STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN OPEN CARRY INC.; and,
KENNETH HERMAN,

Plaintiff-Appellants/

Court of Appeals Case No. 329418
Lower Court Case No. 2015-104373-CZ
Genesee County Circuit Court

CLIO AREA SCHOOL DISTRICT;
FLETCHER SPEARS, III; and,
KATRINA MITCHELL.

Defendant- Appellees/

_____/

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

**** This appeal involves interpretation of a constitutional or statutory provision ****

ORAL ARGUMENT REQUESTED

NOTICE OF FILING
AND
PROOF OF SERVICE

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants, Michigan Open Carry, Inc. and Kenneth Herman, states that this Court has jurisdiction to decide this appeal pursuant to MCR 7.303(B)(1). The grounds for this appeal include MCR 7.305(B)(2); 7.305(B)(3); 7.305(B)(5)(a); and, 7.305(B)(5)(b).

On December 15, 2016, the Michigan Court of Appeals published its decision *Per Curiam* reversing the judgment of the Genesee County Circuit Court in favor of Defendant-Appellees Clio Area School District; Fletcher Spears, III, and Katrina Mitchell. (**Apx 1A**) Plaintiff-Appellants, Michigan Open Carry, Inc. and Kenneth Herman, timely file their Application for Leave to Appeal as required by MCR 7.305(C)(2)(a).

STATEMENT OF QUESTION PRESENTED

I. WHETHER A SCHOOL DISTRICT IS IMPLIEDLY/FIELD PREEMPTED, FROM PROMULGATING FIREARM RULES AND REGULATIONS?

The trial court answered "YES"

The Court of Appeals answered "NO"

Plaintiff-Appellants contend the answer should be "YES"

Defendant-Appellees contend the answer should be "NO"

STATEMENT OF FACTS

A. THE PARTIES:

Plaintiff-Appellant, Michigan Open Carry, Inc. [hereinafter "MOC"] is a Michigan not-for-profit advocacy organization created under the Nonprofit Corporation Act of 1982, MCL §§ 450.2101 - 450.3192. MOC supports the lawful carry of holstered handguns; provides written material for the use of its members, municipalities, and law enforcement that outlines the laws associated with open carrying of handguns; and, offers seminars on the topic.

Plaintiff-Appellant, Kenneth Herman [hereafter "Mr. Herman"] is a local resident whose daughter attended – at the time the underlying matter was brought before the trial court - Edgerton Elementary School within the Clio Area School District. Mr. Herman is licensed by the State to carry a concealed weapon. Mr. Herman lawfully possesses and carries a pistol.

Defendant-Appellee, Clio Area School District is a school district; pursuant to MCL 380.6, a local unit of government pursuant to MCL 169.209(7), and a quasi-municipal corporation that is subject to the Constitution and laws of the state, [hereafter referred to as "CASD"]. Remaining Defendant-Appellees are employees of CASD who are engaged in the enforcement of CASD's policies.

B. PROCEDURAL AND FACTUAL BACKGROUND:

MCL 750.237a(4) generally prohibits possession of a firearm within a "weapon free school zone". MCL750.237a(5)(c) exempts "an individual who is licensed by this state or another state to carry a concealed weapon".

MCL 28.425o(1)(a) generally prohibits the carrying of a "concealed weapon" at a school or school property. However, this statute specifically provides an exception for a concealed

pistol licensee while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school.

18 USC §922(q)(2)(A) restricts knowingly possessing a firearm in a school zone. An exception exists for an individual licensed to do so by the State in which the school zone is located. 18 USC §922(q)(2)(B)(ii).

Reading the three statutes in concert, an individual who is licensed by this state to carry a concealed weapon may not carry a concealed weapon onto a school or school property, excepting those who are in a vehicle and picking up or dropping off the student from school. An individual who is in possession of a firearm that is not concealed, (i.e. openly carried), is not prohibited from possessing that firearm at a school or on school property if that individual is licensed by this state to carry a concealed weapon. The concealed-carry exception of picking up or dropping off a student does not act as a limitation to those who are openly-carrying elsewhere at a school or on school property.

