

# Guns Down At The Polls: How States Can and Should Limit Firearms at Polling Places

**GUNS  
DOWN / CSGV**  
THE COALITION TO  
STOP GUN VIOLENCE

## **The Coalition to Stop Gun Violence**

The Coalition to Stop Gun Violence (CSGV) is the nation's oldest gun violence prevention organization, founded in 1974. Along with its affiliate organization, the Educational Fund to Stop Gun Violence, CSGV develops and advocates for evidence-based solutions to reduce gun injury and death in all its forms. CSGV's guiding principle is simple: We believe gun violence should be rare and abnormal. We pursue this goal through policy development, advocacy, community engagement, and effective training.

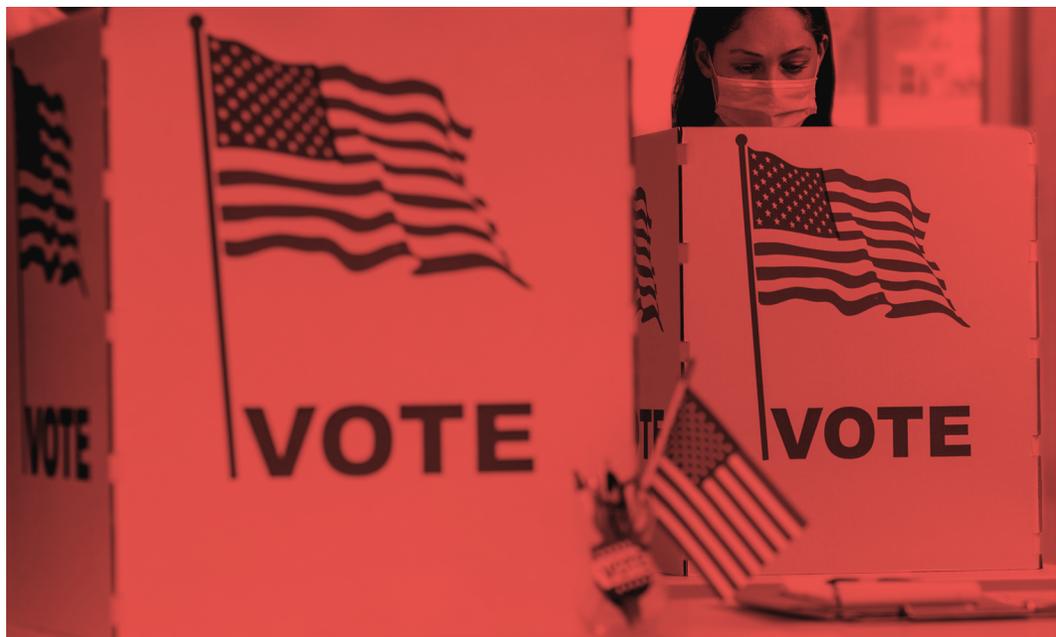
## **Guns Down America**

Formed in 2016, Guns Down America is building a future with fewer guns by straining the gun industry and its lobby and building political and cultural support for policies that will keep us safe from gun violence. GDA is a community powered organization that brings together Americans from across the country to solve our national gun crisis in strategic and creative ways.

## Executive Summary

In the United States, the right to vote is fundamental to our democracy and our elected officials must ensure that all eligible Americans have access to the franchise. While the November 2020 elections pose new challenges and obstacles related to the ongoing COVID-19 pandemic, there is also concern about armed intimidators acting to prevent American citizens from casting their ballot.<sup>1</sup> Democracy faces insurrectionist violence that undermines our democratic institutions by creating a political climate of fear and hatred.

These tactics have given rise to widespread political violence, primarily instigated by far right militias across America. They have led to the killing of protesters, the armed intimidation of state lawmakers, and the normalization of armed confrontations in our streets. The current threat that armed militia and other extremists pose to our democracy is built upon years of systemic racism and voter suppression, both exacerbated by the inequities highlighted by COVID-19.



<sup>1</sup>Matt Barreto et al., Protecting Public Health in the 2020 Elections, ULCA Voting Rights Project (2020); Laura King, *Trump and allies seek to turn violence at protests to his advantage*, LA Times (Aug. 30, 2020), <https://www.latimes.com/politics/story/2020-08-30/trump-violence-protests-political-advantage> (last visited Sep. 1, 2020).

With the White House refusing to condemn politicized violence from its supporters, it is up to state and local governments to defend the right of its citizens to vote freely and safely. This report examines the potential methods that the hotly contested states of Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin can use to protect their voters from armed intimidation and gun violence at the polls without infringing upon constitutional rights or other state laws.

#### Key Findings:

- All five states have the power to constitutionally prohibit firearms at polling places, though none have codified it into law.
- With broad preemption statute exceptions, local governments in states like North Carolina and Virginia have the means to legally prohibit firearms at polling places or locations commonly used as polling places.
- Strict preemption laws in other states, such as Pennsylvania and Wisconsin, prevent local governments from banning firearms at polling places without state law policy changes.
- In states with inflexible preemption statutes or localities where governments decline to implement firearm restriction ordinances, expanding early voting and vote by mail capacity can help limit the number of voters potentially exposed to armed intimidation.
- All states should provide uniform guidance to poll workers on how to address situations where firearms are present at their polling location.

The best means to prohibit firearms at polling places might not look the same in each state. Pre-existing state laws, local firearm culture, and community interests will all shape what potential remedies look like in important ways. The main takeaway from this report is that all five of these states can, and should, act on either the state or local levels to reduce the risk of voters being intimidated by firearms at the polls.

## **Introduction: A Rising Risk of Gun-Based Intimidation at the Polls**

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>2</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>3</sup> However, the fundamental right to vote, vital to our democracy, is endangered by self-proclaimed “poll watchers” with firearms.

The threat of armed individuals disrupting polling places is not theoretical. Private citizens with firearms have demonstrated at polling places during the 2016 and 2018 elections and are poised to do so again this November. In the week before the 2016 election, Guns Down America launched a campaign to give voters a way to report instances of armed intimidation at polling places. In less than twelve hours, 85 voters in 28 states reported seeing firearms at the polls. These incidents were reported by Voter Protection Hotline personnel to local law enforcement and election authorities. Similarly, during the 2018 midterm elections, then-NRA spokesperson Dana Loesch suggested that NRA supporters may need to bring guns to polling locations in order to fend off attacks from “anti-gun progressives.”<sup>4</sup> The circulation of this dangerous rhetoric has real-life consequences for voter safety.

