# STATE OF MICHIGAN

# COURT OF CLAIMS

ROBERT DAVIS,

Plaintiff,

**OPINION AND ORDER GRANTING IN PART PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

v

Case No. 20-000207-MZ

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

Hon. Christopher M. Murray

Defendant.
_____/

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

Plaintiffs,

v

Case No. 20-000208-MM

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 Michigan State Police Director,

Hon. Christopher M. Murray

Defendants.

_____/

Plaintiffs have filed emergency motions for preliminary injunction and declaratory judgment on October 22, 2020 and October 23, 2020. Defendants responded to both motions on October 26, 2020 and plaintiffs filed replies on October 27, 2020.[1] Oral argument was held on October 27, 2020. For the reasons outlined below, the motions will be granted in part.

Before conducting a review of the merits, it is important to recognize that this case is not about whether it is a good idea to openly carry a firearm at a polling place, or whether the Second Amendment to the US Constitution prevents the Secretary of State's October 16, 2020 directive. After all, the Court's duty is not to act as an overseer of the Department of State, nor is it to impose its view on the wisdom of openly carrying firearms at polling places or other election locations. Besides the fact that the Court has no interest in either one of those matters, more importantly its constitutional role is properly limited to only declaring what the law is, not what it should be. See *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). Resolution of these motions rises and falls based solely on a consideration of the four factors governing the issuance of a preliminary injunction, and the law surrounding the Administrative Procedures Act. The Court now turns to those issues.

## I. BACKGROUND

These two consolidated lawsuits challenge an October 16, 2020 written directive[2] from defendant directing local election officials across the state to prohibit "the open carry of firearms on election day in polling places, clerk's office(s), and absent voter counting boards." More

[1] The Court appreciates the timeliness and thoroughness of the briefs.

[2] When referring to the directive throughout this opinion, the Court is only referencing and addressing the prohibition on the open carry of firearms. No other provisions of the directive are addressed in this opinion.

specifically, the directive states that this prohibition extends not only to inside the specified locations, but also to anyone within 100 feet of those locations (on-duty law enforcement officers are exempted). Additionally, the directive states that "[c]arrying a concealed firearm is prohibited in any building that already prohibits concealed carry unless an individual is authorized by the building to do so." According to the directive, defendant "is coordinating with the Attorney General and state and local law enforcement to ensure uniform enforcement of these requirements."

Plaintiffs in both cases argue that the directive is unlawful because it is a "rule" as defined in the Administrative Procedures Act,[3] MCL 24.207, and as such can only be effective when it is promulgated through the APA process. Plaintiffs in Docket No. 20-000208 also argue that MCL 168.678, which provides "each board of election inspectors" with the power to "maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during an election," is an unconstitutional delegation of legislative power to the executive.

## II. ANALYSIS

As noted, plaintiffs in both cases seek the extraordinary remedy of a preliminary injunction. The ultimate purpose of a preliminary injunction is to preserve the status quo that existed prior to the challenged action to allow the judiciary an opportunity to peacefully resolve the dispute. *Buck v Thomas Cooley Law School*, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006) (the Court defined the status quo as " 'the last actual, peaceable, noncontested status which preceded the pending

[3] MCL 24.201 *et. seq.*

controversy.' "), quoting *Psychological Servs of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985).

In *Slis v State of Michigan*, __ Mich App __, __; __ NW2d __ (2020), slip op at 12, the Court of Appeals outlined the four factors a court must consider in determining whether a preliminary injunction should be entered:

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

The party requesting "injunctive relief has the burden of establishing that a preliminary injunction should be issued . . ." MCR 3.310(A)(4). The Court will first turn to the initial consideration, i.e., whether plaintiffs have shown a likelihood of prevailing on the merits. Though plaintiffs[4] do not have to prove they *will* succeed on the merits, they do have to prove that they have a *substantial likelihood* of success on the merits. *Int'l Union v Michigan*, 211 Mich App 20, 25; 535 NW2d 210 (1995).