CASD implemented its Policy "7217 – WEAPONS" prohibiting Mr. Herman and others from *inter alia* possessing a weapon in any setting under the control or sponsored by CASD. (**Apx 2A**). Despite the legality of doing so under State and federal laws, CASD's policy prohibits Mr. Herman from possessing an openly-carried pistol while attending school functions. CASD threatened Mr. Herman with criminal prosecution for trespass. Because of Plaintiff-Appellee Herman's political position on firearm rights in general, and CASD's policy in particular, his daughter was singled-out by CASD employees for ridicule and contempt.

On March 5, 2015, MOC and Mr. Herman brought their suit in the Genesee County Circuit Court for declaratory relief in an effort to conclusively establish that the CASD policy was unlawful as it interferes with lawful firearm possession. (**Apx 3A**)

At first, the CASD Board of Education publicly acknowledged that openly-carried pistols by licensed individuals is lawful. On March 24, 2015, the Board passed a resolution acknowledging the Law and urging "*lawmakers to amend applicable Michigan law to prohibit an individual from openly carrying a firearm on school property and to prohibit an individual who is licensed to carry a concealed pistol from carrying a pistol unconcealed on school property*." *CASD Board of Education Minutes of March 24, 2015*, Resolution #955. (See **Apx 4A**)

On July 6, 2015, CASD then responded to MOC's Complaint by filing their *Motion for Summary Disposition and Declaratory Judgment*. (**Apx 5A**) CASD's motion did not specify a court rule upon which relief was sought. MOC responded to CASD's motion with its *Response and Opposition to Defendants' Motion for Summary Disposition and Declaratory Judgment*. (**Apx 6A**) Defendant-Appellants' motion was heard on August 10, 2015 before the trial court. At the motion hearing, the trial court denied CASD's motion(s) and granted MOC and Mr. Herman's request for declaratory relief. The trial court issued its written *Order Denying Defendants' Motion for Summary Disposition and Granting Plaintiffs Declaratory Relief* on September 7, 2015 (**Apx 7A**).[1] The Order incorporated the court's Transcript of Proceedings of August 10, 2015.

[1] All documents attached hereto were considered by the court below, or are properly part of the record on appeal. See *Coburn v Coburn*, 230 Mich App 118, 583 NW2d 490, *rev'd on other grounds*, 459 Mich 874, 585 NW2d 302 (1998). Copies of constitutional, statutory or court rule provisions are included in the appendix, pursuant to MCR 7.212(C)(7).

CASD appealed the decision of the trial court to the Michigan Court of Appeals. (**Apx 8A**) MOC responded with its responsive Brief. (**Apx 9A**) Oral argument was conducted on December 13, 2016. A written opinion was issued by the appellate court two days later, on December 15, 2016 (**Apx 1A**). The appellate court reversed the decision of the trial court and held that Michigan Law does not preempt CASD policies banning the possession of firearms in schools and at school-sponsored events. This appeal follows.

C. COMPANION CASE:

Contemporaneously heard and decided by the Court of Appeals is an appeal brought by Michigan Gun Owners against Ann Arbor Public Schools (**Apx 10A**). The legal issues are comparable and the Court of Appeals cross-referenced the opinions in each case. *Michigan Gun Owners, Inc. v Ann Arbor Public Schools*; 2016 WL _____; No. 329632, Mich. App., (Dec. 15, 2016)

ARGUMENT

I. WHETHER A SCHOOL DISTRICT IS IMPLIEDLY / FIELD PREEMPTED FROM PROMULGATING FIREARM RULES OR REGULATIONS?

A. STANDARD OF REVIEW:

Questions of law are reviewed de novo. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275 (2008); *People v Sierb*, 456 Mich 519, 522 (1998). Examples of questions of law include the interpretation of statutes, constitutional provisions, *Estes v Titus*, 481 Mich 573, 578-579 (2008); *People v Meconi*, 277 Mich App 651, 659 (2008); *In re Carey*, 241 Mich App 222, 226 (2000), and court rules, *Estes*, 481 Mich at 578-579; *People v Clark (Paul)*, 274 Mich App 248, 251 (2007). A trial court's decision whether to award a declaratory judgment and equitable relief is reviewed *de novo*. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999), *lv den*, 461 Mich 966; 607 NW2d 728 (2000).

B. ISSUE PRESERVATION:

During the lower court proceedings, both in its court filings and during both hearings, MOC argued that CASD's promulgation of rules or regulations regarding possession of firearms on public property was preempted by State Law. (See **Apx 6A**, Plaintiffs' *Response in Opposition to Defendants' Motion for Summary Disposition and Declaratory Judgment*). (See also **Apx 9A**, Plaintiff-Appellees' Brief on Appeal). The same claim is renewed on appeal and the issue, therefore, is preserved.

