is important that the *status quo* of the parties be maintained. The Court has broad equitable powers to temporarily enjoin the conduct of the parties until such final order is issued declaring the relative rights and obligations of the parties.

As detailed above, Michigan law already prohibits voter intimidation and brandishing firearms. Voters in Michigan have been able to possess lawfully-carried firearms while voting since Michigan's admittance as a State. The Pronouncement fundamentally changes the *status quo*.

II. ALL OF THE PERTINENT FACTORS WEIGH IN FAVOR OF GRANTING RELIEF IN THIS CASE

"A preliminary injunction may be granted under MCR 3.310(A) where plaintiff can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered." *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007). "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Dev*

Co, 232 Mich App 503, 509; 591 NW2d 369 (1998). The Michigan Supreme Court has established the following four-factor analysis to determine whether a preliminary injunction should be issued:

(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 injury 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.

Campau v McMath, 185 Mich App 724, 729; 463 NW2d 186 (1990) (citing *Michigan State Employees Ass'n v Dep' of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984)).

For preliminary injunctions, a hearing is required.

According to MCR 3.310(A)(1), unless otherwise provided by statute or court rule, an injunction may not be granted without a hearing. At this hearing, "the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued" If a court grants preliminary injunctive relief, a trial on the merits must be held within six months of the injunction issuing, except for good cause or a stipulation from the parties to extend the time. Given the extraordinary nature of injunctive relief, our court rules contemplate expeditious resolution of the underlying claim or claims once a preliminary injunction issues."

Pontiac Fire Fighters, 482 Mich at 9.

Additionally, MCR 3.310(C)(1) declares that an order granting an injunction must set forth the reasons for its issuance. Although it is not compulsory for a trial court to hold an evidentiary hearing before the issuance of an injunction, some formal hearing is required. *Fancy v Egrin*, 177 Mich App 714, 722; 442 NW2d 765 (1989). If a party's entitlement to the injunction can be established in a particular case by argument, brief, affidavits or other forms of nontestamentary evidence, the trial court need not take testimony at the hearing. *Id.*, p 723. The trial court must, however, conduct an evidentiary hearing where the circumstances of the case require such a hearing. *Id.*

Campau, 185 Mich App at 727; 463 NW2d 186 (1990).

Plaintiffs also seek declaratory judgment under MCR 2.605. “(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” MCR 2.605(A)(1). “[A]n ‘actual controversy’ exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff’s legal rights.” *Lash*, 479 Mich at 196.

There are no contested facts here. Exhibit 2 speaks for itself. The Defendants cannot seriously make an argument that they are contesting any of these statements the Plaintiffs make about restriction on carrying firearms on Election Day. As a result, this case is appropriate for consolidation of the preliminary injunction and hearing on the merits pursuant to MCR 3.310(A)(2).

A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

1. The Secretary of State’s Ban on Firearm Possession is an *ultra vires* act; a) a violation of Michigan’s Administrative Procedures Act; and b) a violation of Michigan’s constitutional separation of powers.

a) Michigan’s Administrative Procedures Act of 1969; MCL§24.201, et.seq.

As detailed above, the office of the Secretary of State is a constitutionally created elected office within the executive branch of state government¹⁷. “The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the

¹⁷ Mich. Const. Art. V, §3

performance of their duties under the provisions of this act.” MCL §168.21. More specifically, the Secretary of State’s duties as to elections are explained MCL §168.31. However, the statute requires that the Secretary of State “issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.” MCL §168.31(1)(a).

The Administrative Procedures Act of 1969 (“APA”) applies to any “Agency” of the state. This includes a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. MCL §24.203(2). The Secretary of State is a state officer created by the Michigan Constitution. Mich. Const. Art. V, §3. A “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.” MCL §24.207. Michigan created the Office of Regulatory Reform to prescribe procedures and standards for the drafting of rules, publication of required notices, and distribution of rules.¹⁸ MCL §24.236. An agency shall not proceed with the processing of a rule outlined in this chapter unless the office of regulatory reinvention has approved the request for rule-making. The office of regulatory reinvention 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. MCL §24.239(3). An agency must publish a notice of public hearing on any proposed rule, and may not

¹⁸ Michigan’s Office of Regulatory Reform was created in 1969, then transferred to the Michigan Office of Administrative Hearings and Rules, then renamed the Office of Regulatory Reinvention and most recently transferred within the Department of Licensing and Regulatory Affairs by executive order of the Governor on February 4, 2019.

do so until submitting a proposed rule to the committee and receiving a grant of approval by the committee. 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. MCL §24.239a¹⁹. 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. 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. MCL §24.241. In anticipation of an argument that the Secretary of State may promulgate an emergency rule, an agency must find that the preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required in the APA. MCL §24.248. The possession of openly-carried firearms creates no credible threat to the preservation of the public health, safety, or welfare of the residents of Michigan. And, even if the Secretary of State were to claim otherwise, she did not comply with the filing requirements, the notice requirements, or the requirement for the governor's certificate concurring in the finding of emergency. MCL §24.248(1).

The issuance of the Secretary of State's October 16th pronouncement failed to comply with any of the statutory requirements of the APA. In short, the Secretary of State is acting *ultra vires*. 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)

¹⁹ Notably, this statute requires the executive branch to involve the legislature in the rule making process.

arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. (f) affected by other substantial and material error of law.” MCL §24.306(1). It is patently clear that each and all of these conditions are met in this instance.

b) Michigan’s Separation of Powers:

The Secretary of State, through her office within the executive branch, has breached the separation of power and directly usurped the constitutional powers of the state legislature where she has sought 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. As stated previously, Michigan’s constitution places all of those powers solely within the legislative branch:

“Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.” Mich. Const. Art. II, § 4(2)

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.” The Act contains no limitation on the power and it such a power to maintain peace. 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. Thus, the SOS’s powers are of indefinite duration, and the no standards govern the SOS’s exercise of powers. 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. Accordingly, MCL 168.678 constituted an unlawful delegation of legislative power to the executive and was unconstitutional under Const

1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch. See *In re Certified Questions from the United States Dist. Ct.*, —N.W.2d—, 2020 WL 5877599, at *1 (Mich. Oct. 2, 2020)

The state legislature cannot and has not delegated such power to executive branch officers. For these reasons, the October 16th pronouncement is without legal authority or effect and is void.

B. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION

If this Court does not grant this injunction, Plaintiffs, and those similarly situated to them, will suffer irreparable injury by surrendering either their fundamental right to vote or their fundamental right to self-protection. With just twelve days remaining until Election Day, Plaintiffs and the general public are at risk of being disenfranchised because of the Pronouncement. Some law enforcement officers have announced an intention to seek the removal and arrest of voters at polling places if they are not in compliance with the Pronouncement. Other law enforcement officials have independently determined that there exists no lawful basis for initiation or enforcement of the Pronouncement and that they will refrain from enforcing same. Indeed, the Kent County Prosecutor has issued guidance to law enforcement in his jurisdiction acknowledging that the Pronouncement “may ensnare people who are doing nothing illegal.” (See **Exhibit 5**) This situation will likely lead to voter confusion and intimidation by members of law enforcement who are called to polling places on Election Day. As detailed in the Verified Complaint in this case, there are voters who have long expressed their support for their fundamental right to self-protection by lawfully carrying firearms while voting. Under the Pronouncement, those individuals will now be turned away from the polls and threatened with arrest when they appear at the polls to vote on Election Day. This disenfranchisement is without the appropriate notice or

compliance with Michigan law or any rule-making process. This will certainly lead to some instances of voter disenfranchisement on Election Day.

C. GRANTING AN INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS AND IS IN THE PUBLIC INTEREST

Any harm to Plaintiffs in the absence of injunctive relief outweighs any harm to Defendants if injunctive relief is granted. Defendants will be simply forced to comply with Michigan's law-making processes rather than resorting to conjuring rules or edicts without regard to the law or circumspection. The very purpose of state government is to establish a legal framework with which elected officials must comply in order to implement law. Injunctive relief would simply put Defendants into the position that adhering to the requisites of the Michigan Constitution and statutes. Forcing state government to comply with and remain within the structure of the law is certainly in the public interest. Plaintiffs are only seeking injunctive relief until the disputed Pronouncement can be properly construed through Plaintiffs' request for a declaratory judgment.

Further, a preliminary injunction will sustain the status quo that has persevered since Michigan's admission as a state and secure the public interest in the fundamental right to lawful self-defense. And, it is the timing of the Secretary of State to issue her pronouncement 17 days before the general election that creates the urgency and proximate need for injunctive relief. This Court should therefore issue a preliminary injunction while the case is being litigated.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' request for an expedited hearing on their Emergency Motion for Declaratory and Injunctive Relief and direct the Secretary of State, the Attorney General and the Director of the Michigan State Police to suspend

implementation of all aspects of the Secretary of State's October 16th pronouncement denying possession of firearms on Election Day.

Dated: October 22, 2020

Respectfully submitted,

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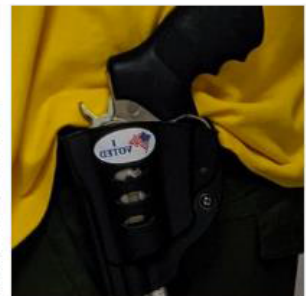
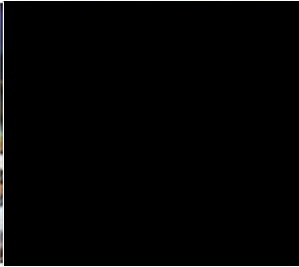
Brief in Support of Emergency Motion for Declaratory
and Injunctive Relief

EXHIBIT 1



Michigan Open Carry, Inc.

+ Invite



Brief in Support of Emergency Motion for Declaratory
and Injunctive Relief

EXHIBIT 2



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 16, 2020

Open Carry of Firearms at Polling Places on Election Day Prohibited

In Michigan, an individual's ability to carry a firearm depends on several factors, such as whether he or she is licensed to carry a concealed weapon or is exempt from licensure; the location; whether the weapon is concealed or openly carried; and other circumstances.

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.

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. The Secretary of State is coordinating with the Attorney General and state and local law enforcement to ensure uniform enforcement of these requirements.

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.

Outside 100 feet of a polling place, clerk's office(s), or absent voter counting board

- Outside of 100 feet of a polling place, if any person is acting in a way that would tend to intimidate, hinder or impede voters on the way to the polls, election inspectors should immediately contact law enforcement.

Signage and Contacting Law Enforcement

- Election inspectors must post signage providing notice of this regulation inside the room containing the polling place and at the building entrance. Notice may also be posted at 100 feet at the discretion of the local clerk.
- Clerks should contact local police departments and county sheriffs in advance of election day to establish points of contact for enforcing this or any other election day regulations.

Required signage:

NOTICE

THE OPEN CARRYING OF A FIREARM IS PROHIBITED IN A POLLING PLACE, INSIDE ANY HALLWAY USED BY VOTERS TO ENTER OR EXIT A POLLING PLACE, AND WITHIN 100 FEET OF AN ENTRANCE TO A BUILDING CONTAINING A POLLING PLACE ON ELECTION DAY. OUTSIDE OF 100 FEET, NO PERSON CAN ACT IN A WAY THAT WOULD TEND TO INTIMIDATE, HINDER OR IMPEDE VOTERS ON THEIR WAY TO THE POLLING PLACE. THESE PROHIBITIONS ALSO APPLY TO AN ELECTION CLERK'S OFFICE OR ABSENT VOTER COUNTING BOARD ON ELECTION DAY.

