

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT DAVIS,

Plaintiff-Appellee,

v

Court of Appeals No. 355265

Court of Claims No. 20-000207-MZ

JOCELYN BENSON,

Defendant-Appellant,

CONSOLIDATED WITH

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

Plaintiffs-Appellees,

v

Court of Claims No. 20-000208-MM

JOCELYN BENSON and DANA NESSEL,

Defendants-Appellants,

COL JOE GASPER,

Defendant.

**BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC.; ACLU OF MICHIGAN; MICHIGAN WELFARE RIGHTS
ORGANIZATION; DETROIT ACTION; DETROIT JUSTICE CENTER; AND
DETROIT PEOPLE'S PLATFORM IN SUPPORT OF APPELLANTS
SECRETARY OF STATE JOCELYN BENSON AND ATTORNEY GENERAL
DANA NESSEL'S EMERGENCY APPLICATION
FOR LEAVE TO APPEAL**

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Interests of Amici Curiae¹

Amici curiae are civil rights groups and public interest organizations committed to securing equal and unfettered access to the ballot for voters of color and encouraging political participation by all citizens. More detailed statements of interest are contained in the accompanying Appendix.

Introduction

Amici curiae submit this brief in support of Secretary of State Jocelyn Benson's guidance prohibiting firearms inside or within 100 feet of polling places, clerks' offices, and absent voter counting boards (the "firearm guidance"). In light of the expedited nature of these proceedings, amici's brief is limited to two critical points regarding the balancing of equities and harms required at the preliminary injunction stage of a case.

First, there is a substantial public interest in maintaining the firearm guidance through this year's election. Limiting open carry in and around polling places will reduce the risk of voter suppression through voter intimidation, a persistent and pernicious threat to the right to vote, particularly for voters of color throughout the State.

Second, Appellees will not suffer such substantial harm from the firearm guidance so as to warrant an injunction. The guidance merely prohibits the open carry of firearms inside or within 100 feet of polling places, clerks' offices, and absent

¹ Pursuant to MCR 7.212(H)(3), counsel for amici curiae authored this brief in its entirety and no party or their counsel, nor any other person or entity other than amicus or their counsel, authored any portion this brief or made a monetary contribution intended to fund its preparation or submission.

voter counting boards. Secretary Benson’s guidance *does not* prohibit concealed carry by an individual authorized by the building to carry a concealed pistol, *does not* prohibit the open carry of firearms outside 100 feet of a polling place, and *does not* prohibit a voter from lawfully possessing their firearm inside their vehicle, even within 100 feet of a polling place. Any claimed burden is slight, especially because similar restrictions are already in place at many polling places—restrictions that Appellees do not challenge. The balance of equities and harms thus weighs against an injunction, and this Court should reverse the decision of the Court of Claims.

Argument

“Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant’s demonstration that the applicant is likely to prevail on the merits; and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted.” *State Employees Ass’n v Dep’t of Mental Health*, 421 Mich 152, 157–58; 365 NW2d 93 (1984). The Court of Appeals reviews a trial court’s decision to grant or deny a preliminary injunction for abuse of discretion. *Davis v City of Detroit Fin. Review Team*, 296 Mich App 568, 612 (2012). Here, issuing the injunction will cause substantial harm to the public but little harm to Appellees. The Court of Claims thus abused its discretion in granting Appellees’ request for an injunction.

Regarding harm to the public, the public interest favors sustaining Secretary Benson’s firearm guidance. The Michigan Supreme Court has long recognized the primacy of the right to vote in our constitutional order. *See Michigan State UAW Community Action Program Council v Austin*, 387 Mich 506, 514; 198 NW2d 385 (1972) (“The right to vote has always received a preferred place in our constitutional system.”); *id.* at 515 (“[T]he right to vote is a right which is at the heart of our system of government.”). And Michiganders have coalesced around the primacy of the right to vote, having emphatically expressed their preference for the construction of constitutional guarantees “in favor of voters’ rights.”² Few would challenge that the right did not come easy to people of color, who were denied access to the franchise for much of this country’s history through *de jure* ballot denial or voter suppression tactics, including voter intimidation.³ *See also In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 74; 740 NW2d 444 (2007) (Cavanagh, J., dissenting) (“It certainly is beyond dispute that certain voters in our country—and even our state—have been intimidated and harassed to keep those citizens from voting.”).

