

Testimony of Tim Carey, Law & Policy Staff Attorney  
The Educational Fund to Stop Gun Violence  
In Support - Senate Bill 329: Prohibiting Firearms at Polling Places during Elections  
Senate Education, Health, and Environmental Affairs Committee  
February 22, 2022

Dear Chair Pinsky, Vice Chair Kagan, and Committee members,

I am writing to you in my capacity as a staff attorney for the Educational Fund to Stop Gun Violence in support of Senate Bill 329. By prohibiting the presence of firearms within 100 ft of a polling place, Maryland would be joining a growing number of states taking steps to protect the sanctity of their elections and the security of their electorate.

### **Prohibiting Firearms at Polling Places Protects Democracy**

The right to vote is a fundamental right that all eligible American citizens ought to exercise freely and safely. All fifty states provide their citizens with a substantive right to vote, forty-nine with an explicit state constitutional right and one with an implicit right.<sup>1</sup> Laws have validity in a democracy, in large part, because the people are able to choose their representation in government. The Supreme Court of the United States said it best when they reasoned that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>2</sup> The presence of firearms at the polls places our most sacred right in peril.

Relatively few states have laws that explicitly prevent the presence of guns at polling places, which became a point of grave concern for many state legislatures during the 2020 elections. Incendiary remarks by then-President Trump and his most ardent supporters created legitimate fears about election-day violence, recognized by news media, law enforcement, and the FBI.<sup>3</sup> Michigan’s secretary of state notably attempted to pass a directive banning guns at the polls after credible threats of violence surrounding the election, but her directive was blocked by courts on procedural grounds.<sup>4</sup> The Maryland legislature is the proper venue to make this policy decision and now is the right time. Though Maryland already has laws that criminalize the use of weapons for intimidation, it is difficult to prove whether someone wielding a

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<sup>1</sup> Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 *Vanderbilt Law Review* 89 (2019); ARIZ. Const. art VII, § 2 is the lone outlier, stating that “No person shall be entitled to vote... unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for a period of time preceding such election as prescribed by law...”

<sup>2</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>3</sup> See Daniel L. Byman & Colin P. Clarke, *Why the risk of election violence is high*, Brookings (Oct. 27, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/27/why-the-risk-of-election-violence-is-high/> (last visited Jan 21, 2021); Joel Rose, *'Guns, Protests And Elections Do Not Mix': Conflict Experts See Rising Warning Signs*, NPR (Oct. 29, 2020),

<https://www.npr.org/2020/10/29/928791633/guns-protests-and-elections-do-not-mix-conflict-experts-see-rising-warning-signs> (last visited Jan 21, 2021); Katie Paul, *Thousands of Facebook Groups buzzed with calls for violence ahead of U.S. election*, Reuters (Nov. 6, 2020), <https://www.reuters.com/article/us-usa-election-facebook-focus/thousands-of-facebook-groups-buzzed-with-calls-for-violence-ahead-of-u-s-election-idUSKBN27M2UN>.

<sup>4</sup> Brakkton Booker, *Michigan Judge Blocks Ban On Open Carry Of Guns At Polls On Election Day*, NPR (Oct. 29, 2020), <https://www.npr.org/2020/10/28/928617983/michigan-judge-blocks-ban-on-open-carry-of-guns-at-polls-on-election-day>.

gun in public intended to stoke fear in others. However, even the potential threat of violence during elections threatens to chill participation in democracy. A clear prohibition of firearms at polling places would be an unambiguous protection of the sacrosanct right to vote.

### **Prohibiting Firearms at Polling Places is Constitutional Under the First and Second Amendments**

Courts in the United States have not interpreted the Second Amendment to provide a right to carry a gun in public or to intimidate others with firearms. In the landmark decision of *District of Columbia v. Heller*, the Supreme Court of the United States interpreted the core of the Second Amendment to protect “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>5</sup> However, the Supreme Court continued to clarify that “[l]ike most rights, the right secured by the Second Amendment is not unlimited” and it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>6</sup> The Supreme Court emphasized that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>7</sup>