Brief in Support of Emergency Motion for Declaratory
and Injunctive Relief

EXHIBIT 3

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

M E M O R A N D U M

October 16, 2020

TO: Michigan State Police
Michigan Association of Police Chiefs
Michigan Sheriffs Association
Prosecuting Attorneys Association of Michigan

FROM: Danielle Hagaman-Clark
Acting Chief of the Criminal Trials and Appeals Division

Re: Election Day (Security & Integrity Guidance)

As November 3, 2020 – Election Day – quickly approaches, we wanted to take this opportunity to thank you for your commitment to helping safeguard our elections process and for helping to ensure that every eligible voter has the opportunity to exercise their right to vote in a safe manner. Regardless of where voters cast their ballots, all law enforcement agencies are committed to ensuring,

- that everyone who is eligible to vote, has the ability to cast their vote and have it be counted.
- that those who choose to appear in person to cast their ballots can do so free from intimidation and harassment.
- that those who are observing the polls do so in accordance with the law; and
- that all participants and observants abide by the laws of this state during the election process.

We anticipate that in the run up to the election – and on Election Day –there may be questions about our election laws. Accordingly, we have prepared legal guidance to try to help with some of the issues that you may encounter. In addition, the Department of Attorney General will have a phone line staffed by prosecutors on Election Day, exclusively for use by law enforcement agencies. Should you have a question or concern, please feel free to call our office at **313-456-0180**. This number is for law enforcement purposes only related to Election Day concerns. We will make sure that an attorney is available to assist you.

As an initial matter, it's important to note that, under MCL 168.940 and 168.941, county prosecutors and law enforcement agencies have a duty to investigate alleged criminal violations of Michigan election law, and in appropriate cases, pursue appropriate enforcement action. These statutes read as follows:

“It is hereby made the duty of any police, sheriff or peace officer, present and having knowledge of any violation of any of the provisions of this act, to forthwith institute criminal proceedings for the punishment of such offender.” (MCL168.941)

“It is hereby made the duty of every prosecuting attorney, whenever he shall receive credible information than any such offense has been committed, to cause the same to be prosecuted.” (MCL 168.940)

You should also be aware that, pursuant to MCL 168.678, each board of election inspectors “shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any election.” Election inspectors are instructed to contact law enforcement, as appropriate, to ensure there is no disruption in voting. If you are called, you can assume that it is because the election inspector has run out of other options to maintain order and law enforcement intervention is necessary.

BODY WORN CAMERAS

Many law enforcement agencies are equipped with body worn cameras (BWC). Every agency that employs the use of these devices has adopted policies for when the camera should be turned off and when it should be recording. Because MCL 168.579 and MCL 168.738 regulate showing a voted ballot to other individuals, there are some restrictions on the use of camera and video in polling places. However, law enforcement should abide by the policies their offices have adopted with regard to BWC and care should be taken not to intentionally record a voter who is casting his or her ballot.

FIREARMS & VOTER INTIMIDATION

The 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, with the exception of law enforcement officers. The laws related to carrying concealed still apply. Because there are certain public places that are often used as polling locations where carrying concealed is not allowed, law enforcement should be familiar with those locations. MCL 28.425o prohibits the carrying of concealed weapons on or in the following premises: A school or school property; a public or private child care center or day care center, public or private child caring institution, or public or private child placing agency; a sports arena or stadium; any property or facility owned or operated by a church, synagogue, mosque, temple, or

other place of worship; an entertainment facility with a seating capacity of 2,500 or more individuals; a hospital; or a dormitory or classroom of a community college, college, or university. It should be noted that a CPL holder can receive express permission from the church to carry concealed on church property.

If a person openly carries a firearm outside the 100-foot buffer zone, there are still potential crimes that could be committed. For example, voter intimidation is a crime even beyond the 100-foot buffer zone, irrespective of what activity the armed person purports to be engaging in. When deciding whether a person should be arrested for a firearms offense, you should consider the following:

- Have you received notification that voters are afraid to enter the polling location because of the presence of armed individual(s)?
- Have you received notification from the precinct inspectors¹ that they are concerned with the presence of armed individual(s)?
- Have you tried to educate the individual by explaining that his or her behavior is intimidating some voters into forgoing their right to vote because they are afraid and that is a crime under Michigan law (e.g. MCL 168.932(a) which makes it a felony to “deter” or “interrupt” an elector from voting)?
- What actions are being taken or what statements are being made by the individual to indicate a specific intent to harass or intimidate?
- Is the individual from the area and what does he or she say their purpose is for standing outside the polls armed with a gun?

Scenario Law Enforcement Likely to Encounter

Law enforcement is called to the polling location by either a voter attempting to enter the polling place or by a precinct inspector who reports that a group of armed individuals are outside the polling location causing voters to leave without casting a ballot because they are afraid or intimidated.

MCL 168.932(a), makes it a felony for: “[a] person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election

¹ MCL 168.678 provides a board of election inspectors with “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 votes after the poll is closed.”

held in this state.” It is a crime for a person to menace a voter at or near a polling place with the intent to influence their vote or deter them from voting.

To determine if an individual is attempting to influence a voter you should consider if the person is voting himself or if they are standing for an extended period of time at or near a polling place openly carrying a firearm. Officers should utilize their discretion to determine if such circumstances exist that might implicate MCL 168.932(a) and, only utilize his or her arrest power as a last resort.

The decision to arrest should only be made after a careful analysis of the facts known to the officer. Every attempt at education and deterrence should be utilized first, with arrest as the last available option. Our office is available for consultation should you encounter this type of situation.

It is worth noting that under federal law 18 U.S.C. § 592, it is illegal to order, keep, or have under one’s control any troops or armed men at any polling place in a general or special election, if one is a civil or military officer or employee of the United States government.

