



President
Mark W. Pennak

March 19, 2021

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN PARTIAL OPPOSITION TO SB 10 (as amended to address SB 10 as enacted by the Senate)

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in opposition to certain aspects of SB 10.

This bill would amend MD Code, Election Law, §16-904, to provide that that a person may not “CARRY OR POSSESS A FIREARM WITHIN 100 FEET OF A POLLING SITE DURING AN ELECTION.” Second, the bill provides that a person may not “CARRY OR DISPLAY A FIREARM ON THE PREMISES OF A PRIVATELY OR PUBLICLY OWNED BUILDING BEING USED AS A POLLING SITE DURING AN ELECTION, INCLUDING IN A PARKING LOT.” This provision, along with the ban on possession within 100 feet of a polling site, creates **literally dozens of new gun-free zones**, including in **privately owned** buildings. Nothing in the bill would mandate or authorize armed security for such polling places. A violation of the bill is punished as a civil infraction under which a \$5,000 fine may be assessed against the violator under MD Code, Election Law, § 13-604. That fine may be imposed even though the person commits a violation “without knowing that the act is illegal.” MD Code, Election Law, § 13-604(a). The bill thus imposes strict liability for otherwise innocent conduct without regard to the person’s knowledge of the law or intent. No *mens rea* is required.

The Senate amended the original bill with important changes in a new subsection “C” which provides an exemption where **(I) THE INDIVIDUAL IS LEGALLY IN POSSESSION OF A FIREARM; (II) THE RESIDENCE OF THE INDIVIDUAL IS WITHIN 100 FEET OF A PRIVATELY OR PUBLICLY OWNED BUILDING BEING USED AS A POLLING SITE DURING AN ELECTION; AND (III) THE INDIVIDUAL IS TRANSFERRING THE FIREARM TO THE INDIVIDUAL’S RESIDENCE OR VEHICLE WITHIN 100 FEET OF A POLLING PLACE.** The bill

is also amended, as enacted by the Senate to permit an off-duty police officer to carry a concealed weapon if that officer is displaying his badge.

The following concerns, however, remain applicable, even as SB 10 was amended. First even amended, SB10 would make Maryland the most restrictive state, by far, of any state. See <https://www.ncsl.org/research/elections-and-campaigns/polling-places.aspx>. Most obviously the bill does not exempt **possession** of a firearm in a home that happens to fall within 100 feet of a polling station. No state imposes such a restriction. The amendments allow possession by an otherwise lawful person only if residence is within 100 feet of the polling station **AND** the person **is transferring** the firearm to or from the person's residence or vehicle within 100 feet of the polling site. This new exception is welcome, but it is poorly drafted. By using the word "AND" the amendment requires **all three** elements of new Section (C)(1) to be present. And by using the operative verb "**transferring**," the amendment only applies to *transfers* that take place to and from the residence (or vehicle) – not possession **in the residence**. The amendment thus does not purport to address or exempt a person who is **merely possessing** the firearm inside the home or on private property that happens to be located within 100 feet of a polling site.

Thus, through poor draftsmanship, the bill remains fatally overbroad, even as amended. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that citizens have the right to possess operative handguns for self-defense in the home. *Heller* also made clear that the right belongs to every "law-abiding, responsible citizen[]". *Heller* 554 U.S. at 635. The Second Amendment "**elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.**" *Heller*, 554 U.S. at 635. The rights guaranteed by the Second Amendment are fundamental and are, therefore, applicable to the States by incorporation under the Due Process Clause of the 14th Amendment. See *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) ("[c]itizens must be permitted to use handguns for the core lawful purpose of self-defense"). In banning home possession, the bill is plainly unconstitutional and thus must be amended to expressly exempt possession of firearms within homes located within 100 feet of a polling place. Poor draftsmanship is intolerable, particularly where it affects the exercise of fundamental constitutional rights. See, e.g., *Briggs v. State*, 413 Md. 265, 992 A.2d 433 (2010).