<sup>2</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>3</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>4</sup> Media Matters Staff, *Dana Loesch says NRA supporters may need to bring guns to polls to protect themselves from progressives*, Media Matters (Oct. 24 2018), <https://www.mediamatters.org/nratv/nra-spokesperson-dana-loesch-says-supporters-may-need-bring-guns-polls-protect-themselves> (last visited Sep. 3, 2020).

The states analyzed in this report already have documented instances of armed intimidation at their polling locations. Armed rightwing supporters questioned voters at polling places and protested outside of a Democratic campaign office with firearms in Virginia during the 2016 election.<sup>5</sup> In 2018, a Pennsylvania man was arrested for threatening to “shoot up” a polling place.<sup>6</sup> In North Carolina, a Black campaign volunteer was accosted by an armed man at an early voting location for the 2018 election.<sup>7</sup> It is expected that similar issues will continue to arise across the nation, exacerbated by growing political animus.

President Trump has already supported the idea of armed insurrection during the 2016 election and in response to prolonged state COVID-19 lockdowns.<sup>8</sup> He has also begun coalescing a massive “poll watcher” effort, sparking concerns among voting rights advocates of intimidation at the polls.<sup>9</sup> Armed counter-protestors, some of whom identify with militia movements, have organized in opposition to anti-racism rallies in at least 33 states across the country over the past several months.<sup>10</sup> One of these confrontations reached a tipping point with the shooting of three Black Lives Matter protestors in Kenosha, Wisconsin by a self-proclaimed “militia” member less than three months from the general election.<sup>11</sup> A few days after the Kenosha shootings, a rightwing counter-protestor was shot by a gunman in Portland, Oregon while clashing with anti-racism protestors.<sup>12</sup> With these recent events fresh in the minds of the public, the possibility of armed interference at polling places cannot be discounted.

This election season, it is more important than ever that people vote and can feel safe while doing so. This report will explore what legal protections, if any,

<sup>5</sup> Laura Jarrett, *Can you bring your gun to vote?*, CNN (Nov. 7, 2016), <https://www.cnn.com/2016/11/07/politics/can-you-bring-your-gun-to-vote/index.html> (last visited Aug. 28, 2020), “On Friday, a Trump supporter showed up to a Loudoun County polling station in Virginia, sporting a handgun in his waistband as he offered sample Republican ballots to voters outside. ‘And as a voter, I felt intimidated,’ Erika Cotti told CNN.” Caitlin Mac Neal, *Armed Trump Supporters ‘Protest’ Outside Virginia Dem’s Campaign Office*, Talking Points Memo (Oct. 14, 2016), <https://talkingpointsmemo.com/livewire/trump-supporter-armed-protest-dem> (last visited Aug. 28, 2020), Donald Trump supporters openly carrying firearms sat outside the campaign office of a Democratic candidate for Congress in Virginia for nearly 12 hours on Thursday, according to CBS affiliate Newsplex in Charlottesville. One of the protesters, Daniel Parks, told Newsplex that he held the protest to support Trump.”

<sup>6</sup> Laura Ly & Lauren del Valle, *A man in Pennsylvania threatened to ‘shoot up’ a polling place after being told he wasn’t registered there*, CNN (Nov. 6, 2018), <https://www.cnn.com/2018/11/06/politics/man-arrested-pennsylvania-polling-place/index.html> (last visited Aug. 28, 2020).

<sup>7</sup> Mark Price & Jane Wester, *Charlotte police plan polling site ‘zone checks’ after black volunteer threatened*, Charlotte Observer (Oct. 25, 2018), <https://www.charlotteobserver.com/article/220596630.html> (last visited Aug. 28, 2020).

<sup>8</sup> Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests ‘Second Amendment People’ Could Act Against Hillary Clinton*, NY Times (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> (last visited Aug. 28, 2020), Trump insinuated that his supporters could assassinate his opponent when he said “[i]f [Clinton] gets to pick her judges [for the Supreme Court], nothing you can do, folks. Although the Second Amendment people – maybe there is, I don’t know;” Mary McCord, *Trump’s ‘LIBERATE MICHIGAN!’ tweets incite insurrection. That’s illegal.*, The Washington Post (Apr. 17, 2020), <https://www.washingtonpost.com/outlook/2020/04/17/liberate-michigan-trump-constitution/> (last visited Aug. 28, 2020).

<sup>9</sup> Jane C. Timm, *GOP recruits army of poll watchers to fight voter fraud no one can prove exists*, NBC News (Jun. 10, 2020), <https://www.nbcnews.com/politics/donald-trump/gop-recruits-army-poll-watchers-fight-voter-fraud-no-can-n1217391> (last visited Aug. 28, 2020).

<sup>10</sup> Heath Druzin, *Bolstered By Lax Gun Laws, Armed Protesters Confront Anti-Racism Rallies, Guns & America* (Jun. 30, 2020), <https://gunsandamerica.org/story/20/06/30/blm-protests-counter-armed-gun-laws/> (last visited Sep. 2, 2020).

<sup>11</sup> Gina Barton and Bruce Vielmetti, *Kyle Rittenhouse, charged in Kenosha protest homicides, considered himself militia*, Milwaukee Journal Sentinel (Aug. 26, 2020), <https://www.jsonline.com/story/news/2020/08/26/kyle-rittenhouse-charged-kenosha-protest-shootings-militia/5634532002/> (last visited Aug. 28, 2020).

<sup>12</sup> Theresa Waldrop, *Portland protest shooting death: Here’s what we know*, CNN (Aug. 31, 2020), <https://www.cnn.com/2020/08/31/us/what-happened-portland-shooting-protest/index.html> (last visited Sep. 2, 2020).

the contested states of Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin provide to prohibit firearms at polling places. Each state section will highlight state law that restricts firearms in public places, regulations at polling places, state preemption statutes surrounding gun laws and relevant exceptions, and other laws like criminal statutes that may also help prevent the presence of firearms at the polls. This report will also analyze the constitutionality of Second Amendment prohibitions regarding the display of firearms at polling locations, as well as potential First Amendment challenges that may arise.

In the context of this report, preemption laws are put in place to ensure that local governments do not enact gun violence prevention policies that are more stringent than relevant federal and state law. Preemption should not be an issue if preexisting federal and state law already permit the action. However, preemption can be a problem when local officials want to address issues with gun violence particular to their jurisdictions that may not be applicable to the entire state.<sup>13</sup> There is no question that citizens of Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin have a constitutionally protected right to bear arms. All five states have a right to bear arms in their State Constitution, and the Supreme Court of the United States has held that Second Amendment rights apply to individual states by virtue of the 14th Amendment of the U.S. Constitution.<sup>14</sup> Nevertheless, laws prohibiting firearms at polling places can function without running afoul of the Second Amendment and state law. In examining each state, this report will break down what applicable state and case law can be used to limit firearms at polling places and overcome potential legal challenges. Though there are no express state laws prohibiting firearms at polling places in these states, with this report we highlight existing tools that may prevent armed intimidation at the polls and present the case that these tools merit further exploration by state and local officials.