The appearance of voter intimidation has changed over the past century, but intimidation and harassment persist as democratic threats that adversely affect a voter’s agency to cast their ballot without influence, thus encroaching on their right to vote. The threat of voter intimidation is especially acute in today’s politically and

² Const 1963, art 2, § 4(1).

³ This brief refers to “voter intimidation” broadly to mean both acts intended to threaten, intimidate, or coerce any person for voting or attempting to vote, or acts perceived by the voter as intended to threaten, intimidate, or coerce them for voting or attempting to vote. See 52 USC § 10307.

socially volatile climate. In Michigan, multiple armed groups proliferated across the State, causing widespread angst and threatening violence against the State's highest executive. On Election Day, large groups are expected descend upon polling places throughout the State, and specifically in majority-minority communities, to monitor election-related activities.⁴ Secretary Benson's firearm guidance is one step in ensuring that polling places and the buffer zones immediately surrounding them are free from intimidation by heavily armed groups that was characteristic of many public spaces in the State over the past several months.

Regarding harm to Appellees, almost none exists. Secretary Benson's guidance is narrow: it prohibits voters from openly carrying firearms in or within 100 feet of polling places, clerk's offices, and absent voter election boards. Secretary Benson's guidance does not affect Appellees' ability to lawfully carry concealed handguns in buildings where it is already permitted, does not prohibit them from openly carrying any sort of firearm outside the 100-foot buffer zone or storing their firearms in their cars, and existing firearm statutes already restrict Appellees from openly carrying firearms in many polling places.

I. The public has a substantial interest in voting in an environment free from intimidation and disruption.

The public will face substantial harm as a result of the Court of Claims' injunction. The public has a compelling interest in a voting experience free from perceived harassment and intimidation. As the United States Supreme Court has

⁴ Beggin, *Crush of poll watchers expected at Michigan election raises intimidation fears*, Bridge Michigan (October 13, 2020), <https://www.bridgemi.com/michigan-government/crush-poll-watchers-expected-michigan-election-raises-intimidation-fears>.

recognized, the state has an interest in setting aside a polling place as an “island of calm in which voters can peacefully contemplate their choices.” *Minnesota Voters Alliance v Mansky*, 138 S Ct 1876, 1880 (2018) (internal quotation marks omitted). Secretary Benson’s guidance facilitates the public’s interest in elections free from intended or perceived threats of harm.

Voter intimidation has a long history in this country, and the specter of armed poll watchers, and even self-identified militias, is real, especially in today’s volatile political climate. Voters across the country will head to the polls in an election where political actors are orchestrating large, aggressive poll-watching campaigns to monitor or challenge individual voters. National security and law enforcement experts warn of increased risk of violence around the election. And thousands of poll watchers are pledged to descend upon Michigan on Election Day,⁵ even as Michiganders are reeling from the news of the recently foiled, politically motivated plot to kidnap the Governor, harm law enforcement officers, and attack the State Capitol. In this context, for many voters, the mere presence of individuals openly carrying assault-style firearms inside or near a polling place is a threat of harm sufficient to deter voter participation.

A. The United States has a long history of voter intimidation and polling place disruption.

Voter intimidation has been a recurring and persistent problem throughout United States history as a means of abridging the votes of Black people who attempt to enter and exercise the franchise.