Courts have also not found that carrying firearms in public qualifies as “speech” protected under the First Amendment. In contrast, courts have found it to be extremely difficult for the carrying of a firearm to convey any particularized message beyond the lethality of the gun itself. For example, Michigan courts have held that attempts to communicate messages by openly carrying firearms did not qualify as protected speech because worried members of the public did not perceive the firearm owners “as open carry activists demonstrating their First... Amendment rights,” but rather “were simply alarmed and concerned for their safety and that of their community.”<sup>8</sup> A Connecticut court evaluating a case in which an individual was openly carrying a firearm, while wearing a right to bear arms t-shirt, wrote that reasonable officers could disagree whether carrying the gun conveyed a message in support of the Second Amendment or was simply carrying for other purposes.<sup>9</sup> In doing so, the court found that the gun carrier’s conduct was not protected by the First Amendment.<sup>10</sup> A court in Ohio also rejected that the open carry of firearms amounted to protected symbolic speech, observing that the defendant “[having] to explain the message he intended to convey undermines the argument that observers would likely understand the message.”<sup>11</sup> These court findings emphasize that the right to free speech cannot be confused with a right to terrorize others and threaten public safety.

### **Prohibiting Firearms at Polling Places is Congruent with Current Maryland Law**

Maryland already has several laws on the books that may indirectly impact the presence of some firearms at some polling places, but codifying an explicit regulation is both the natural and needed next step for the legislature to take. Maryland has made it a crime to carry or possess a firearm on public school property, which many districts utilize as polling places during elections, but not all Maryland polling locations are in schools.<sup>12</sup> Polling locations in Maryland may be established in any public building “that creates an environment suitable to the proper conduct of an election,” which can extend to currently unprotected

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<sup>5</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>6</sup> *Heller*, 554 U.S. at 626.

<sup>7</sup> *Id.*

<sup>8</sup> *Baker v. Schwarb*, 40 F. Supp. 3d 881, 894-95 (E.D. Mich. 2014); *see also Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616-19 (E.D. Mich. 2016) and *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015).

<sup>9</sup> *Burgess v. Wallingford*, 2013 WL 4494481, at \*9 (D.Conn. May 15, 2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), affirmed in part, reversed in part and remanded sub nom. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128 (6th Cir. 2015).

<sup>12</sup> Md. Code Ann., Crim. Law § 4-102(b).

places.<sup>13</sup> Maryland law also criminalizes attempts to “willfully and knowingly...influence or attempt to influence a voter’s voting decision...[or] decision whether to go to the polls to cast a vote through the use of force, fraud, threat, menace, [or] intimidation...” and automatically elevates assault with a firearm to a first degree offense.<sup>14</sup> However, it is notoriously difficult to prove the intent to intimidate when someone is holding a firearm.<sup>15</sup> No measure would communicate as clear and reassuring a message to the public and election officials as a prohibition of firearms at the polls.

Maryland has recognized the need for laws that prevent firearms from disrupting the public’s civil rights and duties before. Maryland prohibits the possession of a firearm, both loaded and unloaded, at a demonstration in a public place or in a vehicle within 1,000 feet of such demonstration after law enforcement has both (1) notified the person about the public demonstration and (2) ordered the person to leave the demonstration until their firearm is stored elsewhere.<sup>16</sup> The Secretary of State Police also possesses the power to further limit the geographic area, circumstances, and times in which state handgun permits are effective, which could be applied to polling places and other political events.<sup>17</sup> Adding a prohibition of firearms at polling places would be consistent with other actions of the Maryland legislature to limit the role of guns in politics.

## **Conclusion**

Passing SB 329 would protect the integrity of Maryland’s elections and the wellbeing of their electorate. The presence of firearms at polling places risks both the chilling of participation in elections and the safety of prospective voters. Courts have not recognized a First or Second Amendment right to possess firearms in public places like polling sites, instead holding that the display of firearms in such places can be presumptively outside the scope of the right to bear arms. A prohibition of firearms at the polls is also consistent with past steps the Maryland legislation has taken to preserve public safety and the core functions of our democracy. The Educational Fund to Stop Gun Violence is in full support of SB 329 and the protections it affords to Maryland voters.

Sincere regards,

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Educational Fund to Stop Gun Violence

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<sup>13</sup> Md. Code Ann., Elec. Law § LAW § 10-101.

<sup>14</sup> Md. Elec Law § 16-201(a)(5)-(6); Md. Code Ann., Crim. Law § 3-202.

<sup>15</sup> See Joseph Blocher, Samuel W. Buell, Jacob D. Charles, Darrell A.H. Miller, *Pointing Guns*, 99 Tex. L. Rev. 1173, 1175 (2021).

<sup>16</sup> Md. Code Ann., Crim. Law § 4-208.

<sup>17</sup> Md. Code Ann., Pub. Safety § 5-307(b).