Groups of Armed Individuals Outside 100 foot Zone

Special consideration should be given to groups of armed individuals who are outside the 100-foot safety barrier. When deciding if the group is acting in an intimidating fashion you should consider the following:

- The number of people grouped together
- The amount of coordination between members of the group – are they wearing clothing that identifies them? Are they positioning themselves with any coordinated effort?
- How are they dressed? Are they in “full kit?”
- Are they yelling, screaming or being loud?
- How are they holding their weapons?
- How close to the 100 foot zone are they positioned?
- What is the size, caliber, appearance of the weapon?

ELECTIONEERING

Michigan law prohibits a person from posting, displaying, or distributing inside a polling place or any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located, “any

material that directly or indirectly makes reference to an election, a candidate, or a ballot question.” Note, while this restriction applies to candidates and ballot proposals appearing on the ballot at this election, it does not apply to official election materials that are required by law to be posted, displayed, or distributed in a polling place on Election Day.

To determine if a person or groups of people are violating the law as it relates to the 100 foot rule it may be helpful to think about the following:

The following activities are prohibited:

- Displaying “pro and con” information or “vote for/against” materials regarding the candidates or proposals that appear on the ballot. This does not include school gear that does not say “vote for/against.”
- Approaching voters to verbally encourage them to vote for or against any person or question on the ballot.
- Distributing any type of campaign literature or write-in stickers.
- Displaying campaign signs, posters, or bumper stickers.
- Collecting petition signatures.
- Requesting donations, selling tickets or engaging in similar activities.
- Vehicles with campaign signs or bumper stickers must be parked at least 100 feet from any entrance to the building in which the polling place is located.

Scenario Law Enforcement Likely to Encounter

A group of people are standing outside of the polling location, voicing support for or against a candidate or proposal as voters approach the polling location or clerk’s office, the group may also be dressed in clothing that supports a candidate for office. They must be at least 100 feet from the entrance of the polling location or clerk’s office. If they are not at least 100 feet from the polling location, they are committing a crime. You should consider their behavior in light of the following criminal statutes:

MCL 168.744(1) makes it a misdemeanor for any person “in a polling room, in a compartment connected to a polling room, or within 100 feet from any entrance to a building in which a polling place is located shall [to] persuade or endeavor to persuade a person to vote for or against any particular candidate or party ticket or for or against any ballot question that is being

voted on at the election. A person shall not place or distribute stickers, other than stickers provided by the election officials pursuant to law” in the same areas.

MCL 168.744(3) makes is a misdemeanor for a person, on election day, to “post, display, or distribute in a polling place, in any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located any material that directly or indirectly makes reference to an election, a candidate, or a ballot question.”

MCL 168.931(1)(k) makes it a misdemeanor for a person to solicit votes in a polling place or within 100 feet of polling place on election day.

MCL 168.932(a) makes it a felony for a person to attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

VOTER INTIMIDATION WITHOUT WEAPONS

Voter intimidation can occur without the presence or use of a weapon. For instance, threatening violence to a voter if he or she votes may rise to the level of intimidation. Some other ways it is illegal to intimidate or coerce a voter are the following:

MCL 168.932(a) makes it a felony for a person to “attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.”

Every situation must be evaluated in terms of the impact the behavior is having on the voter but the statute criminalizes the defendant’s behavior. All of the facts and circumstances are relevant to a determination of the defendant’s intent.

COVID-19 RELATED HEALTH QUESTIONS

Michigan Department of Health & Human Services Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order

(d) Gatherings are permitted for the following purposes notwithstanding the requirements of subsection (1)(c): (1) Voting or election-related activities at polling places

Masks are not required to be worn in a polling location. However, a poll worker may ask a voter to temporarily remove his or her mask in order to verify the voter's identity if they're using a picture ID.

Scenario Law Enforcement Likely to Encounter

A person complains that other voters are not wearing masks and feels like they can't vote safely because of the unmasked individuals. The MDHHS order that requires masks be worn in public spaces specifically excludes polling places. So, while the voter may be upset, the law does not require that a voter wear a mask in order to vote.

POLL WATCHERS AND CHALLENGERS; DISRUPTIONS AT THE POLLS

Elections are an open and transparent process that may be observed by any interested person.

Election challengers may be appointed by political parties and qualified interest groups to observe the election process. A person who wishes to observe but is not a qualified election challenger is commonly called a poll watcher. Election challengers and poll watchers play an important role in verifying that the election is conducted openly and fairly. They are allowed into polling locations to ensure that the election is conducted openly and fairly. However, the right to be present or to challenge voters is not absolute. They have the right to be present and to view aspects of the voting process. They do not have the right to act disorderly. If a precinct inspector has asked the challenger or the watcher to leave and they refuse to do so, the inspector is instructed to call law enforcement.

You should know that if a clerk or an inspector has contacted law enforcement it is only because the person has become extremely disruptive. Clerks and inspectors are instructed to first warn the person that he or she will be ejected from the polls if problems persist. If problems continue, eject the person from the polling place. Specifically, behavior such as drinking of alcoholic beverages or disorderly conduct, as well as threatening or intimidating a challenger while performing an activity allowed under subsection are not allowed. In addition, a challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place. An election official or precinct board that prevents a challenger from being present in the polls or refuses to provide a challenger with any conveniences needed for the performance of his or her duties is subject to penalty.

Here is some guidance on deciding whether a challenger is acting in an appropriate way.

Challenges must not be based on an “impression” that the voter is ineligible due to his or her manner of dress; inability to read or write English; the voter’s perceived race, ethnic background, physical or mental disability, support for or opposition to a candidate or political party; or the voter’s need for assistance with the voting process. A challenger cannot challenge a voter’s right to vote unless the challenger has “good reason to believe” that the voter is not eligible to vote in the precinct.

A voter cannot be challenged simply because he or she does not have or is not in possession of acceptable picture ID, as long as the voter signs the *Affidavit of Voter Not in Possession of Picture ID*. However, a voter who is unable to show picture identification can be challenged if a challenger has good reason to believe that the person is not qualified to vote in the precinct, independent of the voter’s inability to provide acceptable picture ID.