[4] Although not challenged, the Court doubts that plaintiff Davis has standing. He has not alleged he openly carries a firearm or even owns a firearm. It is thus unclear how he meets the "actual controversy" requirement of MCR 2.605. Although he does cite *Slis* for the proposition that he has standing under the APA, that decision applied MCL 24.264, which gives businesses standing to challenge certain rules. *Slis*, slip op at 14. The Court need not decide that issue, however, because the plaintiffs in Docket No. 20-000208 (particularly plaintiff Lambert) have made the necessary allegations to show standing under MCR 2.605.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS

Turning to the merits, the main issue as the Court sees it is the allegation that the directive violates the APA because it is a rule that was not promulgated through the act's procedures. And, a rule not promulgated under the APA is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982). No party disputes that the Department of State is an agency for purposes of the APA, MCL 24.203. Additionally, separate statutory authority *requires* that the secretary "issue instructions and promulgate rules pursuant to the administrative procedures act … for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a). There is no dispute that defendant must abide by the APA.

As to whether the directive is a rule that needed to be approved through the APA process, an administrative rule is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency ... ." MCL 24.207. An agency must utilize formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for *policy determinations* pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) (emphasis added). It is a legal question whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002). And, as noted earlier, the Court need not determine as a final matter whether

plaintiffs are correct as a matter of law. Instead, the standard is whether plaintiffs have shown a substantial likelihood of success on the merits. *Int'l Union*, 211 Mich App at 25.

It is also important to recognize that "the label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA." *AFSCME*, 452 Mich at 9. Instead, courts must examine the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule," for "an agency may not circumvent APA procedural requirements by adopting a guideline in lieu of a rule." *Id*.

Here, because the directive has the force and effect of law, is of general applicability, and covers a substantive matter, plaintiffs have established a substantial likelihood that the directive had to be promulgated as a rule under the APA. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 654; 770 NW2d 915 (2009). The directive itself covers a substantive policy area—where a resident can openly carry a firearm—and applies to every resident of this state. See *Delta County v Michigan Dep't of Natural Resources*, 118 Mich App 458, 468; 325 NW2d 455 (1982) ("The 'stipulations' did affect the rights and practices of the public. The rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies."); *Palozolo v Dep't of Social Services*, 189 Mich App 530, 534; 473 NW2d 765 (1991) ("the policy deprives … an entire class of people benefits to which they would otherwise be eligible on the basis of an internal policy of the agency without the benefit of the protection afforded by the rue-making requirements.").

Additionally, the directive is written in the form of a prohibition, and strongly suggests state and local law enforcement have the power to, and will, enforce the prohibitions within the directive. That fact also strongly suggests the directive is a rule. *Delta County*, 118 Mich App at

468 ("Clearly, then, these guidelines were binding. Therefore, they effectively were rules under the guise of guidelines and policies."); *Spear v Michigan Rehabilitation Services, Inc*, 202 Mich App 1, 5; 507 NW2d 761 (1993); *Jordan v Dep't of Corrections*, 165 Mich App 20, 25-26; 418 NW2d 914 (1987).

Also supporting plaintiffs' position is that the directive does not merely provide guidance to local election officials on existing state law, as it appears to be partially inconsistent with state law. Specifically, the directive applies to individuals within 100 feet of any polling place, even if those polling places are not an area designated as off-limits to open carry under state statute. MCL 750.234d. As far as the Court can discern, there is no affirmative statutory provision "granting" the right to open carry a firearm. See *Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 714 n 6; 918 NW2d 756 (2018) (VIVIANO, J., concurring). But that does not mean the right to open carry does not exist in some form, see *id.*; US Const, Am II, and the more important point is that the only relevant prohibitions on doing so are contained within MCL 750.234d(1)(a)-(h).[5] Just this year the Attorney General recognized this exact same point. See 2020 OAG No. 7311 ("In Michigan, the concept of 'open carry' does not provide the unfettered right to bring firearms into any public space. Numerous restrictions already exist on openly carrying firearms in public places. See e.g., MCL 750.234d [listing various premises, such as a court, church, and hospital, where 'a person shall not possess a firearm']).") See, also, 2002 OAG No. 7113 ("The carrying of firearms in public is also restricted by the Michigan Penal Code, 1931 PA 328, MCL 750.1 et. seq."). However, whether there is a formally recognized right to open carry is not the

[5] MCL 28.425o contains prohibitions (and exceptions to the prohibitions) regarding the carrying of a concealed weapon, but the directive does not speak to concealed weapons at polling places.

dispositive point, and need not be decided. What is important for APA purposes is that even if defendant can place additional restrictions on where people can open carry a firearm beyond those contained in statute,[6] it must be done through compliance with the APA.