C. DISCUSSION:

Field Preemption Jurisprudence.

> A state statutory scheme preempts regulation by a lower-level governmental entity when either of two conditions exist: (1) the local regulation directly conflicts with the state statutory scheme or (2) the state statutory scheme occupies the field of regulation that the lower-level government entity seeks to enter, "even where there is no direct conflict between the two schemes of regulation." Capital Area Dist. Library v Michigan Open Carry, 298 Mich. App. at 233, citing Llewellyn, 401 Mich. at 322, 257 N.W.2d 902; see also Ter Beek, 297 Mich. App. at 453, 823 N.W.2d 864; Mich. Coalition, 256 Mich. App. at 408, 662 N.W.2d 864.
>
> In making the determination that the state has thus preempted the field of [firearm] regulation […], we look to certain guidelines.
>
> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.
>
> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld. However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted.

Capital Area Dist. Library v. Michigan Open Carry, Inc., 826 N.W.2d 736, 298 Mich.App. 220 (2012) lv. denied 495 Mich 898, 839 NW2d 198 (2013), citing *Michigan Coalition for Responsible Gun Owners v. City of Ferndale*; 256 Mich.App. 401, 414 (2003); cert. den. 469 Mich. 880 (2003) citing *People v Llewellyn*, 401 Mich 314, 322 (1977).

Conflicting Decisions in the Court of Appeals.

Capital Area Dist. Library v Michigan Open Carry, Inc.

In a case that mirrors the instant issue quite cleanly, the Court of Appeals has clearly established that a quasi-municipal corporation, i.e., a governmental agency authorized by constitution or statute to operate for and about the business of the state, such as a school district, is preempted from instituting firearm regulations and intruding on the state statutory scheme. *Capital Area Dist. Library v. Michigan Open Carry, Inc.*, 826 N.W.2d 736, 298 Mich.App. 220 (2012) lv. denied 495 Mich 898, 839 NW2d 198 (2013).

In *Capital Area Dist. Library*, the court addressed this issue.

> This case is about whether district libraries established under the District Library Establishment Act (DLEA), MCL 397.171 et seq. , are subject to the same restrictions regarding firearm regulation that apply to public libraries established by local units of government. Plaintiff, the Capital Area District Library (CADL), brought this action for declaratory and injunctive relief, seeking to validate and enforce its ban on firearms on its premises. Defendant, Michigan Open Carry, Inc. (MOC), argues that CADL does not have the power to regulate firearms. Our job is not to determine who has the better moral argument regarding when and where it is appropriate to carry guns. Instead, we are obligated to interpret and apply the law, regardless of whether we personally like the outcome. Id. at 223.

Many of the same arguments present in the instant appeal were addressed by the *Capital Area Dist. Library* court. Including the following identical points:

First, the library argued that it properly instituted its firearm policy pursuant to its power derived from the DLEA (MCL §397.182(1)). Similarly, CASD argued that the Revised School Code, MCL §380.11a(3)(b) expressly authorizes the school district to implement a weapons policy to provide for the safety and welfare of pupils. The *Capital Area Dist. Library* court found that the library's weapons policy was permitted under the DLEA in so far as it was not in

direct conflict with state statutes. The same should be expected with the CASD matter.

Second, CADL argued that district libraries were not expressly preempted by the Firearm and Ammunition Act because "in MCL 123.1101(a), the Legislature defined the phrase 'local unit of government' to mean 'a city, village, township, or county.'" *Id*. at 231. CASD similarly argued that the statute does not expressly include "school district" in the above definition. The court found that libraries were not expressly barred from imposing firearm regulations because a library is not a city, village, township or county. *Capital Area Dist. Library* at 231. Again, it is expected that CASD is not <u>expressly</u> barred from imposing its firearm regulation.