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<sup>13</sup> *Preemption of Local Laws*, Giffords Law Center to Prevent Gun Violence (2019), <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> (last visited Aug. 6, 2020).

<sup>14</sup> M.C.L.A. Const. Art. 1 § 6, "Every person has a right to keep and bear arms for the defense of himself and the state;" N.C. Const. Art. 1, § 30, "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice;" Pa. Const. art. I, § 21, "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned;" Va. Const. art. I, § 13, "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power;" Wis. Const. art. I, § 25, "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose;" *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

## Existing State Law to Prevent Firearms at Polling Places

# Michigan

Michigan has no state law specifically prohibiting the presence of firearms at polling places. However, Michigan does have laws that limit firearms in locations that are often utilized as polling places. Michigan law states that it is illegal for most people to possess firearms at premises such as banks, houses of worship, courts, theatres, sports arenas, day care centers, and hospitals.<sup>15</sup> Limited exceptions only allow for peace officers, security services, licensed concealed carry holders, and those with permission of the location's owner or agent to carry firearms in those places.<sup>16</sup> Similarly, firearms are generally banned from Michigan school property, with few exceptions.<sup>17</sup> Michigan also prevents concealed carry at schools or school property (unless the firearm is in a parent's vehicle while picking up or dropping off a student), public or private day care facilities, sports arenas/stadiums, bars/taverns (unless by an owner or employees), houses of worship (unless permitted by the location), entertainment places with 2,500 or more seating capacity, hospitals, dorms or community college/college/university classrooms.<sup>18</sup> All of these locations have the potential to be polling places according to Michigan statute.<sup>19</sup> There is no legal precedent to suggest that these locations lose their protected status if they are temporarily repurposed as polling places for elections. The Michigan Supreme Court has also clarified that the inhabitants of Michigan have the right to possess a firearm for the "legitimate defense of himself or his property," which leaves discretion for the regulation of firearms in public places.<sup>20</sup>

Though Michigan's polling place regulations are sparse, one statute in particular could help reduce the risk of firearms being displayed to intimidate voters. It is illegal in Michigan for someone "within 100 feet from any entrance to a building

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<sup>15</sup> M.C.L.A. § 750.234d.

<sup>16</sup> *Id.*

<sup>17</sup> M.C.L.A. § 750.237a, with the exception of peace officers, licensed concealed carry owners, an individual with a weapon provided by the school for an instructional purpose, an individual with permission from the school's principal or school board, and if an individual is only transporting a student to school and specific criteria apply.

<sup>18</sup> M.C.L.A. § 28.425; see also *Wade v. University of Michigan*, 320 Mich. App. 1, 905 N.W.2d 439 (2017), holding that a public university ordinance banning all firearms on university property did not violate the complainant's Second Amendment rights. The Court reasoned that the university's ordinance did not control conduct understood to be protected by the Second Amendment, in part because schools are considered to be "sensitive places" that necessitate additional regulation.

<sup>19</sup> M.C.L.A. § 168.662, stating that "school buildings, fire stations, police stations, and other publicly owned or controlled buildings shall be used as polling places." This law also allows Michigan legislators to establish polling places in non-profit buildings or retirement homes if traditionally government-owned buildings are not available or accessible.

<sup>20</sup> *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922).

in which a polling place is located” to “persuade or endeavor to persuade a person to vote for or against any particular candidate or party ticket or for or against any ballot question that is being voted on at the election.”<sup>21</sup> Thus, if someone displaying a firearm were to stand within 100 feet of a polling place with intention to intimidate or otherwise impact the decisions of voters, then their actions could be considered a crime and well outside the scope of Second Amendment protections. Referring back to the Supreme Court of Michigan’s opinions, someone endeavoring to persuade voters by standing outside of a polling place with a firearm is not acting in “legitimate defense of himself or his property.”<sup>22</sup>

Michigan’s preemption statute plainly states that local governments are prohibited from imposing regulations on firearms and pneumatic guns that are not clearly granted in state or federal statute.<sup>23</sup> However, the Michigan legislature codified two exceptions to this rule. The law gives local governments permission to impose additional regulations on the use of firearms and pneumatic guns to commit criminal activities, which includes voter intimidation and coercion, and using pneumatic guns to threaten others.<sup>24</sup> Michigan also permits cities and charter townships to prohibit the discharge of firearms in their jurisdictions.<sup>25</sup> Though it is a sincere hope that no firearms are fired at or near polling places, the authority exists to ban such behavior. Similar to the state level, no local governments in Michigan have regulations directly banning guns at polling places. Nevertheless, some cities like Detroit and Ann Arbor have ordinances banning the brandishing of firearms in public places, which could help achieve the same end result.<sup>26</sup>

Apart from general firearm and polling place restrictions, the display of firearms at the polls could constitute other offenses under Michigan criminal law. Assault has been defined by Michigan courts as being “any unlawful force, partly or fully put in motion, creating a reasonable apprehension of immediate injury of a human being.”<sup>27</sup> The penalty for assault increases in severity if committed with a firearm and

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<sup>21</sup> M.C.L.A. § 168.744.

<sup>22</sup> Zerillo at 928.

<sup>23</sup> M.C.L.A. § 123.1102; Note: “Pneumatic guns” are weapons that fire projectiles with air pressure.

<sup>24</sup> M.C.L.A. § 123.1103, also includes conduct related to the transportation or possession of firearms by local government employees while they are employed with the local government and age restrictions on pneumatic guns not on private property with adult supervision, which are not relevant to this project; M.C.L.A. § 168.744.

<sup>25</sup> M.C.L.A. § 123.1104.

<sup>26</sup> Detroit, Michigan Municipal Code § 31-13-24; Ann Arbor, Michigan Municipal Code § 9:269.

additionally if on school grounds.<sup>28</sup> Accosting or otherwise threatening prospective voters with the display of firearms could very well create “a reasonable apprehension of immediate injury” that merits legal protection places, which could help achieve the same end result.<sup>29</sup>

Apart from general firearm and polling place restrictions, the display of firearms at the polls could constitute other offenses under Michigan criminal law. Assault has been defined by Michigan courts as being “any unlawful force, partly or fully put in motion, creating a reasonable apprehension of immediate injury of a human being.” The penalty for assault increases in severity if committed with a firearm and additionally if on school grounds. Accosting or otherwise threatening prospective voters with the display of firearms could very well create “a reasonable apprehension of immediate injury” that merits legal protection.