Scenario Law Enforcement Likely to Encounter

A poll challenger sees a person of Hispanic ethnicity and “challenges” their right to vote as a qualified elector. The challenger is unable to articulate “good cause” for this belief because all they point to as evidence of the voter’s status is the appearance of the voter. This is not a “good reason to believe” the voter is not legally registered. Challenges must not be based on an “impression” that the voter may be ineligible due to his or her manner of dress; inability to read or write English; the voter’s perceived race, ethnic background, physical or mental disability, or support for or opposition to a candidate or political party; or the voter’s need for assistance with the voting process. When the precinct chairperson attempts to remove the challenger because the challenge has been deemed inappropriate, the challenger might refuse to leave the premises. If the challenger refuses to leave, they are committing the offense of trespass in the officer’s presence and law enforcement has the right to arrest the challenger. In addition, they may also arrest for a violation of:

MCL 750.170 Disturbing the Peace – Jane Doe did make a disturbance at an election place located in the county. Penalty is a 90- day misdemeanor and/or \$500.00 – arrest warranted if it committed in the officer’s presence.

MCL 168.727(2) makes it a misdemeanor for a person to “challenge[] a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters[.]”

On the opposite side, if a voter is challenged for good cause that they are not a qualified voter and they are attempting to vote illegally, they can be arrested by law enforcement for the following:

MCL 168.499(1) makes it a misdemeanor for a person “in answer to a question or in the registration application, [to] make[] a material statement that is false[.]”

MCL 168.519 makes it a misdemeanor for “[a]n individual [to] register as an elector if he or she knows or has good reason to believe that he or she is not a resident and qualified.”

MCL 750.170 Disturbing the Peace – The person did make a disturbance at an election place located in the county. Penalty is a 90- day misdemeanor and/or \$500.00 (offense must be committed in the officer’s presence for arrest.)

When deciding if a poll watcher or challenger is acting disorderly it might help to think about the following things:

- A challenger can be expelled from the precinct for unnecessarily obstructing or delaying the work of the election inspectors.
- Or for touching ballots, election materials or voting equipment;
- Or for campaigning;
- Or acting in a disorderly manner.

A challenger is prohibited from threatening or intimidating voters entering the polling place, applying to vote, entering a voting station, voting, or leaving the polling place. **Challengers are not authorized to approach voters or talk directly to voters for any reason. Challengers and poll watchers are prohibited from taking photos or recording in the polling place during the hours the polls are open for voting.** (Note, however, that challengers and poll watchers may use other applications on mobile devices if not disruptive or intrusive.)

Other disruptions may occur around the use of cell phones at the polls.

Persons shall not use video cameras, cell phone cameras or video recording, cameras, television or recording equipment in the polling place, except that broadcast stations and credentialed media may be permitted to briefly film from public area. Personnel working for broadcast stations or media shall not set up cameras in the polling place.

Persons shall not use cell phones once they have entered voting station. Cellphones may be used in the polling place by voters (while waiting in line), challengers and poll watchers as long as they are not disruptive to the voting process.

ABSENT VOTER APPLICATIONS AND BALLOTS; VOTING TWICE

There are many laws around absentee voting, voting twice and ballots. Here is an overview of some of the crimes related to these issues:

Absent voter ballot applications:

MCL 168.759(8) makes it a misdemeanor for an unauthorized person who both distributes absentee ballot applications to voters and returns those absentee ballot applications to a clerk or assistant of the clerk.

MCL 168.932 makes it a felony for a person who is not involved in the counting of ballots as provided by law who has possession of an absentee ballot which was mailed or delivered to another person is guilty of a felony if he or she 1) opens the envelope containing the ballot 2) makes any marks on the ballot 3) alters the ballot in any way or 4) substitutes another ballot for the absentee ballot in his or her possession.

MCL 168.931(1)(b)(iv), 931(1)(n) makes it a misdemeanor for a person, other than an authorized election official, who gives, lends or promises any valuable consideration to or for a person to induce that person to both distribute absentee ballot applications and receive signed absentee ballot applications from voters for delivery to the clerk.

Voter qualifications

MCL 168.945 makes it a misdemeanor for person who induces or attempts to induce another to apply to vote as an absent voter knowing the person is not qualified to do so is.

Absent voter ballots

MCL 168.932(f) makes it a felony for an unauthorized person who returns, solicits to return or agrees to return an absentee ballot.

MCL 168.761(5) makes it a felony for a person who assists an absentee voter who falsifies the statement which must be signed by such assistants. A person who votes at an election both in person and by means of an absent voter ballot or a person who attempts to vote both in person and by means of an absent voter ballot is guilty of a felony. (MCL 168.769(4))

Voting twice

MCL 168.932e makes it a 4-year felony to for a person to offer to vote or attempt to vote more than once as at the same election.

OTHER CRIMES TO CONSIDER

Should a voter, challenger, poll watcher, or other person appear at the polling location drunk, crowd people unnecessarily or cause a disturbance that interferes with a person's constitutional right to vote, you should consider the following crimes:

MCL 750.167 (disorderly conduct – public intoxication, loitering, crowding people unnecessarily) (1) A person is a disorderly person if the person is any of the following: (e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance. (l) A person who is found jostling or roughly crowding people unnecessarily in a public place.

MCL 750.170 (disturbing the peace) makes it a 90-day misdemeanor to make a disturbance in a building, located at an election place.

MCL 750.81d makes it an offense to resist or obstruct a lawful order of police officer

MCL 750.234E makes it a misdemeanor to willfully and knowingly brandish a firearm in public.

MCL 750.82 makes it a felony to assault someone with a dangerous weapon with the specific intent to injure or to place the victim in reasonable apprehension of an immediate battery. This does NOT require an offender to point a weapon at the victim.

MCL 750.81a makes it a misdemeanor to cause an aggravated injury to a person while assaulting them.

MCL 750.81 makes it a misdemeanor to assault or assault and batter someone.

MCL 750.552 makes it a 30-day misdemeanor to trespass on the property of another.