⁵ *Id.*

Voting rights for Black Americans were not guaranteed at the country's founding. It was not until after the end of the Civil War in 1865 that the expansion of suffrage contemplated extending the franchise to Black people. After the Civil War, Congress adopted the Reconstruction Amendments, including the Fifteenth Amendment, which secured the right to vote without regard to race for the first time.⁶ As a result, African Americans started to see “unprecedented electoral success,” as they used their political power to elect Black officials.⁷ This progress was met with severe pushback: from 1868 until the mid-1870s, white supremacist military organizations used intimidation, violence, and even assassinations to repress Black voters and prevent them from exercising their right to vote.⁸ As might be implied, these acts of violence were not limited to Black prospective voters; “violence and harassment was also directed at white Republicans and Union sympathizers.”⁹

Congress responded by passing a series of laws known as the Enforcement Acts, the purpose of which were to “guarantee the rights protected by the Fourteenth and Fifteenth Amendments, particularly, the right to vote.”¹⁰ Although many of the

⁶ US Const, Am XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

⁷ Cady & Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 NYU Rev L & Soc Change 173, 184 (2015) (“Voters Strike Back”) (observing that “[b]efore the Civil War, no blacks had been elected to federal office, but during Reconstruction, fifteen African-Americans were elected to the United States House of Representatives and two to the United States Senate from previously confederate states”); see also Anderson, *One Person, No Vote* (2019), p 2.

⁸ See *id.* at 184-85 (white people, especially in Southern states, engaged in a “sustained campaign of voter intimidation through terrorism and violence”); see also Foner, *Reconstruction America's Unfinished Revolution, 1864-1844*, p 427 (1988) (“Alabama freedman George Moore reported how, in 1896, Klansmen came to his home, administered a beating, ravished a young girl who was visiting [his] wife, and wounded a neighbor. “The cause of this treatment, they said, was that we voted the radical [Republican] ticket.”); Anderson, *supra* note 6, at 14.

⁹ *Voters Strike Back*, at 185.

¹⁰ *Id.*

statutes' provisions criminalized interference with voting rights—including conspiracies “to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote”—political violence continued all over the country.¹¹ For example, in 1871, white rioters initiated a streak of violence throughout the city of Philadelphia “in an attempt to silence the Black vote.”¹² Among those killed for trying to vote was Octavius Catto, an educator who fought for emancipation alongside Frederick Douglass.¹³ After the Supreme Court struck down many of the criminal provisions of the Enforcement Acts as unconstitutional, and as “the nation’s appetite for Reconstruction waned,” a new era of violence against Black voters, and other types of disenfranchisement, began.¹⁴

During this time, an elaborate system of poll taxes, literacy tests, grandfather clauses, and other discriminatory policies barred many Black people from registering to vote.¹⁵ Also, the paramilitary groups that arose in the mid-1870s continued to resist social change—including and federal protection of the franchise for Black voters—by organizing and travelling in large groups and armed with rifles to intimidate Black voters and suppress their vote.¹⁶ This period of terror led to a

¹¹ *Id.* at 186-87.

¹² Armstrong, *Philly Just Unveiled Its First Memorial to an African-American Figure*, Philadelphia Magazine (Sept. 26, 2017), <https://www.phillymag.com/news/2017/09/26/octavius-catto-statue-city-hall/>.

¹³ *Voters Strike Back*, at 186-87.

¹⁴ *Id.* at 187.

¹⁵ *Id.*

¹⁶ *Id.* at 188 (“organized groups . . . once again staged a campaign of violence and intimidation aimed at black[people] and their political allies”); see also Keyssar, *The Right to Vote* (2d ed. 2009), p 207 (Blacks “who were adamant about registering [to vote] could lose their jobs, have loans called due, or face physical harm. More than a few were killed.”).

decrease in voting among Black people, despite their enthusiasm to participate in democracy by voting.¹⁷

Black Americans worked for decades to regain their ability to vote without intimidation. It wasn't until the beginning of the Civil Rights Movement in the 1950s that the promise of the Fifteenth Amendment started to come within reach. Congress passed the Civil Rights Act of 1957, which contained a voter intimidation provision which made it “unlawful for a private individual as well as one acting under color of law to interfere or attempt to interfere with the right to vote in any . . . election concerning Federal Offices.”¹⁸ But this law did little to increase voter registration or voter turnout among Black Americans. The Justice Department was “unable or unwilling to aggressively enforce the law’s protections.”¹⁹ And prosecutors also had difficulty showing “purposeful discrimination,” which the statute required.²⁰ In 1961, the Federal Commission on Civil Rights reported that “in some 100 counties in eight Southern States, discriminatory laws, arbitrary registration rulings, and threats of physical violence or economic reprisal still kept most Negro citizens from exercising the right to vote.”²¹

The mid-1960s saw the height of the Civil Rights Movement, as large swaths of citizens across the country activated for the cause of securing voting rights for Black Americans. In 1965, public outrage over events such as the “Bloody Sunday”

¹⁷ *Voters Strike Back*, at 188.

