

## EMPOWERING DEMOCRACY: WHAT POLICE NEED TO KNOW AT THE POLLS

Law enforcement plays a critical role in ensuring that every eligible voter can exercise their right to vote. In the upcoming election, police leaders and their personnel should know the rules, understand the appropriate responses, and promote safe participation in the democratic process.

### PREPARING FOR ELECTION DAY

#### In advance of election day, law enforcement leaders and agencies should:

- **Work with local election officials** to establish operations centers or hotlines staffed by law enforcement, election officials, and county or municipal attorneys working collaboratively to provide guidance to those in the field.
- **Engage community leaders and stakeholders throughout the voting period** to develop plans for protecting the public safety and the right to vote in ways best suited to the needs of the community. In some communities, law enforcement presence at or near the polls may be prohibited by state law unless requested by election officials. Even where not prohibited, a law enforcement presence at or near polling places may itself be intimidating for some voters. Meeting with stakeholders in advance and throughout the election and ballot-counting period can facilitate trust, transparency, and information-sharing about ongoing needs in both directions.
- **Familiarize themselves with election laws**, including laws on voter intimidation, poll observers, ballot challenging, and no-electioneering zones.
- **Provide clear directives and advance briefing** to line officers about the law and appropriate responses.

### WHAT ARE THE RULES?

**Voter intimidation, which is unlawful under state and federal law**, includes conduct intended to cause a voter to change their vote, or not vote at all, by instilling fear.<sup>1</sup> Voter intimidation is unlawful both inside and outside of any no-electioneering zone. Examples of voter intimidation may include:

- Verbal threats of violence
- Confronting voters while wearing military-style or official-looking uniforms
- Brandishing or intimidating display of firearms
- Disrupting voting lines or blocking entrances
- Spreading false information about voter fraud, requirements to vote, or penalties
- Aggressively approaching voters' cars or writing down license plate numbers
- Following and/or recording voters to, from, or within polling places
- Directly and aggressively challenging voters' qualifications

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<sup>1</sup> See e.g., 18 U.S.C. §§ 245(b)(1)(A) and 594 and 52 U.S.C. § 20511(1); 25 P.S. § 3547; Az. St. § 16-1013.

- Appearing to patrol or police the voting line while armed

**Officers and election officials are empowered to maintain order and fairly enforce election laws.**

- **Most states prohibit electioneering** in the immediate vicinity of polling places. Prohibited electioneering includes encouraging voters to vote a certain way, passing out leaflets, waving candidate flags, wearing clothing that conveys support for or opposition to a candidate or an issue on the ballot, etc.<sup>2</sup>
- **State law defines who may act as a “poll observer,” “poll watcher,” or “election observer”** and whether such an observer or watcher may challenge at the polls a prospective voter’s eligibility and the procedures for doing so.<sup>3</sup>
- **Law enforcement officers should be familiar with state and local laws related to carrying firearms** (concealed or open-carry) in or around polling places.<sup>4</sup>

**WHAT CAN POLICE DO?**

Across all situations, police officers at or near polling places should use strategies, tactics, and communications approaches grounded in **de-escalation**.

**Law enforcement should not be highly visible at the polls unless called to assist.** Police should avoid being highly visible at polling locations unless they are responding to a specific, concrete issue. Law enforcement at the polls could be perceived as intimidating, particularly given the history of police authority being misused to promote, rather than prevent, voter intimidation.

**If armed individuals or groups are near polling places:** Law enforcement may open consensual lines of communication with the armed individuals/groups, without probable cause or reasonable articulable suspicion that a crime is or may be underway, to understand: (1) who they are, (2) who they are affiliated with, and (3) what their purpose/goal is.

- Law enforcement may ask individuals to identify themselves and/or who they are affiliated with so long as they do not require individuals to answer and do not detain the individuals.<sup>5</sup> Officers may then check databases to determine whether the identified armed person is prohibited from

<sup>2</sup> See Nat’l Ass’n of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place* (Oct. 2022), <https://www.nass.org/sites/default/files/reports/state-laws-polling-place-electioneering-Oct2022.pdf>.

<sup>3</sup> See *Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396, 414 (E.D. Pa. 2016) (state law controls poll watchers); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020) (same); see also Nat’l Ass’n of Secretaries of State, *State Laws on Authorized Poll Watchers & Voter Challenges* (Oct. 2022) (survey of relevant state laws), [https://www.nass.org/sites/default/files/reports/state-laws-poll-watchers-challengers-Oct2022\\_0.pdf](https://www.nass.org/sites/default/files/reports/state-laws-poll-watchers-challengers-Oct2022_0.pdf)

<sup>4</sup> The Supreme Court’s recent expansion of gun rights in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, affirmed that in historically sensitive places, “arms carrying could be prohibited consistent with the Second Amendment,” and it specifically named “polling places” as one of these sensitive places. 142 S. Ct. 2111, 2133 (2022).