Law enforcement officers are provided great discretion in their interactions with citizens of their jurisdictions. In some cases, a brief conversation will be enough to ensure compliance with the laws of this State. In other cases, removing someone from the property will suffice. It is our hope that no one will behave in such a manner that warrants an arrest. However, if an arrest becomes necessary please remember the times when a warrant is NOT required for an arrest:

M.C.L.A. 764.15 provides a peace officer, without a warrant, may arrest a person in any of the following situations:

- (a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.
- (b) The person has committed a felony although not in the peace officer's presence.
- (c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.
- (d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

Please know that the Department of Attorney General stands ready to answer your legal questions as they pertain to election day issues. We know that the laws are nuanced, and that education is usually the first line of action in working with the public. We can be reached at **313-456-0180**. Together we will ensure that everyone is free from intimidation and harassment as they cast their ballot on this Election Day.

VIOLATIONS OF MICHIGAN AND FEDERAL ELECTIONS LAW RELEVANT TO ELECTION DAY

Call **313-456-0180** with questions – AG criminal staff will be available on Election Day to answer your questions. This number is for law enforcement only.

FIREARMS, DEMONSTRATORS & VOTER INTIMIDATION

MCL 168.31 grants the Secretary of State authority to issue directives regarding policy at polling locations.

MCL 28.425o prohibits the carrying of concealed weapons in the following premises: A school or school property; a public or private child care center or day care center, public or private child caring institution, or public or private child placing agency; a sports arena or stadium; any property or facility owned or operated by a church, synagogue, mosque, temple, or other place of worship; an entertainment facility with a seating capacity of 2,500 or more individuals; a hospital; or a dormitory or classroom of a community college, college, or university.

MCL 168.932(a), makes it a felony for: “[a] person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state

18 U.S.C. § 592, it is illegal to order, keep, or have under one’s control any troops or armed men at any polling place in a general or special election, if one is a civil or military officer or employee of the United States government.

PROTESTS WITHOUT WEAPONS

MCL 168.744; 931(1)(k) Michigan law prohibits a person from posting, displaying, or distributing inside a polling place or any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located, “any material that directly or indirectly makes reference to an election, a candidate, or a ballot question.” Note, while this restriction applies to candidates and ballot proposals appearing on the ballot at this election, it does not apply to official election materials that are required by law to be posted, displayed, or distributed in a polling place on Election Day.

MCL 168.744(1) makes it a misdemeanor for any person “in a polling room, in a compartment connected to a polling room, or within 100 feet from any entrance to a building in which a polling place is located shall [to] persuade or endeavor to persuade a person to vote for or against any particular candidate or party ticket or for or against any ballot question that is being voted on at the election. A person shall not place or distribute stickers, other than stickers provided by the election officials pursuant to law” in the same areas.

MCL 168.744(3) makes is a misdemeanor for a person, on election day, to “post, display, or distribute in a polling place, in any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located any material that directly or indirectly makes reference to an election, a candidate, or a ballot question.”

MCL 168.931(1)(k) makes it a misdemeanor for a person to solicit votes in a polling place or within 100 feet of polling place on election day.

MCL 168.932(a) makes it a felony for a person to attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

VOTER INTIMIDATION WITHOUT WEAPONS

MCL 168.932(a) makes it a felony for a person to “attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.”

COVID-19 RELATED HEALTH QUESTIONS

Emergency Order Under MCL 333.2253 – Gathering Prohibition and Mask Order

(d) Gatherings are permitted for the following purposes notwithstanding the requirements of subsection (1)(c): (1) Voting or election-related activities at polling places

POLL WATCHERS AND CHALLENGERS; DISRUPTIONS AT THE POLLS

MCL 750.170 Disturbing the Peace – Jane Doe did make a disturbance at an election place located in the county. Penalty is a 90- day misdemeanor and/or \$500.00 – arrest warranted if it committed in the officer’s presence.

MCL 168.727(2) makes it a misdemeanor for a person to “challenge[] a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters[.]”

MCL 168.499(1) makes it a misdemeanor for a person “in answer to a question or in the registration application, [to] make[] a material statement that is false[.]”

MCL 168.519 makes it a misdemeanor for “[a]n individual [to] register as an elector if he or she knows or has good reason to believe that he or she is not a resident and qualified.”

MCL 750.170 Disturbing the Peace – The person did make a disturbance at an election place located in the county. Penalty is a 90- day misdemeanor and/or \$500.00 (offense must be committed in the officer's presence for arrest.)

ABSENT VOTER APPLICATIONS AND BALLOTS; VOTING TWICE

MCL 168.759(8) makes it a misdemeanor for an unauthorized person who both distributes absentee ballot applications to voters and returns those absentee ballot applications to a clerk or assistant of the clerk.

MCL 168.932e makes it a felony for a person who is not involved in the counting of ballots as provided by law who has possession of an absentee ballot which was mailed or delivered to another person is guilty of a felony if he or she 1) opens the envelope containing the ballot 2) makes any marks on the ballot 3) alters the ballot in any way or 4) substitutes another ballot for the absentee ballot in his or her possession.

MCL 168.931(1)(b)(iv), 931(1)(n) makes it a misdemeanor for a person, other than an authorized election official, who gives, lends or promises any valuable consideration to or for a person to induce that person to both distribute absentee ballot applications and receive signed absentee ballot applications from voters for delivery to the clerk.

MCL 168.945 makes it a misdemeanor for person who induces or attempts to induce another to apply to vote as an absent voter knowing the person is not qualified to do so is.

MCL 168.932(f) makes it a felony for an unauthorized person who returns, solicits to return or agrees to return an absentee ballot.

MCL 168.761(5) makes it a felony for a person who assists an absentee voter who falsifies the statement which must be signed by such assistants.

MCL 168.769(4) A person who votes at an election both in person and by means of an absent voter ballot or a person who attempts to vote both in person and by means of an absent voter ballot is guilty of a felony.