¹⁸ Statutory History of the United States: Civil Rights (Bernard Schwarz ed 1970), 852 (discussing 52 USC § 10101(b)).

¹⁹ *Voters Strike Back*, at 189.

²⁰ *Id.*

²¹ *Id.*

attack by Selma police on peaceful protesters crossing the Edmund Pettus Bridge brought nationwide attention to the resistance Black Americans faced in their attempt to vote.²² The federal government responded by passing the Voting Rights Act of 1965, which, among other key provisions, included a section forbidding voter intimidation without regard to the subjective purpose of the defendant.²³ “Rather, defendants would be deemed to intend the natural consequences of their acts.”²⁴

B. Voter intimidation persists today.

The Voting Rights Act and other federal and state laws prohibiting voter intimidation “largely ended the most flagrant instances of voter intimidation seen during Reconstruction and Jim Crow.”²⁵ But voter intimidation and suppression persist.²⁶

One modern form of voter intimidation includes ballot security task forces, or groups of people charged with various election-day activities that have the intended effect of intimidating voters and discouraging voter turnout.²⁷ Beginning in the 1980s, the Republican National Committee (“RNC”) and state and local Republican

²² *Id.* at 190.

²³ 52 USC § 10101(b) (“No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose, or of causing such person to vote for, or not to vote, for any candidate . . .”).

²⁴ *Voters Strike Back*, at 190.

²⁵ *Id.* at 215. Shortly following the passage of the Voting Rights Act, two counties in Michigan—Allegan and Saginaw Counties—were added to the preclearance provision of Section 5 of the Act. Department of Justice, *Jurisdictions Previously Covered by Section 5*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²⁶ Swirsky, *Minority Voter Intimidation: The Problem that Won’t Go Away*, 11 Temp Pol & Civ Rts L Rev 359, 364 (2002) (“Minority Voter Intimidation”).

²⁷ See Mock, *How Voter Intimidation Could Get Uglier*, Bloomberg CityLab (October 7, 2020), <https://www.bloomberg.com/news/articles/2020-10-07/how-voter-intimidation-could-become-violent-in-2020> (discussing ballot security task forces).

parties openly sponsored a series of so-called “ballot security” programs purportedly designed to deter voter fraud.²⁸ The first reported use of the program was in Passaic County, New Jersey, when the RNC promoted the use of tactics “such as the hiring of off-duty police officers, some wearing black armbands, to patrol heavily-minority precincts and the posting of signs in urban neighborhoods warning that the area was being patrolled by the Ballot Security Task Force.”²⁹ The patrol members “openly flashed their guns,” creating the optics that they worked in official law enforcement capacity when they did not.³⁰

In 1982, the RNC entered into a consent decree in which it agreed, among other things, to refrain from attiring or equipping employees, or permitting them to be attired or equipped, “in a manner which creates the appearance that the individuals are performing official or governmental functions, including . . . wearing public or private law enforcement or security guard uniforms, using armbands, or carrying or displaying guns or badges except as required by law or regulation . . .”³¹ It also prohibited them from carrying out any “ballot security activities” in minority-majority districts.³² The RNC would violate the agreement if they did anything

²⁸ *Id.*

²⁹ *Minority Voter Intimidation*, at 360–61. No doubt, both political parties have a long and notorious history of using a variety of tactics to disenfranchise, or otherwise discriminate against, Black voters. For example, in the 1920s, the Democratic Party of Texas established internal rules that required all voters in its primary to be white, thus excluding Black Democratic voters from participating in the primary for several election cycles. The Supreme Court struck down this policy in its 1944 decision *Smith v Allwright*, 321 US 649 (1944). That this example focuses on the acts of the Republican party should not be viewed as any formal or implied political position.

