



President
Mark W. Pennak

February 19, 2022

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 329

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is a Section 501(c)(4), 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 329.

This bill is a carbon copy of SB 10 from the 2021 General Assembly Session as it was amended and passed by the Senate and identical to the original version of HB 30, submitted this Session. Last Session, SB 10 never emerged from the House Ways and Means Committee after a hearing. Like SB 10, HB 329 would amend MD Code, Election Law, §16-904, to provide 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 the person’s intent. No *mens rea* is required.

Like the Senate amendments to SB 10 in 2021, this bill includes subsection (C)(2) 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 would also permit an off-duty police officer to carry a concealed weapon if that officer is displaying his badge.

The House Sponsor's Amendment: We are advised that the House sponsor has submitted an amendment to HB 30 (attached). The amendment would retain the exemption and further amend the original version of HB 30 to provide that an individual in a residence within 100 feet of a polling place is not in violation of the ban if "THE INDIVIDUAL IS LOCATED AT THE RESIDENCE" and further provides that the an individual is not in violation of the ban if "THE INDIVIDUAL IS LAWFULLY TRANSPORTING THE FIREARM IN A VEHICLE ON A PUBLIC ROADWAY THAT IS WITHIN 100 FEET OF A POLLING PLACE." That amendment was welcomed and we are impressed and gratified that the House sponsor is showing sensitivity to the constitutional issues created by the original version of the Bill. As far as we know, the Senate sponsor of SB 329 has not submitted a similar amendment to SB 329. This testimony thus addresses SB 329 as submitted and also addresses the House sponsor's amendment, should that amendment be considered in this Committee.

The Bill Is Extreme: First the bill is extreme as it would make Maryland the most restrictive state, by far, of any of the twelve states that purports to limit possession at a polling site. See <https://www.ncsl.org/research/elections-and-campaigns/polling-places.aspx>. For example, California, with the most restrictive gun control laws in the country, only bans a person from being "stationed in the immediate vicinity of, or posted at, a polling place without written authorization of the appropriate city or county elections official..." California Election Code § 18544(a) (emphasis added). And Texas bans carry in a polling place only "if the person intentionally, knowingly, or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon on the premises of a polling place on the day of an election or while early voting is in progress." Texas Penal Code § 46.03(a)(2) (emphasis added). No such scienter requirements are imposed by this bill. Neither California nor Texas extends their bans to 100 feet of a polling place.

The Bill Is Unconstitutional: Second, this bill does not exempt mere possession of a firearm in a home that happens to fall within 100 feet of a polling station and thus the ban extends to private homes as well. No state purports to ban possession of a firearm in the home. Specifically, subsection (C)(2) allows possession by an otherwise lawful person only if the 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 exception is welcome, but it is poorly drafted. By using the word "AND" subsection (C)(2) requires all three elements of subsection (C)(2) to be present. And, by using the operative verb "transferring," the bill's exemption only applies to transfers that take place to and from the residence and a vehicle – not mere possession in the residence (or in the vehicle). The language of the exemption in subsection (C)(2) 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. The House sponsor's amendment addresses short-coming. This bill does not.

Thus, through poor draftsmanship, the bill is fatally overbroad. 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 bill, as written, will not survive constitutional challenge.

The Bill Overreaches: We also can see no justification for extending the scope of the ban to 100 feet of a polling station. Of the few states (again only twelve states regulate **any** possession at a polling site) that have enacted similar laws, all but one limits its restrictions on the possession of firearms **to the polling station itself**. The only exception is Missouri which extends its ban outside the polling station but it limits the distance to a mere **25** feet, but further provides that "[p]ossession of a firearm in a vehicle on the premises of the polling place shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises." Missouri, MRS § 571.107.1(2). The bill should be amended to remove the language that extends the prohibition to 100 feet beyond the polling place.

The bill is likewise overbroad in that it would still ban mere possession by 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 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 without being hit with a \$5,000 fine. The House sponsor's amendment to HB 30 addresses this flaw. This bill does not.