## North Carolina

Though North Carolina law does not explicitly prohibit the carrying of firearms at polling places, the North Carolina Court of Appeals observed, in a pre-*Heller* case, that the state Supreme Court has historically found it reasonable to prohibit “the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror[.]”<sup>30</sup> The North Carolina Supreme Court alluded to the possibility of firearm restrictions at polling places being permissible under the Second Amendment, but has not confirmed that point in a legally enforceable way. However, the plain language of the Court’s opinion can be viewed as dicta in compelling support of the position that polling places can, and should, be legally free from firearms. Other state law could prevent individuals from bringing firearms to the polls. It is deemed a felony

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<sup>28</sup> *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 10 (1968), quoting *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).

<sup>29</sup> *People v. Jones*, 443 Mich 88, 92 (1993), quoting *People v. Carlson*, 160 Mich. 426, 429 (1910).

<sup>30</sup> M.C.L.A. § 750.82.

<sup>31</sup> *Id.*

<sup>32</sup> *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 10 (1968), quoting *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).

under North Carolina law to “knowingly possess or carry, whether openly or concealed” firearms on educational property or at events sponsored by a school.<sup>31</sup> Many North Carolina polling places are situated in schools, which could merit firearm protections based on the location alone.<sup>32</sup>

There is not much state law addressing polling place regulations in North Carolina, but what is present appears helpful. North Carolina law mandates a broad 25 to 50 foot “buffer zone” around polling places.<sup>33</sup> The exact parameters of the buffer zone is determined by the county board of elections ahead of the election and will serve to prevent persons attempting to “hinder access...harass others...or otherwise engage in election-related activity in the voting place or in a buffer zone.”<sup>34</sup> Though there is no case law on the subject, the display of firearms near a polling place can easily be interpreted as an attempt to hinder or harass people attempting to vote, thus falling within this statute’s scope. North Carolina’s preemption law prevents the local regulation of essentially any aspect of firearm possession and use not otherwise authorized by state statute.<sup>35</sup> The law also includes meaningful exceptions. Cities and counties are permitted to “regulate or prohibit possession of firearms in, or on the grounds or in the parking areas of, publicly owned buildings, public parks, or recreation areas.”<sup>36</sup> Given that the majority of polling places are in publicly owned buildings, local governments should not have an issue enforcing firearm restrictions at those locations under this exception. North Carolina state law has also held that cities can “regulate, restrict, or prohibit the discharge of firearms at any time or place in the city...and may regulate the display of firearms on the streets, sidewalks, alleys, or other public property” with few exceptions.<sup>37</sup> At least one North Carolina local government has ordinances in place that prohibit the display of firearms at polling places, though others have regulations achieving a comparable effect. Chapel Hill city regulations plainly state that “no person

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<sup>31</sup> N.C.G.S.A. § 14-269.2.

<sup>32</sup> N.C.G.S.A. § 163-129, lists schools, state, county, or municipal buildings, or any building or part of a building maintained through tax revenue as prospective polling places. Churches can also be polling places with the consent of the church.

<sup>33</sup> N.C.G.S.A. § 163-166.4.<sup>34</sup> M.C.L.A. § 123.1104.

<sup>34</sup> *Id.*

<sup>35</sup> N.C.G.S.A. § 14-409.40; applies to “any manner the possession, ownership, storage, transfer, sale, purchase, licensing, taxation, manufacture, transportation, or registration of firearms, firearms ammunition, components of firearms, dealers in firearms, or dealers in handgun components or parts.”

<sup>36</sup> N.C.G.S.A. § 14-409.40(f).

<sup>37</sup> N.C.G.S.A. § 160A-189; allows exception when the discharge of firearms is “used in defense of person or property or pursuant to lawful directions of law-enforcement officers.”

shall display any firearm at any polling place.<sup>38</sup> Raleigh prohibits the possession of firearms, either open or concealed carry, at a parade or picketing or within 500 feet of such an event while on public property, whereas Durham prevents the display of firearms on any public property and limits the locations where concealed carry is permissible.<sup>39</sup> With a clear path paved to prohibit firearms at polling places, whether other localities follow suit is up to the discretion of their local officials.

North Carolina also possesses alternative legal remedies to address the display of firearms at polling places. In North Carolina, it is a crime “[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded.”<sup>40</sup> Persons can also be deemed guilty of assault by using a “deadly weapon” against another, which includes a firearm.<sup>41</sup> The crime of “communicating threats” can be considered punishable if “[t]he threat is communicated to the other person, orally, in writing, or by any other means.”<sup>42</sup> The North Carolina Supreme Court has also recognized that “going armed with dangerous or unusual weapons to the terror of the people [is] a crime in North Carolina.”<sup>43</sup> Firearms are undoubtedly dangerous weapons, and attempting to intimidate voters with them may be considered both a threat and an act of terror.

## Pennsylvania

Pennsylvania has no state laws that specifically limit the places that firearms can be brought to, with the exception of court houses and schools.<sup>44</sup> However, at least one Pennsylvania court has upheld the notion that restrictions prohibiting firearms in “sensitive places such as government buildings” are permissible

<sup>38</sup> Chapel Hill, North Carolina Municipal Code § 11-132; see also Chapel Hill, North Carolina Municipal Code § 11-130(15), stating that “The display of firearms at polling places could be disruptive to the peaceful conduct of the election processes and is detrimental to the health, safety, and welfare of the citizens of Chapel Hill.”

<sup>39</sup> Raleigh, North Carolina Municipal Code § 12-1060; Durham, North Carolina Municipal Code § 46.22.

<sup>40</sup> N.C.G.S.A. § 14-34.

<sup>41</sup> N.C.G.S.A. § 14-33.

<sup>42</sup> N.C.G.S.A. § 14-2771.

<sup>43</sup> *Dawson*, 272 N.C. at 535.

<sup>44</sup> 18 Pa. C.S.A. § 913; 18 Pa. C.S.A. § 912.

under the Second Amendment and the Pennsylvania right to bear arms.<sup>45</sup> Given that Pennsylvania polling places are located in schools, municipal buildings, and other public buildings, it is possible that this court holding could apply to at least some polling locations.<sup>46</sup> State law also prohibits the discharge of firearms in public places and carrying firearms in public places without a license.<sup>47</sup> The open display of licensed firearms does not appear to be otherwise limited, though.