³⁰ See Mock, *supra* note 26.

³¹ *Minority Voter Intimidation*, at 361.

³² See Mock, *supra* note 26.

during election periods that deterred minorities from voting, whether that was intentional or just the outcome.³³

Despite the constraints in the consent decree, in 1986, the RNC planned a “ballot security” effort in the form of a mass mail campaign targeting Black voters in Michigan, Missouri, Indiana, and Pennsylvania.³⁴ Additional litigation ensued, and the mail campaign was ceased via settlement similar to the 1982 consent decree.³⁵

The 1982 consent decree expired in 2018; the 2020 presidential election will be the first without the 1982 consent decree,³⁶ and will take place at a time when the nation is dealing with an uptick in racial tension and political discord. Ahead of the presidential election, the RNC has recruited thousands of poll watchers “to monitor voting for irregularities.”³⁷ And a leading campaign figure has called for “every able-bodied man, woman to join” an “election security operation” and watch voters, so as to not “let them steal [the election].”³⁸ Thousands of people are expected to answer this call and monitor polls all over the country; an especially large showing is expected in communities of color across Michigan.³⁹ This, combined with the surge of

³³ *Id.*

³⁴ People for the American Way Foundation, Special Report, *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today*, p 12, <http://archive.fairvote.org/righttovote/PFAW-NAACP.pdf>.

³⁵ *Id.*

³⁶ Shapiro, *Decades-Old Consent Decree Lifted Against RNC's "Ballot Security" Measures*, NPR (January 9, 2018), <https://www.npr.org/2018/01/09/576858203/decades-old-consent-decree-lifted-against-rncs-ballot-security-measures>.

³⁷ Fessler, *Trump's Calls for Poll Watchers Raise Fears About Voter Intimidation*, NPR (September 30, 2020), <https://www.npr.org/2020/09/30/918766323/trumps-calls-for-poll-watchers-raises-fears-about-voter-intimidation>.

³⁸ *Id.*

³⁹ Beggan, *supra* n. 3.

armed militia-styled activity across the state, is cause for concern for many voters, especially voters of color.

C. Preventing the credible threat of voter intimidation is in the public interest.

Michigan has seen the strain of today's political strife acutely. Since mid-summer, heavily armed militias have been active across the state. In response to Governor Whitmer's measures responding to the COVID-19 pandemic and demonstrations supporting the Black Lives Matter movement following police killings of Black people, protests erupted across the state. On August 15, 2020, members of an alt-right group called the Proud Boys and counter-protesters clashed in downtown Kalamazoo, Michigan.⁴⁰ Authorities said the groups were "visibly armed with a variety of weapons, including guns."⁴¹ And at a COVID-related demonstration, protesters armed with assault rifles entered the Michigan State Capitol Building.⁴² On October 8, 2020, the U.S. Federal Bureau of Investigation announced the arrests of 13 suspects accused of plotting to kidnap and possibly assassinate Governor Whitmer and to overthrow the state government.⁴³ That same day, two political

⁴⁰ Silverman & Chavez, *Clashes break out at rally in Michigan*, CNN (August 16, 2020), <https://www.cnn.com/2020/08/15/us/far-right-rally-proud-boys-michigan/index.html>.

⁴¹ *Id.*

⁴² Eggert, Foody, & Flesher, *Agent: Michigan, Virginia governors mentioned in kidnap plot*, AP (October 13, 2020), <https://apnews.com/article/virus-outbreak-kidnapping-michigan-gretchen-whitmer-arrests-b0d90b827be272781239f8e841d635dd>.