The *Capital Area Dist. Library* court did address the nature of both district libraries and school districts, finding that …

> "although district libraries have the authority to adopt bylaws and regulations and do any other thing necessary for conducting the district-library service, as stated earlier, this Court has held that a district library is a quasi-municipal corporation, i.e., a governmental agency authorized by constitution or statute to operate for and about the business of the state. Jackson Dist. Library v. Jackson Co. # 1, 146 Mich.App. 392, 396, 380 N.W.2d 112 (1985), citing Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, 643, 92 N.W. 289 (1902). " [T]he term ' municipal corporation' may be used in the broad sense to include ... quasi-municipal corporations." Huron-Clinton Metro. Auth. v. Attorney General, 146 Mich.App. 79, 82, 379 N.W.2d 474 (1985). Quasi-municipal corporations " possess and can exercise only such powers as are granted in express words or those necessarily and fairly implied in or incident to powers expressly conferred by the Legislature." Id. As previously discussed, the DLEA gives CADL's board the authority to adopt regulations that govern the library, to supervise and control library property, and to do any other thing necessary to conduct the CADL district library service. MCL 397.182(1). Nevertheless, a quasi-municipal corporation such as a district library remains subject to the Constitution and the laws of this state. **See Detroit Sch. Dist. Bd. of Ed. v. Mich. Bell Tel. Co., 51 Mich.App. 488, 494-495, 215 N.W.2d 704 (1974) (explaining that a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state); Lowrey, 131 Mich. at 644, 92 N.W. 289 (" The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and whatever we may think of the right of the**

> **district to administer in a local way the affairs of the district, under the Constitution, we cannot doubt that such management must be in conformity to the provisions of such laws of a general character as [826 N.W.2d 743] may from time to time be passed....")**; see also generally Llewellyn, 401 Mich. at 321, 257 N.W.2d 902 (" Under Const. 1963, art. 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is 'subject to the Constitution and law'."). Indeed, state law may preempt a regulation by any inferior level of government that attempts to regulate the same subject matter as a higher level of government. See McNeil v. Charlevoix Co., 275 Mich. App. 686, 697 & n. 11, 741 N.W.2d 27 (2007). "Thus, although we deal here with a regulation promulgated by a local administrative agency, application of the principles developed in determining the validity of local ordinances in light of statutory enactments on the same or similar subject matter is appropriate." Id. at 697 n. 11, 741 N.W.2d 27. Id. at 231. Emphasis added.

However, after determining that CADL was not expressly barred under the State's preemption statute, and that CADL was authorized under the DLEA to implement its weapons policy, the *Capital Area Dist. Library* court then applied the four-guidelines of the *Llewellyn* analysis.

After applying the first two *Llewellyn* guidelines, the CADL court turned to an analysis which directly touches upon the issues in the instant appeal:

> The third guideline set forth in Llewellyn requires us to examine the pervasiveness of the state regulatory scheme. In addition to the Legislature's enactment of MCL 123.1102, the Legislature's statutory scheme regarding firearm regulation addresses who may possess a firearm and how, when, and where a firearm may be possessed. Subject to exceptions for certain individuals, MCL 750.234d(1) prohibits a person from possessing a firearm on the premises of any of the following: depository financial institutions, churches or other places of religious worship, courts, theatres, sports arenas, daycare centers, hospitals, and establishments licensed under the former Michigan Liquor Control Act.
>
> With the exception of certain individuals, MCL 750.237a(4) prohibits the possession of a weapon in a weapon-free school zone, which is defined as "school property and a vehicle used by a school to transport students to or from school property." MCL 750.237a(6)(d).
>
> Subject to certain exceptions, MCL 28.425o(1) prohibits a person who is licensed to carry a concealed pistol from carrying a concealed pistol on the

premises of any of the following: a school or school property; a public or private child-care center, daycare center, child-caring institution, or child-placing agency; a sports arena or stadium; a bar or tavern licensed under the Michigan Liquor Control Code, MCL 436.1101 et seq.; any property or facility owned by a church or [826 N.W.2d 746] other place of worship; certain entertainment facilities falling within MCL 28.425o(1)(f); a hospital; and a dormitory or classroom of a college or university.

…

As can be gleaned from these numerous statutes included in the Legislature's statutory scheme regulating firearms, the statutory scheme includes "a broad, detailed, and multifaceted attack" on the possession of firearms. Llewellyn, 401 Mich. at 326, 257 N.W.2d 902. **The extent and specificity of this statutory scheme, coupled with the Legislature's " clear policy choice [in MCL 123.1102] to remove from local units of government the authority to dictate where firearms may be taken,"** Mich. Coalition, 256 Mich.App. at 414, 662 N.W.2d 864, demonstrates that the Legislature has occupied the field of firearm regulation that the library's weapons policy attempts to regulate: the possession of firearms.