A directive that is inconsistent with the law is not a directive but a rule requiring promulgation under the APA. *Jordan v Dep't of Corrections*, 165 Mich App at 27 ("A policy directive cannot be considered an 'interpretive statement' of a rule if it is in fact inconsistent with the rule or contains provisions which go beyond the scope of the rule."). And, compliance with the APA is no mere procedural nicety. Instead, our appellate courts have repeatedly emphasized the importance of the democratic principles embodied in the APA, which requires notice and an opportunity to be heard on the subject under consideration. See *AFSCME*, 452 Mich at 14-15. Thus, the directive is a rule which defendant intends to have enforced as a law, and was required to be promulgated through the procedures of the APA. Defendant's failure to do so makes it a substantial likelihood that plaintiffs will prevail on the merits.

For several reasons the responses submitted by defendant do not alter this conclusion. First, that defendant has supervisory responsibilities over the administration of elections is undisputed. But that proposition does not address the legal issue of whether the directive must meet the requirements of the APA. In the same vein, defendant's statement that she "has issued instructions balancing constitutional rights before" also does not address the legal issue presented. Compliance with the APA does not involve a question of balancing constitutional rights, but instead requires application of statutory provisions and the cases applying those provisions. The

[6] Which, of course, may raise additional separation of powers issues.

same holds true for defendant's recitation on the importance of voting. No party in this proceeding is questioning the importance of voting, especially intimidation-free voting. But again, that principle does not alter the Court's APA analysis.

Second, the exception within MCL 24.207(j) to what constitutes a "rule," does not apply to the directive. MCL 24.207(j) does contain an exception to the statute's definition of "rule" that applies to "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." Here, defendant relies upon two specific statutory provisions that she argues gives her "permissive statutory power" that allows the directive to be issued without following the normal APA process: (1) MCL 168.31(1)(a), noted earlier, which states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections and registrations in accordance with the laws of this state," and (2) MCL 168.31(1)(b), which grants the Secretary of State authority to "[a]dvise and direct local election officials as to the proper method of conducting elections."

The power granted to defendant under MCL 168.31(1)(a) does not allow the directive to fall within the exception in MCL 24.207(j), because MCL 168.31(1)(a) requires that any instruction for the conduct of elections be "in accordance with the laws of this state." The directive, as it applies to the "open carry" of firearms, is at least partially inconsistent with, not in accordance with, state law. As noted earlier, the directive prohibits the open carry of firearms "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." The only exception is for on-duty law enforcement officers. But MCL 750.234d(1)(a)-(h) already contains a list of locations where a

person cannot possess a firearm, and *all* polling places are not included in that list.[7] Thus, the directive is arguably not "in accordance with state law," as MCL 168.31(1)(a) requires it to be, and therefore that statutory authority appears to not fall within the exception to rule-making under MCL 24.207(j).

Caselaw applying MCL 24.207(j) also does not support application of the exception based on the statutory language contained in either MCL 168.31(1)(a) or (b). The main problem is that the language within MCL 168.31(1)(a) is too general to support application of the exception. After all, MCL 168.31(1)(a) simply states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections." If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the rule-making process of the APA, then defendant would *never* have to issue APA promulgated rules for *any* election related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME, AFL-CIO*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—must still adhere to the APA if that implementation takes the form of a rule. See *id*. (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule."); *Spear*, 202 Mich App at 5 (holding that while the agency's "decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule

[7] It is possible that some locations listed in the statute may be used as polling places, and if that is the case the directive is merely duplicative of the statute.

under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act."). Here, assuming defendant had discretion under her statutory authority to limit firearms at polling places, the implementation of that discretionary decision is not exempt from the APA's rulemaking procedures.

Furthermore, the caselaw relied on by defendant in arguing for a different conclusion are easily distinguishable, or lend support for the Court's conclusion, see e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass'n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In those cases, the pertinent agency's enabling statute expressly or impliedly authorized the *specific action* later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking or other means. See *Detroit Base Coalition*, 428 Mich at 187-188 ("The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found."). Here, MCL 168.31(1)(a)-(b) provide generalized authority to defendant, but they lack specificity with respect to the action taken (firearm regulation), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition*, *Mich Trucking Ass'n* and *By Lo Oil Co*.[8] Indeed, defendant has failed to

[8] Defendant also places reliance on the conclusions of the majority in *Pyke v Dep't of Social Services*, 182 Mich App 619; 453 NW2d 274 (1990). But Judge SHEPHARD's dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo*, 189 Mich App at 533-534 & n. 1. The *Pyke* Court's view on MCL 24.207(j) is irrelevant.

specify how the general discretionary authority under MCL 168.31(1)(a)-(b) applies to the regulation of firearms at polling places.