<sup>5</sup> *I.N.S. v. Delgado*, 466 U.S. 210, 216, (1984) (“[I]nterrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.”); *U.S. v. Tafuna*, 5 F.4th 1197, 1202 (10th Cir. 2021) (“Officers—without any basis for suspecting criminal activity is afoot—may approach an individual, ask a few questions, [and] ask to examine the individual’s identification.”) (internal quotation marks omitted).

possessing a gun. Note that in many states it is illegal to give an officer a false name. Providing a false identification in these states would itself allow an officer to detain the person to investigate their true identity.

- Law enforcement may approach an armed individual or group at or near a polling place and ask: **“Why are you here?”**

If the answer/explanation is...	Then police may...
<p><b>To patrol the line of voters, protect against voter fraud, enforce the law, or a similar response.</b></p>	<p><b>Ask the individual or group to stop the activity.</b>  <i>Reason:</i> Armed private paramilitary organizations are not authorized under federal or state law, not protected by the Second Amendment, and have no authority to engage in the functions of law enforcement.<sup>6</sup></p>
<p><b>To challenge voters’ qualifications.</b></p>	<p><b>Ask the individual or group to stop the activity.</b>  <i>Reason:</i> Openly armed individuals and groups do not have the authority to make direct challenges to voters’ qualifications. This is voter intimidation.</p>
<p><b>To exercise their First Amendment or Second Amendment rights.</b></p>	<p><b>Request that the individual or group consent to put away their firearms or move away from the line of voters.</b>  <i>Reason:</i> As part of a consensual encounter, police may ask someone to move and may explain that their openly armed presence likely would be intimidating to voters.<sup>7</sup></p>

**Special consideration regarding firearms:**

- Individuals must comply with weapons permit restrictions and other generally applicable laws at or near polling places, such as any location-specific restrictions on firearms (e.g., schools, public

<sup>6</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Presser v. Illinois*, 116 U.S. 252 (1886). For more information about your state’s anti-paramilitary laws, visit <http://bit.ly/50factsheets>.

<sup>7</sup> *Fla. v. Rodriguez*, 469 U.S. 1, 5–6 (1984) (“The initial contact between the officers and respondent, where they simply asked if he would step aside [approximately 15 feet] and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest.”); *U.S. v. Valdiosera-Godinez*, 932 F.2d 1093, 1099 (5th Cir. 1991) (officers showing badges and motioning to someone to speak with them outside deemed a consensual encounter). See also *Burson v. Freeman*, 112 S.Ct. 1846, 1858 (1992) (concluding that “a long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect th[e] fundamental right” to “cast a ballot in an election free from the taint of intimidation and fraud”); *Arizona Alliance for Retired Americans, et al., v. Clean Elections USA, et al.*, No. 2:22-cv-01823-MTL, at \*2 (issuing a temporary restraining order that includes prohibitions against defendants openly carrying firearms or visibly wearing body armor within 250 feet of a ballot drop box) (D. Ariz., Nov. 1, 2022), available at <https://www.documentcloud.org/documents/23257286-arizballotboxestro110122>.

buildings, stadiums, federal lands/facilities) or any state prohibition on brandishing firearms or using firearms to intimidate.

- In open-carry states, the mere carrying of a holstered handgun in public, without other indications of an intent to intimidate voters, would not warrant a *Terry* stop, but it could be the basis for asking the person to identify themselves and what they are doing, as discussed above.
- If there is probable cause to believe that individuals or groups are violating any state criminal law or local ordinance, law enforcement may direct them to cease the activity, or may issue a citation or make an arrest, depending on state law. If there is only reasonable articulable suspicion to believe a violation has occurred, law enforcement should consider conducting a *Terry* stop to further investigate.

### **What else can law enforcement do to prevent voter intimidation near polling places?**

Law enforcement have an array of tools that can help in these situations, while still protecting the First and Second Amendment rights of those involved. Law enforcement may impose reasonable time, place, and manner restrictions that are narrowly tailored to serve the government's compelling interest in protecting against voter intimidation. **So long as they are not applied in a manner that discriminates based on viewpoint or any other prohibited discriminatory basis (such as race, gender, ethnicity, disability), police may:**

- Move individuals or groups who are shouting, chanting, or waving large banners further away from voters, but still within earshot.
- Request that openly armed groups of individuals consent to putting away their weapons or move further away from voters.
- Separate opposing groups and set up buffer zones between them,<sup>8</sup> so long as the police do not engage in prohibited discrimination.

### **If assembled individuals appear to be or represent that they are part of a "militia," know that:**

- Groups of armed individuals that engage in paramilitary activity or law enforcement functions without being called forth by a governor or the federal government and without reporting to any government authority are acting as unauthorized private militias.
- **An unauthorized private militia that attempts to activate itself for duty, outside of the authority of the state or federal government, is illegal.**
- The Second Amendment does not protect private militias. As the Supreme Court determined in 1886 and reiterated in 2008, the Second Amendment "does not prevent the prohibition of private paramilitary organizations." *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).
- All 50 states prohibit private, unauthorized militias from engaging in military or law enforcement activities.
- Fact sheets containing state laws banning private unauthorized militia activity are available at <http://bit.ly/50factsheets>.

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<sup>8</sup> *Olivieri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986).

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*This guidance document was prepared by the States United Democracy Center, 21CP Solutions, and the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center.*

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