This conclusion is supported by consideration of the fourth Llewellyn guideline: whether the nature of the regulated subject matter demands exclusive state regulation "to achieve the uniformity necessary to serve the state's purpose or interest." Llewellyn, 401 Mich. at 324, 257 N.W.2d 902**. The regulation of firearm possession undoubtedly calls for such exclusive state regulation. If the state prevents all public libraries established by a city, village, township, or county from passing their own firearms regulations but does not similarly prevent district libraries from doing so, it would result in a "Balkanized patchwork of inconsistent local regulations.**" See City of Brighton v. Hamburg Twp., 260 Mich.App. 345, 355, 677 N.W.2d 349 (2004). In such a case, citizens of this state would be subject to varying and possibly conflicting regulations regarding firearms and "a great deal of uncertainty and confusion would be created." Llewellyn, 401 Mich. at 327, 257 N.W.2d 902. It would be extremely difficult for firearm owners to know where and under what circumstances they could possess a gun and just as difficult for other members of the public to know what libraries to avoid should they wish not to be around guns. [826 N.W.2d 747] **An exclusive, uniform state regulatory scheme for firearm possession is far more efficient for purposes of obedience and enforcement than a patchwork of local regulation.**

Accordingly, we hold that state law preempts CADL's weapons policy because the Legislature, through its statutory scheme in the field of firearm regulation, has completely occupied the field that CADL's weapons policy attempts to regulate. Id. at 237. Emphasis added.

The *Capital Area Dist. Library* court clearly held that local regulations regarding firearm possession are field-preempted by the State. This decision stands in stark contrast to the opinion that is the focus of the instant appeal. How could the State occupy the field of firearm regulation when the CADL decision was reached in 2012, but not now?

Michigan Gun Owners, Inc. v Ann Arbor Public Schools
and,
Michigan Open Carry, Inc. v Clio Area School District

Two cases were simultaneously heard and decided by the Michigan Court of Appeals that each address the same question: Whether a school district is impliedly/field preempted, from promulgating firearm rules and regulations? The reasoning of the Court of Appeals is substantially the same in both decisions.

The opinion in the instant appeal has apparently confused plaintiff's field preemption arguments with statutory preemption. In both cases, the Court of Appeals erroneously determined that that the nucleus of the gun-rights organizations' claims involve statutory preemption. The *Michigan Open Carry* court determined that "*plaintiffs asserted that the CASD policy contradicted and therefore was preempted by MCL 123.1102 ...*" Id. at 3. Further, the Court of Appeals determined that the holding in *Capital Area Dist. Library* "*rested on a judgment that district libraries are so closely akin to the local units of government listed in MCL 123.1101(b) that the same regulatory scheme should apply*." Id. at 6. "*It bears repeating that the statute on which plaintiffs rely does not reference schools or school districts as 'local units of government'* Id. at 8. However, **these determinations are clearly in error**. Michigan Open Carry, Inc. does not claim that the school's firearm regulation is statutorily preempted. And, the

Capital Area Dist. Library court specifically held that statutory preemption did not apply to the library's firearm regulation. "*Thus, as a district library, CADL is not expressly barred by MCL 123.1102 from imposing firearms regulations*". *Capital Area Dist. Library* at 231.

Michigan Open Carry, Inc. did not reference MCL 123.1102 in its appellate brief in any way to support the concept that the school district's firearm regulations were statutorily preempted. The language of the statute did not include school districts, nor libraries.

The *Michigan Open Carry* court seeks to double-down on the statutory preemption analysis by finding that school districts are not "local units of government" as defined in MCL 123.1102:

> "School districts are not formed, organized or operated by cities, villages, townships or counties, but exist independently of those bodies. 'Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education.' Const. 1963, art 8, § 3. While a district library enjoys a general ability to 'supervise and control' its property, MCL 397.182(1)(f), the Legislature has specifically allocated to school districts very broad powers of self-governance, which specifically include '[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity'" *Michigan Open Carry*, ___Mich. App. at ___, slip op at 6.