MCL 168.932e makes it a 4-year felony to for a person to offer to vote or attempt to vote more than once as at the same election.

OTHER CRIMES TO CONSIDER

MCL 750.167 (disorderly conduct – public intoxication, loitering, crowding people unnecessarily) (1) A person is a disorderly person if the person is any of the following: (e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance. (l) A person who is found jostling or

roughly crowding people unnecessarily in a public place.

MCL 750.170 (disturbing the peace) makes it a 90-day misdemeanor to make a disturbance in a building, located at an election place.

MCL 750.81d makes it an offense to resist or obstruct a lawful order of police officer.

MCL 750.234E makes it a misdemeanor to willfully and knowingly brandish a firearm in public.

MCL 750.82 makes it a felony to assault someone with a dangerous weapon with the specific intent to injure or to place the victim in reasonable apprehension of an immediate battery. This does NOT require an offender to point a weapon at the victim.

MCL 750.81a makes it a misdemeanor to cause an aggravated injury to a person while assaulting them.

MCL 750.81 makes it a misdemeanor to assault or assault and batter someone.

MCL 750.552 makes it a 30-day misdemeanor to trespass on the property of another.

M.C.L.A. 764.15 provides a peace officer, without a warrant, may arrest a person in any of the following situations:

- (a) A felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.
- (b) The person has committed a felony although not in the peace officer's presence.
- (c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.
- (d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.

Brief in Support of Emergency Motion for Declaratory
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EXHIBIT 4

The Detroit News

POLITICS

Michigan police chiefs' leader: Open carry ban at polling places not based in law

George Hunter and Beth LeBlanc The Detroit News

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The head of the group that represents 385 Michigan police chiefs warned Monday that officers won't be able to enforce Secretary of State Jocelyn Benson's ban on openly carrying firearms at polling places on Election Day because the edict is not based in law.

Secretary of State Jocelyn Benson on Friday sent guidance to local election officials to explain that openly carrying firearms on Election Day in polling places, clerk's offices and absent voter counting boards would be banned.

But the edict has no legal basis, said Robert Stevenson, director of the Michigan Association of Chiefs of Police.

"The Secretary of State issued these administrative rules, but in researching the issue, there's nothing in the law that gives police the authority to enforce these rules," Stevenson said. "Their theory is if people don't follow the rules and don't leave (the polling place), they'd have a trespassing situation where police would be able to take enforcement action.

"But the feedback I've been getting from our police agencies is that they're uncomfortable trying to enforce something they clearly don't have the authority to enforce," Stevenson said. "Our hope is that this will get resolved and there'll be some clear guidance.

"... But as it stands now, there's nothing in the law that gives police the authority to enforce the Secretary of State's edict."

The Secretary of State's office consulted with Attorney General Dana Nessel before issuing the order, Benson spokeswoman Tracy Wimmer said.

"The directive was the result of the Attorney General, the state's top law enforcement official, reviewing relevant laws and legal precedent and ruling, in her capacity as that law enforcement official, that the Secretary has the authority," Wimmer said in a Monday email. "It is within the scope of authority for executives to interpret relevant and applicable law and apply it appropriately, and is indeed based in law."

Nessel said on the Sunday broadcast of Showtime's "The Circus" that Michigan State Police troopers would patrol polling spots if the state believed local sheriffs wouldn't enforce laws prohibiting voter intimidation.

Republican legislative leaders and gun rights groups have criticized the two Democratic officials about the guidance, which Senate Majority Leader Mike Shirkey, R-Clarklake, called "making up firearm policies."

The attorney general made the comments after she was asked whether she could rely on elected local sheriffs to enforce voter intimidation and security laws. Barry County Sheriff Dar Leaf has made statements supporting militia groups, and other sheriffs have refused to enforce previous executive orders by Gov. Gretchen Whitmer because they said they were unconstitutional.

"If you have a county sheriff that seems to be sympathetic to any of these organizations and we think they're not going to enforce the laws, then we'll get somebody else who will, the Michigan State Police," Nessel said. "Every place in the state of Michigan, there will be law enforcement that believe that voters need to be protected."

The National Rifle Association has condemned the directive from Benson, while Michigan Open Carry indicated it is contemplating a lawsuit.

Other law enforcement officials are mixed about whether they plan to enforce the edict.

Wayne County Sheriff Benny Napoleon, a fellow Democrat, expected the directive from Benson would be challenged in the coming days. Until then, he said he plans to comply.

"Until such time as a court of appropriate jurisdiction tells me that plan is unlawful, it is my plan to enforce," Napoleon said Monday, but he didn't expect there to be any issues in Wayne County.

People found to be in violation of the directive "will be asked to leave," the Wayne County sheriff said. "If you refuse to leave, then you will be arrested."

"I just think it's unfortunate that the rhetoric surrounding this election is even putting us to this point where we are concerned about something as fundamental as people's right to vote," Napoleon said.

Napoleon expects to meet this week with the offices of Whitmer, Nessel and the Michigan State Police to discuss the upcoming election. He then plans to meet with the 43 local police chiefs to coordinate efforts.

"I can't control what the individual police chiefs do," Napoleon said. "That's a decision that they have to make with their respective city leaders."

Livingston County Sheriff Mike Murphy said Friday he would not enforce the ban, staying in line with his previous refusal to enforce Whitmer's executive orders.

"An order is an order and, quite frankly, is unenforceable," he said. "They have no authority to supersede law."

Murphy said he will have additional staff on hand in the case of disturbances at polling locations, but he didn't expect they would need to be used.

The Michigan Sheriffs Association was advising elected sheriffs to consult with their counsels and local prosecutors about Benson's decision, said Matt Saxton, CEO and executive director of the association.

On Monday, Saxton added: "This administrative order does cause concern, because it puts law enforcement in the middle of the issue. In my opinion, the order was a solution in search of a problem. I've been in law enforcement for 28 years, and every year there's some concern about safety in the polling places, and we've been able to handle those concerns with no issues.