The amendment is likewise overbroad in that, while it protects "transferring" the firearm to or from the home or a vehicle, the bill, as amended would still ban mere possession by persons with Maryland carry permits or persons who are simply on the way to the range or otherwise permitted location or activity, as specified in Md. Code, Criminal Law, §4-203(b), and who just happen to drive by within 100 feet of a polling place. We respectfully suggest that the bill be amended to exempt from the bill's coverage these types of concealed possessions, all of which are totally non-threatening and utterly innocent. Such an amendment would be consistent with the intent in allowing transfers to a vehicle from the residence. If one may legally **transfer** the firearm to the vehicle within 100 feet of the polling site, one should likewise be permitted to **drive** the vehicle within 100 feet of the polling site on the way to or from the range or dealer or other lawful location.

Second, the point remains that the bill, as amended, still creates dozens of new gun free zones, including new zones on private property. In particular, the bill, even as amended, would ban a **private property owner** from merely storing firearms (any firearm) on his or her private property if that private property were to be used as a polling place. A mere innocent failure to remove existing firearms from that private property could result in a \$5,000 civil penalty. Ironically, that reality may well discourage individual private property owners from consenting to the use of their private property as a polling place.

More fundamentally, by banning virtually all otherwise lawful possession of firearms and failing to mandate armed security for such sites, this bill would actually make these sites more likely to be attacked by a mass shooter, a criminal or deranged individual, rather than less likely. Everyone at the site is less safe. Certainly, there is no evidence that a gun-free-zone actually makes people safer. See <https://www.rand.org/research/gun-policy/analysis/gun-free-zones.html>.

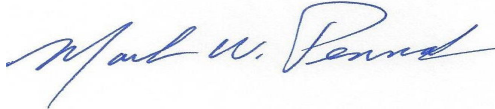
A potential shooter, willing to commit murder, will simply not care that this bill would make his possession of a firearm illegal. The numbers are chilling: between 1950 and 2018, 94% of all mass shootings (as properly defined by the FBI) have taken place in gun free zones. <https://crimeresearch.org/2014/09/more-misleading-information-from-bloombergs-everytown-for-gun-safety-on-guns-analysis-of-recent-mass-shootings/> Between 1998 and December 2015, the percentage is 96.2%. <https://www.nationalreview.com/2014/01/cruelty-gun-free-zones-john-r-lott-jr/>.

Mass shooters are drawn to gun free zones as they know that they will be unopposed for extended periods while they commit their horrific rampages. The Report from the Crime Prevention Research Center (Oct. 2014) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704), indicates that “mass public shooters pay attention to whether people with guns will be present to defend themselves.” (Id. at 10). **No sane person would post a gun-free zone sign outside their own home. If such signs are not suitable outside the home, they not suitable for polling places, particularly where the polling places are located on private property.**

We can readily understand the desire to regulate the **open** display of firearms at a polling place. We therefore suggest that the bill be amended to specifically exempt from its coverage **concealed** carry not only by off-duty police officers (as newly permitted by the bill, as amended), but also by permit holders who are otherwise legally permitted to carry concealed firearms in public and who have been already thoroughly investigated and vetted by the Maryland State Police pursuant to MD Code, Public Safety, §5-306. Such permitted individuals have been issued permits for a “good and substantial reason” under Section 5-306, and thus include persons who have demonstrated to the Maryland State Police a **particularized, special** need for self-protection. In order to vote, such a permitted person would have to park her vehicle more than 100 feet from the polling place, leave her firearm in the vehicle (where it is open to theft) and walk to the polling place, vote, and walk back to the vehicle. Such an individual should not have to choose between exercising her right to vote and her right to self-defense. Private property owners should likewise be permitted to continue to store firearms on their own property when it is used as polling place.

School property, if happened to be used as a polling place, would, of course, remain a prohibited area under existing law. See MD Code, Criminal Law, §4-102. Similarly, under federal law, 18 U.S.C. §922(q)(2), the knowing possession of a firearm in a federally defined school zone is banned. Tellingly, however, federal law exempts from that prohibition “private property” not part of school grounds as well as exempting a permit holder “if the individual possessing the firearm is licensed to do so by the State in which the school zone is located.” 18 U.S.C. §922(q)(2)(B)(i), (ii). If those exemptions are appropriate for school zones, they are likewise appropriate for polling places.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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