Of course, the same points were addressed by the court in *Capital Area Dist. Library*, except that court came to a very different conclusion:

> Nevertheless, a quasi-municipal corporation such as a district library remains subject to the Constitution and the laws of this state. See Detroit Sch. Dist. Bd. of Ed. v. Mich. Bell Tel. Co., 51 Mich.App. 488, 494-495, 215 N.W.2d 704 (1974) (explaining that a school district, a quasi-municipal corporation, is a state agency that is subject to the Constitution and laws of the state); Lowrey, 131 Mich. at 644, 92 N.W. 289 (" The school district is a State agency. Moreover, it is of legislative creation. It is true that it was provided for in obedience to a constitutional requirement; and whatever we may think of the right of the district to administer in a local way the affairs of the district, under the Constitution, we cannot doubt that such management must be in conformity to the provisions of

> such laws of a general character as may from time to time be passed...."); see also generally Llewellyn, 401 Mich. at 321, 257 N.W.2d 902. *Capital Area Dist. Library* at 232.

The *Michigan Open Carry* court converts plaintiffs' field preemption argument to a statutory preemption argument and uses its reversed-determination that school districts are no longer local units of government to assist in the discharge the first *Llewellyn* guideline. "*The first Llewellyn factor asks whether the state law cited as preemptive 'expressly provides that the state's authority to regulate in a specified are of the law is to be exclusive.' As we have stated, no such provision exists.*" *Michigan Open Carry,* ___Mich. App. at ___, slip op at 8. Plaintiffs did not cite to MCL 123.1102

The *Michigan Open Carry* court then moves on to the second Llewellyn guideline.

> The second Llewellyn factor requires us to consider legislative history. Plaintiffs point to the House Legislative Analysis we cited in CADL, reciting that MCL 123.1102 "was designed to address the 'proliferation of local regulation regarding firearm ownership, sale, and possession' and the 'concern that continued local authority to enact and enforce gun control ordinances may result in the establishment of a patchwork of ordinances' We find this fragment of legislative history useless, as it speaks to ordinances and local units of government rather than to schools. As no other legislative history has been presented to us, we conclude that this factor does not support preemption. *Id*. at 8.

The referenced House Legislative Analysis is attached as **Apx 11A**. Again, this conclusion stands in stark contrast to the *Capital Area Dist. Library* court which found that "*legislative history supports a finding that the purpose of the statute would only be served by leaving it to the state to regulate firearm possession in all buildings established by local units of government…*" *Capital Area Dist. Library* at 237.

The *Michigan Open Carry* court then determines, in accordance with Llewellyn's third guideline, that *"[f]irearms are indeed pervasively regulated in Michigan." Michigan Open*

Carry, at 8. Rather than concede that this factor weighs in favor of field preemption of the school district's regulation as *Llewellyn* requires, the court pronounces that *"relevant segments of a multifaceted statutory framework evince the Legislature's intent to prohibit weapons in schools, rather than to rein in a district's ability to control the possession of weapons on its campuses."* To support this conclusion, the court references *"26 different laws specifically referencing 'weapon free school zones'."* And, that forces the court to find that *"the pervasiveness of the Legislature's use of the phrase 'weapon free school zones' presses against the preemption of a district policy…"* Id. at 10. Inexplicably, the court uses this field preemption guideline to find that the state intended local units of government to regulate firearms.

Finally, the *Michigan Open Carry* court applies the fourth *Llewellyn* guideline. The court opines that *"[m]ost parents of school-age children send those children to schools located within a single school district. Most parents easily learn and adapt to the policies and procedures applicable to their children's schools and district." Id.* at 10. Apparently, the concept of parents travelling to other school districts for such events as sporting competitions or similar inter-district activities did not enter into the court's calculus.

The *Michigan Open Carry* court noted that "*40 years have passed since our Supreme Court's decision in Llewellyn, the Supreme Court's views regarding the propriety of judicial reliance on legislative history have changed considerably.*" *Id*. at footnote 5. Clearly, the court of appeals feels that Llewellyn is no longer suitable precedent. This position is inconsistent with law, but consistent with the previous reasoning of the dissenter in the *Capital Area Dist. Library* court. That dissenter participated in the *Michigan Open Carry* court as well. The majority in

Capital Area Dist. Library addressed the dissent in a footnote.