Pennsylvania state law has notably limited polling place restrictions as well. Pennsylvania prevents individuals who are not voting or assisting others in voting from being closer than 10 feet from a polling place.<sup>48</sup> The Pennsylvania Legislature is aware of the need to prevent coercion at the polling places, but opted to focus on police officers rather than members of the public. A police officer shall not “unlawfully use or practice any intimidation, threats, force or violence nor, in any manner, unduly influence or overawe any elector or prevent him from voting or restrain his freedom of choice” or be within 100 feet of a polling place.<sup>49</sup> Whether such restrictions apply to private citizens is not clearly stated.

Pennsylvania has an uncompromising firearm preemption law. It states that “No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.”<sup>50</sup> There are no noted exceptions. Pennsylvania state law generally states that “to the extent permitted by Federal and other State law, [a city] council may regulate, prohibit and prevent the discharge of guns and prevent the carrying of concealed deadly weapons,” but that does not circumvent the issue of preemption.<sup>51</sup> Some major Pennsylvania cities, such as Philadelphia and Allentown, allow for the

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<sup>45</sup> *Perry v. State Civil Service Com'n (Dept. of Labor and Industry)*, 38 A. 3d 942 (Pa.Cmwlth.2011).

<sup>46</sup> 25 Pa. Stat. Ann. § 2727 reads that “[i]n selecting polling places, the county board of elections shall, wherever possible and practicable, select schoolhouses, municipal buildings or rooms, or other public buildings for that purpose.”

<sup>47</sup> 53 Pa. Stat. Ann. § 3703; 53 Pa. Stat. Ann. § 23131; 18 Pa. C.S.A. § 6108.

<sup>48</sup> 25 Pa. Stat. Ann. § 3060.

<sup>49</sup> 25 Pa. Stat. Ann. § 3047, police officers may be within 100 feet of a polling place if they are there to vote, serve a warrant, or are “called upon to preserve the peace.”

<sup>50</sup> 18 Pa. C.S.A. § 6120(a).

<sup>51</sup> 11 Pa. C.S.A. § 12423.

prohibition of firearms “in or around any City-owned or City-occupied facility,” which could involve polling places.<sup>52</sup> No such policies are mandated, though, and many other localities do not possess similar ordinances.

Persons displaying firearms at polling places in Pennsylvania could also be charged under state criminal statute. In Pennsylvania, it is deemed a simple assault when one “attempts by physical menace to put another in fear of imminent serious bodily injury.”<sup>53</sup> Similarly, someone in Pennsylvania can be guilty of recklessly endangering another person when they “recklessly [engage] in conduct which places or may place another person in danger of death or serious bodily injury.”<sup>54</sup> The brandishing or other threatening display of a firearm could readily be construed as placing someone at risk of death or serious bodily injury. That same behavior could also be considered a terroristic threat, which covers actions that “otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.”<sup>55</sup> Contingent on case-specific facts, the display of deadly weapons at polling places could result in both terror and serious public inconvenience for those attempting to exercise their right to vote.

## Virginia

Virginia does not have laws that expressly prohibit the presence of firearms at polling places either, though it does have several legal means of attaining similar results. The Supreme Court of Virginia has upheld that prohibitions on firearms on university property do not violate the right to bear arms under the Second Amendment or State Constitution.<sup>56</sup> The Court also favorably cited the “sensitive places” principle from *Heller*, recognizing the constitutional validity

<sup>52</sup> Philadelphia, Pennsylvania Municipal Code § 16-306; see also Allentown, Pennsylvania Municipal Code § 734.01.

<sup>53</sup> 18 Pa. C.S.A. § 2701.

<sup>54</sup> 18 Pa. C.S.A. § 2705.

<sup>55</sup> 18 Pa. C.S.A. § 2706.

<sup>56</sup> *DiGiacinto v. Rector and Visitors of George Mason University*, 281 Va. 127, 704 S.E.2d 365 (2011); see also *Prekker v. Commonwealth*, 66 Va. App. 103, 782 S.E.2d 604 (2016), recognizing “sensitive place” prohibitions on firearms in dicta.

of firearm restrictions in schools and government buildings.<sup>57</sup> Virginia state law prohibits the knowing possession of any firearm on “the property of any child day center or public, private, or religious preschool, elementary, middle, or high school, including buildings and grounds.”<sup>58</sup> This suggests that Virginia may allow for the prohibition of firearms at polling places situated in sensitive places as well, given that the general criteria for Virginia polling places is only that they “be located in a public building whenever practicable.”<sup>59</sup> Further supporting this point, it is illegal in Virginia to “point, hold or brandish any firearm...in such manner as to reasonably induce fear in the mind of another[.]”

<sup>60</sup> The same statute also makes it unlawful to “hold a firearm...in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured.”<sup>61</sup> Virginia also increases the criminal penalty for such an offense if it is committed within 1,000 feet of public, private, or religious school property.<sup>62</sup> In addition to the “sensitive places” prohibition on firearms near schools that could be repurposed as polling places, the broad language of the brandishing statute could be used to prevent armed citizens from attempting to intimidate voters at the polls.

Virginia also has laws tailored to protect the integrity of elections at polling places. It is unlawful for “any person to loiter or congregate within 40 feet of any entrance of any polling place...or in any manner attempt to influence any person in casting his vote...or to hinder or delay a qualified voter from entering or leaving a polling place.”<sup>63</sup> Specifically on the issue of voter intimidation, it is unlawful in Virginia for “any person to hinder, intimidate, or interfere with any qualified voter so as to prevent the voter from casting a secret ballot.”<sup>64</sup> The presence of armed persons at polling places could readily be interpreted as an attempt to “hinder, intimidate, or interfere” with prospective voters, regardless of whether the brandisher of the firearm says or does anything else.

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<sup>57</sup> *Id.*

<sup>58</sup> Va. Code Ann. § 18.2-308.1(B), though the prohibition only applies during the building’s operating hours.

<sup>59</sup> Va. Code Ann. § 24.2-310.

<sup>60</sup> Va. Code Ann. § 18.2-282. However, this statute does not apply to those engaged in excusable or justifiable self-defense.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Va. Code Ann. § 24.2-604.

<sup>64</sup> Va. Code Ann. § 24.2-607.