⁴³ Egan & Baldas, *'Deeply disturbing': Feds charge extremists in domestic terror plot to kidnap Michigan Gov. Gretchen Whitmer, create civil war*, Detroit Free Press (October 8, 2020), <https://www.freep.com/story/news/nation/2020/10/08/militia-members-charged-plot-against-michigan-gov-gretchen-whitmer/5923650002/>. One person suspected of participating in the plot has ties with Ryan Kelley, a member of the Allendale Township planning commission and founder of American Patriot Council, an organization whose rallies are usually attended by people openly carrying large, assault-style firearms. See Lobo, *Calls for Allendale official's removal intensify*, Detroit Free Press, (October 12, 2020), <https://www.freep.com/story/news/local/michigan/2020/10/12/allendale-officials-ties-kidnap-plot-spark-call-removal/5975877002/>.

operatives accused of orchestrating a series of robocalls targeting minority voters “in an attempt to deter them from voting in the November election” turned themselves in to law enforcement officials.⁴⁴

The armed occupation at the State Capitol and the foiled plot to kidnap the Governor have served as what some are calling “warning signs” that Michigan is at high risk of experiencing a militia-styled occupation during and after the election.⁴⁵ Multiple reports anticipate that on Election Day, “thousands of poll watchers . . . are expected to descend on precincts throughout Michigan.”⁴⁶ Although poll watchers and challengers are expected statewide, their presence is highly anticipated “in communities of color including Flint and Detroit.”⁴⁷

Given this context and the nation’s tragic history of violence against Black people seeking to exercise their right to vote, many minority voters are likely to be intimidated by armed persons inside polling places. In fact, many voters have already expressed concern about a potential armed-militia presence and intimidating atmosphere expected at polling places throughout the State on Election Day.⁴⁸ Their fears are eminently reasonable given the charged rhetoric and violent plots that have recently emerged.

⁴⁴ Roth, *The two right-wing men accused of making voter intimidation calls to Detroit residents have turned themselves in to police*, Michigan Live (October 8, 2020), <https://www.mlive.com/public-interest/2020/10/the-two-right-wing-men-accused-of-making-voter-intimidation-calls-to-detroit-residents-have-turned-themselves-into-police.html>.

⁴⁵ ACLED, *Standing By: Right-Wing Militia Groups & the US Election* (October 2020), pp 21–22, https://acleddata.com/acleddatanew/wp-content/uploads/2020/10/ACLED_MilitiaWatch_StandingByMilitiaGroups_2020_Web.pdf.

⁴⁶ Beggan, *supra* n.3.

⁴⁷ *Id.*

⁴⁸ See State Appx, Vol 2, Exhs. C–W.

The Court of Claims held that Michigan statutes already prohibiting voter intimidation undermine the Secretary's argument that the public interest weighs in favor of prophylactic guidance aimed at preventing voter intimidation.⁴⁹ But successful instances of "[v]oter intimidation . . . are difficult to detect." *Burson v Freeman*, 504 US 191, 208 (1992); see also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 25 n.60 (same). The Court of Claims' opinion does not account for the chilling effect this approach has on voters. Avoiding an environment conducive to voter intimidation is much more effective than relying on individuals who are victims of intimidation to report it.

Secretary Benson's firearm guidance promotes a safe space for people to vote without preventing people who wish to openly carry their firearms near polling places from doing so, so long as they do not carry their firearms in or within 100 feet of polling places, clerk's offices, and absent voter counting boards. The public has a substantial interest in protecting these voters while they are inside polling places, and Secretary Benson's guidance is a reasonable means of doing that.

II. Appellees will not suffer serious harm under Secretary Benson's firearm guidance.

In comparison to the serious harm that could befall the public from the risk of voter intimidation and harassment, little harm will befall Appellees from their inability to openly carry firearms in a polling place. Because Appellees failed to show irreparable harm before the Court of Claims, the court abused its discretion by granting the injunction.

⁴⁹ See Opinion and Order, p 13.