"Every polling place is in a different kind of building, and the laws dictate whether people can carry firearms there," he said. "Some are in churches, which are gun-free zones — but a church pastor can give permission for people to carry in that church, so someone could be coming in with permission to carry a gun.

"Every incident of a possible violation (of Benson's order) will have to be handled individually, which would've occurred regardless of this order," Saxton said.

Nessel's spokeswoman, Kelly Rossman-McKinney, did not immediately respond to an email Monday seeking comment, but on Sunday she told The News that the Attorney Generals' department coordinated the issue with state police.

"But we have already met with them to discuss partnering on enforcement, and they have agreed to assist us," Rossman-McKinney said. "We are committed to ensuring that every voter feels safe and secure."

State Police spokeswoman Shanon Banner was not working Monday, but told The News on Sunday: "I won't get into speculation about enforcement action, but the Michigan State Police does have statewide jurisdiction."

State police spokeswoman Lori Dougovito on Monday referred questions about whether Benson's order was enforceable to the Attorney General's office.

The directive is similar to a prohibition on taking photos or video recording in polling places, Benson's spokeswoman Wimmer said.

"Obviously the public has the right to take pictures in public, but the Department of State determined many years ago that they cannot take photos of others in polling places, because voters have the right to a private ballot," she said.

"The directive respects the right to bear arms, and in fact does not touch on concealed carry, but it does say that in the context of a voting location, open carry of a firearm can cause voter intimidation, and therefore is not allowable," Wimmer said.

What the Secretary of State's office is talking about is voter intimidation, and laws already exist to deal with that, Stevenson said. Circumstances matter, he said.

"Just someone carrying a gun, or standing in a parking lot open-carrying would probably not be intimidation," Stevenson said.

"If a person is approaching people in a threatening manner, or if three to four people are blocking the road, that could be construed as intimidation. But simply having a gun is legal, since Michigan is an open carry state," he said.

The main issue is whether Benson can issue an administrative order "that supersedes state law," Stevenson said.

Additional guidance is "really needed," he added. "it's unfair to put police in the middle like this."

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EXHIBIT 5

PROSECUTING ATTORNEY

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CHRISTOPHER BECKER
Prosecutor

MONICA M. JANISKEE
Chief Assistant Prosecutor

TO: Kent County Law Enforcement

FROM: Chris Becker

A handwritten signature in black ink, appearing to be "CB", is written over the name "Chris Becker".

RE: Secretary of State election order and election day guidance

I am sure many of you are aware of the recent order by the Secretary of State banning the open carrying of firearms inside a polling location, a clerk's office, an absent voter counting board, or within 100 feet of these same entities. Subsequently, I received a memo which many of you may have seen as well, sent out by the Attorney General to MAPC, MSA, and PAAM, in which it states the Secretary of State has the power to issue this order, "by MCL 168.21 and MCL 168.31." I was also on a conference call with other members of PAAM, where members of the Attorney General's office were attempting to explain how this order was legal. I have examined these two statutes, asked attorneys in the office to examine them as well, and after all of this I am not convinced there is any basis in the laws cited that allows the Secretary of State to ban the open carrying of firearms as she directs in her order. It appears that the Secretary would have at least needed to follow the steps in the Administrative Procedure Act to promulgate such an order, which was not done.

This puts law enforcement in a difficult situation. Given the publicity the order has garnered, I can foresee members of the public, clerks, and any number of individuals calling for assistance from your department to enforce an order that I cannot say is valid. For instance, if some individual walks into a polling place with an openly carried firearm and does not engage in any threatening, intimidating, or otherwise interfering behavior, and simply comes to vote openly armed with a gun, this could prompt a call from an election clerk for the police to assist. There is, however, no criminal offense for "open carry in violation of a Secretary of State order," and neither in the Attorney General's memo, nor in their conference call, could they identify any basis for such a claim. Under the Executive Orders we dealt with for much of this year, and even under the new orders by the Director of the MDHHS, there are specific provisions under those laws creating a misdemeanor offense for a violation of those laws. There are no such provisions for alleging a misdemeanor or felony violation of the Secretary's order, and therefore there is no legal basis for your officers to arrest or remove an individual based on a violation of the order.

The possibility for a criminal offense then, in this specific situation, would be a trespass or some sort of disorderly conduct charge. Given the circumstances, however, if there is a situation where a person is simply present in a polling location and openly carrying a firearm, this office will not prosecute such charges. The person is not breaking the law, and there is no basis to remove someone pursuant to

an invalid order. You may also wish to consult your civil counsel to see what liability you may be facing in these situations as well.

I want to be very clear on this; if there is some sort of brandishing or pointing of a weapon, some sort of intimidation or overt activity threatening someone, that is very different. This office does not condone, nor will it support individuals or groups engaging in threatening or intimidating behavior. There is a specific statute, MCL 168.932(a) which makes it a felony for a person by, "bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election." This is a specific criminal statute describing behavior that illegally attempts to interfere with a person's right to vote. There are other offenses that may apply as well. Voter intimidation means just that; activity by a person or persons that is intimidating, threatening, or otherwise intentionally trying to prevent people from voting by putting people in fear.

This office can and will file charges against anyone engaged in these sorts of activities, and will support your departments investigating them. Such cases will be fact dependent, so it is impossible to provide any sort of complete list or guidance of what may occur. It is entirely appropriate for your department to work these complaints like you would any other investigation when you seek to file criminal charges. Unfortunately, this order by the Secretary of State may cover activity that is not threatening or intimidating, so it may ensnare people who are doing nothing illegal. We hope to avoid needlessly involving anyone in the criminal justice system if it can be avoided, and we agree with the Attorney General's suggestion to resolve situations first through education if possible and arrest only as a last resort.

In short, please continue to do what you have typically done well: investigate and enforce violations of the criminal law, protecting the safety and security of the people you serve.