Virginia too has a preemption law related to firearms, though it also has far-reaching exceptions. The law details that no locality shall “govern the purchase, possession, transfer, ownership, carrying, storage, or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute.”<sup>65</sup> The exception allows localities the discretion to adopt ordinances:

*“...that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof (i) in any building, or part thereof, owned or used by such locality, or by any authority or local governmental entity created or controlled by the locality, for governmental purposes; (ii) in any public park owned or operated by the locality, or by any authority or local governmental entity created or controlled by the locality; (iii) in any recreation or community center facility operated by the locality, or by any authority or local governmental entity created or controlled by the locality; or (iv) in any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit. In buildings that are not owned by a locality, or by any authority or local governmental entity created or controlled by the locality, such ordinance shall apply only to the part of the building that is being used for a governmental purpose and when such building, or part thereof, is being used for a governmental purpose.”<sup>66</sup>*

This exception by itself should be sufficient to prevent the presence of firearms at every polling place, should localities choose to enact them. If a polling place is not positioned within any of the locations listed in points (i)-(iv), even buildings not owned by the locality can be implicated by this exception if they are being used for the “governmental purpose” of voting.<sup>67</sup> A growing number of Virginia city governments, such as those in Alexandria, Newport News, and Richmond, have already adopted some or all of these exceptions into local law.<sup>68</sup> Local governments may also prohibit the outdoor shooting of firearms in areas so heavily populated as to make such conduct dangerous to the inhabitants, which hopefully should not be an issue at polling places.<sup>69</sup>

<sup>65</sup> Va. Code Ann. § 15.2-915(A).

<sup>66</sup> Va. Code Ann. § 15.2-915(E).

<sup>67</sup> *Id.*

<sup>68</sup> Alexandria, Virginia City Code § 2-3-5; Newport News, Virginia City Code § 43-3; Richmond, Virginia City Code § 19-334.1; see also Graham Moomaw, Virginia's gun-control debate shifts to newly empowered localities (2020), <https://www.virginiamercury.com/2020/08/10/virginias-gun-control-debate-shifts-to-newly-empowered-localities/> (last visited Aug 11, 2020).

<sup>69</sup> Va. Code Ann. § 15.2-1209.

In addition to the wealth of preemption exceptions for local governments in Virginia, state criminal law could also be used to deter the presence of firearms at polling places. Virginia courts have affirmed the notion of simple assault to include “an intentional placing of another in [reasonable] apprehension of receiving an immediate battery.”<sup>70</sup> Likewise, someone displaying a firearm at polling places in Virginia could be charged with disorderly conduct if they engage “in conduct having a direct tendency to cause acts of violence” with “the intent to cause public inconvenience, annoyance, alarm, or recklessly creating a risk...while in a public place.”<sup>71</sup> Though displaying firearms at a polling place could contribute to a charge of disorderly conduct, other evidence would be required to demonstrate the firearm owner’s intent.

## Wisconsin

Wisconsin has no express law preventing the presence of firearms at polling places, but it is no stranger to the need of balancing the constitutional right to bear arms with public welfare. Wisconsin state courts have recognized the validity of prohibitions of firearms in “sensitive places” and upheld laws restricting firearm usage because of the “important public safety purpose” that they implicate.<sup>72</sup> According to Wisconsin state law, anyone who “knowingly possesses a firearm at a place that the individual knows, or has reasonable cause to believe, is in or on the grounds of a school” is guilty of a felony.<sup>73</sup> Knowingly possessing a firearm within 1,000 of school grounds makes the firearm subject to forfeiture.<sup>74</sup> Given that polling places in Wisconsin “shall be in public buildings, unless...the use of a nonpublic building better serves the need of the electorate,” it is likely that schools and other sensitive places would be primarily utilized.<sup>75</sup> It is also illegal to “[endanger] another’s safety by the negligent operation or handling of a dangerous

<sup>70</sup> *Carter v. Commonwealth*, 42 Va.App 681, 688-89 (2004), quoting Rollin M. Perkins, *Criminal Law* 159 (3d ed. 1982); a “battery” in Virginia law is “a willful or unlawful touching of another,” quoting *Kelley v. Commonwealth*, 69 Va.App. 617, 625 (2019); see also Va. Code Ann. § 18.2-57.

<sup>71</sup> Va. Code Ann. § 18.2-415

<sup>72</sup> *State v. Pocian*, 341 Wis. 2d 380 (Cl.App. 2012), quoting *Heller*, 554 U.S. at 626 when recounting that that “the right secured by the Second Amendment is not unlimited,” and that nothing in the decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings;” *State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 342 (2003), upholding the validity of concealed carry statute.

<sup>73</sup> Wis. Stat. Ann. § 948.605. Exceptions exist for law enforcement and licensed concealed carry owners.

<sup>74</sup> *Id.*

<sup>75</sup> Wis. Stat. Ann. § 5.25.

weapon,” including when one “intentionally point[s] a firearm at or towards another.”<sup>76</sup> Depending on the behavior of the individuals displaying their firearms at polling places, this law could support efforts of local governments to remove them from the premises. Merely holding a firearm outside polling places other than school grounds would not trigger legal protections, however.

Though Wisconsin does not have many voter intimidation laws, the one it does is comprehensive in scope. It is illegal in Wisconsin for a person to “personally or through an agent make use of or threaten to make use of force, violence, or restraint in order to induce or compel any person to vote or refrain from voting at an election.”<sup>77</sup> In addition to other fact-specific circumstances, the display of a firearm at a polling place could be considered a threat to induce or compel a person to vote or refrain from voting.

Wisconsin’s state preemption law operates without noted exceptions to the presence of firearms in public spaces. It states that no city, village, town, or county can regulate “the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.”<sup>78</sup> Local governments may regulate the unjustified discharge of firearms more rigorously than state law, but not the display of them.<sup>79</sup> Oddly enough, local governments are given the authority to prohibit the possession of a knife in buildings that they operate, but not firearms.<sup>80</sup> Wisconsin’s relatively inflexible preemption statute indicates that pre-existing state law may be the most effective means for local governments to regulate firearms at their polling places. Wisconsin’s most populous city, Milwaukee, has prohibited the concealed or open carry of firearms in buildings owned, occupied, or controlled by the County, provided that notice of the restriction is

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<sup>76</sup> Wis. Stat. Ann. § 941.20.

<sup>77</sup> Wis. Stat. Ann. § 12.09.

<sup>78</sup> Wis. Stat. Ann. § 66.0409(2).

<sup>79</sup> Wis. Stat. Ann. § 66.0409(3)(b)(1).

<sup>80</sup> Wis. Stat. Ann. § 66.0409(3)(c).

publicly posted.<sup>81</sup> Such a measure should protect polling places as well, though it is uncertain how many other Wisconsin cities have imposed similar regulations.