Secretary Benson’s firearm guidance was implemented to provide “clear standards” about when and where the public can openly carry a firearm.⁵⁰ And the scope of Secretary Benson’s guidance is narrow: It prohibits the public from openly carrying firearms inside or within 100 feet of polling places, clerks’ offices, and buildings where ballots are being counted.⁵¹ It does not prohibit the public from openly carrying a firearm outside of 100 feet of these spaces, or from carrying a concealed firearm in spaces where it is already allowed. Nor does it prohibit the public from lawfully storing their firearms in their vehicles while they are inside or within 100 feet of these spaces.⁵² Rather, Secretary Benson’s targeted guidance leaves the public free to openly carry firearms in almost all locations, while ensuring the inside of and areas immediately surrounding polling places are free of “disruption, fear, or intimidation [to] voters, election workers, and others present.”⁵³

Given the limited nature of Secretary Benson’s guidance, and the substantial public interest in voting without threat of intimidation, Appellees will not suffer harm outweighing other interests. Even absent the Secretary’s firearm guidance, many voters—other than those with concealed carry permits—are already prohibited from openly carrying firearms in or near premises that may be used as polling places on

⁵⁰ State of Michigan, Jocelyn Benson, Secretary of State, *Open Carry of Firearms at Polling Places on Election Day Prohibited* (October 16, 2020), https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

election day, including schools, childcare centers, sports arenas, property owned by a place of worship, and entertainment facilities.⁵⁴

Appellees do not challenge the lawfulness of these already-existing firearm restrictions. Nonetheless, Appellees argued in the court below that Secretary Benson’s promulgation of uniform guidance will disenfranchise them and hinder their ability to post social media messages with an “I Voted” sticker on the holsters of theirs and their members’ firearms.⁵⁵ These arguments are meritless.

First, no voter is disenfranchised simply because they cannot openly carry their firearms into a polling place, and Appellees do not cite any authority from any jurisdiction suggesting that the right to vote includes the right to openly carry a firearm while voting. Such a position would be untenable, as Michigan law already prohibits the open-carry of firearms in polling places that are schools, churches, entertainment facilities, and sports arenas, and Appellees do not challenge those restrictions.⁵⁶

Second, Secretary Benson’s firearm guidance obviously does not prohibit voters from taking or posting on social media an image of an “I Voted” sticker on a firearm holster. Appellees who lack a concealed carry license and are therefore already prohibited from bringing firearms into numerous venues that serve as polling places can still affix an “I Voted” sticker on a firearms holster. And all voters can still carry

⁵⁴ See MCL 28.425o. The statute’s open carry prohibition contains exceptions only for people with a valid concealed pistol license. Appellees nowhere allege that they or their members have a valid concealed pistol license that would permit them to openly carry in the listed premises.

⁵⁵ See Br in Support of Emergency Motion for Hearing on Declaratory and Injunctive Relief, pp 11–12.

⁵⁶ See MCL 28.425o.

their firearms outside of 100 feet of a polling place, clerk's office, or absent voter counting location, and can store their firearms in their vehicles while they vote.⁵⁷

Stated simply, Appellees do not suffer such substantial harm as a result of the firearm guidance so as to warrant the extraordinary remedy of a preliminary injunction here. The balance of harms weighs against injunctive relief.

Conclusion

“The abstract right to vote means little unless the right becomes a reality at the polling place on election day.” *Perkins v Matthews*, 400 US 379, 387 (1971). Secretary Benson's firearm guidance seeks to make that right a reality for thousands of voters, especially voters of color, who are at risk of being intimidated away from the polls. There is thus a great public interest in sustaining Secretary Benson's firearm guidance, and the balance of harms weighs strongly in its favor. For the foregoing reasons, this Court should reverse or stay the Court of Claims' injunction.

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Respectfully submitted,

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⁵⁷ State of Michigan, Jocelyn Benson, Secretary of State, *Open Carry of Firearms at Polling Places on Election Day Prohibited* (October 16, 2020), https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf (Secretary Benson's firearm guidance does not a person from openly carrying outside of 100 feet of a polling place or from leaving a firearm inside a vehicle parked within 100 feet from a building).