We can readily understand the desire to regulate the **open** display of firearms **at** a polling place. However, voter intimidation is rare and we are unaware of any such open display of firearms has ever even happened in Maryland. See <https://www.baltimoresun.com/politics/bs-md-pol-few-incidents-of-voter->

[intimidation-20201211-62xuahitendlbz7nu2svqcscy-story.html](https://www.mymcmedia.org/maryland-attorney-general-voter-intimidation-voter-harassment-is-a-crime/). Voter intimidation, of any kind, is already a crime under both federal law, 18 U.S.C. § 594, and state law, MD Code, Elec. Law § 16-201(a), and that includes banning any brandishing of firearms at a polling station. See Maryland Attorney General Guidance on Voter Intimidation. <https://archive.mymcmedia.org/maryland-attorney-general-voter-intimidation-voter-harassment-is-a-crime/>. The Bill is thus a solution in search of a problem.

In any event, that concern over potential intimidation does not apply to concealed possession otherwise permitted by law. If the firearm is concealed, it cannot intimidate. This Bill should be amended to exempt from its coverage concealed carry not only by off-duty police officers (as permitted by the Bill), 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. Of the eight states (including New York and New Jersey) in the United States that impose such a “good cause” requirement on carry permits, **NONE** have imposed any restriction on concealed carry by a permit holder at a polling place. 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 documented need for self-defense.

Private property owners should likewise be permitted to continue to possess firearms on their own property when it is used as a polling place. For example, polling places are sometimes located in churches, which have voluntarily allowed their private property to be used for these purposes. Many churches recently have added, for good and obvious reasons, private armed security for the protection of the church and private school facilities that may be associated with the church and that are located on the same grounds. Some churches use permit-holders who are also parishioners at the church to provide such security. This bill would effectively ban such private security. Private property holders should not be placed in this dilemma.

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.

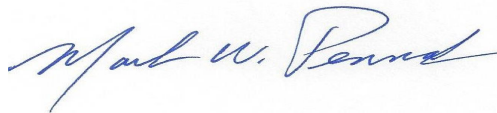
More fundamentally, the bill creates new gun free zones on private property. In particular, the bill would ban a **private property owner** from merely storing firearms (any firearm) on his or her private property if that private property were to be used as a polling place. A mere innocent failure to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

The Bill Invites Attacks: By banning virtually all otherwise lawful possession of firearms and failing to mandate armed security for such sites, this bill would actually make polling 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. The Rand Corporation confirms that 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. See Report from the Crime Prevention Research Center (Oct. 2014), at 10 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629704) (“mass public shooters pay attention to whether people with guns will be present to defend themselves.”). **No sane person would post a gun-free zone sign outside their own home. The statutory equivalent of such a sign is likewise not suitable outside polling places, particularly where the polling places are located on private property.** We urge an unfavorable report.

Sincerely,



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HB0030/243622/1

AMENDMENTS
PREPARED
BY THE
DEPT. OF LEGISLATIVE
SERVICES

14 JAN 22
14:05:35

BY: Delegate Henson
(To be offered in the Ways and Means Committee)

AMENDMENT TO HOUSE BILL 30
(First Reading File Bill)

On page 3, strike beginning with the colon in line 7 down through “(I)” in line 8; in line 8, strike the semicolon and substitute “AND:”; in lines 9 and 12, strike “(II)” and “(III)”, respectively, and substitute “(I)” and “(II)”, respectively; in line 11, after “ELECTION” insert “AND THE INDIVIDUAL IS LOCATED AT THE RESIDENCE”; in the same line, strike “AND”; and in line 13, after “PLACE” insert “; OR”

(III) THE INDIVIDUAL IS LAWFULLY TRANSPORTING THE FIREARM IN A VEHICLE ON A PUBLIC ROADWAY THAT IS WITHIN 100 FEET OF A POLLING PLACE”.