Wisconsin also has a few state criminal laws that could assist in the restriction of firearms at polling places. If accompanied by verbal or written communication, the display of firearms at polls could increase the legitimacy of a “threats to injure” offense.<sup>82</sup> Carrying a firearm in public can also be deemed “disorderly conduct” if “facts and circumstances that indicate a criminal or malicious intent on the part of the person apply.”<sup>83</sup> Anyone displaying a firearm near a polling place with the malicious intent to intimidate other voters could be criminally penalized under this statute. Lastly, an unlawful assembly in Wisconsin “is an assembly which consists of 3 or more persons and which causes such a disturbance of public order that it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.”<sup>84</sup> A group of armed demonstrators at a polling place could very well qualify for this offense.



<sup>81</sup> Milwaukee, Wisconsin Municipal Code § 63.016.

<sup>82</sup> Wis. Stat. Ann. § 943.30.

<sup>83</sup> Wis. Stat. Ann. § 947.01.

<sup>84</sup> Wis. Stat. Ann. § 947.06.

## General Recommendations

Though the most effective means of prohibiting firearms at polling places will look different depending on the needs and legal landscape of the state, there are some general recommendations that Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin can all follow to protect their voters from being intimidated with firearms. As states consider implementing the recommendations below, we encourage lawmakers to be cognizant of the unintended consequences for communities of color. All five of these states can:

- Pass laws explicitly prohibiting the presence of firearms at polling places
- Create preemption law exceptions to allow for local governments to prohibit firearms at their polling places
- Expand early voting and vote by mail options to reduce the risk of armed encounters on election day
- Provide uniform guidance to poll workers on how to address situations where firearms are present at their polling location



## Analysis of the Constitutionality of Prohibitions on Firearms at Polling Places

Irrespective of state laws, policies prohibiting firearms at polling places can be struck down if they are deemed to be in conflict with the U.S. Constitution. This section will examine the validity of polling place firearm prohibitions under the Second Amendment, how such claims are evaluated, and whether the display of firearms in public merits First Amendment protections. The constitutionality of a law does not protect it from violating a state's preemption statute, but it does present one less hurdle in maintaining its legality.

### *Heller and McDonald*

The Supreme Court of the United States notably altered the parameters of Second Amendment canon in the landmark cases of *District of Columbia v. Heller* and *McDonald v. City of Chicago*.<sup>85</sup> For the first time, the Supreme Court recognized an individual right to possess a handgun in the home for self-defense and later held that the Second Amendment applies to states via the 14th Amendment.<sup>86</sup> However, the Court also outlined explicit limitations to the right to bear arms that can enable state and local governments to protect their citizens from gun violence. This section will examine the limitations *Heller* and *McDonald* place on the Second Amendment and how they can be used to protect voters from firearms at polling places.

When Justice Scalia analyzed the text and history of the Second Amendment in *Heller*'s majority opinion, he concluded that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>87</sup> However, the 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>88</sup>

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<sup>85</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>86</sup> *Id.*

<sup>87</sup> *Heller*, 554 U.S. at 635.

<sup>88</sup> *Heller*, 554 U.S. at 626.

The 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>89</sup> Though *McDonald* made the Second Amendment applicable to the states via the 14th Amendment, the Supreme Court of the United States again noted that the Second Amendment “limits (but by no means eliminates) [a state’s] ability to devise solutions to social problems that suit local needs and values.”<sup>90</sup> Like all constitutional rights, the Second Amendment has limitations to prevent it from depriving life and liberty from Americans in other respects.

As mentioned throughout this piece and quoted above, the referenced language and protections surrounding “sensitive places” is taken directly from *Heller*. Following the *Heller* decision, federal and state courts have recognized the existence of “‘presumptively lawful regulatory measures’ identified in *Heller*... [and regulations on] ...conduct that historically has fallen outside the scope of the Second Amendment...” that do not burden Second Amendment rights.<sup>91</sup> Restrictions on firearms in “sensitive places” fall into the latter category, having been identified in the *Heller* opinion as a presumptively lawful measure. Given that “sensitive places” are often repurposed by local governments as polling places, presumptively lawful sensitive place restrictions are a compelling tool to constitutionally prohibit firearms at those sites during election day. What locations can be designated as a “sensitive place,” beyond “schools and government buildings,” varies on a state-by-state basis.<sup>92</sup>

The scope of what exactly constitutes a “sensitive place” in relation to the Second Amendment has been explored by courts across the country. In Georgia, “sensitive places” were explicitly outlined to include “places of worship, government buildings, court houses, and polling places.”<sup>93</sup> The Virginia Supreme Court has held that “university property in academic buildings, administrative

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<sup>89</sup> *Id.*

<sup>90</sup> *McDonald*, 561 U.S. at 785.

<sup>91</sup> *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir.2019), quoting *Heller*, 554 U.S. at 627. See also *Com. v. Powell*, 459 Mass. 572, 946 N.E.2d 114 (2011).

<sup>92</sup> *Heller*, 554 U.S. at 626.

<sup>93</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F.Supp.2d 1306, 1318 (M.D. Ga. 2011).

office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment, or educational events” are all considered “sensitive places.”<sup>94</sup> According to the relevant state laws of Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin, most locations designated by the state to be polling places are considered to be “sensitive places” in *Heller* (i.e., schools and government buildings).<sup>95</sup> Though state preemption statutes may still invalidate ordinances incompatible with state law, local governments in these states could justify most firearm restrictions at the polls over Second Amendment challenges with the “sensitive places” doctrine.

### **Intermediate v. Strict Scrutiny**

Regulations infringing upon a protected constitutional right are often required to satisfy some form of scrutiny before they are upheld by the courts. Delineating between the levels of scrutiny that certain regulations can trigger can be essential to creating some constitutional policies. In *Heller* and *McDonald*, the Supreme Court of the United States did not provide an explicit framework for lower courts to evaluate Second Amendment claims. However, courts across the nation have come together around a two-part framework to constitutionally evaluate Second Amendment restrictions. The state laws and policies limiting firearm usage outlined throughout this report should survive both steps of this process, if they are not deemed presumptively lawful at the start.

Though some variations exist, Second Amendment scholars have highlighted a two-step process followed by many higher courts in addressing Second Amendment issues.<sup>96</sup> The courts first “ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they] apply the appropriate level of scrutiny.”<sup>97</sup> Courts apply intermediate scrutiny “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right.”<sup>98</sup>

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<sup>94</sup> *DiGiacinto*, 704 S.E.2d at 367-68.

<sup>95</sup> M.C.L.A. § 168.662; N.C.G.S.A. § 163-129; 25 Pa. Stat. Ann. § 2727; Va. Code Ann. § 24.2-310; WIS. STAT. ANN., § 5.25.