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Appendix: Interests of Amici Curiae

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”), is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation. Since the 1940s, LDF has been involved in numerous cases relating to voting rights, and protecting the right to vote, before state and federal courts. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers’ Ass’n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977) (en banc); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

The **American Civil Liberties Union of Michigan (“ACLU”)** is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the right to vote, ballot access, and other rights vital to a healthy and robust democracy. The ACLU provides direct representation and files amicus curiae briefs in cases involving civil rights that affect the democratic process, including protecting the right to vote and ensuring every vote casted is counted. See e.g., *Ganik et al. v Winfrey et al*, No 20-013685-AW (Wayne Co Cir Ct 2020); *League of Women Voters et al v Secretary of State et al*, --- NW2d ----, 2020 WL 423319 (Mich App 2020); *League of Women Voters et al v Secretary of State*, --- NW2d ----, 2020 WL 3980216 (Mich App 2020); *Promote the Vote et al v Johnson et al*, No. 2:18-cv-12692 (ED Mich 2018); *Hindel v Ohio Secretary of State*, 875 F3d 344 (Mich App 2017).

This case involves Secretary of State Jocelyn Benson’s guidance prohibiting firearms inside or within 100 feet of polling places, clerks’ offices, and absent voter counting boards. The directive aims to protect all voters from intimidation or harassment that may follow from the visual presence of firearms on election day. The directive at issue in this case sets a clear, consistent standard for voters and local election administrators about the permissibility of openly carrying a firearm in and immediately surrounding polling places. If overturned, the directive will likely disproportionately limit the voices of voters, especially Black voters who have

historically faced voter intimidation and disenfranchisement, and who now wish to cast their ballot on election day free from intimidation or harassment.

Detroit Action is a fiscally sponsored project of Tides Advocacy, a California nonprofit public benefit corporation. Detroit Action is a union of Black and Brown, homeless and housing insecure, low- and no-income Detroiters organizing for power around housing and economic justice. Detroit Action is a grassroots and member-led, multigenerational, community-based organization fighting for real political power. Detroit Action provides opportunities for individuals and families to develop as full human beings through critical survival services, leadership development, organizing training, nonpartisan voter education and mobilization drives, direct action, and collaboration with allied organizations locally, statewide, nationally, and even internationally.

The **Detroit Justice Center (DJC)** is a non-profit law firm working alongside metro-Detroit communities to create economic opportunities, transform the justice system, and promote equitable and just cities. A key aspect of DCJ's work involves collaborating on campaigns that center the needs, wisdom, and vision of its clients and community partners. DCJ has participated in people's forums, coalition building, community surveys, policy advocacy, direct action, cultural organizing, direct legal representation, and broad impact litigation.

Through this work, DCJ has come to appreciate the importance of people's ability to freely and safely participate in the democratic process. The communities where we work—mostly low-income communities of color—face extreme barriers to

this democratic freedom, both through the impacts of poverty and trauma, and the very real threats of white supremacist violence. DCJ's experience teaches that gun violence, and the prevalence of guns in Michigan communities, dramatically exacerbates this violence. This year, communities of color watched in shock and fear as armed white nationalist militias stormed the state capitol in Lansing, forcing our state representatives to wear bulletproof vests as they legislated, and seek the help of armed community members for their own protection. In light of these and other events, it is not unreasonable for DCJ to detect that there is a threat of this same type of violence and intimidation at the polls. This experience teaches that guns and gun violence have significant anti-democratic impacts for communities of color. DCJ thus has a significant interest in seeing guns limited from the polls.

The **Michigan Welfare Rights Organization ("MWRO")** is a state chapter of the National Welfare Rights Union that advocates for public assistance recipients and low-income people. MWRO encourages community involvement and grassroots organizing to improve the status of voters and conducts voter engagement efforts targeted at low-income voters of color throughout the state of Michigan. MWRO has previously engaged in election protection efforts to assist voters in flagging and remedying voting problems or irregularities at polling sites.

Detroit People's Platform ("DPP") is a broad network of Detroit-based social justice organizations, activists, and residents committed to bringing about just transformation in economics and social dynamics through popular education, celebration, and organizing. DPP has long held commitment to working towards a

fair and just Detroit and helps the people of Detroit recognize their voice in deciding the future of the City.