> With all due respect to our learned colleague in dissent, her analysis fails to acknowledge the fact that Llewellyn is binding precedent, which we as an intermediate court may not choose to disregard or rebuff. As such, the dissent avoids the required application and analysis of field preemption. It is a tautology to say that because the Legislature did not expressly include district libraries in its definition of local units of government as set forth in MCL 123.1101(a), it must have specifically intended not to occupy the field of gun regulation when it comes to the presence of guns in district libraries. While cases often rise and fall on the plain language of a statute, because this matter entails regulation by a lower-level governmental entity in an area that is regulated by the state, it is not a statutory-interpretation case. Such a simplistic analysis would render the doctrine of field preemption a nullity, which it is not. *Capital Area Dist. Library* at footnote 2

Court of Appeals Decision Reverses 40 Years of Supreme Court Precedent.

The reasoning of the court in *Michigan Open Carry* and *Michigan Gun Owners* in application of the *Llewellyn* guidelines is impossible to reconcile with the decision of the *Capital Area Dist. Library* court. One opinion is faithful to *Llewellyn* and the other two opinions eviscerate it. The most obvious logical disconnect is that *Capital Area Dist. Library* held that the Legislature has completely occupied the field of firearm regulation, and the *Michigan Open Carry* court now holds the polar opposite.

The recent decisions are incompatible with a logical determination of this state's field preemption jurisprudence, which begs this honorable court to grant Appellants' Application for Leave to Appeal the decision of the Michigan Court of Appeals. Appellants' seek the decision of the Michigan Supreme Court overturning the appellate court and upholding the decision of the trial court.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant submits that the factual and legal issues in this appeal are sufficiently complex, such that this case should not be selected for decision without oral argument, because the Court may be aided in its decision if it hears oral arguments from counsel.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated in its brief on appeal, Plaintiff-Appellants MOC and Kenneth Herman respectfully request that this Honorable Court reverse the decision of the Michigan Court of Appeals, and uphold the judgment of the trial court.

Respectfully Submitted,

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Dated: January 26, 2017

APPELLANTS' APPENDIX

1A. Opinion appeal from, *Michigan Open Carry, Inc. v Clio Area School District*, 2016 WL _____; No. 329418, ___Mich. App.___, (Dec. 15, 2016)

2A. Clio Area School District Policy 7217 – Weapons.

3A. Verified Complaint for Declaratory Relief.

4A. Clio Area School District Board of Education Resolution #955.

5A. Clio Area School District Motion for Summary Disposition.

6A. Michigan Open Carry, Inc. Response in Opposition to Defendants' Motion for Summary Disposition and Declaratory Judgment.

7A. Trial Court Order Denying Defendants' Motion for Summary Disposition and Granting Plaintiffs Declaratory Relief.

8A. Defendant-Appellants' Brief on Appeal (Court of Appeals).

9A. Plaintiff-Appellees' Brief on Appeal (Court of Appeals).

10A. Opinion, Court of Appeals, Michigan Gun Owners, Inc. v Ann Arbor Public Schools 2016 WL _____; No. 329632, ___Mich. App.___, (Dec. 15, 2016)

11A. 1991 House Bill 5437 [Second Analysis] Legislative History

STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN OPEN CARRY INC.; and,
KENNETH HERMAN,

Plaintiff-Appellants/

Court of Appeals Case No. 329418
Lower Court Case No. 2015-104373-CZ
Genesee County Circuit Court

CLIO AREA SCHOOL DISTRICT;
FLETCHER SPEARS, III; and,
KATRINA MITCHELL.

Defendant- Appellees/
_____/

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_____/

PROOF OF SERVICE

I hereby certify that on JANUARY 24, 2017, I served the following documents upon counsel of record at the addresses provided herein by e-filing:

1. **NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL UPON CLERK OF THE COURT OF APPEALS; and,**
2. **PROOF OF SERVICE**

I hereby certify that on JANUARY 24, 2017, I served the following documents upon counsel of record and clerk of the Genesee County Circuit Court at their respective addresses by

first-class mail:

3. **NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL UPON CLERK OF THE GENESEE COUNTY CIRCUIT COURT; and,**
4. **PROOF OF SERVICE**

I hereby certify that on JANUARY 26, 2017, I served the following documents upon counsel of record at the addresses provided herein by e-filing:

5. **PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL; and,**
6. **PROOF OF SERVICE**

Respectfully submitted,

Dated: January 26, 2017 /s/ Dean G. Greenblatt