### B. WHETHER PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Because the directive in all likelihood was unlawfully issued, it is not difficult to conclude that, in the absence of a preliminary injunction, plaintiffs will be irreparably harmed. If the directive were not enjoined then plaintiffs would be precluded from carrying a firearm in places where the Legislature, our policy-making branch of government, has declared it can be carried.[9] To allow an unlawful directive to displace a valid statutory provision would irreparably harm those that the statute benefits, here plaintiffs. *Consumers Power Co v PSC*, 415 Mich 134, 155; 327 NW2d 875 (1982) ("The circuit court may, however, provide relief from an erroneous order of the commission. And, where statutory or administrative procedures inadequately protect the substantive rights of the utility, the circuit court can, in the exercise of its equity powers, provide a remedy to avoid irreparable harm to the substantive rights of the utility.").

### C. BALANCE OF THE HARMS

Finally, the Court is required to consider whether the entry of a preliminary injunction would harm the public interest, and who would be harmed more in the absence of an injunction-plaintiffs or defendant. These considerations are related, and will be considered together. *Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1009 (CA 6, 2006).

[9] Though plaintiffs in Docket No. 20-000208 have raised the right to bear arms provision of the Second Amendment to the United States Constitution, the Court can resolve these issues without the need to address any constitutional issue.

As recognized in the preceding section, to not enjoin a directive that is very likely unlawful would allow a single state officer to circumvent (and essentially amend) a valid and enforceable state law on the same subject. This is certainly not in the public interest, which expects its public officials to follow the rule of law. See, e.g., *Johnson v Heckler*, 604 F Supp 1070, 1075 (ND Ill, 1985) ("Second, the public interest requires that the Secretary of State recognize and apply the correct rule of law."). It would also significantly undermine the rule of law, as it would subvert the primary purpose of the APA process-precluding unfettered action by the executive branch by allowing an opportunity for the public to provide input into agency rule-making that affects the general public, as does the directive. See *AFSCME*, 452 Mich at 15 ("Indeed, the APA is a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people.").

Entry of an injunction would also cause little harm to the public interest put forth by defendant, that being the right of voters to be free from intimidation or harassment from those carrying a firearm. This holds true because, as noted, state law already prohibits the open carry of firearms in some locations used as polling places, such as a church, MCL 750.234d(1)(b), and prohibits carrying a concealed weapon in schools or places of worship. MCL 28.425o. Just as importantly, *voter intimidation is already a crime*, see MCL 768.744(1) and MCL 768.932a, as is intimidation accomplished through use of a firearm. MCL 750.234e; MCL 750.222.[10] In other words, enjoining defendant's directive regarding open carry will not harm the public interest in ensuring intimidation free voting, as state laws—laws passed by the Legislature and signed by the

[10] Although nothing was submitted to establish any actual concern for voter intimidation by those carrying a weapon-either for the upcoming election or in prior ones—the Court recognizes that proof is not always necessary on such matters, and that prevention of voter intimidation is a legitimate area of state concern. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 43; 740 NW2d 444 (2007).

Governor—already provide law enforcement with the tools to stop those whose goal it would be to intimidate voters, whether with or without a firearm.

Finally, although defendant has not raised a laches defense, the Court notes that the eleventh-hour implementation of the directive does not foreclose a judicial decision. First, the main cause for the lateness of these lawsuits was that the directive was issued less than three weeks prior to the election. Although it is understandable why defendant chose to act now, it is nonetheless true that defendant could have taken these steps months ago—perhaps prior to the August primaries—rather than 17 days before the election. Second, because this decision allows the status quo that existed on October 16, 2020 to remain in place, there will be little confusion amongst voters or local election officials, as all prior elections were administered without the additional firearm guidance contained in the directive. Third, because these motions were decided in less than a week from their filing, there is some (though certainly not a lot) time to obtain appellate review of this decision.

## III. CONCLUSION

For these reasons, plaintiffs' motions for preliminary injunction are GRANTED in part, and defendant's October 17, 2020 directive is ENJOINED to the extent it prohibits the open-carry of firearms in places not prohibited by MCL 750.234d or concealed weapons by MCL 28.425o.

IT IS SO ORDERED.

Date: October 27, 2020

Christopher M. Murray
Judge, Court of Claims