<sup>96</sup> Brief for Second Amendment Law Professors as Amicus Curiae, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, New York, 833 F.3d 45 (2nd Cir. 2018), vacated and remanded, 140 S.Ct. 1525 (2020).

<sup>97</sup> *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), cert. denied, 139 S. Ct. 846 (2019) (internal quotation marks omitted).

<sup>98</sup> *Torres*, 911 F.3d at 1262.

To pass intermediate scrutiny, the government must show that the challenged law “is reasonably adapted to a substantial governmental interest.”<sup>99</sup> Courts have upheld basic licensing requirements and restrictions on certain classes of people possessing firearms, such as felons and the mentally ill, under the intermediate scrutiny standard.<sup>100</sup>

Regulations at polling places should not impact the “core” Second Amendment right, and thus should face a lower level of scrutiny. *Heller* explicitly states that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>101</sup> Polling places are public areas used for the purpose of facilitating elections vital to our democracy, well outside the “core” of the Second Amendment relating to personal and home defense. As evidenced by the laws Michigan, North Carolina, Pennsylvania, Virginia, and Wisconsin all utilize to uphold the integrity of their elections, it could be readily argued that protecting voters from the undue influence of firearms is “reasonably adapted to a substantial governmental interest” of maintaining fair and just elections. Furthermore, presumptively lawful regulations like those implicating “sensitive places” should not infringe upon recognized constitutional rights and not face any scrutiny analysis to begin with. Either way, the potential exists for constitutional firearm restrictions to be applied in all five of these states.

### **First Amendment Challenges: Is the Display of Firearms at Polling Places Protected Speech?**

Beyond Second Amendment challenges, firearm restrictions at polling places may also draw First Amendment Free Speech challenges. There are some who may perceive prohibitions on the display of firearms to be “abridging the freedom of speech” guaranteed by the U.S. Constitution.<sup>102</sup> However, courts have upheld limitations on speech around polling places as legitimate.<sup>103</sup> Courts have

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<sup>99</sup> *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011).

<sup>100</sup> *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673, 681-82 (4th Cir. 2010).

<sup>101</sup> *Heller*, 554 U.S. at 635.

<sup>102</sup> U.S.C.A. Const.Amend. 1.

<sup>103</sup> *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992).

also been dubious about the notion of the display of firearms being considered “speech” for First Amendment purposes.<sup>104</sup> This final section will break down both of these issues and make it clear that firearm restrictions at polling places should not warrant First Amendment challenges.

The Supreme Court of the United States has highlighted the significant responsibility states have to protect polling places. In *Burson v. Freeman*, the Supreme Court recognized that “[t]here is a substantial and long-lived consensus among the 50 States that some restricted zone around polling places is necessary to serve the interest in protecting the right to vote freely and effectively.”<sup>105</sup> The Supreme Court has also noted how each state “indisputably has a compelling state interest in preserving the integrity and reliability of its election process.”<sup>106</sup> The Supreme Court has “upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.”<sup>107</sup> The prohibition on firearms at polling places should rise to the level of a compelling state interest, given the substantial threat it poses to the sanctity of elections and the safety of voters. Regardless of state interests in holding integrous elections, it is also doubtful that the display of firearms can be considered protected speech at all.

For decades, the Supreme Court of the United States has set precedence of what can and cannot be considered protected speech under the First Amendment. The Supreme Court has rejected “the view that an apparently limitless variety of conduct can be labeled as ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>108</sup> Conduct that is “sufficiently imbued with elements of communication [may] fall within the scope of the First and Fourteenth Amendments.”<sup>109</sup> More specifically, the Supreme Court has held that conduct is only eligible for First Amendment protections when (i)

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<sup>104</sup> *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616-19 (E.D. Mich. 2016); see also *Baker v. Schwarb*, 40 F. Supp. 3d 881, 894-95 (E.D. Mich. 2014).

<sup>105</sup> *Burson*, 504 U.S. at 191.

<sup>106</sup> *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 231 (1989).

<sup>107</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983).

<sup>108</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

<sup>109</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

there is an “intent to convey a particularized message,” and (ii) the surrounding circumstances give rise to a great “likelihood...that the message would be understood by those who viewed it.”<sup>110</sup> The question now is whether the display of a firearm in public spaces can be considered an intentional and generally understandable message.

Though the Supreme Court has not had to evaluate whether the message behind displaying a firearm was understood by others, lower courts have found such conduct to not be protected speech. In two cases from Michigan, courts have held that attempts of people to communicate messages by openly carrying firearms did not qualify as protect speech because worried members of the public did not perceive the firearms 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>111</sup> North Carolina courts have also “long deemed it reasonable to regulate...the carrying of deadly weapons [at a] public assembly,” given the safety risks posed to the community.<sup>112</sup> The right to free speech cannot be confused with a right to terrorize others and threaten public safety.

Though some may attempt to defend the display of firearms at polling places as free speech, decades of legal precedent make it clear that would not be the case. States have a compelling interest in ensuring that voters can participate in elections without having their well-being threatened. Not all conduct can be deemed expressive speech, especially if the intended message is unlikely to be understood by those who see it. Viewing an armed person at a polling place would instill terror in the hearts of countless voters and may prevent them from fulfilling their civic duties. The constitutional rights to bear arms and free speech do not permit intimidation with deadly armaments.

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<sup>110</sup> *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

<sup>111</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).

<sup>112</sup> *Oaks*, 594 S.E.2d at 793, quoting *Dawson*, 272 N.C. at 546.

## Conclusion

Though neither Michigan, North Carolina, Pennsylvania, Virginia, or Wisconsin, have state laws that explicitly ban firearms at polling places, they all have either the necessary elements in place or the potential to do so. States like North Carolina and Virginia have broad exemptions to their firearm preemption statutes, empowering local governments to prohibit the presence of firearms in polling places if they choose to do so. To uniformly protect voters from the real risk of armed intimidation at the polls, all five states should pass equitable laws to prohibit firearms at polling places. Such restrictions would likely be held constitutional via the “sensitive places” principle and would no longer be challenged by preemption laws. Absent sweeping legal reform, states can encourage early voting and maximize their vote by mail capacity to reduce the number of voters who can be exposed to armed intimidation in the first place. Poll workers can also be trained on how to best manage armed intimidation at their polling places to help address potentially dangerous situations. Though some states have better laws to work with than others, state and local governments in all five of these states can take actions to protect the sacrosanct right of their citizens to vote.

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THE COALITION TO  
STOP GUN VIOLENCE